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STUDENT RIGHTS: FROM *IN LOCO PARENTIS* TO *SINE PARENTIBUS* AND BACK AGAIN? UNDERSTANDING THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT IN HIGHER EDUCATION

*Britton White*\*

I. INTRODUCTION

During the latter half of the twentieth century, the college-student relationship in the United States was in a state of flux. Student rights have undergone significant changes in America during the last fifty years. Specifically, the doctrine of *in loco parentis*, which started as a good idea of how to treat college students, was transformed into an outdated dogma against which young people rebelled during the 1960s. This generation eagerly wanted to trade the doctrine of *in loco parentis*, "in place of the parent," for *sine parentibus*, "without parents." However, in recent years, a combination of court decisions and second-guessing by this very same generation has started the slow turn of the *sine parentibus* ship back toward the island of *in loco parentis*.

One factor in the transition back towards *in loco parentis* has been the passage of the Family Educational Rights and Privacy Act, which deals with the disclosure of student education records. Although the Act's original purpose was to protect student rights, that purpose has been significantly undermined by recent amendments, and the balance of power has been dramatically shifted from students to their parents, who are ironically part of the same generation that demanded independence during the 1960s. Although there has not yet

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been a full return to *in loco parentis*, further congressional amendments to the Act may allow higher education institutions to have almost absolute power in disclosing student information, especially to parents. The harmful effects of such a closely aligned college-parent relationship should cause legislators to reconsider any further changes to the Act regarding disclosures of student information. In addition, legislators should take another look at the exceptions imbedded within the Act, as the full usage of those provisions may make additional amendments completely unnecessary.

Part II of the article discusses the historical background of the doctrine of *in loco parentis* in the context of higher education institutions. Part II also discusses the facts surrounding the passage of the Family Educational Rights and Privacy Act and recent changes in the relationships between colleges, students, and parents. Part III gives a general description of the Act and addresses concerns about the Act, such as what constitutes an education record, and what remedies are available to injured parties. The section also discusses the exceptions to the Act, including the disclosure of documents related to law enforcement unit records, health or safety emergencies, and disclosures to parents of dependent students. Part IV provides a discussion of an amendment to the Act involving the disclosure of student alcohol- and drug-related incidents to parents. Part V discusses the future of student rights under the Act and argues that further amendments to the Act may be unnecessary because other provisions of the Act, most notably the exceptions discussed in Part III, could be utilized to fulfill the purposes for which the recent amendments were enacted.

## II. HISTORICAL BACKGROUND

This section will address the doctrine of *in loco parentis* and its role in three distinct eras in American higher education law. It will also address a new phenomenon, the increased involvement of parents in their children's college education experience. Finally, this section will outline the enactment of FERPA, the act that has guided the disclosure of educational records since 1974.

### *A. In Loco Parentis*

In order to fully understand the development of federal privacy regulations in the college-student relationship, it is helpful to view that relationship in terms of the doctrine of *in loco parentis*.<sup>1</sup> In the context of higher education institutions, *in loco parentis* means that “college authorities st[an]d in the place of the parents to the students entrusted to their care.”<sup>2</sup> Therefore, these authorities are charged with parents’ rights, duties, and responsibilities regarding their students.<sup>3</sup> The doctrine of *in loco parentis* in American colleges and universities has been one of ebb and flow,<sup>4</sup> and it has often been a source of confusion among administrators in setting policy, especially with respect to potential civil liability.<sup>5</sup>

The history of *in loco parentis* in American higher education can be broken down into three distinct eras.<sup>6</sup> The first era can be traced from an influential court decision in 1913 up to the 1960s. During this period, the courts gave colleges and universities a free hand over their students’ lives.<sup>7</sup> The second era extends from the 1960s to the 1980s and was a time of great student unrest and intense litigation that resulted in a reversal of *in loco parentis*.<sup>8</sup> The third era extends from the 1980s to the present and is characterized as a time of changing legal precedent with regard to student and parental rights.<sup>9</sup>

#### *1. The first era: 1913 – 1960s*

The first era began in 1913, when the Kentucky Court of

1. In the context of higher education, *in loco parentis* is defined as the “[s]upervision of a young adult by an administrative body such as a university.” BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

2. Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1136 (1991).

3. Michael Clay Smith, *College Liability Resulting from Campus Crime: Resurrection for In Loco Parentis?*, 59 ED. LAW REP. 1, 4 (1990).

4. See Barbara Jones, *In Loco Parentis Reborn: Whitlock v. Univ. of Denver*, 34 ED. LAW REP. 995, 995 (1986).

5. See Philip M. Hirshberg, *The College’s Emerging Duty to Supervise Students: In Loco Parentis in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189, 200–02 (1994).

6. See Jackson, *supra* note 2, at 1136–37; Smith, *supra* note 3, at 1; Jones, *supra* note 4, at 995–96.

7. See Jackson, *supra* note 2, at 1148.

8. See Smith, *supra* note 3, at 1.

9. See Jackson, *supra* note 2, at 1148.

Appeals<sup>10</sup> decided the watershed case of *Gott v. Berea College*.<sup>11</sup> Although other cases had previously applied principles resembling *in loco parentis*,<sup>12</sup> *Gott* generally is viewed as the clearest expression of the doctrine in American courts.<sup>13</sup> Berea College had promulgated a rule forbidding its students from patronizing certain businesses not affiliated with the college.<sup>14</sup> The plaintiff, a local restaurant owner whose business was adversely affected as a consequence, challenged the rule.<sup>15</sup> The court was presented with the question of how much discretion should be given to colleges and universities when setting rules and regulations for their students. In dismissing the plaintiff's claims, the court held that:

[c]ollege authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose.<sup>16</sup>

In the wake of *Gott*, other courts also characterized the college-student relationship as *in loco parentis* and gave strong deference to college authorities.<sup>17</sup> Throughout this era, a bright

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10. This court is now known as the Kentucky Supreme Court.

11. *Gott v. Berea Coll.*, 161 S.W. 204 (Ky. 1913).

12. See Jones, *supra* note 4, at 995 (discussing the doctrine of *in loco parentis* before 1913, which is beyond the scope of this paper). Jones notes that in *Lander v. Seaver*, 32 Vt. 114 (1859) (although Jones cites the case as an 1860 case, the case was actually decided in May of the 1859 term), the Supreme Court of Vermont held that schools generally treated students as adults regarding all extracurricular behavior unless that behavior had a "direct and immediate effect on the classroom or on the student-teacher relationship." Jones, *supra* note 4, at 995 (quoting K.W. Gordon, *Due Process: A Swing Toward Student Rights*, 12(2) J. C. STUDENT PERSONNEL 95-101 (1971)). But see *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 187 (1866) (holding that the judiciary has "no more authority to interfere than [it has] to control the domestic discipline of a father in his family").

13. Jackson, *supra* note 2, at 1146.

14. *Gott*, 161 S.W. at 205.

15. *Id.*

16. *Id.* at 206.

17. See *Stetson v. Hunt*, 102 So. 637, 640 (Fla. 1924) (holding that "college authorities stand *in loco parentis* [to their students] and in their discretion may make any regulation for their government which a parent could make for the same purpose"); *Woods v. Simpson*, 126 A. 882, 883 (Md. 1924) (stating that college officers "must, of necessity, be left untrammelled in handling the problems which arise as their judgment and discretion may dictate"); *Ingersoll v. Clapp*, 263 P. 433, 437 (Mont. 1928) (holding that "courts will not interfere with the discretion of school officials in matters which the law has conferred to their judgment, unless there is a clear abuse of that

line existed for administrators in promulgating rules,<sup>18</sup> and students were seldom successful in challenging them in the courts.<sup>19</sup> The power of colleges and universities over students amounted to absolute authoritarian control.<sup>20</sup> In the words of one scholar, *in loco parentis* placed “a blanket of security and insularity around the university culture [under which] the university was free to exercise disciplinary power - - or not - - with wide discretion and little concern for litigation.”<sup>21</sup>

## 2. *The second era: 1960s – 1980s*

The doctrine of *in loco parentis* began to fade during the controversial events of the 1960s, when colleges and universities were perhaps the most galvanizing areas for radical change. Students became much more assertive about their rights,<sup>22</sup> often storming administration buildings on campuses to demand the elimination of dress codes, dorm hours, and other rules that seemed to hinder general social reform.<sup>23</sup> One commentator wrote:

After I graduated in 1966, the pendulum began to swing the other way. If young people could be sent to Vietnam to die for their country, it was said, they also should be able to vote and buy a beer. In the early 70’s, many states lowered the drinking age; 18-year-olds got the right to vote. On college campuses, *in loco parentis* became *sine parentibus*—without parents. Dorm supervisors disappeared, along with their sign-out sheets, and dorms became coed. Gone also were class-attendance records, required course work, and, on some

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discretion”); *Anthony v. Syracuse Univ.*, 231 N.Y.S. 435, 440 (N.Y. App. Div. 1928) (noting that university authorities have wide discretion in determining disciplinary rules, and courts will be hesitant to disturb any decision in that respect).

18. See *Gott*, 161 S.W. at 206 (holding that any rule or regulation would be upheld unless unlawful or against public policy). *But see id.* (stating in dictum that less deference would be given to public colleges and universities than to private institutions) (internal reference omitted).

19. Jackson, *supra* note 2, at 1148.

20. *Id.*

21. Joel C. Epstein, Higher Education Center, Parental Notification: Fact or Fiction (Oct. 6, 1999), <http://www.edc.org/hec/pubs/articles/parentalnotification.html> (quoting ROBERT D. BICKEL & PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE?* (1999)).

22. Jones, *supra* note 4, at 996.

23. Helen E. Johnson, *Educating Parents About College Life*, CHRON. HIGHER EDUC., Jan. 9, 2004, at B11.

campuses, even grades.<sup>24</sup>

The traditional doctrine of *in loco parentis* inevitably yielded to expanded concepts of individual liberties for college students.<sup>25</sup> Furthermore, the role of the university administrator evolved from one of setting strict limits in order to maintain authoritarian control to one of helping students find opportunities to mature as adults.<sup>26</sup>

In addition to students viewing themselves as emancipated from their former surrogate parents, the courts also began to recognize students as adults.<sup>27</sup> One of the first cases to announce the demise of *in loco parentis* in public higher education institutions was *Dixon v. Alabama State Board of Education*.<sup>28</sup> At issue in *Dixon* were the procedural due process rights of students who were expelled for participating in civil rights demonstrations.<sup>29</sup> The court ruled in favor of the students, holding that the United States Constitution required the school to provide them with notice and an opportunity to be heard before expelling them.<sup>30</sup> More importantly, the court made a distinct shift from the judicial tradition of giving strong deference to college authorities, which *Gott* and its progeny had established years before.<sup>31</sup> During the years following *Dixon*, other courts began to join the trend of abolishing *in loco parentis* in higher education institutions.<sup>32</sup> Furthermore, the

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24. Claire L. Gaudiani, *The Cold War is Over Between the Generations*, CHRON. HIGHER EDUC., May 20, 1992.

25. Smith, *supra* note 3, at 1.

26. See Jones, *supra* note 4, at 996.

27. *Id.*

28. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961). For an analysis of the repudiation of *in loco parentis* in elementary and secondary schools, which is beyond the scope of this paper, compare *Dixon* with *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (finding the doctrine of *in loco parentis* to be "in tension with contemporary reality and the teachings of th[e] Court"). *But see* *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (noting that the nature of a school's power over schoolchildren is "custodial and tutelary," and "that for many purposes school administrators act *in loco parentis*") (internal reference omitted). See generally Anne P. Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 80 n.234 (1996) (detailing numerous sources discussing the demise of *in loco parentis* in elementary and secondary education).

29. *Dixon*, 294 F.2d at 151-52.

30. *Id.* at 158-59.

31. See Jackson, *supra* note 2, at 1149-50.

32. See, e.g., *Healy v. James*, 408 U.S. 169, 189-90 (1972) (holding that although a college may have a legitimate interest in preventing disruption, the college has the burden of proving that a denial of recognition of a student organization was justified);

Twenty-Sixth Amendment to the United States Constitution was ratified in 1971, giving all citizens eighteen years of age and older the right to vote.<sup>33</sup> A general consensus had developed that college-age young people indeed were adults, and that perhaps *sine parentibus* was a more suitable goal for university-student relations than *in loco parentis*.

### 3. *The third era: 1980s – present*

As individual liberties of students expanded during the second era, civil liability of colleges and universities to their students was marginalized.<sup>34</sup> The abrogation of *in loco parentis* in decisions such as *Bradshaw v. Rawlings* substantially limited a college's duty to protect its students.<sup>35</sup> Beginning in the 1980s, however, this trend of limiting the civil liability of colleges and universities began to reverse as many appellate courts started to recognize such a duty in response to rapid increases of criminal activity on college campuses.<sup>36</sup> During this era, courts fashioned new rules of liability that are similar to those of the landlord-tenant relationship.<sup>37</sup> Colleges and universities could now be liable to a student for damages resulting from campus criminal activity because they are in a special relationship with that student; therefore, the college is expected to take protective steps or give adequate warnings in order to prevent its students from becoming victims of crime.<sup>38</sup>

Central to the issue of liability in this line of cases was whether the criminal activity was foreseeable to the college.<sup>39</sup>

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*Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979) (holding that colleges "no longer control the broad arena of general morals," and that students now "vigorously claim the right to define and regulate their own lives"); *Buttney v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968) (holding that "the doctrine of 'In Loco Parentis' is no longer tenable in a university community").

33. See U.S. CONST. amend. XXVI, § 1.

34. See *Bradshaw*, 612 F.2d at 138 (noting that "the modern American college is not an insurer of the safety of its students").

35. See Hirshberg, *supra* note 5, at 191.

36. *Id.* at 191.

37. See Smith, *supra* note 3, at 1–2.

38. *Id.* at 2.

39. See *Jesik v. Maricopa County Cmty. Coll.*, 611 P.2d 547, 550–51 (Ariz. 1980) (holding that the college had a duty to protect a student from foreseeable criminal harm where the student had been previously threatened by another student and reported the threats to a campus security guard); *Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193, 1194–95 (Cal. 1984) (holding that the college owed a duty to warn the student of danger where the college authorities were aware of previous assaults

For example, the victim in *Miller v. State* was a nineteen-year-old female student who was attacked in the laundry room of her dormitory by an unidentified assailant.<sup>40</sup> She was forced upstairs where she was raped twice at knifepoint.<sup>41</sup> In deciding whether to find a duty to protect, the court examined evidence such as reports of general dormitory crimes including burglary, armed robbery, and rape.<sup>42</sup> Furthermore, the victim had made prior complaints about this specific dormitory having problems with male nonresidents loitering in the hallways and restrooms, yet all of the dormitory's doors remained unlocked.<sup>43</sup> The court found that these facts were sufficient to make such an attack foreseeable, and thus it recognized a duty of the school to protect its students from such events.<sup>44</sup>

As the 1990s arrived, some courts began to expand this duty to include protecting students from their own reckless behavior and that of their fellow students.<sup>45</sup> In *Furek v. University of Delaware*, a student was severely burned during a hazing incident at a fraternity house on campus.<sup>46</sup> The Delaware Supreme Court found that the student's status as a business invitee created a duty on the part of the university to protect the student from hazing activities.<sup>47</sup> The court also relied upon several facts tending to indicate that the incident was foreseeable including these primary findings: (1) the university had voluntarily assumed a duty to monitor

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and rape attempts in a particular parking lot); *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335–36 (Mass. 1983) (holding that a reasonable expectation exists that “reasonable care will be exercised to protect resident students from foreseeable harm”); *Relyea v. State*, 385 So. 2d 1378, 1382–83 (Fla. Dist. Ct. App. 1980) (holding that although a duty to protect could arise from the parties' relationship as landowner and invitee, the criminal acts had to have been reasonably foreseeable, as evidenced by actual or constructive knowledge of prior, similar crimes); *Miller v. State*, 467 N.E.2d 493, 497 (N.Y. 1984) (holding that the college owed the student a duty of maintaining minimal security measures in a dormitory, and that the assault and rape of the student was foreseeable).

40. *Miller*, 467 N.E.2d at 494.

41. *Id.*

42. *Id.* at 495.

43. *Id.*

44. *Id.* at 497.

45. Hirshberg, *supra* note 5, at 191.

46. *Furek v. Univ. of Del.*, 594 A.2d 506, 509–10 (Del. 1991).

47. *Id.* at 520–22. The court also noted that while the university did not own the fraternity house, it owned the land on which the house was located, which further evidenced its control over the situation. *Id.* at 522.

fraternities in order to eliminate hazing, (2) "activities preceding fraternity hazing" were observed by campus security and it was "common knowledge on campus that hazing occurred," and (3) there were past incidents of hazing at this particular fraternity house.<sup>48</sup>

An even broader duty to protect students from their own behavior has been recognized in some cases.<sup>49</sup> In *Pitre v. Louisiana Tech University*,<sup>50</sup> a student was permanently disabled in a sledding accident on campus.<sup>51</sup> The court held that the residential status of the student created a special relationship between him and the university, and consequently the university owed a duty to correct or warn him of foreseeable and unreasonable danger.<sup>52</sup> The court found that the university knew of the danger presented by sledding at this particular site, and thus held that this incident was foreseeable.<sup>53</sup>

Some commentators have posited that this third era is more likely the substantive remnant of a merely stylistic demise of *in loco parentis* rather than a rebirth of the traditional doctrine.<sup>54</sup> Others have argued that *in loco parentis* is making a strong comeback as many universities have reinstated dormitory rules, imposed quiet hours, and regulated when men

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48. *Id.* at 521–22. Although the holding in *Furek* followed the general trend of the third era by expanding the university's duty to protect, the court made an interesting reference to the demise of *in loco parentis*. It stated that "although the University no longer stands in loco parentis to its students, the relationship is sufficiently close and direct to impose a duty . . ." *Id.* at 522. The court continued by adding that the "university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property," including "negligent or intentional activities of third persons." *Id.*

49. Hirshberg, *supra* note 5, at 191.

50. *Pitre v. La. Tech Univ.*, 596 So. 2d 1324 (La. Ct. App. 1992).

51. *Id.* at 1332.

52. *Id.* at 1332–33.

53. *Id.* at 1333.

54. See Jackson, *supra* note 2, at 1137 (asserting that the doctrine of *in loco parentis* continues to influence the legal status and polices of modern American universities). According to Jackson, "despite repeated judicial assurances that *in loco parentis* was doctrinally inadequate, student litigants still rarely prevail in suits against universities," "[t]he new contractual and constitutional analysis applied to student-university disputes is problematic," "[t]he state action doctrine . . . cannot be employed in a private context," and "the continuing debate over hate speech rules on American campuses further illustrates an institutional reluctance to relinquish rigid parental control." *Id.*

and women may visit each others' rooms in an attempt to "rerun[] the 50s."<sup>55</sup> In response to pressure from potential lawsuits, some universities have reinstated policies of not serving alcohol on campus or banning beer in kegs.<sup>56</sup> The court in *Mullins v. Pine Manor College* attempted to reconcile the decline of *in loco parentis* with the growing trend of higher education institutions' duty to protect by stating, "The fact that a college need not police the morals of its resident students . . . does not entitle it to abandon any effort to ensure their physical safety."<sup>57</sup> The court added that "[p]arents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm."<sup>58</sup> Still, confusion exists concerning the doctrine of *in loco parentis* due to the absence of an unequivocal statement by the United States Supreme Court repudiating the doctrine in higher education institutions.<sup>59</sup> Now it may be too late, as more evidence of a return to *in loco parentis* accumulates.

### *B. Parental Involvement: A New Trend*

Evidence of a return to *in loco parentis*, as manifest in recent changes in the college-student relationship, may be being prompted by a new trend of parental involvement. In stark contrast to the tumultuous times of the 1960s and 1970s,

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55. Gaudiani, *supra* note 24 (noting that one such major institution to implement these changes was Boston University).

56. *Id.* See also *What Campuses and Communities Are Doing*, Higher Education Center (2004), available at <http://www.edc.org/hecd/ideasamplers/#limiting>. Institutions choosing to limit alcohol availability or ban alcohol altogether include Duke University, Lehigh University, University of Colorado-Boulder, University of Delaware, University of Iowa, and the University of Rhode Island. Other schools simply restricting the marketing and promotion of alcohol on campus include Baylor University, Stanford University, Texas A & M University, and the University of Minnesota. *Id.*

57. *Mullins v. Pine Manor Coll.*, 449 N.E.2d 331, 335-36 (Mass. 1983).

58. *Id.* at 336.

59. After all, the Court has not decided a case analogous to *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) in its repudiation of *in loco parentis* in elementary and secondary education. See *supra* note 28. See generally Dupre, *supra* note 28, at 70 n.145 (listing sources discussing the dispute about the current status of *in loco parentis* in higher education). Perhaps the Court believed that a statement repudiating *in loco parentis* in higher education would be unnecessary. If elementary and secondary schools no longer stand in place of the parent to schoolchildren, *a fortiori* colleges and universities certainly should not be charged with all the rights and responsibilities of parents over young adults.

programs for parents have been springing up at colleges and universities across the nation to “encourage parents to become enmeshed . . . with their children’s lives on campus.”<sup>60</sup> Scholars have suggested that a significant reason for these changes is that members of the baby boomer generation, who as college students fought for increased student rights in the 1960s and 1970s, have been sending their children off to college and now are lobbying for increased parental rights.<sup>61</sup> A common characteristic of the increase in parental involvement is when parents actively take on problems that their children should be handling on their own.<sup>62</sup>

As colleges and universities struggle to deal with the evolution of the university-student and university-parent relationships, federal regulations exist that make matters even more complex. In response to regulatory uncertainties, some institutions have encouraged parents to become more enmeshed in their children’s lives in college;<sup>63</sup> however, this response may be ill conceived as it could lead to entangling relationships “in which there are unclear boundaries and an unhealthy sense of dependence.”<sup>64</sup> Such a “family” approach “encourages excessive attachments, misplaced expectations, and inappropriate assumptions of authority.”<sup>65</sup> Instead, higher education institutions should take a closer look at the Family Educational Rights and Privacy Act in order to understand better the ideal working relationship between students, universities, and parents.

### C. Legislation

On May 14, 1974, Congress passed the statute that would later become known as the Family Educational Rights and

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60. See Johnson, *supra* note 23.

61. See *id.*

62. *Id.* Johnson notes some examples of extreme parental involvement including a mother calling the university to demand twenty-four-hour technical computer support for students after her daughter lost a term paper during the night that was due the next morning, a father who took leave from his job to assist his son in the college application process, a mother who shouted at an admissions officer after her child was denied admission, and a parent who flew across the country to argue with a professor who had given her son his first “B” in a course. *Id.*

63. See *id.*

64. *Id.*

65. *Id.*

Privacy Act of 1974, or FERPA ("the Act").<sup>66</sup> The Act was originally known as the Buckley Amendment, offered by the senator of the same name,<sup>67</sup> and was a floor amendment to other federal education legislation.<sup>68</sup>

Although a mere amendment, the passage of the Buckley Amendment was perhaps the most significant congressional response to the abrogation of *in loco parentis*. Today, the Act attempts to "enhance[e] student achievement through greater parent involvement in their children's education."<sup>69</sup> Generally, the Act "protects the privacy interests of parents and students with regard to education records."<sup>70</sup> It requires that parents of students be allowed to inspect and review education records of their children,<sup>71</sup> and that they be provided with an opportunity for a hearing to challenge records that they believe to be inaccurate or misleading.<sup>72</sup> The Act also prohibits the release of such records to third parties without the prior written consent of the student's parents.<sup>73</sup>

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66. Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 571, amended by Buckley Amendment, Pub. L. No. 93-568, § 2(a)-(b), 88 Stat. 1858-1862 (codified as amended at 20 U.S.C. § 1232g (2000)). See Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 681 (2003).

67. Pub. L. No. 93-568, 88 Stat. at 1858. James Lane Buckley served as United States Senator from New York from 1971-77.

68. Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 617 (1997).

69. *Id.* at 622.

70. MICHAEL MEDARIS, ET AL., U.S. DEPT. OF JUSTICE, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 3 (1997).

71. See 20 U.S.C. § 1232g(a)(1)(A). The Act states in part:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. *Id.*

72. See *id.* § 1232g(a)(2). The Act states in part:

No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records. *Id.*

73. See *id.* § 1232g(b)(1). The Act states in part:

The Act applies to any public or private agency or institution that is the recipient of federal funds,<sup>74</sup> including elementary, secondary, and higher education institutions.<sup>75</sup> Because federal student financial aid funds are included within the scope of the Act, it may regulate private and even non-profit institutions as long as they are channeling those funds to their students.<sup>76</sup> The Act was passed pursuant to Congress' spending power,<sup>77</sup> which means that it "operates as a condition on the receipt of federal education funding, rather than a direct mandate."<sup>78</sup> Thus, an agency or institution that systematically violates the Act is subject to withdrawal of all federal funds,<sup>79</sup> even if only one part of the agency is receiving funds when the violations occur.<sup>80</sup>

According to Senator Buckley, the purpose of the Act was to remedy the increasing abuse of student records through assuring parents' and students' access to those records while protecting their privacy.<sup>81</sup> Although the Act contains no preface or statement of purpose,<sup>82</sup> Senator Buckley made the following statement regarding his motives behind sponsoring the bill:

More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society. There has been clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations. In addition, the growth

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No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization . . . *Id.*

74. *Id.* § 1232g(a)(3).

75. Daggett, *supra* note 68, at 622-23. To the extent that the Act applies to elementary and secondary institutions, it is beyond the scope of this article.

76. See Medaris, *supra* note 70, app. at A-2.

77. See U.S. CONST. art. I, § 8.

78. Daggett, *supra* note 68, at 620.

79. Lynn M. Daggett, *Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29, 41 (1997).

80. See Daggett, *supra* note 68, at 623.

81. *Id.* at 622.

82. *Id.*

of the use of computer data banks on students and individuals in general has threatened to tear away most of the few remaining veils guarding personal privacy, and to place enormous, dangerous power in the hands of the government, as well as private organizations.<sup>83</sup>

One particular example of privacy abuse that concerned Senator Buckley was the widespread practice of issuing surveys to elementary and secondary students without the permission of their parents.<sup>84</sup> This practice became even more troubling when the students' parents were denied access to those surveys.<sup>85</sup>

The origin of the Act's application to higher education institutions is rather anomalous. According to one scholar, it was not Senator Buckley's intention to include colleges and universities among the regulated agencies and institutions.<sup>86</sup> Apparently, the inclusion of higher education institutions in the Buckley Amendment was the result of a drafting error.<sup>87</sup> Nevertheless, "for more than [thirty] years, [the Act] and its regulations have comprehensively, and in great detail, governed [the handling of] student records" in the realm of higher education.<sup>88</sup>

### III. FERPA AS APPLIED IN HIGHER EDUCATION

Generally, the Family Educational Rights and Privacy Act (FERPA) prohibits the release of education records to third parties without the prior written consent of the student's parents.<sup>89</sup> In the context of higher education, the Act classifies a student who is at least eighteen years old as an "eligible

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83. O'Donnell, *supra* note 66, at 681 (quoting 121 Cong. Rec. S13, 991 (daily ed. May 13, 1975) (statement of Sen. Buckley)).

84. *Id.* at 682. These surveys contained questions that were quite intrusive, including whether the child's parents told him they loved him, if the child had thoughts of running away from home, and whether the child had committed certain crimes in the past. *Id.* What particularly disturbed Senator Buckley, a fervent supporter of federalism, was the use of federal funds to conduct the surveys. According to O'Donnell, it was in this sense that "[his] support for federalism could coexist peacefully with his support for privacy." *Id.* at 683.

85. *See id.* at 682.

86. *Id.* at 683.

87. *Id.*

88. *See* Daggett, *supra* note 68, at 617.

89. *See supra* note 73 and accompanying text.

student,” and thus the parents’ rights under the Act are transferred to the student.<sup>90</sup> The Act defines “education record” as “those records, files, documents, and other materials which contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution.”<sup>91</sup> One challenge for colleges and universities is the identification of what may be classified as an education record for purposes of the Act.

### A. *What Is an Education Record?*

Since the passage of FERPA, many institutions have struggled with determining whether or not school disciplinary records are “education records” within the meaning of the Act. When litigation has arisen on this issue, the results have been far from uniform.<sup>92</sup> For example, the Georgia Supreme Court held in 1993 that university disciplinary records were not “education records” as defined by the Act and thus were available to the public pursuant to state open records acts.<sup>93</sup> On the other hand, a lower court in Louisiana held that similar records were confidential despite any state open records laws.<sup>94</sup>

Recent litigation out of the Sixth Circuit has caught many college officials’ attention. After the Ohio Supreme Court ruled in 1997 that records from campus disciplinary proceedings were not protected education records,<sup>95</sup> the United States Department of Education weighed in on the debate.<sup>96</sup> The

90. See 20 U.S.C. § 1232g(d) (2000). The Act states in part:

For the purposes of this section, whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student. *Id.*

See also Medaris, *supra* note 70, at 3. For purposes of this article, the term “students” will refer to “eligible students” within the meaning of the Act, due to the fact that most college students are at least eighteen years of age.

91. § 1232g(a)(4)(A).

92. See Dennis Gregory, *Campus Discipline vs. Criminal Justice*, CHRON. HIGHER EDUC., Apr. 27, 1994.

93. See *Red & Black Publ’g Co. v. Bd. of Regents of Univ. Sys. of Ga.*, 427 S.E.2d 257, 261–62 (Ga. 1993).

94. Gregory, *supra* note 92.

95. *State ex. rel. Miami Student v. Miami Univ.*, 680 N.E.2d 956, 958 (Ohio 1997). The Ohio Supreme Court relied on *Red & Black Publishing Co.* in reaching its decision. *Id.* at 958–59.

96. Kit Lively, *U.S. Education Department and Ohio Supreme Court Differ on Crime Reports*, CHRON. HIGHER EDUC., Sept. 5, 1997.

Department warned Ohio colleges that they may be violating federal law by complying with the court's ruling to disclose the records.<sup>97</sup> The same parties eventually ended up in the United States Court of Appeals for the Sixth Circuit, where the court ruled that the disciplinary records in question were indeed education records.<sup>98</sup>

Another open records dispute arose in *United States v. Miami University*<sup>99</sup> out of a factual situation not unlike many disputes involving campus newspapers that emerged during the 1990s. Editors of a student newspaper at Miami University made a written request pursuant to a state open records act for student disciplinary records in order to write a report on crime trends.<sup>100</sup> The university officials initially resisted, but did release the records, after redacting some information, when the editors made a written request pursuant to the Ohio Public Records Act.<sup>101</sup> The editors then appealed to the Ohio Supreme Court, and the court, upon finding no federal privacy violations, ordered the officials to turn over the records.<sup>102</sup>

The United States brought an action on behalf of the Department of Education seeking an injunction against the university.<sup>103</sup> The district court disagreed with the Ohio Supreme Court and found that the disciplinary records were education records that should not be disclosed.<sup>104</sup> On appeal to the Sixth Circuit, the court affirmed the decision of the district court and held that under a plain language interpretation of the Act, "student disciplinary records are education records because they directly relate to a student and are kept by that student's university."<sup>105</sup>

Upon reviewing the express statutory exemptions from privacy and the exceptions to the definition of "education

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97. *Id.*

98. Ben Gose, *Court Says Colleges Can't Release Files from Student Judicial Proceedings*, CHRON. HIGHER EDUC., July 12, 2002, at A24.

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

100. *Id.* at 803.

101. *Id.* (The university redacted the identity, sex, and age of the individuals, as well as the date, time, and location of the offenses which led to the disciplinary charges).

102. *Id.* (The court allowed the university to redact the name, social security number, or student I.D. number of the individuals).

103. *Id.* at 804.

104. *Id.* at 804-05.

105. *Id.* at 812.

records,” the court concluded that Congress intended to include disciplinary records within the meaning of education records.<sup>106</sup> The court placed great emphasis on the provisions in 20 U.S.C. § 1232g (b)(6) of the Act.<sup>107</sup> This section allows institutions of higher education to disclose the results of disciplinary hearings against students who are alleged perpetrators to any victim of a violent crime or a non-forcible sex offense.<sup>108</sup> The Act also allows disclosure of the results of such proceedings to the general public if the school determines that the student in question violated the institution’s rules and regulations with respect to the offense.<sup>109</sup>

The court reasoned that Congress began with the assumption that all student disciplinary records are education records.<sup>110</sup> Congress then selected two particular situations, crimes of violence and non-forcible sex offenses, where other countervailing interests outweigh the student’s privacy rights so that otherwise protected records may be disclosed.<sup>111</sup> Congress was careful, however, to limit the amount of information disclosed under this section.<sup>112</sup> All § 1232g (b)(6) disclosures must include “only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and may include the name of any other student, such as a victim or witness, only with the written consent of that other student.”<sup>113</sup>

The court also noted yet another section of the Act that allows disclosure of disciplinary records only in specific circumstances.<sup>114</sup> The Act allows institutions to include

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106. *Id.*

107. *Id.*

108. 20 U.S.C. § 1232g(b)(6)(A) (2000). In early 2005, Congress considered an amendment to the Act that would have made a § 1232g(b)(6)(A) disclosure mandatory rather than permissive. The amendment would have also allowed the next of kin of the alleged victim to be treated as the victim for purposes of this section if the alleged victim is deceased. See H.R. 81, 109th Cong. (2005). The last major action on the bill involved referral to the House Subcommittee on 21st Century Competitiveness. Library of Congress, THOMAS: Search Results: H.R. 81 Summary and Status, <http://thomas.loc.gov/cgi-bin/bdquery/D?d109:1:/temp/~bdS7ZR:0000/X/bss/109search.html>.

109. 20 U.S.C. § 1232g(b)(6)(B).

110. *Miami Univ.*, 294 F.3d at 812.

111. *Id.* at 812–13.

112. See *id.* at 813.

113. § 1232g(b)(6)(C).

114. See *Miami Univ.*, 294 F.3d at 813.

information in a student's education record concerning disciplinary action taken against such student for conduct that posed "a significant risk to the safety or well-being of that student, or other students, or other members of the school community."<sup>115</sup> It also allows institutions to disclose 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."<sup>116</sup> The court again conducted a textual analysis of this section of the Act and concluded that Congress intended for the student's privacy interest in disciplinary records to be protected but carved out an exception for disclosures to specific people and involving certain conduct.<sup>117</sup>

The *Miami University* decision was embraced by college officials, many of whom believe that campus disciplinary proceedings should remain private because punishments are educational rather than criminal.<sup>118</sup> On the other hand, student-press advocates argue that in the wake of the decision, colleges will develop new policies of urging students to report all incidents, especially those that may bring embarrassment, to the institution and campus officials rather than to police.<sup>119</sup>

### *B. Remedies for Violations*

If an institution fails to disclose information or discloses information it should not have disclosed, there are legal remedies available to the injured party. The Act operates as a condition on the receipt of federal funding, and institutions that systematically violate the Act are subject to sanctions from the United States Department of Education through the Family Policy Compliance Office whereby federal funding is removed.<sup>120</sup> According to the Family Policy Compliance Office, which administers the Act for the United States Department of Education, no college has ever been sanctioned under the law,

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115. *Id.*

116. § 1232g(h).

117. *See Miami Univ.*, 294 F.3d at 813.

118. Gose, *supra* note 98.

119. *Id.*

120. *See Daggett*, *supra* note 79, at 41.

but students and their families are free to complain to the Education Department in the hope that it will investigate.<sup>121</sup>

Some students and their families have felt that these possible sanctions are inadequate and have argued that a private cause of action should be recognized by the courts as an additional way to enforce the Act.<sup>122</sup> Many attempts have been made through the years to create such a private cause of action under the Act, but they have generally met stiff resistance in the courts.<sup>123</sup> Another possibility for aggrieved parties has been to argue that violations of the Act create a federal civil rights claim under 42 U.S.C. § 1983.<sup>124</sup> Public colleges and universities are subject to causes of action under § 1983 if the plaintiff proves the requisite elements.<sup>125</sup> The central question is whether § 1983 claims apply to grievances under the Act.

The most important case involving federal civil rights claims under the Act against higher education institutions is *Gonzaga University v. Doe*.<sup>126</sup> In that case, the United States Supreme Court was presented squarely with the question of whether a student may sue a private university for damages under § 1983 to enforce provisions of the Act.<sup>127</sup> The plaintiff in the case was a former student at the university in the undergraduate school of education.<sup>128</sup> Upon graduation, he had planned to teach at a state public elementary school, which required that he obtain an affidavit of good moral character

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121. Michael Arnone, *Congress Weighs Changes in Key Student-Privacy Law*, CHRON. HIGHER EDUC., Oct. 3, 2003, at A22.

122. See Daggett, *supra* note 79, at 41.

123. See *id.* at 42.

124. See *id.* at 45.

125. See generally *id.* at 45–48 (describing in detail who may be sued under § 1983, required elements to make out a prima facie case, possible defenses available to such actions, and types of remedies available).

126. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). See O'Donnell, *supra* note 66, at 699.

127. *Gonzaga*, 536 U.S. at 276. The author notes that *Gonzaga University* is a private university and as such is generally exempt from § 1983 claims—regardless of whether they receive federal funds, private institutions do not act under color of state law, which is an element of making out a prima facie § 1983 claim. See *supra* note 125 and accompanying text. Nevertheless, the Court's holding in *Gonzaga University* was not necessarily limited to questions involving actions against private institutions, but made a broader statement in general about using § 1983 claims to enforce the Act. The Court assumed without deciding that the university acted under color of state law when it disclosed the information in question to state officials. See *Gonzaga*, 536 U.S. at 277 n.1.

128. *Gonzaga*, 536 U.S. at 277.

from the dean of the school of education.<sup>129</sup> Before the plaintiff could receive the affidavit, a teacher certification specialist at Gonzaga learned of possible prior sexual misconduct involving the plaintiff and informed the state agency that was responsible for teacher certification.<sup>130</sup> However, no criminal charges were ever brought against the plaintiff for the alleged misconduct.<sup>131</sup> After he was denied the affidavit, he sued the university and the specialist under § 1983 “for the release of confidential personal information to an ‘unauthorized person’ in violation of” the Act.<sup>132</sup>

The Court noted that state and federal courts had divided sharply on the issue of § 1983’s applicability to the Act and that the lower courts’ decisions in this particular case were in stark contrast to each other.<sup>133</sup> Eager to resolve this issue, the Court unequivocally held that § 1983 cannot be used to enforce violations of the Act.<sup>134</sup> Chief Justice Rehnquist, the author of the majority opinion, wrote the following statement:

Respondent contends that this statutory regime confers upon any student enrolled at a covered school or institution a federal right, enforceable in suits for damages under § 1983, not to have “education records” disclosed to unauthorized persons without the student’s express written consent. But we have never before held, and decline to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights.<sup>135</sup>

The Court noted that while § 1983 actions may be brought to enforce rights created by federal statutes, it must be clear and unambiguous that Congress intended to confer individual rights in order to enforce federal funding legislation through § 1983.<sup>136</sup> It is particularly important to note that current Chief

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129. *Id.*

130. *Id.*

131. Arnone, *supra* note 121.

132. *Gonzaga*, 536 U.S. at 277.

133. *Id.* at 278. After the jury awarded the plaintiff over \$1 million in damages, the state court of appeals ruled that the Act could not be enforced under § 1983. *Id.* at 277–78. The state supreme court reversed and ordered the damage award to be reinstated, reasoning that the Act’s nondisclosure provisions gave rise to a federal right enforceable under § 1983. *Id.*

134. *Id.* at 279.

135. *Id.*

136. *Id.* at 280. The Court described two such cases where it had recognized enforceable rights under spending legislation. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the Court “allowed a § 1983 suit by tenants to

Justice John G. Roberts represented Gonzaga University before the Court in this case.<sup>137</sup> Another lawyer representing Gonzaga made the statement, “[B]y the time [Roberts] argued the case he knew more Ferpa law than most higher-education lawyers.”<sup>138</sup> His knowledge may help direct the Court should it decide to take a FERPA case in the future.

Congress quickly responded to *Gonzaga University* by considering a bill<sup>139</sup> that would have modified the Act to provide parents and students with the right to sue institutions for releasing information that ends up harming the student.<sup>140</sup> Many college officials were opposed to the bill, arguing that it would open up their institutions to frivolous lawsuits and cost them money either through litigation costs or settlements entered into to avoid negative publicity.<sup>141</sup> Proponents responded that few privacy violations result in actual harm to students, and most institutions already go to great lengths to be careful about privacy.<sup>142</sup> Nevertheless, Congress has yet to pass such an amendment giving individuals enforceable rights under the Act.<sup>143</sup>

### C. Exceptions

Although the Act generally requires that an institution obtain the eligible student’s prior consent before making

recover past overcharges under a rent-ceiling provision of the Public Housing Act.” Similarly, in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498 (1990), the Court allowed a § 1983 suit by health care providers to enforce a reimbursement provision of the Medicaid Act. *Gonzaga*, 536 U.S. at 280.

137. Sara Lipka, *Bush Nominee for High Court Knows Colleges*, CHRON. HIGHER EDUC., July 29, 2005, at A1.

138. *Id.* While one could argue that the Court may reverse its position in the future on § 1983 claims regarding the Act, *Gonzaga University* will likely remain good law now that Roberts has taken the place of the late Chief Justice Rehnquist on the Court.

139. H.R. 1848, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:H.R.1848.IH.> The bill was introduced in the House on April 29, 2003 during the first session of the 108th Congress by Rep. Robert E. Andrews (D - NJ). See Arnone, *supra* note 121.

140. Arnone, *supra* note 121.

141. *Id.*

142. *Id.*

143. The last major action on the bill involved referral to the House Subcommittee on Courts, the Internet, and Intellectual Property on June 25, 2003. Library of Congress, THOMAS: Search Results: H.R. 1848 Summary and Status, [http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01848:\(u@X](http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR01848:(u@X). No similar bills have been proposed to date.

disclosures to third parties, several statutory exceptions exist that allow the institution to disclose without student consent and without fear of civil liability.<sup>144</sup> These exceptions include records maintained by a law enforcement unit of the educational agency that are created for a law enforcement purpose,<sup>145</sup> disclosures in connection with a health or safety emergency,<sup>146</sup> and disclosures to parents of a dependent student as defined by the Internal Revenue Code.<sup>147</sup>

### 1. Law enforcement unit records

The law enforcement unit records exception was adopted specifically for colleges and universities in order to deal with campus police records.<sup>148</sup> A law enforcement unit may include any “individual, office, department, division, or other component of a school or school district . . . that is officially authorized or designated by the school district to (1) enforce any Federal, State, or local law, or (2) maintain the physical security and safety of schools in the district.”<sup>149</sup> Records that are “maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement” are not considered education records within the meaning of the Act.<sup>150</sup> Institutions may disclose information from these records to any third party, including federal, state, or local authorities, social service agencies, and even the media.<sup>151</sup> In addition, statutes

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144. See 20 U.S.C. § 1232g(b)(1). See also Medaris, *supra* note 70, at 4–5 (listing all of the statutory exceptions where prior consent is not required in order to disclose, most of which are beyond the scope of this paper).

145. § 1232g(a)(4)(B). The Act also provides other exemptions from the education record definition that are beyond the scope of this paper. These include records of instructional, supervisory, and administrative personnel that are in the sole possession of the author of those records and not accessible to any other person, records that relate exclusively to employees of the educational agency in the normal course of business and in the employee’s capacity as such, and records of students maintained by a physician, psychiatrist, psychologist, or other professional that are used in connection with the treatment of the student. *Id.*

146. § 1232g(b)(1)(I).

147. § 1232g(b)(1)(H).

148. See Daggett, *supra* note 68, at 627. However, this exception also applies to elementary and secondary education institutions. *Id.*

149. Medaris, *supra* note 70, at 5.

150. 20 U.S.C. § 1232g(a)(4)(B)(ii).

151. Medaris, *supra* note 70, at 5.

exist in some states that may require institutions to provide public access to these records.<sup>152</sup>

While the statutory definition of law enforcement unit records may seem simplistic, it contains various nuances that should be noted. If the records are not created for a law enforcement purpose, the Act will protect their disclosure regardless of whether a law enforcement unit possesses them.<sup>153</sup> In addition, unlike other provisions of the Act, if a law enforcement unit shares copies of valid law enforcement records with another component of the school, the records do not lose their status as such.<sup>154</sup> However, the *copy* that the law enforcement unit shares with the other officials becomes an education record within the meaning of the Act once that official receives and maintains it.<sup>155</sup> This can be particularly confusing with respect to school disciplinary proceedings.<sup>156</sup> The original record still in possession of the law enforcement unit remains a non-education record within the meaning of the Act and readily disclosable to third parties while the copies of the records and any records of a subsequent disciplinary proceeding held by other college officials are protected from disclosure by the Act.<sup>157</sup>

## 2. Health or safety emergencies

Unlike the law enforcement unit records exception, which allows disclosure of non-education records, the health or safety emergencies exception allows institutions to disclose otherwise protected education records<sup>158</sup> to appropriate persons in connection with an emergency “if the knowledge of such information is necessary to protect the health and safety of the student or other persons . . . .”<sup>159</sup> This provision is “a

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152. *Id.*

153. *See id.* at 6.

154. *See id.*; *see also* Daggett, *supra* note 68, at 627. Daggett describes other statutory exceptions in the Act as relating to “sole possession notes,” meaning they are neither accessible to nor actually accessed by anyone other than the particular institutional component in possession of the records. Once the records are accessed by another component, they lose their status as sole possession notes and become Buckley records. *Id.* at 626.

155. Medaris, *supra* note 70, at 6.

156. *See supra* pt. III(A).

157. *See* Medaris, *supra* note 70, at 6.

158. *See id.* at 7.

159. 20 U.S.C. 1232g(b)(1)(1) (2000).

commonsense acknowledgement that there may be situations when the *immediate* need for information to avert or diffuse certain unusual conditions or disruptions requires the release of information.”<sup>160</sup> The Act requires that this provision be interpreted narrowly.<sup>161</sup> Examples of such immediate need could include disruptions that involve serious criminal conduct such as weapons-related activity, and it is immaterial whether the location of the incident is on campus or not as long as the crisis affects the school campus or the public health and safety.<sup>162</sup>

### 3. Disclosure to parents of dependent students

Another situation where an institution may disclose otherwise protected education records is when the disclosure is made to the parent or parents of a dependent student as defined by the Internal Revenue Code.<sup>163</sup> Until recently, however, most colleges have been confused by this exception or have found it too difficult to determine which students are “financially dependent” within the meaning of the Code.<sup>164</sup> These institutions have erred on the side of caution for fear of violating the Act.<sup>165</sup> This confusion puts colleges and universities in a delicate position: by choosing to disclose information to the student’s parents, they run the risk of violating the Act’s general requirements of nondisclosure of education records; by choosing not to disclose the information, they may be exposing themselves to potential tort liability to the parents if something goes terribly wrong, for example, serious harm to a student that the parents claim could have been avoided by disclosure of an education record.

## IV. AN AMENDMENT: ALCOHOL AND DRUG-RELATED INCIDENTS

In response to widespread confusion about disclosures to

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160. Medaris, *supra* note 70, at 7.

161. *See id.*; *see also* Daggett, *supra* note 68, at 637 n.145 (noting that “a student’s non-urgent medical condition and associated safety concerns are not emergencies justifying sharing records with the student’s doctor without prior consent”).

162. Medaris, *supra* note 70, at 7.

163. § 1232g(b)(1)(H).

164. Leo Reisberg, *When a Student Drinks Illegally, Should Colleges Call Mom and Dad?*, *CHRON. HIGHER EDUC.*, Dec. 4, 1998, at A39.

165. *See id.*

parents and the increase in lawsuits filed by parents against schools for alcohol and drug related incidents involving their children, Congress amended the Act in 1998 through revisions to the Higher Education Act<sup>166</sup> to allow institutions to inform parents any time a student under the age of twenty-one violates drug or alcohol laws, without running afoul of the Act.<sup>167</sup> This has been seen as a major shift because “since the demise of *in loco parentis* in the 1960s, colleges and universities have recognized that even freshmen are legal adults once they turn 18, and administrators have thus contacted parents only when drinking episodes lead to death or serious injury.”<sup>168</sup>

Under the 1998 amendment, however, permissible disclosures include not only violations of any federal, state, or local law but also school rules and regulations governing the use or possession of drugs and alcohol as long as the school determines that the student violated those school rules and regulations.<sup>169</sup> In adopting such policies, institutions should note that the amendment does not impose any affirmative obligation on the school to inform parents of violations. Instead, the parental notification amendment simply gives institutions discretion to disclose without running the risk of violating the Act.<sup>170</sup> Institutions are not required to tell the student that they have notified their parents of the violation, but they must

166. Higher Education Amendments of 1998, Pub. L. No. 105-244, §§ 951–952, 112 Stat. 1835, 1836. Other federal statutes have amended the Act in other areas. *See e.g.*, Kelly Field, *Education Department Considers Revisions in Privacy-Law Regulations, Official Says*, CHRON. HIGHER EDUC., Apr. 8, 2005, at A21 (describing how a 2000 amendment allows institutions to disclose information they receive from state officials on students who are registered sex offenders without the student’s permission).

167. 20 U.S.C. § 1232g(i)(1) (2000); *see also* Reisberg, *supra* note 164.

168. Reisberg, *supra* note 164.

169. § 1232g(i)(1). The Act states in part:

Nothing in this Act . . . shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student’s education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession. *Id.*

*See also* Epstein, *supra* note 21.

170. *See* § 1232g(i)(1); *see also* Field, *supra* note 166 (stating that colleges can still “refuse to release information to the parents of a student who is a dependent”).

provide a record of the disclosure to the student if he or she requests such information.<sup>171</sup>

The alcohol and drug amendment allows institutions to notify parents whenever an underage student violates the law or school rules regarding alcohol or drugs. This has the effect of increasing an institution's possible liability to parents because Congress has now deferred to the schools on whether to disclose while giving them a "safe-harbor" from possible violations of the Act.<sup>172</sup> Institutions that choose not to disclose have almost no defense to parents' lawsuits against them because the Act now readily invites disclosure of this kind of behavior to parents. Administrators who realized this quickly created their own safe-harbors by establishing parental notification policies or amending existing policies to allow more liberal disclosure to parents. Essentially, institutions can now insulate themselves from liability to parents by erring on the side of disclosure.<sup>173</sup>

Under these new rules, many institutions are adopting parental notification policies in order to limit their liability under the Act.<sup>174</sup> The University of Delaware was one of the first institutions to implement a parental notification policy for drug and alcohol violations, and several other schools have been paying close attention to see how it fares.<sup>175</sup> During the first full year of the policy, the university sent home over 1,000 letters to parents of students who violated alcohol or drug

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171. Steven Burd, *Colleges Allowed to Tell Parents About Alcohol Use*, CHRON. HIGHER EDUC., July 14, 2000, at A31.

172. Of course, an institution's liability will depend on the facts of each case. For purposes of this argument, a useful hypothetical scenario involves an institution that has notice of prior alcohol or drug incidents and fails to inform the student's parents. Subsequently, the student dies or is seriously harmed as a result of this behavior and the parents sue the institution for negligently failing to notify them.

173. This is a significant shift from the Act's original purpose because Senator Buckley arguably would have had institutions err on the side of *nondisclosure*.

174. See Epstein, *supra* note 21. Epstein notes that the University of Delaware, Virginia Tech, American University, and George Washington University are several institutions that have either adopted a parental notification policy or are considering doing so. Radford University in Virginia was the first to adopt such a policy, doing so even prior to the amendments to the federal laws. In fact, Radford's parental notification policy was largely responsible for the new amendment. The father of a Radford student killed in an alcohol-related car crash was instrumental in lobbying for the changes. *Id.*

175. Reisberg, *supra* note 164.

rules.<sup>176</sup> Citing the new policy, University of Delaware officials have noticed a substantial decline in the students' recidivism rate for these offenses.<sup>177</sup>

Similarly, the University of Georgia's parental notification policy recently changed after a January 2006 incident in which a university freshman died in a dormitory from a mixture of alcohol and drugs.<sup>178</sup> Although the policy before 2006 only notified parents concerning situations involving egregious alcohol abuse or repeat offense, the policies for the 2006-07 year require parental notification after just one alcohol or drug violation, including mere possession of alcohol by an underage student, upon the satisfaction of certain conditions.<sup>179</sup>

Although both Delaware and Georgia have changed their policies, officials at other institutions doubt the practicality of enforcing such new policies and argue that because the amendment requires the school to adjudicate the student in violation of their rules and regulations before telling his or her parents, nothing short of catching students in the act of drinking or using drugs will provide the requisite evidence to make such an adjudication.<sup>180</sup> In addition, some college officials are worried that the amendment may actually *increase* the potential for liability to parents.<sup>181</sup> The parental notification amendment gives large amounts of discretion to college authorities because now it is up to them to choose whether to disclose or not. Before the amendment was passed, institutions could simply defer to the Act and the paramount

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176. *Id.*

177. *Id.*

178. See Danée Attebury, *Student Found Dead in Russell Hall Dorm*, RED & BLACK (Univ. of Ga.), Jan. 23, 2006, available at <http://media.www.redandblack.com/media/storage/paper871/news/2006/01/23/News/Student.Found.Dead.In.Russell.Hall.Dorm-2569446.shtml>; Danée Attebury, *Fish Dead from Mixture of Heroin, Cocaine, and Alcohol*, RED & BLACK (Univ. of Ga.), Feb. 2, 2006, available at <http://media.www.redandblack.com/media/storage/paper871/news/2006/02/02/News/Fish-Dead.From.Mixture.Of.Heroin.Cocaine.And.Alcohol-2569574.shtml>; see also Rebecca K. Quigley, *New Alcohol and Drug Policies Passed*, ATHENS BANNER-HERALD (Ga.), Apr. 27, 2006, at A1.

179. See Quigley, *supra* note 178; see also UNIV. OF GA., CODE OF CONDUCT 6 (2005), available at <http://www.uga.edu/judicialprograms/2005-06%20Code%20of%20Conduct.pdf>. The conditions include circumstances such as: significant property damage occurred as a result of the violation, medical attention was required, and others.

180. See Epstein, *supra* note 21.

181. See Reisberg, *supra* note 164.

interest of protecting students' privacy rights when sued by parents for failing to inform them of their children's conduct.

Today, institutions may appear much more culpable in lawsuits if it can be shown that they knew of prior instances of violations *and* faced no risk of running afoul of federal privacy laws by disclosing to the parents. The natural result of this effect will be a substantial increase in parental notification policies at colleges and universities across the nation, and a trend toward liberalizing already-existing notification policies.<sup>182</sup> Indeed, policy changes at the University of Delaware and University of Georgia are prime examples of the trend in higher education institutions during the last several years.

If the trend continues, perhaps the Act will be amended to allow disclosure upon the mere suspicion of alcohol or drug violations. In order to avoid liability, institutions inevitably would be forced to respond by mandating parental notification under these speculative circumstances. The end result of this perpetual follow-the-leader approach is nothing short of *in loco parentis* in higher education where institutions act as a student's parent away from home.

## V. THE FUTURE OF STUDENT RIGHTS UNDER THE ACT

In light of the recent amendments to the Act, for example, the amendment concerning alcohol and drug related incidents, it appears that the exceptions now are beginning to swallow the rule. The general rule of nondisclosure of student records has been eroded so much that there are almost as many circumstances where disclosure is permissible as there are circumstances where it is prohibited. What is most alarming is that these changes may be wholly unnecessary and could lead to systematic disclosure policies that could spiral out of control at the expense of student rights. Thus, the current alcohol and drug provision should be reconsidered. Rather than amend the Act to allow more and more disclosures, legislators and institutions should strive to find a healthy balance in some of the already existing provisions of the Act. The exceptions allowing disclosures for law enforcement unit records, health or safety emergencies, and dependent students should be utilized

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182. See Quigley, *supra* note 178.

to the fullest extent rather than merely overlooked as too narrow or unworkable.

For example, it is not beyond reason that the health or safety emergency exception could be used to notify parents if their child is caught abusing alcohol or drugs. Although the abuse would probably have to rise to a considerable level in order to take advantage of this provision of the Act, certainly parents could be considered "appropriate persons" within the meaning of this provision because they are in the best position to protect their child from reckless behavior.

In addition, the law enforcement unit records exception could be used to notify parents of any alcohol or drug use as long as the law enforcement unit makes that disclosure from records that were originally created for a law enforcement purpose. As noted previously, these are not "education records" within the meaning of the Act, and thus the Act does not even apply to law enforcement unit records. School officials should have working relationships with campus law enforcement so that the law enforcement unit may develop policies for notifying parents whenever students get into trouble for alcohol or drug violations. Institutions such as the University of Georgia could still address the growing concerns of alcohol and drug abuse by having strict notification policies that are a function of the law enforcement unit records exception. Presumably, if an underage student even possesses alcohol, he is in violation of the institution's rules of conduct and can be charged by the law enforcement unit of the institution. Any records kept as a result of that incident are not "education records" within the meaning of the Act and are therefore readily available for disclosure to that student's parents.

Furthermore, the dependent student exception is perhaps the best opportunity to disclose information to parents about alcohol or drug use. It acts as a "catch all" provision to include any disclosures as long as that student is financially dependent on the parents. It is inexcusable that institutions are ignoring this exception merely because the Internal Revenue Code is too difficult to understand. This provision has been used for years by some colleges and universities in making such disclosures to parents<sup>183</sup> and best demonstrates that further amendments to the Act in this respect would be unnecessary.

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183. See Reisberg, *supra* note 164.

While this article argues that the Act should not be amended to further erode students' rights, the arguments made by parents for more rights at the expense of their children are not without merit. After all, the true purpose of the Act is not to cut off parents and treat them as mere third parties regarding student records. Surely, parents retain *some* rights with respect to their college-age children. Armed with high-damage jury verdicts, these parents will readily challenge institutions that choose not to inform them of their students' misconduct when it results in those students' harm. Between institutions of higher education and parents, the latter probably is in the best position to rectify the destructive behavior of students.<sup>184</sup> These arguments clearly cut toward giving parents more rights and marginalizing the application of the Act's general provisions to them.

## VI. CONCLUSION

The Family Educational Rights and Privacy Act presents constant challenges for higher education institutions regarding disclosures of student information. The traditional doctrine of *in loco parentis* has undergone major changes with respect to these institutions, and this helps to explain why some amount of uncertainty exists about how the Act should apply to them. The Act's general rule of nondisclosure has been eroded through amendments allowing disclosure in certain situations or to specific parties. Some of those amendments, however, may be seen as superfluous because the Act contains provisions that are readily available to solve some of the same problems that the changes were originally intended to rectify. Rather than broaden the discretion of higher education institutions, which inevitably leads to increased disclosures in order to avoid liability (i.e., a return to *in loco parentis*), the Act should be utilized to its fullest potential so that a healthy balance may be achieved between those institutions' interests and students' privacy rights.

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184. For example, the most common scenario may involve the parent simply withdrawing the student from school if the behavior does not change.