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A Local Distinction: State Education Privacy Laws for Public Schoolchildren

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A LOCAL DISTINCTION¹: STATE EDUCATION PRIVACY LAWS FOR PUBLIC SCHOOLCHILDREN

*Susan P. Stuart**

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I. INTRODUCTION

If the old maxim is true, that “all politics is local,” then even more so is the principle true that all public education is local.² Recent case law developments also suggest that plaintiffs who are unhappy about a problem in education are increasingly seeking relief from local legal resources, such as going to state court to litigate state law matters,³ rather than seeking relief under federal law.

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¹ “Our citizenship in the United States is our national character. Our citizenship in any particular state is only *our local distinction*. By the latter we are known at home, by the former to the world.” Thomas Paine, *The Last Crisis* (April 19, 1783), in *THE SELECTED WORK OF TOM PAINE* 86 (Howard Fast ed., Duell, Sloan & Pearce 1945) (emphasis added).

² “By and large, public education in our Nation is committed to the control of state and local authorities.” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

³ One of the starkest examples of the switch from the relative toothlessness of federal litigation to the power of the “local option” of state litigation is in school funding equity cases. After plaintiffs failed to receive relief from Texas’s state and local funding legislation in federal court and under the Equal Protection Clause of the Fourteenth Amendment in *San Antonio Independent*

A similar trend is increasingly apparent in privacy cases: State constitutions are becoming the refuge for privacy protection if the federal courts are viewed as sidestepping the issue, at least in matters of Fourth Amendment search and seizure jurisprudence and of decisional privacy.⁴ Such a development is also increasingly likely in the confluence of education and privacy problems in matters of education informational privacy, especially privacy of student records. Plaintiffs will abandon litigation under federal laws because those laws are ineffective and instead will enforce their privacy rights under state law.

State privacy laws have proved more effective at protecting privacy for at least three reasons. First, they typically create an affirmative right to privacy. Next, states are more willing to vociferously protect their citizens' privacy rights. Last, these statutes are more likely to be privately enforceable by individuals. Thus, school districts have more to fear from state privacy laws and the growing trend toward state litigation than they do from federal laws. Hence, this Article will attempt to examine major areas of state privacy law – constitutions, statutes, and regulations – to which school districts must be attentive when dealing with student records.⁵

Part II will review the backdrop for plaintiffs' abandoning federal laws for state law protections over student record privacy. Part III will examine state constitutional privacy provisions, where states have made privacy a fundamental right. Part IV will take up specifically dedicated state statutes and regulations that provide privacy protection to student records. Last, Part V will deal with exemptions in state sunshine laws that protect student record privacy. This Article is designed to educate about this little known but increasingly important niche in privacy protection for the records of public schoolchildren,⁶ and to alert school districts that observing federal privacy laws may no longer be enough protection from litigation.

School District v. Rodriguez, 411 U.S. 1 (1973), they were measurably more successful in attacking the same legislation in the Texas state court and under the Texas Constitution in *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989). See also Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1420-1422 (1992) [hereinafter Gormley, *100 Years*].

⁴ See Ken Gormley & Rhonda G. Hartman, *Privacy & the States*, 65 TEMP. L. REV. 1279, 1280 (1992); Gormley, *100 Years*, *supra* note 3, at 1423-25.

⁵ There is, unfortunately, little way that an Article such as this can address *all* the individual state privacy laws that might protect student records. As soon as this piece is published, some state will amend its statutes or enact a new one. However, this Article observes trends and warns about general categories of concern. This Article will also not address the privacy issues raised by the various states' military access statutes that require schools to give personal information to military recruiters. As of the writing of this Article, those statutes may be subject to challenge pending the Supreme Court's decision on the federal version of the military access statute in *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

⁶ This Article is limited to the student records of K-12 public school students although higher education privacy protections may be addressed tangentially and as exemplars when K-12 analogies and cases are absent.

II. BACKGROUND

Until recently, school districts and other authorities considered federal law the primary source of protection for the privacy of public school records. One such source of solace was the Family Educational Rights and Privacy Act.⁷ A statute ostensibly enacted to protect student and family privacy in public school records, FERPA provides procedures for the limited disclosure of and access to “education records.”⁸ Any school district with a policy or practice of defying these procedures may lose its federal funding.⁹ Although there was some debate whether FERPA was actually a privacy statute or merely a funding statute,¹⁰ *Gonzaga University v. Doe*¹¹ rendered that distinction virtually moot for an individual’s privacy right. In that case, the Supreme Court of the United States determined that FERPA provides no personal rights to persons seeking to enforce the privacy “promised” by the statute.¹² As a consequence, children (and their parents) who believe their privacy has been compromised by nonconsensual disclosure of or access to their student records will search for alternative recourse for protection. State laws are the likely candidates for that recourse.

Gonzaga University v. Doe is instructive in this manner because plaintiff Doe – although unsuccessful on his FERPA claim – did prevail on his state law claim for the common law tort of invasion of privacy.¹³ So too might other individuals who alternatively plead state law claims when seeking a remedy for a breach of privacy occasioned by an unlawful disclosure of student records. Indeed, some of these state law claims could provide more than just minimal injunctive relief; plaintiff Doe was awarded over \$100,000 for invasion of privacy.¹⁴

However, this Article is not exclusively about litigation; it is also about compliance with the law. The general privacy resource that school districts re-

⁷ 20 U.S.C. § 1232g (2000).

⁸ *Id.* § 1232g(a)(4).

⁹ *Id.* § 1232g(b)(1).

¹⁰ Compare *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 903-04 (Ind. Ct. App. 2003) (FERPA requires that student records be kept confidential) with *Red & Black Publ’g Co. v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993) (FERPA does not prohibit disclosure of student records; it only regulates funding based on policies of releasing student records).

¹¹ 536 U.S. 273 (2002).

¹² *Id.* at 287.

¹³ *Doe v. Gonzaga Univ.*, 24 P.3d 390 (2001), *rev’d in part*, 536 U.S. 273 (2002).

¹⁴ *Id.* Doe prevailed on his invasion of privacy claim regarding the internal investigation of his alleged misconduct that eventually led Gonzaga University to refuse to give the moral character affidavit Doe needed to obtain his teaching certification. *Id.* at 399-400. This particular type of invasion of privacy is not one that a student might traditionally pursue for unlawful disclosure of student records. However, Doe’s victory does stand for the proposition that plaintiffs might seek and be awarded more than *de minimis* damages under state law claims for invasion of privacy rather than the administrative slap on the hand threatened by FERPA.

ceive for creating local privacy policies usually derives from Guidances issued by the Department of Education that are, perforce, incomplete because they are only about federal laws, and not about state laws. Those Guidances can be misleading because federal laws do not protect student privacy well. Thus, this Article is intended to serve notice that the Guidances do not, that numerous state laws – constitutions in particular – demand more privacy protection from school districts than federal laws demand. School districts must note that local distinction and prepare for protecting the greater privacy demanded by their respective state.

States may not legislate fewer rights than afforded by the United States Constitution, but they may and have legislated greater rights than afforded by the Constitution.¹⁵ In particular, states have created greater rights with respect to privacy in contrast to federal law. The Supreme Court has not unequivocally determined that privacy exists or is protected under the Constitution. Indeed, it is not even clear that the Supreme Court recognizes a right to informational privacy, a specific privacy right that would afford protection for student records.¹⁶ Furthermore, federal legislation purporting to protect such student informational privacy has more holes than a sieve.¹⁷ As a consequence, state laws – constitutions, statutes, regulations, common law – can be daubed in the holes to protect student privacy where the Constitution and federal laws cannot or will not.¹⁸

Part of the problem school districts face in this area is that state privacy laws have not always been given their due as most people have been enamored with the federal statutes, especially FERPA. However, school districts who put all their privacy eggs in the federal basket may still have problems with their local statutes and constitutions because of the absolute absence of any genuine

¹⁵ States may provide greater rights than those afforded by the Constitution, especially liberty interests (of which privacy is arguably one). *See, e.g., Mills v. Rogers*, 457 U.S. 291, 300 (1982).

¹⁶ *See, e.g., Paul M. Schwartz, Privacy and Participation: Personal Information and Public Sector Regulation in the United States*, 80 IOWA L. REV. 553, 574-76 (1994-95).

¹⁷ *See, e.g., Susan P. Stuart, Lex-Praxis of Education Informational Privacy for Public Schoolchildren*, 48 NEB. L. REV. (forthcoming 2006) [hereinafter Stuart, *Lex-Praxis*].

¹⁸ There seems to be no conflict in recognizing greater privacy rights granted by state law than offered by federal law. The Supremacy Clause only requires preemption of state law by federal law when there exists an explicit indication of preemption by Congress, when it is a physical impossibility to comply with both state and federal law at the same time, or when state law is an obstacle to the federal purpose. U.S. CONST. art. VI, cl. 2; *see, e.g., C.T.S. Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 78-79 (1987); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982). Little is suggested in any of the applicable federal privacy statutes that any such conflicts would arise in matters of states' granting privacy rights to its citizens, particularly in expanding liberty interests (of which privacy is arguably one). *See, e.g., Mills*, 457 U.S. at 300. The only exception appears to be that state privacy rights may have to give way to federal discovery requests. *See, e.g., Mem'l Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1063-64 (7th Cir. 1981) (unauthorized disclosure provisions of state medical records statute preempted by discovery request in federal antitrust case); *United States ex rel. Agency for Int'l Dev. v. First Nat'l Bank of Md.*, 866 F. Supp. 884, 886-87 (D. Md. 1994) (procedures in state confidential records act preempted by federal agency subpoena power).

privacy protections in federal statutes.¹⁹ School districts may be forgiven this misunderstanding as the federal government, especially the Department of Education, has insinuated itself more and more into the regulation of education, and school districts and school boards have forgotten what “local control” really is. However, their constituents have not forgotten nor have their lawyers.

III. STATE CONSTITUTIONS: PRIVACY AS FUNDAMENTAL RIGHT

Unlike the United States Constitution, a handful of state constitutions specifically use the word “privacy” in their provisions. Others, like the Constitution, have been interpreted to include privacy within their “penumbras.”²⁰ These provisions – whether express or implied – and the resulting interpretive case law have been characterized as a “laboratory” for the protection of privacy rights.²¹ Although some explicit provisions have been around since statehood, others have been added as the Supreme Court has grown more conservative and less inclined to recognize privacy rights.²² Thus, states have been amending their constitutions to create new privacy rights in recent decades.²³ Similarly, other states have discovered penumbral privacy in more general provisions of their respective constitutions during the same time period.²⁴ These provisions and judicial interpretations were originally designed to expand Fourth Amendment and decisional-autonomy privacy rights.²⁵ These implicit provisions of privacy, along with the explicit provision, have become shelter for informational privacy and therefore are a potential source for protecting student records.

A. *Explicit Constitutional Privacy Rights*

Unlike the United States Constitution, ten states have constitutions providing explicit privacy rights that could afford protection to personal information.²⁶ Those states are Alaska,²⁷ Arizona,²⁸ California,²⁹ Florida,³⁰ Hawai’i,³¹

¹⁹ I posit in a separate article that there is an absolute privacy protection under the Constitution. Susan P. Stuart, *Fun with Dick and Jane and Lawrence: A Primer on Education Privacy as Constitutional Liberty*, 88 MARQ. L. REV. 563 (2004) [hereinafter Stuart, *Primer*].

²⁰ See generally Gormley, *100 Years*, *supra* note 3.

²¹ *Id.* at 1428-31.

²² *Id.* at 1423-25.

²³ *Id.*

²⁴ See *infra* text accompanying notes 92-129.

²⁵ Gormley, *100 Years*, *supra* note 3 at 1425.

²⁶ *Id.* at 1423-24; Gormley & Hartman, *supra* note 4, at 1282-83. This list does not include those states whose constitutions provide a specific right to privacy to crime victims: IDAHO CONST. art. 1, § 22; MICH. CONST. art. 1, § 24; N.M. CONST. art. II, § 24; WIS. CONST. art. 1, § 9m.

²⁷ “The right of the people to *privacy* is recognized and shall not be infringed” ALASKA CONST. art. 1, § 22 (emphasis added).

Illinois,³² Louisiana,³³ Montana,³⁴ South Carolina,³⁵ and Washington.³⁶ Although the language in some of these provisions clearly reflects Fourth Amendment-type protections from warrantless searches and seizures, nearly all of them expressly or impliedly cover more than that. For example, the South Carolina Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy”³⁷ More broadly, the majority of these explicit provisions protect an unadulterated, more overarching right to privacy: “[t]he right of the people to privacy is recognized and shall not be infringed”³⁸ or “[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”³⁹ Florida’s Constitution has one of the most expansive privacy provisions: “Every natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided

²⁸ “No person shall be disturbed in his *private* affairs, or his home invaded, without authority of law.” ARIZ. CONST. art. 2, § 8 (emphasis added).

²⁹ “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” CAL. CONST. art. 1, § 1 (emphasis added).

³⁰ “Every natural person has the right to be let alone and free from governmental intrusion into the person’s *private* life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” FLA. CONST. art. 1, § 23 (emphasis added).

³¹ “The right of the people to *privacy* is recognized and shall not be infringed without the showing of a compelling state interest” HAW. CONST. art. 1, § 6 (emphasis added).

³² “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of *privacy* or interceptions of communications by eavesdropping devices or other means” ILL. CONST. art. 1, § 6 (emphasis added).

³³ “Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of *privacy*” LA. CONST. art. 1, § 5 (emphasis added).

³⁴ “The right of individual *privacy* is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.” MONT. CONST. art. 2, § 10 (emphasis added).

³⁵ “The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of *privacy* shall not be violated” S.C. CONST. art. I, § 10 (emphasis added).

³⁶ “No person shall be disturbed in his *private* affairs, or his home invaded, without authority of law.” WASH. CONST. art. 1, § 7 (emphasis added).

³⁷ S.C. CONST. art. I, § 10; *see also* ILL. CONST. art. 1, § 6; LA. CONST. art. 1, § 5. A shorter variation exists in Arizona’s and Washington’s Constitutions: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” ARIZ. CONST. art. 2, § 8; WASH. CONST. art. 1, § 7.

³⁸ ALASKA CONST. art. 1, § 22; HAW. CONST. art. 1, § 6.

³⁹ MONT. CONST. art. 2, § 10.

herein.”⁴⁰ This greater coverage is significant because, unlike the Constitution, these state constitutions either do or can unequivocally protect information privacy.

Even more significant is the emphasis the state courts put on these explicit constitutional provisions when they interpret privacy as a state-endowed fundamental right.⁴¹ One state constitution itself even ascribes inalienability to this privacy right.⁴² At the state level, this particular explicit right shares the protections inuring to the rights and freedoms of speech, religion, and association. Consequently, this right of privacy does not suffer the incertitude assigned to a federal, constitutional right of privacy. Instead, what is also fairly universal in most of these jurisdictions is the certitude that state constitutional privacy rights are greater than federal constitutional privacy rights.⁴³

For instance, Alaska’s constitutional privacy protects marijuana possession in one’s own home.⁴⁴ Similarly, Arizona’s constitutional provision protects the right to refuse medical treatment, and hence protects the right to die.⁴⁵ California has even extended protection over its citizens’ privacy by interpreting its constitution to apply to *private* intrusions, not just to governmental intrusions.⁴⁶

Because of this explicit language and expansive interpretation, these courts have expanded these state constitutional privacy provisions to protect the right to autonomy and the right to be left alone and, thus, to protect informational privacy,⁴⁷ decision-making privacy,⁴⁸ and Fourth Amendment physical privacy.⁴⁹ Thus, some state courts have afforded expansive privacy rights under these explicit provisions that are difficult to attain in federal constitutional decisions. One court used such a provision to stake out a broad area of coverage

⁴⁰ FLA. CONST. art. 1, § 23.

⁴¹ See, e.g., *Bd. of County Comm’rs v. D.B.*, 784 So. 2d 585, 588 (Fla. Dist. Ct. App. 2001); *State, Dept. of Soc. Servs. v. McCorkle*, 694 So. 2d 1077, 1081 (La. Ct. App. 1997); *Armstrong v. State*, 989 P.2d 364, 373-74 (Mont. 1999). See generally *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997).

⁴² CAL. CONST. art. 1, § 1.

⁴³ See, e.g., *Lungren*, 940 P.2d at 808; *Commitment of Smith v. State*, 827 So. 2d 1026, 1030 (Fla. Dist. Ct. App. 2002); *Bd. of County Comm’rs*, 784 So. 2d at 588; *State v. Kam*, 748 P.2d 372, 377 (Haw. 1988); *A.G. Edwards, Inc. v. Sec’y of State*, 772 N.E.2d 362, 369 (Ill. App. Ct. 2002); *People v. Cornelius*, 821 N.E.2d 288, 298 (Ill. 2004); *State v. Vikesdal*, 688 So. 2d 685, 691 (La. Ct. App. 1997); *Armstrong v. State*, 989 P.2d at 373-74; *State v. McKinney*, 60 P.3d 46, 49 (Wash. 2002).

⁴⁴ *State v. Crocker*, 97 P.3d 93, 94 (Alaska Ct. App. 2004) (holding that the provision “protects an adult’s right to possess a limited amount of marijuana in their [sic] home for personal use” (citing *Ravin v. State*, 537 P.2d 494 (Alaska 1975))).

⁴⁵ *Rasmussen v. Fleming*, 741 P.2d 674, 682 (Ariz. 1987).

⁴⁶ *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994); *Hooser v. Superior Court*, 101 Cal. Rptr. 2d 341 (Cal. Ct. App. 2000).

⁴⁷ See, e.g., *State v. Lester*, 649 P.2d 346, 353 (Haw. 1982).

⁴⁸ See, e.g., *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997).

⁴⁹ See, e.g., *Hill*, 865 P.2d 633.

that protects “[a] private affairs interest[,] an object or a matter personal to an individual such that any intrusion on it would offend a reasonable person.”⁵⁰ Similarly, another court prefers to keep its constitutional definition of “privacy” flexible and relevant to the circumstances of each case,⁵¹ while a sister court asserts that its state’s constitutional provision establishes a zone of privacy “broadly and without restrictions.”⁵² One court extended privacy so far as to embrace common law concepts, that the right to privacy in the constitution is the equivalent of the right to be let alone. The court stated that the constitutional provision means to be free of public scrutiny, to be free from unreasonable intrusions into one’s private affairs, and to be free from intrusion upon seclusion.⁵³

Under any interpretation of these state constitutional privacies, the courts usually employ a test that is similar to the one derived from Fourth Amendment jurisprudence: Is there a reasonable expectation of privacy?⁵⁴ Several states use such a reasonable expectation starting point – Alaska,⁵⁵ California,⁵⁶ Florida,⁵⁷ Illinois,⁵⁸ and Louisiana.⁵⁹ The state courts’ threshold test will protect a subjective expectation of privacy “that society is prepared to recognize as reasonable.”⁶⁰ As a result, some courts have adopted a two-step examination for testing privacy interests. First, the court will examine the individual’s subjective expectation of privacy; second, it will examine whether or not society is

⁵⁰ State v. Hepton, 54 P.3d 233, 238 (Wash. Ct. App. 2002).

⁵¹ Hill, 865 P.2d at 651.

⁵² People v. Cornelius, 821 N.E.2d 288, 298 (Ill. 2004); A.G. Edwards, Inc. v. Sec’y of State, 772 N.E.2d 362, 370 (Ill. App. Ct. 2002).

⁵³ Capital City Press v. E. Baton Rouge Parish Metro. Council, 696 So. 2d 562, 566 (La. 1997). These three privacies are all protected under tort law. See RESTATEMENT (SECOND) OF TORTS § 652(A) (1977).

⁵⁴ Kyllo v. United States, 533 U.S. 27, 33 (2001); Minnesota v. Carter, 525 U.S. 83, 88 (1998); Katz v. United States, 389 U.S. 347, 359 (1967).

⁵⁵ Jones v. Jennings, 788 P.2d 732, 738 (Alaska 1990).

⁵⁶ Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 811 (Cal. 1997); Bearman v. Superior Court, 11 Cal. Rptr. 3d 644, 647 (Cal. Ct. App. 2004), review denied (June 30, 2004).

⁵⁷ Commitment of Smith v. State, 827 So. 2d 1026, 1030 (Fla. Ct. App. 2002).

⁵⁸ People v. Cornelius, 821 N.E.2d 288, 300 (Ill. 2004); A.G. Edwards, Inc. v. Sec’y of State, 772 N.E.2d 362, 370 (Ill. App. Ct. 2002).

⁵⁹ Capital City Press v. E. Baton Rouge Parish Metro. Council, 696 So. 2d 562, 566 (La. 1997); E. Bank Consol. Special Serv. Fire Prot. Dist. v. Crossen, 892 So. 2d 666, 669 (La. Ct. App. 2004), writ denied 897 So. 2d 608 (La. 2005).

⁶⁰ Jennings, 788 P.2d at 738 (internal quotation omitted); see also Capital City Press v. E. Baton Rouge Parish Metro. Council, 696 So. 2d 562, 566 (La. 1997); State v. Hepton, 54 P.3d 233, 238 (Wash. Ct. App. 2002) (“A private affairs interest is an object or a matter personal to an individual such that any intrusion on it would offend a reasonable person.”).

willing to recognize that expectation as reasonable.⁶¹ That examination necessarily has some limits.

To be sure, these state constitutional rights are not necessarily absolute rights,⁶² particularly as suggested by the limitations set by the reasonableness of one's expectation of privacy. State constitutional privacy rights may be broader than federal rights, but they might still have to give way to other interests. They may have to give way to the public interest – on a case-by-case basis⁶³ – or give way to the rights of others.⁶⁴ But nearly uniformly, government intrusions on these constitutional provisions trigger strict scrutiny because of the provisions' status as fundamental rights.⁶⁵ Therefore, such intrusion passes constitutional muster only if there is a compelling state interest⁶⁶ and the intrusion is effected by the least restrictive means.⁶⁷ Consequently, these explicit state constitutional provisions grant broader protections to their citizens than does the Constitution

⁶¹ *G.P. v. State*, 842 So. 2d 1059, 1062 (Fla. Dist. Ct. App. 2003); *E. Bank Consol. Special Serv. Fire Prot. Dist. v. Crossen*, 892 So. 2d 666, 669 (La. Ct. App. 2004), *writ denied* 897 So. 2d 608 (La. 2005); *Missouliau v. Bd. of Regents of Higher Educ.*, 675 P.2d 962, 967 (Mont. 1984); *State v. McKinney*, 60 P.3d 46, 49 (Wash. 2002).

⁶² *See, e.g., Jennings*, 788 P.2d at 738; *Cornelius*, 821 N.E.2d at 298; *Capital City Press*, 696 So. 2d at 566.

⁶³ *See, e.g., Hooser v. Superior Court*, 101 Cal. Rptr. 2d 341, 346 (Cal. Ct. App. 2000); *E. Bank Consol. Special Serv. Fire Prot. Dist. v. Crossen*, 892 So. 2d 666, 669 (La. Ct. App. 2004), *writ denied*, 897 So. 2d 608 (La. 2005). One of those important public interests is government transparency under state open records laws. *See, e.g., Bd. of County Comm'rs v. D.B.*, 784 So. 2d 585, 591 (Fla. Dist. Ct. App. 2001). However, the variations of disclosure under and in compliance with open records acts is beyond the scope of this Article. In any case, that raises the question of whether or not school records are *public* records under state law and, therefore, even come under the jurisdiction of the open records acts. There is an argument that some student records are, in reality, *private* records for which schools are only the bailee. *See Stuart, Primer, supra* note 19, at 637-39.

⁶⁴ *State, Dept. of Soc. Servs. v. McCorkle*, 694 So. 2d 1077, 1081 (La. Ct. App. 1997).

⁶⁵ *G.P.*, 842 So. 2d at 1062; *McCorkle*, 694 So. 2d at 1081; *Armstrong v. State*, 989 P.2d 364, 374 (Mont. 1999).

⁶⁶ *See, e.g., Jennings*, 788 P.2d at 738; *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 811 (Cal. 1997) (“compelling interest” test applies in autonomy privacy); *Commitment of Smith v. State*, 827 So. 2d 1026, 1031 (Fla. Ct. App. 2002); *Bd. of County Comm'rs*, 784 So. 2d at 588; *State v. Kam*, 748 P.2d 372, 378 (Haw. 1988); *Armstrong*, 989 P.2d at 374.

⁶⁷ *See, e.g., Jennings*, 788 P.2d at 738 (“least intrusive”); *Commitment of Smith*, 827 So. 2d at 1031; *McCorkle*, 694 So. 2d at 1081 (“narrowly defined”); *Armstrong*, 989 P.2d at 374 (Mont. 1999) (“narrowly tailored”); *see also Cornelius*, 821 N.E.2d at 298 (constitutional provision protects from “unreasonable” invasions of privacy). To be sure, there is an occasional variation to this commonly recognized constitutional scrutiny: in *Hill v. NCAA*, 865 P.2d 633 (Cal. 1994), the California Supreme Court – in a student-athlete drug-testing case – used a “balancing test” that weighed the particular privacy interest against a legitimate governmental (or, here, private) interest. *Id.* at 655. Another California case only required “good cause” to support a subpoena for medical records. *Bearman v. Superior Court*, 11 Cal. Rptr. 3d 644, 647-48 (Cal. Ct. App. 2004), *review denied*, (June 30, 2004). However, the more consistent test used by the state courts in testing their constitutional privacy rights is strict scrutiny.

by according citizens a fundamental right to privacy, even to minors.⁶⁸ The question remains about their coverage over minors' student records.

Regardless of the language, the majority of this type of state constitutional provisions protects informational privacy in general and, therefore, likely protects student records in particular.⁶⁹ Protections in at least three states recognize informational privacy as an overarching, general concept derived from the constitutional provision. In California, informational privacy is protected as the interest "in precluding the dissemination or misuse of sensitive and confidential information."⁷⁰ And "[a] particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination and use to prevent unjustified embarrassment or indignity."⁷¹ Likewise, Montana⁷² and Hawai'i⁷³ broadly recognize informational privacy as within the particular ambit of their constitutions.

The remaining states also seem to provide coverage for informational privacy, but the analysis is derived in response to particular problems; they have not yet thrown a protective blanket over information per se. Because the quære before these courts did not strike so generally, representative cases address on a piecemeal basis the protection of specific types of information. Particularly protected in these cases are health care information,⁷⁴ evaluation procedures and personnel matters concerning public employees,⁷⁵ taped conversations,⁷⁶ phone

⁶⁸ *E.g.*, *B.B. v. State*, 659 So. 2d 256, 258 (Fla. 1995); *S.C. v. Guardian ad Litem*, 845 So. 2d 953, 958 (Fla. Dist. Ct. App. 2003); *Lungren*, 940 P.2d at 814; *In re T.A.J.*, 73 Cal. Rptr. 2d 331, 334 (Cal. Ct. App. 1998).

⁶⁹ To date, only South Carolina and Arizona seem not to have addressed informational privacy cases under their respective constitutions. South Carolina's situation might be best attributable to the fact that it is more akin to the Fourth Amendment search and seizure privacy issues than privacy in general. That is not to say that information privacy would not be protected by these two states' provisions. Such apparently limiting language has not stopped other states from interpreting their own provisions to provide broader than expected information protection. *See, e.g.*, ILL. CONST. art. 1, § 6; LA. CONST. art. 1, § 5.

⁷⁰ *Lungren*, 940 P.2d at 812; *Hill*, 865 P.2d at 654.

⁷¹ *Hill*, 865 P.2d at 654.

⁷² *State v. Bilant*, 36 P.3d 883, 887 (Mont. 2001).

⁷³ *State v. Lester*, 649 P.2d 346, 353 (Haw. 1982). Hawaii's constitutional provision also protects the interests formulated in the common law invasion of privacy tort, such as the unauthorized disclosure of personal or embarrassing facts. *Id.*

⁷⁴ *Bilant*, 36 P.3d at 887.

⁷⁵ *Teamsters Local 856 v. Priceless, L.L.C.*, 5 Cal. Rptr 3d 847 (Cal. Ct. App. 2003), *review denied* (Jan. 22, 2004) (detailed salary information); *E. Bank Consol. Special Serv. Fire Prot. Dist. v. Crossen*, 892 So. 2d 666, 670 (La. Ct. App. 2004) (discovery request for assistant fire chief's complete personnel file denied because such files come within the employee's reasonable expectation of privacy); *Trahan v. Larivee*, 365 So. 2d 294, 300 (La. Ct. App. 1978) (constitution prohibits public access to evaluation reports of city's department directors because they are confidential, disclosure may inhibit candid and objective evaluations, and disclosure may embarrass or humiliate the employee); *Missouliau v. Bd. of Regents of Higher Educ.*, 675 P.2d 962, 973 (Mont. 1984) (constitution protects job performance evaluations of state university presidents for which interviewee had been promised anonymity and confidentiality).

records,⁷⁷ private records,⁷⁸ personal banking records,⁷⁹ confidential therapy records,⁸⁰ disclosure of sexual activity on adoption petitions,⁸¹ and medical records.⁸² Other protections include limits on the disclosure of public employee records during discovery, such as financial information and family names and addresses.⁸³ In California, in protecting the identities of an attorney's clients, the court of appeals protected information, such as financial affairs, political affiliates, medical history, and sexual relationships.⁸⁴ Another California decision protected juvenile court reports on suspected sexual abuse of minors, including psychological examinations, social services reports, and hospital reports.⁸⁵ Not all information is afforded such privacy protection,⁸⁶ but the trend among the states favors doing so. Given this overarching protection for a wide range of information, the imagination is little stretched to include student records within the analogous coverage of these decisions.

Presently, there seems to be only one published case that deals with the constitutional protection of student records. In *Porten v. University of San Francisco*, a college student sued the University of San Francisco ("USF") for disclosing grades he earned at Columbia University to the State Scholarship and Loan Commission.⁸⁷ Upon his transfer to USF, he had been assured that his grades from Columbia would be kept confidential and not disclosed to third parties without his consent. Instead, the USF sent his Columbia transcript to the

⁷⁶ *Lester*, 649 P.2d at 353.

⁷⁷ *State v. McKinney*, 60 P.3d 46, 49 (Wash. 2002); *but see* *People v. DeLaire*, 610 N.E.2d 1277, 1282-83 (Ill. Ct. App. 1993) (telephone records are private but are accessible by grand jury subpoena).

⁷⁸ *People v. Cornelius*, 821 N.E.2d 288, 300 (Ill. 2004).

⁷⁹ *A.G. Edwards, Inc. v. Sec'y of State*, 772 N.E.2d 362, 369, 371 (Ill. App. Ct. 2002).

⁸⁰ *S.C. v. Guardian ad Litem*, 845 So. 2d 953, 960 (Fla. Dist. Ct. App. 2003).

⁸¹ *G.P. v. State*, 842 So. 2d 1059, 1061, 1063 (Fla. Dist. Ct. App. 2003); *but see* *Borges v. City of W. Palm Beach*, 858 F.Supp. 174 (S.D. Fla. 1993) (constitution did not protect arrest record for solicitation of prostitution even though found not guilty because it was a public record).

⁸² *Bearman v. Superior Court*, 11 Cal. Rptr. 3d 644, 646 (Cal. Ct. App. 2004).

⁸³ *Jones v. Jennings*, 788 P.2d 732, 739 (Alaska 1990).

⁸⁴ *Hooser v. Superior Court*, 101 Cal. Rptr. 2d 341, 347-49 (Cal. Ct. App. 2000).

⁸⁵ *In re Tiffany G.*, 35 Cal. Rptr. 2d 8, 9-10 (Cal. Ct. App. 1994).

⁸⁶ Public employee drug-testing may not be protected information under state constitutional privacy. *McCloskey v. Honolulu Police Dept.*, 799 P.2d 953, 956-57 (Haw. 1990); *see also* *Hill v. NCAA*, 865 P.2d 633, 635 (Cal. 1994). In Louisiana, applications for public employment are accessible to the press. *Capital City Press v. E. Baton Rouge Parish Metro. Council*, 696 So. 2d 562, 566-67 (La. 1997) (job applications and resumes for position at metropolitan airport authority are not confidential once they have been submitted). Driver's license records are not historically protected in Washington. *State v. McKinney*, 60 P.3d 46, 49 (Wash. 2002). And there is no privacy right in a notice provided to school by a minor under the tort claims act. *Poway Unified Sch. Dist. v. Super. Ct.*, 73 Cal. Rptr. 2d 777, 779 (Cal. Ct. App. 1998).

⁸⁷ *Porten v. Univ. of San Francisco*, 134 Cal. Rptr. 839, 840 (Cal. Ct. App. 1976).

Commission, even though it was neither needed nor requested.⁸⁸ As this was one of the earliest cases testing the limits of the newly ratified California constitutional privacy provision, the court of appeals enumerated the four primary “mischiefs” the new provision prohibited: 1) government snooping and gathering personal information in secret; 2) overbroad business and governmental collection and retention of unnecessary personal information; 3) improper use of personal information collected for another specific purpose, including improper disclosure to third parties; and 4) unchecked inaccuracies of information.⁸⁹ The court then determined that Porten’s complaint focused on the third mischief, “improper use of information properly obtained for a specific purpose.”⁹⁰ The court ruled Porten had stated a *prima facie* violation of California’s constitutional provision.⁹¹

Therefore, explicit state constitutional privacy provisions likely protect student records from disclosure to a greater extent than federal law.

B. *Implicit Constitutional Privacy Rights*

Reaching similar results are those state courts that have divined *implicit* privacy rights in their constitutions. The rise of these newly discovered privacy rights is in no small measure due to hot-button issues in federal litigation, such as abortion-regulation statutes, restrictions on medical decision-making, and criminalization of homosexual conduct. Plaintiffs are taking advantage of state constitutional litigation in these areas because they are more likely to successfully protect their autonomy privacy than federal courts are becoming increasingly reluctant to grant under the Constitution.⁹² States with such implicit privacy rights currently⁹³ include Kentucky,⁹⁴ Minnesota,⁹⁵ New Hampshire,⁹⁶ New Jersey,⁹⁷ Pennsylvania,⁹⁸ Tennessee,⁹⁹ and Texas.¹⁰⁰

⁸⁸ *Id.*

⁸⁹ *Id.* at 842 (citing *White v. Davis*, 533 P.2d 222, 234 (Cal. 1975)).

⁹⁰ *Id.*

⁹¹ *Id.* at 843-44. The court narrowed its analysis to reach this result after consulting additional statutory authority in the California Education Code and the newly enacted FERPA. The *Porten* court then suggested that the University would have to provide a compelling public interest for the unauthorized transmission of the Columbia transcript in order to overcome the plaintiff’s *prima facie* case. *Id.* Note that later California cases have elided by this strict scrutiny standard. *See supra* note 62.

⁹² *See generally* Gormley & Hartman, *supra* note 4, at 1287-89. The Gormley & Hartman article is a nice compendium of state constitutional privacy cases through 1992.

⁹³ Indiana recently flirted with the notion that it protects a fundamental right of privacy in Indiana Constitution art. I, § 1. *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042, 1049 (Ind. Ct. App. 2004), *vacated* 837 N.E.2d 973 (Ind. 2005). The Indiana Supreme Court determined that, even if Indiana’s constitution protects a woman’s fundamental right to terminate her pregnancy, the challenged “waiting-period” statute was not a “material burden” on that right. *Id.* at 988.

⁹⁴ KY. CONST. §§ 1, 2:

§ 1: All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

First: The right of enjoying and defending their lives and liberties.

* * * *

Third: The right of seeking and pursuing their safety and happiness.

* * * *

§ 2: Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

See Commonwealth v. Wasson, 842 S.W.2d 487, 492-95 (Ky. 1992).

⁹⁵ MINN. CONST. art. 1, §§ 1, 2, 10:

§ 1: Government is instituted for the security, benefit and protection of the people, in whom all political power is inherent, together with the right to alter, modify or reform government whenever required by the public good.

§ 2: No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers. . . .

* * * *

§ 10: The 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 warrant shall issue but upon probable cause

See Jarvis v. Levine, 418 N.W.2d 139, 148 (Minn. 1988).

⁹⁶ N.H. CONST. pt. I, arts. 2 & 3:

Art. 2: All men have certain natural, essential, and inherent rights – among which are the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. . . .

Art. 3: When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void.

See In re Caulk, 480 A.2d 93, 95 (N.H. 1984).

⁹⁷ N.J. CONST. art. 1, ¶ 1: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

See, e.g., In re Grady, 426 A.2d 467, 474 (N.J. 1981); *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976).

⁹⁸ PA. CONST. art. 1, § 1: “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

See In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 77 (Pa. 1980).

⁹⁹ TENN. CONST. art. I, §§ 3, 7, 8, 19, 27 (Declaration of Rights). Tennessee’s broad sanction of privacy seems to arise from the penumbras of its bill of rights, most particularly (but not exclusively) shaped by Tennessee Constitution art. I, § 8: “[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.” *See Campbell v. Sundquist*, 926 S.W.2d 250, 260 (Tenn. Ct. App. 1996).

The source of most of these implicit privacy rights is primarily the respective state's bill of rights. More specifically, the source of constitutional privacy is inherent in the inalienable rights of the state citizens in Kentucky, New Hampshire, New Jersey, and Pennsylvania. For example, New Jersey's Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."¹⁰¹ Similarly worded is New Hampshire's constitutional provision that protects privacy: "All men have certain natural, essential, and inherent rights – among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness."¹⁰²

The right to privacy is also found in state constitutional due process provisions, such as in the Minnesota and Tennessee Constitutions: "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers"¹⁰³ Or "no man shall be . . . deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."¹⁰⁴ Texas's constitutional right to privacy is even more ephemeral, apparently emanating from the penumbras of the document itself, the penumbras of being Texan.¹⁰⁵

Regardless of the sources, these constitutional provisions protect a privacy of similar dimensions and with similar scrutiny as their sister jurisdictions with explicit privacy provisions. However, with the inherent vagueness of any implication, the state court decisions in these jurisdictions tend to be a little vaguer in their recognition of a state constitutional right to privacy, in contrast to the explicit privacy rights. For instance, Texas recognizes zones of privacy¹⁰⁶ while Pennsylvania has a broad privacy right that includes the right to be let alone¹⁰⁷ and the right to prevent disclosure of personal matters.¹⁰⁸ Tennessee's

¹⁰⁰ The cases dealing with Texas's right of privacy never specify a particular provision in the state constitution from which the right arises. Presumably, it is a "penumbral" right, arising from the nature of the document itself. *See, e.g.,* *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987); *see also* TEX. CONST. art. 1, § 9.

¹⁰¹ N.J. CONST. art. 1, ¶ 1.

¹⁰² N.H. CONST. pt. I, art. 2.

¹⁰³ MINN. CONST. art. 1, § 2.

¹⁰⁴ TENN. CONST. art. I, § 8.

¹⁰⁵ "We do not doubt . . . that a right of individual privacy is implicit among those 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights." *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987); *Penick v. Christensen*, 912 S.W.2d 276, 285 (Tex. App. 1995).

¹⁰⁶ *Penick v. Christensen*, 912 S.W.2d 276, 285 (Tex. App. 1995) (citing *Tex. State Employees Union*, 746 S.W.2d at 203).

¹⁰⁷ *Commonwealth v. Nixon*, 761 A.2d 1151, 1156 (Pa. 2000) (citing *Stenger v. Lehigh Valley Hosp. Ctr.*, 609 A.2d 796 (Pa. 1992)).

¹⁰⁸ *In re* June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73, 77 (Pa. 1980).

constitutional right to privacy is interpreted as “the right to be let alone.”¹⁰⁹ These categories are somewhat fuzzier than those elucidated when the privacy right is explicit.

In any event, these decisions too assert that these state constitutional provisions recognize broader privacy interests than the United State Constitution.¹¹⁰ Although they acknowledge this constitutional right to privacy is not absolute,¹¹¹ they agree it is fundamental.¹¹² Just as with explicit constitutional provisions, the implicit provision of privacy must be protected from unreasonable intrusion, and any such intrusion is subject to strict scrutiny and a compelling state interest¹¹³ or, at the very least, a countervailing public interest.¹¹⁴

These implicit constitutional provisions also recognize and usually protect informational privacy when such privacy is at issue. They protect informational privacy, generally, in Minnesota,¹¹⁵ New Jersey,¹¹⁶ Pennsylvania,¹¹⁷ Texas¹¹⁸ and perhaps Tennessee.¹¹⁹ One court has designated the right as such “freedom from disclosure of certain matters which an individual deems so personal that publication adversely affects one’s right to the pursuit of life, liberty, and happiness.”¹²⁰ State courts have variously afforded this protection to medi-

¹⁰⁹ *Davis v. Davis*, 842 S.W.2d 588, 600 (Tenn. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250, 266 (Tenn. Ct. App. 1996).

¹¹⁰ *Commonwealth v. Wasson*, 842 S.W.2d 487, 491, 497 (Ky. 1992); *State v. Davidson*, 481 N.W.2d 51, 58 (Minn. 1992); *Campbell*, 926 S.W.2d at 261.

¹¹¹ *Lehrhaupt v. Flynn*, 356 A.2d 35, 41 (N.J. Super. Ct. App. Div. 1976), *aff’d*, 383 A.2d 428 (N.J. 1978); *Nixon*, 761 A.2d at 1156; *Fischer v. Commonwealth, Dept. of Pub. Welfare*, 543 A.2d 177, 179 (Pa. Commw. Ct. 1988).

¹¹² *See, e.g.*, *State v. Gray*, 413 N.W.2d 107, 111 (Minn. 1987).

¹¹³ *See, e.g.*, *State v. Mellett*, 642 N.W.2d 779, 784 (Minn. Ct. App. 2002); *In re Caulk*, 480 A.2d 93, 95 (N.H. 1984); *Nixon*, 761 A.2d at 1156; *Campbell*, 926 S.W.2d at 262; *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205 (Tex. 1987); *Penick v. Christensen*, 912 S.W.2d 276, 285 (Tex. App. 1995).

¹¹⁴ *Lehrhaupt*, 356 A.2d at 41; *Fischer*, 543 A.2d at 179.

¹¹⁵ *Minneapolis Fed’n of Teachers Local 59 v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 111 (Minn. Ct. App. 1994).

¹¹⁶ *Lehrhaupt*, 383 A.2d at 428.

¹¹⁷ *In re June 1979 Allegheny County Investigating Grand Jury*, 415 A.2d 73, 77 (Pa. 1980).

¹¹⁸ *Fox v. Anonymous*, 869 S.W.2d 499, 501 (Tex. App. 1993).

¹¹⁹ Both federal and state courts have determined that the Tennessee Constitution does not protect the privacy of information. *Cutshall v. Sundquist*, 193 F.3d 466, 480-82 (6th Cir. 1999); *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999). The reasoning of the former is barely supported by law and is not binding on a state court while the reasoning of the latter is somewhat suspect because its underlying and confusing rationale is based on precedent that has nothing to do with Tennessee’s constitutional right to privacy.

¹²⁰ *Fischer v. Commonwealth, Dept. of Pub. Welfare*, 543 A.2d 177, 179 (Pa. Commw. Ct. 1988) (citing *In re June 1979*, 415 A.2d 73).

cal reports,¹²¹ financial records,¹²² employment records,¹²³ lists of group members,¹²⁴ identities of victims of sexual assault,¹²⁵ polygraph testing by a state agency,¹²⁶ and court records that would reveal a minor's identity and settlement of his tort claim from a sexual assault by an AIDs-infected counselor.¹²⁷

However, the basis for the authority to use implicit constitutional privacy provisions to protect informational privacy is not nearly as overwhelming as authority under explicit privacy provisions. Based on the extant published cases, fewer litigants have used implicit constitutional protections to challenge government intrusions into citizens' privacy. That is not to say that other jurisdictions will not recognize informational privacy when the issue arises. If one examines the vintage of these cases, one notes that they are only ten to fifteen years old. Fewer implicit privacy provisions have been recognized because, apparently, fewer implicit privacy provisions have been tested in court. But with the increased interest in plaintiffs' resorting to state constitutional protections, the trend to imply privacy rights in those constitutions cannot be ignored by school districts.

Both explicit and implicit privacy provisions in state constitutions offer a safe haven to student records that might not be present in the United States Constitution. Indeed, student records are those documents in which citizens have a reasonable expectation of privacy. As a fundamental right, these state constitutional privacy rights would take precedence over any conflicting federal or state statutes that purport to allow disclosure without a compelling state interest. A compelling state interest would obviously embrace legitimate educational interests in the records,¹²⁸ but other non-educational interests should have an uphill battle arguing for disclosure of this information in these states. Although not necessarily an exemplar of student records privacy, *Porten* comes closest to nailing the real privacy issue: If schools *collect* personal information from schoolchildren for a legitimate educational purpose, then by what right may

¹²¹ *In re June 1979*, 415 A.2d at 75-78 (court authorized limited disclosure of medical reports on tissue specimens pursuant to subpoena only because of grand jury secrecy rules but promised confidentiality for purposes of further litigation); *Fox*, 869 S.W.2d at 504.

¹²² *Lehrhaupt v. Flynn*, 356 A.2d 35, 41-42 (N.J. Super. Ct. App. Div. 1976) *aff'd*, 383 A.2d 428 (N.J. 1978) (holding that financial information is protected by constitution but government transparency requires municipal officials to file annual reports of assets and liabilities); *Fox*, 869 S.W.2d at 507; *see also* *Minneapolis Fed'n of Teachers, Local 59 v. Minneapolis Pub. Schs., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 110-11 (Minn. Ct. App. 1994) (teacher disciplinary records are not protected from government transparency).

¹²³ *Fox*, 869 S.W.2d at 504.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Tex. State Employees Union v. Tex. Dept. of Mental Health & Mental Retardation*, 746 S.W.2d 203, 205-06 (Tex. 1987).

¹²⁷ *Fox*, 869 S.W.2d at 507.

¹²⁸ *E.g.*, 20 U.S.C. § 1232g(b)(1) (2000).

schools *disclose* that information in the absence of a parallel legitimate educational purpose?¹²⁹

School administrators in the affected states must be aware of the growth in state constitutional litigation and give due consideration to whether compliance with disclosure requests – even under FERPA or state open records acts – is a wise idea in light of the fundamental protections offered to informational privacy under their state constitutions. Indeed, school districts in all other states must be aware of the movement to rely on state constitutions as the source of privacy rights and be prepared to defend privacy policies that do not stand up to the strict scrutiny of “need to know.”

IV. PRIVACY STATUTES & REGULATIONS PROTECTING STUDENT RECORDS

A more prevalent type of privacy protection afforded by states is through legislation; many state statutes provide privacy to student records. Some state statutes make student records private information as a matter of law. Such statutes include those that are derived from FERPA and those that simply afford specific privacy protection to these student records. Similarly, state education departments have promulgated regulations that offer privacy protections, especially for special education records.¹³⁰ The “advantage” of these statutes over federal statutes is that private enforcement is likely available, in contrast to the limitations placed on FERPA by *Gonzaga University v. Doe*.

A. *Mini-FERPAs: Statutes & Regulations*

The majority of states that have developed student record privacy regimes have done so by engrafting the principles of FERPA into their own local statutes. FERPA is the federal statute that hinges federal funding upon compliance with a statutory framework that denotes what student records may be disclosed and to whom.¹³¹ Its coverage is comprehensive and detailed in establishing what is an education record subject to protection and what is not, how education records can be disclosed and to whom.¹³² Although FERPA does not

¹²⁹ Such limitation on disclosures may even significantly limit the reach non-educational disclosures currently allowed under FERPA. *See, e.g.*, 20 U.S.C. § 1232g(b)(1)(D) (student aid); 20 U.S.C. § 1232g (b)(1)(E) (juvenile justice authorities); 20 U.S.C. § 1232g (b)(1)(J) (grand jury subpoenas). *See generally*, Stuart, *Lex-Praxis*, *supra* note 17.

¹³⁰ It is beyond the scope of this Article to delve into the specific protections for all student information, such as screening tests, individual surveys, etc. The focus here is on privacy protections that cast their net broadly over student information in education records.

¹³¹ 20 U.S.C. § 1232g.

¹³² *Id.*; *see generally* Stuart, *Lex-Praxis*, *supra* note 17; Lynn M. Daggett & Dixie Snow Huefner, *Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records*, 51 AM. U. L. REV. 1 (2001); Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work*, 46 CATH. U. L. REV. 617 (1996-97).

protect students' "directory information" -- name, home address, telephone number, age, and the like¹³³ -- it does protect "education records," which are "records, files, documents, and other materials which . . . contain information directly related to a student; and . . . are maintained by an educational agency or institution or by a person acting for such agency or institution."¹³⁴ FERPA then prescribes four primary areas of responsibilities for school districts vis à vis those records.¹³⁵ Those basic areas are providing parental access to student education records; supplying notice of that access to parents; regulating the disclosure of education records, particularly nonconsensual disclosure; and regulating the collection of information in student records.¹³⁶ Education records may be disclosed and/or accessed by certain third parties, but for the most part, those disclosure and access provisions are rather narrow.¹³⁷ Perhaps because of FERPA's familiarity, a large number of state legislatures have adapted its principles, in some shape or form, to govern privacy in their respective states' public schools.¹³⁸

One method of incorporating FERPA into a state privacy regime is to simply incorporate it by reference to its name and citation.¹³⁹ For instance, Utah's relevant statute states:

Employees and agents of the state's public education system shall protect the privacy of students, their parents, and their families . . . through compliance with the protections provided for family and student privacy under . . . the Federal Family Educational Rights and Privacy Act and related provisions under 20 U.S.C. 1232(g) and (h) in the administration and operation of all public school programs, regardless of the source of funding.¹⁴⁰

¹³³ 20 U.S.C. § 1232g(a)(5)(A); 34 C.F.R. § 99.31 (2005).

¹³⁴ 20 U.S.C. § 1232g(a)(4)(A).

¹³⁵ *Id.* § 1232g.

¹³⁶ *Id.*; see also Stuart, *Lex-Praxis*, *supra* note 17.

¹³⁷ 20 U.S.C. § 1232g.

¹³⁸ See generally Richard A. Leiter, ed., NATIONAL SURVEY OF STATE LAWS 269-74 (5th ed. 2005).

¹³⁹ ARIZ. REV. STAT. §§ 15-141 & 15-1043 (2002); ME. REV. STAT. ANN. tit. 20-A § 5001-A (West 2004); MICH. COMP. LAWS § 15.243(2) (2001 & Supp. 2005) (incorporated in open records act as exemption); MISS. CODE ANN. § 37-15-3 (2001); MONT. CODE ANN. § 20-1-213(1) (2003); NEV. REV. ST. §§ 386.650 & 386.655 (2003); N.H. REV. STAT. ANN. § 189:1-e (1999); UTAH CODE ANN. § 53A-13-301(1) (2000); WASH. REV. CODE § 28A.605.030 (Supp. 2005). Colorado, curiously enough, has incorporated FERPA into its open records act, thereby regulating disclosure, not privacy. COLO. REV. STAT. § 24-72-204(3) (2004).

¹⁴⁰ UTAH CODE ANN. § 53A-13-301 (2000).

Nevada's statute simply provides that "the public schools . . . shall comply with the provisions of . . . the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g, and any regulations adopted pursuant thereto . . ." ¹⁴¹ Similarly prosaic are Arizona's ¹⁴² and Maine's ¹⁴³ wholesale incorporation of FERPA into their statutory scheme.

That is not to say that state statutes have incorporated FERPA *carte blanche* without some adaptation. Some legislatures have incorporated it for reference only and have still created their own disclosure and access regimes. For example, Michigan has incorporated FERPA's disclosure exemptions generally then further exempted (at the discretion of the school district) even directory information from disclosure for purposes of marketing, surveys and solicitation. ¹⁴⁴ Mississippi has only incorporated FERPA's parental access provision ¹⁴⁵ whereas Washington has adopted only FERPA's nonconsensual disclosure provisions. ¹⁴⁶ New Hampshire only incorporates FERPA's directory information provision: "A local education agency which maintains education records may provide information designated as directory information consistent with the Family Educational Rights and Privacy Act (FERPA)." ¹⁴⁷ Montana limits FERPA's provisions only to matters of disclosure to the juvenile justice system ¹⁴⁸ while Oregon includes that and the provisions for disclosure to law

¹⁴¹ NEV. REV. ST. § 386.655(1)(a).

¹⁴² ARIZ. REV. STAT. §§ 15-141A & 15-1043 (2002 & Supp. 2005).

¹⁴³ ME. REV. STAT. ANN. tit. 20-A § 5001-A.

¹⁴⁴ MICH. COMP. LAWS § 15.243(2).

¹⁴⁵ MISS. CODE ANN. § 37-15-3 (2001).

¹⁴⁶ WASH. REV. CODE § 28A.605.030 (Supp. 2005). The Washington statute is rather hard to follow insofar as it suggests that student records may be disclosed without consent in accordance with FERPA. However, local school districts are instructed to establish procedures prohibiting the release of student records without parental consent.

¹⁴⁷ N.H. REV. STAT. ANN. § 189:1-e (1999).

¹⁴⁸ MONT. CODE ANN. § 20-1-213(5) (2003); *see also* ME. REV. STAT. ANN. tit. 20-A § 6001(3) (Supp. 2004); MICH. COMP. LAWS § 380.1135(5) (2001) (FERPA limits disclosure to law enforcement agencies). Washington incorporates FERPA in only a couple of instances, one of which is cooperation with the juvenile justice system. WASH. REV. CODE § 13.40.480 (2004). As a point of reference, FERPA has carved out a specific, limited exception concerning the disclosure of student records when disclosed to juvenile justice authorities; disclosure is appropriate pursuant to specific state statutes governing the same. 20 U.S.C. § 1232(b)(1)(E) (2000). These statutes are also supposed to assure these records will not be further disclosed without written consent of the parent(s). *See generally* Stuart, *Lex-Praxis*, *supra* note 17. Hence, states are likely to emphasize special disclosure rules for the juvenile justice system, as in Arizona, ARIZ. REV. STAT. § 15-141D (2002 & Supp. 2005); Florida, FLA. STAT. § 1002.22(3)(d)(13) (2004 & Supp. 2005); Illinois, 105 ILL. COMP. STAT. 10/6(a)(6.5) (1998 & Supp. 2005); Indiana, IND. CODE §§ 20-33-7-1 to -3 (2004); Iowa, IOWA CODE § 280.25 (Supp. 2005); Maine, ME. REV. STAT. ANN. tit. 20-A § 6001 (Supp. 2004); Oregon, OR. REV. STAT. § 336.187(1)(b) (2003); and WASH. REV. CODE § 13.40.480 (2004). A state that does not have such special provisions violates FERPA when its local school districts hand over student records to the juvenile justice system.

enforcement agencies when necessary for the health and safety of the student and others.¹⁴⁹

On the other hand, some states have actually mimicked FERPA by drafting their own mini-FERPAs that govern access to and disclosure of student records.¹⁵⁰ Some of these state “mini-FERPAs” are complex and intricate, such as California’s, which is more comprehensive than FERPA itself. California’s pupil records protection includes specific statutory provisions for parental notice of access to student records,¹⁵¹ maintenance of logs noting persons requesting and receiving access to student records,¹⁵² release of directory information,¹⁵³ and regulation of access to and disclosure of records to third parties.¹⁵⁴ Equally inclusive is Florida’s mini-FERPA, the purpose of which is to

protect the rights of students and their parents with respect to student records and reports as created, maintained, and used by public educational institutions of the state. The intent of the Legislature is that students and their parents shall have rights of access, rights of challenge, and rights of privacy with respect to such records and reports, and that rules shall be available for the exercise of these rights.¹⁵⁵

Similarly comprehensive are the Illinois School Student Records Act,¹⁵⁶ the Kentucky Family Education Rights and Privacy Act,¹⁵⁷ the Colorado statute for the protection of student data,¹⁵⁸ and the Wisconsin pupil records act,¹⁵⁹ all of which provide for parental notice and access and limited disclosure to certain third parties.

¹⁴⁹ OR. REV. STAT. § 336.187(1)(a).

¹⁵⁰ CAL. EDUC. CODE §§ 49060-49079 (West 2000); DEL. CODE ANN. tit. 14, § 4111 (1999 & Supp. 2004); FLA. STAT. § 1002.22 (2004 & Supp. 2005); 105 ILL. COMP. STAT. 10/1 to 10/10 (1998 & Supp. 2005); KY. REV. STAT. ANN. § 160.710 (West 1999); OHIO REV. CODE ANN. § 3319.321 (LexisNexis 2004); VA. CODE ANN. § 22.1-287 (West 2001 & Supp. 2005); WIS. STAT. § 118.125 (2004).

¹⁵¹ CAL. EDUC. CODE § 49063.

¹⁵² *Id.* § 49064.

¹⁵³ *Id.* § 49073.

¹⁵⁴ *Id.* §§ 49075-77.

¹⁵⁵ FLA. STAT. § 1002.22(1).

¹⁵⁶ 105 ILL. COMP. STAT. 10/1 to 10/10 (1998 & Supp. 2005).

¹⁵⁷ KY. REV. STAT. ANN. §§ 160.700-.730 (West 1999 & Supp. 2004). Kentucky presumes student records are confidential. *Id.* § 160.705(1).

¹⁵⁸ COLO. REV. STAT. § 22-1-123 (2004). Colorado’s statute is a blend of its own FERPA-like organization while periodically incorporating federal statutory citations, such as FERPA’s.

¹⁵⁹ WIS. STAT. § 118.125 (2004). Wisconsin’s statute, like Kentucky’s, starts with the premise that pupil records are confidential then lists numerous exceptions to that confidentiality. WIS. STAT. § 118.125(2).

Some state statutes pattern themselves after FERPA but provide more presumptive privacy rights. For example, the Florida student privacy statute is the most rigorous in the country although it is similar to FERPA in many respects in its regulation of parental access, parental notice, and nonconsensual disclosures. Florida's legislative purpose is that

[e]very student has a right of privacy with respect to the educational records kept on him or her. Personally identifiable records or reports of a student, and any personal information contained therein, are confidential and exempt from s. 119.07(1) [open records act]. A state or local educational agency, board, public school, career center, or public postsecondary educational institution may not permit the release of such records, reports, or information without the written consent of the student's parent, or of the student himself or herself if he or she is qualified as provided in this subsection, to any individual, agency, or organization.¹⁶⁰

Similarly, Delaware's mini-FERPA denotes all student "personal" records as confidential and, unlike FERPA, restricts non-school disclosure only to parents and to government agencies for "public health, safety, law enforcement or national security" when pursuant to "law or court order."¹⁶¹ The major exemption in the Delaware statute allows only for *consensual* disclosure of school records to potential employers and institutions of higher education.¹⁶² In sum, states have engrafted privacy onto FERPA where such privacy does not otherwise exist.

FERPA has been instrumental in guiding state legislatures in enacting their own versions of education records privacy protections. Similarly, it has been instrumental in guiding state education departments in drafting privacy regulations.

Rather than enact FERPA-like statutes, other states have formulated FERPA-like regulations. Although a complete rundown of all the regulations adopted by any particular state board of education is beyond the scope of this Article, school districts must be aware that such regulations exist as they too are enforceable in protecting student record privacy. School districts must be aware that these regulations might be fairly strict, such as in Massachusetts, where state regulations provide that no third party shall have access to information in or from student records without specific, informed written consent of the eligible student or parents.¹⁶³ West Virginia has likewise been influenced by FERPA

¹⁶⁰ FLA. STAT. § 1022.22(3)(d) (Supp. 2005).

¹⁶¹ DEL. CODE ANN. tit. 14, § 4111(a)(1) (1999).

¹⁶² *Id.* § 4111(a)(2).

¹⁶³ *Commonwealth v. Buccella*, 751 N.E.2d 373, 380 (Mass. 2001); *Commonwealth v. Nathaniel N.*, 764 N.E.2d 883, 888 (Mass. App. Ct. 2002). In *Nathaniel N.*, the court relied on 603

in one of its state education rules.¹⁶⁴ In coordination with its statutory right to privacy, Pennsylvania's Department of Education regulations require that local school districts adopt FERPA-type rules concerning disclosure of and access to student records.¹⁶⁵ And New Jersey has a regulatory scheme that mirrors FERPA yet places on the local districts a great deal of responsibility for formulating their own policies.¹⁶⁶ Even by regulatory regime, FERPA has influenced privacy policy at the state level.

Many state legislatures have taken up the banner of student privacy and have done so by mimicking the intent and format of the federal FERPA to protect student records. In their various forms, these statutes and regulations pose challenges to school districts who may be more inclined to follow FERPA rather than more restrictive state statutes. Insofar as these state statutes are not expressly preempted by FERPA and a school district complies with FERPA when complying with a more restrictive state statute, there is no obstacle to prevent a district's following state statutes rather than FERPA.¹⁶⁷ This tack is especially

MASS. CODE REGS. 23.07(4) (1995), in determining that a school did not unlawfully fail to provide juvenile defendant's school records to the police pursuant to the Individuals with Disabilities Education Act. This Massachusetts regulation is a regulatory version of FERPA and a restrictive version it is: "no third party shall have access to information in or from student records without specific, informed written consent of the eligible student or parents." *Id.*; *Nathaniel N.*, 764 N.E.2d at 888. Indeed, the court gave greater force and effect to this state regulation than to IDEA's suggestion that special education records are to be sent to law enforcement authorities when special education students are involved.

¹⁶⁴ W. Va. Code. R. §§ 126-94-1 to 30 (2003). This State Board of Education Procedural Rule limit[s] collection and disclosure of information relating to students which is individually identifiable, generally requiring consent of the parents for disclosure and collection, except when collection is a normal part of the educational program. Disclosure requires consent of the parents, except when for release of directory information or in specific circumstances. Students and parents have the right to review such information, and procedures are established to amend the records when found to be inaccurate and to challenge disclosures which are in violation of the policy.

State ex rel. Garden State Newspapers, Inc. v. Hoke, 520 S.E.2d 186, 194-95 (W. Va. 1999) (holding court did not exceed its power in sealing record of proceedings brought by juvenile against school district and its administrators because that record included educational records).

¹⁶⁵ 22 PA. CODE §§ 12.31-.33 (2004); Bd. of Dirs. of Palmyra Area Sch. Dist. v. Palmyra Area Educ. Ass'n, 644 A.2d 267, 270 (Pa. Commw. Ct. 1994) (teachers' union improperly used mailing list compiled of student names and addresses because not accessed for "legitimate educational interest"); Parents Against Abuse in Schs. v. Williamsport Area Sch. Dist., 594 A.2d 796, 802-03 (Pa. Commw. Ct. 1991) (parents had right of access to school psychologist's notes from interviews he conducted of students who had suffered physical and mental abuse by a teacher). "The governing board of every school district, intermediate unit and area vocational-technical school shall adopt a plan for the collection, maintenance and dissemination of pupil records and submit the same to the Department for approval." 22 PA. CODE § 12.31(a).

¹⁶⁶ N.J. ADMIN. CODE § 6:3-6.1 (2004).

¹⁶⁷ See *supra* note 13 and accompanying text; U.S. CONST. art. VI, § 2 (Supremacy Clause); *Mills v. Rogers*, 457 U.S. 291, 300 (1982).

important when the litigation stakes are higher under state law than under federal law.

B. Access Only Statutes

Several states only regulate access to student records.¹⁶⁸ Unlike the FERPA-type legislation and regulations, these legislatures apparently presumed the confidentiality of education records but felt compelled to legislate exemptions to that implicit privacy by affirmatively allowing access.

These statutes are reminiscent of FERPA but only address access to student records and are in a small number of jurisdictions. Ohio's student records access statute looks like FERPA but it does not have the same content. Rather, it is an amalgam of limitations on access to student records.¹⁶⁹ Also rather FERPA-like are Virginia's¹⁷⁰ and Nebraska's¹⁷¹ student records statutes. Instead of governing student privacy, they govern access to those records.

More straightforward in their focus on access to student records are the statutes in Connecticut, Georgia, Massachusetts, New Jersey, Rhode Island, and Texas. For example, Texas¹⁷² and Connecticut¹⁷³ merely establish a parent's right to access his or her child's education records. Similarly limited is Georgia's treatment of student records: "No local school system . . . shall have a policy of denying . . . parents . . . the right to inspect and review the education records of their child."¹⁷⁴ The Rhode Island statute is limited to the rights of parents, legal guardians, and eligible students.¹⁷⁵ Massachusetts's statutes mandate that the state board of education create regulations for the "maintenance, retention, duplication, storage and periodic destruction" of student records,¹⁷⁶ and also provides for specific access to parents, guardians and students over the age of eighteen.¹⁷⁷ And New Jersey's statute similarly mandates the state board of education to supply regulations that, among other things, will govern access.¹⁷⁸

¹⁶⁸ See generally Leiter, *supra* note 138.

¹⁶⁹ OHIO REV. CODE ANN. § 3319.321 (2004).

¹⁷⁰ VA. CODE ANN. § 22.1-287 (2001).

¹⁷¹ NEB. REV. STAT. § 79-2,104 (2003).

¹⁷² TEX. EDUC. CODE ANN. § 26.004 (Vernon 1996). These parental rights also seem to extend to what might otherwise be covered by privilege, like counseling and psychological records.

¹⁷³ CONN. GEN. STAT. § 10-15b (2002).

¹⁷⁴ GA. CODE ANN. § 20-2-720 (2005).

¹⁷⁵ R.I. GEN. LAWS § 16-71-3 (2001).

¹⁷⁶ MASS. GEN. LAWS ch. 71, § 34D (2002). The Massachusetts Board of Education has, indeed, implemented rigorous regulations pursuant to this statute. See *supra* note 163.

¹⁷⁷ *Id.* § 34E.

¹⁷⁸ N.J. STAT. ANN. § 18A:36-19 (West 1999).

What one takes from these access statutes is the feeling that the states presume privacy of these records and will open them only to limited disclosure. It is unclear if the express provision of access to some means the implicit denial of access to others. If so, then these states actually will recognize an enforceable right to privacy. However, logic suggests that the very limits of the access to student records to parents and/or students as set out in some of the statutes might, perforce, limit access by all others.¹⁷⁹

C. *Special Education Records*

Special education records in all states have privacy coverage under the regulations that must be adopted under the Individuals with Disabilities Act ("IDEA").¹⁸⁰ Just as some states have adopted miniature versions of FERPA to protect the privacy of education records, so to have all states adopted similar versions of the Department of Education's regulations for special education.¹⁸¹ The IDEA requires that the states conform to its statutory mandates and adopt regulations similar to those formulated by the Department of Education in exchange for partial federal funding of education for children with disabilities.¹⁸² Among those state-crafted regulations must be provisions protecting the school records of qualifying students under the Act.¹⁸³ As a consequence, under any state regime for the protection of student records, special education records are universally and unequivocally protected private information by state regulation rather than by statute. Generally, such regulations must provide for notice and access to parents concerning these records.¹⁸⁴ Two notably distinct protections cover special education students' files under these regulations: nonconsensual disclosures of student information may only be for compliance with and provision of services under IDEA;¹⁸⁵ and school districts must have an individual designated to maintain the confidentiality of these files.¹⁸⁶ Thus, as mandated by IDEA, states afford greater privacy rights to special education students than to general education students.

¹⁷⁹ "Expressio unius est exclusion alterius." This rule of statutory construction stands for the principle that when a legislative body expressly enumerates items in a statute, then others not so enumerated are presumed excluded. *See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001).

¹⁸⁰ 20 U.S.C. § 1407 (2000); 34 C.F.R. § 300.127 (2004).

¹⁸¹ 20 U.S.C. § 1407(a); *see generally* Peter Walker & Sara Jane Steinberg, *Confidentiality of Educational Records: Serious Risks for Parents and School Districts*, 26 J.L. & EDUC. 11 (1997).

¹⁸² 20 U.S.C. § 1407.

¹⁸³ "The State must have on file in detail the policies and procedures that the State has undertaken to ensure protection of the confidentiality of any personally identifiable information, collected, used, or maintained" 34 C.F.R. § 300.127 (2004).

¹⁸⁴ 34 C.F.R. §§ 300.560-300.577.

¹⁸⁵ *See* 34 C.F.R. § 300.572(d); 34 C.F.R. § 300.500(b)(3); 34 C.F.R. § 300.571.

¹⁸⁶ 34 C.F.R. § 300.572(b); *Buckley I*, *supra* note 132, at 646; *see also* Stuart, *Lex-Praxis*, *supra* note 17.

At least three states, Alaska, New York, and Nevada, have also enacted specific state statutes that regulate access to and disclosure of special education student records. Alaska's statute places access and disclosure matters up to the parents.¹⁸⁷ New York requires that the state department of education write regulations governing privacy of special education records.¹⁸⁸ A bit more generally, Nevada has incorporated the IDEA and its regulations into its automated information system.¹⁸⁹ Other than those three states, the rest seem to be resting on the protections provided by their regulations patterned on those drafted by the Department of Education to cover their special education records under the IDEA.

D. Reaping the Whirlwind: Enforcing Statutory Rights

The affirmative enforceability of these state statutes and regulations is what will make them more valuable and clearly more powerful than FERPA. After *Gonzaga University v. Doe*, FERPA has virtually no life left for vindicating individual privacy rights. Thus, state statutes could become the new "club" for requiring school districts to honor the privacy of student records. Congress's power to govern the states through its spending powers (or its commerce powers) does not have similar parallels with the power that state legislatures have to regulate state citizens.¹⁹⁰ State courts are more likely to interpret their privacy statutes to include personal rights than to be diluted as mere funding statutes. Consequently, enforcing personal privacy rights pursuant to state statutes through a private right of action may be significantly easier under state than under federal statutes, at least so long as the legislature intended to create some right to be vindicated by litigation.¹⁹¹

¹⁸⁷ ALASKA STAT. § 14.30.272(a)(8) (2004): "A school district shall inform the parent of a child with a disability of the right . . . to give consent or deny access to others to the child's educational record." Perhaps this statute would not be so broadly interpreted, but the plain meaning of the statute indicates that there is no place for nonconsensual disclosure of these records, even to educational personnel.

¹⁸⁸ The charge to the state department is

[t]o make provision by regulation of the commissioner to assure the confidentiality of any personally identifiable data, information, and records collected or maintained by the state department of education or any school district, including a committee or subcommittee on special education, and the officers, employees or members thereof, pursuant to or in furtherance of the purposes of this article, and shall establish procedures upon which any such personally identifiable data, information, or records may be disclosed.

N.Y. Educ. Law § 4403(9) (McKinney 2001).

¹⁸⁹ NEV. REV. STAT. 386.655(2) (2003). The statute also incorporates "any other applicable federal law."

¹⁹⁰ See generally *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002).

¹⁹¹ Such intent can be determined as follows: When " 'it appears that the duty imposed [by statute] is . . . for the benefit of particular individuals or classes of individuals, a private right of action arises for injury sustained by reason of the breach, by any person the statute was designed

A school district might argue that there exists no such private right of action inuring to these statutes except in instances where a specific right exists in the statute, as in Florida,¹⁹² or where a specific cause of action exists, as in Illinois.¹⁹³ However, those fine points did not even come up in the handful of cases that school districts, students, and others have used to protect or gain access to student records. Most of such cases have been access cases in which someone other than the statutorily designated individuals wanted access to the records.¹⁹⁴ One can conclude that these statutes' enforcement for access purposes indicates the courts' willingness to vindicate individual rights under these statutes, thereby assuring that all other privacy rights likewise would be vindicated.

Florida, which has the strictest student privacy protections, has also had the most reported litigation in this area. For instance, one court granted Florida State University's motion to quash a subpoena requesting the production of formal orders in student conduct code cases. Even though the subpoena allowed for the redaction of identifying information, the Florida Court of Appeals determined that these formal orders were confidential records and reports. Because Florida's privacy statutes made no provision for *partial* disclosure of such records and reports, the proposed redaction would still not fulfill the legal restrictions on disclosure.¹⁹⁵ Florida's statutory restrictions were intended to pro-

to protect, provided the injury sustained by him is a special injury different from that inflicted on the general public, and has resulted proximately from and because of the violation." *Bartholomew County Beverage Co. v. Barco Beverage Corp.*, 524 N.E.2d 353, 356 (Ind. Ct. App. 1988). The primary considerations for examining legislative intent to create a private right of action are the creation of a benefited class, the promotion of a legislative purpose by a private right of action, and consistency with the statutory scheme. E.g., *Sheehy v. Big Flats Cmty. Day, Inc.*, 541 N.E.2d 18, 20 (N.Y. 1989). A cause of action may be implied even without the provision of an express remedy. E.g., *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 432 N.E.2d 849, 852 (Ill. 1982). See generally Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 *Hastings L.J.* 877 (2003).

¹⁹² "[S]tudents and their parents shall have rights of access, rights of challenge, and rights of privacy with respect to such records and reports" FLA. STAT. § 1002.22(1) (2004).

¹⁹³ "Any person injured by a willful or negligent violation of this Act [Illinois School Student Records Act] may institute an action for damages in the Circuit Court of the County in which the violation has occurred or the Circuit Court of the County in which the school is located. 105 Ill. Comp. Stat. 10/9(b) (1998 & Supp. 2005); *see also* 105 Ill. Comp. Stat. 10/9(a); *John K. v. Bd. of Educ. for Sch. Dist. No. 65*, 504 N.E.2d 797 (Ill. App. Ct. 1987) (parents entitled to injunctive relief to gain access to student records).

¹⁹⁴ Access cases might be otherwise litigated under the applicable state open records law. However, these were actually pursued under the affirmative privacy statutes.

¹⁹⁵ *Fla. State Univ. v. Hatton*, 672 So. 2d 576, 578-79 (Fla. Dist. Ct. App. 1996) (relying on FLA. STAT. § 228.093(3)(d) now FLA. STAT. § 1002.22.) Similarly, University of Florida's honor court proceedings are not "public meetings" because discussion therein might include confidential student records. *Marston v. Gainesville Sun Publ'g Co.*, 341 So. 2d 783, 785 (Fla. Dist. Ct. App. 1976).

vide affirmative confidentiality to student records¹⁹⁶ and not just to exempt them from public disclosure in certain circumstances. Indeed, Florida prides itself on providing greater protections than FERPA.¹⁹⁷

Other state court cases involve the partial protection of student records by limiting access only to student information that is masked or not personally identifiable.¹⁹⁸ Those courts generally treated student records statutes as making records absolutely confidential from public disclosure unless the request was for solely statistical information.¹⁹⁹ Regardless of the parties involved, school districts should recognize that litigation and privately enforceable rights are inherent in these privacy statutes. Thus, these statutes bring greater risks to school districts in terms of immediate outlays for attorney fees (and perhaps damages) than do federal laws purporting to protect student records.

V. SUNSHINE LAWS PROTECTING STUDENT RECORDS

A. *The Protection*

Often, the matter of student record privacy arises when the school district is being held accountable by a member of the public requesting information under a state open records law. Hence, one might consider it unusual to find protection for student records in these laws. Open records laws accommodate the concept that governments must be accountable to their citizens and that government agencies should be “transparent” for public oversight.²⁰⁰ Therefore, the public may access many records held by the government. However, student records are often exempted from such access.

¹⁹⁶ See, e.g., *Johnson v. Deluz*, 875 So. 2d 1, 3-4 (Fla. Ct. App. 2004). In *Johnson v. Deluz*, the Florida Court of Appeals determined that, even though teachers might usually be considered a party with access to confidential student information, that right had limits. *Id.* Consequently, a school board had to redact all identifying student information from an investigative report concerning a principal when teachers requested a copy of that report. *Id.*

¹⁹⁷ *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 58 (Fla. Dist. Ct. App. 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004) (TV station could not access redacted Transportation Student Discipline Forms or surveillance videotapes).

¹⁹⁸ See, e.g., *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65*, 538 N.E.2d 557, 559-60 (Ill. 1989) (Illinois Student Records Act does not protect information by which no individual student may be identified); *Human Rights Auth. of Ill. Guardianship & Advocacy Comm'n v. Miller*, 464 N.E.2d 833, 836 (Ill. App. Ct. 1984). Disclosure of testing and statistical information is clearly at the forefront of so-called school reform efforts and accountability movements. Unfortunately, the scope of this Article is not intended to travel in that territory.

¹⁹⁹ See, e.g., *Hardin County Schs. v. Foster*, 40 S.W.3d 865, 868-69 (Ky. 2001) (statistical disciplinary data that does not contain personally identifiable student information is not confidential under student records act); see also *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681-83 (Tex. App. 2000) (court relied, in part, on state statute that protected student records as confidential in considering whether or not to allow disclosure of testing information identified by test number, gender, age and ethnicity).

²⁰⁰ Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1173 (2002).

Each state legislature has enacted an open records statute,²⁰¹ also called “freedom of information” acts, “open access” acts, and “sunshine” laws.²⁰² What these statutes do is assure access to public information so that governments do not operate in secret.²⁰³ However, not all public records are subject to disclosure; no sunshine law mandates “absolute disclosure.”²⁰⁴ Instead, there are exemptions from disclosure for those public records that the legislature deems of such a nature – usually having a “privacy” interest – to which the public should not be privy. One category of information to which this exempting method of “privacy protection” applies is student records.

Of course, this category of exemption within a sunshine law assumes student records are actually public records.²⁰⁵ That is not always true. North Carolina has enacted a statute that specifically states that student records are simply not public records at all: “The official record of each student is not a public record as the term ‘public record’ is defined by [the public records act]. The official record shall not be subject to inspection and examination as authorized by [the public records act].”²⁰⁶ Other state legislatures have implied a similar result by enacting separate privacy statutes for student records, making them “confidential” and therefore not subject to disclosure. As discussed above, a state with a comprehensive student records act usually considers those records outside the purview of the open records acts. Florida’s education records privacy statute²⁰⁷ is such an example as is Illinois’s School Records Act.²⁰⁸ Indeed, student records in Florida are affirmatively confidential, not negatively

²⁰¹ Kristen M. Blankley, *Are Public Records too Public? Why Personally Identifying Information Should Be Removed from Both Online and Print Versions of Court Documents*, 65 OHIO ST. L.J. 413, 428 n.68 (2004.); Case Comment, *Open Records – Agencies or Custodians Affected: The North Dakota Supreme Court Expands the Scope of North Dakota’s Open Records Law*, 75 N.D. L. REV. 745, 749 n.25 (1996).

²⁰² Solove, *supra* note 200, at 1160-61.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1162.

²⁰⁵ In a related article, I opine that student records are not public records at all: they belong to the students and their parents and the school is the government keeper. See generally Stuart, *Lex-Praxis*, *supra* note 17. These aren’t records that the government must keep as a government agency; they are records the government keeps in order to better educate. This function also makes them distinct from employee personnel records kept by government agencies that have a direct impact on the working of the agency. Instead, student records have virtually nothing to do with the administration of the government function of the school, apart from statistical information required to be kept when the school is acting as a governmental agency.

²⁰⁶ N.C. GEN. STAT. § 115C-402(e) (2003); see also N.J. STAT. ANN. § 47:1A-1.1 (2003) (higher education student records are not “government records” in New Jersey).

²⁰⁷ FLA. STAT. § 1002.22(3)(d) (2004).

²⁰⁸ 105 ILL. COMP. STAT. 10 (1998 & Supp. 2005); see also *Bowie v. Evanston Cmty. Consol. Sch. Dist.*, No. 65, 538 N.E.2d 557, 559-60 (Ill. 1989).

exempted from disclosure.²⁰⁹ Likewise, student records have specific confidentiality in Wisconsin²¹⁰ and in Kentucky.²¹¹

Many state sunshine laws themselves, however, impliedly regard student records as public records but extend them a modicum of privacy protection through the traditional means of listing them as specific exemptions from public disclosure. For instance, Colorado exempts addresses and telephone numbers of public school students²¹² and “scholastic achievement data on individual persons”²¹³ while one of Iowa’s exemptions keeps confidential the following public records: “[p]ersonal information in records regarding a student, prospective student, or former student maintained, created, collected or assembled by or for a school corporation or educational institution maintaining such records.”²¹⁴ Similar protections exist in New Hampshire,²¹⁵ Oklahoma,²¹⁶ Vermont,²¹⁷ Tennessee,²¹⁸ Washington,²¹⁹ and Wisconsin.²²⁰ Wyoming in a nod to its Old West roots, exempts nearly everything under its public records act in “[s]chool district records containing information relating to the biography, family, physiology, religion, academic achievement and physical or mental ability

²⁰⁹ See, e.g., *WFTV, Inc. v. Sch. Bd. of Seminole*, 874 So. 2d 48, 58 (Fla. Dist. Ct. App. 2004), review denied, 892 So. 2d 1015 (Fla. 2004).

²¹⁰ WIS. STAT. § 118.125(2) (2004) (“All pupil records maintained by a public school shall be confidential, except as provided [herein].”). However, the Wisconsin Supreme Court has interpreted this provision as an exemption to the state public records act. *Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*, 342 N.W.2d 682, 687-88 (Wis. 1984).

²¹¹ “Education records of students in the public educational institutions in this state are deemed confidential and shall not be disclosed, or the contents released, except under the circumstances described in [this Act].” KY. REV. STAT. ANN. § 160.705(1) (West 1999). The Kentucky Supreme Court too views this provision as an exemption to the state’s open records act rather than an affirmative statement by the legislature that these are not public records. *Hardin County Schs. v. Foster*, 40 S.W.3d 865, 868 (Ky. 2001). That interpretation is a bit difficult to fathom given the plain meaning of the statutory language.

²¹² COLO. REV. STAT. § 24-72-204(3)(a)(VI) (2004).

²¹³ COLO. REV. STAT. § 24-72-204(3)(a)(I); *Sargent Sch. Dist. No. RE-33J v. W. Servs., Inc.*, 751 P.2d 56, 60 (Colo. 1988).

²¹⁴ IOWA CODE § 22.7(1) (2001).

²¹⁵ N.H. REV. STAT. ANN. § 91-A:4 (2001); *Brent v. Paquette*, 567 A.2d 976, 983 (N.H. 1989).

²¹⁶ OKLA. STAT. tit. 51, § 24A.16 (2000). In Oklahoma, student records are kept “confidential” along with “teacher lesson plans, test and other teaching material” and “personal communications concerning individual students.” *Id.*

²¹⁷ VT. STAT. ANN. tit. 1, § 317 (1996).

²¹⁸ TENN. CODE ANN. § 10-7-504(a)(4) (1999).

²¹⁹ WASH. REV. CODE § 42.17.310 (2000).

²²⁰ Wisconsin’s open records act exclusions have been interpreted to specifically incorporate the pupil confidentiality statutes. WIS. STAT. § 19.36(1) (2003); WIS. STAT. § 118.125(2); *State ex rel. Blum v. Bd. of Educ. Sch. Dist. of Johnson Creek*, 565 N.W.2d 140, 144 (Wis. Ct. App. 1997) (ruling that interim pupil grades are pupil records exempt from disclosure in a student dispute over GPAs and scholarship selection).

of any student except to the person in interest or to the officials duly elected and appointed to supervise him."²²¹

Other states' exemptions are a bit more convoluted, and even repetitive of other statutes, by carving out parts of records as being exempt or by incorporating FERPA's exemptions within their sunshine laws. As a backup to its School Student Records Act, Illinois's freedom of information act exempts "files and personal information maintained with respect to . . . students"²²² Maryland, on the other hand, includes its school records protections among the specifically denominated exemptions to its public records act.²²³ Similarly, Michigan²²⁴ and Arkansas²²⁵ expressly incorporate FERPA as an exemption to their sunshine laws. Texas exempts "in conformity with" FERPA.²²⁶ Others "protect" student record privacy because the legislature exempts from disclosure those records that are protected by federal law, like FERPA²²⁷ and the IDEA, either specifically or generally.²²⁸

Other states more broadly offer protections by generally incorporating applicable state laws,²²⁹ such as Oregon, which exempts "[s]tudent records required by state or federal law to be exempt from disclosure."²³⁰ Similarly, Virginia protects scholastic records from disclosure when "prohibited by law."²³¹

²²¹ Wyo. Stat. Ann. § 16-4-203(d)(viii) (2005).

²²² 5 ILL. COMP. STAT. 140/7(1)(b)(i) (1988 & Supp. 2005); *see also* Chicago Tribune Co. v. Bd. of Educ. of Chicago, 773 N.E.2d 674, 682 (Ill. App. Ct. 2002) (school board properly denied reporter's FOIA request concerning personal information of over one million students, including information about school, room number, medical status, special education status, race, lunch status, grade point average, date of birth, and standardized test scores).

²²³ MD. CODE ANN., STATE GOV'T § 10-616(k) (LexisNexis 2004); *see also* Kirwan v. The Diamondback, 721 A.2d 196, 203 (Md. 1998) (stating in dictum that FERPA is federal law that would exempt records from disclosure).

²²⁴ MICH. COMP. LAWS § 15.243(1)(t)(2) (2001); *see generally* Connoisseur Communication of Flint, L.P. v. Univ. of Mich., 584 N.W.2d 647, 649 (Mich. Ct. App. 1998).

²²⁵ ARK. CODE ANN. § 25-19-105(b)(2) (Michie 2002) (stating that the Arkansas act exempts "education records as defined in the Family Educational Rights and Privacy Act of 1974 . . . unless their disclosure is consistent with the provisions of that act . . ."). *See also* Ark. Gazette Co. v. S. State Coll., 620 S.W.2d 258 (Ark. 1981).

²²⁶ TEX. GOV'T CODE ANN. § 552.026 (2004).

²²⁷ *But see generally* Or. County R-IV Sch. Dist. v. LeMon, 739 S.W.2d 553, 559 (Mo. Ct. App. 1987). In a rather convoluted opinion, the Missouri Court of Appeals determined that student names, addresses and telephones were not exempt from disclosure under the state's sunshine law, even though there is an exemption "as otherwise provided by law" and FERPA did not qualify as such law prohibiting disclosure because this information otherwise fit within disclosable "directory information."

²²⁸ *See* Tamu K. Walton, *Protecting Student Privacy: Reporting Campus Crimes as an Alternative to Disclosing Student Disciplinary Records*, 77 IND. L.J. 143, 153 n.78 (2002).

²²⁹ *Id.* at 153-54 n.79.

²³⁰ OR. REV. STAT. § 192.496(4) (2003).

²³¹ VA. CODE ANN. § 2.2-3705.4 (2001). Virginia's exemption also provides access for parents but other access may be prohibited upon request by any parent for students under eighteen.

New York allows public agencies to exempt records from disclosure if exempted under state or federal law.²³² One California court has interpreted such general protections to cover student records even though California's Public Records Act would have required disclosure of student disciplinary records because that Act also has an exemption pursuant to federal law.²³³ The court determined that, because FERPA included student disciplinary records as educational records under its protection, those disciplinary records were not subject to disclosure.²³⁴ Indiana similarly forbids public disclosure of student records because of its sunshine law's incorporation of federal law exemptions.²³⁵ In summary, sunshine laws – the antithesis of privacy – provide some of the most specific protections for student records.

One odd exemption is in Michigan, where the public records act offers more general protection against disclosures that are considered to be unwarranted invasions of privacy.²³⁶ In *Kestenbaum v. Michigan State University*,²³⁷ the court of appeals determined that exemption applied to a magnetic tape that a state university used to produce a student directory. The court averred that the state's freedom of information act was not designed to honor a request to develop mailing lists for political purposes when it sought disclosure of student information given to the university for a completely different purpose.²³⁸ In reaching that conclusion, the court relied on the similar exemption and rationale underlying the federal Freedom of Information Act, that disclosure is prohibited if it constitutes an invasion of privacy.²³⁹ If state sunshine laws are interpreted

²³² N.Y. PUB. OFF. LAW § 87 (McKinney 2001); *see also* *Kryston v. Bd. of Educ., E. Ramapo Cent. Sch. Dist.*, 430 N.Y.S.2d 688, 689 (N.Y. App. Div. 1980) (FERPA is one of those statutes that would fit within the statutory exemption).

²³³ CAL. GOV'T CODE § 6250 (West 2002); *Rim of the World Unified Sch. Dist. v. Super. Ct.*, 129 Cal Rptr. 2d 11, 12-15 (Cal. Ct. App. 2003).

²³⁴ *Rim of the World Unified Sch. Dist.*, 129 Cal Rptr. 2d at 15; *accord* *Osborn v. Bd. of Regents of Univ. of Wis. Sys.*, 647 N.W.2d 158, 170 (Wis. 2002) (race and gender statistical data derived from university admissions application is accessible by researcher who is not otherwise seeking personally identifiable information protected by FERPA, WIS. STAT. § 19.35(1)(9) (2003)).

²³⁵ IND. CODE § 5-14-3-4 (2001); *Unincorporated Operating Div. of Ind. Newspapers v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 903 (Ind. Ct. App. 2003).

²³⁶ MICH. COMP. LAWS § 15.243(13)(1)(a) (2001).

²³⁷ 294 N.W.2d 228, 234-36 (Mich. Ct. App. 1980), *aff'd*, 327 N.W.2d 783 (Mich. 1982).

²³⁸ *Id.* at 236; *see also* *Brent v. Paquette*, 567 A.2d 976, 983-84 (N.H. 1989) (students' and parents' names and addresses exempt from disclosure under state's Right-to-Know statute's exemption against disclosure of information that would constitute an invasion of privacy).

²³⁹ *Kestenbaum*, 294 N.W.2d at 233. FOIA even has express language in it that prohibits access to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (2000). Additional language protects information that "could reasonably be expected to constitute an unwarranted invasion of person privacy." 5 U.S.C. § 552(b)(7)(C); *see generally* Martin E. Halstuk, *Shielding Private Lives from prying Eyes: The Escalating Conflict between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMMLAW CONSPECTUS 71 (2003).

as impliedly shielding certain information in order to prevent an invasion of privacy, these statutes may protect an even broader range of information than just their specifically enumerated exemptions. Even if student records are not specifically exempted, they would be impliedly exempted under the public's reasonable expectation to be free of unwarranted invasions of privacy. Indeed, the Supreme Court recently expanded FOIA's protection to prohibit disclosure of death-scene photographs that would have invaded the privacy of surviving family members.²⁴⁰ Hence, the breadth of protection under sunshine laws may not be confined to specifically enumerated prohibitions but may cover student records under a much broader range of protection. This opens the door to expanded use of the courts by students and their parents.

B. *The Litigation*

School districts are – or should be – aware of the dangers involved in public record requests. Accessing any statutory annotation for any sunshine law will likely yield reported litigation, usually because the government has refused access.²⁴¹ Refusal is often the correct response, but that does not stop the requester from pursuing a lawsuit. Thus, sometimes the public's request for access to school information presents a school district with a no-win situation. To that extent, sunshine laws are fraught with more litigation dangers than federal privacy laws. On the other hand, although the exposure exists, it is somewhat less exposure to student-initiated litigation.

The genesis of any student-initiated litigation for release of information under sunshine laws is the inherent clash between the purpose of those laws for government accountability and the individual citizen's sense that some government records are too private for public disclosure. Courts for nearly a century have recognized this "sense" by formulating remedies for common law invasion of torts,²⁴² first elucidated in the well-known and oft-cited 1890 Harvard Law Review article, *The Right to Privacy*.²⁴³ The privacy tort most often used for the

²⁴⁰ Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004), *reh'g denied*, 541 U.S. 1057 (2004).

²⁴¹ See, e.g., 5 U.S.C. § 552.

²⁴² The four major invasion of privacy torts are found at RESTATEMENT (SECOND) OF TORTS § 652(A) (1977):

- (2) The right of privacy is invaded by
 - (a) unreasonable intrusion upon the seclusion of another . . . ; or
 - (b) appropriation of the other's name or likeness . . . ; or
 - (c) unreasonable publicity given to the other's private life . . . ; or
 - (d) publicity that unreasonably placed the other in a false light before the public

²⁴³ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy [The implicit made explicit]*, 4 HARV. L. REV. 193 (1890) in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 75 (Ferdinand David Schoeman, ed. 1984).

unauthorized release of information is the civil wrong of making private facts public.²⁴⁴ Courts have incorporated these tort concepts into the analyses of whether or not to release information under sunshine laws.²⁴⁵ To the extent these sunshine laws are in derogation of the common law right of privacy, they might fairly be restricted and applied narrowly.²⁴⁶

However, independent tort actions against government agencies solely for recovery under the tort are few and far between and will rarely be successful for wrongful disclosure of private information held by the government because of the heavy burden on a plaintiff.²⁴⁷ Such actions are made difficult because the tort usually requires proof that the publicized information was not actually a matter of public concern.²⁴⁸ The only school records case involving the tort was not successful. In Louisiana, a school board member obtained and forwarded a student's records to the state department of education for an investigation into allegations of grade-changing.²⁴⁹ The court determined that those actions did not constitute an invasion of privacy because there was no violation of the student's expectation of privacy nor an improper public disclosure.²⁵⁰

All this is not to suggest that the invasion of privacy tort may not prove useful in these situations. There are a handful of cases by which individuals have sued *private* individuals – as opposed to governmental entities – and suc-

²⁴⁴ RESTATEMENT (SECOND) OF TORTS § 652D (1977): “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.” *But see* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 170 (2004), *reh'g denied*, 541 U.S. 1057 (2004) (holding that photographs of deceased would constitute an intrusion into the privacy of the family).

²⁴⁵ *See, e.g.*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 167-70 (2004), *reh'g denied* 541 U.S. 1057 (2004); Dept. of Children v. Freedom of Info. Comm'n, 710 A.2d 1378, 1381 (Conn. App. Ct. 1998); Seattle Firefighters v. Hollister, 737 P.2d 1302, 1305 (Wash. Ct. App. 1987)); *accord* O'Donnell v. United States, 891 F.2d 1079, 1082-83 (3d Cir. 1989); Doe v. Unified Sch. Dist., 255 F. Supp. 2d 1239 (D. Kan. 2003).

²⁴⁶ *See* Lewis v. LeGrow, 670 N.W.2d 675, 686 (Mich. Ct. App. 2003) (contrasting privacy statute and common law right to privacy); Williams v. Matthews, 448 S.E.2d 625, 628 (Va. 1994) (statute authorizing seizure of property in derogation of right to privacy). *See generally* Edmundson v. Rivera, 363 A.2d 1031, 1033 (Conn. 1975); Summers v. Summers, 239 N.E.2d 795, 798 (Ill. 1968); Rusinek v. Schultz, Snyder & Steele Lumber Co., 309 N.W.2d 163, 166 (Mich. 1981).

²⁴⁷ *See, e.g.*, Rocque v. Freedom of Info. Comm'n, 774 A.2d 957, 962-63 (Conn. 2001).

²⁴⁸ *See, e.g.*, Hatch v. Town of Middletown, 311 F.3d 83, 86 (1st Cir. 2002); Dept. of Children v. Freedom of Info. Comm'n, 710 A.2d 1378, 1381 (Conn. App. Ct. 1998). This may well be a recognition that access to government records also has common law underpinnings. *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978); Providence Journal Co. v. Rodgers, 711 A.2d 1131, 1135 (R.I. 1998).

²⁴⁹ Young v. St. Landry Parish Sch. Bd., 673 So. 2d 1272, 1275-76 (La. Ct. App. 1996).

²⁵⁰ Young, 673 So. 2d at 1275-76; *see also* Doe v. Unified Sch. Dist., 255 F.Supp.2d 1239, 1249-50 (D. Kan. 2003) (school board member's disclosure of information to a single person did not constitute publicity for privacy tort); *accord* Williamson *ex rel.* Williamson v. Keith, 786 So. 2d 390, 396 (Miss. 2003) (school board lawyer not liable for invasion of privacy for subpoenaing special education records because there was no publicity).

ceeded in proving unlawful disclosure of private information.²⁵¹ Under the circumstances, the risk of tort litigation under sunshine laws is pretty minimal, given the large number of cases that do not succeed.²⁵² However, school officials do risk some harm from such tort suits even if the plaintiff is unsuccessful, especially if the suit is instituted against a school official as a private individual rather than as a public official, even if only in costs and attorney fees.

In the main, sunshine laws have proved effective in protecting student records and private information therein on explicit statutory terms. Courts have usually been assiduous in preventing access to personal information in school records under sunshine laws. Courts have even gone so far as to engraft tort notions of privacy in a broader sense to cast a greater protective shadow over school records. Regardless of the minimal success of the tort itself in matters of records, the sunshine laws on their own terms have proved successful in providing protection, especially more successful than federal laws.

VI. CONCLUSION

School districts ignore their state constitutions, state statutes, and state regulations governing the privacy of student records at their peril. It is easy and comfortable to follow the federal statutes and regulations and assume they follow the same principles and provide the same protection as state law. They do not. In many cases, the federal laws conflict with state laws. When the state laws afford greater rights than the federal laws, the school districts run the serious risk of entangling themselves in disputes not anticipated by the guidance and policies formulated by the United States Department of Education. Most state laws are more restrictive about privacy protections than the federal laws and have more likelihood of creating litigation problems than federal laws.

The use of state laws to vindicate civil rights in other areas of the law is beginning to affect the particular vindication of privacy rights. School districts are familiar with privacy protections under federal law, but not as familiar with their respective state laws. Although school districts are often the bulwark for preventing public access under sunshine laws, they must also be attentive to the more particularized details of state laws. This "brave new world" of state litigation is destined to expand as litigants abandon federal remedies for state remedies. This "brave new world" makes familiarity with the "local distinction" of state privacy laws imperative.

²⁵¹ *E.g.*, Hill v. MCI World-Com Commc'ns, Inc., 141 F. Supp. 2d 1205, 1213-15 (S.D. Iowa 2001); Pachowitz v. LeDoux, 666 N.W.2d 88, 104 (Wis. Ct. App. 2003), *review denied*, 671 N.W.2d 849 (Wis. 2003). *But see* Olson v. Red Cedar Clinic, 681 N.W.2d 306, 308-10 (Wis. Ct. App. 2004), *review denied*, 687 N.W.2d 523 (Wis. 2004) (clinic's transmission of medical records to school psychologist was not an invasion of privacy under Wisconsin statute because there was no public disclosure).

²⁵² *See generally* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (appendices).