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Civil Rights - Education: Do Violations of the Family Educational Rights and Privacy Act of 1974 (FERPA) Create an Enforceable Right under the Meaning of 42 U.S.C. 1983

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CIVIL RIGHTS—EDUCATION: DO VIOLATIONS OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974 (FERPA) CREATE AN ENFORCEABLE RIGHT UNDER THE MEANING OF 42 U.S.C. § 1983 *Gonzaga University v. John Doe*, 536 U.S. 273 (2002)

I. FACTS

In October of 1993 John Doe was a student in Gonzaga University's Department of Education.[1] He had planned to teach in the State of Washington upon graduation from Gonzaga, as he had submitted an application to the state seeking teacher certification.[2] In addition to submitting an application for teacher certification in Washington, he also had to submit an affidavit from the dean of the Education Department that would support his good moral character.[3] Roberta League, Gonzaga's teaching certificate specialist, overheard a student's conversation on October 5, 1993, that dealt with another student at Gonzaga, Jane Doe, who had been physically injured as a result of the actions of John Doe.[4] League, after recognizing that John Doe was a student in the Department of Education and currently was a student teacher, discussed the conversation with the director of field experience for student teachers at Gonzaga, and then decided to investigate the situation further.[5] League's investigation consisted of speaking to the student whom she had overheard talking about Jane Doe, and making various attempts to get Jane Doe to come forward about the date rape allegations.[6] League also contacted a senior investigator with the Office of the Superintendent of Public Instruction (OSPI), which regulates teacher edu-

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1. Doe v. Gonzaga Univ., 992 P.2d 545, 549 (Wash. Ct. App. 2000).

2. *Id.* at 549-50.

3. *Id.* The dean would have to certify, under penalty of perjury, that, "several faculty members have been contacted who personally know or knew _____, who is a candidate for certification. They have no knowledge . . . that the applicant has been convicted of any crime or has a history of any serious behavioral problems." Doe v. Gonzaga Univ., 24 P.3d 390, 393 n.3 (Wash. 2001).

4. *Doe*, 992 P.2d at 549. League overheard that Jane Doe's injuries consisted of obvious physical pain that was a result of having sex with John Doe. *Id.*

5. *Id.*

6. *Id.* at 550-51. Both the student who League initially overheard talking about Jane Doe and the director of field experience for student teachers talked with Jane Doe about making a formal statement about the sexual allegations, but Jane Doe refused to make such a statement and instead said "'I guess I don't really know what rape is,' and, 'I promised [John Doe] I wouldn't tell. He made me promise.'" *Id.* at 550.

cation programs, to inform her that a teacher education student, John Doe, "had possibly date raped another student."[7] League, in subsequent conversations with OSPI, identified John Doe by name.[8]

In March 1994, John Doe was told in a letter from the Dean of the Department of Education, that the dean would not give Doe the moral character affidavit from Gonzaga "in light of allegations of sexual assault."[9] John Doe was not provided any information as to what the sexual assault allegations were, or who had actually made such allegations.[10] When John Doe and his parents asked Gonzaga about their possible appeal rights in relation to the dean's refusal to submit the affidavit of moral character, "they were told there were none."[11]

John Doe then sued Gonzaga and Roberta League in state court for violations of tort and contract law, and violation of 42 U.S.C. § 1983 for releasing his personal information without his consent to an unauthorized person in violation of the Family Educational Rights and Privacy Act of 1974 (FERPA).[12] After a trial in Spokane County Superior Court, the jury ruled in favor of John Doe on every count, which resulted in a total award of $1,155,000, which included $150,000 in compensatory damages and $300,000 in punitive damages for the FERPA claim.[13]

At the trial, Gonzaga made a motion for judgment as a matter of law on John Doe's FERPA claim, which raised the issue that there was no right or privilege under § 1983 created by FERPA.[14] Gonzaga also argued that its conduct, the release of John Doe's personally identifiable information to an unauthorized person without John Doe's consent, was not done under the color of state law.[15] The trial court denied Gonzaga's motions, so it appealed both the judgment and the denial of its motions.[16]

The Court of Appeals of Washington found that the trial court erred by not granting a directed verdict to Gonzaga on the § 1983 claim.[17] The court

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7. *Id.*

8. *Id.*

9. Brief for Respondent at 3, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (No. 01-679).

10. *Id.* at 3, 5.

11. *Id.* at 5.

12. Gonzaga Univ. v. Doe, 536 U.S. 273, 277, 122 S.Ct. 2268, 2272 (2002).

13. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 396 (Wash. 2001). The complete breakdown of the jury verdict provided $500,000 on the defamation count, $55,000 on the breach of educational contract count, $50,000 on the negligence count, $450,000 on the FERPA count, and $100,000 on the invasion of privacy count. *Id.*

14. Brief for Petitioner at 7, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002) (No. 01-679).

15. *Id.*

16. *Id.*

17. *Doe*, 992 P.2d at 555. The court of appeals also held that Gonzaga was entitled to judgment as a matter of law on Doe's claims for invasion of privacy, negligence, and breach of

held that FERPA did "not create any right or privilege that private individuals can enforce under § 1983."[18] FERPA was viewed as legislation that required a system-wide plan be in place at participating schools, rather than a law that attempted to ensure that "the needs of any particular person have been satisfied."[19]

The Washington Supreme Court granted John Doe's petition for review, and it reversed in part and affirmed in part the court of appeals' holding.[20] The supreme court sustained the jury's verdict on the FERPA claim, and the judgment was reinstated.[21] The court also held that FERPA itself may not give rise to a private cause of action, but John Doe did not have to allege a private cause of action under FERPA to bring a § 1983 claim.[22] The court recognized that Doe had asserted the FERPA violation itself as the grounds for his § 1983 claim, "which provides a remedy for violation of federally conferred rights."[23] Then the court applied the test set forth by the United States Supreme Court to determine whether the statutory provisions of FERPA that were violated gave rise to a privately enforceable federal right.[24] After deciding that the FERPA provision in question passed the test and provided a privately enforceable right under § 1983, the court concluded there was "substantial evidence to support the jury finding that the trial defendants deprived [John Doe] of his federal statutory right under FERPA."[25]

The United States Supreme Court granted certiorari to decide "whether a student may sue a private university for damages under Rev. Stat. § 1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), to enforce provisions of the Family Educational Rights and Privacy Act of 1974."[26] As the supreme court and court of appeals in Washington, as well as other federal courts have divided on this issue, the United States Supreme Court decided to resolve the conflict between these lower courts and clarify "any ambiguity in [its] own

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educational contract. *Id.* at 549. Doe's defamation claim was remanded for a new trial as some of the trial court's evidentiary rulings were reversed. *Id.*

18. *Id.*

19. *Id.* at 556 (citing Blessing v. Freestone, 520 U.S. 329, 343 (1997).

20. *Doe*, 24 P.3d at 393.

21. *Id.* The defamation, invasion of privacy, and breach of contract jury verdicts were also sustained and their judgments reinstated, but the negligence claim was dismissed. *Id.*

22. *Id.* at 400.

23. *Id.* (citing Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990)).

24. *Id*; *see also Blessing v. Freestone,* 520 U.S. 329, 340 (1997).

25. Respondent's Brief at 7, Gonzaga University v. Doe, 536 U.S. 273 (2002) (No. 01-679). The Washington Supreme Court also found that substantial evidence existed that Gonzaga acted under the color of state law, another requirement necessary to bring an action under a § 1983 claim. *Id.* The issue of whether Gonzaga acted under the color of state law was not granted certiorari by the U.S. Supreme Court. 122 S.Ct. 865 (Mem) (2002).

26. Gonzaga University v. Doe, 122 S.Ct. 2268, 2271 (2002).

opinions."[27] The Court *held* that one could bring a § 1983 action against state actors in an effort to enforce rights that are created by federal statutes, but spending legislation that is drafted in the style of FERPA did not confer enforceable rights, and therefore did not allow one to seek a remedy under § 1983.[28]

II. LEGAL BACKGROUND

A. THE FAMILY EDUCATIONAL AND PRIVACY RIGHTS ACT OF 1974 (FERPA)

FERPA conditions the receipt of federal funds under the programs of the Department of Education on educational institutions' compliance with FERPA's provisions that pertain to the procedures regarding the handling and keeping of educational records.[29] Congress enacted FERPA to protect the privacy of students and their parents by allowing parents access to their child's educational records, and by preventing the release of a student's educational record to third parties without the parents' consent.[30] Educational institutions must follow the conditions relating to access and disclosure of a student's educational records, or the Secretary of Education, acting under the spending power of Congress, can withhold federal funds from that institution.[31]

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27. *Id.* at 2272. The Supreme Court determined that since all of these courts based their decisions on the same Supreme Court opinions, the Court decided that its "opinions in this area may not be models of clarity." *Id.*

28. *Id.* at 2273; *see also* Maine v. Thiboutot, 448 U.S. 1, 9 (1980) (allowing § 1983 claims to be brought against state and local officials that are based on federal statutory rights).

29. John E. Theuman, Annotation, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA) (20 U.S.C.A. §1232g)*, 112 A.L.R. FED. 1, § 2(a) (1993). FERPA is often referred to as the Buckley Amendment, as Senator Buckley was a chief sponsor of the legislation. *Id.*

30. *Id.*; *see also* 20 U.S.C. § 1232g.

31. 20 U.S.C. § 1232g. The most relevant provision of FERPA as discussed in the Court's majority opinion in Gonzaga v. Doe states:

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

20 U.S.C. § 1232g(b)(1)(2002).

The dissenting opinion of Justice Stevens would also consider the following provisions:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the

FERPA defines an educational record as documents, files, records, or other materials which "contain information directly related to a student; and are maintained by an educational agency or institution or by a person acting for such agency or institution."[32] FERPA states that an educational record does not include records of instructional and administrative personnel, which are still in the sole possession of the person who created the record and have not been revealed to any other person except a substitute.[33] Records maintained by the law enforcement unit of the educational institution, which were created for the purpose of law enforcement, are also not considered educational records.[34]

If a parent or student believes a violation under FERPA has occurred, that student must file a written complaint with the United States Secretary of Education.[35] The Secretary of Education, under the power granted to him or her under FERPA, has an office designated within the department, the Family Policy Compliance Office (Office), to "investigate, process, and review complaints and violations under the Act."[36] The Office also "[p]rovide[s] technical assistance to ensure compliance with the Act."[37] If the Office determines that an educational institution has not complied with FERPA, the Office must give that institution a statement containing specific

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parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

Gonzaga 536 U.S. at ___, 122 S.Ct. at 2281 n.1 citing 20 U.S.C. § 1232g(a)(1)(A).

No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

Gonzaga, 536 U.S. at ___, 122 S.Ct. at 2281 n.1. *citing* 20 U.S.C. § 1232g(a)(1)(B).

32. 20 U.S.C. § 1232g(a)(4)(A).

33. *Id.* at 20 U.S.C. § 1232g(a)(4)(B).

34. *Id.* at § 1232g(a)(4)(B)(ii). FERPA also does not consider records for students, over the age of eighteen or attending a postsecondary educational institution, that are created and maintained by a recognized medical professional to be an education record, "except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice." *Id.* at § 1232g(a)(4)(B)(iv). Records for employees at an educational institution for persons who are employed by that institution, but are not attending the institution are not education records so long as they relate to that person's capacity as an employee. *Id.* at § 1232g(a)(4)(B)(iii).

35. 34 C.F.R. § 99.63; *see also* 20 U.S.C. § 1232g(g)(2002).

36. 34 C.F.R. § 99.60; *see also* 20 U.S.C. § 1232g(g).

37. 34 C.F.R. § 99.60; *see also* 20 U.S.C. § 1232g(g). The Secretary also designates the Office of Administrative Law Judges to be the Review Board that is mandated under the Act (FERPA) to enforce the Act with respect to all applicable programs. 34 C.F.R. § 99.60.

steps the institution must follow in order to comply with FERPA.[38] An institution not complying with FERPA would then be given a reasonable period of time to allow the institution to comply voluntarily with FERPA.[39] If, after a reasonable period of time, the educational institution does not then voluntarily comply with FERPA, the Secretary may either withhold further payments under any applicable program and obtain a cease and desist order to compel the institution to comply, or terminate the institution's eligibility to receive federal funding under any applicable program.[40]

B. UTILIZING A PRIVATE RIGHT OF ACTION UNDER 42 U.S.C § 1983 TO ENFORCE PURELY STATUTORY VIOLATIONS OF FEDERAL LAW: THE EARLY CASES.

In *Maine v. Thiboutot*,[41] the Court held for the first time that a § 1983 action may be brought against state actors in an effort to enforce rights that were created by federal statutes.[42] In *Thiboutot*, the plaintiffs were a husband and wife, Lionel Thiboutot and Joline Thiboutot respectively, who had a total of eight children, of which three were Lionel's from a previous marriage.[43] Lionel had been receiving welfare benefits based on all eight children under Aid to Families with Dependent Children (AFDC),[44] part of the federal Social Security Act.[45] When the Department of Human Services for the State of Maine changed the way the state administered benefits under AFDC, Lionel was then entitled to benefits under AFDC for only the three children that were exclusively his, even though he was legally responsible for the other five children as well.[46]

The Thiboutots unsuccessfully challenged Maine's interpretation of AFDC before the state's administrative agencies before seeking relief under § 1983 "for themselves and others similarly situated" in the state superior

38. 34 C.F.R. § 99.66. After conducting an investigation the Office must provide both the complainant and the institution with the basis for its findings. *Id.* If the Office does not find that an educational institution violated FERPA after having received a complaint to that effect, the complainant and institution would still both receive notice of the Office's finding and the basis for its finding. *Id.*

39. *Id.* A reasonable amount of time to comply with FERPA is determined by the circumstances of the case. *Id.*

40. 34 C.F.R. § 99.67; *see also* 20 U.S.C. § 1232g(f) (2002).

41. 448 U.S. 1 (1980).

42. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981).

43. *Thiboutot*, 448 U.S. at 3.

44. *Id.*; *see also* 42 U.S.C. § 602(a)(7) (1980).

45. *Thiboutot*, 448 U.S. at 3.

46. *Id.*

court.[47] The Supreme Judicial Court of Maine affirmed the superior court's decision in favor of the Thiboutots.[48] The United States Supreme Court granted certiorari to decide, "whether § 1983 encompasses claims based on purely statutory violations of federal law. . . ."[49]

Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .[50]

The Court had to answer whether the word "laws," as found in § 1983, should be limited to a subset of laws or whether it literally meant all federal laws.[51] The Court concluded that because the statute, § 1983, was written in such plain language and Congress did not attach any modifiers to the phrase that included "laws," the statute encompassed Thiboutot's claim that Maine violated the Social Security Act.[52]

The Court also stated that even if one found § 1983 ambiguous as to whether it should apply to spending legislation, the Court had already decided cases that suggested the § 1983 remedy broadly included violations of federal statutory law.[53] For example, Justice Stone in *Hague v. Comm. for Indus. Org.*,[54] wrote that "§ 1983 was the product of an 'exten[sion] to include rights, privileges, and immunities secured by the laws of the United States as well as the Constitution."[55] In another previously decided case, the Court stated that a suit in federal court under § 1983 is proper to secure compliance by participating states with the provisions of the Social Security

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47. *Id.* The superior court enjoined the state from enforcing the new interpretation of AFDC, and required the state to adopt new regulations, pay the Tiboutots the correct amounts retroactively, and notify those similarly situated of the new regulations. *Id.* The superior court denied the Thiboutot's motion to be entitled to attorney's fees. *Id.*

48. *Id.* at 3-4. The Maine Supreme Court reversed the decision of the superior court in part by allowing the Thiboutots to be eligible to recover attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976. *Id.* at.

49. *Id.* The court also addressed the question that if one could recover under a § 1983 claim, could that plaintiff also recover attorney's fees under § 1988? *Id* at 4.

50. 42 U.S.C. § 1983 (2002).

51. *Thiboutot*, 448 U.S at 4.

52. *Id.*

53. *Id.*

54. 307 U.S. 496 (1939).

55. *Thiboutot*, 448 U.S. at 5 (*citing Hague v. CIO*, 307 U.S. at 525-526).

Act.[56] The Court concluded that § 1983 should not be read as limited to civil rights or equal protection laws.[57] Thus the Court held that § 1983 created a cause of action for deprivations of any federal statutory right.[58]

In 1981, less than a year after *Thiboutot* was decided, *Pennhurst State School and Hospital v. Halderman*[59] afforded the Supreme Court the chance to discuss factors that could prevent one from bringing a § 1983 action for state noncompliance with federally imposed conditions.[60] The parties in *Pennhurst* did not raise the issue of a § 1983 action, but the Court decided to briefly discuss what would prevent a § 1983 action in light of its recent decision in *Thiboutot*.[61] Before the decision in *Thiboutot,* the typical remedy for a state's noncompliance with federally imposed conditions in legislation enacted under Congress's spending power would not be a private cause of action for noncompliance.[62] Instead, the remedy would be an action by the federal government to terminate funds to the State.[63] The *Pennhurst* Court purported that one could bring an action under § 1983 for violations of rights that were secured by the federal laws of the United States based upon two factors.[64] The first factor that the plaintiff must show is that the state's noncompliance with the spending legislation involved a right secured by the laws of the United States.[65] The second factor

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56. *See id.* at 4 (*citing* Rosado v. Wyman, 397 U.S. 397 (1970)); *see also* Lynch v. Household Finance Corp., 405 U.S. 538, 543 n. 7 (1972) (stating that § 1983 was different from its predecessor in that it had been expanded to "provide protection for rights . . . secured by federal law"); City of Greenwood v. Packwood, 384 U.S. 808, 829-30 (1966) (stating that state officers in a § 1983 suit may be responsible for damages "not only for violations of rights conferred by federal equal rights laws, but for violations of other constitutional and statutory rights as well.").

57. *Thiboutot*, 448 U.S. at 6-7. This decision was reached not only due to the plain language of § 1983 and past treatment of the provision, but also due to a finding that the legislative history in regards to the phrase "and laws" does not give a definite answer as to whether there were any limits to the laws that § 1983 would encompass. *Id.*

58. *Id.* at 9.

59. 451 U.S. 1 (1981).

60. *Pennhurst*, 451 U.S. at 28. *Pennhurst* dealt with determining the scope and meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DDBill). *Id.* at 25-26. The complaint alleged that conditions at Pennhurst, a medical facility that housed many mentally challenged patients who brought this action, were so poor that they denied plaintiffs due process and equal protection under the law in violation of the Fourteenth Amendment among other claims. *Id.* at 5. The U.S. Court of Appeals for the Third Circuit chose to find for the plaintiffs under an implied cause of action to enforce the bill of rights provision of the DDBill. *Id.* at 10. Although the court of appeals did not address a private right of action under § 1983, the Supreme Court raised the idea of how one would apply a private right of action challenge to the case. *Id.* at 27-28. However, the Court did not specifically analyze such a challenge, as the parties to the case did not raise a § 1983 action. *Id.* at 28.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

suggested that one could not bring a § 1983 action if the allegedly violated legislation provided an exclusive remedy for violations of its terms.[66]

The first factor from *Pennhurst* that must be met to allow one to bring a § 1983 action for violation of a federal law was more clearly defined in 1990 in *Wilder v. Virginia Hosp. Ass'n.*[67] The Court in *Pennhurst* had stated that a plaintiff bringing a § 1983 action may only do so if the statute claimed to have been violated, created an enforceable right under § 1983.[68] As the Court's decision in *Pennhurst* was focused on whether the statute gave rise to an implied right of action, the Court did not specifically address the process one must undertake to determine if spending legislation gave rise to an enforceable right under § 1983.[69] In *Wilder*, a three-prong test was utilized to determine whether the Boren Amendment the plaintiff claimed had been violated created a "federal right that was enforceable under § 1983."[70]

According to the *Wilder* test, a provision of a federal spending legislation statute creates an enforceable right under § 1983 if; 1) the plaintiff is one of the class of people intended to receive a benefit from the statute; 2) the provision reflects a binding obligation on the state, not a mere congressional preference for a certain kind of conduct, and 3) the plaintiff asserts an interest that is not "too vague and amorphous such that it is 'beyond the competence of the judiciary to enforce.'"[71] Using this test, the Court found that the Boren Amendment created an enforceable right under

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66. *Id.* This second factor was actually taken from the dissent by Justice Powell in *Thiboutot. Id.*

67. 496 U.S. 498, 509 (1990).

68. *Pennhurst*, 451 U.S. at 28.

69. *See id.* at 27-34. Some of what became the test to determine whether spending legislation creates rights that are enforceable under § 1983 in *Wilder* came from the test for determining whether an implied right of action exists in federal law that is discussed in *Pennhurst. See Wilder v. Virginia*, 496 U.S. at 508-09. The test for determining whether a statute provides for an implied right of action looks at four factors. *Cort v. Ash*, 422 U.S. 66,78 (1975).

Those factors are: 1) is the plaintiff "one of the class for whose especial benefit the statute was enacted;" 2) is "there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" 3) "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 4) "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Id.*

70. *Wilder*, 496 U.S. at 509. The issue in *Wilder* was whether the Boren Amendment to the Medicaid Act, which required "reimbursement according to rates that a 'State finds and makes assurances satisfactory to the Secretary [of Health and Human Services], are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities,' was enforceable in an action pursuant to § 1983." *Id.* at 503 (*citing* 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V)).

71. *Id.* (*citing* Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989) (*citing* Wright v. City of Roanoke Redevelopment & Hous. Auth., 107 S.Ct. 766, 774 (1987)).

§ 1983.[72] The decision in *Wilder* created the right "to have the State adopt rates that it finds are reasonable and adequate rates to meet the costs of an efficient and economical health care provider."[73]

The majority in *Wilder* concluded that the first prong of the test had been met as the plaintiffs, health care providers, were the class of persons intended to benefit from the Boren Amendment.[74] The language of the Amendment refers to payments to hospital services, nurse services, and intermediate care for the mentally retarded, which are synonymous with health care workers.[75]

The second prong of the test, which required the statute to impose a "binding obligation on the States that gives rise to enforceable rights,"[76] was met, as the Court determined that the Boren Amendment utilized mandatory rather than precatory terms.[77] The Court also found that because the state would lose its funding from noncompliance with the Boren Amendment, even if the state complied with the rest of the Medicaid Act, a binding obligation was imposed on the state.[78] The Court did not elaborate on the third prong of the test, regarding the plaintiff's interest not being too vague and amorphous, but the Court did conclude that the Boren Amendment met the test and created an enforceable right under § 1983.[79]

The second factor from *Pennhurst* would not allow a plaintiff to bring a § 1983 action where the statute that was violated provided an exclusive remedy for violations of its terms.[80] In *Middlesex County Sewerage*

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72. *Id.* at 522.

73. *Id.* The relevant portion of the Boren Amendment, which both the majority opinion and dissent cite as relevant, states that the Boren Amendment requires states to reimburse Medicaid service providers (hospital services, nursing facility services, and services in an intermediate care facility for the mentally retarded) "using 'rates (determined in accordance with methods and standards developed by the State. . .) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities. . .'" *Id.* at 503, 522 (citing 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V)).

74. *Id.* at 510.

75. *Id.*

76. *Id.*

77. *Id.* at 512. An example of such use of precatory terms would be when the amendment says the states "must" "'provide for payment. . .of hospital[s]' according to rates that the State finds are reasonable and adequate." *Id.* The reference to mandatory versus precatory terms was from *Pennhurst*, which purported that if Congress spoke in precatory terms, the statute was less likely to be what Congress intended to say. *Pennhurst State Sch. & Hosp. v.Halderman*, 451 U.S. 1, 18 (1981).

78. *Wilder v. Virginia*, 496 U.S. 498, 512 (1990).

79. *Id.* at 523. The Court also found that the second factor from *Pennhurst*, which would require Congress not to have created an exclusive remedy in a statute to proceed with a § 1983 action based on that statute was met, and the plaintiffs had a valid § 1983 action for violations of the Boren Amendment. *Id.* at 519-524.

80. *Pennhurst*, 451 U.S. at 28.

Authority v. National Sea Clammers Ass'n,[81] this second factor precluded the plaintiffs from pursuing a private action under § 1983 for violations of two federal acts.[82] The Court found that Congress had "foreclosed a § 1983 remedy" under each of the two Acts, as the remedial devices provided in the particular Acts were so comprehensive that they demonstrated congressional intent to preclude any remedy under § 1983.[83]

In *Middlesex,* the plaintiffs claimed the Federal Water Pollution Control Act (FWPCA) had been violated, but that Act conferred authority to both government officials and private citizens to sue in response to violations of provisions of the Act.[84] The EPA Administrator, in the event of violations of the FWPCA, could seek damages of $10,000 per day under civil penalties, as well as seek criminal penalties.[85] Any interested person could also seek judicial review of certain actions that were done by the EPA Administrator in the United States courts of appeals.[86] The other Act that the plaintiffs in *Sea Clammers* claimed had been violated provided many of the same enforcement mechanisms as the FWPCA, as well as provisions for express citizen suits.[87] The Court could not find that Congress intended to allow a § 1983 right of action when the Acts that were allegedly violated in the matter provided such "comprehensive enforcement mechanisms."[88]

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81. 453 U.S. 1 (1981).

82. *Middlesex County Sewerage Auth.*, 453 U.S. at 19-20. The Court raised the issue of whether a § 1983 action may apply in this case, despite the fact the respondents did not raise it themselves. *Id.* The case involved alleged damage to fishing waters due to dumping and discharges of waste into the ocean. *Id.* at 4-5. The plaintiffs had sought damages based on common law and under the provisions of two federal acts. *Id.*

83. *Middlesex County Sewerage Auth.*, 453 U.S. at 20. As the Court found the existence of Congress' intent to foreclose a remedy under § 1983, the Court did not attempt to discover if the Federal Acts created an enforceable right under § 1983. *Id.*

84. *Id.* at 11. The EPA Administrator was even authorized to allow the state in which the violation occurred the option to take action before doing so himself. 33 U.S.C. § 1319(a)(1) (1976 ed. Supp III).

85. 33 U.S.C. § 309(d), (c) (1981).

86. *Middlesex County Sewerage Auth,*453 U.S. at 13-14 This review must be sought within 90 days. *Id.* at 14 n.23.

87. *Id.* The citizen suit provisions in the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), as amended 33 U.S.C. § 1401 (1976 ed. and Supp.III), authorized private citizens to bring actions seeking injunctions to enforce this statute. *Id.* The similar enforcements of the MPRSA to the FWPCA included the assessment of both civil and criminal penalties by the Administrator of the EPA. *Id.* at n.24 (*citing* 33 U.S.C. §§ 1415(a), (b)).

88. *Id.* at 20.

C. TWO COMPETING METHODS OF DETERMINING IF A VIOLATION OF FEDERAL SPENDING LEGISLATION CREATES AN ENFORCEABLE RIGHT UNDER § 1983

Since *Thiboutot*, two exceptions emerged that would prevent a § 1983 action for violation of federal statutes.[89] These exceptions do not allow a private right of action under § 1983 "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983."[90] In terms of whether Congress has foreclosed the possibility of using § 1983 to enforce a violation of a federal statute, *Sea Clammers* still provides the best example of statutes or acts that foreclosed the possibility of a § 1983 action.[91] If an Act contains remedial measures that are 'comprehensive,' a suit under § 1983 would be precluded because the remedial measures would serve as congressional intent as to how violations of the Act should be remedied.[92]

The three-prong test used by the majority in *Wilder* continues to be a viable method to determine if a provision of federal spending legislation creates an enforceable right under § 1983.[93] In *Blessing v. Freestone*,[94] five mothers sued the director of Arizona's child support agency under § 1983, because they felt they had an enforceable right under certain provisions of the Social Security Act.[95] The Court noted that the lower court had applied the three-prong test and that this test was what the Supreme Court would utilize to determine if a statute creates a privately enforceable right.[96]

An alternative approach to determine whether a § 1983 enforceable right is created by a violation of a federal statute was used to decide the

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89. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 28 (1981); *see also* Wilder v. Virginia, 496 U.S. 498, 508 (1990).

90. Suter v. Artist M. 503 U.S. 347, 355-356 (1992); *see also* Blessing v. Freestone, 520 U.S. 329, 341 (1997).

91. *Blessing*, 520 U.S. at 346-347.

92. Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981).

93. *Blessing*, 520 U.S. at 340. The requirement of the three-prong test was as follows: "First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States." *Id.*

94. 520 U.S. 329 (1997).

95. *Id.* at 332. The mothers felt they had an enforceable right to have Arizona's program pertaining to child support services achieve "substantial compliance" with the requirements of a certain provision. *Id.* at 332-33.

96. *Id.* at 338. The Supreme Court then utilized the three-prong test when it determined whether a privately created right existed. *Id.* at 340-341. The case was remanded back to district court as no right for private action was found based on the plaintiffs' specific claim, but the possibility of enforceable rights may exist elsewhere in the statute. *Id.* at 347-349.

1992 case of *Suter v. Artist M*.[97] In *Suter*, the majority recognized that a § 1983 action may not be possible to enforce a violation of a federal statute "where the statute did not create enforceable rights . . . within the meaning of § 1983."[98] However, in *Suter* the Court did not use the three-prong test to determine if a right had been created.[99]

The Court, in an effort to ascertain if an enforceable right under § 1983 had been created, based its inquiry on whether Congress unambiguously conferred a right upon the Act's beneficiaries.[100] To determine if Congress intended to create a right, the Court had to analyze the language of the statute in question, which was a provision of the Adoption Act that required the state to use "reasonable efforts to prevent a child from being removed from his home, and once removed to reunify the child with his family."[101] The Court sought to discover if the "reasonable efforts" language placed a mandatory requirement on the state that rose to the level of unambiguously conferring a right to the plaintiffs.[102] The Act did place a requirement on the state according to the Court, but the "reasonable efforts" clause required only that the state have a plan in place to prevent a child from being removed from his or her house.[103] The "reasonable efforts" clause or other language in the Act did not require the state to have a specific method or procedure that would insure that the state was using "reasonable efforts" to prevent a child from being removed from his home.[104] No statutory guidance was found as to how to calculate "reasonable efforts," so the Court viewed the "reasonable efforts" language as a directive that would seem to vary according to the situation of each case.[105]

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97. 503 U.S. 347 (1992).

98. *Suter*, 503 U.S. at 355.

99. *Id.* at 355-358. The dissent raised the point that the majority did not use the three-pronged test that had been utilized in *Wilder* just two years before. *Id.* at 366.

100. *Id.* at 357, 363. In *Suter*, the plaintiffs in this class action lawsuit brought the action to obtain both declaratory and injunctive relief under the Adoption Act. *Id.* at 352. The plaintiffs believed that the defendants, the Director and an administrator from the Illinois Department of Children and Family Services (DCFS), violated 42 U.S.C. § 671(a)(15) (1988 ed., Supp. I) by failing "to make reasonable efforts to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred." *Id.* at 351-52.

101. *Id.* at 352, 357; *see also* 42 U.S.C. § 671(a)(15) (1992). The lower courts said that the "reasonable efforts" clause created a right that was enforceable under § 1983. *Id.* at 353-354..

102. *Id.* at 357.

103. *Id.* at 358.

104. *Id.* Had the Adoption Act set forth in detail some clear factors to be considered when determining how to prevent a child from being removed from his or her home an enforceable right may have been created. *Id.* at 359-360.

105. *Id.* at 360. This directive given to the states that they must use "reasonable efforts," appeared to give each state a fairly broad limit that it could apply. *Id.*

The Court also looked at the legislative history of the Act, and determined that although Congress was concerned about the required reasonable efforts made by the states, the Act did leave a great deal of discretion to the states.[106] Thus the Court concluded, after examining the language and legislative history of the Act, "that the 'reasonable efforts' language [did] not unambiguously confer an enforceable right upon the Act's beneficiaries."[107]

The test used in *Suter* was a departure from the three-prong test utilized in *Wilder*.[108] This new or alternative test was derived from the dissent in *Wilder*, which purported that the test for determining if a statute conferred an enforceable right under § 1983 should be the same as the test used in implied right of action cases.[109] In essence, the holding in *Suter* only allowed an enforceable right to be created under § 1983 if the Act that was violated contained an implied right of action for private enforcement.[110] The test to determine if an implied right of action exists is found in *Cort v. Ash*.[111] In his dissent from *Wilder*, Chief Justice Rehnquist noted that before *Thiboutot*, one had to demonstrate that a federal statute contained an implied cause of action to enforce judicially a provision within that statute.[112] He went on to say that "[t]he [c]ourt's general practice was 'to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.'"[113] Furthermore, Rehnquist concluded that when seeking a remedy for violation of a statute either under § 1983 action or by implied

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106. *Id.* at 362. The Court contrasted the Adoption Act language to the language found in the Medicaid legislation found in *Wilder*, where an enforceable right was found. *Id.* at 359. The Medicaid Act contained factors that prompted the Court to take the position that the Medicaid Act itself placed an obligation on the states, which required them to adopt reasonable and adequate rates. *Id.* There was nothing in the Adoption Act itself that placed an obligation on the state to act in a certain way in order to be acting with "reasonable efforts." *Id.* at 361-362.

107. *Id.* at 363.

108. *Id.* at 365-366. (Blackmun, J., dissenting).

109. *Wilder v.Virginia Hosp. Ass'n*, 496 U.S. 498, 525 (1990) (Rehnquist, C.J., dissenting).

110. *Suter v. Artist M.*, 503 U.S. 347, 363 (1992).

111. *Id.* The factors used to determine whether an implied right for private enforcement exists are as follows:

Those factors are: 1) is the plaintiff "one of the class for whose especial benefit the statute was enacted;" 2) is "there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?" 3) "is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?" 4) "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?"
Cort *v. Ash*, 422 U.S. 66,78 (1975).

112. Wilder, 496 U.S. at 525. Chief Justice Rehnquist also wrote the majority opinion in *Suter*. *Suter v. Artist M.*, 503 U.S. 347 (1992).

113. *Wilder*, 496 U.S. at 525 (*citing* Cannon v. Univ. of Chicago, 441 U.S. 677, 690 n.13 (1979)).

right of action, "the language used by Congress must confer identifiable enforceable rights."[114]

D, PAST DECISIONS INVOLVING § 1983 ACTIONS FOR VIOLATIONS OF FERPA

The existence and validity of both the three-prong *Wilder* test and the *Suter* test has caused confusion in lower courts in terms of which test to apply when determining if a federal statute has created an enforceable right under § 1983.[115] This confusion as to which test to apply can be seen in § 1983 actions that have been brought to enforce violations of FERPA. Courts have generally determined that if either of the two factors first noted in *Pennhurst*[116] exist, they would not allow a § 1983 action to be brought for a violation of FERPA.[117] The lower courts then tend to split in terms of what test or tests should be used to determine whether FERPA creates rights that are enforceable within the meaning of § 1983.[118] The lower courts have generally agreed that Congress did not foreclose bringing a § 1983 action to enforce violations of FERPA.[119]

Whether to apply the *Suter* implied right of action test[120] or the three-prong test of *Wilder*[121] has led the lower courts to reach different decisions as to whether violations of FERPA are enforceable by a § 1983 action. In *Falvo v. Owasso Ind. Sch. Dist.*,[122] the court relied upon the three-prong test found in *Wilder*, as it determined that the additional requirements of *Suter*

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114. *Id.* 525-26.

115. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 278, (2002).

116. *Pennhurst State Sch. & Hosp.*, 451 U.S. 1, 27-28 (1981). The two factors that would preclude a § 1983 action were 1) if the statute does not create rights that are enforceable within the meaning of § 1983, and 2) if Congress has foreclosed the possibility of § 1983 action through the enactment itself. *Id.*

117. *See* Falvo v. Owasso Indep. Sch. Dist., 233 F.3d 1203, 1211 (10th Cir. 2000); *see also* Belanger v. Nashua, New Hampshire Sch. Dist., 856 F.Supp. 40, 45 (D.N.H., 1994).

118. *Compare Belanger*, 856 F.Supp. at 44-45 (stating that the *Suter* test must first be applied, and then the *Wilder* test must be applied) *with* Gundlach v. Reinstein, 924 F.Supp. 684, 692 (E.D.D. Pa. 1996) (applying only the *Suter* test), *and Falvo*, 233 F.3d at 1210-12 (applying only the *Wilder* test).

119. *Belanger*, 856 F. Supp. at 47; *contra* Meury v. Eagle-Union Community Sch. Corp., 714 N.E.2d 233, 239 (Ind. Ct. App. 1999) (holding that FERPA enforcement provisions explicitly provide that the Secretary of Education is solely responsible for enforcement, which would then preclude a § 1983 action).

120. *Suter v. Artist M.*, 503 U.S. 347, 363 (1992). Language in the Act must unambiguously confer an enforceable right on the Act's beneficiaries. *Id.*

121. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990). "First, Congress must have intended that the provisions in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States." *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997).

122. 233 F.3d 1203, 1211 (10th Cir. 2000).

did not apply.[123] The court in *Falvo* had to decide if a teacher's practice of allowing her students to grade each others' tests, and then call out their own grades in a class violated FERPA.[124] The three-prong test of *Wilder* was then applied, and the court determined a violation of FERPA had created a right that was enforceable by a § 1983 action.[125] First, the relevant provision of FERPA § 1232g(b)(1), intended to benefit the plaintiff in the case.[126] The court found that one purpose of FERPA was to assure protection and privacy of a student's educational record, and a parent of a child in school would definitely be the person intended to benefit from this purpose.[127] Second, the court found that FERPA provided a binding obligation on the school in question, rather than a mere congressional preference that the school behave in a particular manner.[128] The court reached this decision because FERPA does not authorize any federal funding for schools that do not comply with its provisions, which the court saw as a clear obligation on the schools.[129] Third, the court concluded that the language of FERPA was not vague or amorphous, therefore, it was within the competency of the judiciary to enforce.[130]

However, other courts have ignored the three-prong test found in *Wilder* when determining if FERPA creates an enforceable right under § 1983. In *Gundlach v. Reinstein*,[131] a Pennsylvania district court stated that the correct test to apply in a § 1983 action for violation of FERPA was the *Suter* test, which required the court to determine whether Congress unambiguously conferred an enforceable right upon an Act's beneficiaries.[132] The plaintiff in *Gundlach*, Mr. Gundlach, was a former law student who was suing his law school under tort and contract claims.[133] Gundlach also

123. *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d at 1211 n.6. *Falvo* was reversed by the United States Supreme Court on an unrelated issue. *See* Owasso Indep. Sch. Dist. No. 1-011 v. Falvo, 534 U.S. 426 (2002). The court chose not to follow *Suter*, as the United States Supreme Court had applied the three-prong *Wilder* test in the *Blessing* case that followed *Suter*. *Falvo*, 233 F.3d at 1211 n.6.

124. *Falvo*, 233 F.3d at 1207. The plaintiff in the case also claimed this teacher's practice violated the Fourteenth Amendment. *Id.*

125. *Id.* at 1211-13.

126. *Id.* at 1211.

127. *Id.*

128. *Id.*

129. *Id.*; *see also* 20 U.S.C. § 1232g(b)(1) (2002). This language was similar to statutory language that the Supreme Court has interpreted as creating "precise requirements." *Id.* (*citing* SUTER V. ARTIST M., 503 U.S. 347, 361 n.12 (1992)).

130. FALVO V. OWASSO INDEP. SCH. DIST., 233 F.3d 1203, 1211 (10th Cir. 2000).

131. 924 F.Supp. 684, 692 (E.D. Pa. 1996).

132. GUNDLACH V. REINSTEIN, 924 F. Supp. 684, 691 (E.D. Pa. 1996); *see also Suter*, 503 U.S. at 363. The court applied the *Suter* test as opposed to the *Wilder* test, as it chose to accept its controlling circuit court's belief that *Suter* should apply. *Gundlach*, 924 F.Supp. at 691.

133. *Gundlach*, 924 F. Supp. at 687-88.

brought a § 1983 claim against the law school because he thought the school had violated FERPA when it attached letters, which Gundlach believed to be part of his educational record, to its answer of Gundlach's charges.[134] The court applied the *Suter* test to determine if Congress had conferred upon Gundlach a right that he could enforce.[135] The court operated under the assumption that the *Suter* test required any obligations by FERPA on the law school to be unambiguously expressed, so the school would know the obligations under which it had to operate.[136] The post-*Suter* view would not allow one to bring a § 1983 action for a violation of FERPA unless that plaintiff could satisfy the test used to determine if there was an implied right of action for spending legislation.[137] However, the court never had to apply the *Suter* test in this case, because it recognized that even under the *Wilder* test, Gundlach would not be allowed to proceed with his § 1983 action because there was no FERPA violation.[138]

Perhaps the best example of confusion caused by the two tests to determine if a statute has created a right within the meaning of § 1983 is in *Belanger v. Nashua.*[139] In *Belanger*, the New Hampshire district court tried to combine the *Suter* test and the three-prong test from *Wilder.*[140] The court viewed the *Suter* test as leaving the *Wilder* three-prong test alone and adding an extra threshold inquiry for cases involving federal spending legislation.[141] Under this view, the court first determined whether "[t]he language of FERPA reveal[ed] a congressional intent to impose obligations directly on educational agencies or institutions."[142] Having found that the language of FERPA did impose obligations on educational institutions, it applied what it found as the second part of the *Suter* test, which was to

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134. *Id.* at 690.

135. *Id.* at 691. The court recognized that "[t]he First Circuit Court of Appeals has interpreted *Suter* to require that courts first determine whether the Congress intended to impose mandatory obligations on participating institutions, an inquiry that necessarily entails an examination of 'exactly what is required' of the participating institutions by the statute." *Id.* (*citing Suter*, 503 U.S. at 357).

136. *Gundlach*, 924 F. Supp. at 691.

137. *Id.* at 692; *see also* CORT V. ASH, 422 U.S. 66, 78 (1975) (stating the factors that are relevant in determining whether a private remedy is implicit within a statute that does not expressly describe a remedy).

138. *Gundlach*, 924 F. Supp. at 692.

139. 856 F.Supp. 40 (D. N.H. 1994).

140. *See id.* at 44-45. This case involved a parent who claimed her rights under FERPA were violated when she was denied access to educational records of her son. *Id.* at 40-41. The court followed a theory of the First Circuit that stated even though *Suter* provided some new insight on how to handle § 1983 actions based on violations of federal statutes, it was not necessary to kill the ideas of *Wilder*, and the wise way to proceed would be to try to meld the *Suter* decision with the Court's prior precedents. *Id.*

141. *See id.* at 44-45.

142. *Id.* at 46.

determine whether the obligations imposed on the institutions was a mandatory requirement rather than a mere congressional preference.[143] As the court found FERPA imposed obligations that were mandatory requirements, the court proceeded to answer the questions raised under the *Wilder* test.[144] The combination of the *Suter* test, which is similar to the implied right of action test, and the *Wilder* test does not seem to be what the Supreme Court would have intended.[145] To prevent more conflict between the lower courts, and to clarify its previous decisions about § 1983 actions for violations of federal spending statutes, the Court granted certiorari in *Gonzaga University v. John Doe.*[146]

III. ANALYSIS

Chief Justice Rehnquist wrote the majority opinion for *Gonzaga,* which held that a plaintiff cannot bring a § 1983 action to enforce provisions of FERPA relating to the policy or practice of releasing educational records to unauthorized persons.[147] The majority determined that FERPA did not create personal rights that one could enforce under § 1983.[148] Justice Souter joined with Justice Breyer to concur in the opinion, but disagreed in part with the method the majority used to conclude that no personal rights that were enforceable under § 1983 were created in FERPA.[149] In a dissent joined by Justice Ginsburg, Justice Stevens argued that the language of FERPA did create enforceable rights under a § 1983 action, and accused the majority of now requiring congressional intent to specifically confer an enforceable right under § 1983, as opposed to specifically intending to confer just a federal right.[150]

A. MAJORITY OPINION

The Court recognized that Congress enacted FERPA under its spending power to condition educational institutions and agencies receipt of federal funds on certain "requirements relating to the access and disclosure of

143. *Id.* at 46. The creation of two questions to determine if the *Suter* test was met came from the First Circuit's interpretation of how to apply *Suter. Id.* at 44-46.

144. *Id.* at 47. The court found that FERPA did create enforceable rights within the meaning of § 1983 as it met all the requirements of the *Wilder* test. *Id.*

145. *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 509 n.9 (1990); *see also Suter v. Artist M.,* 503 U.S. 347, 363 (1992).

146. *Gonzaga Univ.v. Doe,* 536 U.S. 273, 317-18, 122 S.Ct. 2268, 2272 (2002).

147. *Id.* at 2271. Justices O'Connor, Scalia, Kennedy, and Thomas joined the majority opinion.

148. *Id.*

149. *Id.* at 2279.

150. *Id.* at 2280-84.

student educational records."[151] The Court also recognized that in *Thiboutot* the Court allowed § 1983 actions to be brought against state actors to enforce rights created by federal statutes.[152] A quick historical tour of the Court's cases that dealt with § 1983 actions to enforce private rights created by federal statutes was taken to emphasize some of the most important holdings in those cases.[153] The Court noted that there had been only two times where it found spending legislation that had created enforceable rights.[154] In its most recent decisions, however, the Court had denied any attempt to show enforceable rights from spending clause legislation.[155] The Court took this tour through its past § 1983 cases to show that the *John Doe* court, and other lower courts, had misinterpreted these cases when they determined the standard for finding enforceable rights by § 1983.[156]

The Court emphasized that its opinions should be read to purport that only an unambiguously conferred right is enforceable by § 1983.[157] Statutes that create benefits or interests that are conferred to a particular group of plaintiffs do not give rise to § 1983 actions.[158] The mistake of trying to enforce benefits instead of rights would not occur, according to the Court, if the Court's implied right of action cases would be used as a guide to determine whether a statute confers rights that would be enforceable under § 1983.[159] There was an overlap of implied right of action cases and

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151. *Id.* at 2272-73.

152. *Id.* at 2273.

153. *Id.* at 2273-75. The Court mentioned that in *Pennhurst* the Court did not find that the Developmentally Disabled Assistance and Bill of Rights conferred enforceable rights as the Court did not consider Congress expressed an unambiguous intent to confer individual rights. *See id.* at 2273. *Pennhurst*, however, was decided as an implied right of action case as opposed to a § 1983 action case. *See Pennhurst State Sch. & Hosp. V. Halderman*, 451 U.S. 1, 25 (1981).

154. *Gonzaga Univ. v. Doe*, 536 U.S. at 273-74, 122 S.Ct. 2268, 2273 (2002). The two cases where enforceable rights were created were *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), and *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990).

155. *Gonzaga Univ.*, 536 U.S. at 274, 122 S.Ct. at 2274. The two most recent cases that the Court refers to are *Suter v. Artist M.* 503 U.S. 347 (1992), and *Blessing v. Freestone*, 520 U.S. 329 (1997).

156. *Gonzaga Univ.*, 536 U.S. at 280-81, 122 S.Ct. at 2274. John Doe had argued that there was a difference between a § 1983 action and an implied cause of action. Respondent's Brief at 40-43, Gonzaga Univ. v. Doe, 122 S.Ct. 2268 (2002) (No. 01-679).

157. *Gonzaga*, 536 U.S. at 282-83, 122 S.Ct. at 2275.

158. *Id.* The Court concluded that the three-prong test in *Blessing* was being misread to allow benefits or interests to give rise to § 1983 actions, as those relying on that case did not take into account other language in *Blessing* that emphasized that only violations of rights, not laws, give rise to § 1983 actions. *Id.*

159. *Id.* The majority noted that the failure to use implied right of action cases as a guide was done in *Wilder*, but not in *Suter*, and *Pennhurst*. *Id.* In fact, the Court in *Wilder* specifically argued against treating § 1983 classes similarly to implied right of action cases, noting that they were different types of actions. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990).

those trying to enforce rights under § 1983, because in each type of action one must "determine whether Congress intended to create a federal right."[160] Therefore, the initial inquiry in an implied right of action case and a § 1983 action are the same.[161]

The Court stated that requiring the same inquiry for § 1983 actions as implied right of action cases created a situation where Congress must use clear and unambiguous terms to create new rights under § 1983.[162] A statute would be enforceable only where "Congress explicitly conferred a right directly on a class of persons that included the plaintiff in the case."[163] The Court determined that the question would not be whether anyone would benefit or whether an interest was created for a particular person, but whether Congress intended to confer federal rights upon those beneficiaries of the statute.[164] There would be no basis for a private suit under § 1983 if the text and structure of a statute did not indicate that Congress intended to create new individual rights.[165]

The Court then examined the text of the pertinent provisions of FERPA to determine if Congress had conferred an enforceable right in clear and unambiguous terms.[166] The Court found that FERPA failed to create enforceable rights, as it lacked the "rights creating" language that was crucial to show the necessary congressional intent to create new rights.[167] Since the language in FERPA spoke about the Secretary of Education not allowing funds to be authorized for violating FERPA, the Court concluded that there was no grant of individual entitlement that would be enforceable under § 1983.[168] Also, the provisions of FERPA "speak only in terms of institutional policy and practice, not individual instances of disclosure."[169]

The Court found this aggregate focus not to be on whether a particular person's needs had been satisfied, and therefore would not create rights for

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160. *Gonzaga*, 536 U.S. at 283, 122 S.Ct. at 2275. Plaintiffs suing under § 1983, unlike those suing under an implied right of action, would not have the burden of showing that Congress also intended to create a private remedy as § 1983 is presumed to supply the remedy. *Id.* at 2276.

161. *Id.*

162. *Id.* at 2279 at 289-90.

163. *Id.* at 2276 (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 690 n.13 (1979)).

164. *Gonzaga*, 536 U.S. at 285-86, 122 S.Ct. at 2276-77.

165. *Id.* at 2277.

166. *Id.* at 2277-79.

167. *Id.* at 2277.

168. *Id.; see also* 20 U.S.C. § 1232g(b)(1) (2002). The Court compared FERPA's language authorizing the Secretary of Education to act to the terminology found in Titles VI and IX, which contain language so as, "no person shall be subjected to discrimination," and determined the focus is two steps removed from the parents and students who may claim a right was created. *Gonzaga*, 536 U.S. at 286, 122 S.Ct. at 2277.

169. *Gonzaga*, 536 U.S. at 288, 122 S.Ct. at 2278.

an individual.[170] The Court also determined that the mechanism Congress put in place to enforce FERPA supported the Court's assertion that the provisions failed to grant enforceable rights under § 1983.[171] FERPA expressly called for the Secretary of Education to "deal with the violations" of the Act.[172] In accordance with these enforcement provisions, the Secretary established an office that acted as a review board and enforced FERPA.[173] The Court asserted that these sorts of administrative procedures were evidence of a federal review mechanism that indicated the lack of congressional intent to create individually enforceable private rights.[174]

After holding that FERPA did not create enforceable rights under § 1983, the Court explained how to determine if a federal statute has created rights that are enforceable.[175] The Court stated that "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms–no less and no more than what is required for Congress to create new rights enforceable under an implied right of action."[176] The correct test to apply to determine whether a statutory provision has given rise to a federal right is the *Suter* test, not the three-prong test of *Wilder*.[177] The language of a federal statute must unambiguously confer an enforceable right upon the Act's beneficiaries in order to support a cause of action brought under § 1983.[178] Therefore, the *Wilder* three-prong test is no longer relevant when determining if an enforceable right under § 1983 is created in FERPA.[179]

B. JUSTICE BREYER'S CONCURRENCE

In his concurrence, Justice Breyer stated that whether one may bring a § 1983 action to enforce a federal statute is ultimately a question of congressional intent.[180] However, since there is so much diversity in statutes for a single test to be absolutely controlling, Justice Breyer would not "pre-

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170. *Id.* An example of this sort of language is shown when an institution has violated FERPA if it has a policy or practice of releasing educational records. *Id.*

171. *Id.* at 2278.

172. *Id.*; *see also* 20 U.S.C. § 1232g(f).

173. *Gonzaga*, 536 U.S. at __, 122 S.Ct. at 2278-79.

174. *Id.* at 2279. The Court also determined that since FERPA required the Secretary not to carry out the functions of the Act in any of the Department of Education's regional offices to avoid multiple interpretations of the Act, the Court could not believe Congress intended to have private suits brought before hundreds of federal and state judges around the country. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 2275.

178. *Id.*

179. *Id.*

180. *Id.* at 2279 (Breyer, J., concurring).

determine an outcome through the use of a presumption–such as the majority's presumption that a right is conferred only if set forth 'unambiguously' in the statute's 'text and structure.'"[181] Justice Breyer, despite not agreeing with the majority's presumption, did not believe Congress intended to create private judicial actions to enforce FERPA's privacy provisions.[182]

Justice Breyer agreed that the majority correctly identified certain areas of FERPA's provisions that do not indicate an intent on behalf of Congress to create an enforceable right or rights.[183] The fact that much of the language in FERPA was "broad and nonspecific" indicated to Justice Breyer that Congress did not intend to create enforceable rights because language that is not specific leaves states, or in this case educational institutions, in a position where they are not certain of the actual restrictions upon them.[184] As Justices Souter and Breyer did not agree with the majority's decision to apply the *Suter* test, there was only a five to four majority that ruled that the *Suter* test was the correct test to apply when determining whether a federal statute had created enforceable rights within the meaning of § 1983.[185]

C. JUSTICE STEVEN'S DISSENT

Justice Stevens, who was joined by Justice Ginsberg, claimed that FERPA did create federal rights and questioned the majority's creation of what he called "a new category of second-class statutory rights."[186] Justice Stevens looked at the text and title of FERPA (Family Educational Rights and Privacy Act), and he determined enforceable rights were indeed created by this language.[187] Justice Stevens acknowledged that the language in the

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181. *Id.*

182. *Id.* at 2279-80.

183. *Id.* at 2280. Breyer points to the lack of any reference in the provisions to individual rights, and that the statute seems to indicate federal enforcement not on an individual level, but rather on the national level. *Id.*

184. *Id.*

185. *Id.* at 2279. Despite arguing that the *Suter* test should not apply, Breyer does not specifically endorse the three-prong *Wilder* test. *Id.* Breyer does recognize that the three-prong test has been helpful in determining the intent of Congress, but he purports that no single test should be followed in every single § 1983 case. *Id.*

186. *Id.* at 2280 (Stevens, J., dissenting).

187. *Id.* at 2281. Justice Stevens found many examples of rights-creating language throughout FERPA. *Id.* Section (a)(1)(A) of FERPA gives parents "the right to inspect and review the education records of their children." 20 U.S.C. § 1232g(a)(1)(A) (2002). Section (a)(1)(D) provides that a student may waive "his right of access." Subsection (d) provides that after a student reaches the age of eighteen, "the rights accorded to the . . . student" shall then be passed from the parent to the child. Justice Stevens even mentioned that the name of the act,

provision of FERPA relevant in this case (§ 1232g(b)) was not as explicit as other portions of FERPA, but he determined the language in § 1232g(b) did formulate an individual right.[188] The provision met the standards of the three-prong test, created in *Wilder*, which was used to articulate what was required to create a federal right in *Blessing*.[189] Justice Stevens determined section 1232g(b) of FERPA passed the three-prong test because: "It is directed to the benefit of individual students and parents; the provision is binding on States as it is couched in mandatory, rather than precatory terms; and the right is far from vague and amorphous."[190]

Justice Stevens also disagreed with the majority's view that because FERPA speaks about policies and practices it has an aggregate focus that prevents the statute from forming individual rights.[191] Section 1232g(b) does not ban policies or practices; instead it allows policies or practices, "so long as 'there is written consent from the student's parents specifying records to be released.'"[192] Justice Stevens would therefore find that although policies are mentioned, they are dependent upon an individual's actions of giving consent, which focuses on an individual rather than on policies or practices.[193] Having found that FERPA met the standards of the three-prong test, Justice Stevens would then ask whether Congress had expressly forbidden a § 1983 action in the statute itself.[194] As FERPA does not provide any guaranteed access to federal judicial review or formal administrative hearings, Justice Stevens concluded that Congress had not foreclosed enforcement under § 1983 by providing enforcement mechanisms that were comprehensive and incompatible with § 1983 actions.[195]

Justice Stevens then disputed the majority's finding that the test for determining if a federal right was created by statute should be the same for

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"Education Rights," indicated that Congress intended to have created enforceable rights. *Gonzaga Univ. v. Doe*, 536 U.S. 273, ___, 122 S.Ct. 2268, 2281 (2002).

188. *Id.*

189. *Id.; see also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 (1990); *Blessing v. Freestone*, 520 U.S. 329, 340-341 (1997).

190. *Gonzaga Univ. v. Doe*, 536 U.S. at 295, 122 S.Ct. at 2281 (quoting Blessing v. Freestone 520 U.S. 329, 344 (1997)). Stevens went on to state the provision in FERPA is even more specific and clear than rights that had been found in earlier cases such as *Wright* and *Wilder*. *Id.* at 2281-82.

191. *Id.* at 2282.

192. *Id.* (*quoting* 20 U.S.C. § 1232g(b)(2)(A)).

193. *Id.*

194. *Id.* at 2282-83. This question of whether Congress expressly forbid a § 1983 action is the second factor that would not allow one to bring a § 1983 action according to the Court in *Pennhurst*. *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981).

195. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 297, 122 S.Ct. 2268, 2283 (2002).

§ 1983 cases as for implied right of action cases.[196] Justice Stevens argued that the Court had made a distinction between the two types of cases in *Wilder*.[197] In *Wilder*, the Court recognized that an implied right of action may be brought only where Congress intended to create a private remedy for the violation of statutory rights.[198] A § 1983 action, albeit a statutory form of relief created by Congress, provides an alternative method of bringing private suits for statutory violations when courts find that Congress has not foreclosed that option.[199] Justice Stevens argued that the ruling by the majority to require § 1983 cases to use the same test as implied right of action cases would overrule both *Wright* and *Wilder*, as those cases "concluded that the statutes at issue created rights enforceable under § 1983, but the statutes did not 'clearly and unambiguously' intend *enforceability under* § 1983."[200]

Justice Stevens argued that since implied right of action cases have never clearly distinguished between finding if a cause of action exists and finding whether there is a right that is enforceable, the majority appeared to have said that what is now required for a § 1983 action is "congressional intent specifically to make the right *enforceable under* § 1983."[201] If that was not what the majority was implying, and the majority was simply saying that in both situations, § 1983 cases and implied right of action cases, one must determine if the statute created an enforceable right, then why was there a need for a new test?[202] Justice Stevens claimed that the test required by the majority created a group of second-class rights, which were rights that had presumptive enforceability under § 1983.[203] They are second-class rights when compared "to a right whose enforcement Congress has clearly intended," which are now the only rights the majority would recognize as being enforceable under § 1983.[204]

196. *Id.* at 2284. Justice Stevens noted that since FERPA was enacted, all of the federal courts of appeals have concluded that rights enforceable under § 1983 were created by FERPA, and most federal and state courts have agreed with the decision reached by the circuit courts. *Id.* at 299, n.6.

197. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990).

198. *Id.*

199. *Id.* This concern was grounded in the principle of separation of powers. *Id.*

200. *Gonazga*, 536 U.S. at 300, n.8.

201. *Id.* at 301.

202. *Id.* at 302.

203. *Id.* at 302-03.

204. *Id.*

IV. IMPACT

The decision reached by the Court in *Gonzaga* will have an immediate effect on people seeking remedies under FERPA, and the decision will greatly limit the ability of people to bring a § 1983 action for violations of federal law. Shortly after the Court's decision in *Gonzaga*, a law professor, discussing the decision, stated that:

It's [the holding in *Gonzaga*] ultimately about the structure of how certain rights are going to be enforced. This ruling basically will affect a whole host of laws that protect privacy or federal laws that protect a variety of different interests. It makes it a lot harder for people to bring private causes of action not just for FERPA, but for a whole host of federal laws"[205]

All § 1983 cases that are brought as a result of violations of federal law will be affected by the Court's requirement that an enforceable right in a § 1983 action must be determined by the test used to find an enforceable right in an implied right of action case.[206]

The *Gonzaga* decision has already had an impact on § 1983 claims in federal courts around the country.[207] In *Briand v. Lavigne*,[208] a district court in Maine had to determine if a federal statute, which protected against the disclosure of people's records in substance abuse counseling, created an enforceable right under § 1983.[209] The court, in making its determination that Congress did not provide privately enforceable rights under the statute involved, relied extensively on *Gonzaga*.[210] The court used implied right of action cases as a guide for determining if an enforceable right under § 1983 was created.[211] Therefore, the court looked at the text of the statute and determined that, just as in FERPA, the language of the statute did not contain express rights-creating language.[212]

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205. Interview by Liane Hansen with Daniel Solove, Professor of Law, Seton Hall University, (June 20, 2002), 2002 WL 3496726.

206. *See* Briand v. Lavigne, 223 F.Supp.2d 241 (D. MA 2002) (§ 1983 action based on violations allegedly committed by a parole officer); *see also* Henry's Wrecker Serv. Co. of Fairfax County Inc. v. Prince George's County, 2002 WL 1953824 (D. MD.) (§ 1983 claim based on alleged violations of the plaintiff's rights under Interstate Commerce Commission Termination Act).

207. *See Henry's Wrecker Serv.*, 2002 WL 1953824; *see also Briand*, 223 F. Supp.2d at 241.

208. *Briand v. Lavigne*, 223 F. Supp.2d 241 (D. MA 2002).

209. *Briand*, 223 F. Supp.2d at 243-245; *see also* 42 U.S.C. § 290dd-2 (2002) (providing that records of people in substance abuse counseling may only be disclosed in the manner provided by the statute). Title 42 contained statements that purported to give individuals who were admitted to a program to receive mental health services, a bill of rights. *Id.* at 245.

210. *Id.* at 244-246.

211. *Id.*

212. *Id.* The Maine court found that the statute in question was not focused on individuals, but rather on those people who keep the medical records, just as the Court in *Gonzaga* determined

In *Almendares v. Palmer*,[213] the court indicated that the *Wilder* three-prong test was no longer to be followed as a result of the decision in *Gonzaga*.[214] The federal Food Stamp Act (FSA) requires that state agencies have appropriate bilingual personnel and printed materials in those areas of the state where a substantial number of those who would receive food stamps speak a language other than English.[215] The plaintiffs in *Almedares*, low income Spanish-speaking recipients of food stamps, brought a § 1983 action against the administrators of the food stamps, because the recipients believed their right to bilingual information had been deprived.[216] The court rejected the three-prong test from *Wilder* and chose to follow the method employed in *Gonzaga* to determine if the FSA created an enforceable right under § 1983.[217] The court looked at the text and structure of the FSA and determined that the Act did not contain express rights-creating language, which would give rise to an enforceable right under § 1983.[218] The court did not elaborate in great detail as to why the FSA did not create an enforceable right under § 1983 except by saying that the FSA was similar, in the language used by Congress, to FERPA, which the Supreme Court found did not have rights-creating language.[219] As a result of the decision in *Gonzaga*, Congress must use explicit right-or-duty-creating language in order for one to have an enforceable right under § 1983.[220] Without clear unambiguous language by Congress to create a private right of action, the courts, as a result of *Gonzaga*, will not "impute to Congress an intent to create a private right of action."[221]

The *Gonzaga* decision's effect on FERPA will be the unavailability of § 1983 to enforce FERPA provisions.[222] Without the ability to bring § 1983 actions for violations of FERPA, the only way to remedy violations is

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that FERPA focused on the educational institutions that cared for student records, and not the students. *Id.*

213. No. 3:00-CV-7524 2002 WL 31730963 (N.D. Ohio Dec. 3, 2002).

214. *Almendares v. Palmer*, No. 3:00-CV-7524 2002 WL 31730963 at 4 (N.D. Ohio Dec. 3, 2002). The court refers to the test in *Blessing*, but that test is the test that originated in *Wilder*.

215. *Id.*

216. *Id.* at 1.

217. *Id.* at 4-5.

218. *Id.*

219. *Id.* The court did not believe the FSA contained rights-creating language as the Act simply imposed conditions on those who received federal funds. *Id.* The court also determined that the FSA had an "aggregate" focus rather than a focus on individual needs of any particular person. *Id.* at 5. At no point did the court look beyond the language of the FSA to the purpose or intent of Congress in requiring bilingual personnel or materials for those persons receiving benefits under the FSA who did not speak English. *Id.* at 1-8.

220. *Id.* at 4 n.2.

221. *Id.* (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 2276 n. 3 (2002)).

222. Theuman, *supra* note 34, at § 14(b).

through the enforcement mechanisms within FERPA itself.[223] Currently, the Department of Education states that a school must "have a parent's consent prior to the disclosure of education records."[224] Although this sounds like a fairly good assurance that a student's education record is not likely to end up in the "wrong" person's hands, an individual can no longer bring a § 1983 action to obtain damages if an educational institution discloses a student's educational record, to that student's detriment, in violation of FERPA.[225]

FERPA's enforcement mechanisms do not provide any remedy to a student or parent who has been harmed by an educational institution's violation of FERPA. A former student at the University of New Hampshire now knows this reality well.[226] The student, while attending the University of New Hampshire, claimed she was physically assaulted by her research/academic advisor, and during the criminal trial of this advisor, her GRE scores were announced to the court by the counsel for the defense in an effort to prove she was a bad student as reflected by the GRE scores.[227] The university admitted, as the student claimed, that the student had not given consent that her GRE scores be released to any unauthorized third persons.[228] The advisor had given the scores to his lawyer, which led to the student filing a claim with the Department of Education that the university had violated the disclosure provision of FERPA.[229] Despite having her private test scores announced in court and used to show she was not a good student, the Department of Education's response to the university was that it wanted "assurance and evidence that the university has informed appropriate officials of FERPA's prior written consent requirement for disclosure of education records."[230] In contrast, John Doe in *Gonzaga,* who was able to bring a § 1983 action for a violation of his rights under FERPA, was awarded a jury verdict of $450,000.[231] FERPA itself contains no provisions that allow the Secretary of Education to grant any form of relief

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223. *Gonzaga Univ. v Doe*, 536 U.S. 273, ___, 122 S.Ct. 2268, 2278-79 (2002).

224. *FERPA General Guidance for Parents*, at http://www.ed.gov/offices/OM/fpco/ferpa/parents.html (last visited Oct. 5th, 2002).

225. *Gonzaga*, 536 U.S. at ___, 122 S.Ct. at 2278-2279; *see also Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2nd Cir. 2002) (finding that FERPA does not create a right enforceable under § 1983 for a natural parent to gain access to her child's educational records).

226. Letter from LeRoy S. Booker, Director of Family Policy Compliance Office, to Dr. John R. Leitzel, President, University of New Hampshire, (Jan. 2001) (on file at the Department of Education).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 277, 122 S.Ct. 2268, 2272 (2002).

to a student or parent who may have been injured as a result of an educational institution's violation of FERPA.[232]

Some may claim that allowing people to recover under § 1983 actions for violations of FERPA are not necessary, as many of these § 1983 claims, just as in *Gonzaga,* are one of many claims that include such torts as defamation and invasion of privacy.[233] The Supreme Court, however, addressed this issue when it responded to an argument in *Wright v. City of Roanoke Redevelopment and Hous. Auth.* that some sort of state court remedy could instead enforce a § 1983 claim under a violation of the Housing Act.[234] The Court recognized that although a state-remedy may exist, there is no reason to bar a § 1983 action, "which was adopted to provide a federal remedy for the enforcement of federal rights."[235]

Overall, the adoption of the new *Gonzaga* test to determine whether a federal statute gives rise to enforceable rights within the meaning of § 1983, may require Congress to be more diligent when creating and enacting spending legislation.[236] The Court in *Gonzaga* insisted that, "if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms – no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."[237] The Court also stated that in order for rights to be created that are enforceable under a § 1983 action, the provisions of the statutes must contain rights-creating language.[238] Congress clearly has the responsibility to determine whether rights that are enforceable under a § 1983 action exist in the legislation it enacts.[239]

V. CONCLUSION

The decision in *Gonzaga University v. Doe* held that the Family Educational Rights and Privacy Act (FERPA) would not support a cause of action under § 1983.[240] Cases brought under § 1983 actions to enforce

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232. 20 U.S.C. § 1232g (2002); *see also* 34 C.F.R. § 99.66 (2002).

233. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 396 (Wash. 2001).

234. *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U. S. 418, 429 (1987).

235. *Id.*

236. *See Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 783-784 (2nd Cir. 2002) (holding that under *Gonzaga,* a court must now look to see if the language used by Congress unambiguously confers an enforceable right under § 1983, as opposed to trying to determine if Congress had foreclosed an action under § 1983).

237. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290, 122 S.Ct. 2268, 2279 (2002).

238. *Id.* at 2277.

239. *See Niziol v. Dist. Sch. Bd. Of Pasco County*, 240 F.Supp.2d 1194, 1201 (M.D. Fla 2002) (following *Gonzaga* by finding no basis for a private suit unless a statute provides an indication that Congress intended to create new individual rights).

240. *Gonzaga* 276.

private rights that are created by federal laws will not be successful unless Congress has unambiguously conferred such a right to the plaintiff in such an action.[241] The Court's decisions in implied right of action cases should be used as guide to determine if Congress intended to create rights that are enforceable within the meaning of § 1983.[242] Congress must use rights-creating language to express, in clear and unambiguous terms, that it intended to create rights that are enforceable under § 1983.[243] The Court determined that since FERPA did not have such express rights-creating language, one could not bring a § 1983 action to enforce violations of FERPA, despite the number of injuries that the violations may have caused.[244] The *Gonzaga* decision seems to have taken away, to a large degree, the ability of courts to enforce the federally authorized ability of an individual to seek a private remedy for a violation of his rights that are protected under federal law.

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241. *Id.* at 283.
242. *Id.*
243. *Id.* at 290.
244. *Id.*

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