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## "Children Are Not Second Class Citizens": Can Parents Stop Public Schools from Treating Their Children Like Guinea Pigs?

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## **"CHILDREN ARE NOT SECOND CLASS CITIZENS":<sup>1</sup> CAN PARENTS STOP PUBLIC SCHOOLS FROM TREATING THEIR CHILDREN LIKE GUINEA PIGS?**

### I. INTRODUCTION

*Dear Senator Grassley: I am writing you to express my frustration with the present condition of our education system . . . .*<sup>2</sup>

Imagine . . . an area surrounded by green lawns, sidewalks, and rows of one indistinguishable house followed by another.<sup>3</sup> In this suburbia-like neighborhood live the Wilsons. The Wilsons are a traditional, hardworking, middle-class family, who like many families, have a mortgage, a white-picket fence, and a chocolate lab named Gomer. Wendy and William, the Wilsons' two children, attend the local public schools in Happy Days School District. Wendy, age seven, is a second-grader who is excited about learning multiplication tables and writing in cursive, while her brother, William, age fifteen, is a tenth-grader who is worried about making it through geometry and passing driver's education. Mr. and Mrs. Wilson know their children need a quality education to succeed in today's competitive world. Therefore, they chose to send Wendy and William to Happy Days believing the school district would provide their children with the fundamentals necessary to prepare them for a challenging future.

A month before the new school year began, Happy Days School Board met with Hypnotic Research Institute ("Hypnotic") to discuss the potential distribution of a survey to its first through twelfth-graders. Hypnotic prides itself in its surveys and promotes them as valuable learning methods for a community to assess how its youth feel regarding certain private topics. In fact, because Hypnotic believes in the necessity of the surveys, it offers to pay Happy Days one million dollars for access

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<sup>1</sup> Merriken v. Cressman, 364 F. Supp. 913, 919 (E.D. Pa. 1973) (quoting Miller v. Gillis, 315 F. Supp. 94 (N.D. Ill. 1969)). "Students are persons under the Constitution; they have the same rights and enjoy the same privileges as adults. Children are not second-class citizens. Protections of the Constitution are available to the newborn infant as to the most responsible and venerable adult in the nation." *Id.*

<sup>2</sup> 140 CONG. REC. 1220 (1994) (statement in a letter by Jane F. Ponn, concerned parent, to Senator Grassley).

<sup>3</sup> The following scenario is purely a fictional setting created by the author. Also, any similarity to a real family is solely coincidental.

to its schools. Eventually, the school board concedes, brushing off the survey as harmless and concentrating on the much-needed funds it will generate for the district, which will also look good on future voting platforms.

The survey, focusing on sexual activity, drug use, and racist outlooks, contains questions such as the following: (1) Do you think about having sex?; (2) Do you not trust people because they might want sex?; (3) How many times in the past week have you smoked pot?; and (4) If you could eliminate an entire race, which would you choose?<sup>4</sup> Despite the survey's content, the school board decides not to inform their students' parents. As a result, all of the parents, including Mr. and Mrs. Wilson, are unaware that their children are doing anything nonacademic during class time.

On the day scheduled for administration, the survey is given to all participating grades, including Wendy's second grade class and William's tenth grade class. Consequently, instead of Wendy learning the multiples of nine and William learning the Pythagorean Theorem, each was told to answer personal questions about sex and drugs. In addition, neither Wendy nor William was ever told that if he or she did not want to participate in the survey, both could withdraw without consequence. Yet, after the survey is completed, class time is wasted, and the school district collects its check, Wendy and William, both confused, confront their parents about the survey's content; little Wendy wants to know what sex really is, and William wants reassurance that he is not an awful person for having to choose to eliminate his buddy's race.

Upset by the survey's content, Mr. and Mrs. Wilson believe they had a right to know their children were going to be taking such a controversial survey.<sup>5</sup> More specifically, they are shocked that such a survey could be distributed to their children without their consent. Mr. and Mrs. Wilson agree that if the survey had covered a legitimate

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<sup>4</sup> Questions (1) and (2) were taken from example questions addressed in *Fields v. Palmdale School District*, 271 F. Supp. 2d 1217 (C.D. Cal. 2003). Question (3) was composed from questions asked in *C.N. v. Ridgewood Board of Education*, 146 F. Supp. 2d 528 (N.J. 2001). Question (4), modified minimally here, was given on a survey in 1992 in Bettendorf, Iowa. See Ellen Makkai, *Schools Snoop for Scandal*, WORLD NET DAILY, at [http://www.worldnetdaily.com/news/article.asp?ARTICLE\\_ID=26208](http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=26208), at 1 (last visited July 24, 2004); see also 140 CONG. RECS. 846-01, 863 (daily ed. Feb. 4, 1994).

<sup>5</sup> See *infra* Part II.A-C. Part II.A focuses on the idea of parental rights and establishes how that fundamental right developed through two seminal cases. Part II.C, on the other hand, concentrates on the concept of freedom of intimate association, which provides protection for the parent-child relationship.

educational topic, such as mathematical achievement, neither would have protested.<sup>6</sup> However, because of the survey's inappropriate content, Mr. and Mrs. Wilson agree that if they had known of the survey's existence, they would have removed Wendy and William from their respective classes. Now, both feel betrayed by the survey's distribution and want assurance that Happy Days will not subject Wendy and William to another survey without first obtaining their approval. What can Mr. and Mrs. Wilson do?<sup>7</sup>

First, imagine the year is 1975.<sup>8</sup> In 1975, the federal government is officially involved in public education; however, no specific federal statute exists to aid Mr. and Mrs. Wilson in their dilemma.<sup>9</sup> Therefore, because there is no federal provision to assist Mr. and Mrs. Wilson, Happy Days' administration of the survey, without any parental consent or notice, will go unpunished. Thus, in 1975, Mr. and Mrs. Wilson are unable to do anything about the Hypnotic survey and cannot protect Wendy and William from having to answer future questions on invasive surveys.

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<sup>6</sup> This Note focuses solely on the types of surveys and/or testing that are considered social, not academic. For the purposes of this discussion, social, invasive surveys are those that cover such topics as the following: (1) political affiliations; (2) psychological problems of the student or the student's family; (3) sexual behavior or attitudes; (4) illegal or demeaning behavior; (5) critical appraisals of close family relationships; (6) legally recognized privileged or analogous relationships; (7) religious practices or affiliations; and (8) family income. For more information on academic surveys in elementary and secondary schools, see DOUGLAS A. ARCHBALD & FRED M. NEWMANN, *BEYOND STANDARDIZED TESTING: ASSESSING AUTHENTIC ACADEMIC ACHIEVEMENT IN THE SECONDARY SCHOOL* (1988); DOUGLAS A. WRIGHT ET AL., *ACADEMIC REQUIREMENTS AND ACHIEVEMENT IN HIGH SCHOOLS* (1982); *CHILDREN UNDER PRESSURE; A COLLECTION OF READINGS ABOUT SCHOLASTIC PRESSURE* (Ronald C. Doll & Robert S. Fleming eds., 1966).

<sup>7</sup> This hypothetical, as well as this Note, is only addressing specific, statutory action that Mr. and Mrs. Wilson could take. Thus, any sort of constitutional action, such as a due process claim or Free Exercise claim, will not be considered here. Also, only a federal statute will be discussed, not any individual state statute.

<sup>8</sup> The year 1975 was chosen because the statute being addressed in this Note, the Protection of Pupil Rights Act, was enacted in 1978. Thus, any claims such as Mr. and Mrs. Wilson's, would have been void of any federal statutory relief. See 20 U.S.C. § 1232h (1982); see also *infra* Part II.D.

<sup>9</sup> In 1965, the federal government enacted the Elementary and Secondary Education Act, thus becoming more involved in public education. See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965); see also *infra* notes 104-06 and accompanying text (discussing the Act).

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Now, imagine the year is 2005.<sup>10</sup> By 2005, the Protection of Pupil Rights Act (“PPRA”) has officially been created to assist parents who are in Mr. and Mrs. Wilson’s situation. In fact, Mr. and Mrs. Wilson’s claim qualifies under the PPRA’s parameters, yet the statute will provide them with little relief. First, and foremost, Mr. and Mrs. Wilson will not be able to seek relief through the courts because the PPRA does not permit judicial assistance.<sup>11</sup> Thus, Mr. and Mrs. Wilson are forced to either deal directly with Happy Days or contact the federal government.

One option for Mr. and Mrs. Wilson would be to file a complaint directly with Happy Days’ administration because the PPRA requires the school district to provide written notice at the beginning of the school year of any scheduled nonacademic survey.<sup>12</sup> However, if Mr. and Mrs. Wilson choose that option, Happy Days will likely respond by stating that Hypnotic’s survey was only voluntary and that Wendy and William were not “required” to participate.<sup>13</sup> As a result, Hypnotic will argue that since the survey was not “required,” the PPRA is inapplicable.<sup>14</sup> This option, as a result, does not help Mr. and Mrs. Wilson obtain relief.

Alternatively, Mr. and Mrs. Wilson can file a complaint with the Department of Education, alleging that Happy Days failed to notify them of the survey as mandated by the PPRA.<sup>15</sup> But, because the Department has complete discretion in deciding whether or not to conduct an investigation, their complaints will likely go unnoticed.<sup>16</sup> Consequently, Happy Days will not be punished for disregarding the PPRA’s provisions.<sup>17</sup> This option, like the option of filing directly with Happy Days, does not help the Wilsons obtain relief. In the end, 2005 produces

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<sup>10</sup> The year 2005 was chosen because the PPRA was officially enacted in 1978, promulgated in 1984, congressionally amended in both 1994 and 2001, and judicially altered in 2002. See *infra* Part II.D for official enactment and the congressional amendments and Part II.E for the judicial modification.

<sup>11</sup> See *infra* Part III.A; see also *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

<sup>12</sup> See *infra* Part II.D; see also 20 U.S.C.A. § 1232h(c)(2) (West Supp. 2004).

<sup>13</sup> See *infra* Part III.B; see also 20 U.S.C.A. § 1232h(b).

<sup>14</sup> See *infra* Part III.B.

<sup>15</sup> See *infra* Part II.D-E.

<sup>16</sup> See *infra* note 137 and accompanying text (discussing the Department’s procedures for filing a complaint); see also *infra* note 138 and accompanying text (presenting statistics on the number of complaints the Department has reviewed between 1978 and 1994).

<sup>17</sup> For Happy Days to receive punishment, the Department of Education would have to conclude that a violation had indeed occurred. Otherwise, there is nothing in the statute reprimanding Happy Days’ failure to notify Mr. and Mrs. Wilson.

the same result as 1975. Wendy and William are still unprotected, and Mr. and Mrs. Wilson are still helpless.<sup>18</sup>

This Note will concentrate on the issue of parental rights, discussing how both the legislative and judicial systems have treated the PPRA, which focuses on school-aged children and nonacademic testing in the classroom.<sup>19</sup> Part II will begin by outlining the foundational roots of parental rights, followed by a historical overview of social research in the public school classroom.<sup>20</sup> Next, Part II will address the freedom of intimate association, focusing on the parent-child relationship, and how by not allowing parents to consent to their child's participation in invasive research, that relationship is potentially jeopardized.<sup>21</sup> Finally, Part II will uncover the Congressional creation of the PPRA, its various modifications over the past thirty years, and conclude with how the judicial system has interpreted the statute's meaning.<sup>22</sup> Part III will analyze the current status of the PPRA, identifying the statute's inapplicability in the judicial system, as well as its linguistic loopholes and ineffective standard of enforcement.<sup>23</sup> Part IV will present a redrafting of the current PPRA, establishing a path for judicial relief, eliminating the "required" loophole, and creating a more efficient form of power within the statute.<sup>24</sup>

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<sup>18</sup> The primary difference between the years 1975 and 2005 is that in 2005 the PPRA officially exists. Thus, Mr. and Mrs. Wilson are misled into believing relief will be provided to them if they follow the procedural guidelines in the complaint process. *See infra* Part III.

<sup>19</sup> The USA Patriot Act of 2001 will not be discussed because it does not address the statute focused on in this Note. For information concerning The Patriot Act, see Adrian Arroyo, *The USA Patriot Act and the Enhanced Border Security and Visa Entry Reform Act: Negatively Impacting Academic Institutions by Deterring Foreign Students from Studying in the United States*, 16 *TRANSNAT'L LAW* 411 (2003); Paige Norian, *The Struggle to Keep Personal Data Personal: Attempts to Reform Online Privacy and How Congress Should Respond*, 52 *CATH. U. L. REV.* 803 (2003); Rita Shulman, *USA Patriot Act: Granting the U.S. Government the Unprecedented Power to Circumvent American Civil Liberties in the Name of National Security*, 80 *U. DET. MERCY L. REV.* 427 (2003).

<sup>20</sup> *See infra* Part II.A-B.

<sup>21</sup> *See infra* Part II.C.

<sup>22</sup> *See infra* Part II.D-E.

<sup>23</sup> *See infra* Part III.

<sup>24</sup> *See infra* Part IV. A complete ban on nonacademic surveys in elementary schools is not discussed here, which the author firmly believes Congress should consider. This type of restriction would require the comparison of mature versus immature students and is thus outside the scope of this Note. For a more in depth discussion on student's maturity levels, see JANICE GIBSON-CLINE, *PSYCHOLOGY FOR THE CLASSROOM* 46 (1967); LOIS COFFEY MOSSMAN, *PRINCIPLES OF TEACHING AND LEARNING IN THE ELEMENTARY SCHOOL* 59 (1929); GEORGE A. FARGO, *BEHAVIOR MODIFICATION IN THE CLASSROOM* 28 (1970).

II. THE DEVELOPMENT OF PARENTAL RIGHTS

*Dear Senator Grassley: I am writing to express my intense concern about the non-academic subjects, invasive questionnaires, and psychological therapy being forced upon students in our public schools without either the permission or knowledge of parents - a subject in which, I believe, you are also interested.*<sup>25</sup>

For nearly a hundred years, the judicial system has acknowledged that parents have a right to make decisions concerning their children's education.<sup>26</sup> However, the courts consistently struggle with how to balance the constant force between the state's power and parental rights regarding education.<sup>27</sup> To address this concern, this Part will first outline the beginnings of "parental rights" by addressing the seminal cases, which memorialize that such a right truly exists.<sup>28</sup> Second, this Part will introduce the historical beginnings of social research in public schools, followed by an overview of how that research usurps a parent's right of intimate association with his child.<sup>29</sup> Third, this Part will uncover the legislature's enactment of the PPRA and how it has evolved over the past thirty years.<sup>30</sup> Finally, this Part will discuss the judicial system's recent treatment of the PPRA, concluding with the current, ambivalent state of the statute.<sup>31</sup>

A. *The Establishment of Parental Rights Through Judicial Interpretation*

The United States Supreme Court first focused on the issue of parental rights in the 1920s in two historic cases: *Meyer v. Nebraska*<sup>32</sup> and

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<sup>25</sup> 140 CONG. REC. 1218 (1994) (statement in a letter by Susan L. Gabriel, concerned parent, to Senator Grassley).

<sup>26</sup> See Ralph D. Mawdsley, *The Changing Face of Parents' Rights*, 2003 BYU EDUC. & L.J. 165.

<sup>27</sup> See generally William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177 (2000). Ross maintains that the relationship between government and parents is one that "has created recorded controversy since Plato advocated the communal rearing of children." *Id.*

<sup>28</sup> See *infra* Part II.A.

<sup>29</sup> See *infra* Part II.B-C.

<sup>30</sup> See *infra* Part II.D.

<sup>31</sup> See *infra* Part II.E.

<sup>32</sup> 262 U.S. 390 (1923). The issue presented to the *Meyer* Court was whether: A state law forbidding, under penalty, the teaching in any private, denominational, parochial or public school, of any modern language, other than English, to any child who has not attained and successfully

*Pierce v. Society of the Sisters*.<sup>33</sup> In those cases, the Court clearly announced that the Fourteenth Amendment's Due Process Clause protects the right of parents to direct the upbringing of their children.<sup>34</sup>

In 1923, the Supreme Court first analyzed the concept of parental rights in *Meyer v. Nebraska*.<sup>35</sup> In *Meyer*, an elementary school teacher was charged with violating a state foreign language law when he taught a student in the German language.<sup>36</sup> The Supreme Court of Nebraska affirmed the conviction, holding that the statute did not violate the liberty interests of the teacher, which are guaranteed under the Fourteenth Amendment, but instead was a valid exercise of the state's police power.<sup>37</sup> The United States Supreme Court disagreed, however,

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passed the eighth grade, invades the liberty guaranteed by the Fourteenth Amendment and exceeds the power of the State.

*Id.* at 300-01.

<sup>33</sup> 268 U.S. 510 (1925). The issue presented to the *Pierce* Court was whether "[The Compulsory Education] Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35.

<sup>34</sup> Ross, *supra* note 27, at 177. An in depth analysis of the constitutional issues created in *Meyer*, *Pierce*, and their progeny, which established that parents have a right to direct the upbringing and education of their children, is beyond the scope of this Note. For a more thorough discussion involving the constitutional aspects of parental rights, see Susan Tomaine, Comment, *Troxel v. Granville: Protecting Fundamental Parental Rights While Recognizing Changes in the American Family*, 50 CATH. U. L. REV. 731 (2001) (examining the common law history of parental rights); Ross, *supra* note 27 (discussing the importance of *Meyer* and *Pierce* and how later cases have reaffirmed their principle); see also Bevis Longstreth, *Behavioral Research Using Students: A Privacy Issue for Schools*, 76 SCH. REV. 1 (1968) (asserting a problem exists concerning students' constitutional right to privacy and researchers in public schools). *But see* Robert R. Sears, *In Defense of Privacy*, 76 SCH. REV. 23 (1968) (arguing that problems of privacy violations are exaggerated).

<sup>35</sup> *Meyer*, 262 U.S. at 390. The Nebraska Supreme Court examined the factual evidence which set out that the defendant, a parochial school teacher at Zion Evangelical Lutheran Congregation, taught the German language to a ten-year-old pupil, who had not passed the eighth grade. *Meyer v. State*, 187 N.W. 100, 101 (Neb. 1922). However, because the teaching was about a book of biblical stories, written in the German language, "the defendant argue[ed] that in teaching the German language in this book he was giving religious instruction according to the faith of the Zion Evangelical Lutheran Congregation." *Id.*

<sup>36</sup> *Meyer*, 262 U.S. at 396. The Nebraska statute provided that no person in any type of public or private school could teach in any language other than English to a student who had not successfully completed the eighth grade without being charged with a misdemeanor. *Id.* at 395. This law, which was similar to laws in twenty-one other states, had at the time been attacked unsuccessfully in two other states as well, Ohio and Iowa. *Id.* In the previously adjudicated attempts, the statute had been "upheld and sustained as against all constitutional objections." *Id.*

<sup>37</sup> *Id.* at 397. The Court declared that "the police power itself is an attribute of sovereignty. It exists without any reservation in the Constitution. It is founded on the



asserting that the state cannot freely exercise its police power without first balancing an individual's right of liberty against the state's right to control, regardless of the reasonableness in its regulations.<sup>38</sup>

In the Supreme Court's analysis, it discussed the due process liberty clause in two respects: the teacher's liberty interest to teach his students and the parent's liberty interest to choose that teacher to instruct his children.<sup>39</sup> Although the Court could not define the liberty guarantee "with exactness," Justice McReynolds declared that an individual's right of liberty includes the freedom "to acquire useful knowledge, to marry, establish a home and *bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>40</sup> The Court recognized that corresponding with this liberty guarantee is the idea that parents have a natural duty to guide their children's education.<sup>41</sup> Thus, in light of the Court's determination that both the teacher, as well as the parents, have a strong liberty interest vested in the Fourteenth Amendment, it held the state's regulation unreasonable.<sup>42</sup> Accordingly, *Meyer's* acknowledgment of

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right of the State to protect its citizens, to provide for their welfare and progress and to insure the good of society." *Id.* at 395. The Supreme Court of Nebraska reasoned that the state had a legitimate interest in protecting its citizens against "the baneful effects of permitting foreigners who had taken residence in this country, to rear and educate their children in the language of their native land." David Fisher, Note, *Parental Rights and the Right to Intimate Association*, 48 HASTINGS L.J. 399, 402 (1997) (citing *Meyer*, 262 U.S. at 397-98).

<sup>38</sup> *Meyer*, 262 U.S. at 399. Justice McReynolds wrote:

[T]his liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

*Id.* at 399-400 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)).

<sup>39</sup> *Id.* at 400. Specifically, the Court stated, "[The teacher's] right to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment." *Id.*

<sup>40</sup> *Id.* at 399 (emphasis added).

<sup>41</sup> *See id.* at 391. "In finding the state's ends invalid, the Court compared the statute to Plato's theory that the state should entirely usurp the parent's role, providing common guardianship, such that 'no parent is to know his own child . . .'" Fisher, *supra* note 37, at 403 (citing *Meyer*, 262 U.S. at 401) (alteration in original). The Court stressed, nonetheless, that social models such as Plato's child-rearing theory "had been rejected by [the] American society and the Constitution." *Id.*

<sup>42</sup> Fisher, *supra* note 37; *see also* Jennifer L. Sabourin, Note, *Parental Rights Amendments: Will a Statutory Right to Parent Force Children to "Shed Their Constitutional Rights" at the Schoolhouse Door?* 44 WAYNE L. REV. 1899 (1999). Although *Meyer* establishes that parents

parental rights was the first indication that the Constitution does not permit the government to interfere with a parent's right to make decisions regarding the upbringing and education of his children.<sup>43</sup>

The Court revisited parental rights two years later in *Pierce v. Society of the Sisters*.<sup>44</sup> The *Pierce* Court reviewed an Oregon statute, which required parents to send their children between the ages of eight and sixteen to a public school.<sup>45</sup> The Supreme Court followed *Meyer's* reasoning and announced the state statute unconstitutional because its enactment was unreasonable and not a legitimate exercise of the state's police power.<sup>46</sup> Justice McReynolds, again writing for the Court, cited to the "doctrine of *Meyer*," reiterating the idea that there exists a "liberty of parents and guardians to *direct the upbringing* and education of children under their control."<sup>47</sup> The Court continued the *Meyer* reasoning by stressing that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations."<sup>48</sup> *Pierce* thus reinforced the *Meyer* principle, holding that a parent's right to guide the upbringing of his children cannot be abridged

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have certain rights when it involves their children, the Court has also acknowledged that parents' rights are not absolute, nor unlimited. Donald C. Hubin, *Parental Rights and Due Process*, 1 J.L. & FAM. STUD. 123, 126 (1999). For example, a parent does not have a right to abuse his or her child. *Id.* (analyzing parental rights as "fiduciary rights").

<sup>43</sup> *Meyer*, 262 U.S. at 399.

<sup>44</sup> 268 U.S. 510 (1925).

<sup>45</sup> *Id.* at 530. The statute required that all parents and legal guardians who had children between the ages of eight and sixteen send their children to a public school or be charged with multiple misdemeanors for each day the child was absent. *Id.*

<sup>46</sup> *Id.* at 510. In reviewing the historical presence of religious schooling in the United States, the Court focused on the judicial system's solemn duty to objectively review the reasonableness of the state's police power. *Id.* This power, the Court argued, must be used to prevent the government from enacting such legislation that has the blatant purpose of destroying the Nation's private schools. *Id.* The *Pierce* Court concluded that the Oregon statute was "so unusual and extraordinary," it must give way to the freedom of parents to choose what is best for his or her child. *Id.* at 515; *see also* Ross, *supra* note 27, at 178 (asserting that the law was enacted to minimize the effect of Catholicism in the country).

<sup>47</sup> *Pierce*, 268 U.S. at 534-35 (emphasis added). After the Court readdressed the *Meyer* principle, it concluded that the state's reasoning to force all children into public schools was unjustified, and thus did not give way to the fundamental theory of liberty. *Id.*

<sup>48</sup> *Id.* at 535 (emphasis added). The Court recognized that "the statute in the suit trespasses, not only upon the liberty of the parents individually, but upon their liberty collectively as well." *Id.* at 519. In effect, *Pierce* recognized that the state was imposing on the rights of parents to support private and parochial schools by sending their children to obtain such education and religious training. *Id.*; *see also* Ross, *supra* note 27, at 178 (declaring that if the law had been upheld, it would have been the demise of the Nation's public schools because no parent would send their child to both public and private schools concurrently).

by the state's unreasonable legislation.<sup>49</sup> As a result, these two historical cases created what inevitably became identified as "parental rights."<sup>50</sup>

Both *Meyer* and *Pierce* stand for the same principle: that parents have a Constitutional right to direct the upbringing and education of their children.<sup>51</sup> The dual opinions indicate that the Supreme Court created a "fundamental right" for parents, who thus have a high duty to guide their children's future.<sup>52</sup> This *Meyer-Pierce* principle has yet to diminish and is, in fact, as strong as it was eighty years ago.<sup>53</sup> Therefore, this principle should encourage parents to be proactive and to defend their rights against any unjustified interference by the government when the focus concerns their child's best interests.

Within decades of the Supreme Court's *Meyer-Pierce* decision, parental rights again faced challenges.<sup>54</sup> However, the threat was not because of the state's enactment of "rights-restricting" legislation, but as

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<sup>49</sup> *Pierce*, 268 U.S. at 535.

<sup>50</sup> The Court decided both *Meyer* and *Pierce* during the peak of the Supreme Court's use of economic due process. Ross, *supra* note 27, at 182. After 1937, the Court abandoned the argument of economic due process; however, it began honoring the concept of personal liberties under the First Amendment's Free Exercise Clause. *Id.* at 179. Thus, even though the Supreme Court has altered its analysis of parental rights, those rights are still as prevalent as they were in the 1920s. *Id.* at 180.

<sup>51</sup> *Meyer v. Nebraska*, 262 U.S. 399 (1923); *Pierce*, 268 U.S. at 534-35. When analyzing both *Meyer* and *Pierce*, the Court never expressly declares the type of right it bestows on parents. See Fisher, *supra* note 37, at 404. However, subsequent cases have treated the right granted as one of fundamental value. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (asserting that "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court").

<sup>52</sup> See generally Fisher, *supra* note 37, at 404. Fisher's article asserts that in both *Meyer* and *Pierce* the opinions are shy about classifying the right delegated as fundamental. *Id.* Nevertheless, he adds, Justice McReynolds' comment in *Meyer* that "the individual has certain fundamental rights which must be respected," implies the protection of a greater right. *Id.* (citing *Meyer*, 262 U.S. at 401). For more information regarding the dispute of parental rights as fundamental verses non-fundamental, see Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209 (1994) (arguing that the right established is a fundamental right). But see James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371 (1994) (arguing that the right established is not a fundamental right).

<sup>53</sup> See Fisher, *supra* note 37, at 404. Fisher concludes that the due process analysis the Court used in both *Meyer* and *Pierce* was of the same as the courts use today. *Id.* He reasons that at the beginning of the century, the Court was not concerned with categorizing due process rights as either "just plain" liberty rights or "fundamental" rights. *Id.* As a result, Fisher deduces that regardless of the Court's lack of categorization, "the Court in *Meyer* and *Pierce* clearly engaged in what would today be considered heightened scrutiny of government objectives despite using 'rational basis' language." *Id.* at 404-05.

<sup>54</sup> See *infra* Part II.B.

a result of social psychologists wanting direct access to children.<sup>55</sup> Consequently, with this pressing desire to research children, psychologists soon realized the possibilities of testing students while in their public school classrooms.<sup>56</sup> Thus, researchers and schools alike subtly began challenging parental rights, arguing that they are in a better position to make decisions for children while those children are in their custody.<sup>57</sup>

#### B. *The Historical Background of Research in Public Schools*

The Supreme Court's opinions in both *Meyer* and *Pierce* established the principle that parents have a right to direct the upbringing of their children.<sup>58</sup> This right, the Court declared, is guaranteed by the Fourteenth Amendment and is not to be trumped by a state's unreasonable enactment of legislation.<sup>59</sup> However, only a few years after *Pierce* and *Meyer* were decided did parental rights again become threatened.<sup>60</sup> Yet, the rising threat was not from the state's creation of arbitrary legislation, but the result of social researchers entering public schools.<sup>61</sup> In fact, beginning in the 1950s, researchers in the area of school psychology began recognizing the possibilities of a classroom as an experimental arena.<sup>62</sup>

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<sup>55</sup> See *infra* Part II.B.

<sup>56</sup> See *infra* Part II.B; see also Frances A. Mullen, *The School as a Psychological Laboratory*, 14 AM. PSYCHOLOGIST 53, 54 (1959) (asserting the possibilities of using public school classrooms as experimental laboratories).

<sup>57</sup> See *Troxel v. Grandville*, 530 U.S. 57, 57 (2000) (plurality opinion). With schools wanting to override a parent's right to guide the upbringing of their children, the school districts had to defeat the "presumption that fit parents act in their children's best interests." *Id.* at 58.

<sup>58</sup> See *supra* Part II.A; see also *Meyer v. Nebraska*, 262 U.S. 399 (1923); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>59</sup> See *supra* Part II.A; see also notes 35-50 and accompanying text.

<sup>60</sup> Mullen, *supra* note 56, at 54. "Training in the school setting has gone on since the 1930's when Andrew Brown taught the child clinical courses in the Department of Psychology at the University of Chicago and used both the public schools and the Institute of Juvenile Research as his laboratory." *Id.* (focusing on the "barriers" inhibiting the transition of public schools into laboratories). Mullen argued that psychologists were discouraged by public school research; however, she believed that schools had "tremendous potential . . . as a laboratory for research and training in almost all phases of psychological study . . ." *Id.* at 56. Based on that perception, she concluded her article by encouraging researchers to seek out public schools for their psychological needs. *Id.*

<sup>61</sup> *Id.* at 56.

<sup>62</sup> *Id.* To illustrate the abundance of research being conducted on children, between 1958 and 1959, approximately 162 articles appeared in psychology journals reporting the use of children as subjects. See Alfred Castaneda & Leila S. Fabel, *The Relationship Between the*

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Since the mid-twentieth century, psychologists interested in examining children as experimental subjects realized the potential data that could be obtained from observing and testing children in one of their “natural settings.”<sup>63</sup> Additionally, the American public school system began opening its doors to researchers wanting to perform various psychological studies on their students.<sup>64</sup> In fact, in as early as 1959, a Chicago public school administrator wrote an article in the *American Psychologist* encouraging school psychologists to research students during school hours.<sup>65</sup> The administrator enhanced the article by accentuating “the exciting possibilities” of such work and emphasized the “boundless laboratory opportunities” in the school setting.<sup>66</sup> As a result of this and similar articles, the experimentation process subtly progressed, creating new problems for parents who wanted to protect the best interests of their children.<sup>67</sup>

In 1959, one of the first controversial student testings occurred in the public schools in Houston, Texas.<sup>68</sup> Five thousand ninth graders were asked to complete six “socio-psychometrics” tests, which contained such questions as:

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*Psychological Investigator and the Public Schools*, 16 AM. PSYCHOLOGIST 201, 203 (1962). The 162 articles discussed were found in non-child specific journals, thus excluding all of the articles appearing in journals almost exclusively devoted to child-related research. *Id.*

<sup>63</sup> Anne M. Dellinger, *Experimentation in the Classroom: Use of Public School Students as Research Subjects*, 12 J.L. & EDUC. 347, 349 (1983).

<sup>64</sup> *Id.*; see also Robert E. Clasen et al., *Access to Do Research in Public Schools*, 38 J. EXPERIMENTAL EDUC. 16 (1969). Mr. Clasen and his colleagues claimed that administrators base their decisions on whether or not to allow psychologists access to their schools by considering the importance of the research, the impact it will have on the school district’s routine curriculum, how much the community is involved, and how much the district will financially gain from the survey’s distribution. Clasen, *supra*, at 16.

<sup>65</sup> Dellinger, *supra* note 63, at 349. The number of school psychologists employed by the Chicago public school system increased from sixty-six in 1957 to ninety in 1958. Mullen, *supra* note 56, at 54. And, one-third of those twenty-four “psychologists,” newly employed, were not professionals with an official certificate to work as a school psychologist, which only requires “two years of supervised clinical experience with children.” *Id.* However, because the demand was so high for researchers, those approximately eight individuals in Chicago’s public schools were issued temporary certificates to work in the schools. *Id.*

<sup>66</sup> Dellinger, *supra* note 63, at 349 (quoting Mullen, *supra* note 56, at 55).

<sup>67</sup> *Id.* By the 1960’s, psychology departments at large universities across the country were establishing connections between their faculty researchers and the public schools located in there same geographical area. *Id.* But see Marcia Guttentag, *Research Is Possible: New Answers to Old Objections*, 6 J. SCH. PSYCHOLOGY 254 (1968) (discussing the difficulties that school psychologists encountered when approaching the idea of research in schools).

<sup>68</sup> Gwynn Nettler, *Test Burning in Texas*, 14 AM. PSYCHOLOGIST 682 (1959). The research program in Houston, which had begun in 1955, was sponsored by the Rip Van Winkle Foundation. See Leonard D. Eron & Leopold O. Walder, *Test Burning II*, 16 AM. PSYCHOLOGIST 237 (1962).

I enjoy soaking in the bathtub.  
 A girl who gets into trouble on a date has no one to  
 blame but herself.  
 If you don't drink in our gang, they make you feel like a  
 sissy.  
 Sometimes I tell dirty jokes when I would rather not.  
 Dad always seems to [sic] busy to pal around with me.<sup>69</sup>

After the survey's distribution, the Houston school board ordered that the answer sheets be burned because parents felt the questions concerning the students' perception of themselves, their families, their peers, and their teachers were inappropriate.<sup>70</sup>

Despite many complaints made by parents, researchers were taking full advantage of this new laboratory.<sup>71</sup> In addition, public schools in general were reacting positively to this new attention.<sup>72</sup> For example, in 1969, ninety-six Wisconsin school superintendents were questioned on how they felt concerning experiments in the classroom.<sup>73</sup> Each superintendent agreed that his district was not only willing to grant school psychologists access to their schools, but each believed that the district had an obligation to do so for the good of the research.<sup>74</sup> In fact, only two of the superintendents polled could remember ever denying a request from an outside researcher.<sup>75</sup> Thus, as a result of the willingness of public schools to provide researchers direct access to their students, many minor children were transformed into experimentation subjects.<sup>76</sup>

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<sup>69</sup> Nettler, *supra* note 68, at 682. A majority of the Houston school board members agreed with the parents' concerns that the questions were fashioned in such a way they did not benefit the children but potentially undermined their moral character. *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Dellinger, *supra* note 63, at 349.

<sup>72</sup> *Id.*; see also Castaneda & Fabel, *supra* note 62, at 201-03 (focusing on the willingness of administrators to allow researchers access to their public schools).

<sup>73</sup> Dellinger, *supra* note 63, at 349. In addition to the Wisconsin poll, at a national convention of the American Educational Researchers Association, only three of sixty-six researchers reported being refused the opportunity to conduct research in schools. See Clasen, *supra* note 64, at 19.

<sup>74</sup> Dellinger, *supra* note 63, at 349.

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

<sup>76</sup> See Phyllis Schlafly, Symposium, *The Public School System as an Instrument of Power*, 77 CORNELL L. REV. 1000 (1992) [hereinafter Schlafly, Symposium]. Ms. Schlafly boldly asserted in her article that:

Minor children are forced to disclose all sorts of things that we would not allow the police department to force arrested suspects to disclose. Children are required to reveal incriminating information about

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As the research continued into the 1960s and 1970s, school psychologists grew aware of the unique problems with studying children in their classroom environment.<sup>77</sup> For instance, psychologists recognized potential invasion of privacy issues raised in using a human for experimentation.<sup>78</sup> However, these concerns did not deter researchers from taking advantage of the public school classroom and minor children.<sup>79</sup> Consequently, because researchers were failing to obtain parental consent before testing each student, the privacy issues inherent in the parent-child relationship, through the freedom of intimate association, were facing serious abuse.<sup>80</sup>

C. *How Research in Public Schools Affects Parental Rights Through Intimate Association*

In the 1920s, the Supreme Court recognized in both *Meyer* and *Pierce* that parents have a fundamental right to guide the upbringing of their children.<sup>81</sup> Since then, the Court has further defined the parental role to include the right “to make decisions concerning the care, custody, and control of their children.”<sup>82</sup> Despite the Supreme Court’s affirmation of parental rights, public schools across the Nation began challenging those

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themselves and their families . . . . Children in the classroom are forced to read materials, which the parents consider pornographic, profane, immoral, and anti-religious. The American people would never stand for any government bureau or any court forcing adults to submit to these types of violations, but these violations are committed on minor children in the public school classroom every day.

*Id.* at 1001.

<sup>77</sup> See Clasen, *supra* note 64, at 16.

<sup>78</sup> *Id.* Clasen described the psychologists’ recognitions as an “increasing concern for care in the treatment of human subjects in experimentation” as well as “the issue of the invasion of the right to privacy.” *Id.*

<sup>79</sup> See generally Dellinger, *supra* note 63, at 349.

<sup>80</sup> See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624-25 (1980) (arguing that intimate association is found in the “zone of privacy” created in the First, Third, Fourth, and Fifth Amendments). Mr. Karst’s article, which is regarded as one of the seminal articles discussing associational rights, criticizes the Supreme Court’s reluctance in calling the right to privacy of married persons an intimate association. *Id.* at 625; see also *Griswold v. Connecticut*, 381 U.S. 479 (1965); see also Paul D. Fredrick, *The 1978 Hatch Amendment: Attempted Applications Are Failing to Protect Pupil Rights*, 19 IND. L. REV. 589, 594 (1986).

<sup>81</sup> See *supra* Part II.A.

<sup>82</sup> *Troxel v. Granville*, 530 U.S. 57, 57 (2000) (plurality opinion). In *Troxel*, the Court stated that “[t]he Fourteenth Amendment’s Due Process Clause has a substantive component that ‘provides heightened protection against government interference with certain fundamental rights,’ including parents’ fundamental right to make decisions concerning the care, custody, and control of their children . . . .” *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

rights by turning students over to school psychologists, suggesting that the administrators have the right "to make decisions concerning the care" of students while in the school's custody.<sup>83</sup> However, by schools making these decisions, and therefore injecting themselves "into the private realm of the family," they potentially violate what the Court had repeatedly declared—that fit parents have the Constitutional right to decide what is in their child's best interests.<sup>84</sup> Thus, according to *Meyer*, *Pierce*, and their progeny, a public school that administers social surveys to its students without first receiving the consent of parents potentially infringes the intrinsic privacy rights imbedded in the parent-child relationship under the concept of freedom of intimate association.<sup>85</sup>

The freedom of intimate association rests on the theory that certain human relationships are so united through their beliefs, morals, and values that they should be afforded the highest level of protection from unreasonable interference by the State.<sup>86</sup> This freedom, which exists in

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<sup>83</sup> See *supra* Part II.B; see also *Dellinger*, *supra* note 63, at 349.

<sup>84</sup> *Troxel*, 530 U.S. at 58; see also *Glucksberg*, 521 U.S. at 720 (stating that "[i]n a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] . . . to direct the education and upbringing of one's children") (citations omitted); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (stating that there is a "fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'") (citations omitted); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

<sup>85</sup> See *Karst*, *supra* note 80, at 625. The Supreme Court has declared that a right of association exists and derives from the cases concerning "marriage, procreation, contraception, family relationships, and child rearing and education." *Troxel*, 530 U.S. at 58 (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)). *Karst* asserts that one reason why the freedom of intimate association is a separate and distinct category, and not just combined to fit within the "zone of privacy" is because of the Supreme Court's "revival of substantive due process as a guarantee of individual freedoms" in the 1970s. See *Karst*, *supra* note 80, at 626 (arguing that the Court's opinion in *Griswold* shaped the beginnings of intimate association even though it omitted articulating those rights as such, instead categorizing them as privacy rights).

<sup>86</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). The *Roberts* Court declared that these relationships "have played a critical role in the culture and traditions of the Nation by



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the core of the due process clause, can be defined as “a close and familiar personal relationship with another that is in some significant way comparable to a marriage or family relationship.”<sup>87</sup> This freedom, the Supreme Court has repeatedly declared, is necessary to provide a constitutional shield for those intimate associations that are bonded through their common kinship.<sup>88</sup> Thus, as the Court has openly recognized, this unique association deserves the right to be free from unwarranted state interference.<sup>89</sup> Included in these associations is the relationship between a parent and a child.<sup>90</sup>

The freedom of intimate association is not absolute.<sup>91</sup> It does not demand that the government refrain from advancing its “majoritarian views” at all times.<sup>92</sup> Instead, the freedom demands that a state set forth serious justifications before it significantly impairs the values found within intimate associations.<sup>93</sup> Thus, before the state substitutes its views of morality into these associations, including a parent-child relationship, it must have a compelling justification for doing so.<sup>94</sup> As a result, this

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cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.” *Id.* at 618-19.

<sup>87</sup> Karst, *supra* note 80, at 629. Karst recognized that the inherent uniqueness of intimate associations is the joining of individuals who once had separate and distinct lives but unite together as one being. *Id.*

<sup>88</sup> *Roberts*, 468 U.S. at 619 (citing *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Moore v. E. Cleveland*, 431 U.S. 494, 503-04 (1977); *Yoder*, 406 U.S. at 232 (1972); *Griswold*, 381 U.S. at 482-85).

<sup>89</sup> *Roberts*, 468 U.S. at 619 (citing *Quilloin*, 434 U.S. at 255; *Smith v. Org. of Foster Families*, 431 U.S. 816, 844 (1977); *Carey v. Population Serv. Int’l*, 431 U.S. 678, 684-86 (1977); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley*, 405 U.S. at 651; *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Olmstead v. United States*, 277 U.S. 438, 478 (1928)).

<sup>90</sup> *Roberts*, 468 U.S. at 619. See *Fredrick*, *supra* note 80, at 426-33. The *Roberts* Court stated that “[f]amily relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one’s life.” *Roberts*, 468 U.S. at 619-20.

<sup>91</sup> Karst, *supra* note 80, at 627. Karst argues that the freedom of intimate association is like other freedoms imbedded in the Constitution and carries with it a presumptive value, not an absolute value. *Id.*

<sup>92</sup> *Id.* Karst states that “[t]he freedom does not imply that the state is wholly disabled from promoting majoritarian views of morality.” *Id.*

<sup>93</sup> *Id.* Karst continues by stressing that the relationships deserving the protection of intimate association, such as marriage and familial relationships, are held by the courts as “fundamental freedoms” and are treated as other fundamental rights found within the Constitution. *Id.*; see also *Roberts*, 468 U.S. at 619.

<sup>94</sup> Karst, *supra* note 80, at 627. If a state attempts to significantly hinder a person’s fundamental right, it must have a compelling justification to pass strict scrutiny analysis. *Id.* at 627-28; see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (determining that when a state

freedom stands for the principle that because a liberty interest is embedded in the constitutional foundations of the due process clause, intimate associations deserve the respect of the government, which should consequently defer to the parent's right to guide his child's upbringing.<sup>95</sup>

The theory of intimate association premises on the *Meyer-Pierce* principle: Because such a sacred relation binds the parent-child relationship, the government should not take away the parent's fundamental right to direct the upbringing of his children.<sup>96</sup> Nevertheless, the threat of violating that freedom did not discourage social psychologists from entering public schools; however, the increasing use of children as research subjects encouraged the federal legislature to begin evaluating the role of parental rights.<sup>97</sup> By the mid-twentieth century, parents were not only having their rights challenged by state officials, but with Congress now attentive to the social testing occurring in the Nation's public schools, the federal government began testing parental rights as well.<sup>98</sup>

#### D. Legislative Solutions to Public School Research

By the 1950s, the idea of parental rights, as first acknowledged by *Meyer* and *Pierce*, was being challenged as school psychologists recognized the endless possibility of testing students in their natural environment: the classroom.<sup>99</sup> In addition to this recognition, public schools were encouraging researchers to take advantage of their students' accessibility.<sup>100</sup> Because of the growing connection between

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restricts a person's freedom to marry it must pass strict scrutiny because that freedom is a fundamental right guaranteed by the Fourteenth Amendment); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) ("When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

<sup>95</sup> See *Troxel v. Granville*, 530 U.S. 57, 57 (2000); see also *Roberts*, 468 U.S. at 619.

<sup>96</sup> See *Fredrick*, *supra* note 80, at 426. *Fredrick* asserts that "the Supreme Court has consistently referred to the need for government to respect familial boundaries and the position of parents." *Id.* However, despite the Supreme Court's declaration, it has never defined the limits of those boundaries. *Id.* Consequently, lower courts are split on how far that respect extends. *Id.*; see *Brown v. Hot, Sexy, and Safer Prod., Inc.*, 68 F. 3d 525, 532-35 (1st Cir. 1995); *Halderman v. Pennhurst St. Sch. and Hosp.*, 707 F. 2d 702, 708 (3d Cir. 1983); *Medeiros v. Kiyosaki*, 478 P. 2d 314, 319 (Haw. 1970); *People v. Bennett*, 501 N.W. 2d 106, 111-12 (Mich. 1993).

<sup>97</sup> See *infra* Part II.D.

<sup>98</sup> See *infra* Part II.D.

<sup>99</sup> See *supra* Part II.B-C.

<sup>100</sup> See *supra* Part II.B.

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researchers and public schools, Congress, in the 1960s, considered regulating the relationship.<sup>101</sup> Consequently, in 1962, Representative John Ashbrook of Ohio introduced one of the first bills focusing on a parent's right to know when his or her child is part of a research experiment in the classroom.<sup>102</sup> The bill, however, was not passed.<sup>103</sup>

Notwithstanding the denial of Ashbrook's bill, Congress enacted the Elementary and Secondary Education Act ("ESEA") in 1965.<sup>104</sup> The ESEA, which was referred by the Committee on Labor and Public Welfare, was established "to strengthen and improve educational quality and educational opportunities in the Nation's elementary and secondary schools."<sup>105</sup> However, the ESEA did not directly focus on research in public schools.<sup>106</sup> In 1966, another bill was therefore introduced focusing specifically on federally funded research.<sup>107</sup> That bill, presented by Representative Benjamin S. Rosenthal of New York, forced public schools to first get parental consent before administering certain invasive tests on their students.<sup>108</sup> Again, however, Congress denied the bill.<sup>109</sup>

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<sup>101</sup> Dellinger, *supra* note 63, at 350.

<sup>102</sup> Fredrick, *supra* note 80, at 593. Representative John Ashbrook "introduced a bill requiring parental knowledge of, and consent for, their children's participation in federally funded research relating to students' personalities, home life, family relationships, sexual behaviors, and religious beliefs." *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). With the passage of the ESEA, the federal government became more involved in public school financing. See Stafford Smiley, *The Elementary and Secondary Education Amendments of 1974: The Effect of the Consolidation and Review Provisions Upon the Distribution of Decisionmaking Authority*, 12 HARV. J. ON LEGIS. 447, 447 (1975).

<sup>105</sup> SENATE COMM. ON LABOR AND PUBLIC WELFARE, ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, S. REP. NO. 89-146, at 29 (1965), reprinted in 1965 U.S.C.A.N. 1446, 1448. On April 1, 1965, President Lyndon B. Johnson announced the purpose of this legislation by stating, "This bill has a simple purpose: To improve the education of young Americans. It will help them master the mysteries of their world - enrich their minds - and learn the skills of work. And these tools can open the world to them." *Id.*

<sup>106</sup> See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965). The ESEA "expired on June 30, 1973, subject to an automatic one-year extension provided by the General Education Provisions Act (GEPA)." Smiley, *supra* note 104, at 453 (citations omitted).

<sup>107</sup> See H.R. 14288, 89th Cong. (2nd Sess. 1966). The premise of Rosenthal's bill was similar to that of Ashbrook's in that he "would have prohibited the use of federal funds to support research involving the administration of 'personality inventory' tests, unless the tests were taken voluntarily and . . . with the prior informed consent of a parent or guardian." Dellinger, *supra* note 63, at 350 (emphasis added).

<sup>108</sup> *Id.* Rosenthal introduced his bill, in part, because of his disgust with the surveys. *Id.* Rosenthal provided his colleagues with one example where the New York City Board of Education had permitted researchers, operating under a grant from the National Institutes of Mental Health, to administer the Minneapolis Multiphasic Personality Inventory to 350

Nonetheless, Rosenthal's bill and its subcommittee report converted into very useful statistics for Congress, warning of the imminent problem of public school research.<sup>110</sup> Nevertheless, another eight years passed before Congress transcribed an amendment affecting students and their privacy rights.<sup>111</sup>

In 1974, Representative Jack Kemp of New York presented an amendment to the General Education Provisions Act ("GEPA").<sup>112</sup> This amendment obligated schools to make available to parents, who requested, any newly produced instructional materials that were going to be issued to their children.<sup>113</sup> As part of the GEPA's amendments, Senator James Lane Buckley presented an amendment that would shield parents and students from nonacademic testing in the classroom.<sup>114</sup> Like

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ninth graders without seeking parental consent. *Id.* In fact, after the survey was completed and a parent contacted the school, the assistant principal responded that, "parents 'simply have to trust the judgment of the educators.'" Longstreth, *supra* note 34, at 1. Some of the questions the parents thought were inappropriate and objected to asked, True or False: (1) I am very strongly attracted by members of my own sex; (2) Sexual things disgust me; (3) I like movie love scenes; (4) I have never indulged in any unusual sex practices; (5) Many of my dreams are about sex matters; and (6) There is something wrong with my sex organs. Dellinger, *supra* note 63, at 350 n.13.

<sup>109</sup> Fredrick, *supra* note 80, at 594.

<sup>110</sup> Dellinger, *supra* note 63, at 351-52. Due to the congressional subcommittee report, "[l]egislators questioned the value of many of the studies, particularly those with questionnaires examining the student's self-image, family relationships, sexual experience, religious views, personal values, and facts about the student's parents." Fredrick, *supra* note 80, at 594. The subcommittee suggested that parents be allowed the opportunity to examine questionnaires before their children participate in any program. *Id.*

<sup>111</sup> Fredrick, *supra* note 80, at 594.

<sup>112</sup> See 20 U.S.C. § 1232h (1976). This amendment, which became effective on August 21, 1974, was titled the *Pupil rights, protection; inspection by parents or guardians of instructional material; research or experimentation program or project*. The amendment was defined as:

All instructional material, including teacher's manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section "research or experimentation program or project" means any program or project in any applicable program designed to explore or develop new or unproven teaching methods or techniques.

*Id.* This amendment eventually became subsection (a) of the PPRRA. Compare 20 U.S.C. § 1232h(a) (1982) with 20 U.S.C.A. § 1232h(a) (West Supp. 2004).

<sup>113</sup> 120 CONG. REC. 8,505 (1974). Specifically, the amendment required schools that receive federal funds to make available to parents any instructional material that was to be used in a program or project designed to explore new teaching methods. Fredrick, *supra* note 80, at 594-95.

<sup>114</sup> Fredrick, *supra* note 80, at 594 n.49. Senator Buckley stressed that the fundamental reason for his introducing the amendment was to reaffirm his basic belief that parents have

his predecessors, Representatives Ashbrook and Rosenthal, Senator Buckley was motivated by the overwhelming use of surveys being administered to elementary and secondary students.<sup>115</sup> However, when the 1976 Education Amendments were signed into law, the legislature had reformatted the provisions, departing from Senator Buckley's intention.<sup>116</sup> In fact, Congress dropped the section compelling schools to obtain parental consent before subjecting students to testing.<sup>117</sup> Thus,

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a basic right and responsibility for the welfare and the development of their children. 121 CONG. REC. 13,991 (1975).

<sup>115</sup> Fredrick, *supra* note 80, at 594. Senator Buckley gave the following explanation for the genesis of his bill in a speech to the Legislative Conference of the National Congress of Parents and Teachers:

My initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society. There has been clear evidence of frequent, even systematic violations of the privacy of students and parents by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations.

121 CONG. REC. 13,991; *see also* Margaret L. O'Donnell, *FERPA: Only a Piece of the Privacy Puzzle*, 29 J.C. & U.L. 679 (2003) (outlining the history of FERPA).

<sup>116</sup> O'Donnell, *supra* note 115, at 683-84. The section that was dismissed was defeated in the Senate by two votes. 121 CONG. REC. 13,991. "That section would have required parental consent before a child undergoes certain forms of testing or treatment, such as psychiatric, or divulges sensitive personal or family information, or partakes in certain behavior or value-changing courses or activities." *Id.* However, with regard to the amendment that did pass, it was done so without the customary committee discussion and debate. *Id.* Consequently, not much exists in the records regarding its legislative history. *See* D. Martin Warf, Note, *Loose Lips Won't Sink Ships: Federal Education Rights To Privacy Act After Gonzaga v. Doe*, 25 CAMPBELL L. REV. 201 (2003) (stating that because little legislative history exists regarding the the PPRA's sister statute, courts have had difficulty determining Congress' intentions).

<sup>117</sup> 121 CONG. REC. 13,991. More precisely, Congress eliminated the section requiring "parental consent before a child undergoes certain forms of testing or treatment, . . . divulges sensitive personal or family information, or partakes in certain behavior or value-changing courses or activities." *Id.* Senator Buckley pleaded with his colleagues by asserting that "[m]any schools do not ask parents' permission to give personality or psychiatric tests to their children, or to obtain data from the children on their parents and family life. Some of these tests include questions dealing with the most personal feelings and habits of children and their families." *Id.* Buckley continued by discussing how some of the personally identifiable data obtained from the students is unknowingly given to various government agencies and to private organizations. *Id.* One example Senator Buckley presented to his colleagues demonstrated that "[a] year ago . . . a Federal office demanded information on pupil and family ethnic attitudes from over 100,000 [sic] New York City's elementary school pupils. Fortunately, the city board of education adamantly refused, even in the face of a reported threat to cut off all federal education funds - over \$200 million a year - to the city." *Id.*

once again, Congress chose not to regulate the administration of public school surveys.<sup>118</sup>

In 1978, Senator Orrin Hatch of Utah sponsored an amendment to the 1974 GEPA amendment.<sup>119</sup> That provision became known as the

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<sup>118</sup> Although Congress dropped the section regarding testing or treatment and parental consent, Senator Buckley's amendment passed and became known as the Family Educational Rights and Privacy Act ("FERPA"). 20 U.S.C. § 1232g (1976). FERPA stated, in its original form:

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions;

(1)(A) No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the educational records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)(A) For the purposes of this section, the term "education records" means, . . . those records, files, documents, and other materials which -

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g (1976); see 20 U.S.C. 1232g (2000) (showing FERPA in its current form); see also John E. Theuman, Annotation, *Validity, Construction, and Application of Family Educational Rights and Privacy Act of 1974 (FERPA)* (20 U.S.C.A. § 1232G), 112 A.L.R. FED. 1 (1993) (discussing and analyzing the formation of FERPA).

<sup>119</sup> HOUSE COMM. ON EDUC. AND LABOR, EDUCATION AMENDMENTS OF 1978, H.R. NO. 95-1137, at 1 (1978), reprinted in 1978 U.S.C.A.N. 4971. Senator Hatch as well as Senators Bartlett, Garn, McClure, Wallop, and Zorinsky proposed the amendment. 124 CONG. REC. 27,423 (1978). Senator Hatch believed in the purpose of the amendment and expressed that belief on the floor of the Senate by stating, "our amendment requires that before any elementary or secondary age child is subjected to psychiatric, behavior probing or other nonscholastic and nonaptitude testing; that there must first be obtained the written consent of the respective child's parent or guardian." *Id.* at 27,423; see also Phyllis Schlafly, *How Public School Curriculum Has Changed!*, 35 EAGLE FORUM 8 (2002), available at

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Hatch Amendment, or the Protection of Pupil Rights Act (“PPRA”).<sup>120</sup> The PPRA, which Senator Hatch commonly referred to as the “parental consent amendment,” contained two subsections.<sup>121</sup> In subsection (a), the amendment incorporated Representative Kemp’s 1974 amendment requiring federally funded schools to make instructional materials available to parents when the proposed program encompassed “new or unproven teaching methods or techniques.”<sup>122</sup> Subsection (b), in contrast, provided new regulations regarding psychiatric and psychological examinations, testing, or treatment.<sup>123</sup> Specifically, subsection (b) provided that if a school district wants to require a student to participate in psychological testing where the primary purpose is to force the student to reveal personal information about himself or his family, such as his political affiliation, mental instabilities, sexual behavior, financial situation, and/or illegal behavior, the school must first obtain written parental consent.<sup>124</sup> Senator Hatch’s act, as it was

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<http://www.eagleforum.org/psr/2002/mar02/psrmar02.shtml> (Mar. 2002) [hereinafter Schlafly, *Changed!*].

<sup>120</sup> See 20 U.S.C. § 1232h (1982). The Hatch Amendment did not create any debate in either sector of Congress. CHILD ABUSE IN THE CLASSROOM: EXCERPTS FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS BEFORE THE U.S. DEPARTMENT OF EDUCATION 11 (Phyllis Schlafly ed., 1985) (highlighting the personal testimonies of persons who attended the seven hearings conducted by the U.S. Department of Education in March, 1984). In reality, “[p]robably no Senator or Congressman thought that anybody could object to providing schoolchildren with this mantle of protection against such classroom abuse of their personal rights or family privacy.” *Id.*

<sup>121</sup> See 20 U.S.C. § 1232h (1982); see also 124 CONG. REC. 27,423 (1978).

<sup>122</sup> 20 U.S.C. § 1232h(a). Congress simply moved the 1974 Kemp provision, which focuses on parental access to instructional materials, to subsection (a) of the Hatch Amendment. 20 U.S.C. § 1232h(a); see *supra* note 112 (illustrating subsection (a)).

<sup>123</sup> 20 U.S.C. § 1232h(b).

<sup>124</sup> *Id.* Specifically, subsection (b) provided:

No student shall be required, as part of any applicable program, to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

- (1) political affiliations;
- (2) mental and psychological problems potentially embarrassing to the student or his family;
- (3) sex behavior and attitudes;
- (4) illegal, anti-social, self-incriminating and demeaning behavior;
- (5) critical appraisals of other individuals with whom respondents have close family relationships;
- (6) legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

intended, shaped the foundation for greater parental rights in public schools, and thus created the basis for the PPRA's present form.<sup>125</sup>

The PPRA, however, was not readily accepted by some, and therefore, was not initially acknowledged.<sup>126</sup> Specifically, persons in opposition of the PPRA argued that testing was "necessary for community schools . . . to collect firsthand views of teens about their sexual attitudes and behavior; the availability of drugs and firearms; problem behavior among students; their parents' attitudes and family history of problem behavior and conflicts."<sup>127</sup> In contrast, the PPRA's

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- (7) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program) without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

*Id.*

<sup>125</sup> See 20 U.S.C.A. § 1232h (West Supp. 2004) (showing the current provisions of the PPRA).

<sup>126</sup> Fredrick, *supra* note 80, at 590-91. Opponents of the amendment consisted of a diverse range of established education groups, scientific organizations, and civil rights activists, including in part, "American Civil Liberties Union, American Association of School Administrators, National Parent Teachers Association, American Association of Colleges of Teachers Education Association for the Advancement of Psychology, Council for Education and Development, Federation of Behavioral Psychological and Cognitive Science, National Association of School Psychologists, and People for the American Way." *Id.* at 591 n.22. They argued that the regulations limited academic freedom and chilled the educational system's ability to remain an unrestricted arena for the "marketplace of ideas." *Id.*; Comments, *What Will We Tell the Children? A Discussion of Current Judicial Opinion on the Scope of Ideas Acceptable for Presentation in Primary and Secondary Education*, 56 TULANE L. REV. 960, 963 (1982) [hereinafter Comment, *Children*]. In 1919, Justice Holmes first introduced his theory of the "marketplace of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *Abrams*, Justice Holmes very famously announced that "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." *Id.* Under the marketplace theory, "the child is presented with objective conceptions of divergent viewpoints and theories, and thereby given the opportunity to determine for himself, with appropriate parental guidance, the validity of the various positions." Comment, *Children, supra*, at 963. However, one major argument against the school environment as a "marketplace of ideas" is the contention that the idea of exposing elementary-aged students to a variety of topics and ideas is inappropriate for their maturity level, where secondary-aged students are more secure and stabilized to better analyze the various viewpoints. *Id.* at 970.

<sup>127</sup> George Archibald, *Mrs. Ridge Promotes Survey on Sex, Drugs; Information Used to Gain Grant*, WASH. TIMES, Feb. 18, 2003, at A01, available at 2003 WL 7705978 (statement made by Mr. Bete, president of Channing Bete Company, a Massachusetts firm that devises data-gathering programs). The surveys are compiled to "'look at protective factors and risk factors' and develop 'a focused, long-range community action plan for building on existing



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proponents claimed that the regulations were needed to protect minor children from “psychiatric meddling,” “psychological abuse,” and “federal thought control,” as well as “prevent[ing] invasions into the students’ personal and family matters.”<sup>128</sup> Despite the assertions of the statute’s opponents, the PPRA’s supporters pleaded for six years, and the provisions were finally settled.<sup>129</sup>

In November 1984, after months of research and public hearings, the Department of Education finalized regulations regarding the education of school children and implemented the PPRA.<sup>130</sup> Stated generally, the

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resources [to develop] healthy beliefs, clear standards, and healthy behaviors for children and youths.” *Id.*

<sup>128</sup> See Fredrick, *supra* note 80, at 591; see also 124 CONG. REC. 27,423. Senator Hatch believed that the non-academic testing was nothing more than “psychiatric probing” and that researchers manipulated children through “mind-bending” surveys. 124 CONG. REC. 27, 423.

<sup>129</sup> CHILD ABUSE IN THE CLASSROOM, *supra* note 120, at 11. The PPRA’s proponents ranged from parents to “concerned citizen” groups including “the Eagle Forum, American Education Coalition, National Council for Better Education, Maryland Coalition of Concerned Parents for Privacy Rights in Public Schools, Guardians of Education for Maine, The American Coalition for Traditional Values, and other pro-family organizations.” Fredrick, *supra* note 80, at 590 n.15.

<sup>130</sup> See 34 C.F.R. §§ 98.3-98.7 (2003); see also CHILD ABUSE IN THE CLASSROOM, *supra* note 120, at 16. Because the PPRA took six years before it received federal recognition, “[s]ome Congressmen charged that the federal bureaucrats did not issue regulations because they did not like the statute and did not intend to enforce it.” CHILD ABUSE IN THE CLASSROOM, *supra* note 120, at 17. In fact, it was not until after substantial evidence was gathered by the Department of Education, concerning possible violations, that it conducted seven days of open hearings to receive comments from the public. *Id.* The seven hearings took place as promised in March 1984, in Seattle, Pittsburgh, Kansas City, Phoenix, Concord, Orlando, and Washington, D.C. *Id.* Across the country, “more than 1,300 pages of testimony were recorded by court reporters as parents, public school teachers, and interested citizens spelled out their eye-witness accounts of the *psychological abuse of children in the public schools.*” *Id.* at 11. For example, one witness gave testimony about a survey that was administered through a Guidance Counseling Program in Lincoln County, Oregon, that students were forced to answer:

1. Do you have a close relationship with either your mother or father?
2. Have you taught a Sunday school class or otherwise taken an active part in your church?
3. Do you believe in a God who answers prayers?
4. Do you believe that tithing - giving one-tenth of one’s earnings to the church - is one’s duty to God?
5. Do you pray about your problems?
6. Do you read the Bible or other religious writings regularly?
7. Do you love your parents?
8. Do you believe God created man in His own image?
9. If you ask God for forgiveness, are your sins forgiven?
10. Have you ever had problems so bad you wished you could die so you would not have to face them?

1984 regulations employed both subsections of the Hatch Amendment and authorized that the amendment's scope include most programs funded by the United States Department of Education.<sup>131</sup> In addition, the regulations included definitions for psychiatric and psychological examination, testing, and treatment, and introduced the procedures for filing a complaint.<sup>132</sup>

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11. Would you rather live with someone else?
  12. Would you like to have different parents?
  13. What chores do you have at home on a regular basis?
  14. What do you fear - real or imagined?
  15. If you could change one thing in your home, or school, what would you change and why?
  16. Why did your parents get married?
  17. Do your parents ever lie to you?

*Id.* at 29-30 (testimony of Archie Brooks). Even after the Hearings took place, the Department of Education hesitated for six months before publishing the regulations in the Federal Register on September 6, 1984. *Id.* at 20.

<sup>131</sup> Fredrick, *supra* note 80, at 590; see 20 U.S.C. § 1232h(b) (Supp. 1985).

<sup>132</sup> 34 C.F.R. §§ 98.3-98.4, 98.7. Section 98.3 provides:

- (a) All instructional material-including teachers' manuals, films, tapes, or other supplementary instructional material-which will be used in connection with any research or experimentation program or project shall be available for inspection by the parents or guardians of the children engaged in such program or project.
- (b) For the purpose of this part research or experimentation program or project means any program or project in any program under § 98.1 (a) or (b) that is designed to explore or develop new or unproven teaching methods or techniques.
- (c) For the purpose of the section 'children' means persons not above age 21 who are enrolled in a program under § 98.1 (a) or (b) not above the elementary or secondary education level, as determined under State law.

34 C.F.R. § 98.4 (emphasis omitted). Section 98.4 provides:

- (a) No student shall be required, as part of any program specified in § 98.1 (a) or (b), to submit without prior consent to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning one or more of the following:
  - (1) Political affiliations;
  - (2) Mental and psychological problems potentially embarrassing to the student or his or her family;
  - (3) Sex behavior and attitudes;
  - (4) Illegal, anti-social, self-incriminating and demeaning behavior;
  - (5) Critical appraisals of other individuals with whom the student has close family relationships;
  - (6) Legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or

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In 1994, ten years after the Department of Education implemented the Hatch Amendment, Congress again addressed its provisions.<sup>133</sup> This time the amendment was reviewed under the Goals 2000: Educate America Act ("Goals 2000").<sup>134</sup> Senator Charles E. Grassley of Iowa,

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(7) Income, other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under a program.

(b) As used in paragraph (a) of this section, prior consent means:

(1) Prior consent of the student, if the student is an adult or emancipated minor; or

(2) Prior written consent of the parent or guardian, if the student is an unemancipated minor.

(c) As used in paragraph (a) of this section:

(1) Psychiatric or psychological examination or test means a method of obtaining information, including a group activity, that is not directly related to academic instruction and that is designed to elicit information about attitudes, habits, traits, opinions, beliefs or feelings; and

(2) Psychiatric or psychological treatment means an activity involving the planned, systematic use of methods or techniques that are not directly related to academic instruction and that is designed to affect behavioral, emotional, or attitudinal characteristics of an individual or group.

34 C.F.R. § 98.4 (emphasis omitted). Section 98.7 provides:

(a) Only a student or a parent or guardian of a student directly affected by a violation under Section 439 of the Act may file a complaint under this part. The complaint must be submitted in writing to the Office.

(b) The complaint filed under paragraph (a) of this section must-

(1) Contain specific allegations of fact giving reasonable cause to believe that a violation of either § 98.3 or § 98.4 exists; and

(2) Include evidence of attempted resolution of the complaint at the local level (and at the State level if a State complaint resolution process exists), including the names of local and State officials contacted and significant dates in the attempted resolution process.

(c) The Office investigates each complaint which the Office receives that meets the requirements of this section to determine whether the recipient or contractor failed to comply with the provisions of section 439 of the Act.

34 C.F.R. § 98.7.

<sup>133</sup> 20 U.S.C. § 1232h (1994).

<sup>134</sup> HOUSE COMM. ON EDUC. AND LABOR WELFARE, GOALS 2000: EDUCATE AMERICA ACT, H. R. NO. 103-168, at 58 (1994), reprinted in 2000 U.S.C.C.A.N. 63. This act was enacted on March 31, 1994, and its primary purpose was stated:

To improve learning and teaching by providing a national framework for education reform; to promote the research, consensus building, and systematic changes needed to ensure equitable educational opportunities and high levels of educational achievement for all students; to provide a framework for reauthorization of all Federal education programs; to promote the development and adoption of a

believing that Congress had a duty to protect the constitutional rights of parents in public schools, introduced the amendment as follows:

To prohibit the use of certain funds for activities related to a student's personal values, attitudes, beliefs, or sexual behavior without certain consent, notification, access to information, and an opportunity for a hearing, to provide for enforcement of such prohibition, and to require the Secretary of Education to designate or establish an office and review board within the Department of Education.<sup>135</sup>

Grassley emphasized the ineffectiveness of the Hatch Amendment,<sup>136</sup> and how the regulations placed too heavy a burden on parents to establish that a violation had occurred in his or her child's school.<sup>137</sup>

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voluntary national system of skill standards and certifications; and for other purposes.

*Id.* The Protection of Pupil Rights amendment changed § 439 of the GEPA. See 20 U.S.C. § 1232h.

<sup>135</sup> 140 CONG. REC. S 846-01, 864 (daily ed. Feb 4, 1994). Senator Grassley stressed the importance of parental rights to his colleagues by asserting the practicality of those rights and also the constitutionality behind those rights granted in *Meyer* and *Pierce*. *Id.* In fact, Grassley stated, "Congress should protect [parental] rights as much as they protect the civil rights of students access to the school door." *Id.* at 857. Furthermore, he emphasized the destruction of this country as a society "where dramatically fewer young children can read, write, or count but who become worldly wise to stories about sex and drugs and violence." *Id.* at 856. Thus, as an advocate of parental rights, Grassley believed that the government has an affirmative duty to protect children and their parents. *Id.*

<sup>136</sup> *Id.* At the Goals 2000's proceedings and debate, Senator Grassley underlined the Hatch Amendment's weaknesses. *Id.* Very simply, he concluded that the original 1978 act was outdated. *Id.* More specifically, Grassley believed that Senator Hatch's amendment was efficient for its time, but because "a lot of bureaucratic red tape and regulations make the Hatch amendment very ineffective," the PPRA needs a facelift to refocus the original intentions of the statute's purpose. *Id.* at 856. Furthermore, Senator Grassley stressed to his colleagues the necessity of abolishing the "psychiatric probing" taking place regularly in elementary and secondary schools without the knowledge, much less the consent, of parents or guardians. *Id.* He continued by demonstrating that Senator Hatch's amendment focused only on the idea of parental consent, and that it did not focus on the true underlying problem of the nonacademic surveys – the need to eliminate. *Id.*

<sup>137</sup> *Id.* Senator Grassley explained the primary problem of the 1978 statute as being a law that places too great a burden on parents. 140 CONG. REC. 1219 (1994). To illustrate, Grassley reviewed the exact procedures and obstacles that parents must overcome to prove a violation in their child's school:

First, parents must prove that they attempted a resolution at the local level. They must prove that the development and/or administration of the program is supported by the U.S. Department of Education funds. They must prove that the activity that they find offensive meets the definition of a research or experimentation program or project

Additionally, Senator Grassley proved the statute's weakness by illustrating that since the regulation's promulgation in 1986, only seventeen requests had avoided the statute's loopholes to qualify for federal investigation.<sup>138</sup> In the end, Senator Grassley's proposal was accepted, and the PPRA was remodeled.<sup>139</sup>

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under the regulations . . . . If the conditions appear to exist that are spelled out in the law, then parents must get through each and every one of the following hoops for the Family Compliance Office at the Department of Education to investigate. Parents must prove that the specific activity that they find offensive is funded with Department of Education funds. They must prove that their child is directly affected by the activity in question. They must prove that the activity meets the definition of psychiatric or psychological testing or treatment in the regulation. They must prove that the primary purpose of the activity is to reveal private information protected under the act. They must prove that the school has not received their written consent. They must prove that they attempted to resolve the conflict at the appropriate State and local levels before filing a complaint with the Family Compliance Office at the Department of Education in Washington.

*Id.*

<sup>138</sup> 140 CONG. REC. 1224 (1994). To illustrate the inconsistencies in the Department's policies and the amount of impermissible testing that occurs, Senator Grassley introduced a number of surveys sent to him from concerned parents across America. *See generally id.* In fact, Grassley submitted "letters from parents in Arkansas, Georgia, Indiana, Iowa, . . . Kentucky, Maryland, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, Virginia, and Washington" asking for help. *Id.* at 863. One of the questionnaires he submitted was titled *Passive Child Abuse*, and it had been distributed to a seventh grade health class in Davenport, Iowa. *Id.* at 858-59. The children were told specifically not to take a copy out of the classroom or to discuss the exercise with their parents. *Id.* One child disobeyed the teacher and gave a copy to her mother. *Id.* The questionnaire read as follows:

There are many ways to abuse children other than actively hitting, pushing, pinching, and name-calling them. The following is a list of ways in which children may be passively abused.

1. Allowing children to stay up late watching TV on school nights.
2. Failure to have children's glasses fixed or teeth repaired.
3. Failure to have a will made or to designate a guardian for your children.
4. Staying with a partner who is an active and abusive alcohol or drug user.
5. Dating or living with someone who hates and is abusive to children.
6. Driving too fast, carelessly, or under the influence of alcohol or drugs.
7. Not fastening children into automobile child restraints, seat belts, and shoulder harnesses when driving.
8. Abusing alcohol or drugs or selling illegal drugs.
9. Being very critical of mate and talking against him or her to children.

Grassley's revisions only minimally changed subsections (a) and (b) of the original Hatch Amendment.<sup>140</sup> However, his new amendment introduced three new subsections: (1) regulating notice; (2) enforcement; and (3) the requirements of an office and review board.<sup>141</sup> Additionally,

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10. Neglecting to fill out or sign children's school forms.
  11. Having no idea who your children's friends are or where your children hang out.
  12. Sending children to school when ill or letting them fake illness to avoid school.
  13. Not providing clean clothes and a clean home.
  14. Not having children immunized.
  15. Never following through on punishments given to children.
  16. Letting children stay overnight at a friend's home without talking to the parents.
  17. Bringing one partner after another into your life.
  18. Never doing anything alone with your children.
  19. Working so much that there is no time to spend with children.
  20. Promising to do something with your children and then canceling out because you have lost interest.
  21. Treating yourself to new things but expecting children to make do with what they have.
  22. Refusing to allow children to participate in outside activities because it's inconvenient.
  23. Allowing children to watch adult (sex and violence) movies.
  24. Smoking cigarettes.
  25. Never taking children's side against a teacher or always taking children's side against a teacher.
  26. Never attending parent-teacher conferences or other school activities.
  27. Making children late to school by not getting up in the morning.
  28. Having extremely high or low expectations of children.
  29. Allowing your children to skip school because you want their company or because you do not feel like getting them dressed.

*Id.* The Davenport, Iowa school adapted this survey from the Quad-City Times. *Id.*; see also Doris Wild Helmering, *Are You a (Passive) Child Abuser?*, QUAD-CITY TIMES (Apr. 29, 1991).

<sup>139</sup> 140 CONG. REC. S.1097-01 (1994). Senator Grassley's amendment to the PPRA was adopted by a unanimous vote of 93 yeas. *Id.* See generally 20 U.S.C. § 1232h (1994).

<sup>140</sup> 20 U.S.C. § 1232h(a)-(b) (1994). The only modification made from the 1978 Act to the Goals 2000 Act occurred in subsection (b). Compare 20 U.S.C. § 1232h(b) (1982) with 20 U.S.C. § 1232h(b) (1994). Unlike the original statute, which regulated psychiatric and psychological examination, testing, or treatment, the 1994 amendment altered the regulation to limits on "surveys, analysis, or evaluations." 20 U.S.C. § 1232h(b) (1994). Subsequently, the 1994 amendment dropped the definitions of psychiatric and psychological examination, testing, or treatment found in 34 C.F.R. §§ 98.3-98.4. See *supra* note 132 (citing the full text of §§ 98.3-98.4).

<sup>141</sup> 20 U.S.C. § 1232h(c) (1994). Subsection (c), which defines notice, states that "[e]ducational agencies and institutions shall give parents and students effective notice of their rights under this section." *Id.* Subsection (d), which contains the enforcement regulation, states the following:

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each new subsection granted specific power to the Secretary of the Department of Education.<sup>142</sup> Consequently, the Secretary was embodied with new responsibilities of forewarning parents of upcoming surveys, carrying out certain enforcement obligations, and creating a review board to investigate possible PPRA violations.<sup>143</sup>

In 2002, Congress again had the opportunity to review the Hatch Amendment.<sup>144</sup> The occasion transpired because of the debate concerning the No Child Left Behind Act of 2001 (“No Child Act”), which greatly reinforced the Elementary and Secondary Act of 1965.<sup>145</sup> Congress enacted the No Child Act in large part “to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind.”<sup>146</sup> However, only a small portion of the No Child Act directly affects the PPRA.<sup>147</sup>

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The Secretary shall take such action as the Secretary determines appropriate to enforce this section, except that action to terminate assistance provided under an applicable program shall be taken only if the Secretary determines that -

- (1) there has been a failure to comply with such section; and
- (2) compliance with such section cannot be secured by voluntary means.

20 U.S.C. § 1232h(d). And, subsection (e), which establishes the office and review board, states that “[t]he Secretary shall establish or designate an office and review board within the Department of Education to investigate, process, review, and adjudicate violations of the rights established under this section.” 20 U.S.C. § 1232h(e).

<sup>142</sup> See 20 U.S.C. § 1232(c)-(e).

<sup>143</sup> *Id.*

<sup>144</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 2083-88 (Supp. 2002). Senator Bunning, in support for the Act, stated during the proceedings and debate that “[e]very child in America deserves a good education, and the President is exactly right when he says no child should be left behind.” 147 CONG. REC. S13366 (2001). This Act, he concluded, “is a win-win-win bill for students, parents and schools.” *Id.*

<sup>145</sup> Prior to the No Child Left Behind Act, the Elementary and Secondary Act was the nation’s “largest and most comprehensive federal education law.” Donald M. Payne, *Reflections on Legislation: Reauthorization of the Elementary and Secondary Education Act: Challenges Throughout the Legislative Process*, 26 SETON HALL LEGIS. J. 315, 316 (2002).

<sup>146</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 2083-88. Congressman Todd Tiahrt introduced the No Child Left Behind amendment to the PPRA. See U.S. Department of Education, *FPCO Hot Topics*, at [http://www.ed.gov/offices/OII/fpco/hot\\_topics/ht\\_04-10-02.html](http://www.ed.gov/offices/OII/fpco/hot_topics/ht_04-10-02.html) (last modified May 7, 2003) [hereinafter *Hot Topics*]. In addition to Congressman Tiahrt, Senator Shelby supported the PPRA’s amendment. 147 CONG. REC. S13373 (2001). In fact, during the proceedings and debate for the No Child Left Behind Act, Senator Shelby expressed his views on the importance of the PPRA’s amendment:

The need for this provision stems from the growing practice of a large number of marketing companies going into classrooms and using class time to gather personal information about students and their families

The primary purpose of the No Child Act's amendment to the PPRA was to restructure the statute's function back to Senator Hatch's original intentions in 1978, giving parents more deference in their children's education.<sup>148</sup> The No Child Act thus evolved to improve parental rights in public schools by creating new provisions; the two primary provisions mandate that all local educational agencies ("LEAs") develop policies focusing on parental rights and then notify parents of those established rights.<sup>149</sup> In addition, the law expanded to incorporate all types of social surveys, including those that are federally funded and those that are not.<sup>150</sup> The No Child Act's amendment had one goal in mind – to protect parents and students from invasive surveys.<sup>151</sup>

The No Child Act remodeled the PPRA in two distinct ways.<sup>152</sup> First, it amended subsection (b) by including an eighth category of regulation,

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for purely commercial purposes. In many cases, parents are not even aware that these companies have entered their children's school, much less that they are exploiting them in the one place they should be the safest, their classroom . . . . The goal of these laws, as is the case with our provision, is to ensure that the privacy of children is protected and that their personal information cannot be collected and/or disseminated without the prior knowledge and, most importantly, the ability of parents to exclude their children from such activities.

*Id.*

<sup>147</sup> See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 2083-88.

<sup>148</sup> *Id.*; see also *Hot Topics*, *supra* note 146, at 2.

<sup>149</sup> O'Donnell, *supra* note 115, at 684. Specifically, "the law was greatly expanded to include passive parental consent for activities involving the collection, disclosure or use of personal information in connection with marketing; the administration of any non-Department of Education funded survey that contains one or more of the eight topics; or non-emergency invasive physical exams or screenings." *Id.* at 685. The word "passive" is used in the sense of notice and an opportunity to object, versus active, which requires prior written consent. *Id.* at 717 n.30. "The term 'personal information' means individually identifiable information including: (i) a student or parent's first and last name; (ii) a home or other physical address (including street name and the name of the city or town); (iii) a telephone number; or (iv) a Social Security identification number." 20 U.S.C.A. § 1232h(c)(6)(E) (West Supp. 2004). The term "survey" includes evaluations. 20 U.S.C.A. § 1232h(c)(6)(G). And finally, invasive physical examination means "any medical examination that involves the exposure of private body parts, or any act during such examination that includes incisions, insertion, or injection into the body, but does not include a hearing, vision, or scoliosis screening." No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 2087.

<sup>150</sup> O'Donnell, *supra* note 115, at 684. Unlike subsections (a) and (b) of the law, which contain the limiting phrase "as part of any applicable program," subsection (c) of the law applies to LEAs that receive funds under any applicable program." See 20 U.S.C.A. § 1232h(a)-(c)(West Supp. 2004).

<sup>151</sup> See *Hot Topics*, *supra* note 146, at 3.

<sup>152</sup> 20 U.S.C.A. § 1232h (West Supp. 2004).



which focuses on students and their religious beliefs and affiliations.<sup>153</sup> Second, it added an entirely new provision by reformatting subsection (c).<sup>154</sup> Prior to the No Child Act's alterations, subsection (c) focused on the requirement of parental notice.<sup>155</sup> However, with the enactment of the No Child Act, subsection (c) now concentrates on two aspects: the development of local policies and the enhancement of parental notification.<sup>156</sup> First, the No Child Act requires all schools to develop

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<sup>153</sup> 20 U.S.C.A. § 1232h(b) (West Supp. 2004). Subsection (a) of the original PPRA was not amended. Compare 20 U.S.C. § 1232h(a) (1982) with 20 U.S.C.A. § 1232h(b) (West Supp. 2004). With the enactment of a new category, subsection (b) now reads:

No student shall be required, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning:

- (1) political affiliations or beliefs of the student or the student's parent;
- (2) mental or psychological problems of the student or the student's family;
- (3) sex behavior or attitudes;
- (4) illegal, anti-social, self-incriminating, or demeaning behavior;
- (5) critical appraisals of other individuals with whom respondents have close family relationships;
- (6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
- (7) *religious practices, affiliations, or beliefs of the student or student's parent*; or
- (8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),

without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.

*Id.* (emphasis added to show the new category).

<sup>154</sup> See 20 U.S.C.A. § 1232h(c) (West Supp. 2004).

<sup>155</sup> 20 U.S.C. § 1232h(c) (1994); see *supra* note 141 (displaying the Goals 2000 notice requirement). Now, after the No Child Act's enactment, the notice requirement has moved to subsection (d), the enforcement requirement has moved to subsection (e), and the office and review board requirement has moved to subsection (f). 20 U.S.C.A. § 1232h(d)-(f) (West Supp. 2004).

<sup>156</sup> See 20 U.S.C.A. § 1232h(c) (West Supp. 2004). Subsection (c) now reads, in part:

(c) Development of local policies concerning student privacy, parental access to information, and administration of certain physical examinations to minors

- (1) Development and adoption of local policies  
Except as provided in subsections (a) and (b) of this section, a local educational agency that receives funds under any applicable program shall

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develop and adopt policies, in consultation with parents, regarding the following:

(A)(i) The right of a parent of a student to inspect, upon the request of the parent, a survey created by a third party before the survey is administered or distributed by a school to a student; and

(ii) any applicable procedures for granting a request by a parent for reasonable access to such survey within a reasonable period of time after the request is received.

(B) Arrangements to protect student privacy that are provided by the agency in the event of the administration or distribution of a survey to a student containing one or more of the following items (including the right of a parent of a student to inspect, upon the request of the parent, any survey containing one or more of such items):

(i) Political affiliations or beliefs of the student or the student's parent.

(ii) Mental or psychological problems of the student or the student's family.

(iii) Sex behavior or attitudes.

(iv) Illegal, anti-social, self-incriminating, or demeaning behavior.

(v) Critical appraisals of other individuals with whom respondents have close family relationships.

(vi) Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers.

(vii) Religious practices, affiliations, or beliefs of the student or student's parent.

(viii) Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program).

....

(2) Parental notification

(A) Notification of policies

The policies developed by a local educational agency under paragraph (1) shall provide for reasonable notice of the adoption or continued use of such policies directly to the parents of students enrolled in schools served by that agency. At a minimum, the agency shall -

(i) provide such notice at least annually, at the beginning of the school year, and within a reasonable period of time after any substantive change in such policies; and

(ii) offer an opportunity for the parent (and for purposes of an activity described in subparagraph (C)(i), in the case of a student of an appropriate age, the student) to opt the student out of participation in an activity described in subparagraph (C).

(B) Notification of specific events

The local educational agency shall directly notify the parent of a student, at least annually at the beginning of the school

and adopt policies with parents concerning parents' rights under the PPRA.<sup>157</sup> Second, the No Child Act provision forces LEAs to provide annual notice to parents of scheduled surveys, opportunities for parents to remove their children from certain activities, and specific alternatives available for children whose parents choose to remove them from such testing.<sup>158</sup> Accordingly, the No Child Act's modifications altered the face

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year, of the specific or approximate dates during the school year when activities described in subparagraph (C) are scheduled, or expected to be scheduled.

(C) Activities requiring notification

The following activities require notification under this paragraph:

(i) Activities involving the collection, disclosure, or use of personal information collected from students for the purpose of marketing or for selling that information (or otherwise providing that information to others for that purpose).

(ii) The administration of any survey containing one or more items described in clauses (i) through (viii) of paragraph (1)(B).

(iii) Any nonemergency, invasive physical examination or screening that is -

(I) required as a condition of attendance;

(II) administered by the school and scheduled by the school in advance; and

(III) not necessary to protect the immediate health and safety of the student, or of other students.

*Id.* (excluding § 1232h(c)(3)-(5)).

<sup>157</sup> *See id.*

<sup>158</sup> *Id.* The activities that parents may remove their children from include the following: "the collection, disclosure, or use of personal information collected from students for the purpose of marketing or for selling that information, or otherwise providing that information to others for that purpose." *Id.* However, the law does not include information that is collected for the following:

(i) College or other postsecondary education recruitment, or military recruitment;

(ii) Book clubs, magazines, and programs providing access to low-cost literacy products;

(iii) Curriculum and instructional materials used by elementary schools and secondary schools;

(iv) Tests and assessments used by elementary schools and secondary schools to provide cognitive, evaluative, diagnostic, clinical, aptitude, or achievement information about students . . . .

(v) The sale by students of products or services to raise funds for school-related or education-related activities; and

(vi) Student recognition programs.

*Id.* § 1232h(c)(4)(A).

of the statute by adding much more specificity in subsection (c) regarding policy-making and parental notification.<sup>159</sup>

With each amendment over the past thirty years, Congress has asserted its desire to help uninformed parents shield their children from nonacademic probing.<sup>160</sup> Ultimately, legislation appears to recognize that "parents have a right and a responsibility to be involved in their children's education."<sup>161</sup> However, despite the legislature's professed objective to place parents in a stronger position, the judicial system has interpreted the PPRA otherwise and ultimately damaged Congress' purported intention.<sup>162</sup>

#### E. *The Judicial Interpretation of the PPRA*

Since the PPRA's official enactment in 1978, it has not received much attention.<sup>163</sup> In fact, until recently, the process was so overly burdensome that many parents stood helpless while researchers invaded their children's schools.<sup>164</sup> However, since 2001, the judicial system has

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<sup>159</sup> See *id.* § 1232h(c).

<sup>160</sup> See 147 CONG. REC. S13373 (2001). In defending the No Child Act's amendment, Senator Shelby very clearly blamed public schools for the increasing problems with non-educational activities through their continued allowance of researchers into their schools. *Id.*

<sup>161</sup> *Id.* Senator Shelby stressed the importance of the No Child Act as a provision that "enhances parental involvement by giving them an opportunity to decide for themselves who does and does not get access to their children during the school day." *Id.*

<sup>162</sup> See *infra* Part II.E.

<sup>163</sup> See generally *Namazi v. Univ. of Cincinnati Coll. of Med.*, 3 Fed. App. 482 (6th Cir. 2001) (finding no meritorious basis to file a PPRA claim); *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368 (S.D.N.Y. 1999) (holding that neither the plain meaning of the PPRA nor the Congressional intent behind the PPRA provides an implied private right of action); *Herbert v. Reinstein*, 976 F. Supp. 331 (E.D. Pa. 1997) (holding that because plaintiff was not required by Temple to submit to any psychological examination as part of any applicable program, he cannot claim an enforceable right under the PPRA and he cannot establish a § 1983 claim based on a violation of § 1232h); *Newkirk v. E. Lansing Pub. Sch.*, 1993 U.S. Dist. LEXIS 13194 (W.D. Mich. 1993) (holding that the teachers' and counselor's use of psychotherapeutic materials and activities with the student without the parents' informed consent did not violate the PPRA because the plaintiffs were not within the class of intended beneficiaries of the PPRA and could not use § 1983 as a vehicle to enforce their claim against defendants); *Triplett v. Livingston County Bd. of Educ.*, 967 S.W.2d 25 (Ky. App. 1997) (holding that the Kentucky Instructional Results Information System assessment exam, which assessed student skills in reading, mathematics, writing, science, and social studies, did not violate the PPRA).

<sup>164</sup> 140 CONG. REC. 1097-01 (1994); see *supra* note 137 (describing the PPRA's procedures on filing a complaint).

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decided a few very important cases regarding the PPRA and FERPA.<sup>165</sup> Both statutes are theoretically beneficial, providing parents and students with a safety net to avoid intrusive surveys and questionnaires, while creating a system of checks-and-balances for school districts to regulate nonacademic material.<sup>166</sup> Nevertheless, the courts have not acted favorably toward either statute.<sup>167</sup> Specifically, the New Jersey district court opinion in *C.N. v. Ridgewood Board of Education* and the Supreme Court's opinions in *Oswasso Independent School District v. Falvo* and *Gonzaga University v. Doe* leave both FERPA and the PPRA ineffective in protecting parents and their children.<sup>168</sup>

In 2001, the PPRA faced one of its strongest judicial setbacks in *C.N. v. Ridgewood Board of Education*.<sup>169</sup> In *C.N.*, an organization called the Human Resources Coordinating Council contacted a local middle and high school, wanting to research various students in its community.<sup>170</sup> The group convinced the school board that it was in Ridgewood's best interest to survey the student population to gain insight into the community's youth.<sup>171</sup> After Ridgewood conceded to the survey's distribution, the district's superintendent notified all parents of the upcoming event, asserting that the survey was voluntary and

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<sup>165</sup> *Oswasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J. 2001).

<sup>166</sup> *Hot Topics*, *supra* note 146, at 1-5.

<sup>167</sup> See *infra* notes 169-230 and accompanying text.

<sup>168</sup> *Hot Topics*, *supra* note 146, at 1-5.

<sup>169</sup> 146 F. Supp. 2d 528. The version of the PPRA analyzed in *C.N.* is the 1994 provision under the Goals 2000 Act. See *supra* notes 133-43 and accompanying text (discussing the 1994 provision which established three new subsections: regulating notice, enforcement, and the requirements of an office and review board). The plaintiffs in the action are all residents of Ridgewood and are the parents of three minor girls, two of whom attended Ridgewood High School and the other at Benjamin Franklin Middle School. *Id.* at 530. The defendants included the Ridgewood Board of Education and several school administrators, including Frederick J. Stokley, Superintendent of Schools; Joyce Snider, Assistant Superintendent; Ronald Verdicchio, member of the central administration; Robert Weakley, Director of Human Resources; John Mucciolo, Ridgewood High School Principal; Anthony Bencivenga, Benjamin Franklin Middle School Principal; and Sheila Brogan, President of the Board of Education. *Id.*

<sup>170</sup> *Id.* at 530. The organization was comprised of public and private social service agencies. *Id.* "The HRCC created a 'Vision Team' to supervise the project, which included thirty persons from every sector of the community, including school officials and one student." *Id.*

<sup>171</sup> *Id.* Defendants claimed that the survey's purpose was to both "strengthen the community's resolve" in hopes of better understanding their youth as well as to prevent an incident like the infamous Columbine High School shootings. *Id.* at 531 n.2.

anonymous.<sup>172</sup> On the day of administration, students were required to answer either, "Never," "Once," "Twice," "3-4 Times," or "5 or More Times," to whether they had:

- (56) Stolen something from a store.
- (57) Gotten in trouble with the police.
- (58) Hit or beat up someone.
- (59) Damaged property just for fun (such as breaking windows, scratching a car, putting paint on walls, etc.).<sup>173</sup>

After the survey's distribution, a few parents filed suit pursuant to 42 U.S.C. § 1983, alleging a deprivation of their rights secured by the Constitution, FERPA, and the PPRA.<sup>174</sup> Specifically, the parents argued that they had a right to know the survey's true content before it was administered to their children.<sup>175</sup> The district court disagreed.<sup>176</sup> In fact,

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<sup>172</sup> *Id.* at 530-31. The survey was called, "Profiles of Student Life," and was administered to two thousand junior and senior high school students. The O'Reilly Factor, *Back of the Book: Interview with Steve Aden* (Fox News television broadcast, Jan. 17, 2002), available at 2002 WL 5594638. The survey did not provide a space for students to place their names. *C.N.*, 146 F. Supp. 2d at 531. It was produced by the Search Institute of Minneapolis, Minnesota, consisted of 156 questions, and cost \$4,800 to be conducted. *Id.*; see also *The O'Reilly Factor, supra*.

<sup>173</sup> *C.N.*, 146 F. Supp. 2d at 530-31. Students were given three types of questions to fill out. *Id.* at 531-32. First, students were asked to answer each question with "Strongly Agree," "Agree," "Not Sure," "Disagree," or "Strongly Disagree." *Id.* Some of the questions included the following:

- (40) I get along well with my parents.
- (43) If I break one of my parent's rules, I usually get punished.
- (45) It is against my values to have sex while I am a teenager.

*Id.* at 531. Additionally, students were asked "how many times over the last two weeks they had imbibed alcohol, specific types of drugs, or had driven a vehicle after drinking alcohol." *Id.* Finally, "[f]urther areas covered by the survey included violent and criminal behavior and sexual activity and proclivities." *Id.*

<sup>174</sup> *Id.* at 531. Specifically, the plaintiffs believed that their First, Fourth, Fifth, and Fourteenth Amendment rights had been violated in addition to the FERPA and PPRA. *Id.* at 530.

<sup>175</sup> *Id.* The parents argued that the survey's inappropriate content invaded their children's right to privacy. *Id.* In addition, the parents alleged the following:

[P]rior to the administration of the survey the defendants failed to notify parents as to how and when the survey would be administered, how students could elect not to participate, how nonparticipating students would be accommodated, whether parental consent would be required before their child could take the survey, whether parents had a right to object to their child taking the survey, how parents could object to their child taking the survey, and whether certain questions would be subject to a Fifth Amendment right against self-incrimination.

it held that neither the PPRA, nor FERPA, creates a private right to relief, thereby restricting the parents access to the judicial system.<sup>177</sup>

Before the court dismissed the parents' complaint, it first reviewed the PPRA's express language, concluding that Ridgewood did not violate any part of the statute's provisions.<sup>178</sup> First, and foremost, Judge Politan reviewed subsection (b) of the PPRA, which mandates that schools obtain parental consent when they require students to participate in a social survey.<sup>179</sup> He determined that because the PPRA only compels written parental consent when the survey "requires" a pupil to participate, the Ridgewood survey did not violate the statute because it was given on a voluntary basis.<sup>180</sup> Thus, the court rejected the parents' PPRA assertion, declaring that the statute's express language only directs that those surveys *requiring* student participation also require parental consent.<sup>181</sup>

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*Id.* at 531-32.

<sup>176</sup> *Id.* at 533-40. One reason the court gave for the dismissal of the parents' complaint was because Ridgewood's survey did not qualify under the PPRA because it lacked federal funds. *Id.* This argument, however, would now fail because the No Child's amendment to the PPRA closed this loophole regarding federally funded surveys. *See supra* notes 144-59 and accompanying text (discussing how the No Child Left Behind amendment to the PPRA expanded to give parents protection against federally and non-federally funded surveys).

<sup>177</sup> *Id.* at 535. On appeal, the Third Circuit U.S. Court of Appeals reversed the district's court ruling regarding the parents' constitutional claims, stating the following:

The Circuit Court agreed with the parents that the school's administration of the questionnaire may have violated the First Amendment's prohibition against compelled speech and the Fourth Amendment's prohibition against unreasonable intrusion into the household. The Court also agreed with the parents that the Board may have violated 'the substantive due process rights for the adults to raise their children.' The court remanded the case to the lower court.

*See* Schlafly, *Changed!*, *supra* note 119.

<sup>178</sup> *C.N.*, 146 F. Supp. 2d at 535. One counter-argument the defendants asserted was that the law governing student surveys was unclear at the time the Ridgewood surveys were administered and thus did not provide enough specificity for the district to follow. *Id.* The defendants asserted this argument under the genre of "qualified immunity." *Id.* at 533-34. Essentially, "municipal officers enjoy qualified immunity if 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 534 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Thus, the court explained that a right is apparent when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (alteration in original)).

<sup>179</sup> *See* 20 U.S.C.A. § 1232h(b) (West Supp. 2004).

<sup>180</sup> *C.N.*, 146 F. Supp. 2d at 534. The court also made notice that the statute is silent on the fact that if a student is "required" to take a survey, if he or she is also "required" to answer the survey, or if he may decline. *Id.* at 537.

<sup>181</sup> *Id.*

Next, the C.N. court analyzed the § 1983 claim.<sup>182</sup> The court concluded that neither the PPRA nor FERPA provides a private right of action.<sup>183</sup> First, the court discussed the basic premise of a § 1983 claim, which must demonstrate a violation of a constitutional or statutory right, as well as a deprivation under the color of state law.<sup>184</sup> Thus, because the PPRA does not expressly create enforceable rights for private persons,

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<sup>182</sup> *Id.* A § 1983 claim is filed when an individual believes that he has a "civil action for a deprivation of [his] rights." 42 U.S.C. § 1983 (2002). That statute states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.* (emphasis added). Accordingly, it is for the courts to decide first whether the injured individual has a right either under the Constitution or one created through a statute to obtain relief and second whether or not the claim is viable. See Sheldon Nahmod, *Symposium on Section 1983: The Restructuring of Narrative and Empathy in Section 1983 Cases*, 72 CHI.-KENT. L. REV. 819 (1997).

<sup>183</sup> C.N., 146 F. Supp. 2d at 535 (citing *Tarka v. Franklin*, 891 F.2d 102, 104 (5th Cir. 1989) (implying no private right of action under FERPA); *Fay v. S. Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2d Cir. 1986) (finding that FERPA does not provide for a private right of action); *Girardier v. Webster Coll.*, 563 F.2d 1267, 1276-77 (8th Cir. 1977) (finding that FERPA does not provide a private remedy); *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368, 390 (S.D.N.Y. 1999) (holding that the PPRA provides no implied private right of action); *Herbert v. Reinstein*, 976 F. Supp. 331, 339 (E.D. Pa. 1997) (holding that the PPRA does not provide for a § 1983 claim); *Hartfield v. E. Grand Rapids Pub. Sch.*, 960 F. Supp. 1259, 1264 (W.D. Mich. 1997) (finding that FERPA does not create a private right of action); *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996) (finding that FERPA does not give rise to a private cause of action but does create an interest that may be vindicated in a 42 U.S.C. § 1983 action); *Odom v. Columbia Univ.*, 906 F. Supp. 188, 195 (S.D.N.Y. 1995) (finding that FERPA does not provide for a private right of action); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 43 n.4 (D.N.H. 1994) (noting that courts consistently hold that no private right of action exists under FERPA); *Rothman v. Emory Univ.*, 828 F. Supp. 537, 542 (N.D. Ill. 1993) (finding that in enacting FERPA, Congress did not create a private cause of action); *Norris v. Bd. of Educ. of Greenwood Cmty. Sch. Corp.*, 797 F. Supp. 1452, 1462 (S.D. Ind. 1992) (finding that FERPA does not provide for a private right of action); *Norwood v. Slammons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991) (finding that although FERPA creates no private cause of action, a plaintiff may assert a FERPA violation as the basis for a claim under § 1983); *Smith v. Duquesne Univ.*, 612 F. Supp. 72, 80 (W.D. Pa. 1985) (finding that the dispositive language in FERPA disfavors the implication of a private remedy).

<sup>184</sup> C.N., 146 F. Supp. 2d at 536.



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but instead grants rights through an “applicable program,” the technical meaning of the statute only allows possible claims to be filed by the Secretary of the Department of Education.<sup>185</sup> The district court therefore concluded that the PPRA, as written, provides no judicial relief for parents.<sup>186</sup>

The *C.N.* analysis clearly weakened the PPRA.<sup>187</sup> Yet, because the statute lacked scrutiny from the highest court, the PPRA still had potential viability. One year later the Supreme Court took the opportunity to analyze parental rights in two cases: *Oswasso Independent School District v. Falvo*<sup>188</sup> and *Gonzaga University v. Doe*.<sup>189</sup> Both cases,

<sup>185</sup> *Id.* at 537. An “applicable program” is the following:

[A]ny program for which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The term includes each program for which the Secretary or the Department has administrative responsibility under the Department of Education Organization Act or under Federal law effective after the effective date of the Act[,] [May 4, 1980].

20 U.S.C. § 1221(c)(1) (1994) (citations omitted).

<sup>186</sup> *C.N.*, 146 F. Supp. 2d at 537. Following *C.N.*, the state of New Jersey implemented a new law analogous to the federal version of the PPRA. Eagle Forum, *Ridgewood Parents Wonder if New Law Will Stop Nosy Questionnaires*, available at <http://www.eagleforum.org/educate/2002/feb02/nosy-questions.shtml> (last visited Sept. 9, 2004) [hereinafter *Nosy Questionnaires*]; see also Evonne Courtros, *Parental Ok for Pupil Surveys Clears Hurdle Senate Passes Bill on 28-5 Vote*, THE RECORD, Dec. 5, 2000, at A03, available at 2000 WL 15844283. Ms. Courtros’ article discusses the various reactions to the state’s enactment of a law synonymous to the PPRA. *Id.* at 2. For example, the former president of the New Jersey School Boards Association, who was also a member of the Ridgewood school board, criticized the new law stating that “[i]t’s going to make it much more difficult for school boards and communities to deal with the kinds of situations that give rise to a Columbine.” *Id.*

<sup>187</sup> While the trial took place, a group created by the Department of Education, the Family Policy Compliance Office, independently investigated the Ridgewood School District. Schlafly, *Changed!*, *supra* note 119, at 2. On December 18, 2001, after two years of investigation, the department issued a fifteen page letter to the school district stating that Ridgewood had, in fact, violated all four requirements of the PPRA:

- (1) the survey was funded with federal education (Goals 2000) funds;
- (2) the students were “required” to participate in the survey;
- (3) the survey asked questions that would reveal information in three of the prohibited information categories; and
- (4) the school district did not obtain prior written parental consent from the parents.

*Id.*

<sup>188</sup> 534 U.S. 426 (2002). The issue presented in *Falvo* addressed “whether peer-graded classroom work and assignments are education records.” *Id.* at 429. Respondents filed a § 1983 action against the school district and school officials, claiming that “peer grading” violated FERPA. *Id.* The District Court granted the petitioners summary judgment motion and held that student-graded papers are not within the FERPA definition of “education records.” *Id.* The Tenth Circuit, on the other hand, reversed, holding that FERPA provided respondent with a cause of action enforceable under § 1983, that student-graded papers do

unlike *C.N.*, focus only on the PPRA's sister statute, FERPA.<sup>190</sup> However, the holdings in both *Falvo* and *Gonzaga* are relevant for the PPRA, and have influence on the statute's future effectiveness.

In *Falvo*, a teacher's method of allowing peer grading was challenged as violating FERPA.<sup>191</sup> The Court concluded that a student's individual class work did not qualify as education records because education records typically only include "institutional records."<sup>192</sup> Thus, it held that peer grading does not violate FERPA.<sup>193</sup> Nevertheless, the key element of *Falvo* is that the Supreme Court did not entertain the question of whether FERPA provides private parties a right of action under § 1983, the ultimate finding in *C.N.*<sup>194</sup> The Supreme Court's avoidance was simple—the question was to be answered four months later in *Gonzaga*.<sup>195</sup>

*Gonzaga*, like *Falvo*, focused on the scope of FERPA.<sup>196</sup> In *Gonzaga*, the respondent student attended Gonzaga University pursuing a degree

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fit within the parameters of FERPA, and that the very act of grading is an impermissible release of information to the student grader. *Id.*

<sup>189</sup> 536 U.S. 273 (2002). The issue presented in *Gonzaga* asked "whether a student may sue a private university for damages under 42 U.S.C. § 1983 to enforce provisions of the Family Educational Rights and Privacy Act of 1974, which prohibit the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons." *Id.* at 276 (citations omitted).

<sup>190</sup> See *Hot Topics*, *supra* note 146.

<sup>191</sup> *Falvo*, 534 U.S. at 430.

<sup>192</sup> *Id.* at 426. The Court concluded that "institutional records" include student grade point averages, standardized test scores, and records of disciplinary actions. *Id.*; see also Quinlan Publishing Group, *Highest Court Finds Peer Grading Does Not Violate FERPA*, at <http://www.quinlan.com/spotlights/ss020729.shtml> (last visited Sept. 9, 2004).

<sup>193</sup> *Falvo*, 534 U.S. at 427.

<sup>194</sup> *Id.* at 430. Before the Court began its analysis in *Falvo*, it asserted the following disclaimer: "At the outset, we note it is an open question whether FERPA provides private parties, like respondent, with a cause of action enforceable under § 1983. We have granted certiorari on this issue in another case." *Id.* The Court reasoned that because neither party in *Falvo* had challenged the § 1983 issue before the Court of Appeals, it was not going to address it. *Id.* at 430-31.

<sup>195</sup> For more information regarding the Court's analysis in *Falvo*, see Kelly A. Nash, Note, *Peer Grading Outlawed: How the Tenth Circuit Misinterpreted the Family Educational Rights and Privacy Act in Falvo v. Owasso Independent School District*, 25 *HAMLIN L. REV.* 479 (2002); and Randi M. Rothberg, Comment, *Not as Simple as Learning the ABC's: A Comment on Owasso Independent School District No. I-011 v. Falvo and the State of the Family Educational Rights and Privacy Act*, 9 *CARDOZO WOMEN'S L.J.* 27 (2002).

<sup>196</sup> 536 U.S. at 277; see also 20 U.S.C. 1232g (2000) (setting out FERPA in its entirety). FERPA mandates that any school that releases its students' educational records to an unauthorized person without that student's consent will be denied its federal funds. See Cheryl A. Priest, Comment, *Civil Procedure: The Right to Sue Under Section 1983*, 55 *FLA. L.*

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in education.<sup>197</sup> However, after a university employee overheard a conversation between two students, focusing on alleged sexual misconduct by the respondent, the employee called the agency responsible for granting the state's teaching certificates.<sup>198</sup> During the conversation with the agency, the employee identified the student and discussed the allegations she had overheard.<sup>199</sup> As a result, the student was denied an affidavit of good moral character, which was required of all new teachers in the state.<sup>200</sup> Furthermore, the respondent was told he would not receive his teaching certificate.<sup>201</sup> The respondent sued both the employee and the university asserting a FERPA violation under § 1983.<sup>202</sup> He argued that the university violated FERPA by sharing confidential information from his education records without obtaining his consent; such a violation, he stressed, permits a claim of relief under § 1983.<sup>203</sup>

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REV. 753, 753 (2003). See generally Cara Runsick Mitchell, *Defanging the Paper Tiger: Why Gonzaga Did Not Adequately Address Judicial Construction of FERPA*, 37 GA. L. REV. 755 (2003) (arguing that *Gonzaga* merely clarified the lower courts ambiguity regarding § 1983 claims under FERPA).

<sup>197</sup> 536 U.S. at 279. *Gonzaga University* is a private institution in Spokane, Washington. *Id.* at 277. Respondent's intention was to teach at a public elementary school in the State of Washington. *Id.* at 273.

<sup>198</sup> *Id.* at 277. Respondent did not learn of the investigation, or that information about him had been disclosed, until March 1994—six months after the university employee called the agency. *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* At one time, the State of Washington mandated that all new teachers wanting to work in Washington secure an affidavit of good moral character from their graduating college or university. *Id.* Without the affidavit, a newly graduated teacher could not teach in that state. *Id.*

<sup>202</sup> *Id.* In addition to the § 1983 claim, respondent filed claims alleging violations of Washington tort and contract law. *Id.* The lower court agreed with respondent's FERPA claim and entered judgment for \$1,155,000, including \$300,000 in punitive damages. *Id.* After the judgment was rendered, the university appealed. *Id.* The Washington Court of Appeals reversed, holding that FERPA does not provide an individual a private right to sue under § 1983. *Id.* at 278. Thereafter, the Washington Supreme Court reversed. *Id.* "The State Supreme Court reasoned that while FERPA does not explicitly grant a private right of action, its nondisclosure provision creates a federal right enforceable under section 1983." Priest, *supra* note 196, at 753. The United States Supreme Court then granted certiorari because it realized how split the lower courts were on whether FERPA was enforceable under § 1983. *Gonzaga*, 536 U.S. at 278 n.2 (citing *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203, 1210 (10th Cir. 2000)); *Brown v. Oneonta*, 106 F.3d 1125, 1131-32 (2d Cir. 1997); *Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996); *Meury v. Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 239 (Ind. Ct. App. 1999)). Thus, the Supreme Court wanted the opportunity to clarify the ambiguity regarding FERPA. *Id.* at 278.

<sup>203</sup> *Id.* at 273. In 1980, the Supreme Court held for the first time that § 1983 claims can be based on the Constitution and also on violations of federal statutory law. *Id.* at 279; see also

The Supreme Court, however, rejected the respondent's claim and held that private citizens do not have enforceable rights under FERPA.<sup>204</sup> Specifically, the Court concluded that because FERPA's language only confers an express right on the Secretary of the Department of Education, the statute is unenforceable by private persons.<sup>205</sup> In the analysis, Chief

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Maine v. Thiboutot, 448 U.S. 1 (1980). Since *Thiboutot*, the Court has identified "two independent ways for a private individual to enforce a federal statute that [does] not explicitly confer a private remedy: (1) through an action under § 1983 or (2) through a court-implied private cause of action arising directly under the statute itself." *Cases: III. Federal Statutes and Regulations, D. Family Educational Rights and Privacy Act*, 116 HARV. L. REV. 372, 372 (2002) [hereinafter *Cases: III*]. However, despite the Court's establishment of the two factors, lower courts have inconsistently evaluated § 1983 claims. *Id.*; see also *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). In *Pennhurst*, the Supreme Court held that there was virtually no indication from the plain language of the Developmentally Disabled Assistance and Bill of Rights Act that Congress created rights and obligations pursuant to its power to enforce the Fourteenth Amendment. *Pennhurst*, 451 U.S. at 4. To the contrary, the Act's language and structure demonstrated that it was a mere federal-state funding statute. *Id.* at 1. Moreover, the Act sought to improve care to individuals by encouraging better state planning, coordination, and demonstration projects, not requiring the states to fund newly declared individual rights. *Id.* at 3. *But see Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990). The *Wilder* Court held that § 1983 did create enforceable rights because the Medicaid Act was intended to benefit the hospital management. *Id.* It found that the state was obliged to adopt reasonable and adequate rates and that this obligation was enforceable. *Id.*; see also *Blessing v. Freestone*, 520 U.S. 329 (1997). The *Blessing* Court found that the Social Security Act Title IV-D could not be analyzed generally, and held that the Act did not give individuals a federal right to force a state agency to substantially comply with the law. *Id.*

<sup>204</sup> *Gonzaga*, 536 U.S. at 273. Justices Breyer and Souter concurred in the judgment. *Id.* at 291 (Breyer J., and Souter J., concurring). Both rejected the majority's declaration that an individual's private right to action under § 1983 must at all times be unambiguously accorded by the plain language of the statute, arguing that "the statute books are too many, the laws too diverse, and their purposes too complex, for any single legal formula to offer more than general guidance." *Id.* Nevertheless, Justice Breyer was persuaded by the majority's overall holding, finding that Congress precluded the use of FERPA for private enforcement. *Id.* at 291-92. Justice Stevens, on the other hand, strongly dissented from the opinion. *Id.* at 293 (Stevens, J., and Ginsberg, J., dissenting). He agreed with respondent's claim that FERPA "creates a right of nondisclosure of personal information from a student's record without consent." *Id.*; see *infra* notes 204-25 and accompanying text (highlighting Justice Stevens' opinion).

<sup>205</sup> *Gonzaga*, 536 U.S. at 273-74. In the Court's analysis, it provided examples of statutes, which it has concluded create enforceable rights under § 1983 claims. *Id.* Specifically, the Court recognized that "Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 create individual rights because those statutes are phrased 'with an unmistakable focus on the benefited class.'" *Id.* at 284 (emphasis in original) (citation omitted). For example, "Title VI provides: No person in the United States shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance' on the basis of race, color, or national origin." *Id.* at 284 n.3 (quoting 42 U.S.C. § 2000(d) (1994) (emphasis in original) (omission in original). Also, "Title IX provides: No person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance.'" *Id.*

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Justice Rehnquist first discussed the requirements for granting relief under § 1983 and then continued by demonstrating why FERPA does not qualify under § 1983's scope.<sup>206</sup>

First, because FERPA was enacted through Congress' spending power, the Supreme Court reviewed and finalized the dispute over how a person can obtain relief through this type of statute under § 1983.<sup>207</sup> It explained that to seek redress under § 1983, a violation must occur in one of two ways: either from a violation of rights secured by the United States Constitution, or from a violation of explicit rights conferred by Congress.<sup>208</sup> Although the Court recognized it had in the past granted relief under § 1983 by implying a private right of action from various spending statutes, it stressed that "[w]e now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."<sup>209</sup> Therefore, this decision eliminated the ambiguity of past cases by confirming that the Supreme Court will only grant relief if the alleged spending violation is expressly found in the statute's plain language or in the Constitution.<sup>210</sup>

The *Gonzaga* Court recognized that although its two approaches for interpreting federal funding statutes, one where it *implies* an enforceable right and the other where it *expressly* finds an enforceable right, appeared

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(quoting 20 U.S.C. § 1681(a) (2000)) (emphasis in original). Thus, because both Title VI and Title IX contain express language creating enforceable rights, both are actionable under § 1983. *Id.*

<sup>206</sup> *Id.* at 279-91.

<sup>207</sup> *Id.* at 278-86; see also Charles Davant IV, *Sorcerer or Sorcerer's Apprentice?: Federal Agencies and the Creation of Individual Rights*, 2003 WIS. L. REV. 613 ("[T]he Supreme Court has not squarely addressed whether federal agencies can create individual rights, [they] behave in a manner that suggests they are creating rights enforceable by private lawsuits.").

<sup>208</sup> *Gonzaga*, 536 U.S. at 279. In 1980, the Court determined for the first time that private persons could bring a § 1983 claim as a result of a violation under statutory law. *Id.* (citing *Thiboutot*, 448 U.S. at 4). See generally Mitchell, *supra* note 196.

<sup>209</sup> *Gonzaga*, 536 U.S. at 283. The Court expressly declared that "unless Congress 'speaks with a clear voice,' and manifests an 'unambiguous' intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983." *Id.* at 280 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)); see also Quinlan Publishing Group, *FERPA Suits Not Allowed Under Section 1983 of the U.S. Code*, at <http://www.quinlan.com/spotlights/ss020729d.shtml> (last visited Sept. 16, 2003) (outlining the Supreme Court's decisions in *Falvo* and *Gonzaga*).

<sup>210</sup> *Gonzaga*, 536 U.S. at 283. See generally *Cases: III*, *supra* note 203, at 372 (discussing how the *Gonzaga* holding should provide more stability in the future for the judicial system to analyze § 1983 claims).

different, both actually arise from a single manner of reasoning.<sup>211</sup> The Court emphasized that instead of analyzing the approaches differently, "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."<sup>212</sup> In fact, the Court stated that the two approaches overlap—both requiring the Court to ascertain Congress' intent in creating the statute.<sup>213</sup> If Congress does not intend to benefit an identifiable group of persons through the statute's express language, the Court will not step-in and imply that Congress intended to do so.<sup>214</sup> Therefore, the Supreme Court confirmed that its two approaches require the same reasoning, as well as require a plaintiff seeking relief under § 1983 to demonstrate that pursuant to Congress' intention, Congress created enforceable rights under the statute in question.<sup>215</sup>

Next, the Court depicted the reasons why FERPA does not accord enforceable rights.<sup>216</sup> Chief Justice Rehnquist announced that the statute

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<sup>211</sup> *Gonzaga*, 536 U.S. at 283. The Court declared that "[w]e have recognized that whether a statutory violation may be enforced through § 1983 'is a different inquiry from that involved in determining whether a private right of action can be implied from a particular statute.'" *Id.* (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990)).

<sup>212</sup> *Id.* at 283.

<sup>213</sup> *Id.* In 1997, the Supreme Court established a precise method for determining whether a particular federal statute creates an enforceable right under § 1983. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). *Blessing* stated that first, the court must determine that Congress intended the provision in question to benefit the plaintiff. *Id.* at 340. Second, the court needs to identify whether "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence." *Id.* at 340-41. Finally, *Blessing* determined that "the statute must unambiguously impose a binding obligation on the States." *Id.* at 341. Overall, *Blessing* found that "the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms." *Id.*

<sup>214</sup> *Gonzaga*, 536 U.S. at 283-84. One year after the Supreme Court decided in *Thiboutot* that private citizens can sue under § 1983, the Court established that unless Congress expressly provides for relief in the statute, that "legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." *Pennhurst State Sch. And Hsp. v. Halderman*, 451 U.S. 1, 4. Since the Court's decision in *Pennhurst*, it has only found two federal funding statutes that create a private right of action. *Gonzaga*, 536 U.S. at 280-82; see *Wilder*, 496 U.S. at 522-23 (allowing a § 1983 suit under the Medicaid Act); *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 430 (1987) (allowing a § 1983 suit under the Public Housing Act). *But see Blessing*, 520 U.S. at 343 (rejecting a § 1983 suit under Title IV-D of the Social Security Act); *Suter v. Artist M.*, 503 U.S. 347, 359-60 (1992) (rejecting a § 1983 suit under the Adoption Assistance and Child Welfare Act).

<sup>215</sup> *Gonzaga*, 536 U.S. at 284 n.3. The Court added that "[w]here a statute does not include this sort of explicit 'right- or duty-creating language' we rarely impute to Congress an intent to create a private right of action." *Id.*

<sup>216</sup> *Id.* at 287.

“lack[s] the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights.”<sup>217</sup> He emphasized that the rights granted under FERPA do not belong to private persons but to the Secretary of Education.<sup>218</sup> Thus, because of the statute’s language and its administrative obligations on the Secretary, it does not expressly confer “individual entitlement” to the judicial system.<sup>219</sup> As a result, the Court will not interpret FERPA as having individual rights.<sup>220</sup>

In his dissent, Justice Stevens’ expressed his disagreement with the majority’s result.<sup>221</sup> He, unlike the majority, believed the statute did create federal rights for private persons and accused the majority of crafting “a new category of *second-class* statutory rights” through their implied-rights analysis.<sup>222</sup> Justice Stevens stressed that when FERPA is

<sup>217</sup> *Id.* (citing *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 n.13 (1979)).

<sup>218</sup> *Id.* The statute directs “that [n]o funds shall be made available’ to ‘any educational agency or institution’ which has a prohibited ‘policy or practice.’” *Id.* (citing 20 U.S.C. § 1232g(b)(1) (2000) (alteration in original)).

<sup>219</sup> *Id.* (citing *Blessing*, 520 U.S. at 343). The Court emphasized its point by quoting its own language in *Cannon*, stating:

There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.

*Id.* (quoting *Cannon*, 441 U.S. at 690-93).

<sup>220</sup> *Id.* Rehnquist also focused on FERPA’s nondisclosure provisions, declaring that because they only refer to “institutional policy and practice” and not an individual’s ability to act, Congress expressly did not create a right for private citizens. *Id.* at 288. Finally, the Court said that because FERPA expressly authorizes various administrative duties upon the Secretary, including to “deal with violations,” the statute is unusable by individual persons in the courts. *Id.* at 289-90.

<sup>221</sup> *Id.* at 293 (Stevens, J., dissenting).

<sup>222</sup> *Id.* (emphasis added). Justice Stevens pressed that the Court’s holding was unprecedented, exclaiming:

[T]he Court seems to place the unwarranted “burden of showing an intent to create a private remedy,” on § 1983 plaintiffs. Moreover, by circularly defining a right actionable under § 1983 as, in essence, “a right which Congress intended to make enforceable,” the Court has eroded-if not eviscerated-the long-established principle of presumptive enforceability of rights under § 1983. Under this reading of the Court’s opinion, a right under *Blessing* is second class compared to a right whose enforcement Congress has clearly intended. Creating such a hierarchy of rights is not only novel, but it blurs the long-recognized distinction between rights and remedies. And it does nothing to clarify our § 1983 jurisprudence.

*Id.* at 302-03 (citation omitted).

analyzed as a whole, including the statute's title, it does provide a private right of action.<sup>223</sup> Additionally, Justice Stevens emphasized that although the majority focuses on Congress' lack of explicit rights-creating language, "none of [the Court's] four most recent cases involving whether a Spending Clause statute created rights enforceable under § 1983 . . . involved the sort of 'no person shall' rights-creating language envisioned by the Court."<sup>224</sup> Thus, in accordance with FERPA's entire statutory design and the Court's recent interpretations of spending legislation, Stevens asserts that the statute does create a private right of action.<sup>225</sup>

*Gonzaga's* holding firmly established that FERPA only confers a right on the Secretary of Education to file claims, leaving parents without any judicial relief.<sup>226</sup> The Court's analysis of FERPA, in both *Falvo* and *Gonzaga*, are valuable because they provide mandatory authority for future decisions about the validity of FERPA under a § 1983 claim.<sup>227</sup> However, these decisions are also valuable because of their foreseeable effect on the PPRA.<sup>228</sup> Specifically, because the statutes are so similar in text, the Supreme Court's treatment of FERPA likely predicts the Court's

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<sup>223</sup> *Id.* at 293-94. Specifically, Stevens argued that "FERPA in its entirety, includes 10 subsections, which create rights for both students and their parents, and describe the procedures for enforcing and protecting those rights." *Id.* at 293. For example, "subsection (a)(1)(A) accords parents 'the right to inspect and review the education records of their children,'" and "[s]ubsection (a)(1)(D) provides that a 'student or a person applying for admission' may waive 'his right of access' to certain confidential statements." *Id.* at 293-94. Furthermore, Stevens argued that subsection (a)(2), which refers to "the privacy rights of students," and subsection (c), which protects "the rights of privacy of students and their families," both create explicit action for students and their parents. *Id.* at 294; *see also* 20 U.S.C. § 1232 (2000).

<sup>224</sup> *Gonzaga*, 536 U.S. at 297; *see also* *Blessing*, 520 U.S. 329; *Suter v. Artist M*, 503 U.S. 347 (1992); *Wilder v. Va. Hosp. Ass'n.*, 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987). Mr. Warf wrote in his article that "Stevens considers the language in FERPA *more indicative of congressional intent to create a right than any of the other statutes the Court previously held to create rights.*" Warf, *supra* note 116, at 214 (emphasis added).

<sup>225</sup> *See* *Gonzaga*, 536 U.S. at 293-303.

<sup>226</sup> *Id.* at 289. "Prior to *Gonzaga*, the Court had established a clear line of cases interpreting the language 'and laws' within section 1983 to offer protection for 'rights' that were created by Congressional law." *See* Warf, *supra* note 116, at 206; *see also* *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n.*, 453 U.S. 1 (1981); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981); *Maine v. Thiboutot*, 448 U.S. 1 (1980). Now, when a plaintiff seeks relief under a Spending Clause statute through § 1983, he "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Gonzaga*, 536 U.S. at 282 (quoting *Blessing*, 520 U.S. 340).

<sup>227</sup> *See generally* Priest, *supra* note 196 (analyzing how the Supreme Court has interpreted § 1983 over the past twenty years).

<sup>228</sup> *See infra* Part III.A (comparing FERPA and the PPRA).



treatment of the PPRA.<sup>229</sup> Thus, because *Gonzaga* “clos[ed] the door on any section 1983 claim arising from a violation of FERPA,” parents and students with viable PPRA complaints will likely only be able to look to the Department of Education for relief.<sup>230</sup>

### III. EXAMINING THE PPRA’S LOOP HOLES

*Dear Senator Grassley: I'm pleased to hear of your concern for our children . . . . It seems that the schools through curricula have appointed themselves as surrogate parents . . . . Teachers are to be academic educators. Not parents. Not psychological conditioners. Not values evaluators. Not emotion guides. Please help protect our children from the New World Order.*<sup>231</sup>

For almost eighty years, the courts have recognized that parents have a fundamental right to direct the upbringing of their children.<sup>232</sup> Since that affirmation in *Meyer* and *Pierce*, the parent-child relationship has gained additional recognition through the freedom of intimate association.<sup>233</sup> However, for the past half-century, those rights have eroded in the public schools.<sup>234</sup> In fact, although Congress enacted the PPRA in an attempt to regulate invasive surveys in elementary and secondary public schools, the 1978 statute, as well as its two major amendments, have afforded little, if any, relief for parents and their children.<sup>235</sup>

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<sup>229</sup> See *infra* Part III.A; see also *infra* notes 247-67 and accompanying text.

<sup>230</sup> Warf, *supra* note 116, at 216.

<sup>231</sup> 140 CONG. REC. S846-01, S866-67 (1994) (written statement by Steven L. Bailey, concerned parent, to Senator Grassley). Mr. Bailey attached a survey that his sixth grade daughter had received that was titled, *This Is Me*. *Id.* The questions included the following: (1) I am happiest when?; (2) I get angry when?; (3) I am frightened by?; (4) I feel love when?; and (5) I feel sad about? *Id.*

<sup>232</sup> See *supra* Part II.A; see also *Meyer v. Nebraska*, 262 U.S. 399 (1923); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534-35 (1925).

<sup>233</sup> See *supra* Part II.C. The freedom of intimate association only includes those relationships surrounding a marriage or family. See *supra* note 85.

<sup>234</sup> See *supra* Part II.B.

<sup>235</sup> See *supra* Part II.D; see also *supra* note 119 (providing a part of Senator Hatch’s speech which addressed his intentions behind the PPRA); note 135 and accompanying text (providing Senator Grassley’s reasoning for creating the Goals 2000 amendment to the PPRA); and note 146 and accompanying text (providing Senator Shelby’s intentions behind the No Child Act’s amendment to the PPRA).

Originally, the PPRA was designed to provide both parents and children protection from nonacademic testing in the classroom.<sup>236</sup> Nearly thirty years later, however, the PPRA stands on unstable ground due to three primary causes: (1) the Supreme Court's decision in *Gonzaga*, concluding that FERPA does not provide private persons a right of action; (2) Congress' omission to effectively eliminate the statute's primary loophole; and (3) the statute's enforcement provision, which only provides the Secretary of Education with authority to regulate possible violations.<sup>237</sup> First, the Supreme Court's holding in *Gonzaga*, denying any judicial relief to parents under FERPA, afforded the ultimate setback for the PPRA.<sup>238</sup> Because of *Gonzaga*, parents with potentially viable claims will only be able to turn to the Secretary of Education to look for relief.<sup>239</sup> Second, Congress' continued failure to revise the wording of subsection (b) leaves the law bereft of any sound help for parents.<sup>240</sup> Thus, if Congress does not amend subsection (b) to eliminate the word "required," the law will forever fail to provide families any sound protection.<sup>241</sup> Third, because Congress centralized the statute's enforcement provision around the Secretary of Education, the power of the provision is weak because no one person, or group of persons, can adequately regulate an entire Nation of schools.<sup>242</sup> As a result, parents who believe a PPRA violation has occurred in their child's school are left with few options to find relief.

Accordingly, this Part of the Note will first address the judicial system's inevitable effect on the PPRA and what, if any, aid parents can now find after the Supreme Court's holding in *Gonzaga*.<sup>243</sup> Second, this Part will discuss Congress' failure to correct the PPRA's linguistic loophole, surfacing around the word "required" in subsection (b), which

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<sup>236</sup> See *supra* Part II.D; see also *supra* notes 119-25 and accompanying text (outlining Senator Hatch's objective in creating in PPRA).

<sup>237</sup> See *infra* Part III.A-C.

<sup>238</sup> See *infra* Part III.A; see also *infra* notes 247-52 and accompanying text (comparing FERPA and the PPRA).

<sup>239</sup> See *infra* Part III.A; see also *infra* note 267 (quoting Justice Stevens' opinion in *Gonzaga* about the amount of discretion held by the Department of Education in determining whether or not to investigate a parent's complaint).

<sup>240</sup> See *infra* Part III.B; see also 20 U.S.C. § 1232h (1982); 20 U.S.C. § 1232h (1994); 20 U.S.C.A. § 1232h (West Supp. 2004).

<sup>241</sup> See *infra* Part III.B; see also *infra* notes 268-78 and accompanying text (illustrating how public schools evade the PPRA through this loophole).

<sup>242</sup> See *infra* Part III.C; see also *infra* notes 279-84 (highlighting the Goals 2000 enactment of its enforcement provision and its office and review board provision).

<sup>243</sup> See *infra* Part III.A.

destroys many viable PPRA complaints.<sup>244</sup> And finally, this Part will illustrate that because the PPRA only grants power to the Secretary of Education, thereby failing to delegate that power to the states, the overall purpose of the enforcement provision is ineffective.<sup>245</sup>

A. *The Judicial System's Effect on the PPRA*

Due to the PPRA's and FERPA's indisputable parallels, the Court's recent treatment of FERPA has one inescapable consequence with regard to the PPRA—the statute will be void of any judicial relief for parents and students. In 2002, the United States Supreme Court determined in *Gonzaga* that a § 1983 claim only provides protection when a right guaranteed by the Constitution or one clearly expressed by Congress is violated.<sup>246</sup> As a result, Chief Justice Rehnquist and the majority invalidated FERPA under a § 1983 claim, concluding that it does not provide private citizens with enforceable rights.<sup>247</sup> Although *Gonzaga's* opinion focused strictly on FERPA, its relationship with its sister statute is undeniable.

FERPA and PPRA share a similar congressional history.<sup>248</sup> Both were originally enacted in the 1970s, through Congress' spending power, for the same general purpose: to afford protection to parents and students for privacy violations by public schools, or more specifically, by outside researchers.<sup>249</sup> In fact, when FERPA was originally designed, it contained a provision that premised the overall purpose of the PPRA.<sup>250</sup> In addition, both statutes mandate that public schools comply with specific provisions regarding such things as parental inspection of materials, parental consent for release of records or permission to conduct surveys, and parental notice of rights under both.<sup>251</sup> Most importantly, both FERPA and the PPRA only confer a right on the Secretary of the Department of Education to inspect possible

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<sup>244</sup> See *infra* Part III.B.

<sup>245</sup> See *infra* Part III.C.

<sup>246</sup> 536 U.S. 273, 283 (2002); see *supra* Part II.C.

<sup>247</sup> *Gonzaga*, 536 U.S. at 287; see also American Civil Liberties Union, *Your Right to Keep Your School Records Private*, at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=13152&c=161> (last modified July 17, 2003).

<sup>248</sup> Compare 20 U.S.C. § 1232g (1976) (illustrating FERPA in its original form) with 20 U.S.C. § 1232h (1982) (illustrating the PPRA in its original form).

<sup>249</sup> See *supra* notes 114-16 and accompanying text (outlining the history of FERPA); see also Part II.D (outlining the history of the PPRA).

<sup>250</sup> See *supra* notes 115-17 and accompanying text.

<sup>251</sup> See 20 U.S.C. § 1232g (2000) and 20 U.S.C.A. § 1232h (West Supp. 2004).

violations.<sup>252</sup> Thus, because of these similarities, a valid assumption can be made that how the Supreme Court treats one statute, it will treat the other.

Although the Supreme Court has yet to analyze the PPRA as it has FERPA, the future of the PPRA in the judicial system is inevitable. One example of *Gonzaga's* foreseeable effect appears in *Fields v. Palmdale School District*.<sup>253</sup> In *Fields*, a volunteer children's mental health counselor at an elementary school approached her school district about giving a psychological survey to its first, third, and fifth graders.<sup>254</sup> The school board conceded, and asked the counselor to send consent forms home with the students.<sup>255</sup> Although the letters contained a warning that "answering questions may make [a] child feel uncomfortable," the actual content of the survey was not disclosed.<sup>256</sup>

On the survey's scheduled day of administration students were asked various sexual inquiries, such as "to rate the frequency of the following activities on a scale from 'never' to 'almost all the time,'" including the following:

- (8) Touching my private parts too much
- ...
- (17) Thinking about having sex
- ...
- (23) Thinking about sex when I don't want to
- ...

<sup>252</sup> See 20 U.S.C. § 1232g (2000) and 20 U.S.C.A. § 1232h (West Supp. 2004).

<sup>253</sup> 271 F. Supp. 2d 1217 (C.D. Cal. 2003). The plaintiffs in the action were parents of public school, elementary-aged children. The defendants included Palmdale School District, the District's Director of Psychological Services, the elementary school principle, and the mental health counselor. *Id.* at 1218.

<sup>254</sup> *Id.* at 1217. The counselor sent letters home with the children specifically asking parents for "'support in participating in a district wide [sic] study of our first, third and fifth grade children,' and stated that the study was 'part of a collaborative effort with The California School of Professional Psychology . . . , [the] Children's Bureau of Southern California[,] and the Palmdale School District.'" *Id.* at 1219 (alteration in original).

<sup>255</sup> *Id.* at 1217.

<sup>256</sup> *Id.* at 1219 (alteration in original). At no point prior to the survey's distribution were any parents informed of the survey's content. *Id.* However, only two parents withdrew their child from having to take the survey. *Id.* The record indicates, nevertheless, that, had the parents "known the true nature of the Survey, none of the parents would have consented to their children's involvement." *Id.* The only reason the other parents did not withdraw their children is because they relied on the school districts representations. *Id.*

(44) Having sex feelings in my body.<sup>257</sup>

After the survey's completion and its true content was revealed, parents filed a claim against the school board, which included a violation of their constitutional right of privacy and a § 1983 federal civil rights claim.<sup>258</sup> In his analysis, Judge Selna focused primarily on the constitutional claim.<sup>259</sup> He ultimately concluded that the Fourteenth Amendment's fundamental deference to parents does not permit them to control a public school curriculum "because they have chosen to send their children to public school."<sup>260</sup> Although the court briefly discussed the § 1983 claim, it recognized that since no constitutional or statutory right had been violated, the parents could not make a prima facie case under § 1983.<sup>261</sup> As a result, their claims were dismissed.<sup>262</sup>

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<sup>257</sup> *Id.* at 1219-20. Other questions included the following: "(22) Thinking about touching other people's private parts; (26) Washing myself because I feel dirty on the inside; (34) Not trusting people because they might want sex; (40) Getting scared or upset when I think about sex; (47) Can't stop thinking about sex; (54) Getting upset when people talk about sex." *Id.* These questions were taken directly from the *Fields* opinion.

<sup>258</sup> *Id.* at 1220. In all, the parents' complaint asserted four causes of action: (1) violations of their federal constitutional right to privacy; (2) violations of their state constitutional right to privacy; (3) deprivation of their civil rights pursuant to 42 U.S.C. § 1983; and (4) negligence. *Id.*

<sup>259</sup> *Id.* at 1220-23.

<sup>260</sup> *Id.* at 1223 (emphasis added) (citing *Brown v. Hot, Sexy and Safer Prod., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995) (arguing that parents cannot tell schools what to teach their children)). The court determined, in a footnote, that the parents' true complaint was grounded in the Fourteenth Amendment's Substantive Due Process Clause. *Id.* at 1220 n.4. Accordingly, the court recharacterized the privacy claims as substantive due process claims because the parents did not "connect their asserted interest in 'control[ing] the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs,' to the First, Third, Fourth, Fifth, Ninth, or Tenth Amendments." *Id.* (alteration in original) (citations omitted). The analysis stressed that "the right established in *Meyer* and *Pierce* to direct the education of one's children does not give parents the right to 'control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs,' contrary to the Parents' assertions." *Id.* at 1223. In sum, the court recognized the *Meyer-Pierce* principle that parents have a fundamental right to direct their children's education; however, the court concluded that the Substantive Due Process Clause is not absolute, and does not protect these parents' claim of liberty. *Id.*

<sup>261</sup> *Id.* The court stated that to assert a § 1983 violation, the plaintiffs must prove that the defendants (1) violated a "clearly established" statutory or constitutional right, and (2) were acting "under color of state law" when it committed the alleged violation. *Id.* at 1223 (internal citations omitted).

<sup>262</sup> *Id.* at 1223-24. In the end, the court dismissed the parents' federal privacy and § 1983 claims for failure to state a cause of action and dismissed the state privacy and negligence claims, without prejudice under 28 U.S.C. § 1367(c)(3) (allowing district courts to decline to

*Fields* is highly relevant for one very important reason: Neither party, nor the court, raises the PPRA.<sup>263</sup> Clearly, the survey's content fits within the PPRA's scope as well as the survey's audience—a group of innocent six, eight, and ten year olds. However, the PPRA was never addressed. This omission, by both the parents' attorney and the court, can only be attributed to *Gonzaga's* holding on FERPA. In fact, the only plausible interpretation of why neither party nor the court raised the PPRA as a viable claim is because of *Gonzaga's* finding that FERPA lacked the "rights-creating" language to substantiate a claim under § 1983.<sup>264</sup> For instance, if *Gonzaga's* majority had reached the same conclusion as Justice Stevens in the dissent, finding that FERPA does grant rights to private persons, then, more likely than not, the PPRA would have been raised in *Fields*.<sup>265</sup>

The *Fields* decision, consequently, is immediate proof of *Gonzaga's* effect on the PPRA. More importantly, it represents the foreshadowing of an inevitably long line of cases where the PPRA, a statute enacted to prevent inappropriate surveys, will be ignored as void. Now, parents confronted with a possible PPRA violation will only have one place to turn for help: the Department of Education.<sup>266</sup> And, because the PPRA gives the Department of Education complete discretion in reviewing complaints and also does not guarantee "access to a formal administrative proceeding," parents, such as Mr. and Mrs. Wilson, will have to accept the fact that they are truly unable to protect their children from turning into the state's experimental guinea pigs.<sup>267</sup>

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exercise supplemental jurisdiction over a claim if the court has dismissed all claims over which it has original jurisdiction).

<sup>263</sup> See generally *id.*

<sup>264</sup> See *supra* notes 196-26 and accompanying text (discussing *Gonzaga*).

<sup>265</sup> See *supra* notes 221-25 and accompanying text (discussing Justice Stevens' dissenting opinion).

<sup>266</sup> By completely restricting a person's private right to sue under § 1983, "the Court relaxed the pressure on schools to closely adhere to FERPA guidelines." Warf, *supra* note 116, at 202.

<sup>267</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 298 (Stevens, J. dissenting). In *Gonzaga*, Justice Stevens said that "FERPA provides no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it leaves to administrative discretion the decision whether to follow up on individual complaints." *Id.* Consequently, because FERPA does not guarantee access to the Department of Education, a valid assumption can be made that neither does the PPRA.

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B. *The Legislature's Failure to Amend the PPRA's Loophole*

Congress enacted the PPRA, as well as its two major amendments, to protect parents and their children from invasive surveys that are distributed in public schools.<sup>268</sup> However, since the PPRA's official enactment in 1978, the statute has been flawed. When Senator Hatch introduced the statute, subsection (b) possessed one very specific loophole, which allows any elementary and secondary school that violates the statute to dodge most parental complaints.<sup>269</sup> Specifically, because Congress incorporated the word "required" in subsection (b), any school that distributes a survey to its students, without first getting parental consent, can escape the PPRA entirely if it asserts that the survey's administration was voluntary.<sup>270</sup> Furthermore, schools can invoke this argument after the survey's distribution, even if they failed to tell the students it was voluntary before they completed it.

Since the PPRA's creation in 1978, the Act has read, "[n]o student shall be *required*, as part of any applicable program, to submit to a survey, analysis, or evaluation that reveals information concerning . . ." <sup>271</sup> This phrase, which precludes subsection (b), creates a loophole for researchers by mandating that only those surveys *requiring* students to participate be the only surveys that *require* parental consent. Consequently, if a school simply calls a survey voluntary, both the school and the researchers avoid having to deal with parents entirely. Thus, by following the PPRA's express language, schools can evade the statute in its entirety.

The "required" requirement, which Congress has overlooked for nearly thirty years, provides the easiest escape for schools that want to distribute a "how do you feel" kind of survey. For example, in 2002, sixth through twelfth graders in Vigo County, Indiana, were compelled to take an "Alcohol, Tobacco, and Other Drug Use Survey."<sup>272</sup> The

<sup>268</sup> See *supra* notes 119-24 and accompanying text (providing Senator Hatch's intentions behind the enactment of the PPRA); notes 135-139 and accompanying text (providing Senator Grassley's reasoning for creating the Goals 2000 amendment to the PPRA); and notes 144-47 and accompanying text (providing Senator Shelby's intentions behind the No Child Act's amendment to the PPRA).

<sup>269</sup> See 20 U.S.C. § 1232h (1982); 20 U.S.C. § 1232h (1994); and 20 U.S.C.A. § 1232h (West Supp. 2004).

<sup>270</sup> See 20 U.S.C.A. § 1232h(b) (West Supp. 2004).

<sup>271</sup> 20 U.S.C.A. § 1232h(b) (West Supp. 2004) (emphasis added). Compare 20 U.S.C. § 1232h(b) (1982) with 20 U.S.C.A. § 1232h(b) (West Supp. 2004).

<sup>272</sup> *Parental Rights Myths*, WASH. TIMES, Mar. 6, 2002, at A16, available at 2002 WL 2906120. The Vigo county school board allowed the survey's administration because it was

children were asked, "How many times in the last two weeks have you had five or more alcoholic drinks (beer, wine, liquor) at a sitting," and, "If you have ever used these drugs, at what age did you first use them?"<sup>273</sup> After the survey's administration, Vigo County avoided the PPRA and its challenges by protesting that their survey was voluntary.<sup>274</sup> Thus, despite the PPRA's intention to require parental consent before a social survey is administered in class, schools are avoiding the statute altogether by simply calling their surveys voluntary.

In addition to Indiana, other states are mirroring the survey charade, and thus, compounding the problem. In April 2003, ten thousand Fairfax County, Virginia, sixth, eighth, tenth, and twelfth graders were scheduled to take a 169-question survey asking, "How old were you when you first had sex?," "Have you ever had oral sex?," and "The last time you had sexual intercourse, what one method did you or your partner use to prevent pregnancy?"<sup>275</sup> Like the survey in Vigo County, Indiana, the school districts argued that students had the option not to participate in the survey.<sup>276</sup> Unfortunately, Indiana and Virginia are not

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threatened with having \$500,000 withdrawn from a drug-prevention program if it did not get 90% of its students to take the survey. *Id.* A group known as the Indiana Prevention Resource Center helped the Vigo county school board make the surveys voluntary and anonymous. *Id.*

<sup>273</sup> *Id.* The drugs listed included, among other things, snuff, marijuana, cocaine, crack, inhalants, heroin, and steroids. *Id.*

<sup>274</sup> *Id.* The Washington Times article stated that the primary reason of why the survey was given to the students on a voluntary basis is because the Indiana Prevention Resource Center recognized that when parental consent is required "participation rates drop dramatically." *Id.* Thus, the Prevention center would argue that its research is skewed because not all the children are able to participate when parents exercise their right to decide what is best for their child. *Id.*

<sup>275</sup> Archibald, *supra* note 127; see Jon Ward, *Fairfax Pulls the Plug on Student Sex Survey*, WASH. TIMES, Apr. 24, 2003, at B01, available at 2003 WL 7710011. The survey contained more than sex questions, which would have only been administered to the tenth and twelfth graders. Ward, *supra*. In fact, a similar survey had been administered two years prior without the sexual questions. *Id.* The survey was part of a program promoted by Michele Ridge, the national spokeswoman for Communities That Care ("CTC"). Archibald, *supra* note 127 (Ridge is the wife of President Bush's director of homeland security). CTC has "developed the youth survey used in more than 400 communities nationwide to collect personal information from students to help local governments justify federal and foundation grant applications." *Id.*

<sup>276</sup> *Id.* The county school board voted on whether or not to permit the survey, which resulted in a 8-4 vote along party lines: Democrats favoring and Republicans opposing the survey's administration. *Id.* Daniel Carmody, the vice-president of Channing Bete, the Massachusetts-based firm that developed the data-gathering program emphasized that "The survey is a voluntary survey. But we can't control if a particular teacher gives students the impression that they have to answer the survey, then a parent gets upset. We can't assume responsibility for that . . ." Ward, *supra* note 275. Ultimately, Channing Bete



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alone; schools in Minnesota, Ohio, Connecticut, New York, New Jersey, Pennsylvania, and Texas have all recently distributed impermissible surveys hiding behind the “required” requirement.<sup>277</sup> This loophole is used by school districts all over the United States to defeat valid complaints by parents and will continue until this federal law is revised. Thus, unless legislative action is taken to amend this portion of the original PPRA, the “required” requirement will continue to override the PPRA’s intended purpose to obtain parental consent.

In the end, Congress has failed the PPRA’s intended audience through its continuous failure to repair the “required” requirement. Currently, those schools that want to earn an extra dollar by testing their elementary and secondary students on inappropriate material can easily do so by using the “required” requirement to their advantage. As a result, parents like Mr. and Mrs. Wilson will not be able to stop schools from violating their right to choose what is best for their child; consequently, little Wendy, as well as her second grade class, will have to continue answering inappropriate sex questions.<sup>278</sup> Without serious legislative action, this statute will continue to impair a parent’s right to decide, will allow impermissible testing on children, and will do nothing more than take up space in the United States Code.

C. *The Ineffectiveness of the PPRA’s Enforcement Provision*

The PPRA’s current enforcement provision, enacted nearly ten years ago, is inadequate. When Congress created this provision, it only granted supervisory power to the Secretary of Education to manage all

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decided against the survey’s administration out of fear of being sued. *Id.* However, had the survey not been pulled by the research company, the PPRA would not have prevented its distribution.

<sup>277</sup> HB-Rights, *The Protection of Pupil Rights Amendment (“PPRA”)*, at <http://www.hb-rights.org/5parents/ppra> (last visited Sept. 3, 2003); see also Gretchen McKay, *Parents Fear School Survey Could Lead to Trouble*, PITTSBURGH POST-GAZETTE, Apr. 10, 2000, at A1, available at 2000 WL 10893433. For example, the survey given in Mahtomedi, Minnesota was to high school freshmen boys and girls and called an *Assessment For Bias*. HB-Rights, *supra*. The students were questioned whether or not they are biased “toward straight people or against gay people.” *Id.* In Pittsburgh, Pennsylvania, on the other hand, the statewide youth survey, which has been administered to students in grades six through twelve since 1989, focuses on drug use and crime. McKay, *supra*. One reason that Pennsylvania permits such surveys to be given in their schools derives from the amount of grant money they receive. *Id.* For example, “since 1995, \$122 million has been given to Pennsylvania schools for safety and violence prevention programs.” *Id.* Thus, the condition is placed on Pennsylvania schools that if they want the money, they must conduct the surveys.

<sup>278</sup> See *supra* notes 10-14 and accompanying text.

alleged PPRA complaints.<sup>279</sup> However, because the Secretary and his review board cannot possibly evaluate all the complaints sent to Washington, many of the complaints that parents file with the Department are overlooked.<sup>280</sup>

In 1994, Congress first introduced the enforcement provision to the PPRA in the Goals 2000 Act.<sup>281</sup> The Goals 2000 enforcement amendment obligated the Secretary of Education "to take such action as the Secretary determines appropriate to enforce" the statute.<sup>282</sup> Accordingly, the Secretary was granted complete discretion in how he or she wanted to regulate the PPRA.<sup>283</sup> In addition to the enforcement amendment, the Goals 2000 Act created a provision compelling the Secretary of Education to create an office and review board "within the Department of Education to investigate, process, review, and adjudicate violations of the rights" contained within this statute.<sup>284</sup> The Secretary thus formed the Family Policy Compliance Office ("FPCO"), a group of persons who

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<sup>279</sup> See generally 20 U.S.C. § 1232h (1994).

<sup>280</sup> See generally 140 CONG. REC. 1220 (1994). When Senator Grassley presented the Goals 2000 amendment to his colleagues, he introduced a letter he had written to then Secretary of Education, Richard W. Riley as well as Mr. Riley's response. *Id.* One of the questions Senator Grassley asked Mr. Riley was how many PPRA complaints had been filed with the Department. *Id.* Mr. Riley replied that the office had received "numerous" complaints since the statute's promulgation. *Id.* However, he continued by stating that if a complaint did not follow certain procedural guidelines, it was dismissed. *Id.* When Senator Grassley questioned how many parental complaints had been dismissed because of the mandated procedures, Mr. Riley responded that "Our records are not kept in such a way that we can provide this information." *Id.*

<sup>281</sup> See 20 U.S.C. § 1232h(d) (1994).

<sup>282</sup> *Id.* Specifically, subsection (d) provided the following:

The Secretary shall take such action as the Secretary determines appropriate to enforce this section, except that action to terminate assistance provided under an applicable program shall be taken only if the Secretary determines that - (1) there has been a failure to comply with such section; and (2) compliance with such section cannot be secured by voluntary means.

*Id.*

<sup>283</sup> See generally *id.* In *Gonzaga*, Justice Stevens declared that "FERPA provides no guaranteed access to a formal administrative proceeding or to federal judicial review; rather, it leaves to *administrative discretion* the decision whether to follow up on individual complaints." *Gonzaga v. Doe*, 536 U.S. 273, 298 (2002) (Stevens, J. dissenting) (emphasis added). Consequently, because this Note has established the indisputable similarities between FERPA and the PPRA, Justice Stevens' statement can also be extended to the PPRA.

<sup>284</sup> See generally 20 U.S.C. § 1232h(e) (1994). Subsection (e) states the following: "The Secretary shall establish or designate an office and review board within the Department of Education to investigate, process, review, and adjudicate violations of the rights established under this section." *Id.*

receive and review parental complaints from across the Nation and are located in Washington, D.C.<sup>285</sup>

However, despite the Goals 2000 enforcement and review board amendments, the PPRA is weak. Instead of public schools being forced to follow the statute's provisions, they are unmotivated to do so, knowing that there exists only a small likelihood they will be punished if they somehow violate the PPRA's guidelines.<sup>286</sup>

Because the Goals 2000 Act established that only the Secretary can enforce the PPRA's provisions, a public school that fails to follow the statute's provisions has a great possibility of avoiding punishment for

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<sup>285</sup> U.S. Department of Education, *Family Policy Compliance Office ("FPCO")*, available at <http://www.ed.gov/policy/gen/guid/fpc/index.html> (last visited Nov. 4, 2003). The sole purpose surrounding the FPCO's creation was to ensure student and parental rights through the PPRA and FERPA. *Id.* Thus, if parents believe that a PPRA violation has occurred at his or her child's school, or if the state educational agencies or local educational agencies failed to directly notify a parent, that parent's only possible remedy is to file a complaint with the FPCO. *Id.* Once a complaint is filed, the group must review the allegations to determine if a violation has truly happened. *Id.* Ultimately, if the FPCO concludes that the reported school district has, in fact, violated the PPRA, the Department of Education must withdraw that district's federal funding. *Id.*

<sup>286</sup> One reason why public schools are unmotivated to comply with the PPRA's provisions is because of the overly burdensome procedure for parents who want to file a complaint with the FPCO. For example, when Senator Grassley wrote to Richard Riley, the former Secretary of Education, he asked what the filing procedures entailed for parents. 140 CONG. REC. 1219 (1994). Mr. Riley replied that the FPCO is only required to investigate a complaint if the following conditions are met:

- (1) The activity that is the subject of the complaint is supported with funds supplied, in whole or in part, by the U.S. Department of Education.
- (2) The complainant is either a parent or guardian of a student, or the student if an adult or emancipated minor, who is directly affected by the activity.
- (3) The activity meets the definition of psychiatric or psychological examination, test, or treatment . . . of the regulations.
- (4) The *primary purpose* of the activity is to reveal any of the information listed in . . . [the CFR].
- (5) The school district or other recipient of funds has not obtained prior written consent of the student's parent.
- (6) The *complainant has attempted to resolve the apparent conflict* at the appropriate local and State levels (if a State complaint procedure exists) before filing the complaint with the Department.

*Id.* (emphasis added to suggest possible loopholes for the procedural guidelines). The first provision listed above is no longer required following the enactment of the No Child Left Behind Act. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 2083-88 (2002); see also *supra* notes 144-59 and accompanying text (discussing the No Child Act amendments).

two reasons: (1) because no one person, or select group, can effectively control, and regulate, all of the Nation's public schools; and (2) as discussed above, because the PPRA does not allow parental access to the judicial system, schools will be less motivated to comply with the PPRA's provisions because they know that unless the FPCO catches their violation, they will not be punished.<sup>287</sup> Thus, unless the PPRA is amended to provide a system of more localized regulation, one better capable of controlling the public schools, many public schools will "fall through the cracks" and never be forced to comply with the statute's provisions.

Under the current form of the PPRA, the enforcement provision does not adequately regulate the country's public schools. For example, in 1994 when Senator Grassley was pleading with his colleagues to accept his Goals 2000 amendment, he proved the PPRA's weakness by illustrating that in eight years, only seventeen complaints had been *investigated* by the FPCO out of the many complaints filed with the group during that period.<sup>288</sup> In addition, as of 2002, the FPCO had only withdrawn one school's funding as a result of a PPRA violation—almost twenty-five years after the statute's enactment.<sup>289</sup> Thus, because the FPCO does not have the manpower to properly evaluate all of the Nation's public schools, the PPRA must be amended.

The current PPRA enforcement provision does not provide a sufficient review of the public school system. For instance, if a school abuses the PPRA's provisions by administering a social survey to their students, violating subsection (b) of the statute, it has a greater likelihood than not of going unpunished.<sup>290</sup> Additionally, if a school abuses the PPRA by not complying with the notification procedures, violating subsection (c) of the statute, the violation will probably never be noticed.<sup>291</sup> Furthermore, without schools feeling a threat of punishment, they will not be deterred from conducting the same types of invasive surveys in the future.<sup>292</sup> Therefore, Congress needs to amend the PPRA

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<sup>287</sup> See *supra* Part III.A.

<sup>288</sup> 140 CONG. REC. S846-01, 862; see *supra* notes 133-43 and accompanying text.

<sup>289</sup> See *C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J. 2001); see also *supra* note 187 (explaining the FPCO's notice to the Ridgewood board of education).

<sup>290</sup> See *supra* note 153 (displaying subsection (b) in its entirety).

<sup>291</sup> See *supra* note 156 (displaying subsection (c) in part).

<sup>292</sup> See *generally* Part III.B. Part III.B discusses recent surveys that have been administered to students in various states, proving that this survey problem still fervently exists. Accordingly, this Part also confirms that schools do not believe they will be penalized for distributing an invasive survey because they are still actively distributing surveys.

to extend the Secretary of Education's power into the states, mandating that the state educational agencies observe and review each of the public schools in its geographical region.<sup>293</sup>

In the end, the PPRA's enforcement provision is ineffective. The provision's key obstruction is that all of the statute's power rests in the hands of one person, the Secretary of Education. This statute needs a more localized enforcement system, not to eliminate surveys entirely, but to ensure that parents are aware of the survey's existence and have consented to their child participating in that survey. Without this type of enforcement system, the *Meyer-Pierce* principle will continue to be lost, parents such as Mr. and Mrs. Wilson will continue to be overlooked as their child's primary decision-makers, and a parent's freedom of intimate association with his or her child will continue to be violated.<sup>294</sup> Thus, in addition to amending the statute to provide access to the judicial system and to eliminate the "required" requirement, the statute must be amended to delegate the Secretary's power onto the states in order to provide a greater system of regulation and to provide better protection for families.<sup>295</sup>

The current status of the PPRA is an illusion, cruelly misleading parents into believing it will protect children from invasive surveys in their schools, the type of surveys that interrupt the primary purpose of the classroom: to learn. Therefore, unless the PPRA is amended to create access to the judicial system, to eliminate its linguistic loophole found in the word "required," and to localize its form of regulation, the personal rights of families, such as the Wilsons, will be neglected.<sup>296</sup> Furthermore, without these new legislative revisions, parents will be forced to watch their children's education depart from reading, writing, and arithmetic to sex, drugs, and suicide.

#### IV. IF AT FIRST YOU DON'T SUCCEED, TRY, TRY AGAIN – PROPOSED REDRAFT OF THE PPRA

*Dear Senator Grassley: . . . We must enact much stronger legislation at the local, State, and Federal levels of our country*

<sup>293</sup> See *infra* Part IV. See generally 20 U.S.C. §§ 1400, 1411 (2000).

<sup>294</sup> See *supra* Part II.A-C. Part II.A focuses on the *Meyer-Pierce* principle that all parents have a fundamental right to direct the upbringing of their children. Part II.C concentrates on a parent's right of intimate association with his children. See also *infra* Part IV.

<sup>295</sup> See *supra* Part III.A-B. Part III.A discusses the judicial system's treatment of the PPRA, where as Part III.B analyzes Congress' failure in amending the PPRA's primary loophole.

<sup>296</sup> See *supra* notes 10-18 and accompanying text.

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*to halt this invasion of our homes. Will the passing of new laws, or the strengthening of existing ones, stop the sapping of time from true "academics"? . . . No[,] \* \* \* but what it can do is to stop the erosion of our rights and freedoms, the rest of what ails the learning community will be taken care of in the home, at local board meetings and at the polls \* \* \* We, the parents, are taking our schools back.<sup>297</sup>*

In 1978, the PPRA's original design was simple—it would aid parents in regulating what nonacademic material their children were exposed to at school.<sup>298</sup> In fact, Congress asserted that its purpose of enacting such a statute was to ensure the constitutional right granted to parents to direct the upbringing of their children.<sup>299</sup> With each amendment, legislation has repeatedly affirmed to help guard the parent-child relationship, yet the PPRA does not provide such assistance to families.<sup>300</sup> Instead, the PPRA is a greater hardship on parents, teasing them into believing that the statute can help protect their elementary and secondary-aged children.<sup>301</sup> Despite the thirty years of congressional attempts to amend the statute, the PPRA is powerless because of *Gonzaga's* holding, denying all access to the judicial system, because of its linguistic loophole and its centralized standard of enforcement.

Thus, in following the PPRA's original intentions, parents should be given the opportunity to decide if their children participate in nonacademic testing in public schools. The law was never created to altogether stop these kinds of surveys, which would be difficult since many of these invasive surveys are federally funded, but it should at a minimum, provide parents with what it was initially created to do—make schools obtain parental consent.<sup>302</sup> This Note proposes an amendment that corrects the three primary faults of the current PPRA, granting those parents who want the right, the ability to shield their children from inappropriate surveys in the classroom.

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<sup>297</sup> 140 CONG. REC. 1221 (1994) (statement in a letter by Jane F. Ponn, concerned parent, to Senator Grassley).

<sup>298</sup> See *supra* Part II.D.

<sup>299</sup> See *supra* Part II.D. See generally 124 CONG. REC. 27,423 (1978).

<sup>300</sup> See *supra* Part III. See generally 147 CONG. REC. S13365-07 (2001); 140 CONG. REC. S846-01.

<sup>301</sup> See *supra* Part III; see also 140 CONG. REC. S846-01 (containing many letters written by concerned parents, who do not know how to protect their children from invasive questioning).

<sup>302</sup> As briefly discussed, the author believes that Congress should consider, at minimum, a strict ban on surveys in elementary schools. See *supra* note 24.

PROPOSED PROVISIONS TO BE CHANGED OR ADDED TO THE  
PROTECTION OF THE PUPILS RIGHT STATUTE<sup>303</sup>

*Section 1: Parental rights concerning nonacademic testing*<sup>304</sup>

(b) No student *attending a public school* shall [be required, as part of any applicable program, to] submit to a survey, analysis, or evaluation that reveals information concerning:

- (1) political affiliations;
- (2) mental and psychological problems potentially embarrassing to the student or his family;
- (3) sex behavior and attitudes; illegal, anti-social, self-incriminating and demeaning behavior; critical appraisals of other individuals with whom respondents have close family relationships; legally recognized privileged and analogous relationships, such as those of lawyers, physicians, and ministers; or religious practices, affiliations, or beliefs of the student or student's parent; or income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program)

without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of unemancipated minor, without the prior written consent of the parent.

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<sup>303</sup> The proposed statute is not a new form of the PPRA. Instead, the proposed provisions are amendments to the existing PPRA. The provisions in regular font are the current provisions with revisions that the author suggests be made to the current statute. The provisions in italicized font, on the other hand, are amendments to be supplemented to the current statute.

<sup>304</sup> Section one begins with subsection (b) of the current statute. 20 U.S.C.A. 1232h(b) (West Supp. 2004). Subsection (a) of the current PPRA will not be discussed. In order to make the alterations in this provision effective, subsection (e) of the current statute, which gives the Secretary of Education sole control over the statute, would have to be eliminated.

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*Commentary:*

Section one is taken in large part from the current version of the PPRA. However, the "required" element is eliminated, thus mandating parental consent for both "required" and "non-required" surveys. Also, this section eliminates the phrase "as part of any applicable program." Through this abolition, this section will no longer be under the sole control of the Secretary of the Department of Education. Instead, in its absence, private individuals will be able to sue under § 1983, and the Supreme Court's holding in *Gonzaga* will no longer control. Additionally, the central arguments in the New Jersey case, *C.N.*, would be rendered moot.<sup>305</sup>

*Section 1(a): Relief*<sup>306</sup>

*If the student is an unemancipated minor and takes a survey containing one of the eight (8) above topics and does not receive a consent form from the school to obtain parental consent, that student's parent(s) and/or legal guardian shall have the authority to proceed in his or her choice of action.*<sup>307</sup>

*Commentary:*

This provision entitles an individual the right of access to the judicial system. As noted in the first section, the phrase, "as part of any applicable program" was removed to eliminate the Secretary's sole control over this section. Now, pursuant to §§ 1 and 1(a), a parent forced

<sup>305</sup> If the PPRA eliminates the "any applicable program" phrase, then the provision would have to also be amended in FERPA, granting both statutes functional under § 1983.

<sup>306</sup> This provision, as well as the next, would follow subsection (b), yet would prelude subsection (c).

<sup>307</sup> The parent's "choice of action" is strictly dependent upon when a parent is acting. For example, if a parent wants to seek relief because a social survey has already been administered in his child's public school without his consent, that parent must first file a complaint with the state educational agency. By mandating that the parent first turn to the state agency, this eliminates any potential ripeness issue. See *Power v. Sch. Bd. of Va. Beach*, 276 F. Supp. 2d 515, 521 (E.D. Va. 2003) ("For a case to be ripe, it must involve 'an administrative decision [which] has been formalized and its effects felt in a concrete way by the challenging parties.'") (alteration in original) (citations omitted); see also *Pac. Gas & Elec. v. Energy Res. Comm'n*, 461 U.S. 190, 200 (1983); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). But, if the state agency reviews and investigates the complaint, concluding that no PPRA violation occurred in the school, the parent can then file a complaint in district court. The court will then review the school's actions and determine if the parent is entitled to monetary relief resulting from a PPRA violation. Alternatively, if a parent wants to stop a social survey from being distributed in his or her child's school, that parent may first file a complaint in the district court to obtain injunctive relief.



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to use the PPRA will have enforceable rights to access the courts through a § 1983 civil rights claim.<sup>308</sup>

*Section 1(b): Relief*

*If the school provides consent forms for the students to return with their parent's signature and the student neglects to do so, the school may not administer the examination, testing, or treatment to that student. If the school proceeds with the examination, that student's parent(s) and/or legal guardian shall have authority to proceed in his or her choice of action.*<sup>309</sup>

*Commentary:*

This provision is designed ultimately to ensure that parents will be notified and will consent to any social research before their children participate. Furthermore, a school will potentially face liability if it either fails to provide consent forms to the parents, but also if it administers the testing material without the consent forms being returned. Thus, a school's possible assertion that "it did its job by giving the forms" or "we can't be responsible for parents who don't return the slips" will be denied.

*Section 2: Enforcement*<sup>310</sup>

*The Secretary of Education shall mandate that state educational agencies create an office and review board within its own agency to regulate this statute.*<sup>311</sup>

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<sup>308</sup> See *supra* note 307. Post distribution of a survey, a parent will only be able to file suit if he or she has exhausted his or her claim at the state level.

<sup>309</sup> See *supra* note 307.

<sup>310</sup> This proposed section would replace subsection (f) of the current statute, which establishes the Secretary's duty to create an office and review board within his own Department. 20 U.S.C.A. § 1232h(f) (West Supp. 2004).

<sup>311</sup> This type of delegation mimics the Individuals with Disabilities Education Act ("IDEA"). See generally 20 U.S.C. §§ 1400, 1411 (2000). Under IDEA, Congress created the more centralized form of regulation, knowing that more children would benefit. *Id.* In fact, Congress stated that the federal government needed "to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities." 20 U.S.C. § 1400(d)(1)(c). Thus, in applying the same principles as in IDEA, Congress needs to amend the PPRA's enforcement provision to "be responsive to the growing needs of an increasingly more diverse society. A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals." 20 U.S.C. § 1400(c)(7)(A).

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*Commentary:*

This proposed amendment eliminates subsection (e) of the current statute, which controls the statute's enforcement.<sup>312</sup> Now, instead of the Secretary of Education having sole control over the statute and its enforcement terms, this provision delegates the Secretary's power among the states to review and investigate complaints filed by parents.

*Section 2(a): Duties of the Secretary*

*The Secretary shall create an office and review board to:*

- (i) Supervise the state educational agencies to ensure that each agency follows its assigned duties; and*
- (ii) Allocate the designated federal grants to each state agency.<sup>313</sup>*

*Commentary:*

This provision is designed to establish the Secretary of Education's duties under the PPRA. In comparison to the Goals 2000 review board provision, this proposed amendment allows the Secretary to remain as the chief administrator of the statute's operations; however, his power to enforce the statute is delegated to the states. In addition, the Secretary will distribute the designated grant money to the states for the states to then distribute to the schools. This delegation of power will ultimately benefit both the FPCO and parents. First, it will help the FPCO because the group simply does not have the ability to adequately observe and review all of the Nation's public schools. Consequently, schools were going unchecked and valid PPRA complaints unnoticed. Second, parents will have a better chance of obtaining relief because the states are better able to do a more thorough job of evaluating complaints because they will receive substantially fewer than the federal group did overall.

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<sup>312</sup> Subsection (f) currently states: "The Secretary shall establish or designate an office and review board within the Department of Education to investigate, process, review, and adjudicate violations of the rights established under this section." 20 U.S.C.A. § 1232h(f) (West Supp. 2004).

<sup>313</sup> See *supra* note 311 (discussing how the PPRA's proposed revisions mimic the provisions of IDEA). The first phrase under IDEA's funding provision states, "The Secretary shall make grants to States and the outlying areas, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter." 20 U.S.C. § 1411(a)(1).

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*Section 2(b): Duties of the state educational agencies*

*The state educational agencies shall:*

- (i) Supervise the public schools in its designated region as well as investigate, process, review, and adjudicate violations of the rights established under this section; and*
- (ii) Review each public school in its region to determine if each school has complied with the regulations of this statute; and*
- (iii) Allocate the funds received from the Secretary to each school that complies with the statute. The funds will be distributed on a strict contingency basis. If the agency determines that a school did not comply with the statute's regulations, it shall withhold that school's educational funds for the duration of that academic year.*

*Commentary:*

This proposed amendment creates an entirely new method of enforcement for the PPRA. In contrast to the current statute, this provision establishes that the state educational agencies have the power to investigate and review complaints filed by parents. Additionally, this provision compels state agencies to supervise its designated public schools, ensuring that the schools are complying with the statute's provisions. Also, this amendment institutes a new standard for allocating funds. Now, instead of the schools automatically receiving a set amount of money each year, schools will be granted educational funds on a contingency basis. Therefore, if a school complies with the PPRA, it will receive the full amount of the funds at the end of the school year. However, if the school fails to follow the PPRA's guidelines, it will be denied only those funds for that school year.<sup>314</sup>

Overall, the model statute uses the current PPRA as a base but opens the door for § 1983 claims, eliminates the statute's primary linguistic loophole, and creates a more efficient method for reviewing complaints, as well as distributing funds. First, the statute provides parents with the option of using the judicial system if their child's school district has threatened to administer an inappropriate survey. Second, the statute

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<sup>314</sup> The denial of funds will only be for the school year in which a PPRA violation occurred. If the school complies with the PPRA the following academic year, it will again receive the funds.

eradicates the "required" requirement, mandating that all nonacademic surveys receive consent. Third, the proposed amendment shifts the power of the current PPRA's enforcement provision onto the states and grants the state educational agencies control over the public schools. Thus, the state agencies will have the authority to investigate complaints as well as distribute funds in accordance with schools' compliance of the statute. Accordingly, the PPRA will no longer be problematic but an enforceable piece of legislation.

The first requirement mandates that all surveys receive parental consent regardless of whether the survey is required or voluntary. Therefore, the escape that schools use to dismiss the PPRA's procedures will no longer exist. Now, all public educational institutions, such as that in *C.N.*, will have to face the possibility of a lawsuit if they decide to distribute a social survey to their minor students without first obtaining parental consent.<sup>315</sup> Thus, this provision eliminates the PPRA's primary loophole by abolishing a school's ability to evade the statute by simply calling their survey "required."

The second requirement reopens the door for §1983 claims. Through this added provision, in combination with the elimination of "any applicable program" from the preceding subsection, parents are given options. Essentially, this provision allows parents the ability to access the judicial system under a §1983 claim if they need to obtain immediate relief.<sup>316</sup> Now, parents can use the judicial system as a primary resource or as a secondary resource depending upon when the parent is filing the claim. Therefore, instead of parents only being able to turn to the FPCO, this provision grants them the ability to obtain relief for themselves and their children through the courts or the government.

The third requirement is an extension of the second. Now, a parent who wants to file a lawsuit against his child's school can do so if the school administers an impermissible survey to their child without receiving direct, written consent. Thus, this provision obligates schools to not only send a consent form home with its students, but also to make sure the consent form is signed and returned before a survey is distributed. Consequently, this added component guarantees that parents are aware of a survey's distribution, as well as ensures that the school district receives a signed consent form releasing it from future

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<sup>315</sup> See *supra* notes 169-86 and accompanying text (discussing *C.N. v. Ridgewood Bd. of Educ.*, 146 F. Supp. 2d 528 (D.N.J. 2001)).

<sup>316</sup> See *supra* note 307.

liability. This provision, thus, protects both parents and school districts by requiring that each student obtain permission to participate in the scheduled testing. As a result, all public elementary and secondary schools that fail to receive proper consent from parents and still coerce students into answering a survey's questions could be subject to judicial scrutiny.

The final three provisions are closely associated. Section two establishes that instead of the Goals 2000 amendment, which provides that the Secretary has the single authority to establish a review board within its federal department, that power is bestowed to the states.<sup>317</sup> Thus, the proposed provision combines the principles of the Goals 2000 amendment and also the Individuals with Disabilities Education Act, redefining the statute to create a more localized system of regulation.<sup>318</sup> By creating a more localized system, the complaints filed with the state agencies will have a better chance of being reviewed because the agencies will not be as bombarded as the FPCO has been in the past. Consequently, this proposed amendment, granting enforcement power to the fifty states, will be more effective for parents than the current statute that only allows the federal government to act.

Section 2(a) reestablishes the Secretary of Education's duties under the PPRA. First, instead of the Secretary controlling all of the Nation's public schools, his job is to oversee the state educational agencies, ensuring that the state agencies are fulfilling their duties. Therefore, the Secretary no longer has to review the filed complaints because that duty belongs to the states. Second, the Secretary is to manage and distribute federal funds solely to the state agencies. Consequently, unless a state agency violates its duties under the statute or a public school appeals directly to the Department, forcing the Secretary to act, he should no longer have any immediate interaction with the public schools.<sup>319</sup>

Section 2(b) creates a new and stronger method of enforcement for the PPRA. First, the proposed provision grants all of the Secretary's

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<sup>317</sup> As stated above, this proposed provision is premised on the federal to state regulations in IDEA. See *supra* note 307. For more information on IDEA, see Rebecca L. Bouchard, *The Relationship Between the Individuals with Disabilities Education Act and Section 1983: Are Compensatory Damages an Available and Appropriate Remedy?*, 25 W. NEW ENG. L. REV. 301 (2003); Joshua Andrew Wolfe, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals with Disabilities Education Act*, 55 VAND. L. REV. 1627 (2002).

<sup>318</sup> See *supra* note 311 (discussing how the proposed amendment mimics the IDEA).

<sup>319</sup> If a public school allegedly violates the PPRA and the state agency denies it federal funds, the public school can appeal to the Secretary and the FPCO for review.

former power to the states. Now, when parents believe a PPRA violation has occurred in their child's school, they will turn to the state educational agencies and not to the FPCO. Second, this amendment compels state agencies to supervise the public schools in their region to make certain that the schools are abiding by the statute's provisions. Third, this amendment institutes a new standard for allocating funds. Now, instead of the schools automatically receiving a set amount of money each year, schools will be granted funds on a contingency basis.<sup>320</sup> If a school complies with the PPRA, it will receive the full amount of funds promised. But, if the school fails to follow the PPRA's guidelines, it will not receive the funds for that school year, and it will be suspended for the next academic year. That suspension, however, is subject to review after one year. If the school can prove it followed the PPRA's provisions, the suspension will be terminated.<sup>321</sup> Thus, this proposed amendment creates a penalty for those schools that either knowingly, or negligently, fail to comply with the statute. As a result, the PPRA is a more efficient statute.

Through the revisions of the model statute, Mr. and Mrs. Wilson will have the ability to file a claim with the Happy Days School Board, the state educational agency, or take more serious action by filing a claim in court.<sup>322</sup> Also, Mr. and Mrs. Wilson know that if any future surveys arise containing invasive material, Happy Days will be required to receive their consent because the statute now covers surveys both required and voluntary. More importantly, the Wilsons will not have to worry whether little Wendy is being asked how she feels about sex or whether William is being introduced to thoughts of a world with one less race. Instead, Mr. and Mrs. Wilson will know their children are in school learning, rather than serving as subjects for researchers, who want to use

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<sup>320</sup> For example, all of Happy Days schools will be reviewed after a school year is complete. If Happy Days Elementary School complied with the PPRA's provisions, it will be given federal funds, which it can use during the following year. However, if Happy Days failed to follow the PPRA, it will be denied the funds outright.

<sup>321</sup> For example, when the state agency reviews Happy Days Elementary in June 2004 and determines that it violated the PPRA in that academic year, the school would not receive the funds for the 2003-2004 year. Nevertheless, it would again be subject to review in June 2005.

<sup>322</sup> See Part I. In Part I, Mr. and Mrs. Wilson did not have the ability to obtain any form of effective relief for Wendy and William. Now, as a result of the amended statute, Mr. and Mrs. Wilson will be able to protect their children. See also *supra* note 307 (illustrating the requirements of which form of relief can be obtained at what time).

public elementary and secondary classrooms as their personal laboratories.<sup>323</sup>

#### V. ENOUGH IS ENOUGH

*Dear Senator Grassley: . . . I think it is wrong that [schools] are trying to change and monitor our attitudes. I want to go to school to learn facts and not learn what opinions my school administration wants me to know. I want to form my own opinions. I urge Congress to help make sure kids can form their own opinions.*<sup>324</sup>

Since the Supreme Court's decisions in *Meyer* and *Pierce*, parents have held a constitutional right to direct the upbringing of their children. However, for the past few decades, the strength of that right has faded. Even with the enactment of statutes like the PPRA, parental rights have almost become extinct, especially in public education.

At one time, children were sent to school to learn the basic skills necessary to function in society. However, as researchers recognized the experimentation prospects of a classroom, children ceased being the students and became targeted as test subjects.<sup>325</sup> In 1978, Senator Hatch recognized the growing problem in the Nation's public schools and enacted the PPRA to help combat the problem. However, with each invasive survey that continues to be administered, another example is provided of the statute's ineffectiveness.

For nearly thirty years, the PPRA has failed to be a weapon that parents need to protect their children against researchers and public schools that encourage those researchers. Regardless of a survey's purported use to society as a whole, parents should be allowed to decide what is best for their child and for their family. In fact, the Constitution

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<sup>323</sup> Phyllis Schafly, President of the organization Eagle Form, asserted in an interview her disgust with researchers invading schools and conducting surveys by boldly announcing that "[a]ll you have to do is turn on the TV" to understand that problems exist such as underage drinking, drugs, and teenage pregnancy. See Archibald, *supra* note 127. Therefore, she emphasizes, "[w]hether it's 55 percent or 58 percent makes no difference," the problems still exist, and the surveys are not helping solve anything. *Id.*

<sup>324</sup> 140 CONG. REC. 1217-18 (1994) (written statement by Michelle Petersen, concerned student, to Senator Grassley).

<sup>325</sup> See generally 124 CONG. REC. 27,423 (1978). Senator Hatch believed that the problem with invasive testing in public schools began "when schools started becoming more concerned with children's attitudes, beliefs, and emotions rather than providing them with basic education." *Id.*

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supports the idea that "[p]arents should have the right to know about the values and attitudes being taught to their children, as well as the right to decide who will teach beliefs, values, and attitudes to their children."<sup>326</sup> If the PPRA is not amended to correct the statute's legislative failings, parents will lose their fundamental right to decide whether or not their children should be subjected to certain non-educational information in the classroom. In the end, parents will be forced to watch their children become nothing more than "second class citizens" in their own classrooms.<sup>327</sup>

Now, imagine Congress recognized the PPRA's weaknesses and acted to resolve those issues as proposed in this Note. Hypnotic will no longer be able to advance its social surveys onto students without first obtaining parental consent. Thus, Mr. and Mrs. Wilson can finally protect their children, knowing that if a violation again occurs at Happy Days, they will be able to seek and obtain relief for themselves, Wendy, and William. Additionally, the Wilsons have the ability to attain that relief either through the courts or the state government. In the end, the proposed statute will not be able to stop Hypnotic from trying to conduct its experiments in Happy Days schools, but it will stop little Wendy and William from having to participate if Mr. and Mrs. Wilson conclude, as their parents, that the material is inappropriate for a classroom setting. Finally, the PPRA is an enforceable statute.

**Beth Garrison\***

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<sup>326</sup> 140 CONG. REC. 1227 (written statement by Cynthia L. Sharretts, concerned parent, to Senator Grassley).

<sup>327</sup> *Merriken v. Cressman*, 364 F. Supp. 913, 919 (E.D. Pa. 1973) (quoting *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969)); *see supra* note 1.

\* Candidate for J.D., Valparaiso University School of Law, 2005. I would like to dedicate this Note to my family, especially my parents H. Morris and Barbara Garrison, who taught me the value of perseverance, strength, and hard work. Additionally, my sincerest thanks go out to Professor Susan Stuart and Samantha Ahuja, for without their guidance, this Note would never have been possible. Finally, I would like to thank Frank Dale, who not only inspires me daily, but whose patience and love has made me a better person.