

The Privacy Advantages of Homeschooling

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The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, *at all*, or can not, *so well do*, for themselves—in their separate, and individual capacities.

In all that the people can individually do as well for themselves, government ought not to interfere.

—*Abraham Lincoln*¹

I. INTRODUCTION

In 1969, the Supreme Court stated in its landmark *Tinker v. Des Moines* decision that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² However, over thirty years later, courts and legislatures still curtail a multitude of other student rights while those students attend school.³ The deterioration of student civil liberties is most evident when considering *public* school students’ loss of privacy.⁴ Public schools collect, extract, assimilate and distribute a sundry of personal information, including residential data, discipline reports, test scores and comparative rankings, registration and classification records, medical accounts and

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¹ ABRAHAM LINCOLN, *Fragment on Government*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN 220, 220 (Roy P. Basler ed., 1953).

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that school regulation limiting freedom of expression must be justified by a reasonable forecast of substantial disruption).

³ *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (period for in-school meditation or voluntary prayer violates the establishment clause); Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (1994) (requiring schools to adopt anti-gun procedures to receive federal funding).

⁴ *See infra* Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY.

psychological assessments.⁵

In contrast to students' loss of privacy rights while in schools, the Supreme Court expressly protects citizens' privacy rights while in their homes.⁶ In 1961, the Supreme Court stated that physical invasion of the home "by even a fraction of an inch" is too much.⁷ In 2001, the Court continued, by stating that, "to explore details of the home that would previously have been unknowable without physical intrusion . . . is a 'search' and is presumptively unreasonable without a warrant."⁸

Although the Fourth Amendment right against unreasonable searches and seizures traditionally protected "people, not places,"⁹ the contemporary standard is determined by a "reasonable expectations of privacy" test.¹⁰ Nowhere else do people expect privacy more than in their homes; consequently, most homeschooled students preserve more personal privacy than those who attend public schools.¹¹ In other words, to extend *Tinker's* metaphor, students tend to retain more constitutional protections behind "picket fences" than behind "schoolhouse gates."¹²

"Homeschooling"¹³ is, basically, when parents teach their children at home instead of sending their children to formal schools.¹⁴ A variety of homeschool programs and cooperatives

⁵ See *infra* Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY.

⁶ *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (limiting technological invasions of the home).

⁷ *Silverman v. United States*, 365 U.S. 505, 512 (1961).

⁸ *Kyllo*, 533 U.S. at 40.

⁹ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁰ *Id.* at 362 (Harlan, J., concurring); see also BLACK'S LAW DICTIONARY 262 (2d pocket ed. 2001) ("[E]xpectation of privacy. A belief in the existence of the right to be free of governmental intrusion in regard to a particular place or thing.").

¹¹ Although private schools are not a primary focus of this paper, parents may also conscribe away many of their family's privacy rights by sending their children to so-called "private" schools.

¹² See *supra* text accompanying note 2.

¹³ "Homeschooling," "home education" or "home instruction."

¹⁴ "Homeschool" is a fairly modern term (and may serve as a noun, adjective or verb). Over the last three decades, "home" and "school" have gradually been co-joined and are now most commonly phrased as one compound word. See, e.g., *Angstadt v. Mid-West Sch. Dist.*, 377 F.3d 338, 341 (3d Cir. 2004) ("In 2001, she stopped *home schooling* . . .") (emphasis added); *Olson v. Stevens*, 730 A.2d 432, 433 (N.J. Super. Ct. App. Div. 1999) (consisting of various phrases which use the term "home school," such as: "Stevens began *home schooling* her daughter . . .") (emphasis added); DAVID H. ALBERT, *HOMESCHOOLING AND THE VOYAGE OF SELF-DISCOVERY* (2003) (emphasis added); MARY LEPPERT & MICHAEL LEPPERT, *HOMESCHOOLING ALMANAC 2002-2003* (2001) (emphasis added). Perhaps to establish grammatical consistency when discussed among "public school" and "private school," statutes and court rulings for the most part continue to record "home" and "school" as separate words (except when used as an adjective, whereby the words are sometimes hyphenated). Another reason the two words remain separated by government agencies, however, may be to re-enforce the customary separation of home

exist,¹⁵ and a variety of state regulations govern homeschools.¹⁶

The purpose of this paper is two-fold: 1) to expose the expansion of information gathering and dissemination via the United States public school system; and 2) to facilitate parental choices on how best to educate their children if privacy issues are a concern. Privacy is fundamentally the omission of outside interference; therefore, in attempting to demonstrate the privacy advantages of homeschooling, this work, for the most part, proves a negative by comparatively cataloguing how much privacy is denied, or potentially denied, when students attend public schools.

Section II compares and contrasts students' legal requirements regarding the types of information students *must* provide to government educational institutions and the information public schools and homeschools *must* or *may* gather or release. Section III examines homeschooling's legal foundations and regulatory issues. Section IV postulates challenges facing the future of homeschooling's privacy advantages.

II. EDUCATIONAL INSTITUTIONS AND PRIVACY

A. Applicable Law

1. Congressional Acts

Two congressional acts substantially affect collection and dissemination of otherwise private information originally collected for educational purposes: the Family Educational Rights and Privacy Act (FERPA, commonly known as the Buckley Amendment),¹⁷ and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (PATRIOT Act).¹⁸ The federal Privacy Act of 1974,¹⁹ the Freedom of

and school. *See Olson*, 730 A.2d at 433 (separating "home" and "school" throughout the opinion, except once, where J.A.D. Rodriguez consigns the term via hyphens and quotes: "She also sought enforcement of an agreement . . . so she could 'home-school' their daughter.").

¹⁵ However, detailed clarifications of how to operate homeschools are beyond the scope of this paper.

¹⁶ *See infra* Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING; *see also* Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students*, 70 A.L.R. 5th 169 (1999).

¹⁷ 20 U.S.C. § 1232g (2000).

¹⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115

Information Act²⁰ and state laws also, to varying degrees, affect the dissemination of school records.²¹

FERPA creates a federal minimum standard limiting the unauthorized release of electronically or physically stored information about students.²² Under FERPA, education records include all records, files, documents, or other materials maintained by an educational agency, or anyone on behalf of the educational agency, containing or possessing information directly related to a student.²³

A school record is like a short chronicle of a student's academic life. School records contain information such as test scores, IQ, subjects studied, grades, teacher evaluations, psychological and psychiatric reports, and disciplinary information. Some schools even record information about religious and political beliefs in students' records—only a few states have laws against keeping a record of students' political activity.²⁴

However, FERPA forbids unauthorized release of law enforcement records and health and psychological records.²⁵ Some courts have ruled that school disciplinary proceedings against students do not constitute "education records" either.²⁶

Under FERPA, students may review their records,²⁷ request explanations of their contents,²⁸ and correct or amend any

Stat. 272 (2001) [hereinafter USA PATRIOT ACT].

¹⁹ 5 U.S.C. § 552a (2000) (protects personal information maintained in government record systems).

²⁰ *Id.* at § 552 (2000) (right to access, inspect and copy personal information maintained in government record systems).

²¹ David A. Banisar, *Privacy of Education Records*, ELEC. PRIVACY INFO. CTR., Jan. 1994, <http://www.epic.org/privacy/education/school.html>.

²² See 20 U.S.C. § 1232g (2000).

²³ *E.g., id.* at § 1232g(a)(4)(A) (2000) ("information directly related to a student"); *id.* at § 1232g(b)(1) (2000) ("personally identifiable information").

²⁴ Dana Textoris, ACLU of Ohio, *Student Privacy: Student Records*, 2, http://www.acluohio.org/get_involved/cllc/student_records.pdf (last visited Nov. 9, 2005).

²⁵ 20 U.S.C. § 1232g(a)(4)(B) (2000).

²⁶ See, e.g., *Red & Black Publ'g Co., v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993); *State ex rel. Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1997).

²⁷ ACLU, *Ask Sybil Liberty About Your Right to Keep Your School Records Private*, Dec. 31, 1997, <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=9070&c=161> [hereinafter ACLU, *School Records Private*] (Schools may request a reasonable fee for copying records. Legal guardians and students themselves, if 18 or older, may view records. Access age may differ from state to state. Some information, such as psychiatric reports and other non-educational records, may only be accessible to guardians.).

²⁸ 20 U.S.C. § 1232g(a)(2) (2000) (Students have the right to hearings before neutral or impartial officials to challenge records' contents. The hearings must allow for assistance or representation and evidentiary presentations.). See also SPARC, *Correcting School Records Form Letter*, <http://www.deltabravo.net/custody/correction.php> (last visited Nov. 9, 2005).

records they feel are incorrect, misleading, or violate their privacy rights.²⁹ FERPA allows disclosure of student information without prior consent: to officials within the school or institution who the school or institution determines have a legitimate educational interest,³⁰ for limited access by federal and state educational authorities,³¹ and in emergency situations.³²

FERPA supposedly grants both civil and criminal penalties for violators of the Act.³³ However, in a 2002 Supreme Court case, a mother claimed that FERPA forbade school administrators from reading aloud her son's grades in class during peer grading, but the Court decided otherwise.³⁴ In a companion case, the Court ruled that FERPA does not even create personal rights under 42 U.S.C. § 1983³⁵ to enforce FERPA's nondisclosure provisions.³⁶ The Court stated that FERPA only directs the Secretary of Education to enforce its nondisclosure provisions and other spending conditions, and not the rights of private individuals.³⁷ It seems, therefore, that the government has rendered civil and criminal penalties nearly useless as it rarely finds the Act is violated.

The PATRIOT Act curtails some of the privacy rights

²⁹ 20 U.S.C. § 1232g(a)(2) (2000) (If students' requests are denied, students have the right to include statements in their files stating why they believe the information is wrong and/or otherwise should not be in their records.); ED.gov, *Family Educational Rights and Privacy Act (FERPA)*, available at <http://www.ed.gov/print/policy/gen/guid/fpco/ferpa/index.html> (last visited Nov. 9, 2005) (Questions regarding FERPA may be directed to: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C., 20202-5920; (202) 260-3887 or via TTD (800) 877-8339.).

³⁰ 20 U.S.C. § 1232g(b)(1)(A) (2000).

³¹ *Id.* at § 1232g(b) (2000).

³² *Id.* at § 1232g(h) (2000) (situations that threaten the health or safety of the student or other individuals).

³³ See Banisar, *supra* note 21 ("Individuals who willfully violate the disclosure provisions can be convicted of a misdemeanor and fined up to \$5,000. Any party who knowingly or willfully obtains a person's record also faces criminal penalties. Civil liability for willful or intentional acts includes injunctions against further acts, damages of not less than \$1,000, attorney fees and costs."); see also 20 U.S.C. § 1232g(a)(1)(C)-(D) (2000) (conversely, students may waive their privacy rights in writing, which allows identified third parties to access some or all of their records.).

³⁴ *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 429-30 (2002); see also Daniel R. Dinger, *Johnny Saw My Test Score, So I'm Suing My Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy Under the Family Education Rights and Privacy Act*, 30 J.L. & EDUC. 575 (2001); 20 U.S.C. § 1232g(a)(4) (2000) (defining "education records"); 20 U.S.C. § 1232g(b)(1) (2000) (FERPA cuts off funding to programs that allow the dissemination of, among other things, test scores or other personal information that is identifiable by name or Social Security number.).

³⁵ 42 U.S.C. § 1983 (Supp. V 1999).

³⁶ *Gonzaga Univ. v. John Doe*, 536 U.S. 273, 276, 287-89 (2002).

³⁷ *Id.* at 287, 289; see also 20 U.S.C. § 1232g(f) (2000); 20 U.S.C. § 1232g(g) (2000).

apparently granted in FERPA.³⁸

The PATRIOT Act changes the standards for sharing student records in two important ways:

- i. It makes it much easier for law enforcement to gain access to student records.³⁹ Prior to the PATRIOT Act, law enforcement agents needed to prove they had 'probable cause' before getting access to a student's record, which requires specific evidence of wrong doing. Now under the PATRIOT Act, law enforcement only need to have 'reasonable suspicion,' a much lower standard.⁴⁰ This means student records aren't protected as strongly as they were before.
- ii. FERPA required that schools notify students if their records had been released to law enforcement agents. Under the PATRIOT Act, schools are no longer required to notify students. Students have no idea if their records have been turned over to law enforcement or for what reason.⁴¹

Sentinel newspaper reporter, Thomas Ryan, summarizes, "[t]he Patriot Act creates an exception to the privacy protections of the FERPA⁴² to require 'emergency disclosure' if specified federal officials obtain a court order relevant to a terrorism investigation, which is very broadly defined in the Act."⁴³ FERPA, however, already contains an exception for "safety or well-being" that is arguably sufficient to deal with a true emergency caused by a terrorist suspect.⁴⁴

Any educational records that school systems⁴⁵ collect and keep about public-schooled students or home-schooled students fall under the purview of FERPA.⁴⁶

³⁸ USA PATRIOT ACT §§ 215, 507 (Section 215 can be used to access purchase records, computer files, educational files, library records and generic information, and § 507 amends section 404 of the General Education Provisions Act, 20 U.S.C. § 1232g by allowing the Attorney General to "collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation . . .").

³⁹ USA PATRIOT ACT §§ 215, 507.

⁴⁰ *New Jersey v. T. L. O.*, 469 U.S. 325, 347 (1985) ("The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T. L. O. was carrying marihuana as well as cigarettes in her purse.")

⁴¹ Textoris, *supra* note 24, at 2 (footnotes added).

⁴² 20 U.S.C. § 1232g(j)(1)(A)-(B) (Supp. II 2002) (FERPA aids in the investigation and prosecution of terrorism.)

⁴³ Thomas Patrick Ryan, *Another Look at the Patriot Act*, THE SENTINEL NEWSPAPERS, Nov. 29, 2004 (on file with Chapman Law Review).

⁴⁴ 20 U.S.C. § 1232g(h) (2000).

⁴⁵ See, e.g., *id.* at § 1232g(a)(2) (2000) (so long as the systems accept federal funding).

⁴⁶ Student education records fall under FERPA. Kathleen Lucadamo et al., *Secret School Files Dumped*, DAILY NEWS, Nov. 14, 2004, at 2 ("Under the [FERPA], a school must protect the confidentiality of student education records that it maintains," said Susan Aspey, Press Secretary of the U.S. Department of Education, regarding alleged mismanagement of homeschooling records.)

2. Judicial Decisions

Although nothing in the U.S. Constitution specifically mentions privacy rights, other rights hint at it.⁴⁷ The Fourth Amendment specifically grants:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁸

However, the Supreme Court currently permits a variety of exigency and “special needs” exceptions to the Fourth Amendment.⁴⁹ The Court has also found privacy privileges in the First Amendment’s rights to freedom of speech, religion and association,⁵⁰ the Third Amendment’s prevention against forced quartering of soldiers,⁵¹ and the Fifth and Fourteenth Amendments’ due process rights, equal protection provisions, and protections against self-incrimination.⁵² The Ninth Amendment ensures that just because the Constitution or the Bill of Rights does not mention a particular right it does not mean that it is not a right of the people.⁵³ Thus, the Supreme Court has interpreted the Ninth Amendment to provide some privacy protection.⁵⁴

In 1977, the Supreme Court recognized child-rearing and education as within the scope of the right to privacy.⁵⁵ However, Ninth Amendment protections have been applied, with few exceptions, only to out-of-school or at-home privacy protection, as delineated by landmark cases decided throughout the 1960’s, 70’s and 80’s, concerning issues such as prophylactic issues,⁵⁶ sexual behavior,⁵⁷ abortion rights,⁵⁸ and wiretapping.⁵⁹ Perhaps, then, it

⁴⁷ *Griswold v. Connecticut*, 381 U.S. 479, 483-85 (1965).

⁴⁸ U.S. CONST. amend. IV.

⁴⁹ See discussion *infra* Part II. C. 2. Information That School or Government Officials May By Law Require From *Some* Students.

⁵⁰ U.S. CONST. amend. I; see, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (right to speak anonymously); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (striking down compulsory disclosure of names and addresses of organization members).

⁵¹ U.S. CONST. amend. III.

⁵² U.S. CONST. amend. V, § 1 (restricts the government from forcing individuals to divulge certain information about themselves); U.S. CONST. amend. XIV § 1 (same); e.g., *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977) (explaining substantive due process privacy protection to information privacy).

⁵³ U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

⁵⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁵⁵ *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977).

⁵⁶ See *Griswold*, 381 U.S. at 482-84 (also recognizing the right to educate one’s child as one chooses as part of the right to privacy).

⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 578-89 (2003).

⁵⁸ *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

is not coincidental or surprising that the modern rise in homeschooling⁶⁰ follows the wave of privacy rights pursued in the late twentieth century.

B. The Rise of Homeschooling

The National Center for Education Statistics (NCES) reports that in 2003 about 1.1 million U.S. students were homeschooled, up from 850,000 in 1999,⁶¹ a 29% increase in just five years.⁶² Ian Slatter, spokesman for the National Center for Home Education (NCHE), however, claims that the NCES statistic *underestimates* the number of children actually being homeschooled.⁶³ Slatter claims that the true figure is two million children.⁶⁴ This million-or-so student discrepancy exposes the informational obfuscation provided by not registering children in traditional school systems.

Nonetheless, it is estimated that homeschooled children currently represent 2.2% of the five- to seventeen-year-old population in the United States.⁶⁵ The top reasons parents give for homeschooling their children are:

- 31% Concern about school environment.⁶⁶
- 30% To provide religious/moral instruction.⁶⁷
- 16% Dissatisfaction with academic teaching.⁶⁸
- 7% Child has mental/physical health problem.⁶⁹
- 7% Child has special needs.⁷⁰

Thus far, statistics do not reveal concern of personal

⁵⁹ *Katz v. United States*, 389 U.S. 347, 353 (1967).

⁶⁰ *See, e.g.*, Susan Saiter, *The Learning Society; Schooling in the Home: A Growing Alternative*, N.Y. TIMES, Apr. 14, 1985, at §12, pg. 45.

⁶¹ Shannon Reilly & Alejandro Gonzalez, *Home-schooling Up*, USA TODAY, Sept. 1, 2004, at A1.

⁶² *More Kids Learning at Home, U.S. Says*, ASBURY PARK PRESS, Aug. 4, 2004, at A5.

⁶³ *Id.* *See, e.g.*, Abby Goodnough, *Kitchen-Table Classrooms*, N.Y. TIMES, Sept. 24, 1995, at §13, N.J., pg.1 ("Since New Jersey has no specific statute governing home schooling, the State Department of Education does not count the children involved from year to year.")

⁶⁴ *More Kids Learning at Home, U.S. Says, supra* note 62, at A5.

⁶⁵ *More Kids Learning at Home, U.S. Says, supra* note 62, at A5.

⁶⁶ *E.g.*, David Andreatta, *Teacher-Bust Rate More Than One a Day*, N.Y. POST, Oct. 25, 2004, at 2 (1,416 Department of Education employees were arrested between July 1, 2003, and June 30, 2004); Carl Campanile, *Scared Kids Flee Schools*, N.Y. POST, Aug. 23, 2004, at 2 ("More than 2,500 city students fled their public schools last year out of fear for their safety . . ."); NANCY DAY, *VIOLENCE IN SCHOOLS: LEARNING IN FEAR 8-12* (1996).

⁶⁷ Reilly & Gonzalez, *supra* note 61, at A1.

⁶⁸ *See, e.g.*, GUY STRICKLAND, *BAD TEACHERS: THE ESSENTIAL GUIDE FOR CONCERNED PARENTS* 12, 148 (1998).

⁶⁹ Reilly & Gonzalez, *supra* note 61, at A1.

⁷⁰ Reilly & Gonzalez, *supra* note 61, at A1.

confidentiality as a major rationale for homeschooling children, even though government officials, school administrators, and faculty members collect large amounts of information about the students who attend public schools.⁷¹ Few people realize or recognize that homeschooling provides an additional over-arching advantage over public schooling. And that advantage is privacy.

C. Information Gathering

In 1973, the Supreme Court stated, “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”⁷² Although the federal Constitution does not necessarily provide a right to education, every state has a public school education provision in its constitution.⁷³ States must ensure that their education statutes do not conflict with any privacy rights. States may, and often do, provide privacy protections greater than protections granted by the federal constitution;⁷⁴ therefore, states must balance educational and privacy standards to justify collecting otherwise private information for educational purposes.

Why should students and parents be concerned about information privacy? As a HSLDA *National Privacy Report* stressed:

[a] transfer of information about a private citizen to the government cannot be viewed as harmless. Once a private citizen gives personal information to a government official, the citizen no longer has any control over where that information is stored, or the purposes to which it will be put. The more information a government collects on its citizens, the greater its ability to control the citizens. Informational privacy is an important right. Home school families are concerned about family privacy in choosing to direct the education of their children.⁷⁵

“Privacy” generally refers to people’s right to control

⁷¹ See discussion *infra* Part II. C. Information Gathering.

⁷² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁷³ KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 978-82 (5th ed. 2001) (N.Y. CONST. art. XI, § 1 provides, “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” Many state constitutions, such as Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia, utilize a “thorough and efficient” educational standard.). *Id.* at 981.

⁷⁴ *E.g.*, CAL. CONST. art. I, § 1 (“protect[s] property, and pursuing and obtaining safety, happiness, and *privacy*”) (emphasis added).

⁷⁵ Home School Legal Defense Association, *HSLDA’s National Privacy Report*, Mar. 2001, available at <http://www.hslda.org/docs/nche/000010/200104260.asp> [hereinafter *HSLDA, Privacy Report*].

information about themselves and their families. Even when considering the many state-mandated homeschooling statutes, homeschooled students and their parents overwhelmingly control much more of their personal and private information than do publicly schooled children and their parents.⁷⁶

Privacy and education issues interact daily. Parents must provide personal data even before their children may attend most public schools.⁷⁷ Sometimes, schools extract private information before students may participate in school-sponsored programs.⁷⁸ Parents and students “consent” – for a variety of reasons, not the least of which include frustration, ignorance, or subtle coercion – to divulging information that their families may not necessarily want others to know.⁷⁹ The types of personal information that public schools gather can, basically, be organized into three general categories:

Information that most school or government officials require by law from *every* student;⁸⁰

Information that school or government officials *may* by law require from *some* students;⁸¹ and,

Information legally permitted to be garnered through less obvious means.⁸²

1. Information that Most School or Government Officials

⁷⁶ See discussion *infra* Part II. C. 1. Information That Most School or Government Officials Require By Law From *Every* Student.

⁷⁷ See discussion *infra* Part II. C. 1. a. Registration.

⁷⁸ See discussion *infra* Part II. C. 2. a. Corporal Testing.

⁷⁹ As in criminal Due Process cases, which require voluntary confessions, factors such as age, educational background, and mental capabilities, should, arguably, come into play when students and guardians are asked to provide information. When students are called into guidance counselors’ or principals’ offices, the situations mirror the world of law enforcement custodial interrogations prior to *Miranda v. Arizona*, 384 U.S. 436 (1966). As noted in the landmark case, police interrogation techniques were officially:

‘[i]f at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.’

Id. at 449-50. This denotes the atmospheric benefit of a home environment versus an administrative institutional environment.

⁸⁰ See discussion *infra* Part II. C. 1. Information That Most School or Government Officials Require By Law From *Every* Student.

⁸¹ See discussion *infra* Part II. C. 2. Information That School or Government Officials *May* By Law Require From *Some* Students.

⁸² See discussion *infra* Part II. C. 3. Legally Garnering Information Through Less Obvious Means.

Require by Law from *Every* Student

a. Registration

A straightforward way to comprehend the type and amount of information public schools require is to review what a typical school district requests each student to submit. One school district⁸³ requires parents to divulge at least four different types of information: residential, emergency contact, directory and medical.⁸⁴ Parents *must by law* complete, sign and submit a Parental/Guardian Consent Form on a yearly basis for each child they wish to register.⁸⁵ In accordance with FERPA,⁸⁶ parents may opt their students out of inclusion in any student directory and other photo/image identifiers.⁸⁷

The sample district's Student Information and Emergency Form (SIEF) is by far the most intrusive.⁸⁸ In addition to the student's address information, the school requests that the parents/guardians supply, among other information, the student's Social Security number, date of birth, age, emergency and alternative emergency contact information, personal physician's name contact information, a listing of any medical needs, parents' and/or guardians' contact information including employers and home and business phone numbers, and all siblings' names, birthdates and schools.⁸⁹ Courts generally do not protect names, addresses and phone numbers as confidential.⁹⁰ The SIEF also asks, "[w]ith whom does [the]

⁸³ Ocean Twp. Sch. Dist. (OTSD), Ocean Twp., N.J. This school district is the sample district referred to throughout this article.

⁸⁴ See *infra* notes 85, 87, 88 and 91.

⁸⁵ Twp. of Ocean Sch. Dist., Student Info. and Emergency Form (unpublished form, on file with Chapman Law Review). In addition to the above forms, the envelope distributed by the Ocean Township School District to parents and guardians also contain letters of welcome from the principal and PTA president, transportation department information, a PTA Committee Volunteer Interest Sheet, a PTA Membership envelope requesting dues money, a voter registration form/envelope, and open house information.

⁸⁶ 20 U.S.C. § 1232(g)(5) (2000) (requires notice be given before directory information is released).

⁸⁷ Twp. of Ocean Sch. Dist., Parental/Guardian Consent Form (unpublished form, on file with Chapman Law Review). Ironically, a directory opt-out will only occur after a student submits the appropriate form, which requires the student's and parent's names and dated signature.

⁸⁸ See Twp. of Ocean Sch. Dist., Student Info. and Emergency Form, *supra* note 85 (requiring student to submit, among other things, student's social security number, emergency contacts, personal physician, parents' employer(s) and a current utility bill).

⁸⁹ *Id.*

⁹⁰ *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 124 S. Ct. 2451, 2456, 2460 (2004) (State law enforcement may reasonably compel people to "stop and identify" themselves. "In every criminal case, it is known and must be known who has been arrested and who is being tried. . . . Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." (citation

student reside?" and lists check-boxes for "both parents," "mother," "father," or "guardian,"⁹¹ and requires the dated signature of a parent or legal guardian.⁹² The sheet notes twice in bold, capital letters that a current utility bill must be submitted with the completed form.⁹³ This information is far beyond the theoretically benign requests for basic contact and medical information.

The sample school district supplies copies of this "carbon-backed" triplicate form to the district's health office, guidance department and attendance controller.⁹⁴ Text at the top of the SIEF orders that parents "complete this form and return it immediately to your student's homeroom teacher."⁹⁵ The form permits countless eyes access to this sensitive information.⁹⁶

It does not take a conspiracy theorist to recognize that this seemingly benign information gathering and dissemination may, in the aggregate, be detrimental.⁹⁷ For instance, online and hardcopy student directories may provide access for molesters and harassers to learn the names and contact information of potential victims.⁹⁸ Further, school systems' (mis)use of Social Security numbers is particularly alarming.⁹⁹ "Courts have ruled that there are only four (4) instances when Social Security numbers MUST be used. These are: 1. For tax purposes[;] 2. To receive public assistance[;] 3. To obtain and use a driver's

omitted)). *Id.* at 2461. *Contra* cases titled "*Doe*," "*Roe*," "*In re*," *etc.*, and witness protection programs, where witnesses are not necessarily required to identify themselves.

⁹¹ Twp. of Ocean Sch. Dist., Student Info. and Emergency Form (unpublished form, on file with Chapman Law Review).

⁹² *Id.*

⁹³ *Id.* ("YOU MUST INCLUDE A CURRENT UTILITY BILL WITH THIS FORM" and "FILL OUT COMPLETELY AND ATTACH A CURRENT UTILITY BILL").

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Kathleen Vail, *Privacy Rights Versus Safety: Should Juvenile Records be Open to Schools?*, AM. SCH. BOARD J., April 1997, available at <http://www.asbj.com/security/contents/0497vail.html> (Many states, including California, Florida, Missouri, Texas, and West Virginia, require that law enforcers notify school officials when students are charged with some crimes whether or not the offenses occurred on school property or at a school function.)

⁹⁸ See Andrew Sickinger, *A Few Words of Western Wisdom*, WESTERN COURIER, Aug. 27, 2004, available at

<http://www.westerncourier.com/media/paper650/news/2004/08/27/Opinion/A.Few.Words.Of.Western.Wisdom-706368.shtml> ("The *stalker book*, also known as the 'student directory,' includes your name, year, major, local address and phone number and your home address. Although the school claims it doesn't sell the book to credit card companies, you will get bombarded with offers from them shortly after the book comes out, through the mail and over the phone.") (emphasis added).

⁹⁹ Schools often use Social Security numbers as Student ID numbers and require disclosure of Social Security number for a variety of reasons. Stealing Social Security numbers is often a major component of identity theft.

license[; and,] 4. To register a motor vehicle.”¹⁰⁰ School attendance is not one of these instances.¹⁰¹ Nonetheless, Social Security numbers have become a *de facto* national ID number and many, if not most, schools use Social Security numbers as students’ ID numbers.¹⁰² Social Security cards, however, initially stated in capital letters, “NOT TO BE USED FOR IDENTIFICATION.”¹⁰³ Some homeschooling parents have objected to Social Security identifiers based on religious convictions.¹⁰⁴ Regardless of what information school systems claim that students must provide, the Privacy Act states: “[i]t shall be unlawful . . . to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”¹⁰⁵

Since education is regulated variably by each state, homeschooling “registration” requirements fluctuate.¹⁰⁶ In 1995, at least sixteen states lacked any homeschooling statutes and eleven states did not even require homeschoolers to notify their local school districts at all regarding their status.¹⁰⁷ As of 2003, “[n]ine states allow parents to remove children from school without reporting that they are doing so. An additional 14 states require home-schoolers to report that they are keeping their

¹⁰⁰ CLAIRE WOLFE, 101 THINGS TO DO ‘TIL THE REVOLUTION 34-35 (rev. ed. 1999) (citing the Heritage Caucus); accord Flavio L. Komuves, *We’ve Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 540, 545, 548 (1998).

¹⁰¹ See Banisar, *supra* note 21 (“[Social Security numbers] are considered an education record under FERPA and its [sic] collection and disclosure by government agencies is [sic] generally prohibited by the Privacy Act of 1974.”); see also Plyler v. Doe, 457 U.S. 202, 205, 215, 223 (1982) (requires undocumented children of alien immigrants be educated at public schools; such children apparently would not be able to submit Social Security numbers).

¹⁰² See Komuves, *supra* note 100, at 531-32, 537-38.

¹⁰³ WOLFE, *supra* note 100, at 30; see also Home School Legal Defense Association, *Social Security Inspector General Testifies Before Congress*, July 27, 2001, available at <http://www.hslda.org/docs/news/hslda/200107270.asp?> [hereinafter HSLDA, *Social Security Inspector*] (“Social Security was created in 1935 for the sole purpose of tracking Americans’ earnings in order to properly credit their wages. Americans were promised that it would not be used for anything else. The Department of Defense now uses the SSN for armed forces and draft registration, and the Internal Revenue Service requires it for income tax returns and bank deposits to ensure that all income has been declared. . . . Federal, state, and local governments also use the SSN for issuing food stamps and driver’s licenses, to marriage licenses and water and sewer bills.”).

¹⁰⁴ HSLDA, *Social Security Inspector*, *supra* note 103 (Some argue that *The Bible* presses for a separation of church and state functions and that Social Security numbers are “a mark” which may “one day lead to chip implantation or biometric identification;” and, therefore, First Amendment freedom of religion rights should keep Social Security numbers out of school requirements.).

¹⁰⁵ 5 U.S.C. § 552a (2000).

¹⁰⁶ See *infra* notes 107, 108, 247, 303 and accompanying text.

¹⁰⁷ Goodnough, *supra* note 63, at §13, N.J., pg.10.

children at home, but require very little else.”¹⁰⁸

b. Examinations

i. Academic Classifications

Public school systems generally rank students and organize classes according to many factors, including, among other things, students’ ability levels and disabilities,¹⁰⁹ whereas homeschoolers are not subject to class rankings or limited by aptitude placements.¹¹⁰ It is common knowledge that school systems across the country assess students using a battery of mandatory standardized tests, such as the CAT, HSPT, GEPA, ESPA, Stanford, and Regency.¹¹¹ However, only about half the states require homeschoolers to submit to standardized testing,¹¹² and a number of states do not supervise parents who keep their children out of public or private schools.¹¹³ States’ use of achievement tests to monitor home instruction has been found constitutional,¹¹⁴ and homeschooled children who wish to enter or re-enter public schools may be required to pass performance and classification examinations.¹¹⁵

Actual requirements to assess homeschoolers’ achievements vary from state to state.¹¹⁶ The *Homeschooling Almanac 2002-2003* advises:

[y]ou can obtain an academic record of your [homeschooled] child’s schooling career in two ways. The first way is to keep records yourself

¹⁰⁸ Editorial, *Make Home Schooling Safe for Children*, N.Y. TIMES, Nov. 15, 2003, at A12.

¹⁰⁹ Telephone Interview with Diana Panigrosso, English Teacher, Marlboro High Sch., Marlboro, N.J., and Past English Dept. Chairperson, St. Mary’s High Sch., South Amboy, N.J. (Dec. 9, 2004).

¹¹⁰ Telephone Interview with Dawn Lincoln, parent who has homeschooled two children in both Connecticut and New Hampshire (Dec. 10, 2004) (on file with author).

¹¹¹ See State Education Profiles for Use with NAEP, 2000-2001 School Year, State Assessments: MATH (source on file with Chapman Law Review) (testing differs from state to state); see also No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (No Child Left Behind Act requires performance testing); see, e.g., John Mooney, *State Must Devise Tests to Comply with No Child Left Behind*, STAR-LEDGER (Newark, N. J.), Dec. 6, 2004, at 13 (“By rule, [New Jersey] must have standards in place and test students in grades three through eight by 2006.”).

¹¹² See, e.g., LINDA DOBSON, THE HOMESCHOOLING BOOK OF ANSWERS 173, 329-41 (1998) (No forced standardized testing of homeschoolers in: Alabama, Arizona, California, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, New Jersey, Oklahoma, Texas, Utah, Wisconsin, Wyoming, American Samoa, or Washington, D.C.).

¹¹³ Editorial, *Make Home Schooling Safe for Children*, *supra* note 108, at A12.

¹¹⁴ *Murphy v. Arkansas*, 852 F.2d 1039, 1040, 1044 (8th Cir. 1988).

¹¹⁵ *E.g.*, *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 929, 931 (6th Cir. 1991).

¹¹⁶ See *infra* Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING.

and then create a transcript format document for such use The other way is to enroll in an independent study program (ISP), either public or private, that maintains records and generates transcripts for you.¹¹⁷

Many homeschooling parents assess and record their children's performance in some way; however, what gets revealed beyond the home is, for the most part, a familial decision.¹¹⁸

ii. Medical Exams

Public schools may garner medical information.¹¹⁹ A separate letter to parents from the sample township's health office informs:

[t]he State of New Jersey requires that all Kindergarten, 1st, 2nd [,] 3rd and 4th grade students have their HEPATITIS B VACCINE SERIES completed by the beginning of the 2004-05 school year. It is also required that all Kindergarten students have one dose of the VARICELLA VACCINE before entering Kindergarten or the date of chickenpox illness. It is recommended that 1st grade students have their Varicella Vaccine completed as well.¹²⁰

Vaccinations requirements vary by state; however,

[p]arents who choose to have their child abstain from vaccinations fall into a gray area – with little wiggle room. New York State requires that all children receive required vaccinations before entering the day care or school systems. While the Department of Education will accept a medical deferment in instances of children who are immunodeficient, exemption for parental concerns dealing with religious or philosophical issues are reviewed and granted only on a case-by-case basis.¹²¹

Since public schools require nearly all students to receive certain vaccinations, people can make general assumptions about individual students' medical information.¹²² In this way, public

¹¹⁷ LEPPERT & LEPPERT, *supra* note 14, at 166.

¹¹⁸ Telephone Interview with Dawn Lincoln, *supra* note 110 (“Assessment can also include more subtle forms of direct observation.”).

¹¹⁹ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 659 (1995) (“[R]equiring advance disclosure of medications” prior to a urinalysis test is not “*per se* unreasonable.”); see also *Skinner v. Ry. Labor Executives' Ass'n*, 498 U.S. 602, 626 n.7 (1989) (The Court “[did] not view this procedure as a significant invasion of privacy.”).

¹²⁰ Letter from Ocean Twp. Elementary Sch. to students' parents/guardians [hereinafter Letter from Ocean Twp. Elementary Sch.] (on file with Chapman Law Review) (emphasis omitted).

¹²¹ Shannon Heaney, *Vaccinations: What Every Parent Should Know*, DAILY NEWS, Sept. 28, 2004, at Family Health 2.

¹²² Letter from Ocean Twp. Elementary Sch., *supra* note 120 (State administrative code no longer requires that physical examinations be performed at specific grade levels; however, the sample district still *requests* any updated student health information. New Jersey state law prevents students from bringing personal medications into school; however, students may carry medically necessary inhalers and epi-pens if parents submit

school students' personal medical privacy is compromised, but such data remains ambiguous for homeschoolers.

iii. Psychological Exams

In 2000, the Third Circuit held that “[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution.”¹²³ In spite of this, in October 2004, a U.S. House of Representatives appropriations bill included a new, mandatory mental health screening of every child in America, including preschool children.¹²⁴ Moreover, the pharmaceutical industry supported the bill because it has also been interpreted to require drugging of children deemed mentally ill, even when parents refuse.¹²⁵ The bill has yet to pass the Senate; whether the program would be enforced or tabulated through school system rosters is also not yet apparent.¹²⁶ The state of Illinois has already implemented a similar mandatory mental health screening program via its school systems.¹²⁷ Arguably, homeschooled students, especially those “living off the grid,”¹²⁸ can avoid government-imposed psychological screenings.

Many public schools utilize school psychologists and

the proper forms to the health office. Parents may come to the school and deliver medications, or the school nurse may administer medications after parents and physicians file the required health forms.).

¹²³ Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000).

¹²⁴ Ron Strom, *Forced Mental Screening Hits Roadblock in House*, WORLDNETDAILY, Sept. 9, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=40365 (The “New Freedom Initiative” is a result of the New Freedom Commission on Mental Health, which President Bush established in 2002); H.R. 438, 108th Cong. (2004) (Rep. Paul’s amendment to stop the program failed.).

¹²⁵ Strom, *supra* note 124. See also The Liberty Committee, *Mental-health Screening of Children*, Sept. 7, 2004, available at <http://www.thelibertycommittee.org/update09.07.04.htm>. *Contra* The Child Medication Safety Act of 2003, S. 1390, 108th Cong. (1st Sess. 2003) (read twice and referred to the Committee on Health, Education, Labor, and Pensions) (prevents schools from forcing parents to drug their child as a condition of attending school).

¹²⁶ As of November 11, 2005, the bill had not passed the Senate.

¹²⁷ CHILDREN’S MENTAL HEALTH ACT of 2003, 405 ILL. COMP. STAT. 49/1-15 (2003) (“The Illinois State Board of Education shall develop and implement a plan to incorporate social and emotional development standards as part of the Illinois Learning Standards for the purpose of enhancing and measuring children’s school readiness and ability to achieve academic success. . . . Every Illinois school district shall develop a policy for incorporating social and emotional development into the district’s educational program.”); see also Illinois Leader, *Leader Readers Express Outrage with Mental Health Screening Plan for Expectant Mothers and Children 18 Yrs and Younger*, July 26, 2004, available at <http://www.illinoisleader.com/opinion/opinionview.asp?c=17967> (letters from readers commenting on the Act).

¹²⁸ Slang for self-reliant living.

counselors.¹²⁹ These professionals must abide by duties of confidentiality.¹³⁰ Psychotherapist-patient privilege protects much of the parties' communication;¹³¹ however, confidentiality may be breached in most states if revealing the information would prevent serious harm to the patient or a third party.¹³²

Sometimes, psychological exams are mandatory, particularly before students may re-enter schools after suspension or expulsion.¹³³ Many parents who homeschool their children, though, allege that public school atmospheres are the source of many children's discipline problems.¹³⁴ "Parents and students alike have reported a great release of pressure because of the move from institutional schools to home. Problems often disappear."¹³⁵ Homeschooled children do not accumulate school-related discipline or psychological records unless parents decide to maintain them.¹³⁶

2. Information that School or Government Officials *May* by Law Require from *Some* Students

a. Corporal Testing

Nowhere is the loss of students' privacy in schools more apparent than in Supreme Court rulings on compulsory drug testing.¹³⁷ The Court currently permits a variety of "special

¹²⁹ Daniel J. Reschly, *The Present and Future Status of School Psychology in the United States*, 29 SCH. PSYCHOL. REV. 507, 510 (2000), available at <http://www.nasponline.org/pdf/spr294reschly.pdf>.

¹³⁰ American School Counselor Association, *Ethical Standards for School Counselors*, § A.2., <http://www.schoolcounselor.org/files/ethical%20standards.pdf> (last revised June 26, 2004) ("The professional school counselor: . . . b. Keeps information confidential unless disclosure is required to prevent clear and imminent danger to the student or others or when legal requirements demand that confidential information be revealed.").

¹³¹ BLACK'S LAW DICTIONARY 555 (2d pocket ed. 2001) ("[P]sychotherapist-patient privilege. A privilege that a person can invoke to prevent the disclosure of a confidential communication made in the course of diagnosis or treatment of a mental or emotional condition by or at the direction of a psychotherapist. The privilege can be overcome under certain conditions, as when the examination is ordered by a court.").

¹³² *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (holding that psychologists may have duties to warn third parties).

¹³³ See *Demers ex rel. Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 204 (D. Mass. 2003) (upholding student expulsion because he refused to see a psychiatrist). *But see Boman v. Bluestem Unified Sch. Dist. No. 205*, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5297, at *8-10 (D. Kan. Feb. 14, 2000) (granting student a permanent injunction after school administration refused to reinstate her until she underwent a psychological evaluation).

¹³⁴ DOBSON, *supra* note 112, at 56-57.

¹³⁵ DOBSON, *supra* note 112, at 57.

¹³⁶ Telephone Interview with Dawn Lincoln, *supra* note 110.

¹³⁷ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (holding that public school's athlete drug testing policy is legal and constitutional); *Bd. of Ed. v. Earls*, 536 U.S. 822, 838 (2002) (students engaging in competitive extra-curricular activities may

needs” exceptions to the Fourth Amendment.¹³⁸ A “special-needs analysis” is a “balancing test used by the Supreme Court to determine whether certain searches (such as administrative, civil-based, or public-safety searches) impose unreasonably on individual rights.”¹³⁹ In school settings, special needs exceptions permit such personal invasions as: mandatory drug testing of any students involved in school-sponsored sports¹⁴⁰ or extra-curricular activities,¹⁴¹ unwarranted locker and handbag searches,¹⁴² and other such involuntary or unwarranted searches and seizures of students’ persons, papers and effects.¹⁴³

The landmark 1995 case *Vernonia School District v. Acton* opened the door to mandatory urine tests for any students involved in school-sponsored sports.¹⁴⁴ Seven years later, in *Board of Education v. Earls*, the Supreme Court expanded school officials’ rights to drug test any student participating in any school-sponsored extra-curricular activity.¹⁴⁵ School officials across the country have initiated programs in line with these rulings.¹⁴⁶ For instance, in October 2004, the Alvin School District in Texas began random weekly drug testing of 25 to 50 students, many of whom were involved in extra-curricular

be subject to urinalysis).

¹³⁸ See *Acton*, 515 U.S. at 653; *Earls*, 536 U.S. at 829.

¹³⁹ BLACK’S LAW DICTIONARY 656 (2d pocket ed. 2001); see also *id.* at 626 (Government agents may also invoke administrative searches: “[a] search of public or commercial premises carried out by a regulatory authority to enforce compliance with health, safety, or security regulations. The probable cause required for an administrative search is less stringent than that required for a search incident to a criminal investigation.”).

¹⁴⁰ *Acton*, 515 U.S. at 664-65.

¹⁴¹ *Earls*, 536 U.S. at 838.

¹⁴² See, e.g., *In re Isiah B. v. Wisconsin*, 500 N.W.2d 637, 641 (Wis. 1993) (holding that students have no reasonable expectation of privacy for personal items stored in school lockers); *Desilets v. Clearview Reg’l Bd. of Educ.*, 627 A.2d 667, 673 (N.J. Super. Ct. App. Div. 1993) (holding that search of hand luggage prior to a field trip was justified under the Fourth Amendment); *New Jersey v. T. L. O.*, 469 U.S. 325, 346-47 (1985) (upholding a handbag search for cigarettes).

¹⁴³ See *infra* Part II. C. 2. b. Searches and Seizures.

¹⁴⁴ *Acton*, 515 U.S. at 664-65.

¹⁴⁵ *Earls*, 536 U.S. at 829-31 (citing *Acton*, 515 U.S. at 652-56) (applying a “special needs” analysis and finding a diminished expectation of privacy because students are temporary custodial wards of the state). *Contra* Brad Setterberg, Note, *Privacy Changes, Precedent Doesn’t: Why Board of Education v. Earls was Judged by the Wrong Standard*, 40 HOUS. L. REV. 1183, 1217 (2003) (arguing *Earls* “is disingenuous and contrary to the established precedent of Fourth Amendment analysis”).

¹⁴⁶ See *ABC13 Eyewitness News: School District to Begin Random Drug Testing Next Week* (ABC television broadcast Oct. 30, 2004) (transcript on file with Chapman Law Review); Andrew Dunn, *Drug Czar Praises Local School’s Test Program*, THE LEDGER (Lakeland, Fla.), Oct. 28, 2004, available at <http://www.theledger.com/apps/pbcs.dll/article?AID=/20041028/NEWS/410280398&SearchID=73216563726179>.

activities (approximately 2,000 students a year).¹⁴⁷ Such tests are in line with U.S. Department of Education grants to seven school districts nationwide to create student drug testing programs in, what U.S. Drug Czar John P. Walters described as, “hopes of expanding random student drug testing to more places.”¹⁴⁸ Drug or alcohol testing of individual students while they are in school usually falls under a “reasonable suspicion” rationale,¹⁴⁹ but the allowance of such searches varies from state to state.¹⁵⁰ In contrast, narcotics policemen are not likely to patrol homeschoolers’ residences, absent voluntary consensual invitations¹⁵¹ or probable cause.¹⁵²

Aside from testing for drugs, courts generally have not allowed schools to require other medical tests from students.¹⁵³ For instance, in early 2004, the New York chapter of the American Civil Liberties Union settled a lawsuit against the U.S. Department of Education and school officials after a school required a group of female students to submit gynecological records as a condition of reinstatement.¹⁵⁴ “Under the terms of the agreement, school officials are barred from demanding that

¹⁴⁷ *ABC13 Eyewitness News: School District to Begin Random Drug Testing Next Week*, *supra* note 146.

¹⁴⁸ Dunn, *supra* note 146.

¹⁴⁹ *New Jersey v. T. L. O.*, 469 U.S. 325, 337 (1985) (“Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’”) (citation omitted).

¹⁵⁰ ACLU, *School Records Private*, *supra* note 27.

¹⁵¹ A search is considered reasonable when there is voluntary consent, even absent a warrant or suspicion. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”); *United States v. Drayton*, 536 U.S. 194, 207 (2002) (“Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.”). *But see* *United States v. Lindsay*, 506 F.2d 166, 173 (D.C. Cir. 1974) (holding that silence does not equal consent).

¹⁵² The Fourth Amendment mandates a showing of probable cause as justification for a search warrant, unless exigent circumstances, “plain view,” or another exemption applies. See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (holding that the information supporting an application for a search warrant must demonstrate that an informant is credible or that his information is reliable); *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (holding that probability of criminal activity is the standard for probable cause); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (re-affirming the “totality-of-the-circumstances” approach to probable cause).

¹⁵³ Press Release, ACLU, NYCLU Hails Victory for Students’ Privacy Rights Following Lawsuit Over Forced Gynecological Exams (Jan. 31, 2004), available at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=14854&c=31> [hereinafter Press Release, ACLU, NYCLU Hails Victory].

¹⁵⁴ *Id.*

students undergo or reveal the results of pregnancy, STD [Sexually Transmitted Disease] and HIV testing and may not exclude students for being pregnant, HIV-positive or having an STD.”¹⁵⁵ Schools may not force students to submit to HIV tests.¹⁵⁶ However, if personal medical situations are made known to school officials, they may act in the interests of school safety.¹⁵⁷

Although public schools are generally not permitted to gather highly confidential medical information beyond drug test results, some states have begun different types of physical testing, thereby obtaining, to a certain degree, additional medical information. Arkansas, for example, “is now the only state that screens every student in public school for body mass index. [Schools] weigh [the students] and measure their height, and with that, . . . compute their body mass index and mail the results home to the parents. We let them know if their child is overweight.”¹⁵⁸ Whether gathering this type of information and disclosing the results will fall under the realm of impermissible testing remains to be seen.

b. Searches and Seizures

In 1985, the Supreme Court case *New Jersey v. T. L. O.* set forth the standard for conducting student searches.¹⁵⁹ School officials may constitutionally search students if the search is based on reasonable suspicion and is not excessively intrusive.¹⁶⁰ Strip searches,¹⁶¹ locker searches,¹⁶² and backpack/handbag searches¹⁶³ have generally been upheld.

School officials, though, sometimes push the boundaries of acceptable searches.¹⁶⁴ For instance, in 1996, Georgia school

¹⁵⁵ *Id.*

¹⁵⁶ ACLU, *Ask Sybil Liberty About Your Right to Privacy*, Dec. 31, 1997, <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=9068&c=161>.

¹⁵⁷ 20 U.S.C. § 1232g(h) (2000) (situations that threaten the health or safety of the student or other individuals); *see also* Honig v. Doe, 484 U.S. 305, 328-29 (1988) (holding that a school district may suspend a disabled child who is dangerous to himself, herself or others for up to ten days without violating stay-put provision).

¹⁵⁸ Deborah Solomon, *Questions for Mike Huckabee: The Skinny on Politics*, N.Y. TIMES, Aug. 7, 2005, at § 6, pg. 14.

¹⁵⁹ *New Jersey v. T. L. O.*, 469 U.S. 325, 341 (1985).

¹⁶⁰ *Id.* at 341-42.

¹⁶¹ *See* Cornfield v. Consol. High Sch., 991 F.2d 1316, 1323 (7th Cir. 1993) (upholding a strip search of a student that was deemed reasonable).

¹⁶² *See In re Isiah B.*, 500 N.W.2d 637, 638 (Wis. 1993) (upholding a random locker search at school).

¹⁶³ *See* DesRoches v. Caprio and Sch. Bd., 156 F.3d 571, 572 (4th Cir. 1998) (upholding search of a student's backpack for missing tennis shoes because reasonable suspicion existed); *New Jersey v. T. L. O.*, 469 U.S. 325, 332-33 (1985) (upholding search of a student's purse).

¹⁶⁴ *See generally* Thomas v. Clayton County Bd. of Educ., 94 F. Supp. 2d. 1290 (N.D.

officials and law enforcement strip-searched an entire class of fifth graders in search of a missing \$26.¹⁶⁵ Although the search was deemed unconstitutional, the judge refused to allow a jury to address the issue of damages because none of the adults involved could be held liable for their actions.¹⁶⁶ In 2000, Michigan school officials allegedly strip-searched over twenty students in an effort to recover \$354 that was supposedly stolen.¹⁶⁷ Four years later, another Michigan school system allegedly subjected its entire student body to a mass physical search.¹⁶⁸ According to an ACLU press release:

[t]he unlawful sweeps were planned and scheduled in advance and therefore not based on reasonable suspicion or probable cause to believe that any particular student or group of students had committed or was about to commit a crime or violated the law in any way. No guns or drugs were found¹⁶⁹

In 2001, the ACLU of Southern California sued the Los Angeles Unified School District alleging that school officials chose to search some students who were late to school and that school officials randomly selected students for pat-downs in front of their classmates during class time; allegedly, none of the searches followed reasonable suspicion.¹⁷⁰ Once again, unwarranted, government authorized, in-school strip searches are not a homeschooler concern.

Courts have ruled that general use of metal detectors on those entering school facilities is minimally invasive, and is permissible under the Fourth Amendment.¹⁷¹ Courts have

Ga. 1999).

¹⁶⁵ *Id.* at 1293-95.

¹⁶⁶ Press Release, ACLU, ACLU of GA Says School Strip Search Ruling Ignores Students' Rights (Oct. 4, 1999), *available at* <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=8711&c=51>.

¹⁶⁷ Press Release, ACLU, ACLU of Michigan Sues School District Over Strip Search of Students (Aug. 15, 2000), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=8073&cfm> ("Approximately 20 boys were ordered into the shower room one at a time. Each boy was directed to remove his pants, lift his shirt and drop his underwear while a teacher examined him. . . . The five girls in the gym class were then forced to stand in a circle in the locker room, and pull down their shorts and lift up their shirts so the teachers could inspect their underwear. The money was never recovered.")

¹⁶⁸ Complaint for Declaratory and Injunctive Relief and Damages and Jury Demand at 3, *Wells v. City of Detroit*, (E.D. Mich. June 10, 2004), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=15930&c=31>.

¹⁶⁹ Press Release, ACLU, ACLU Challenges Detroit Police Over Mass Searches of Public School Students (June 10, 2004), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=15931&c=31>.

¹⁷⁰ Press Release, ACLU, ACLU of Southern California Sues to Stop Intrusive Searches at High School (June 19, 2001), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=7322&c=161>.

¹⁷¹ *See, e.g., Day v. Chi. Bd. of Educ.*, 1998 U.S. Dist. LEXIS 1376, at *15-16 (N.D. Ill.

allowed governments to facilitate in-school searches with drug-sniffing canines.¹⁷² However, in 2002, South Dakota officials “brought in a German Shepherd to conduct a suspicionless drug sweep” of elementary and high school classrooms, and the dog allegedly terrorized schoolchildren when it escaped its leash and chased them around the classroom.¹⁷³

[A school official] instructed the students to put their hands on their desks and avoid petting or looking at the dog or making any sudden movements. In some classrooms, a school official told students that any sudden movement could cause the dog to attack. In at least one instance . . . the dog escaped its leash in a kindergarten class and chased students around the room. . . . Many [students] began crying and trembling and at least one [student] urinated involuntarily.¹⁷⁴

Students learning at home are, arguably, not subject to such unwarranted searches.¹⁷⁵

3. Legally Garnering Information Through Less Obvious Means

a. Information Gleaned by Individual Faculty Members

It is common practice that during the first week of public school, teachers require students to fill out index cards or some other worksheet detailing, among other things, parent or guardian contact information, home address(es), and phone numbers.¹⁷⁶ Many teachers also ask students to brief their personal interests, likes and dislikes, and/or clubs and organizations to which they belong.¹⁷⁷ Students usually fill out one index card worth of personal information for each teacher they have.¹⁷⁸ Schools collect this information for allegedly benign

Feb. 4, 1998); *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 866 (Cal. App. 4th 1998) (“Random metal detector weapon searches of high school students do not violate the Fourth Amendment constitutional ban on unreasonable searches and seizures.”); *Smith v. Norfolk City Sch. Bd.*, 46 Va. Cir. 238, 256 (Va. Cir. Ct. 1998) (students may be scanned with a hand-held metal detector).

¹⁷² *E.g.*, *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981); *Doe v. Renfrow*, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979), *cert. denied*, 451 U.S. 1022 (1981).

¹⁷³ Press Release, ACLU, South Dakota School Officials Terrorized Kindergarten Classes with Drug-Sniffing Dogs, ACLU Charges (July 25, 2002), available at <http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=10548&c=230>.

¹⁷⁴ *Id.*

¹⁷⁵ See *supra* notes 151 and 152 and accompanying text.

¹⁷⁶ Telephone Interview with William Alusik, Sci. Teacher, Westfield High Sch., Westfield, N.J. (Dec. 5, 2004) (unpublished interview, on file with author); Telephone Interview with Evan Billig, Student, Ocean Twp. Intermediate Sch., Ocean, N.J. (Dec. 5, 2004) (unpublished interview, on file with author).

¹⁷⁷ Telephone Interview with William Alusik, *supra* note 176; Telephone Interview with Evan Billig, *supra* note 176.

¹⁷⁸ Telephone Interview with William Alusik, *supra* note 176; Telephone Interview with Evan Billig, *supra* note 176; cf. AOL Instant Message Interview with Brooke DeKolf,

purposes; however, most of this information could be obtained through the main school office or other school records.¹⁷⁹ Teachers generally do not guarantee that they will destroy student data sheets at the end of the school year and there is no telling into whose hands this personal information may eventually fall.¹⁸⁰

Student information cards are only the beginning of a school-year's worth of subtle information gathering. Viewing how students are dressed, assigning in-class presentations, and performing other commonplace interactions create opportunities for overt and covert information gathering. Personal information is particularly abundant in liberal arts classes, such as social studies or English, where teachers routinely require students to comment on current events, debate, and journal write.¹⁸¹ For instance, the classic first essay of the year – “What did you do this summer?” – illustrates how school employees may easily glean familial and personal information.¹⁸²

For obvious reasons, slight or subtle invasions of privacy rarely instigate legal proceedings; however, in 1999, parents of some Ridgewood, New Jersey, students brought suit in protest of a proposed 156 question, in-school “voluntary and anonymous” survey that touched on issues such as students’ personal substance abuse, criminal activities, sexuality, sexual activity, and relationships with parents.¹⁸³ The court found that, although one teacher may not have informed his students that the survey was voluntary and another teacher may have told students that they would be “cutting class” if they left the survey room, the school “did everything reasonably necessary to ensure its voluntary nature” and no privacy violation occurred.¹⁸⁴

FERPA allows releasing statistical information that is not

Student, James A. McDivitt Elementary Sch., Old Bridge Twp., N.J. (Dec. 6, 2004) (Sometimes, students fill out only one such form in their homerooms; then, photocopies are sent to each student's teachers.) (unpublished interview, on file with author).

¹⁷⁹ See *supra* Part II. C. 1. a. Registration.

¹⁸⁰ Telephone Interview with Evan Billig, *supra* note 176; AOL Instant Message Interview with Brooke DeKolf, *supra* note 178.

¹⁸¹ Telephone Interview with JoAnn Testa, Librarian and German Teacher, St. Mary's High Sch., S. Amboy, N.J. (Dec. 9, 2004).

¹⁸² *Id.*

¹⁸³ C.N. v. Ridgewood Bd. of Ed., 319 F. Supp.2d 483, at 486-87 (D. N.J. 2004) (citation omitted); see also, Jim Brown, *Attorneys Appeal Decision Upholding School Sex and Drugs Survey*, Oct. 1, 2004, AGAPEPRESS, <http://headlines.agapepress.org/archive/10/12004e.asp>.

¹⁸⁴ *Ridgewood Bd. of Ed.*, 319 F. Supp. 2d at 487, 492. However, such public school situations, arguably, fit the Supreme Court's rationale when it outlawed school prayer. Subtle pressures to cooperate and conform existed, though no students technically had to recite school prayers and theoretically could excuse themselves from the room.

personally identifiable.¹⁸⁵ In contrast, the HSLDA¹⁸⁶ opposes any federal government method of tracking or registering homeschooling.¹⁸⁷ Government agents rarely, if ever, accumulate data or statistics regarding homeschoolers' opinions, religion, home-life or emotions.¹⁸⁸

b. Information Gleaned by Collateral Means, and Other Concerns

i. Commuting

Commuting to and from school can be an issue. Citizens retain practically no Fourth Amendment rights when inside (or recently outside)¹⁸⁹ vehicles.¹⁹⁰ Law enforcement is entitled to search drivers with little cause.¹⁹¹ Vehicle passengers, too, have minimal expectations of privacy.¹⁹² Many school systems have purchased video equipment to survey students while they are passengers on school buses.¹⁹³ In response to a series of bombings in London, other public transportation systems like the

¹⁸⁵ FERPA, 20 U.S.C § 1232g (1998).

¹⁸⁶ Home School Legal Defense Association, *HSLDA Fights for Privacy Rights*, July 20, 2001, available at <http://www.hslda.org/docs/news/hslda/200107201.asp>? (“HSLDA is primarily interested in preventing government intrusions into family rights in the areas of medical privacy, financial records, and social security number abuse, identity theft and private educational records.”).

¹⁸⁷ HSLDA, *Privacy Report*, *supra* note 75 (The U.S. Dept. of Education attempted to survey homeschoolers' parents about: “[p]reschool programs and learning activities at home for young children; [a]ctivities and programs that school-age children may participate in after school, and [t]ypes of educational activities, including training at work, in which adults may take part in [sic].”).

¹⁸⁸ Telephone Interview with Dawn Lincoln, *supra* note 110. *Contra* Lawrence M. Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998*, EDUC. POL'Y ANALYSIS ARCHIVES, Mar. 23, 1999, <http://epaa.asu.edu/epaa/v7n8/> (university study providing statistics about homeschoolers).

¹⁸⁹ *Michigan v. Long*, 463 U.S. 1032, 1034-35, 1051 (1983) (reasonable to search a vehicle after the driver exits).

¹⁹⁰ *United States v. Stanfield*, 109 F.3d 976, 981 (4th Cir. 1997) (law enforcement may open and visually inspect inside of vehicle).

¹⁹¹ *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (upholding police officer's request to have driver get out of vehicle and onto shoulder for expired license plate stop; the officer may then frisk the driver for weapons if he reasonably concludes that the person might be armed and dangerous).

¹⁹² *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (“[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”); *Wyoming v. Houghton*, 526 U.S. 295, 302-03 (1999) (passengers possess reduced expectation of privacy with regard to property they transport in cars).

¹⁹³ Honeywell - Silent Witness, <http://www.silentwitness.com/schoolbus/> (last visited Nov. 10, 2005) (“Silent Witness is the industry leader in researching, designing and manufacturing video monitoring systems installed in school buses. Over 100,000 Silent Witness systems have been installed in buses across North America keeping children in their seats and discipline problems off the bus.”).

New Jersey rail lines and New York City bus lines are subjecting their passengers to random bag searches.¹⁹⁴ Also, “police in Washington, D.C., are considering conducting random searches on the capital’s subways.”¹⁹⁵

Because homeschooled students do not commute to and from school, law enforcement officers are afforded fewer chances to interact with and possibly search homeschooled students, their cars, and their belongings.

ii. Electronic Surveillance and Faculty Member Observations

Throughout the school year, schools record student behaviors in a multitude of ways. Under safety rationales, some government officials have posted video surveillance equipment in schools.¹⁹⁶ Arizona state officials and a local school board have experimented with facial recognition video systems.¹⁹⁷ Virginia Sheriff’s Captain Fred Pfeiff summarizes: “[w]e are following national trends to use technology to make our schools safer and provide us with reasonable intelligence information in case a crisis situation occur[s].”¹⁹⁸ Many schools speaker systems allow for two-way communications with classrooms; in other words, some school administrators may listen in on classroom conversations.¹⁹⁹

Most school systems require that teachers be officially observed; this entails administrators monitoring faculty members’ classroom performances and, hence, collateral observations of student behaviors.²⁰⁰ Sometimes, teachers incorporate video observation into their classrooms; although this is often for reasonable purposes such as self-improvement

¹⁹⁴ Mimi Hall, *Bag Searches on New York Subway to Begin*, USA TODAY, July 25, 2005, at 7A, available at http://www.usatoday.com/news/nation/2005-07-25-nyc-bag-searches-begin_x.htm?csp=N009.

¹⁹⁵ *Id.*

¹⁹⁶ See *ACLU Protests Cameras in Colorado Schools*, THE DAILY CAMERA (Boulder, Colo.), Jan. 25, 2001, available at <http://www.aclu.org/Privacy/Privacy.cfm?ID=6962&c=130> (\$840,000 for new security cameras in schools); Graeme Zielinski & Christine B. Whelan, *Fauquier to Use Cameras to Keep Eye on Students*, WASH. POST, Aug. 6, 2000, at V1 (installed \$60,000 worth of cameras “even though there has been no serious violence at [the schools] in recent years”).

¹⁹⁷ Press Release, ACLU, *ACLU Asks Arizona School District to Reject Face-Recognition Checkpoints* (Dec. 17, 2003), available at <http://www.aclu.org/news/newsprint.cfm?ID=14598&c=253> (face-recognition system allegedly installed to identify sex offenders and missing children who visit the school).

¹⁹⁸ Zielinski & Whelan, *supra* note 196 (school system also installed new telephone system that tracks callers).

¹⁹⁹ Telephone Interview with JoAnn Testa, *supra* note 181.

²⁰⁰ Telephone Interview with Diana Panigrosso, *supra* note 109.

analysis, as requested for viewing by another potential employer, or as part of a performance-oriented lesson plan.²⁰¹

iii. Libraries and Computers

Students who write, research, and communicate on public computers retain less privacy than those who research at home. School facilities are public facilities; students' expectations of privacy on public machines may be reasonably lower than on home equipment. In fact, many schools utilize internet content filters to block objectionable material, but they can also track users' Internet surfing habits.²⁰² A 1988 *Washington Law Review* article foresaw that "[n]ot only does computer-assisted testing and instruction . . . threaten to invade privacy insidiously, its use with young schoolchildren poses the additional threat of arresting development of their privacy expectations."²⁰³ Since their expectation of privacy is greater, students using home computers may have fewer worries about government monitoring, password retrieval or program/website blocking.²⁰⁴ For the most part, families remain in control of their electronic domains and access.

Similarly, students who utilize public school libraries may be subjected to lower expectations of privacy.²⁰⁵ For example, in 2004, the FBI requested the names and addresses of everyone who had checked out the book, *Bin Laden: The Man Who Declared War On America*, from a Washington state public library.²⁰⁶ The library, however, did not submit to the request, and the FBI eventually withdrew its subpoena (but kept the

²⁰¹ Telephone Interview with Diana Panigrosso, *supra* note 109. Various legal and non-legal *non*-school sponsored video-taping instances occur on school grounds; *see, e.g.*, Dolores Orman, *Former Student Sues over Videos*, ROCHESTER DEMOCRAT AND CHRONICLE, Nov. 7, 2004, at 1B (custodian allegedly videotaped students undressing and using bathroom facilities).

²⁰² HSLDA, *Privacy Report*, *supra* note 75. As with student records, Web pages designed or amended by students may still be used against students in school-related (or other) criminal matters. *See also* Banisar, *supra* note 21 (In 1992, the Higher Education Act created an exception for records collected for "law enforcement purposes."). A famous example is the Web page maintained by the Columbine shooters. *See, e.g.*, John Temple, *It's Impossible to Ignore Pain of Columbine*, ROCKY MOUNTAIN NEWS, Feb. 28, 2004, at 2A (discussing heightened security and seriousness of internet threats after Columbine shootings).

²⁰³ Charles R. Tremper & Mark A. Small, *Privacy Regulation of Computer-Assisted Testing and Instruction*, 63 WASH. L. REV. 841, 841-42 (1988) (footnotes omitted).

²⁰⁴ *But see* Jennifer C. Wasson, *FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy?*, 81 N.C. L. REV. 1348, 1349 (2003) (explaining that college students are unaware how much information universities collect based on their computer usage).

²⁰⁵ *See* April Zepeda, *Small Town Library Takes on the Feds*, Oct. 5, 2004, <http://www.komotv.com/stories/33363.htm>.

²⁰⁶ *Id.*

book).²⁰⁷

[The PATRIOT] Act does allow government access to library circulation records listing books checked out by patrons, or records of internet use. The library again may not disclose the existence of a warrant or the fact that records were produced, not even to the patron. The Act overrides any state library privacy laws.²⁰⁸

Therefore, if federal agents had demanded the book records under the USA PATRIOT Act, the library would have most likely had to surrender them without question or legal recourse.²⁰⁹ The amount of these requests is increasing.²¹⁰ However, librarians are forbidden to talk about requests from the state regarding PATRIOT Act-based information gathering.²¹¹ “In a surreal twist, librarians are suddenly the ones being shushed.”²¹²

This thesis specifically examines government interference with privacy, as activities by private citizens do not invoke the Fourth Amendment.²¹³ However, the general public also has enhanced access to conversations, research and personal actions made outside of one’s home. “[I]t is now possible to eavesdrop on a typist’s keystrokes and, by exploiting minute variations in the

²⁰⁷ *Id.*

²⁰⁸ Ryan, *supra* note 43; USA PATRIOT ACT §§ 215, 507 (§ 215 allows the Director of the Federal Bureau of Investigation to “make an application for an order requiring the production of any tangible thing (including books, records, papers, documents, and other items) for an investigation” Section 507 allows for the collection of education records possessed by educational institutions and agencies); U.S. CONST. art. VI, cl. 2 (Under this “Supremacy Clause,” absent any delegated, implied or inherent powers, federal law may pre-empt state law. Also, when Congressional acts conflict, it is traditionally implied that the more recent law is to be followed, unless specifically overruled by other provisions in the Constitution as interpreted by the Supreme Court.).

²⁰⁹ *Doe v. Gonzales*, 126 S. Ct. 1 (2005) (denying emergency application to vacate order staying preliminary injunction in case of librarian challenging the constitutionality of 18 U.S.C. § 2709(c), which prohibits disclosure that the Federal Bureau of Investigation requested information concerning electronic communications of an individual or entity); see also Associated Press, *Libraries Lose Appeal of Patriot Act Gag*, Oct. 17, 2005, <http://www.livejournal.com/users/mparent7777/3703160.html>.

²¹⁰ Christine V. Baird, *Even the Library is Now Open to Expanded Powers of Spies*, STAR-LEDGER, Sept. 11, 2005, at §1, pg. 1 (“Since October, 2001, 63 public libraries and 74 academic libraries surveyed received legally executed requests.”). *Id.* at §1, pg. 16.

²¹¹ *Id.*

²¹² *Id. But cf. id.* (Some provisions of the PATRIOT Act may serve to help libraries—and perhaps the country— remain safe: “[a]nother little-noted provision of the Patriot Act, Section 217—known as the computer trespasser provision—could assist librarians who believe someone is using a computer in [an] unauthorized way, such as showing false identification when signing up for access.”).

²¹³ STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 35 (7th ed. 2004) (“[T]he Fourth [Amendment] is interpreted as providing protection only against the government and those acting in conjunction with it.”). Although beyond the scope of this paper, civil tort and property law afford some protections against non-governmental privacy invasion.

sounds made by different keys, distinguish and decipher what is being typed.”²¹⁴ As technology advances – and camera/video phones, digital binoculars, and other such devices become more commonplace – so does the capability for unwanted intrusion.

In summary, students’ personal-computer and home-library research – unless compromised via utilization of public resources – holds greater privacy protection than public research and communication venues.

III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING

The Supreme Court has long recognized that students need not solely attend public schools, but may attend private or parochial schools.²¹⁵ Two cases opened the gates for students to attend non-public schools.²¹⁶ In 1925’s *Pierce v. Society of Sisters*, the Supreme Court held that children do not have to attend public schools in order to fulfill state educational requirements.²¹⁷ Then, in 1972’s *Wisconsin v. Yoder*, the Supreme Court held that Amish children did not have to attend public school after the eighth grade.²¹⁸ The Supreme Court has yet to rule on the legitimacy of homeschooling programs; however, the *Pierce* Court did recognize “the liberty of parents and guardians to direct the upbringing and education of children under their control.”²¹⁹

In 2000, the Supreme Court re-emphasized “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”²²⁰ However, the Supreme Court has also expressed “that the privacy right [does] not restrict the government ‘from regulating the implementation of parental decisions concerning a child’s education.’”²²¹ Thus, “parents ‘have

²¹⁴ Stephen Mihm, *The 4th Annual Year in Ideas*, N.Y. TIMES MAGAZINE, Dec. 12, 2004, at 50.

²¹⁵ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (requiring all children to attend public school violates due process clause); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that First and Fourteenth Amendments prevent state from compelling Amish students to attend school beyond eighth grade).

²¹⁶ *Pierce*, 268 U.S. at 534; *Yoder*, 406 U.S. at 234.

²¹⁷ *Pierce*, 268 U.S. at 533-34.

²¹⁸ *Yoder*, 406 U.S. at 234.

²¹⁹ *Pierce*, 268 U.S. at 534-35. *Contra* *People v. Bennett*, 501 N.W.2d 106, 115 (Mich. 1993) (finding no fundamental constitutional right of parents to direct the education of their children); Daniel E. Witte, Notes and Comments, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 198 (1996) (*Bennett* is considered “one of the last offensive campaigns to effectively eradicate alternative education on a statewide basis.”).

²²⁰ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

²²¹ *State v. DeLaBruere*, 577 A.2d 254, 274 (Vt. 1990) (quoting *Runyon v. McCrary*, 427 U.S. 160, 178 (1976)).

no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”²²² “[T]he parents’ rights must give way to reasonable state regulation.”²²³

In 1982, only Nevada and Utah “had statutes that specifically provided for home schooling.”²²⁴ Yet, by 1993, thirty-two states provided statutes for homeschooling.²²⁵ Currently every state and province allows some form of homeschooling.²²⁶ However,

[r]equirements vary widely. Some states have no explicit requirements. Some require that parents notify public school officials that they will be homeschooling. In some states, parents must submit curriculum plans; in others, periodic reports. Some states require testing. Some states require several of these.²²⁷

Basically, homeschooling laws can be separated into three categories: private school laws, equivalency laws, and home education laws.²²⁸ Private school laws governing homeschooling are the least intrusive.²²⁹ States with specific home education laws tend to be the most regulated.²³⁰

“Equivalency laws . . . exempt children from compulsory attendance laws if they are receiving ‘equivalent instruction’ elsewhere.”²³¹ Where and how students spend their educational time is not a private matter for public school attendees.²³² Most states’ educational compulsory attendance statutes enable governments to locate children during the daytime hours

²²² *Id.* (quoting *Runyon*, 427 U.S. at 178).

²²³ *Id.*

²²⁴ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

²²⁵ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

²²⁶ LEPPERT & LEPPERT, *supra* note 14, at 37.

²²⁷ DOBSON, *supra* note 112, at 8.

²²⁸ DOBSON, *supra* note 112, at 7. See also Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 87 (2002).

²²⁹ DOBSON, *supra* note 112, at 329-42 (Alabama, Alaska, California, Iowa, Illinois, Kentucky, Michigan, Nebraska, Oklahoma and Texas all have such laws. This article provides state-by-state tabulation of home school compulsory education law citations).

²³⁰ DOBSON, *supra* note 112, at 8 (such states include Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming).

²³¹ DOBSON, *supra* note 112, at 7. See also *Forstrom v. Byrne*, 775 A.2d 65, 70 (N.J. Super. Ct. App. Div. 2001) (“[O]ur compulsory school attendance law permits home schooling.”); *Crites v. Smith*, 826 S.W.2d 459, 469 (Tenn. Ct. App. 1991); McMullen, *supra* note 228, at 88. Cf. *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (“District court enjoined defendants from enforcing the compulsory attendance law contrary to the construction . . .”).

²³² DOBSON, *supra* note 112, at 7 (“Intrusive regulations cannot be imposed upon private schools.”).

approximately 180 days a year.²³³

Laws require compulsory school attendance but not compulsory education. Compulsory school attendance laws are enforceable; it is not difficult to check attendance for young people enrolled in public and private schools, including homeschools. However, laws that required compulsory education would give the state control over education.²³⁴

Compulsory attendance is not the same as compulsory education,²³⁵ yet “[e]very state recognizes homeschooling as a legal way to meet state compulsory attendance requirements.”²³⁶

Various state cases have challenged how homeschooling should be defined and what, if any, regulations should apply.²³⁷ Homeschooling litigation typically involves three issues: “(1) statutory interpretation of exemptions,²³⁸ (2) complaints regarding state requirements for home instructors’ qualifications,²³⁹ and (3) state evaluations of the home instruction²⁴⁰ programs.”²⁴¹ In *Yoder*, the Supreme Court stressed, “[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic

²³³ Typically, public schools have a 180-day school year. See, e.g., MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1996) (school will be open for whatever number of days the school board designates).

²³⁴ DOBSON, *supra* note 112, at 20.

²³⁵ See McMullen, *supra* note 228, at 87.

²³⁶ DOBSON, *supra* note 112, at 12; see, e.g., Care & Protection of Charles, 504 N.E.2d 592, 597 (Mass. 1987) (“[T]he Legislature intended that the approval of a home school proposal fall within the . . . standard for the approval of a private school.”).

²³⁷ E.g., Clark v. Reiss, 831 S.W.2d 622 (Ark. Ct. App. 1992); State v. Buckner, 472 So.2d 1228 (Fla. Dist. Ct. App. 1985).

²³⁸ E.g., Clark, 831 S.W.2d at 623 (“[E]rrred in construing the home schooling statute, Ark.Code Ann. § 6-15-503 (Supp.1991)”); Buckner, 472 So.2d at 1241 (“[A]lthough the legislature authorized one type of at-home schooling, the legislature did not necessarily prohibit other types . . .”).

²³⁹ E.g., State v. Melin, 428 N.W.2d 227, 232 (N.D. 1988) (finding a compelling state interest in securing certified teachers to teach homeschoolers); *In re Marriage of Riess*, 632 N.E.2d 635, 637 (Ill. App. Ct. 1994) (respondent argued that child’s “mother [was] not properly trained to provide home schooling for the child, and that such education was not in the best interest of the child”).

²⁴⁰ See Donald D. Dorman, Note, *Michigan’s Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REFORM 733, 753 (1990) (questions of state involvement arise “[i]f the home school ever falls below required standards”); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1922 (1996) (“[T]he Due Process Clause prohibits laws or regulations that involve impermissible administrative discretion and may provide a due process claim to home educators if they must seek permission from a public school official before they begin home schooling.”) (citing JOHN W. WHITEHEAD & WENDELL R. BIRD, HOME EDUCATION AND CONSTITUTIONAL LIBERTIES 57-58 (1986)).

²⁴¹ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

education.”²⁴²

Denial of home instruction and compulsion to attend school do not violate the religious freedom of the parent. A U.S. district court has held that parents have no fundamental right to maintain home instruction for their children and that parental rights of free exercise of religion are not abridged by the state’s denial of home instruction.

The state may compel all children to attend a school, public or private, and home instruction will not suffice as an exemption from compulsory attendance requirements unless the state statute so specifies.²⁴³

States which once denied homeschooling did so based on the difficulty of supervising homeschools and on rational basis review, stressing states’ interests in fostering students’ socialization skills.²⁴⁴ This, of course, was before the Supreme Court stressed the importance of privacy.²⁴⁵ Although rational basis review remains the current standard, the HSLDA argues, “[a] person’s right to privacy should always receive a higher protection than a government’s right to information, unless the government has a compelling interest in collecting that information.”²⁴⁶

Ironically, considering the oft-stressed importance of socialization, the Tenth Circuit Court of Appeals upheld the right of school boards to deny part-time attendance of otherwise homeschooled students,²⁴⁷ although this is not necessarily the trend.²⁴⁸ Over the last decade, California has been experimenting with public school–home school partnerships, which often incorporate computer-age communication capabilities between homeschooled students and school facilities, teaching personnel, and other students.²⁴⁹ Arguably, such programs better facilitate parental

²⁴² *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

²⁴³ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

²⁴⁴ See *Knox v. O’Brien*, 72 A.2d 389, 392 (Cape May County Ct. 1950) (“Cloister and shelter have its [sic] place, but not in the every day give and take of life.”); *State v. Will*, 160 P. 1025, 1026-27 (Kan. 1916) (Kansas statutes neither denied nor allowed homeschooling. However, the court ruled that the exclusion of home instruction from statutes, that established private, denominational and parochial school instruction as valid, indicated legislative intent to disallow homeschooling.).

²⁴⁵ See *supra* Part II. A. 2. Information That School or Government Officials May By Law Require From Some Students.

²⁴⁶ HSLDA, *Privacy Report*, *supra* note 75 (emphasis omitted).

²⁴⁷ *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 696-700 (10th Cir. 1998).

²⁴⁸ Lukasik, *supra* note 240, at 1973-74 (delineating several California part-time attendance programs).

²⁴⁹ Lukasik, *supra* note 240, at 1973-76.

monitoring of shared information. Some legislatures also allow homeschoolers to participate in interscholastic sports.²⁵⁰

In states that allow homeschooling, the burden usually falls on the state to show that the parent is not providing adequate instruction.²⁵¹ In this way — given the privacy rights afforded the home and the overall success rates of homeschooled children²⁵² — governments may support familial rights of privacy. Nonetheless, parents who homeschooled their children in Indiana were denied damages when they alleged that a school superintendent sought information from parents while attempting to verify compliance with home-instruction law.²⁵³

Some contemporary grass-roots movements question whether public schools truly act in citizens' best interests. Many homeschooling proponents and civil libertarians stress that public schools are more likely to promote rules and teach subjects that preserve *government* not *citizen* interests.²⁵⁴ In the 1970s, educator John Holt created the term "unschooling" to describe the burgeoning "homeschooling" movement whereby students study topics in which the students show individual interests, as opposed to following cookie-cutter curriculums mandated by school systems.²⁵⁵ One of homeschooling's greatest strengths is its flexible instruction because the curriculum, lesson planning and teaching approaches need not be the same as in public schools.²⁵⁶ Although a few states "require that homeschoolers submit their curriculum plans to officials,"²⁵⁷ for the most part,

²⁵⁰ Lukasik, *supra* note 240, at 1975 n.378; *cf.* *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 342-43 (3d Cir. 2004) (upholding attendance requirement limiting participation in school sports).

²⁵¹ *See, e.g., Sheppard v. State*, 306 P.2d 346, 356 (Okla. Crim. App. 1957); *State v. Massa*, 231 A.2d 252, 255 (Morris County Ct. 1967).

²⁵² *See* CAFI COHEN, AND WHAT ABOUT COLLEGE?: HOW HOMESCHOOLING LEADS TO ADMISSIONS TO THE BEST COLLEGES AND UNIVERSITIES 10 (Revised 2d ed. 2000) ("[H]omeschooled students have won admission to a wide range of colleges and universities. And the list of selective schools that have accepted homeschoolers continues to grow.").

²⁵³ *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 798 F.2d 230, 235-36 (7th Cir. 1986).

²⁵⁴ *See, e.g., CLAIRE WOLFE, DON'T SHOOT THE BASTARDS (YET): 101 MORE WAYS TO SALVAGE FREEDOM 6* (1999) ("It's not 'public schools.' It's *government* schools. The government isn't 'us.' It's *them*. The federals. Washington, D.C."); *see generally* JOHN TAYLOR GATTO, *DUMBING US DOWN: THE HIDDEN CURRICULUM OF COMPULSORY SCHOOLING* 14-16 (1992).

²⁵⁵ PATRICK FARENGA, *THE BEGINNER'S GUIDE TO HOMESCHOOLING* 35-37 (3d ed. 2000). *See also* LEPPERT & LEPPERT, *supra* note 14, at 101-02.

²⁵⁶ DOBSON, *supra* note 112, at 18 ("[E]ven in states in which the code specifies what must be taught and when, homeschoolers have been quite successful in interpreting the law in the broadest possible of terms . . .").

²⁵⁷ DOBSON, *supra* note 112, at 19, 329-42; *see also* McMullen, *supra* note 228, at 88 (in Texas, "[h]ome schools need only have a written curriculum, conduct it in a bona fide manner and teach math, reading, spelling, grammar, and good citizenship. . . [In]

homeschooling families retain private choices when it comes to what and how subjects are being taught.

IV. CONCLUSIONS AND CHALLENGES

Homeschooling and privacy laws are obviously in a state of flux.²⁵⁸ If the rise in homeschooling continues, there may come a time when homeschooling will no longer carry any privacy advantages in any state. Although all states guarantee some form of education,²⁵⁹ government officials could easily argue that they cannot guarantee educational standards without greater regulation of homeschools. Most state departments of education require compulsory attendance in school.²⁶⁰ If school officials do not know why a student is missing from school, they are usually required to investigate; the burden often lies with the state to insure that children are receiving appropriate or equivalent instruction elsewhere.²⁶¹ For instance, the federal Individuals with Disabilities Educational Act (IDEA) requires states to ensure that disabled children receive appropriate educational services.²⁶² In other words, child welfare, curriculum and truancy could all become excuses to supervise homeschooling families.

Currently, homeschooled children have overall impressive success rates.²⁶³ Most homeschooled students have a good chance at getting into U.S. colleges or universities, especially since homeschooling allows students to experience a wide range of unconventional activities that are sometimes not available to students who get their educations in traditional schools.²⁶⁴ At some point, however, homeschoolers' performance rates could become inferior. When or if such a shift occurs, homeschooling families could be privacy *disadvantaged* even in their homes, the

Michigan, . . . parents have the option, but not the requirement, of notifying the state that they are homeschooling" (footnote omitted).

²⁵⁸ See *supra* Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY and Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING.

²⁵⁹ See ALEXANDER & ALEXANDER, *supra* note 73.

²⁶⁰ DOBSON, *supra* note 112, at 20.

²⁶¹ Miller, *supra* note 16, at 186-87 (providing comparison samples of contrary state statutes and court interpretations concerning homeschooling).

²⁶² Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 *et seq.* (West 2000).

²⁶³ See COHEN, *supra* note 252, at 10 ("[H]omeschooled students have won admission to a wide range of colleges and universities. And the list of selective schools that have accepted homeschoolers continues to grow.").

²⁶⁴ COHEN, *supra* note 252, at 13 (Students who are homeschooled often have very impressive accomplishments that are often eye-catching to college admissions departments).

last great refuge of privacy the court currently affords.

The possibility exists, arguably, for the federal government to pre-empt the field of education – or more at issue, homeschooling – and regulate it. Schools that do not comply could lose their federal aid.²⁶⁵ Even though the U.S. Constitution does not mention education, the federal government has increasingly used its grants-in-aid spending power to exert pressure on the states to meet federal standards and requirements or risk losing federal support.²⁶⁶ On the other hand, if a federal government's grants-in-aid program had the impact of violating the First Amendment, the Supreme Court could hold such regulations unconstitutional.²⁶⁷

School systems administrators have long argued that their resources are harshly limited and that their schools are overcrowded.²⁶⁸ Homeschooling reduces the expense and size of public school systems, yet does not detract from the tax-based support. Currently, when parents homeschool their children, governments receive tax funding for students they do not actually have to teach.²⁶⁹ Perhaps governments have not been inclined to prohibit homeschooling because of this. This situation, of course, could change if any significant school voucher program goes into effect.²⁷⁰

One may wonder: If the government is obligated by law or

²⁶⁵ *But see* Sandra L. Macklin, Note, *Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321, 1337 (1999) (however, as of 1999, the department that enforces FERPA "has never attempted to withdraw federal funds based on FERPA violations").

²⁶⁶ KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 219 (14th ed. 2001) ("[T]he size and range of the [grant-in-aid] programs have increased considerably over the years, and detailed federal conditions have proliferated."); *see, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may attach conditions on the receipt of federal funds).

²⁶⁷ *Flast v. Cohen*, 392 U.S. 83, 85-86, 105-06 (1968) (holding that taxpayers have standing to challenge the use of federal money on textbooks and other materials for a parochial school).

²⁶⁸ *See, e.g.*, Tom Ford, *Burnsville Schools Scrimping, Saving to Keep Spending in Line*, STAR TRIBUNE (Minneapolis, Minn.), Nov. 24, 2004, at S4 ("Several of the [New Prague School] district's high schools are overcrowded and lack enough classrooms . . ."); Etan Horowitz, *Leaders Seek to Guide Tavares Growth: A City Council Workshop Will Focus on Managing Exploding Development and Its Effects*, ORLANDO SENTINEL (Fla.), Nov. 28, 2004, at K1 ("[Tavares] middle school [near Orlando] was overcrowded by 247 students, and the high school was overcrowded by 161 students.").

²⁶⁹ School districts are primarily funded via property and other taxes. *E.g.*, *Fla. Dep't of Educ. v. Glasser*, 622 So. 2d 944, 948-49 (Fla. 1993) (specific enabling legislation may authorize school districts to levy taxes).

²⁷⁰ Government moneys may be disbursed to schools that students choose to attend. BLACK'S LAW DICTIONARY 755 (2d pocket ed. 2001) ("[A voucher is a] written or printed authorization to disburse money.").

statute not to distribute personal information,²⁷¹ then why should families be concerned about giving the government such information? Basically, the less information government officials collect, the less opportunity they have to legally or illegally disseminate it. For instance, it is not greatly publicized that the No Child Left Behind Act requires secondary schools to provide military recruiters access to school facilities and contact information for every student upon request.²⁷² Also, private companies are attempting to expand access to government databases.²⁷³ For instance, in 2000, an Ohio school board allegedly sold students' personal data to a local bank, which used the information to solicit new customers.²⁷⁴ Many examples of illegal, questionable, or apathetic collection, treatment and dissemination of private information exist.

Public school students have few true remedies after their rights have been violated. FERPA lays out certain rights that parents and students hold;²⁷⁵ however, government officials' mistakes and apathy towards citizens' personal information is apparent.²⁷⁶ A blatant example of how some school officials indifferently handle students' private information took place in

²⁷¹ *E.g.*, FERPA, 20 U.S.C. § 1232g (2000).

²⁷² No Child Left Behind Act of 2001, PUB. L. NO. 107-110, 115 Stat. 1425 (2002). *See also*, John Seeley, *Operation Opt Out: As Military Recruiters Work the High Schools, Teachers and Students Urge a Reality Check*, L.A. CITY BEAT, Oct. 21, 2004, at 11, available at <http://lacitybeat.com/article.php?id=1321&IssueNum=72> (“[K]nown to activists as the ‘No Cannon Fodder Left Alone’ clause, [the provision] does provide a loophole for parents (or the student, when 18) to opt out of service sales pitches.”); David Goodman, *No Child Unrecruited: Should the Military be Given the Names of Every High School Student in America?*, MOTHER JONES, Nov./Dec. 2002, available at http://www.motherjones.com/news/outfront/2002/11/ma_153_01.html (discussing educators' opinions of the Act's disclosure requirement).

²⁷³ *See* ACLU, ACLU Sues Ohio School Board that Sold Students' Personal Information to a Bank (Aug. 29, 2000), available at <http://aclu.org/Privacy/Privacy.cfm?ID=8095&c=39> [hereinafter ACLU, Ohio School Board]; *accord* ACLU, ACLU Asks Univ. of Nevada to Stop Selling Student Information to Credit Card Company (Jan. 22, 2002), available at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=10201&c=161> [hereinafter ACLU, Univ. of Nevada].

²⁷⁴ *See* ACLU, Ohio School Board, *supra* note 273; *accord* ACLU, Univ. of Nevada, *supra* note 273.

²⁷⁵ *See supra* Part II. A. 1. Congressional Acts.

²⁷⁶ Lucadamo et al., *supra* note 46, at 2; *accord* Associated Press, *Children's Private Records Posted Online in Florida*, Sept. 30, 2004, available at <http://www.informationweek.com/story/showArticle.jhtml?articleID=48800362> (“Florida's child welfare agency . . . acknowledged that confidential records for nearly 4,000 abused and neglected children were available on the Internet [The records] included names of children, as well as details such as birth dates, Social Security numbers, photographs, case histories and directions to foster homes.”); *see also* Alison Gendar et al., *Schools Trashed Over Files: Educators Offer Apology But Furious Parents Want Heads to Roll*, N.Y. DAILY NEWS, Nov. 15, 2004, at 3; Kathleen Lucadamo, *Klein Apologizes, Launches Probe*, N.Y. DAILY NEWS, Nov. 16, 2004, at 7.

November 2004, when New York City educators dumped approximately 300 pounds of confidential records in a sidewalk trash pile.²⁷⁷ Students' medical and psychological reports were in plain sight and passersby rummaged through them.²⁷⁸

Detailed in the documents were names, dates of birth, home addresses, telephone numbers and even Social Security numbers for many of the 1,125 students from across the city who were home-schooled from 1987 to 1998. The boxes also contained confidential information on thousands of other children, including 8,300 grade and attendance sheets, 6,200 computer printouts and an audit file.²⁷⁹ New York City's childrens agencies had been caught five prior times improperly disposing of private records.²⁸⁰

Besides simply being more proactive when discarding old files, several straightforward and inexpensive steps could be taken to increase student privacy in public schools. Government and school officials could more actively proclaim and proliferate students' rights by utilizing such tools as the No Child Left Behind Act's military recruitment solicitation opt-out forms, FERPA's student directory opt-out form, or FERPA's school records access information and correction forms.²⁸¹ Currently, the U.S. Department of Education only distributes pamphlets explaining privacy and educational rights upon specific request.²⁸² Both parents and educators could do more to ensure that students understand their privacy rights.²⁸³ Similarly, school systems and governments should limit information collection and dissemination to only what is truly necessary.²⁸⁴ One particular productive and significant first step would be for all school systems to eliminate the use of Social Security

²⁷⁷ Lucadamo et al., *supra* note 46, at 2; *accord* Associated Press, *supra* note 276; *see also* Gendar et al., *supra* note 276, at 3; Lucadamo, *Klein Apologizes, Launches Probe*, *supra* note 276, at 7.

²⁷⁸ Lucadamo et al., *supra* note 46, at 2.

²⁷⁹ Lucadamo et al., *supra* note 46, at 3.

²⁸⁰ Bob Port, *Foulup is Far From the First Time*, N.Y. DAILY NEWS, Nov. 14, 2004, at 3.

²⁸¹ *See* Seeley, *supra* note 272, at 11; Goodman, *supra* note 272; *see also* 20 U.S.C. § 1232g(e) (2000) (requires that every school notify students of their rights under FERPA); *see, e.g.*, Detroit Public Schools, *Do You Know Your Rights to Privacy and Access of Records?*, available at <http://www.detroitk12.org/resources/parents/privacy.htm> (last visited Nov. 11, 2005); Hot Springs School District, *Family Educational Records Privacy Act*, available at <http://www.hssd.k12.sd.us/ferpa.htm> (last updated Apr. 5, 2005).

²⁸² Press Release, ACLU, NYCLU Hails Victory, *supra* note 153.

²⁸³ Press Release, ACLU, NYCLU Hails Victory, *supra* note 153.

²⁸⁴ *E.g.*, *Krebs v. Rutgers*, 797 F. Supp. 1246, 1259-60 (D.N.J. 1992) (Court issued preliminary injunction against state university enjoining it from disclosing students' Social Security numbers to campus post office personnel; the university characterized such disclosure as a "legitimate educational interest."). *Id.* at 1260.

numbers as student IDs, as some Florida educational systems have done.²⁸⁵

Supreme Court Justice Louis Brandeis emphasized that “the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.”²⁸⁶ This paper focuses on this one right as it concerns modern educational standards and is not presented to skew all the good that public school programs accomplish. Of course, government schooling presents many advantages, not the least of which may include: social, psychological and emotional benefits; better parental time-management; best use of family monies;²⁸⁷ choice educational supplies, equipment, facilities and programs; and qualified staffs and certified teachers.

Nonetheless, because the law does not currently or consistently mandate collection of personal information about homeschooled children, privacy is an often overlooked advantage of homeschooling in most states. Concerned parents, particularly those willing and able to choose their state of residence, should “shop” to find which states offer suitable educational and privacy advantages in line with their needs and desires.²⁸⁸ Ultimately, parents who believe in the freedom to make decisions about their children’s private lives without government interference must decide how much personal and familial information is worth divulging in exchange for their children’s education.

²⁸⁵ Komuves, *supra* note 100, at 538 n.33; *see also* Fla. St. Univ. v. Hatton, 672 So. 2d 576, 577 (Fla. Dist. Ct. App. 1996) (court ordered state university to produce only summaries of records without identifying information).

²⁸⁶ *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

²⁸⁷ *Cf. Forstrom v. Byrne*, 775 A.2d 65, 67 (N.J. Super. Ct. App. Div. 2001) (parents who choose to homeschool their physically disabled children may not receive full IDEA benefits and other funding); Individuals with Disabilities Education Act, 20 U.S.C.A. § 1412(a)(10)(C)(i) (West 2000).

²⁸⁸ *See* DOBSON, *supra* note 112, at 329-42 (provides basic state-by-state tabulation of state regulatory approaches); Miller, *supra* note 16, at 176-84 (provides comparison samples of contrary state statutes and court interpretations concerning homeschooling).