

*THE CHICAGO TRIBUNE V. THE UNIVERSITY OF
ILLINOIS: THE LATEST ITERATION OF NEW
TEXTUALIST INTERPRETATION OF FERPA BY
THE FEDERAL COURTS*

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INTRODUCTION

*The Chicago Tribune Co. v. The Board of Trustees of the University of Illinois*¹ is the most recent iteration of a trend in which the Family Educational Rights Protection Act (“FERPA”)² is interpreted by the federal courts according to New Textualism.³ The object of this approach is to interpret the meaning of a law’s text with text-linked or text-based sources rather than legislative history or Congressional intent.⁴ The last twenty years of federal court FERPA case law evidences a shift toward a textualist approach to FERPA interpretation whereby softer approaches to statutory interpretation: legislative history, Congressional intent, and policy objectives are secondary for resolving legal disputes in the federal judiciary. Consequently, FERPA interpretation by federal circuit courts has also become highly uniform.

This article begins with an explanation of the language and structure of FERPA. The Second Section reviews FERPA case law in the Supreme Court and federal circuit courts over the last twenty years. These cases demonstrate the Supreme Court’s preference for New Textualism and the influence of *Gonzaga University v. Doe*⁵ upon federal courts’ application of FERPA. Not only has Supreme Court preference for New Textualism herded the circuits away from softer approaches to statutory interpretation, *Gonzaga*’s treatment of Section 1983 causes of action has eliminated a major reason the federal courts have needed to go beyond FERPA’s text. Following *Gonzaga*, the federal circuit courts no longer need to determine

1. 680 F.3d 1001 (7th Cir. 2012) [hereinafter *Chicago Tribune*].

2. The Family Educational Rights Protection and Privacy Act, 20 U.S.C. § 1232g (2012).

3. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION*, 227 (2d ed., Foundation Press 2000) [hereinafter Eskridge, Frickey, & Garrett]. *Muhammed v. Barlow*, 488 Fed. App’x. 824, (5th Cir. 2012), is a more recent federal FERPA appeal dismissed for the plaintiff’s failure to prosecute.

4. Eskridge, Frickey, & Garrett, *supra* note 3, at 228. *See also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

5. 536 U.S. 273 (2002) [hereinafter *Gonzaga*].

whether Congress intended to create individually enforceable privacy rights.

This trend is borne out by recent FERPA litigation in the Seventh Circuit. Section Three of this article begins with a summary of the events leading to *The Chicago Tribune v. The University of Illinois*. Section Three continues with the U.S. district court decision,⁶ granting The Chicago Tribune Co. (“Tribune”) access to the records sought in its Illinois Freedom of Information Act (“FOIA”) request.⁷ Section Three concludes with a summary of the Seventh Circuit appeal,⁸ vacating the U.S. district court order for lack of subject matter jurisdiction. This article argues that the *Chicago Tribune* fits neatly into the federal court trend towards principally text-based interpretation of FERPA. Consequently, state courts faced with conflicts requiring the resolution of FERPA disputes to apply state law correctly can rely on a straightforward method for properly interpreting the federal law.

I. FERPA TEXT AND STRUCTURE

FERPA protects the integrity and privacy of education records by imposing two principal requirements on educational institutions that maintain those records as conditions for receiving federal money.⁹ Under the first of these requirements, educational institutions must allow students access to their own education records and an opportunity to contest any perceived inaccuracies.¹⁰ Under the second, an educational institution cannot have a policy or practice of disclosing a student’s education records or the “personally identifiable information” therein¹¹ without obtaining the

6. *Chi. Tribune Co. v. Univ. of Ill. Bd. of Trs.*, 781 F. Supp. 2d 672, 673 (N.D. Ill. 2011) [hereinafter *Chi. Trib. v. U.I.*].

7. Freedom of Information Act, 5 I.L.C.S. § 140 (2009). The § 140/7 exemptions from disclosure section was amended shortly after U.I. denied the Tribune’s FOIA request. At the time the district court issued its decision, the “private information” exemption (§ 140/7(1)(b) – (c)) remained unchanged: “personal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . .” See *Chi. Trib. v. U.I.*, 781 F. Supp. 2d at 674.

8. *Chicago Tribune*, 680 F.3d 1001 (7th Cir. 2012).

9. 20 U.S.C. § 1232g(a)-(b) (West 2010).

10. § 1232g(a)(1)(A)–(B). Section 1232g(a)(1)(C) limits students’ and parents’ rights to inspect documents maintained by the institution. § 1232g(a)(1)(D) provides for a waiver of a student’s right to access confidential recommendations. § 1232(a)(2) conditions the receipt of federal education funding on the requirement that educational agencies and institutions are provided a hearing in which the content of their records may be challenged. The same subsection allows parents to insert a written explanation “respecting the content of such records” into the file.

11. § 1232g(b)(1). The Secretary of Education regulations, not statute, define personally identifiable information. It includes but is not limited to “(a) The student’s name; (b) The name of the student’s parent or other family members; (c) The address

student's written consent.¹² Congress derives its authority to regulate access to education records in state and private educational institutions from the federal constitutional Spending Clause.¹³ That is, Congress conditions the receipt of federal education funding, including financial aid, upon compliance with FERPA's privacy and access provisions.

Once an educational institution accepts federal money from the Department of Education ("DOE"), FERPA subjects "education records" as defined by Section 1232g(a)(4)(B) to the access and confidentiality conditions summarized above. Education records are defined by statute as files "directly related to a student" that are "maintained by an educational agency or institution or by a party acting for the agency or institution."¹⁴

of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. § 99.3.

12. § 1232g(b). Section 1232g(b)(2) affords very similar prohibitions against disclosing personally identifiable information in education records in addition to the protections for the records themselves. There is a written consent and judicial order exception to this prohibition as well. § 1232g(b)(2)(A)–(B). Parental permission and consent requirements transfer to the student once he or she turns eighteen. § 1232g(d).

13. Spending Clause power, the power to lay and spend taxes, comes from the first clause of article 1, section 8 of the U.S. Constitution. *U.S. v. Butler*, 297 U.S. 1, 63 (1936) [hereinafter *Butler*]; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("Put simply, Congress may tax and spend.") [hereinafter *Sebelius*]. "Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987) [hereinafter *South Dakota*] (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127, 143–44 (1947); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)); *Sebelius*, 132 S. Ct. at 2579). Congress may achieve legislative objectives using the spending power provided it meets four requirements. *Id.* at 207–08 (exercise of general spending power must be pursuant of the general welfare, unambiguously made by Congress, related to federal interest in national projects or programs, and not barred by other constitutional provisions independent of a constitutional grant of federal funds) (citations omitted). In short, Congress can attach conditions to funds it distributes to states to achieve a wide range of policy goals that it might not be constitutionally empowered to regulate otherwise. *Sebelius*, 132 S. Ct. at 2600.

14. § 1232g(a)(4). Note, "student" is defined by § 1232g(a)(6) as "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution." See regulatory definition of "personally identifiable information," *supra* note 11.

Any record maintained by the educational institution meeting this definition is subject to the access requirements and privacy protections of FERPA unless the student consents to disclosure or a statutory exception applies.

Because of the threshold definitional requirements and exceptions, FERPA does not protect absolutely every educational record. For documents that meet the two elements above, FERPA creates four initial exceptions for education records that may be disclosed without consent. In short, records of instructional, supervisory, and ancillary personnel that are solely possessed by the person who made them; records maintained by law enforcement personnel for law enforcement purposes; human resource records of the institution's employees; and physician, psychologist, and psychiatrist records used only for the student's treatment are not subject to FERPA.¹⁵ In addition, an educational institution may publish "directory information" as defined in Section 1232g(a)(5) with proper notice to all students.¹⁶ These exceptions to records protected by FERPA carve out room for school officials to share records necessary for smooth operations while allowing student access and respecting confidentiality.

Subsection 1232g(b), conditioning the receipt of federal education money on an educational institution's non-release of education records, was implicated in *Chicago Tribune*. This subsection allows the release of education records with student consent or in the case of an exception to the "written consent requirement."¹⁷ School officials and teachers within the institution who have legitimate educational interests,¹⁸ officials at schools the student intends to attend,¹⁹ the U.S. Secretary of Education,²⁰ financial

15. § 1232g(a)(4)(B)(i) - (iv). Refer to this subsection of the law directly for completely nuanced outline of records that do not qualify under the definition of education records.

16. "The student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." § 1232g(a)(5)(A). Public notice must be given and a "reasonable period of time" afforded for a parent to request that the directory information not be disclosed. § 1232g(a)(5)(B).

17. The "written consent requirement" refers to the prohibition against disclosing student education records subject to FERPA without first obtaining the student or parent's written consent.

18. § 1232g(b)(1)(A).

19. § 1232g(b)(1)(B).

20. § 1232g(b)(1)(C). This section also allows access for the U.S. Comptroller General and state educational authorities. For more on complying with law enforcement requests for information under the PATRIOT ACT see Lee S. Strickland, Mary Minow, & Thomas Lipinski, *Patriot in the Library: Management Approaches When Demands for Information Are Received from Law Enforcement and Intelligence Agents*, 30 J.C. & U.L. 363 (2004).

aid administrators,²¹ state and local authorities,²² organizations conducting studies for or on behalf of educational institutions,²³ accrediting organizations,²⁴ parents of a dependent student,²⁵ emergency responders,²⁶ those subject to grand jury or law enforcement subpoenas,²⁷ and the Secretary of Agriculture²⁸ need not obtain written consent before accessing students' educational records subject to FERPA protections. The remaining sections of FERPA regulate administrative requirements,²⁹ enforcement of the provisions,³⁰ and specific applications of the law.³¹ The

21. "[I]n connection with a student's application for, or receipt of, financial aid." § 1232g(b)(1)(D).

22. § 1232g(b)(1)(E). This sub-section addresses disclosure to state and local authorities by straddling November 19, 1974 when FERPA was first amended. It grandfathers in reporting that was allowed prior to this date. § 1232g(b)(1)(E)(i). It adds additional privacy protections to a similar allowance for disclosure after this date. § 1232g(b)(1)(E)(ii).

23. § 1232g(b)(1)(F). This provision has the additional requirements that the information be collected (i) "for the *purpose* of developing, validating, or administering predictive tests, administering student aid programs, and improving instruction;" (ii)(a) "if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations;" and (ii)(b) "such information will be destroyed when no longer needed for the purpose for which it is conducted." (emphases and tabulation added).

24. "[I]n order to carry out their accrediting functions . . ." § 1232g(b)(1)(G).

25. § 1232g(b)(1)(H).

26. "[I]n connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons . . ." § 1232g(b)(1)(I).

27. § 1232g(b)(1)(J).

28. "[O]r authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service . . ." § 1232b(1)(K).

29. State and federal education authorities are allowed access to student records for audit and evaluation of federally supported education programs under § 1232g(b)(3). A similar allowance is provided by § 1232g(b)(5). A record of entities requesting or receiving access to education records must be kept by the educational institution under § 1232g(b)(4)(A). Information can only be transferred to a requesting entity if that entity promises to guard the privacy of the information provided under § 1232g(b)(4)(B). Sections 1232g(b)(6)–(7) allow for the disclosure of information relating to convictions of violent or sex offenders. See also Benjamin F. Sidbury, *The Disclosure of Campus Crime: How Colleges and Universities Continue to Hide Behind the 1998 Amendment to FERPA and How Congress Can Eliminate the Loophole*, 26 J.C. & U.L. 755 (2000). Section 1232g(c) governs student privacy pertaining to data gathering activities. Parents and students must be informed of their FERPA rights. § 1232g(e). Finally, the Secretary of Education must (and has established the Family Policy Compliance Office) establish an office and review board to hear alleged FERPA violations. § 1232g(g).

30. Section 1232g(f) authorizes the Secretary of Education to take "appropriate action" to enforce FERPA and "deal with violations."

31. Section 1232g(h) authorizes disclosure of disciplinary action against a student that posed a "significant threat" to the well-being of any student. Section 1232g(i) authorizes disclosure of drug or alcohol violations to parents when students are under

Secretary of Education issues FERPA regulations that compliment, interpret, and explain FERPA's various provisions.³² Within the DOE, the Family Policy Compliance Office ("FPCO") receives complaints of alleged FERPA violations and issues occasional advice letters to institutions with questions about the application of FERPA to a given disclosure.³³

II. FERPA CASE LAW

The dominant approach to FERPA interpretation by the federal courts has been New Textualism, heavily dependent upon the statute's plain language and the meaning of the words in the statute. The federal circuit courts' use of "soft" information such as the law's policy objectives, legislative history, or Congressional intent merely to clarify the meaning of ambiguous terms or to resolve linguistic conflicts between FERPA and other applicable federal laws was endorsed and made mandatory by the Supreme Court in two cases. In addition to this emphasis, Supreme Court precedent has eliminated a major reason the federal circuit courts often resorted to softer methods of statutory interpretation: determining enforceability of federal rights under United States Code, Title 42, § 1983.³⁴

A. FERPA in the Supreme Court

FERPA case law is relatively sparse in the U.S. Supreme Court.³⁵ In the

twenty-one. Section 1232g(j) authorizes disclosure to investigate and prosecute terrorism. For more on this specific addition to FERPA see Jamie Lewis Keith, *The War on Terrorism Affects the Academy: Principal Post-September 11, 2001 Federal Anti-Terrorism Statutes, Regulations and Policies That Apply to Colleges and Universities*, 30 J.C. & U.L. 239, 292 (2004).

32. 34 C.F.R. § 99.1 et seq.

33. The FPCO maintains a website to achieve its mandate. DEPT. OF EDUC., *Family Policy Compliance Office*, <http://www2.ed.gov/policy/gen/guid/fpc/index.html> (last visited Jan. 2, 2013).

34. In short, a law may expressly confer a right and a cause of action to enforce it. In that case, one simply sues to enforce the right under the law itself. However, a statute may also create a right and imply a right or cause of action to enforce it. See *Blessing v. Freestone*, 520 U.S. 329 (1997) for factors to determine whether a statute confers a right enforceable under Section 1983). In the latter case, a party seeking to enforce the right conferred by the law must sue to enforce the law under another statute. 42 U.S.C. § 1983 creates a federal cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . ." If, for example, one were to be discriminated against based on race, color or national origin in violation of 42 U.S.C. § 2000d, one has a cause of action for the violation of rights against discrimination under § 1983. Since FERPA creates no private right of action to enforce any privacy rights that it confers, FERPA litigants frequently sue under § 1983 to enforce FERPA privacy rights. A lawsuit such as this is referred to throughout this paper as a "Section 1983" cause of action.

35. Lynn M. Daggett, *FERPA in the Twenty-First Century: Failure to Effectively Regulate Privacy for All Students*, 58 CATH. U. L. REV. 59, 63 (2008) ("From FERPA's

two instances the Court has taken up FERPA since its enactment in 1974, the Court has been concerned with the plain language of the law. The first U.S. Supreme Court ruling on a FERPA issue came in 2002.³⁶ *Owasso Independent School District v. Falvo* clarified the potentially ambiguous definition of “education records” and what it means to maintain those records under that definition.³⁷ The case arose when the school district was sued for allowing students to grade one another’s papers and call out the grades for the teacher to record. Both parties agreed that if a student’s graded assignment immediately became an “education record” as contemplated by FERPA, the sharing of grades with peers or calling out the grades aloud in class would have violated the Section 1232g(b)(1) disclosure prohibitions.³⁸ *Owasso* was the first time the Court applied FERPA to decide what constituted “education records” under the law.

In this determination, the Court was primarily concerned with respecting the balance of federalism by relying first on the ordinary meaning of the statutory language.³⁹ Particularly important was the word “maintain,” which the Court defined as “to keep in existence or continuance; preserve; [or] retain.”⁴⁰ Furthermore, because “maintain” is a verb, the court determined that someone must have acted on the school’s behalf.⁴¹ The only agents the Court would recognize as maintaining the records were teachers, administrators, and other school employees, but not the students in their capacity as students.⁴² *Owasso* thus turned on a textualist interpretation of FERPA in addition to concerns about any new burdens Congress sought to impose on teachers if plaintiffs’ interpretations were to be acceptable.⁴³

enactment in 1974 until 2002, the Supreme Court decided no FERPA cases. In fact, during this period only two of the Court’s opinions even cited FERPA, and then only in passing in footnotes.” (citing *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318, note 16 (1979); *Goss v. Lopez*, 419 U.S. 565, 575, note 7 (1975)). Margaret L. O’Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679, 687 (2003) [hereinafter O’Donnell].

36. *Owasso Ind. Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426 (2002) [hereinafter *Owasso*].

37. *Owasso*, 534 U.S. at 428–29.

38. *Id.* at 431.

39. *Id.* at 432. Note, O’Donnell, *supra* note 35, at 694–95 reads the guiding principle language to mean that “statutory considerations” were secondary to an interpretation “tailored to fit the guiding principle announced.” The authors of this article read the Court’s focus on Webster’s definition of “maintain” and the implications of that definition as aligning what O’Donnell calls the “rules approach” to interpretation with the federalism principle. *Id.* at 688.

40. *Id.* at 433–34 (citing *Random House Dictionary of the English Language* 1160 (2d ed. 1987)).

41. *Id.* at 433.

42. *Id.* at 433–34.

43. *Id.* at 434–35. The Court reasoned that Congress would not have wanted to

Six months later, the Supreme Court decided *Gonzaga*.⁴⁴ In this case, Gonzaga University disclosed information about one of its recent graduates to comply with a Washington law requiring the state's "new teachers to obtain an affidavit of good moral character from a dean of their graduating college or university."⁴⁵ Without this disclosure, Doe would not have been able to obtain the affidavit and thus would have been unable to teach in the state. Even so, Doe sued Gonzaga University in a Spokane state district court, claiming a federal private right of action for deprivation of rights conferred by FERPA under Section 1983.⁴⁶ Doe's theory was that FERPA confers a student right to withhold consent to disclose. He argued that by disclosing his education records without his consent or a FERPA exception to this requirement, Gonzaga had violated a federally conferred right that could be enforced under Section 1983. After Doe won at the trial-court level, the issue of whether FERPA conferred a right enforceable under Section 1983 was central to each stage of the appeal.⁴⁷

The trial court held that FERPA conferred a right enforceable under Section 1983.⁴⁸ The Washington Court of Appeals reversed⁴⁹ and the Washington Supreme Court re-reversed.⁵⁰ Subsequently, the U.S. Supreme Court granted certiorari for a final decision on whether a private right of action was possible to enforce FERPA under Section 1983.⁵¹ Chief Justice

burden teachers with the vast number of records that would be necessary to allow access to all the information recorded about students in every way whatsoever. If the Court were to adopt the respondent's position, teachers would be burdened with keeping a separate access record for all requests to examine their individual grade books in accordance with § 1232g(b)(4). The Court further explained formal hearings for student disputes of their grades and abandoning traditional teaching methods like group grading would further burden teachers. *Id.* at 435–36.

Note Justice Kennedy's single-location interpretation of education record: "[B]y describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar . . ." and Scalia's disagreement with this interpretation in his *Gonzaga* concurrence are omitted from this discussion but offer additional support for the Supreme Court's clear textualist preference in this FERPA case.

44. See *Gonzaga*, 536 U.S. 273 "The Court, having been primed on the § 1983 issue in *Falvo* and disappointed [n 130] to find that the attorneys had not properly preserved the issue on appeal, was eager to address the § 1983 question in *Gonzaga*." O'Donnell, *supra* note 35, at 705. See also, Benjamin F. Sidbury, *Gonzaga Univ. v. Doe and Its Implications: No Right to Enforce Student Privacy Rights Under FERPA*, 29 J.C. & U.L. 655 (2003) [hereinafter Sidbury (2003)].

45. See *Gonzaga*, 536 U.S. at 277.

46. *Id.* at 276; Sidbury, *supra* note 44, at 658–59.

47. See Sidbury, *supra* note 44, at 661–63.

48. *Doe v. Gonzaga Univ.*, No. 94-2-03120-6, (Spokane Super. Ct. filed Aug. 6, 1997).

49. *Doe v. Gonzaga Univ.*, 992 P.2d 545 (Wash. App. 2000).

50. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 400–02 (Wash. 2001).

51. See *Gonzaga*, 536 U.S. at 273.

Rehnquist, writing for the U.S. Supreme Court majority, began by analyzing the operative provisions of FERPA implicated by the facts of the case: Sections 1232g(b)(1), 1232g(f), and 1232g(g).⁵² Referring to Section 1232g(b) as FERPA's "nondisclosure provision," the Court held that the law failed to create a private right that could be enforced by the courts.⁵³ This holding was based, in part, on the observation that the relevant portions of FERPA speak in terms of institutional policy or practice rather than individual instances of disclosure.⁵⁴ Moreover, the specific portions of the law implicated in this action direct the Secretary of Education to enforce the law's spending conditions and to establish an administrative body (the FPCO) to review alleged violations.⁵⁵ In addition, educational institutions that receive federal education money need only "substantially comply" with FERPA to avoid termination of federal funding.⁵⁶ Finally, the language of both subsections 1232g(b)(1) and (2) references individual consent "in the context of describing the type of 'policy or practice' that triggers a funding prohibition" such that no individual right is created.⁵⁷ Here, as in *Owasso*, the majority based its interpretation on the plain language and structure of the relevant portions of FERPA.⁵⁸

Gonzaga is probably more significant for its general treatment of Section 1983 causes of action than for its treatment of FERPA. After all, the Justices were preoccupied with whether FERPA was individually enforceable under Section 1983.⁵⁹ Nevertheless, the Section 1983 analysis turned largely upon FERPA's language. The majority wanted, and could not find, unambiguous rights-creating language to allow FERPA enforcement under Section 1983. This high linguistic threshold for

52. *Id.* at 279. The Court also cites § 1234c(a), but it appears to have been referring to § 1232c(b)(2) for the requirement that educational institutions receiving FERPA funding need only to "substantially comply" with federal programs awarding federal money.

53. *See Gonzaga*, 536 U.S. at 288.

54. *Id.* (citing § 1232g(b)(1) – (2), "prohibiting the funding of 'any educational agency or institution which has a *policy or practice* [sic] of permitting the release of education records'").

55. *Id.* at 289.

56. *Id.*

57. *Id.*

58. "We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983." *Id.* at 283. "'The question of whether Congress . . . intended to create a private right of action [is] definitively answered in the negative' where a 'statute by its terms grants no private rights to any identifiable class.'" *Id.* at 283–84 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 576 (1979)). "Accordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or an implied right of action." *Gonzaga*, 536 U.S. at 286.

59. For an explanation of 42 U.S.C. 1986, *see supra* note 34.

creating individually enforceable rights inspired commentary by four Justices in one concurring and one dissenting opinion.

Justice Souter joined Justice Breyer concurring in the outcome, but not in the majority's strict adherence to plain-language and structural interpretation of FERPA.⁶⁰ Instead of modifying the test for Section 1983 rights, the concurrence found the breadth of the statute's key language in Section 1232g(b), rather than the absence of specific rights-creating language, sufficient to reach the majority holding.⁶¹ For Justices Souter and Breyer, "the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance."⁶² The concurrence thus accepted the conclusion that Congress did not intend for Section 1983 enforceability of the applicable sections, but was reluctant to require affirmative enforceability language for future litigants seeking to protect federally conferred rights through Section 1983.

Both the majority's Section 1983 requirements and its textual analysis of FERPA were too much for Justices Ginsburg and Stevens. Justice Stevens' dissent attacked the majority holding on both fronts.⁶³ First, he said, the majority read FERPA to circuitously avoid the rights-creating language in the title and text of the act.⁶⁴ Justice Stevens further read Section 1232g(b) as conferring a right upon parents and students to withhold their consent to disclose education records, rather than as a system-wide administrative limitation on educational institutions.⁶⁵ Based on the rights-creating language, previously established tests for implied rights of action and enforceability of rights under Section 1983, and the "overall context of FERPA," Stevens would have allowed FERPA to be enforced individually.

Justice Stevens' second argument was that the majority had incorrectly combined the implied right of action case law with the requirements for enforcing rights of action under Section 1983 so badly as to create a second-class federal right.⁶⁶ In short, he said, the Court cannot require plaintiffs to show that Congress intended to unambiguously confer a right

60. See *Gonzaga*, 536 U.S. at 291–92 (Souter & Breyer, JJ., concurring); Sidbury, *supra* note 44, at 670–71. They did not endorse the majority's presumption that "a right is conferred [by Congress] only if set forth 'unambiguously' in the statute's 'text and structure.'" *Gonzaga*, 536 U.S. at 291 (citing *ante* 280, 288).

61. *Id.* at 292.

62. *Id.* at 291.

63. *Id.* at 293–303 (Stevens & Ginsburg, JJ., dissenting); Sidbury (2003), 29 J.C. & U.L. at 671–773.

64. *Id.* at 293 (citing §§ 1232g(a)(1), 1232g(a)(1)(D), 1232g(a)(2), 1232g(c), and the title).

65. "The right of parents to withhold consent and prevent the unauthorized release of information." *Id.* at 294 (citing the respondent).

66. *Id.* at 299–303.

of action under Section 1983 because that has never been the standard.⁶⁷ If an implied federal right is evident in a federal law, then Section 1983 can be used to enforce that right unless the statute says otherwise, he argued.⁶⁸ By requiring the opposite, the majority had placed new burdens on plaintiffs who wish to use Section 1983.⁶⁹ For Stevens, the Court had eroded the “long-established principle of presumptive enforceability of rights under § 1983.”⁷⁰

Thus, *Owasso* and *Gonzaga* demonstrated a preference for New Textualism by the Supreme Court in the interpretation of FERPA and related laws. With the exception of the *Gonzaga* concurrence, the Justices largely refrained from questioning whether the court should have been taking a largely textualist approach to statutory interpretation. Justice Stevens’ *Gonzaga* dissent focused on rights-creating language that he found in the statute. His focus on the linguistic dispute was an endorsement of the Court’s approach to statutory interpretation even if he disagreed with its conclusion.

B. FERPA According to *Owasso* and *Gonzaga* in the Federal Circuit Courts

Consistent with *Owasso* and *Gonzaga*, the federal circuit courts also emphasize the textualist approach to interpreting FERPA over softer methods of interpretation. In addition to this emphasis, *Gonzaga* eliminated the major impetus for interpreting FERPA with sources beyond the law’s text—courts no longer need to determine whether Congress intended FERPA to confer individually enforceable privacy rights. Consequently, *Gonzaga* has had a significant impact on federal circuit court FERPA jurisprudence,⁷¹ especially since prior to *Gonzaga*, the majority of federal circuit courts recognized FERPA as individually enforceable under Section 1983.⁷²

67. *Id.* at 301.

68. *Id.* at 300.

69. *Id.* at 302–03.

70. *Id.* at 302.

71. For examples of *Gonzaga*’s effect on § 1983 rights outside of FERPA context, see *Delancey v. City of Austin*, 570 F.3d 590, 594 (5th Cir. 2009); *Cuvillier v. Sullivan*, 503 F.3d 397, 407 (5th Cir. 2007); *Johnson v. City of Detroit*, 446 F.3d 614, 618–22 (6th Cir. 2006); *Ohio Republican Party v. Brunner*, 544 F.3d 711, 728 (6th Cir. 2006); *Hughlett v. Romer-Sensky*, 497 F.3d 557, 561–65 (6th Cir. 2006); *Ind. Prot. & Advocacy Servs. v. Ind. Family & Soc. Servs. Admin.*, 603 F.3d 365, 363 (7th Cir. 2010); *Slovinec v. DePaul Univ.*, No. 02-3837, 332 F.3d 1068 (7th Cir. June 18, 2003) (Unpublished); *Mo. Child Care Ass’n v. Cross*, 294 F.3d 1034, note 8 (8th Cir. 2003); *Sanchez v. Johnson*, 416 F.3d 1051, 1057–58 (9th Cir. 2005); *Day v. Bond*, 500 F.3d 1127, 1138 (10th Cir. 2007).

72. *Gonzaga*, 536 U.S. at 299 (Stevens, J. dissenting); *Sidbury*, *supra* note 44 at 659, 674. The following review of federal circuit court FERPA jurisprudence also

1. Tenth Circuit

The effect of Supreme Court jurisprudence on FERPA litigation can be directly assessed in *Falvo ex rel. Pletan v. Owasso Independent School District No. 1-011*⁷³—the Tenth Circuit case overturned by *Owasso*. Although neither party argued the issue on appeal, the Tenth Circuit's first relevant inquiry was whether the law conferred an individual right enforceable under Section 1983.⁷⁴ The court almost immediately departed from FERPA's plain language to the Congressional Record to determine whether Congress intended to confer this individually enforceable right.⁷⁵ As the reader already knows,⁷⁶ the Tenth Circuit concluded that FERPA indeed conferred an individual privacy right enforceable by Section 1983.

Even though the Supreme Court ultimately reversed the Tenth Circuit's *Falvo* decision, it did not do so because of the interpretive approach taken by the Tenth Circuit on issues separate from the Section 1983 enforceability of FERPA. Regarding those issues, the Tenth Circuit embarked on a lengthy analysis on the merits of the claim that a FERPA violation had occurred, to determine whether the practice of peer grading, allowing students to shout their grades to the teacher for recording, violated FERPA.⁷⁷ It began with the statutory language, focusing on "education records." According to the court, the statutory language alone was enough to conclude that an opinion of the FPCO had improperly interpreted "education record" to exclude a teacher's grade book from the statutory definition.⁷⁸ The Tenth Circuit opined that interpreting the statute otherwise would obviate the need for allowing the disclosure of this information to substitute teachers in Section 1232g(a)(4)(B)(I). This conclusion was bolstered by reference to FERPA's privacy and access purposes.⁷⁹ While it was reversed on this interpretation, the Tenth Circuit began with the text of FERPA in its analysis and relied on softer methods of interpretation to confirm its textualist conclusions.

In spite of eventual reversal by the Supreme Court, the Tenth Circuit in *Falvo* also relied upon FERPA's plain language also to interpret the

supports this statement.

73. 233 F.3d 1203 (10th Cir. 2000) [hereinafter *Falvo*] overruled by *Owasso*, 534 U.S. 426. In *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1062 (10th Cir. 2002) the Tenth Circuit faithfully deferred to the Supreme Court precedent in *Owasso*.

74. *Id.* at 1210.

75. *Id.* at 1211.

76. See *Owasso*, 534 U.S. at 426.

77. *Falvo*, 223 F.3d at 1213.

78. *Id.* at 1214. This conclusion inspired some criticism from the academy. Amy Bennett & Adrienne Brower, "That's Not What FERPA Says!": *The Tenth Circuit Court Gives Dangerous Breadth to FERPA in its Confusing and Contradictory Falvo v. Owasso Independent School District Decision*, 2001 B.Y.U. Educ. & L.J. 327 (2001).

79. *Falvo*, 223 F.3d at 1216.

meaning of “maintained . . . by a person acting for [an educational] agency or institution.” The Tenth Circuit analysis did not end with FERPA’s statutory language. Upon reaching its now invalid holding, the court proceeded to match this interpretation with Congress’s intent to protect student grades from disclosure.⁸⁰ Even though it was reversed, the Tenth Circuit’s *Falvo* decision remained loyal to textualist methods of interpretation, declining to test the “murky waters” of legislative history and Congressional intent. Despite the correct approach, the Tenth Circuit’s flawed conclusion remained the law in the Tenth Circuit for over a year before the Supreme Court reversed.

Before *Owasso* reversed *Falvo*, the Tenth Circuit adjudicated another FERPA appeal: *Jensen v. Reeves*.⁸¹ In *Jensen*, a child’s parents sued the school district after their child was suspended for several acts of misconduct and other parents were notified of his punishment.⁸² On appeal, the parents argued that the school’s disclosure of the disciplinary measures taken against their child violated FERPA’s non-disclosure provisions.⁸³ In its unpublished opinion, the court found “the contemporaneous disclosure to the parents of a victimized child of the results of any investigation and resulting disciplinary actions taken against an alleged child perpetrator does not constitute a release of an ‘education record’ within the meaning of 20 U.S.C. § 1232g(a)(4)(A).”⁸⁴ Despite what it said was a reliance upon the statutory language for this conclusion, the court’s explanation for this conclusion makes clear the desire to avoid placing teachers in the “untenable position” of preventing schools from notifying the parents of victimized children that protective measures were being taken to shield their child from the offending student. Similarly, the court affirmed the school’s notification of parents of witnesses because it had not found “a single case holding that the extremely limited type of information conveyed [constituted] an education record under § 1232g.”⁸⁵ The Tenth Circuit thus applied New Textualism in its *Falvo* decision, but its conclusion was reversed by the Supreme Court in *Owasso*. In the interim, its *Jensen* decision demonstrated Tenth Circuit consideration for FERPA’s practical effects. The Tenth Circuit’s timid *Jensen* decision perhaps anticipated unfavorable results as *Falvo* was appealed to the Supreme Court.

80. *Id.* at 1217.

81. *Jensen v. Reeves*, 3 Fed. Appx. 905 (10th Cir. 2001).

82. *Id.* at 906.

83. *Id.* at 910.

84. *Id.*

85. *Id.*

2. Sixth Circuit

The leading Sixth Circuit FERPA case was decided in June 2002 (about one week after *Gonzaga*).⁸⁶ In *U.S. v. Miami University*, the Secretary of Education sued Ohio State University and Miami (Ohio) University for releasing disciplinary records to a national education magazine without redacting students' personally identifiable information.⁸⁷ On appeal, the court faced one relevant issue: whether disciplinary records were "education records" subject to FERPA and prohibited from disclosure.⁸⁸ The court applied FERPA according to the "unambiguous and plain meaning from the language of a statute."⁸⁹ Accordingly, it found "student disciplinary records are education records because they directly relate to a student and are kept by that student's university."⁹⁰ The application of the federal law was very straightforward. Any explanation the court provided for Congressional intent or FERPA's purpose was mere context for its textualist interpretation.⁹¹

The Sixth Circuit proceeded with softer methods of statutory interpretation to confirm this conclusion. That is, the court explained that the legislative history, the structure of the statute,⁹² and its "evolution by amendment" demonstrated that Congress intended "education records" to

86. Prior to *Gonzaga*, the Sixth Circuit recognized private rights created by FERPA that could be enforced in a Section 1983 action. *Cullens v. Bemis*, No. 92-1582, 1992 U.S. App. Lexis 30892, at *2 (6th Cir. Nov. 18, 1992). Since then, the Sixth Circuit no longer allows a private action to enforce FERPA under Section 1983. *Bevington v. Ohio Univ.*, 93 Fed. Appx. 748, 750 (6th Cir. 2004).

87. *United States v. Miami Univ.*, 294 F.3d 797, 803-05 (6th Cir. 2002) [hereinafter *Miami*]. The decision to release these records was made pursuant to *State ex rel. Miami Student v. Miami University*, 680 N.E.2d 956, 957 (Ohio 1997) [hereinafter *The Miami Student*]. In *The Miami Student*, the Ohio Supreme Court held that the Ohio Freedom of Information Act exception for the release of records was prohibited by state or federal law because it concluded student disciplinary records were not "education records" as contemplated by FERPA. The Ohio Supreme Court relied on *Red & Black Publishing Co. v. Bd. of Regents of Univ. Sys. of Georgia*, 427 S.E.2d 257 (Georgia 1993) [hereinafter *Red & Black*] for this conclusion about federal law. Similarly in *Red & Black*, the Georgia Supreme Court held that the disciplinary records sought by a student newspaper were not "education records" subject to FERPA privacy protections. Consequently, FERPA did not trigger applicable exceptions to the Georgia FOIA.

88. *Id.* at 811-15 (heading E. Student Disciplinary Records, Education Records and the FERPA). Note the preceding section D. of *Miami* determined that the Ohio Supreme Court had improperly interpreted "education record" in *The Miami Student*, which was a question of federal law. *Id.* at 810-11.

89. *Id.* at 811 (citing *Bartlik v. U.S. Dept. of Labor*, 62 F.3d 163, 166 (6th Cir. 1995)). Education record is defined by § 1232g(a)(4)(A).

90. *Id.* at 812.

91. *See id.* at 806-07 (Section B).

92. Specifically, the law's exceptions for the release of certain disciplinary records in §§ 1232g(b)(6)(A)-(C); 1232g(h)(2), 1232g(i)(1), 1232g(a)(4)(B)(ii).

include student disciplinary records within its meaning.⁹³ Disciplinary records are not, however, the same as law enforcement records. When there was ambiguity regarding the Section 1232g(a)(4)(B)(ii) exclusion of law enforcement records, the court relied on regulations⁹⁴ issued by the Secretary of Education to clarify the statute's meaning.⁹⁵ Based on the regulations, the court found the DOE protects student disciplinary records, as "education records," but not law enforcement unit records."⁹⁶ It further found that disciplinary records containing criminal offense references as requested by the newspaper were not law enforcement unit records. Accordingly, those records remained education records, subject to FERPA disclosure protections.

Thus FERPA's interpretation and application in the Sixth Circuit is very similar to the Tenth Circuit and Supreme Court approach. FERPA is interpreted primarily based on its text. Other, softer approaches to statutory interpretation are used by the Sixth Circuit only to clarify ambiguity and confirm its text-based conclusions. The Secretary of Education's regulations, Congressional intent, and the law's policy goals were discussed in this case as little more than narrative flourishes to confirm the meaning of the language and structure of FERPA.⁹⁷

3. Seventh Circuit

The most relevant Seventh Circuit case (prior to *Chicago Tribune*) was

93. *Miami*, 294 F.3d at 812–14. For a largely comprehensive review of legislative amendments to FERPA since it was enacted in 1974 see U.S. DEPT. OF EDUC., *Legislative History of Major FERPA Provisions* (last visited Mar. 10, 2012), <http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpaleghistory.pdf>). As of December 14, 2012, Congress has amended FERPA twice since the DOE published this list: (1) Jan. 8, 2002, P.L. 107-110, Title X, Part F, § 1062(3), 115 Stat. 2088 (No Child Left Behind Act, which created new exceptions to confidentiality for particular information-sharing reasons like transferring suspension and expulsion records, transferring disciplinary records, and to allow for sharing immunization, guardianship, and other non-academic and academic records with local educational entities); and (2) Dec. 13, 2010, P.L. 111-296, Title I, Subtitle A, § 103(d), 124 Stat. 3192 (Allowing information sharing with the Secretary of Agriculture for the Food and Nutrition Service). See also Mary Margaret Penrose, *In the Name of Watergate: Returning FERPA to its Original Design*, 14 N.Y.U. J. Legis. & Pub. Pol'y 75 (2011) for a discussion of politics and Congressional Record leading to FERPA.

94. 34 C.F.R. §§ 99.8(a)(1)(i),(ii), 99.8(a)(2), 99.8(b)(2)(ii), 99.8(c)(2), and 60 F.R. 3464, 3466.

95. *Miami*, 294 F.3d at 814–15 (using the two-step procedure in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, (1984) [hereinafter *Chevron*]).

96. *Id.* at 815.

97. *Id.* at 806 ("Congress enacted the FERPA 'to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent.' Joint Statement, 120 Cong. Rec. 39858, 39862 (1974)"). A similarly hierarchical treatment of interpretive approaches can be found in *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 926–27 (6th Cir. 2000).

Disability Rights Wisconsin v. State Department of Public Education.⁹⁸ In *Disability Rights Wisconsin*, Wisconsin's nonprofit stock corporation ("DRW") served as the state's protection and advocacy agency, required by federal law.⁹⁹ DRW investigated allegations that developmentally disabled students had been improperly restrained at an elementary school.¹⁰⁰ On appeal, the court was confronted with the issue of whether and to what extent the Wisconsin public school system had to disclose records uncovered in DRW's investigation into the use of "seclusion rooms" for disciplining students with disabilities.¹⁰¹ In making this decision, the Seventh Circuit began with the plain language of the federal protection and assistance statutes.¹⁰² The federal laws empowered DRW with "broad investigatory authority, including access to certain records."¹⁰³ With regard to the investigatory powers of an agency charged with protecting developmentally disabled individuals, the court remained faithful to a plain-language and structural analysis of those laws.¹⁰⁴ However, the textualist analysis was insufficient to determine how the language of two

98. *Disability Rights Wis., Inc. v. State Dep't of Pub. Instruction*, 463 F.3d 719 (2006) [hereinafter *Disability Rights Wisconsin*]. Prior to *Gonzaga*, the Seventh Circuit recognized the enforceability of FERPA rights under Section 1983. *Adatsi v. Mathur*, No. 90-2002, 1991 U.S. App. Lexis 13087, at *7 (7th Cir. June 17, 1991) (Unpublished) (disputes over correctness of grades are beyond the scope of FERPA). Seventh Circuit cases seeking to enforce FERPA with private rights of action are dismissed under *Gonzaga*. See also *Shockley v. Svoboda*, 342 F.3d 736, 741 (7th Cir. 2003) (the authors recommend this case for a particularly juicy read); *Slovinec v. DePaul Univ.*, 332 F.3d 1068, 1069 (7th Cir. 2003).

99. *Disability Rights Wisconsin*, 463 F.3d at 722. DRW lost its motion at the district court level.

100. *Id.* at 723

101. *Id.* at 722.

102. *Id.* at 724–26. (referring to Developmental Disabilities and Bill of Rights Act (the DD Act), the Protection and Advocacy for Mentally Ill Individuals Act of 1986 (the PAIMI Act) and the Protection and Advocacy of Individual Rights Act (the PAIR Act)—known collectively as the federal protection and advocacy statutes or the federal P&A statutes. DD Act, 42 U.S.C. §§ 15001–15115 (2006); PAIMI Act, 42 U.S.C. § 10801–10851 (2006); PAIR Act, 29 U.S.C. § 794e (2006)). For more on the interaction between sharing mental illness information by universities while complying with FERPA privacy protections, see Susan P. Stuart, "Hope and Despondence": *Emerging Adulthood and Higher Education's Relationship with Its Nonviolent Mentally Ill Students*, 38 J.C. & U.L. 319 (2012) (citing Allison B. Newhart & Barbara F. Lovelace, *FERPA Then and Now: Tipping the Balance in Favor of Disclosure of Mental Health Information under the Health and Safety Emergency Exception*, 2009 URMIA J. 19 (2009); Lesley McBain, *Balancing Student Privacy, Campus Security, and Public Safety: Issues for Campus Leaders*, WINTER 2008 PERSP. (2008) (available at http://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/08_perspectives%281%29.pdf).

103. *Disability Rights Wisconsin*, 463 F.3d at 725 (citing 42 U.S.C. § 15043(a)(2)(H)–(I); 42 U.S.C. § 10805(a); 29 U.S.C. § 794e(f)(2)).

104. *Id.* at 726–27.

federal disability statutes interacted with one another.¹⁰⁵ The court decided DRW need not obtain approval of the state education department for the records it sought, based on the purposes and effects of the applicable laws, not the statutory text.¹⁰⁶

This softer approach to statutory interpretation was also applied to determine FERPA's interaction with federal protection and advocacy statutes.¹⁰⁷ It began with the policy goals Congress hoped to achieve with FERPA: preventing access to student records without parental consent and statutory protection.¹⁰⁸ The court then outlined the statutory protection for personally identifiable information under Section 1232g(b)(1) and regulatory elaboration on the meaning of the phrase under the applicable regulations (34 C.F.R. § 99.3). Noting that the student names with corresponding information about their disabilities and disciplinary histories were "education records," the court declined to proceed with a plain language analysis.

Instead, the Seventh Circuit looked to the uniqueness of the situation in which a state agency was charged with protecting disabled students from abuse and neglect. Relying on a 1996 case from the Eleventh Circuit,¹⁰⁹ the court found that neither disabled students nor their parents were harmed when an agency responsible for ensuring compliance with federal law was allowed access to their records. Because the agency requesting student records protects individuals with mental disabilities, those individuals' privacy interests were outweighed by DRW's mandate to investigate and remedy suspected neglect.¹¹⁰ The Seventh Circuit thus demonstrated a preference for the statutory plain language, but ultimately utilized the purposes of FERPA and the applicable disability statutes to determine how the laws interacted. This softer method of statutory interpretation was necessary only because the language of the applicable federal laws did not dictate how the laws affect one another. The softer approach in these special circumstances has survived *Gonzaga*.

105. *Id.* at 727–28.

106. *Id.* at 729–30.

107. *Id.* at 730 (referring to section C. FERPA's Interaction with the Federal P&A Statutes).

108. *Id.* (citing *Rios v. Read*, 73 F.R.D. 589, 597–99 (E.D.N.Y.1977); Address to the Legislative Conference of the National Congress of Parents and Teachers, March 12, 1975, 121 Cong. Rec. S7974 (daily ed. May 13, 1975)).

109. *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 497–99 (11th Cir. 1996) (Defendant facility and Alabama Dept. of Mental Health and Mental Retardation challenged the order of Alabama's federal district court, which enjoined defendants from failing to release to plaintiff Alabama Disabilities Advocacy Program the medical records of two former institutionalized residents [non-educational] under the Developmental Disabilities Assistance and Bill of Rights Act).

110. *Disability Rights Wisconsin*, 463 F.3d at 730 (citing *Bery v. City of New York*, 97 F.3d 689, 97 (2nd Cir. 1996)).

4. Second Circuit

Second Circuit case law prior to *Gonzaga* is particularly illustrative of the case's effect on the use of interpretive methods other than the statutory language to decide if Congress intended Section 1983 enforceability. For example, in *Fay v. South Colonie Central School District*, a father who had recently separated from his wife sought information about his children's grades from their school.¹¹¹ The case thus implicated FERPA's parental access provisions under Section 1232g(a).¹¹² In deciding the case, the Second Circuit began with the language of the applicable portion of FERPA, but went beyond the language and structure of the law to determine whether Congress intended to preclude private enforcement of the law under Section 1983.¹¹³ It concluded, "although FERPA authorizes extensive enforcement procedures created by regulation, *see* 34 C.F.R. §§ 99.60-67 (1985), these regulations do not demonstrate a Congressional intent to preclude suits under [Section] 1983 to remedy violations of FERPA."¹¹⁴ The Second Circuit thus employed a softer method of statutory interpretation to conclude that FERPA rights were enforceable under Section 1983. *Gonzaga* directly overruled this conclusion and eliminated any future need for the Second Circuit to go beyond FERPA's plain language to determine Section 1983 enforceability.¹¹⁵

The same approach was taken by the Second Circuit in another pre-*Gonzaga* case: *Brown v. City of Oneonta*.¹¹⁶ In *Brown*, local police were pursuing a black criminal suspect near a college campus. The college released a list of its black students to the police, who then questioned individuals on that list matching the description given by the victim.¹¹⁷ Several students on the list sued, alleging FERPA violations by the school

111. *Fay v. S. Colonie Central School District*, 802 F.2d 21, 24 (2d Cir. 1986) [hereinafter *Fay*].

112. *Id.* at 24-27. In relevant part FERPA reads, "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. . . ." Recall that *Gonzaga* addressed § 1232g(b), FERPA's nondisclosure subsection.

113. *Id.* at 33.

114. *Id.*

115. *Id.* at 21-34. The Second Circuit decided other cases for reasons that prevented the court from reaching substantive FERPA arguments. *Robertson v. Doe*, No. 01-9434, 40 Fed. Appx. 631 (2d Cir. July 17, 2002) (Unpublished); *Robertson v. Goode*, No. 99-7408, 2000 U.S. App. LEXIS 6117 (2d Cir. Mar. 30, 2000) (Unpublished); *Sirohi v. Trustees of Columbia Univ.*, No. 97-7912, 1998 U.S. App. LEXIS 22519 (2d Cir. Apr. 16, 1998) (Unpublished).

116. *Brown v. City of Oneonta*, 106 F.3d 1125, 1128 (2d Cir. 1997).

117. *Id.* at 1128-29.

for releasing their information.¹¹⁸ The school responded that the emergency situation exception to FERPA's nondisclosure provisions justified the university's release of this information.¹¹⁹

The Second Circuit began its analysis with the language of the applicable portions of FERPA: 1232g(b)(1)(E)(ii) and 1232g(b)(6). Faced with a statutory ambiguity, the court looked to the applicable regulations to help determine what constituted a sufficient emergency to trigger the FERPA exception.¹²⁰ Ultimately, the Second Circuit sided with the college, affording administrators responding to the crime large discretion in determining what constituted an emergency situation sufficient to trigger the exception.¹²¹ *Gonzaga* subsequently reversed the Second Circuit holding in both *Fay* and *Brown* that FERPA is individually enforceable under Section 1983.¹²² The Second Circuit approach to plain language FERPA interpretation was thereby reinforced and the need to explore Congressional intent to determine Section 1983 enforceability was

118. *Id.* at 1129–30.

119. *Id.* at 1131 (citing § 1232g(b)(1)(I) (1990)). For more about FERPA's emergency exception see Stephanie Humphries, *Institutes of Higher Education, Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law*, 35 J.C. & U.L. 145 (2008); Helen H. de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J.C. & U.L. 267 (2011).

120. *Brown*, 106 F.3d at 1132 (citing 34 C.F.R. § 99.36 (1986)).

121. *Id.* at 1132–33. The Second Circuit relied on the statutory language of § 1232g to resolve *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 151 (2d Cir. 2002) (alleged disclosures to doctors, home instructor, and lawyer were not sufficient to amount to a policy or practice of violating plaintiff student's privacy rights) (citing *Gundlach v. Reinstein*, 924 F. Supp. 684, 690 note 7 (E.D.Pa. 1996), *aff'd without op.*, 114 F.3d 1172 (3d Cir. 1997)) [hereinafter *Gundlach*].

122. In the years following the decision in *Gonzaga*, the Second Circuit affirmed a district court's 12(b)(6) dismissal of a private suit against the Connecticut Department of Children and Families for violating a non-disclosure agreement. *Dutkiewicz v. Hyjek*, 135 Fed. Appx. 482, 483 (2d Cir. 2005) (no private right of action under FERPA; its nondisclosure requirements could not have been enforced pursuant to 42 U.S.C. § 1983). Similarly, in *Sverev v. New School University*, the court upheld the trial court's sua sponte dismissal of the student's private FERPA lawsuit. *Sverev v. New Sch. Univ.*, 114 Fed. Appx. 439 (2d Cir. 2004). Similar results were reached in *Doe v. Anonymous Unnamed School Employees*, 87 Fed. Appx. 788, 789 (2d Cir. 2004) (FERPA's nondisclosure provisions created no rights enforceable under 42 U.S.C. § 1983; §1983 and FERPA claims against the college, private university, and private university employees were properly dismissed); *Curto v. Roth*, 87 Fed. Appx. 785, 785 (2d Cir. 2004) ("In light of the Supreme Court's recent holding that the nondisclosure provisions of FERPA 'create no rights enforceable under § 1983,' [citing *Gonzaga*], we affirm the dismissal of Curto's claims under 42 U.S.C. § 1983 and FERPA . . ."); and *Taylor v. Vermont Department of Education*, 313 F. 3d 768 (2d Cir. 2002) ("We also affirm the dismissal of plaintiff's 42 U.S.C. § 1983 claim based on FERPA, § 1232g(a), under the reasoning of [*Gonzaga*]"). Note that *Taylor* implicated the records access provisions of FERPA, § 1232g(a)(1)(A) whereas *Gonzaga* dealt with the nondisclosure provisions of FERPA, § 1232(b)(1). Note: as to whether or not *Gonzaga* directly reversed *Fay* & *Brown*, it does not cite either case in the opinion.

eliminated.

5. Third Circuit

The *Gonzaga* majority cited one federal district court case and an Indiana state intermediate appellate court case for the finding that courts were split on whether FERPA created an individually enforceable Section 1983 right.¹²³ The federal case was a Third Circuit case, affirmed without an opinion. In *Gundlach*, a Temple University law student sued his former school after it denied him access to the facilities during his sixth semester of law school.¹²⁴ The federal district court ultimately dismissed his Section 1983 claim to enforce his FERPA rights based on the language of Section 1232g(b)(1) as well as Congressional intent.¹²⁵ That is, “the requirement placed on the participating institution is not that it must prevent the unauthorized release of education records, as Mr. Gundlach contends, but that it cannot improperly release such records as a matter of policy or practice.”¹²⁶ The Third Circuit’s pre-*Gonzaga* reading of the law thus eliminated much of the need for the court to look past the statutory language. *Gonzaga* simply reaffirmed the Third Circuit approach to statutory interpretation and its conclusions about FERPA enforceability under Section 1983.

The *Gundlach* decision depended on a prior Third Circuit district court case, also affirmed without discussion on appeal: *Smith v. Duquesne University*.¹²⁷ In *Smith*, the district court undertook a much more systematic analysis of the remedies permitted for FERPA violations under the now disfavored *Court v. Ash*.¹²⁸ That is, the court looked at the remedies permitted under the language of FERPA, the legislative intent regarding a private action to enforce FERPA, and the enforcement mechanisms available to the Secretary of Education. Here, as in *Gundlach*, the Third Circuit affirmed the district court holding that FERPA did not confer a federal right enforceable pursuant to Section 1983. The Third Circuit had thus already eliminated the need to go beyond FERPA’s text and determine Congressional intent regarding Section 1983 enforceability before the Supreme Court decided *Gonzaga*.¹²⁹

123. See *Gonzaga*, 536 U.S. at 278, n.2 (citing *Gundlach v. Reinstein*, 924 F.Supp. 684 (E.D. Pa. 1996; *Meury v. Eagle-Union Community School Corp.*, 714 N.F. 2d 233, 239 (Ind. Ct. App. 1999)).

124. *Gundlach*, 612 F. Supp. at 690.

125. *Id.* at 692.

126. *Id.*

127. *Smith v. Duquesne Univ.*, 612 F. Supp. 72 (W.D. Pa. 1985), *aff’d without op.*, 787 F.2d 583 (1986).

128. *Smith*, 612 F.Supp. at 79. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

129. A discussion of federal district court cases are beyond the scope of this article, but *Krebs v. Rutgers*, No. 92-1682, 797 F Supp. 1246 (D.C. NJ July 22, 1992) is a

6. Fifth Circuit

Although not cited by the *Gonzaga* majority, some relatively old FERPA case law out of the Fifth Circuit may have also supported the minority position that FERPA confers no rights enforceable under Section 1983. In *Klein Independent School Dist. v. Mattox*, a superintendent provided copies of a schoolteacher's transcripts pursuant to a state FOIA request.¹³⁰ In its determination that sharing such records did not constitute a FERPA violation, the court relied on the language of the law to conclude that FERPA does not protect records of individuals not in attendance, and also does not protect records maintained in the normal course of business pertaining to an employee exclusively in that employee's capacity as such.¹³¹ Consequently, it was unnecessary for the court to address whether FERPA rights could be privately enforced under Section 1983.¹³² However, the Fifth Circuit dicta, written fifteen years before *Gonzaga* was decided, indicated a reluctance to recognize that such a right existed fifteen years before the Supreme Court took up *Gonzaga*. As in other federal circuit court case law, the Fifth Circuit discussed FERPA's purpose and Congressional intent, but merely for an affirmation of its conclusions based on a textualist FERPA interpretation.

In another relatively old case, *Tarka v. Cunningham*, the Fifth Circuit applied FERPA plain language to determine the applicability of the law to a non-matriculating student who was auditing graduate courses at the University of Texas.¹³³ Because the statute and regulations did not adequately distinguish between enrolled students and auditing students, the court looked to the legislative history for assistance interpreting "student" as it appears in the statute.¹³⁴ The Fifth Circuit held FERPA inapplicable to auditing students based on the Congressional Record. The Fifth Circuit thus interpreted FERPA based on the text to the extent possible many years before *Owasso* and *Gonzaga*. It referred to the legislative history only to clarify otherwise ambiguous terms in the law prior to Supreme Court FERPA case law and can be expected to adhere even more closely to this interpretive approach after *Owasso* and *Gonzaga*.

particularly interesting federal case out of New Jersey involving the use of students' social security numbers as personal identifiers. It is discussed by Alexander C. Papandreou, *Krebs v. Rutgers: The Potential for Disclosure of Highly Confidential Personal Information Renders Questionable the Use of Social Security Numbers As Student Identification Numbers*, 20 J.C. & U.L. 79, 82 (1993).

130. *Klein Independent School Dist. v. Mattox* 830 F.2d 576, 578 (5th Cir. 1987).

131. *Id.* at 579–80.

132. *Id.* at 580.

133. *Tarka v. Cunningham*, 891 F.2d 102, 105 (5th Cir. 1990).

134. *Id.* at 106–07.

7. Ninth Circuit

Finally, the Ninth Circuit's application of FERPA privacy protections in *Disability Law Center of Alaska, Inc. v. Anchorage School District*¹³⁵ was very similar to that of the Seventh Circuit in *Disability Rights Wisconsin*. In *Disability Law Center of Alaska*, the plaintiff law center, an advocacy agency, requested information from the defendant school district in response to several complaints.¹³⁶ The school district refused to provide the requested contact information for the students' guardians or legal representatives, citing FERPA. The Ninth Circuit held that the law center's access to the contact information was not barred by FERPA.¹³⁷

In arriving at this conclusion, the Ninth Circuit began with a plain language interpretation of FERPA's applicable provisions and the Developmental Disabilities Act.¹³⁸ Finding the interaction of the two laws ambiguous, the court gave *Chevron*¹³⁹ deference to the Department of Health and Human Services and DOE's proposed finding that the disability laws fit within an exception to FERPA's nondisclosure provisions.¹⁴⁰ The court weighed FERPA's policy interests against its plain language conclusions, but only as a post-factum test of its conclusions.¹⁴¹ Finding "the value in protecting vulnerable individuals outweighs the value in protecting against a small diminution in privacy," the Ninth Circuit deferred to the agencies' proffered interpretations.¹⁴² Much like its sister circuits¹⁴³ and the Supreme Court, the Ninth Circuit demonstrated a

135. 581 F.3d 936 (9th Cir. 2009).

136. *Id.* at 938.

137. *Id.* at 939–41.

138. *Id.* (referring to 42 U.S.C. §§ 10801 et seq., 15001 et seq.).

139. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). "The *Chevron* doctrine [fn 5] . . . concerns when courts should defer to interpretations of statutes by administrative agencies. In contrast to the older pragmatic tradition that emphasized a variety of contextual factors in deciding when and to what extent deference is appropriate,[fn 6] *Chevron* posits that a two-step inquiry is required in every case. At step one, the court undertakes an independent examination of the question. If it concludes the meaning of the statute is clear, that ends the matter. But if the court concludes that the statute is ambiguous, then it moves on to step two, under which it must defer to any interpretation by a responsible administrative agency that the court finds to be reasonable. . . . [Justice Scalia] has long been perceived as the Court's most enthusiastic partisan of the two-step method associated with the decision. [fn 7]" Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 Wash. U. L.Q. 351, 352 (1994) [hereinafter Merrill].

140. *Disability Law Center of Alaska, Inc.*, 581 F.3. at 939–41 (referring to 467 U.S. 837, 842–43).

141. *Id.* at 940 ("The analysis is especially apt here, where the value in protecting vulnerable individuals outweighs the value in protecting against a small diminution in privacy. We defer to the interpretation.").

142. *Id.*

143. In the interest of brevity, this review has omitted some Circuit Court case law

preference for textualist interpretation of FERPA, relying on corresponding regulatory scheme, modifications by amendment, legislative history, and policy objectives as a secondary source for interpretation. As did the Court in *Disability Rights Wisconsin*, this Ninth Circuit in this case also affirmed the use of softer interpretive approaches to FERPA in cases of ambiguity and conflict even after *Gonzaga*.

III. *THE CHICAGO TRIBUNE V. THE UNIVERSITY OF ILLINOIS*

The twenty-year trend toward New Textualism preceded the FERPA dispute in *The Chicago Tribune v. The University of Illinois*. Prior to the dismissal of the case on jurisdictional grounds, the parties and district court grappled with the plain meaning of statutory terms of art in FERPA. On appeal, the Seventh Circuit held that the dispute could be determined only by deciphering the meaning of a phrase from Illinois' FOIA: "prohibited from disclosure by federal law."¹⁴⁴ Consequently, the Seventh Circuit's interpretation of FERPA is brief and non-binding.

A. Background

In the early years of this century, the University of Illinois ("U.I.") employed a standard admissions process by which admissions decisions were based on an applicants' grade point average, standardized test scores, and other accomplishments.¹⁴⁵ U.I. also had an informal system, commonly known by faculty and staff as Category I, by which prominent political figures, donors, and U.I. administrators could influence admissions decisions based on non-merits.¹⁴⁶ U.I. began formally tracking these Category I recommendations in 2002.¹⁴⁷ While it is unclear what triggered the *Chicago Tribune's* ("the *Tribune*" hereinafter) interest, the newspaper began its investigation of U.I.'s Category I applications process at least as early as April 2009.¹⁴⁸ Much of the information the *Tribune*

that deals with FERPA briefly and tangentially. *Webster Groves School Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1375 (8th Cir. 1989); *Vukadinovich v. McCarthy*, 901 F.2d 1439 (7th Cir. 1990); *Stow v. Grimaldi*, 993 F.2d 1002 (1st Cir. 1993).

144. See *Chicago Tribune*, 680 F.3d at 1004–05.

145. ABNER MIKVA ET AL., STATE OF ILLINOIS ADMISSIONS REVIEW COMMISSION, REPORT & RECOMMENDATIONS, 13–14 (Aug. 6, 2009) [hereinafter ADMISSIONS REVIEW COMMISSION REPORT] available at <http://www.uillinois.edu/our/news/2009/admissions.cfm>.

146. *Id.* at 14–15.

147. *Id.* at 14 (referring to Abel Montoya); Jodi S. Cohen & Tara Malone, *U. of I. Admissions System Changed in 2002, Former Employee Says*, *Chicago Tribune* (June 30, 2009), <http://www.chicagotribune.com/news/local/chi-u-of-i-clout-commission-30-jun30,0,1635187.story>.

148. Brief of Appellant Bd. of Trs. of the Univ. of Ill. at 11, *Chicago Tribune v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001 (7th Cir. 2012) [hereinafter U.I. Appellant Br.].

obtained was provided pursuant to the Illinois FOIA.¹⁴⁹

In May 2009, the *Tribune* broke the story with an article entitled, “Clout Goes to College.”¹⁵⁰ Among the many striking details of the Category I admissions process the article exposed, the newspaper made public that under the cover of the Category I admission process, “University officials recognized that certain students were underqualified [sic]—but admitted them anyway; Admissions officers complained in vain as their recommendations were overruled; Trustees pushed for preferred students, some of whom were friends, neighbors and relatives; Lawmakers delivered admission requests to U. of I. lobbyists, whose jobs depend on pleasing the lawmakers.; [and] University officials delayed admissions notifications to weak candidates until the end of the school year to minimize the fallout at top feeder high schools.”¹⁵¹ The publicity and public response prompted an official investigation by order of Illinois Governor Pat Quinn in June 2009.¹⁵² Elicited by this article, in its August 2009 final report, the official investigation by the Admissions Review Commission confirmed much of what the *Tribune* found with greater detail and provided more details about the practice in question.¹⁵³ The report was based upon interviews with faculty and staff as well as over 9,000 pages of documents from the U.I.¹⁵⁴ All student identities and additional information subject to FERPA privacy protections were redacted from these documents specifically to comply with FERPA.¹⁵⁵ Similar redactions were made to documents independently requested by the *Tribune* in its own investigation.¹⁵⁶ Although the Admissions Review Commission declined to challenge the completeness of the redacted information provided by U.I., the *Tribune* persisted in its requests for unedited responses to its FOIA requests.

149. 5 I.L.C.S. § 140/7(1)(a).

150. Jodi S. Cohen, Stacy St. Clair & Tara Malone, *Clout Goes to College*, Chicago Tribune (May 30, 2009), <http://www.chicagotribune.com/news/watchdog/college/chi-070529u-of-i-clout,0,5173000.story>.

151. *Id.*

152. ADMISSIONS REVIEW COMMISSION REPORT, *supra* note 145, at 3 (citing Ill. Exec. Or. 09-12 (June 10, 2009)). The Commission created a website to elicit feedback and post all relevant documents, including a link to the final Review Commission Report at <http://www2.illinois.gov/gov/admissionsreview/Pages/default.aspx> (accessed Jan. 2, 2013).

153. *Id.* at 1–7.

154. *Id.* at 9.

155. *Id.* This assessment was based on advice from U.I. counsel and an opinion letter from the DOE. Letter fr. Paul Gammill, Director, Family Policy Compliance Office of the D.O.E., to Zachary T. Fardon, Associate, Latham & Watkins LLP, *Response to June 25, 2009 Request for FERPA Guidance on Behalf of U.I.*, at 1, ¶ 2 (Aug. 6, 2009) (available via PACER).

156. U.I. Appellant Br., *supra* note 148, at 11–12.

B. The District Court Opinion Finding No Federal Prohibitions in FERPA's Funding Conditions and Ordering Disclosure to the *Tribune*

This controversy found its way to federal court after U.I. declined to respond to a FOIA request by the *Tribune* for

the following public records with regard to each applicant in Category I (and/or the equivalent designation in the professional schools) who was admitted to the University of Illinois and subsequently attended the University of Illinois: the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in such applicants' applications. Further, please provide any records about the identity of the University official to whom the request was made, any other University officials to whom the request was forwarded, and any documents which reflect any changes in the status of the application as a result of that request.¹⁵⁷

At trial, U.I. argued that the Illinois FOIA exempted a public body from its otherwise applicable legal obligation to disclose because FERPA prohibited disclosure.¹⁵⁸ The *Tribune* responded with three relevant arguments, each about the meaning of FERPA and Illinois FOIA terms of art. The *Tribune* argued that the request did not ask for "education records," that the records were about applicants not "students," and that FERPA did not "prohibit" the release of information as contemplated by the exception to Illinois FOIA.¹⁵⁹

The district court found the third argument about the meaning of "prohibit" in the Illinois FOIA dispositive. After defining the word according to Webster's dictionary, the district court opined, "FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid Illinois officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations."¹⁶⁰ Under the Spending Clause, the district court said, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under the enumerated powers in Article I.¹⁶¹

157. *Chicago Tribune v. U.I.*, 781 F. Supp. 2d 673, 673–74 (N.D. Ill. 2011). Compare with the regulatory definition of "personally identifiable information," *supra* note 11.

158. *Chi. Trib. v. U.I.*, 781 F. Supp. 2d at 675 (citing 5 ILCS § 140/7(1)(a)).

159. *Id.*

160. *Id.* (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002)).

161. *Id.* (citing *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987)).

In support of its analysis, the district court cited only the Sixth Circuit's *Miami* case for the analogy between Spending Clause legislation and state-federal contracts. That is, "the federal government has a right to enforce the state's promise to abide by the conditions of FERPA once it has accepted federal funds."¹⁶² However, the Sixth Circuit's limit of this conclusion to federal actions to enforce FERPA was the caveat upon which the district court built its decision for the *Tribune*. The district court holding was only a limited one that FERPA does not "specifically prohibit" U.I. from doing anything.¹⁶³ Accordingly, U.I. was ordered to respond to the *Tribune's* information request in toto.

C. The Seventh Circuit Decision Vacating the District Court Order for Lack of Federal Subject Matter Jurisdiction

The *Tribune's* trial court victory was short-lived because U.I. immediately appealed,¹⁶⁴ arguing that it had created administrative privacy policies to comply with federal law.¹⁶⁵ The U.I. appellate brief emphasized FERPA's plain language and U.I.'s reliance upon it to create practical policies for controlling the release of sensitive education records. In response, the *Tribune* offered a scandalous story describing corrupt politicians and public school administrators allegedly doing favors for one another and hiding behind federal privacy laws intended to protect the very system that they abused.¹⁶⁶ Despite many well-founded textualist arguments, the *Tribune* framed the controversy to be about more than U.I.'s compliance with federal privacy protections; this was, the *Tribune* argued about Chicago-style politics at their worst.¹⁶⁷

After appellate briefing,¹⁶⁸ amicus briefing,¹⁶⁹ oral argument,¹⁷⁰ and supplemental briefing,¹⁷¹ the Seventh Circuit vacated the district court

162. *Id.* at 675–76 (citing *U.S. v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002)).

163. *Id.* at 676.

164. *Chi. Trib. v. U.I.*, 680 F.3d 1001 (7th Cir. 2012).

165. U.I. Appellant Br., *supra* note 148, at 8–14.

166. Brief of Plaintiff-Appellee Chicago Tribune Co. at 2–10, *Chicago Tribune v. Bd. of Trustees of Univ. of Illinois*, 680 F.3d 1001 (7th Cir. 2012) (No. 11—2066) [hereinafter *Tribune Appellee Br.*].

167. *Id.* at 11 ("When University Trustee Lawrence Eppley tells Chancellor Herman that Governor Blagojevich wants a student admitted to the University and the Chancellor overrides the Admissions Department and orders the sponsored student to be admitted in place of a more qualified applicant, that is a matter of profound public interest and concern.").

168. U.I. Appellant Br. filed July 13, 2011; *Tribune Appellee Br.* filed August 13, 2011.

169. U.I. Amici filed July 20, 2011; *Tribune Amicus* filed August 19, 2011.

170. October 1, 2011.

171. Filed October 14, 2011. The Electronic Privacy Information Center gathers and links to all appellate and amicus briefs as well as some relevant cases at its website,

order on May 24, 2012, finding that the federal courts lack subject matter jurisdiction over this case.¹⁷² Writing for the three-judge panel, Chief Judge Easterbrook foreshadowed this result from the outset.¹⁷³ Accordingly, the Seventh Circuit opinion is a lesson in procedural law¹⁷⁴ and the nuances of federal subject matter jurisdiction for federal defenses to state-law causes of action.¹⁷⁵

The Seventh Circuit ruled that the *Tribune's* claim for documents arose “under state law and *only* state law.”¹⁷⁶ Furthermore, the court found that the application of Section 7(1)(a) of the Illinois FOIA did not entirely depend on the meaning of Section 1232g(b)(1) of FERPA because the language at issue, “specifically prohibited from disclosure by federal . . . law,” was embedded in an Illinois law—namely, FOIA. The holding was that because “the *Tribune's* claim to the information [arose] under Illinois law, the state court [was] the right forum to determine the validity of whatever defenses the University [presented] to the *Tribune's* request.”¹⁷⁷ Although “‘pure’ argument about the meaning of [FERPA] belongs in federal court,” Judge Easterbrook said, it can only arrive there if the United States brings suit because *Gonzaga* does not allow a private party to enforce Section 1232g.¹⁷⁸

The Seventh Circuit officially declined to “express any opinion as to whether the information the *Tribune* [sought related] to student records within the meaning of [FERPA] and the implementing regulations.”¹⁷⁹ Unofficially, the court affirmed the district court’s explanation of FERPA’s conditional spending provisions.¹⁸⁰ In relevant part, the Seventh Circuit opined that FERPA “does not by itself forbid any state to disclose anything.”¹⁸¹ Rather, FERPA prohibits the Secretary of Education from granting money to state bodies whose policies allow student records to be disclosed. Furthermore, any “state can turn down the money and disclose whatever it wants. The most one can say about [FERPA] is that *if* a state takes the money, *then* it must honor the conditions of the grant, including

<http://epic.org/amicus/tribune/> (accessed Jan. 2, 2013).

172. See *Chicago Tribune*, 680 F.3d at 1006. The authors give a Stephen Colbert wag of the finger to the Court’s apparent use of Wikipedia for its fact statement.

173. *Id.* at 1002.

174. *Id.* at 1003 (citing *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986)).

175. *Id.* at 1003–04 (citing *Grable & Sons Metal Products, Inc. v. Daure Engineering & Manufacturing*, 545 U.S. 308 (2005)).

176. *Id.* at 1004.

177. *Id.* at 1006.

178. *Id.* at 1005; See also Sidbury (2003), *supra* note 44, at 668 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002)).

179. *Id.* at 1006.

180. *Id.* at 1004–05.

181. *Id.* at 1004.

nondisclosure.”¹⁸² It follows that honoring “a grant’s conditions is a matter of contract rather than a command of federal law.”¹⁸³

The dicta further explained two ways in which the Illinois FOIA could affect this contractual agreement. It is possible that information is specifically prohibited from disclosure by federal law in the sense intended by a particular state FOIA whenever the state has “entered into a contractual commitment with the federal government under which disclosure is forbidden as long as the contract lasts.”¹⁸⁴ It is equally possible that those same prohibitions from disclosure are triggered only by federal laws that are unconditional—“when there is nothing the state can do (such as turning down proffered funds) to honor the pro-disclosure norm” The Seventh Circuit thus approached this controversy according to the text of FERPA and the Illinois FOIA, but declined to issue an advisory opinion on the meaning of Illinois state law as applied to federal law.¹⁸⁵

IV. STATE COURTS RISING TO THE CHALLENGE OF INTERPRETING FERPA ACCORDING TO ITS PLAIN LANGUAGE

Because of its jurisdictional failings, *The Chicago Tribune v. The University of Illinois* has not been as exciting for FERPA scholars as anticipated. Albeit in dicta, the Seventh Circuit very briefly expanded the case law about FERPA’s operation as Spending Clause legislation. Based on this opinion, FERPA remains distinct from an outright federal prohibition on state activity. Accordingly, the way in which a state FOIA treats FERPA conditions (as prohibitions or something else) will assuredly be the focus of future scholarly analysis and state court litigation.¹⁸⁶ In this

182. *Id.* (citing *Owasso Indep. Sch. Dist.*, 534 U.S. 426, 428 (2002); *U.S. v. Miami Univ.*, 294 F.3d 797, 809 (6th Cir. 2002)).

183. *Id.* at 1004–1005.

184. *Id.* at 1005.

185. Judge Easterbrook added that the Seventh Circuit would not allow a state to avoid the effects of its commitments to the federal government by reading its own FOIA laws “narrowly.” *Id.* at 1005. Since this statement follows the alternative arguments, which would presumably be allowed by the Seventh Circuit, the court apparently means a reading of the state FOIA exemption that requires very specific kind of federal prohibition, allowing for disclosure under state law in spite of the federal prohibition.

186. See Mathilda McGee-Tubb, *Deciphering the Supremacy of Federal Funding Conditions: Why State Open Records Laws Must Yield to FERPA*, 53 B.C. L. Rev. 1045 (2012) (FERPA meets the *South Dakota* test and trumps conflicting state FOIA laws otherwise requiring disclosure); *Press-Citizen Co, Inc. v. Univ. of Iowa*, 817 N.W.2d 480, 482 (Iowa 2012) (“This case requires us to decide where disclosure ends and where confidentiality begins under the Iowa Open Records Act and the Federal Educational Rights and Privacy Act. . . .”); *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 970 N.E.2d 939, 942 (Ohio 2012) (“This is a public-records action in which relator, ESPN, Inc. seeks certain records from respondent, the Ohio State University”).

respect, the Seventh Circuit has reinforced a message the federal circuit courts have been sending for over twenty years: interpret FERPA according to its text unless there's a good reason to do otherwise. If state courts can apply this simple approach to FERPA interpretation, the need for federal court intervention in cases like *The Miami Student* and *Red & Black* will be eliminated.¹⁸⁷

Recall that the Sixth Circuit in *Miami* effectively reversed the Ohio Supreme Court's ruling about whether student disciplinary records could be disclosed because, the Sixth Circuit concluded, the Ohio Supreme Court improperly interpreted FERPA's definition of "education record." If the *Miami Student* is read in conjunction with *Chicago Tribune*, it might appear that FERPA litigants now find themselves in an impossible position. Plaintiffs who construe the conflict in terms of state FOIA will go to state court and risk effective reversal of improper interpretations of federal law in federal court.¹⁸⁸ On the other hand, plaintiffs who construe the conflict in terms of FERPA will go to federal court where they will encounter jurisdictional problems after *Gonzaga* and the *Chicago Tribune*. However, recent state court FERPA litigation has demonstrated an awareness of a trend toward textualism in the federal courts and applied FERPA in such a way that litigation has not proceeded to federal court.

Recent state court litigation has demonstrated a willingness and ability to interpret FERPA as it applies to state FOIA exemptions. For example, in *Press-Citizen Co. v. University of Iowa*, the Iowa Supreme Court applied FERPA to deny media access to information, even in redacted form, about University of Iowa football players allegedly involved in sexual assaults.¹⁸⁹ The court concluded that the Iowa FOIA¹⁹⁰ effectively treated FERPA as preemptive of Iowa's state open records statute because of the potentially severe consequences arising from FERPA violations.¹⁹¹ The court further determined that redaction in this case could not adequately shield identities of students whose privacy rights enjoy FERPA privacy protection.¹⁹²

Also, in *State ex rel. ESPN v. Ohio State University*, the Ohio Supreme Court reached a similar decision. It did so by refusing to release student-related emails records outright or requiring redaction of personally identifiable student information subject to FERPA, in response to an ESPN media demand for these materials under the Ohio public records statute.¹⁹³

187. See note 87 and accompanying text.

188. See *supra* note 175 and accompanying text.

189. *Press-Citizen*, 817 N.W.2d at 482–84.

190. Iowa Open Records Act, IOWA CODE §§ 22.1(3) & 22.2(1) (2010). See § 22.7 for list of exemptions from disclosure.

191. *Press Citizen*, 817 N.W.2d at 487–88.

192. *Id.* at 491–92.

193. *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 970 N.E.2d 939, 944–45 (Ohio

Perhaps sensitive to *Miami Student* which arose in Ohio, the Ohio Supreme Court relied heavily on the Sixth Circuit's FERPA analysis in that case to conclude that Ohio law incorporated FERPA to bar from disclosure or to severely restrict disclosure of FERPA-protected student information.¹⁹⁴ It is reasonable to predict the Illinois Supreme Court would reach the same result if the *Tribune* case is litigated in state court under the Illinois FOIA.

CONCLUSION

Those encountering disputes over FERPA will be best served by text-based interpretations of the law. The battleground for FERPA litigation in the federal circuit courts is thus well established. *Owasso* and *Gonzaga* evidence the Supreme Court's preference for New Textualism in the interpretation of FERPA. The Federal Circuits have responded to the thrust of these cases. Moreover, *Gonzaga*'s effect on individual FERPA enforceability under Section 1983 has eliminated a major reason why the federal circuit courts have gone beyond the text of FERPA. As of this writing, FERPA interpretation almost uniformly begins with the letter of the law and often ends there.¹⁹⁵

The federal circuit court approach, New Textualism, is very straightforward. Interpret the meaning of a law's text with text-linked or text-based sources rather than write legislative history or Congressional intent.¹⁹⁶ If state courts can interpret FERPA in a similarly textualist way, they may keep FOIA-FERPA litigation out of federal court. FERPA policy objectives, legislative history, and Congressional intent can only be used to frame textualist interpretations, confirm conclusions based on textualist approaches, resolve conflicts between the language of different federal statutes, and clarify ambiguity in statutory language.¹⁹⁷ While there are

2012).

194. *Id.* at 218–220.

195. A similar trend is also evident in DOE interpretation as well as in federal district court and state court. Cara Runsick Mitchell, *Defanging the Paper Tiger: Why Gonzaga Did Not Adequately Address Judicial Construction of FERPA*, 37 GA. L. REV. 755, 771 (2003) (“Many FERPA questions addressed by courts have been definitional. Frequently, courts decide whether the requested records are “education records” [fn 137] or whether they fall under some exemption or exception. [fn 138]”).

196. *Supra* note 3 and accompanying text.

197. See Nancy Tribbensee, *Privacy and Confidentiality: Balancing Student Rights and Campus Safety*, 34 J.C. & U.L. 393 (2008), for a discussion about FERPA's interaction with HIPAA and an assessment of the law's treatment of various records kept by institutes of higher education. See Laura Khatcheressian, *FERPA and the Immigration and Naturalization Service: A Guide for University Counsel on Federal Rules for Collecting, Maintaining and Releasing Information About Foreign Students*, 29 J.C. & U.L. 457 (2003), for a discussion of FERPA's interaction with immigration law.

criticisms of a textualist approach to statutory interpretation,¹⁹⁸ students, administrators, journalists, and attorneys who encounter FERPA disputes will be best served in achieving their desired outcomes with arguments based in the language of the statute.¹⁹⁹

198. See Eskridge, Frickey, & Garrett, *supra* note 3, at 230–36 (citing Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Daniel Farber & Philip Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); Merrill, 72 WASH. U.L.Q. 351 (1994) *supra* note 138; Stephen Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399; Patricia Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. L. REV. 277 (1990); Nicholas Zepos, *Justice Scalia's Textualism: The "New" New Legal Process*, 12 CARDOZO L. REV. 1597 (1991); John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Jerry Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231.).

199. An exhaustive discussion of the propriety of New Textualist FERPA interpretation is beyond the scope of this article. However, a healthy body of literature addresses FERPA interpretation. Mary Margaret Penrose, *Tattoos, Tickets, and Other Tawdry Behavior: How Universities Use Federal Law to Hide their Scandals*, 33 CARDOZO L. REV. 1555 (2012) (critiques current use of FERPA by universities, often based on plain-language interpretation and corresponding university policy, to hide scandal, particularly in college football). Randi M. Rothberg, *Not As Simple As Learning the ABC's: A Comment on Owasso Independent School District No. I-011 v. Falvo and the State of the Family Educational Rights and Privacy Act*, 9 CARDOZO WOMEN'S L.J. 27, 37 (2003) ("While the confusing nature of FERPA's language often renders the statute weak or bypassable, so too does its inherent lack of enforcement mechanisms and remedies."). Robert W. Futey, *The Family Educational Rights & Privacy Act of 1974: Recommendations for Realigning Educational Privacy with Congress' Original Intent*, 41 CREIGHTON L. REV. 277, 278 (2008) ("Congress should amend FERPA to realign it with the protections Congress originally intended.").

