

# Student Privacy and the Protection of Pupil Rights Act as Amended by No Child Left Behind

---

LYNN M. DAGGETT\*

## Table of Contents

Introduction.....	54
I. PPRA Overview; PPRA and FERPA.....	55
A. PPRA and FERPA: Common origins.....	56
B. PPRA and FERPA: Common structure.....	57
C. PPRA and FERPA applicability.....	58
D. Specific privacy interests addressed by FERPA & PPRA.....	60
II. The PPRA Prior to NCLB.....	64
A. Parent access to instructional materials.....	64
B. Parent consent requirements.....	64
1. Original language.....	64
2. Broadened parent consent requirements.....	66
C. Notice and enforcement requirements.....	66
D. Regulatory guidance.....	67
E. PPRA litigation prior to the NCLB amendments.....	64
1. Newkirk v. East Lansing Public Schools.....	68
2. C.N. v. Ridgewood board of Education.....	69
3. Altman v. Bedford Central Sch. Dist.....	71
4. The PPRA and high stakes tests.....	71
5. PPRA claims by dismissed graduate students.....	72
F. Summary.....	73
III. NCLB's Amendments to the PPRA.....	75
A. The original version.....	76

---

\* Professor, Gonzaga University School of Law; J.D., University of Connecticut School of Law, 1987; Ph.D. (Education), Duke University, 1984.

B. Continuation of the pre-NCLB access and consent provisions; lack of clarity over when a survey is required.....	81
C. Required new school policies regarding parent inspection, opt-out and specific notice rights.....	84
1. Applicability.....	85
2. Notice.....	86
3. Miscellaneous provisions.....	86
4. New rights regarding surveys.....	86
a. Externally created surveys right of inspection.....	87
b. Surveys, internally or externally created, required or not, which ask about sensitive information.....	89
c. The new survey provisions' ambiguous scope.....	89
5. New rights regarding instructional materials.....	91
6. New rights regarding physical exams and screenings.....	92
a. The new language.....	92
b. Its myriad problems.....	94
7. New rights regarding collection and disclosure of student information for marketing or sale.....	100
a. The new language.....	100
b. Regulation of FERPA-type student privacy.....	101
c. FERPA's limits on the new provision.....	102
d. The true scope of the problem.....	102
e. Solving this problem.....	104
8. Other NCLB parent involvement and opt-out provisions.....	107
IV. Enforcement of the PPRA.....	108
A. <i>Gonzaga v. Doe</i> : A new standard for Section 1983 claims asserting statutory violations.....	109
B. Administrative (FPCO) complaints.....	111
C. Federal enforcement.....	112
D. State law claims.....	112
E. Violations of PPRA as grounds for employee discipline.....	116
V. Recent (Post-NCLB Amendments and <i>Gonzaga</i> ) PPRA Litigation.....	116
VI. Putting the PPRA in Perspective.....	121
A. Limited impact on academic activities.....	122

B. Textual gaps and difficulties .....	122
C. Lack of meaningful enforcement .....	125
D. Costs to schools and impact on school activity choices.....	125
E. Linking PPRA provisions more closely to furthering schools' educational mission .....	128
Conclusion .....	131

### **Introduction**

School I administers a survey which asks students to answer personal questions, including items asking about mental health concerns and sexual experiences and attitudes. School I does so in concert with community mental health agencies, in order to assess the mental health needs of youths in the community. Several students do not want to answer the survey, and many parents object to their children doing so.

School II vaccinates female students to prevent the virus which can cause cervical cancer. School II believes these vaccinations are a unique opportunity to enhance public health. Several parents do not want their daughters vaccinated, and several female students do not want to be vaccinated.

School III turns over student mailing lists to an entity which describes itself as providing scholarship assistance. The entity then sells the mailing lists to credit card companies. School III believes it is assisting students to obtain financial aid for higher education. Several parents and students object to this use of their information.

The issues raised above are ones which are not primarily governed by the Family Educational Rights and Privacy Act (“FERPA”),<sup>1</sup> the federal student records statute. In fact, a little-known counterpart to FERPA, the Protection of Pupil Rights Act (“PPRA”),<sup>2</sup> is the statute which primarily regulates these scenarios. The PPRA was recently expanded by language buried deep in the massive No Child Left Behind Act (“NCLB”).<sup>3</sup> The PPRA attempts to balance school authority and discretion with student and family privacy.

This Article explores the PPRA’s contribution to the landscape of student and family privacy. Part II of the Article

---

<sup>1</sup>Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2000 & Supp. IV 2004).

<sup>2</sup>Protection of Pupils Rights Act, 20 U.S.C. § 1232h (2000 & Supp. IV 2004) (also known as the Hatch Amendment after its 1978 sponsor).

<sup>3</sup>No Child Left Behind Act, Pub. L. No. 107-110 § 1061, 115 Stat. 1425, 2083 (2002).

provides an overview of the PPRA and its close relationship with its sister statute FERPA. Part III surveys the PPRA, and litigation under it, prior to amendments by NCLB. Part IV examines and critiques the NCLB amendments to the PPRA, which focus on school activities of the type pursued by hypothetical Schools I, II and III. Part V of the Article reviews the dearth of enforcement avenues available under PPRA, and Part VI explores the consequently small body of post-NCLB litigation under the PPRA. Part VII attempts to put the PPRA into perspective: its limited impact on academic activities, its unusually significant textual problems and its resulting lack of effectiveness in balancing school authority and discretion with student and family privacy. Part VII also examines the impact of its lack of enforcement options, and its costs to schools and likely impact on their activities. The Article concludes that further amendments to the PPRA are needed to clarify several important textual problems, provide meaningful enforcement options, and more closely align its provisions with the extent to which regulated activities are part of the school's educational mission.

### **I. PPRA Overview; PPRA and FERPA**

The PPRA was originally enacted in 1974 as a right of parent access to federally funded experimental instructional materials.<sup>4</sup> It was amended in 1978,<sup>5</sup> most notably adding parent consent requirements before schools collected sensitive information from students. The second round of amendments, undertaken in 1994, somewhat broadened the access and consent requirements, and added procedural requirements.<sup>6</sup> But it was not until recently, as part of NCLB,<sup>7</sup> that Congress conjured up its most significant expansion of the PPRA, modestly broadening access and consent requirements and

---

<sup>4</sup>Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 574 (1974).

<sup>5</sup>Education Amendments of 1978, Pub. L. No. 95-561, 92 Stat. 2355 (1978).

<sup>6</sup>Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 268 (1994).

<sup>7</sup>No Child Left Behind Act, Pub. L. No. 107-110 § 1061, 115 Stat. 1425, 2083 (2002).

adding a new set of opt-out requirements for many additional school activities which were unregulated by PPRA previously. Currently, the PPRA's main provisions require parent consent to (or in some cases after the NCLB amendments an opportunity to opt out of) school collection of certain sensitive information, such as medical data or sexual attitudes or practices, from students via surveys and evaluations.<sup>8</sup> NCLB also amended PPRA to limit schools' ability to collect and disclose student information for commercial purposes<sup>9</sup> and for certain physical exams,<sup>10</sup> and also provide parents with access rights to instructional materials and surveys and evaluations.<sup>11</sup>

A. *PPRA and FERPA: Common origins*

The PPRA is complementary to FERPA (also known as the Buckley Amendment),<sup>12</sup> the federal student records statute. Both statutes were spearheaded in the 1970's by Senator James Buckley.<sup>13</sup> In fact, in proposing FERPA as a floor amendment to education legislation, Buckley cited several examples of schools administering sensitive surveys to students without their parents' knowledge.<sup>14</sup> Buckley's language which would have required parent consent for such surveys was defeated on the floor and was thus not part of the original FERPA enactment,<sup>15</sup> but later became part of PPRA.

---

<sup>8</sup>20 U.S.C. § 1232h(b), (c) (2000 & Supp. IV 2004).

<sup>9</sup>*Id.* at § 1232h(c).

<sup>10</sup>*Id.* at § 1232h(c)(1)(D).

<sup>11</sup>*Id.* at § 1232h(c)(1)(A)(i), (C)(i).

<sup>12</sup>20 U.S.C. § 1232g (2000 & Supp. IV 2004). For more comprehensive treatment of FERPA, see Dixie Snow Huefner and Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 EDUC. L. RPTR. 469 (2001); Lynn M. Daggett, *Bucking up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29 (1997); Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617 (1997).

<sup>13</sup>For a detailed discussion of Buckley's speeches and floor comments, see Margaret O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J. C. & U. L. 679, 681-85 (2003).

<sup>14</sup>120 Cong. Rec. S14,587-88, S14,602, S14,597 (daily ed. May 14, 1974).

<sup>15</sup>120 Cong. Rec. S13,991 (daily ed. May 13, 1975).

### B. *PPRA and FERPA: Common structure*

PPRA and FERPA occupy contiguous sections of the United States Code.<sup>16</sup> Both are Spending Clause legislation and specifically part of the General Education Provisions Act (“GEPA”).<sup>17</sup> GEPA is a set of conditions which bind schools which receive federal education funds. On average, federal education funds amount to a small portion of a typical school district’s budget.<sup>18</sup> No federal funds are specifically provided to schools to help subsidize compliance with PPRA, FERPA, or other GEPA conditions.<sup>19</sup> Failure to comply with GEPA conditions can, however, trigger the Department of Education’s (“DOE”) initiation of a process which could result in the withdrawal of all federal education funds.<sup>20</sup>

Both FERPA’s and PPRA’s titles refer to “rights”<sup>21</sup> and both statutes use the word “rights” in the text,<sup>22</sup> suggesting a grant of individual rights. Both statutes are couched in systemic language specifically requiring schools to write policies which give rights to parents and adult students (students 18 years or over, legally emancipated, or, in the case of FERPA, enrolled in a postsecondary institution), and both announce that federal funds will be withheld from schools which have a pattern or practice of violating such policies.<sup>23</sup>

---

<sup>16</sup>See 20 U.S.C. § 1232g-h.

<sup>17</sup>*Id.* at §§ 1221-1234i.

<sup>18</sup>U.S. DEP’T OF EDUC., 10 Facts About K-12 Education Funding (June 2005) (for 2004-2005, federal funds made up 8.3% of education spending), available at <http://www.ed.gov/about/overview/fed/10facts/index.html>.

<sup>19</sup>Other GEPA conditions include requirements that federally funded education programs, participation by private school students, *see* 34 C.F.R. §§ 76.650-.662 (2007), and a prohibition on federal control of school curriculum, 20 U.S.C. § 1232a (2000 & Supp. IV 2004).

<sup>20</sup>See 20 U.S.C. §§ 1234 - 1234i (2007).

<sup>21</sup>See *id.* at § 1232g (“Family Educational *Rights* and Privacy Act”) (emphasis added); *id.* at § 1232h (“Protection of Pupil *Rights* Act”) (emphasis added).

<sup>22</sup>See 20 U.S.C. § 1232h (using the term “rights” nine times in the PPRA); *Gonzaga v. Doe*, 536 U.S. 273, 293 (2002) (Stevens, J., dissenting) (noting FERPA is filled with references to “rights,” and citing six specific FERPA references to “rights”).

<sup>23</sup>See 20 U.S.C. § 1232g(a)(1)(A) (FERPA); *id.* at § 1232h(c)(1) (PPRA).

Both statutes require written notices to parents of their statutory rights.<sup>24</sup> A single small federal office, the Family Policy Compliance Office, enforces the two statutes through an informal administrative complaint process and offers technical assistance for both statutes.<sup>25</sup>

Both PPRA and FERPA accord rights primarily to parents.<sup>26</sup> PPRA does not give rights directly to students to exercise, save for those who are aged 18 and over or who are legally emancipated.<sup>27</sup> FERPA employs the same restriction, except that it goes one step further in transferring rights to students of any age enrolled in postsecondary education.<sup>28</sup> Neither statute provides rights for mature minors; for example a 17-year-old high school senior does not have the right to access her own school records under FERPA, nor to choose to participate in a survey after her parents have opted her out of participation under PPRA. This contrasts directly with other federal education statutes, such as the Individuals with Disabilities Education Act (“IDEA”), which do accord older minor students some rights.<sup>29</sup>

### C. *PPRA and FERPA applicability*

As part of GEPA, which imposes conditions on the receipt of federal education funds, both FERPA and PPRA apply to not only to public schools, but also to private schools which directly receive federal education funds.<sup>30</sup>

---

<sup>24</sup>See 34 C.F.R. § 99.7 (2007) (FERPA); Parts III.C, IV.C.2, *infra* (PPRA).

<sup>25</sup>See 34 C.F.R. §§ 99.60-.66 (2007) (FERPA); Part III.C, *infra* (PPRA).

<sup>26</sup>See 20 U.S.C. § 1232g(d); *id.* at §§ 1232h(b), 1232h(c)(5)(B) (PPRA).

<sup>27</sup>*Id.*

<sup>28</sup>20 U.S.C. § 1232g(d); 34 C.F.R. §§ 99.3(5), 99.5(a) (2007).

<sup>29</sup>The IDEA requires older minors to be part of the IEP teams planning their educational programs, or at least to have their views considered by the team. 34 C.F.R. § 300.321(a)(7) (2007) (child to be part of IEP team when appropriate); *id.* at § 300.321(b) (when transition services are discussed, which is required no later than the first IEP to be in place when the child turns 16, 34. C.F.R. § 300.320(b), the child must be invited to IEP team meeting, and if child does not attend, her views must be established and considered by team); *see generally* 20 U.S.C.A. §§ 1414(a)(1)(D), 1414(c) (2000 & Supp. 2007).

<sup>30</sup>See 34 C.F.R. § 98.1 (2007) (PPRA); *id.* at § 99.1 (FERPA).

In its miscellaneous provisions, NCLB amended both PPRA and FERPA.<sup>31</sup> The high profile accountability and related provisions of NCLB apply only to public schools. Specifically, these NCLB provisions attempt to make public schools accountable by imposing annual testing requirements for students in grades 3-8, as well as providing tutoring, transfer and other recourse for students at public schools which are classified as needing improvement or failing.<sup>32</sup> However, NCLB's amendment of PPRA retains PPRA's applicability to private schools,<sup>33</sup> and thus private schools may continue to be required to provide parent access to instructional materials, obtain parent consent before administering some surveys and provide advance notice and parent opt-out opportunities for certain other activities under PPRA and continue to be required to permit access to student records and maintain confidentiality of student records under FERPA.

One way in which PPRA and FERPA differ is their applicability to higher education. FERPA applies to virtually all postsecondary institutions which receive federally subsidized student financial aid or other federal education funds.<sup>34</sup> In contrast, the new section of the PPRA applies only to elementary and secondary schools. Despite two PPRA suits brought by graduate students,<sup>35</sup> neither of which addressed the PPRA's inapplicability to graduate claims, the entire PPRA seems to be limited to elementary and secondary education.<sup>36</sup>

---

<sup>31</sup> No Child Left Behind Act, Pub.L. No. 107-110, Title X, § 1062(3), 115 Stat. 2088 (2002) (FERPA), *id.* at § 1061, 115 Stat. 2083 (PPRA).

<sup>32</sup> See *infra* notes 124-125 and accompanying text.

<sup>33</sup> See 20 U.S.C. at § 1232h(c)(6)(C).

<sup>34</sup> See 34 C.F.R. § 99.1 (2007).

<sup>35</sup> See *infra* Part III.E.5.

<sup>36</sup> See 60 Fed. Reg. 44696-01 (Aug. 28, 1995) (noting in proposed PPRA regulations that since the PPRA, in contrast to FERPA, does not refer to postsecondary institutions, the proposed regulations apply only to K-12 schools, which is perceived to be consistent with the PPRA's legislative history); Margaret O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J. C. & U. L. 679, 684 (2003) (PPRA does not apply to higher education).

*D. Specific privacy interests addressed by FERPA and PPRA*

FERPA concerns itself with education records (personal student information such as grades and disciplinary records) maintained by a school.<sup>37</sup> FERPA does not broadly regulate schools' creation or destruction of education records.<sup>38</sup> It is instead concerned with the ability to know what information a school maintains about a student, and gives parents and adult students a limited right to keep that information from being disclosed to third parties. More specifically, FERPA provides three main rights with regard to education records.<sup>39</sup> First, there is a right of access to one's own education records.<sup>40</sup> Second, there is limited confidentiality for education records. This confidentiality is limited in the sense that education records generally cannot be disclosed without written consent, but there are a number of exceptions permitting nonconsensual disclosure, such as internal disclosure to other school employees for valid educational reasons.<sup>41</sup> Third, there is a right to an internal hearing to challenge records if, for example, they are allegedly inaccurate.<sup>42</sup>

As with FERPA, PPRA provisions concern access. Yet in contrast to FERPA's grant of access to records about a specific student, PPRA provides access to general school materials; specifically to certain instructional materials and surveys used by a school.<sup>43</sup> So, for example, a parent may

---

<sup>37</sup>20 U.S.C. § 1232g(a)(4).

<sup>38</sup>FERPA does prohibit destruction of records when a request to access them is pending. *See* 34 C.F.R. § 99.10(e) (2007). For students with disabilities, the IDEA requires schools to offer parents an opportunity to request destructions of special education records when they are no longer needed. *See* 34 C.F.R. § 300.624 (2007).

<sup>39</sup>*See generally* Lynn M. Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 620 (1997). FERPA also requires annual notice of FERPA rights. *See generally id.* at 620 n.20.

<sup>40</sup>*See generally id.* at 629-30.

<sup>41</sup>*See generally id.* at 631-38.

<sup>42</sup>*See generally id.* at 638-39.

<sup>43</sup>*See infra* Parts III.A, IV.C.5.

under PPRA request access to a survey before it is administered to her child. The child's responses to the survey are beyond PPRA access. However, if the school maintains the responses and the survey was not answered anonymously so that a particular student's responses are identifiable, the student's responses would be education records to which there is a right of access under FERPA.

More significantly, and also in contrast to FERPA, PPRA is primarily concerned with what information a school gathers or maintains about a student in the first place.<sup>44</sup> Another example of a federal statute protecting this sort of student privacy interest is the IDEA, which requires schools to offer parents an opportunity to request destruction of (often sensitive) special education records when the school no longer needs them.<sup>45</sup> The bulk of PPRA gives parents consent or opt-out rights to keep their child from participating in certain school activities, such as certain surveys and physical exams, which could generate sensitive information. This involves a different aspect of informational privacy than FERPA. FERPA requires schools to keep what they know about students confidential; PPRA keeps schools from learning certain information about students in the first place.

This dichotomy, whereby FERPA protects student privacy by limiting the disclosure of student records, and PPRA protects student privacy by keeping schools from collecting certain information about students, is not a complete one. A NCLB amendment to the PPRA adds a FERPA-like disclosure limitation, specifically requiring advance notice and an opt-out opportunity with regard to the collection and/or disclosure of certain student information for commercial

---

<sup>44</sup>This is the type of informational privacy at issue in the seminal constitutional case of *Whalen v. Roe*, 429 U.S. 589 (1977) (challenging statute providing for government collection of patient information from private pharmacy).

<sup>45</sup>See generally 34 C.F.R. § 300.624 (2007); Lynn Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 646 (1997). This situation may arise, for example, when a student graduates or ends special education services.

purposes.<sup>46</sup> Conversely, two FERPA provisions address the information a school may maintain about its students. First, FERPA requires regulations or similar protections to guard “the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, authorized, or assisted” by the DOE or the school, including “the use, dissemination, and protection of such data.”<sup>47</sup> Second, FERPA requires schools to make an internal hearing procedure available to challenge education records which are “in violation of the privacy rights of . . . students.”<sup>48</sup>

As with other education statutes such as the IDEA,<sup>49</sup> there is a dispute over the basis for these parental rights: are rights given to parents to act as agents for their children’s best interests, or has PPRA given parents some substantive right of control over their child’s educational experiences? For example, if a school plans to administer a student survey which asks questions about sexuality, do PPRA parent consent/opt-out requirements concerning surveys exist to allow parents to keep schools from learning this sensitive information about their child (an informational privacy protection guarding disclosure of sensitive information), or to maintain parental control over how their child is exposed to information about sexuality (a familial or parenting decisional “privacy” protection)?

One commentator suggests that the PPRA is a “euphemism for parent control over children - perhaps, ‘family’ privacy - and over the educational process. . .

---

<sup>46</sup>See *infra* Part IV.E.7.

<sup>47</sup>20 U.S.C. § 1232g(c).

<sup>48</sup>*Id.* at § 1232g(a)(2).

<sup>49</sup>For a discussion of whether parent IDEA rights are substantive parenting rights or rights accorded to parents as stewards for their minor children, see Lynn Daggett, Perry Zirkel and LeeAnn Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REFORM 717, 727-44 (2005) (IDEA parent rights are not substantive parent rights but are given to parents as proxies for their children’s interests). For a discussion of this issue under the IDEA, see *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) (the IDEA gives parents some rights of their own and thus they may proceed pro se in IDEA litigation).

[i]nstead of creating anything that resembles a right of privacy in the individual student.”<sup>50</sup> Many have voiced their agreement, including some PPRA plaintiffs<sup>51</sup> as well as the House sponsors of the floor amendment to NCLB to amend the PPRA,<sup>52</sup> who clearly view the PPRA as providing substantive parenting rights. On the other hand, the sponsor of the Senate floor amendment to NCLB to amend PPRA<sup>53</sup> suggests that the statute in fact protects a sort of student privacy; namely protection from government collection of certain information. The fact that this right is given to parents rather than directly to students is not dispositive of whether it protects student privacy. PPRA rights may well be given to parents to act on behalf of their child’s privacy interests, as, for example, FERPA rights are given to parents to act on behalf of their children’s privacy interest in keeping education records confidential. Parents are routinely given authority to enforce rights of their children by other statutes such as the IDEA.<sup>54</sup> This Article assumes that protecting both family privacy and student privacy are goals of the PPRA and evaluates its effectiveness accordingly.

---

<sup>50</sup>Susan Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1174 (2006).

<sup>51</sup>See, e.g., *infra* Parts III.E.1-3.

<sup>52</sup>See *infra* notes 138-139 and accompanying text.

<sup>53</sup>See *infra* note 140 and accompanying text.

<sup>54</sup>See Lynn Daggett, Perry Zirkel and LeeAnn Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REFORM 717, 727-744 (2005) (IDEA parent rights are not substantive parent rights but are given to parents as proxies for their children’s interests). See generally Barbara Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996) (parenting rights flow from parents’ responsibilities toward their children, and are given parents as trustees or stewards for their children).

## II. The PPRA Prior to NCLB

### A. *Parent access to instructional materials*

In its initial 1974 form, the one-sentence PPRA affords parents a right of access to instructional materials.<sup>55</sup> This access right is quite limited in scope, and makes available only instructional materials<sup>56</sup> in federally funded research and experimentation programs, which are defined as “any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.”<sup>57</sup> Thus, for example, a school trying out a new curriculum (perhaps, as was common in that era, replacing a phonics-based approach to reading with a whole language approach) must make the curriculum materials available upon request to parents of children in the experimental whole language curriculum.

The 1994 amendments broaden parent access rights to instructional materials in any federally funded program, whether or not one of “research and experimentation.”<sup>58</sup>

### B. *Parent consent requirements*

#### 1. Original language.

The original PPRA contained no consent requirements.<sup>59</sup>

---

<sup>55</sup>20 U.S.C. § 1232h (1976).

<sup>56</sup>*Id.* (defining such materials to “include[e] teacher’s manuals, films, tapes, or other supplementary instructional material”).

<sup>57</sup>*Id.*

<sup>58</sup>The 1994 amendments may also provide parents with access rights beyond instructional materials. *Id.* The original language provided for access to “instructional materials, including teacher’s manuals, films, tapes or other supplementary instructional materials.” 20 U.S.C. § 1232h (1976). The 1994 amendments modified the last item from “supplementary instructional materials” to “supplementary materials.” 20 U.S.C. § 1232h (2000). This may be a deliberate attempt to provide parents with access to noninstructional materials, but more likely is designed merely to eliminate a redundancy, since the list is of various types of instructional materials.

The 1978 amendments add a new section concerning psychological/psychiatric “examination, testing, or treatment.”<sup>60</sup> Where “a primary purpose” of such testing or treatment is the disclosure of certain sensitive information, students cannot be required to participate without written parent<sup>61</sup> consent. There are seven statutory categories of sensitive student information:

- “political affiliations,”
- “mental and psychological problems potentially embarrassing to the student or his family,”
- “sex behavior and attitudes,”
- “illegal, anti-social, self-incriminating and demeaning behavior,”
- “critical appraisals of other individuals with whom respondents have close family relationships,”
- “legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers,” and
- “income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program.”<sup>62</sup>

Thus, for example, under some circumstances a school must get written parent consent before minor students are required to complete a mental health instrument such as a psychological inventory. The circumstances under which consent is required are limited to tests or treatment which 1) are required, and 2) are part of a federally funded program.<sup>63</sup>

---

<sup>59</sup>See 20 U.S.C. § 1232h (1976).

<sup>60</sup>*Id.* (1984).

<sup>61</sup>*Id.* (proving for written student consent for adult or emancipated students).

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* Federally funded research may also trigger federal human subjects protections. See 34 C.F.R. §§ 75.681, 76.681, 76.740, 97.101-409 (2007). If triggered, informed parent consent is required, *id.* at §§ 97.116,

If a school gives students an optional psychological inventory, the PPRA would not require consent. Similarly, if a school requires students to undergo testing or treatment outside of a federally funded program, the PPRA would not require consent. Moreover, even if a test or treatment were a required part of a federally funded program, the PPRA would not require consent so long as the sensitive questions were not a primary purpose of the test or treatment.

2. Broadened parent consent requirements.

The 1994 amendments change parent consent rights from “psychological testing or treatment” to “survey[s], analysis, or evaluations,” which involve the same categories of sensitive information, thus apparently removing treatment from the scenarios where consent is required,<sup>64</sup> and delete the requirement that disclosure of sensitive information be a primary purpose of such activities.<sup>65</sup> The 1994 amendments continued to limit consent to activities listed above which students were 1) required to complete 2) as part of a federally funded program.<sup>66</sup>

C. *Notice and enforcement requirements*

The 1994 amendments add a requirement that schools notify parents and students of their PPRA rights.<sup>67</sup> The 1994 amendments also direct the Secretary of Education to “take appropriate action” to enforce the PPRA, including creating a procedure for investigating and resolving complaints that the PPRA has been violated.<sup>68</sup> The amendments limit the remedy

---

.117, as well as assent by minor research subjects with the capacity to assent. *Id.* at § 97.408.

<sup>64</sup>However, the 1984 regulations continue to refer to psychological treatment as triggering consent requirements. 34 C.F.R. § 98.4 (2007).

<sup>65</sup>20 U.S.C. § 1232h (2000). These are more than “minimal” changes, as characterized by one student commentator. Beth Garrison, *Note: Children Are Not Second Class Citizens: Can Parents Stop Public Schools from Treating their Children Like Guinea Pigs?*, 39 VAL. U. L. REV. 147, 175 (2004) (so suggesting).

<sup>66</sup>20 U.S.C. § 1232h (2000).

<sup>67</sup>*Id.*

<sup>68</sup>20 U.S.C. § 1232g.

of termination of federal funding to cases where the school will not voluntarily agree to comply.<sup>69</sup> The Family Policy Compliance Office (“FPCO”) is responsible for enforcing PPRa.<sup>70</sup> The FPCO is also responsible for enforcing FERPA,<sup>71</sup> which in fact represents the bulk of its duties.<sup>72</sup> To enforce these two federal statutes, the FPCO has a staff of ten.<sup>73</sup> It does not have its own attorneys, but has access to the Department of Education’s Office of General Counsel for legal advice.<sup>74</sup> The FPCO has never withheld federal funding because of PPRa violations, nor has it ever initiated the process to do so.<sup>75</sup> It has never gone to court to enforce the PPRa, and has done so only once to enforce FERPA.<sup>76</sup>

#### *D. Regulatory guidance*

The Department of Education issued final regulations in September 1984,<sup>77</sup> which are codified at 34 C.F.R. Part 98.<sup>78</sup> In substantial part, the regulations track the statutory language in effect at that time.<sup>79</sup> After the 1994 amendments,

---

<sup>69</sup>*Id.*

<sup>70</sup>34 C.F.R. § 98.5 (2007).

<sup>71</sup>*See* 20 U.S.C. § 1232g(g) (2000 & Supp. IV 2004); 34 C.F.R. § 99.64(a) (2007).

<sup>72</sup>*See* Letter to Rep. Bob Schaffer, 34 IDELR & 151, 605 (FPCO Oct. 26, 2000).

<sup>73</sup>E-mail from Ellen Campbell, FPCO, to author (Nov. 21, 2002) (on file with author).

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* The Department of Education successfully sued to enforce FERPA in a case involving disclosure of student discipline records by Miami University. *U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002).

<sup>77</sup>49 Fed. Reg. 35,321 (Sept. 6, 1984).

<sup>78</sup>34 C.F.R. §§ 98.1-.10 (2007). In the mid-90’s the Department proposed changes to the regulations, but they were never adopted. 60 Fed. Reg. 44,696 (1995). The Department’s website indicates it will be proposing new regulations to implement the 2002 statutory amendments. *See* <http://www.ed.gov/offices/fpc>.

<sup>79</sup>However, in three areas the regulations add detail to the statute’s text. First, the regulations specify which educational entities are covered by the PPRa. 34 C.F.R. § 98.1 (2007). Second, the regulations define the psychological “examinations,” tests and treatment for which consent may

new regulations were proposed but never finalized.<sup>80</sup> The regulations have thus not been updated since 1984.

*E. PPRA litigation prior to the NCLB amendments*

PPRA claims have been very infrequently litigated; LEXIS and WESTLAW searches<sup>81</sup> revealed only seven published decisions resolving claims under the pre-NCLB PPRA. One involved the 1978 language; the other six involved the 1994 language requiring parent consent before certain surveys or evaluations, and the broadened parent right of access to instructional materials.

1. *Newkirk v. East Lansing Public Schools*.<sup>82</sup>

The first court case to examine the PPRA<sup>83</sup> involved a parent's PPRA claim stemming from her son's alleged nonconsensual school counseling,<sup>84</sup> music instruction involving "psychotherapeutic materials," and "conflict resolution curriculum" in social studies.<sup>85</sup> The school won summary judgment on the PPRA claim, because, as the court noted, no instructional materials were federally funded or experimental, and thus the activities fell doubly outside PPRA access provisions.<sup>86</sup> The court also indicated that the counseling was outside the PPRA's reach, as it was not

---

be required. *Id.* at § 98.4(c). Third, the regulations assign FPCO as the enforcing agency and set out a complaint process. *Id.* at §§ 98.5-10.

<sup>80</sup>The proposed regulations are at 60 Fed. Reg. 44696-01 (Aug. 28, 1995).

<sup>81</sup>WESTLAW and LEXIS federal and state caselaw databases were searched with the term "1232h."

<sup>82</sup>*Newkirk v. East Lansing Pub. Sch.*, 1993 U.S. Dist. LEXIS 13194 (W.D. Mich. 1993). The opinion notes an earlier summary judgment on constitutional claims, *id.* at \*1, which was summarily affirmed on appeal. *Newkirk v. East Lansing Pub. Sch.*, 1995 U.S. App. LEXIS 14817 (6th Cir. 1995).

<sup>83</sup>The court noted it had found no extant PPRA cases. 1993 U.S. Dist. LEXIS 13194 at \*12.

<sup>84</sup>*Id.* at \*3.

<sup>85</sup>*Id.* at \*4.

<sup>86</sup>*Id.* at \*12-13.

federally funded, and its primary purpose was not to elicit sensitive information.<sup>87</sup>

## 2. C.N. v. Ridgewood Board of Education.

The most extensive court discussion of the PPRA resulted from an unsuccessful parent challenge to a survey administered by a New Jersey public school district in cooperation with community social service agencies to assess youth social service needs.<sup>88</sup> The lengthy survey included several questions which undisputedly involved sensitive information of the type listed by the PPRA. Students were asked about relationships with their parents, attitudes toward teenage sex, sexual “activity and proclivities,” and involvement in specific criminal acts such as shoplifting, assault and vandalism, use of drugs and alcohol, and drunk driving.<sup>89</sup> The school provided parents with advance notice of the survey, but did not obtain parent consent.<sup>90</sup> The school asserted that students were not required to complete the survey,<sup>91</sup> but parents claimed that some students had been compelled to participate.<sup>92</sup>

---

<sup>87</sup>*Id.* at \*13-15 (thus holding a Section 1983 unavailable under these circumstances). The court reserved the question of Section 1983 claims asserting PPRA violations generally. *Id.* at \*17.

<sup>88</sup>*C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J. 2001); *aff'd in part, rev'd in part*, 281 F.3d 219 (3rd Cir. 2001) (summary judgment inappropriate before completion of discovery). A community group of social service providers decided to gather data about the social service needs of local youths. To this end, the group identified an existing professionally prepared survey, and arranged for it to be administered by the local middle and high schools. *Id.* at 530-31.

<sup>89</sup>*Id.* at 531.

<sup>90</sup>*Id.*

<sup>91</sup>The school’s advance notice of the survey indicated it would be voluntary. The front page of the survey indicated students were to fill it out anonymously, and the survey had no place for students to fill in their names. The survey also indicated that there were no codes which could be used to identify responses, and told participating students their answers would be completely anonymous. *Id.*

<sup>92</sup>Parallel administrative claims were filed with the FPCO. Based on declarations and affidavits, FPCO found that students were required to complete the survey, triggering PPRA’s consent requirements. *C.N. v.*

Several parents filed Section 1983 claims alleging FERPA, PPRA and several constitutional violations.<sup>93</sup> The school won summary judgment on all claims.<sup>94</sup> With regard to the PPRA claim, the court found that the survey was outside the PPRA.<sup>95</sup> The court held specifically that the PPRA applied only to surveys administered as part of a federally funded program; in the case at hand federal funds were not used in connection with the survey.<sup>96</sup> The court also held that the PPRA applied only to mandatory surveys; completion of the survey at issue in the case was voluntary.<sup>97</sup> Finally, the court held that the individual defendants were entitled to qualified immunity since any PPRA violations were not in accordance with clearly established law at the time the survey was administered.<sup>98</sup> The court specifically noted the absence of regulatory guidance, as well as the absence of any case law indicating that the school's survey violated PPRA.<sup>99</sup>

The plaintiffs did not claim a private right of action under PPRA, and the court noted with approval other decisions finding that PPRA creates no private cause of action.<sup>100</sup> The plaintiffs instead sued under Section 1983.<sup>101</sup> The court appeared to approve of a Section 1983 claim to enforce PPRA, noting "one may sue under 42 U.S.C. § 1983

---

Ridgewood Bd. of Educ., 430 F.3d at 172 n. 16. FPCO directed the school to inform officials of the PPRA consent requirements. *Id.*

<sup>93</sup>*Id.* Specifically, plaintiffs claimed First (speech), Fourth (privacy), Fifth (privilege against self-incrimination) and Fourteenth Amendment (substantive due process parenting rights) violations.

<sup>94</sup>146 F.Supp.2d 528, 540. The court made its opinion of the litigation clear at the very outset of the opinion; referring to the school's administration of the survey, the court noted "It is said that no good deed goes unpunished, or, at least in this case, unlitigated." *Id.* at 530.

<sup>95</sup>The merits of the plaintiffs' PPRA claim were succinctly summarized by the court: "plaintiffs cannot establish that the PPRA . . . even appl[ies] to this situation. Moreover, plaintiffs have not proffered a scintilla of evidence showing the defendants violated the PPRA . . ." *Id.* at 535.

<sup>96</sup>*Id.* at 536-37 (referring to 20 U.S.C. § 1221).

<sup>97</sup>*Id.* at 537.

<sup>98</sup>*Id.* at 534, 535-37.

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* at 535 n.7 (citations omitted).

<sup>101</sup>*Id.*

to vindicate violations of the Constitution or federal statutes.”<sup>102</sup>

### 3. Altman v. Bedford Central Sch. Dist.

A parent challenged numerous school activities, largely on constitutional grounds.<sup>103</sup> The parent also claimed that the school requirement that students participate in a Drug Abuse Resistance Education (“DARE”) program violated the PPRA. As in *C.N.*, the court held that the PPRA provided no private right of action, but was actionable under Section 1983.<sup>104</sup> The court again found, however, that the PPRA applied only to federally funded programs.<sup>105</sup> Since the DARE program was not federally funded, the court held that the PPRA was not violated.<sup>106</sup> For the same reason, the court rejected a PPRA challenge to a peer facilitation program in which high school students provided an orientation for incoming students.<sup>107</sup>

### 4. The PPRA and high stakes tests.

Two courts have resolved PPRA claims concerning academic “high stakes” tests (such as exams which students must pass to graduate from high school). One court held that

---

<sup>102</sup>*Id.* at 535. The court also noted in a footnote that the lack of a private cause of action is “irrelevant because 42 U.S.C. §1983 may be used to enforce such [PPRA] rights.” *Id.* at 535 n.7. The defendant school district apparently did not dispute the availability of a Section 1983 claim to enforce the PPRA.

<sup>103</sup>*Altman v. Bedford Central Sch. Dist.*, 45 F.Supp.2d 368 (S.D.N.Y. 1999), *aff’d in part, rev’d in part*, 245 F.3d 49 (2nd Cir. 2001); *cert. denied*, 534 U.S. 827 (2001). The early phases of the litigation are chronicled and analyzed in Rosemary Salomone, *Struggling with the Devil: A case study of values in conflict*, 32 GA. L.REV. 633 (1998). Salomone notes that the conflict began when the school set up an after school program for interested students to play Magic: The Gathering. When the school refused to stop this group, parents sent the school a letter claiming that the PPRA required the school to allow the parents to opt their children out of a lengthy list of school activities. *Id.* at notes 98-102 and accompanying text.

<sup>104</sup>45 F.Supp.2d at 390.

<sup>105</sup>*Id.* at 391 (referring to 20 U.S.C. § 1221).

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* at 393.

parents do not have the right to opt their children out of these tests since they do not ask students for information in any of the PPRA's statutory sensitive information categories.<sup>108</sup> This court also held that the tests were not instructional materials to which parents had PPRA access rights since they are "not a part of the student's regular curriculum and ha[ve] no instructional purpose."<sup>109</sup> In the other case, the Ohio Supreme Court held that disclosure of portions of previously administered editions of Ohio's exam was required under the state public records law.<sup>110</sup> The majority opinion does not discuss the PPRA. However, a dissenting opinion notes that since such tests are not instructional materials under the PPRA, there is no parent right of access to the tests.<sup>111</sup>

5. PPRA claims by dismissed graduate students.

Two final cases involve students dismissed from professional schools, which are seemingly not covered by the PPRA. In one of these cases, a dismissed law student made numerous claims, including a Section 1983 claim based on an alleged PPRA violation.<sup>112</sup> Specifically, the dismissed student claimed that the law school disciplinary panel's requirement that he undergo a psychiatric evaluation and any treatment recommended by the evaluator violated the PPRA.<sup>113</sup> The court hearing the case noted that it was unaware of any other cases involving the PPRA.<sup>114</sup> The court did not discuss the PPRA's applicability to higher education, but appeared to assume that the PPRA was applicable. The court found that

---

<sup>108</sup>*Triplett v. Livingston County Bd. of Educ.*, 967 S.W.2d 25, 31 (Ky. 1997); *cert. denied*, 525 U.S. 1104 (1999). The parents' claims that requiring their children to take the test violated the Establishment Clause and their constitutional right to direct their children's upbringing were also rejected. *Id.* at 31-33.

<sup>109</sup>*Id.* at 34.

<sup>110</sup>*State ex rel. Rea v. Ohio Dept of Educ.*, 692 N.E.2d 596 (Ohio 1998).

<sup>111</sup>*Id.* at 607-608 (Lundberg Stratton, dissenting). Another dissenting opinion notes that the PPRA provides only for access, and not for the copies sought by the plaintiffs. *Id.* at 608 (Cook, dissenting).

<sup>112</sup>*Herbert v. Reinstein*, 976 F.Supp. 331, 340 (E.D. Pa. 1997).

<sup>113</sup>*Id.* at 339.

<sup>114</sup>*Id.*

the psychiatric evaluation was not part of any program administered by the federal Department of Education, and thus the PPRA did not apply.<sup>115</sup> This court suggested that there would be a Section 1983 claim available if the evaluation were required by such a program.<sup>116</sup> In the other case, an appellate court found that a dismissed medical student had not responded to the defendant's summary judgment motion on her PPRA claim and thus not preserved that issue for appeal.<sup>117</sup> That court did not discuss the merits of the PPRA, nor its applicability to higher education.

#### *F. Summary*

Prior to the NCLB amendments, the PPRA's scope was quite limited. First and foremost, the pre-NCLB PPRA access and consent requirements applied only to federally funded education programs. Since federal funding of education is quite modest,<sup>118</sup> the pre-NCLB PPRA did not apply to numerous school-based activities, such as the social services needs survey in *C.N.*, the DARE drug education program in *Altman*, and the high stakes tests and the misconduct-related psychiatric evaluation in other cases.

For federally funded education programs, such as Title I remedial education, the pre-NLCB PPRA gave parents four rights. First, parents had a right of access to instructional materials in those programs. Second, solicitation of parent consent was required if a school required students to complete a survey or evaluation which asked them to provide information in certain sensitive categories. Third, schools

---

<sup>115</sup>*Id.* at 340 (referring to 20 U.S.C. § 1221).

<sup>116</sup>*Id.*

<sup>117</sup>*Namazi v. Univ. of Cincinnati Coll. of Med.*, 3 Fed. Appx. 482 (6th Cir. 2001).

<sup>118</sup>The DOE reports that currently "the Federal contribution to elementary and secondary education is a little under nine percent, which includes funds not only from the Department of Education (ED) but also from other Federal agencies, such as the Department of Health and Human Services' Head Start program and the Department of Agriculture's School Lunch program." U.S. Dep't of Educ., *The Federal Role in Education*, available at <http://www.ed.gov/about/overview/fed/role.html> (last visited Sept. 14, 2007).

were required to give parents notice of their PPRA rights. Fourth and finally, the FPCO offered an informal complaint process for PPRA complaints.

The pre-NCLB PPRA did not, however, give parents control over their children's educational experiences. Courts rejected parents' attempts to keep their children from participating in the *Altman* DARE program, the *C.N.* social services needs survey, and academic high stakes tests. The courts also dismissed an adult student's desire not to participate in misconduct-related psychiatric evaluation and treatment. The pre-NCLB PPRA limited parent consent requirements to a) required b) surveys and evaluations in c) federally funded programs which d) elicited certain sensitive information.

These limitations effectively excluded academic activities. With a few exceptions such as Title I remedial instruction and special education, academic activities (i.e. classes) are not typically part of federally funded programs. Moreover, academic instructional activities do not normally require students to disclose sensitive information. Even in a health class, an exam would normally ask students to give objectively correct answers to questions about sex or drugs (for example, answering a question about whether condoms are 100% effective), rather than require them to disclose personal behavior or attitudes. Thus, under the pre-NCLB PPRA, parent control over student academic experiences was extremely limited.

If the PPRA was trying to provide parents with substantive rights to keep their children from being exposed to, and thus thinking about, sensitive issues such as sex, the PPRA would require parent consent whether or not a school survey is federally funded, and whether or not students are required to participate. The PPRA does not do this, but instead provides a mechanism for parents to avoid having their children be required to provide certain sensitive information in federally funded surveys or other programs. The pre-NCLB PPRA parent consent requirements thus appear to be aimed

primarily at protecting student privacy rather than giving parents a degree of control over their children's education.

Finally, the pre-NCLB PPRA does not provide parents with any broad right to be involved in their children's education. Access rights are limited to instructional materials in federally funded programs. The pre-NCLB PPRA does not, for example, give parents a right of access to books in a school's library collection, nor to films shown in most classes.

### III. NCLB's Amendments to the PPRA

President George W. Bush's omnibus education bill, the No Child Left Behind Act ("NCLB"),<sup>119</sup> numbers hundreds of pages.<sup>120</sup> The NCLB reauthorizes the Elementary and Secondary Education Act ("ESEA"), which is Spending Clause legislation that provides modest funding for certain school programs such as drug and alcohol education and remedial instruction in math and reading. ESEA's goal is to "ensure that all children have a fair, equal and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging [s]tate academic achievement standards and state academic assessments,"<sup>121</sup> and to "close the achievement gap with accountability, flexibility, and choice, so that no child is left behind."<sup>122</sup> Parent involvement is explicitly recognized as an important and necessary component of student achievement.<sup>123</sup>

Some NCLB provisions applicable to public schools are well-known: yearly standardized testing of all students in grades 3-8, reporting by each school of separate test results for various groups of students (separately for each racial group,

---

<sup>119</sup>No Child Left Behind Act, Pub. L. No. 107-110 § 1061, 115 Stat. 2083 (2002).

<sup>120</sup>*Id.*

<sup>121</sup>20 U.S.C. § 6301 (2000 & Supp. IV 2004).

<sup>122</sup>No Child Left Behind Act, Pub. L. No. 107-110 § 1061, 115 Stat. 2083 (2002).

<sup>123</sup>*See* 20 U.S.C. § 6318 (extensive parent involvement policy requirements established by NCLB). *See infra* note 277 and accompanying text.

low-income students and disabled students),<sup>124</sup> labeling as “needing improvement” the schools in which any one of these groups does not perform well on the tests, and then as “failing” if the problem persists, and affording parents in “failing” schools the right to transfer their child to another area public school and/or to receive supplemental services such as tutoring from a failing school.<sup>125</sup> The NCLB also contains many other less well-known provisions, such as those on school prayer<sup>126</sup> and Boy Scouts’ access to school facilities.<sup>127</sup> One such little-known NCLB provision<sup>128</sup> significantly modifies the PPRA, broadening its access to instructional materials and survey provisions, and adding new requirements for physical exams and disclosure of student information for commercial purposes.

A. *The original version*

As originally introduced and reported out of committee in the House, the NCLB Act did not amend the PPRA. On the floor of the House, Representatives Tiahrt<sup>129</sup> and Graham<sup>130</sup> proposed adding the so-called “Parent Freedom of Information Act.”<sup>131</sup> After limited debate, the House passed the amendment and the bill,<sup>132</sup> and sent it to the Senate. The Senate passed its own bill; it required compliance with the PPRA, but did not amend it.<sup>133</sup> The bills went to conference committee, which adopted a modified version of the Tiahrt amendment subsequently passed by both houses. The

---

<sup>124</sup>20 U.S.C.A. at § 6311(b) (2000 & supp. 2007).

<sup>125</sup>*Id.* at § 6316(b).

<sup>126</sup>No Child Left Behind Act, Pub. L. No. 107-110 § 9524, 115 Stat. 1980-81 (2002), codified at 20 U.S.C. § 7904 (2000 & Supp. IV 2004).

<sup>127</sup>*Id.* at § 9525, 115 Stat. at 1981-82, codified at 20 U.S.C. § 7905.

<sup>128</sup>*Id.* at § 1061, 115 Stat. at 2083-88, codified at 20 U.S.C. § 1232h(c).

<sup>129</sup>R-Kansas, *available at* <http://www.house.gov./house/MemberWWW.shtml> (last visited Nov. 25, 2007).

<sup>130</sup>R-South Carolina, *available at* <http://www.house.gov./house/MemberWWW.shtml> (last visited Nov. 25, 2007).

<sup>131</sup>147 Cong. Rec. H2577-01 (daily ed. May 23, 2001).

<sup>132</sup>No Child Left Behind Act, H.R. 1, 107th Cong. § 916 (1st Sess. 2001).

<sup>133</sup>No Child Left Behind Act, H.R. 1, 107th Cong. § 916 (1st Sess. 2001) (Engrossed Senate Amendment).

conference committee report references the PPRA amendment only briefly.<sup>134</sup> Thus, the legislative history for NCLB's PPRA amendments is quite thin. Moreover, and as discussed earlier, the 1984 PPRA regulations have not been modified to reflect the NCLB amendments.<sup>135</sup> As a result, much of the text of the PPRA is unclear, and there is little hope of elucidation either in the form of legislative intent or in administrative fleshing out of details.

The original Tiahrt amendment would have required parent consent for surveys and evaluations which asked for sensitive information,<sup>136</sup> irrespective of whether the surveys were required, federally funded, or otherwise. It would have also required consent for all medical and mental health treatment and testing, required or not.<sup>137</sup> It did not address collection or disclosure of student information for commercial purposes.

On the House floor, Rep. Tiahrt characterized the amendment primarily as an extension of parenting rights, but also referred to the parent involvement it facilitated as important to enhancing student learning:

I rise today in support of parental rights. . . our schools should not only be accountable to the government, but parents as well. Ultimately, it is the families who should have the most say in how their children are educated.

The Parental Freedom of Information amendment is based on the need to provide concerned, active parents with information that is vital for them to exercise their right to guide the upbringing of the children.

Educators have often said that involved parents are the most important thing public schools need to help students learn. I believe involved parents must be informed parents.

---

<sup>134</sup>H.R. Rep. No. 107-334 at 1065 (2001) (Conf. Rep.).

<sup>135</sup>See 34 C.F.R. § 98 (2007).

<sup>136</sup>H.R. 1, § 916(b)(1) (1st Sess. 2001).

<sup>137</sup>*Id.* at § 916(c).

The current hodgepodge of State and Federal laws simply does not provide parents of public school children with the clear-cut right to access information regarding their child's education.

*The goal of this amendment is to plainly and unambiguously define the rights parents have under the law.*<sup>138</sup>

Another proponent characterized the amendment as:

empower[ing] parents through information and putting parents in the driver's seat when it comes to administering various psychological and psychiatric examinations, nonemergency medical examinations and tests that might be required at school.

Giving parents the authority to make these decisions is just one strategy to do two things: one, to make parents a more integral part of the academic and learning experience of their children; but, secondly, to allow parents to be in a position where they have a better opportunity to protect their children from different examinations, procedures, different experiments that take place in America's government-owned schools that are somehow different from the academic mission that most

---

<sup>138</sup>147 Cong. Rec. H2577-01, (daily ed. May 23, 2001) (statement of Rep. Tiahrt) (emphasis added) (also noting "Specifically, parents will have the right to access the curriculum to which their children are exposed. Parents will also have the right to give informed written consent prior to any student being required to undergo nonemergency medical or mental health examinations, testing, or treatment, while at school; and finally, they shall be afforded the right to inspect surveys and questionnaires seeking personal information before they are given to students. This legislation in no way seeks to influence the content of curricula or tests. It simply allows parents to access the basic information which involved parents need to guide the education of their children. . . .").

parents assume these institutions are all about. .  
<sup>139</sup>  
. .

In the Senate Conference Report there is a lengthy statement by Sen. Shelby concerning the new regulation of student information collected or disclosed for commercial purposes, which is explained as a necessary protection of student privacy:

This legislation encompasses a number of important reforms for our schools. One notable provision reforms the collection and dissemination of personal information collected from students to protect their privacy.

Earlier this year Senator DODD and I introduced the Student Privacy Protection Act. The goal of this legislation is to ensure that parents have the ability to protect their children's privacy by requiring parental notification of any data collection for commercial purposes from their children during the school day. I am pleased that the conference agreed with Senator DODD and me on the importance of protecting student's privacy and the essential nature of parental participation in the process.

The need for this provision stems from the growing practice of a large number of marketing companies going into classrooms and using class time to gather personal information about students and their families for purely commercial purposes. In many cases, parents are not even aware that these companies have entered their children's school, much less that they are exploiting them in the one place they should be the safest, their classroom.

---

<sup>139</sup>*Id.* (statement of Rep. Schaffer).

The provision included in H.R. 1 builds on a long line of privacy legislation to protect kids, such as the Family Educational Rights Act, the Children's Online Privacy Protection Act and the Protection of Pupil Rights Act. The goal of these laws, as is the case with our provision, is to ensure that the privacy of children is protected and that their personal information cannot be collected and/or disseminated without the prior knowledge and, most importantly, the ability of parents to exclude their children from such activities.

We understand that schools today are financially strapped and many of these companies offer enticing financial incentives to gain access. Our goal is not to make it more difficult for schools to access the educational materials and the computers that they so desperately need or to deter beneficial relationships. Rather our goal is to ensure that the details of these arrangements are disclosed and that parents are allowed to participate in the decision making process.

The bottom line is that parents have a right and a responsibility to be involved in their children's education. Much of these noneducational activities are being done at the expense of the parents' decision making authority because schools are allowing companies direct access to students. The provision included in H.R. 1 enhances parental involvement by giving them an opportunity to decide for themselves who does and does not get access to their children during the school day.<sup>140</sup>

---

<sup>140</sup>147 Cong. Rec. S13365-07 (daily ed. Dec. 18, 2001).

*B. Continuation of the pre-NCLB access and consent provisions; lack of clarity over when a survey is “required”*

The NCLB amendments’ structural approach to the PPRA is primarily to add additional sections. Prior language is left largely intact. Thus, for example, the original language giving parents a right of access to instructional materials in federally funded programs is unchanged.<sup>141</sup> New language discussed below<sup>142</sup> adds additional access rights.

The requirement of consent for “required” and federally funded surveys which elicit certain types of sensitive information<sup>143</sup> is also largely intact; the NCLB amendments only slightly broaden the types of sensitive information. Specifically, the NCLB amendments add an eighth category of sensitive information: “religious practices, affiliations, or beliefs of the student or student’s parent.”<sup>144</sup>

Lack of clarity over when students are “required” to complete a survey or physical exam makes it difficult to determine when parents must consent to a survey. PPRA regulations do not address this issue, and, as discussed earlier,<sup>145</sup> have not been updated in more than twenty years. The issue of true voluntariness is illustrated by recent phases of the *C.N.* litigation<sup>146</sup> and related FPCO complaints. According to the Third Circuit in *C.N.*, the evidence available from discovery was that the survey administrators provided teacher instructions to be read verbatim which stated “the survey is voluntary. That means you do not have to take it and

---

<sup>141</sup>20 U.S.C. § 1232h(a) (2000 & Supp. IV 2004).

<sup>142</sup>*See infra* Part IV.C.5.

<sup>143</sup>20 U.S.C. at § 1232h(b).

<sup>144</sup>*Id.* at § 1232h(b)(7). The NCLB amendments also expand the “political affiliations” category to “political affiliations or beliefs of the student or the student’s parent,” *id.* at § 1232h(b)(1), and broaden the “mental and psychological problems potentially embarrassing to the student or his family” to “mental and psychological problems of the student or the student’s family.” *Id.* at § 1232h(b)(2).

<sup>145</sup>*See supra* Part III.D.

<sup>146</sup>*C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 170 n. 13 (3rd Cir. 2005).

it is not a test that you take for school grades.”<sup>147</sup> The letter the school sent home to parents prior to the survey stated in pertinent part “The *voluntary* and *anonymous* survey will be made available to young people in grades 7-12,”<sup>148</sup> but did not specify the date of the survey nor tell parents how to keep their child from participating.<sup>149</sup> The school provided directions for teachers which stated “(1) *Students should be informed that the survey is anonymous and voluntary,*”<sup>150</sup> but also told principals they were free to edit the directions.<sup>151</sup> One middle school teacher allegedly told students they had to take the survey.<sup>152</sup> The survey was administered during a class period, which the court noted may have caused some students to liken it to a mandatory test. Students who chose not to do the survey were supposed to sit quietly and study.<sup>153</sup> A high school public address system announcement told students if they left the room during the survey they would receive a “cut.”<sup>154</sup> Students testified they interpreted this as meaning they would receive a cut if they did not complete the survey.<sup>155</sup> All (100%) of the students completed the survey.<sup>156</sup> The court found this evidence sufficient to create an issue of fact on the voluntariness of the survey, precluding summary judgment on several constitutional claims.<sup>157</sup>

The court’s opinion also notes that administrative claims were filed with the FPCO simultaneously with the lawsuit. Based on declarations and affidavits, and a “totality of the circumstances” test which it apparently applies to this

---

<sup>147</sup>430 F.3d at 164.

<sup>148</sup>*Id.* at 176 (emphasis in original).

<sup>149</sup>*Id.* at 175.

<sup>150</sup>*Id.* at 165 (emphasis in original).

<sup>151</sup>*Id.* at 166.

<sup>152</sup>*Id.* at 175. The teacher could not remember if he told students the survey was voluntary.

<sup>153</sup>*Id.* at 176.

<sup>154</sup>*Id.* at 175.

<sup>155</sup>*Id.*

<sup>156</sup>*Id.*

<sup>157</sup>*Id.*

issue,<sup>158</sup> the FPCO found that students were required to complete the survey. This finding triggered PPRA's consent requirements, and thus the FPCO determined that the schools had violated the PPRA.<sup>159</sup>

This recitation is not offered to criticize (nor to praise) the court's and FPCO's findings, but rather to illustrate the difficulty of convincing a court that a survey, or for that matter a physical exam, was truly voluntary as opposed to required.<sup>160</sup> This is so for several reasons. First, schools are multi-layer bureaucracies, and a clear understanding at the top level of management that survey participation is completely voluntary may not trickle down to all the employees who are actually administering the survey. Second, except for legal adults and emancipated students, the holder of any consent rights is the parent who will not actually be present for the survey. Finally, the actual survey takers will largely be minors, who are legally obligated to be in school, whereas the survey administrators will be adult school employees, who are in positions of power over the students. Perhaps at least in part for this last reason, the *C.N.* court also seemed concerned with the subjective perceptions of the students as to the voluntariness of the survey.<sup>161</sup>

---

<sup>158</sup>See Letter to Rep. Bob Schaffer, 34 IDELR ¶ 151 (Oct. 26, 2000). (noting that many commenters asked for clarification on this issue when it proposed amendments to the PPRA in 1995 and indicating in processing a PPRA complaint FPCO "would determine on a case-by-case basis whether a student has been required to submit to a survey"); 60 Fed. Reg. 44696-01, 44697 (1995) (in proposed but never final PPRA regulations noting that whether a survey is "required" would be determined on a case-by-case basis rather than according to a "single rule.").

<sup>159</sup>430 F.3d 159, 172 n.16.

<sup>160</sup>The Conference Committee report to the NCLB amendments to the PPRA notes: "The Conferees intend that the term 'condition of attendance' includes any action, whether overt or implicit, by a school or local educational agency in the announcement, scheduling, or administration of a non-emergency, invasive physical examination or screening which states or implies that the school- or local educational agency-administered examination or screening is required, compulsory, or may not be opted out of by the parent." H.R. Rep. No. 107-334 (2001) (Conf. Rep.).

<sup>161</sup>See *supra* note 154 at 175 and accompanying text.

In contrast to the access rights for instructional materials, which enhance parent involvement in a child's education, affirmative consent requirements give parents control over their child's educational experience. The amendments maintain parent affirmative consent requirements which are quite limited in scope: affirmative consent is needed only for a) required<sup>162</sup> b) surveys and evaluations in c) federally funded programs which d) elicit certain sensitive information ("sensitive information" being defined slightly more broadly after the amendments). As with the pre-NCLB PPRA, affirmative consent is required for very few school-based activities, and even then it is largely only for nonacademic activities.

*C. Required new school policies regarding parent inspection, opt-out and specific notice rights*

The meat of the NCLB amendments to the PPRA is in the addition of new Section c), which requires covered schools to write new policies which afford parents additional inspection, opt-out and advance notice rights. More specifically, parents now have the right to:

- advance notice, inspect (and in some cases opt out of) certain surveys beyond the ones for which affirmative consent is required,
- inspect certain additional instructional materials in addition to those in federally funded programs,
- advance notice with approximate dates and an opportunity to opt out of certain physical exams and screenings, and

---

<sup>162</sup>Some state laws include broader consent requirements. For example, Washington regulations give parents more rights, as they are not limited to surveys etc. which a school requires students to do. The state regulation requires written parent consent before a child is given a diagnostic personality test, or an oral or written survey or test asking about their personal or family beliefs or practices about religion or sex. WASH. ADMIN. CODE §§ 180-52-030, -035 (2006).

The new mandate to offer parents opportunities to opt their children out of certain surveys, physical procedures, and disclosure of information for sales and marketing act as a sort of consent rebuttal. To the extent schools choose to engage in these activities they can assume parents' consent, but parents must be informed and given an opportunity to rebut the assumed consent. This approach is modeled on FERPA's directory information provisions.<sup>163</sup> FERPA allows schools to disclose student information after notifying parents of the information a school considers to be directory, and affording parents an opportunity to object to and opt out of disclosure of their child's directory information. Opt-out opportunities are more likely to produce false consents (i.e. parents who do not agree their child should participate, but for some reason fail to file an objection), while active consent is more likely to produce false lack of consents (parents who are willing to allow their child to participate, but for some reason a consent form does not reach the school).

### 1. Applicability.

New Section (c) applies to elementary and secondary schools which receive any federal education funds.<sup>164</sup> As a practical matter, this means all public K-12 schools as well as many private K-12 schools. Unless the school had comparable policies already in place as of NCLB's enactment,<sup>165</sup> the new section requires schools to develop written policies, "in consultation with parents,"<sup>166</sup> which give parents<sup>167</sup> the rights described above. The FPCO has published model notices, available on its website.<sup>168</sup>

---

<sup>163</sup>See 34 C.F.R. § 99.37(a) (2007).

<sup>164</sup>20 U.S.C. at § 1232h(c)(6)(C) (2000 & Supp. IV 2004).

<sup>165</sup>*Id.* at § 1232h(c)(3). NCLB was enacted on January 8, 2002.

<sup>166</sup>*Id.* at § 1232h(c)(1).

<sup>167</sup>Parents are defined to include guardians as well as persons in loco parentis. *Id.* at § 1232h(c)(6)(D). Parent rights transfer to student upon turning 18 or becoming emancipated. *Id.* at § 1232h(c)(5)(B).

<sup>168</sup>Family Policy Compliance Office, PPRA Model Notice and Consent/Opt-Out for Specific Activities (October 2006), available at [www.ed.gov/policy/gen/guid/fpc](http://www.ed.gov/policy/gen/guid/fpc).

## 2. *Notice.*

Schools must provide at least annual notice at the start of each academic year of these policies “directly” to parents,<sup>169</sup> and must provide additional notice if these policies are changed midyear. Any opt-out event (for example a school’s plan to conduct physical exams of students or administer a survey) must either be specifically described with approximate dates in the annual notice, or a separate advance notice of the event must be provided to parents so they have an opportunity to exercise their opt-out and related rights.<sup>170</sup>

## 3. *Miscellaneous provisions.*

None of the new PPRA provisions supersede FERPA requirements.<sup>171</sup> The federal Department of Education is required to annually notify state education agencies and schools of their obligations under the new section c).<sup>172</sup> Schools are explicitly permitted to use ESEA funds to “enhance parental involvement in areas affecting the in-school privacy of students.”<sup>173</sup>

## 4. *New rights regarding “surveys.”*

The new language concerns surveys or evaluations “administered or distributed by a school,”<sup>174</sup> whether or not they are required.<sup>175</sup> It thus would not appear to govern

---

<sup>169</sup>20 U.S.C. § 1232h(c)(2)(B) (2000 & Supp. IV 2004).

<sup>170</sup>*Id.* at § 1232h(c)(2)(A)(i).

<sup>171</sup>*Id.* at § 1232h(c)(5)(A)(i).

<sup>172</sup>*Id.* at § 1232h(c)(5)(C).

<sup>173</sup>*Id.* at § 1232h(c)(5)(D).

<sup>174</sup>*Id.* at § 1232h(c)(1)(A)(i).

<sup>175</sup>While the old PPRA survey provisions mandate consent for required surveys, *see* 20 U.S.C. § 1232h(b) (2000) (“no student shall be required, as part of any applicable program. . .”), the new requirements are not limited to required surveys. *See* 20 U.S.C. at § 1232h(c)(2)(C)(ii) (2000 & Supp. IV 2004) (parent notification and opt-out required for “administration of any survey containing one or more items [eliciting sensitive information]”). The FPCO model notices reflect this. Family Policy Compliance Office, PPRA Model Notice and Consent/Opt-Out for Specific Activities (October 2006), available at [www.ed.gov/policy/gen/guid/fpc](http://www.ed.gov/policy/gen/guid/fpc). This important distinction appears to have confused one student commentator. Beth Garrison, Note: *Children Are Not Second Class*

surveys administered by students not acting as school agents,<sup>176</sup> but would cover surveys administered by school employees on behalf of a nonschool entity, such as the survey administered by the school in *C.N.* on behalf of a community mental health group.

a. *Externally created surveys - right of inspection.*

School policy must afford parents the right, upon request, to inspect any “survey”<sup>177</sup> (a term which is undefined except that it includes “evaluations,”<sup>178</sup> another term which is undefined), which is “created by a third party.”<sup>179</sup> Parents who request it must be able to inspect a survey before the school administers it to students.<sup>180</sup> This right of inspection is not limited to surveys which are part of federally funded programs, nor those which students are required to complete, nor even those which ask about the eight statutory categories of sensitive information. It would, for example, have permitted the parents in *C.N.* to inspect the anonymous survey before the school district administered it.

As it is defined to cover “surveys” and “evaluations,” the inspection language arguably applies to those “evaluations” which are standardized tests created by third parties. The PPRA explicitly excludes academic tests from

---

*Citizens: Can Parents Stop Public Schools from Treating their Children Like Guinea Pigs?*, 39 VAL. U. L. REV. 147, 150 (2004) (suggesting PPRA does not apply to non-required surveys); *id.* at 200-01 (same).

<sup>176</sup>See Student Press Law Center, *Surveying the Law: A Legal Guide to What Rights High School Journalists Have to Survey* (2003), available at <http://www.splc.org/legalresearch.asp> (last visited Nov. 25, 2007), for an extended discussion of PPRA and constitutional issues involved when student journalists survey classmates.

<sup>177</sup>20 U.S.C. § 1232h(c)(1)(A) (2000 & Supp. IV 2004).

<sup>178</sup>*Id.* at § 1232h(c)(6)(G).

<sup>179</sup>*Id.* at § 1232h(c)(1)(A).

<sup>180</sup>*Id.* at § 1232h(c)(1)(A)(i). The inspection policy must set out the process for parents to have “reasonable access” to surveys and provide for inspection within a “reasonable time” of the request. *Id.* at § 1232h(c)(1)(A)(ii).

the instructional materials parents may access,<sup>181</sup> but contains no parallel exclusion for academic tests in the rights of access parents are granted to surveys and evaluations.<sup>182</sup> Since most in-class academic tests are created by teachers, they would fall outside of the survey access provision, and, as just noted, are explicitly outside the instructional materials provision. On the other hand, standardized achievement tests, ability tests, personality tests, and mastery and other high stakes tests are created by third parties, and thus are arguably accessible by parents before their administration. If this is the case, there are two immediate problems for schools. First, both standardized test publisher requirements and ethical standards for school psychologists typically mandate that such tests be kept confidential. Second, in this age of hypercompetitiveness for college admissions and the like, there is the potential that parents who access such tests may share the test questions with their children.

After a test is administered, whether academic or nonacademic, and whether internally or externally created, parents have a FERPA right of access to their child's responses. Parents may also have a FERPA right of access to the test protocol, as it may have the student's responses on it, and thus be a FERPA record. Finally, parents may have a right of access to reasonable explanations and interpretations of records which may mean they have a right of access to their child's answers).<sup>183</sup> Courts have offered scant, and conflicting, guidance on this issue.<sup>184</sup>

---

<sup>181</sup>*Id.* at §§ 1232h(c)(1)(C), (c)(6)(A).

<sup>182</sup>*See id.* at § 1232h(c)(1)(A).

<sup>183</sup>*See generally* Lynn Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 627-628 (1997).

<sup>184</sup>Most recently, a California federal court has weighed in on the continuing issue of student/parent access to test protocols. *Newport-Mesa Unif. Sch. Dist. v. State of Cal. Dep't of Educ.*, 371 F.Supp. 2d 1170 (C.D. Cal. 2005). State law in the case provides for access by special education students of test protocols after students have taken the tests. The school district claimed providing access to the standardized achievement test as requested by the parent would violate federal copyright law. The court found the state statute to be enforceable as it fell within the "fair use" provision of federal copyright law, but noted that the school could use

*b. Surveys, internally or externally created, required or not, which ask about sensitive information.*

-Right of access. School policy must provide parents with a right of access to sensitive surveys which ask about any of the eight statutory categories of sensitive information.<sup>185</sup>

-Right to opt out. School policy must describe the school's arrangements to protect student privacy with regard to sensitive surveys.<sup>186</sup> Schools must also give parents the right to opt their child out of these surveys.<sup>187</sup> The policy must provide for specific advance notice with approximate dates to parents of any sensitive surveys.<sup>188</sup> Thus, for example, the school in *C.N.* would have had to provide parents with specific advance notice of its social services survey, and given parents the right to opt their minor children out of the survey.

*c. The new survey provisions' ambiguous scope.*

The PPRA's survey provisions are so unclear that it is difficult to assess them. As discussed earlier,<sup>189</sup> determining when a survey is "required," triggering the parent consent provision, is problematic. What qualifies as a "survey" or "evaluation" is also unclear.<sup>190</sup> This ambiguity raises questions such as whether there is a right of parent access to standardized academic tests, perhaps even before they are administered.

---

safeguards to preserve confidentiality, such as requiring a written nondisclosure agreement. *Id.* at 1179. The court also distinguished student access to a test protocol before actually taking the test, citing authority indicating sharing the test protocol in such situations would not constitute fair use and would violate copyright law. *Id.* at 1175 (citations omitted).

<sup>185</sup>20 U.S.C. at § 1232h(c)(1)(B) (2000 & Supp. IV 2004).

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* at § 1232h(c)(2)(A)(ii).

<sup>188</sup>*Id.* at § 1232h(c)(2)(C)(ii).

<sup>189</sup>*See supra* notes 145-161 and accompanying text.

<sup>190</sup>In 1995 proposed, but never final, PPRA regulations, the Secretary of Education stated that he would not define "survey" because "he believes the term is self-explanatory." 60 Fed. Reg. 44696-01 (1995).

Yet another issue is whether the survey and evaluation provisions also apply to physical exams and screenings, or to surveys conducted for commercial purposes. These two scenarios have their own PPRA requirements,<sup>191</sup> yet it is unclear whether the separate physical exam and commercial survey requirements are in addition to general PPRA survey requirements, or whether the separate provisions for physical exams and commercial surveys are the exclusive regulators of those activities. Consider, for example, a school which decides to have its students complete a survey to assist in marketing a youth-oriented product, or to require its students to submit to blood tests to detect drug use. These activities undoubtedly trigger the special commercial survey and physical exam PPRA provisions; do they also trigger the PPRA survey requirements?<sup>192</sup>

More puzzling are physical exam and commercial activities which are outside the special provisions. Examples would be requiring student athletes to submit to blood tests to detect drug use as a condition of team membership, or a survey which collects student information to assist a company, such as Scholastic Books, which makes low-cost children's books. These activities are outside the special physical exam and commercial information provisions,<sup>193</sup> but are they still regulated by the PPRA survey provisions? If so, the special provisions' requirements, which mirror those of the survey requirements, are rendered fairly meaningless. If not, these activities, which indisputably impact student privacy, are unregulated by the PPRA.

Congress (or the FPCO through promulgation of regulations) needs to define "surveys" and "evaluations" to clarify whether they include or exclude commercial surveys and physical exams, and standardized academic and

---

<sup>191</sup>See *infra* Parts IV.C.6 and IV.C.7.

<sup>192</sup>In these scenarios it may not make significant practical difference, as the survey requirements appear to parallel the requirements of these more specific provisions. *But see infra* note 223 and accompanying text for a discussion of potential conflict.

<sup>193</sup>See *infra* note 242 and accompanying text.

nonacademic tests. Any definition also needs to address the level of formality, if any, required for an activity to be a “survey” or “evaluation.” It seems clear that use of a formal instrument qualifies as a survey or evaluation. What about an interview of a student by a guidance counselor to help identify causes of a student’s academic difficulty? What of questions posed by a school administrator to determine if a student engaged in misconduct, which, as one student facing discipline recently claimed, may amount to an “evaluation” of eliciting sensitive information in the form of self-incriminating statements?<sup>194</sup> If these activities are PPRA surveys, parents must be given an opt-out opportunity and schools must make significant changes in their guidance counseling and disciplinary functions.<sup>195</sup>

##### 5. *New rights regarding instructional materials.*

School policy must give parents the right to inspect any “instructional materials [now more broadly defined]<sup>196</sup> used as part of the educational curriculum” for their child.<sup>197</sup> This right of inspection is not limited to materials or curriculum in federally funded programs, nor is it limited to

---

<sup>194</sup> See *infra* notes 347-351 and accompanying text.

<sup>195</sup> PPRA regulations promulgated under a former version of the PPRA may be instructive on this issue, at least by analogy; they define a “psychiatric or psychological examination or test” as “a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs, or feelings.” 34 C.F.R. § 98.4(c)(1) (2007).

<sup>196</sup> A new statutory definition of “instructional materials” for this provision broadens former language referring to teacher’s manuals, films, tapes, and supplemental materials to include “instructional content . . . provided to a student, regardless of its format, including printed or representational materials, audio-visual materials, and materials in electronic or digital formats (such as materials accessible through the Internet),” but not “academic tests or academic assessments.” 20 U.S.C. at § 1232h(c)(6)(A) (2000 & Supp. IV 2004).

<sup>197</sup> *Id.* at § 1232h(c)(1)(c). The inspection policy must set out the process for parents to have “reasonable access” to instructional materials and provide for inspection within a “reasonable time” of the request.

materials or curriculum which involves sensitive information. This broadening of access rights to virtually all of a school's instructional materials appears to be part of and is consistent with the parent involvement preference which underlies the NCLB Act.<sup>198</sup>

The amendments are also conspicuous in what they do not provide with regard to instructional materials. Notably, the amendments do not require parent access *before* a school uses instructional materials, nor access to observe their child's actual instruction.<sup>199</sup> The amendments do not give parents control over their child's education experience by affording them the right to prevent their child from using instructional materials to which the parent objects. Finally, the amendments do not offer parents collectively a right of input into the school's initial choice of instructional materials.<sup>200</sup>

6. *New rights regarding physical exams and screenings.*

a. *The new language.*

School policy must address physical examinations and screenings of students by the school.<sup>201</sup> A specific new requirement is that school policy provide parents with advance notice with approximate examination dates and an opportunity to opt their minor, unemancipated child out of<sup>202</sup> "physical

---

<sup>198</sup>See *supra* note 123 and accompanying text.

<sup>199</sup>State law may so provide. For example, Washington schools are required to have policies assuring parents the opportunity to observe their child's classes and activities in a nondisruptive way. WASH. REV. CODE ANN. § 28A.605.020 (West 2006).

<sup>200</sup>State law may so provide. For example, school districts in Washington are required to create an instructional materials committee (IMC) to recommend textbooks and all other instructional materials for adoption by the school board. The IMC may by statute include parents at the school board's discretion, but parents may not make up a majority of the IMC. *Id.* at § 28A.320.230. Schools must notify parents of any opportunity to serve on the IMC. IMC's are responsible for hearing complaints regarding the school district's instructional materials. Schools may purchase and use unapproved instructional materials on a trial basis. *Id.*

<sup>201</sup>20 U.S.C. § 1232h(c)(1)(D) (2000 & Supp. IV 2004).

<sup>202</sup>*Id.* at § 1232h(c)(2)(A)(ii).

examinations or screening[s]” excluding “hearing, vision, [and] scoliosis screening[s]”<sup>203</sup> that are:

- a) “non-emergency,” and
- b) “invasive,”<sup>204</sup> and
- c) are “required as a condition of school attendance,” and
- d) are “administered by the school,” and
- e) are “scheduled . . . in advance,” and which are
- f) “not necessary to protect the immediate health and safety of the student, or of other students.”<sup>205</sup>

This section explicitly does not preempt existing state law to the extent it permits or requires screenings, requires parent notification (thus giving parents more rights), or provides for examinations and screenings without parent notification.<sup>206</sup> It also does not apply to surveys (which are statutorily defined to include evaluations) administered to IDEA students, such as a physical therapy evaluation.<sup>207</sup>

Requiring students to submit to a thorough wellness exam including one or more “invasive” elements, such as examination of genitalia<sup>208</sup> or inserting a thermometer into the mouth to take a temperature, in order to be able to attend school would appear to be an example of an activity triggering the new provision. Requiring students to submit to drug testing in order to be able to attend school, if the test were

---

<sup>203</sup> *Id.*

<sup>204</sup> “Invasive” exams are defined as those that “involve exposure of private body parts, or any . . . incision, insertion, or injection into the body.” *Id.* at § 1232h(c)(6)(B).

<sup>205</sup> *Id.* at §§ 1232h(c)(2)(A), (B), (C)(iii).

<sup>206</sup> *Id.* at § 1232h(c)(4)(B).

<sup>207</sup> *Id.* at § 1232h(c)(5)(A)(ii).

<sup>208</sup> *Cf.* *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003) (finding colorable Fourth Amendment claim for children in Head Start program given physical exams, which included blood tests and examination of genitalia, without parent notice or consent; state law tort claims may also lie).

“invasive” (i.e. if it were performed by drawing blood, or by monitored urinalysis in which student’s genitals were visible to the monitors) would also appear to trigger the new provision.

b. *Its myriad problems.*

Even putting aside disputes over the underlying public policy issues involving parent rights, public health interests, and school authority, the new provision is replete with difficulties. The new provision ignores existing comprehensive state law regulation, which renders the new language essentially inapplicable. Additionally, it is seemingly incompatible with other federal health care statutes and with other PPRA provisions. Moreover, even if it were applicable, the new provision’s facial limitations renders it irrelevant to the vast majority of real world school health procedures, including those which were likely of concern to the provision’s sponsors. First and foremost, state common and statutory law, which the new language explicitly does not preempt,<sup>209</sup> already regulates the health care of minors, including physical exams and screenings. As a matter of general common law, minors are incompetent to consent to their own health care; informed parent consent is required.<sup>210</sup> Most states have created exceptions to this general rule. Emancipation gives the minor the capacity to consent to medical treatment;<sup>211</sup> the new PPRA provision accordingly transfers its rights to emancipated minors.<sup>212</sup> Additionally, many states have enacted statutes which give minors of a certain age the right to get medical evaluation and treatment

---

<sup>209</sup>See *supra* note 206 and accompanying text.

<sup>210</sup>See generally JAMES RAPP, 4 EDUCATION LAW § 11.04[5][b] (2006); THOMAS JACOBS, 2 CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 10.35 (2006); Am. Jur. *Physicians, Surgeons and Healers* §§ 160-61 (2007); Danny Veilleux, *Medical Practitioner’s Liability for Treatment Given Child Without Parent’s Consent*, 67 A.L.R. 4TH 511 (1989 & Supp. 2007); David Vukadinovich, *Minors’ Rights to Consent to Treatment: Navigating the Complexity of State Laws*, 37 J. HEALTH L. 667 (2004).

<sup>211</sup>See, e.g., Rapp at § 11.04[5][b]; Vukadinovich at 677-81; Veilleux, 67 A.L.R. 4th 511 at § 6.

<sup>212</sup>20 U.S.C. § 1232h(c)(5)(B) (2000 & Supp. IV 2004).

for certain conditions, such as substance abuse and STDs, without parent consent,<sup>213</sup> and some have by statute or judicial interpretation created exceptions for “mature” minors to consent to their own treatment.<sup>214</sup> These laws are explicitly unaffected by the new PPRA language. Moreover, minors have been found to have constitutional,<sup>215</sup> and in some states additional statutory, rights<sup>216</sup> to make certain reproductive decisions, such as accessing birth control and terminating pregnancy.<sup>217</sup>

In fact, the situations regulated by the new language, such as the school-required invasive wellness exams and drug testing discussed above, would be controlled by this body of state law. In general, the common law rule that minors lack capacity to consent to their own medical treatment, and that affirmative parent consent is required, would be controlling. Thus, under the common law, the new provision’s opt-out opportunity would not apply, and in any event would be

---

<sup>213</sup>See, e.g., *Rapp* at § 11.04[5][b]; *Vukadinovich* at 681-90.

<sup>214</sup>See, e.g., *Children and the Law* at § 10.35; *Vukadinovich* at 671; *Veilleux*, 67 A.L.R. 4th 511 at § 7.

<sup>215</sup>See, e.g., *Planned Parenthood of Centr. Mo. v. Danforth*, 428 U.S. 52, 72-75 (1976) (discussing adolescent constitutional reproductive rights); see generally Lynn Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 649 (1997).

<sup>216</sup>See, e.g., *Vukadinovich* at 688-690.

<sup>217</sup>Related issues have recently arisen under FERPA. While FERPA gives parents of minor students a right of access to their child’s education records on request, it does not require schools to reach out and inform parents. Thus under normal circumstances, schools must decide whether to inform a parent, for example, when a female student tells a school employee she is pregnant. One school wrote a policy requiring schools to so inform parents. Litigation challenged this policy as gender discrimination under Title IX and in violation of minors’ constitutional right to make reproductive decisions without parent notice under judicial oversight. A preliminary injunction to suspend the policy was denied, the court finding the school counselor and union lacked standing and the matter was not ripe, and rejecting the constitutional abortion rights argument. *Port Wash. Teachers’ Ass’n v. Bd. of Educ.*, 361 F.Supp.2d 69 (E.D. N.Y. 2005). The case is criticized in Melissa Prober, *Note: Please Don’t Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student’s Pregnancy*, 71 BROOK. L. REV. 557 (2005).

insufficient.<sup>218</sup> To the extent state law provided for mature minor students to consent to their own treatment, the new provision also would not apply, and again the minor's informed consent would be required and an opt-out opportunity would be insufficient. The new provision is thus essentially inapplicable, and may actually mislead some schools, parents and students as to their true rights and obligations.

Related to the issue of state laws which allow mature minors to consent to certain aspects of their own health care is the new provision's second difficulty; its incompatibility with other federal statutes. While the new provision explicitly does not preempt FERPA<sup>219</sup> and is not applicable to evaluations of IDEA students,<sup>220</sup> which have their own set of parent rights,<sup>221</sup> it is silent with regard to its interplay with other federal health care laws. Two examples of other applicable federal health care statutes are the laws concerning treatment and evaluation of minors for substance abuse, and the Health Insurance Portability and Accountability Act (HIPAA). Whenever state law gives minors the capacity to consent to their own substance abuse treatment and counseling, federal law requires that such records to be kept confidential, even from the parents.<sup>222</sup> HIPAA also provides that, to the extent a minor can consent to her own health care, the minor has the right to keep related information confidential even with regard to her parents. This is so even if her parents consented to the care provided.<sup>223</sup> Thus, if a school were to administer a substance

---

<sup>218</sup>This seems inconsistent with the sponsors' goal of giving parent *more* control over their children.

<sup>219</sup>20 U.S.C. § 1232h(c)(5)(A)(1) (2000 & Supp. IV 2004).

<sup>220</sup>*Id.* at § 1232h(c)(5)(A)(ii).

<sup>221</sup>*Id.* at § 1414(a)(1)(D); 34 C.F.R. § 300.300(a) (2007) (informed parent consent required for initial evaluation for special education eligibility); *id.* at § 300.300(c) (informed parent consent required for reevaluation).

<sup>222</sup>*See* 42 U.S.C. § 290ee-3 (2000); 42 C.F.R. § 2.14 (2007); *see generally* Lynn Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 648-649 (1997).

<sup>223</sup>*See Vukadinovich* at 668-69. Note, however, that HIPAA excludes FERPA records. *See* 45 C.F.R. § 160.103 (2007). The scope of this exclusion is in dispute. *See* Steven J. McDonald and Barbara L. Shiels,

abuse or other physical exam or screening to a minor student which would ostensibly trigger PPRA parent opt-out requirements, and if state law gave the student the ability to consent, these other federal statutes may well preclude the parents from knowing the results, or even of the occurrence of the screening itself, for which PPRA purportedly triggered parent opt-out rights.

Yet another potential incompatibility lies in the new PPRA's own opt-out provisions for certain "surveys," which include "evaluations."<sup>224</sup> Under this new provision, is a physical exam or screening which elicits sensitive information, such as a drug test revealing illegal drug use, also subject to the opt-out requirements for surveys and evaluations? What of medical screenings which are outside this provision, such as ones which are not required as a condition of school attendance or ones which are not invasive? What of mental health screenings and evaluations, as well as actual treatment, which were regulated in the original bill but are not regulated by the new provision?

The final difficulty with the new provision is its very limited facial applicability. As discussed earlier,<sup>225</sup> the original bill would have required consent for all medical and mental health treatment and testing, whether or not it was required.<sup>226</sup> Instead, the enacted language is limited to *physical* exams and screenings which are both invasive and scheduled in advance. It does not refer to treatment.

These limitations appear to have confused even the agency responsible for enforcing the PPRA. In its model notice, the FPCO uses the example of school-administered flu shots as an activity which, if required of students, would

---

FERPA: New Issues for Our Old Friend, 11-13 (2002), available at [www.nacua.org](http://www.nacua.org) (noting three different interpretations of scope of the FERPA exclusion in HIPAA). See generally, Pietrina Scaraglino, *Complying with HIPAA: A Guide for the University and its Counsel*, 29 J. C. & U. L. 525 (2003).

<sup>224</sup>This issue is discussed at Part IV.C.4.c, *supra*.

<sup>225</sup>See *supra* Part IV.A.

<sup>226</sup>*Id.*

trigger the new specific advance notice and opt-out provisions.<sup>227</sup> A similar high profile example would be requiring female students to receive the new HPV vaccine in order to prevent cervical cancer. However, both flu shots and HPV vaccines constitute medical treatment not involving examination, and thus actually appear to be beyond the activities regulated by the new provision. The FPCO's flu shot example also had a county public health department administering the flu shots,<sup>228</sup> while the new opt-out language is limited to exams and screenings "administered by the school."<sup>229</sup>

The sponsors of the new PPRA section might have wanted to be responsive to certain recent high-profile cases, but the very limited enacted language does not actually cover the scenarios presented in those very cases. The new language addresses only physical evaluation which is *required* for school attendance. Medical evaluation/screening activities at school in which students may choose to participate, such as pregnancy screening, substance abuse evaluation, and STD evaluation are not reached by the new section. Similarly, the recent mandatory blanket drug testing for student athletes<sup>230</sup> and participants in extracurricular activities<sup>231</sup> found to be constitutional by the Supreme Court was required as a condition of sports/club participation rather than school attendance, and thus would be beyond the new opt-out provision. A recent high-profile case involved a high school coach who allegedly required a swim team member to take a

---

<sup>227</sup>Family Policy Compliance Office, PPRA Model Notice and Consent/Opt-Out for Specific Activities (October 2006), *available at* [www.ed.gov/policy/gen/guid/fpcoc](http://www.ed.gov/policy/gen/guid/fpcoc).

<sup>228</sup>*Id.*

<sup>229</sup>20 U.S.C. § 1232h(c)(2)(C)(iii)(I) (2000 & Supp. IV 2004). If the county health department or other health agency were acting as the school's agent, this would likely be sufficient for the flu shots to be "administered by the school."

<sup>230</sup>*See* *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (blanket drug testing of student athletes does not violate Fourth Amendment).

<sup>231</sup>*See* *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (blanket drug testing of students participating in extracurricular activities does not violate Fourth Amendment).

pregnancy test, which is a true physical evaluation, and an allegedly required one.<sup>232</sup> Again, however, the new PPRA language would not apply, since the statute only reaches those activities which involve an “invasive” procedure. The over-the-counter urine pregnancy test allegedly required by the swim coach would not be covered.<sup>233</sup> The physical exam must also be required for school attendance, rather than merely membership in a sport or club. Thus, if the allegedly pregnant student risked only participation on the swim team if she were to refuse to take the test, the opt-out language would not be triggered. An older and even more troubling case alleged a school official coerced a student into terminating her pregnancy and urged her to keep it secret from her parents.<sup>234</sup> As medical *treatment*, this would also appear to be outside the new opt-out language. As an example of a final limitation in the new provision, if a school nurse demanded that a student allow her temperature to be taken, perhaps because the nurse was concerned that a student claiming illness on the day of a big exam was faking, the clearly “invasive” insertion of the thermometer into the student’s mouth or ear would not trigger the parent opt-out provision, since it was not “scheduled in advance.”

---

<sup>232</sup>*Gruenke v. Seip*, 225 F.3d 290 (3rd Cir. 2000). The federal appeals court in that case reversed summary judgment for the school on some claims, finding that the coach’s actions violated the student’s Fourth Amendment rights, *id.* at 300-02 (also rejecting qualified immunity on this claim), and might violate her informational privacy rights in keeping medical information confidential. *Id.* at 302-03. The appeals court affirmed summary judgment for the school on other claims, finding qualified immunity on the familial (parenting rights) privacy claim asserting interference with important and intimate family decisions. The court suggested the alleged behavior would violate constitutional parenting rights, but held that parenting rights under these circumstances were not clearly established. *Id.* at 303-06. The court also affirmed summary judgment for the school on the speech claim. *Id.* at 307-08.

<sup>233</sup>This assumes normal administration of the test, namely that it was used privately by the allegedly pregnant student so that her private body parts were not exposed to other persons while she urinated. If on the other hand a blood test for pregnancy were performed, the screening would be “invasive,” thus potentially triggering the opt-out language.

<sup>234</sup>*Arnold v. Bd. of Educ.*, 880 F.2d 305, 314 (11th Cir. 1989) (but declining to find a constitutional duty to notify the parents).

The activities which are facially regulated by the new opt-out provision seem to be rare ones, and distinctions drawn by the new provision seem arbitrary and even nonsensical. It is thus fortuitous that unpreempted state law makes the new opt-out provision virtually inapplicable. The new provision adds neither clarity nor enhanced privacy protection. At best the provision is meaningless, and at worst it is arbitrary, confusing and even misleading. Congress would do schools, parents, and students a service by repealing this incoherent provision. Such an act would allow schools to divert resources from trying to decipher and comply with this provision toward actually furthering the schools' educational missions.

7. New rights regarding collection and disclosure of student information for marketing or sale.

This new section was not part of the bill originally enacted by the House,<sup>235</sup> and was apparently added during conference. It identifies an important problem - school disclosure of student information which is then used for commercial purposes. Unfortunately, the new provision fails to provide even a minimally adequate solution to this problem.

a. The new language.

The new section requires school policy to address the collection, use and disclosure<sup>236</sup> of student "personal information" for sale or marketing.<sup>237</sup> Student "personal information" is defined as "individually identifiable information" including student or parent names, and student home addresses, phone numbers, and social security

---

<sup>235</sup>See *supra* Part IV.A.

<sup>236</sup>20 U.S.C. § 1232h(c)(1)(E) (2000 & Supp. IV 2004). This section addresses not only the specific "collection" of student data for commercial purposes, such as having students complete a survey for use by credit card companies, but also the "disclosure" or "use" of existing student information for commercial purposes, such as providing a student mailing list to a credit card company.

<sup>237</sup>*Id.* at § 1232h(c)(1)(E).

numbers.<sup>238</sup> The policy must describe how student privacy will be protected in these matters.<sup>239</sup> If any instrument is used to collect student information for purely commercial purposes, such as sales or marketing, the policy must provide requesting parents with the right of “reasonable access” to that instrument within a “reasonable time.”<sup>240</sup> If any student information is used or disclosed for commercial purposes, the policy must provide for specific advance notice with approximate dates to parents of these activities, and parents must be given the right to opt their child out.<sup>241</sup> These rules concerning student personal information used or collected for sales or marketing do not apply in a number of instances. For example, information used or collected for educational or military recruitment, “for book clubs, magazines or programs providing access to low-cost literary products,” for “curriculum and instructional materials,” for “tests and assessments,” for student fundraising efforts, or for “student recognition programs” would enjoy exemption from these rules.<sup>242</sup>

b. Regulation of FERPA-type student privacy.

As discussed earlier,<sup>243</sup> the PPRA is primarily concerned with the aspect of informational student privacy which involves limits on the government’s ability to collect information. This new provision regulates disclosure of student information, yet it involves the specific variety of student privacy - governmental disclosure of student information to third parties - which is the primary purview of FERPA.<sup>244</sup>

---

<sup>238</sup>*Id.* at § 1232h(c)(6)(E).

<sup>239</sup>*Id.*

<sup>240</sup>*Id.* at § 1232h(c)(1)(F).

<sup>241</sup>*Id.* at §§ 1232h(c)(2)(A), (B), (C)(I).

<sup>242</sup>20 U.S.C. § 1232h(c)(4)(A) (2000 & Supp. IV 2004).

<sup>243</sup>*See supra* Part II.D.

<sup>244</sup>20 U.S.C. at § 1232h(c)(4)(A).

c. FERPA's limits on the new provision.

The new provision explicitly does not supersede FERPA.<sup>245</sup> Under FERPA, written consent is required for release of current student personal information for commercial or other purposes,<sup>246</sup> unless 1) the information is deemed “directory” as a matter of school policy, and 2) the parents have not objected to release of information about their child.<sup>247</sup> In such cases FERPA permits, but does not require, schools to disclose directory information to any person on request.<sup>248</sup> FERPA allows schools to designate as directory information student names, addresses and phone numbers, but not social security numbers or parent names.<sup>249</sup> Consequently, the new opt-out language is actually limited to student names, addresses, and phone numbers disclosed for commercial purposes,<sup>250</sup> but may possibly extend to other directory information collected from students for commercial purposes.

d. The true scope of the problem.

The FPCO model opt-out notice offers examples of providing student information to companies which provide “student-based products and services,” such as “school jewelry” like high school class rings, which are subject to the new requirements concerning disclosure of student

---

<sup>245</sup>*Id.* at § 1232h(c)(5)(A)(I).

<sup>246</sup>*Id.* at § 1232g(b)(2); 34 C.F.R. § 99.30(a) (2007); *see generally* Lynn Daggett, *Bucking up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617, 631 (1997).

<sup>247</sup>20 U.S.C. § 1232g(a)(5); 34 C.F.R. §§ 99.3, 99.37(a) (2007); *see generally* Daggett, 46 CATH. U. L. REV. at 633-634. The directory information notice and objection opportunity requirements do not apply to the release of directory information regarding former students. 34 C.F.R. at § 99.37(b).

<sup>248</sup>*Id.*

<sup>249</sup>20 U.S.C. § 1232g(a)(5)(A). The federal Privacy Act would also bar schools from release of social security numbers. 5 U.S.C. § 552a (2000 & Supp. IV 2004).

<sup>250</sup>The FPCO model notice recognizes this. *See* Family Policy Compliance Office, PPRM Model Notice and Consent/Opt-Out for Specific Activities (October 2006), available at [www.ed.gov/policy/gen/guid/fpc](http://www.ed.gov/policy/gen/guid/fpc) (providing an opt-out notice for the release of FERPA directory information and a consent form for other information).

information for commercial purposes.<sup>251</sup> These examples involve fairly inoffensive and unobtrusive, albeit minimally educationally-related, activities. Yet several recent administrative decisions<sup>252</sup> show the extent to which many schools have facilitated, albeit apparently unwittingly, massive disclosures of student information to credit card companies and ad agencies which are not even arguably connected to schools' educational missions. These decisions involve school administration of student surveys which were represented as educational, but were actually used for marketing. Several seemingly educational entities, Educational Research Center of America ("ERCA"), Student Marketing Group ("SMG")<sup>253</sup> and National Research Center for College and University Admissions, Inc., ("NRCCUA"), distributed surveys to teachers and guidance counselors for completion by middle and high school students. Millions of students completed the surveys, which included questions about GPA, extracurricular activities, name and address, and date of birth. The entities represented themselves as nonprofit corporations and claimed that the surveys were "designed to help students further their education and professional development by enabling institutions of higher learning to identify potential students and to provide them with information about curricula, extracurricular activities and financial aid programs."<sup>254</sup> In

---

<sup>251</sup>Family Policy Compliance Office, PPRRA Model Notice and Consent/Opt-Out for Specific Activities (October 2006), *available at* [www.ed.gov/policy/gen/guid/fpc](http://www.ed.gov/policy/gen/guid/fpc). The FPCO Model Notice for Directory Information uses examples of "companies that manufacture class rings or publish yearbooks." Family Policy Compliance Office, Model Notice for Directory Information (undated), *available at* [www.ed.gov/policy/gen/guid/fpc](http://www.ed.gov/policy/gen/guid/fpc).

<sup>252</sup>*In re* Educ. Research Ctr. of America, Inc., 2003 WL 21100697 (F.T.C. May 6, 2003) (final order); *In re* Educ. Research Ctr. of America, Inc., 2003 WL 221366 (F.T.C. Jan. 29, 2003) (proposed consent order); *In re* The Nat'l Research Ctr. for Coll. and Univ. Admissions, Inc., 2003 WL 221365, 221367 (F.T.C. Jan. 28, 2003) (final orders); *In re* The Nat'l Research Ctr. for Coll. and Univ. Admissions, Inc., 2002 WL 31248527 (F.T.C. Oct. 2, 2002) (proposed consent order).

<sup>253</sup>Also doing business as College Bound Selection Service, 2003 WL 21100697, & 3.

<sup>254</sup>*Id.* at & 10.

fact, these entities aggregated the survey data to create lists and sold them to commercial entities including “banks, insurance companies, consumer goods and services providers, and list brokers,”<sup>255</sup> as well as credit card companies, direct marketers, database marketing companies and ad agencies.<sup>256</sup> At least in the case of ERCA, little if any information was compiled into survey reports for higher education institutions.<sup>257</sup>

Federal Trade Commission (“FTC”) complaints asserted that these entities had engaged in deceptive trade practices.<sup>258</sup> The FTC eventually issued consent orders which directed the entities to cease misrepresenting how personally identifiable data would be disclosed, to delete and not to use the data from past surveys for noneducational marketing purposes (as defined by the PPRA), and not to use the data from future surveys for noneducational marketing purposes (as defined by the PPRA) without a clear and conspicuous disclosure statement in all communications to parents, school employees and students relating to the surveys.<sup>259</sup>

e. Solving this problem.

One would hope that schools which were asked to administer surveys of the sort at issue in the FTC cases, and which knew the true uses of the data, would refuse. However, that has not proven to always be the case.<sup>260</sup> In contrast to

---

<sup>255</sup>*Id.* at ¶ 9.

<sup>256</sup>2003 WL 221365 at ¶ 8.

<sup>257</sup>2003 WL 21100697 at ¶ 14.

<sup>258</sup>It is worth noting that the FTC became involved only because the survey entities were deceptive about the true uses of the survey data. FTC enforcement would not be available for nondeceptive disclosure of student information for commercial purposes. For a proposal for a tort claim for persons whose personal data is misused, see Sarah Ludington, *Reining in the Data Traders: A Tort for the Misuse of Personal Information*, 66 MD. L. REV. 140 (2006).

<sup>259</sup>*See, e.g., id.*

<sup>260</sup>According to the NCLB Conference Committee report, there is a “growing practice of a large number of marketing companies going into classrooms and using class time to gather personal information about students and their families for purely commercial purposes.” *See supra* note 140 and accompanying text.

activities which at least arguably supported the school's educational mission,<sup>261</sup> like the mental health survey in *C.N.*,<sup>262</sup> using school time to have students complete a survey to create a database for credit card companies and ad agencies is wholly unrelated to a school's education mission. In light of this, the amended PPRA's identical treatment of these very different activities is both puzzling and troubling. If a school agreed to administer a survey for commercial purposes,<sup>263</sup> the amended PPRA would merely require specific advance notice and an opt-out opportunity. Since these surveys are not federally funded (nor is student participation seemingly required), the amended PPRA survey provisions, if applicable,<sup>264</sup> would not require affirmative consent.

What is not clear is why schools should be able to serve as conduits of student information for commercial purposes. Several alternative approaches to disclosure of student information for commercial purposes would be more protective of student privacy. The PPRA could require schools to get affirmative consent before disclosing student information for commercial purposes, as it does for certain surveys.<sup>265</sup> Preferably, state law could simply forbid

---

<sup>261</sup>Identifying youth mental health needs, and making appropriate community services available to meet those needs, ought to remove barriers to learning for some students.

<sup>262</sup>*See supra* Part III.E.2.

<sup>263</sup>At the higher education level there is some evidence of universities selling student information to commercial entities. *See, e.g.*, Kathy Chu, *Schools Give Student Data to Banks*, USA TODAY, Oct. 2, 2006 at A1 (universities making up to \$2.5M selling student mailing lists to banks and credit card companies, allowing them to market on campus, and cobranding credit cards for alumni). One commentator notes the significant market value of student mailing lists. *See* Susan Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1172 n.61 (2006).

<sup>264</sup>As discussed earlier with regard to the physical exams section, *see* notes 191-192 and accompanying text, *supra*, it is unclear whether the PPRA survey provisions also apply to a survey for commercial purposes, or whether the commercial purposes provision is the sole regulator.

<sup>265</sup>*See supra* Part IV.B.

schools<sup>266</sup> from disclosing personally identifiable student information for commercial use.<sup>267</sup> Such a ban would protect schools which face requests for student mailing lists compiled under the authority of state public records laws. As discussed earlier,<sup>268</sup> FERPA permits schools to release directory information to any person (including a third party for commercial purposes) without parent consent. State public records laws, however, may go further. These laws typically make public records available to any person, and exclude records protected by FERPA.<sup>269</sup> Since directory information falls under a FERPA exception, schools may be required by state public records law to turn over student mailing lists to commercial requesters.<sup>270</sup>

The logical structural approach for such a provision would be to amend the directory information provision in FERPA to preclude the release of directory information of both current and former students for commercial use.<sup>271</sup>

---

<sup>266</sup>For example Washington law forbids schools from release of mailing lists for commercial purposes. WASH. REV. CODE ANN. § 42.17.260(9) (2006).

<sup>267</sup>*Id.*

<sup>268</sup>See *supra* Part IV.C.7.c.

<sup>269</sup>Even if the state public records law does not have an explicit FERPA exemption, the federal FERPA statute would preempt the state statute.

<sup>270</sup>For examples of massive student records requests under state public records laws for noneducational purposes, see *Fish v. Dallas Indep. Sch. Dist.*, 170 S.W.3d 226 (Tex. App. 2005) (extensive coded student testing data requested under state public records law by citizen and NAACP; in battle of FERPA experts, jury agrees with two experts who testified that although the records were not personally identifiable, the students were readily identifiable and thus the information was “easily traceable” under FERPA and exempt from disclosure); *Osborn v. Regents of Univ. of Wisc.*, 647 N.W.2d 158 (Wisc. 2002) (extensive data on university applicants requested under state public records law by researcher and private individual rights organization; since FERPA does not protect applicant records, school must supply redacted records).

<sup>271</sup>Such a change would also expand protection from commercial disclosures to include higher education students, to whom the PPRA’s commercial disclosure limitation does not apply. Another commentator has also suggested tightening up FERPA’s directory information provision. See Susan Stuart, *Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 84 NEB. L. REV. 1158, 1211-12 (2006) (proposing

FERPA should also be amended to prohibit persons who receive directory information from redisclosing that information for commercial use. For example, a nonprofit entity offering tutoring services that receives student directory information should not be able to disclose the information to a credit card company.<sup>272</sup> If FERPA were amended in this manner, there would be no need to address collection and disclosure of student information in the PPRA. Collection of such information for commercial purposes is both a bad use of school time and inconsistent with NCLB's goal of prioritizing student academic achievement. However, this troubling scenario could easily be avoided if the schools simply had no ability to disclose such information for commercial purposes.

Finally, any exceptions to a ban on disclosure of student directory information for commercial use should be very limited. The PPRA's list of permissible "educational" marketing activities is too broad, and seems to condone, for example, school disclosure of student information to for-profit test preparation and tutoring companies, and sellers of class rings. While schools might agree to send such companies' brochures home with students, providing mailing lists with student names and addresses to these entities is unnecessary. Limiting any exceptions to nonprofit entities would also reduce inappropriate commercial disclosures.

8. *Other NCLB parent involvement and opt-out provisions.*

While not codified in the PPRA, it is worth noting that NCLB also adds a parent opt-out provision to the Drug Free

---

that directory information be defined more narrowly, with release limited to educational purposes, and that consent be required for any disclosure for commercial purposes); *id.* at 1169 (criticizing FERPA's identical treatment of student information gathered for educational as compared with other governmental purposes, which premise results for example in disclosure of student information for commercial purposes).

<sup>272</sup>Existing FERPA nondisclosure language which forbids redisclosure of student records does not apply to redisclosure of directory information. See 20 U.S.C. § 1232g(b)(4)(B) (2000 & Supp. IV 2004); 34 C.F.R. § 99.33 (2007).

Schools and Communities Act (“DFSCA”).<sup>273</sup> The DFSCA is a federally funded program which requires schools to provide drug and alcohol education, including a no use message, to all students every year.<sup>274</sup> The new provision requires schools to notify parents of the contents of DFSCA programs except for classroom instruction, and gives parents the right, upon written request, to opt their child out of DFSCA-funded activities.<sup>275</sup> This provision thus could change the outcome of the scenario in *Altman*,<sup>276</sup> in which the court held that the parents had no opt-out rights regarding the school’s DARE program. If that DARE program were DFSCA funded and completed outside of classroom instruction, the new provision would require informing parents about it and giving them the right to opt their children out of the program. This would not be required by the PPRA, which limits parent opt-out rights to noninstructional survey, mailing list and medical assessment activities.

Finally, to further NCLB’s premise that effective education requires parent involvement, schools are required to develop written parent involvement policies jointly with parents, distribute these policies to parents, and annually evaluate these policies with parents.<sup>277</sup>

#### IV. Enforcement of the PPRA

The PPRA includes no express private cause of action. Prior to the NCLB amendments, the few courts which addressed the question found that PPRA was a federal statute which was actionable under Section 1983.<sup>278</sup> Since these decisions, the Supreme Court in *Gonzaga v. Doe* has identified a new, tougher standard for deciding which federal statutes may form the basis for Section 1983 claims. There the Court specifically held that FERPA violations are not actionable

---

<sup>273</sup>20 U.S.C. at § 7163 (2000 & Supp. IV 2004).

<sup>274</sup>*Id.* at §§ 7101-18. Section 7115 sets out the specific programmatic requirements.

<sup>275</sup>*Id.* at § 7163.

<sup>276</sup>*See supra* Part III.E.3.

<sup>277</sup>20 U.S.C. at § 6318 (2000 & Supp. IV 2004).

<sup>278</sup>*See supra* Part III.E.

under Section 1983 under this standard,<sup>279</sup> and it seems clear that PPRA claims are similarly non-actionable under Section 1983.<sup>280</sup> Moreover, the administrative enforcement option is fairly toothless, and constitutional and state law claims are not applicable to most PPRA violations.

A. *Gonzaga v. Doe*:<sup>281</sup> *A new standard for Section 1983 claims asserting statutory violations*

Prior to *Gonzaga*, the Court articulated and repeatedly applied a two part test to determine whether a particular federal statute was actionable under Section 1983. First, the Court examined whether the statute in question created benefits which were determinate enough to be enforceable.<sup>282</sup> Second, the Court examined whether Congress had created a comprehensive remedy which would make unnecessary, and thereby foreclose, enforcement under Section 1983.<sup>283</sup> The Court in *Gonzaga* held that FERPA created no rights enforceable under Section 1983. In the majority opinion, the Court purported to affirm its prior two-part analysis,<sup>284</sup> but announced several new principles. First, the Court announced a sort of unofficial presumption against Spending Clause legislation creating Section 1983-enforceable rights, noting that the normal remedy for violations of Spending Clause

---

<sup>279</sup>See *infra* Part V.A.

<sup>280</sup>The *Gonzaga* decision also postdates the NCLB amendments to the PPRA, so Congress did not have a chance in those amendments to explicitly address section 1983 actionability under the new standard. Nonetheless, it is conspicuous that in the almost five years since the *Gonzaga* decision, Congress has not acted to amend the PPRA's enforcement provisions. In the last session of Congress, an unsuccessful bill would have created a private cause of action for FERPA, but not PPRA, violations in federal court. Remedies for proven FERPA violations would have included injunctions and damages, with treble damages available for willful or knowing violations. The bill did not provide for reimbursement of attorney's fees. H.R. 6315, 109th Cong. (2nd Sess. 2006).

<sup>281</sup>*Gonzaga v. Doe*, 536 U.S. 273 (2002).

<sup>282</sup>See *Gonzaga*, 536 U.S. at 294-95 (Stevens, J., dissenting).

<sup>283</sup>*Id.* The Court did not reach this second prong of the analysis in *Gonzaga*. *Id.* at 290 n.8.

<sup>284</sup>*Id.* at 282-83.

legislation was termination of funding rather than private lawsuits.<sup>285</sup> Second, the Court announced that Congressional intent was determinative in ascertaining if Section 1983-enforceable rights could be inferred from a statute.<sup>286</sup> Third, the Court announced that the analysis used to decide if a statute created a private cause of action relevant to determining if the same statute was enforceable under Section 1983.<sup>287</sup> Finally, the Court distinguished statutes such as Title VI and Title IX, which are couched in the language of personal interests, with statutes such as FERPA, which it found to be couched in systemic language.<sup>288</sup>

Under this analysis, PPRA seems indistinguishable from FERPA. Both are Spending Clause legislation. In fact, both are part of the same GEPA conditions on the receipt of certain federal education funds.<sup>289</sup> Also, while both repeatedly refer to “rights,” they contain references to school policies<sup>290</sup> which the Court in *Gonzaga* found imposed systemic requirements on schools under FERPA rather than creating enforceable individual rights.<sup>291</sup> The PPRA’s scant legislative history contains no affirmative evidence that Congress intended a private cause of action or Section 1983 enforcement.<sup>292</sup> In fact, an older amendment to the PPRA established of the same FPCO administrative complaint mechanism that already existed for FERPA,<sup>293</sup> as opposed to the right to file a lawsuit, or a Section 1983 claim.

Notably, after *Gonzaga* the parties in *C.N.* continued to litigate the school’s administration of the survey, but

---

<sup>285</sup>*Id.* at 280.

<sup>286</sup>*Id.*

<sup>287</sup>*Id.* at 283.

<sup>288</sup>*Id.* at 284.

<sup>289</sup>*See supra* note 17 and accompanying text.

<sup>290</sup>*See supra* notes 21-23 and accompanying text.

<sup>291</sup>*See supra* note 285 and accompanying text.

<sup>292</sup>*See supra* Part IV.A.

<sup>293</sup>*See supra* note 68 and accompanying text.

consented to dismissal of PPRA (and FERPA) claims on assumption there is no longer a private PPRA claim.<sup>294</sup>

*B. Administrative (FPCO) complaints*

With private claims and Section 1983 claims seemingly unavailable after *Gonzaga*, is there any meaningful way to enforce the PPRA? The statute and regulations set out two enforcement mechanisms. First, the federal government can move to terminate all of an offending school's federal education funding.<sup>295</sup> This is of course a drastic remedy, and one which has apparently never been invoked or even initiated.<sup>296</sup> Second, individuals who believe their FERPA rights have been violated can file a complaint with the Family Policy Compliance Office ("FPCO").<sup>297</sup> The FPCO, with its staff of ten,<sup>298</sup> may choose to investigate these complaints and seek voluntary compliance by the offending school.<sup>299</sup> There are no hearings, no timelines for processing complaints, no

---

<sup>294</sup>C.N. v. Ridgewood Bd. of Educ., 430 F.3d 159, 170 n.13 (3rd Cir. 2005) (noting that "the parties have obviously interpreted [*Gonzaga*] to dictate the fate of the private PPRA claim asserted here. The propriety of that assumption is not before us.").

Moreover, courts are beginning to find NCLB violations (such as a failing school not providing tutoring services or a transfer to a different school) not enforceable under Section 1983. See, e.g., Ass'n of Cmty Orgs. for Reform Now v. New York City Dep't of Educ., 269 F.Supp.2d 338, 343-44 (S.D.N.Y. 2003) (NCLB transfer and supplemental educational services provisions are not actionable under Section 1983). A federal court has also suggested that the Court's reasoning in *Gonzaga* meant that violations of federal confidentiality provisions for records of substance abuse/mental health counseling were not privately actionable. Briand v. Lavigne, 223 F.Supp.2d 241 (D. Me. 2002) (applying Court's reasoning in *Gonzaga*, violations of 42 U.S.C. § 290dd-2 do not create private right of action and apparently are not actionable under *Bivens* claim which is federal analog Section 1983).

<sup>295</sup>34 C.F.R. § 98.10 (2007).

<sup>296</sup>See *supra* note 75 and accompanying text.

<sup>297</sup>See 34 C.F.R. at §§ 98.5-.10.

<sup>298</sup>Email from Ellen Campbell, FPCO, to author (Nov. 21, 2002) (on file with author).

<sup>299</sup>34 C.F.R. §§ 98.8-.9.

judicial appeals, and no compensation or other recourse associated with these FPCO proceedings.<sup>300</sup>

### C. Federal enforcement

A third enforcement possibility is for the FPCO to ask the Department of Justice to enforce the PPRa. In *U.S. v. Miami University* (“*Miami*”),<sup>301</sup> the federal government successfully sought injunctive relief against a private university for alleged FERPA violations. The suit began well before the *Gonzaga* case, but the Sixth Circuit ruled after *Gonzaga*, holding that the decision did not affect the availability of federal enforcement.<sup>302</sup> The *Miami* court held that specific FERPA and GEPA language, as well as the “inherent authority to sue to enforce conditions imposed on the recipients of federal grants,” provided authority for federal enforcement of FERPA,<sup>303</sup> and thus presumably of the PPRa. *Miami* is apparently the only occasion where the federal government has sued to enforce FERPA, although GEPA appears to explicitly authorize federal enforcement.<sup>304</sup>

---

<sup>300</sup>As an example, the parents in *C.N.* filed administrative claims with the FPCO simultaneously with their lawsuit. Based on declarations and affidavits, FPCO found that students were required to complete the survey, triggering PPRa’s consent requirements, and thus found the schools had violated the PPRa. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 172 n.16. The remedy for this violation was described as follows “[The FPCO] ordered the Board to provide it with written assurance that all appropriate officials of the District have been informed of the PPRa requirements. Specifically, [that they were] informed of the requirement that written consent be obtained from parents prior to administering a survey that is subject to the PPRa.” *Id.*

As the dissent in *Gonzaga* notes, the virtually identical remedies under FERPA (FPCO complaint and termination of federal funding) “provide[] no guaranteed access to a formal administrative proceeding or to federal judicial review; rather it leaves to [FPCO] discretion whether to [even] follow up on individual complaints.” *Gonzaga v. Doe*, 536 U.S. 273, 297 (2002).

<sup>301</sup>*U.S. v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002).

<sup>302</sup>*Id.* at 818 n.20.

<sup>303</sup>*Id.* at 807-08 (citing 20 U.S.C. § 1232g(f) (FERPA) and 20 U.S.C. § 1234c(a) (GEPA), as well as Supreme Court precedent regarding federal suits to enforce spending clause legislation).

<sup>304</sup>20 U.S.C. § 1234c.

Notably, the federal government has apparently never sued to enforce the PPRA.

*D. State law claims*

State law claims might also be available, although close examination shows that availability to be narrow.<sup>305</sup> Some states have statutes governing student privacy, which might be privately enforceable.<sup>306</sup> Additionally, to the extent that school PPRA or similar privacy policy is violated by a private school, common law breach of contract claims might be available to private school students whose tuition payments supply the consideration for a contractual relationship, the terms of which include school privacy and other policies. However, the likely harm from a PPRA violation is mental, which is not normally compensable in contract.<sup>307</sup>

---

<sup>305</sup>For an examination of the narrow availability of common law claims under FERPA, see Lynn Daggett, *Bucking up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29, 42-44 (1997).

<sup>306</sup>For an overview of state education privacy laws, see Susan Stuart, *A Local Distinction: State Education Privacy Laws for Public Schoolchildren*, 108 W. VA. L. REV. 361 (2005) (but while reporting many state mini-FERPA laws, not reporting any mini-PPRA laws). These state laws vary greatly. For an overview of Texas's Parental Rights and Responsibilities statute, which among other things requires parent consent for surveys, and audio and video recording of students, see Linda Schlueter, *Parental Rights in the Twenty-First Century: Parents as Full Partners in Education*, 32 ST. MARY'S L.J. 611, 640-643 (2001) (citing TEX. EDUC. CODE § 26.009); *id.* at 641 nn. 21-12 (citing Texas provisions requiring consent for medical and psychological treatment, school-based health services, and referral for chemical dependency treatment); *id.* at 643 (noting two local lawsuits in which parents successfully settled claims against schools for giving surveys without consent); *id.* at 656 (noting statute provides no specific remedy for violations). In contrast, Illinois law requires mental health assessments for students in its public schools. See generally Jennifer Gelman, *Comment: Brave New School: A Constitutional Argument Against State-Mandated Mental Health Assessments in Public Schools*, 26 N. ILL. U. L. REV. 213 (2005) (criticizing statute as intrusive on substantive parenting rights).

<sup>307</sup>See generally RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981 & Supp. 2006).

Tort claims present several obstacles for plaintiffs, including governmental immunity where available for public school defendants. Moreover, the likely damages suffered as a result of a PPRA violation, for example providing sensitive information about sexual experience in response to a survey to which there was no parent consent or opt-out opportunity, would seem to be purely mental harm<sup>308</sup> which is insufficient to make out a negligence claim in some states, and in any event would likely not involve the severe emotional distress required by courts in states which do allow claims for negligently inflicted pure mental harm. This scenario would also fail to meet the harm requirement for other tort claims such as misrepresentation. Thus, negligence and many other tort claims would be viable only under very limited circumstances.<sup>309</sup>

---

<sup>308</sup>Unconsented to health care could amount to a malpractice or battery tort claim. See Danny Veilleux, *Medical Practitioner's Liability for Treatment Given Child Without Parent's Consent*, 67 A.L.R. 4TH 511 (1989 & Supp. 2007).

<sup>309</sup>For example, while there is no general legal duty to rescue, many states recognize a duty when there is a specific and serious risk of danger (e.g. in therapy a patient makes a serious and credible threat toward another person). See generally RESTATEMENT (SECOND) TORTS §§ 314, 314A (1965 & Supp. 2006). If a school, through a non-anonymous survey or evaluation, learned information about a student that created a legal duty to take affirmative action (perhaps, for example, that the student was considering suicide) and failed to take reasonable steps such as notifying the parents, causing harm, a negligence claim would lie. If a school did not use reasonable care in performing physical exams or screening of students, causing significant harm, a malpractice claim would be viable. Similarly, if a school misrepresented the nature of a survey or physical exam to parents, a claim for negligent misrepresentation or fraud might be available, if damages could be proven. See generally *id.* at §§ 525, 552. More generally, it seems unlikely that a PPRA violation would amount to negligence per se. One federal appeals court has held that FERPA violations do not constitute negligence per se. *Atria v. Vanderbilt Univ.*, 142 Fed. Appx. 246, 253-54 (6th Cir. 2005) (negligence claim involving professor's practice of returning graded exams in a pile for students to sift through and retrieve their own; FERPA sets only administrative policy requirements and not standard of care and thus cannot be basis of negligence per se claim).

The tort claim which seems most applicable is invasion of privacy. Proving such a claim requires a “highly offensive” intrusion into privacy.<sup>310</sup> Violation of the PPRA may suggest a “highly offensive” intrusion. However, since the PPRA’s structure mandates school policies rather than granting individual rights, if the violation is not part of or pursuant to school policy/practice (perhaps such as the single teacher in *C.N.II*<sup>311</sup> who allegedly told his students the survey was mandatory), a court may find no actual violation of PPRA and thus no highly offensive intrusion. However, parties seeking to substantiate a tort claim might use the nature of the information collected by the school as evidence of a highly offensive intrusion. The plaintiff in *Gonzaga* was awarded \$100,000 for invasion of privacy, which was upheld by the Washington Supreme Court.<sup>312</sup> That court held that the school’s investigation, pursuant to a rape allegation, and disclosure to state educational certification authorities of the plaintiff’s “personal relationships, habits, and even anatomy. . . the intimate details of a [teacher certification] candidate’s sex life” was a “highly offensive” intrusion into the plaintiff’s private affairs.<sup>313</sup> However, information obtained from students in a survey may also be of “legitimate concern to the public,” which defeats the tort claim.<sup>314</sup>

Beyond a highly offensive intrusion lie additional requirements that depend on the type of invasion of privacy theory applied. In appropriation claims, the defendant normally takes the plaintiff’s likeness for commercial gain.<sup>315</sup> If construed broadly, this theory might cover scenarios where schools disclose student information for commercial purposes but the student’s likeness is not involved and the school is not

---

<sup>310</sup>See generally RESTATEMENT (SECOND) TORTS at §§ 652A-D (1965 & Supp. 2006).

<sup>311</sup>See *supra* note 152 and accompanying text.

<sup>312</sup>*Gonzaga Univ. v. Doe*, 24 P.3d 390, 399-400 (Wash. 2001), *rev’d on other grounds*, U.S. (2002).

<sup>313</sup>*Id.*

<sup>314</sup>See generally RESTATEMENT (SECOND) TORTS at § 652D (1965 & Supp. 2006).

<sup>315</sup>See generally *id.* at § 652C.

benefiting financially. Intrusion claims normally require invasion of physical space,<sup>316</sup> which would not be involved in the administration of surveys, but might be involved in certain school physical exam activities, particularly ones which involve exposure of private body parts, or, if a broadly defined as in *Gonzaga*, an “intrusion” into sensitive information.<sup>317</sup> Non-anonymous student survey or physical exam information that causes significant damages might amount to a public disclosure of private facts under *Gonzaga*’s broad definition of an invasion of privacy claim, particularly if the damaging information is widely shared.<sup>318</sup> In general, however, invasion of privacy and other common law claims will not be available to redress PPRA violations.

*E. Violations of PPRA as grounds for employee discipline*

Although there appear to be no court decisions on point, violation of the PPRA is presumed to be grounds for employee discipline. Courts have, however, specifically held that violations of FERPA are a valid basis for employee discipline.<sup>319</sup>

## **V. Recent (Post-NCLB Amendments and Gonzaga) PPRA Litigation**

In the almost five years since *Gonzaga*, court discussions of the PPRA have been scarce. Parents seem to

---

<sup>316</sup>See generally *id.* at § 652B.

<sup>317</sup>See *supra* notes 310-314 and accompanying text.

<sup>318</sup>See generally RESTATEMENT (SECOND) TORTS at § 652D.

<sup>319</sup>See, e.g., *Swigart v. Kent St. Univ.*, 2005 WL 1077176 (Ohio App. 11th Dist. 2005) (upholding discharge of employee who contacted campus newspaper and disclosed 2.68 GPA of candidate for student government which had been reported to be 2.92); *cf. Roberts v. Fayette Cty. Bd. of Educ.*, 173 S.W.3d 918 (Ky. App. 2005) (failure to hire plaintiff as special education teacher not illegal where applicant had, among other things, violated FERPA by discussing student’s grades in front of classmates). See generally Dixie Snow Huefner and Lynn M. Daggett, *FERPA Update: Balancing Access to and Privacy of Student Records*, 152 ED. LAW REP. 469, 486 (2001); Lynn M. Daggett, *Bucking up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE L.REV. 29, 44 (1997).

have refocused on constitutional claims, specifically attempting to make PPRA claims the basis for constitutional privacy and parenting violations. This strategy has proved unsuccessful in two federal appeals courts.<sup>320</sup>

In order to identify psychological barriers to learning, a school mental health counselor in *Fields v. Palmdale School District* (“*Fields*”)<sup>321</sup> gave a mental health survey to elementary school students.<sup>322</sup> The survey included questions about sexual matters such as rating the applicability of statements “Touching my private parts too much” and “Thinking about having sex.”<sup>323</sup> Prior to administering the survey, the school obtained consent, but did not disclose the sexual nature of some of the questions.<sup>324</sup> The survey results were anonymous.<sup>325</sup>

---

<sup>320</sup>In recent constitutional claims involving FERPA violations, some courts have found that the context within which student records were disclosed means the student had no reasonable expectation of privacy in the records, thus dooming the constitutional privacy claim. *See, e.g.,* *Risica v. Dumas*, 466 F.Supp.2d 434, 440-41 (D.Conn. 2006) (student whose “hit list” on outside of his geography book found by school janitor, and was then disclosed to student on the list and to school staff, had no claim as court found FERPA did not create the reasonable expectation of privacy necessary to such claim); *C.M. v. Bd. of Educ. of Union Cty. Regl High Sch. Dist.*, 128 Fed. Appx. 878, 883-884 (3rd Cir. 2005) (no reasonable expectation of privacy in nondisclosure to attorneys, experts, insurance carrier, and other persons involved in parent’s IDEA litigation and OCR complaint). By analogy, courts facing PPRA constitutional claims might focus on the context in which sensitive information was gathered (e.g. in group counseling session) to find that the student had no reasonable expectation of privacy in the information.

<sup>321</sup>427 F.3d 1197 (9th Cir. 2005). The decision is criticized in Elliott Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), 29 HARV. J. L. & PUB. POL’Y 1133 (2006). The article notes a 320-91 House of Representatives vote to have the court rehear the case en banc. *Id.* at 1134 n.4 (citing H.R. Res. 547, 109th Cong. (2005)).

<sup>322</sup>*Fields*, 427 F.3d at 1200.

<sup>323</sup>*Id.* at 1202-03.

<sup>324</sup>*Id.* at 1201.

<sup>325</sup>*Id.*

Parents claimed violations of their constitutional privacy and constitutional parenting rights,<sup>326</sup> but did not make PPRA claims. The Ninth Circuit affirmed a dismissal of the parents' claims.<sup>327</sup> The unanimous opinion held that fundamental constitutional parenting rights did not extend to parents being the sole source of sexual information for their children, nor to veto the sexual information schools provide to students.<sup>328</sup> In fact, in some rather sweeping language, the court found that as to education the constitutional parenting right stopped at the schoolhouse door and was limited to the choice of whether to send their child to public school.<sup>329</sup> As to the privacy claim, the court found that since the survey was voluntary and anonymous it could not involve forced disclosure of sensitive information, nor did imparting information on sensitive issues amount to interference with making decisions about those issues.<sup>330</sup> The court thus found rational basis analysis applicable, and after defining the school's educational interests broadly,<sup>331</sup> found the survey to be rationally related to the school's interests in its students' mental health and achievement as well as its *parens patriae* interests.<sup>332</sup>

As discussed earlier, the parents in *C.N.* began their challenge to a school survey prior to the NCLB amendments of the PPRA. Their Section 1983/PPRA challenge was rejected as the survey was not intended to be required of students, and thus did not trigger PPRA consent requirements.<sup>333</sup> After the NCLB amendments and *Gonzaga*, the parents abandoned their PPRA/Section 1983 claim and

---

<sup>326</sup>*Id.* at 1202-03.

<sup>327</sup>*Id.* at 1211.

<sup>328</sup>*Id.* at 1206.

<sup>329</sup>*Id.* at 1207.

<sup>330</sup>*Id.* at 1207-08.

<sup>331</sup>The court specifically stated that "education is not merely about teaching the basics of reading, writing and arithmetic. Education serves higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds" *Id.* at 1209.

<sup>332</sup>*Id.* at 1209-11.

<sup>333</sup>*See supra* Part III.E.2.

instead pursued constitutional claims involving privacy (including parenting) and speech.<sup>334</sup> In the second round of this case (hereafter “*CN II*”), the Third Circuit affirmed summary judgment for the school on all claims. As discussed earlier, the Third Circuit found an issue of fact as to whether completion of the survey was truly voluntary,<sup>335</sup> but held that even if it were not voluntary, summary judgment was appropriate.<sup>336</sup>

The court subjected the informational privacy claims, which asserted that students were forced to disclose sensitive information in the survey, to a balancing test. This test revealed that the government interest in obtaining the information, although it was to further community mental health interests rather than educational interests specifically, outweighed any invasion of privacy, particularly given the intended voluntary and anonymous nature of the survey.<sup>337</sup> As to the parenting rights-oriented privacy claims, which asserted that completion of the survey interfered with important, intimate decision-making, the court found that, while mandatory nonconsensual counseling and psychological testing might in some circumstances be unconstitutional,<sup>338</sup> the parents’ decision regarding whether to have their child complete the survey was not so important and intimate as to rise to a colorable constitutional violation.<sup>339</sup> In rejecting the compelled speech claim, the court noted that the students were not asked to adopt any specific position on the sensitive issues in the survey,<sup>340</sup> were not truly compelled to complete the

---

<sup>334</sup>*C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3rd Cir. 2005) (hereinafter “*CN II*”) (survey of middle and high school students asking about drug and alcohol use, sexual matters, suicide attempts, and relationships; PPRA claim abandoned by parties on assumption there is no private PPRA claim).

<sup>335</sup>See *supra* notes 145-161 and accompanying text.

<sup>336</sup>*C.N. II*, 430 F.3d at 174-175.

<sup>337</sup>*Id.* at 179-81.

<sup>338</sup>*Id.* at 183.

<sup>339</sup>*Id.* at 184-85. The Third Circuit rejected the *Fields* holding, however, that constitutional parenting rights stopped at the schoolhouse door. *Id.* at 185 n.26.

<sup>340</sup>*Id.* at 187-88.

survey (for example by threat of punishment), the surveys were completed anonymously, and only aggregated results were released.<sup>341</sup> Now-Justice Alito joined in the opinion.<sup>342</sup>

In the limited circumstances in which they are available, state law claims might prove more promising for some parents. In one recent case, a school had a community mental health center administer a “TeenScreen” mental health evaluation to students.<sup>343</sup> The notice and opt-out required by the PPRA were provided, but affirmative consent was not required and the parents claimed not to have received the notice.<sup>344</sup> On the basis of this evaluation, a mental health center worker told the plaintiff, a high school student, that she had obsessive compulsive and social anxiety disorders.<sup>345</sup> The plaintiffs made a number of claims, from medical malpractice to a violation of their constitutional parenting and privacy rights, to tortious invasion of privacy and intentional infliction of emotional distress.<sup>346</sup>

Finally, in *Haas v. West Shore School District* (“*Haas*”), a student appealing his expulsion for drinking alcohol advanced the creative argument that a school interview of him about his alleged misconduct was a survey eliciting sensitive information concerning illegal/incriminating behavior for which prior parent consent was required by the PPRA as well as state law implementing the PPRA and the

---

<sup>341</sup>*Id.* at 190.

<sup>342</sup>*Id.* at 161. The constitutional phase of the *C.N.* litigation is noted and criticized as insufficiently protective of constitutional parenting rights in Robert Kubica, *Let’s Talk About Sex: School Surveys and Parents’ Fundamental Right to Make Decisions Concerning the Upbringing of their Children*, 51 VILL. L. REV. 1085 (2006).

<sup>343</sup>*Rhoades v. Penn-Harris-Madison Sch. Corp.*, 2006 WL 2788588 (N.D. Ind. 2006).

<sup>344</sup>*Id.*

<sup>345</sup>*Id.*

<sup>346</sup>*Id.* The court denied a motion to dismiss the constitutional, common law privacy, and the claim alleging failure to get written consent as required by state statute, holding them to be outside the administrative panel requirements for medical malpractice claims. *Id.*

school's PPRA policy.<sup>347</sup> The court disagreed, noting that the relevant state law applied to surveys by external entities,<sup>348</sup> would not apply if participation in the interview was not required,<sup>349</sup> and did not apply to interviews conducted by the school as part of disciplinary proceedings.<sup>350</sup> Notably, the dissenting judge would have held that the interview, if required, needed parent consent under the school's PPRA policy.<sup>351</sup>

---

<sup>347</sup>Haas v. West Shore Sch. Dist., 915 A.2d 1259, 1259-60 (Pa. Commw. Ct. 2007).

<sup>348</sup>*Id.* at 1259. The court's reasoning here is questionable; the PPRA's written consent and opt-out requirements are not limited to third party surveys.

<sup>349</sup>*Id.* at 1259 n.6 (noting that court below had found interview not to be required, but declining to reach issue).

<sup>350</sup>*Id.* at 1259.

<sup>351</sup>*Id.* at 1260 (Smith-Ribner, J., dissenting).

## VI. Putting the PPRA in Perspective

Prior to its amendment as part of NCLB,<sup>352</sup> the scope of the PPRA was quite limited. First and foremost, the pre-NCLB PPRA applied only to federally funded education activities. For those education activities which are federally funded, the pre-NCLB PPRA gave parents: 1) access to instructional materials, 2) the ability to prevent a school from requiring their child to complete a survey or evaluation which asked them to provide information in certain sensitive categories unless the parent consented, 3) notice of their PPRA rights, and 4) an informal FPCO complaint process for PPRA complaints. The pre-NCLB PPRA did not give parents control over their children's educational experiences, nor did it provide parents with any broad right to be involved in their children's education.

After amendment by NCLB,<sup>353</sup> the PPRA now also requires schools to develop written policies, "in consultation with parents," which give parents the right to inspect and sometimes opt out of surveys, to inspect instructional materials, to receive advance notice and the opportunity to opt out of certain medical exams and screenings, and to opt out of student information collected for sales or marketing. Schools must provide at least annual notice at the start of each academic year of these policies "directly to parents," and must provide additional notice if these policies are changed midyear, or if the school decides to engage in additional opt-out activities (for example, to conduct a survey which involves sensitive material). Most of these rights are not limited to federally funded activities, nor to required activities.

The NCLB-amended PPRA can be evaluated in light of the NCLB's overall goal of academic achievement for all students, advanced by school accountability and parent

---

<sup>352</sup>See *supra* Part III.F.

<sup>353</sup>See *supra* Part IV.

involvement,<sup>354</sup> as well as the student informational privacy and parenting rights that the PPRA specifically protects.<sup>355</sup>

*A. Limited impact on academic activities*

The NCLB-amended PPRA's broadening of access rights to virtually all of a school's instructional materials is wholly consistent with and furthers the parent involvement policy of NCLB.<sup>356</sup> Though one would hope that a federal statute was not needed for schools to make curricular materials available to interested parents, the PPRA's requirement of school policy requiring access to instructional materials access,<sup>357</sup> coupled with its requirement of direct notice to parents of their PPRA rights,<sup>358</sup> may enhance parental awareness of their access rights.

While parents now have increased access to instructional materials, the amended PPRA still does not accord parents a right of control over their child's academic experience, which some parents believe is, or should be, part of substantive parenting rights. The NCLB amendments do enhance parent control somewhat by requiring specific advance notice and parent opt-out opportunities for a number of activities. However, the opt-out activities are largely outside of a school's academic program. Invasive required physical exams and screenings might be part of interscholastic athletics, or the school nurse's duties, but they would not be part of any health, physical education, or other class. Similarly, a mental health survey or personality test would not be part of instruction in any class. Health class instruction might cover many of the PPRA's sensitive topics, but not at a level that amounts to surveying students' personal attitudes or experiences. The class might, for example, cover birth control methods, but would not ask students which methods they have used. In classes providing instruction on such sensitive issues,

---

<sup>354</sup>See *supra* notes 122-123 and accompanying text.

<sup>355</sup>See *supra* notes 50-54 and accompanying text.

<sup>356</sup>See *supra* note 123 and accompanying text.

<sup>357</sup>See *supra* Part IV.C.5.

<sup>358</sup>See *supra* Part IV.C.2.

the amended PPRA does not provide parents with control. Parents would not, for example, have PPRA rights to keep their children from participating in a health class which instructed students on various methods of birth control,<sup>359</sup> although they could inspect the instructional materials used in the class. Thus, to the extent the PPRA provides parenting rights, those rights are essentially limited to nontraditional, nonacademic school activities like the hypothetical birth control survey. While the NCLB-amended PPRA falls conspicuously short of giving parents substantive parenting rights as to their children's academic experiences, it remains consistent with NCLB goals of focusing on student academic achievement. If the PPRA gave parents broad opt-out rights for academic activities, schools would have to divert resources to keep track of and implement parent opt-out requests, and opted out students might miss instruction which is important to their scholastic achievement.

The nonacademic activities (school survey, physical exam, and disclosure of information for commercial purposes) which are the focus of the amended PPRA are thus largely peripheral to NCLB's academic goals. Therefore, evaluation of PPRA's regulation of these activities centers on how effectively the statute protects student informational privacy and/or substantive parenting rights/family privacy, all of which remain the specific goals of PPRA.

---

<sup>359</sup>State law may give parents the right to opt out of some curriculum. For example in Washington, parents may opt their children out of any sex or AIDS education program offered by their school district. WASH. REV. CODE ANN. § 28A.230.070(4) (2006) (AIDS education; parents may opt their children out after attending school's presentation on its AIDS education program); WASH. ADMIN. CODE § 180-50-140(4) (2006) (sex education).

Parent constitutional challenges, based on religious beliefs and/or constitutional parenting rights, to the curriculum their child is exposed to at school have been singularly unsuccessful. *See, e.g.,* *Grove v. Mead School Dist.*, 753 F.2d 1528 (9th Cir. 1985) (parent claim that teaching book *The Learning Tree* inhibits family's fundamentalist Christian religious beliefs and furthers the religion of secular humanism fails, particularly where school offered student alternative reading assignment).

### *B. Textual gaps and difficulties*

As noted throughout this article, the PPRA is replete with drafting difficulties. These include questions about whether there is a right of access to standardized achievement tests,<sup>360</sup> when responding to a survey is “required,”<sup>361</sup> what the scope of “surveys” and “evaluations”<sup>362</sup> may be, and whether the survey requirements apply to physical exams.<sup>363</sup> In fact, in some areas such as physical examinations and screenings, the PPRA’s text is simply incoherent.<sup>364</sup> The lack of significant legislative history for the PPRA<sup>365</sup> enhances the difficulty of interpreting the statute. Moreover, while FPCO did not draft the statute, and is thus not responsible for its drafting difficulties, FPCO’s failure to update the PPRA regulations in over twenty years, during which time two major sets of amendments were enacted,<sup>366</sup> enhances these interpretation difficulties. The annual notices and model policies FPCO does offer<sup>367</sup> largely track the statutory language and are not of significant additional interpretative assistance.

These difficulties frustrate NCLB and PPRA goals in several ways. To the extent that PPRA obligations are unclear, schools use staff time, as well as legal and other resources, in an attempt to attain increased clarity. These resources could, of course, instead be focused on student academic achievement. Parents who are unclear about their PPRA rights, or interpret them differently than the school does, may become frustrated. As a result these parents may become less, rather than more, involved in their child’s education.

---

<sup>360</sup>See *supra* notes 181-182 and accompanying text.

<sup>361</sup>See *supra* notes 145-161 and accompanying text.

<sup>362</sup>See *supra* notes 190-195 and accompanying text.

<sup>363</sup>See *supra* note 193 and accompanying text.

<sup>364</sup>See *supra* Part IV.C.6.b.

<sup>365</sup>See *supra* Part IV.A.

<sup>366</sup>See *supra* Part III.D.

<sup>367</sup>See *supra* note 168 and accompanying text.

### C. Lack of meaningful enforcement

In certain nonacademic activities, such as a survey with sexual questions, the PPRA does accord rights to parents, some of which undo the results of prior litigation such as *C.N.*<sup>368</sup> However, as discussed earlier,<sup>369</sup> the PPRA fails to provide meaningful enforcement of those rights. No private cause of action or Section 1983 claim is available. FPCO complaints offer no remedy to parents. Common law, state law, and constitutional claims are not widely available.

As with the textual difficulties described immediately above, lack of a meaningful enforcement mechanism frustrates NCLB and PPRA goals. Parents who believe a school has violated the PPRA but find they can do nothing about it likely become frustrated and also may become less, rather than more, involved in their child's education. If Congress really thinks the rights purportedly protected by the PPRA are important, it should add some meaningful enforcement mechanism; a formal administrative hearing mechanism, a private cause of action, enforcement under Section 1983, or some combination of remedies.<sup>370</sup>

### D. Costs to schools and impact on school activity choices

While the NCLB-amended PPRA does not prohibit schools from administering surveys or invasive physical exams, nor does it prohibit from collecting or disclosing

---

<sup>368</sup>See *supra* Part III.E.2.

<sup>369</sup>See *supra* Part V.

<sup>370</sup>For criticism of FERPA's virtually identical remedies and proposals for alternate enforcement mechanisms, see Lynn M. Daggett, *Bucking up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L.REV. 29, 56-66 (1997) (noting that FPCO complaint process is too weak, and removal of federal funds too harsh, respectively, and proposing less extreme and thus more workable remedies). For another student commentator claim that the PPRA cannot be meaningfully enforced and needs additional enforcement mechanisms, see Beth Garrison, *Note: Children Are Not Second Class Citizens: Can Parents Stop Public Schools from Treating their Children Like Guinea Pigs?*, 39 VAL. U. L.REV. 147, 195 (2004); *id.* at 209 (proposing "choice of action" for PPRA violations).

student information for commercial purposes, it does add significant and unsubsidized<sup>371</sup> transaction costs to schools which choose to engage these activities. First, schools have some relatively minor general transaction costs in developing the new policies required by the NCLB amendments, “in consultation with parents,” and providing the policy “directly to parents.” Second, and more significantly, engaging in any of the activities which require consent or an opt-out opportunity entails substantial additional transaction costs.

A school which wishes to administer a voluntary<sup>372</sup> survey involving sensitive information, for example, must either plan far enough ahead to provide specific notice (with at least approximate dates) to parents and inform them directly of opt-out rights in the annual PPRA notice, or send home a specific notice of the plan to administer the survey with this information. The school is required to make the survey available for inspection by interested parents, and must keep track of individual parents as well as adult and emancipated students who opt out of participation. On the day of the survey, the school must ensure that students who opted out are actually precluded from participation. If all or almost all students participate, the school risks a perception that the high turnout was somehow influenced by the school.<sup>373</sup> If, on the other hand, significant numbers of students do not participate, the survey results may not be representative or particularly useful. If students do not fill out the survey anonymously, the responses constitute an education record under FERPA to which parents have a right of access, reasonable explanation and interpretation.<sup>374</sup>

---

<sup>371</sup>As discussed earlier, the PPRA comes with no federal dollars to subsidize compliance. *See supra* Part II.A.

<sup>372</sup>In light of lack of clarity over “required” surveys discussed earlier, *see supra* notes 145-161 and accompanying text, schools may choose to get consent before administering even a voluntary survey, which adds further transaction costs.

<sup>373</sup>This concern was noted by the *C.N. I* court. *See supra* notes 156-157 and accompanying text.

<sup>374</sup>*See supra* note 183 and accompanying text.

Textual gaps and difficulties<sup>375</sup> enhance these transaction costs; for example, the lack of definition of “evaluation” and “survey.” The statute excludes IDEA evaluations of students,<sup>376</sup> suggesting that individual as well as group evaluations and surveys are regulated. It thus seems fairly clear that giving a single student a standardized personality test is covered by PPRA access, opt-out and consent requirements. Less clear is PPRA’s coverage of a school administrator’s questioning of a student accused of misconduct, as was the issue in *Haas*,<sup>377</sup> where the judges disagreed about the PPRA’s applicability. A colloquy on the House floor when the NCLB amendment to the PPRA was proposed indicates the requirements concerning surveys and evaluations were not intended to cover a teacher’s questioning of a student who is suspected of being abused, nor normal contact with a guidance counselor.<sup>378</sup> If the PPRA does cover a *Haas*-type scenario, schools will need to make significant changes in their approach to the investigation of discipline and other activities. Similarly, it is unclear whether survey access rights include standardized academic tests.<sup>379</sup> Survey access rights appear to include standardized personality tests such as the MMPI, which triggers additional school-borne concerns and transaction costs related to sharing copyrighted information with laypersons such as students’ parents.

Transaction costs and textual uncertainties may deter cautious schools from administering surveys, evaluations and physical screenings; a very good or a very bad result depending on perspective. From the perspective of some parents, schools should not be in the business of collecting information on mental health, medical, or other sensitive topics from minor students, and should certainly not do so using classroom time and a captive audience of minor students complying with compulsory education requirements. School time should be used for academic instruction, consistent with

---

<sup>375</sup> See *supra* Part VII.B.

<sup>376</sup> See *supra* note 207 and accompanying text.

<sup>377</sup> See *supra* notes 347-351 and accompanying text.

<sup>378</sup> 147 Cong. Rec. H2577-01 (daily ed. May 23, 2001).

<sup>379</sup> See *supra* notes 181-184 and accompanying text.

NCLB's emphasis on academic achievement. On the other hand, from the perspective of other parents, and some educators and mental health and medical care providers, schools offer a unique opportunity to gather data needed to assess and meet minors' mental health, medical and other needs, thereby enhancing learning and furthering NCLB's goals.

At the other end of the possible school behavior spectrum is the school which goes ahead and engages in these activities without complying with the PPRA. Unfortunately, the statute offers no meaningful punishment for this type of school, nor does it provide any recourse for students. As discussed earlier,<sup>380</sup> there is no private enforcement of the PPRA, nor is it actionable under Section 1983. The FPCO complaint process is toothless. The sole remedy set out in the statute, withdrawal of all federal education funds, is draconian, based more in theory than reality, and offers no remedy to the student. Constitutional and state law claims may be available under narrow circumstances, but not broadly.

*E. Linking PPRA provisions more closely to furthering schools' educational mission*

Both the parenting rights and student informational privacy premises of the PPRA, as well as NCLB goals in general, focus on schools' educational mission. Under the NCLB, the primary mission of a school is the academic achievement of all students, attained in part through parent involvement.<sup>381</sup> However, the two PPRA premises suggest limits on schools' educational mission. The parenting rights perspective suggests a parental veto power on how a school delivers its educational mission, at least for certain nonacademic activities. The student informational privacy perspective suggests that schools' educational mission should not include inappropriate collection or disclosure of student information.

---

<sup>380</sup> See *supra* Part V.

<sup>381</sup> See *supra* notes 121-123 and accompanying text.

These perspectives actually share significant common ground. Both would be furthered by more closely tying PPRA regulation to activities which do not further a school's educational mission. The PPRA has already implemented this strategy with regard to academic activities,<sup>382</sup> where it bows to school authority and discretion and accords parents a right to be involved, but not to control. With respect to nonacademic activities, PPRA's current linkage to the educational mission of school is too tenuous and should be strengthened. For example, the trigger for PPRA consent and opt-out requirements for surveys is the inclusion of questions which ask about certain sensitive information, yet the PPRA survey requirements do not distinguish between school-administered surveys which have educational purposes and those which are for other purposes. They should. A school's authority to have its students respond to a survey involving sensitive questions which serves an educational goal is greater, and the intrusion on student privacy and parenting rights is less, than when a school has students respond to the same survey for non-academic reasons. This distinction should be recognized in PPRA.

An example of a student survey seemingly administered for legitimate educational purposes is the one at issue in *Fields*,<sup>383</sup> in which the school gave a mental health survey to elementary school students to identify psychological barriers to learning. This case also illustrates that legitimate educational purposes are not strictly limited to academic activities. On the other hand, a survey of students for the purpose of collecting market research for a product obviously serves no valid educational purpose. Somewhat less clear is the survey in *C.N.*,<sup>384</sup> which was administered on behalf of

---

<sup>382</sup>See *supra* Part VII.A.

<sup>383</sup>427 F.3d 1197 (9th Cir. 2005). The decision is criticized in Elliott Davis, *Unjustly Usurping the Parental Right: Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), 29 HARV. J. L. & PUB. POL'Y 1133 (2006). The article notes a 320-91 House of Representatives vote in favor of the court rehearing the case en banc. *Id.* at 1134 n.4 (citing H.R. Res. 547, 109th Cong. (2005)).

<sup>384</sup>See *supra* Part III.E.2.

community organizations to assess the mental health needs of area youth. As in *Fields*, the school might say that the survey would enhance student learning by making appropriate community mental health services available to its students. Yet such a survey would be unrelated to the school's education mission if it were used purely to meet social service needs, or strictly as a social science research tool that utilized the school's captive audience of research subjects. In such cases, schools should be accorded some deference in defining when a survey is administered for educational purposes, so long as the school publicly announces the established educational purpose prior to administering the survey.

Schools should have wide authority to administer surveys when the school determines that doing so serves the school's educational mission. On the other hand, the current PPRA presumes parent consent and requires only an opt-out opportunity for a non-required survey which serves no educational purpose, such as a marketing survey, or one that uses students as research subjects for purely social science research. Such surveys take time out of the school day which could be used for academic instruction and hopefully enhanced achievement. Schools should be prohibited from using school resources to administer surveys for noneducational purposes.

A final issue on which most parents and educators can likely agree is that the amended PPRA does not go far enough in preventing student information from reaching commercial entities such as credit card companies. Currently, the PPRA and FERPA allow schools to disclose student names, addresses and phone numbers for commercial purposes after providing parents with an opt-out opportunity.<sup>385</sup> In fact, under some states' public records laws, disclosing student mailing lists to a commercial entity on request is actually required.<sup>386</sup> Such activities are not part of a school's educational mission and ought to be flatly prohibited. Directory information such as student mailing and telephone

---

<sup>385</sup> See *supra* Part IV.C.7.

<sup>386</sup> See *supra* notes 268-270 and accompanying text.

lists should be released only for educational reasons, and schools should carefully scrutinize the requester's professed need for the student mailing or telephone list. For example, a company marketing class rings may realize comparable benefits by providing the school with brochures for students and/or having a company representative visit the school to talk with interested students instead of collecting a comprehensive student contact list from the school. In any event, persons and entities receiving such information should certainly be barred from re-releasing it to commercial entities.

### **Conclusion**

After its amendment by NCLB, the "Protection of Pupil Rights Act" does little to live up to its title. PPRA grants no enforceable "rights," and due to its textual problems and lack of meaningful redress, offers little actual "protection." In fact, the PPRA continues to freely permit many activities which have nothing to do with schools' educational mission, and which interfere with both parental autonomy and student privacy. If Congress is serious about protecting pupil rights, it must act to amend and improve this statute, and arm those affected by it with effective enforcement rights.