American University Law Review

Volume 51 | Issue 1 Article 1

2001

Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records

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Keywords
Family Educational Rights and Privacy Act ("FERPA"), acecess rights, educational interests, confidentiality, school records

ARTICLES

RECOGNIZING SCHOOLS' LEGITIMATE EDUCATIONAL INTERESTS: RETHINKING FERPA'S APPROACH TO THE CONFIDENTIALITY OF STUDENT DISCIPLINE AND CLASSROOM RECORDS

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INTRODUCTION

In schools all over America, student artwork and other papers are displayed on classroom walls, and students grade one another's work. Less comfortably, in schools all over America, when schools determine that students have engaged in sexual harassment or other misconduct, their victims and sometimes the student body are informed of the sanctions imposed on the misbehaving student. Under the definition of "education records" in the Family Educational Rights and Privacy Act (FERPA),[1] as recently interpreted

1. 20 U.S.C. § 1232g (1994 & Supp. 2001) (enumerating those records, files, documents, and other materials that fall under the definition of "education

by federal courts, each of these actions may violate federal law, and in the case of public schools, may expose the school to liability under civil rights statutes.[2]

This Article explores the scope of "education records" covered by FERPA and the implications of the definition for school practices such as those mentioned above. The Article begins with a summary overview of FERPA, the federal statute that regulates access to student records.[3] Part II then examines separately, and in more detail, the statutory and regulatory language concerning the scope and definition of "education records" under FERPA. In Part III, special attention is paid to recent federal court decisions on the scope of education records, with emphasis on two controversial sub-issues: (1) whether discipline records are records under FERPA, and (2) whether grades on student-graded tests and papers that are not turned in to the teacher are themselves FERPA records. Part IV of the article concludes that under FERPA's plain language, regulations, and legislative history, both student discipline records and grades on peer-graded student papers are education records covered by FERPA. While this result is clear as a matter of statutory interpretation, it is also unworkable, and in some respects pedagogically unsound. For example, the decisions limit schools' ability to have students grade one another's work, to display student work, and to inform student victims about discipline taken against student wrongdoers. This Article suggests that Congress should amend FERPA to address these concerns. Specifically, FERPA should provide that under circumstances like these, schools may identify legitimate educational interests in limited disclosure of education records.

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records").

2. *See, e.g.*, cases cited *infra* note 62.

3. Portions of the following review of FERPA in Parts I and II of this article were adapted from Dixie Snow Huefner & Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. REP. 469 (2001).

I. OVERVIEW OF FERPA[4]

FERPA (also known as the Buckley Amendment),[5] provides generally that student records: (1) are to be kept confidential, with access to third parties only with parent consent,[6] (2) may be accessed on request by the student's parents,[7] and (3) may be challenged by parents if claimed to be misleading, inaccurate, or in violation of students' privacy rights.[8] FERPA also requires schools to notify parents of their FERPA rights.[9] First enacted in 1974, FERPA has been amended by Congress seven times, most recently in October,

4. For recent academic commentary on FERPA, see Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617 (1997) [hereinafter *Daggett I*], which provides a comprehensive overview of FERPA, and argues that Congress' and the courts' lack of attention to FERPA is cause for concern to parents, students, and schools; Lynn M. Daggett, *Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE L. REV. 29 (1997) [hereinafter *Daggett II*]; Thomas A. Mayes & Perry A. Zirkel, *Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate that Schools Comply with FERPA?*, 8 J.L. & POL'Y 455 (2000), which addresses conflict between statute and regulations concerning release of special education records to police when a criminal referral of a disabled student is made; Maureen P. Rada, Note, *The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How it Can be Undone*, 59 OHIO ST. L.J. 1799 (1998) arguing for a FERPA amendment that tells universities that student disciplinary records are not protected "educational records" and suggesting that universities need to affirmatively disclose information regarding crime on campus; Benjamin Sidbury, Note, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress Can Eliminate the Loophole*, 26 J.C. & U.L. 755 (2000) addressing the problems of the 1998 amendment to FERPA and arguing to amend FERPA to require universities to disclose student disciplinary records relating to all criminal offenses to third parties.

For general FERPA resources, see generally Family Policy Compliance Office Website, *at* http://www.ed.gov/offices/OM/fpco/ (last modified Sept. 7, 2001), which includes FERPA regulations, model policies, and a FERPA online library of letters of finding); National Center for Education Statistics, *Statistical Analysis Report: Protecting the Privacy of Student Records: Guidelines for Education Agencies*, *at* http://nces.ed.gov/pubs97/97527.html (last modified July 1997), which provides a comprehensive overview of FERPA and sample forms; JAMES A. RAPP, EDUCATION LAW §§ 13.04, F7.03, T7 (M. Bender 2001), which provides a comprehensive overview of FERPA in section 13.04, provides sample student records forms and policies in section F7.03, and lists state student records laws in section T7; John Theumann, Annotation, *Validity, Construction and Application of Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C.A. § 1232g)*, 112 A.L.R. FED. 1 (1993) analyzing the decisions in which state and federal courts have considered the construction, application, and validity of various FERPA provisions.

5. 20 U.S.C. §1232g; Family Educational Rights and Privacy, 34 C.F.R. pt. 99 (2001) (setting forth FERPA regulations).

6. *See* 20 U.S.C. § 1232g(b)(1)-(b)(2) (defining the parental consent requirement and exceptions to this requirement).

7. *See id.* § 1232g(a)(1)(A) (requiring educational agencies and institutions to establish procedures for granting parental requests of their children's educational records as a condition of receiving federal education funds).

8. *See id.* § 1232g(a)(2) (establishing the parental right to challenge the content of their child's education records).

9. *See id.* § 1232g(e) (requiring educational agencies and institutions to inform "effectively" parents or adult students of their rights under this section).

2000.[10] FERPA regulations were also significantly amended in the summer of 2000.[11]

FERPA is spending clause legislation. Rather than a mandate, FERPA requirements are conditions attached to the receipt of federal education funds.[12] No specific federal funding is attached to FERPA.[13] Because FERPA was initially passed by Congress as an attachment to a bill,[14] there is no significant legislative history for FERPA's original provisions. Each amendment of FERPA has been included as a small segment of more comprehensive legislation,[15] which also has limited the legislative history for FERPA. Congress has never written legislation focusing exclusively or primarily on student records.[16]

While FERPA has never taken much of Congress's time or energy, its coverage is exceedingly broad. FERPA covers the vast majority of

10. Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858-62 (1974) (codified as amended at 20 U.S.C. § 1232g (1974)); Pub. L. No. 96-46 § 4(c), 93 Stat. 338, 342 (1979) (codified as amended at 20 U.S.C. § 1232g(b)(5) (1994)); Student Right-to-Know and Campus Security Act, Pub. L. No.101-542, § 204, 104 Stat. 2381, 2385-87 (1990) (codified as amended at 20 U.S.C. § 1092 (1994)); Higher Education Amendments of 1992, Pub. L. No. 102-325, § 1555(a), 106 Stat. 448, 840 (1992) (codified as amended at 20 U.S.C. § 1232g(a)(4)(B)(ii) (1994)); Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of 20 U.S.C.); Higher Education Amendments of 1998, Pub. L. No. 105-244, §§ 951-952, 112 Stat. 1581, 1835-36 (codified as amended at 20 U.S.C. 1232g (1998)); Campus Sex Crimes Prevention Act, Pub. Law No. 106-386 § 1601(d), 114 Stat. 1464, 1538 (2000) (codified as amended at 20 U.S.C. § 1232g (2000)).

11. Family Educational Rights and Privacy, 65 Fed. Reg. 41,852 (July 6, 2000) (codified at 33 C.F.R. pt. 99). On June 1, 1999, the Department of Education proposed new FERPA regulations. Proposed Rulemaking Notice, 64 Fed. Reg. 29,532 (June 1, 1999). The proposed regulations fleshed out the new statutory language and proposed amending FERPA in a number of other areas including the sole possession notes exception, the categories of directory information, and the exemption for disclosure of a student's records when that student is in litigation with a school. After receiving comments from forty-two parties and making a number of changes, the Department published final regulations on July 6, 2000, which took effect August 7, 2000. 65 Fed. Reg. 41,852, 41,852 (July 6, 2000).

12. *See* 20 U.S.C. § 1232g(a)(1)(A)-(B) (1994 & Supp. V 1998) (elaborating the conditions for the availability of funds to educational agencies or institutions).

13. FERPA is part of the Federal General Provisions Concerning Education (GEPA), 20 U.S.C. 1221, a set of unfunded conditions on the receipt of federal education funds.

14. Education Amendments of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974) (codified as amended at 20 U.S.C. § 1232g (1974)).

15. For example, Congress most recently amended FERPA in Sections 951 and 952 of the Higher Education Act of 1998. Pub. L. No. 105-244, §§ 951-952, 112 Stat. 1581, 1835-36 (1998) (codified as amended at 20 U.S.C. § 1232g (1998)). Principal among these changes were increasing postsecondary institutions' ability to (1) disclose the results of discipline proceedings where the student's conduct amounted to certain enumerated violent or sex crimes, *id.* at § 951(2), and (2) disclose some adult students' drug and alcohol problems to their parents. *Id.* at § 952.

16. *See Daggett I, supra* note 4, at 617-18 (criticizing Congress' lack of attention to student records and FERPA regulations).

American schools. Any educational agency, public or private, K-12 or postsecondary, that (1) (a) provides education services or instruction, or (b) is authorized to direct and control public K-12 or postsecondary educational institutions, and (2) receives federal education funds (including federally guaranteed student loans) is subject to FERPA.[17] If one part of an educational agency receives funds, FERPA applies to the entire agency.[18]

A. FERPA Access Rights

1. Who has FERPA "access" rights?

The only group given actual rights by FERPA are parents and adult students.[19] FERPA defines "parent" broadly and gives full rights to either biological parent, and also to some caretakers who are not biological parents.[20] "Parent" rights transfer to students when students reach the age of eighteen or enroll in a postsecondary institution [hereinafter "adult students"].[21]

2. What "access" means

Parents and adult students have the right, upon request, to access their own (child's) records within a "reasonable" time, and no later than forty-five days after the request.[22] "Access" generally refers to in-person inspection of the original records, but in most cases does not entitle parents to obtain photocopies of the records.[23]

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17. *See* 20 U.S.C. § 1232g(a)(3) (providing that the term "educational agency or institution" means "any public or private agency or institution which is the recipient of funds under any applicable program"); Family Educational Rights and Privacy, 34 C.F.R. § 99.1 (2001) (articulating the educational agencies or institutions to which FERPA regulations apply). Because the federal Department of Education does not provide funds to itself, it is not covered by FERPA. Parks v. Dep't of Educ., 2000 WL 62291, at *3 (D. Or. Jan. 26, 2000) (unpublished decision).

18. 34 C.F.R. § 99.1(d).

19. 20 U.S.C. § 1232g(a)-(b).

20. 20 U.S.C. § 1232g. *See* 34 C.F.R. § 99.4 (clarifying that "parents" include non-custodial parents unless there is a specific court order to the contrary); *see also* 34 C.F.R. § 99.3 (stating that "parent" includes not only a natural parent, but a guardian or individual acting in the absence of a natural parent).

21. 20 U.S.C. § 1232g(d). *See* 34 C.F.R. § 99.5 (explaining that when a student becomes a legal adult, that student gains the right to access his or her own education rights and that adult student's parents lose their former FERPA rights).

22. 20 U.S.C. § 1232g(a)(1)(A). Access includes the right to "reasonable" explanations and interpretation of records (e.g., a conference with a teacher about a grade). 34 C.F.R. § 99.10(b)-(c).

23. Parents have a right to a copy of records only if not providing such a copy would "effectively prevent" access. 34 C.F.R. § 99.10(d). In most cases, schools may charge parents a modest per-page copy fee for photocopying costs. *Id.* § 99.11.

B. Confidentiality of Records as to Third Parties

In general, third parties cannot access student records without written parental consent.[24] In addition, personally identifiable information contained within those records cannot be disclosed by any means—oral, written, or electronic—without parental consent.[25] The release of information without reference to a particular student's name may violate FERPA if the information is "easily traceable" to a student.[26]

There are many exceptions to the consent requirement. Some disclosures to other school employees are permitted. Nonconsensual disclosure of the record may be made to "other school officials, including teachers," within the educational agency *with a legitimate educational interest* in a student's educational record.[27] It is the school's responsibility to set out a written standard for determining when there is a legitimate educational reason for inspecting student records.[28] Schools may also release records to a school in which the student seeks to enroll, or in which the student is currently enrolled or receiving services, if the releasing schools make a "reasonable attempt" to provide advance notice to the parent (e.g., in a school's FERPA policy).[29]

Some disclosure of certain less-private information is also permitted. Specifically, schools may release "directory information"

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24. 20 U.S.C. § 1232g(b)(2). Before an educational agency or institution can disclose a student's records, the student or parent must sign and date a written consent form, which specifies the records sought to be released, the person to whom they are to be released, and the reason for the release. 34 C.F.R. § 99.30. The parent and the minor student are then entitled to a copy of the released records upon parental request and payment of copy fees. *Id.*

25. *See* 34 C.F.R. § 99.3 (defining "disclosure" as permitting "access to or the release, transfer, or other communication of personally identifiable information contained in education records to any party, by any means, including oral written, or electronic means").

26. *See id.* § 99.3 (providing that "personally identifiable information" includes any list of personal characteristics that would make a student's identity easy to trace); *see also* Carey v. Me. Admin. Sch. Dist. 17, 754 F. Supp. 906, 923-24 (D. Me. 1990) (stating claim that the school violated FERPA by providing the media with confidential information about an apparently unnamed special education student who brought an automatic weapon to school).

27. *See* 20 U.S.C. § 1232g(b)(1)(A) (1994 & Supp. V 2001); 34 C.F.R. § 99.31(a)(1) (2001) (specifying an exception for "officials and teachers within the educational institution or local educational agency who have been determined by such agency or institution to have legitimate educational interests, including the educaitonal interests of the child for whom consent would otherwise be required").

28. *See* 20 U.S.C. § 1232g(b)(1)(A); 34 C.F.R. § 99.31(a)(1) (requiring that the school make the determination as to what constitutes "legitimate educational interests").

29. *See* 20 U.S.C. § 1232g(b)(1)(B) (indicating that the school must provide notice to the parents of the release of records); 34 C.F.R. § 99.34(b) (stating that the school's attempt to provide notice must be "reasonable").

(relatively less private information), e.g., names and addresses, so designated in writing.[30] Schools must give parents the opportunity to object to release of some or all directory information about their child.[31] Some disclosures in connection with litigation and law enforcement are permitted. Schools may release records in response to a federal grand jury or other subpoenas.[32] Schools may release a student's relevant records to the court if the school and the parent (or adult student) are in litigation against each other.[33] Some disclosures to parents of adult students and minor students are permitted. Schools may release records to parents of adult students who are declared by that parent as a dependent on the most recent federal income tax return.[34] Even if the student is not a dependent, postsecondary schools may inform parents that their under-twenty-one-year-old child has violated school policy regarding drug or alcohol use.[35] Schools may release the records of nonadult students to those students.[36]

FERPA also has an emergency exception. Schools may release records to "appropriate persons" in a health or safety emergency, as necessary to protect the health or safety of the student or others.[37]

Limited disclosure of disciplinary results and sex offender status is permitted. Schools may release records to alleged postsecondary-school victims of a crime of violence or nonforcible sex offense, who can be informed of the final results of any school disciplinary proceedings against the alleged perpetrator.[38] If the final result is

30. *See* 20 U.S.C. § 1232g(a)(5)(A)-(B) (defining the term "directory information" and providing that schools must give public notice of the categories it has designated as directory information); 34 C.F.R. §§ 99.3, 99.37 (defining conditions that apply to disclosing directory information).

31. *See* 20 U.S.C. § 1232g(a)(5)(A)-(B) (stating that parents have the right to inform the school that the information should not be released without parental consent); 34 C.F.R. §§ 99.3, 99.37 (defining conditions that apply to disclosing directory information and determining a parent's right to "refuse to let" the school designate certain information as directory information).

32. *See* 20 U.S.C. §§ 1232g(b)(1)(J), (b)(2)(B); 34 C.F.R. § 99.31(a).

33. *See* 34 C.F.R. § 99.31(a) (providing standards for records released to a court).

34. *See* 20 U.S.C. § 1232g(b)(1)(H); 34 C.F.R. § 99.31(a)(8) (stating that schools may release records of dependent children, as defined by Section 152 of the Internal Revenue Code of 1986, to parents).

35. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 952, 112 Stat. 1581, 1835-36 (1998) (codified as amended at 20 U.S.C. § 1232g(i) (1994 & Supp. 2001)).

36. *See* 34 C.F.R. § 99.5 (providing that schools may choose to give minor students additional rights, including the right to access their own records).

37. *See* 20 U.S.C. § 1232g(b)(1)(I); 34 C.F.R. § 99.36 (providing that records shall be released "in connection with an emergency, to appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons").

38. *See* 20 U.S.C. § 1232g(b)(6)(A)-(B); 34 C.F.R. § 99.31(a)(13) (allowing the

that an alleged perpetrator violated school rules or policies with respect to the criminal allegation, the school may make public the student's name, the violation committed, and the sanction.[39] Beginning in 2002, certain sex offenders will be required to inform the state about any higher education institutions in which they are enrolled.[40] Such schools have access to this information, and may release it to the public.[41] Finally, schools may also release information without consent to certain other government, accreditation, research, and financial aid agencies.[42]

Schools have obligations to keep a log of many of these disclosures,[43] and persons who receive records have obligations not to redisclose them except as permitted by FERPA.[44]

C. Challenges to Records

Parents may ask the school to amend records that they believe are inaccurate, misleading, or invade the privacy rights of their

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release of records to "an alleged victim of any crime of violence . . . or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime").

39. *See* 20 U.S.C. § 1232g(b)(6)(C) (allowing release of records of student deemed guilty of a violent crime or nonforcible sex offense).

40. *See* Campus Sex Crimes Prevention Act, Pub. L. No. 106-386 § 1601, 114 Stat. 1464, 1537-38 (2000) (codified as amended at § 1232g(b)(7)(A) (2000)) (stating the notice requirements for sexually violent offenders).

41. *Id.* (permitting educational institutions to disclose information "concerning registered sex offenders").

42. *See* 20 U.S.C. § 1232g(b)(1)(E); 34 C.F.R. 99.31(a)(5)(i)(a) (stating that schools may release records to state and local officials if (1) state statute permits such release, and (2) the disclosure concerns the juvenile justice system's ability to serve a child effectively prior to adjudication); 20 U.S.C. § 1232g(b)(1)(C), (b)(3), (b)(5); 34 C.F.R. § 99.35 (allowing schools to release these records to federal and state education authorities for audit and evaluation purposes (e.g., special education compliance audits), including the U.S. Attorney General's Office in connection with its enforcement of a school's compliance with civil rights or other laws); 20 U.S.C. § 1232g(b)(1)(D) (stating that schools may release records in connection with a student's financial aid records); 20 U.S.C. §1232g(b)(1)(F) (allowing the release of records to educational organizations, such as the Educational Testing Service, when such organizations are conducting studies for test development purposes, student aid, or improving instruction); 20 U.S.C. §1232g(b)(1)(G) (permitting student record release "to accrediting organizations for accreditation purposes").

43. *See* 20 U.S.C. § 1232g(b)(4)(A); 34 C.F.R. § 99.32 (requiring schools to keep a record of certain requests for access to personally identifiable information from a student's education records and each disclosure thereof).

44. *See* 20 U.S.C. § 1232g(b)(4)(B); 34 C.F.R. § 99.33. When records are released to outsiders, except for disclosures pursuant to court orders, subpoenas or litigation with a student, or the results of disciplinary proceedings, the person receiving the records must be notified of his or her obligation not to disclose the records to anyone else without written parental consent, except as permitted by the statute. If the recipient violates FERPA with regard to the released records, the releasing school must deny records access to the receiver for a minimum of five years. 20 U.S.C. § 1232g(b)(4)(B).

children.[45] This right to contest student records does not, however, extend to challenging the fairness of grades or the grading process.[46] The school can decide not to amend the records, but it must grant and inform the parents of their right to seek an internal hearing to challenge the records.[47] Any individual, including a school employee, may conduct the internal hearing if that individual does not have a direct interest in the outcome.[48] If a parent loses that hearing, the hearing regulations include no provision for an appeal.[49] However, the parent may place a statement in the child's records explaining what he or she finds to be inaccurate, misleading, or violative of the privacy rights of the student.[50]

D. Notice to Parents/Adult Students

FERPA requires schools to annually notify parents or adult students of their FERPA rights.[51] To provide such notice, the school may utilize "any means that are reasonably likely to inform."[52] The statute, however, includes a special provision requiring effective notification for parents or adult children who are disabled or do not speak English as a primary language.[53]

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45. *See* 34 C.F.R. § 99.20(a) (2001) (granting parents the right to request schools to change such records).

46. *See* Tarka v. Cunningham, 917 F.2d 890, 891 (5th Cir. 1990) (stating that the statute does not include "'error' founded in a dispute over the way a teacher grades his students"); *see also* Lewin v. Med. Coll. of Hampton Rds., 931 F. Supp. 443, 445 (E.D. Va. 1996) (finding no federal right under FERPA to challenge the substantive accuracy of academic evaluations); Thomas R. Baker, *Inaccurate and Misleading: Student Hearing Rights under FERPA*, 114 EDUC. L. REP. 721, 726 (1997) (noting that FERPA's legislative history explicitly refutes the idea that a FERPA hearing would be utilized as a means for students to challenge a grade given in class).

47. *See* 34 C.F.R. § 99.20(c) (mandating that the school inform the parent of its decision and the parent's right to a hearing).

48. *Id.* at § 99.22(c) (describing eligibility of those empowered to conduct the hearing).

49. *See* 34 C.F.R. §§ 99.21-22.

50. *See* 20 U.S.C. § 1232g(a)(2) (2001); 34 C.F.R. § 99.21 (providing that the statement becomes part of the child's records, to be released whenever the challenged records are released).

51. *See* 34 C.F.R. § 99.7(a)(1) (stating that the notification requirement applies to students currently in attendance).

52. *See id.* at § 99.7 (requiring that parents or eligible students be informed of their rights to: (1) inspect and review the student's education records; (2) request correction of records; (3) consent to disclosures of certain information before records are released to third parties; and (4) file a complaint with the federal Department of Education's Family Policy Compliance Office).

53. *See* 34 C.F.R. § 99.7(b)(1)-(2) (stating that schools must provide this notice effectively to parents or adult students who are disabled or "have a primary or home language other than English").

E. Enforcement of FERPA

Courts have consistently held that FERPA itself does not provide the right to file a private lawsuit to challenge alleged violations.[54] Individuals who believe their FERPA rights have been violated are not, however, left without any recourse. First, the individuals may file a complaint with the Family Policy Compliance Office ("FPCO"),[55] who will then investigate the complaint and notify the complainant and the school in writing of its findings and reasons.[56] There is no hearing.[57] If the FPCO finds that the school has violated the statute, the Office will provide the school with a list of certain conditions to meet within a specified period of time in order to resolve the complaint.[58] These conditions may include removing records or agreeing to handle records differently in the future.[59] In extreme cases, where a pattern of violations exists, the Office of the Secretary of the Department of Education may initiate proceedings to withdraw federal funds from the school.[60] The federal government, in some cases, may also enforce FERPA by bringing a civil action.[61]

Second, plaintiffs may address FERPA violations with a civil rights lawsuit. The Second, Fifth, Sixth, and Tenth Circuits, as well as many federal district and state courts, have held that a Section 1983 action may be brought to vindicate FERPA violations.[62] Prevailing plaintiffs

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54. *See, e.g.*, Tarka v. Franklin, 891 F.2d 102, 104 (5th Cir. 1989) (noting that the decisions of the Fifth Circuit and other circuits coupled with FERPA's legislative history have consistently shown that FERPA does not provide for a private cause of action); Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 35 (2d Cir. 1986) (holding that "FERPA itself does not give rise to private action"); Francois v. Univ. of D.C., 788 F. Supp. 31, 32 (D.D.C. 1992) (stating that FERPA noncompliance does not give rise to a private cause of action under FERPA).

55. *See* 20 U.S.C. § 1232g(g); 34 C.F.R. § 99.63 (providing the FPCO's address).

56. *See* 34 C.F.R. § 99.66 (describing the FPCO's enforcement responsibilities).

57. *Id.* (explaining the FPCO's response to noncompliance).

58. *Id.* (describing the secretary's enforcement of decisions).

59. *Id.* § 99.67.

60. *See* 20 U.S.C. § 1232g(b)(2), (f); 34 C.F.R. § 99.67 (indicating that FERPA enforcement can be accomplished via termination or withholding federal funds). Apparently, the Office has never attempted to withdraw federal funds because of FERPA violations. A search of the FED-ADMIN Westlaw database on October 30, 2001 found no hearing decisions withdrawing funds for FERPA violations.

61. *See* United States v. Miami Univ., 91 F. Supp. 2d 1132, 1138-44 (S.D. Ohio 2000) (concluding that the statutory language and the purpose of FERPA reveal a congressional intent to empower the Secretary of Education with broad enforcement powers, including the power to bring a civil action in federal court).

62. *See, e.g.*, Falvo v. Owasso Indep. Sch. Dist., 233 F.3d 1203, 1211 (10th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3789 (U.S. June 25, 2001) (No. 00-1073) (concluding that FERPA creates an enforceable right under 42 U.S.C. § 1983 (2001) ("Section 1983"), which is a civil action for deprivation of rights); Cullens v. Bemis, No. 92-1582, 1992 U.S. App. LEXIS 30892, at *3 (6th Cir. Nov. 18, 1992) (acknowledging that FERPA creates an interest that may be vindicated a Section 1983 claim); Tarka v. Franklin, 891 F.2d 102, 106 (5th Cir. 1989) (affirming summary judgment for school

can recover money damages, attorneys' fees, and in some cases pain and suffering and punitive damages from schools that are found to have violated the law.[63]

This array of enforcement options notably does not include any way for private school students to challenge FERPA violations in court.[64] Employees of both public and private schools, however, may be subject to discipline for violating student records laws.[65]

II. WHAT ARE STUDENT RECORDS UNDER FERPA?

A. Statutory and Regulatory Definitions and Language

FERPA takes a three-part approach to delineating the "education records" it regulates. First, FERPA includes a broad general

on Section 1983 claim where plaintiff was not a student); Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2nd Cir. 1986) (affirming judgment under Section 1983 for school's refusal to permit access to child's records and for sending copies of school notices); *see also* Blessing v. Freestone, 520 U.S. 329 (1997) (illustrating the Supreme Court's utilization of a less stringent standard for finding that a federal statute creates the kind of federal rights that are actionable under Section 1983); *Falvo*, 233 F.3d at 1213 (concluding that under the more lenient *Blessing* standard for finding a Section 1983 cause of action, FERPA violations are actionable under Section 1983). *But see* Norris v. Bd. of Educ., 797 F. Supp. 1452, 1465 (S.D. Ind. 1992) (rejecting the availability of a Section 1983 claim for FERPA violations on the basis that FERPA provides "an exclusive administrative enforcement mechanism"). For an overview and analysis of Section 1983 claims to redress FERPA violations, see generally *Daggett II*, *supra* note 4.

63. 42 U.S.C. §§ 1981a, 1988 (2001) (describing plantiffs' right of recovery).

64. *See* Altschuler v. Univ. of Pa. Sch. of Law, No. 99-7423, 1999 U.S. App. LEXIS 34303, at *7 (2d Cir. Dec. 27, 1999) (finding that a private law school, which receives federal funds, is not a state actor subject to a Section 1983 claim for alleged FERPA violation); *Cullens*, 1992 LEXIS 30892, at *4 (affirming that a Section 1983 claim based on alleged FERPA violations cannot be brought against a private college). *But see* Doe v.Gonzaga Univ., 24 P.3d 390, 402 (Wash. 2001) (stating that when a private university supplies information to the state about a teacher certification candidate pursuant to state law, it acts under color of state law and may be liable under Section 1983 for FERPA violation, and affirming a jury award of $150,000 compensatory and $300,000 punitive damages against a private university for a FERPA-based Section 1983 claim).

65. *See, e.g.*, Henderson v. Huecker, 744 F.2d 640, 644 (8th Cir. 1984) (upholding dismissal of counselor at state rehabilitation center, in part for attaching confidential student information to the complaint in her lawsuit where student names could have been edited out with no harm to counselor's claim); Downie v. Indep. Sch. Dist. No. 141, 367 N.W.2d 913, 917 (Minn. Ct. App. 1985) (sustaining dismissal of tenured school guidance counselor for, among other things, breaching confidentiality of students whom he counseled, which the court found to be "[t]he most serious of the charges . . . and certainly the conduct which has the most potential for causing long-lasting harm to students"). FERPA is no defense for failure to report concerns about students to other school officials when appropriate. *Cf.* Peace v. J. Sterling Morton High Sch. Dist. 201, 651 F. Supp. 152, 156 (N.D. Ill. 1986), *aff'd*, 830 F.2d 789 (7th Cir. 1987) (upholding five-day suspension of school psychologist for failing to notify promptly school authorities that a student was contemplating suicide after a sexual encounter with a teacher).

definition of education records.[66] Second, FERPA exempts several categories of student information from the general broad definition.[67] Third, for certain other types of student information, FERPA does not exclude them as education records but instead modifies the general access and disclosure rules for them.[68]

1. General definition of education records

FERPA initially employed the following laundry list to define what constituted "education records":

> Any and 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.[69]

Within six weeks of FERPA's enactment, Congress amended the education records definition, replacing the laundry list of specific record types with "those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."[70] This broad conceptual definition is still intact. This definition of records applies to FERPA's access, disclosure and challenges to records provisions. Under it, records received by schools from outside sources are FERPA records if the school maintains them.[71] The definition makes clear

66. *See* 20 U.S.C. § 1232g(a)(4)(A) (2001) (outlining what constitutes "education records").

67. *See id.* § 1232g(a)(4)(B) (stating what is not included in the definition of "education records").

68. *See id.* § 1232g(a)(1)(C)(i).

69. Education Amendments of 1974, Pub. L. No. 93-380 § 513, 88 Stat. 484 (1974) (codified as amended at 20 U.S.C. § 1232g (1974)).

70. 20 U.S.C. § 1232g(a)(4)(A). The regulations' general definition of education records closely tracks the language in the statute. 34 C.F.R. § 99.3.

71. Courts have held that information a school receives about a student from an outside source is a record for FERPA purposes. *See, e.g.*, Warner v. St. Bernard Parish Sch. Bd., 99 F. Supp. 2d 748, 752 (E.D. La. 2000) (holding that letters about a student's curriculum written by the parent and political candidate to a teacher are considered FERPA records and may not be released publicly); Belanger v. Nashua, N.H. Sch. Dist., 856 F. Supp. 40, 48 (D.N.H. 1994) (finding that the juvenile court records contained in school folders are FERPA records).

that FERPA records are not limited to documents in the official "student file"—the material may be in a teacher's desk, nurse's office, or principal's file, among other places. Regulations note that student information may be recorded in a variety of ways, "including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche."[72] The regulations define "personally identifiable information" as not only that which includes a student's name, but also as records which include the student's parent's name, the family's address, an ID number such as social security, or information that makes the student's identity "easily traceable."[73]

2. Exempted records

The statute goes on to exclude four categories of recorded information as FERPA records,[74] and the regulations add a fifth exempt category. First, FERPA records do not include "sole possession" notes.[75] These are notes prepared by certain school employees that are neither accessible by nor released to anyone else except a temporary substitute for the maker of the note.[76] The regulations add the requirement that the notes be used only as a memory aid.[77] This exception allows a teacher's anecdotal notes or counselor treatment-session notes to be withheld from the parent. Once the notes are accessed by a third party (even a school administrator or the student herself), they lose their status as sole possession notes and become FERPA records.[78]

Second, for students age eighteen and over or in postsecondary

72. 34 C.F.R. § 99.3; *see also* MR v. Lincolnwood Bd. of Educ., 843 F. Supp 1236, 1239 (N.D. Ill. 1994), *aff'd*, No. 94-1357, 1995 U.S. App. LEXIS 10481 (7th Cir. Apr. 26, 1995) (finding that a videotape of a special education student made by the school without the parent's consent was a record, but that its admission in a due process hearing did not violate FERPA).

73. 34 C.F.R. § 99.3.

74. 20 U.S.C. § 1232g(a)(4)(B) (2001) (listing the four categories not considered "education records").

75. *Id.* § 1232g(a)(4)(B)(i) (referring to certain types of records in possession of the maker (or substitute) of those records only).

76. The Department of Education recently proposed regulations that would have narrowed this definition significantly but decided against adopting them. *See* Proposed Rulemaking Notice, 64 Fed. Reg. 29,532, 29,534 (June 1, 1999) (expanding definition of "sole possession records" to include records "that are typically maintained by the school official unbeknownst to other individuals"); Family Educational Rights and Privacy, 65 Fed. Reg. 41,852, 41,855-56 (2000) (codified at 34 C.F.R. pt. 99) (deciding not to revise definition of "sole possession records" in the manner proposed).

77. *See* 34 C.F.R. § 99.3 (stating that the "sole possession" notes must be used only as a personal memory aid).

78. *See id.* (stressing that the notes must be in the creator's possession only in order to qualify as a non-FERPA record).

institutions ("adult students"), FERPA records do not include mental or physical health treatment records accessible only to treatment staff, even if they are not sole possession notes.[79] Access is available to a treatment professional of the adult student's choosing.[80] Third, FERPA records do not include records created for law enforcement purposes by a law enforcement unit within an education agency.[81] This exception was created particularly for campus police records at universities.[82] Similarly, however, if a K-12 school district creates a separate security unit, certain of that unit's records are not FERPA records.[83] Regulations specifically provide that records created and maintained exclusively for disciplinary purposes are not law enforcement records exempt from FERPA, and remain subject to FERPA while in the law enforcement unit's possession.[84] Fourth, because FERPA protects only student records, employee records (other than records of students who are employed by a school because of their student status) are not covered.[85] FERPA regulations also exclude alumni records containing only information about former students after they have left a school.[86]

The primary consequences of sole possession notes, treatment records, school security documents, and employee records being excluded as education records are twofold. First, parents (and adult students) have no FERPA right to access them.[87] Second, security

79. *See* 20 U.S.C. § 1232g(a)(4)(B)(iv) (2001) (excluding health treatment records for adult students under these conditions).

80. *See* 34 C.F.R. § 99.10(f) (stating that a student may have access to those education records "reviewed by a physician or other appropriate professional of the student's choice"); *see also* 20 U.S.C. § 1232g(a)(4)(B)(iv); 34 C.F.R. § 99.3 (excluding as "treatment" records those of remedial or other activities that are part of the school's instructional program).

81. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §99.8 (adding numerous details regarding law enforcement records).

82. *See generally* 60 F. Reg. 3464, 3466-668 (1995).

83. Note that security-related records maintained by other school employees, such as building administrators, would be records under FERPA. *See* 34 C.F.R. § 9.8 (explaining that school records that come to be in the possession of school law enforcement units do not lose their status as education records).

84. *See* 34 C.F.R. § 99.8(b)(2)(ii), (c)(2) (stating that records with a non-law enforcement purpose are not included in the definition of "[r]ecords of a law enforcement," and do not lose their FERPA status).

85. *See* 20 U.S.C. § 1232g(a)(4)(B)(iii) (requiring that these employee records be "made in the normal course of business"); *see also* Klein Indep. Sch. Dist. v. Mattox, 830 F.2d 576, 579 (5th Cir. 1987) (stating that a teacher's college transcript was not a record under FERPA); 34 C.F.R. § 99.3 (excluding employee records which "maintained in the normal course of business," relating to the employee in his or her "capacity as an employee," and unavailable for other purposes).

86. *See* 34 C.F.R. § 99.3 (stating that "education records" does not include records that consist only of information about former students).

87. *See id.*; 20 U.S.C. § 1232g(a)(1)(4)(B) (explaining that these records are not "education records").

documents presumably could be shown to outside authorities such as police without parent (or adult student) consent, and perhaps in the case of public schools, may even be accessible under public records laws.[88] Of course, if sole possession notes were shown to an outsider without the requisite permission, they would no longer be sole possession notes, and would become FERPA records, the disclosure of which violates the Act. Although sole possession notes and other non-records are not accessible via a FERPA request, they are subject to subpoena.[89] However, courts will consider the student's privacy interests in deciding whether to permit subpoena of student records.[90]

3. Reference to specific types of student information

Rather than excluding certain types of records entirely, FERPA instead creates special access and disclosure rules for them.[91] This approach suggests that in general Congress considers these categories of student information to be education records under FERPA. For example, FERPA language limits access to parent financial records by adult students,[92] and allows students to waive access to letters of recommendation,[93] implying that in other respects these documents are FERPA records. FERPA allows nonconsensual disclosure of directory information, upon notice and absent parental objection.[94]

88. *See* 34 C.F.R. § 99.3; 20 U.S.C. § 1232g(b)(1)(c)(B) (permitting access to state and local officials in accordance with state statutes).

89. *See* Rios v. Reed, 73 F.R.D. 589, 598 (E.D.N.Y. 1977) (finding that there is no privilege analogous to a doctor-patient or attorney-client privilege that would prohibit disclosure of student records, and that a school may, if done in compliance with judicial order, disclose "personally identifiable information").

90. *See, e.g.*, Venson v. State, 74 F.3d 1140, 1143 (11th Cir. 1996) (conducting in-camera review of student records in a criminal trial to determine whether there was any exculpatory material to be released to the defendant); Gillard v. Valley Boulder Sch. Dist., 196 F.R.D. 382 (D. Colo. 2000) [OFFICE HOURS: PLEASE DOUBLECHECK THE CASE NAME] (issuing a protective order to maintain confidentiality of a student's records in the student's tort claim against the school district).

91. *See* 20 U.S.C. § 1232g(a)(1)(C)-(D) (1995) (listing situations when certain records can and cannot be accessed).

92. *See id.* § 1232g(a)(1)(C)(i) (denying postsecondary students the ability to access the financial records of their parents); 34 C.F.R. §99.12(b)(1) (2000) (restating the unavailability of the financial records of parents to postsecondary students in the section entitled "[w]hat limitations exist on the right to inspect and review records?").

93. *See* 20 U.S.C. § 1232g(a)(1)(D) (enabling a "student or person applying for admission" to waive his or her right to access recommendations under certain situations); 34 C.F.R. §§ 99.12(b)(2)-(3), (c) (reiterating the ability of postsecondary students to waive the right to access confidential letters).

94. *See* 20 U.S.C. § 1232g(a)(5) (listing the information concerning the students that constitutes "directory information," and explaining that the information will become public if the institution gives the parents adequate notice and the parents do not object).

FERPA has also been amended to add specific references to student disciplinary records. FERPA permits postsecondary institutions to disclose the results of certain disciplinary proceedings to alleged victims, and in some cases to make the outcome public.[95] For all students, postsecondary or K-12, FERPA provides that schools are not prohibited from:

> (1) including appropriate information *in the education record* of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or (2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.[96]

Finally, FERPA permits higher education institutions to disclose to parents that their adult, but under twenty-one year-old child has violated the law or school rules concerning drugs and alcohol.[97]

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95. *See* 20 U.S.C. § 1232g(b)(6) (1994 & Supp. V 2000) (stating that institutions of postsecondary education can disclose the results of a disciplinary proceeding conducted by those institutions to the victim of a crime of violence or a nonforcible sex offense or to the public in general if such an offense is determined to have actually been committed).

96. 20 U.S.C. § 1232g(h) (1995) (emphasis added).

97. *See* 20 U.S.C. § 1232g(i) (1994 & Supp. V 2000) (explaining that an institution of higher education is not prohibited from notifying the parents of a student that the student has violated a federal, state, or local law or an institutional rule regarding the use of alcohol or drugs).

III. COURT INTERPRETATIONS OF THE SCOPE OF FERPA EDUCATION RECORDS[98]—DISCIPLINE AND CLASSROOM RECORDS

A. Student Discipline Records as FERPA Records

Several state courts and one federal district court have held that FERPA records, at least at the postsecondary level, are limited to those which are educational/academic in nature, and hence do not include student discipline or similar records.[99] These decisions

98. While this Article focuses on discipline and daily classroom records, another area of controversy is whether FERPA education records include test protocols. School employees, concerned about the integrity of the tests as well as compliance with professional ethics standards, which provide for release only to qualified professionals, are reluctant to share test protocols. An attempt to judicially create another exempt category for test protocols containing personally identifiable information has been rejected by one court. *See* John K. v. Bd. of Educ. for Sch. Dist. No. 65, 504 N.E.2d 797, 804 (Ill. App. Ct. 1987) (requiring release of raw Rorschach test data). An older Office of Special Education Programs ("OSEP") opinion letter indicated that protocols may not need to be released under FERPA. *See Letter to MacDonald*, 20 INDIV. WITH DISABILITIES EDUC. L. REP. 1159 (1993) (stating that "test protocols" which do not contain personally identifiable information may not need to be released to parents by the school district under FERPA). A more recent letter from the FPCO found that test protocols with personally identifiable information are FERPA records, and also that reviewing test questions with a parent is part of the interpretation and explanation of records FERPA requires schools to offer parents upon request. *See Fonda-Fultonville Cent. Sch. Dist.*, 31 INDIV. WITH DISABILITIES EDUC. L. REP. ¶ 149 (1998) (articulating that FERPA does require educational agencies to release a child's education records, including answer sheets not accompanied by question sheets, upon a request by the child's parents). One way to comply with professional obligations, and also with FERPA, might be to release test protocols to a qualified professional of the parent's choosing, such as the parent's independent evaluator in a special education dispute.

99. All of these cases involved media requests for access to university student discipline records. Their analysis and interpretation of FERPA is unusual. *See, e.g.*, Bauer v. Kincaid, 759 F. Supp. 575, 589-90 (W.D. Mo. 1991) (finding that FERPA penalizes, but does not prohibit the disclosure of records, and that FERPA's purpose is not to protect student privacy); *id.* at 592 (finding that FERPA creates an irrational classification and is therefore in violation of the Equal Protection clause); *id.* at 594 (concluding that FERPA is in violation of the public's First Amendment right of access to criminal trials); *see also* Kirwan v. Diamondback, 721 A.2d 196, 204 (Md. 1998) (parking tickets) (relying on the other decisions cited in this note and the absence of any mention of disciplinary records on the floor of Congress during the debate over FERPA's enactment to find that disciplinary records, including parking tickets, are not covered by FERPA); State *ex rel.* Miami Student v. Miami Univ., 680 N.E.2d 956, 959 (Ohio 1997) (holding that the statistics from the University Disciplinary Board concerning student infractions of school rules and regulations were not "educational records" and therefore not protected by FERPA); Red & Black Publ'g Co. v. Bd. of Regents, 427 S.E.2d 257, 261 (Ga. 1993) (finding that the purpose of FERPA was to control careless information sharing by schools and not to protect student privacy, and that FERPA does not prohibit disclosure of information but merely permits withholding of federal funds to schools with a practice of disclosing education records, and also finding significant the fact that the discipline records were maintained by the university's Office of Judicial Programs and not by the university registrar). Many courts during this era, however, did find disciplinary records to be covered by FERPA. *See, e.g.*, Norwood v. Slammons, 788 F. Supp. 1020, 1027-28 (W.D. Ark. 1991) (holding contrary to *Bauer*, finding that the disciplinary

predated the 1998 FERPA amendments regarding disciplinary records and seemed willing to ignore FERPA in favor of state law. More recently, the federal government sued in federal court to enforce FERPA to override one of these state court decisions. In *United States v. Miami University*,[100] the federal district court held that student discipline records are covered by FERPA and permanently enjoined the Miami and Ohio State Universities from releasing them without the necessary consent.[101] The court found that the plain language of the statute, its legislative history, regulations, and the Department's long-standing interpretation[102] supported its conclusion.[103] *The Chronicle of Higher Education* (the "*Chronicle*"), a defendant to the case via intervention, has appealed the district court's decision to the Sixth Circuit.[104]

Miami University began as a request from the Miami University student newspaper, *The Miami Student*, for access to the University's student disciplinary proceedings, in order to track crime and student misconduct on campus.[105] Trying both to accommodate the newspaper and to comply with FERPA, the University ultimately released redacted copies of some of the records.[106] The newspaper sued in state court under the Ohio Public Records Act, seeking

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records are protected by FERPA, and that not disclosing such information to the public is not a violation of the First Amendment or the Fifth Amendment Equal Protection Clause); DTH Publ'g Corp. v. Univ. of N.C. at Chapel Hill, 496 S.E.2d 8, 12-13 (N.C. Ct. App. 1998) (holding that the results of disciplinary proceedings are "educational records" as defined in FERPA and do not have to be disclosed to the public by the university); Connoisseur Communication v. Univ. of Mich., 584 N.W.2d 647, 649 (Mich. Ct. App. 1998) (finding the information sheet to be an education record protected under FERPA).

100. 91 F. Supp. 2d 1132 (S.D. Ohio 2000).

101. *See id.* at 1160 (holding that student disciplinary records are "education records" as defined by FERPA and that the defendants violated FERPA by disclosing such records).

102. *See* Family Education Rights and Privacy, 60 Fed. Reg. 3464, 3465 (Jan. 17, 1995) (codified as amended at 99 C.F.R. § 99 (1995)) (stating that records of an institution's disciplinary proceedings are "education records" under FERPA and can only be changed by a Congressional amendment to FERPA).

103. *See Miami Univ.,* 91 F. Supp. 2d at 1148-54 (performing a comprehensive statutory interpretation, the court examined the facial content, legislative history, and legislative intent to come to the conclusion that education records include student disciplinary records).

104. *Miami Univ.*, 91 F. Supp. at 1132 (introducing the *Chronicle* as a "national weekly newspaper covering issues regarding higher education"), *appeal docketed*, No. 00-3518 (6th Cir. 2001). As of this writing, the decision has not been handed down. *Id.*

105. *See Miami Univ.*, 91 F. Supp. 2d at 1135.

106. *See id.* (relying on its interpretation of FERPA, the University removed the name, sex, and age of the accused students as well as the date, time, and location of the incidents that generated the disciplinary proceedings, and other internal memoranda, written statements by students appealing adverse decisions, and the final result of certain proceedings).

disclosure of all information but the names and Social Security or identification numbers of the accused students.[107] The Ohio Supreme Court issued a writ of mandamus compelling Miami University to disclose its student disciplinary records, holding that FERPA did not apply to those records.[108] Without any statutory construction of the relevant FERPA section, the Ohio court adopted, in effect, its own narrow definition of education records, holding that disciplinary records are not education records because they do not pertain to academic data, financial aid, or scholastic performance.[109] The *Chronicle* then requested additional discipline records, without any redaction.[110]

The U.S. Department of Education subsequently filed suit in federal district court in Ohio.[111] The court held that the Department of Education and the United States have standing to bring civil actions to enforce FERPA.[112] Turning to the scope of education records under FERPA, the court held that disciplinary records fall within FERPA's broad general definition of an education record—one maintained by the school or its agents containing information directly related to a student.[113] The court found no indication to the

107. *See Miami Student*, 680 N.E.2d at 957 (stating that the editors of the student-run newspaper were not satisfied with the redacted disclosure by the university and subsequently sued on an original mandamus action).

108. *See id.* at 959 (requiring the disclosure of the disciplinary records with the student's name, social security number, and student identification number deleted).

109. *See id.* at 959 (following the reasoning of the Georgia Supreme Court in Red & Black Publ'g Co. v. Board of Regents, 427 S.E.2d 257 (Ga. 1993), which held that infractions allegedly committed by fraternities were not education records because they did not relate to student academic performance, financial aid, or scholastic probation). The Ohio Supreme Court noted that crime on campuses across the country had been escalating and emphasized that, for safety purposes, Miami University students, potential students, and their parents were entitled to data on campus crime and student misconduct. *Miami Student*, 680 N.E.2d at 959. To protect the identity of the student alleged with misconduct, however, Miami University was allowed to delete the student's name and identification number, as well as the exact date and time of the incident. *Id.* The university was ordered to disclose the general location of the incident, the age and sex of the student, the nature of the offense, and the type of disciplinary penalty imposed. *Id.* at 959-60.

110. *See Miami Univ.*, 91 F. Supp. 2d at 1135 (discussing the requests of the 1995 and 1996 disciplinary records by the *Chronicle*).

111. *See id.* at 1136 (stating that the Department sought a declaratory judgment and preliminary and permanent injunctions prohibiting both Universities from releasing disciplinary records except as expressly permitted under FERPA). The *Chronicle* was allowed to join the suit as an intervening defendant. *Id.* at 1134.

112. *See id.* at 1137-46 (finding that the United States and the Department of Education have standing to sue derived both from FERPA language and from the United States' inherent right to sue a recipient of federal funds for compliance with the conditions of those funds). The court also held that a newspaper does not have a First Amendment right to compel a university to disclose nonpublic disciplinary information in its possession because, among other reasons, it would undermine the university's educational mission. *Id.* at 1154-58.

113. *See id.* at 1149 (referring to the order granting preliminary injunction, the

contrary in FERPA's legislative history.[114] The court also noted that FERPA's list of exclusions to the definition of education records does not include disciplinary records.[115] The court held that subsequent amendments to FERPA in the 1990s allowing the release of disciplinary information in certain limited circumstances[116] showed that, in general, disciplinary records were considered education records.[117] The court reasoned that if Congress had intended to exclude disciplinary records from the definition of education records it would not have needed to enact statutory exceptions permitting their limited disclosure.[118] After reviewing the earlier cases to the contrary,[119] the court noted that these decisions which interpreted the meaning of education records to the contrary did so without

court explained that since the records contained information directly related to the student and are maintained by the institutions, the records are clearly "education records" as defined by FERPA).

114. *See id.* at 1150 (performing a detailed analysis of the legislative history and a breakdown of statutory construction to determine the proper interpretation of "education records").

115. *See id.* at 1151 (citing the four exceptions for "education records" enumerated in 20 U.S.C. § 1232g(a)(4)(B) (1994).

116. *See Miami Univ.*, 91 F. Supp. 2d at 1151 (discussing three provisions added to FERPA in amendments that allow disclosure of disciplinary proceedings). As the court noted, FERPA has been amended several times to deal with discipline. For example, the court recognized the 1990 amendment allowing postsecondary schools to disclose the results of disciplinary proceedings to the victim of an alleged crime of violence, regardless of the results. *See id.* (citing 20 U.S.C. § 1232g(b)(6)(A) (1994 & Supp. IV 1998)). In 1998, this disclosure was expanded to include victims of an alleged nonforcible sexual offense, as well as expanded to allow postsecondary schools to disclose the final results of disciplinary proceedings to the public if the school determined that the alleged perpetrator had violated the school's rules or policies with respect to a crime of violence or nonforcible sexual offense. *See id.* (citing 20 U.S.C. § 1232g(b)(6)(B)). The 1998 amendment defines and limits the "final results" that may be disclosed to the name of the student, the violation committed, and the sanction imposed. 20 U.S.C. § 1232g(b)(6)(C)(i). The name of any other student, such as a witness or victim, can be disclosed only with the written consent of that other student. *Id.* § 1232g(b)(6)(C)(ii). There are other similar amendments not specifically discussed by *Miami University*. In 1994, Congress specified that information about disciplinary action could be included *in a student's education record* and shared with others who have a legitimate educational interest in the student's behavior. *See* 20 U.S.C. § 1232g(h) (listing teachers and school officials of both the student's school and other schools as people who have legitimate educational interests). Finally, in 1998 Congress rewrote FERPA to allow institutions of higher education to inform parents or legal guardians of their child's violation of drug or alcohol laws or institution rules/policies with respect to the use or possession thereof if the student is under the age of 21. *Id.* § 1232g(i).

117. *See* United States v. Miami Univ., 91 F. Supp. 2d 1132, 1151 (S.D. Ohio 2000) (determining that it was Congress' intent to make the majority of disciplinary records private).

118. *See id.* (stating that Congress did not intend for the statutory exceptions permitting limited disclosure of disciplinary proceedings to be redundant and superfluous).

119. *See* cases cited *supra* note 99 and accompanying text.

explanation and without a basis in the statutory language.[120] As the court observed, nothing in the statute itself limits education records to academic records.[121]

Finally, the court relied on regulations[122] and related guidance from the Department of Education to reject an argument that disciplinary records are exempt law enforcement records. Specifically, the Secretary of Education has noted that:

> If a law enforcement unit of an institution creates a record for law enforcement purposes and provides a copy of that record to a dean, principal, or other school official for use in a disciplinary proceeding, that copy is an "education record" subject to FERPA if it is maintained by the dean, principal, or other school official and not the law enforcement unit. The original document created and maintained by the law enforcement unit is not an "education record" and does not become an "education record" merely because it was shared with another component of the institution.[123]

In other words, if a school is taking disciplinary action against a student on the basis of information provided by a law enforcement unit, the school's records are education records subject to FERPA, while the law enforcement unit's records are not subject to FERPA and may be independently disclosed. Because the court viewed the Department's interpretation of the distinction between the two kinds of records as reasonable, the court ruled that deference was owed to the Department's interpretation.[124]

Miami University and the earlier cases dealing with discipline records[125] turned on whether such records are included as education records under FERPA. Another recent case involving disclosure of

120. *See Miami Univ.*, 91 F. Supp. 2d at 1149 n.17 (dismissing the reasoning used by these courts and reemphasizing the intent of Congress as educed by statutory analysis).

121. *See id.* (relying on the plain language of the statute to dismiss the holdings of the courts that found disciplinary records not to be protected by FERPA).

122. *See id.* at 1151-52 (citing 20 U.S.C. § 1232g(4)(B) in explaining what "education records" do not include). FERPA regulations provide that a subdivision of an education agency remains a "law enforcement unit," even though it may perform non-law enforcement activities, including "investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student." Family Educational Rights and Privacy, 34 C.F.R. § 99.8(a)(2) (2000). "Records created and maintained by a law enforcement unit exclusively for a non-law enforcement purpose, such as a disciplinary action or proceeding conducted by the educational agency or institution" do not constitute records of a law enforcement unit. 34 C.F.R. § 99.8(b)(2)(ii).

123. *Miami University*, 91 F. Supp. 2d at 1153 n.22 (citing Rules and Regulations, Department of Education, 60 Fed. Reg. 3464-66 (1995)).

124. *See id.* at 1153 (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984)) (discussing the importance of deferring to the agency's detailed definitions of its regulations).

125. *See* list of cases *supra* note 99 and accompanying text.

discipline records took a different analytic approach. In *Jensen v. Reeves*,[126] a second grade student was accused of harassing a classmate. The school sent a letter to the alleged victim describing the discipline imposed on the alleged harasser.[127] The parents of the alleged harasser sued on a number of theories including a FERPA claim.[128] The trial court dismissed the claim, finding no FERPA violation when information is released to an alleged victim's parent.[129] The district court's reasoning is perplexing. The district court stated incorrectly that FERPA deals only with release of educational records without the *student's* consent.[130] The district court also arguably misconstrued the meaning of a FERPA record by stating that the principal did not release any actual records to the complaining parents by sharing information about the action taken against the student.[131] Even if these rulings were legally incorrect, however, the case was ultimately dismissed on the independent grounds that the school district did not have a policy of releasing information without consent and, therefore, the parent of the misbehaving child had no judicial remedy for an isolated FERPA violation.[132] The Tenth Circuit's short unpublished opinion noted that the claim concerned an individual disclosure, as opposed to a widespread disclosure practice.[133] It cited policy concerns to support disclosure to victims, including the concern that "educators [would be] in an untenable position: they could not adequately convey to the parents of affected students that adequate steps were being undertaken to assure the safety of the student."[134] Thus, in contrast to the court in *Miami University*, the *Jensen* court did not find disciplinary records to be entirely excluded. Instead, the *Jensen* court found disclosure of limited information from these records did not violate FERPA.

126. No. 99-4142, 2001 WL 113829 (10th Cir. Feb. 9, 2001).
127. *See id.* at *4 (explaining that the letter revealed that plaintiff-student C.J. lost his lunch privileges and had to stay a week in the principal's office as punishment for the harrassment complaint filed against him).
128. *See id.* at *1 (providing the seven causes of action listed in the plaintiff's civil rights complaint, including number (6), a violation of privacy rights under FERPA).
129. *See id.* at *5 (affirming the district court and reasoning that "the extremely limited type of information conveyed here" does not "constitute an education record").
130. *See* Jensen v. Reeves, 45 F. Supp. 2d 1265, 1276 (D. Utah 1999) (reasoning why the disclosure of the disciplinary information was not a FERPA violation).
131. *Id.* at 1276.
132. *Id.*
133. Jensen v. Reeves, No. 99-4142, 2001 WL 113829 at *4 (10th Cir. Feb. 9, 2001).
134. *Id.* at *4.

B. Daily Classroom Records as FERPA Records

In *Falvo v. Owasso Independent School District Number I-011*[135] the Tenth Circuit held that grades on peer-graded classroom tests and homework are FERPA records, "maintained" by schools through their unpaid student grading agents. After an initial unanimous decision by a three-judge panel of the Tenth Circuit reversing a summary judgment for the school district,[136] the court was asked to rehear the case *en banc*. The request was denied,[137] but the panel withdrew its original opinion and issued a new, somewhat more extensive opinion.[138] Four of the ten Tenth Circuit judges voted to rehear the case *en banc*, and wrote a short dissent from the denial of *en banc* rehearing to explain their view that the peer-grades on student papers were not education records under FERPA.[139] The Supreme Court has granted certiorari in the case.[140]

In *Falvo*, a parent of several middle school students challenged the school district's practice of allowing students to grade each other's papers and tests.[141] After grading the work, the student graders returned the papers to the original students, who then called out their own grades to the teacher.[142] The parent complained to the school about both peer grading and students being asked to call out their own grades to the teacher.[143] The school offered to allow the plaintiff's children to report their grades confidentially,[144] but refused to disallow the peer grading, and the parent challenged the decision on both substantive due process and FERPA theories.[145]

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135. Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1215 (10th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3789 (June 25, 2001) (No. 00-1073).

136. Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1201 (10th Cir. 2000) (Kelly, J., dissenting).

137. *See id.* at 1201 (discussing the process through which the appeal traveled to get to its current position).

138. *See Falvo*, 233 F.3d at 1215 (reversing the district court and holding the student-graded papers to be "education records").

139. *Falvo*, 233 F.3d at 1202 (5-4 decision) (Kelly, J., dissenting).

140. Owasso Indep. Sch. Dist. v. Falvo, 121 S. Ct. 2547 (2001).

141. *See Falvo II*, 233 F.3d at 1207-08 (describing the cause of action in the case).

142. *See id.* at 1207 (detailing the procedure employed in the school for peer-grading).

143. *See id.* (explaining that parent-plaintiff Falvo complained of the grading practice to school counselors and to the School District Superintendent before bringing her claims before a court).

144. *See id.* at 1207 n.2 (noting that students were always permitted to report their grades confidentially to the teacher).

145. *See id.* (explaining that the parent did not challenge the practice of calling out grades as a distinct constitutional and FERPA violation because she believed that the prior act of student grading "itself constitutes a disclosure"). Therefore, the court did not determine whether allowing Falvo's children to report their own grades privately resolved the challenge to the practice of calling out grades. *Id.* at 1207.

The district court held that the grades subject to peer grading were not education records under FERPA, and granted summary judgment to the school district on both the FERPA and due process issues.[146] On appeal, the Tenth Circuit also rejected the substantive due process claim,[147] but found a violation of FERPA.[148] The appellate court joined others in finding FERPA violations actionable under Section 1983.[149] However, largely because the FPCO's statutory interpretation of FERPA suggested that FERPA-based rights had not clearly been established previously, the court found that the individual defendants had qualified immunity from monetary damages.[150] It reversed the district court's grant of summary judgment for the school district on the parent's FERPA-based claim for injunctive relief and remanded the claim to the district court.[151]

The court noted that there was "no dispute that the grades which students place on each other's papers and then report to the teacher 'contain information directly related to a student.'"[152] Most of the court's analysis focused on whether the student grading met FERPA's requirement that the activity be "maintained by an educational agency or institution or by a person acting for such agency or institution," as the student work apparently had never been in the

146. *Falvo II*, 233 F.3d at 1207-08 (describing the court's decision).

147. *See id.* at 1210 (concluding that the lower court did not err in granting summary judgment for defendants on this claim). The court recognized that to some extent there is a Fourteenth Amendment substantive due process liberty interest in the privacy of personal information. *Id.* at 1208. Nevertheless, after examining binding precedent, which limited constitutional privacy protection to information that is "highly personal or intimate," and precluding reliance on statutes (such as FERPA) to create an expectation of privacy, the court found no authority to extend this right to student records. *Id.* at 1208-10 (relying on Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1981) as binding precedent).

148. *See id.* at 1218-19 (finding that the "plain language of FERPA demonstrates that the term 'educational records' encompasses the grades at issue," concluding that the district court erred in holding that the challenged grading practice did not offend FERPA, and holding that the parent may pursue a claim for injunctive relief for the FERPA violations).

149. *See id.* at 1211-13 (analyzing federal judicial precedent and finding that Section 1983 allows the court to grant a remedy for FERPA violations).

150. *See Falvo II*, 233 at 1219 n.14 (holding qualified immunity to be generally unavailable to defendants that violate FERPA, but granting defendants in this case qualified immunity because "the very agency charged with administering the statute, the FCPO, had put forward a directly contrary interpretation").

151. *See id.* at 1220 (stating that "qualified immunity does not protect the individual defendants from liability for injunctive relief"). The court noted that the claim against the school could succeed only if the grading practice were pursuant to school policy or custom, or carried out by someone with final policy-making authority with respect to grading. *Id.* at 1219-20 n.15 (citing Seamons v. Snow, 206 F.3d 1021, 1028 (10th Cir. 2000)). The court also remanded the claims for injunctive relief against the individual defendants in their official capacities. *Id.* at 1219-20.

152. *Id.* at 1215.

physical possession of the teacher.[153] The court concluded that because the students were correcting each other's work on behalf of the teachers, the grades were being "maintained" by the school through its student grading agents.[154] The *Falvo* court limited its analysis to the grades on the peer-graded work, and did not address whether the papers themselves were also FERPA records.[155] The court seemed to draw its conclusion primarily from the plain language of FERPA, stating that, "[b]ased purely on the language of the statute itself, this court concludes the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under FERPA."[156] The *Falvo* court

153. *See id.* at 1213 (citing FERPA, 20 U.S.C. § 1232g (1994)); *see also id.* at 1207 (illustrating how the grading practice resulted in the students' grades never being in the teacher's physical possession).

154. *See id.* at 1216 (resolving that "the grades which students mark, at the teacher's discretion, on each other's homework and test papers and later report to the teacher are 'maintained . . . by a person acting for [an educational] agency or institution,'" because the student graders, in assisting the teacher, become such persons).

155. One could argue from the final *Falvo* decision that FERPA records extend to the student work itself rather than the grades on the work. The court concluded that the grades on assignments and tests constitute education records because student-agents of the school "maintained" the grades until the teacher recorded the grades in the grade book. Under this reasoning, assignments and tests would likewise be education records since they contain information directly related to individual students, and are "maintained" by the student-agents until the graded students are allowed to take them home or dispose of them as they see fit. Of course, the papers are "maintained" in this manner for only a matter of minutes while they are graded and the grade is recorded, after which they are the property of the student. In contrast, the grade on the paper is recorded (semi)permanently in the teacher's grade book. Neither the district nor appeals courts addressed whether the records were "maintained," instead focusing on whether they were FERPA records and whether the student graders were persons "acting for" the school. *See Falvo II*, 233 F.3d at 219-20 n.15 (citing Seamons v. Snow, 206 F.3d 1021, 1028 (10th Cir. 2000)). FERPA does not define the word "maintain," and it is unclear whether there is some sort of durational requirement. By way of comparison, the federal Privacy Act defines "maintain" as to "maintain, collect, use, or disseminate." 5 U.S.C. § 552a(a)(3) (1994 & Supp. 1998). If there is no durational requirement, then even a student's chalk work on a classroom blackboard is arguably a record that the school temporarily maintains prior to destruction via erasure. However, if temporarily kept records are not considered to be "maintained" by a school, the consequences to student privacy are grave. Schools could abuse their authority and disclose all manner of student information by choosing to share temporarily kept records. For example, a teacher could disclose a student's IQ score, which she had seen on a record in her possession but not kept.

156. *Falvo II*, 233 F.3d at 1215 (footnote omitted). Neither the opinion nor the dissent from the denial of rehearing en banc pays particular attention to FERPA's legislative history. The panel opinion references it once as evidence of FERPA's general purposes. *See id.* at 1211 (discussing legislative intent of FERPA); *see also id.* at 1217 (citing the court's non-obligation to analyze a statute's legislative history when the language of the statute is clear). The dissent from the denial of rehearing en banc references FERPA's legislative history regarding FERPA hearings to challenge records. *See id.* 233 F.3d at 1203 (Kelly, J., dissenting) (discussing the absence of any reference in the legislative history of FERPA to all grades as

recognized the FPCO's position, expressed in an opinion letter, that student-assigned grades were not, "strictly speaking, 'maintained'" by schools and therefore were not FERPA records.[157] However, the court did not find the letter persuasive.[158] Citing recent U.S. Supreme Court precedent, the court noted that the FPCO letter was not a product of the formal regulatory process and therefore not entitled to the same deference as regulations.[159] The court also pointed to the lack of reasoning in the FPCO letter to support its conclusion.[160] However, the court did find that the FPCO letter rendered individual rights under FERPA sufficiently unclear such that the individual defendants were entitled to good faith immunity from monetary damages.[161]

The *Falvo* court also did not affirmatively rely on policy grounds in interpreting FERPA's records definition; it did not suggest significant specific positive policy results that would spring from its decision. Although the court recognized the possibility of some negative consequences of its decision, it believed its role to be limited to interpreting the statute as written by Congress, stating that "[t]his court must go wherever the language and intent of the statute takes us. Should our interpretation cause public discomfort or impose undesired burdens, it is to the source of the enactment, Congress, that those who are discomforted or burdened must turn for relief."[162]

The court did, however, suggest that its decision need not have negative policy consequences, noting that schools could continue peer grading "if done anonymously or with the consent of parents."[163] If the teacher graded papers and wished to return them to students with a minimum of work, the teacher could have students hand out

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educational records). Reading the legislative history as precluding hearings to challenge grades, the dissent from the denial of rehearing en banc concludes that if grades cannot be challenged in FERPA hearings, Congress could not have intended grades by peers to be regarded as education records. *Id.*

157. *Id.* at 1213 n.9.

158. *See id.* at 1215 (characterizing the letter as lacking "sufficient reasoning, fail[ing] to account for the breadth of FERPA's language, and indicat[ing] the FPCO's somewhat cursory and purely hypothetical consideration of the issue before this court," and concluding, therefore, that the interpretation of FERPA in the letter is "not persuasive").

159. *Id.* at 1214 (citing Christensen v. Harris County, 529 U.S. 576 (2000) (noting that it will not extend deference to an agency interpretation contained in an opinion letter or where the statute in question is ambiguous)).

160. *See id.* at 1215 (criticizing the FCPO letter as "somewhat cursory and purely hypothetical").

161. *See Falvo II*, 233 at 1219 n.14 (granting defendants qualified immunity because "the very agency charged with administering the statute, the FPCO, had put forward a directly contrary interpretation").

162. *Id.* at 1213 (citation omitted).

163. *Id.* at 1218 n.13 (referencing 20 U.S.C. § 1232g(b)(1)).

the graded papers "in sealed envelopes" or folded over to cover the grade, or could have students approach the teacher individually to receive their papers.[164] Teachers could use students to collect self-graded papers by having students turn them face down before collection by a peer.[165]

The dissenters from the denial of rehearing en banc (the dissenters) would have held that the grades on student papers were not maintained by the school or its agents, and thus were not FERPA records.[166] Specifically the dissenters concluded that "uncompensated student[s] that participate[d] in the grading process" were not acting as agents for the school.[167] The dissenters also concluded that because the teacher grade books in which the peer-scored grades were entered are usually sole-possession notes, and thus defined by FERPA as non-records, the grades on the papers that were the basis of the grades in the grade book must also not be FERPA records.[168] Also, according to the dissenters, Congress expressly would have indicated in the statute if it intended for grades prior to entry in a grade book to be considered education records.[169]

The dissenters suggested that a teacher's receipt of student-assigned grades was one step removed from that teacher's maintenance of those grades in a grade book, and did not render the grades FERPA records any more than it did the papers on which the grades were originally ascribed.[170] Relying on a sentence in the legislative history materials, the dissenters asserted that Congress did not intend for parents to be able to seek a hearing to challenge

164. *See id.* (suggesting a variety of methods by which teachers could distribute graded student work without violating FERPA).

165. *See id.* (providing alternative means by which teachers can continue student grading practice in compliance with FERPA). The court concluded that "[t]he School District's protestations that this opinion somehow marks the end of the world for teachers, therefore, are far exaggerated." *Id.*

166. *See id.* at 1202 (Kelly, J., dissenting) (citing 20 U.S.C. § 1232g(4)(A)(ii), and contending that the student-generated grades "simply do not meet the second element of the definition of 'education records'").

167. *Falvo*, 233 F.3d at 1202 (Kelly, J., dissenting) (citing 20 U.S.C. § 1232g(a)(4)(A)(ii), suggesting that student graders are too remote from the educational agency or agency to be "'a person acting for such agency or institution'").

168. *See id.* (asking "[i]f the teacher's grade book normally is not an 'educational record,' how could it be that individual grades on papers can be 'educational records'").

169. *See id.* (asserting that "had Congress intended such an important change in this sensitive area, surely Congress would have included express language to that effect").

170. *See id.* (arguing that student graders are not persons acting for an educational agency or institution, as required by FERPA).

grades that their children received.[171] They also noted that the access log required by FERPA would be unworkable if this obligated individual teachers to maintain a log of all access to grades.[172] Finally, the dissenters suggested "practical difficulties" would "abound" from the court's decision: disclosure of academic awards or an athlete's academic ineligibility could reveal underlying grades.[173] Moreover, to avoid disclosure of FERPA records, "overworked and underpaid" teachers would have to grade and return all graded student papers rather than using students for this task.[174] The dissenters concluded that "[t]his cannot be what Congress meant when it sought to protect a student's personal information and academic record from unwarranted disclosure."[175]

IV. ANALYSIS AND RECOMMENDATIONS

A. Disciplinary Records

1. Discipline records are covered by FERPA

Despite the decisions of several state courts to the contrary, it is clear that a student's discipline records are records under FERPA and thus subject to its confidentiality requirements.[176] First, as noted in the District Court for the Southern District of Ohio's decision in *Miami University*, discipline records fall within FERPA's statutory definition.[177] In fact, such records appear to fall within the original statute's "laundry list" definition of potential types of protected information, as "verified reports of serious or recurrent behavior

171. *See id.* (citing 120 Cong. Rec. 39,862 (1974)).

172. *See id.* (arguing that the "thousands of grades a student might receive over time would render the teacher's obligation to maintain all such grades impossible"). [OFFICE HOURS: PLEASE VERIFY THE ACCURACY OF THIS QUOTE AND WHETHER IMPOSSIBLE ENDS THE SENTENCE]

173. *See Falvo*, 233 F.3d at 1203 (Kelly, J., dissenting) (discussing potential consequences of the majority's holding).

174. *See id.* (contending that the majority decision could place additional burdens on teachers).

175. *Id.*

176. For other articles reaching the same conclusion, see Thomas R. Baker, *State Preemption of Federal Law: The Strange Case of College Student Disciplinary Records Under FERPA*, 149 EDUC. L. REP. 283, 286 (2001), which characterizes non-academic disciplinary records as "clearly" within FERPA's statutory grasp; Rada, *supra* note 4, at 1808 n.44 (citing 20 U.S.C. § 1232g(h)), which disclaims any prohibition on an educational institution's inclusion of disciplinary records in a student's educational records.

177. *See* United States v. Miami Univ., 91 F. Supp. 2d 1132, 1160 (S.D. Ohio 2000) (concluding that student disciplinary records are educational records as defined in 20 U.S.C. § 1232g (1994)).

patterns."[178]

FERPA's definition neither expressly limits its protection to academic records, nor includes an exception for discipline or other nonacademic records. Where FERPA specifically addresses discipline records,[179] it clarifies or modifies the general confidentiality rules for these records, rather than excluding them from FERPA's coverage.[180] Thus, for example, FERPA clarifies that discipline records may be "included" in a student's "education record" and shared with other school employees with "legitimate educational interests" in a student's conduct.[181] As the judge noted in *Miami University*, FERPA allows postsecondary institutions to disclose the results of certain disciplinary proceedings to alleged victims,[182] and in some cases to make the outcome public.[183] FERPA does not exclude such information as records, but merely allows postsecondary institutions to disclose certain information in those records without consent under very limited circumstances.[184] By implication, all other disciplinary records are subject to FERPA's general confidentiality

178. *See* Education Amendments of 1974, Pub. L. No. 93-380, Title V, § 513(a), 88 Stat. 571, 571-72 (1974) (codified as amended at 20 U.S.C. § 1232g (1994)) (suggesting several types of information that are subject to FERPA's confidentiality requirements). Note that the laundry list is apparently not exclusive, as the wording states "including, but not necessarily limited to." *Id.*

179. *See generally* 20 U.S.C. § 1232g(b), (h) (1994 & Supp. 1999) (disclaiming prohibitions on educational institutions' rights to disclose disciplinary records in circumstances involving violent crimes, nonforcible sex offenses, conduct that poses a "significant risk to the safety or well-being" of the disciplined student or others, and the use or possession of alcohol or a controlled substance by a student under age 21).

180. *See id.* (using negative language in stating that "nothing in this [section or Act] shall be construed to prohibit," rather than affirmative language exempting discipline records from the statute).

181. *See* 20 U.S.C. § 1232g(h) (describing what schools may disclose).

182. *See* 20 U.S.C. § 1232g(b)(6)(A) (proclaiming that "[n]othing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence . . . the final results of any disciplinary proceeding"); *see also Miami Univ.*, 91 F. Supp. 2d at 1151 (invoking 20 U.S.C. § 1232g(b)(6)(A), which "permits schools to disclose the results of any disciplinary proceeding to the victim of the crime . . . if it was a crime of violence or a nonforcible sex offense").

183. *See* 20 U.S.C. § 1232g(b)(6)(B) (proclaiming that "[n]othing in this section shall be construed to prohibit an [educational] institution. . .from disclosing the final results of any disciplinary proceeding" conducted against a student alleged to have committed a violent crime or "a nonforcible sex offense"); *see also Miami Univ.*, 91 F. Supp. 2d at 1151 (explaining that in 1998, Congress expanded FERPA's exceptions regarding disclosure of disciplinary actions taken in regard to alleged violent crimes and sex offenses, allowing educational institutions to "release to the public at large the final results of any disciplinary proceeding" conducted against a student alleged to have committed such offenses).

184. *See* 20 U.S.C. § 1232g(b), (h)-(i) (permitting some disclosure of information related to violent crimes, nonforcible sex offenses, and illegal use or possession of alcohol or a controlled substance by a student under the age of twenty-one).

obligations. Finally, FERPA permits higher education institutions to disclose to parents that their under-twenty-one-year-old adult children committed drug or alcohol violations of the law or school rules.[185] The implication is that absent consent, such information may not be disclosed to other persons, and that disciplinary or other information about financially independent adult students normally may not be shared with parents.

Congress enacted each of these specific FERPA provisions regarding discipline records as an amendment to FERPA in the 1990s: the victim disclosure provision in 1990[186] and 1998[187] amendments, the clarification of inclusion of discipline records in education records and internal sharing of that information in the 1994 amendment,[188] the public disclosure provision in 1998 amendments,[189] and the parent disclosure of student drug and alcohol misconduct in 1998 amendments.[190] Several of these amendments are more recent than the state court decisions that limit education records to academic records. For example, in 1993, *Red and Black Publishing Co. v. Board of Regents*[191] held that higher education discipline records are not covered by FERPA, and thus are

185. *See id.* § 1232g(i)(1)(A), (B) (declaring that "[n]othing in this chapter shall be construed to prohibit an educational institution from disclosing" the use, by a student under the age of twenty-one, of alcohol or other controlled substances proscribed by state, local, or federal law, or by a school policy).

186. *See* Act of November 8, 1990, Pub. L. No. 101-542 § 203, 104 Stat. 2385 (codified as amended at 20 U.S.C. § 1232g(b)(6) (1994)) (permitting disclosure to an alleged victim of the results of any disciplinary proceeding against the alleged perpetrator).

187. *See* Act of October 7, 1998, Pub. L. No. 105-244 § 951, 112 Stat. 1835 (codified as amended at 20 U.S.C. § 1232g(b)(6)(A) (1994 & Supp. V 1999)) (allowing disclosure to an alleged victim if the educational institution determines that the student violated that institution's rules or policies, and limiting the disclosure to the name of the student, the violation committed and the punishment imposed).

188. *See* Act of October 20, 1994, Pub. L. No. 103-382 § 249(5), 108 Stat. 3926 (codified as amended at 20 U.S.C. § 1232g(h) (1994)) (incorporating disciplinary records as part of the student record and allowing the disclosure of such information to teachers and school officials with legitimate educational interests in them).

189. *See* Pub. L. No. 105-244 § 951, 112 Stat. 1835, 1835-36 (codified as amended at 20 U.S.C. § 1232g(b)(6)(B), (C)) (permitting disclosure of the name of the student, the violation committed, and the sanction imposed as the final results of a disciplinary proceeding against an alleged perpetrator of a crime of violence or a nonforcible sex offense if the educational institution determines that the student committed a violation of the institution's rules or policies with respect to such crime or offense).

190. *See id.* § 952, 112 Stat. at 1836 (codified as amended at 20 U.S.C. § 1232g(i)) (condoning parental disclosure of student drug and alcohol violations where the student is under twenty-one years of age and where the institution determined that the student committed the violation).

191. 427 S.E.2d 257 (Ga. 1993).

not confidential.[192] *Red and Black* predates the 1998 amendments providing for very limited public disclosure of the results of some higher education discipline proceedings.[193]

2. Pedagogical and policy consequences of confidential student discipline records

While *Red and Black*[194] and similar decisions[195] are wrongly decided as a matter of FERPA's current, plain language, they identify two important reasons for allowing more disclosure of student discipline records. First, the school and the victim, have a significant interest in knowing the outcome of any school discipline when student misconduct involves a victim. The victim's interest in this knowledge is obvious and significant. FERPA permits disclosure to the victim when a higher education student is determined to have committed a crime of violence or a nonforcible sex offense.[196] However, victims in kindergarten through twelfth grade school ("K-12") settings are also vitally interested in knowing disciplinary outcomes,[197] as are all victims of misconduct such as sexual harassment that does not meet the definition of a crime of violence or a nonforcible sex offense.[198]

192. *See id.* at 261.

193. *See* Pub. L. No. 105-244 § 951, 112 Stat. 1835, 1835-36 (codified as amended at 20 U.S.C. § 1232g(b)(6)(B), (C)) (limiting the public disclosure to include the name of the student, the violation committed, and the sanction imposed by the institution and the names of other students, such as victims of witnesses, only with the other students' written consent).

194. *See* 427 S.E.2d at 261 (reasoning that disciplinary records are not the type of records Congress intended FERPA to protect because the records are not of an academic nature and are kept with a disciplinary office rather than with the registrar).

195. *See* Bauer v. Kincaid, 759 F. Supp. 575, 591 (W.D. Mo. 1991) (stating that criminal reports on students are not educational records under FERPA because they do not relate to the type of records Congress intended FERPA to protect, and that the court will not presume that the legislature intended these records to be covered under FERPA); Kirwan v. Diamondback, 721 A.2d 196, 204-206 (Md. 1998) (characterizing records of parking tickets as documents that do not fall within FERPA's definition of educational records because no legislative history suggests they were intended to be included and they have no relation to a student's educational plan).

196. *See* 20 U.S.C. § 1232g(b)(6)(A) (1994 & Supp. 1999) (allowing the final results of any disciplinary proceeding conducted by the educational institution against such perpetrator to be disclosed to the alleged victim).

197. *See Daggett I*, *supra* note 4, at 657 (arguing that Buckley should be amended to allow access to the results of disciplinary proceedings for pre-college victims, not just college-age victims).

198. Some sexual harassment by higher education students would meet this definition if it involved physical assault or forcible or nonforcible sex offenses. *See* 18 U.S.C. § 16 (1994) (defining the term "crime of violence" as "the use, attempted use, or threatened use of physical force against [another's] person or property," or a felony that "involves a substantial risk that physical force against the person or property of another may be used in the course of committing" that felony).

Schools also have institutional interests in disclosure of disciplinary action to victims. The victim must have confidence in the school's response to misconduct by knowing what action has been taken against the wrongdoer. Furthermore, knowing what actions schools have taken in the past may serve as an incentive for students to report future alleged misconduct. More pragmatically, K-12 schools owe a duty of reasonable supervision to their students. The Supreme Court recently held that schools at all levels may be vicariously liable under Title IX for peer sexual harassment of students if they are deliberately indifferent to claimed harassment.[199] Allowing schools to disclose disciplinary results to victims helps students and their families to understand that the school has met its legal responsibilities, and avoids legal claims.[200]

As the perpetrator is also a potential defendant for such claims, notifying the victim of the outcome may also limit the perpetrator's exposure.[201] Under current law, in a worst case scenario, the perpetrator may share false information about the outcome of discipline against her (for example, that the school determined a sexual harassment claim to be unfounded), and the school has no authority to disclose correct information (that, for example, the student has been found guilty of harassment and been punished).[202]

Second, some schools have pedagogical reasons for making the results of student discipline public. Some educators believe that discipline is most effective when the results are made public.[203] The publicity is thought not only to enhance the punishment's effectiveness for the perpetrator, but also to send a message to the entire student body about unacceptable behavior and its consequences.[204] Some schools may want the perpetrator to apologize

199. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 646-47 (1999) (declaring the "importance of school officials' comprehensive authority" in controlling conduct within schools).

200. *But see* Rada, *supra* note 4, at 1820 (arguing that by not releasing disciplinary records, educational institutions are shielding themselves from tort liability).

201. The perpetrator may, of course, protect his or her own interests by reporting the outcome to the victim or permitting the school to do so.

202. This worst case scenario is not far-fetched. For example, one of the authors is familiar with a situation in which a law student secured a positive letter of recommendation from a teacher for employment. After the employer made an offer to the student, the student was found to have engaged in plagiarism. The student hired an attorney to prevent the teacher from informing the employer of the misconduct.

203. *See* Thomas H. Allen, *Developing a Discipline Plan for You*, *at* http://www.humboldt.edu/~tha1/discip-options.html (1996) (stating that the Kounin Model of discipline believes that by correcting one student's behavior, it tends to change the behavior of others).

204. *See* Student Misconduct, Discipline, School Searches and Seizures, Reporting Offenses, Police Interviews and Arrests, and Restitution for Vandalism and

publicly for misconduct, or to make public presentations (such as speaking to groups about past drug use, for example) as a consequence for misconduct. As currently written, FERPA limits schools' ability to act on this pedagogy without the student perpetrator's consent.[205]

Others, including alleged and convicted perpetrators, have interests in keeping many aspects of disciplinary proceedings and their outcome confidential. As discussed above, publicity surrounding discipline may be punishment in and of itself, which in some cases could be harsher than the misconduct warrants. Publicity of disciplinary proceedings may create suspicion that an innocent student is in fact guilty on a "where there's smoke there's fire" theory. Making the disciplinary hearing or other process open, or ending the confidentiality of the details of any decision may be a heavy burden on the complainant and other witnesses, and may prevent complainants and witnesses from coming forward. For example, burdens on the complainant and witnesses would likely be extremely heavy in a sexual harassment hearing involving minor student victims that was open to the public. Moreover, students and their parents have undisputed interests in accessing their own discipline records.[206] These access rights would be unavailable if discipline records were excluded from FERPA.

3. Recommendation: Amend FERPA—not to exclude discipline records, but to allow limited disclosure of them

FERPA should be amended to balance these competing interests, but not to exclude discipline records entirely.[207] Excluding discipline records from FERPA ignores the real interests various constituencies have in keeping some aspects of discipline confidential.[208]

Negligence, HAW. ADMIN. R. tit. 8, § 19-1, *available at* http://lilinote.k12.hi.us/STATE/BOE/HomePage.nsf?OpenDatabase (last visited Sept. 8, 2001) (stating that one of the aims of discipline is to deter other students from future disciplinary problems).

205. *See* 20 U.S.C. § 1232g(b)(6) (1994 & Supp. 1999) (limiting the information an educational institution may release to the student's name, the violation committed, and the sanction imposed).

206. *See Kirwan*, 721 A.2d at 204 (stating that one of the policies behind FERPA was to prohibit educational institutions from acting in secret and to allow students and their parents access to their educational records).

207. This position contrasts with that taken by another commentator. *See generally* Rada, *supra* note 4, 1819-20 (discussing the Ohio Supreme Court decision in the Miami University case and arguing that discipline records should be excluded from FERPA).

208. *See id.* at 1820 (arguing that educational institutions have an interest in keeping disciplinary records confidential under FERPA to shield themselves from tort liability and to be able to promote a safer institution).

Additionally, in many states, it would make such records subject to public records and meetings laws since they would no longer be protected by FERPA. Arguably this would mean the media and the public would be entitled to be present at expulsion hearings and to access disciplinary records.[209]

Instead, FERPA's current language permitting very limited disclosure of disciplinary outcomes to victims and the public should be broadened as follows (deleted language in brackets, new language in italics):

> (A) Nothing in this section shall be construed to prohibit an *educational agency or* institution [of postsecondary education] from disclosing, to an alleged victim [of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense] *(or the parent of an alleged victim, if the child is under 18)*, the final results of any disciplinary proceeding conducted by such *agency or* institution against the alleged perpetrator [of such crime or offense with respect to such crime or offense].
>
> (B) Nothing in this section shall be construed to prohibit an *educational agency or* institution [of postsecondary education] from disclosing the final results of any disciplinary proceeding conducted by such *agency or* institution against a student who is an alleged perpetrator [of any crime of violence (as that term is defined in section 16 of Title 18), or a nonforcible sex offense], if the *agency or* institution determines as a result of that disciplinary proceeding that the student committed a violation of the *agency or* institution's rules or policies [with respect to such crime or offense].
>
> (C) For the purpose of this paragraph, the final results of any disciplinary proceeding –
>
> (i) shall include only the name of the student, the violation committed, and any sanction imposed by the *agency or* institution on that student; and
>
> (ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.
>
> (D) Persons who receive information under this provision may not redisclose such information except as permitted by FERPA.[210]

This proposal continues the general status of discipline records as covered by FERPA, and hence outside state public records and

209. *See, e.g.*, OHIO REV. CODE ANN. §§ 121.22, 149.43 (Anderson 1999) (stating that public meetings and public records are open to public access). *But see* MO. REV. STAT. § 610.021(6) (2000) (excluding specifically scholastic expulsion hearings from Missouri's Sunshine Law).

210. 20 U.S.C. § 1232g(b)(6) (1994 & Supp. V 1999).

meetings laws. It limits nonconsensual disclosure to name, violation, and sanction, as does FERPA currently, to limit the intrusion on the privacy of the alleged perpetrator, victim, and witnesses.[211] As FERPA does currently, the proposal limits public disclosure to situations where the perpetrator is found to have actually violated school rules.[212] If the perpetrator is found innocent, only the alleged victim may be notified, and may not redisclose the information to others. The proposal also continues FERPA's current approach of permitting, but not requiring, victim and public disclosures, leaving the disclosure decision in each case to the school's best judgment.[213] The proposal broadens current FERPA language in two respects. First, disclosures would not be limited to postsecondary institutions.[214] Second, disclosures would not be limited to crimes of violence or nonforcible sex offenses, but would include any behavior found to violate school rules.[215]

B. Day-to-Day Classroom Records

Falvo[216] was correctly decided under FERPA's current and plain language. However, FERPA as currently written, and as correctly interpreted by the Tenth Circuit in *Falvo*, significantly burdens schools' ability to act in ways that are educationally valid and appropriate. The *Falvo* court itself suggested the appropriate remedy for any burdens imposed by its decision: Congress needs to amend FERPA.[217]

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211. *Id.* § 1232g(b)(6)(C) (limiting the final results of disciplinary proceedings to protect perpetrators, victims, and witnesses).

212. *Id.* § 1232g(b)(6)(B) (stating that the institution must have determined that the alleged perpetrator violated the institution's rules or policies in order to disclose the final results of a disciplinary proceeding).

213. *See id.* § 1232g(b)(6) (indicating that the statute does not prohibit an institution of postsecondary education from disclosing information, but it does not require it to do so).

214. *See id.* (granting only postsecondary educational institutions the right to disclose the final results of disciplinary proceedings).

215. *See id.* (allowing for disclosure of disciplinary proceedings based only on crimes of violence or nonforcible sex offenses). Another commentator has suggested broadening the discipline disclosure exception beyond crimes of violence and nonforcible sex offenses to include all criminal offenses. *See* Sidbury, *supra* note 4, at 779-80 (arguing that FERPA should be "amended to mandate disclosure of all disciplinary records involving all criminal offenses"). This article expands Sidbury's proposal by recommending that schools be able to disclose violations of school rules that are not criminal offenses, such as sexual harassment, to victims.

216. Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1211 (10th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3789 (U.S. June 25, 2001) (No. 00-1073).

217. *See Falvo II*, 233 F.3d at 1213 (stating that plain language interpretation of FERPA is appropriate, and that if interpretation causes public discomfort, Congress should relieve this discomfort by amending FERPA).

1. Falvo *correctly interprets FERPA that student graders are persons who act for schools and are subject to FERPA*

The *Falvo* court is correct in holding that teachers who assign grading tasks to students make those students their agents and thereby "persons acting for" the school district.[218] Thus the grades in the students' possession are "maintained" by the school district and are FERPA records even before their entry in a teacher's grade book. Neither the peer graders' status as students nor their lack of compensation changes this result. FERPA's language defining records does not exclude students as persons who can "act for," or be agents of, a school.[219]

a. Student status does not prevent persons from being a school's agents under FERPA

Were students excluded as possible agents of the school under FERPA, the ramifications would be significant and detrimental to FERPA's central purpose of keeping student records confidential. Neither the court's opinion in *Falvo* nor the dissent from rehearing en banc addresses these consequences. If the grades calculated by peers are not FERPA records, then FERPA does not require the peer graders to keep them confidential. The practice in the school district in *Falvo*, of course, was to make the grades nonconfidential *within the classroom*, but if the peer-graded papers are not FERPA records, FERPA also would not prohibit peer graders from sharing peer grades outside of school, or even posting grades earned by their peers on the Internet.

Moreover, schools use students as their agents in a wide variety of ways besides serving as graders. Both K-12 and postsecondary schools routinely use students as peer tutors.[220] For example, in many law schools, academic resource programs for at-risk students use peer tutors to provide extra support and remediation.[221] In these

218. *See id.* at 1216 (reasoning that because the student-checker is giving a grade and because the grades are used at some point by the teacher, the student is acting for the educational institution, resulting in those grades being educational records under FERPA).

219. *See* 20 U.S.C. § 1232g(a)(4)(A) (1994) (providing definition for "education records").

220. *See, e.g.*, Inara Verzemnicks, *Never Too Young; Getting Children Involved in Public Service*, WASH. POST, Nov. 6, 1996, at C5 (showing the use of peer-tutors in a Washington, D.C. public school).

221. *See American University Washington College of Law Legal Analysis Study Group Website*, *at* http://www.wcl.american.edu/minority/academic.html (last vistited Sept. 9, 2001) (promoting a program where student tutors help students develop legal writing, legal analysis, and exam preparation skills); *Georgetown University Law Center Tutorial Program Website*, *at* http://data.law.georgetown.edu/curriculum/

programs, student tutors have access to grades, LSAT scores, and other information about their tutees.[222] These programs are premised on the assumption that these student tutors are agents of the school for FERPA purposes and are thus bound by FERPA to keep information about their tutees confidential to the same extent as are faculty and other law school employees.[223] Universities also use work-study student employees in positions involving access to student records.[224] For example, a law school registrar's office might hire undergraduate work-study students to help it maintain student records.[225] Many K-12 and postsecondary schools use students on judicial panels to resolve Honor Code or disciplinary violations and sometimes even to impose disciplinary sanctions.[226] Under the analysis of the dissent in *Falvo*, schools would likely have to discontinue all such programs because student graders, peer tutors, peer disciplinarians, and perhaps even work-study students would not be agents with whom the school could share records under the legitimate educational interest exception.[227]

b. Individuals need not be compensated to serve as school agents under FERPA

FERPA's language does not indicate that compensation is required in order for persons to "act for" a school.[228] Reading such a

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tab_courses.cfm (last visited Sept. 20, 2001) (advertising a program where peer tutors assist first year law students).

222. This is the current practice at one of the author's schools.

223. At one of the author's schools student tutors are required to sign a statement acknowledging their FERPA obligations to keep information about their tutees confidential. *See* 20 U.S.C. § 1232g(a)(4)(A) (1994) (including persons acting for educational agencies or institutions under FERPA's province).

224. *See, e.g.*, *University of Maryland Office of Student Financial Aid*, *at* http://www.inform.umd.edu/CampusInfo/Departments/FIN/FWS/JOBS/LISTINGS/683_on403.html (last visited Sept. 20, 2001) (noting a work study position in the student support services office); *University of Vermont Work-Study Employers for Aid Year 2001-2002*, *at* http://career.uvm.edu/students/Work_Study/ws_jobs_web.html (last visited Sept. 8, 2001) (advertising for a student to fill a work study position in the registrar's office).

225. This is the practice at one of the author's schools.

226. The University of Virginia Honor Committee is a good example of this phenomenon. *See The Honor Committee Website*, *at* http://www.student.virginia.edu/~honor/ (visited Sept. 8, 2001) (stating the University of Virginia's honor code system and the fact that it is student-run).

227. Of course, including students as FERPA agents does not mean that every record in a student's possession is a FERPA record. For most of their waking hours, student graders, tutors, and work-study employees do not act as FERPA agents and if they happen to have access to another student's record during their "off" hours, those records would not be subject to FERPA requirements.

228. *See* 20 U.S.C. § 1232g(a)(4)(A)(ii) (1994) (defining "educational records" as those records "maintained by an educational agency or institution or by a person acting for such agency or institution").

requirement into the statute, as the dissent from denial of rehearing *en banc* seemed to do,[229] would also have far-reaching ramifications. If uncompensated persons could not be FERPA agents, then parent and other school volunteers would not be subject to FERPA and could publicly disclose whatever student information they acquire in the course of their volunteer work. Also, most board of education positions are unpaid,[230] but no one could seriously suggest that boards of education are not acting for schools when they conduct student expulsion hearings or decide other matters involving student records.[231] The dissent from denial of rehearing's language allows the inference that board of education members might also not be persons who could "maintain" FERPA records, and hence would not be subject to FERPA.[232]

c. The Falvo *court correctly interpreted FERPA's grade book, sole possession notes, and access logs language*

The majority in *Falvo* also convincingly rebutted the grade book/sole possession notes and grade hearing arguments raised by the dissenters ("the dissenters") from denial of rehearing.[233] The dissenters were correct that the contents of a teacher's grade book, as well as notes made by teachers, school counselors and other employees, might constitute sole possession notes exempt from parental access under FERPA.[234] Sole possession notes, however, are not non-FERPA records in the sense the dissent presumes them to be. The dissent states: "If the teacher's grade book normally does not constitute an 'education record' [because not shared with others],

229. *See* Falvo v. Owassa Indep. Sch. Dist. No. I-011, 233 F.3d 1201, 1202 (10th Cir. 2000) (Kelly, J., dissenting) (arguing that a teacher's receipt and recording of a grade from a student who had graded another student's paper does not "make[] every uncompensated student that participates in the grading process 'a person acting for such agency or institution'" subject to the requirements of FERPA).

230. For example, the Missouri Rockford School District Policy provides that no school members shall "profit financially in any manner by reason of any dealings with the board". ROCKWOOD SCH. DIST. BD. POL'Y, Policy 0350, *available at* http://www.rockwood.k12.mo.us/hr/policies/0000/index.html (last visited Sept. 21, 2001).

231. *See* 20 U.S.C. § 1232g(b)(1)(A) (1994) (permitting disclosure of records to school personnel with legitimate educational interests").

232. *See Falvo*, 233 F.3d at 1202 (Kelly, J., dissenting) (drawing conclusion that uncompensated students who participated in grading of other student papers were not subject to FERPA).

233. *See* Falvo v. Owasso Indep. Sch. Dist. No. I-011, 233 F.3d 1203, 1215 (10th Cir. 2000) (finding that the exclusion of grade books from definition of educational records "defies. . .the plain language" of the statute).

234. *See* 20 U.S.C. § 1232g(a)(4)(B)(i) (1994); Family Educational Rights and Privacy, 34 C.F.R. § 99.3 (2000) (describing what is excluded from being "educational records").

how can it be that individual grades on papers can be 'education records'?"[235] This statement ignores the fact that if the individual grades from a grade book are shared with others, they become FERPA records.[236] Similarly, once third parties (e.g., students) have access to counselor or teacher notes or to information from the notes, the notes or the relevant portions thereof lose their status as sole possession notes and become FERPA records.[237]

The dissenters were similarly incorrect in assuming that grade books and other sole possession notes cannot refer to information already in FERPA records.[238] For example, counselor notes of sessions with students and teacher notes of conversations with students may refer to information in FERPA records, including a student's comments about declining grades to a counselor or a teacher's notes of a conversation with a student about the need to improve her class attendance. As the *Falvo* court points out, a sole possession note does not mean that all of the data in the note (such as grades derived from peer-graded student papers) are also exempt under FERPA.[239]

Interestingly, recently proposed regulations would have narrowed the sole possession notes exception to FERPA's broad definition of records. The proposed regulations would have excluded from the definition of sole possession notes documents that are "used for purposes other than memory aids or reference tools," [240] as well as "[r]ecords that contain information taken directly from a student or that are used to make decisions about the student." [241] The proposed regulations also would have limited sole possession notes to records "typically maintained by . . . school official[s] unbeknownst to other individuals."[242] Under all three of these proposed limitations, grade books would no longer have been sole possession notes, as they are used for purposes other than memory aids, contain grades used to make decisions about students, and are maintained by teachers with

235. *Falvo*, 233 F.3d at 1202 (Kelly, J., dissenting).
236. *See* 20 U.S.C. § 1232g(a)(4)(B)(i); 34 C.F.R. § 99.3 (excluding only those records in the "sole possession" of the record maker).
237. *See id.* (requiring excluded records to be unavailable to everybody except the record maker or substitute).
238. *See Falvo*, 233 F.3d at 1202-03 (Kelly, J., dissenting) (recognizing that grades prior to entry in a grade book are not FERPA records because they do not fit within the court's "narrow definition" of "educational records").
239. *See Falvo II*, 233 F.3d at 1215 (rejecting the school district's contention that the statute "excludes gradebooks from the definition of 'educational records' in an unqualified manner," and recognizing that such an interpretation would permit teachers to reveal the contents of their grade books to anyone).
240. Proposed Rulemaking Notice, 64 Fed. Reg. 29,532, (June 1, 1999).
241. *Id.* at 29,534.
242. *Id.*

the full knowledge of the school community.

The Department of Education initially characterized its proposal as "clarifying" the sole possession notes definition.[243] After receiving many comments suggesting that the proposed change unduly narrowed the scope of sole possession notes and read the exception out of existence,[244] the Department modified its stance. The Department reiterated that sole possession notes do include notes taken by a counselor or teacher who observes a student, so long as the note is not shared with others excluding temporary substitutes.[245] The final regulations make only minor changes to the prior definition,[246] although they do clarify that the notes are meant to be used "only as a personal memory aid."[247] Moreover, a grade book arguably is not used only as a personal memory aid but is used to make evaluative and placement decisions about students, something that further weakens the argument of the dissenters.

The court's opinion also quickly disposes of the dissenters' argument that graded papers cannot be FERPA records since grades cannot be challenged in FERPA hearings.[248] The dissenters are correct that the fairness of grades (e.g., a student's grade of C in a history class), and the fairness of the grading process (e.g., the history grades were based solely on scores on a final exam) cannot be challenged in FERPA hearings.[249] The accuracy of the grading

243. *See id.* at 29,532 (reasoning that clarification was necessary because of past "confusion" over the meaning of sole-possession records).

244. *See* Family Educational Rights and Privacy, 65 Fed. Reg. 41,852, 41,855-56 (July 6, 2000) (discussing comments which suggested that the proposed changes "define[d] 'sole possession records' out of existence" by exempting personal notes taken by teachers from information gained from students to use in making minor decisions). The *Falvo* court had also noted that the dissent from denial of rehearing en banc's interpretation of sole possession notes made the category superfluous. *See Falvo II*, 233 F.3d at 1216 (rejecting the school district's contention "that interpreting § 1232g(a)(4)(B)(i) as merely allowing for the disclosure of grade books to substitutes, as this court does, 'renders subsection 1232g(b)(1)(A) superfluous, because subsection 1232g(b)(1)(A) already provides that it is not a violation of FERPA to allow access to educational records' by substitute teachers").

245. *See* 65 Fed. Reg. at 41,856 (noting that the "main purpose" of the subdivision was to keep personal notes private).

246. *See* 65 Fed. Reg. at 41,856 (deciding to abandon proposed changes and adopt only "minor" changes to clarify the definitions at issue).

247. *See* Family Educational Rights and Privacy, 34 C.F.R. § 99.3 (2001); 65 Fed. Reg. 41,852, 41,853 (July 6, 2000) (adding "personal memory aid" as a requirement).

248. See *Falvo II*, 233 F.3d at 1217 (presenting the view that Congress "could have sensibly intended" to permit parents to challenge the accuracy as opposed to the fairness of individual grades in FERPA hearings based on individual homework assignments and test grades).

249. *See Falvo*, 233 F.3d at 1202-03 (Kelly, J., dissenting) (recognizing a "critical distinction" between an "institutional record" where a grade is reported, and the fairness of "graded material itself" for purposes of availability for disclosure under FERPA).

process (that a student's B in torts was inaccurately recorded as a C, or was incorrectly calculated due to a math error), however, is a permissible subject for a FERPA hearing.[250] The dissenters were concerned that Congress did not intend "a right to a hearing on each and every grade received."[251] However, the *Falvo* court did not suggest that one can challenge the fairness of the teacher's grading standards on student homework and tests, only that one can challenge the accuracy of the grade itself.[252] The court reasoned that if grades calculated by students under the teacher's direction constitute FERPA records, all grades should be subject to a hearing, just as final grades are, because inaccuracy at one stage can lead to inaccuracy at the final stage.[253]

Finally, the *Falvo* court effectively rebuts the dissenters' argument regarding access log obligations created by its decision. The court first points out that the log of access requests can still be centrally maintained by each school district.[254] Second, and in any event, access logs are required only for nonconsensual disclosures to certain persons *outside* the school system, rather than for disclosures within the school system, such as to the students themselves. Moreover, the log can be viewed only by parents, record custodians, and other education authorities for audit and evaluation purposes.[255]

250. *See Falvo II*, 233 F.3d at 1217 (explaining that the accuracy of the grading process is a proper subject of a FERPA hearing in light of the fact that inaccurate grading may have a "significant impact" on a student's final grades).

251. *See Falvo*, 233 F.3d at 1203 (Kelly, J., dissenting) (describing the concern that a broadened definition of "educational records" would permit aggrieved students to invoke FERPA hearings to challenge a grade given on any assignment).

252. *See Falvo II*, 233 F.3d at 1217 (noting that "Congress could sensibly have intended to provide parents a means to challenge the accuracy of grades on individual homework and test papers").

253. *See id.* (describing a scenario in which one student out of malice grades another student's papers inaccurately, and the latter student's permanent grades are thereby affected). This particular scenario does not strike the authors as realistic because the disputed practice (as is customary in other schools as well) allowed the student whose work was graded to see (and presumably check) the grade before calling it out to the teacher.

254. *See id.* (rejecting the school district's contention that a broadened definition would require teachers to maintain an "access record" detailing each person requesting information relating to a graded assignment or test, and that person's interest in making the request as running contrary to the statute's allowance of a "central custodian" to deal with access records).

255. *See* 20 U.S.C. § 1232g(b)(4)(A) (1994) (describing what the records shall contain and who may see them); 34 C.F.R. § 99.32 (explaining in detail the requirements of 20 U.S.C. § 1232g(b)(4)(A) regarding access records).

2. Falvo *brings to light significant pedagogical burdens on schools created by FERPA*

While the *Falvo* court correctly interprets FERPA as it is currently written, neither the court nor the dissenters recognize or address the impact of the opinion on widespread and pedagogically valid school practices. Such practices include having students evaluate other students' work, having students work together on projects that receive group and individual grades, and displaying students' work with a teacher's evaluation on it. Peer grading of each other's work serves not only to lessen the teacher's grading load, but also provides students with quick feedback, an important technique to maximize learning.[256] Students working in pairs or groups on written or other projects is integral to basic instructional strategies such as cooperative learning.[257] Sometimes the work is graded only as to the final group project, but other times the group grade is based on individual grades of the various participants, creating an incentive for each student to carry a fair share of the work load and assume responsibility for a specific subtask. Displaying student work can serve to motivate not only the student whose work is displayed, but also classmates who may be inspired by the peer work they see.

Under FERPA's current language as interpreted by the *Falvo* court, schools' abilities to continue these practices may be limited. Schools could attempt to obtain parental consent[258] for peer evaluation, group work evaluations, and displaying of evaluated student work. In the event, however, that some parents did not consent, schools would have to make exceptions to their grading and instructional practices.[259] Schools alternatively could display evaluated student

256. *See, e.g.*, REGIE ROUTMAN, INVITATIONS: CHANGING AS TEACHERS AND LEARNERS K-12 255-56 (rev. ed. 1994) (discussing pedagogical benefits of peer grading in context teaching of spelling skills).

257. *See generally* J. SCOTT HEWITT & KATHLEEN S. WHITTIER, TEACHING METHODS FOR TODAY'S SCHOOLS: COLLABORATION AND INCLUSION 271-73 (1997) (discussing the function and benefits of various cooperative learning strategies for students in all grade levels).

258. In K-12 schools with minor students, the parents hold FERPA rights and thus student consent would be insufficient. *See* 20 U.S.C. § 1232g(b)(1)(1994 & Supp. 1999) (requiring parental consent for release of educational records).

259. If some children are exempted from having their grades made public within the classroom, it is possible that those children may be singled out for as much ridicule as Falvo's children allegedly received by having their grades made public. Many teachers would assert that students know how other students are performing in their classrooms, regardless of whether the grades are shared publicly. However, the extent of this knowledge surely decreases as the students enter secondary schools and have different classmates in their various class sections.

artwork without names or other personally identifiable information (e.g., by having student artists sign the back of their drawings). Similarly, K-12 schools could adopt the practice of many law schools and assign students numbers to use on exams rather than names. With exam numbers, teachers could collect student papers, shuffle them, and hand them out for grading. Student graders would not then know whose paper they were grading.

Reasonable persons can disagree as to whether the student privacy benefits in these alternative practices outweigh their administrative costs.[260] Moreover, adopting an anonymous and confidential approach to grading even daily and weekly assignments may impact student attitudes. Students who are aware of their peers' daily performance may choose either to be supportive or unsupportive of their classmates. These options are eliminated by anonymous grading. Other educational options simply cannot be adequately dealt with by such methods as anonymous student grading. For example, peer editing might be restricted because the editor sees and comments on the work of another. Student-edits, however, serve to heighten the student editor's perspective for his or her own work and is an important instructional strategy in strengthening student writing skills.[261]

Ungraded student group work is another valuable instructional strategy that may be frustrated by FERPA. Teachers from all levels may assign group work for students to complete, resulting in one work product for all students in a group.[262] For example, a second grade teacher may divide the class into groups, asking each group of students to work together to make one group list of animals. A law school professor may have groups of labor law students negotiate a mock labor contract.[263] A science teacher may ask a team to perform and report the outcomes of an experiment. In each of these exercises, a group of students would be creating a single education record, but the parents, or the adult students themselves, have not executed FERPA's required written consent.[264]

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260. *See* 34 C.F.R. §§ 99.1-99.67 (describing the purpose of regulations as the protection of student privacy and outlining extensive administrative procedures schools must follow in order to meet that goal).

261. *See, e.g.*, ROUTMAN, *supra* note 256, at 53-59 (providing a discussion of benefits and examples of student editing of fellow student writing).

262. *See, e.g.*, HEWITT & WHITTIER, *supra* note 257, at 271-73 (discussing the use of group learning techniques).

263. One of the authors has in fact had her labor law students complete this task. Both authors have used group exercises and group grading in some of their courses.

264. One might argue that these group-created records are each members' own records, and thus schools may share them with each member without consent.

If schools were to begin asking for blanket consent for group projects, that would not solve the problem. First, FERPA consent must specify the records sought to be released and the period of time the consent is to be effective.[265] It is unclear whether a blanket consent of "group work records" covering an entire academic year would meet FERPA's requirements. Second, some parents and adult students may refuse to consent, potentially requiring schools to make fundamental (not to mention administratively unworkable) alterations in instructional strategies.

Of course, students have some interest in protecting the privacy of their performance, particularly on high stakes tests such as final exams, term papers, and standardized achievement and ability measures. It would be inappropriate for teachers to disclose student final exam grades, SAT scores, or IQ results to peers. Some students and parents have concerns about the disclosure of their performance on lower stakes quizzes and daily worksheets to peers.[266] Such students may worry that disclosure will result in teasing if they perform poorly, or jealousy if they excel.

3. Recommendation: Amend FERPA—not to exclude daily classroom records, but to allow limited disclosure to students when the school identifies a legitimate educational reason to do so

FERPA should be amended to reflect a pedagogically appropriate balance between conflicting concerns. Simply put, FERPA should reflect that schools' reasonable pedagogical concerns may override some legitimate student privacy concerns. As with discipline records, FERPA's definition of general records should *not* be amended to exclude peer grades on day-to-day classroom records. Such an amendment would make these grades subject to public access under many state public records laws.[267] It would inappropriately allow schools and others to disclose such records to persons beyond a

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Analogy might also be made to a teacher's grade book, where the law states that portions that contain personally identifiable information about other students must be redacted. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a). Records about more than one student (e.g., a teacher's grade book) must be edited before providing access so that information about other identifiable students is not disclosed. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a).

265. *See* 20 U.S.C. § 1232g(b)(2)(A) (1994) (requiring written parental consent for the release of records "specifying records to be released").

266. *See, e.g.*, *Falvo II*, 233 F.3d at 1207 (describing how the children of the parents who brought the FERPA claim were "severely embarrassed" by the disclosure of grades to other students as a result of the school's peer grading process).

267. *See, e.g.*, Oklahoma Open Records Act, OKLA. STAT. ANN. tit. 51, §§ 24A.1-26 (West 2000) (providing example of public records statute in jurisdiction where *Falvo* originated).

student's classmates. Except perhaps for viewing displayed student work, the public has no legitimate interest in accessing individual student performance, and students have a significant interest vis a vis the general public in maintaining the privacy of their performance.[268] Moreover, students and their parents have undisputed interests in accessing their own performance records. These access rights would be unavailable if day-to-day classroom records were excluded from FERPA.

For similar reasons, amending FERPA's directory information definition to include day-to-day classroom records is not a workable solution. There is some merit to the argument that day-to-day classroom records are ones in which students have a lesser expectation of privacy.[269] However, making such records directory information gives schools the right to disseminate it to anyone, which as discussed earlier is more disclosure than is educationally justified.[270] Such an approach also gives students an opportunity to object, which would place unworkable and educationally unjustified burdens on schools.[271]

Because the primary reason for disclosing day-to-day classroom records is pedagogical, FERPA's special disclosure rule for school employees *with legitimate educational interests* would be an appropriate place to deal with this issue.[272] The current "legitimate educational interest" exception does not cover students in most cases, as it is limited to "school officials, including teachers."[273] Congress should amend § 1232g(b)(1)(A) as follows, allowing nonconsensual disclosure to:

> Other school officials,[274] including teachers within the educational

268. *See* Family Educational Rights and Privacy, 34 C.F.R. § 99.1 (2000) (laying out the "requirements for the protection of privacy of parents and students").

269. *See Falvo*, 233 F.3d at 1203 (Kelly, J., dissenting) (implicitly recognizing a lowered expectation of privacy in day-to-day records, arguing that an overly expansive definition of educational records and the resulting need to keep all day-to-day records absolutely private "cannot be what Congress meant when it sought to protect a student's personal information and permanent academic record from unwarranted disclosure").

270. *See* 20 U.S.C. § 1232g(a)(5)(A) (1994) (permitting public disclosure of directory information).

271. *See id.* § 1232g(a)(5)(B) (providing a notice period in which schools must offer public notice of the release of directory information and time period for parents to object and prevent disclosure of such information).

272. *See id.* § 1232g(b)(1)(A) (limiting disclosure of educational records without parental consent to "school officials including teachers within the educational agency, who have been determined to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required").

273. *Id.*

274. Although beyond the scope of this Article, the authors also suggest clarifying

> institution or local educational agency, *and a student's classmates, to the extent such persons* have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required. Students do not have a legitimate educational interest in learning their classmates' performance on standardized ability or achievement tests, nor on midterm and final exams, but schools may appropriately determine that students have legitimate educational interests in evaluating their classmates' work, or in working with classmates on group projects. Schools may also determine that positive student motivation and/or positive recognition of student achievement are legitimate educational interests for displaying student work. Students and other persons who receive information under this provision may not redisclose such information except as permitted by FERPA.[275]

This proposal would leave to each educational agency the determination of the circumstances in which classmates would have legitimate educational interests in information about peers. The school is required to include in its annual FERPA notification a "specification of criteria for determining . . . what constitutes a legitimate educational interest."[276] Thus, schools would need to have an agency-wide discussion and make a reasonable and pedagogically supported decision about when students have legitimate educational reasons to have information about their classmates, as in peer grading and editing or group work. Existing statutory language requires schools to consider the student's own educational interests in making this determination.[277] Parents or adult students would be on notice of the school's policies.

This proposal draws a line between high stakes performances, such as SAT scores and final exam grades to which students cannot be given access, and other situations in which there may be legitimate educational reasons for disclosure to classmates. It continues to bring all such records within FERPA's general scope, thus preserving parent/adult student access rights and avoiding any public access

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that volunteers at schools are "school officials" who may receive student information in which they have a legitimate educational interest. For example, a parent who volunteers in a classroom by working with some students on reading would have a legitimate educational interest in receiving information about, for example, those students' scores on reading tests.

275. 20 U.S.C. § 1232g(b)(1)(A) (italicized text indicates new language authors suggest adding to statute).

276. 34 C.F.R. § 99.7(a)(3)(iii).

277. *See* 20 U.S.C. § 1232g(b)(1)(A) (requiring that "legitimate educational interests" include "the educational interests of the child for whom consent would otherwise be required").

rights under state public records and meetings laws. The proposal expands access only to classmates, who would be required to treat the information as confidential.

Finally, this proposal may be helpful in connection with the disciplinary records issue. Arguably, in some cases victims and other students have legitimate educational interests in knowing disciplinary information about classmates, but the alleged perpetrator's own educational interests would also be considered under this language.

CONCLUSION

Recent federal court decisions explore whether education records under FERPA include discipline records (*Miami University*) and grades on student-graded tests and papers that are not collected by teachers (*Falvo*). Under FERPA's plain language, regulations, and legislative history, the *Miami University* and *Falvo* courts correctly determined that student discipline records and grades on peer-graded student papers are education records covered by FERPA. While this result is clear as a matter of statutory interpretation, it is also unworkable, and in some respects pedagogically unsound. For example, the decisions limit schools' ability to have students grade one another's work, to display graded student work, and to inform student victims about discipline taken against student wrongdoers. Congress should amend FERPA to address these concerns. Specifically, FERPA should provide that, under circumstances like these, schools may identify legitimate educational interests in limited disclosure of education records. First, schools at every level should be able to determine that victims of offenses committed by students have an interest in knowing the disciplinary consequences for the perpetrator, and whether or not the offense also constitutes a violent crime or sex offense. Second, schools should be able to continue practices of peer grading, student group work, and display of student work if they identify legitimate educational interests in such activities.