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## A Student Right of Privacy: The Developing School Records Controversy

### INTRODUCTION

The right of privacy is an amorphous area of the law. It is undefined largely because the contexts in which the need for protection has been asserted, generally involve other legally recognized rights. One such context is the maintenance and dissemination of students' school records. The need for safeguarding the right to privacy in educational records has recently been the subject of judicial and legislative pronouncements. Despite the recent recognition of this right, conflicts with other legal guarantees remain unsettled. Thus, it is necessary to analyze the current legal ramifications of the right of privacy in students' school records in order to place it in its proper perspective.

### THE NEED FOR PRIVACY

"Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."<sup>1</sup> Dividing the limits of man's public existence from his private life is "an activity that began with man himself and is one that will never end; for it is an activity that touches the very nature of man; and man's nature is, to a considerable degree, made and not given."<sup>2</sup> The right of privacy is based upon a societal recognition of man's need for control and limitation on that which concerns his existence.<sup>3</sup> However, as man's needs change, society must continually re-evaluate the legal protections it extends to such needs.

An analysis of the right of privacy in our democratic society must be made against a background of countervailing demands. An open society places a high value on a relatively unlimited freedom of speech,<sup>4</sup>

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1. A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) [hereinafter cited as WESTIN].

2. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 *LAW & CONTEMP. PROB.* 272, 274 (1966).

3. A. MILLER, *THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS* 25 (1971) [hereinafter cited as MILLER].

4. See generally *Near v. Minnesota*, 283 U.S. 697 (1931).

but also holds that an individual be allowed to remain autonomous. These two demands have been accentuated by our increasingly urban society which has forced people into smaller physical areas in a vertically structured physical surrounding.<sup>5</sup>

While all creatures share a certain need for privacy,<sup>6</sup> man's needs are to a much greater extent defined by his society. In contrast to the teaching that each person is merely a small part of a larger whole, our culture concentrates on teaching each man to be "himself" and an "independent person."<sup>7</sup> Defining the nature of man in terms of "individualism" leads to a greater emphasis on one's ability to withdraw aspects of his existence from public observation. Thus, the ability to control the circulation of information relating to this part of his life becomes a power that is essential to maintaining social relationships and personal freedom.<sup>8</sup>

#### LEGAL DEVELOPMENT OF THE RIGHT OF PRIVACY

The right of privacy as a legal concept may be viewed as an individual's power to determine the extent another individual will be allowed to obtain and use his ideas, writings, name, image or other aspects of his identity. It includes the ability to control information about himself or those for whom he is responsible and physical intrusions into his areas of privacy.<sup>9</sup> The right to privacy became legally enforceable after the appearance of the now famous Warren and Brandeis article,<sup>10</sup> but developed essentially as a tort action in the nature of "appropriation" and intrusion on physical space.<sup>11</sup> Later, the right to prevent public disclosure of private facts was judicially recognized,<sup>12</sup> but remained limited to published matter which was of an offensive and objectionable nature as tested by the reasonable man standard.<sup>13</sup> Addi-

5. MILLER, *supra* note 3, at 24.

6. It is important to note a basic finding of many animal studies: virtually all animals seek periods of individual or small group seclusion, and this drive is also part of man's composition. These territorial patterns serve a number of important purposes, including regulation of densities and frames of reference for group and individual activities such as learning, playing, hiding and definitions of intruders. The parallels between territorial rules in animal life and trespass concepts in human society are also noteworthy. See R. ARDREY, *THE TERRITORIAL IMPERATIVE* (1966); E. HALL, *THE HIDDEN DIMENSION* (1966); WESTIN, *supra* note 1, at 9.

7. D. LEE, *FREEDOM AND CULTURE* 31, 32 (1959).

8. MILLER, *supra* note 3, at 25.

9. Beane, *The Right to Privacy and American Law*, 31 *LAW & CONTEMP. PROB.* 253, 254 (1966).

10. Brandeis and Warren, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

11. See W. PROSSER, *THE LAW OF TORTS* § 117 (4th ed. 1971) [hereinafter cited as PROSSER].

12. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

13. See, e.g., *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954);

tionally, a tort action for placing another in a false light has been held to lie when one's name or image is used without his consent.<sup>14</sup>

The development of the constitutional right of privacy is of more recent origin. The leading case in this area is *Griswold v. Connecticut*,<sup>15</sup> in which the Supreme Court held unconstitutional a state statute prohibiting the distribution of contraceptive information. The statute was found to violate a married couple's right of privacy, although no definition of that right was established. More recently the right of privacy, as emanating from the due process guarantees of the 14th amendment, has been defined on a case by case basis. In *Roe v. Wade*,<sup>16</sup> the Supreme Court found that a woman's right of privacy was violated by state interference with her decision to have an abortion. The court further enunciated the constitutional right of privacy and established its application within the states.

## THE SCHOOL RECORDS CONTROVERSY

### *Contents of Student School Records*

One of the contexts in which the issue of privacy frequently arises is the maintenance and dissemination of school records. This is an area of special concern because it involves the development of human resources, exemplified by the desire to develop every child's full potential.<sup>17</sup> It is a sensitive subject because the schools perform this social function in the formative years of a child's development. They must meet legitimate demands for pupils, parents, and the community<sup>18</sup> which often conflict with the school's view of its function.

Student files in many cases include extensive economic and social background data, evaluations of attitudes, behavior, performance and ability, and health information.<sup>19</sup> In addition, school records may also contain subjective evaluations, often unverified, made by teachers and other school personnel which reflect their intentional and unintentional biases.<sup>20</sup> Concern has developed over the potentially harmful effects

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*Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956); *Shorter v. Retail Credit Co.*, 251 F. Supp. 329 (D.S.C. 1966).

14. See PROSSER, *supra* note 11, at § 117.

15. 381 U.S. 479 (1965).

16. 410 U.S. 113 (1973).

17. RUSSELL SAGE FOUNDATION, *GUIDELINES FOR THE COLLECTION, MAINTENANCE & DISSEMINATION OF PUPIL RECORDS* 2 (1969) [hereinafter cited as SAGE].

18. *Id.*

19. Divoky, *Cumulative Records: Assault on Privacy*, LEARNING (Sept. 1973).

20. See 120 CONG. REC. E2020 (daily ed. April 3, 1974) (remarks of Congressman Kemp); 120 CONG. REC. H2458 (daily ed. April 2, 1974) (remarks of Congressman Badillo).

which the improper use and increasingly wide exchange of this information may have on the student's development.<sup>21</sup>

### *Practices in Maintenance and Dissemination*

The collection of sensitive and highly personal information without the informed consent of either the student or his parents, until recently has received little attention.<sup>22</sup> The result has been that, when files are finally opened and inspected, damaging comments based on subjective observations have often been discovered regarding the student, and less frequently the parents.<sup>23</sup> Although access has been traditionally denied to parents and students, these same records have at times been available for inspection by the local police, F.B.I., C.I.A., and health agencies without notice to the involved parents or student.<sup>24</sup>

Subjective analysis and psychological testing is often based on the theory that it is being done in the best interests of the child. However, this theory ignores the fact that parents have the "primary legal and moral responsibility for the upbringing of their children and only entrust them to the schools for basic educational purposes."<sup>25</sup> Educators contend that certain conclusions must be made in the records concerning performance, including academic and extra-curricular skills, and that such conclusions are necessary "professional tools" in education's ambitious goal of educating the "whole child."<sup>26</sup> The need for these professional tools is also used as one of the justifications for withholding such information from the pupil and parents.<sup>27</sup> The result has been that parental and student access, when allowed, is typically limited to attendance and achievement records. Intelligence test scores, personality data, and teacher-counselor evaluations generally are withheld from both parents and students.<sup>28</sup>

The issue of privacy with regard to psychological testing was raised in *Merriken v. Cressman*.<sup>29</sup> The plaintiffs in that case, an eighth grade

21. See 120 CONG. REC. H2438 (daily ed. April 2, 1974) (congressional commitment to privacy).

22. See Goslin and Bordier, *Record Keeping in Elementary and Secondary Schools*, in ON RECORD (S. Wheeler ed. 1969) [hereinafter cited as Goslin and Bordier]; SAGE, *supra* note 17, at 6.

23. Lauerman, *Student Files: Big Brother in the Schools?*, Chicago Tribune, Nov. 6, 1974, at 1, col. 1; Divoky, *How Secret School Records Can Hurt Your Child*, PARADE (March 31, 1974).

24. Goslin and Bordier, *supra* note 22, at 57; SAGE, *supra* note 17, at 7.

25. 120 CONG. REC. S7534 (daily ed. May 9, 1974) (comments of Senator Buckley).

26. 120 CONG. REC. E2130 (daily ed. April 4, 1974) (comments of Congressman Kemp).

27. *Id.*

28. SAGE, *supra* note 17, at 6.

29. 364 F. Supp. 913 (E.D. Pa. 1973).

student and his mother, were granted injunctive relief to prevent the school from psychologically testing the student to determine his potential for drug abuse based on personal and family background. The court found the testing was highly personal and probative of the family relationship. Furthermore, the court stated that the maintenance of such test results in school files fostered stigmatization with peers and self-fulfilling prophecies. In the absence of justification by a showing of compelling state interest or a waiver, the testing was held to be an infringement of the plaintiff's constitutional right of privacy. Although the minor's right of privacy was expressly recognized in *Merriken*, the issue of whether a parent can waive this right for his child was unanswered.

### *Local Statutory and Common Law Right of Inspection*

Several states have enacted statutes regarding the confidentiality and inspection of student records,<sup>30</sup> and similar inspection guidelines have been established by a number of state and local boards of education.<sup>31</sup> However, the issue of parental inspection has seldom been addressed in appellate review. One of the few cases to directly confront this question was *Van Allen v. McCleary*.<sup>32</sup> The court held that a common law right of parental access to educational information existed to aid the parent in the discharge of his duty to care for the child and that the right was limited only by constitutional or legislative restrictions. In another case, *Dachs v. Board of Education*,<sup>33</sup> a school district refused to give a student's forwarding address to her divorced father. In the absence of a showing of danger of physical harm at the hands of the father, the non-disclosure was deemed impermissible.<sup>34</sup>

Parental rights regarding child-rearing and education have in other contexts received judicial recognition. Parents may guide the religious

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30. See, e.g., REV. STAT. OF NEB. § 79-4,157 (Supp. 1973); MASS. ANN. LAWS c.71, § 34D (Supp. 1973); CAL. EDUC. CODE § 10751 (West 1974).

31. See, e.g., School District of Philadelphia, Division of Pupil Personnel and Counseling, *Guidelines For School Personnel in the Use of Pupil Information* (August 12, 1974); Illinois Program for Evaluation, Supervision and Recognition of Schools, § 4-14.1(b); Chicago Board of Education, B/R 74-1095-1 (corrected) (November 13, 1974).

32. 27 Misc. 2d 81, 211 N.Y.S.2d 501 (1961).

33. 53 Misc. 2d 13, 277 N.Y.S.2d 449 (1967).

34. For treatment of the issue of inspection of student records in other contexts, compare *Johnson v. Board of Education*, 31 Misc. 2d 810, 220 N.Y.S.2d 362 (1961) (inspection at board office) with *Marmo v. Board of Education*, 56 Misc. 2d 517, 289 N.Y.S.2d 51 (1968) (preparation of a criminal defense) and *Wagner v. Redmond*, 127 So. 2d 275 (La. 1960) (board member's right of inspection) and *Board of Trustees v. Leach*, 258 Cal. App. 2d 281, 65 Cal. Rptr. 588, 462 P.2d 832 (1968) (grand jury inspection).

development of their child to the point of withdrawing him from school entirely despite a state compulsory attendance statute,<sup>35</sup> or placing the child in a non-public educational institution.<sup>36</sup> However, parents are subject to state regulation in narrow situations. In *Prince v. Massachusetts*,<sup>37</sup> the Supreme Court upheld a state statute proscribing the distribution of periodicals by children on public streets. The Court asserted the fundamental principle that the custody, care and nurture of a child resides primarily with the parent, but that the challenged statute was not beyond the state's legitimate interest in child labor laws.

Whether or not a student has a right to inspect his records and the extent of the student's right of privacy in this context remains an undecided issue.

#### *The Family Educational Rights and Privacy Act of 1974*

In response to the growing concern over the right of privacy within schools, the Family Educational Rights and Privacy Act was enacted as an amendment to the Elementary and Secondary Education Act of 1974.<sup>38</sup> The statute, as originally enacted, was never the subject of a house committee investigation and was overshadowed in debates by the provisions regarding school busing and distribution of funds. Because of the reaction among educators to a number of significant ambiguities, the Act was subsequently amended in January of 1975.<sup>39</sup>

The Family Educational Rights and Privacy Act provides that "no funds shall be made available under any applicable program to any educational agency or institution" which fails to provide parents with access to records directly related to their children.<sup>40</sup> Thus, the Act is

35. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

36. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

37. 321 U.S. 158 (1944).

38. PUB. L. No. 93-380, § 513 (1974) as amended S.J. RES. 40 § 2 (1974).

39. S.J. RES. 40, § 2 (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438).

40. S.J. RES. 40, § 2(a)(1) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(1)(A)). This section provides that:

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 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.

based on the principle that the federal government can attach such conditions to the use of its funds as it deems necessary. The financing provisions, according to its sponsor, Senator Buckley, is designed to aid in the development of more comprehensive civil rights protections.<sup>41</sup>

The Act refers only to such educational agencies or institutions which are receiving funds under "applicable programs." An applicable program is defined as any federal "program for which the U.S. Commissioner of Education has administrative responsibility."<sup>42</sup> Therefore, only those educational institutions, including private schools, which receive funds under federal programs are subject to the privacy requirements; schools which do not receive federal funds, except indirectly through payments to students, are exempt.<sup>43</sup> Thus, educational institutions that wish to avoid the Act's requirements may do so by foregoing federal funds.

The statute as originally drawn limited the right of inspection to parents of "students attending." Congress amended the Act by deleting the word "attending" and expressly covering the situation where an inspection of the records of a student no longer attending the school is desired.<sup>44</sup> The word "student" implies a certain enrollment and attendance concept absent in the "applicant" status.<sup>45</sup> Thus, an applicant would appear to be unable under this statute to inspect school records and discover potentially discriminatory grounds for his rejection by the particular institution.

The Act appears to have been drawn to suit the typical situation of parents wishing to inspect and challenge school records concerning educational recommendations or disciplinary problems.<sup>46</sup> However, no specific guarantee for the right to privacy of parents is provided. Material may be challenged on the grounds that such records are "inaccurate, misleading, or otherwise in violation of the privacy or other rights of *students*."<sup>47</sup> The requirement of an opportunity to correct

41. 120 CONG. REC. S7534 (daily ed. May 9, 1974) (remarks of Senator Buckley).

42. Proposed Rule 99.1(a), 3 Fed. Reg. 1210 (1975).

43. Proposed Rule 99.1(b), 3 Fed. Reg. 1210 (1975).

44. S.J. RES. 40, § 2(a)(4)(B) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(6)).

45. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2268 (unabridged 1961); Proposed Rule 99.3, 3 Fed. Reg. 1211 (1975).

46. The definition of parent includes "natural parent, an adoptive parent, or the legal guardian of a student." Proposed Rule 99.3, 3 Fed. Reg. 1211 (1975).

47. S.J. RES. 40, § 2(a)(1) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(2)) (emphasis added). The entire section provides that:

No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided

or delete "inaccurate, misleading, or otherwise inappropriate" information may be construed to allow accurate and appropriate information which otherwise infringes on the parents' rights to stand. For example, a record may correctly identify a parent as an alcoholic, but the dissemination of this information to a student's teacher may invade the parent's right of privacy. However, parents apparently are allowed to insert a written explanation as to any matter within the records.<sup>48</sup> Legislative history indicates that the right to challenge the accuracy of records generally refers to accuracy of the recordation and not to a substantive challenge. For example, the recordation of a grade may be attacked, but not the grade given.<sup>49</sup> While in most cases, substantive challenges should be banned from the required hearing, inaccurately premised information may, in certain cases, present a grave threat to privacy. An exception has been recognized for challenging the labeling of a child as mentally or otherwise retarded.<sup>50</sup> A hearing to determine the propriety of the labeling may include substantive evidence of the student's condition. This author believes that any labeling of a student that could potentially cause him injury should be subject to similar treatment.

The amended statutory language defines the breadth of the right of inspection in terms of the types of records involved. The prior language opened "any and all records, files, and data," but has now been narrowed to "educational records" with enumerated exceptions.<sup>51</sup> The parental right of inspection is therefore limited upon vesture of the rights in the student at certain times<sup>52</sup> by the exclusion of certain records from the definition of "educational records."

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an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

48. *Id.*

49. *Joint Statement in Explanation of Buckley/Pell Amendment*, 120 CONG. REC. S21488 (daily ed. December 13, 1974) [hereinafter cited as *Joint Statement*].

50. See Proposed Rule 99.20, 3 Fed. Reg. 1213 (1975), and comments.

51. Exceptions include certain records of institutional, supervisory, and administrative personnel, certain law enforcement personnel records and records of professionals treating students 18 years of age or in post-secondary education. S.J. RES. 40, § 2(a)(2)(F) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(4)(B)).

52. S.J. RES. 40, § 2 (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(d)), provides:

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

A serious problem under the prior language was the concern that the records of social workers, counselors, and other professionals rendering a service to the student could be opened by the student or his parent.<sup>53</sup> Often older students discuss problems with such personnel based on the premise that it is confidential and will not be revealed to anyone including parents. Since those rendering such aid are dependent on their ability to foster a relationship of trust, a breach of this trust could render their presence valueless.<sup>54</sup> Additionally, some professionals felt that their observations should be foreclosed from the student, as knowledge of such information might adversely affect the student.<sup>55</sup> Whether the amended statutory language resolves this issue is open to question.

Resolution of a given case will depend upon whether a school counselor or similar professional is considered as instructional, supervisory or administrative personnel, and whether the records involved are kept in the counselor's sole possession and revealed only to his substitutes.<sup>56</sup> If both conditions are met, then the counselor's notes are within the literal language of the statutory exception. However, this may not have been the intention of Congress. Memory aids were probably the focus of the exception and were expected to be opened only to substitutes performing for a temporary period.<sup>57</sup>

In response to the need for confidentiality in the school counseling relationship, several states have enacted statutory student-counselor privileges.<sup>58</sup> Most of these statutes contain some certification process and will protect a student's confidential communications with a certified counselor whether in public or private schools.<sup>59</sup> The Act contains no

53. Interview with Eugene Schiltz, Chief Social Worker, Evanston Township School District 65, in Evanston, Illinois, December 4, 1974.

54. *Id.*

55. *Id.*

56. S.J. RES. 40, § 2(a)(2)(F) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(4)(B)(i)).

57. *Joint Statement, supra* note 49, at S21488.

58. *See, e.g.*, S.D. COMPILED LAWS ANN. § 19-2-5.1 (Supp. 1973); C.G.S.A. § 10-154(a) (Supp. 1973); IDAHO CODE § 9-203 (Supp. 1973); IND. ANN. STAT. § 28-4537; ME. REV. STAT. ANN. 20, § 806 (Supp. 1973-74); N.C. GEN. STAT. § 8-53.4 (Supp. 1973); N.D. CENT. CODE § 31-01-06.1 (Supp. 1973); ORE. REV. STAT. § 44.040; 24 P.S. § 13-1319 (Supp. 1973-74).

59. *See, e.g.*, S.D. COMPILED LAWS ANN. § 19-2-5.1 (Supp. 1973): Elementary or secondary school counselor and student-exceptions-

No counselor, certified in accordance with the certification regulations of the state board of education and regularly employed as counselor for a private or public elementary or secondary school or school system in the state of South Dakota, may divulge to any other person, or be examined concerning any information or communication given to him in his official capacity by a student unless:

provision to resolve a potential conflict between these student privileges granted by the state and the Act's parental rights. A student desiring to prevent parental inspection may place the educational institution in the position of violating either the state statute or the funding condition.

A proposed Senate amendment would have allowed material otherwise considered confidential by law to be excluded from the educational records definition.<sup>60</sup> The House dropped this "blanket provision" and the conferees agreed "because State laws and court decisions vary so widely that the section's potential effects were uncertain."<sup>61</sup> The refusal to provide this provision in itself raises the potential uncertainty as to the ability of states to protect a student's confidential communications. States that have established student-counselor privileges may be forced to withdraw the protection granted at least to the point of compliance with federal funding conditions. The result is a preemption of state authority to create a privilege for confidential student communications.<sup>62</sup>

Additional exclusions from the right of inspection include parental financial information, confidential letters and statements or recommendations placed in the records prior to January 1, 1975, and confidential recommendations in the student file where the student has signed a waiver of the right of access.<sup>63</sup> These exclusions were provided by the amendment as a response to criticisms levelled by higher educational institutions. The prior language allowed student inspection of recommendations for employment and graduate education, notwithstanding guarantees of confidentiality often given by the schools. At least one school put the recommendations in "escrow," and released these only with a signed waiver by the student and the person writing the recommendation.<sup>64</sup> Under the new language of the Act, records

- (1) This privilege is waived in writing by the student; or
- (2) The information or communication was made to the counselor for the express purpose of being communicated or of being made public; or
- (3) The counselor has reason to suspect, as a result of that information or communication, that the student has been subjected to child abuse or that the student's physical or mental health may be in jeopardy.

60. See *Joint Statement*, *supra* note 49, at S21488.

61. H.R. REP. No. 931619, 120 CONG. REC. H12157, H12160 (daily ed. December 17, 1974).

62. While Congress uses the "power of the purse" to require state adherence to its policy, an issue may arise as to whether a federal judge can invalidate state rules or simply determine compliance with funding conditions. See *Townsend v. Swank*, 404 U.S. 282 (1971) (Burger, C.J., concurring).

63. S.J. RES. 40, § 2(a)(3) (1974) *amending* PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(1)(B)).

64. Interview with Iola Gardner, Preprofessional Advisor, University of Illinois, Circle Campus, in Chicago, Illinois, December 5, 1974.

containing recommendations filed prior to January 1, 1975, are not foreclosed from inspection as long as used solely for the purpose for which they were "specifically intended."<sup>65</sup> Students or persons thereafter applying for admissions or for employment may now sign a waiver of their right of access to recommendations which will serve as a guarantee to the person writing the recommendation that it will remain confidential.

The Act contains only one provision expressly dealing with records of professional personnel, unless these records can qualify as instructional, supervisory or administrative. Records that are created and maintained by a physician, psychiatrist, psychologist or other professional concerning a student 18 years of age or older or in post-secondary education are excluded from educational records. However, the exclusion extends only to those records which are for the purpose of treating the student and not those generally available to others.<sup>66</sup> Furthermore, the provision will not foreclose parental inspection of the same records prior to the student's becoming 18 years of age or beginning post-secondary education. Thus, the Act does not recognize a student right of inspection but gives a limited right to parents.

Some information, considered closed under the prior statutory language because it was "personally identifiable," can now be opened. A literal interpretation of the prior language foreclosed even the publishing of football players' weights and the names of students in a school play.<sup>67</sup> The amended statute provides for the release of such "directory information."<sup>68</sup> However, the educational institution must give notice and allow objections by parents to the categories of information the particular institution will include as "directory."<sup>69</sup> It follows that any category thus excluded from directory information thereafter is treated as other personally identifiable data, with a restricted right of access.

Both the original and amended versions of the statute require that those who requested or obtained access to the file shall have such "access" recorded.<sup>70</sup> The amendment further requires that the record of

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65. S.J. RES. 40, § 2(a)(3) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(2)(B)(ii)).

66. S.J. RES. 40, § 2(a)(2)(F) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(4)(B)(iv)).

67. *Joint Statement, supra* note 49, at S21488.

68. S.J. RES. 40, § 2(a)(2)(F) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(5)).

69. *Id.*

70. S.J. RES. 40, § 2(a)(9) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(b)(4)(A)).

access be kept with the student's permanent file.<sup>71</sup> With minor exceptions, inspection of the record of access is limited to parents and certain school officials. The provision that personal information released to a third party shall not be further disclosed by that party remains unchanged.<sup>72</sup>

The amended statute provides that the required hearing to challenge the contents of a student's educational records shall be "in accordance with the regulations of the Secretary."<sup>73</sup> Additionally, in order to provide for an effective right of access and inspection, the Secretary has proposed rules regarding such rights. This authority is based on the congressional mandate to the Secretary to take "appropriate action" to enforce the Act's protections.<sup>74</sup> The Secretary has proposed that the right of access include the following rights: to be provided with a list of the types of recorded information directly related to the student, to obtain copies of such information, to a response upon a reasonable request for explanation and interpretation, and to a hearing to challenge the contents of those records.<sup>75</sup>

Formal criteria for the hearing have not been established; therefore informal proceedings to settle disputes concerning the content of records are not precluded.<sup>76</sup> However, a parent can require a formal hearing and present evidence as to the inaccurate, misleading or inappropriate nature of the information recorded.<sup>77</sup> The proposed rules recognize that the diversity of school organizational structures precludes a detailed provision of hearing criteria, but establishes the principle that certain procedures are necessary in order to insure due process.<sup>78</sup> Allowance of relevant evidence, a decision by a non-interested official, and a hearing and decision within a reasonable time are specific guarantees included in the proposed rules.<sup>79</sup>

An amendment to the California Education Code has been enacted to provide a method for challenge and removal.<sup>80</sup> This procedure be-

71. *Id.*

72. S.J. RES. 40, § 2(a)(2)(F) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(b)(4)(B)).

73. S.J. RES. 40, § 2(a)(1) (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(a)(2)).

74. S.J. RES. 40, § 2 (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(f)).

75. Proposed Rule 99.13(a), (c), (d), (f) and (e), 3 Fed. Reg. 1212 (1975).

76. Educational institutions may attempt to settle a dispute through informal meetings. Proposed Rule 99.21, 3 Fed. Reg. 1213 (1975).

77. *Joint Statement, supra* note 49, at S21488.

78. Proposed Rule 99.22, 3 Fed. Reg. 1213 (1975), and comments.

79. *Id.*

80. CAL. EDUC. CODE §§ 10751, 10760, 10761 (West 1974).

gins with a written request to remove information filed with the superintendent of the district.<sup>81</sup> Within thirty days of receipt of the request, a meeting is required between the superintendent, the parent and the employee that recorded such information.<sup>82</sup> If the parental allegation is denied and removal is not ordered, appeal to the governing board of the school district is permitted within thirty days.<sup>83</sup> This appeal must be decided within thirty days of receipt and the decision is regarded as final.<sup>84</sup> A decision at either stage may be assisted by a hearing panel composed of non-interested individuals, which meet in closed session, hear parental evidence and objections, and submit written findings.<sup>85</sup> This type of procedure satisfies the due process requirements of the proposed rules.

#### THE STUDENT'S RIGHT OF PRIVACY

Whether a minor student has a personally enforceable right of privacy is left open by the Family Educational Rights and Privacy Act. The Act does provide that upon attainment by the student of 18 years of age or upon enrollment in a post-secondary educational institution, the rights previously accorded exclusively to the parent thereafter are held *only* by the student.<sup>86</sup> However, this statutory "right" of privacy is a condition for the receipt of federal education funds, and does not explicitly answer the question of whether a student has a judicially enforceable right of privacy in the school records context.

The proposed rules for enforcement of the Act state that its provisions shall not be interpreted to preclude educational institutions from according their students rights *similar* to those given to the parents. In addition, student rights may be provided protection by the states.<sup>87</sup> The Act therefore implicitly recognizes the right of privacy of a student, but leaves its enforcement to parents and the states. If, indeed, a right of privacy exists in the student, a further issue arises as to whether the Act's provision for parental control over records results in an infringement on the students' rights.

It has been held that school children have constitutional rights that are not left behind at the schoolhouse gate. In *Tinker v. Des Moines*

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81. *Id.* § 10760(a).

82. *Id.* § 10760(b).

83. *Id.* § 10760(c).

84. *Id.* § 10761(b).

85. *Id.* § 10761(d).

86. S.J. RES. 40, § 2 (1974) amending PUB. L. No. 93-380, § 513 (1974) (will be codified as 20 U.S.C. § 438(d)).

87. Proposed Rule 99.4, 3 Fed. Reg. 1211 (1975), and comments.

*Independent Community School District*,<sup>88</sup> the Supreme Court held that the wearing of arm bands was a constitutionally protected exercise of free speech. The Court asserted that state operated schools are not to be enclaves of totalitarianism, and school officials do not possess absolute authority over their students.

Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the state must respect, just as they themselves must respect their obligations to the state.<sup>89</sup>

The need for an enforceable student right of privacy is especially acute since the "educational system compels the student to reveal his abilities and personality to school authorities."<sup>90</sup> The records become depositories of this revealed information. While this intrusion into a student's privacy may be justified by the state's overriding interest in education, any further intrusions should be strictly limited. Otherwise, an erosion of the student's self-confidence and self-respect may likely result.<sup>91</sup>

Several courts have taken the position that students have a constitutional right of privacy. In *Merriken v. Cressman*,<sup>92</sup> Judge Davis recognized that psychological testing could result in an invasion of a student's right of privacy. Violations of this right have also been found in cases involving school regulation of hair length.<sup>93</sup> Thus, authority exists for the proposition that a student's right of privacy is of constitutional dimension and exists undiminished within the school context.

The establishment of parental rights of inspection and control over dissemination may potentially infringe a student's freedom. By failing to provide for such a contingency, the Act may have created a situation in which the student's constitutional rights may be waived by his parents.

In general, parents are allowed broad control over the sensitive child-rearing process.<sup>94</sup> The Act reflects this general proposition by vesting rights in the parents until a point of presumed maturity of the student. However, the rights of parents in their control over minor

88. 393 U.S. 503 (1969).

89. *Id.* at 511.

90. *Doe v. McMillan*, 459 F.2d 1304, 1325 (D.C. Cir. 1972) (Wright, J., dissenting), *rev'd*, 412 U.S. 306 (1973).

91. *Id.* at 1327.

92. 364 F. Supp. 913 (E.D. Pa. 1973).

93. See *Stull v. School Board*, 459 F.2d 339 (3d Cir. 1972); *cf. Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969).

94. Kleinfeld, *The Balance of Power Among Infants, their Parents, and the State*, 4 FAM. L.Q. 320, 324 (1970).

children are not unlimited, and arguably are restricted by the constitutional rights of the child, as well as compelling state interests.<sup>95</sup>

The issue of a waiver was expressly avoided in *Merriken*. However, it was indirectly decided in *Coe v. Gernstein*.<sup>96</sup> In *Coe*, a three judge panel struck down as unconstitutional a state statute which required parental consent for a minor daughter's abortion. The court stated that "a pregnant woman under 18 years of age cannot, under the law, be distinguished from one over 18 years of age in reference to 'fundamental,' *personal*, constitutional rights."<sup>97</sup> Since the state had no authority to interfere with the right of privacy in the first trimester, it could not therefore statutorily delegate that authority to the parents. Therefore, the minor's right of privacy was held to predominate.

A waiver of constitutional rights must be an intentional and voluntary relinquishment or abandonment, and is not to be readily presumed.<sup>98</sup> By giving parents the control over the contents of records in cases where the student is able to maturely exercise his right of privacy, the Act allows the parent to waive another's personal rights. The problem of waiver becomes particularly troublesome in situations of conflict between student and parent. Such conflicts typically arise when a student desires to prevent parental inspection and/or dissemination of personally identifiable information.

A fundamental question remains as to whether parental control and inspection of the records is impermissibly extending parental rights into a protected area of student constitutional liberty. Although it can be argued that there are times when family harmony and an interest in the well-being of the child dictates parental control,<sup>99</sup> as with incompetent or younger children, the mature student should exercise sole control over his records and destiny.<sup>100</sup>

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95. See Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

96. 376 F. Supp. 695 (S.D. Fla. 1973), *cert. denied*, 42 U.S.L.W. 3662 (U.S. June 4, 1974).

97. *Id.* at 698.

98. See generally *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Boykin v. Alabama*, 395 U.S. 238 (1968).

99. It has been argued that it is questionable to vest the parent with the power to veto the child's decision and base it on the state's objective of preserving family harmony, as such may in fact exacerbate the conflict and undermine mutual respect. When there exists an emotional child-parent conflict, the justification of such parental control is eroded. Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305, 330 (1974).

100. A number of states recognize that at least in cases of medical treatment, a subjective evaluation of the minor's maturity will be made to hold valid the consent of the minor. See, e.g., CAL. CIV. CODE § 34.6 (Supp. 1973).

## CONCLUSION

The importance of the right of privacy derives from the significance it has in the definition of an individual. As society becomes increasingly urban and complex, the ability of an individual to withdraw aspects of his "self" and control how he is viewed becomes more intense. The need for an individual to be able to close off certain information from others is now being recognized in the school record context.

The Family Educational Rights and Privacy Act presents a less than direct guarantee of this need. Although the Act provides for parental control over student records, the question of student rights remains unsettled. Within the expanding area of protection of privacy the extent of student inspection and non-disclosure of educational records presents one of the more complex and sensitive questions.

Students are the future of society and their needs require current legal recognition and protection. Resolution of the school record problem must be made with the realization that whatever is imprinted on a youth will affect his future and that of society. As Justice Douglas stated in his dissenting opinion in *Wisconsin v. Yoder*:

It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.<sup>101</sup>

MICHAEL J. ZDEB

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101. *Wisconsin v. Yoder*, 406 U.S. 205, 245 (1972) (Douglas, J., dissenting).

