The Evolution of FERPA:

Student Privacy vs. Government Policy Goals

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The U.S. Department of Education (USDE) has been brazen in its desire to interpret the Family Education Rights and Privacy (FERPA) law to allow much greater sharing of educational records so they may gauge the success—or lack thereof—of individual colleges and the U.S. Higher Education System as a whole. On April 7, 2011, USDE issued a press release that announced a series of initiatives to safeguard student privacy while clarifying that states have the flexibility to share school data that are necessary to judge the effectiveness of government investments in education.

Over time, interpretations of FERPA have complicated valid and necessary disclosures of student information without increasing privacy protections, and in some cases dramatically decreased the protections afforded to students. To help strike a balance between student records privacy and data availability, common-sense rules that strengthen privacy protections and allow for meaningful uses of data are needed. “Data should only be shared with the right people for the right reasons”, said U.S. Secretary of Education Arne Duncan (U.S. Department of Education, 2011).

Moreover, on April 8, 2011, USDE released a Notice of Proposed Rule Making (NPRM) under the Family Education Rights and Privacy Act, which provides citizens 45 days from the date of the publication in the Federal Register to submit written comments (Federal Register/Vol. 76, No. 68/Proposed Rules, 2011). USDE expects to publish final rules by the end of 2011 (U.S. Department of Education, 2011).

The NPRM would virtually provide unlimited access to education records in the name of evaluating program outcomes to any program evaluators who can convince an authorized representative that they are reviewing an education program. Fordham University’s Center on Law and Information Policy wrote in its response to the NPRM that “this change and other profound troubling definitional changes are so fundamental, and such a departure from what the

crafters of FERPA intended, that they should be left to Congress to review" (The Center on Law & Information Policy, Fordham University School of Law, 2011). USDE proposed changes to the FERPA rules – changes that taken together would give colleges and universities more latitude to share student-level information with state agencies and others without student consent.

The federal government has recognized that education officials have been confused and have differing interpretations of privacy laws and regulations that have impeded appropriate information sharing (Graham, Hall, & Gilmer, 2008). As a result, information sharing in higher education has faced substantial obstacles.

To better understand the motivation behind the needed ongoing regulatory changes in FERPA, it is important to know the meaning of and the judicial and legislative history of the Act.

FERPA is a federal law with a two-fold purpose:

> To assure parents of students, and students themselves if they are over the age of 18 or attending an institution of postsecondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent (Congressional Record 120: 39862, 1974).

Congress enacted FERPA in 1974, based primarily upon the efforts of New York Senator James Buckley. Often called the Buckley Amendment, FERPA was a floor amendment to other educational initiatives and, as such, lacks the extensive and traditional legislative history by which one might determine the intent of Congress (Schulze, 2009). Taking into account issues raised by institutions, students, and parents, Senator Buckley and Senator Claiborne Pell of Rhode Island collaborated on and presented a Joint Statement in Explanation of the Buckley/Pell Amendment. The joint statement represents the major source of legislative history for FERPA; it provides a narrative and explanation of the meaning and intent of the various provisions of the

amendment so as to provide an adequate record on the basis for which to develop necessary regulations (Graham, Hall, & Gilmer, 2008).

The Joint Statement makes clear that:

> The amendment is intended to require educational agencies and institutions to conform to fair information record-keeping practices. It is intended to open the basis on which decisions are made to more scrutiny by the students, or their parents about who decisions are being made, and to give them the opportunity to challenge and to correct—or at least enter an explanatory statement—inaccurate, misleading, or inappropriate information about them which may be in their files and which may contribute, or have contributed to an important decision made about them by the institution (Congressional Record 120: 39862, 1974).

Since FERPA's enactment, it has been amended eleven times by Congress in light of numerous developments. Based on the most recent development of the USDE wanting to clear the current impediments to the FERPA law that prevents the sharing of students' education records with state labor agencies, FERPA will be amended again.

Despite the numerous amendments, the only time that Congress amended the general definition of records protected under FERPA was in December, 1974. The same language proffered by Senators Buckley and Pell in their 1974 Joint Statement protecting "education records" remains in effect today. That definition currently reads:

> For purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), those records, files, documents, and other materials which—
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> (i) Contain information directly related to a student; and

(ii) Are maintained by an education agency or institution, or by a person acting for such agency or institution (U.S. Government, 2011).

This definition suggests that only those documents affirmatively kept or collected by a school are subject to FERPA protection. It would be over twenty-five years before the United States Supreme Court would have the opportunity to address any portion of FERPA. The first judicial decision interpreting FERPA addressed the definition of "education records."

In February, 2002 the Court handed down *Owasso Independent School District v. Falvo.* In this case a parent brought a 42 U.S.C. § 1983 action against the Owasso school district and individual school officials alleging that peer grading violates FERPA. The precise question before the Court was whether peer-graded classroom work and assignments are education records under FERPA. The district court granted summary judgment in favor of the school district, holding that grades put on papers by another student are not, at that stage, records maintained by an educational institution and, thus, do not constitute education records under FERPA. (Graham, Hall, & Gilmer, 2008).

The Tenth Circuit of Appeals reversed, finding that "the very act of grading was an impermissible release of the information to the student grader. Ultimately, the Supreme Court disagreed with Falvo and the Tenth Circuit and asserted that the practice of peer grading is common throughout the country (Penrose, 2011). The Court's opinion reflects a belief that FERPA was intended to combat disclosure of permanent files and not individual documents of a transitory or temporary nature.

The legislative history reveals that FERPA took a far-sided approach to isolating only those records of a permanent nature that could be relied upon by their parties or other schools to erroneously categorize a student. Also evident from the statutory language, transitory records were not intended for FERPA protection. "Education records" that remain solely with the

maker—or individual teacher—are not covered under FERPA (Penrose, 2011). The Court therefore correctly limited FERPA's protection to documents of a more permanent nature. Nevertheless, its definition is near-sided in that it refuses to embrace computers and data collection systems as they exist in the twenty-first century. Also, it is not likely that students' education records are all kept in a central location at a single repository and it is doubtful that only one file exists for each student.

The narrow definition of "education records" in this case demonstrates the pressing need to develop a modern definition—which hopefully will be addressed in the impending final rules of FERPA scheduled to be published by the end of 2011.

FERPA's remedies are limited to one method: the USDE may discontinue federal funding to a school that maintains a practice or policy of unauthorized disclosures (U.S. Department of Education, 2011). Thus, in *Gonzaga University v. Doe* (Gonzaga University v. Doe, 2002), the Supreme Court of the United States took up the issue it reserved in *Owasso*: whether a policy or practice of unauthorized disclosure of education records provides the basis for claim under § 1983.

A Gonzaga University undergraduate student sued the school and professor alleging a violation of FERPA. The student was planning to become an elementary teacher upon graduation and, under Washington State Law, all new teachers required an affidavit of good moral character from their graduating college. The professor in charge of certifying such affidavits overheard a student conversation discussing sexual misconduct by the undergraduate student. Subsequently, the professor launched an investigation into the matter and refused to certify the student's necessary affidavit of good moral character. The student sued—claiming violation of his confidentiality rights.

In June, 2002 the Court decided *Gonzaga University v. Doe.* Chief Justice Rehnquist authored the Court's opinion holding that FERPA's nondisclosure provisions created no personal rights to enforce under § 1983, overruling the case of *Doe v. Gonzaga University*, 536 U.S. 273 (2002) (Gonzaga University v. Doe, 2002).

According to the Court, unless Congress manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for granting any personal rights under the civil rights provisions of § 1983. (Gonzaga University v. Doe, 2002).

In summary, the Court held that:

> FERPA's non-disclosure provisions contain no rights-creating language, they have an aggregate, not individual focus, and they serve primarily to direct the Secretary's distribution of public funds to educational institutions. They, therefore have no right rights enforceable under § 1983 (Gonzaga University v. Doe, 2002).

Thus, in *Gonzaga*, although Congress intended FERPA to benefit individuals, which the student claimed was sufficient to establish claim under § 1983, it did not intend the Act to create any individual rights. An issue the Court did not decide, however, was whether the USDE may sue to enforce FERPA. This issue arose in *Miami University*, albeit prior to the guidance from *Gonzaga*. In *Miami University* the court held that the Secretary of Education could bring an action for declaratory and injunctive relief based on the following passages in the Act (United States v. Miami Univesity, 2002):

> The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that actions to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot

> be secured by voluntary means. The Secretary may…(4) take any other action authorized by law with respect to the recipient.

The broad language used in the fourth enumerated permitted action, the Court reasoned, empowered the United States to maintain an action in federal court to enjoin a practice or policy of releasing records without consent. Whether this holding remains sound in the aftermath of *Gonzaga* is an open question (Schulze, 2009).

Perhaps the soundness of the Court's holding in *Miami University* will be further clarified after the outcome of *Chicago Tribune Company v. University of Illinois Board of Trustees*, which is currently under appeal (Chicago Tribune Company v. University of Illinois Board of Trustees, 2011). The central issue in *Chicago Tribune* is whether the FERPA barred the release of university admission records under Illinois' Freedom of Information Act (FOIA). A lower federal court found that Illinois law required the documents to be released. The District Court concluded that FERPA does not prohibit the University "from doing anything," because the University does not have to accept federal education funds "and the conditions of FERPA along with it (Chicago Tribune Company v. University of Illinois Board of Trustees, 2011)." That ruling is fundamentally flawed because it is premised upon a hypothetical, prospective analysis of what the University could choose to do in the future, but does not reflect what the University actually did in this case–accept federal education funds and the affirmative obligations imposed by FERPA prohibiting disclosure of education records. Further, the District Court's decision is directly contrary to *United States v. Miami University*, the leading federal authority that interpreted FERPA in the context of a newspaper's request for education records from a public university pursuant to a state FOIA (U.S. Justice Department and nine college associations, 2011).

Aside from judicial cases, FERPA has been amended over the years in relation to other Federal Laws and Enactments. Additional laws and regulations have evolved that intersect with FERPA and present new challenges. Since its passage, FERPA has needed clarifications, amendments, and updates to stay current with the national education scene. For a number of years, little change was made to the FERPA regulations. But then in the 1990s, a series of ameliorations addressed issues of the decade and FERPA concerns in a changing business and social landscape. Some of these changes were focused on specific incidents that drew national attention and affected both FERPA and higher education, such as the dorm hall murder of co-ed Jeanne Clery, the escalation of alcohol and drug usage on campus, 9/11, and increased incidents of violence in the schools. In addition, other changes arose as legislation in other sectors of American society imposed their own amendments on FERPA and on how institutions conduct the business of education.

Amendments to FERPA over the Years		
1974	December 31	Buckley/Pell Amendment
1979	August 6	Education Amendments of 1978
1979	October 17	Department of Education established
1990	November 8	Campus Security Act
1992	July 23	Higher Education Amendments of 1992
1994	October 20	Improving America's Schools Act
1998	October 7	Higher Education Amendments of 1998
2000	October 28	Campus Sex Crimes Prevention Act
2001	October 26	USA PATRIOT Act of 2001
2008	December 9	Amendments of 2008
2009	January 2009	Amendments of 2009

The majority of the amendments signified an incorporation of interpretation and guidance made by the USDE over the years. Some of the amendments incorporated much-needed updates; after all, records management practice has evolved and experienced vast changes in application and policy since FERPA was first proposed in 1974.

FERPA continues to be amended as needed, as the change in cultural environment and operational needs of our educational institutions warrant. Now it is in the era of accountability. Postsecondary education plays an important role in producing a skilled workforce able to compete in the global economy. Some stakeholders have suggested that collecting information on graduates' employment outcomes—whether they are employed in their field of study for example—will provide better information to help assess the impact of a postsecondary education.

The Higher Education Opportunity Act directed the U.S. Government Accountability Office (GAO) to study the information that states have on the employment outcomes of postsecondary graduates. GAO's study found that state officials claimed they faced challenges in their data collection efforts, including the means by which they can appropriately link student and employment data and comply with FERPA, which prohibits disclosing a student's education records without written consent. GAO recommended that the USDE clarify means by which states can collect and share graduates' employment information under the FERPA and establish a time frame to do so (GAO, 2010).

The USDE has agreed with GAO's recommendations. In the recently published April 8, 2011 NPRM on FERPA, USDE states that the proposed amendments are necessary to ensure that FERPA continues to protect the privacy of education records while allowing for the effective use of data in statewide longitudinal data systems (SLDS). USDE believes that improved access to data contained within an SLDS will "facilitate States' ability to evaluate education programs, to build upon what works and discard what does not, to increase accountability and transparency, and to contribute to a culture of innovation and continuous improvement in education" (Federal Register/Vol. 76, No. 68/Proposed Rules, 2011).

To uphold the Supreme Court's pronouncement that "education is perhaps the most important function of state and local governments" (Brown v. Board of Education of Topeka, 1954), the Government has a duty to ensure that those persons most vulnerable to its abuses are protected. FERPA's purpose of protecting students must be firmly enshrined and vigorously enforced. While certainly not as revolutionary as *Brown*, FERPA builds on the notion that fairness and openness of education form is an essential part of a democratic society. Not only will the proposed FERPA rules tighten security over data and toughen enforcement against organizations that illegally disclose students' personal information, the rules will also facilitate education reform efforts.

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