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Baking Common Sense into the FERPA Cake: How to Meaningfully Protect Student Rights and the Public Interest

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**BAKING COMMON SENSE INTO THE FERPA CAKE: HOW
TO MEANINGFULLY PROTECT STUDENT RIGHTS AND
THE PUBLIC INTEREST**

Zach Greenberg & Adam Goldstein[†]

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SECTION 1: WHAT IS FERPA?

In Georgia, a high school student is found dead in a rolled-up gym mat; his parents are denied access to the surveillance video. In Oklahoma, police investigating reports of numerous sexual assaults at a college are denied access to campus crime records. In Illinois, an investigation into alleged political cronyism is stymied when a newspaper is denied access to the names of families who received free tuition at a state college. In each case, the schools point to the same federal law to rationalize their decision: the Family Educational Rights and Privacy Act (“FERPA”).¹

This article will describe the Greek tragedy of FERPA. We will introduce FERPA as our protagonist, discuss its tragic flaws and downfall, and then provide a roadmap for its redemption. The first section is a short overview of FERPA, with a focus on the driving forces behind its enactment. Then the problems with FERPA will take center stage, replete with examples illustrating the dire need for reform. Finally, and most importantly, we will provide a means of fixing FERPA to achieve its twofold purpose of protecting student privacy and affording students and parents access to their education records.

A. Key FERPA Terms

FERPA has two main functions: 1) protecting student privacy and 2) providing students and parents access to their education records. In terms of the first function, FERPA prohibits any “educational agency or institution” from having a policy of disclosing the “education records” of students, or the “personally identifiable information” contained therein, without their consent.² An “educational agency or institution” is any school that receives federal funds (including federal student loan funds), while “students” are individuals attending the school for whom the school “maintains education records or personally identifiable information.”³ This definition does not include college applicants, as they are not yet enrolled and thus their records are not covered by FERPA.⁴

Starting with what it means to “maintain” a record, the Supreme Court has held that it refers to a state of ongoing custody, such as records that “will be kept in a filing cabinet in a records room at the school or on a permanent secure database.”⁵ For example, a student’s grade point average kept with a registrar or other central custodian is “maintained” for the purposes of FERPA, but test scores briefly held by a teacher and then passed around to students are not.⁶ Another core term is

1 20 U.S.C. § 1232g (2012). Each of these erroneous FERPA interpretations is discussed in greater detail in Section 2, *infra*.

2 § 1232g(b)(1).

3 § 1232g(a)(3) (defining “educational agency or institution”); § 1232g(a)(6) (defining “student”).

4 § 1232g(a)(6).

5 *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002).

6 *Id.* at 428; see also Randi M. Rothberg, Comment, *Not As Simple As Learning the ABC’s: A Comment on Owasso Independent School District No. I-011 v. Falvo and the State of the Family Educational Rights and Privacy Act*, 9 CARDOZO WOMEN’S L.J. 27 (2002) (analyzing the *Owasso* decision).

“education records,” defined as, “those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.”⁷ Generally, this definition encompasses the student’s file located in the school’s central database.⁸

Moving to “personally identifiable information,” information is considered personally identifiable if it would lead a reasonable person in the school community to identify the student based on the information.⁹ There are also several categories of information exempt from FERPA, such as school-defined directory information (name, address, phone number, and other basic contact details) and law enforcement records.¹⁰ Furthermore, there are mechanisms allowing schools to disclose education records to outside organizations without the student’s consent.¹¹ These exemptions and mechanisms balance the protection of student privacy with other interests such as student safety.

FERPA’s second function is granting students and parents access to their education records. This is done by prohibiting schools receiving federal funds from having a policy or practice of denying students and parents the right to inspect and review their education records.¹² Such schools also must grant parents the opportunity for a hearing to challenge the contents of their child’s education records to ensure accuracy.¹³ This includes the parent’s (or eligible student’s) right to request a correction of any inaccuracy in those records.¹⁴

By prohibiting federally funded schools from having a policy or practice of disclosing student education records and denying parties access to their records, FERPA seeks to protect student privacy and ensure accurate recordkeeping. How these provisions came into fruition is the topic of the next section.

B. Legislative History and Original Purpose

To figure out how far FERPA has fallen, we must first examine its ascent. This story features an unlikely antihero: Richard Nixon. FERPA was passed in the wake of the Watergate scandal as a response to the fear that schools kept secret and

7 20 U.S.C. § 1232g(a)(4)(A) (2012).

8 *See generally* FAMILY POL’Y COMPLIANCE OFF., FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE DISCLOSURE OF STUDENT INFORMATION RELATED TO EMERGENCIES AND DISASTERS (June 2010), <https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-disaster-guidance.pdf> (discussing FERPA’s practical purpose).

9 73 Fed. Reg. 74,806, 74,831–32 (Dec. 9, 2008) (codified at 34 C.F.R. pt. 99).

10 § 1232g(a)(4–5) (listing types of records not covered under FERPA).

11 34 C.F.R. § 99.31(a) (2016) (allowing schools to disclose FERPA records without the student’s or parent’s consent to certain individuals for limited purposes, such as officials within the student’s school with legitimate educational interests, other schools for the purpose of the student’s enrollment or transfer, and government officials for the purpose of conducting audits of educational institutions); see 73 Fed. Reg. 74,806 and 76 Fed. Reg. 75,604, 75,617 (Dec. 2, 2011) (codified at 34 C.F.R. pt. 99) for clarifications on these FERPA sections.

12 20 U.S.C. § 1232g(a)(1) (2012).

13 § 1232g(a)(2).

14 § 1232g(a)(2); 34 C.F.R. § 99.3 (2016) (defining “eligible student” as one who has turned eighteen or has enrolled in higher education, whether or not they are eighteen at that time).

inaccurate records on students, which could be harmfully disclosed.¹⁵ According to the Buckley/Pell Amendments to FERPA—which are essentially its legislative history since it was enacted in a nontraditional matter without the usual hearings and committee reports—FERPA’s goals were to 1) protect student privacy by deterring schools from disclosing education records, and 2) allow parents and students to access their education records.¹⁶ Senator James Buckley, the architect of FERPA, sought to “protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities.”¹⁷

This purpose was shaped by a few key amendments to FERPA. The first major change was an expansion of the type of protected records. Originally, FERPA protected a laundry list of records listed in the bill text.¹⁸ This list was then replaced with the term “education records,” a broader definition encompassing more records than the original list.¹⁹

Another major revision sought to strike a balance between student privacy and campus security by permitting schools to release education records concerning violent acts. This revision allows schools to disclose the final result of any disciplinary proceeding if 1) the student was found responsible for a crime of violence or nonforcible sexual offense, and 2) the student’s act violated school rules.²⁰ This provision permits (but does not require) schools to release the name of the student, the violation committed, and any sanction imposed by the school.²¹ According to Representative Thomas Foley, these amendments reflected the “balance between one student’s right of privacy to another student’s right to know about a serious crime in his or her college community.”²²

15 120 CONG. REC. 14,580 (1974) (“[T]he revelations coming out of Watergate investigations have underscored the dangers of Government data gathering and the abuse of personal files, and have generated increased public demand for the control and elimination of such activities and abuses.”); *see also* Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to its Original Design*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 75, 78 (2011) (“Watergate did not cause FERPA. Rather, Watergate and its attendant revelation that the government kept secret files about ordinary Americans created a climate that gave rise to FERPA.”)

16 120 CONG. REC. 39,862 (1974); U.S. DEP’T OF EDUC., LEGISLATIVE HISTORY OF MAJOR FERPA PROVISIONS (2002), <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html>

17 120 CONG. REC. 14,580 (1974). FERPA is commonly called the “Buckley Amendment” after Senator Buckley.

18 According to 120 CONG. REC. 13,952 (1974), FERPA originally protected “all official records, files, and data directly related to their children, including all material that is incorporated into each student’s cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.”

19 120 CONG. REC. 39,862–63 (1974). This change has prompted calls to revert back to the list and litigation over what exactly FERPA covers. *See generally* Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002) (litigation over what it means to “maintain” a record in terms of FERPA); *see, e.g.*, Penrose, *supra* note 15, at 93–107 (calling for a new definition of education records).

20 20 U.S.C. § 1232g(b)(6)(B) (2012).

21 § 1232g(b)(6)(C)(i).

22 144 CONG. REC. H2,984, (daily ed. May 7, 1998) (statement of Rep. Foley).

Changes to FERPA have also come in the form of guidance from the Department of Education (“ED”), the agency tasked with interpreting and enforcing FERPA.²³ The first change modified the term “personally identifiable information.” Previously, information was deemed personally identifiable if a reasonable person in the “school or its community” could identify the student based on the information.²⁴ This standard caused confusion as to whether the relevant group is only school personnel or the greater community. In the ED’s 2008 comments on FERPA, it clarified that the standard is a reasonable person in the “school community,” such as a student or professor.²⁵ This change narrowed the class of people used to determine whether information in a record is protected by FERPA.²⁶

There have also been changes regarding how FERPA is enforced. The ED stated in its 2011 comments on FERPA that the Secretary of Education is allowed “to issue a complaint to compel compliance through a cease and desist order, to recover funds improperly spent, to withhold further payments, to enter into a compliance agreement, or to ‘take any other action authorized by law,’ including suing for enforcement of FERPA’s requirements.”²⁷ This apparently excludes the levying of fines on offending institutions; thus, the ED cannot enforce FERPA by taking away *some* of a school’s federal funding.²⁸ It is either all or nothing. However, it should be noted that the ED has never even threatened the drastic option of taking away all of a school’s federal funding.²⁹

There is already a significant amount of literature featuring a more comprehensive FERPA overview than what is provided here.³⁰ This is an area of scholarship we do not wish to rehash. The remainder of this piece discusses topics more pertinent to fixing FERPA: the serious problems with FERPA and our recommended solutions.

SECTION 2: PROBLEMS WITH FERPA

In the classic shell game often found at carnivals and urban curbsides, the contestant must correctly choose the cup with the ball after a dazzling array of sleight of hand. Our contestant is a student and the object is a functioning FERPA—a law that will both protect student privacy and ensure institutional accountability. The

23 § 1232g(f) (designating the Secretary of Education as the enforcer of FERPA).

24 73 Fed. Reg. 74,832 (Dec. 9, 2008) (codified at 34 C.F.R. pt. 99).

25 *Id.*

26 The bizarre and detrimental ramifications of this change are explained in Section 3, *infra*.

27 76 Fed. Reg. 75,619–20 (Dec. 2, 2011) (codified at 34 C.F.R. pt. 99).

28 *Id.* at 75,620. The effects of this provision are discussed in Section 3, *infra*.

29 STUDENT PRESS L. CTR., A STUDENT PRESS LAW CENTER WHITE PAPER: FERPA AND ACCESS TO PUBLIC RECORDS 3 (2014), http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/ferpa_wp.pdf [hereinafter SPLC PAPER] (discussing how there is no evidence of any public records detailing such a proceeding taking place).

30 See, e.g., Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59 (2009) [hereinafter *FERPA in the Twenty-First Century*]; Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools’ Legitimate Educational Interests: Rethinking FERPA’s Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1 (2001); Penrose, *supra* note 15.

student confidently picks the cup farthest to the left, titled “a rights statute.” Under this cup, there is nothing—FERPA cannot be enforced by individuals, nor does the ED even try to enforce it. Dismayed but not deterred, the student picks the cup farthest to the right titled “a privacy statute,” under which she again finds nothing—schools invoke FERPA to conceal records that may embarrass the institution if brought to light, with the privacy of students a secondary concern, if even that. Her frustration boiling over, the student smashes the last cup out of the way reading “an open records statute” as it rolls towards her on the ground. Upon the table, she despondently gazes at the empty space, as the ED has explicitly stated that FERPA is not an open records statute.³¹

A. FERPA Has Been Severely Misinterpreted

FERPA’s fall from a law designed to protect student privacy to a safe word for schools seeking to avoid negative publicity is rooted in decades of severe misinterpretation and confusion. While the statute’s wording is far from crystal clear, school administrations have muddied the definitions of “education record” and “identifiable information” to the point of incomprehension. This section will explore examples of how FERPA has been misused to conceal evidence of wrongdoing on the part of the school, often at the expense of the very students it was designed to protect.

The utter confusion of schools trying to interpret FERPA was on full display during a study conducted by the Student Press Law Center (“SPLC”) and *The Columbus Dispatch*. The SPLC and *The Dispatch* asked 110 universities to provide the names of students found responsible by the school for committing an act of violence—records schools are allowed to disclose under FERPA.³² Twenty-two schools, a full twenty percent, erroneously cited FERPA when asked to disclose this crime data, while another seventy-five percent of schools did not provide any documents at all, citing a variety of inconsistent rationales.³³

The main points of confusion are the definitions of “education record” and “identifiable information,” which have been stretched and distorted to serve the ends of the institutions charged with interpreting these terms.³⁴ One of the most egregious misinterpretations involved Kendrick Johnson, a seventeen-year-old Georgia high school student found dead in a rolled-up gym mat.³⁵ The parents of the deceased demanded that the school release surveillance footage of the gym that may hold more

31 Summary, 73 Fed. Reg. 74806, 74831 (Dec. 9, 2008) (codified at 34 C.F.R. pt. 99).

32 *Campus Insecurity: Inside the Investigation*, COLUMBUS DISPATCH (Nov. 24, 2014, 12:01 AM), <http://www.dispatch.com/content/stories/local/2014/11/23/campus-insecurity-inside-the-investigation.html>.

33 *Id.*

34 20 U.S.C. § 1232g (2012).

35 *Georgia School’s Refusal to Release Video Needed for Student Death Investigation Named “FERPA Fib of the Year”*, STUDENT PRESS L. CTR. (Jan. 3, 2014, 11:16 AM), <http://www.splc.org/article/2014/01/press-release-georgia-schools-refusal-to-release-video-needed-for-student-death-investigation-named->; Jade Bulecza, *UPDATE: Attorneys for Kendrick Johnson’s Family Want Gym Video*, WTXL ABC 27 (Oct. 17, 2013), http://www.wtxl.com/news/attorneys-for-kendrick-johnson-s-family-want-gym-video/article_4e5b-243e-31f1-11e3-8053-001a4bcf6878.html.

information about the mysterious death of their son.³⁶ The school inexplicably cited FERPA in refusing the grieving parents.³⁷ It is difficult to imagine how the words “education record” and “identifiable information” about a student can be construed to include a surveillance video of a high school gym.³⁸ The school’s obstructive and indefensible position that a video potentially depicting wrongdoing, possibly a murder, is an educational record forced the parents to sue to gain more information about what happened to their child.³⁹

The misinterpretation of FERPA is even more pronounced at the college level, where institutions of higher education, especially those that are larger and more prominent, have more to lose from negative press. For example, when a newspaper requested information from the University of Kansas (“KU”) regarding two fraternities disciplined for hazing, KU erroneously cited FERPA in providing heavily redacted documents revealing no information about what merited the punishment.⁴⁰ Also, at the University of North Carolina at Chapel Hill (“UNC”), administrators stonewalled a newspaper’s attempt under the state’s open records law to obtain details of an athletic department scandal involving allegations of plagiarism, fake classes, and improperly-received benefits.⁴¹ Like the prior examples, it is difficult to see how employee phone records and parking tickets constitute “education records” under FERPA, yet this is exactly the argument UNC made in court to keep the public

³⁶ Bulecza, *supra* note 35.

³⁷ *Id.*

³⁸ See *Rome City Sch. Dist. Disciplinary Hearing v. Grifasi*, 806 N.Y.S.2d 381, 383 (N.Y. Sup. Ct. 2005) (holding school surveillance records are not protected by FERPA because FERPA is not meant to apply to records regarding the “physical security and safety of the school building”).

³⁹ Jason Hanna & Victor Blackwell, *Gym Mat Death: Attorneys Call for Release of Surveillance Video*, CNN (Oct. 11, 2013, 11:06 AM), <http://www.cnn.com/2013/10/10/justice/georgia-gym-mat-death/>. Other egregious FERPA violations at the high school level include a New York school refusing to provide a video of a football injury to a deceased student’s parents, Matthew Spina, *Parents of High School Football Player Who Died File Claim*, BUFFALO NEWS (Jan. 27, 2014), <http://buffalonews.com/2014/01/27/parents-of-high-school-football-player-who-died-file-claim/>, and a Michigan school refusing to disclose the amount of taxpayer money it paid to a family as a result of a hazing scandal and lawsuit, *Herald Pub. Co. v. Coopersville Area Pub. Sch.*, No. 09-01400-PZ (Ottawa Cty. Ct. 2010) (order granting summary disposition), <http://s3.amazonaws.com/cdn.getsnworks.com/spl/pdf/coopersville.pdf>.

⁴⁰ Sara Shepherd, *Two KU Fraternities Are on Probation for Hazing; University Won’t Say Why*, LAWRENCE J.-WORLD (Dec. 20, 2015), <http://www2.ljworld.com/news/2015/dec/20/two-ku-fraternities-are-probation-hazing/>. KU invoked FERPA to protect information that could cast the university in a negative light, as they still provided the names of the fraternities and the punishment but not the bad acts. Florida State University had a similar FERPA philosophy when it tried to use the law to block the release of reports detailing academic misconduct in its athletic program. Frank LoMonte, *FSU-NCAA Case is a Touchdown for Transparency, a Fumble for FERPA Fundamentalists*, STUDENT PRESS L. CTR. (May 26, 2010, 1:52 AM), <http://www.splc.org/blog/splc/2010/05/fsu-ncaa-case-is-a-touchdown-for-transparency-a-fumble-for-ferpa-fundamentalists>.

⁴¹ Sara Gregory, *N.C. State Judge Issues Decision in UNC FERPA Case*, STUDENT PRESS L. CTR. (Aug. 9, 2012, 6:08 PM), <http://www.splc.org/article/2012/08/n-c-state-judge-issues-decision-in-unc-ferpa-case?id=2425>. The misuse of FERPA to prevent the release of information that can result in civil liability, sanction by the National Collegiate Athletic Association, or embarrassment is widespread when it comes to college athletics. Jill Riepenhoff & Todd Jones, *Secrecy 101*, COLUMBUS DISPATCH (Dec. 17, 2010, 3:41 PM), <http://www.dispatch.com/content/stories/local/2010/10/14/secrecy-redirect.html> (describing how schools use FERPA to prevent the release of information concerning athletic department scandals).

in the dark.⁴² The same argument was made by the University of Illinois with regards to records of conversations between *administrators* about the “clout list,” a scandal where well-connected but academically subpar applicants received preferential admissions treatment from a public university.⁴³

The proliferation of bizarre FERPA interpretations and the lengths to which institutions will go to defend them underlie how easily this statute can be abused. In a case that unfolded at Laramie County Community College, the *Wyoming Tribune Eagle* acquired a leaked report of negligent conduct allegations against the school’s president on a student trip to Costa Rica.⁴⁴ In response to imminent publication, the college tried to get a *temporary restraining order* preventing the newspaper from publishing the report because the college claimed the report was covered by FERPA.⁴⁵ This is despite the fact that FERPA only applies to schools, not newspapers, and that the violation had already occurred via the initial leak from the college.⁴⁶

Such FERPA abuses are particularly disturbing when they involve the callous disregard of students’ rights. The University of Virginia cited FERPA when it refused to investigate a student’s rape complaint and threatened to discipline her unless she signed a confidentiality agreement regarding her case.⁴⁷ Georgetown University, the University of Central Florida, and several other schools echoed this refrain to explain why they also imposed gag orders on their students.⁴⁸ It took a ruling from the ED to stop these institutions from extracting promises of confidentiality as a price for using their campus judicial system.⁴⁹ These examples illustrate how schools have twisted FERPA from a law designed to promote institutional accountability and protect students’ rights into an excuse to conceal damaging information.

These misinterpretations cross the line from sloppy to malicious when student safety is at issue, such as when universities wrongfully cite FERPA to conceal how violent crime is reported and dealt with on campus. According to an investigation by the Center for Public Integrity, colleges routinely invoke FERPA to withhold

42 See, e.g., Kirwan v. Diamondback, 721 A.2d 196, 206 (Md. 1998) (“[W]e hold that ‘education records’ within the meaning of the Family Educational Rights and Privacy Act do not include records of parking tickets . . .”).

43 Tamar Lewin, *Privacy and Press Freedom Collide in University Case*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/education/21privacy.html>; Jodi S. Cohen, Stacy St. Clair & Tara Malone, *Clout Goes to College*, CHI. TRIBUNE (May 29, 2009), <http://www.chicagotribune.com/news/watchdog/chi-070529u-of-i-clout-story.html> (describing the “Clout List” scandal).

44 Michael Van Cassell, *LCCC Censors Story by WTE*, WYO. NEWS (May 22, 2010), http://www.wyomingnews.com/news/lccc-censors-story-by-wte/article_9e66d7aa-e3fb-50ee-bafc-b0895b12b053.html; SPLC PAPER, *supra* note 29, at 7.

45 SPLC PAPER, *supra* note 29, at 7.

46 20 U.S.C. § 1232g(a) (2012). FERPA only applies to “educational agencies or institutions,” which does not include subsidiaries of schools such as student groups or newspapers.

47 SPLC PAPER, *supra* note 29, at 7.

48 *Id.*

49 Trisha LeBoeuf, *Colleges Cannot Enforce Gag Orders on Sexual Assault Victims*, STUDENT PRESS L. CTR. (June 16, 2015, 4:09 PM), <http://www.splc.org/blog/splc/2015/06/colleges-cannot-enforce-gag-orders-on-sexual-assault-victims>.

information regarding how sexual misconduct proceedings are conducted.⁵⁰ To give just one example, Oklahoma State University cited FERPA when questioned as to why it declined to notify law enforcement of allegations that a fraternity member sexually assaulted nearly a dozen other members.⁵¹ This is despite the fact that crime records are explicitly exempt from FERPA and are actually required to be disclosed under the federal Clery Act.⁵²

How did FERPA morph from a law serving students to a tool wielded by universities to ward off negative press? The answers lie in the next section.

B. FERPA Cannot Be Enforced by Individuals and Will Not Be Enforced by the Government

The proliferation of FERPA misinterpretations is a byproduct of the virtually non-existent enforcement of the statute. The lack of an individual enforcement mechanism combined with the ED's refusal to get involved allows schools to interpret FERPA in any way they see fit. Without the credible threat of litigation or any form of reprimand for erroneous FERPA interpretations, there is no accountability for the numerous administrators who violate the statute with impunity. This raises the question: Is a law without consequences for defiance even a law?

1. Government Enforcement Action

Starting with the statute itself and its amendments, FERPA allows aggrieved parties to file a complaint with the Office of the Chief Privacy Officer detailing the FERPA violation.⁵³ This office, which serves under the ED, then notifies the institution, potentially leading to an investigation of the alleged violations.⁵⁴ The office can seek voluntary compliance from the violating schools or, if the school refuses, initiate proceedings to withhold federal funds.⁵⁵ Considering that such funding makes up a significant portion of many institutions' budgets, this has the potential to be a significant deterrent.⁵⁶ However, no such proceeding has ever been

⁵⁰ See Kristen Lombardi, *Sexual Assault on Campus Shrouded in Secrecy*, CTR. FOR PUB. INTEGRITY 9 (Dec. 1, 2009, 12:01 AM) (last updated Mar. 26, 2015, 5:21 PM), <https://www.publicintegrity.org/2009/12/01/9047/sexual-assault-campus-shrouded-secrecy>.

⁵¹ Allie Grasgreen, *Oklahoma State Didn't Report Sexual Assaults, Citing FERPA*, INSIDE HIGHER ED (Dec. 13, 2012), <https://www.insidehighered.com/quicktakes/2012/12/13/oklahoma-state-didnt-report-sexual-assaults-citing-ferpa>.

⁵² 20 U.S.C. § 1092(f)(3) (2012) (The Clery Act requires schools to not only disclose the records, but also to "make timely reports to the campus community on crimes considered to be a threat to other students and employees" such as a pattern of rapes in a particular area.).

⁵³ 20 U.S.C. § 1232g(g) (2012). The Office of the Chief Privacy Officer was originally called the Family Policy Compliance Office. 82 Fed. Reg. 6252, 6253 (Jan. 19, 2017) (codified at 34 C.F.R. pt. 99).

⁵⁴ 34 C.F.R. § 99.66(b) (2016).

⁵⁵ See 20 U.S.C. § 1232g(f) (2012) (voluntary compliance); 34 C.F.R. § 99.67(a)(1–3) (2016) (withholding of federal funds).

⁵⁶ In 2013, federal funding made up an average of 16% of the total budget of public colleges and universities. PEW CHARITABLE TRS., FEDERAL AND STATE FUNDING OF HIGHER EDUCATION 9 (June 2015), http://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf. Also, in 2013, public and private educational institutions received on average between \$700 and \$11,000 per student from the federal government. DONNA M. DESROCHERS & STEVEN HURLBURT, DELTA COST PROJECT AT AM.

initiated.⁵⁷ Despite having the power to reduce schools to financial ruin by terminating their federal funding, the Office of the Chief Privacy Officer's reluctance to even attempt to take this step has rendered FERPA a meaningless deterrent.

The totality of the federal government's efforts to enforce FERPA through the courts consists entirely of the ED's intervention in *United States v. Miami University*.⁵⁸ For the first and only time, the federal government sued a university for violating FERPA.⁵⁹ The decision in that case is noteworthy for two reasons. First, the court found that the ED has standing to bring suits to enforce FERPA.⁶⁰ Consequently, the ED knows they have the power to enforce FERPA—they just choose not to use it. Second, the ED intervened to *prevent* a school from releasing records subject to FERPA.⁶¹ This would seem to indicate that it construes FERPA as more of a student privacy statute than an open records statute, although it is difficult to make this determination based on a single case.

In the face of widespread confusion over what FERPA actually does, the ED's limited and isolated enforcement of the law has provided little clarity. Judging by this pitiful enforcement record, schools rationally have no reason to comply with FERPA and, unsurprisingly, proceed to violate it without consequence.⁶²

2. Individual Enforcement Action

One would believe the Family Educational *Rights* and Privacy Act grants rights that individuals can enforce. Not so. The ways in which students can enforce their rights are virtually nonexistent. This is because the Supreme Court decided in 2002 that aggrieved parties cannot enforce FERPA by suing under 42 U.S.C. § 1983, the

INST. FOR RES., TRENDS IN COLLEGE SPENDING: 2003–2013 at 22–23 (Jan. 2016), <http://www.deltacostproject.org/sites/default/files/products/154626%20Final01%20Delta%20Cost%20Project%20College%20Spending%2011131.406.P0.02.001%20.pdf>.

57 There is no evidence of any public records detailing such a proceeding taking place. See SPLC PAPER, *supra* note 29, at 3. This utter lack of enforcement has drawn the ire of courts. See, e.g., *Belanger v. Nashua Sch. Dist.*, 856 F. Supp. 40, 47 (D.N.H. 1994) (“[T]hough FERPA directs the Secretary of Education to enforce the statute, neither the statute nor the regulations gives an explicit remedy that would be beneficial to the plaintiff in resolving this claim.”) (internal citations omitted); *Krebs v. Rutgers*, 797 F. Supp. 1246, 1257 (D.N.J. 1992) (discussing the “complete inadequacy” of FERPA’s enforcement mechanisms as complainants are left “without any meaningful possibility of enforcement by the Secretary,” who “cannot be expected to threaten and/or act upon this drastic remedy for each and every minor FERPA violation, nor does this enforcement threat necessarily respond to the harm suffered by aggrieved individuals.”).

58 *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002).

59 *Id.* at 804.

60 *Id.* at 808. (construing Section 20 U.S.C. § 1234c(a), which allows the Secretary of Education to “take any other action authorized by law” when a school fails to comply with FERPA, to confer upon the ED standing to sue schools for FERPA violations).

61 *Id.* at 814–15 (the ED argued that student disciplinary records are education records as opposed to law enforcement records and thus may not be disclosed under FERPA).

62 The ED's lack of FERPA enforcement stands in stark contrast to its enforcement of the Clery Act, a law that, like FERPA, imposes requirements on colleges and universities. See Rob Arcamona, *Eastern Mich. U Agrees to Largest-Ever Fine for Violations of Crime Reporting Law*, STUDENT PRESS L. CTR. (June 2, 2008, 12:00 AM), <http://www.splc.org/article/2008/06/eastern-mich-u-agrees-to-largest-ever-fine-for-violations-of-crime-reporting-law>.

primary way individuals can enforce federal statutory and constitutional rights.⁶³ In *Gonzaga University v. Doe*, the Court held that a right can only be vindicated under § 1983 if it was “unambiguously conferred” by Congress to individuals through the text of the statute.⁶⁴ FERPA’s provisions failed to create such rights as they spoke “only in terms of institutional policy and practice” with “an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education’s distribution of public funds to educational institutions.”⁶⁵ Private parties are thus unable to bring suits to enforce FERPA, leaving enforcement entirely in the hands of the federal government.⁶⁶

Private parties can have a judge correct a school’s flawed FERPA interpretation in a roundabout way through suits brought under state open records laws.⁶⁷ However, this method of enforcement is limited exclusively to instances when the institution cites FERPA in denying a request under these laws, which forces the judge to rule on the validity of the school’s invoking of FERPA.⁶⁸ Since these suits are brought under open records laws rather than FERPA, they offer little recourse to litigants seeking to hold the schools accountable for FERPA violations. As a result, these suits are not a reliable way to enforce FERPA and should not be considered as such.

Without a means for individuals to sue institutions for violating FERPA, the Court left it up to the federal government to enforce the statute. However, this enforcement mechanism is nonexistent and toothless, as the prior section discussed.⁶⁹ So the Court left it up to the ED to enforce FERPA, and the ED left it up to no one in particular, thus resulting in a lack of enforcement. School administrators rationally see no reason to faithfully interpret and apply FERPA when faced with the impossibility of private enforcement and the near-certain improbability of government enforcement. Yet for the students who lack any independent way to enforce FERPA when their records are wrongfully released or concealed, they must ask: Is a right that cannot be enforced even a right?

63 *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002) (FERPA “entirely lack[s] the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights).

64 *Id.* at 283.

65 *Id.* at 288–90.

66 *Id.* at 287–90.

67 *See FERPA in the Twenty-First Century*, *supra* note 30, at 97–99 (discussing how public schools are regulated by open record laws that can be used by individual citizens and media organizations to request information from these institutions); *see generally* BRYAN ARNOLD, ABA, A SURVEY OF PUBLIC RECORD LAW —ISSUES AFFECTING STATE AND LOCAL CONTRACTS, BIDDERS, AND CONTRACTORS (May 2010), http://apps.americanbar.org/dch/thedl.cfm?filename=/PC500000/relatedresources/A_SURVEY_OF_OPEN_GOVERNMENT_LAWS.pdf. (overview of state open records laws).

68 *See infra* notes 74–78 and accompanying text (discussing cases where judges resolved conflicts between state open records laws and FERPA).

69 *See supra* Section 2(B)(I)

C. *There Is Confusion over How FERPA Interacts with Other Statutes*

A core problem with FERPA is the widespread confusion over how it interacts with other statutes.⁷⁰ This confusion has resulted in the aforementioned litigation and misinterpretation of the statute. The two biggest clashes are with state open records laws and the federal Clery Act.

1. Conflicts with State Open Records Laws

The conflict between FERPA and open records laws reflects the fundamental tension between privacy and transparency.⁷¹ This tension comes to a head when media organizations request records from public educational institutions and are rejected by the school, which claims that the records must be kept private under FERPA. In response, media organizations take the school to court for noncompliance with the open records law.⁷² In these cases, courts must sort through how FERPA, a law designed to protect student privacy, interacts with state open records laws, which have the sole purpose of promoting transparency and accountability in government.⁷³

In a seemingly easy solution to this problem, many open records laws incorporate statutes mandating the privacy of certain records, such as FERPA.⁷⁴ These exemptions for records that other laws prohibit from disclosure, called “otherwise prohibited” clauses, appear to settle the “FERPA versus open records law” battle in favor of FERPA. The logic goes as follows: FERPA prohibits schools from disclosing certain records, open records laws exempt records otherwise prohibited from disclosure by other laws, and therefore the records must remain private under FERPA. But there’s a twist.

70 Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U.L. REV. 617, 667 (“The greatest burden Buckley places on schools is dealing with its conflicts with other laws.”).

71 This concern is recognized by the many open records laws that exempt disclosures that would constitute an “unwarranted invasion of personal privacy.” See, e.g., CAL. GOV’T CODE § 6254(c) (West 2017) (exempting from disclosure “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”).

72 The student newspapers at the University of Kentucky and the University of Florida have each sued their respective institutions for using FERPA to refuse requests for records under state open records laws. Evelyn Andrews, *If You Can’t Beat ‘em, Sue ‘em*, STUDENT PRESS L. CTR. (Sept. 12, 2016, 1:35 PM), <http://www.splc.org/article/2016/09/if-you-cant-beat-em-sue-em-some-universities-are-taking-aggressive-legal-action-against-their-student-news-outlets>. A community college in Wyoming was also sued by media organizations for the same reason. Sommer Ingram, *Judge: FERPA Not Justification for Prior Restraint on Wyo. Newspapers*, STUDENT PRESS L. CTR. (May 5, 2010, 12:00 PM), <http://www.splc.org/article/2010/05/judge-ferpa-not-justification-for-prior-restraint-on-wyo-newspapers>.

73 See, e.g., 5 ILL. COMP. STAT. ANN. 140/1 (LexisNexis 2016) (“Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest [I]t is the public policy of the State of Illinois that access by all persons to public records promotes the transparency and accountability of public bodies at all levels of government.”).

74 See, e.g., WASH. REV. CODE ANN. § 42.56.070 (LexisNexis 2016) (allowing exceptions for any law that “exempts or prohibits disclosure of specific information or records.”).

2. Does FERPA Actually Prohibit Disclosure? It Depends

Courts are split on whether FERPA prohibits disclosure. While courts have uniformly construed open records laws in favor of disclosure by interpreting exemptions narrowly, they are inconsistent in their treatment of FERPA, resulting in a divergence of conflicting decisions.⁷⁵ This deep fracturing among our nation's foremost legal minds underlies the widespread misinterpretation of FERPA, as well as its uneven enforcement.

Several courts have found that FERPA fits squarely into the "otherwise prohibited" exemption to open records laws.⁷⁶ According to these courts, FERPA preempts open records laws and thus must be followed by schools.⁷⁷ This contrasts sharply with the approach of courts that construe FERPA to not prohibit anything because it only *conditions* the receipt of federal funds on complying with its terms.⁷⁸ These courts see FERPA merely as a carrot and a stick; compliance is a prerequisite for obtaining federal funds while noncompliance may entail the withholding of such funds.⁷⁹ According to this view, compliance is a voluntary decision by the school rather than mandatory prohibition imposed by the government—thus there is no conflict between FERPA and any "otherwise prohibited" clause.⁸⁰ As of today, it is

⁷⁵ See Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 URB. LAW. 65, 66 (1996) (explaining that in almost every state, courts have found "both a presumption in favor of disclosure of public records and a narrow construction of exemptions from disclosure."); see Mathilda Mcgee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. REV. 1045, 1059 (2012) (discussing the divergent and inconsistent approaches courts have taken in interpreting FERPA in the context of state open records laws).

⁷⁶ See, e.g., *United States v. Miami Univ.*, 294 F.3d 797, 811 (6th Cir. 2002) (finding no conflict between FERPA and Ohio's open records law because FERPA prohibits disclosure); *Unincorporated Operating Div. of Ind. Newspapers v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 904 (Ind. Ct. App. 2003) ("FERPA is a federal law which *requires* education records to be kept confidential.") (emphasis added).

⁷⁷ *Miami Univ.*, 294 F.3d at 811; *Unincorporated Operating Div. of Ind. Newspapers*, 787 N.E.2d at 904 (At least one court has held that FERPA preempts the entire field of student privacy law by making the disclosure of certain public records permissive rather than mandatory in every instance.) Roxann Elliott, *Daily Tar Heel Hits Stumbling Block in Records Lawsuit Against UNC*, STUDENT PRESS L. CTR. (May 15, 2017 7:17 PM), <http://www.splc.org/blog/splc/2017/05/daily-tar-heel-hits-stumbling-block-in-records-lawsuit-against-unc> (discussing ongoing litigation between the University of North Carolina, Chapel Hill and its student newspaper over UNC's refusal to release sexual misconduct records under the state open records law.).

⁷⁸ See, e.g., *Chi. Tribune Co. v. Univ. of Ill.*, 781 F. Supp. 2d 672, 675 (N.D. Ill. 2011) (citing the dictionary definition of "prohibit" in finding that FERPA poses no conflict with Illinois open records law), *vacated on other grounds*, *Chi. Tribune Co. v. Bd. of Trs. of the Univ. of Ill.*, 680 F.3d 1001 (7th Cir. 2012); *E. Conn. State Univ. v. Freedom of Info. Comm'n*, No. CV96 0556097 1996 Conn. Super. LEXIS 2554, *1, *7-8 (Conn. Super. Ct. Sept. 30, 1996) (categorizing FERPA as "merely a precondition for federal funds" and not an absolute prohibition on disclosure); *Bauer v. Kincaid*, 759 F. Supp. 575, 589 (W.D. Mo. 1991) ("FERPA is not a law which prohibits disclosure of educational records. It is a provision which imposes a penalty for the disclosure of educational records.").

⁷⁹ *Chi. Tribune Co.*, 781 F. Supp. 2d at 675; *E. Conn. State Univ.*, 1996 Conn. Super. LEXIS 2554 at *7-8; *Bauer*, 759 F. Supp. at 589.

⁸⁰ *Chi. Tribune Co.*, 781 F. Supp. 2d at 675; *E. Conn. State Univ.*, 1996 Conn. Super. LEXIS 2554 at *7-8; *Bauer*, 759 F. Supp. at 589; see also *Maynard v. Greater Hoyt Sch. Dist.* No. 61-4, 876 F. Supp. 1104, 1108 (D.S.D. 1995) (summarily holding that the state open records law is not preempted by FERPA); *Princeton City Sch. Dist., Bd. of Educ. v. Ohio State Bd. of Educ.*, 645 N.E.2d 773, 778 (Ohio Ct. App. 1994) (holding that the state open records law not preempted by FERPA because FERPA contains no prohibitions, only the denial of federal funds.).

an open question whether FERPA legally prohibits anything, wreaking havoc on the schools tasked with compliance.⁸¹

3. Perceived Conflicts Between FERPA and the Clery Act

Friction also exists between FERPA and the Clery Act, which requires colleges to disclose statistical information regarding criminal activities that occur on campus or near university property.⁸² Colleges must also provide the campus community with a “timely warning” of committed crimes that are “[c]onsidered by the institution to represent a threat to students and employees.”⁸³ However, this term only includes violations of college rules that are also crimes of violence as defined by the Federal Bureau of Investigation.⁸⁴ The goal is to promote safety by requiring colleges to provide students and the general public with information about crime in the educational community.⁸⁵

Legally, the Clery Act poses no conflict with FERPA. The Clery Act requires schools to disclose law enforcement records and other crime records—records that are categorically exempt from FERPA.⁸⁶ Thus, if an institution is required to disclose a record under the Clery Act, that record is not covered by FERPA.⁸⁷ FERPA and the Clery Act interlock with one another to protect student privacy while bolstering the safety of the educational community.

Despite the FERPA exemptions fitting neatly into the Clery Act, schools have manufactured conflicts by erroneously citing FERPA in refusing to disclose information required by the Clery Act. North Central College in Illinois inexplicably invoked FERPA to defend why it failed to disclose reports of ten sexual assaults over a three-year span.⁸⁸ Similarly, the previously discussed sexual assaults at Oklahoma State University also went unreported due to the university’s misinterpretation of

81 This split of authority has been noted by legal scholars. See, e.g., Mcgee-Tubb, *supra* note 75, at 1049, n. 24; *FERPA in the Twenty-First Century*, *supra* note 30, at 113; Rob Silverblatt, *Hiding Behind Ivory Towers: Penalizing Schools That Improperly Invoke Student Privacy to Suppress Open Records Requests*, 101 GEO. L.J. 493, 500–02 (2013).

82 20 U.S.C. § 1092(f) (2012).

83 34 C.F.R. § 668.46(a) (2016).

84 *Id.*

85 For example, a school would violate the Clery Act if it failed to disclose that a student was recently murdered on campus, which is exactly what occurred at Eastern Michigan University. Michael Beder, *Eastern Michigan U. Faces Largest-Ever Fines for Failure to Report Campus Crimes*, STUDENT PRESS L. CTR. (Dec. 19, 2007, 12:00 PM), <http://www.splc.org/article/2007/12/eastern-michigan-u-faces-largest-ever-fines-for-failure-to-report-campus-crimes>.

86 20 U.S.C. § 1232g(a)(4)(B)(ii) (2012) (exempting records maintained by a law enforcement unit of a school that were created by that law enforcement unit for the purpose of law enforcement); see Tamu K. Walton, *Protecting Student Privacy: Reporting Campus Crimes as an Alternative to Disclosing Student Disciplinary Records*, 77 IND. L.J. 143, 164 (2002) (“FERPA is not a barrier to complying with the disclosure requirements of the [Clery Act].”).

87 Walton, *supra* note 86.

88 Bill Bird, *Ten Sex Assaults at North Central in Three Years, Reports Show*, CHI. TRIB., (Mar. 21, 2016), <http://www.chicagotribune.com/suburbs/naperville-sun/news/ct-nvs-north-central-rape-cases-st-0320-20160319-story.html>.

FERPA, keeping the educational community and city police in the dark.⁸⁹ This pseudo-conflict poses dire consequences for student safety and institutional accountability as the public, and certainly the students living on campus, can only benefit from accurate information regarding dangerous criminal activity in their communities. It also creates perverse incentives for schools to falsely categorize violent crime as lesser offenses in order to avoid the Clery Act's reporting requirements and any resulting negative press.⁹⁰ This can potentially distort the public's perception of violent crime in campus communities.

D. Department of Education Shortcomings

The ED has done little to clear up the situation. On one hand, the ED has explicitly stated that "FERPA is not an open records statute or part of an open records system."⁹¹ The ED also intervened in the Miami University case arguing against disclosure of student disciplinary records under FERPA and was successfully sued by the SPLC for attempting to restrict universities from disclosing FERPA-exempt law enforcement records.⁹² This is in addition to the ED's outright refusal to enforce FERPA when universities abuse it to conceal newsworthy information.⁹³ These actions would lead one to believe that the ED construes FERPA as a privacy statute rather than as an open records statute.

Yet FERPA's stated purpose and legislative history detract from the ED's anti-open records stances. FERPA was enacted as a solution to the use of secret files by giving parents and students access to information maintained by their school.⁹⁴ There is also the ED's deafening silence regarding the many institutions that release student education records in violation of FERPA, which calls into question exactly what kind of law the ED believes FERPA to be.⁹⁵ The ED's inaction on enforcement sends

89 Tyler Kingkade, *Nathan Cochran Pleads Guilty to Sexual Battery at OSU, But Won't Face Prison*, HUFFINGTON POST (Sept. 23, 2013 2:34 PM), http://www.huffingtonpost.com/2013/09/23/nathan-cochran-sexual-battery_n_3975964.html. This is the rare case where the university convened a task force to investigate its use of FERPA, eventually finding that FERPA was misinterpreted. Tyler Kingkade, *OSU Sexual Assault Task Force Finds School 'Misinterpreted' Federal Privacy Laws*, HUFFINGTON POST (Feb. 26, 2013 1:12 PM), http://www.huffingtonpost.com/2013/02/26/osu-sexual-assault_n_2765577.html; see also COLUMBUS DISPATCH, *supra* note 32 (noting that twenty-two schools cited FERPA to avoid disclosing Clery Act crime statistics).

90 For example, schools can easily classify crimes that would trigger the Clery Act (assault and vandalism) as crimes that fall outside the act's requirement (disorderly conduct, trespassing) in order to avoid reporting them and harming their reputation. 20 U.S.C. § 1092(f) (2012).

91 Family Educational Rights and Privacy, 73 Fed. Reg. 74806, 74831 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99).

92 *United States v. Miami Univ.*, 294 F.3d 797, 814 (6th Cir. 2002); *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991).

93 See *supra* notes 56–61 and accompanying text (discussing the lack of government FERPA enforcement).

94 *Supra* notes 15–17 and accompanying text (discussing FERPA's legislative history).

95 See *FERPA in the Twenty-First Century*, *supra* note 30, at 111–12 (discussing lawsuits by students and parents against schools for unremedied FERPA violations such as disclosing student names and photos to truckers as part of a "trucker buddy" program; disclosing a medical student's records in response to a subpoena without first notifying the student; and sending a fax of a student-athlete's education records to several radio stations that broadcasted the student's poor academic performance).

conflicting messages to schools looking to the ED for guidance as to how to correctly interpret and apply FERPA.

The ED has also created confusion by conflating the distinction between education records and the information they embody. This distinction is crucial as FERPA only prohibits schools from releasing the *records* rather than the *actual information* contained therein.⁹⁶ For example, if a university administrator gave a newspaper a record of a student's grades, the administrator would be disclosing an education record in violation of FERPA. But if that same administrator simply told a journalist about a student's grades—even the exact same information contained in the education record—there is no FERPA violation because no records were disclosed.⁹⁷

However, the ED doesn't seem to recognize this distinction. According to the ED, the mere *disclosure* of information could violate FERPA, a notion that is incredibly problematic for schools and their employees.⁹⁸ For one, the ED's interpretation of FERPA would impose an incredibly broad and burdensome obligation on school employees to refrain from *discussing* the contents of education records. Considering the massive amount of information contained in the totality of an institution's education records, it is both unreasonable and impossible for all school employees to refrain from disclosing this information.⁹⁹ The ED's failure to adequately distinguish between the records and the information they contain makes applying FERPA a greater difficulty than it already is.

FERPA grants rights that cannot be enforced, protects privacy rights that can be violated without consequence, and promotes open records so long as those records do not embarrass the institutional record holder. It has decayed from a valiant attempt to promote privacy and transparency following the Watergate scandal into a gigantic rug under which schools sweep embarrassing information. The next section discusses how FERPA can be restored to its rightful purpose.

96 20 U.S.C.A. § 1232(g)(a)(4)(A) (West, Westlaw through Pub. L. No. 115-61) (defining "education records" as records, files, documents and other materials).

97 The Supreme Court has recognized the significance of this difference in *Owasso*, which narrowed what qualifies as an educational record. *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002).

98 73 Fed. Reg. 74,806, 74,832 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99) ("For example, it might be well known among students, teachers, administrators, parents, coaches, volunteers, or others at the local high school that a student was caught bringing a gun to class last month but generally unknown in the town where the school is located. In these circumstances, a school district may not disclose that a high school student was suspended for bringing a gun to class last month, even though a reasonable person in the community where the school is located would not be able to identify the student, because a reasonable person in the high school would be able to identify the student.").

99 For instance, how would the employees of Arizona State University refrain from disclosing the information contained in education records of over 70,000 enrolled students? ARIZ. STATE UNIV., ENROLLMENT TRENDS BY CAMPUS OF MAJOR (2016), <https://facts.asu.edu/Pages/Enrollments/Enrollment-Trends-by-Campus-of-Major.aspx>.

SECTION 3: MAKING FERPA GREAT, FOR ONCE

A. *Fixing FERPA's Scope*

1. We Need to Fix the Over-Classification of Records Under FERPA Because Privacy Rights Must Protect Private Information

Any proposed fix of FERPA must begin with the acknowledgement that its existence substantially curtails the public's right to know the operations of public schools, universities, and graduate schools. Because that right has a constitutional dimension (as limiting access to information limits the public's ability to report on government workings),¹⁰⁰ the scope of records protected by FERPA must be constrained to protect the public's right to know while also protecting legitimate privacy interests. Fortunately, our legal system has a long history of these balancing tests.

In its current incarnation, the ED simply denies the relationship between FERPA and state open records statutes.¹⁰¹ That denial is inconsistent with the ED's decision to file a lawsuit to prevent disclosure of records under state law in the 2002 case *United States v. Miami University*.¹⁰² If there was ever a time when the ED could seriously assert that FERPA does not interact with government transparency obligations, that ended when the ED used FERPA as a sword to curtail government transparency.

Even if we construe FERPA strictly as a privacy right, the enforcement of privacy rights is traditionally subject to limitations, including some constitutional limitations. At common law, the tort of public disclosure of private facts requires that the disclosure be highly offensive to a reasonable person.¹⁰³ Beyond that, the newsworthiness of the information is a defense against enforcement of a privacy right against someone engaged in the otherwise lawful exercise of their right to free expression.¹⁰⁴ And, of course, the information must actually be private to begin with.¹⁰⁵

100 The First Amendment itself may not create a constitutional right of access. *See, e.g.*, *Houchins v. KQED*, 438 U.S. 1 (1978); *But see id.* at 17 (Stewart, J., concurring) (“[The] terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.”) (suggesting that the denial of access to a record for the purpose of frustrating journalism could, indeed, violate the First Amendment).

101 *See* 73 Fed. Reg. 74,806, 74,831 (Dec. 9, 2008) (to be codified at 34 C.F.R. pt. 99) (“FERPA is not an open records statute or part of an open records system”).

102 294 F.3d 797 (6th Cir. 2002).

103 *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (AM. LAW INST. 1977) (stating that the tort arises “only when the publicity . . . is such that a reasonable person would feel justified in feeling seriously aggrieved by it . . .”).

104 *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (invalidating the application of a federal law prohibiting the disclosure of information obtained via illegal wiretap when the journalists had no reason to know of the illegal activity).

105 *See, e.g.*, *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308 (1977) (striking down injunction against publication of 11-year-old defendant's identity after the information was already published elsewhere).

FERPA has *none* of these contours. FERPA's language is mechanical; any record that meets its two-prong definition is drawn into its ever-expanding information void. Within that void, there is no opportunity to test the relative newsworthiness of the information sought. If such a test did exist, there would be no opportunity to apply it, because even a judicial order would likely result in the ED intervening to assert the blunt language of the statute.

Often, the information being protected by FERPA is not private to begin with, either because the student has shared that information with other individuals or because the subject matter of the record in question reveals nothing about the student at all, other than a name. In its present incarnation, FERPA suggests that the more the public knows about an incident, the more likely the record contains identifiable information, and therefore should be withheld.¹⁰⁶ FERPA is the only "privacy" statute in American history asserting that information is *more likely to be private* when it is *most likely already known*.¹⁰⁷

2. We Should Add the Unwarranted Invasion of Personal Privacy Standard to the Definition of an Education Record

The simplest way to bake the concept of privacy into the FERPA cake is to add the following limitation to the definition of an education record: "(3) contains information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

We have the advantage of knowing that this language would function effectively because we have seen it in the federal Freedom of Information Act ("FOIA"), where it has been effective for several decades. It was first adopted by Congress in the 1967 amendments to the Administrative Procedure Act of 1946,¹⁰⁸ exempting from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."¹⁰⁹ The same privacy test is used as one of the exemptions to the protection of law enforcement records.¹¹⁰

106 Under current regulations, schools are instructed to consider the knowledge of a "reasonable person in the school community, who does not have personal knowledge of the relevant circumstances," in determining whether a release of information would make a specific student identifiable. 34 C.F.R. §§ 99.3(f) (definition of personally identifiable information) and 99.31(b) (2016) (detailing when disclosure may be appropriate). The result: the more a records custodian subjectively believes the public knows about a situation, the less that custodian may statutorily disclose. Information related to something private is less likely to be known and therefore easier to disclose, until at some point, the public knows enough about that private information that it is no longer private, and therefore cannot be disclosed. For more, see *infra* note 120 and accompanying text.

107 *Cf.* THE PRINCESS BRIDE (20th Century Fox 1987) (statement of Inigo Montoya) ("You keep using that word. I do not think it means what you think it means.")

108 This would seem to track the tort standard—but there is no direct evidence of a relationship between the tort standard and the eventual law, in part because there is little public record of the meetings that led to its creation. The disclosure amendments to the Administrative Procedure Act of 1946 were part of a broad overhaul of that entire section; according to the Congressional Record, the amendments were the result of four years of work involving presidential conferences, the American Bar Association, and the agencies themselves. 113 CONG. REC. S90-1, 948 (daily ed. January 19, 1967) (statement of Sen. Dirksen).

109 5 U.S.C. § 552(b)(6) (2012).

110 § 552(7)(c).

A recent, if extreme, example of how courts can weigh privacy interests is the series of disputes over photos of detainees abused by American forces at Abu Ghraib.¹¹¹ At summary judgment, the Department of Defense (“DOD”) argued, among other things, that disclosure of the photographs would constitute an unwarranted invasion of the detainees’ personal privacy; the American Civil Liberties Union responded that the DOD and court could redact the photographs to protect the privacy of the detainees depicted.¹¹² The court rejected the argument that redaction would be ineffective because some photographs had been leaked, writing:

If, because someone sees the redacted pictures and remembers from earlier versions leaked to, or otherwise obtained by, the media that his image, or someone else’s, may have been redacted from the picture, the intrusion into personal privacy is marginal and speculative, arising from the event itself and not the redacted image.

Moreover, even were I to find an “invasion of personal privacy,” any further intrusion into the personal privacy of the detainees by redacted publications would be, with the exception of the small number described above, minimal and, under a balancing analysis, not “unwarranted” in light of the public interest policy of FOIA.¹¹³

The Supreme Court interpreted FOIA’s personal privacy exemption in 1991’s *United States Department of State v. Ray*.¹¹⁴ In *Ray*, an immigration lawyer representing a Haitian national seeking asylum sought copies of State Department interviews with unsuccessful Haitian asylum seekers in order to support a claim that his client would face retaliation if returned.¹¹⁵ The State Department produced twenty-five documents but deleted the names from seventeen of them, arguing that disclosing their identity would be a clearly unwarranted invasion of personal privacy.¹¹⁶ The Supreme Court agreed, looking to the purpose of the State Department in creating those interviews:

[T]he State Department considered the danger of mistreatment [sic] sufficiently real to necessitate that monitoring program. How significant the danger of mistreatment may now be is, of course, impossible to measure, but the privacy interest in protecting these individuals from any retaliatory action that might result from a renewed interest in their aborted

111 *ACLU v. Dep’t of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005), *aff’d*, 543 F.3d 59, 85–86 (2d Cir. 2008), *vacated on other grounds*, 558 U.S. 1042 (2009).

112 *Id.* at 572.

113 *Id.*

114 There are two parts of the federal FOIA that protect personal privacy. 5 U.S.C. § 552(b)(6) (2012) protects “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” while (7)(C) protects information gathered for law enforcement purposes. 502 U.S. 164 (1991).

115 The purpose of the monitoring program was to ensure that, pursuant to an agreement with the Haitian government, returnees were not being mistreated. *See Ray*, 502 U.S. at 166.

116 *Id.*

attempts to emigrate must be given great weight. Indeed, the very purposes of respondent's FOIA request is to attempt to prove that such a danger is present today.¹¹⁷

In *Ray*, the interviews were given under a promise of confidentiality—and still, the disclosure of the substance of those interviews was considered appropriate under FOIA once names were redacted.¹¹⁸ Compare that to the existing status quo under FERPA, where the protection of the privacy interest identified in its statutory title forms no part of the test that weighs whether the protection should apply.

Other exemptions to FOIA also provide instructive examples of how courts can effectively balance personal privacy rights against the public interest. In the 1974 case *National Parks & Conservation Ass'n v. Morton*, the U.S. Court of Appeals for the D.C. Circuit analyzed the meaning of the term “confidential” within exemption (4) to the FOIA, which protects confidential trade or financial information given to the government by private companies or citizens.¹¹⁹ The court interpreted the exemption as protecting both the governmental interest in withholding records and the privacy of the entities described in the records.¹²⁰ The case involved government-led audits of concession vendors at national parks; the district court had granted summary judgment to the government, saying the audits contained information about the businesses that “would not generally be made available for public perusal.”¹²¹

On appeal, the D.C. Circuit noted that finding the information would normally be private was not enough to justify refusing to disclose it here, and remanded, writing:

While we discern no error in this finding, we do not think that, by itself, it supports application of the financial information exemption. The district court must also inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy.

....

... The exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position.¹²²

In other words, a school looking to withhold a record under this new iteration of FERPA would need to do more than merely show that the record contains information that is not generally disclosed. The institution would have the further obligation of

117 *Id.* at 176–77.

118 *See id.*

119 5 U.S.C. § 552(b)(4) (2012).

120 *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767–68 (D.C. Cir. 1974).

121 *Nat'l Parks & Conservation Ass'n v. Morton*, 351 F. Supp. 404, 407 (D.D.C. 1972), *rev'd*, *Morton*, 498 F.2d at 765.

122 *Morton*, 498 F.2d at 769–70 (citations omitted).

determining that there is some reason to believe the information is actually private with respect to the requested individual(s).

Most of the abuses of FERPA discussed in Section 2 of this Article would be resolved by this new rule. For example, compare this approach to the ED's circular reasoning on privacy and disclosures of potentially identifiable information. In 2008, the ED promulgated a new standard for when information could be withheld from a requester: when a "reasonable person" in the "school community" would know the identity of the person to whom the information refers.¹²³ The ED explained:

In these circumstances, a school district may not disclose that a high school student was suspended for bringing a gun to class last month, even though a reasonable person in the community where the school is located would not be able to identify the student, because a reasonable person in the high school would be able to identify the student. The student's privacy is further protected because a reasonable person in the school community is also presumed to have at least the knowledge of a reasonable person in the local community, the region or State, the United States, and the world in general. The "school community" standard, therefore, provides the maximum privacy protection for students.¹²⁴

This represents a rarely seen example of a catch-484: a catch-22 *within* a catch-22.¹²⁵ The first catch-22 is that the student body cannot be told his identity because they already know his identity. The second is that this provides "maximum privacy protection" for a criminal act,¹²⁶ in which no one should have a right of privacy to begin with. So to protect a nonexistent privacy right, the ED has set a standard that no one can be told what he or she is reasonably likely to already know.¹²⁷ Our amendment resolves the situation cleanly and coherently by observing that there cannot be an unwarranted invasion of personal privacy if there is no privacy right to invade.

This new rule would also resolve the abuse of FERPA at the University of Illinois we discussed in Section 2.¹²⁸ Would the disclosure of letters identifying scholarship recipients constitute an invasion of privacy? That seems unlikely; the general rule is that, for a disclosure of fact to be an invasion of privacy, it has to be highly offensive to a reasonable person.¹²⁹ But even if we assume *arguendo* that the embarrassment of having political connections disclosed rises to the level of "highly offensive," such an invasion is not unwarranted in light of the abuse of public trust and public funds

123 Personally Identifiable Information and De-Identified Records and Information, 73 Fed. Reg. 74,830, 74,832 (Dec. 9, 2008) (codified at 34 C.F.R. §§ 99.3 and 99.31(b)).

124 *Id.*

125 484 is 22 squared.

126 See *supra* notes 123–25, and accompanying text; Gun Free School Zones Act, 18 U.S.C. §§ 921, 922(q) (2012).

127 Cf. Edward R. Murrow on Vietnam, 1969: "Anyone who isn't confused doesn't really understand the situation."

128 Lewin, *supra* note 43.

129 RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

involved in the scandal. While not every abuse of public trust would outweigh every privacy interest, the idea that someone got into a college through family connections would be hardly surprising, let alone offensive.

This change would also harmonize FERPA with larger policy goals.

3. As a Matter of Policy, We Should Not Create Privacy Rights Greater Than Public Interest Limitations on Privacy Rights Because Those Limits Have Constitutional Dimensions

In the definition of privacy rights protected under FOIA (and proposed in our fix of FERPA), the phrase “clearly unwarranted” is not merely a term of art or disposable poetry. Determining that the privacy right *exists* is only the first part of the inquiry. The second is to weigh that right against the public interest served by disclosure.

The public has a legitimate, even compelling, interest in the administration of its public schools. These are state-funded institutions where children spend a substantial portion of their waking hours until adulthood—and beyond, in the case of higher education. And yet, under FERPA, schools are entitled to outright deny access to the vast majority of the records they create and maintain, in the name of a hypothetical conception of privacy that comports with none of the limitations on privacy interests recognized by state and federal courts.

The public’s right to know, even in the face of information that would otherwise be private or embarrassing, was the key element in a 2005 decision from the Supreme Judicial Court of Maine. In *Blethen Maine Newspapers, Inc. v. State*, a newspaper publisher requested that the State Attorney General release records related to the investigation of sexual assault allegations against eighteen priests, all of whom were dead by that time.¹³⁰ The State Attorney General refused, citing that the disclosure would be an “unwarranted invasion of personal privacy” under state law for the living victims, witnesses, and relatives of the priests.¹³¹ Although it ordered redaction of identifiable information, the court ordered disclosure, finding “that [publisher’s] request satisfies the requirement of a substantial public interest that may warrant the invasion of personal privacy.”¹³²

This is not to say that all requests for information from a public school would inherently be in the public interest because of the public’s generalized right to know. Again looking at case law involving FOIA for guidance, fishing expeditions looking for wrongdoing are not in the public interest unless accompanied by compelling evidence of wrongdoing.¹³³ In the absence of a public interest in disclosure, there is

130 *Blethen Me. Newspapers, Inc. v. State*, 871 A.2d 523 (Me. 2005).

131 *Id.* at 528.

132 *Id.* at 534. Although the court acknowledged that the relatives of the priests identified might have a cognizable privacy interest in the information, it found that the public interest outweighed any privacy interest threatened by the redacted disclosures.

133 *See, e.g., Comput. Prof’ls for Soc. Resp. v. United States Secret Serv.*, 72 F.3d 897, 905 (D.C. Cir. 1997) (finding “no public interest that would be served” by disclosing records of Secret Service surveillance of computer enthusiast meeting).

no balancing test to be performed.¹³⁴ Applying that idea to our new FERPA privacy test, the failure to state an articulable public interest would, in theory, justify withholding a record under FERPA even where the privacy interests are low.¹³⁵ In the K–12 context, what constitutes a legitimate public interest in the disclosure of information about adults may not constitute a legitimate interest when that information pertains to children.¹³⁶

At present, however, schools are withholding documents of utmost public concern, as seen in this article’s discussion about the reporting of the SPLC and *The Columbus Dispatch* in Section II. In that example, one in five schools refused to turn over reports of students found responsible for violent crimes or sex offenses by campus panels, specifically citing FERPA as the reason; sixty percent refused to cite *anything* while withholding the documents.¹³⁷ These are documents specifically not protected by FERPA,¹³⁸ so these assertions are wrong as a matter of law. But as a matter of policy, withholding these documents is reprehensible and undermines student safety on campus. The Clery Act was enacted to ensure that students could obtain information about campus crime to protect themselves. Instead, universities will tell you how many rapes occur on campus, but won’t tell you when they believe they identified a rapist.¹³⁹

We will revisit the SPLC and *Dispatch* requests for records in our discussion of enforcement mechanisms, *infra*. But first, there is one more change to recommend to FERPA’s text.

4. FERPA’s Regulations Should Be Amended to Include College Applications in the Definition of Education Records

While the core problem with FERPA is its massive overreach and overclassification of records, there is at least one area where FERPA seems to under-

134 Nat’l Ass’n of Retired Fed. Emps. v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989) (skipping the balancing test after finding no public interest in disclosure of federal retiree mailing addresses because “something, even a modest privacy interest, outweighs nothing every time.”). At the same time, the inverse must also be true: in the absence of an articulable privacy interest, any public interest, however slight, would suffice to compel disclosure.

135 Note, however, that the public interest must be measured *independent* of the identity of the requester. See *Horner*, 879 F.2d at 875 (discussing that identity of the requesting party cannot be part of the test). For example, if a public library were to request copies of student drawings to illustrate a bulletin board advertising a school choir concert, the analysis must be divorced from the innocence of the details: there is no generalized public interest in disclosing student academic work.

136 If *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969), stands for the proposition that students possess constitutional rights contoured to the “special characteristics of the school environment,” it stands to reason that the privacy rights could also be “tailored.” Unlike speech rights, however, that tailoring would be to enlarge the scope of privacy within the school environment. As states possess the most developed education and privacy laws, it is likely unnecessary and unwise to determine that policy at the federal level.

137 COLUMBUS DISPATCH, *supra* note 32.

138 20 U.S.C. § 1232g(b)(6)(B) (2012).

139 The fact that such identification may be wrong in light of the absence of due process in these proceedings is hardly a defense for holding them in secret. Sunlight remains the best disinfectant.

protect privacy as the public might understand it: the applications of prospective students that do not yet attend the institution.¹⁴⁰

At present, FERPA protects the records of students, and students are defined as those *attending* an institution.¹⁴¹ A student who applies for admission but is either unsuccessful or chooses to attend another institution never becomes an “eligible student” in the eyes of the regulations, and therefore, those applications never become protected by FERPA.

This status quo should be amended because, in our view, FERPA must do what Senator Buckley intended, what Congress intended, and what the public understands it to do: protect education records. Even the Supreme Court fell back on the common sense understanding of FERPA in the *Owasso* case when it held that the statute’s use of the term “maintained” “suggests 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 student is no longer enrolled.”¹⁴² And yet, applications from non-matriculating students could well fit into the Supreme Court’s definition of a “maintained” record, but would not be covered by the language of FERPA at present.

B. Fixing FERPA’s Enforcement

1. The Office of the Chief Privacy Officer Should Handle Appeals for All FERPA Interpretations, Including Complaints of Over-Classification

Four months after FERPA was enacted, Congress added § 1232g(g), directing that the Secretary of Education create an office to oversee FERPA and providing that, except for hearings, “none of the functions of the Secretary under this section shall be carried out in any of the regional offices”¹⁴³ As the Supreme Court noted in *Gonzaga*, the purpose of this section was to avoid “multiple interpretations” that could create a hardship for the people FERPA was intended to protect.¹⁴⁴

In the decades since, the Family Policy Compliance Office has issued dozens of opinion letters, all of them designed to prohibit the disclosure of information protected by FERPA.¹⁴⁵

The problem is that under-classification of records has become exceptionally rare, primarily because there is no incentive to under-classify. Schools are already

140 A few states already prohibit the disclosure of some or all portions of application records. *See, e.g.*, IOWA CODE § 22.7(1) (2017) (requiring personal information about prospective students be kept confidential); UTAH CODE ANN. § 63G-2-305(28) (LexisNexis 2016) (protecting application materials, but not final decisions); TEX. GOV’T CODE ANN. tit. 5 § 552.114(a)(2) (West 2017) (including applications in the definition of education records). This recognition only serves to underscore that application materials are records of the type most people would understand to be education-related.

141 34 C.F.R. § 99.3 (2016) (definition of “eligible student”).

142 *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 433 (2002) (holding that peer grading does not constitute “maintenance” of records within the meaning of FERPA).

143 20 U.S.C. § 1232g(g) (2012); *see also* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002) (discussing history of § 1232g(g)).

144 *Gonzaga Univ.*, 536 U.S. at 290 (citing 120 CONG. REC. 39863 (1974) (joint statement)).

145 *See generally* FERPA ONLINE LIBRARY, <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/index.html> (last visited Feb. 14, 2017).

adequately motivated to be as opaque as possible with the public. Meanwhile, over-classification of records under FERPA has become a rampant problem, and one the ED has shown no interest in correcting.

Failing to enforce a logical and narrow reading of FERPA at the departmental level undermines the congressional goal of avoiding multiple interpretations of the statute. As long as the office refuses to hear complaints of over-classification, courts will reject FERPA applications on an *ad hoc* basis.¹⁴⁶ If FERPA is going to fulfill its intended purpose of protecting truly private information while permitting the disclosure of non-private information, the ED needs to take a more active role in determining when FERPA is being misused to withhold information. Accordingly, the Office of the Chief Privacy Officer ought to accept appeals on *all* contested applications of FERPA, including those interpretations that result in documents being withheld.

The negative effects of over-classification are everywhere. They are seen in *The Columbus Dispatch's* inability to obtain crime records; Lowndes High School's withholding of information about Kendrick Johnson's death from his parents;¹⁴⁷ Oklahoma State University's refusal to tell police about someone they believed to be a serial rapist;¹⁴⁸ and myriad other abuses far too numerous to meaningfully catalog here.¹⁴⁹ But under the present system, there is no clear avenue to pursue an appeal of a wrongful invocation of FERPA. For the policy reasons stated *supra*, that must change. FERPA's enforcement must include invoking a financial penalty against an institution that has a policy or practice of improperly hiding behind FERPA to frustrate public records access.

Our next step, then, is to craft that penalty.

2. To Create a Financial Disincentive to FERPA Abuse that Is Both Legal and Effective, the Regulations Interpreting FERPA Should Be Amended to Clarify that an "Educational Program" Can Include Any Segregable Portion of an Education Program

As we have discussed *supra*, FERPA's financial penalty—a complete loss of federal education funding—has never been invoked. In part, that is because the ED, quite correctly, views the total loss of funding as “a last resort when the Secretary

146 This is in part because FERPA applications are reviewed as defenses to state FOIA lawsuits. *See, e.g.,* Haughwout v. Tordenti, No. CV166032526, 2016 Conn. Super. LEXIS 2886, at *1 (Conn. Super. Ct. Nov. 17, 2016) (rejecting school's claim that FERPA prohibited disclosure of closed investigative file used to reach disciplinary expulsion); *see also* Red & Black Pub. Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (finding records about hazing are “not of the type the Buckley Amendment is intended to protect”); *State ex rel. The Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1996) (finding disciplinary records are not FERPA-protected because they are “non-academic in nature”); *Bauer v. Kincaid*, 759 F. Supp. 575, 590 (W.D. Mo. 1991) (finding incident reports are not FERPA-protected because “they do not contain the same type of information which a student is required to submit as a precondition to enrollment or attendance”).

147 *See supra* notes 35–37, and accompanying text.

148 *See* Grasgreen, *supra* note 51.

149 *See generally* STUDENT PRESS L. CTR., FERPA FACT (March 28, 2017), <http://ferpafact.tumblr.com>.

determines that compliance with FERPA cannot be achieved by voluntary means.”¹⁵⁰ But that is also partially because a complete loss of federal funding would shut down almost any institution receiving those funds.

That threat might make the FERPA penalty provision unenforceable as an unconstitutional restriction on the rights of the states. Understanding why requires a brief explanation of the spending power and federalism.

Under the Tenth Amendment to the Constitution, the federal government cannot directly compel the states to enact a federal regulatory program; as the Supreme Court has stated, the Constitution should be understood to create “an indestructible union, composed of indestructible states,” with states having authority to self-regulate.¹⁵¹ Instead, the federal government can encourage states to follow its objectives through its spending power, by making funding conditional on compliance. But the Supreme Court views the spending power as contractual, and as with any contract, its validity depends on “whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”¹⁵² FERPA is an exercise of this spending power, and it is therefore constitutional only if the state feels free to walk away from the table.

In *National Federation of Independent Business v. Sebelius*, the Supreme Court struck down part of the Affordable Care Act that threatened to withhold existing Medicaid funding if states rejected the ACA’s expansion of Medicaid eligibility.¹⁵³ The Court distinguished this from the “financial inducement” that Congress had offered states to raise the drinking age, which had been a potential loss of five percent of highway funds, or one-half of one percent of the state budget.¹⁵⁴

In this case, the financial “inducement” Congress has chosen is much more than “relatively mild encouragement”—it is a gun to the head The threatened loss of over 10 percent of a State’s overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.¹⁵⁵

A 2015 report from the Pew Charitable Trusts estimated that, in 2013, sixteen percent of higher education budgets came from the federal government—and that number was on the rise.¹⁵⁶ If the potential loss of ten percent of a state’s budget is a “gun to the head,” sixteen percent of an institution’s budget is presumably something more coercive than a gun to the head and, therefore, more likely to be struck down by the Court. Even the federal government itself had attempted to *defend* the

150 Letter from Paul Gammill, Dir., Family Policy Compliance Officer, to Zachary T. Fardon, Esq., Latham & Watkins LLP (Aug. 6, 2009) (included as exhibit to Response by Defendant University of Illinois Board of Trustees to Rule 56 Statement at 10, *Chi. Tribune Co. v. Bd. of Trs. of Univ. of Ill.*, 781 F. Supp. 2d 672 (N.D. Ill. 2012) (No. 10-00568) (citing 20 U.S.C. § 1232g(f)).

151 *Texas v. White*, 74 U.S. 700, 725 (1868).

152 *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

153 132 S. Ct. at 2605.

154 *Id.* at 2604.

155 *Id.* at 2604–05.

156 PEW CHARITABLE TR., FEDERAL AND STATE FUNDING OF HIGHER EDUCATION 9 (2015), http://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf.

Medicare expansion by arguing that, if that penalty was unenforceable, FERPA, among other laws, was also unenforceable.¹⁵⁷

One could have already noticed that FERPA acts as a “gun to the head.” In *Student Press Law Center v. Alexander*, the plaintiff sought to prohibit the ED from warning campus law enforcement not to turn over crime records (prior to the 1998 amendment making those records exempt from FERPA).¹⁵⁸ In rejecting the ED’s claim that the claim was not yet ripe because this was not an actual “enforcement” proceeding, the federal district court wrote:

[T]he [ED] may never render a “formal” ruling under the FERPA, because the agency always obtains voluntary compliance. Even without a formal complaint, the [ED] regularly achieves compliance through the manifestly coercive technique that it euphemistically labels as technical assistance letters.¹⁵⁹

If a court has already recognized that FERPA is so “manifestly coercive” that there may never be an actual enforcement action, and the enforceability of FERPA under the Tenth Amendment hinges on state participation being free and non-coerced, then FERPA may well be, in the words of a former director of the SPLC, a “dead statute walking.”¹⁶⁰

Redeeming FERPA’s penalty provision requires altering it to create a more granular enforcement model, one that would enable enforcement actions over smaller amounts of funding in a way that would be less coercive than a total loss of funding. The text of the statute requires that “[n]o funds shall be made available under any applicable program to any educational agency or institution” that violates FERPA.¹⁶¹ But the definition of what constitutes a “program” is in the regulations.¹⁶² A fix to that definition could solve this problem. The new definition would read (emphasis added):

Education program means any program, **or any segregable part or instance of a program**, that is principally engaged in the provision of education, including, but not limited to, early childhood education, elementary and secondary education, postsecondary education, special education, job training, career and technical education, and adult education, and any program that is administered by an educational agency or institution.

157 See Brief for Respondents (Medicaid) at 46–47, *Dep’t of Health and Human Servs. v. Florida* (No. 11-400), consolidated with *Sebelius*, 132 S. Ct. at 2566 (2012).

158 778 F. Supp. 1227 (D.D.C. 1991).

159 *Id.* at 1232.

160 Frank D. LoMonte, *Why FERPA Is Unconstitutional*, INSIDE HIGHER ED (Sept. 13, 2012), <https://www.insidehighered.com/views/2012/09/13/federal-privacy-law-should-be-deemed-unconstitutional-essay>.

161 20 U.S.C. § 1232g(a)(1)(A) (2012).

162 34 C.F.R. § 99.3 (2016) (definition of “education program”).

Once portions of a program qualify as “education programs,” fines can be tailored to match the offenses. If a release of an individual’s records violates FERPA, the federal funding the institution receives due to that student’s attendance (*e.g.*, loans, grants, work/study funds, etc.) would be an instance of an education program—and thus, an education program for which funds could be withdrawn without disturbing the larger funding picture. Similarly, if records are improperly withheld, federal funding that relates to the withheld records could be withdrawn, while funding for unrelated programs would remain undisturbed.

The ED’s ability to tailor these kinds of remedies was recently tested in *Association of Private Sector Colleges and Universities v. Duncan*.¹⁶³ Congress required the ED to measure whether graduates of certain for-profit and vocational schools (which received Title IV financial aid funding indirectly through their students) obtained “gainful employment” in a “recognized occupation.”¹⁶⁴ The colleges argued that any work for salary would meet this standard; the ED adopted a more complicated rule that, among other things, measured whether graduates would have enough money in discretionary income to make loan payments.¹⁶⁵

The federal district court upheld the ED’s definition.¹⁶⁶ The judge noted that the ED is statutorily granted the authority to govern “the manner of operation of”¹⁶⁷ education programs and “to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer” those programs.¹⁶⁸ In the words of the court, “[t]hese provisions fashion an awfully big umbrella, and it is no stretch to conclude that the 2014 disclosure regulations fall under it.”¹⁶⁹

Under that umbrella, then, we propose altering the definition of education programs to permit the administration of a FERPA enforcement mechanism that would actually be effectively utilized and would not offend the Constitution. And by “enforcement mechanism,” we mean a method of punishing both over-disclosures of private information *and* frivolous and abusive invocations of FERPA to frustrate open records laws.

3. *Gonzaga University v. Doe* Was Wrongly Decided and Should Be Overturned

In the *Gonzaga* case, the Supreme Court held that FERPA conferred no individual right of enforcement under § 1983, and that, more generally, a right

¹⁶³ 110 F.Supp. 3d 176 (D.D.C. 2015).

¹⁶⁴ 20 U.S.C. §§ 1002(b), 1002(c) (1998).

¹⁶⁵ See *Duncan*, 110 F.Supp. 3d at 183. The actual system used by the ED is described in full in the text of the case, but in short, the ED used two tests: one comparing debt to discretionary income, and one comparing debt to annual earnings. A school would fail the test if the median annual loan payment was both more than thirty percent of discretionary income and more than twelve percent of annual earnings. A program failing this test for two out of three consecutive years becomes ineligible for Title IV financial aid funding.

¹⁶⁶ *Id.* at 176.

¹⁶⁷ *Id.* at 199 (citing 20 U.S.C. § 1221e-3 (2012)).

¹⁶⁸ *Id.* (citing 20 U.S.C. § 3474 (2012)).

¹⁶⁹ *Id.*

granted by the federal government cannot be enforced unless the language of that grant is clear and unambiguous.¹⁷⁰

The strange nature of this decision is clear on its face: the Court opined that while § 1983 allows enforcement of federally conferred rights, the Family Educational Rights and Privacy Act never intended to confer any *rights* on individual *families*.¹⁷¹ *Gonzaga* should be reversed for all of the substantial reasons articulated in Justice John Paul Stevens' dissent,¹⁷² but there are additional reasons we will highlight here.

In reaching its conclusion, the *Gonzaga* majority placed some weight on the narrow scope of the potential remedies offered under Title 20 (that is, the Education Code, which includes FERPA), suggesting that the absence of a specific individual enforcement mechanism implied the lack of intent to make a right individually enforceable under *any* mechanism.

The *Gonzaga* majority compared FERPA to Title IV-D of the Social Security Act¹⁷³ and the Court's decision in a case interpreting that Title, *Blessing v. Freestone*.¹⁷⁴ Title IV-D permits the Secretary of Health and Human Services to reduce grants under an aid program to states that do not "substantially comply" with the requirements of the program.¹⁷⁵ In *Blessing*, five mothers in Arizona sued the director of the state child support services agency, arguing that the state's failure to "substantially comply" with its obligations under Title IV-D created liability under § 1983.¹⁷⁶

The *Blessing* court found that there was no enforceable right created under Title IV-D, and the *Gonzaga* court thought the same rationale applied to FERPA. In the words of the Court:

FERPA's nondisclosure provisions further speak only in terms of institutional policy and practice, not individual instances of disclosure. Therefore, as in *Blessing*, they have an "aggregate" focus, they are not concerned with "whether the needs of any particular person have been satisfied," and they cannot "give rise to individual rights[.]" Recipient institutions can further avoid termination of funding so long as they "comply substantially" with the Act's requirements. This, too, is not unlike *Blessing*, which found that Title IV-D failed to support a § 1983 suit in part because it only required "substantial compliance" with federal regulations.¹⁷⁷)

170 *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

171 *Id.* at 288–89.

172 *Id.* at 293.

173 42 U.S.C. § 651 (2012) *et seq.*

174 520 U.S. 329 (1997).

175 See Aid to Families With Dependent Children program, 42 U.S.C. § 601 *et seq.* (2012); *Blessing*, 520 U.S. at 333 (describing the obligations of the program); 42 U.S.C. § 609(a)(8) (2012) (authorizing the reduction for various types of "substantial noncompliance").

176 *Blessing*, 520 U.S. at 335–38.

177 *Gonzaga Univ. v. Doe*, 536 U.S. 273, 288 (2002) (citations omitted).

The problem is that the enforcement procedures that the Court is comparing have nothing in common except the words “comply” and “substantially,” and not in the same order.

Title IV-D requires a finding of a failure to substantially comply “on the basis of the results” of an audit or review authorized under the program.¹⁷⁸ In contrast, the Secretary of Education is authorized to act when he or she “has reason to believe that any recipient . . . is failing to comply substantially with any requirement” of applicable law.¹⁷⁹ Title IV-D permits only the discretion to reduce the size of the grant under that section by between one and two percent, escalating up to five percent on the third or subsequent violations; the Secretary of Education is permitted to cut funding, issue complaints, enter into compliance agreements, or “take any other action authorized by law.”¹⁸⁰

In other words, the act at issue in *Blessing* authorized a finite enforcement action that could only be taken at finite times. The act in *Gonzaga* authorizes any lawful enforcement action to be taken whenever the Secretary believes anything might be substantially noncompliant. The law supporting FERPA enforcement hardly suggests a congressional intent to limit the agency’s ability to enforce its provisions.

Adding to the inapplicability of this rationale is that *Blessing* was decided decades after FERPA was enacted.¹⁸¹ To the extent the crux of the *Gonzaga* decision is that Congress’ choice of language was not intended to create an enforceable right, it seems disingenuous to attribute significance to a choice of language that *had* no significance at the time it was chosen.¹⁸²

Rather than apply a standard of review that didn’t exist when FERPA was enacted, a more accurate method of gauging whether Congress intended FERPA to protect individual rights would be the Congressional Record. On the day FERPA was enacted, Senator Carl Curtis, a Nebraska Republican, submitted without objection into the Record a series of press releases and articles about FERPA.¹⁸³ One, an essay titled *Cumulative Records: An Assault on Privacy*, illustrated the concerns motivating the law with examples:

A secretary at a private tutoring agency calls a public junior high school to inquire about a child’s reading level. The principal opens the child’s record and gratuitously informs the unseen caller that the child has a history of bedwetting, his mother is an alcoholic, and a different man sleeps at the home every night. When the disclosures are reported to the

178 42 U.S.C. § 609(a)(8)(A) (2012).

179 20 U.S.C. § 1234c (2012).

180 See 42 U.S.C. § 609(a)(8)(B) (2012); 20 U.S.C. § 1234c(a)(4) (2012).

181 *Blessing* was decided in 1997; FERPA was enacted in 1974.

182 While the language of FERPA is significant, the choice of one drafting form or another would not have held the binary “on/off” significance that the Court would later give it. In light of the ambiguity of Congress’ intent in drafting structure, the decision to ignore other context clues with clear significance, such as the Congressional Record and the word “Rights” in the title, is peculiar.

183 120 CONG. REC. 36,528 (1974).

board of education, the principal denies the incident and his immediate superiors back him up.

A teacher of a child entering a new school gets this summary of the student's past academic year: "A real sickie - absent, truant, stubborn and very dull. Is verbal only about outside, irrelevant facts. Can barely read (which was huge accomplishment to get this far). Have fun."

A black father who works for the school system has a friendly teacher show him his bright daughter's "confidential" record. In it is a five-page critique of how his own community activities as a "black militant" are causing his daughter to be "too challenging" in class."¹⁸⁴

The *Gonzaga* ruling would suggest that Congress did not intend to create a right for individuals when it enacted a law self-described as creating rights and cited these individuals. Short of traveling to the future so they could read the Court's *Blessing* decision, it is not clear what else Congress could have done.

C. FERPA's Relationship to Existing Laws

1. FERPA's Relationship to State FOIA Laws and Federal Campus Safety Laws Should Be Clarified and Harmonized by These Reforms

If FERPA confers a personal privacy right, as we believe it does, then that right should be personally enforceable and protect only private information, and that is the goal of our proposed amendments. The existing FERPA, however, has been treated as creating something less than a personal privacy right, and as more akin to a regulation on educational institutions divorced from individual interests. But regulation of education should primarily rest with the states, because education is, and always has been, a state interest; and a state should be free to balance that interest against other interests, such as the need for transparency and accountability in schools. A review of state laws reveals that narrowing the focus of FERPA to personal privacy will correctly return management of non-private education records back to the states.¹⁸⁵

For our purposes of comparing state laws to FERPA, laws that penalize disclosure and laws that prohibit disclosure are treated interchangeably. Philosophically, one could debate whether FERPA is primarily intended as a single affirmative penalty to enforce privacy or merely as a restriction on disclosure that affects a privacy goal. That distinction is meaningless in the context of what

¹⁸⁴ Karen J. Stone & Edward N. Stoner II, *Revisiting the Purpose of FERPA*, STETSON U. 2 (Feb. 2012), http://www.stetson.edu/law/academics/highered/home/media/2002/Revisiting_the_Purpose_of_FERPA.pdf (citing Diane Divoky, *Cumulative Records: Assault on Privacy*, 2 LEARNING 18 (Sept. 1973), reprinted in 120 CONG. REC. S36528-31 (daily ed., Nov. 19, 1974)).

¹⁸⁵ A compilation of state laws invoking or referencing FERPA and student records privacy has been compiled by the authors of this piece and is attached as an Appendix. In the interest of space and clarity, string cites to state laws that fit a general profile will be omitted in favor of a reference to that document.

disclosures schools actually make, because in the absence of some obligation to disclose information, educational institutions—like *any* institution—default to a position of privacy to protect their own interests.

Ordering an educational institution to withhold information is like ordering a dog to eat a steak: you shouldn't assume compliance has anything to do with your involvement. If there is no functional distinction, then, between FERPA-as-penalty and FERPA-as-FOIA-exemption, then FOIA exemptions are comparable to FERPA. To the extent private information is in the possession of private institutions, private institutions are bound by privacy law and untouched by FOIA law, so there is no urgent need to restrict disclosure.

2. Once FERPA Only Prohibits the Release of Private Information for Unwarranted Reasons, There Should Be No Conflict Between State Open Records Laws and FERPA

At present, fifteen states fully incorporate FERPA by reference;¹⁸⁶ one other, South Carolina, incorporates FERPA at the K–12 level. Another nineteen states have state-level protections that are comparable to FERPA's existing federal form.¹⁸⁷ Factoring in laws less restrictive than FERPA, court decisions, and other sources of protection, only four states—Maine, New Mexico, Rhode Island, and Wyoming—are silent on the treatment of education records.¹⁸⁸

In its present form, FERPA conflicts with these state laws by mandating privacy of records that state law would otherwise indicate should be public, as evident in the *Miami University* case.¹⁸⁹ In other words, using the text of FERPA, the federal government sued a state entity to force the state to disobey a state court order interpreting a state law. And yet, FERPA lacks a valid enforcement mechanism; in fact, the *Miami University* case should never have been permitted to go forward, because the unduly coercive nature of FERPA's hypothetical contract with the states renders the contract defective, leaving the federal government without standing to bring an enforcement action.¹⁹⁰

Once FERPA's records protection is narrowed to protect only that information which would invade student privacy if disclosed, these conflicts vanish. In fact, every state already has some form of FOIA exemption for disclosures that would constitute an unwarranted invasion of personal privacy.¹⁹¹ State laws would once again control the disclosure of state education records, and states that prefer the older FERPA

186 Arkansas, Alaska, Arizona, Colorado, Delaware, Idaho, Indiana, Kentucky, Michigan, Montana, South Dakota, Texas, Utah, West Virginia, and Washington; see Appendix for citations.

187 Florida, Illinois, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin; see Appendix for citations.

188 See Appendix for the absence of citations.

189 See 91 F. Supp. 2d 1132 (S.D. Ohio 2000), *aff'd*, 294 F.3d 797 (6th Cir. 2002), *functionally overruling* State *ex rel.* The Miami Student v. Miami Univ., 680 N.E.2d 956 (Ohio 1997).

190 See 294 F.3d at 808–10 (finding the government's authority to enforce legislation pursuant to the spending power in the nature of contract enforcement). If the contract is unenforceable, then there is no standing to enforce it.

191 Arnold, *supra* note 67, at 7.

method could choose to enact such a regulation; but our belief is that, once states demonstrate the absence of adverse consequences for making some records available, states will choose that path.

3. Misuses of FERPA that Infringe on Clery Act Regulations Should Be Appealable Through Either the FERPA Enforcement Channel (i.e., the Office of the Chief Privacy Officer) or Through Clery Enforcement Channels

As abuses of FERPA to withhold Clery documents depend much more on interpretations of FERPA and its regulations than on interpretations of the Clery Act, violations of the Clery Act that depend on a FERPA interpretation should go the office most familiar with FERPA. And there is some precedent for permitting offices to overlap enforcement in this way; for example, some Title IX rights can be pursued through the mechanisms of the Clery Act.¹⁹² The nature of such complaints will make them hybrid questions of balancing student safety and individual privacy, making either office eligible, and it should be left to the complainant to choose the office with the enforcement mechanism best suited to address his or her needs.

D. Conclusion

If this reform of FERPA is viewed as radical, it is only because a radical change is necessary.

The status quo of FERPA is untenable. It creates a “right” that is not a right.¹⁹³ It cannot be enforced by individuals because of the *Gonzaga* decision.¹⁹⁴ It cannot be lawfully enforced by the government under the rationale in the *Sebelius* decision.¹⁹⁵ It protects information totally unrelated to privacy,¹⁹⁶ while failing to protect some information the public might think is private.¹⁹⁷ It interferes with state control of state-produced records.¹⁹⁸ It is regularly misused to frustrate access to public information, campus safety information, and records of students, non-students, and dependent children. FERPA in its current form is more of a risk to safety and privacy than anything we could propose in its place.

Our proposal, ultimately, is to create a FERPA that does “what the label says.” Taken as a whole, our reform of the Family Educational Rights and Privacy Act would turn the statute into: (1) a right; (2) to privacy, as the law has evolved to define it; (3) in education records; (4) enforceable by students, families, and the government. It is not the *only* privacy law protecting student records; it is the federal baseline on which states can build, either with their own state-level education records provisions

¹⁹² See generally TAKING LEGAL ACTION UNDER THE CLERY ACT, KNOW YOUR IX, <https://www.knowyourix.org/legal-action/taking-legal-action-clery-act/> (last visited Mar. 27, 2017).

¹⁹³ See *supra* notes 62–65, and accompanying text.

¹⁹⁴ See *id.*

¹⁹⁵ See *supra* notes 148–57, and accompanying text.

¹⁹⁶ See, e.g., *supra* notes 32–51, and accompanying text.

¹⁹⁷ See, e.g., *supra* note 95, and accompanying text.

¹⁹⁸ See *supra* note 186, and accompanying text.

or general privacy laws. And unlike the existing FERPA, our FERPA is far less prone to abuse, as it permits enforcement against entities that over-classify records to the detriment of students, parents, or the public. Students and families across the country would benefit from these changes, as would the educational institutions thereby provided with greater clarity on the issue.

APPENDIX

	Fully incorporates FERPA by reference	Incorporates limited part of FERPA	State-level student record statute comparable to FERPA	State-level statute protecting limited student records (i.e., narrower than FERPA)	Non-statutory protection specific to student records (caselaw, attorney general opinions, etc.)	Other	Notes
Alabama	—	—	—	—	Executive Order No. 6 (May 21, 2015) (data in state Longitudinal Date System not available to the public).	—	
Alaska	Alaska Stat. § 40.25.120(a)(5) (2014).	—	—	—	—	—	
Arizona	Ariz. Rev. Stat. § 15-141 (2012).	—	—	—	—	—	
Arkansas	Ark. Code § 25-19-105(b)(2) (2010)	—	—	—	—	—	
California	—	—	—	Calif. Educ. Code §§ 49060 to 49075 (2017) (K-12 records only).	<i>Rim of the World Univ. Sch. Dist. v. Superior Ct.</i> , 104 Cal. App. 4th 1393, 129 Cal. Rptr. 2d. 11 (2003) (state law preempted by FERPA).	—	
Colorado	Colo. Rev. Stat. § 24-72-204(3)(e).	—	—	—	—	—	

Connecticut	—	—	—	Conn. Gen. Stat. § 1-210(b)(11) (names and addresses of students).	<p><i>Univ. of Conn. v. FOIC</i>, 585 A.2d 690 (Conn. 1991) (withholding names of university employees who are also students);</p> <p><i>Hartford Bd. of Educ. v. FOIC</i>, No. CV 95-055564, 1997 WL 15422 (Conn. Super. Ct. 1997) (release of names of parents prohibited);</p> <p><i>Eastern Conn. State Univ. v. FOIC</i>, No. CV 96-0556907, 1996 WL 580 996 (Conn. Super. Ct. Sept. 30, 1996) (permitting release of recordings from student disciplinary hearing).</p>	—	
Delaware	Del. Code. Ann. tit. 14, §200.	Del. Code. Ann. tit. 14, § 4111(b)(2) (disclosures of records to state agencies shall comply with FERPA regulations).	—	—	—	—	

District of Columbia	—	—	—	D.C. Code § 38-607 (student health information only).	—	—	
Florida	—	—	Fla. Stat. § 228.093(3)(d) (1995); see also 212.23(1), 250.237.	—	—	—	
Georgia	—	—	—	—	<i>Red & Black Publishing Co. v. Bd. of Regents</i> , 427 S.E. 2d 257 (1993) (records subject to disclosure except where prohibited by FERPA).	—	
Hawaii	—	—	—	—	OIP Ltr. No. 94-10 (May 4, 1995) (applications are private).	—	
Idaho	Idaho Code § 9-304A(1).	—	—	—	—	—	

Illinois	—	—	5 Ill. Comp. Stat. 140/7(1)(j) (protecting disciplinary records, test questions, student evaluations, and course materials); 105 Ill. Comp. Stat. 10/1 <i>et seq.</i> (protecting identifiable primary and secondary school records).	—	<i>Bowie v. Evanston Comm'ty Consol Sch. Dist. No. 65, 538 N.E.2d 557 (1989)</i> (permitting disclosure of de-identified records).	—	
Indiana	Ind. Code § 5-14-3-4(a)(3).	—	—	—	—	—	
Iowa	—	—	Iowa Code § 22.7.	—	—	—	
Kansas	—	—	—	Kan. Stat. Ann. § 45-221(a)(17) (2014) (protects applications, financial statements, and information submitted for financial aid purposes).	—	—	
Kentucky	Ky. Rev. Stat. § 61.878(1)(k).	—	—	—	—	—	
Louisiana	—	—	—	—	Op. Atty. Gen. 02-0040 (student records protected when release would invade privacy).	—	

Maine	—	—	—	—	—	—	This row intentionally blank.
Maryland	—	Md. G.P. § 4-355(a)(2)(5) (2015) (definition of directory information).	Md. G.P. § 4-313 (2015).	—	—	—	
Massachusetts	—	—	603 CMR 23.07.	—	—	—	
Michigan	Mich. Comp. Laws § 15-243(2).	—	—	—	<i>Kestenbaum v. Mich. State Univ., 327 N.W. 2d 783 (1982) (state can withhold student directory information on computer tape even though it publishes a paper directory on the grounds that the digital release of information is hypothetically more intrusive).</i>	Mich. Comp. Laws § 15-243(1)(q) permits state institutions to withhold academic transcripts for anyone who is delinquent in their payments to the institution.	
Minnesota	—	—	Minn. Stat. § 13.32 (2016).	—	—	—	
Mississippi	—	Miss. Code § 37-15-3 (2013) (inspection/disclosure to parent or eligible student).	Miss. Code § 37-15-3 (prohibiting release of records to the public, other than those eligible for disclosure under FERPA's inspection requirements).	—	—	—	

Missouri	—	—	Mo. Rev. Stat. §§ 610.021(6) (protecting “scholastic, probation, expulsion, or graduation” records) and (7) (test records and scores).	—	—	—	
Montana	Mont. Admin R. § 10.55.909(2).	—	—	—	—	—	
Nebraska	—	—	Neb. Rev. Stat. § 79-2,104.	—	—	—	
Nevada	—	—	—	—	—	—	<i>Donrey v. Bradshaw, 798 P.2d 144 (Nev. 1990) (imposing a privacy balancing test on all records disclosures).</i>
New Hampshire	—	—	N.H. Rev. Stat. §§ 189.65, 189.67 (2014).	—	—	—	
New Jersey	—	—	N.J. Admin. Code §§ 6A:32-2.1, 7.5, 7.6 (school district records); N.J. Stat. Ann. §47:1A-1.1 (GRC exemptions No. 16 and 17) (higher education records).	—	—	—	

New Mexico	—	—	—	—	—	—	This row intentionally blank.
New York	—	—	—	—	—	<i>Board of Educ. v. Regan, 500 N.Y.S.2d 978 (Sup. Ct. 1986) (denying access to student financial information under FERPA).</i>	
North Carolina	—	—	N.C. Gen. Stat. §§ 115C-402.5, 115C-402.15 (imposing affirmative K-12 obligation to maintain record privacy); N.C. Gen. Stat. § 132-1.1(f) (exempting student records from disclosure at public colleges).	—	—	—	
North Dakota	—	—	—	—	—	N.D. Cent. Code § 15-10-17(7) (requires state board of higher education to adopt rules to protect student record privacy)	

Ohio	—	Ohio Rev. Code § 3319.321(2)(a) (restrictions on disclosure of directory information).	—	Ohio Rev. Code § 3319.321 (secondary schools).	<i>U.S. v. Miami Univ.</i> , 91 F.Supp.2d 1132 (S.D. Ohio 2000) (prohibiting disclosure of records under FERPA despite state supreme court's ruling that they could be disclosed); see also <i>State ex rel. The Miami Student v. Miami Univ.</i> 680 N.W.2d 967 (1997).	—	
Oklahoma	—	Okla. Stat. tit. 70, § 3-168(2) (requires all educational institutions to adopt FERPA-consistent policies).	Okla. Stat. tit. 51, § 24A.16.B and Okla. Admin Code § 210.1-3-8.1.	—	—	—	
Oregon	—	Or. Admin. R. § 581-021-0220 (authorizes complaints with state law violations through federal FERPA enforcement procedures).	Or. Admin. R. §§ 581-021-0220k 2050, 0330 and 0340.	—	—	—	
Pennsylvania	—	—	—	Pa. Code § 708(b)(15)(i) (exempts transcripts from disclosure under FOIA).	—	—	

Rhode Island	—	—	—	—	—	—	This row intentionally blank.
South Carolina	—	S.C. Code § 59-1-490(B)(1) (state department of education to adopt policy using FERPA as “minimum” protection level; K-12 records only); S.C. Code § 59-101-210(A)(4) (state-mandated hazing reports must not include FERPA-protected information).	—	—	—	—	
South Dakota	S.D. Codified Laws § 1-27-1.5(1) (exempting disclosure of personal information except when FERPA-defined directory information); S.D. Codified Laws § 13-3.51 to 51.6 (governing K-12 and post-secondary technical schools).	—	S.D. Codified Laws § 1-27-1.5(1).	—	—	—	

Tennessee		—	Tenn. Code Ann. § 10-7-504.				
Texas	Tex. Gov't Code § 662.026; 552.114(1) (permitting disclosure of information when consistent with FERPA).	—	—	—	—	—	
Utah	Utah Code § 53A-13-301.	—	Utah Code § 53A-A-1409 (effective 2017-2018 school year) (requires disclosures comply with both FERPA and this section, which limits disclosures to only those authorized by state law or required under FERPA).	—	—	—	
Vermont	—	Vt. Stat. Ann. tit 1, §17(c)(11) (2012) (incorporating FERPA's authorized disclosure provisions).	Vt. Stat. Ann. tit. 1, §317(c)(11) (2012) (exempting student records from disclosure).	—	—	—	
Virginia	—	—	Va. Code. Ann. §§ 2.2-3701 and 2.2-3705.4.	—	—	—	

Washington	Wash. Rev. Code § 28A.605.030.	—	—	—	—	—	
West Virginia	W. Va. Code § 18-2-5h(c)(2) and (f)(2).	—	—	—	—	—	
Wisconsin	—	—	Wis. Stat. § 118.125(2).	—	—	—	
Wyoming	—	—	—	—	—	—	This row intentionally blank.