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FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students

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FERPA IN THE TWENTY-FIRST CENTURY: FAILURE TO EFFECTIVELY REGULATE PRIVACY FOR ALL STUDENTS

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I. INTRODUCTION

In 1974, Congress passed a floor amendment to education legislation, intended by its sponsor to both protect the confidentiality of student records and to guarantee access to one's own student records.[1] Almost thirty-five years later, the Family and Educational Rights and Privacy Act (FERPA)[2] has evolved into a large, complex, and confusing body of law. Building on earlier scholarship,[3] this Article examines twenty-first century FERPA issues and developments, both legal and extralegal. Part II of the Article provides a very brief overview of FERPA. Part III explores the Supreme Court's recent, sudden, and surprising interest in FERPA. From 1974 to 2001 the Court did not hear a single FERPA case, nor even cite FERPA other than in passing in footnotes in two cases.[4] In its 2001–2002 term, however, the Supreme Court decided two FERPA cases, holding in *Owasso Independent School District v.*

1. *See* Lynn Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620–21 (1997) [hereinafter Daggett, *Bucking Up Buckley I*].

2. 20 U.S.C. § 1232g (2000 & Supp. V 2005).

3. *See generally* Daggett, *Bucking Up Buckley I*, *supra* note 1 (overview of FERPA and suggestions for change); Lynn M. Daggett, *Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29, 29–67 (1997) [hereinafter Daggett, *Bucking Up Buckley II*] (overview of remedies under FERPA); 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. 19–48 (2001) [hereinafter Daggett & Heufner, *Recognizing Schools' Legitimate Interests*] (discussion of the Tenth Circuit decision in *Falvo* and the *Miami University* discipline records case); Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469, 469–91 (2001) [hereinafter Huefner & Daggett, *FERPA Update*] (updated overview of FERPA).

4. *See infra* note 21 and accompanying text.

Falvo that peer grading of classroom work did not violate FERPA and discussing the scope of "education records" covered by FERPA,[5] and finding in *Gonzaga University v. Doe* that 42 U.S.C. § 1983 civil rights claims are not available for alleged FERPA violations.[6] Part III then turns to a critique of recent amendments to FERPA, which are modest and largely weaken student privacy protection, and Congress's failure to significantly examine FERPA's effectiveness and amend it appropriately in response to the Court's opinions and other developments.

Part IV of the Article details some of the new realities of student records in the twenty-first century. Chief among them is the escalating understanding of various groups—litigants, the federal government, researchers, commercial entities, the media, and others—of the value of student records. With this recognition, demands for student records are rapidly increasing. FERPA provides neither substantial protection for student privacy in the face of these demands, nor much guidance on the limits of the protection it does provide. FERPA also continues to offer little guidance on how to interpret it vis-à-vis other arguably conflicting laws in areas as diverse as duty to warn parents or others of dangerous students and rights of noncustodial parents. In light of lessened protection of student privacy in the twenty-first century, while the value of and demands for student information increase, it is unsurprising but nonetheless troubling, that reports of seemingly egregious FERPA violations by schools are more and more frequent. Part IV concludes with a brief review of these reports.

II. FERPA OVERVIEW

FERPA[7] is Spending Clause legislation enacted in 1974 as a floor amendment to a comprehensive education statute.[8] As one of several conditions on the receipt of any federal education funds set forth in the General Education Provisions Act (GEPA),[9] schools (both public and private, preschool, K–12 and post-secondary) must agree to comply with its terms. Several sources provide overviews, commentary, or both, on FERPA.[10]

5. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 430, 436 (2002).

6. Gonzaga Univ. v. Doe, 536 U.S. 273, 276, 290 (2002).

7. 20 U.S.C. § 1232g (2000 & Supp. V 2005).

8. *See* DEP'T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS 1 (2002), *available at* http://www.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf (noting that "FERPA was offered as an amendment on the Senate floor and was not the subject of Committee consideration. Accordingly, traditional legislative history for FERPA as first enacted is unavailable").

9. 20 U.S.C. § 1221 (2000).

10. For overviews of FERPA, see JAMES A. RAPP, EDUCATION LAW § 13.04, F7.03, T7 (2008) (Section 13.04 is a comprehensive overview of FERPA; § F7.03 has sample student records forms and policies; § T7 lists state student records laws); OONA CHEUNG ET AL., NAT'L CTR. FOR EDUC. STATISTICS, PROTECTING THE PRIVACY OF STUDENT RECORDS: GUIDELINES FOR EDUCATION AGENCIES (1997), *available at* http://nces.ed.gov/pubs97/97527.pdf

FERPA may be boiled down to four essential requirements,[11] two of which are of primary significance:

1. Parents/adult students have the right to access their own education records;[12] and

2. In general (and with more than a dozen exceptions)[13] schools cannot disclose education records or their contents to third parties without the written consent of the parent/adult student.[14]

FERPA also requires:

3. Parents/adult students who believe their education records are inaccurate or invasive of privacy have the opportunity for an internal and informal hearing;[15] and

4. Schools provide parents/adult students with an annual notice of their FERPA rights.[16]

FERPA broadly defines the records that it regulates. Initially, FERPA included a laundry list of specific types of covered records, such as grades, test scores, and "verified reports of serious or recurrent behavior patterns."[17] Within weeks of its initial enactment, FERPA's definition of records was broadened to include "those records, files, documents and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for

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(comprehensive overview of FERPA and sample forms); John E. Theuman, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (20 U.S.C.S. § 1232g)*, 112 A.L.R. FED. 1, 14–20 (1993); Family Educational Rights and Privacy Act (FERPA), http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html (last visited Dec. 21, 2008) (includes text of regulations and links to model policies and letters of finding). For academic commentary on FERPA see generally Thomas Baker, *Inaccurate and Misleading: Student Hearing Rights under FERPA*, 114 EDUC. L. REP. 721 (1997); Daggett, *Bucking Up Buckley I*, *supra* note 1; Daggett, *Bucking Up Buckley II*, *supra* note 3; Daggett & Huefner, *Recognizing Schools' Legitimate Educational Interests*, *supra* note 3; Huefner & Daggett, *FERPA Update*, *supra* note 3; Maureen Rada, *The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How it Can be Undone*, 59 OHIO ST. L.J. 1799 (1998) (discussing the Ohio Supreme Court decision in the *Miami University* case).

11. *See* Huefner & Daggett, *FERPA Update*, *supra* note 3, at 470.

12. 20 U.S.C. § 1232g(b)(1)–(2) (2000 & Supp. V 2005); *id.* § g(a)(1)(A) (2000).

13. *See* Huefner & Daggett, *FERPA Update*, *supra* note 3, at 477–84 (discussing exceptions to non-disclosure). For example, a California court rejected a parent challenge to a school's sharing a student's records with the (non-attorney) consultant who was representing the district in a special education dispute about the student's program. Tyler L. v. Poway Unified Sch. Dist., No. D037558, 2002 WL 423467, at *3 (Cal. Ct. App. Mar. 19, 2002). The court held that sharing the records did not violate FERPA, relying in part on the "legitimate educational interests" exception, which permits schools to share student records internally with employees and other agents who have a legitimate educational interest in them. *Id.* at *2 & n.6.

14. 20 U.S.C. § 1232g(b)(1) (Supp. V 2005).

15. *Id.* § 1232g(a)(2) (2000).

16. *Id.* § 1232g(d).

17. Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–72 (1974).

such agency or institution."[18] There are several categories of records exempted from this definition, such as certain records of a school's law enforcement unit,[19] and "sole possession" notes created by an individual school employee such as a teacher or counselor as a confidential memory aid.[20]

III. LEGISLATIVE, ADMINISTRATIVE, AND SUPREME COURT DEVELOPMENTS (OR LACK THEREOF)

A. The Supreme Court and FERPA

From FERPA's enactment in 1974 until 2002, the Supreme Court decided no FERPA cases. In fact, during this period only two of the Court's opinions even cited FERPA, and then only in passing in footnotes.[21] In 2002, the Court decided two FERPA cases: *Owasso Independent School District v. Falvo*[22] and *Gonzaga University v. Doe*.[23] The current Chief Justice, John Roberts, argued for the school in *Gonzaga*.[24] In *Gonzaga*, the Court held that FERPA violations are not actionable under § 1983.[25] In *Falvo*, the Court held that the practice of peer grading did not involve student records and thus did not violate

18. 20 U.S.C. § 1232g(a)(4)(A). A Joint Statement in Explanation of Buckley/Pell Amendment provides guidance on the purpose of this change:

> This [change in the definition of education records] is a key element in the amendment. An individual should be able to know, review, and challenge all information–with certain limited exceptions–that an institution keeps on him, particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution.

20 CONG. REC. 39,862 (1974).

19. 20 U.S.C. § 1232g(a)(4)(B)(ii).

20. *Id.* § 1232g(a)(4)(B)(i).

21. A Westlaw search in the SCT database for "1232g" on September 7, 2002 identified only two Court citations to FERPA.

In a case exploring whether employers must share information with a union about its psychological testing program for employees as part of good-faith bargaining under the federal labor statute, the Court took notice that people are sensitive about disclosure of information that bears on their competence, citing FERPA and other laws to support this proposition. Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 n.16 (1979). In its seminal student procedural due process case, the Court held that suspensions from school triggered due process obligations, in part because such suspension would be included in student records which would likely find their way to colleges and prospective employers, in accordance with the limitations of the newly enacted FERPA; thus, such discipline could stigmatize the suspended students. Goss v. Lopez, 419 U.S. 565, 575 n.7 (1975).

22. 534 U.S. 426 (2002).

23. 536 U.S. 273 (2002).

24. *See id.* at 275 (noting Roberts's appearance for petitioner Gonzaga University).

25. *Id.* at 276, 290.

FERPA.[26] In some respects straightforward, and in others subtle, this pair of opinions significantly lessens FERPA's protection of student privacy.

1. Gonzaga*—No Private Judicial Enforcement of FERPA*

The *Gonzaga* majority identified a new, tougher standard for deciding when a federal statute can serve as the basis for § 1983 claims.[27] Applying this new standard, the Court held that FERPA claims based on unauthorized disclosure of student records were not actionable under § 1983.[28] This holding[29] removed the only meaningful private[30] remedy for students whose FERPA rights are violated. It has long been settled that FERPA has no express or implicit right

26. *Falvo*, 534 U.S. at 436. Peer grading is the practice in which "[t]eachers . . . ask students to score each other's tests, papers, and assignments as the teacher explains the correct answers to the entire class." *Id.* at 428.

27. For a discussion of the Court's analysis of § 1983 actionability of federal statutes, see Lynn M. Daggett, *Student Privacy and the Protection of Pupil Rights Act as Amended by No Child Left Behind*, 12 U.C. DAVIS J. JUV. L. & POL'Y 51, 68–73 (2008) [herinafter Daggett, *Student Privacy*]. In prior cases, the Court briefly examined whether the statute in question created benefits which were determinate enough to be enforceable. The *Gonzaga* Court shifted the analysis to a search for affirmative congressional intent to make the statute actionable through a private cause of action or a § 1983 claim, intent which the Court hinted was not likely to be present in Spending Clause legislation. *Gonzaga*, 536 U.S. at 283. In applying this standard to FERPA, the Court distinguished statutes such as Title VI and Title IX, which are couched in the language of individual rights, with statutes such as FERPA, which mentions rights repeatedly in both its text and title, but which the Court found to be couched in systemic language and hence not to create private rights. *Id.* at 284 & n.3. The Court had held on earlier occasions that the language of a statute is the best indicator of legislative intent. Nw. Airlines, Inc. v. Trans. Workers Union, 451 U.S. 77, 91 (1981).

28. *Gonzaga*, 536 U.S. at 290. Subsequent to *Gonzaga*, a federal appeals court held that claims of violations of FERPA provisions providing for access to one's own records are not actionable under § 1983. *See* Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 785–86 (2d Cir. 2002).

29. Justice Stevens's dissent noted that the majority's decision was contrary to the great weight of federal appellate court authority: "Since FERPA was enacted in 1974, all of the Federal Courts of Appeals expressly deciding the question have concluded that FERPA creates federal rights enforceable under § 1983. Nearly all other federal and state courts reaching this issue agree with these Circuits." *Gonzaga*, 536 U.S. at 299 (Stevens, J., dissenting) (footnote omitted); *see also id.* at 299 n.7 (noting that the majority cites only a single state-court case that actually held that FERPA is not actionable under § 1983).

30. There is a public remedy—the Department of Education can initiate proceedings to terminate a school district's federal education funds *if* the school is not in "substantial" compliance. *See id.* at 279, 288 (majority opinion) (citing 20 U.S.C. §§ 1234c(a), 1232g(f) (2000)). This is of course a drastic remedy, and one that has apparently never been invoked nor even initiated. *See* Daggett, *Bucking Up Buckley II*, *supra* note 3, at 41.

of action[31] and courts continue to so hold.[32] FERPA violations amount to tort and other common-law claims only under unusual circumstances.[33] The federal government may sue to enforce FERPA, but has done so only once.[34]

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31. This point is so well settled that Rule 11 sanctions may be levied against persons who assert a private cause of action under FERPA. *Cf.* Sargent v. U.S. Dep't of Educ., No. 07-C-618, 2007 WL 3166943, at *4–5 (E.D. Wis. Oct. 25, 2007) (involving pro se FERPA and Privacy Act claims by a medical doctor of denial of access to his own medical school records from his enrollment almost fifty years earlier and access to records of communication between medical school and FPCO concerning his request; the court dismissed the FERPA claim and ordered plaintiff to answer defendant medical school's motion for sanctions under Fed. R. Civ. P. 11); *see also* Sargent v. U.S. Dep't of Educ., No. 07-C-618, 2007 WL 3228821, at *1–2 (E.D. Wis. Oct. 31, 2007) (issuing later ruling in same case that plaintiff would pay school's reasonable attorney's fees and costs for violating Rule 11; although plaintiff was pro se, attorney for defendant medical school met with plaintiff and explained *Gonzaga* and other FERPA case law to him and provided an advance copy of motion for sanctions and plaintiff pursued FERPA claim).

State-law claims in those states with statutes governing student records may have private enforcement remedies. *Cf.* Daniel S. v. Bd. of Educ. of York Cmty. High Sch., 152 F. Supp. 2d 949, 951 (N.D. Ill. 2001) (permitting in part a private claim under Illinois state student records law); Ibata v. Bd. of Educ. of Edwardsville Cmty. Unit. Sch. Dist. No. 7, 851 N.E.2d 658, 660–61 (Ill. App. Ct. 2006) (same).

32. *See, e.g.*, Dutkiewicz v. Hyjek, 135 F. App'x 482, 483 (2d Cir. 2005); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67–68 (1st Cir. 2002) (suggesting that Congress intended public and not private enforcement of FERPA); Hayes v. Williamsville Cent. Sch. Dist., 506 F. Supp. 2d 165, 170 n.10 (W.D.N.Y. 2007); Millington v. Temple Univ. Sch. of Dentistry, No. Civ. A. 04-3965, 2006 WL 83447, at *3–4 (E.D. Pa. Jan. 9, 2006); Shelton v. Trs. of Columbia Univ., No. 04 Civ. 6714(AKH), 2005 WL 2898237, at *3 (S.D.N.Y. Nov. 1, 2005) (holding a university's alleged denial of access to dismissed student of his records insufficient to establish a FERPA claim); Deptford Twp. Sch. Dist. v. H.B., Civil No. 01-0784(JBS), 2005 WL 1400752, at *14 (D.N.J. June 15, 2005); Curto v. Smith, 248 F. Supp. 2d 132, 140–41 (N.D.N.Y. 2003) (dismissing a veterinary school student's claim that the school had shared her failure on an exam with members of the public and others); Slovinec v. DePaul Univ., 222 F. Supp. 2d 1058, 1061 (N.D. Ill. 2002) (providing no claim available to student who asserted faculty refused to write references unless the student waived his right of access, a demand explicitly prohibited by FERPA), *aff'd*, 332 F.3d 1068 (7th Cir. 2003); M.P. v. Indep. Sch. Dist. No. 721, 200 F. Supp. 2d 1036, 1045 (D. Minn. 2002) (rejecting a FERPA claim by a schizophrenic student that a school employee had discussed the student's condition in front of classmates); Cherry v. LeDeoni, No. 99 CV 6860(SJ), 2002 WL 519717, at *2, *4–5 (E.D.N.Y. Mar. 31, 2002); *Daniel S.*, 152 F. Supp. 2d at 954.

33. *See* Daggett, *Bucking Up Buckley II*, *supra* note 3, at 42–43. For example, defamation claims can only be successful when the plaintiff proves the statements made about her are false. When schools disclose truthful information about students (for example, their grades, or IQ or other test scores), defamation would not be a viable claim. *Id.* at 43.

34. In *United States v. Miami University*, the Department of Education asked the Department of Justice to enforce FERPA and thereafter the federal government sought injunctive relief against a private university for alleged FERPA violations. 294 F.3d 797, 804 & n.6 (6th Cir. 2002). The suit began well before the *Gonzaga* case, but the Sixth Circuit ruled after *Gonzaga*, holding that the decision did not affect the availability of federal enforcement. *Id.* at 818 & n.20. The *Miami University* court held that specific FERPA and General Education Provisions Act (GEPA) language, as well as "inherent power to sue to enforce conditions imposed on the recipients of federal grants," provided authority for federal enforcement of FERPA. *Id.* at 807–08 (citing 20 U.S.C. § 1232g(f) (2000) (FERPA) and 20 U.S.C. § 1234c(a)

Administrative complaints may be filed with the Family Policy Compliance Office (FPCO). The FPCO can investigate these complaints and seek voluntary compliance by the offending school.[35] There is no hearing requirement, no timeline for processing complaints nor, in fact, any requirement that complaints be processed, and no compensation or other recourse for the student. As the dissent[36] in *Gonzaga* notes, the FPCO complaint and termination of federal funding remedies "provide[] no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it leaves to [FPCO] discretion the decision whether to [even] follow up on individual complaints."[37]

The *Gonzaga* holding that FERPA is not actionable under § 1983 is obviously a bad result for prospective plaintiffs, and a good one from the perspective of schools trying to minimize their liability and litigation costs. The decision also has less obvious, potentially far-reaching implications. First, 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.[38] Second, to the limited extent the *Gonzaga* Court interpreted the substance of FERPA, it did so narrowly. The majority opinion characterizes

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(2000) (GEPA), as well as Supreme Court precedent regarding federal suits to enforce spending clause legislation). *Miami University* is apparently the only occasion where the federal government has sued to enforce FERPA, although GEPA appears to explicitly authorize federal enforcement. *See* 20 U.S.C. § 1234c. See Daggett & Huefner, *Recognizing School's Legitimate Educational Interests*, *supra* note 3, at 19–23, for an extended discussion of the *Miami University* case.

35. 34 C.F.R. §§ 99.60(a)–(b) (2001).

36. The two dissenters attacked both the majority's announced doctrine and its application to FERPA. Applying the prior standard, the dissent found FERPA's language was mandatory, in fact actually used the word "rights" numerous times, was aimed at a specific class of students and parents, and created rights such as access to one's own records which were less ambiguous than ones found by the Court to be actionable under § 1983 in other cases. *Gonzaga*, 536 U.S. at 293–95 (Stevens, J., dissenting). As to the majority's emphasis on FERPA's use of systemic language, the dissent noted that a systemic problem might be a requirement for individual relief, but still created individual rights. *Id.* at 295–96. The dissent also criticized the majority's intermixing of private cause of action cases with § 1983 enforcement. *Id.* at 296–97. Turning to the second, "comprehensive enforcement" prong of the analysis, the dissent reviewed the FPCO complaint and termination of federal funding remedies available under FERPA and found them to "fall far short" of being comprehensive remedies that would render unnecessary enforcement under § 1983. *Id.* at 297–98. Finally, the dissent noted that all federal appeals courts addressing the issue had found FERPA to be actionable under § 1983. *Id.* at 299 & nn.6–7.

37. *Id.* at 298 (Stevens, J., dissenting).

38. *See, e.g.*, *id.* at 292 (Breyer, J., concurring) (stating that "much of [FERPA's] key language is broad and nonspecific," specifically questioning the scope of records covered under FERPA). Justice Breyer noted that FERPA "is open to interpretations that . . . favor confidentiality almost irrespective of conflicting educational needs or the importance, or common sense, of limited disclosures in certain circumstances." *Id.*

the Family Education *Rights*[39] and Privacy Act (emphasis added) as a statute that actually confers no individual rights,[40] and which is violated only by school policy or practice rather than the actions of individual teachers or other school employees and agents, and is thus "two steps removed" from § 1983 enforceability.[41] Courts are increasingly holding or suggesting that FERPA is only violated by a pattern or policy of misconduct, rather than individual violations.[42] However, a federal court of appeals recently held that violation of FERPA's *access* provisions does not require a showing of a pattern or policy.[43] The Court's narrow interpretation of FERPA's structure and enforceability arguably suggests to courts and schools that they interpret all of FERPA's provisions narrowly.

Given the Court's narrow interpretation that FERPA is violated only by a school policy or practice and the Court's removal of FERPA's sole real private federal-enforcement mechanism, is there sufficient external incentive for schools to comply with FERPA at a practical level? Federal lawsuits are not a realistic possibility, and the FPCO complaint process is more an annoyance than a deterrent. State-law claims are theoretically available, although a close examination of the *Gonzaga* case and other recent litigation shows their availability is more theoretical than real. Some states have statutes governing student records that may be privately enforced;[44] this was not the case in

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39. The dissent lists the numerous instances where FERPA's text uses the word "right" and purports to convey specific rights. *Id.* at 293–94 (Stevens, J., dissenting).

40. The majority seemed concerned that if FERPA were interpreted to confer individual, enforceable rights, it would "set [Congress] resolutely against a tradition of deference to state and local school officials." *Id.* at 286 n.5 (majority opinion).

41. *Id.* at 287–88.

42. *See* Weixel v. Bd. of Educ. of City of N.Y., 287 F.3d 138, 151 (2d Cir. 2002) (holding multiple alleged privacy violations by a single school were insufficient to establish a FERPA claim); Popson v. W. Clark Cmty. Sch., 230 F. Supp. 2d 910, 949 (S.D. Ind. 2002) (holding that a teacher's personal notes were not FERPA records); Daniel S. v. Bd. of Educ. of York. Cmty. High Sch., 152 F. Supp. 2d 949, 951–52, 954 (N.D. Ill. 2001) (single disclosure by a gym teacher to a team that he had kicked two students out of class after allegedly forcing them to "stand naked in front of their classmates," yelling profanities at them, and likening them to "those kids at Columbine" does not constitute policy or practice required for a FERPA violation, nor do other alleged FERPA violations by this same teacher amount to a requisite policy or practice); Mele v. Travers, 741 N.Y.S.2d 319, 321 n.2 (App. Div. 2002) (suggesting that the parent must show that school policy resulted in the FERPA violation). Recently promulgated regulations clarify that valid FPCO complaints are not limited to allegations of patterns or practices of FERPA violations, but may instead assert a single FERPA violation. *See* Family Education Rights and Privacy, 73 Fed. Reg. 74,806, 74,854 (Dec. 9, 2008) (to be codified at 34 C.F.R. § 99.64(a)). The regulations also provide that FPCO may issue a finding of noncompliance based on a single violation. *See id.* at 74,855 (to be codified at 34 C.F.R. § 99.66(c)). In addition, FPCO may initiate investigations of FERPA violations even if no complaint has been filed. *See id.* (to be codified at 34 C.F.R. § 99.64(b)).

43. Lewin v. Cooke, 28 F. App'x 186, 192 (4th Cir. 2002).

44. *See, e.g.*, *Daniel S.*, 152 F. Supp. 2d at 951 (involving claim under Illinois state student records law); Ibata v. Bd. of Educ. of Edwardsville Cmty. Unit. Sch. Dist. No. 7, 851 N.E.2d 658,

Gonzaga. The plaintiff in *Gonzaga* did assert state-law tort and contract claims (defamation, negligence, breach of educational contract, and invasion of privacy) as well as a FERPA/§ 1983 claim.[45] The *Gonzaga* plaintiff's $1.155 million verdict, which at first glance suggests the availability of substantial damages for FERPA violations, in fact demonstrates that removing § 1983 claims as a remedy for FERPA violations leaves injured students with no meaningful remedy.[46] In fact, the *Gonzaga* plaintiff ultimately received no money damages on his state-law claims as direct compensation for his FERPA rights being violated; his success on state-law claims resulted from school practices outside of the alleged FERPA violation.

As has been discussed elsewhere, the *Gonzaga* situation is not atypical; normally the only meaningful available remedy for FERPA violations has been § 1983 claims,[47] and that recourse is no longer available. Recent attempts to turn FERPA violations into common-law claims continue to be largely unsuccessful. For example, violations of some statutes constitute negligence

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660 (Ill. App. Ct. 2006) (discussing claim based on Illinois law). For an overview of state education privacy laws, see Susan P. Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361 (2005).

45. Doe v. Gonzaga Univ., 24 P.3d 390, 393 (Wash. 2001), *rev'd*, 536 U.S. 273 (2002).

46. The bulk of the *Gonzaga* jury's damages award ($950,000 of $1,155,000) came from the defamation ($500,000) and FERPA/§ 1983 ($450,000) claims. *Id.* at 396. After the *Gonzaga* decision, FERPA/§ 1983 claims are no longer available. Defamation claims can only be successful when the plaintiff proves the statements made about her are false. Most unauthorized disclosures under FERPA involve accurate information (for example, unauthorized sharing of a student's grades or IQ test scores); thus defamation claims will normally be unavailable for FERPA violations involving disclosure. FERPA can also be violated by failing to give parents/adult student access to their own records, by not offering requesting parents/adult students an internal hearing to challenge the accuracy of their own records, or by not providing parents/adult students with an annual notification of their FERPA rights. In these scenarios, too, defamation claims would not succeed. In short, defamation is not, absent unusual circumstances, a viable claim when FERPA is violated.

Three of the other claims were not directly about the alleged FERPA violation. The negligence claim in *Gonzaga* was not directly a FERPA claim, but instead alleged a breach by the school of its duty to perform a reasonable investigation of rape allegations and resulted in a jury award of $50,000 in damages. *See id.* at 393–94, 396, 398–99. The Washington Supreme Court upheld the appellate court's decision reversing the jury award on negligence, holding that the school had no duty to investigate and therefore that no breach had occurred. *Id.* at 399. Similarly, the breach of educational contract claim (which resulted in a jury award of $55,000) related to school handbook language providing students accused of misconduct with a chance to be heard, rather than a FERPA violation. *See id.* at 396, 402–03. Finally, the plaintiff in *Gonzaga* was awarded $100,000 for invasion of privacy, which was reinstated by the Washington Supreme Court. That court held that the school's investigation, pursuant to the rape allegation, into the plaintiff's "personal relationships, habits, and even anatomy . . . [invaded] the intimate details of a [teacher certification] candidate's sex life." *Id.* at 399. This "highly offensive" intrusion into the plaintiff's private affairs, required to succeed with the claim, was a violation of his privacy. *Id.* at 399–400.

47. *See generally* Daggett, *Bucking Up Buckley II*, *supra* note 3, at 45–55 (explaining the process involved when bringing a civil rights suit against a school that violates FERPA).

per se. A federal appeals court rejected a negligence per se claim involving a professor's practice of returning graded exams in a pile for students to sift through and retrieve their own, reasoning that FERPA sets only administrative policy requirements—not a standard of care—and thus cannot be the basis of a negligence per se claim.[48]

Students making constitutional privacy claims based on nonconsensual disclosure of their student information have been singularly unsuccessful. Courts often find that the context within which student records were disclosed means the student had no reasonable expectation of privacy in the records, thus dooming the constitutional privacy claim.[49]

Claims against private schools and public universities that have a contractual relationship with students in which students pay tuition and the school provides instruction, and the school's policies (presumably including a student-records policy) form some of the terms of the relationship, may prove somewhat more promising for plaintiffs. In one case involving a private-school student, a court refused to dismiss a case that included claims of invasion of privacy and conversion of a student's school and psychological records where the private school refused to release them to the parent.[50] In another case, a graduate student at a private university filed claims, including breach of contract, when a faculty member disclosed to another university that employed the plaintiff as an instructor that the student had not yet passed his comprehensive exams, in violation of the school's policy concerning confidentiality of student information.[51] The claim was ultimately dismissed because the court found that the student had lied to the employing school about his status, and thus the school's alleged breach had not caused the damages asserted by the plaintiff

48. *See* Atria v. Vanderbilt Univ., 142 F. App'x 246, 248, 253–54 (6th Cir. 2005) (dismissing plaintiff's negligence per se claim, but allowing negligence claim to proceed).

49. *See, e.g.*, C.M. v. Bd. of Educ. of Union County Reg'l High Sch. Dist., 128 F. App'x 875, 883–84 (3d Cir. 2005) (holding that plaintiff had no reasonable expectation of privacy in nondisclosure to attorneys, experts, insurance carrier, and other persons involved in parent's IDEA litigation and OCR complaint); Risica v. Dumas, 466 F. Supp. 2d 434, 440–41 (D. Conn. 2006) (granting school's summary judgment motion because a student whose "hit list" on the outside of his geography book was seen by a school janitor, and was then disclosed to a student on the list and to school staff, had no claim as the court found FERPA did not create the reasonable expectation of privacy necessary to such a claim). *Cf.* C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 161, 181–82 (3d Cir. 2005) (finding no constitutional violation related to survey of middle and high school students asking about drug and alcohol use, sexual matters, suicide attempts, and relationships; the court stated that the government interest in obtaining the information outweighed any invasion of privacy, particularly given the intended voluntary and anonymous nature of the survey); Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1207–08 (9th Cir. 2005) (stated that the Constitution does not prohibit schools from conducting a survey of elementary school students asking about sexual matters; emphasis on voluntariness of the survey in rejecting the constitutional privacy claim). Now-Justice Alito joined in the *C.N.* opinion.

50. Gens v. Casady Sch., 177 P.3d 565, 571–72 (Okla. 2008).

51. Frank v. Univ. of Toledo, No. 3:06 CV 1442, 2007 WL 4590982, at *7 (N.D. Ohio Dec. 28, 2007).

when he was fired by the employing university.[52] However, another graduate student who had been dropped from a Ph.D. program, this time at a public university, unsuccessfully claimed state-privacy-act and state-constitutional-privacy violations from disclosure of some information about him.[53]

2. Falvo*—Scope of Records Under FERPA*

Parent Kristja Falvo challenged the practices at her children's school of having students grade each other's non-anonymous tests and papers (thus making the student's score known to the student grader), and having students call out the grades on their own papers for the teacher to record (thus making the scores known to classmates).[54] Given the facts of the case, the claim might have been brought (and more favorably decided) under disability statutes,[55] but the actual suit claimed violation of FERPA; specifically, unauthorized disclosure of education records.[56] The Court agreed with the trial court that the peer grading did not involve FERPA records because the student tests and papers were not "maintained by . . . a person acting for" an educational agency.[57] The Court unanimously held that "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book."[58]

The majority opinion is quite brief, comprising only about four pages. It refers to none of the numerous federal and state court decisions interpreting FERPA, nor its early amendment, which broadened the definition of covered

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52. *Id.* at *8.

53. Lachtman v. Regents of Univ. of Cal., 70 Cal. Rptr. 3d 147, 166–68 (Ct. App. 2007).

54. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 428–29 (2002).

55. *See* Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1208 (10th Cir. 2000), *rev'd*, 534 U.S. 426 (2002). Part of the parent's concern stemmed from the stigma that she perceived this practice inflicted on one of her children, who was disabled. Specifically, the parent claimed that the peer grading and calling out of grades resulted in class-wide knowledge of the grades her child received. *Id.* at 1207. However, the parent did not include an IDEA, § 504, or ADA disability discrimination claim, nor a claim that the IDEA's records provisions were violated, in her suit. *Id.* at 1208.

The *Falvo* opinion does not of course resolve whether the peer grading practice at issue in *Falvo* violates disability laws. In a recent case, a schizophrenic student claimed that a school employee had discussed his condition in front of other students. M.P. v. Indep. Sch. Dist. No. 721, 200 F. Supp. 2d 1036, 1037 (D. Minn. 2002), *rev'd*, 439 F.3d 865 (8th Cir. 2008). The Court held that the student could prevail on a § 504 claim if he showed that the school acted with deliberate indifference. *Id.* at 1040–41.

56. *Falvo*, 534 U.S. at 428–29. The parent also asserted a constitutional privacy claim, but the constitutional privacy claim was rejected by the trial court and the Tenth Circuit. Falvo v. Owasso Indep Sch. Dist. No. I-011, 233 F.3d 1203, 1207–08 (10th Cir. 2000). The Supreme Court's grant of certiorari was limited to the statutory FERPA issue. *Falvo*, 534 U.S. at 430.

57. *Falvo*, 534 U.S. at 430 (quoting 20 U.S.C. § 1232g(a)(4)(A)(ii) (2000)). The Tenth Circuit agreed with the parent that the practice violated FERPA. *Id.*

58. *Id.* at 436. Recently promulgated regulations codify this holding. *See* Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,852 (Dec. 9, 2008) (to be codified at 34 C.F.R. § 99.3(b)(6)).

records.[59] The *Falvo* Court reasoned that peer grading in schools is an activity chosen for educational reasons, noting that:

> Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on.[60]

Thus, the Court held that student peer graders are not persons "acting for" the school and the papers they might briefly possess while grading them are not maintained FERPA records.[61] The Court did not discuss the consequence of this holding; specifically that if student-peer graders are not persons acting for a school under FERPA, FERPA does not prohibit the peer graders from sharing their peers' grades outside of the classroom. Of course, schools may enact rules to prohibit this sharing.

The Court's "acting for" holding is appropriately interpreted as excluding students as FERPA-regulated persons who act for a school when they, like the peer graders in *Falvo*, act in an unpaid capacity and their responsibilities are primarily part of their instructional experience.[62] For example, students who

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59. *See supra* Part II.

60. *Falvo*, 534 U.S. at 433–34.

61. *Id.* The Court did not recognize that peer graders relieved teachers of significant tasks, thus also performing an unpaid service of benefit to the school. The opinion thus of course does not address when or if a task with multiple purposes (such as learning and assisting the school) performed by a student is done by a person "acting for" a school who must comply with FERPA. What of, for example, the student who assists a teacher outside of instructional time by grading papers? The opinion also does not recognize alternative peer grading practices, which would have avoided FERPA problems. Law school students and faculty are familiar with using exam numbers rather than names on exams and other graded work. In some law schools, legal research and writing faculty use peer grading to help students develop their skills by having students edit and critique classmate papers identified by number rather than name.

The concurring opinion agreed with the majority that peer graders are not persons acting for schools and thus papers in possession of the peer graders are not FERPA records. *Id.* at 436 (Scalia, J., concurring in the judgment). The concurring opinion does not explain its reasoning on this point, except to refer to the "ordinary meaning" of the phrase a "person acting for" a school. *Id.*

62. *Id.* at 433 (majority opinion). The Court did not hold that student status in all cases precludes coverage under FERPA. The Court did not hold, for example, that students actually hired by or given an official unpaid role by schools as tutors, or teacher assistants with grading responsibilities, are excluded from FERPA. To have so held would have meant that common university practices of using graduate students to teach sections of large classes, grade exams, or tutor students, and of using work-study students in offices, such as the office of the registrar, which works with student records, would be unregulated by FERPA. This in turn would mean such graduate and work-study students either could not have access to student records under FERPA, and thus in many cases could not be employed at all, or that such students could be hired and then disclose student information at will without violating FERPA.

grade the work of their peers as part of their instructional experience, or work on a group project for a grade, access their peers' work primarily to enhance their own instruction (although of course the school also benefits because the peers perform the task of getting the papers graded), and are regarded by their classmates primarily as peers rather than as graders. By contrast, a graduate student who teaches a section of a large course and grades exams for students in that section does so for pay in recognition of the benefit the school receives, and is viewed by the students in the section more as a school employee than as a peer.

This reasoning that students performing tasks for learning purposes are not "acting for" a school, and thus are not covered by FERPA, would have been sufficient to decide the case. Nonetheless, the Court went further, also holding that at least until the peer-graded papers were turned in to the teacher (which apparently never happened in the Falvo children's school district), they were not "maintained" by the school and thus doubly fell outside FERPA's protection.[63] The Court's underlying reasoning about what "maintain" means is far broader than what is necessary to support its holding. It is one thing to say that student papers never in a school employee or agent's possession (although information in the papers—the grade—is orally disclosed to the teacher and recorded in her grade book) are not maintained by the school. The Court went further, relying on a dictionary definition to suggest that records were maintained only if they were "preserved" or "retained."[64] Under this definition of "maintain," schools could destroy student records and then disclose their contents from memory without violating FERPA. For example, a school could destroy a student's IQ test report or transcript and other grade records and then disclose the IQ or GPA at will without fear of a FERPA violation because the IQ and grade records were not preserved or retained by the school.[65]

Most perniciously, albeit in dicta,[66] in the context of its exploration of what records schools "maintain" and which are thus covered by FERPA, the Court even suggested that

> FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the

63. *Id.* at 432–34.

64. *Id.* at 433 (citation omitted).

65. Schools often receive educational and other evaluations from outside persons, such as an independent evaluator selected by the parents under the IDEA, or juvenile court or psychiatric records for students returning to school after incarceration or hospitalization. Limiting "maintained" records to those permanently kept by a school would mean that after schools read and destroyed these records, the school could publicly disclose their contents without violating FERPA.

66. *Id.* at 436 (noting the Court's limited holding that "grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book").

> student is no longer enrolled. . . . It is fanciful to say [the student graders] maintain the papers in the same way the registrar maintains a student's folder in a permanent file.[67]

The Court reiterated this idea that FERPA records may be limited, as the school district argued, to ones kept by a "central custodian"[68] several times.[69] Although concurring in the judgment and the reasoning that peer graders are not persons "acting for" schools,[70] Justice Scalia disagreed vehemently with this "central custodian" approach to defining FERPA records. Justice Scalia pointed out that FERPA's explicit exclusion of "sole possession" notes[71] would be meaningless if all documents kept by school employees other than a school's central records custodian were outside FERPA's coverage.[72] Justice Scalia noted that this formulation would also exclude teacher grade books (which of course are kept by individual teachers rather than school central-records custodians); this was an issue that the majority opinion explicitly did not decide.[73] Justice Scalia also found the majority's "central custodian" discussion "unnecessary for the decision of this case" and "incurably confusing," as well as inconsistent with basic principles of statutory construction.[74]

The Court's dicta, agreeing with an argument made by both the school's attorney and the United States as amicus suggesting that FERPA records are limited to those kept in a central file,[75] should not be relied on for several reasons. First and most obviously, this suggestion is dicta—it is not essential to the Court's holding.[76] Second, as the concurrence points out, such an interpretation of FERPA records would make FERPA's exclusion of sole

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67. *Id.* at 433.

68. In presentations to educators on FERPA, I use the term "myth of the manila folder" to discuss how FERPA covers records well beyond those maintained, often in a manila folder, by a registrar for university students and in a central office for elementary and secondary students.

69. *Id.* at 434 (discussing the single access log required by FERPA for certain nonconsensual disclosures of student records, implying that "Congress contemplated that education records would be kept in one place with a single record of access"). The Court further described that "FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar." *Id.* at 434–35.

70. *Id.* at 436 (Scalia, J., concurring in the judgment).

71. Confidential notes kept, for example, by a counselor of a meeting with a student that are not accessible to any third party, including other school officials, and thus of course are not in a permanent file maintained by a central custodian. *See* 20 U.S.C. § 1232g(a)(4)(B)(i) (2000).

72. *Falvo*, 534 U.S. at 437 (Scalia, J., concurring in the judgment).

73. *Id.*

74. *Id.*

75. *See id.* at 431–32 (majority opinion) (citing Brief for Petitioners at 17, *Falvo*, 534 U.S. 426 (2001) (No. 00-1073); Brief for United States as Amicus Curiae at 14, *Falvo*, 534 U.S. 426 (2001) (No. 00-1073)).

76. *Cf.* Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ., 787 N.E.2d 893, 906 (Ind. Ct. App. 2003) (holding that *Falvo* should not be read as limiting FERPA records to those maintained by a central custodian).

possession notes from its definition of records superfluous.[77] In fact, limiting FERPA records to those that are centrally maintained would render not only the sole possession notes, but also many other sections of FERPA, superfluous.[78] Third, the Court's suggested central-file limit ignores Congress's decision to amend FERPA's definition of records. As discussed in Part II, FERPA originally defined records via a laundry list of documents (such as transcripts, standardized test scores, and records of significant behavioral problems) that would normally be found in a central file, but Congress deliberately broadened FERPA's definition of records so that it is not limited to central-file-type records.[79] Fourth, imputing a central-file requirement for FERPA records is not supported by, and in fact is inconsistent with, the plain language of FERPA's current definition of education records. The current definition nowhere mentions central files or central custodians; in fact, FERPA defines education records quite broadly as all information recorded about a student maintained by a school or a person acting for the school.[80]

Fifth, neither the federal Department of Education, which is responsible for enforcing FERPA, nor courts addressing the issue both before and after *Falvo*, have interpreted FERPA records to be limited to those in a central file.[81] Most recently and significantly, the Sixth Circuit held in a post-*Falvo* case that discipline records are covered by FERPA.[82] Although many discipline records are not maintained in a central file, the Sixth Circuit found that "Congress made no content-based judgments" concerning FERPA's records definition, and held that discipline records were covered by FERPA without regard to whether they were kept in a central file.[83] It is significant that the *Miami University* case was brought by the federal government (specifically the Department of Justice) to enforce FERPA, and the federal government's position was that FERPA included discipline records without regard to their location.

Sixth, to limit FERPA records to those in a central file would have grave and unfortunate pedagogical consequences. As discussed in Part II, FERPA

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77. *Falvo,* 534 U.S. at 437 (Scalia, J., concurring in the judgment) (noting that FERPA's exclusion of teacher notes as sole possession notes would be superfluous if only records maintained in a central file were covered by FERPA).

78. For example, FERPA also excludes law enforcement records, which are normally not centrally maintained but are kept by a school's security unit. 20 U.S.C. § 1232g(a)(4)(B)(ii) (2000). It limits access to postsecondary schools' health records, which are normally kept at a school's health center. *Id.* § 1232g(a)(4)(B)(iv). It excludes adult students' right of access to parent financial aid statements, which are normally kept at a school's financial aid office. *Id.* § 1232g(a)(1)(C)(i).

79. *See supra* note 18 and accompanying text.

80. 20 U.S.C. § 1232g(a)(4)(A).

81. *See generally* Daggett & Huefner, *Recognizing Schools' Legitimate Educational Interests*, *supra* note 3, at 12–29.

82. United States v. Miami University, 294 F.3d 797, 812–15 (6th Cir. 2002).

83. *Id.* at 812–13.

essentially says three things about covered "education records": (1) parents and adult students may access their own records; (2) records may not in general be disclosed without written consent of the parent/adult student; and (3) parents/adult students may request an internal hearing to challenge the accuracy of their records.

Schools maintain many documents about students that are distinct from information kept in central files. A student's teacher keeps papers, exams, and assignments as well as a grade book. The school nurse or health center maintains health records. A school psychologist keeps evaluations and test results. A principal or other administrator keeps records of minor discipline such as detentions. At the postsecondary level, the financial aid office has its own set of records. Limiting FERPA records to those in a central file would mean that these other records could not be accessed by parents/adult students, could be disclosed without parent/adult student consent, and could be precluded from internal challenges. Surely Congress did not intend, and the Supreme Court does not contemplate, a lack of right of access by students to their own papers and exams in teachers' own files, nor disclosure to the world of test results by school psychologists.

Finally, the *Falvo* opinion seems to tacitly recognize problems of both federal–state relations with regard to education regulation, and practical feasibility of broader readings of some aspects of FERPA. As to issues of federalism, the Court indicated that the appellate court's broad interpretation of FERPA "would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools."[84] And as to day-to-day feasibility of complying with FERPA if broadly interpreted, the Court suggested it would impose a "weighty administrative burden" on every teacher, and perhaps even peer grader students,[85] to maintain an access log of each student's assignments,[86] permit FERPA hearings to challenge grades,[87] and require teachers to grade all assignments themselves.[88] This imposition on teachers would, according to the Court, "mak[e] it much more difficult for teachers to give students immediate guidance" and "forc[e] teachers to abandon . . . group grading of team assignments."[89] The Court expressed "doubt [that] Congress meant to

84. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 432 (2002) (indicating that to do so would "effect . . . a substantial change in the balance of federalism").

85. *Id.* at 434.

86. *Id.*

87. *Id.* at 435 (citing 20 U.S.C. § 1232g(a)(2) (2000)) (imagining challenges to grades "on every spelling test and art project"). In fact, Congress and the courts have stated that FERPA hearings are not available to contest the fairness of grades. Daggett, *Bucking Up Buckley I*, *supra* note 1, at 638.

88. *Falvo*, 534 U.S. at 435. This argument of course recognizes that the student peer graders perform a service of substantial benefit to the teacher and thus to the school in addition to enhancing their own learning.

89. *Id.*

intervene in this drastic fashion with traditional state functions . . . exercis[ing] minute control over specific teaching methods and instructional dynamics in classrooms throughout the country."[90]

The *Falvo* Court is right in its understanding that the plain language of FERPA's definition of records makes full compliance by schools not truly feasible. Moreover, the textual definition of records is not tied closely enough to a school's legitimate educational interests. Under the plain language definition, displaying outstanding student work (whether art, poetry, papers, projects, or exams) on the walls of an elementary school classroom violates FERPA. Such student work would fall within the literal definition of FERPA because the student work has been graded or otherwise judged outstanding by school employees and is being maintained by school employees on school property in a display. The work is thus being disclosed without written parent consent. FERPA's current language ignores that this activity serves important educational interests. For example, it offers positive motivation to the students who have done the outstanding displayed work, and both motivation and peer modeling to their classmates. It also ignores that the disclosure of the student records is internal to the school community, rather than to the world outside of the school.

It would be appropriate for Congress to amend FERPA to allow internal disclosures for legitimate pedagogical reasons.[91] Instead of suggesting such an approach and giving Congress an opportunity to act, the *Falvo* Court ignored clear statutory text and adopted an interpretation that, while based on valid educational and feasibility concerns, is not really responsive to them. The Court's suggestion that FERPA records are limited to those maintained in a permanent file by a central custodian would mean that schools could disclose the student work in the hypothetical display, or other student work, at will, including to persons outside the school community, and for any reason, including ones unrelated to legitimate pedagogical goals.

The *Falvo* Court's suggestion that student "records," which are protected by FERPA, are narrower than the plain language of the statutory text is a silent invitation that some lower courts appear to have taken. Some courts continue to hold that FERPA is not violated by the disclosure of information known independently from its inclusion in education records because it has been publicly observed.[92] In several recent decisions, some courts seem to be interpreting the records covered by FERPA even more narrowly. One court ordered the release of records, with names redacted, of two students disciplined

90. *Id.* at 435–36.

91. This proposal was made in an earlier work by the author. *See* Daggett & Huefner, *Recognizing Schools' Legitimate Educational Interests*, *supra* note 3, at 45–47.

92. *See* Daniel S. v. Bd. of Educ. of York Cmty. High Sch., 152 F. Supp. 2d 949, 954 (N.D. Ill. 2001) (finding teacher's ejection of students from class was known by many including the other students in that class; hence, disclosure of this information to others does not violate FERPA).

by the board of education for shooting plastic BB's at classmates,[93] suggesting that redacted discipline records are not FERPA records.[94] Another court held that a school-created videotape of two students fighting was analogous to law enforcement records, which are excluded from FERPA, because the tape was "recorded to maintain . . . physical security and safety . . . and [did] not pertain to the educational performance of the students" and was thus not a FERPA record.[95] Yet another court found that a maintenance worker discharged for alleged inappropriate sexual behavior toward students was entitled to nonredacted student complaints, finding such complaints to be outside of FERPA because they were made by students in their capacity as witnesses and were primarily related to employees rather than students.[96] A fourth court held that a "hit list" discovered by a school janitor on the outside of a student's book was not a FERPA record because the book was open for public inspection and the student had no expectation of privacy in it and thus it could be disclosed to staff and students on the list.[97] Finally, a state's "pupil records" exception in its public records law was interpreted, citing *Falvo*, as limited to

> institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like.
>
> The [report of an investigation of misconduct including sexual harassment of students by a former school superintendent] does not fall within that group. True, it identifies students by name and details acts taken by them and against them, some of which violated school policy and subjected them to discipline. However, the report was not directly related to the private educational interests of the student. Its purpose was to investigate complaints of malfeasance . . . .[98]

B. Congressional Inattention to FERPA

Congress's approach to FERPA in the twenty-first century may be characterized primarily by inattention. Congress has not substantively amended FERPA since 2001. To the extent Congress has addressed FERPA issues, it has done so in relatively minor ways, and often in an indirect manner by amending other statutes rather than amending FERPA itself. Moreover,

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93. Bd. of Trs., Cut Bank Pub. Sch. v. Cut Bank Pioneer Press, 160 P.3d 482, 483–84, 488 (Mont. 2007).

94. *Id.* at 487.

95. Rome City Sch. Dist. v. Grifasi, 806 N.Y.S.2d 381, 383 (Sup. Ct. 2005).

96. Wallace v. Cranbrook Educ. Cmty., No. 05-73446, 2006 WL 2796135, at *4–5 (E.D. Mich. Sept. 27, 2006).

97. Risica v. Dumas, 466 F. Supp. 2d 434, 441 (D. Conn. 2006).

98. BRV, Inc. v. Superior Court, 49 Cal. Rptr. 3d 519, 526–27 (Ct. App. 2006) (ordering production of report under state public records law with names redacted).

most of the changes Congress has made have been to lessen protection of student privacy. Several recent bills introduced to amend FERPA, some to increase its privacy protections[99] or enforcement,[100] and others to reduce it,[101] have all died early in the legislative process.

1. Amendments to FERPA

Provisions buried in two post-9/11 omnibus statutes, the USA PATRIOT Act and No Child Left Behind Act (NCLB), modestly alter FERPA. One of the changes to FERPA makes it easier for federal law enforcement authorities to obtain ex parte secret subpoenas of student records relevant to terrorism investigations.[102] This amendment seems structured to discourage schools from challenging such subpoenas, and provides students with no opportunity to do so, because the subpoena is kept secret from them. A second provision requires schools to share some secondary student information with the military for recruiting purposes.[103] Elementary and secondary schools are now somewhat more limited in their ability to collect and disclose student information for commercial purposes. Schools must give parents an

99. The Home School Non-Discrimination Act of 2005 would have prohibited release of directory information about private school and home-schooled students without written parental consent, and narrowed the disclosure exception for testing, research and student aid organizations. H.R. 3753, 109th Cong. § 7 (2005); S. 1691, 109th Cong. § 7 (2005). Another bill proposed a blanket exclusion of home schooled students from FERPA. H.R. 130, 109th Cong. § 1 (2005).

100. One bill would have created a private cause of action for FERPA violations in federal court. Remedies would have included injunctions and damages, with treble damages available for willful or knowing violations. The bill did not authorize reimbursement of attorney's fees. Student Privacy Protection Act of 2006, H.R. 6315, 109th Cong. § 2 (2006).

101. Seemingly in response to the tragic shooting at Virginia Tech, the Mental Health Security for America's Families in Education Act of 2007 would amend FERPA to explicitly permit higher education institutions to share certain student mental health information with parents, if the student is financially dependent, and a mental health professional certifies in writing that: (1) the student "poses a significant risk of harm" to self or others, and (2) sharing information with the parents "may protect the health and safety of the student or other[s]." H.R. 2220, 110th Cong. § 3 (as introduced May 8, 2007). For post-Virginia Tech overviews of when colleges may share information about at-risk students with parents or others without student consent (that is, to parents of financially dependent students, law enforcement unit records, unrecorded information, health and safety emergencies, certain drug and alcohol issues of under twenty-one-year-old students), see Disclosure of Information from Education Records to Parents of Postsecondary Students, http://www.ed.gov/print/policy/gen/guid/fpco/hottopics/ht-parents-postsecstudents.html (last visited Dec. 22, 2008). *See also* Nancy E. Tribbensee & Steven J. McDonald, *FERPA and Campus Safety*, NACUANOTES, Aug. 6, 2007, http://www.nacua.org.

Another bill would require postsecondary education institutions to disclose discipline results of certain violent or sexual offenses to alleged victims, supplanting the current language, which permits, but does not require, such disclosure. Dick Shick Honesty in Campus Justice Act, H.R. 128, 110th Cong. § 2 (2007) (unsuccessful as H.R. 81, 109th Cong. (2005)).

102. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 507, 115 Stat. 272, 367–68 (codified as amended at 20 U.S.C. § 1232g(j)(1) (Supp. V 2005)).

103. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9528, 115 Stat. 1425, 1983 (2002) (codified as amended at 20 U.S.C. § 7908).

opportunity to opt out of such sharing; however, sharing for commercial purposes is not banned, nor is affirmative consent required. Schools are required to establish policies so that when students transfer to other schools the new school is made aware of the student's disciplinary history.

a. Student Records and Terrorism-Related Investigations

The single actual amendment of FERPA provides law enforcement authorities with the ability to obtain confidential subpoenas of student records under a lower standard than is generally required for subpoenas for terrorism investigations. Specifically, a single small section of the Patriot Act added a new section (j) to FERPA concerning subpoenas of student records in the context of terrorism-related investigations.[104] Preexisting FERPA provisions establish procedural requirements for schools served with subpoenas of student records. In general, FERPA requires schools to give parents notice before complying with a subpoena of student records (such subpoenas are hereinafter referred to as "general FERPA subpoenas").[105] However, FERPA also provides that courts (and federal grand juries) may issue subpoenas of student records for law enforcement purposes and that these law enforcement subpoenas may direct the school to keep them confidential even as to the involved student/parents (such subpoenas are hereinafter referred to as "confidential law enforcement FERPA subpoenas").[106]

FERPA's new section (j) concerns subpoenas of student records for terrorism-related investigations (such subpoenas are hereinafter referred to as "confidential terrorism-investigation-related FERPA subpoenas"). Like the preexisting law enforcement subpoena language, new section (j) limits subpoenas to those issued by courts.[107] Presumably, even before the addition of new section (j), the Attorney General's Office could have utilized the existing confidential law enforcement subpoena provision to obtain court-issued subpoenas of student records and keep the subpoena's existence and contents confidential.

The new section (j) changes the law governing subpoenas of FERPA records in several respects. First, schools are granted immunity for complying in good

104. USA PATRIOT Act § 507 (codified as amended at 20 U.S.C. § 1232g(j)).

105. 20 U.S.C. § 1232g(b)(2)(B) (2000).

106. *Id.* § 1232g(b)(1)(J). Recently promulgated regulations track the statutory language and do not appear to add new substance. Family Education Rights and Privacy, 73 Fed. Reg. 74,806, 74,852 (Dec. 9, 2008) (to be codified at 34 C.F.R. § 99.31(a)(9)).

107. Normally, the application to the court for the subpoena will be by the U.S. Attorney General's Office, but the Attorney General's Office does not have the power to access student records on its own; a court-issued subpoena must be obtained. The statute provides that some other federal employees may apply for confidential terrorism-investigation-related subpoenas. The section specifically states that an application may be filed by "the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General)." *Id.* § 1232g(j)(1).

faith with subpoenas of student records for terrorism-related investigations.[108] FERPA establishes no good-faith immunity for compliance generally nor for compliance with subpoenas specifically. The availability of immunity in terrorism-related investigations may serve as an incentive for some schools to comply with the subpoena rather than apply to the court to quash or modify it.

Second, new section (j) explicitly provides that confidential terrorism investigation-related FERPA subpoenas are not to be included in FERPA access logs.[109] FERPA requires schools to maintain a log of disclosure requests by outsiders (that is, persons other than the family or employees of the school).[110] Access to the log is limited to the family and custodian of records.[111] Not including confidential terrorism-investigation-related FERPA subpoenas in the access log means, of course, that the family will not be able to learn of the subpoena by accessing the log. Preexisting FERPA regulations exclude confidential law enforcement FERPA subpoenas from access logs, although the statute itself does not explicitly address this issue.[112]

Third, new section (j) sets out a lower standard for issuing a confidential terrorism-investigation-related FERPA subpoena than is used for law enforcement subpoenas generally. A court "shall" issue a confidential terrorism-investigation-related FERPA subpoena if "there are specific and articulable facts giving reason to believe that the education records are likely to contain information"[113] that is "relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18, or an act of domestic or international terrorism as defined in section 2331 of that title."[114]

Prior to the enactment of new section (j), schools[115] presented with general FERPA subpoenas or confidential law enforcement FERPA subpoenas sometimes went to court to ask that the subpoena be quashed or modified. In such cases, courts often inspected the subpoenaed records in camera and balanced the student's privacy interests with the subpoenaer's need for the records,[116] frequently resulting in quashing or limiting the subpoena. It is

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108. *Id.* § 1232g(j)(3).

109. *Id.* § 1232g(j)(4).

110. *Id.* § 1232g(b)(4)(A) (2000).

111. *Id.*

112. 34 C.F.R. § 99.32(d)(5) (2007) excludes from FERPA access logs:

> A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed.

Id.

113. 20 U.S.C. § 1232g(j)(2)(A) (Supp. V 2005).

114. *Id.* § 1232g(j)(1)(A).

115. In the case of general FERPA subpoenas, the family of the student whose records were subpoenaed could also go to court.

116. *See infra* notes 201–02 and accompanying text.

unclear whether schools presented with confidential terrorism-investigation-related FERPA subpoenas will choose to go to court to seek this in camera review and balancing of interests. The statutory grant of immunity for good-faith compliance with such subpoenas may influence schools to comply without prior court review. If schools do ask courts to review confidential terrorism-investigation-related FERPA subpoenas, it is unclear whether courts will perform an in camera review and balancing test.[117]

b. Access to Students and Student Information by Military Recruiters

A second legislative change gives the military the right to demand certain student information from schools. Although not actually amending FERPA's language, as part of No Child Left Behind, Congress effectively modified FERPA's directory information provisions regarding secondary schools and military recruiters.[118] A preexisting FERPA provision permits schools to designate categories of certain not-too-private information (such as name, address, and degrees received) as directory information. Once a school designates categories of information as directory, and so notifies families and gives them a chance to object, the school may release directory information about non-objecting students to persons or entities of its choosing.[119]

In contrast to existing directory information language, which permits but does not require schools to release directory information, Congress now requires secondary schools to release to requesting military recruiters lists of names, addresses, and telephone numbers of students who have not filed objections.[120] This amendment appears to make the military the only entity aside from parents with a FERPA right of access. Other FERPA provisions for nonconsensual access (for example, to other employees within a school with a legitimate educational interest[121] or to a new school to which the student is

117. There are media reports of libraries applying to courts to quash or modify USA PATRIOT Act subpoenas of library records, with some success. *See, e.g.*, Karen Dorn Steele, *USA Patriot Act Casts Doubt on What We Once Took for Granted*, SPOKESMAN REV. (Spokane, Wash.), Sept. 10, 2002, at A1 (reporting that the King County, Washington, Library successfully asked a court to quash an FBI subpoena of all its information on a terrorism suspect).

118. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 9528, 115 Stat. 1425, 1983 (2002) (codified as amended at 20 U.S.C. § 7908(a)).

119. 20 U.S.C. § 1232g(a)(5)(A)–(B) (2000). Thus, for example, a school could choose to release an honor roll or dean's list (of non-objecting students' names) to the local newspaper if it followed the above-described procedure for designating student honors and awards as directory information.

120. 20 U.S.C. § 7908(a)(1)–(2) (Supp. V 2005); 10 U.S.C. § 503(c) (Supp. V 2005); *see generally* Kate Dittmeier Holm, *No Child Left Behind and Military Recruitment in High Schools: When Privacy Rights Trump a Legitimate Government Interest*, 36 J. L. & EDUC. 581 (2007) (explaining how NCLB increases the level of access military recruiters have to high school students' personal information); Lila A. Hollman, Note, *Children's Rights and Military Recruitment on High School Campuses*, 13 U.C. DAVIS J. INT'L L. & POL'Y 217 (2007) (arguing current U.S. law violates international law limiting military recruitment of minors).

121. 20 U.S.C. § 1232g(b)(1)(A) (2000).

transferring[122]) are discretionary: the school has the authority, but not the obligation, to release the records without written consent from the family.[123]

Schools are required to notify parents of their right to opt out of the release of information to the military.[124] It is unclear whether a general directory information objection suffices to remove a student from lists given to military recruiters or whether a specific military recruiting information objection must be made.[125] The controversial ways in which the military has used this information is discussed in Part IV.B.

c. PPRA Amendments Affecting FERPA Directory Information Provisions

One legislative change made to a companion statute to FERPA enhances (albeit modestly) the privacy protection of student records by limiting their disclosure for commercial purposes. The Protection of Pupil Rights Act (PPRA),[126] like FERPA, is a part of GEPA and a condition on the receipt of federal funds. The PPRA is primarily concerned with limiting the collection and disclosure of sensitive information from students in surveys. In NCLB,[127] Congress substantially broadened the PPRA in several respects, including adding new limits on collection and disclosure of presecondary[128] student information for commercial purposes. Specifically, the amended PPRA requires schools to enact policies regarding the "collection, disclosure, or use of personal information" about students (which is defined to include names, addresses, telephone numbers, and social security numbers) directly or indirectly for sales or marketing purposes.[129] Parents must be able to access any instruments used to gather information for these commercial purposes before any such instrument is actually administered to students.[130] Parents must be notified at least annually of the approximate dates when any of these activities are scheduled and must be given the right to opt out of these

122. *Id.* § 1232g(b)(1)(B).

123. *See* 34 C.F.R. § 99.31(b) (2007).

124. 20 U.S.C. § 7908(a)(2) (Supp. V 2005); 10 U.S.C. § 503(c)(1)(B) (Supp. V 2005).

125. The safe approach would appear to be for schools, in their annual FERPA notifications, to inform families of the school's obligations with respect to military recruiters. *See* 20 U.S.C. § 1232h(c)(2)(A). Schools could give the families a chance to object either generally to releasing directory information to all persons or specifically to release of information to military recruiters.

126. 20 U.S.C. § 1232h (2000 & Supp. V 2005). See Daggett, *Student Privacy*, *supra* note 27, at 55–63 (2008) [hereinafter Daggett, *Student Privacy*] for an overview of the PPRA.

127. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1061, 115 Stat. 1425, 2083 (2002). See Daggett, *Student Privacy*, *supra* note 27, at 81–87, for an analysis of NCLB's amendment of the PPRA.

128. The new amendments do not apply to higher education and thus would not limit colleges' collection and sharing of student information for commercial purposes. *See* 20 U.S.C. § 1232h(c)(6)(C) (Supp. V 2005).

129. *Id.* § 1232h(c)(1)(E).

130. *Id.* § 1232h(c)(1)(F).

activities or the sharing of existing information about their child for commercial purposes.[131]

As an example, a school might receive a request from a company for a list of student names and addresses to mail advertisements concerning upcoming rock concerts or home drug testing kits. FERPA allows the school, in its discretion, to choose to supply the lists if they have designated names and addresses as directory information, given parents a chance to object, and removed the names of objecting parents. The amended PPRA limits schools' discretion by requiring schools to provide parents with (1) a chance to opt out (which apparently means a specific opportunity to opt out in addition to, or instead of, the general directory information objection), (2) advance notice of such activities, and (3) an opportunity to inspect any instrument used to collect this information in advance of its actual use with students.[132] Notably, the PPRA would not actually preclude the school from supplying the mailing list nor require affirmative parental consent to do so.[133]

d. Sharing of Disciplinary Records of Transferring Students as a Means of Combating Student Drug Use

Finally, NCLB provisions also encourage schools to share disciplinary information with schools in which their students enroll. FERPA allows schools to share records with other schools in which the student intends to enroll, requiring parental notice—but not parental consent—for such disclosures.[134] As part of NCLB, Congress amended the Safe and Drug Free Schools and Communities Act (SDFSCA) to encourage the sharing of disciplinary records of students who transfer between schools.[135] Apparently based on the premise that when a student with a disciplinary record transfers to a new school the new school should know of the student's history, public schools are now specifically authorized to use SDFSCA funds for "[e]stablishing or implementing a system for transferring suspension and expulsion records, consistent with [FERPA], by a local educational agency to any public or private elementary school or secondary school."[136] Moreover, states are required to have:

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131. *See* Daggett, *Student Privacy*, *supra* note 27, at 101. These information-gathering requirements do not apply to information gathered for "the exclusive purpose of developing, evaluating, or providing educational products or services for . . . students," such as college recruitment, instructional materials, and student fundraising activities. 20 U.S.C. § 1232h(c)(4)(A). The PPRA is explicitly not superseded by FERPA. *Id.* § 1232h(c)(5)(A)(i).

132. 20 U.S.C. §§ 1232h(c)(1)(A), (2)(A)–(B).

133. *See* Daggett, *Student Privacy*, *supra* note 27, at 105.

134. 20 U.S.C. § 1232g(b)(1)(B).

135. Safe and Drug Free Schools and Communities Act of 1994, Pub. L. No. 107-110, §§ 4001–55, 115 Stat. 1425, 1734–65 (amending 20 U.S.C. §§ 7101–65).

136. 20 U.S.C. at § 7115(b)(2)(E)(xvi) (Supp. V 2005).

> [a] procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.[137]

2. The Conspicuousness of Congressional Inattention to FERPA

Congress's failure to reexamine or to significantly amend FERPA, and the modest changes Congress has made which actually work to weaken protection of student privacy, is conspicuous in the face of the Supreme Court's first-ever FERPA decisions, which work to effect drastic changes in FERPA by removing meaningful enforcement of FERPA and perhaps narrow the records FERPA protects. Congressional inattention to and weakening of FERPA is also in contrast to Congress's increased privacy protection and continuing robust enforcement options for special education students. The one way in which Congress somewhat enhanced student records privacy, limiting release of student records for commercial purposes, inexplicably occurred through the amendment of another statute rather than FERPA and, in both scope and substance, does not do enough to deal meaningfully with a real problem. Finally, the tragic shootings committed by a troubled student at Virginia Tech stimulated a robust public discussion about FERPA but no action by Congress. It is as if Congress has forgotten FERPA is on the books.

a. Lack of Response to Changes in Judicial Interpretation of FERPA and Enforcement Options for FERPA

As discussed above, the Supreme Court, in *Gonzaga University v. Doe*,[138] held in 2002 that FERPA violations were not actionable under § 1983. As a dissenting opinion in *Gonzaga* points out, during the "over . . . quarter century of settled law" when federal courts agreed that FERPA was actionable under § 1983, Congress did not act to overrule the decisions.[139] In the six years since the *Gonzaga* decision, Congress also has not acted to overrule the Court's opposite conclusion. One is left to wonder what Congress intended. As already discussed,[140] the Court also interpreted the scope of education records in *Falvo*.[141] *Falvo* includes dicta suggesting that FERPA records were limited to those in a permanent file maintained by a central custodian. This decision contrasts Congress's amendment of FERPA to supersede a laundry-list definition of records with the current broad definition of records, which

137. *Id.* § 7165(b).

138. 536 U.S. 273, 276 (2002).

139. *Id.* at 299 (Stevens, J., dissenting).

140. *See supra* Part III.A.2.

141. Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 434–35 (2002).

references neither a permanent file nor a central custodian.[142] Again, one is left to wonder whether Congress's silence in the more than six years since the *Falvo* decision means Congress agrees with this dicta, or, on the other hand, ignores it as inaccurate and mere dicta.

b. The Contrast with Congress's Careful Attention to Privacy Protections for Special Education Students

In contrast to congressional and administrative inattention to FERPA's protection of privacy for all students, both Congress and the Department of Education have recently fine-tuned the records provisions in the federal special education statute, the Individuals with Disabilities Education Act (IDEA).[143] Moreover, and again in contrast to the situation for students generally under FERPA, students covered under the IDEA have robust administrative and judicial recourse available to them for violations of their FERPA and IDEA records rights.

The IDEA and its voluminous regulations[144] both incorporate FERPA requirements and add some additional records requirements[145] for covered students. In fact, IDEA is one of the major federal education funding statutes that trigger an obligation to comply with FERPA.[146] In 2004, the Individuals with Disabilities Education Improvement Act (IDEIA) amended the IDEA.[147] IDEIA regulations were promulgated in 2006.[148] In contrast to the trend of reducing student privacy in FERPA,[149] the IDEIA amendments work to enhance the privacy protections of the IDEA records provisions. The amendments broaden the definition of "parents" who have access rights, add new limits on the disclosure of records of special education students, and facilitate the reporting of NCLB test results in ways that do not intrude on the privacy of special education students. First, the IDEIA broadened the definition of "parents" who have IDEA procedural rights, including those

142. *See supra* Part III.A.2.

143. *See* 20 U.S.C. § 1400 (2000).

144. 34 C.F.R. §§ 300.1–304.31 (2007).

145. *See* Huefner & Daggett, *FERPA Update*, *supra* note 3, at 487–88; *see also* Daggett, *Bucking Up Buckley II*, *supra* note 3, at 644–48. For example, retention of records sufficient to document compliance (e.g., individualized education programs, or IEPs) is required for five years. FERPA does not contain general records retention requirements. *Cf.* J.P. v. W. Clark Cmty. Sch., 230 F. Supp. 2d 910, 916, 949 (S.D. Ind. 2002) (recognizing that a teacher's destruction of personal notes concerning an autistic student did not violate FERPA absent a showing that the school had a school-wide policy of destroying such documents).

146. *See* 20 U.S.C. § 1417(c) (requiring the protection of education records in accordance with FERPA).

147. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. § 1400 (Supp. V 2005)).

148. Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46,540 (Aug. 14, 2006) (amending 34 C.F.R. §§ 300–01).

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

involving education records and confidentiality.[150] The IDEA formerly defined "parent" to include legal guardians and surrogate parents.[151] Regulations now define "parent" to include foster parents (unless prohibited by state laws concerning foster parents), and persons "acting in the place of a biological or adoptive parent . . . [or] with whom the child lives or an individual who is legally responsible for the child's welfare."[152]

Second, IDEIA regulations also add new limitations to nonconsensual disclosure of student records. The new regulations require parental consent before releasing records to persons involved in transitional services (who may be present at IEP team meetings), as well as between local education agencies (LEAs) of residence and private school locations for students in out-of-town private schools. For example, if such a student were to return to her local public school, the LEA of the student's former private school (the responsible LEA for any special education services under IDEIA) could not share records with the LEA of residence without parental consent.[153]

Finally, in reporting NCLB data, Department of Education commentary on new regulations clarify that schools reporting disaggregated student achievement alternate assessment and other data for special education students need not report such data if it would violate FERPA (for example, perhaps if the group of special education students were quite small and reporting would make individual student achievement information identifiable).[154]

Although the IDEIA's actual substantive changes to the protection of special education student records are not sweeping, Congress's and the Department of Education's level of attention to these issues stands in conspicuous contrast to their lack of attention to FERPA. In even starker contrast is the ability of general education and special education students to enforce their privacy rights. General education students have no meaningful enforcement mechanisms for FERPA violations after the Court decided in *Gonzaga* that FERPA claims are not actionable under § 1983.[155] Special education students whose IDEA (and FERPA, as it is incorporated into IDEA) records rights are

150. 20 U.S.C. § 1401(23) (Supp. V 2005).

151. 20 U.S.C. § 1401(19) (2000).

152. 34 C.F.R. § 300.30(a)(4) (2007). IDEIA regulations add details concerning covered foster parents, guardians, and court decrees identifying "parents." The regulations also clarify that biological and adoptive parents attempting to act as parents are presumed to be the parent when other persons (such as foster parents, stepparents, or other relatives) also qualify as IDEA parents. *Id.* § 300.30(b). In some contrast, FERPA regulations include as parents persons "acting as . . . parent[s] in the absence of a parent or a guardian" but is silent as to foster parents. *Id.* § 99.3.

153. *Id.* § 300.622. For general education students, FERPA permits such sharing after notice to the parents. 20 U.S.C. § 1232g(b)(1)(B).

154. Improving the Academic Achievement of the Disadvantaged, 72 Fed. Reg. 17,748, 17,763–64 (Apr. 9, 2007) (amending 34 C.F.R. § 200.6).

155. Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002).

violated continue to be able to assert records violations in IDEA claims.[156] These claims begin with a formal administrative hearing resulting in a written decision that may be appealed to a court.[157]

Recent cases asserting egregious records violations demonstrate this disparity. A federal appeals court was faced with a claim by a student diagnosed with chronic fatigue syndrome and fibromyalgia, which had caused lengthy absences from school.[158] The student claimed that the school had responded to her disability in pertinent part by (1) filing a report of suspected child abuse and specifically educational neglect, (2) calling the student's private physicians to "urge[] them to change their diagnoses," telling them about the abuse referral, suggesting that the student had a personality disorder and that other physicians had diagnosed a school phobia, and (3) sharing similar private and false information with a home teacher and a lawyer.[159] The court held that the allegations, if true, did not amount to the "policy or practice" required for a FERPA violation.[160] The student's case went forward only on her disability law claims.[161]

In another case, a parent claimed a FERPA violation by her disabled African American son's former first grade teacher.[162] The student's former teacher purchased and leased a condominium in the same building as the family and allegedly told her tenant and others about the student's "social skills, behavior and academic progress" such as that she "held back" the student.[163] The court dismissed the FERPA/§ 1983 claim under *Gonzaga* and also rejected a

156. *See, e.g.*, C.M. v. Bd. of Educ. of Union County Reg'l High Sch. Dist., 128 F. App'x 876, 880 (3d Cir. 2005) (determining that if the plaintiff had not been provided access to certain information in her school records, injunctive relief under IDEA may be appropriate although the plaintiff had graduated); J.P.E.H. v. Hooksett Sch. Dist., No. 07-CV-276-SM, 2007 WL 4893334, at *4–7 (D.N.H. Dec. 18, 2007) (holding that claims by a parent of a disabled student that the school improperly shared information about her child may proceed as a violation of IDEA records confidentiality, but dismissing parent's FERPA claims); *cf.* Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 (2d Cir. 2005) (holding that a failure to provide a parent with class profiles that the school district has not yet created does not violate IDEA); K.C. v. Fulton County Sch. Dist., No. 1:03-CV-3501-TWT, 2006 WL 1868348, at *9–11 (N.D. Ga. June 30, 2006) (alleging that the school denied parents access to their child's records; the court found that this was a very limited denial of access which did not limit the parents' ability to participate in their child's education and therefore did not violate IDEA); Combier v. Biegelson, No. 03 CV 10304 (GBD), 2005 WL 477628, *1, *4–5 (S.D.N.Y. Feb. 28, 2005) (finding that an IDEA parent lacked standing to claim a FERPA violation resulting from a school's disclosure to her of records that contained information about other students), *aff'd sub nom.* Combier-Kapel v. Biegelson, 242 F. App'x 714 (2d Cir. 2007).

157. 20 U.S.C. §§ 1415(f), (i) (Supp. V 2005).

158. Weixel v. Bd. of Educ. of City of N.Y., 287 F.3d 138, 142 (2d Cir. 2002).

159. *Id.* at 143, 151.

160. *Id.* at 151.

161. *Id.* at 151–52.

162. Cudjoe v. Indep. Sch. Dist. No. 12, 297 F.3d 1058, 1060 & n.1, 1061 (10th Cir. 2002).

163. *Id.* at 1061, 1063.

constitutional privacy claim under *Falvo*,[164] but did not preclude the case from going forward on the disability law claims after exhausting the IDEA remedies.[165] A final case involved a noncustodial mother's denial of access to her disabled child's records.[166] A federal appeals court held that the parent had no claim available for a FERPA violation but did have an actionable claim for denial of records access under the IDEA.[167]

Special education students have privacy interests in their records above and beyond those of general education students. First, special education records may contain extremely private information such as evaluation reports and notes of therapy sessions that are related to students' special education programs. Second, we are unfortunately not yet a country free from discrimination against persons with disabilities, and the disclosure of special education information may be stigmatizing. These special education concerns may justify some difference in privacy protections and enforcement options but not ones of the current magnitude.

c. A Missed Opportunity to Amend FERPA Appropriately as Part of NCLB

Congress overhauled one of its major education statutes, the Elementary and Secondary Education Amendments (ESEA),[168] by enacting the massive omnibus NCLB, which included modifications to other federal student records provisions. Specifically, the PPRA,[169] which primarily governs the collection and dissemination of certain sensitive information from students, was amended to require elementary and secondary schools to develop written policies that provide parents the right to advance notice and to opt out of the collection of student information for commercial purposes.[170] These amendments do not supersede FERPA explicitly,[171] but indirectly amend preexisting language in FERPA concerning "directory information." Therefore, NCLB's PPRA amendments preclude elementary and secondary schools (but not colleges) from releasing directory information for commercial purposes before giving

164. *Id.* at 1062–63.

165. *Id.* at 1068.

166. Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 (2d Cir. 2002).

167. *Id.* at 796.

168. Like the IDEA, the ESEA/NCLB is one of the major federal education funding statutes that triggers an obligation to comply with FERPA.

169. *See supra* Part III.B.1.c.

170. These rules concerning students' personal information used or collected for sales or marketing do not apply in a number of instances: to information used or collected for "postsecondary education" or "military recruitment," for "[b]ook clubs, magazines, and programs providing access to low-cost literary products," for "[c]urriculum and instructional materials," for "[t]ests and assessments," for student fundraising efforts, or for "[s]tudent recognition programs." 20 U.S.C. § 1232h(c)(4)(A) (Supp. V 2005).

171. *Id.* § 1232h(c)(5)(A)(I).

parents an opportunity to opt out, but do not bar the release of student records for commercial purposes.

Congress cared enough about the issue of release of student information for commercial purposes to make this amendment. It is unfortunate that Congress: (1) did not choose the less circuitous path of amending FERPA directly; (2) did not opt for the more appropriate, stiffer limitation of a bar on school release of student information for commercial purposes; and (3) did not extend the rule to include colleges, which, as discussed in Section IV.A.4, is where the problem of school disclosure of (and profit from) sharing student information with credit card companies and commercial entities is apparently most prevalent.[172]

One would hope that schools would actually refuse to disclose student mailing lists or similar information to commercial requesters. Such disclosures do not further schools' educational missions. Schools could and should simply be forbidden from disclosure of personally identifiable information for commercial use,[173] as some state laws provide.[174] Such a ban would protect schools that face requests for student mailing lists under state public records laws. The logical place for such a provision would be to amend the directory information provision in FERPA to preclude the release of directory information of both current and former students for commercial use.[175] Congress missed an easy opportunity to amend FERPA directly and appropriately in this way as part of NCLB.

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172. *See infra* Part IV.A.4.

173. *See* Daggett, *Student Privacy*, *supra* note 27, at 56.

174. For example, Washington law forbids schools from releasing mailing lists for commercial purposes. WASH. REV. CODE ANN. § 42.17.260(9) (West 2006).

175. This proposal was made in an earlier work by the author. *See* Daggett, *Student Privacy*, *supra* note 27, at 104–07. FERPA should also be amended to prohibit persons who receive directory information from redisclosing that information for commercial use. For example, a nonprofit entity offering tutoring services receiving student directory information should not be able to in turn disclose the information to a credit card company. Existing FERPA nondisclosure language forbidding redisclosure of student records does not apply to redisclosure of directory information. *See* 20 U.S.C. §1232g(b)(4)(B) (2000); 34 C.F.R. § 99.33 (2007). Finally, any exceptions to a ban on disclosure of student directory information for commercial use should be very limited. The PPRA's list of permissible "educational" marketing activities is too broad–seemingly condoning, for example, a school to disclose student information to for-profit test preparation and tutoring companies, and the seller of class rings. While schools might agree to send such companies' brochures home with students, providing these entities mailing lists with student names and addresses is unnecessary. Along these lines, any exceptions should be limited to nonprofit entities.

Another commentator has also suggested tightening up FERPA's directory information provision. *See* Susan P. Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1211–12 (2006) (proposing that directory information be defined more narrowly, with release limited to educational purposes, and that consent be required for any disclosure for commercial purposes). Stuart criticizes FERPA's identical treatment of student information gathered for educational as compared with other governmental purposes, because such treatment ultimately allows disclosure of student information for commercial purposes. *Id.* at 1170–71.

d. Virginia Tech

Finally, the country was shaken in April 2007 by the tragic on-campus killings by a student at Virginia Tech.[176] Immediately after the killings, the country learned that the shooter had a history of mental illness, and had received both mental health treatment and discipline on campus.[177] His former English professor described disturbing aspects of some of the student's creative writing in great detail.[178] Some media commentators seemed to suggest the student's parents and classmates and others at Virginia Tech should have been made aware of this information, blaming FERPA for this failure to disseminate this information.[179] A report commissioned by Virginia's governor to investigate includes a finding that a misunderstanding of FERPA prevented appropriate sharing of information about the student to parents and school employees.[180]

Congress has not acted to amend FERPA in light of this tragedy. President Bush did assign the Secretary of Education, the Secretary of Health and Human Services, and the Attorney General to "lead a national dialogue regarding steps the nation can take to prevent such tragedies at schools in the future."[181] After a national listening tour, a "recurring theme[]" was "the need for additional guidance on . . . FERPA."[182] The Secretary of Education assigned the office that enforces FERPA[183] to take steps to provide further education on FERPA. This education consisted of a letters that attempt to clarify the ways in which FERPA permits nonconsensual information sharing in similar situations,[184] as well as three short brochures—one for higher education, one for presecondary schools, and one for parents.[185] Additionally, recently promulgated regulations give schools somewhat more flexibility to

176. *See* VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH 24–29 (2007), *available at* http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf (providing detailed timeline of shootings).

177. *See id.* at 31–53 (providing twenty-plus page mental health history of the shooter).

178. *See id.* at 42–45.

179. In fact, from a student privacy perspective, one wonders why the English professor and other Virginia Tech employees, as well as the authors of the investigative report, were publicly sharing details of the student's discipline and health records as well as his academic assignments.

180. *Id.* at 68.

181. *See* Letter from Margaret Spellings, Secretary of Education, to school officials (Oct. 30, 2007), http://www.ed.gov/print/policy/gen/guid/secletter/071030.html [hereinafter Letter from Margaret Spellings].

182. *Id.*

183. This office and its actions are discussed in Part III.C, *infra*.

184. *See, e.g.*, Disclosure of Information from Education Records to Parents of Postsecondary Students, http://www.ed.gov/print/policy/gen/guid/fpco/hottopics/ht-parents-postsecstudents.html; Letter from Margaret Spellings, *supra* note 181.

185. The brochures are available at http://www.ed.gov/policy/gen/guid/fpco/ferpa/safeschools/index.html.

share information without consent in emergency situations.[186] Perhaps in an attempt to avoid future acts of student violence, some postsecondary schools have made their own changes in policy, such as performing background checks on prospective students.[187]

C. Administrative Enforcement and Interpretation of FERPA

FERPA is administered and enforced by the Family Policy Compliance Office (FPCO) within the Department of Education (DOE).[188] The FPCO has a small staff of ten or so[189] and is responsible for enforcing both FERPA and the PPRA. The FPCO deals with complaints asserting violations,[190] provides model policies and other technical assistance,[191] and takes on special tasks such as the post-Virginia Tech education outreach discussed immediately above. The FPCO also promulgates regulations for FERPA and the PPRA. The FPCO has recently, and modestly, amended some of FERPA's regulations.

1. Electronic Consent Regulation

The FPCO has promulgated final regulations for electronic consent to disclosure of records.[192] To be valid, electronic consent must authenticate

186. The prior FERPA regulation on sharing in emergencies explicitly provided that it was to be "strictly construed." 34 C.F.R. § 99.36(c) (2007). The new FERPA regulation removes the "strictly construed" language and substitutes a standard of an "articulable and significant threat" under the "totality of the circumstances," and further provides that FPCO will defer to a school's judgment applying this standard whenever that judgment is supported by a rational basis. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,854 (Dec. 9, 2008) (to be codified at 34 C.F.R. § 99.36(c)).

187. Mary Beth Marklein, *'An Idea Whose Time Has Come'?; Schools Increasingly Subjecting Applicants to Background Checks*, USA TODAY, Apr. 18, 2007, at D7.

188. About the Family Policy Compliance Office (FPCO), http://www.ed.gov/policy/gen/guid/fpco/index.html.

189. E-mail from Ellen Campbell, FPCO, to author (Nov. 21, 2002) (on file with author).

190. Back in the days when judicial recourse was available for FERPA claims, one court suggested in dicta that FERPA court claimants must first exhaust the FPCO administrative complaint process. *See* Mele v. Travers, 741 N.Y.S.2d 319, 321 n.2 (N.Y. App. Div. 2002).

191. Model policies and letters on topics of interest are available on the FPCO's website, http://www.ed.gov/policy/gen/guid/fpco/index.html. *See, e.g.*, U.S. DEP'T OF EDUC., FPCO GUIDELINES: DISCLOSURE OF EDUCATION RECORDS CONCERNING REGISTERED SEX OFFENDERS (2002), *available at* http://www.ed.gov/policy/gen/guid/fpco/pdf/ht102402.pdf; Letter from Rod Paige, Secretary of Education, and Donald H. Rumsfeld, Secretary of Defense, to colleagues (Oct. 9, 2002), *available at* http://www.ed.gov/policy/gen/guid/fpco/pdf/htterrorism.pdf; Letter from LeRoy S. Rooker, Director, FPCO, to colleagues (Apr. 12, 2002), *available at* http://www.ed.gov/policy/gen/guid/fpco/pdf/ht100902.pdf [hereinafter Letter from LeRoy S. Rooker].

192. 34 C.F.R. § 99.30(d) (2007); Family Educational Rights and Privacy Act, 69 Fed. Reg. 21,670 (Apr. 21, 2004).

(such as making a request using a PIN or password) that the named person is actually the one who is consenting.[193]

2. Updated FERPA Regulations

DOE periodically reports that it will propose amended FERPA regulations.[194] A somewhat comprehensive actual amendment of the FERPA regulations occurred in 2000.[195] The most recent amendments to the FERPA regulations became final in December 2008.[196] These changes largely clarify existing practice and understanding and do little to address the issues identified in this Article.

IV. TWENTY-FIRST CENTURY FERPA REALITIES

While Congress and the enforcing agency largely ignore FERPA and the Supreme Court narrowly interprets FERPA's substance and removes its one meaningful enforcement option, demands for student information by private litigants, citizens making public records statutes requests, researchers, commercial entities, and the federal government itself continue, and in fact have escalated. Various federal agencies have compiled vast student databases that operate largely outside of FERPA. Lack of clarity continues regarding various FERPA provisions, particularly their intersection with other laws. Attempts to identify other viable claims for privacy intrusions have been largely unsuccessful. In light of all this, it is perhaps unsurprising, though no less troubling, to read of seemingly egregious FERPA violations by some schools.

A. Demands for Student Records

Civil litigants and criminal defendants, citizens and the media exercising rights under state public records laws, researchers, and commercial entities are increasingly demanding access to student records.

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193. 34 C.F.R. § 99.30(d)(1). Use of the electronic consent standards for student loan transactions is one example of successful implementation of these requirements. *See* Family Educational Rights and Privacy Act, 69 Fed. Reg. at 21,670.

194. Unified Agenda of Federal Regulatory and Deregulatory Actions, 72 Fed. Reg. 22,472 (Apr. 30, 2007) (to be codified at 34 C.F.R. pt. 99).

195. *See* Family Educational Rights and Privacy Act, 65 Fed. Reg. 41,852 (July 6, 2000).

196. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99). To the (small) extent the proposed regulations do concern an issue raised in this Article, it is so noted.

1. Subpoenas and Other Civil and Criminal Discovery of Student Records[197]

As discussed above, FERPA establishes procedural requirements for complying with subpoenas of student records, most significantly that schools make a "reasonable effort" to provide pre-compliance notice to the parent/adult student whose records have been subpoenaed.[198] FERPA does not provide substantive protection of such records from subpoena, for example, by establishing a privilege for student records/student information,[199] nor does it provide a standard or other substantive guidance to courts faced with motions to quash or modify subpoenas of student information.[200]

In a case decided soon after FERPA's enactment, a federal district court adopted a balancing test to decide a motion to quash a subpoena of student records, reviewing the records and weighing the need for the requested student information against the intrusion on the student's privacy.[201] Most courts reviewing subpoenas of student records continue this review of the subpoenaed records and balancing of interests in deciding to what extent (if any) to enforce the subpoena.[202] In fact, subpoenaing student records seems to be a twenty-

197. For an overview of such requests and suggestions for dealing with subpoenas of and law enforcement requests for student records which is designed for nonlawyer school officials, see STEVEN MCDONALD & ANDREA NIXON, GUIDELINES FOR RESPONDING TO COMPULSORY LEGAL REQUESTS FOR INFORMATION (2007), https://wiki.internet2.edu/confluence/display/secguide/Protocol+for+Law+Enforcement+Requests.

198. For general subpoenas, FERPA requires schools to make a "reasonable effort" to provide notice to parents/adult students in advance of compliance, in order to afford an opportunity to ask a court to quash or modify the subpoena. 20 U.S.C. § 1232g(b)(2)(B) (2000); 34 C.F.R. § 99.31(a)(9)(i)–(ii) (providing that advance notice is given "so that the parent or eligible student may seek protective action"). For good cause, subpoenas or court orders issued by federal courts or grand juries for law enforcement or anti-terrorism purposes may require the school to comply without disclosing the issuance of the subpoena to the parent/adult student. 20 U.S.C. § 1232g(b)(1)(J) (federal law enforcement subpoenas); *id.* § 1232g(j) (Supp. V 2005) (ex parte court orders to investigate and prosecute terrorism). Recently promulgated regulations clarify that when a third party's records provided by a school pursuant to FERPA are subpoenaed, the third party would bear the obligation of providing parent notice before complying. Family Education Rights and Privacy, 73 Fed. Reg. 74,806, 74,853 (Dec. 9, 2008) (to be codified at 34 C.F.R. § 99.33(b)(2)).

For discussions of FERPA's approach to subpoenas generally, as well as earlier reported decisions, see Daggett, *Bucking Up Buckley I*, *supra* note 1, at 634–35; Huefner & Daggett, *FERPA Update*, *supra* note 3, at 480–81.

199. *See, e.g.*, Garza v. Scott & White Mem'l Hosp., 234 F.R.D. 617, 624 (W.D. Tex. 2005) ("FERPA does not create an evidentiary privilege . . . .").

200. However, for subpoenas other than those for law enforcement purposes, the advance notice requirement, and its purpose of providing families with an opportunity to quash or modify subpoenas does indicate an intent to provide some protection of student information from the subpoena power. *See* Letter from LeRoy S. Rooker, *supra* note 191.

201. Rios v. Read, 73 F.R.D. 589, 592, 598–99 (E.D.N.Y. 1977).

202. *But see* DeFeo v. McAboy, 260 F. Supp. 2d 790, 792, 795 (E.D. Mo. 2003) (noting FERPA records generally are *not* exempt from subpoena; ordering disclosure of discipline and law enforcement FERPA non-records without any balancing of interests as long as both the parents and student are notified); *id.* at 793 (also holding, post-*Gonzaga*, that FERPA violations

first century growth industry. An ever-increasing number of published opinions[203] reviewing subpoenas in an astonishing variety of circumstances, including, but not limited to, the scenarios described below, demonstrate the value to litigants of accessing, or preventing access to, student records. Typically in these cases, the litigants on both sides of a case thought that access to, or confidentiality of, the student records was important enough to pay attorneys to go to court to quash, or seek enforcement or modification of, a subpoena for student records.

Paint manufacturers and property owners defending claims that lead paint was ingested by children, causing neurological damage, have subpoenaed the plaintiff children's mothers' ancient school records. The defendants in these cases assert that the mothers' disabilities or academic difficulties may explain their children's current problems, and seek evidence of such disabilities or difficulties in their mothers' records. These defendants have had mixed results in getting courts to enforce their student records subpoenas.[204]

Music companies claiming illegal downloads of copyrighted music have subpoenaed electronic student records from universities that are internet service providers in order to ascertain the identities of the downloaders, with a fair amount of success.[205]

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are actionable under § 1983); Orefice v. Secondino, No. CV040486287S, 2006 WL 1102714, at *1 (Conn. Super. Ct. Apr. 7, 2006) (refusing to quash subpoena of school records without balancing interests, apparently not asked to do so). Families notified of a subpoena of their child's student records who consult a knowledgeable attorney can be informed about the in camera review available from courts, the balancing test the court can be asked to perform and the real possibility that a court will order the subpoena quashed or modified. However, parents who receive a letter from a school informing them of a subpoena of their records are unlikely to mention any of this, and one wonders how many parents assume they have no recourse against a subpoena.

203. One can only imagine the number of discovery requests for student records that never made it to court, or were decided by a court without a published opinion.

204. Adams v. Rizzo, No. 04-8469, 2006 WL 3298303, at *2 (N.Y. Sup. Ct. Nov. 13, 2006) (holding in a lead-based paint exposure case that IQ and other educational records of a mother who had indicated that she had a learning disability, which might provide another causative theory of the children's problems, were discoverable, and this theory was the basis for good faith deposition questions; also rejecting existence of educational records privilege); Bunch v. Artz, 71 Va. Cir. 358, 366 (Cir. Ct. 2006) (holding, in lead paint exposure case, that defendants could discover mother's education records). *But see* Ward v. County of Oneida, 797 N.Y.S.2d 214, 215–16 (App. Div. 2005) (holding, in another lead paint exposure personal injury case, that parents' educational records were confidential under FERPA and protected from discovery).

205. In several cases, courts have found good cause for expedited discovery of these subpoenas, provided the university and students have an opportunity to move to quash the subpoena. *See, e.g.*, Arista Records LLC v. Does 1–4, No. 1:07-cv-1115, 2007 WL 4178641, at *1–2 (W.D. Mich. Nov. 20, 2007) (Michigan State University as internet service provider); Interscope Records v. Does 1–14, Civil Action No. 5:07-4107-RDR, 2007 WL 2900210, at *2 (D. Kan. Oct. 1, 2007) (University of Kansas as internet service provider); LaFace Records, LLC v. Does 1–5, No. 2:07-cv-187, 2007 WL 2867351, at *1–2 (W.D. Mich. Sept. 27, 2007) (Northern Michigan University as internet service provider; summarizing other opinions with varied results).

Criminal defendants accused of sexual misconduct against minors have subpoenaed their accusers' student records in an attempt to find evidence of lying or other information that they might use to impeach the accuser's testimony or exculpate themselves. Courts faced with such subpoenas have been willing to perform the in camera review of the accusers' records, but generally do not discover impeaching information in the records.[206] In one case, in which the government subpoenaed the school records of a defendant who claimed Attention Deficit Disorder (ADD), the court refused to quash the subpoena.[207]

In one case, after the court permitted expedited discovery for these subpoenas from the University of Tennessee at Knoxville as internet service provider, a student filed a motion to quash on FERPA grounds. Virgin Records Am., Inc. v. Does 1–33, No. 3:07-CV-235, 2007 WL 3145838, at *1 (E.D. Tenn. Oct. 24, 2007). The court denied that motion, reasoning that most of the information sought, such as addresses and phone numbers, was "directory" under FERPA and thus nonconsensual disclosure was permitted absent filing an objection with the school, which had not been done in this case. *Id.* at *2–3. The court also found that the student's internet address was not a FERPA record because it was not listed as such in the University's records policy. *Id.* This analysis ignores that the name and addresses were sought to identify the user who had downloaded music from a specific IP address at a specific time, rather than a request for directory information about an identified user. Under this reasoning, a request for the name and address of a student identified as conducting any other activity at school, such as making a 4.0 GPA, seen fighting, or plagiarizing a paper, would not be protected by FERPA. Moreover, a school's policy cannot, of course, limit the records that are protected by FERPA. For another case that concludes the student's information is directory information, and not an invasion of privacy, see *Warner Bros. Records, Inc. v. Does 1–14*, No. 8:07-CV-625-T-24TGW, 2007 WL 4218983, at *2 (M.D. Fla. Nov. 29, 2007). The same result, but with a somewhat better analysis, is found at *Warner Bros. Records, Inc. v. Does 1–6*, 527 F. Supp. 2d 1, 2–3 (D.D.C. 2007) (enforcing subpoena against Georgetown University as internet service provider because subpoenaed information is relevant and "crucial to the prosecution of plaintiffs' claims," and requiring advance notice for subpoenaed students with an opportunity for both Georgetown and the students to move to quash).

206. *See, e.g.*, People v. Bachofer, No. 03CA1311, 2008 WL 192268, at *2–5 (Colo. Ct. App. Jan. 24, 2008) (unsuccessful appeal by thirty-one-year-old defendant who engaged in standoff with police and convicted of, among other charges, false imprisonment of his fifteen-year-old girlfriend during the standoff the defendant claimed to have been consensual). The *Bachofer* trial court reviewed the subpoenaed school records of the girlfriend in camera and appropriately quashed the subpoena. *Id.* at *4–5. The court concluded that a subpoena is not a law-enforcement subpoena under FERPA merely because it is issued by a party to a criminal case. *Id.* at *3. In performing the balancing test, the appellate court also held that the trial court erred in looking for exculpatory material only about the standoff rather than exculpatory material concerning the girlfriend/witness's credibility generally; but after performing its own in camera review, the appellate court found no noncumulative exculpatory material and thus held the error to be harmless. *Id.* at *4–5. *See also* May v. Dir., Civil Action No. 6:06cv326, 2007 WL 708580, at *24–25 (E.D. Tex. Mar. 5, 2007) (holding proper a denial of access to child rape victim's school records in an attempt to show a history of misconduct and prior instances of untruthfulness after an in camera review revealed nothing usable for impeachment).

207. United States v. Hunter, 13 F. Supp. 2d 586, 594 (D. Vt. 1998) (reviewing government subpoena of criminal defendant's undergraduate records in connection with his notice of intent to claim ADD; finding records relevant if ADD actually claimed, but maintaining possession under seal and available to government only if ADD claim actually made).

Where the student is a plaintiff in a civil suit seeking damages for injuries at school or at a school-sponsored activity from a third party,[208] and thus presumably putting her physical and perhaps mental condition at issue, courts, not surprisingly, have been willing to enforce subpoenas of the plaintiff's relevant school records.[209] In one case brought by a student plaintiff claiming that a teacher raped her and other students, the court enforced a subpoena of other (alleged victims) students' records.[210] But, more often, courts have refused to enforce subpoenas of other (potential pattern witness) students' records by a student plaintiff claiming injury by a school employee.[211] Students claiming injuries inflicted by another student have had some success in obtaining the defendant student's records.[212] One court permitted an expert

208. Where the school and the student are themselves adverse parties, a separate FERPA regulation provides for nonconsensual disclosure to the court of the student's relevant records. *See* 34 C.F.R § 99.31(a)(9) (2007) (also noting that the parent may ask the court to seal the records); *see also* Huefner & Daggett, *FERPA Update*, *supra* note 3, at 481–82 (describing the disclosure regulation involved in school–student litigation).

209. *See, e.g.*, Gaumond v. Trinity Repertory Co., 909 A.2d 512, 515–19 (R.I. 2006) (concerning claim by special education student for injury on field trip to defendant theater, where report prepared by school nurse that was redacted at student's request under IDEA records provisions would be made available to defendant; rejecting existence of "school-disabled student privilege"); *see also* Catrone v. Miles, 160 P.3d 1204, 1207–08, 1210, 1213–16 (Ariz. Ct. App. 2007) (in medical malpractice case, defendants claimed plaintiff's condition was genetic and not the result of negligence, and sought sibling's special education records in support of this theory; court properly ordered partial production of such records after in camera review and balancing); Orefice v. Secondino, No. CV040486287S, 2006 WL 1102714, at *2 (Conn. Super. Ct. Apr. 7, 2006) (claim for damages for emotional distress puts mental state in issue).

210. Anonymous v. High Sch. for Envtl. Studies, 820 N.Y.S.2d 573, 575–76 (App. Div. 2006) (finding, in claim by student allegedly raped by teacher against school for negligent hiring and supervision, records of teacher's sexual behavior with the plaintiff and other students was not protected from discovery). *Cf.* Baker v. Mitchell-Waters, 826 N.E.2d 894, 899–900 (Ohio Ct. App. 2005) (permitting discovery of records of other student complaints with names redacted where student claimed teacher abuse).

211. *See, e.g.*, Loch v. Bd. of Educ. of Edwardsville Cmty. Sch. Dist. #7, Civil No. 06-017-MJR, 2008 WL 79022, at *2 (S.D. Ill. Jan. 7, 2008) (affirming magistrate's rulings denying discovery of other students' names and warning the pro se plaintiffs that continuing to raise the issue may result in sanctions under Fed. R. Civ. P. 11); Loch v. Bd. of Educ. of Edwardsville Cmty. Sch. Dist. #7, Civil No. 06-017-MJR, 2007 WL 3037287, at *1 (S.D. Ill. Oct. 17, 2007) (holding, in student challenge to school's denial of her eligibility for special education, subpoenas of other students' records quashed); Loch v. Bd. of Educ. of Edwardsville Cmty. Sch. Dist. #7, Civil No. 06-017-MJR, 2007 WL 3037288, at *1 (S.D. Ill. Oct. 17, 2007) (in another ruling in the same case upholding school's refusal to provide information about other named students in answer to interrogatories; school provided information requested but without student names); E.W. v. Moody, No. C06-5253 FDB, 2007 WL 445962, at *1–2 (W.D. Wash. Feb. 7, 2007) (in a § 1983 claim by a student alleging inappropriate sexual contact by the defendant teacher, and asserting that the teacher had behaved similarly with other students, the student's request for names of the teacher's other students was protected by FERPA).

212. *See, e.g.*, DeFeo v. McAboy, 260 F. Supp. 2d 790, 795 (E.D. Mo. 2003) (ordering disclosure of discipline and law enforcement FERPA non-records of allegedly negligent student who drove into plaintiff student); *cf.* Rose v. Kenyon Coll., 211 F. Supp. 2d 931, 932, 940 (S.D.

in a discrimination case to conduct classroom observations over a school's FERPA objections.[213]

Finally, in cases where student records are helpful to school employees' workplace claims of discriminatory or other illegal treatment at school, courts may provide relevant student records to the employee.[214]

2. Requests Under State Public Records Statutes

Public schools are regulated not just by FERPA but also by state public records statutes, and receive demands both from the media and individual citizens for student records under these public records laws. Such laws typically exempt various categories of records from a public right of access. If the state public records law specifically exempts all records covered by FERPA, the public records statute makes the law fairly clear.[215] In such a situation, if a member of the public or the media requested a student's transcript from a public school, the school would not be obligated to provide it, and to do so would violate FERPA. If the request were for documents that were arguably not FERPA records, the situation would be less clear. FERPA's only guidance to schools that cannot comply with FERPA because of a conflicting state law is a requirement that the school report the potential conflict to the FPCO.[216] One federal district court and the FPCO have held that FERPA does not preempt conflicting state laws;[217] but a state appeals court has held that FERPA does, in fact, preempt state law.[218] The one

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Ohio 2002) (in a college student's civil suit alleging rape by a fellow student, the plaintiff student sought discovery of the defendant student's education records; the codefendant college moved for a protective order).

213. Santamaria v. Dallas Indep. Sch. Dist., Civil Action No. 3:06-CV-692-L, 2006 WL 1343604, at *2–3 (N.D. Tex. May 16, 2006).

214. *See, e.g.*, Fairchild v. Liberty Indep. Sch. Dist., 466 F. Supp. 2d 817, 820, 827 (E.D. Tex. 2006) (holding, in a claim by a teacher aide asserting retaliatory discharge for reporting wrongdoing by a special education teacher, including problems with medicine administration, that documents concerning emergency medical treatment of special education students are discoverable with both a protective order and an opportunity for parents to object); Humphreys v. Regents of the Univ. of Cal., No. C-04-03808 SI (EDL), 2006 WL 2319593, at *2 (N.D. Cal. Aug. 10, 2006) (redacting information concerning students in an employment discrimination case to protect student privacy).

215. *See, e.g.*, Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ., 787 N.E.2d 893, 903–04 (Ind. Ct. App. 2003) (finding that a state public records statute exempts from disclosure records made confidential by federal law). Note, though, that to the extent FERPA defines documents as nonrecords (for example, sole possession notes), a FERPA records exemption in the public records statute seemingly would not protect the documents from disclosure.

216. 34 C.F.R. § 99.61 (2007) (requiring notice to FPCO within forty-five days).

217. Maynard v. Greater Hoyt Sch. Dist. No. 61-4, 876 F. Supp. 1104, 1108 (D.S.D. 1995); South Dakota, 20 IDELR 105, 106 (FCPO May 14, 1993).

218. Rim of the World Unified Sch. Dist. v. Superior Court, 129 Cal. Rptr. 2d 11, 14–15 (Ct. App. 2002) ("FERPA preempts [state law] require[ing] the public disclosure of student expulsion records . . . .").

instance in which the federal government has sued to enforce FERPA arose when a university's student newspaper requested student disciplinary records under the state public records statute, and the state court held the disciplinary records were not FERPA records.[219] The federal government sued in federal court, culminating in a Sixth Circuit decision that disciplinary records are protected by FERPA.[220]

Most complex is the situation where the state public records exemption for student records does not match up with FERPA, as illustrated by a recent Washington Supreme Court case.[221] The relevant state public records statute exempted "[p]ersonal information in any files maintained for students in public schools."[222] The school district had video surveillance on its buses, and a fight between two students was caught on video.[223] The school allowed the parents of one of the two students to view the tape, but denied a request for a copy under the public records statute.[224] The court interpreted the public records exemption narrowly, equating it to "the protection of material in a . . . student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address, telephone number, social security number, and other similar records."[225]

The majority opinion's only mention of FERPA was to suggest that allowing the parents to view the videotape was inconsistent with it being a record because there was no parental consent, court order, or subpoena.[226] In fact, it seems likely that the tape is a FERPA record.[227] It contains personally identifiable (via picture) information about several students riding the bus. It was maintained by the school for possible disciplinary purposes. FERPA regulations explicitly provide that its records may be in tape format,[228] and

219. State *ex rel.* The Miami Student v. Miami Univ., 680 N.E.2d 956, 958–59 (Ohio 1997).

220. United States v. Miami Univ., 294 F.3d 797, 810, 812–13 (6th Cir. 2002).

221. Lindeman v. Kelso Sch. Dist. No. 458, 172 P.3d 329, 330–31 (Wash. 2007).

222. WASH. REV. CODE. ANN. § 42.17.310(1)(a) (West 2006).

223. *Lindeman*, 172 P.3d at 330.

224. *Id.* FERPA provides parents with a right of in-person access to student records but does not provide a general right to a copy of their child's records except in unusual circumstances not present in the case. *See* 34 C.F.R. § 99.10(d) (2007).

225. *Lindeman*, 172 P.3d at 331. The court ordered the school to pay the parents' attorney's fees, costs and penalties under the public records statute. *See id.* at 332.

226. *Id.* at 332. Under FERPA, consent is of course not required for parents to access their own child's records. To the extent that records pertain to more than one student (such as a teacher's grade book), the school must redact the information about other students. *See* 20 U.S.C. § 1232g(a)(1)(A) (2000); 34 C.F.R. § 99.12(a). It is fairly easy to do this with a grade book; *Lindeman* illustrates the difficulty of doing so with some electronic records. Is the school expected to pay a technician to blur the faces of all the other students on the bus?

227. *Lindeman* does not raise the possibility that the videotape was a law-enforcement record excluded from the definition of record under FERPA. This would be the case if the school's security unit set up the videotaping program and did so at least in part for law enforcement purposes. *See* 34 C.F.R. § 99.8(b)(1)(i).

228. 34 C.F.R. § 99.3.

there is precedent specifically holding that a videotape of students in class is a FERPA record.[229]

This case demonstrates the difficult situation that schools face when records are requested under state public records statutes, which are arguably not exempt under those state statutes.[230] Schools that refuse such requests on the grounds that the records are protected by FERPA risk the consequences that befell the school in this case: defending, and losing, a claim under the state public records statute, with resulting responsibility for the claimant's attorney's fees and costs, as well as statutory penalties.[231] To be blunt, this is a stiffer set of risks than those that loom under FERPA if the school hands over the records in violation of FERPA. After *Gonzaga*, there is no meaningful private remedy for the student whose records are disclosed; there may be an FPCO complaint, but as discussed above, the FPCO is on record as stating that FERPA does not preempt conflicting state law.

3. Researcher Requests

Researchers have begun to realize that existing student records make for a fertile, ready-made research database, which avoids the time and expense ordinarily involved in data collection. For example, in a case in which extensive coded student testing data was sought under state public records law and in which there was a battle of FERPA experts, a jury agreed with two experts who testified that, although the records did not contain personally identifiable information, the students were readily identifiable; thus the information was "easily traceable" under FERPA and exempt from disclosure.[232]

Apparently to research a story, a newspaper essentially sought a student information database with information (such as class rank and free-or-reduced-lunch status, but not names) for each student in a large school district.[233] The

229. MR *ex rel.* RR v. Lincolnwood Bd. of Educ., Dist. 74, 843 F. Supp. 1236, 1239 (N.D. Ill. 1994); *aff'd sub nom.* Rheinstrom *ex rel.* Rheinstrom v. Lincolnwood Bd. of Educ. Dist. 74, 56 F.3d 67 (7th Cir. 1995) (mem.). Along similar lines, a federal appeals court has indicated that a tape recording of the medical school committee hearing and deliberations, which resulted in the plaintiff's academic dismissal, "appear[ed]" to be a FERPA record. Lewin v. Cooke, 28 F. App'x 186, 193–95 (4th Cir. 2002) (per curiam) (but finding defendants had qualified immunity because the law on this point was unclear).

230. *See, e.g.*, BRV, Inc. v. Superior Court, 49 Cal. Rptr. 3d 519, 521, 524–27, 530 (Ct. App. 2006) (ordering production, under state public records laws, of investigative report on former school superintendent accused of, among other things, sexual harassment of female students; "pupil records" exception under public records statute limited to institutional records maintained by a central custodian related to private educational interests of students).

231. *See Lindeman*, 172 P.3d at 332 (ordering the school district to pay attorney fees, costs, and penalties).

232. Fish v. Dallas Indep. Sch. Dist., 170 S.W.3d 226, 228–29 (Tex. App. 2005).

233. Chi. Tribune Co. v. Bd. of Educ. of Chi., 773 N.E.2d 674, 677 (Ill. App. Ct. 2002). Recently promulgated regulations establish standards for when de-identified records may be

court held that the state public records law's exclusion for "files and personal information maintained with respect to . . . students" governed the request although the information may not have been personally identifiable.[234]

The supreme court in another state examined a fairly similar "student-database-without-names" request made to a state university, this time from a researcher, and held that the state's public records law required disclosure.[235] The court concluded that FERPA did not bar the request since without names the database did not contain personally identifiable information.[236] That court allowed the university to charge the researcher for the costs involved in providing the information requested.[237]

4. Commercial Requests

Commercial student databases are on the rise. One report indicates that some universities make up to $2.5 million selling student mailing lists to banks and credit card companies, allowing them to market on campus, and co-branding credit cards for alumni.[238] Recent administrative decisions by the Federal Trade Commission (FTC) show the extent to which many schools, albeit apparently unwittingly, have facilitated massive disclosures of student information to credit card companies and ad agencies.[239] Several "educational entities" distributed surveys to teachers and guidance counselors for completion by millions of middle and high school students, including questions about GPA, extracurricular activities, name and address, and date of birth.[240] The entities represented themselves as nonprofit corporations and claimed that the surveys would help colleges "identify potential students and to provide

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released. Family Educational Rights and Privacy, 73 Fed. Reg. 74,806, 74,852–53 (Dec. 9, 2008) (to be codified at 34 C.F.R. § 99.31(b)).

234. *Id.* at 679–80.

235. Osborn v. Bd. of Regents of Univ. of Wis. Sys., 647 N.W.2d 158, 160–61 (Wis. 2002).

236. *Id.* at 161, 171.

237. *Id.* at 176.

238. Kathy Chu, *Schools Give Student Data to Banks*, USA TODAY, Oct. 2, 2006, at A1; *see also* Michelle Singletary, *Colleges Are in Cahoots with Credit Card Companies on Campus*, BOSTON GLOBE, Nov. 30, 2007, at C4. The website www.truthaboutcredit.org asks colleges not to sell student lists to credit card companies. Truth About Credit, http://www.truthaboutcredit.org/campaign (last visited Dec. 21, 2008). A recent US Public Interest Research Group survey of college students found that sixty-seven percent opposed schools' sharing of student information with credit card companies. *See* Kathy Chu, *Credit Cards Go After College Students*, USA TODAY, Mar. 31, 2008, at B6; Kathy Chu, *Colleges' Debit-Card Deals Draw Scrutiny*, USA TODAY, Mar. 17, 2008, at A1 (describing how schools profit from making student ID cards available as a debit card with a preferred bank; University of Minnesota earns $1 million annually and received a $2 million signing bonus for such an arrangement; some debit cards charge hefty overdraft fees rather than declining purchases on overdrawn accounts).

239. *See In re* Educ. Research Ctr. of Am., Inc., 135 F.T.C. 578, 580–81 (2003) (final order); *In re* Am. Student List, LLC, 135 F.T.C. 31, 32–34 (2003) (final order); *In re* Nat'l Research Ctr. for Coll. and Univ. Admissions, Inc., 135 F.T.C. 13, 14–16 (2003) (proposed consent order).

240. *In re Educ. Research Ctr. of Am., Inc.*, 135 F.T.C. at 580.

them with information about curricula, extracurricular activities and financial aid programs."[241] In fact, these entities aggregated the survey data to create lists and sold them to commercial entities including "banks, insurance companies, consumer goods and services providers, and list brokers,"[242] as well as "credit card companies, direct marketers, . . . database marketing companies, and advertising agencies."[243]

FTC complaints alleging that these entities engaged in deceptive trade practices were eventually resolved by consent orders that directed the entities to cease misrepresenting how personally identifiable data would be disclosed, to delete and not to use the data from past surveys for noneducational marketing purposes (as defined by the PPRA), and to not use the data from future surveys for noneducational marketing purposes (as defined by the PPRA) without a clear and conspicuous statement.[244] These noneducational purposes must be disclosed in all communications to parents, school employees, and students relating to the surveys.[245] Notably, these cases provided no remedy for students whose data had already been collected and shared commercially, nor of course were these or other entities prohibited from continuing to collect student information for commercial purposes, provided they disclosed that fact to students.

5. The Self-Help Problem—Unauthorized Release of Student Records

The requests detailed above by litigants, researchers, the media and citizens under public records laws, and commercial entities demonstrate those groups' dawning realization of the high value of student records. Others use (illegal) self-help mechanisms to access student information—for example, by hacking into electronically stored student records. This problem has reached the point where recently surveyed colleges listed security and privacy of their data as their top technology concern.[246]

241. *Id.* at 581.

242. *Id.* at 580.

243. *In re Nat'l Research Ctr. for Coll. and Univ. Admissions, Inc.*, 135 F.T.C. at 15.

244. *In re Educ. Research Ctr. of Am., Inc.*, 135 F.T.C. at 598–600; *In re Nat'l Research Ctr. for Coll. and Univ. Admissions, Inc.*, 135 F.T.C. at 22–23.

245. *In re Educ. Research Ctr. of Am., Inc.*, 135 F.T.C. at 598–99; *In re Nat'l Research Ctr. for Coll. and Univ. Admissions, Inc.*, 135 F.T.C. at 22–23.

246. Marisol Bello, *Securing Students' Data Top Tech Issue*, USA TODAY, Mar. 20, 2008, at A3 (noting that a hacker recently obtained records on 10,000 Harvard graduate school applicants, and a sixty-eight percent increase in such incidents in 2007). Recently promulgated regulations attempt to deter identity theft of students by adding items such as biometric records, date and place of birth, and mother's maiden name to the category of "personally identifiable information," which is treated as confidential. Family Education Rights and Privacy, 73 Fed. Reg. 74,806, 74,852 (Dec. 9, 2008) (to be codified at 34 C.F.R. § 99.3(6)).

B. Student Records Maintained by Federal Agencies

FERPA does not cover student records held by the federal Department of Education, nor other federal agencies.[247] To the extent federal agencies have obtained student information from school districts or other entities covered by FERPA in accordance with a FERPA exception (perhaps, for example, in the course of an audit of a federally subsidized program such as the IDEA),[248] FERPA redisclosure provisions prohibit the agency from disclosing this information to third parties.[249] Moreover, the federal Privacy Act[250] provides some protection for individual information held by federal agencies. Like FERPA, the Privacy Act provides a right of access to one's own records[251] and limits disclosure of those records.[252] However, there are important differences between the Privacy Act and FERPA. For example, the Privacy Act covers only records maintained by federal agencies in "systems of records"[253] and not individual records that are not part of a formal records system. Thus, for example, DOE's system of records of applicants for federally assisted student aid would be covered. For those records that are covered, the Privacy Act permits nonconsensual disclosure for many reasons, including law enforcement,[254] research,[255] "routine use[s],"[256] and instances where the records are not exempt under the federal Freedom of Information Act.[257] Federal agencies must publish details of their systems of records in the Federal Register;[258] the DOE's systems of records are also available on its website and comprise more than 350 pages.[259] Privacy Act violations are remediable by

247. *See* Parks v. Dep't of Educ., No. CIV. 99-1052-KI, 2000 WL 62291, at *3 (D. Or. Jan. 26, 2000).

248. FERPA permits disclosure of records for audit purposes. 20 U.S.C. §§ 1232g(b)(1)(C), (b)(3), (b)(5) (2000).

249. 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33 (2007). *Cf.* United States v. Univ. Hosp., Inc., No. 1:05-cv-445, 2006 WL 2612631, at *1–3 (S.D. Ohio July 28, 2006) (reviewing the federal government's allegations that hospital residents were employees rather than students and thus defendant hospital owed employment taxes; the court denied government request for discovery which would have permitted redisclosure to other agencies to enforce laws, in part because of FERPA privacy protections).

250. 5 U.S.C. § 552a (2000).

251. *Id.* § 552a(d).

252. *Id.* § 552a(b).

253. *See id.* §§ 552a(a)(4)–(5).

254. *Id.* § 552a(b)(7).

255. *Id.* § 552a(b)(5) (non-identifiable information only may be disclosed under this exception).

256. *Id.* §§ 552a(a)(7), (b)(3).

257. *Id.* § 552a(b)(2).

258. *Id.* § 552a(e)(4).

259. *See* Department of Education System of Records Notices, http://www.ed.gov/policy/gen/leg/som.html (last visited Dec. 22, 2008).

private lawsuits with prevailing plaintiffs eligible for damages, costs, and attorney's fees.[260]

Concerns stemming from FERPA's lack of coverage of student information maintained by the DOE and other federal agencies are emerging.

1. The Military and Student Records

As discussed above, Congress requires schools, as part of NCLB, to share certain directory information (names, addresses, and phone numbers) about secondary school students with military recruiters upon request unless the parents opt out in advance. The Department of Defense (DOD), through a contractor, has used this and other information, some from other government databases, to create a national recruiting database in which information for high school and college students and selective service registrants sixteen years and older is collected, such as date of birth, gender, social security number, ethnicity, and GPA. A Privacy Act notice regarding this Joint Advertising, Market Research, and Studies (JAMRS) database was promulgated in May 2005.[261]

After several Privacy Act lawsuits were filed,[262] the DOD announced changes in this database.[263] Information in the JAMRS database is to be used only for recruiting and not released to law enforcement, intelligence, or other agencies.[264] Information is retained for three years rather than five.[265] Social security numbers will no longer be collected.[266] Students will have an opt-out opportunity, good for ten years, to keep their information out of the database, and to remove any information already in the database.[267]

To enforce the Solomon Amendment,[268] DOD promulgated regulations in March 2008 addressing military recruiting on college campuses, and military access to student recruiting (directory) information.[269] The thrust of the regulations is to require colleges to treat military recruiters, and requests for

260. 5 U.S.C. § 552a(g).

261. Privacy Act of 1974; System of Records, 70 Fed. Reg. 29,486 (May 23, 2005).

262. *See, e.g.*, Complaint at 1–2, Hanson v. Rumsfeld, No. 1:06-CV-03118 (S.D.N.Y. Apr. 24, 2006), *available at* http://www.nyclu.org/files/hanson_v_rumsfeld_complaint_042406.pdf (stating allegations by high school students that DOD illegally collected and disseminated student information).

263. Privacy Act of 1974; System of Records, 72 Fed. Reg. 952 (Jan. 9, 2007).

264. *See id.* at 953.

265. *Id.* at 955.

266. *Id.* at 953.

267. *Id.* at 953, 955.

268. 10 U.S.C. § 983 (West Supp. 2008).

269. Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education, 73 Fed. Reg. 16,527 (March 28, 2008) (codified at 32 C.F.R. pt. 216).

student directory information from the military, equally to the most favorably treated non-military employers.[270]

Finally, DOD schools are also outside of FERPA and have their own, different set of rules concerning confidentiality of student information. This complicates the sharing of student information when students return from DOD schools to domestic, FERPA-covered schools.[271]

2. Other Federal Student Databases

Federal databases for non-military uses are also on the rise. DOE maintains a database of social security numbers and other information on sixty million student borrowers, which is accessible to lenders[272] presumably as a "routine use" under the Privacy Act. Schools are permitted by FERPA,[273] but are required by other higher education law, to share student information with the federal Office of Student Aid[274] for inclusion in this database. Recently, that database was briefly shut down when it was determined lenders were accessing the database for non-financial-aid reasons, such as trolling for new borrowers.[275]

DOE supports the establishment of a national "unit records" database that would track students throughout their careers as a means of evaluating college and university performance.[276] Such a database would presumably be regulated by the Privacy Act but not FERPA.

The federal government has also compiled vast databases of all foreign students[277] and information about several hundred individual students that it

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270. 32 C.F.R. § 216.4(a) (2008). At the higher-education level, these regulations clarify that a student opt-out from the release of her directory information also serves as an opt-out to a request from the military; a separate military opt-out is not required from college students, in contrast to secondary students. *Id.* § 216.4(b)(5).

271. *See* Privacy Act of 1974; System of Records, 72 Fed. Reg. 24,572 (May 3, 2007) (providing that when a DOD student transfers to a non-DOD school, the student's DOD program files will be shared only upon request from the school, and "[o]nly academic and attendance records will be released").

272. *See* Amit R. Paley, *Loan Firms Set to Regain Access to U.S. Student Data*, WASH. POST, May 3, 2007, at A7.

273. 34 C.F.R. § 99.31(a)(4) (2007).

274. 34 C.F.R. §§ 668.24(d)(2), (f); 34 C.F.R. § 685.309(a)(2).

275. Kathy Chu, *Leery Officials Kick Lenders Out of Student Database*, USA TODAY, Apr. 18, 2007, at B1; *Lenders Regain Loan Database Access*, USA TODAY, May 3, 2007, at B1 (DOE to require lenders to provide list of employees who need access and certification; access to be granted only for authorized purposes).

276. *See* SEC'Y OF EDUC. COMM'N ON THE FUTURE OF HIGHER EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 21 (2006), *available at* http://www.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf.

277. Dan Eggen, *FBI Seeks Data on Foreign Students*, WASH. POST, Dec. 25, 2002, at A1 ("The FBI is asking colleges . . . to provide the government with personal information about all foreign students and faculty . . . ."); Mary Beth Marklein, *INS Database Worries Colleges*, USA

asserts is relevant to terrorism prevention.[278]

As the foregoing discussion shows, schools are increasingly required to provide student information to federal agencies without student consent, at which point FERPA protection changes and the Privacy Act becomes the main protector. The Privacy Act permits government agencies to share information and match databases.[279]

C. Potential FERPA Conflicts with Other Laws

As previously noted, FERPA's intersection with other laws is terribly unclear.[280] These interpretational problems continue, for example, as courts struggle with (and have yet to reach consensus on) issues such as: whether state agencies for protection and advocacy of persons with disabilities are entitled to access student records without parental consent; whether parents have a right of access to their children's test protocols; how constitutional reproductive rights of minors intersect with parental FERPA rights to access records; how the common-law duty to warn of specific danger to a student is affected by FERPA; whether information obtained in violation of FERPA is admissible in criminal proceedings; and how family law matters, such as custody and adoption, affect FERPA.

1. Protection and Advocacy (P&A) Access to Student Records

Federal law requires states to establish protection and advocacy (P&A) agencies to serve persons with disabilities.[281] Some such agencies have sought access to student records and school premises to monitor school compliance

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TODAY, Jan. 20, 2003, at 6D (describing an INS database of foreign students, which schools must supply requested information to).

278. Greg Toppo, *Education Department Assisted FBI*, USA TODAY, Sept. 1, 2006, at 4A (reporting on "Project Strike Back" a joint effort of DOE and FBI to review financial aid records of several hundred students as a counterterrorism measure).

279. *See supra* Part IV.B.

280. *See generally* Daggett, *Bucking Up Buckley I*, *supra* note 1, at 648–52, 667–70 (describing unsettled issues of the intersection of FERPA with federal substance abuse records laws, case law establishing constitutional rights of minors, the PPRA, state FOIA laws, evidentiary privileges, child abuse reporting laws, and reporting criminal activity and making recommendations to amend FERPA to clarify certain of these issues); Huefner & Daggett, *FERPA Update*, *supra* note 3, at 488–90 (discussing interaction between FERPA and various federal and state laws); *see also* Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 681–85 (2003).

FERPA regulations require schools that believe they cannot comply with both FERPA and a conflicting state or local law to notify the FPCO. 34 C.F.R. § 99.61 (2007). The FPCO may issue an informal opinion, and on occasion has issued joint opinion letters with other federal agencies that enforce the potentially conflicting statutes, but these letters are not binding law, and may not even be given administrative deference by courts. *See* Christensen v. Harris County, 529 U.S. 576, 587–88 (2000) (interpretation of statute in agency opinion letters is "entitled to respect," but is not accorded normal judicial deference to agency opinions).

281. 42 U.S.C. § 15041 (2000).

with disability laws. FERPA does not address this issue. Recently two federal appeals courts have held that P&A agencies with probable cause to suspect abuse or neglect may be entitled at least some access without a parent's written consent as is generally required by FERPA.

The Seventh Circuit held that a state P&A agency investigating the use of "seclusion" rooms could access records of students who had spent time in such rooms without knowing the students' names and without their parents' consent.[282] The Second Circuit did not go this far. The P&A agency in that case received parent complaints about a school using seclusion and physical restraints on students with disabilities.[283] The court held that, under these circumstances, the P&A agency could observe the school in session and speak with its students, and obtain a list of the school's students and their contact information.[284] The Tenth Circuit did not reach the merits of this issue, holding the matter moot because the P&A agency had withdrawn its records request.[285] Federal district courts within the Ninth Circuit have held that the P&A statutes do not override, and cannot be harmonized with, FERPA, and that FERPA precludes schools from providing P&A agencies with nondirectory student information.[286]

2. Access to Test Protocols

A California federal court has weighed in on the continuing, and still

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282. Disability Rights Wis., Inc. v. Wis. Dep't of Pub. Instruction, 463 F.3d 719, 722, 730 (7th Cir. 2006). This court noted that the P&A had statutory authority to investigate possible abuse and neglect, and attendant access to records. *Id.* at 726. In the case at hand, the P&A had probable cause to believe there was abuse or neglect, that it was the agency with the most expertise, and was statutorily obligated to keep the records confidential. *Id.* at 728–29. The Seventh Circuit also found that the P&A's need for the information outweighed any invasion of student privacy, and thus FERPA did not bar release of the records. *Id.* at 730. FERPA does not include any such balancing test.

283. Conn. Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Bd. of Educ., 464 F.3d 229, 233 (2d Cir. 2006).

284. *Id.* at 242–43. In that case the federal DOE and HHS had submitted a joint amicus brief indicating that (1) FERPA did not prohibit classroom observation and (2) the federal P&A statutes provided a "limited override" of FERPA consent requirements. *Id.* at 236. The court suggested access to individual records would require parent consent. *Id.* at 243–45.

285. Unified Sch. Dist. No. 259 v. Disability Rights Ctr. of Kan., 491 F.3d 1143, 1145–50 (10th Cir. 2007) (reviewing P&A investigation of longstanding program of homebound instruction consisting of one to three hours per week to student with disability requested records of other students receiving homebound instruction; school declined to provide information in the aggregate for students).

286. Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist., No. 3:07-cv-0131-RRB, 2007 WL 2827532, at *6 (D. Alaska 2007) (citing Wash. Prot. and Advocacy Sys., Inc. v. Evergreen Sch. Dist., No. C03-5062 (W.D. Wash. Apr. 11, 2003), *aff'd*, 71 F. App'x 654 (9th Cir. 2003) (mem.)).

unsettled, issue[287] of access to test protocols.[288] FERPA, of course, provides for access to all records, and to reasonable explanations and interpretations of records.[289] Providing layperson access to test protocols may, however, violate test security, professional ethical standards for test administrators, and copyright law. State law in the California case provided for parental access to test protocols after their students had taken the tests.[290] The school district claimed that providing access to the standardized achievement test as requested by the parent would violate federal copyright law.[291] The court found the state statute to be enforceable as it fell within the "fair use" provision of federal copyright law, but noted that the school could use safeguards to preserve confidentiality, such as requiring a written nondisclosure agreement.[292]

On a related issue, a federal appeals court held that an answer key to an exam was not a record under FERPA because it contained no personally identifiable information, although it was subject to discovery in litigation.[293]

3. Disclosure of Minor Student Pregnancy to Parents

Although FERPA gives parents of minor students a right of access to their child's education records on request, it does not require schools to reach out and inform parents.[294] Thus, under normal circumstances, schools must decide whether to inform a parent when a student tells a school employee that the student is pregnant. One school wrote a policy that required informing parents whose daughters were known to be pregnant, which was challenged as gender discrimination under Title IX and in violation of a minor's constitutional right to make reproductive decisions without parental notice under judicial oversight.[295] A preliminary injunction to suspend the policy was denied, the court finding the school counselor and union lacked standing and the matter was not ripe, and rejecting the constitutional reproductive rights argument.[296]

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287. For earlier commentary and review of cases and administrative opinions on this issue, see Daggett, *Bucking Up Buckley I*, *supra* note 1, at 627–28.

288. Newport-Mesa Unified Sch. Dist. v. Cal. Dep't of Educ., 371 F. Supp. 2d 1170, 1179 (C.D. Cal. 2005).

289. 20 U.S.C. § 1232g(a)(1)(A) (2000); 34 C.F.R. § 99.10(a) (2007).

290. *Newport-Mesa*, 371 F. Supp. 2d at 1179.

291. *Id.* at 1174.

292. *Id.* at 1179. The court also distinguished student access to a test protocol before actually taking the test, citing authority indicating that sharing the test protocol in such situations would not constitute fair use and would violate copyright law. *Id.* at 1175.

293. Lewin v. Cooke, 28 F. App'x 186, 193 (4th Cir. 2002).

294. *See* Daggett, *Bucking Up Buckley I*, *supra* note 1, at 649.

295. Port Wash. Teachers' Ass'n v. Board of Educ. of the Port Wash. Union Free Sch. Dist., 361 F. Supp. 2d 69, 72–73 (E.D.N.Y. 2005).

296. *Id.* at 73. The case is criticized in Melissa Prober, Note, *Please Don't Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student's Pregnancy*, 71 BROOK. L. REV. 557 (2005).

4. Tort Duty to Warn of Danger

Although there is no general legal duty to rescue, commentators recognize a duty when there is a specific and serious risk of danger (such as when in therapy a patient makes a serious and credible threat toward another person).[297] The issue is whether and when schools have such a duty with regard to dangers presented by students to themselves or others, and whether and how FERPA affects this duty. On this issue, as with the others in this section, FERPA is silent. In one case, a student sexually assaulted a classmate and later raped another classmate whom he had dated in the past.[298] The second victim claimed the school had a legal duty to warn her of the danger this student presented, and also claimed that failure to warn her amounted to deliberate indifference, triggering liability under Title IX.[299] The court rejected the Title IX claim, noting that at the time of the plaintiff's rape, the first complaint had been filed and the school was processing it, but there had been no adjudication.[300] The court declined to decide the duty to warn claim,[301] but did take the time to include a lengthy and graphic description of the rape from the victim's deposition.[302]

In another tragic case, parents of an MIT student who committed suicide claimed the school should have told them of their daughter's mental health issues and suicidal tendencies.[303] The school's defense, in part, was that FERPA did not permit such disclosure.[304] The court allowed the case to proceed against some individual school employees and required the production of the student's records.[305]

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297. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 41 (Proposed Final Draft No. 1, 2005).

298. Doe v. Ohio St. Univ. Bd. of Regents, No. 2:04CV0307, 2006 WL 2813190, at *1 (S.D. Ohio Sept. 28, 2006).

299. *Id.* at *10, *12–13.

300. *Id.* at *12.

301. *Id.*

302. *Id.* at *2–3.

303. Carpenter v. Mass. Inst. of Tech., No. 023660, 2005 WL 1488417, at *1 (Mass. Super. Ct. May 17, 2005).

304. *Id.* at *3.

305. *See id.* at *1 (granting plaintiff's motion to compel the student's records compiled during the school's investigation). *See generally* John S. Gearan, Note, *When is it OK to Tattle? The Need to Amend FERPA*, 39 SUFFOLK U. L. REV. 1023 (2006) (discussing the lawsuit arising from another MIT student's suicide); Heather E. Moore, Note, *University Liability when Students Commit Suicide: Expanding the Scope of the Special Relationship*, 40 IND. L. REV. 423, 446–49 (2007) (discussing FERPA and university tort duties as to students who may be suicidal).

5. Impact of FERPA Violations on Admissibility of Evidence in Criminal Proceedings

The IDEA provides that students with disabilities who allegedly engage in criminal behavior may be referred by their schools to criminal authorities.[306] When such a criminal referral is made, the school "shall" share the referred student's education records, apparently after complying with FERPA.[307] In a recent case, an IDEA student was referred to police for drug possession.[308] The student challenged his criminal conviction on several grounds, including the school's failure to share his FERPA records with the police.[309] The court held that any IDEA violation did not justify dismissal of the criminal conviction.[310]

A related issue is whether information collected in violation of FERPA is admissible in criminal proceedings. In another case, a public university called police when it appeared that an adult student was using school computers to access child pornography.[311] The student claimed he was doing so as research for a class.[312] The student also claimed that informing the police about his school computer work violated his FERPA rights, and the search warrants and search results obtained by the police as a result of the school's tip should be voided as fruit of the poisonous tree.[313] The federal court suggested that even if FERPA was violated,[314] it would not void the resulting searches.[315]

6. FERPA and Family Law

FERPA regulations accord access rights to noncustodial parents unless there is a court order or law to the contrary.[316] This language leaves plenty of questions for courts to resolve, particularly questions regarding noncustodial parents. FERPA rights of noncustodial parents were recently addressed in several cases. A state trial court upheld a school's refusal to produce records on the authorization of an estranged noncustodial parent; the matter was affirmed on other grounds with the question of noncustodial parent status

306. 20 U.S.C. § 1415(k)(6)(A) (Supp. V 2005).

307. *Id.* § 1415(k)(6)(B); 34 C.F.R. § 300.529 (2007).

308. Commonwealth v. Nathaniel N., 764 N.E.2d 883, 885 (Mass. App. Ct. 2002).

309. *Id.*

310. *Id.* at 888 (noting that the IDEA did not specify when during the criminal process the records were to be shared, and that in fact the student had provided some records to the court).

311. United States v. Bunnell, No. CRIM.02-13-B-S, 2002 WL 981457, at *1 (D. Me. May 10, 2002).

312. *Id.*

313. *Id.* at *2.

314. FERPA contains no explicit exception in its nondisclosure provisions regarding the reporting of suspected criminal activity. *See* Daggett, *Bucking Up Buckley I*, *supra* note 1, at 668.

315. *Bunnell*, 2002 WL 981457, at *2 (noting that the school gave the police access to the recycling bin in its computer facility).

316. 34 C.F.R. §§ 99.3, 99.4 (2007).

reserved.[317] A federal court dealing with a noncustodial parent's request for an IDEA hearing noted that "non-custodial status, whether by operation of a divorce decree, incarceration, or otherwise, does not automatically divest a non-custodial parent of . . . rights."[318] Another federal court heard an incarcerated parent's claim that a school's provision of records to him with certain information redacted (such as the student's current address and telephone number) violated FERPA.[319] The parent's request for records may have been related to the fact that the child's mother had been the main prosecution witness against him.[320] A federal appeals court held that a noncustodial parent lacked standing to request a hearing to amend her child's records under FERPA where "[t]he divorce decree clearly states that all legal rights over education lie with the [custodial] father."[321] Finally, one court dealt with a claim by adoptive parents against a school that revealed their student's education records to the student's birth mother.[322]

In a related matter, FERPA rights transfer from parents to students once the student turns eighteen or enrolls in college.[323] However, if the parent claims the student as a dependent for tax purposes, the school may choose to share information with the parent without student consent.[324] The FPCO is now on record as saying that in the case of parents who file separate tax returns (perhaps pursuant to a divorce), "[i]f a student is claimed as a dependent by either parent . . . , then either parent may have access."[325] Moreover, some minor students enroll part-time in college before completing high school, and the statute and regulations do not address who holds FERPA rights. The

317. Mele *ex rel.* Mele v. Travers, 741 N.Y.S.2d 319, 320–21 & n.2, 322 (App. Div. 2002). The defendant landlord facing a tenant's tort claim involving lead paint exposure to a minor child sought consensual discovery of the child's brother's school records; when plaintiff refused, defendant obtained authorization from the children's estranged, noncustodial parent. *Id.* at 320. The school district refused access to the records, based in part on the wishes of the custodial parent, which was upheld by the trial court. *Id.* at 320 & n.1. The appeals court affirmed, holding that the landlord lacked standing to challenge the school's refusal to turn over records; the appeals court reserved the question of whether the noncustodial parent's FERPA rights were violated. *Id.* at 321 & n.2, 322.

318. Fuentes v. Bd. of Educ. of City of N.Y., No. 01 CV 1454(FB), 2002 WL 1466421, at *2 (E.D.N.Y. July 10, 2002) (specifically citing FERPA as preserving noncustodial parent rights "absent a binding . . . court order barring access to records" (citing 20 U.S.C. § 1232g (2000))).

319. Cherry v. LeDeoni, No. 99 CV 6860(SJ), 2002 Westlaw 519717, at *1, *4 (E.D.N.Y. Mar. 31, 2002). The school had provided the redacted information only after notifying the custodial parent of the request, pursuant to school policy, and giving her 45 days to get a court order barring access. The redaction had been recommended by the court. *Id.* at *1–2.

320. *Id.* at *2.

321. Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 791–92 (2d Cir. 2002).

322. Geehern *ex rel.* R. v. Bd. of Educ. of the Tuxedo Union Free Sch. Dist., 54 F. App'x 701, 702 (2d Cir. 2002).

323. 20 U.S.C. § 1232g(d) (2000).

324. *Id.* § 1232g(b)(1)(H).

325. FPCO Frequently Asked Questions, http://www.ed.gov/policy/gen/guid/fpco/faq.html (last visited Dec. 22, 2008) (citing 34 C.F.R. § 99.31(a)(8) (2007)).

FPCO is now also on record that in such a joint enrollment situation, the two schools (normally high school and college) "may exchange information on that student," and the "parents still retain the rights under FERPA at the high school and may inspect and review any records sent by the [college] to the high school," but the student is the holder of FERPA rights as to her records at the college.[326]

D. Unremedied FERPA Violations

Without a private cause of action or a § 1983 claim available, some seemingly clear violations of FERPA are occurring. Some have been noted earlier in this Article. Others are noted in the press but are apparently unremedied:

- The University of Northern Colorado lists, with pictures, students who are not "necessarily dangerous" but have been banned from campus, including a student with an eating disorder who was banned because she posed a risk to herself.[327]
- A reporter discovered records, including grades and standardized test scores, for 6000-plus students on a school's website.[328]
- Some schools have put webcams in their classrooms and allow unlimited public access.[329]

Students have been upset enough about other (seemingly egregious) FERPA violations to go to court only to find no legal claim is available to them to reach the merits of their case:

- A board of education's meeting minutes included the plaintiff's

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326. *Id.*

327. John Bacon, *University Bans 24 People from Campus*, USA TODAY, Apr. 26, 2007, at 3A. Since this report, the university has removed the banned students from its publicly accessible website, but has them listed on a database accessible to faculty, staff, and students. *See* Univ. N. Colo. Police Dep't, Individuals Banned from Campus, http://www.unco.edu/police/communications/banned.htm (last visited Dec. 22, 2008); Univ. N. Colo., University Resource for System Access, http://ursa.unco.edu/cp/home/loginf (last visited Dec. 22, 2008).

328. *School District Posts Students' Files Online*, SPOKESMAN REV. (Spokane, Wash.), Sept. 21, 2003, at B8 (reporting the disclosure in Vancouver, Washington).

329. Greg Toppo, *Who's Watching the Class?*, USA TODAY, Aug. 11, 2003, at D1. For recent commentary on school electronic surveillance, see Kevin P. Brady, *"Big Brother" is Watching, But Can He Hear, Too?: Legal Issues Surrounding Video Camera Surveillance and Electronic Eavesdropping in Public Schools*, 218 EDUC. L. REP. 1 (2007). A January 31, 2007, letter to the FPCO from the National School Boards Association (NSBA) asked for guidance on thirteen questions concerning video images of students. Letter from Lisa E. Soronen, NSBA Staff Attorney, to LeRoy Rooker, Director, Family Policy Compliance Office (Jan. 31, 2007), *available at* http://www.nsba.org/SecondaryMenu/COSA/Search/AllCOSAdocuments/LettertoFPCOregardingvideoimagesunderFERPA.aspx. As of this publication, there is no published FPCO response.

name and that the board voted to expel him.[330]

- An athlete whose coach disclosed his bipolar disorder to the rest of the team had his FERPA claims, and others, dismissed; no private cause of action under FERPA and no damages available under ADA Title III.[331]
- Another student athlete claimed that his public university had given his educational records to a radio station after the student was suspended for academic reasons; this was also after a newspaper article reported the student and others were "disgruntled" with their coach.[332]
- Plaintiff's medical school records were released in response to a subpoena without prior notice, as required by FERPA.[333]
- Former Texas Tech basketball coach Bobby Knight gave a document to local boosters that included disciplinary details about a named student athlete.[334]
- School-created "geography program" in which truckers were given names and photos of young students and asked to correspond with them.[335]

V. CONCLUSION

The reported egregious and unredressed FERPA violations just described are troubling, but not really surprising. FERPA's developments in the twenty-first century are a strange confluence: an erosion of substantive protection and an evisceration of enforcement options, primarily via its interpretation by the Court, in the face of a congressional approach marked primarily by inaction. Although the judicial and legislative branches of the federal government lessen FERPA's protection of student privacy, or at least enable it through inaction,

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330. R.M. *ex rel.* K.M. v. Boyle County Sch., No. 5:06-152-JMH, 2006 WL 2844146, at *1 (E.D. Ky. Oct. 2, 2006). The court denied the plaintiff's motion to strike the meeting minutes from the record. *Id.* at *2.

331. Zona v. Clark Univ., 436 F. Supp. 2d 287, 289–90 (D. Mass. 2006).

332. Axtell v. Univ. of Tex. at Austin, 69 S.W.3d 261, 263 (Tex. App. 2002). The student athlete sued under both FERPA and a common law negligence tort claim. *Id.* A state appeals court upheld the dismissal of the complaint, holding that the defendants were immune from the tort claim under the state tort claims act, and noting that the student "concedes that he cannot maintain a cause of action under FERPA against the University." *Id.* at 264, 267.

333. Dyess v. La. State Univ. Bd. of Supervisors, No. Civ. A. 05-392, 2005 WL 2060915, at *1 (E.D. La. Aug. 19, 2005) (dismissing FERPA and other claims).

334. *See Disclosure of Student Info by Coach Violates FERPA*, LEGAL ISSUES IN COLL. ATHLETICS, Apr. 2003, at 6 (noting university president "regrets" the "technical" FERPA violation; coach's previous statement that his actions did not violate FERPA to the contrary).

335. Goins v. Rome City Sch. Dist., 811 N.Y.S.2d 520, 520–21 (App. Div. 2006) (dismissing FERPA and other claims).

federal administrative agencies collect student data, and do so largely outside of the protection that FERPA does afford. Many others, from private litigants to researchers to commercial entities, have realized the value of student information and increasingly demand its production from schools, claiming entitlement under public records or other laws that conflict with FERPA, or claiming that FERPA does not cover the records they demand. Most schools undoubtedly try in good faith to comply with FERPA. However, schools faced with such requests often face graver consequences if they produce the records than if they refuse the demands on FERPA grounds. FERPA's current overall status of "somewhat" protecting student privacy thus disserves both schools and students. Students' privacy is not well-protected, and schools have disincentives to comply and uncertainty about just what compliance requires.

Congress needs to amend FERPA, starting with: the addition of a meaningful enforcement mechanism; a clear definition of what records it covers; an extension of its coverage to the federal government; a clear statement that it generally preempts conflicting state law such as public records statutes; a careful delineation of state laws that are not preempted, such as child abuse reporting obligations; and clear guidelines on how FERPA intersects with other federal laws. If congressional inaction continues, states that have assumed that FERPA provides robust protection of student privacy (or that it at least occupies the field), and hence have not enacted comprehensive student privacy protection laws need to rethink those assumptions and write state laws that achieve what FERPA currently does not: effective protection of student privacy.