STUDENT PRIVACY AND SCHOOL SURVEILLANCE VIDEOS

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ABSTRACT

Chanda Denee Marlowe: Student Privacy and School Surveillance Videos
(Under the direction of Cathy Packer)

This thesis takes a close look at school video surveillance case law, pertaining to both school employees and students, to try to determine what legal rights, if any, students have to be free from school video surveillance on public school grounds. It concludes that, unless a state law offers greater privacy protection, students have a right to be free from video surveillance in school locker rooms or other areas on campus that schools have designated for them to change clothes, but nowhere else. This thesis also takes a close look at the statutes, regulations, guidance, and court decisions that govern the disclosure of school surveillance videos to better understand who can get access to those videos and under what circumstances. Given a school's broad authority to record its students and staff, the issue of who gets access to the surveillance footage after a student has been recorded is particularly salient. Finally, this thesis concludes with a set of best practices for public schools that are considering adopting or increasing school video surveillance.

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CHAPTER 1: SCHOOL VIDEO SURVEILLANCE

Introduction

Schools are keeping close eyes on their students.[1] Seventy-five percent of the nation's public elementary, middle, and high schools report use of one or more security cameras as part of their school monitoring systems, and, as one lawyer put it, public school districts across the nation are beginning to adopt America's "newest darling of criminal justice reform"– body-worn cameras.[2] Even though these surveillance measures are intended to keep schools safe, privacy advocates are skeptical.[3] They worry that any benefits gained from these initiatives will come at the expense of students' privacy.[4] With cameras in schools increasing, it is important to consider what legal rights students have to challenge school video surveillance.

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[1] LUCINDA GRAY, ET AL., U.S. DEP'T OF EDUC., PUBLIC SCHOOL SAFETY AND DISCIPLINE: 2013–14 (2015). The percentage of schools using one or more security cameras has increased considerably since 2009–10 when sixty-one percent of schools reported the use of one or more video surveillance cameras.

[2] NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., PUBLIC SCHOOL SAFETY AND DISCIPLINE: 2013–14 (2015), https://nces.ed.gov/pubs2015/2015051.pdf; Rachel Levinson-Waldman, *The Dystopian Danger of Police Body Cameras,* BRENNAN CTR. FOR JUST. (Aug. 17, 2015), https://www.brennancenter.org/blog/dystopian-danger-police-body-cameras. While there are currently no national statistics available on the use of police body cameras in schools, there have been news reports about the use of body cameras in schools in Houston, Texas; Memphis, Tennessee; Topeka, Kansas; and Des Moines, Iowa, have adopted them recently. Evie Blad, *Body Cameras on School Police Spark Student Privacy Concerns*, EDUC. WK., Mar. 3, 2015, http://www.edweek.org/ew/articles/2015/03/04/body-cameras-on-school-police-spark-student.html. The school district in Houston, Texas, started with 25 school officers wearing body cameras as a part of a pilot program, and the district has plans to expand the program to all 210 members of the force. *Id.* The school district in Des Moines, Iowa, has taken this initiative one step further by equipping its principals and assistant principals with body cameras to wear while interacting with students and parents. Mackenzie Ryan, *New Arena for Body Cameras: Iowa Schools*, USA TODAY, July 6, 2015, https://www.usatoday.com/story/news/nation-now/2015/07/06/iowa-body-cameras-video-schools/29761487/.

[3] Evie Blad, *Body Cameras on School Police Spark Student Privacy Concerns*, EDUC. WK., Mar. 3, 2015, http://www.edweek.org/ew/articles/2015/03/04/body-cameras-on-school-police-spark-student.html.

[4] *See* discussion *infra* Chapter I, Part II.

According to the Association of Texas Professional Educators, the legal implications of school video surveillance can be divided into main categories: "the legality of making a recording of students and the legality of showing that recording to a specific individual."[5] The Supreme Court has ruled that schools cannot make recordings of students in school locker rooms where they change clothes, but courts have yet to address the issue of whether students can be recorded on other areas of a school's campus.[6] In cases outside of the school environment, courts have consistently held that individuals have no reasonable expectation of privacy when they are in public view.[7] Therefore, it is generally assumed by school officials that students can be recorded in common areas in schools because common areas are considered within the public view.[8] Proponents of body-worn cameras in schools have relied on this reasoning, along with the fact that cameras already line school parking lots, cafeterias, and hallways, to argue that outfitting school officers and administrators with body cameras is a natural progression without

[5] *Cameras in the classroom: FAQs on Senate Bill 507*, TEACH THE VOTE (July 15, 2015), http://www.teachthevote.org/news/2015/07/15/cameras-in-the-classroom-faqs-on-senate-bill-507/.

[6] Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 497 (6th Cir. 2008) ("[V]ideo surveillance … significantly invaded students' reasonable expectations of privacy in boys' and girls' locker rooms.").

[7] *See* Florida v. Riley, 488 U.S. 445, 448-49 (1989); U.S. v. Concepcion, 942 F.2d 1170, 1172 (7th Cir.1991); U.S. v. Boden, 854 F.2d 983, 990 (7th Cir.1988); U.S. v. Taketa, 923 F.2d 665, 677 (9th Cir.1991).

[8] *See, e.g.*, Chadwell v. Brewer, 59 F. Supp. 3d 756, 765 (W.D. Va. 2014) (holding a teacher, who was suspected of drinking on the job, had no constitutional right to privacy to be free recording in his office); Plock v. Bd. of Educ. of Freeport Sch. Dist., 145, 545 F. Supp. 2d 755 (N.D. Ill. 2007) (holding teachers had no reasonable expectation of privacy in communications in their classrooms, as required to challenge audio monitoring under Fourth Amendment); Goodwin v. Moyer, 549 F. Supp. 2d 308, 2006 WL 839342 (M.D. Pa. 2006) (holding a bus driver, who was suspected of abusing a student, had no expectation of privacy when it comes to school video surveillance on a public school bus); John E. Theuman, *Annotation, Constitutionality of Secret Video Surveillance,* 91 A.L.R.5th 585, 596 (2001); Dominique Braggs, *Webcams in Classrooms: How Far Is Too Far?* 33 J.L. & EDUC. 275, 277–82 (2004).

legal ramifications.[9] This thesis will explore whether these assumptions about student privacy are settled by law.

Given a school's seemingly broad authority to record its students, the issue of who gets access to the surveillance footage after a student has been recorded is particularly salient and will also be explored in this thesis. The Family Educational Rights and Privacy Act[10] (FERPA) generally governs the disclosure of school surveillance videos. When a school surveillance video is considered an education record under FERPA, it cannot be disclosed to the public without parental permission.[11] Unfortunately, it is not always easy to determine what constitutes an education record under FERPA.[12] Finally, even if a school surveillance video is determined to be an education record under FERPA, it can still be disclosed to appropriate parties under certain circumstances.

Thus, the three-fold purpose of this thesis is to take a close look at the legal rights of students to challenge public school video surveillance, the rights of others to access surveillance videos once they have been recorded, and best practices for schools that are considering adopting or increasing school video surveillance measures. [13] Chapter One will discuss relevant scholarly literature, research questions, methodologies, and limitations. Chapter Two will review cases in which students and school employees have challenged school video surveillance under the

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[9] *See* Rachel Levinson-Waldman, *The Dystopian Danger of Police Body Cameras,* BRENNAN CTR. FOR JUST. (Aug. 17, 2015), https://www.brennancenter.org/blog/dystopian-danger-police-body-cameras.

[10] 20 U.S.C. 1232g(a)(4)(A).

[11] *Id.*

[12] 20 U.S.C. 1232g(a)(4)(A) (defining "education records" as "those records, files, documents, and other materials which contain information directly related to the student and are maintained by an educational agency or institution or by a person acting for such agency or institution.") There is no comprehensive list of what is considered an education record under FERPA. *See id.*

[13] School employee cases are included because the courts' discussions of what makes it reasonable to record employees in some areas of a school's campus but not others can shed light on whether students are likely to receive similar protections in those areas.

Fourth Amendment, state constitutions, state tort law, and state eavesdropping statutes in order to better understand what students can do legally to stop schools from recording them. Chapter Three will review FERPA, along with the U.S. Department of Education's FERPA regulations and the U.S. Department of Education's guidance interpreting FERPA, state privacy laws, and court decisions that govern the disclosure of student information in order to better understand who can get access to public school surveillance videos and under what circumstances. Chapter Four, the final chapter of this thesis, will provide a summary of the finding of this research and a best practice guide for school districts that are considering adopting or increasing school video surveillance measures.

Literature Review

While scholars have been writing about surveillance, in general, for centuries, scholars began writing about school video surveillance, in particular, in the early 2000s. Scholars have discussed why schools subject students to school video surveillance, what problems are caused when students are subjected to school video surveillance, whether students have protection against school video surveillance, and who can access school surveillance videos.

Why Schools Subject Students to School Video Surveillance

Schools subject students to school video surveillance to keep students safe. According to education law scholar Kevin P. Brady, "Beginning in the 1980s, the primary justification for installing video cameras in U.S. schools was as a deterrent to school violence, vandalism, and theft."[14] Brady explained that school leaders are similar to parents in that they both desire to

[14] Kevin P. Brady & Cynthia Dieterich, *Video Surveillance of Special Education Classrooms: Necessary Protections of Vulnerable Students or Intrusive Surveillance of Select Student Populations?*, 325 EDUC. L. REP. 573, 577 (2016).

protect children.[15] Courts have found this school responsibility for maintaining school safety argument compelling, even if student privacy is sacrificed. For example, in one student privacy case, the U.S. Supreme Court said: "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."[16]

Unfortunately, there is some evidence that school video surveillance does not prevent violence and that it might harm students. According to the National Association of School Psychologists, "There is no clear evidence that the use of metal detectors, security cameras, or guards in schools is effective in preventing school violence."[17] As Dominique Braggs explained, Columbine High School had surveillance cameras in place prior to the 1999 school shooting, but they were largely unmonitored and did not deter the two shooters.[18] Additionally, the National Association of School Psychologists wrote, "Surveillance cameras in schools may have the effect of simply moving misbehavior to places in schools or outside of schools that lack surveillance."[19]

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[15] *Id.*

[16] Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. vs. Earls 536 U.S. 822, 831 (2002); *see also* New Jersey v. T.L.O., 469 U.S. 325, 350 (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.").

[17] NAT'L ASS'N OF SCH. PSYCHOLOGISTS, RESEARCH ON SCHOOL SECURITY: THE IMPACT OF SECURITY MEASURES ON STUDENTS 1 (2013), http://www.audioenhancement.com/wp-content/uploads/2014/06/school-security-by-NASP.pdf; *see also* Andrew Hope, *Governmentality and the 'Selling' of School Surveillance Devices*, 63 SOC. REV. 4, 840–47 (2015) ("[T]he continuing high incidence of school shootings in the U.S. (eight in 2010, ten in 2011, fourteen in 2012, thirty-two in 2013 and over forty in 2014), suggests that increasing use of school surveillance devices might not provide an adequate solution.").

[18] Dominique Braggs, *Webcams in Classrooms: How Far Is Too Far?* 33 J.L. & EDUC. 275, 281 (2004).

[19] NAT'L ASS'N OF SCH. PSYCHOLOGISTS, *supra* note 17.

Schools may also monitor students because they want to encourage good behavior. Bryan Warnick, an Ohio State University professor, noted in his research on school video surveillance that "some teachers use webcams to allow parents to track the activities of their children in the classroom."[20] In those instances, the teachers hoped that parental involvement would have a direct impact on the students' actions in their classrooms.[21] According to privacy expert Daniel Solove, "This aspect of surveillance does not automatically make it harmful . . . since social control can be beneficial and every society must exercise a sizeable degree of social control."[22] Psychological studies provide interesting examples of why this is true. For example, in one study conducted by Arther L. Bearman *et al.*, children selected fewer pieces of candy when there was a mirror behind the unguarded candy bowl.[23] In another study, psychologists Max Ernest-Jones *et al.* found that people were twice as likely to clean up after themselves in a cafeteria when there was a poster of human eyes on the cafeteria wall.[24] These findings show that school video surveillance may produce socially desirable results that are both beneficial to the individual student and the school community at large.

What Problems Are Caused When Students Are Subjected to School Video Surveillance

Scholars have written about the problems caused by surveillance, some of which are especially applicable to students. For one, the knowledge or perception of surveillance can have a chilling effect, curtailing student expression, creativity, and growth. According to Solove: "Not

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[20] Bryan Warnick, *Surveillance Cameras in Schools: An ethical analysis*, 77 HARV. EDUC. REV. 317, 319 (2007).

[21] *Id.*

[22] Daniel J. Solove, *A Taxonomy of Privacy*, 154 UNIV. OF PENN. L. REV. 477, 493 (2006).

[23] Arthur L. Beaman et al., *Self-Awareness and Transgression in Children: Two Field Studies*, 10 J. OF PERSONALITY & SOC. PSYCHOL. 1835–46 (1979).

[24] Max Ernest-Jones et al., *Effects of Eye Images on Everyday Cooperative Behavior: A Field Experiment*, 32 EVOLUTION & HUM. BEHAV. 172–78 (2011).

only can direct awareness of surveillance make a person feel extremely uncomfortable, but it can also cause that person to alter her behavior. Surveillance can lead to self-censorship and inhibition."[25] Law professor Julie Cohen further explained: "[P]ervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream. Monitoring constrains the acceptable spectrum of belief and behavior [resulting in] a subtle yet fundamental shift in the content of our character, a blunting and blurring of rough edges and sharp lines."[26] According to Bryan Warnick, a professor at Ohio State University, school video surveillance has the potential to make every moment static.[27] Warnick argued, "Places of human growth and development [like schools] need to be places that possess a certain type of forgiveness . . . [and] the presence of video cameras and recordings sends a message of neither forgiveness nor forgetfulness."[28] As legal scholar John Theuman pointed out, "Video surveillance . . . may be considered far more invasive than conventional investigative techniques – for the camera sees all, and forgets nothing."[29] This has made law scholars and parents worry that past judgments or unflattering evaluations will follow students for unreasonable amounts of time and stifle their potential.[30]

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[25] Solove, *supra* note 22, at 493.

[26] *See* Julie E. Cohen, Examined Lives: Informational Privacy and the Subject as Object, 52 STAN. L. REV. 1373, 1397–98 (2000).

[27] Warnick, *supra* note 20, at 333–34.

[28] *Id.*

[29] John E. Theuman, Annotation, *Constitutionality of Secret Video Surveillance*, 91 A.L.R. 5th 585, 596 (2001).

[30] *See, e.g.*, Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013); *Beyond One Classroom: Parental Support For Technology and Data Use in Schools*, FPF SURV. (Future of Privacy Forum, Washington, D.C.), Dec. 8, 2016, at 5, *available at* https://fpf.org/wp-content/uploads/2016/12/Beyond-One-Classroom.pdf. Sixty-eight percent of parents are concerned that an electronic record would be used in the future against their child by a college or an employer. *Id.* Social media scholar danah boyd does not capitalize her name. *See* danah m. boyd, *What's in a Name?,* DANAH, https://www.danah.org/name.html.

Surveillance can also affect students' perceptions of the world and their self-images. Social media scholar and youth advocate danah boyd acknowledged that school surveillance can provide a sense of security for students, but also explained that it "can evoke anger, embarrassment, guilt, shame, [and] fear."[31] The National Association of School Psychologists said, "Analysis of the use of surveillance cameras in schools suggests that they may work to corrode the educational environment by, among other things, implicitly labeling students as untrustworthy."[32] According to Kirstie Ball *et al.*, there is a risk that children who are subjected to extensive monitoring will begin to view themselves as criminal or delinquent because surveillance in many contexts is focused on monitoring suspicious groups to prevent criminal activity.[33]

Do Students Have Protection Against Public School Video Surveillance?

The consensus among scholars is that public schools do not violate the Fourth Amendment when they implement school video surveillance because school employees and students have no reasonable expectation of privacy in common areas in schools.[34] In 2003, for example, criminal justice scholar Crystal A. Garcia and law professor Sheila Suess Kennedy wrote that "[i]t is highly unlikely that courts will find constitutional impediments to deployment of most technologies currently in the schools," but the constitutional problems that "currently exist are more likely to involve discriminatory use or an impermissible location of the

[31] danah boyd, *Making Sense of Privacy and Publicity*, SXSW (Austin, TX, Mar.13, 2010), http://www.danah.org/papers/talks/2010/ SXSW2010.html. Boyd does not capitalize her name.

[32] NAT'L ASS'N OF SCH. PSYCHOLOGISTS, *supra* note 17.

[33] KIRSTIE BALL ET AL., *The Problem of Surveillance and Gender*, ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES 51 (Routledge 2012).

[34] *See,* e.g., Clifford S. Fishman & Anne T. McKenna, WIRETAPPING AND EAVESDROPPING § 30:24 ("A number of courts have properly held that teachers and students have no right not to be videotaped in classrooms and other public areas of a public school."); John E. Theuman, Annotation, *Constitutionality of Secret Video Surveillance*, 91 A.L.R. 5th 585, 596 (2001).

technology."[35] Garcia and Kenney pointed out that a camera in a hallway would be inoffensive because it would see no more than what an alert teacher would see whereas a camera in a restroom might constitute an invasion of student privacy. In 2004, Braggs discussed the constitutional issues surrounding webcams in classrooms, using Biloxi, Mississippi's school district, the first in the nation to place webcams in all of its classrooms, as a case study.[36] Braggs defined webcams as "small cameras that take pictures at regular intervals and upload the information to a website."[37] The cameras in Braggs's study recorded images, not sound.[38] According to Braggs, Biloxi's installation of webcams in all classrooms did not violate the constitution because "classrooms are public spaces where students have no expectation of privacy."[39]

In 2004, education law scholars Nathan Roberts and Richard Fossey reviewed two cases in which state courts ruled on the constitutionality of video surveillance of school employees on school grounds.[40] Roberts and Fossey wrote that the courts relied on the U.S. Supreme Court case *O'Connor v. Ortega*,[41] which established "the constitutionality of a public workplace search

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[35] Crystal A. Garcia & Sheila Suess Kennedy, *Back to School: Technology, School Safety and the Disappearing Fourth Amendment*, KAN. J.L. & PUB. POL'Y, 275, 280 (2003).

[36] Braggs, *supra* note 18, at 277–82 (2004).

[37] *Id.* at 277.

[38] *Id.*

[39] *Id.* at 278. Braggs based her conclusion on the line of Supreme Court decisions that established that individuals have no reasonable expectation of privacy in public places and the U.S. Supreme Court case *New Jersey v. T.L.O.*, which held that "students within the school environment have a lesser expectation of privacy than members of the population generally." 469 U.S. 325, 348 (1995).

[40] Nathan Roberts & Richard Fossey, *Searches and Seizures in the School Workplace: Where Does the Teacher Stand?*, 192 ED. LAW REP. 4 (2004).

[41] 480 U.S. 709, 107 (1987).

would be judged based on its reasonableness, not on the more onerous 'probable cause'[42] standard that applies to the police."[43] According to Roberts and Fossey, the courts concluded the schools' video surveillance measures were reasonable because the places in question – a classroom and an employee break room – were open and visible to others on campus.[44]

In 2007, education law scholar Kevin P. Brady discussed "the appropriate laws and inherent limitations associated with the installation of a legally compliant video camera surveillance system in the public school environment."[45] Brady reviewed three lower court cases in which the courts ruled school employees had no reasonable expectation of privacy in a classroom, a shared office space, or an employee break room.[46] Brady concluded, "Generally, the use of video surveillance without audio capability in schools does not violate any constitutional principles."[47] In 2013, Jason P. Nance, an assistant professor at the University of Florida Levin College of Law, wrote that school video surveillance for security purposes is constitutional under the Fourth Amendment.[48] Nance said, "[I]f the issue were presented to courts, courts most likely

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[42] Ornelas v. United States, 517 U.S. 690, 696 (1996) (Probable cause "exist[s] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.")

[43]Roberts & Fossey, *supra* note 40, at 4. In *State v. McLellan*, the Supreme Court of New Hampshire relied on *O'Connor v. Ortega* when considering a criminal case against a school custodian who had been charged with misdemeanor theft for allegedly taking money from a teacher's desk. 744 A. 2d 611 (N.H. 1999). In *Brannen v. Kings Local School District*, the Ohio Court of Appeals relied on *O'Connor* when considering a case in which school custodians claimed a hidden video camera, which their supervisor had placed in their break room, violated their Fourth Amendment right to be free from unlawful searches. 761 N.E.2d 84 (Ohio Ct. App. 2001).

[44] *Id.*

[45] Kevin P. Brady, *"Big Brother" Is Watching, but Can He Hear, Too?: Legal Issues Surrounding Video Camera Surveillance and Electronic Eavesdropping in Public Schools*, 218 EDUC. L. REP. 1 (2007).

[46] Roberts v. Houston Indep. Sch. Dist., 788 S.W.2d 107 (Tex. Ct. App. 1990); Crist v. Alpine Union Sch. Dist., 2005 WL 2362729 (Cal. App. 4 Dist.); Brannen v. Kings Local Sch. Dist. Bd. of Educ., 761 N.E.2d 84 (Ohio Ct. App. 2001).

[47] Kevin P. Brady, *supra* note 45, at 5.

[48] Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1 (2013).

would justify the use of surveillance cameras in public spaces at schools on the theory that recording individuals in public places is minimally intrusive."[49] However, Nance argued that recording individuals in public places is intrusive.[50] According to Nance, when schools use a combination of security measures, the measures are no longer minimally intrusive: "the cumulative effect . . . amounts to a substantial invasion of students' privacy, harming students' educational progress."[51] Nance called for students' Fourth Amendment rights to be strengthened.[52]

Scholars are in agreement that school employees and students have reasonable expectations of privacy in school locker rooms. In 2007, Brady reviewed one case decided by the U.S. District Court for the Middle District of Tennessee, *Brannum v. Overton County School Board*,[53] in which the court ruled against the school district for videotaping students undressing in a locker room.[54] Based on *Brannum*, Brady advised public school officials to use caution when choosing the locations of their video cameras.[55] In 2008, *Brannum* went to the U.S. Court of Appeals for the Sixth Circuit,[56] and Judith O'Gallagher was one of the first lawyers to provide a detailed summary of that court's analysis and ruling.[57] O'Gallagher

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[49] *Id.* at 13.

[50] *Id.* at 8.

[51] *Id.*

[52] *Id.* at 57.

[53] 516 F.3d 489 (6th Cir. 2008).

[54] Kevin P. Brady, *supra* note 45, at 5.

[55] *Id.*

[56] 516 F.3d 489 (6th Cir. 2008).

[57] Judith O'Gallagher, *Surveillance Camera in School Locker Room Violates Fourth Amendment*, 26 MCQUILLIN MUN. L. REP. 1. (2008).

explained that the Sixth Circuit relied on the constitutional prerequisites of valid school searches, which were established in *New Jersey v. T.L.O.* (1985)[58] and *Vernonia School Dist. 47J v. Acton* (1995),[59] to reach its conclusion that videotaping students while they changed clothes was an unreasonable search under the Fourth Amendment.[60] In *T.L.O.*, the U.S. Supreme Court held that an assistant principal's search of a high school student's purse did not violate the Fourth Amendment.[61] The *T.L.O.* Court said a search is reasonable when it is justified at its inception and when there are reasonable grounds for suspecting the search will turn up evidence that a student has violated school rules or the law.[62] O'Gallagher explained how the *Brannum* court relied on the *T.L.O.* framework to determine that the school's decision to use video surveillance for security purposes was justified at its inception but not reasonable in scope and manner.[63] According to O'Gallagher, the *Brannum* court found recording students in a school locker room where students changed clothes to be too intrusive, especially when there was no history of threats to security in that location.[64] O'Gallagher also discussed how the *Brannum* court distinguished its facts from *Vernonia*.[65] In *Vernonia*, the U.S. Supreme Court held that a school's decision to subject student-athletes to random drug tests did not violate the Fourth Amendment.[66]

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[58] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[59] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

[60] O'Gallagher, *supra* note 57.

[61] New Jersey v. T.L.O., 469 U.S. 325 (1985).

[62] *Id.* at 326.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

As O'Gallagher explained, the parents in *Vernonia "*were well aware that participation in school sports was conditioned on the students submitting to drug-testing policies," whereas the parents in *Brannum* were not put on notice that their children were subjected to video surveillance in school locker rooms.[67]

Scholars and others have written about state laws that limit a school's ability to record its students. In 2012, law student Beth Martinez wrote about a Georgia statute that provides greater protection against the silent video recording of students than federal law provides.[68] The Georgia statute forbids "[a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view."[69] Martinez explained that the Georgia statute defines a private place as a space "where one is entitled reasonably to expect to be safe from casual or hostile . . . surveillance."[70] According to Martinez, this broad definition has proven problematic because it lends itself to various interpretations.[71] Martinez discussed a Georgia court's observation in *Atlanta Independent School System v. S.F. ex rel. M.F.*[72] that "according to Georgia courts, an evaluation of a defendant's expectation of privacy should depend on 'the same principles as privacy protections under the Fourth Amendment,'" not the Georgia surveillance statute.[73] In

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[67] O'Gallagher, *supra* note 57.

[68] Beth Martinez, *Location, Location, Location: A "Private" Place and Other Ailments of Georgia Surveillance Law Curable Through Alignment with the Federal System*, 46 GA. L. REV. 1089 (2012).

[69] *Id.* at 1090 (quoting O.C.G.A. § 16-11-62(2)).

[70] *Id.* at 1092.

[71] *Id.* at 1108.

[72] No. 1:09-CV-2166-RWS, 2010 WL 4837613 (N.D. Ga. Nov. 23, 2010).

[73] Beth Martinez, *supra* note 68, at 1108–09 (quoting Atlanta Independent School System v. S.F. ex rel. M.F., No. 1:09-CV-2166-RWS, 2010 WL 4837613 (N.D. Ga. Nov. 23, 2010).

2016, education lawyers Stuart S. Waxman and Frank G. Barile analyzed two New York Public Employment Relations Board decisions[74] involving instances where school video surveillance conflicted with New York's Taylor Law.[75] The Taylor Law gives employees the right to negotiate the terms and condition of their employment.[76] Waxman and Barile explained that a school district's decision to use video surveillance might compromise employee job security or implicate employee privacy concerns, which could impact working conditions in violation of the Taylor Law.[77]

Who Can Access School Surveillance Videos?

Scholars have discussed the disclosure of school surveillance video to parents, police, and media. Most of those scholars, in a paragraph or two, point out the ambiguity surrounding schools' decisions to disclose or not to disclose school surveillance videos, but do not discuss this issue at length.

In 2007, education law scholar Kevin P. Brady wrote that parents are usually legally entitled to access videotapes of their children taken in a school setting under the Family Educational Rights and Privacy Act[78] (FERPA).[79] Also in 2007, W. D. Wright and Pamela Darr

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[74] *See* Civil Serv. Emps. Ass'n, Local 1000, 45 N.Y. P.E.R.B. P 3007 (2011); Custodian Ass'n of Elmont, 28 N.Y. P.E.R.B. P 4693 (1995).

[75] Stuart S. Waxman & Frank G. Barile, *"Eye in the Sky": Employee Surveillance in the Public Sector*, 79 ALB. L. REV. 131 (2016); N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 2015) (Under the Taylor Law, "it is an improper practice for a public employer or its agents deliberately to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights.")

[76] N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 2015).

[77] Stuart S. Waxman & Frank G. Barile, *"Eye in the Sky": Employee Surveillance in the Public Sector*, 79 ALB. L. REV. 131 (2016); N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 2015).

[78] 20 U.S.C. § 1232(g) (FERPA was passed in 1974 "to protect the privacy of student educational records by regulating to whom and under what circumstances those records may be disclosed.")

[79] Kevin P. Brady, *supra* note 45.

Wright, authors of *Special Education Law*, explained that schools do not always give parents access, even when parents are entitled to it.[80] According to Wright and Wright, "School officials use 'privacy arguments' to prevent parents from observing their child or having access to the child's records . . . because they want to show the parent who's boss."[81] Wright and Wright said this happens when a school believes it has made a mistake or when a parent questions a school's authority.[82]

Scholars have also discussed media access to school surveillance videos. For example, the Student Press Law Center has argued that FERPA has limited media access to student information more than legislators intended.[83] According to the Student Press Law Center, schools "persistently cite FERPA to deny journalists' requests for public records[, including school surveillance footage,] even when the records have little relation to a student's educational life."[84] The SPLC also said, "[M]any of the documents that schools and colleges mistakenly believe to be FERPA records . . . cannot qualify as 'education records' under the [Department of Education's] definition."[85] Law student Sarah P. West wrote, "Courts have not definitively established surveillance video as an education record, and the U.S. Department of Education has provided sparse guidance on the subject."[86] West also pointed out the "tension between FERPA,

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[80] PETER W.D. WRIGHT & PAMELA D. WRIGHT, SPECIAL EDUCATION LAW (Harbor House Law Press) (2007), http://www.wrightslaw.com/advoc/ltrs/video_privacy.htm.

[81] *Id.*

[82] *Id.*

[83] *FERPA and Access to Public Records*, STUDENT PRESS L. CTR. 1 (2016), http://du1hnuqovpr1r.cloudfront.net/20160413711l3MOalqW/dist/img/ferpa_wp.pdf.

[84] *Id.*

[85] *Id.* at 3.

[86] Sarah P. West, *They Got Eyes in the Sky: How the Family Educational rights and Privacy Act Governs Body Camera Use in Public Schools*, 65 AM. U. L. REV. 1533, 1536 (2016).

[which] require[es] student privacy and control over education records, and state open records laws, [which] require[e] disclosure of certain records." She explained that access to school surveillance video could vary state to state.[87]

Very few scholars have written about police access to school video surveillance. For example, in 2016, West explained that there was some ambiguity regarding whether body camera footage would be considered an education record or a law enforcement record under FERPA. According to West, education records are those records that are collected and maintained by school officials while law enforcement records are those records collected by law enforcement units for specific law enforcement purposes.[88] West further explained, "[L]aw enforcement records, as opposed to education records, may be disclosed to third parties, including agents of the juvenile justice system, without the student's consent."[89] West concluded, "The plain text of FERPA [] reinforces the concept that body camera footage is an education record, not a law enforcement record" because the footage would be use primarily in disciplinary proceedings by principals.[90]

Scholars have been writing about students' privacy rights and school video surveillance for nearly twenty years. The consensus among scholars is that schools can video students at school without violating students' Fourth Amendment rights except for in areas like locker rooms where students change clothes. On the other hand, scholars' discussions of whether schools can record and who can access those recordings are often a small part of larger articles

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[87] *Id.* at 1552.

[88] *Id.* at 1544.

[89] *Id.*

[90] *Id.* at 1557.

about school surveillance practices more generally.[91] There has been no thorough analysis of this topic. Each scholar analyzed only a few cases. One must consult several different articles to begin to see the full landscape of legal issues surrounding the video surveillance of students. This thesis will analyze all federal and state school video surveillance cases that discuss whether students have a right to be free from school video surveillance in public schools. This thesis will also explore who can access public school video surveillance footage, using FERPA and all cases in which a party has claimed a right to access school surveillance videos.

Research Questions and Methodology

This thesis will address the following research questions:

- What legal rights, if any, do students have to be free from public school video surveillance? How do courts decide?
- What do FERPA, state laws, and courts say about who can access public school surveillance footage and under what circumstances?
- What best practices should public schools follow when they are considering adopting or increasing school video surveillance measures?

The first research question will be answered by analyzing one case involving the rights of students to be free from video surveillance and nine cases involving video surveillance of school employees. These are both state and federal cases. School employee cases are included because the courts' discussions of what makes it reasonable to record employees in some areas of a school's campus but not others can shed light on whether students are likely to receive similar protections in those areas. The second research question will be addressed using the statutes, regulations, guidance, and court decisions that govern the disclosure of school surveillance video. The final question will be addressed using the body of information compiled in this thesis.

[91] This is includes metal detectors; Global Positioning System (GPS) monitoring; radio-frequency identification (RFID), which uses electromagnetic fields to automatically identify and track tags attached to object; and biometric monitoring.

Limitations

This thesis has three major limitations. First, this thesis focuses only on student privacy law as it pertains to public schools, not private schools. Private schools are not subject to the Fourth Amendment, state constitutions, and state statutes, and private schools that do not receive federal funds are not subject to FERPA. Second, there is, as of now, no case law discussing whether students have a right to be free from video surveillance in areas on school grounds other than school locker rooms.[92] For this reason, any legal analysis of students' rights to be free from surveillance in other areas on a school's campus must draw from cases where school employees have challenged school video surveillance.

[92] This excludes special education case law and collective bargaining case law.

CHAPTER 2: THE LEGALITY OF MAKING SCHOOL SURVEILLANCE VIDEOS

Introduction

In 2008, the U.S. Court of Appeals for the Sixth Circuit held that students have a Fourth Amendment right to be free from school video surveillance in school locker rooms where they change clothes.[1] The court found video surveillance of the locker rooms to be an unreasonable search under the Fourth Amendment.[2] Courts have yet to rule on whether students have a constitutional right to be free from video surveillance in other areas on school grounds. However, cases in which school employees have challenged school video surveillance under the Fourth Amendment suggest students are unlikely to be protected from school video surveillance in other areas on a school's campus.[3] When thinking about what these cases may mean for students, it is important to remember that the Supreme Court has said, "[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally."[4]

School employees have also challenged school video surveillance under state constitutions, state tort law, and state eavesdropping statutes. All these challenges but two were

[1] Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 499 (6th Cir. 2008).

[2] *Id.*

[3] *See, e.g.*, Chadwell v. Brewer, 59 F. Supp. 3d 756, 765 (W.D. Va. 2014) (holding a teacher who was suspected of drinking on the job had no constitutional right to privacy to be free recording in his office); Plock v. Bd. of Educ. of Freeport Sch. Dist., 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007) (holding teachers had no reasonable expectation of privacy in communications in their classrooms, as required to challenge audio monitoring under Fourth Amendment); Goodwin v. Moyer, 549 F. Supp. 2d 621, 634 (M.D. Pa. 2006) (holding a bus driver who was suspected of abusing a student had no expectation of privacy when it comes to school video surveillance on a public school bus).

[4] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995).

unsuccessful. Ten states expressly recognize a right to privacy in their constitutions,[5] and school employees from two of those states have argued unsuccessfully that school video surveillance violated their right to privacy under their state constitutions.[6] There are two cases in which school employees argued they had a right to be free from video surveillance under the common law tort of intrusion upon seclusion, and in one of these cases the school employee was successful.[7] Finally, all states except Vermont have laws regulating eavesdropping,[8] but, for the most part, school employees have not been successful in using state eavesdropping laws to challenge video surveillance that takes place on school grounds.[9] However, state eavesdropping laws vary from state to state,[10] and, in one case, the teachers who challenged a school district's plan to audio record their classroom were successful because their state's eavesdropping law required two-party consent.[11]

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[5] *Privacy Protections in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Dec. 3, 2015), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx ("Constitutions in 10 states—Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington—have explicit provisions relating to a right to privacy.").

[6] Crist v. Alpine Union Sch. Dist., D044775, 2005 WL 2362729, at *5 (Cal. Ct. App. Sept. 26, 2005); State v. McLellan, 744 A.2d 611 (N.H. 1999).

[7] John Doe (1-3) v. Dearborn Pub. Schs. No. 06-CV-12369-DT, 2008 WL 896066, *12 (E.D. Mich. Mar. 31, 2008) (holding gym teachers have stated a *prima facie* case on their intrusion upon seclusion claim based on the school recording them in their office, which was located in the school's locker room where they changed clothes); Crist v. Alpine Union Sch. Dist., D044775, 2005 WL 2362729, at *10 (Cal. Ct. App. Sept. 26, 2005) (holding teachers failed to as a matter of law to show that the school's surveillance of their high school office was highly offensive to a reasonable person).

[8] *Tape Recording Laws at a Glance*, REPS. COMMITTEE FOR FREEDOM OF THE PRESS (Aug. 1, 2012), https://www.rcfp.org/reporters-recording-guide/tape-recording-laws-glance.

[9] Evens v. Super. Ct., 91 Cal. Rptr.2d 497, 500 (Cal. Ct. App. 1999); People v. Drennan, 101 Cal. Rptr.2d 584, 590 (Cal. Ct. App. 2000); State v. Duchow, 749 N.W.2d 913, 925 (Wis. 2008).

[10] *State Law: Recording*, DIGITAL MEDIA L. PROJECT, http://www.dmlp.org/legal-guide/state-law-recording (last visited April 20, 2017).

[11] Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 920 N.E.2d 1087 (2009).

Finally, students and school employees have a right to challenge school video surveillance under a school policy if the policy prohibits surveillance.[12] One teacher sued her school district for violating its own policy that prohibited involuntary videotaping but lost her case because the policy was obsolete.[13] The court would not allow the teacher to hold the school district to its old policy.[14]

In every Fourth Amendment case, and in many of the others as well, courts discussed whether the school employee had a reasonable expectation of privacy in the place she was recorded. For there to be a search under the Fourth Amendment, there must be a government intrusion in an area where a person has a reasonable expectation of privacy.[15] Courts determine this on a case-by-case basis.[16] The less private an area is, the less likely it is that a reasonable expectation of privacy exists. Courts have ruled that school employees have no reasonable expectation of privacy in school classrooms or school break rooms.[17] Courts have found that school employees have a reasonable expectation of privacy in school offices and a diminished expectation of privacy on school buses.[18]

Part I of this chapter will review cases in which students and school employees have challenged school video surveillance under the Fourth Amendment. Part II of this chapter will review cases in which school employees have challenged school video surveillance under their

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[12] *See* Roberts v. Houston Indep. Sch. Dist., 788 S.W.2d 107, 111 (Tex. App. 1990), *writ denied* (June 27, 1990).

[13] *Id.*

[14] *Id.*

[15] Katz v. United States, 389 U.S. 347, 361 (1967).

[16] O'Connor v. Ortega, 480 U.S. 709, 710 (1987).

[17] *See, e.g.*, Plock v. Bd. of Educ. of Freeport Sch. Dist., 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007); Brannen v. Kings Local Sch. Dist. Bd. of Educ., 761 N.E.2d 84, 92 (Ohio Ct. App. 2001).

[18] John Doe (1-3) v. Dearborn Pub. Sch., No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008); Goodwin v. Moyer, 549 F. Supp. 2d 621 (M.D. Pa. 2006).

state constitutions. Part III of this chapter will review cases in which school employees have challenged school video surveillance under tort law. Part IV of this chapter will review cases in which school employees have challenged school video surveillance under state eavesdropping laws. Part V of this chapter will provide an example of a teacher who sued a school for violating its own policy.

Right to Privacy under the Fourth Amendment

When trying to determine whether school video surveillance violates students' and school employees' Fourth Amendment rights, courts first ask whether there was a search.[19] If a search occurred, courts then ask whether that search was reasonable.[20]

Did a Fourth Amendment Search Occur?

There are eight court cases that discussed the threshold question of whether a Fourth Amendment search occurred when a school district recorded its students or employees.[21] These cases relied on the Supreme Court's 1967 decision in *Katz v. United States*,[22] which formulated the "reasonable expectation of privacy" test that is used to decide when a governmental intrusion constitutes a "search" under the Fourth Amendment.[23] If the government has intruded into an area where a person has no reasonable expectation of privacy, then no search has occurred, and the analysis stops there.[24] The person does not have a constitutional right to challenge the video surveillance. According to the Supreme Court, a "reasonable expectation of privacy" exists

[19] Katz v. United States, 389 U.S. 347, 361 (1967).

[20] New Jersey v. T.L.O., 469 U.S. 325, 326 (1985).

[21] One case in which students challenged school video surveillance and seven cases in which school employees challenged school video surveillance.

[22] 389 U.S. 347 (1967).

[23] *Id.* at 361.

[24] *Id.*

when: (1) "the individual [has] manifested a subjective expectation of privacy in the object of the challenged search" and (2) "society [is] willing to recognize that expectation as reasonable."[25] The first prong of this test is subjective,[26] which makes it difficult to contest because a defendant will invariably affirm that expectation.[27] Therefore, courts generally focus on the second prong.[28] The second prong of the reasonable expectation of privacy test is objective.[29] According to one federal court, the objective prong generally addresses two considerations:

> [The first consideration focuses on] what a person had an expectation of privacy *in*, for example, a home, office, phone booth or airplane. This inquiry centers on whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a reasonable expectation of privacy. The second consideration examines what the person wanted to protect his privacy *from*, for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes. This inquiry, therefore, focuses on the government intrusion at issue.[30]

All courts did not go into detail about both considerations. Government employee cases often hinge on whether the government intrusion occurred in an area over which the employee had exclusive use.[31] In both school employee and student cases, "the extent to which the Fourth Amendment protects people may depend upon where those people are."[32] The next section of

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[25] California v. Ciraolo, 476 U.S. 207, 211 (1986).

[26] Smith v. Maryland, 442 U.S. 735, 740 (1979).

[27] Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Subjective Expectations*, 82 U. CHI. L. REV. 113 ("A majority of courts that apply *Katz* do not even mention the subjective inquiry; when it is mentioned, it is usually not applied; and when it is applied, it makes no difference to outcomes.")

[28] *Id.*

[29] Smith v. Maryland, 442 U.S. 735, 740 (1979).

[30] John Doe (1-3) v. Dearborn Public School, No. 06-CV-12369-DT, 2008 WL 896066, at *2 (E.D. Mich. Mar. 31, 2008).

[31] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709, 710 (1987); John Doe (1-3) v. Dearborn Public School, No. 06-CV-12369-DT, 2008 WL 896066, at *2 (E.D. Mich. Mar. 31, 2008).

[32] Minnesota v. Carter, 525 U.S. 469, 473 (1998).

this chapter details what courts have said about whether students and school employees have a reasonable expectation of privacy in a number of different school locations.

Locker rooms

The U.S. Court of Appeals for the Sixth Circuit held that students have a reasonable expectation of privacy in school locker rooms where they change clothes. In *Brannum v. Overton County School Board*,[33] school officials installed video cameras throughout a public middle school building, including the boys' and girls' locker rooms, in order to improve security.[34] The video footage was transmitted to an assistant principal's office where it was displayed and stored.[35] The Sixth Circuit noted that the school district did not put video surveillance guidelines in place, "written or otherwise, determining the number, location, or operation of the surveillance cameras."[36] Members of a visiting school's basketball team noticed the cameras during a girls' basketball game.[37] When the visiting team's coach notified the director of schools, the director's response was that the videotapes of the ten to fourteen-year-old girls contained "nothing more than images of a few bras and panties."[38] Thirty-four middle school students sued the school district despite the fact that the cameras were taken down a day after they were noticed.[39] While

[33] 516 F.3d 489 (6th Cir. 2008).

[34] *Id.* at 491–92.

[35] *Id.* at 492. ("In addition to [the assistant principal] receiving the images on his computer, they were also accessible via remote internet connection. Any person with access to the software username, password, and Internet Protocol (IP) address could access the stored images. Neither [the assistant principal] nor anyone else had ever changed the system password or username from its default setting. The record indicates that the system was accessed ninety-eight different times between July 12, 2002, and January 10, 2003, including through internet service providers located in Rock Hill, South Carolina; Clarksville, Tennessee; and Gainsboro, Tennessee.")

[36] *Id.*

[37] *Id.*

[38] *Id.* at 493.

[39] Brannum v. Overton Cty. Sch. Bd., 516 F.3d 491–93 (6th Cir. 2008).

the court "acknowledged that generally, students have a less robust expectation of privacy than is afforded the general population," it concluded that the "video surveillance … significantly invaded students' reasonable expectations of privacy in boys' and girls' locker rooms."[40] The Sixth Circuit explained that even though the Supreme Court has previously observed locker rooms as places that are "not notable for the privacy they afford . . . [t]his does not mean however, that a student's expectation of privacy in his or her locker room is nonexistent."[41] Instead, the Sixth Circuit recognized, "[T]he universal understanding among middle school age children in this country is that a school locker room is a place of heightened privacy."[42] According to the Sixth Circuit: "[S]tudents retain a significant privacy interest in their unclothed bodies . . . . [S]tudents using locker rooms could reasonably expect that no one, especially the school administrators, would videotape them, without their knowledge, in various states of undress while they changed their clothes for an athletic activity."[43]

School Offices

Two federal courts have held school employees have at least some expectation of privacy in their offices. In *John Doe (1-3) v. Dearborn Public School*,[44] the U.S. District Court for the Eastern District of Michigan said it was reasonable for gym teachers to expect to be free from school video surveillance in an office located inside the boys' locker room.[45] In this case, the principal of Dearborn High School installed cameras in the gym teachers' office because he

[40] *Id.*at 496.

[41] *Id.*

[42] *Id.* at 498.

[43] *Id.* at 496.

[44] No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

[45] *Id.* at *5.

suspected one of the gym teachers of theft.[46] The cameras were installed without the gym teachers' knowledge, and the images from the concealed camera were displayed on a monitor located in the main office copy room.[47] After finding out about the cameras, the gym teachers claimed they had "a reasonable expectation of privacy in their office."[48] The *Dearborn* court agreed.[49] The court found the gym teachers had established their subjective expectations of privacy by stating their claim.[50] The court found their expectations of privacy were reasonable because the school provided an office for the gym teachers to change from "street clothes to athletic clothes and to disrobe in order to shower after conducting physical education classes;" "the locker room/office [could] only be accessed from the boys' locker room and [was] contained in the boys' locker room;" and the office was for the exclusive use of the male physical education teachers who used the office at least three times a week for its intended purpose – changing clothes.[51] Because of this, the court determined the gym teachers had a reasonable expectation of privacy in their office that society would recognize.

In *Chadwell v. Brewer*,[52] the U.S. District Court for the Western District of Virginia held that surreptitiously videotaping the office of a teacher who was suspected of misconduct did not

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[46] *Id.* at *1.

[47] *Id.* ("The monitor was located in the main office copy room and could display images from the concealed camera and the other various cameras around the building. . . . [The security director] testified that the system does record live images on the disc but that the storage capacity was 30 days. This meant that on the 31st day, the 1st day was recorded over and that the "looping" is automatic. The images from the DVR could be recorded or burned onto a CD.")

[48] *Id.* at *4.

[49] *Id.* at *5. The court cited the two-part *Katz* test.

[50] John Doe (1-3) v. Dearborn Public Sch., No. 06-CV-12369-DT, 2008 WL 896066 *4 ("Addressing the first prong of the Katz test, Plaintiffs have established subjective expectations of privacy in the object of the challenged search. Plaintiffs claim they are entitled to privacy in their office and/or locker room.")

[51] *Id.* at *5.

[52] 59 F. Supp. 3d 756 (W.D. Va. 2014).

violate the teacher's reasonable expectation of privacy.[53] In this case, a principal hid a camera in the teacher's office because the principal suspected the teacher was drinking during school hours.[54] Each day, the principal reviewed the video footage, and, on one occasion, the video footage showed the teacher drinking beer at his desk.[55] The teacher was disciplined and then later terminated because he violated the terms of his discipline agreement.[56] The teacher sued the school district, alleging that the video surveillance of his office violated his Fourth Amendment rights.[57] He argued that he had a reasonable expectation of privacy in his office because it was "located at the end of a dead-end hallway and was rarely visited by anyone other than the teacher's aide who stored her belongings there."[58] The school district, on the other hand, argued he had no reasonable expectation of privacy because he shared the office with another individual and because "the public school setting [constitutes] an enclave of lowered expectations of privacy because public school administrators have the heightened burden of providing a safe haven for students."[59] While the court acknowledged the teacher's "privacy expectations were likely tempered by the shared nature of the space and the realities of the school environment

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[53] *Id.* at 763.

[54] *Id.* at 759.

[55] *Id.*

[56] *Id.* After reviewing the footage, the principal and the superintendent demanded that the teacher sign a "Last Chance Agreement," which required, among other things, that he participate in a thirty-day rehabilitation treatment program, that he never drink alcohol again, and that he release all his medical records, or face termination. The teacher signed the agreement to avoid losing his job, even though he strongly disagreed with its terms. Later when the school district obtained the teacher's medical records, the records revealed statements that the teacher had drank beer at a sports event and that he did not remain in the treatment program for thirty days. The school district terminated the teacher's employment because of these violations. *Id.*

[57] Chadwell v. Brewer, 59 F. Supp. 3d 756, 759 (W.D. Va. 2014).

[58] *Id.* at 763.

[59] *Id.*

itself," the court said the teacher "pleaded sufficient facts . . . to suggest that he had at least some expectation of privacy in his office."[60] Having satisfied the beginning of the Fourth Amendment analysis, the court's discussion then turned to whether the video search was reasonable. This issue will be discussed later in this chapter.

School Employee Break Rooms

There is only one case in which a court has discussed whether school employees have a reasonable expectation of privacy in a school break room. In *Brannen v. Kings Local School District*,[61] the Court of Appeals of Ohio ruled third-shift custodians had no reasonable expectation of privacy in a public school break room.[62] In this case, the supervisor of custodians installed a hidden camera in the employee break room when he suspected third-shift custodians of "taking unauthorized breaks for many hours, while turning in time sheets indicating they had worked their full eight-hour shifts."[63] The Ohio Association of Public School Employees negotiated a settlement between the district and the third-shift custodians so that the custodians would not be terminated for cheating the school district.[64] The custodians signed the agreement, admitting to taking unauthorized breaks during regular shifts, agreed to a suspension, and agreed to have their paychecks docked.[65] The custodians then filed a lawsuit against the district, alleging that the installation of the hidden video camera in the break room violated their Fourth

[60] *Id.*; O'Connor v. Ortega, 480 U.S. 709, 730 (1987) ("It is privacy that is protected by the Fourth Amendment, not solitude.") (Scalia, J., concurring).

[61] 761 N.E.2d 620 (Ohio Ct. App. 2001).

[62] *Id.* at 630.

[63] *Id.* at 626.

[64] *Id.*

[65] *Id.*

Amendment right to be free from unlawful searches.[66] The court held that the custodians did not have a reasonable expectation of privacy in the break room.[67] The court explained the break room was more like an all-purpose utility room than a break room. It contained a washing machine, clothes dryer, cleaning supplies, cleaning machines, lockers, a refrigerator, and a microwave oven.[68] The teachers and principal had "unfettered access" to this room.[69] One custodian described the break room as "open all the time."[70] The court concluded, "The break room was so open to fellow employees that the custodians could not have a reasonable expectation of privacy in this area."[71] Because the custodians had no reasonable expectation of privacy in the break room, they could not successfully claim that the school district violated their Fourth Amendment rights.[72]

School Classrooms

Courts are in consensus that school employees have no reasonable expectation of privacy in a classroom. In *Plock v. Board of Education of Freeport School District Number 145*,[73] the U.S. District Court for the Northern District of Illinois held that "teachers had no reasonable expectation of privacy in communications in their classrooms, as required to challenge audio

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[66] *Id.*

[67] Brannen v. Kings Local Sch. Dist., 761 N.E.2d 630 (Ohio Ct. App. 2001).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* ("Appellant's lack of a reasonable expectation of privacy in the break room defeats their claim that [the school district] violated their Fourth Amendment rights.")

[73] 545 F. Supp. 2d 755 (N.D. Ill. 2007).

monitoring under the Fourth Amendment."[74] In this case, parents who suspected teachers' aides were abusing children in special-education classrooms requested that the district install audio and video recording equipment in special-education classrooms.[75] When the district notified the teachers and the aides of its intent to install the audio and video recording equipment, the teachers sought to enjoin the district from carrying out some aspects of the district's proposed video surveillance plan.[76] The court held that the teachers and aides did not have reasonable expectations of privacy in their classrooms that would allow them to challenge the surveillance.[77] The *Plock* court first explained the nature of a classroom was such that teachers could not expect to have privacy. According to the court: "A classroom in a public school is not the private property of any teacher. A classroom is a public space in which government employees communicate with members of the public. There is nothing private about communications which take place in such a setting."[78] The court emphasized the fact that teachers do not have exclusive use in a classroom.[79] According to the court, "Classrooms are open to students, other faculty, administrators, substitute teachers, custodians, and on occasion, parents," and "[w]hat is said and done in a public classroom is not merely liable to being overheard and repeated, but is likely to be overheard and repeated."[80] Thus, the *Plock* court concluded that the plaintiff school teachers did not have an expectation of privacy in their classrooms which society was willing to recognize

[74] *Id.* at 758. After dismissing the teacher's federal claim, this court remanded the plaintiffs' eavesdropping claim back to an Illinois circuit court. The teachers' eavesdropping claim will be discussed in Part IV of this chapter.

[75] *Id.* at 756.

[76] *Id.*

[77] *Id.* at 758.

[78] *Id.*

[79] Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007).

[80] *Id.*

as reasonable.[81] Because the search here was not recognized under the Fourth Amendment, the court did not go on to discuss the reasonableness of the search.[82]

In *State v. McLellan,*[83] the New Hampshire Supreme Court held that a school custodian did not have a reasonable expectation of privacy under the Fourth Amendment to challenge school video surveillance that showed him stealing money from a teacher's desk.[84] In this case, a police sergeant installed a video camera in a classroom where thefts had occurred.[85] The sergeant also placed an envelope containing $26.91 in the teacher's desk drawer.[86] When the sergeant reviewed the videotapes, he saw the defendant custodian remove the envelope from the desk.[87] The custodian was charged with two misdemeanor counts of theft.[88] The custodian moved to suppress the video surveillance evidence, asserting that it constituted an unconstitutional warrantless search in violation of the Fourth Amendment.[89] The district court granted this motion.[90] On appeal, the State argued that the custodian could not challenge the video surveillance because the video surveillance of the classroom did not constitute a search within the meaning of the Fourth Amendment.[91] The *McLellan* court agreed with the State.[92] The

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[81] *Id.*

[82] *Id.*

[83] 744 A.2d 602 (N.H. 1999).

[84] *Id.* at 605.

[85] *Id.* at 603.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 604.

[89] State v. McLellan, 744 A.2d 602, 604 (N.H. 1999).

[90] *Id.*

[91] *Id.*

court held that the custodian did not have a reasonable expectation of privacy in the classroom because he did not enjoy exclusive use and control of the classroom.[93] It was not the custodian's personal space, even though he was the only one who had access to the classroom during the time when the video camera was set to record.[94] On the contrary, the *McLellan* court described the classroom as open to students and school staff.[95]

In *Roberts v. Houston Independent School District*,[96] the Court of Appeals of Texas held that a school district could videotape a classroom teacher's performance because a teacher has no reasonable expectation of privacy while teaching in a public classroom.[97] In this case, the teacher was aware that the district was videotaping her, but she had objected to being recorded. [98] After reviewing the videotape, the school board terminated the teacher for incompetence and inefficiency.[99] When a trial court affirmed the school district's decision, the teacher appealed and argued that the termination proceedings violated her right of privacy.[100] The *Roberts* court rejected the teacher's claim because it said the teacher had not demonstrated that she had a reasonable expectation of privacy in her classroom. According to the record in this case: "[T]he appellant was videotaped in a public classroom in full view of her students, faculty members,

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[92] *Id.* at 605.

[93] *Id.*

[94] *Id.*

[95] State v. McLellan, 744 A.2d 602, 605 (N.H. 1999).

[96] 788 S.W.2d 107 (Tex. App. 1990), *writ denied* (June 27, 1990).

[97] *Id.* at 111.

[98] *Id.* at 108.

[99] *Id.*

[100] *Id.*

and administrators. At no point, did the school district attempt to record the appellant's private affairs"[101] According to the *Roberts* court, "The activity of teaching in a public classroom does not fall within the expected zone of privacy."[102]

School Buses

Only one court has considered whether a bus driver has a reasonable expectation of privacy on a public school bus. In *Goodwin v. Moyer*,[103] the U.S. District Court for the Middle District of Pennsylvania ruled that a school bus driver had a "diminished expectation of privacy" on a public school bus with student passengers.[104] In this case, the school district said it installed a video camera in the school bus with the bus driver's knowledge.[105] The surveillance video revealed that the bus driver "had let a little girl walk from the mini-mart on Route 292 to her home in a trailer park" instead of dropping her off at home as his job required.[106] The school district used this evidence as a basis for the bus driver's termination, and the bus driver filed a complaint against the school district for invasion of privacy under the Fourth Amendment.[107] According to the *Goodwin* court, the bus driver could not expect that his statements on the bus would be kept private because bus drivers enjoy "a diminished expectation of privacy."[108] The

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[101] *Id.* at 111.

[102] *Id.*

[103] 549 F. Supp. 2d 621 (M.D. Pa. 2006).

[104] *Id.* at 633. School-employee video surveillance cases did not define a diminished expectation of privacy, but it seems to fall somewhere between the privacy expectations one might have in places retained for his or her exclusive use and public places in which one has no reasonable expectation of privacy. *See* State v. Duchow, 749 N.W.2d 913, 922 (Wis. 2008).

[105] *Id.* at 626. The bus driver disputed this fact; he said was unaware that he was being recorded until he received a letter informing him that he was not approved to be a full-time driver. *Id.*

[106] *Id.*

[107] *Id.* at 625.

[108] *Id.* at 633.

court explained that bus drivers enjoy a diminished expectation of privacy because they "[drive] children, for whom society has a special interest to protect from any misdeeds by the bus driver and from whose misdeeds society likewise has a special interest to protect the bus driver."[109]

A Search under the Fourth Amendment must be Reasonable

If courts decide that a Fourth Amendment search has occurred, the next step is to determine whether the search was reasonable.[110] To be reasonable under the Fourth Amendment, most searches must be pursuant to a warrant based on probable cause.[111] However, the U.S. Supreme Court has said that there are circumstances in which "strict adherence to the requirement that searches be based on probable cause [is not required]."[112] Instead of requiring a warrant in student search cases, the U.S. Supreme Court has said courts must "strike the balance between the school child's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place."[113] Instead of requiring a warrant in school employee cases, the U.S. Supreme Court has said courts must balance the employees' legitimate expectations of privacy with the government's need for supervision, control, and the efficient operation of the workplace to determine the constitutionality of

[109] *Id.*

[110] New Jersey v. T.L.O., 469 U.S. 325, 326 (1985); Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 495 (6th Cir. 2008) ("[T]he ultimate measure of the constitutionality of [a search] is one of 'reasonableness.'")

[111] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).To be reasonable under the Fourth Amendment, most searches must be pursuant to a warrant. A warrant will be issued only if there is probable cause to believe that seizable evidence will be found on the premises or person to be searched. The Supreme Court, however, has held that school officials can search students based on a standard that is lower than probable cause. School officials need only reasonable suspicion of wronging to conduct a search. According to the Supreme Court, the nature of the school environment justifies this exception. *Id.*

[112] *Id.* at 341. "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351.

[113] *Id.* at 326.

searches conducted by government employers.[114] For both students and school employees, the legality of a search depends on reasonableness.[115]

Determining the reasonableness of any search conducted by school officials involves a twofold inquiry: (1) whether the search was justified at its inception, and (2) whether the search was permissible in its scope.[116] A student search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[117] An employee search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct.[118] Then, according to the Supreme Court, a student search is permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[119] Similarly, courts determine whether an employee search is permissible in its scope by considering whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]."[120] Two courts balanced the plaintiff's privacy interest, the nature

[114] O'Connor v. Ortega, 480 U.S. 709, 719–720 (1987).

[115] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985); O'Connor v. Ortega, 480 U.S. 709, 710 (1987).

[116] *Id*.

[117] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

[118] O'Connor v. Ortega*,* 480 U.S. 709, 726 (1987).

[119] New Jersey v. T.L.O., 469 U.S. 325, 326 (1985).

[120] O'Connor v. Ortega*,* 480 U.S. 709, 726 (1987).

and extent of the intrusion, and the government's compelling interest to determine whether the search was reasonable in scope.[121]

Justified at its Inception

Courts have yet to find that a school's decision to record its students and school employees was not justified. In the one student case, in this section, the school subjected students to video surveillance for security reasons, and the court concluded the video surveillance was justified at its inception. In each of the three school employee cases in this section, the school decided to record its employee because it suspected the employee of misconduct.

In *Brannum v. Overton County School Board*,[122] the Sixth Circuit concluded that the school district's act of installing cameras inside the boys' and girls' locker rooms for security reasons was justified at its inception.[123] The court explained that recording students for security reasons was "an appropriate and common sense purpose and not one subject to our judicial veto."[124] In doing so, it appears that the *Brannum* court has given away the inception test, finding that there are no conceivable circumstances in which video surveillance of students might not be justified for security reasons. The *Brannum* court, however returns to this issue when it discussed whether the school video surveillance was permissible in scope. This will be discussed in the next section. On the other hand, courts are much more demanding when determining whether the video surveillance of school employees was justified at its inception. In *Chadwell v. Brewer*,[125] the U.S. District Court for the Western District of Virginia found the school district's decision to

[121] *See* Goodwin v. Moyer, 549 F. Supp. 2d 621, 633 (2006); Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489 (6th Cir. 2008).

[122] 516 F.3d 489 (6th Cir. 2008).

[123] *Id.* at 496.

[124] *Id.*

[125] 59 F. Supp. 3d 756 (W.D. Va. 2014).

video record a teacher in his shared office was justified at its inception because the school district suspected, and the surveillance video confirmed, that the teacher was drinking beer during the school day.[126] In *Brannen v. Kings Local School District Board of Education*,[127] the Court of Appeals of Ohio considered whether installing cameras and recording third-shift custodians in a school break room was justified at its inception.[128] The *Brannen* court said the search was justified because the custodians were suspected of "taking excessive, unauthorized breaks."[129] Finally, in *John Doe (1-3) v. Dearborn Public School*,[130] the U.S. District Court for the Eastern District of Michigan found that the video search of gym teachers in their locker room/office (where they changed clothes) to be an unreasonable search under the Fourth Amendment, but held the search might have been justified at its inception because it was used to determine whether employees were stealing.[131]

Permissible in its Scope

In addition to being justified at its inception, a search must also be permissible in its scope. There is only one case in which students have challenged school video surveillance under the Fourth Amendment, and, in that case, the court found the video surveillance was not

[126] *Id.* at 763–64 ("[The] . . . individualized suspicion of [the teacher] makes [the school district's] search reasonable at its inception.").

[127] 761 N.E.2d 84 (Ohio Ct. App. 2001). The *Brannen* court determined that the school custodians had did not have a Fourth Amendment claim because they had no reasonable expectation of privacy in their school break room. The court, nevertheless, continued the Fourth Amendment analysis and determined there was no Fourth Amendment violation of the custodians' privacy rights "even if they were able to establish a reasonable expectation of privacy in the break room." *Id.* at 92.

[128] *Id.* at 92–93.

[129] *Id.*

[130] No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

[131] *Id.* at *5.

permissible in scope. In *Brannum v. Overton County School Board*,[132] the U.S. Court of Appeals for the Sixth Circuit found the school district's hidden video surveillance of middle school students in a locker room where they changed clothes was not permissible in scope.[133] The court reached this conclusion by interpreting the U.S. Supreme Court's "permissible in scope" instructions as a balancing test.[134] The Sixth Circuit "balance[ed] the scope and the manner in which the search [was] conducted in light of the students' reasonable expectations of privacy, the nature of the intrusion, and the severity of the school officials' need in enacting such policies."[135] In doing so, the Sixth Circuit first acknowledged that students had reasonable expectations of privacy that they would not be recorded in a locker room where they changed clothes.[136] Second, the Sixth Circuit discussed the nature of the intrusion and decided "video surveillance is inherently intrusive . . . [because] a video camera sees all and forgets nothing,[137] The court also determined that the scope of the surveillance in this case, which consisted of the video recording and image storage of the children while changing their clothes, was intrusive because "the school officials wholly failed to institute any policies designed to protect the privacy of the students and did not even advise the students or their parents that they were being videotaped."[138] Taken together, the first and the second factors show that the school district significantly intruded on

[132] 516 F.3d 489 (6th Cir. 2008) (*"*Surveillance of school hallways and other areas in which students mingle in the normal course of student life is one thing; camera surveillance of students dressing and undressing in the locker room—a place specifically set aside to offer privacy—is quite another. The two do not stand on equal footing.").

[133] New Jersey v. T.L.O., 469 U.S. 325, 326 (1985).According to the Supreme Court, a student search is permissible when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.*

[134] Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 496(6th Cir. 2008).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 497.

the students' privacy.[139] The third factor required that the court consider the severity of the school officials' need to place surveillance cameras in locker rooms. This factor also seemed to better address the first prong of the reasonableness test – whether the search was justified in its inception – because the court takes a close look at whether the video surveillance was justified based on the facts of the case rather than it being accepted as a general security measure. The record in this case showed there was no history of misconduct in the school locker room, and the records suggest that the school board members were not even aware that the locker rooms were under school video surveillance.[140] The court explained, "As the commonly understood expectation for privacy increases, the range and nature of permissible government intrusion decreases."[141] This led the Sixth Circuit to determine the video surveillance in this case was excessive in its scope.[142] Then the court balanced all factors together and said:

> Given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy, we believe placing cameras in such a way so as to view the children dressing and undressing in a locker room is incongruent to any demonstrated necessity, and wholly disproportionate to the claimed policy goal of assuring increased school security, especially when there is no history of any threat to security in the locker rooms.[143]

Thus, the court concluded that the school's surveillance of students undressing in a school locker room "was a search, unreasonable in its scope,[that] violated the students' Fourth Amendment privacy rights."[144]

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[139] *Id.*

[140] Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 498 (6th Cir. 2008).

[141] *Id.*

[142] *Id.* at 497 ("Surveillance of school hallways and other areas in which students mingle in the normal course of student life is one thing; camera surveillance of students dressing and undressing in the locker room—a place specifically set aside to offer privacy—is quite another. The two do not stand on equal footing.").

[143] *Id.*

[144] *Id.*

One court found the school video surveillance of school employees was not permissible in scope, and, therefore, the surveillance was determined to be an unreasonable search under the Fourth Amendment. In *John Doe (1-3) v. Dearborn Public School*,[145] the U.S. District Court for the Eastern District of Michigan found the school district's hidden video surveillance of gym teachers in their office, which was located inside a boys' locker room, was not permissible in its scope.[146] In this case, one of several gym teachers was suspected of theft.[147] First, the court said, "there are genuine issues of fact as to whether the measures adopted were reasonably related to the objectives of the search" because the school subjected more than the person who was suspected of theft to video surveillance.[148] Second, the court said the surveillance might have been excessively intrusive because the office was located in the boys' bathroom where the gym teachers changed clothes.[149] The *Dearborn* court expressed concerns about the length of time employees were subjected to recording and how those recordings were stored and maintained.[150] The recorded images lasted for at least thirty days and could have easily been copied or burned onto a CD.[151] The district claimed that no one saw the live video, yet the assistant principal testified he inadvertently saw an image of the gym teachers when he was walking by the principal's office."[152] The court wondered, "What [] is the purpose of videotaping the office if no one is watching the monitor or reviewing the recorded images," especially given the fact that the

[145] No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

[146] *Id.* at *5.

[147] *Id.* at *1.

[148] *Id.* at *5.

[149] *Id.*

[150] *Id.*

[151] *Dearborn*, No. 06-CV-12369-DT, 2008 WL 896066, at *1.

[152] Id.

school district's stated purpose for videotaping the office was to catch one gym teacher in the act of stealing?[153] Therefore, the court determined the video surveillance was not permissible in scope, making it an unreasonable search under the Fourth Amendment.[154]

Three courts have found video surveillance of school employees to be permissible in scope. In *Chadwell v. Brewer*,[155] the U.S. District Court for the Western District of Virginia found the school district's hidden video surveillance of a teacher in his office to be permissible in scope because the district's surveillance measures were reasonably related to the objectives of the surveillance and not excessively intrusive in relationship to the nature of the teacher's suspected misconduct.[156] The *Chadwell* court did not find the school district's surveillance measures to be a point of contention. The court simply stated, "[The school district's] hidden video surveillance was certainly reasonably related to determining whether [the teacher] was drinking in his office" without further discussion.[157] The court, however, addressed the teacher's reliance on dicta from the U.S. Court of Appeals for the Ninth Circuit to make his argument that the school's search method was excessively intrusive.[158] In criminal opinions, the Ninth Circuit has noted, "Video surveillance can result in extraordinarily serious intrusions into personal privacy."[159] While the *Chadwell* court acknowledged that "surreptitious video surveillance presents unique constitutional concerns," the *Chadwell* court said, "An employer's work-related search of an employee's office is judged by a reasonable standard that is less stringent than the

[153] *Id.* at *5.

[154] *Id.*

[155] 59 F. Supp. 3d 756 (W.D. Va. 2014).

[156] *Id.* at 764–65.

[157] *Id.* at 764.

[158] *Id.*

[159] *Id.*

probable cause and warrant requirements imposed on law enforcement officials in the criminal context."[160] The court found "it difficult to believe that a hidden camera used over a limited period of time to confirm or deny [the school district's] suspicion regarding [the teacher] drinking alcohol on the job, would violate [the teacher's] constitutional rights."[161] The fact that the teacher had "significant responsibilities as a special education teacher and the correspondingly severe consequences that result from his misconduct" contributed to the court's decision that the video surveillance in this case did not violate the Fourth Amendment.[162]

In *Brannen v. Kings Local School District Board of Education*,[163] the Court of Appeals of Ohio found the school district's hidden video surveillance of custodians in a school break room to be permissible in scope because the district's surveillance measures were reasonably related to the objectives of the surveillance and not excessively intrusive in relationship to the nature of the custodians' suspected misconduct.[164] In this case, the custodians were suspected of taking unauthorized breaks for many hours, while indicating on their time sheets that they had worked full eight-hour shifts.[165] The *Brannen* court said the surveillance measures were reasonable because "[t]he video camera was installed solely for the purpose of confirming or denying" allegations that the custodians were taking unauthorized breaks.[166] The court also determined that the surveillance was not excessively intrusive because "[t]he video camera created only a

[160] *Id.*

[161] Chadwell v. Brewer, 59 F. Supp. 3d 756, 765 (W.D. Va. 2014).

[162] *Id.*

[163] 761 N.E.2d 84 (Ohio Ct. App. 2001).

[164] *Id.* at 93.

[165] *Id.* at 88.

[166] *Id.* at 93.

visual record of the activities in the break room; it did not record private conversations."[167] Furthermore, the court said, "The camera was operational only between 10:00 p.m. and 6 a.m. for one week," and "[t]he camera recorded only that which the [custodian supervisor] could have observed in person."[168] The court explained, "The mere fact that the observation is accompanied by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutional forbidden one."[169] Thus, the video search of custodians in a break room was deemed reasonable, so no Fourth Amendment violation had occurred.[170]

In *Goodwin v. Moyer*,[171] the U.S. District Court for the Middle District of Pennsylvania ruled the school video surveillance of a bus driver was permissible in scope.[172] The *Goodwin* court did not use the two-part test to determine the reasonableness of a search conducted by a government employer.[173] Instead, the court balanced the following factors:

> (1) whether the plaintiff's privacy interest is objectively legitimate as recognized by society; (2) the nature and extent of the intrusion; and (3) whether the government has a compelling interest in intruding upon the plaintiff's privacy.[174]

First, the court determined that the bus drive enjoyed a "diminished expectation of privacy" because he was a bus driver who drove children "for whom society has a special interest to

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[167] *Id.*

[168] *Id*.

[169] *Id*.

[170] *Id.*

[171] 549 F. Supp. 2d 621 (M.D. Pa. 2006).

[172] *Id.* at 633.

[173] O'Connor v. Ortega, 480 U.S. 709, 726 (1987) (determining whether an employee search is permissible in its scope by considering whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]").

[174] Goodwin v. Moyer, 549 F. Supp. 2d 621, 633 (2006).

protect from any misdeed by the bus driver and from whose misdeeds society likewise has a special interest to protect the bus driver."[175] Second, the court found cameras on the bus to be an "insignificant intrusion" on the bus driver's privacy because the bus driver "was not located in a private area; he was in a public conveyance surrounded by others and in view of the public through the bus's windows."[176] The court also determined the intrusion in this case was insignificant because the camera "capture[d] the entire activity of the bus as it shuttle[d] children to and from school," rather than capturing the bus driver "engaged in acts of a private nature."[177] Finally, the court determined "the government has a compelling interest in protecting children entrusted to it, as well as protecting the bus driver from the children."[178] Because each of these factors weighed in favor of recording the bus driver, the court held that the bus driver did not "suffer[] an unreasonable deprivation of his Fourth Amendment right to privacy."[179]

Right to Privacy under State Constitutions

There are two cases in which school employees unsuccessfully challenged school video surveillance under their state constitutions. One case turned on the fact that teachers had no reasonable expectation of privacy in their office. In that case, a reasonable expectation of privacy was required to pursue a California constitutional law privacy claim. In the other case, a custodian argued that he had automatic standing to challenge the school's video surveillance under the New Hampshire Constitution, but the court disagreed. Automatic standing would have

[175] *Goodwin*, 549 F. Supp. 2d at 633 (2006).

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

allowed the custodian to challenge the video surveillance even if he did not have a reasonable expectation of privacy in the area begin surveilled.

California

The California state constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*."[180] According to the Supreme Court of California, to pursue a constitutional privacy claim, the plaintiff must first show a significant intrusion on a privacy interest based on three threshold elements: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of privacy."[181] Once a plaintiff shows a "genuine, nontrivial invasion of a protected privacy interest," the defendant must then provide an explanation or justification for the conduct.[182]

In an unpublished opinion, *Crist v. Alpine Union School District*,[183] the California Fourth District Court of Appeals held that two teachers' aides who were filmed in their computer lab office did not have a right to be free from school video surveillance under their state constitution. In this case, the school district placed a hidden camera in the teachers' shared office because it suspected the night custodian was engaging in unauthorized computer use.[184] Within a few weeks, the surveillance tape showed the night custodian burning CDs on the office computer.[185]

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[180] Cal. Const. art. I, § 1 (emphasis added).

[181] Loder v. City of Glendale, 927 P.2d 1200, 1228 (Cal. 1997).

[182] *Id.* at 30.

[183] D044775, 2005 WL 2362729 (Cal. Ct. App. Sept. 26, 2005).

[184] *Id.* at *1.

[185] *Id.* at *2.

The two teachers argued that the school district violated their privacy rights with its attempt to catch the night custodian's misconduct.[186] In analyzing this claim, the court focused its discussion on the second and third elements that are required to pursue a constitutional privacy claim in California.[187] The court found the teachers had a reasonable expectation of privacy in the office because of where their office was located and how it was used. The office was located in the back corner of the computer lab, and, even though it had no lock, school employees and students would knock on the door to the computer lab office before entering when the door was closed.[188] Next the court looked at whether the school district's conduct was a serious invasion of privacy. The court explained that it was not; the district's video recording was very limited because the camera was positioned in such a way that only the immediate area around the computer was filmed, and the recording was set to start only after school hours when the teachers were scheduled to be off work.[189] Finally, the court said the school district's invasion was justified.[190] In this case, the court determined that unauthorized computer use was a serious matter that warranted the district taking steps to support a disciplinary action against the employee.[191] Based on this analysis, the court ruled in favor of the school district, holding the "strong justification for, and limited nature of, the intrusion, tipped the balance against [the teachers]."[192]

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[186] *Id.*

[187] *Id.* at *7.

[188] *Id.* at *10.

[189] Crist v. Alpine Union Sch. Dist., D044775, 2005 WL 2362729, *9 (Cal. Ct. App. Sept. 26, 2005).

[190] *Id.* at *8.

[191] *Id*.

[192] *Id.* at *11.

New Hampshire

Part I, Article 19 of the New Hampshire Constitution mirrors the Fourth Amendment, but it provides greater protection for individual rights than its federal counterpart.[193] While the New Hampshire Supreme Court (interpreting the New Hampshire Constitution) and the U.S. Supreme Court (interpreting the U.S. Constitution) have developed standing doctrines, it is easier for a defendant to establish standing under the New Hampshire Constitution. Standing doctrines regulate who may seek the exclusion of evidence from a criminal trial on the grounds that the police discovered evidence during an unconstitutional search or seizure.[194] The U.S. Supreme Court uses the *Katz* reasonable-expectation-of-privacy test, which determines whether a Fourth Amendment search has occurred, to decide whether a defendant has standing to challenge a search.[195] Under the New Hampshire Constitution, "[e]very subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all possessions."[196] The New Hampshire Supreme Court, emphasizing the word "all" in that

[193] N.H. Const. Pt. 1, art. XIX ("Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. Therefore, all warrants to search suspected places, or arrest a person for examination or trial in prosecutions for criminal matters, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order, in a warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued; but in cases, and with the formalities, prescribed by law.").

[194] State of N.H. v. Boyer, WL 11623428 (N.H. 2015). "The standing doctrine ultimately aims to prevent a defendant from challenging a search on the basis that the search violated somebody else's constitutional rights." Brief of the Defendant at *8, State of N.H. v. Boyer, No. 2014-0725 (N.H. Apr. 16, 2015).

[195] *Id.* "[T]he U.S. Constitution has long held that only a criminal defendant whose privacy was invaded by a search has standing to challenge the constitutionality of that search . . . . The standing doctrine as administered by the federal courts has evolved since [*Jones v. United States*, 362 U.S. 157 (1960)]. Within a few years of the advent in *Katz v. United States*, 389 U.S. 347, 361 (1967) [], of legitimate expectation of privacy standard as a test of whether a given police action constitutes a 'search' within the meaning of the Constitution, the Supreme Court decided to use the same standard when deciding whether a defendant has standing to challenge a search. Under that test, to demonstrate standing, a defendant must show a subjective expectation of privacy that is legitimate because it is one that society is prepared to recognize as reasonable." Brief of the Defendant at *8, State of N.H. v. Boyer, No. 2014-0725 (N.H. Apr. 16, 2015).

[196] N.H. Const. Pt. 1, art. XIX.

provision, has held that the New Hampshire Constitution affords greater protection than the U.S. Constitution because it grants automatic standing to all persons charged with crimes in which their possession of any item or thing is an element of the crime.[197] In cases not involving possessory offenses, the New Hampshire Supreme Court has employed the *Katz* reasonable-expectation-of-privacy test to decide the issue of standing.[198]

In *State v. McLellan*,[199] the New Hampshire Supreme Court held that a school custodian who was videotaped stealing money from a teacher's desk in a classroom did not qualify for automatic standing under the New Hampshire Constitution.[200] The court determined the custodian had no "possessory interest in the classroom, desk, or money prior to the time of the offending act."[201] Therefore, he could not challenge the school video surveillance under the New Hampshire constitution.[202] The custodian argued for automatic standing under the New Hampshire constitution just in case the court determined he did not have the reasonable expectation of privacy required to challenge school video surveillance under the Fourth Amendment.[203]

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[197] State of N.H. v. Boyer, WL 11623428 (N.H. 2015). For example, the charges against a defendant in *State v. Settle* required proof that the defendant had been in possession of stolen property. Therefore, he qualified for automatic standing under the New Hampshire constitution. 447 A.2d 1284 (N.H. 1982). On the other hand, the defendant in *State v. Aloha* was charged with crimes involving another person's possession of marijuana. The *Aloha* court determined that the New Hampshire constitution did not afford the defendant automatic standing "[b]ecause possession by the defendant is simply not an element of . . . the charges against him." 137 A.2d 33 (1993).

[198] State v. Settle, 447 A.2d 1284, 1287 (N.H. 1982).

[199] State v. McLellan, 744 A.2d 611 (N.H. 1999). Automatic standing would have allowed the custodian to challenge the video surveillance as unlawful without establishing a reasonable expectation of privacy in the classroom.

[200] *Id.*at 604.

[201] *Id.*

[202] *Id.*

[203] *See id.* at 605. The New Hampshire Supreme Court held the custodian had no reasonable expectation of privacy in the classroom where he took money from a teacher's desk. Therefore, the video surveillance was not a search under the Fourth Amendment. *See* discussion *infra* p 11.

Common Law Right to Privacy

School employees who challenged school video surveillance of their school offices under the common law tort of intrusion were only successful when they challenged the video surveillance of an office where they changed clothes. Courts considered the location in which the employees were recorded and the scope of the recording to reach their conclusions.

In *John Doe (1-3) v. Dearborn Public School,* [204] the U.S. District Court for the Eastern District of Michigan found that gym teachers who were subjected to school video surveillance in their office that was located in a boys' locker room stated a prima facie case on their invasion of privacy claim. The *Dearborn* court explained that "[i]n order for Plaintiffs to state a cause of action based on an invasion of privacy claim, they must demonstrate: 1) an intrusion; 2) into a matter in which the Plaintiffs had a right of privacy; and, 3) by means that would be objectionable to a reasonable person."[205] First, the court found the gym teachers could show the school district's act of placing cameras in the gym teachers' office was an intrusion.[206] Second, the gym teachers were able to demonstrate they had a right of privacy in changing clothes in their office and "reasonable persons would object to such surveillance."[207] Finally, the court said the intrusion in this case was conducted in a manner highly offensive to a reasonable person. The court explained that *Brannum v. Overton County School Board*, the case in which a school district videotaped middle-school students changing clothes in a school locker room, was on point and applied to school district employees as well as students.[208] When it comes to video

[204] No. 06-CV-12369-DT, 2008 WL 896066.

[205] *Id*. at *10.

[206] *Id*.

[207] *Id.*

[208] *Id.*

recording areas on campus where people undress, the *Brannum* court said and this *Dearborn* court agreed that "[s]ome personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against government invasion."[209] Therefore, the gym teachers successfully challenged the school video surveillance with an intrusion upon seclusion claim in addition to their Fourth Amendment claim.

In an unpublished state court opinion, *Crist v. Alpine Union School District*,[210] the California Fourth District Court of Appeal held that teachers who were recorded in a computer lab office failed to establish their common law invasion of privacy claim. The court explained that "the plaintiff must establish that (1) the defendant intruded into a place, conversation or matter where the plaintiff had an objectively reasonable expectation of privacy, and (2) the intrusion was conducted in a manner highly offensive to a reasonable person" in order to prove the tort of intrusion.[211] In this case, the school district installed the cameras to catch the custodian whom they suspected of unauthorized computer use.[212] When the teachers found out that they were being recorded, they alleged they suffered from emotional distress.[213] The *Crist* court agreed that under the circumstances of this case, the teachers could legitimately assert a reasonable expectation of privacy in the computer office, but the court held "there was no privacy violation as a matter of law because the record shows a limited intrusion and a strong justification for the intrusion."[214] The court said the intrusion was limited because the district

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[209] *Id.*

[210] D044775, 2005 WL 2362729 (Cal. Ct. App. Sept. 26, 2005).

[211] *Id*.

[212] *Id.* at *10.

[213] *Id.* at *1.

[214] *Id.*

installed the camera in such a way that it pointed directly at the computer and was only turned on after hours when the unauthorized computer use was occurring.[215] The court also said the district had a strong justification for the intrusion because "[u]nauthorized use of the computer system is a serious matter . . . [and the] District had a right to engage in the videotaping to obtain incontrovertible proof of the identity of the culprit and to support a disciplinary action against the employee."[216] Thus, the teachers were not successful in their invasion of privacy claim because the school district narrowly tailored its surveillance as to time, location, and scope, and engaged in the conduct for a legitimate purpose.

Rights under State Eavesdropping Laws

There are four cases in which school employees have challenged video surveillance under state eavesdropping statutes. All but one of these cases were unsuccessful. Teachers successfully challenged a school's plan to audio record their classroom under a state's two-party consent eavesdropping law. In the cases in which the school employees were unsuccessful, courts found that they failed to show that the recording they were subjected to was the type of recording that was/is prohibited in the states' eavesdropping statutes.

In *Plock v. Board of Education of Freeport School District Number* 145,[217] the Illinois Second District Appellate Court held a school district's proposed plan to audio record its teachers and teachers' aides in a special education classroom violated the Illinois Eavesdropping

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[215] *Id*.

[216] *Id.*

[217] 920 N.E.2d 1087 (2009). In 2007, a federal court dismissed the teachers' Fourth Amendment claim after determining the teachers had no reasonable expectation of privacy in the classroom where they were recorded. Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 545 F. Supp. 2d 755 (N.D. Ill. 2007).The court remanded the teachers' aides eavesdropping claim back to the trial court, and the trial court determined that audio recording the classroom would violate the state's eavesdropping act. The school district appealed to the Illinois Second District Appellate Court. Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 920 N.E.2d 1087 (2009). That decision is discussed here.

Act.[218] The Illinois Eavesdropping Act provides that one commits eavesdropping when she "[k]nowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation" without the consent of all parties to the conversation.[219] The Illinois Eavesdropping Act defines a "conversation" as "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation."[220] The teachers argued that the school district's plan would violate the state's eavesdropping law because the teachers did not consent to the school's plan to audio record their classroom.[221] In response, the school district argued that the teacher's classroom instruction was like a public speech,[222] which did not fall under the Illinois Eavesdropping Act's definition of "conversation."[223] The 2009 *Plock* court distinguished special education classroom instruction from a speech at a public event, explaining that "[a]t lower levels of education . . . teachers are providing the students instruction and guidance on acquiring independent living skills. This necessarily requires ongoing oral exchanges between teachers and students."[224] The court further explained that "teachers imparting knowledge to students and the students asking and answering

[218] *Id.* at 1089. Both audio and video recording equipment were proposed, but the plaintiffs only challenged the audio under the Illinois eavesdropping act. *Id.*

[219] 720 ILCS 5/14—2(a)(1) (West 2006).

[220] 720 ILCS 5/14—1(d) (West 2006).

[221] Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 920 N.E.2d 1087, 1094–95 (2009).

[222] *Id.* at 1093 (citing DeBoer v. Village of Oak Park, 90 F.Supp.2d 922 (N.D.Ill.1999), which held that a speech made at an event that was open to the public did not fall under the Illinois Eavesdropping Act's definition of "conversation").

[223] *Id.*

[224] *Id.*

. . . questions is easily distinguishable from public speeches."[225] The school district also argued that the teachers could be audio recorded in their classroom because in 2007 a federal district court determined that teachers do not have a reasonable expectation of privacy in their classrooms.[226] However, the 2009 *Plock* court found that the Illinois Eavesdropping Act clearly states that it applies to any conversation "regardless of whether any party has an objective or subjective expectation of privacy."[227] Therefore, the court concluded that the school district's plan to audio record its teachers would violate the state's eavesdropping act.[228]

In that same case, the Illinois Second District Appellate Court was not persuaded by the school district's argument that the Illinois Eavesdropping Act should not apply to the recording of school classrooms for public policy reasons. The school district "maintain[ed] that its proposed policy [would serve] the public interest by protecting both students and teachers."[229] In response, the court said, "[A] court cannot rewrite statutes to make them consistent with the court's idea of orderliness and public policy."[230] The court also explained: "[T]he protection of students and teachers is not the only public policy at issue in this case. There is also the public policy of protecting the rights of Illinois citizens via the guidelines set forth in the [Illinois Eavesdropping Act]."[231] The court said that teacher presence and, periodically, administrator

[225] *Id.*

[226] *Id.* at 1094.

[227] Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 920 N.E.2d 1087, 1094 (2009).

[228] *Id.* at 1092.

[229] *Id.*

[230] *Id.*

[231] *Id.*

presence in the classroom was another means to protect teachers and students.[232] Of the cases reviewed for this thesis, the 2009 *Plock* court is the only court that discussed a way to protect students and teachers without the use of audio or video surveillance.

The remaining cases in this part of the chapter discuss school employees' unsuccessful state eavesdropping claims. In *People v. Drennan*,[233] California's Third District Court of Appeal held that California's eavesdropping law,[234] which prohibits intentional eavesdropping upon or recording of a confidential communication, did not apply to a school district that silently videotaped a school employee in his office.[235] The court held that California's eavesdropping law requires sound-based or symbol-based communication.[236] In this case, a California school superintendent hid a video camera in a smoke detector in a principal's office to determine if someone was breaking into the office to take confidential documents.[237] The principal argued the superintendent's silent recording was a violation of California's eavesdropping law.[238] The court reviewed the statute and found that it was "replete with words indicating the Legislature's intent to protect only sound-based or symbol-based communications."[239] For example, one subdivision of California's eavesdropping law "prohibits the use of 'amplifying' devices by which to

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[232] *Id.*

[233] 84 Cal. App. 4th 1349 (3d Dist. 2000).

[234] Cal. Penal Code § 632 (West).

[235] People v. Drennan, 84 Cal. App. 4th 1349, 1355 (3d Dist. 2000).

[236] *Id.*

[237] *Id.* at 1352.

[238] *Id*. "A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment." Cal. Penal Code § 632 (West).

[239] *Id.* at 1355.

'eavesdrop' on a communication that otherwise could not be overheard."[240] That subdivision also "makes clear that such communication may be carried on by 'telegraph, telephone, or other device,' which transmit information by sound or symbol."[241] Thus, the court concluded that the superintendent's actions did not violate California's eavesdropping law because there was no sound recording, and sound was required to meet the definition of "communication" within the statute.[242]

In *Evens v. Superior Court*,[243] the California Court of Appeals concluded that a school board could use an illegally obtained video-recording of a teacher in her disciplinary proceeding, even though California's eavesdropping law prohibits intentional eavesdropping upon or recording of a confidential communication,[244] and California's Education Code prohibits "any person, including a pupil," from using a recording device in any classroom without the teacher's consent.[245] In this case, two students surreptitiously recorded their science teacher in class.[246] The teacher argued that the recording should not be used against her because California's privacy laws "read together mandate that evidence obtained as a result of unconsented recordings" is not admissible in school disciplinary actions.[247] The California Court of Appeals reviewed California's Education Code and determined that "it provides sanctions against violators but does

[240] Cal. Penal Code § 632(a)(West); People v. Drennan, 84 Cal. App. 4th 1349, 1355 (3d Dist. 2000).

[241]Cal. Penal Code § 632(a)(West); People v. Drennan, 84 Cal. App. 4th 1349, 1357 (3d Dist. 2000).

[242] People v. Drennan, 84 Cal. App. 4th 1349, 1355 (3d Dist. 2000).

[243] 91 Cal. Rptr.2d 497, 500 (Cal. Ct. App. 1999).

[244] *Id.*

[245] *Id.*

[246] *Id.* at 498.

[247] *Id.*

not specifically prohibit entities such as the Board . . . from using [the] videotape."[248] The California Court of Appeals reviewed California's eavesdropping law and determined that it prohibited "evidence obtained as a result of eavesdropping upon or recording a *confidential communication* . . . [from being admitted] in any judicial, administrative, legislative, or other proceeding," but it did not apply in this case. Under California's eavesdropping law, "A confidential communication is one carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto." The teacher who was recorded contended that she "had every expectation that her communications and activities would be confined to the classroom and not be subject to public dissemination" because the California Education code prohibits unauthorized recordings in classrooms.[249] The court said the teacher's expectations were unreasonable. The court explained:

> Communications and activities on the part of a teacher will virtually never be confined to the classroom. Students will, and usually do, discuss a teacher's communications and activities with their parents, other students, other teachers, and administrators. This is especially true when a student believes that the teacher is guilty of misconduct. A teacher must always expect "public dissemination" of his or her classroom "communications and activities."[250]

[248] *Id.* at 499.

[249] *Id.* The California Education Code section 51512 provides: "The Legislature finds that the use by any person, including a pupil, of any electronic listening or recording device in any classroom of the elementary and secondary schools without the prior consent of the teacher and the principal of the school given to promote an educational purpose disrupts and impairs the teaching process and discipline in the elementary and secondary schools, and such use is prohibited. Any person other than a pupil, who willfully violates this section shall be guilty of a misdemeanor. [¶] Any pupil violating this section shall be subject to appropriate disciplinary action. [¶] This section shall not be construed as affecting the powers, rights and liabilities arising from the use of electronic listening or recording devices as provided for by any other provision of law." Cal. Educ. Code § 51512 (West).

[250] Evens v. Super. Ct., 91 Cal. Rptr.2d 497, 499 (Cal. Ct. App. 1999).

Thus, the court concluded,"[T]he videotape recording at issue here was made in a public classroom, and is clearly not the type of 'confidential communication' contemplated by [California's eavesdropping law]."[251]

In *State v. Duchow*,[252] the Supreme Court of Wisconsin held that a bus driver's statements to a student were not "oral communications," which would be prohibited from being recorded under Wisconsin's eavesdropping law, because the bus driver had no reasonable expectation of privacy in his statements.[253] In this case, a bus driver moved to suppress a recording under Wisconsin's eavesdropping law when he was charged with abusing a student who rode the bus.[254] The parents who suspected that their child was being abused placed a voice-activated tape recorder in their child's backpack.[255] The following comments were made by the bus driver and caught on tape: "Stop before I beat the living hell out of you . . . . You'd better get your damn legs in now" . . . . [and] "Do you want me to come back there and smack you?"[256] The Supreme Court of Wisconsin denied the bus driver's motion to suppress these tape-recorded statements because they were not "oral communications" within the state's eavesdropping law.[257] Under Wisconsin's eavesdropping law, an "oral communication" is "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to

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[251] *Id.*

[252] 749 N.W.2d 913 (Wis. 2008).

[253] *Id.* at 925.

[254] *Id.* at 915.

[255] *Id.* at 916. The child had Downs Syndrome. His changes in behavior rather than his words communicated to his parents that something was wrong. *Id.*

[256] *Id.*

[257] *Id.* The electronic surveillance control law, Section 968.30(9)(a), Stats., provides, "Any aggrieved person in any ... hearing ... before any court ... of this state ... may move before the trial court or the court granting the original warrant to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that [] the communication was unlawfully intercepted." Wis. Stat. Ann. § 968.27 (West)

interception under circumstances justifying that expectation."[258] The court determined that Wisconsin's eavesdropping law incorporated the *Katz* reasonable-expectation-of-privacy standard into the act's definition of "oral communication."[259] This case, therefore, turned on whether the bus driver had a reasonable expectation of privacy that his statements made on a public school bus would not be recorded.[260] The court said the bus driver had no reasonable expectation of privacy in his statements because his statements were made in a public location and under circumstances in which he would likely be reported.[261] The court first considered the place where the bus driver spoke and, relying on *Plock v. Board of Education of Freeport School District*, determined that "[s]chool bus drivers endure a [] diminished expectation of privacy inside the school buses they operate . . . [because] society, as well as the government, retains an interest in ensuring that the children and the bus driver alike are protected from 'misdeeds' against each other."[262] Then the court explained that the bus driver in this case had no reasonable expectation of privacy in his recorded statements because (1) the bus was public property, being operated for a public purpose, (2) the bus had "windows through which [the bus driver] and [the student] could be seen,"[263] and (3) he made the threats while the child was being transported to school, a circumstance in which he would likely be reported.[264] Wisconsin's eavesdropping law

[258] State v. Duchow, 749 N.W.2d 913, 916 (Wis. 2008).

[259] *Id.* The court essentially goes through the Fourth Amendment reasonable expectation of privacy analysis even though the bus driver has not made a Fourth Amendment claim. *See id.*

[260] *Duchow*, 749 N.W.2d at 917 (Wis. 2008).

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] State v. Duchow, 749 N.W.2d 913, 925 (Wis. 2008). Before beginning its analysis, the *Duchow* court recognized the following non-exclusive list of factors that courts have used to determine whether a reasonable expectation of privacy exists: "(1) the volume of the statements; (2) the proximity of other individuals to the speaker, or the

only protects "oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception," and, in this case, the bus driver had no reasonable expectation that his statements would be kept private.[265]

Rights under School Policies

Students and teachers can also sue school districts for violating their own policies. *Roberts v. Houston Independent School District*[266] provides an example of a case in which a teacher unsuccessfully challenged the school district that recorded her classroom performance over her objections, citing an obsolete school policy.[267] In this case, a section of the school district's older manual provided, "No mechanical or electronic device shall be utilized to listen to or record the procedures unless requested or permitted by the teacher."[268] However, the school updated the manual to include guidelines on videotaping teachers for quality assurance before recording the teacher.[269] The court held that the adoption of the new manual with guidelines for recording teachers superseded all prior policies and procedures of the old manual.[270] According to the court, "[T]he new section expressly authorizes the principal to make arrangements for videotaping, and [it] does not require that the teacher must request or give consent to the

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potential for others to overhear the speaker; (3) the potential for the communications to be reported; (4) the actions taken by the speaker to ensure his or her privacy; (5) the need to employ technological enhancements for one to hear the speaker's statements; and (6) the place or location where the statements are made." *Id.*

[265] *Id.*

[266] 788 S.W.2d 107 (Tex. App. 1990), *writ denied* (June 27, 1990).

[267] *Id.* at 111.

[268] *Id.* at 111.

[269] *Id.*

[270] *Id.*

videotaping."[271] Based on this analysis, the court concluded that the videotaping of the teacher did not violate any of the school district's policies or procedures. [272] While the school's new policy failed to protect the teacher from school video surveillance, it is clear that a school policy could offer students privacy protections beyond state and federal law.

Conclusions

This chapter took a close look at school video surveillance case law pertaining to both students and school employees to determine what legal rights, if any, students have to be free from school video surveillance in public school settings. Students have a constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment. Video surveillance in areas where students have a reasonable expectation of privacy is considered a Fourth Amendment search, which will be deemed unreasonable if it is not justified in its inception and reasonably related in scope to the circumstances which justified the search in the first place. There has only been one court decision regarding the Fourth Amendment rights of students to be free from school video surveillance. The Sixth Circuit held students have a constitutionally protected privacy right not to be surreptitiously videotaped in areas where students may dress and undress. It found the school district's recording of students in school lockers rooms to be an unreasonable search under the Fourth Amendment. Similarly, in *John Doe (1-3) v. Dearborn Public School*, the U.S. District Court for the Eastern District of Michigan found the surreptitious recording of gym teachers in their locker room/office to be an unreasonable search under the Fourth Amendment. Like the students in *Brannum*, the gym teachers expected that they would not be recorded in an area where they changed clothes, and that expectation was reasonable.

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[271] *Id.*

[272] *Id.*

Courts have yet to find that students or school employees have a constitutionally protected right not to be videotaped in other areas on a school's campus. Courts have determined school employees have no reasonable expectations of privacy in their classrooms or break rooms. Schools were therefore able to record school employees in those areas without violating their Fourth Amendment rights. Courts have determined school employees have a reduced or "diminished expectation of privacy" in their offices and on buses. Schools still were able to record school employees in their offices or on buses because the recordings were determined to be reasonable (justified at inception and permissible in scope). In summary, schools have recorded school employees in classrooms, offices, break rooms, and buses without violating their Fourth Amendment rights.

School employees have also challenged school video surveillance under state constitutions, state tort law, and state eavesdropping statutes. Only two of the eight cases that were reviewed were successful. One of those cases was a tort law case involving teachers changing clothes. The gym teachers in *John Doe (1-3) v. Dearborn Public School* were subjected to video surveillance of their locker room/office, and they successfully challenged the video surveillance under state tort law. It makes sense that they were successful under this claim because their Fourth Amendment challenge to the school's video surveillance also was successful, and these claims involved similar analyses. Both the Fourth Amendment and the tort of intrusion require an intrusion in an area in which the individual has a reasonable expectation of privacy. The special education teachers in *Plock v. Board of Education of Freeport School District Number* 145 who challenged the audio component of a school's plan to video record their classroom were also successful. The court determined if the school district audio recorded the teachers without their consent, it would violate the state's eavesdropping law. The *Plock*

court was the only court that discussed the nature of teachers-student conversations in a classroom and noted their interest in not having those conversations recorded. Teachers provide students guidance in addition to instruction. The *Plock* court was also the only court that discussed means of protecting students that did not involve video or audio surveillance. Discussing whether recordings may chill student learning or growth and whether a school can achieve its safety and security goals without video surveillance are factors that courts should consider in all school video surveillance cases involving students.

Other school employees have not been successful in challenging school video surveillance under state law. Most claims turned on whether the plaintiff had a reasonable expectation of privacy in the area where she was recorded. For the same reasons brought forth under Fourth Amendment analyses, courts have found that school employees have either no expectation of privacy or a reduced expectation of privacy in areas on campus other than a school locker room. Three of eight cases had no discussion of an employee's reasonable expectation of privacy because the cases were decided on other issues. In *State v. McLellan*, the court determined the custodian who stole money from a teacher's classroom desk did not have standing to challenge the video surveillance under the New Hampshire constitution. The New Hampshire constitution requires discussion of the reasonable expectation of privacy, but the court's analysis did not get that far. In *People v. Drennan*, the court considered whether silent recording qualified as eavesdropping on confidential communication, which was prohibited under California's eavesdropping law. Finally *Roberts v. Houston Independent School District* discussed whether a school district had to honor its own policies.

Suing school districts for violating their own policies gives students and staff another way to challenge school video surveillance. In order for this to work, the school must have a

policy that is protective of student and school employee privacy. Even if this is the case, students/staff must be aware that a school can change its policy at any time. For example, in *Roberts v. Houston Independent School District*, a school district had an old policy that prohibited the video recording of classrooms without the teacher's request or permission. A teacher argued that the school violated this policy by recording her over her objections. The school district argued, and the court agreed, that the school district had not violated its own policies because it had recently adopted guidelines for recording teachers for evaluation purposes. Because the school determined this to be its new policy, the old policy was no longer applicable.

Based on this case review, students have a right to be free from video surveillance in school locker rooms or other areas on campus that schools have designated for them to change clothes, but nowhere else. School employee cases suggest classrooms, break rooms, and buses are places where students can be recorded because, in case law, these places are often described as "accessible" or "public property, being operated for a public purpose." Finally, the Supreme Court's determination that "[s]tudents have a lesser expectation of privacy than members of the population generally" further justifies a school's decision to record students in those areas on a school's campus.

CHAPTER 3: THE LEGALITY OF SHARING SCHOOL SURVEILLANCE VIDEOS

Introduction

Given a school's broad authority to record its students and staff,[1] the issue of who gets access to the surveillance footage after a student has been recorded is particularly salient. Controlling access is an important means to protect students' privacy. This chapter takes a close look at the statutes, agency regulations and guidance, and court decisions that govern the disclosure of school surveillance videos to better understand who can obtain access to those videos and under what circumstances.

[1] *See, e.g.*, Chadwell v. Brewer, 59 F. Supp. 3d 756, 765 (W.D. Va. 2014) (holding a teacher who was suspected of drinking on the job had no constitutional right to privacy to be free from video surveillance in his school office); Plock v. Bd. of Educ. of Freeport Sch. Dist., 545 F. Supp. 2d 755, 758 (N.D. Ill. 2007) (holding teachers had no reasonable expectation of privacy in communications in their classrooms, as required to challenge audio monitoring under the Fourth Amendment); Goodwin v. Moyer, 549 F. Supp. 2d 621, 633 (M.D. Pa. 2006) (holding a bus driver who was suspected of abusing a student enjoyed a diminished expectation of privacy on a school bus).

For the most part, one federal law – the Family Educational Rights and Privacy Act[2] (FERPA) – governs the disclosure of school surveillance videos. The law applies to all schools, colleges, and universities that receive federal funding.[3] When a school surveillance video is considered an "education record" under FERPA, it cannot be disclosed to the public without parental permission or the permission of a student who is eighteen or older.[4] Allowing parental access or access to students who are eighteen and over while limiting others' access to school surveillance footage protects students' privacy. Unfortunately, it is not always easy to determine what constitutes an education record under FERPA. For example, courts disagree about whether a video that is non-academic in nature should be considered an education record under FERPA.[5]

Even if a school surveillance video is determined to be an education record under FERPA, the video can be disclosed to appropriate parties under certain circumstances. For example, a teacher can access education-record school surveillance videos if she has a legitimate educational interest, police and health care workers can access education-record school surveillance videos in emergency situations, and others can access education-record school surveillance videos if there is a court order. School surveillance videos that are not education records under FERPA can be disclosed to the public, if nothing in state laws prohibits it. While it is important to consider who is requesting access to the school surveillance video, that alone is

[2] 20 U.S.C. 1232g (2006).

[3] *Id.*

[4] 20 U.S.C. 1232g(a)(4)(A) (2006) (defining "education records" as "those records, files, documents, and other materials which contain information directly related to the student and are maintained by an educational agency or institution or by a person acting for such agency or institution").

[5] *Compare* Bryner v. Canyons Sch. Dist., 351 P.3d 852. (Utah Ct. App. 2015) (finding that "nothing in the plain language of the statute limits the application of FERPA to only academic records.), *with* Jacobson v. Ithaca City Sch. Dist., 53 Misc. 3d. 1091 (N.Y. Supp. Ct. 2016) (finding that the video at issue did not meet FERPA's "directly related to a student" requirement because the video did not relate "in any way to the educational performance of the students depicted").

not determinative of whether the record will be released. Disclosure of a school surveillance video, first and foremost, depends on whether it is categorized as an education record.

Part I of this chapter will discuss school surveillance videos that are considered education records under FERPA, explaining who can access those education-record school surveillance videos under specific circumstances. Part II of this chapter will discuss school surveillance videos that are exempt from the definition of education records under FERPA, explaining who can access those videos under specific circumstances. Part III of this chapter will discuss state laws that govern the disclosure of school surveillance videos.

School Surveillance Videos As Education Records under FERPA

FERPA affords parents and students who have reached eighteen the right to access their education records, and it gives them some control over the disclosure of their education records to others. However, there are exceptions. Parental access rights may be limited when students other than their own children are in the video, and parents' power to restrict disclosure to others does not apply in certain circumstances. Schools must release a student's education record to school officials who have a legitimate educational interest, to persons charged with helping in health or emergency situations, and to persons designated in a court order.

Parental Access and Control

FERPA gives parents the right to inspect and review their children's education records, the right to challenge the content of those education records, and the right to control the disclosure of education records containing their child's personally identifiable information.[6] FERPA defines education records as records that are "(1) directly related to a student; and (2)

[6] 20 U.S.C. § 1232g(a)(1)(A)(2006). The ultimate enforcement of FERPA lies with the Secretary of the Department of Education, who may terminate funding to any school or program in violation of FERPA, but this has never happened.

maintained by an educational agency or institution."[7] FERPA definitions make it clear that education records may be in a teacher's desk, nurse's office, or principal's file, among other places, and that they are not strictly limited to documents in the student's official file.[8] FERPA regulations, which are administrative laws promulgated by the U.S. Department of Education, note that student information may be recorded in a variety of ways, "including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche."[9] Furthermore, FERPA regulations do not limit the definition of "personally identifiable information" to a student's name.[10] Personally identifiable information also includes the student's parent's name, the family's address, the student's identification number or social security number, and any information that makes the student's identity easily traceable.[11]

The U.S. Department of Education's Family Policy Compliance Office (FPCO), which oversees institutional compliance with FERPA, has not issued formal guidance on the subject of school video surveillance maintained by schools. The FPCO has provided varying and conflicting informal guidance on school surveillance videos when questioned by parents, school districts, and state attorneys general.[12]

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[7] *Id.*

[8] 20 U.S.C. § 1232g(a)(1)(A)(2006) ("[T]hose records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution."). The definition of FERPA was updated six weeks after it was enacted replacing a laundry list of specific record types with the current, broader definition of "education records." The original definition of education records included academic work completed, attendance data, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns, among other things. *See* Education Amendments of 1974, Pub. L. No. 93-380 § 513, 88 Stat. 484 (1974) (codified as amended at 20 U.S.C. § 1232g (1974)).

[9] 34 C.F.R. § 99.3.

[10] *Id.*

[11] *Id.*

[12] The FPCO has an online library of FERPA letters on its website, but the FPCO letters on school video surveillance that are often cited by courts and scholars are not available on the website.

In 2004, in a letter responding to a parent complaint, the FPCO first said that a school surveillance video is an education record for all students who are recorded by a school's video surveillance system.[13] The FPCO directed schools to deny parental access to the video if there was more than one student in the video, unless the video was altered so the identities of other students were not disclosed.[14] Alternatively, the parents of all other students who were in the video could consent to allow the parent who made the request to view the video.[15] Even the parents of children in the background of the video had to be consulted before the video could be shared.

Two years later, in 2006, the FPCO changed its position on the subject of school surveillance videos maintained by schools. This became apparent when the Texas attorney general issued opinions that said the FPCO had determined that a school surveillance video is an education record only for the students who are the focus of the video.[16] This means that the parents of students who are involved in a fight, drug deal, or some other disturbance or

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[13] Bryner v. Canyons Sch. Dist., 351 P.3d 852, 858 (Utah Ct. App. 2015) (quoting *Letter re: Berkeley County Sch. Dist.,* 7 FERPA Answer Book 40, 104 LRP Publications 44490 (Feb. 10, 2004)) ("If education records of a student contain information on more than one student, the parent requesting access to education records has the right to inspect and review, or be informed of, only the information in the record directly to his or her child . . . . If, on the other hand, another student is pictured fighting in the videotape, you would not have the right to inspect and review that portion of the videotape."), *but cf.* Rome City Sch. Dist. v. Grifasi, 806 N.Y.S. 2d 381, 382 (N.Y. Sup. Ct. 2005) (holding non-academic videos made for security purposes were not "education records" under FERPA), *and* Lindeman v. Kilso Sch. Dist., 172 P. 3d 329 (Wash. 2007) (holding non-academic videos made for security purposes were not "student records" under Washington's student privacy law). Not all courts followed the FPCO's 2004 guidance. *See infra* pp. 20–21, 26–27.

[14] Bryner v. Canyons Sch. Dist., 351 P.3d 852, 858 (Utah Ct. App. 2015).

[15] *Id.*

[16] *Bryner*, 351 P.3d at 858 (citing Opinion of the Texas Attorney General, OR 2006-00484, 2006 WL 208275 (Tex. Att'y Gen. Jan. 13,2006) and Opinion of the Texas Attorney General, OR2006-07701 (July 18, 2006), which stated, ("[T]he [FPCO] ... has determined that videotapes of this type do not constitute the education records of students who did not participate in the altercation.... The [FPCO] has, however, determined that the images of the students involved in the altercation do constitute the education records of those students. Thus, FERPA does apply to the students involved in the altercation.").

altercation are considered the focal point of the video, and those parents must consent for an outside party to review the video.[17] The Texas attorney general also explained that the parents of children who are the focal point of the video could access the video without each other's permission.[18] On the other hand, the parents of students in the video who are walking down the hall, sitting on the bus, or eating lunch are deemed to be in the background, and those parents would not be able to access the video or veto the access of other parents.[19]

The most up-to-date guidance on school video surveillance – a 2016 communication – has come from the National School Boards Association (NSBA) recounting what FPCO representatives have shared with the NSBA.[20] The NSBA said, "In conference with FPCO, it is our understanding [that] . . . . If multiple students are the 'focus' of the video, all students and their parents may view the video, although the school may not give copies of the video to any of the parents without the consent of the other parents."[21] This is a change since 2006. NSBA also said that the FPCO has remained consistent in advising school districts that school surveillance videos of students who are not involved in an altercation are not education records under FERPA.[22] However, according to the NSBA, the FPCO has made one small change to its guidance: "[I]f the school uses the video to find witnesses to the altercation and the students are

[17] *Id.*

[18] *Id.*

[19] *See id.*

[20] If the FPCO has issued guidance via response letters to inquiries, those letters have not been made public.

[21] Thomas E. Myers, *2016 FERPA Update: Back to the Basics (Or Back to the Future?)*, 2016 SCH. L. SEMINAR, (National School Boards Association, Fort Worth, TX), Apr. 7–9, 2016, *available at* https://cdn-files.nsba.org/s3fs-public/01-Myers-2016-FERPA-Update-Paper.pdf.

[22] *Id.*

named or used as witnesses, the video becomes the witnessing student's education record also."[23] This means that school surveillance videos could now be education records for certain students in the background.

Two courts' decisions in cases about individuals seeking copies of school surveillance videos turned on whether the videos at issue satisfied the statutory definition of education records under FERPA. The courts had differing opinions on whether non-academic videos should be considered education records under FERPA. In 2015, *Bryner v. Canyons School District*,[24] the Utah Court of Appeals held that a school surveillance video of a fight among middle school students was an education record as defined by FERPA.[25] The court also held that an unredacted copy of the video could not be released to the parent requesting the video because the video contained personally identifiable information of other students.[26] In this case, Robert Bryner, the parent of a middle school student involved in a fight with other students outside of the classroom, requested a copy of the video under Utah's public records laws, the Government Record Access and Management Act (GRAMA).[27] The school district and later a trial court denied Bryner's request because they found the video to be an education record for students other than Bryner's child.[28] Bryner argued that the video was not an education record because "it

[23] *Id.* It is up to schools to decide whether video images are "directly related" to students. *See id.*

[24] 351 P.3d 852 (Utah Ct. App. 2015). The decision not to release the video in this case seems to align with the FPCO's guidance that was shared with the NSBA.

[25] *Id.* at 859.

[26] *Id.* at 854 ("Because FERPA forbids release of the unredacted video, . . . the District may produce only a redacted copy and that Bryner is to bear the cost of that redaction.").

[27] *Id.* at 855 (GRAMA is a series of laws designed to guarantee that the public has access to the records of government bodies at all levels in Utah).

[28] *See Bryner*, 351 P.3d 852, 855–58 (describing the video as "nothing more than a record of the actions of the students involved in the incident.") Based on this description, the court did not consider whether the video would be an education record for students in the background because that was not an issue in this case. *See id.*

is nonacademic in nature and, therefore, is not the type of record FERPA was meant to protect."[29] In response to this argument, the court said, "[N]othing in the plain language of the statute limits the application of FERPA to only academic records."[30] The court, therefore, considered whether the video satisfied FERPA's two elements of an education record. In order to qualify as an education record, the record first must contain information directly related to a student.[31] The court found the images of students involved in the fight were directly related to students because those images identified the students.[32] In order to qualify as an education record, the school must also maintain the record.[33] Bryner argued the school district did not maintain the record because the video was not administered by educators or regularly reviewed by educators.[34] The court did not find Bryner's argument persuasive because, according to the court, "FERPA requires only that the record be maintained by or on behalf of an educational agency, not that educators themselves maintain the records or review them."[35] Thus, the court decided that the school surveillance video at issue here was an education record under FERPA.[36] And while FERPA gives parents the right to review and inspect education records, the court

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[29] *Id.* at 857.

[30] Bryner v. Canyons Sch. Dist., 351 P.3d 852, 857 (Utah Ct. App. 2015) (According to the court, a plain reading of FERPA's statutory language reveals that Congress intended for the definition of education records to be broad in scope).

[31] 20 U.S.C. 1232g(a)(4)(A) (2006).

[32] Bryner v. Canyons Sch. Dist., 351 P.3d 852, 855 (Utah Ct. App. 2015) ("[T]he students in the video were clearly identifiable either by face, body shape, clothing or otherwise.").

[33] 20 U.S.C. 1232g(a)(4)(A) (2006).

[34] Bryner v. Canyons Sch. Dist., 351 P.3d 852, 855 (Utah Ct. App. 2015). The court did not say who had been responsible for administering or reviewing the video. *See id.*

[35] *Id.* at 858–59.

[36] *Id.* at 859.

concluded that the video could not be released to Bryner without the consent of the parents of the other students who were shown fighting in the video.[37] Rather than ordering the school to get the consent of all parents whose children were in the video, the court ordered the district to blur the faces of other students in the video, and Bryner had to bear the cost of that redaction.[38]

In *Jacobson v. Ithaca City School District*,[39] a New York trial court held that two video recordings[40] of a school's guest speaker were not education records as defined by FERPA; therefore, the video recording had to be disclosed without parental consent to an attorney who requested access to the recordings under the state's Freedom of Information Law (FOIL).[41] In this case, the school district had denied the attorney's request for the video recordings and instead provided the attorney with a partial transcript of the video recordings.[42] The school district determined the recordings were education records and refused to release them "on the basis that when they are in the custody of [the school district] they are maintained by an educational agency."[43] The court disagreed because the video recordings did not meet both prongs of the statutory definition of education records.[44] Although the school was able to show

[37] *Id.* at 859–60 ("[W]hile Bryner has a right to 'inspect and review' the part of the Video relating to his child, he does not 'have the right to inspect and review' the portions of the Video in which other students are pictured.").

[38] *Id.* at 859.

[39] 53 Misc. 3d. 1091 (N.Y. Supp. Ct. 2016).

[40] *Id.* at 1093 (noting that the two video recordings of thee vent were made by a grandmother of one of the students who was not an employee of the school district.).

[41] *Id.* at 1097 ("FOIL expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. To this end, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted.").

[42] *Id.* at 1093.

[43] *Id.*

[44] *Id.* (explaining that mere fact that information may be held by an educational agency is insufficient to make it an educational record.")

that the district maintained the video, it was unable to show that the video "contain[ed] information directly related to a student."[45] While the court was sympathetic to the school district's argument "that the visual and audio made it possible for a person in the community to identify students participating in the question and answer session," the court still found that the video did not meet FERPA's "directly related to a student" requirement because the video did not relate "in any way to the educational performance of the students depicted."[46] In particular, the court said the video had not been "maintained with, referenced in, or indexed to, any individual student files maintained by the central registrar or custodian of student records."[47] Thus, the court ruled that the video was not an education record under FERPA.[48] This court's interpretation of what is considered an education record differs from *Bryner v. Canyons School District*, which said that FERPA is not limited to academic records.[49] Additionally, the attorney who requested the video recordings consented to those videos being redacted to protect the identities of students involved.[50] The court "determin[ed] that redaction [was] necessary and appropriate in this case, regardless of the applicability of FERPA, to protect the identities of the students involved in the event."[51] The court did not cite a law to support this determination.

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[45] Jacobson v. Ithaca City Sch. Dist., 53 Misc. 3d. 1091, 1093 (N.Y. Supp. Ct. 2016).

[46] *Jacobson*, 53 Misc. 3d. at 1093–94.

[47] *Id.* at 1094.

[48] *Id.* (noting the school's decision to share the partial transcript with the attorney "evince[d] an understanding that [the video] was not an educational record" under FERPA, for had it been considered an educational record, it would have been entirely exempt from disclosure under FOIL."

[49] 351 P.3d 852. (Utah Ct. App. 2015). The decision not to release the video in this case seems to align with the FPCO's guidance that was shared with the NSBA).

[50] *Id.*

[51] *Id.* (explaining that the school district created this problem and must pay for the redactions: "It bears emphasizing that respondent created the possibility that video recordings depicting students would be published, not only by permitting the event to occur, but also by allowing individuals whom it did not employ . . . to be present and record the event. The risk that unredacted video recordings depicting individual students would be published existed from

One court seemingly sidestepped the question of whether a videotape was an education record under FERPA in reaching its conclusion that the video could be disseminated to the public. In *State v. Mart*,[52] a video of students fighting on a school bus was used as evidence in the criminal prosecution of one of the students involved in the incident.[53] The school district and a trial court denied the release of the video to a local newspaper and a local news station, and both news organizations appealed.[54] They argued that the video must be released because it is a public record under Louisiana's public records law. Louisiana's public record law defines a public record to include:

> All . . . tapes, recordings . . . having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state.[55]

The court said: "Given this broad definition, it can hardly be disputed that the evidence tape constitutes a public record. It is a reproduction of a tape prepared for use by a parish school system during the court of its duty to provide public transportation to students."[56] The school argued that even if the court found the evidence video to be a public record under Louisiana's public records law, withholding of this public record is justified.[57] The district attorney argued,

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the moment that the recordings were made by individuals not under [the school district's] control and, in fact, portions of the video recordings have apparently been published and made available for public viewing. Thus, disclosure of video recordings redacted as directed herein causes no further harm to any of the innocent students involved.")

[52] State v. Mart, 697 So. 2d 1055 (La. App. 1st Cir. 1997).

[53] *Id.*

[54] *Id.* at 1058.

[55] *Id.*

[56] *Id.* at 1059.

[57] *Id.*

"[F]ederal law prevents dissemination of the tape to the general public because it is a confidential educational record." The court did not consider whether the video was directly related to students and maintained by the school.[58] Instead, the court said, "Contrary to the District Attorney's assertion, the Buckley Amendment does not preclude the release of information pertaining to students to the public; rather, it acts to control the careless release of educational information by educational institutions by threatening to withhold federal funds for doing so."[59] The court, therefore, concluded that Louisiana's public access law mandates that the evidence be released to the public.[60] The *Mart* court's decision to forego the two-prong education record test seems to oversimplify the goal of FERPA. According to Senator James Buckley who proposed FERPA and spoke about it a congressional hearing, FERPA was enacted "to protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities."[61] Controlling the careless release of educational information is one aspect of that protection.

School Official Access

School officials can access school surveillance videos that are considered education records under FERPA. School officials are the exception to the rule that prohibits schools from disclosing a student's education record that contains his or her personally identifiable information without parental consent.[62] Teachers, administrators, and others who directly work

[58] State v. Mart, 697 So. 2d 1055, 1059 (La. App. 1st Cir. 1997).

[59] *Id.* at 1060.

[60] *Id.*

[61] 120 Congr. Rec., 1974.

[62] 20 U.S.C. 1232g(b)(1)(A) (2006).

for the school are school officials within the meaning of FERPA.[63] Furthermore, in 2008, the Department of Education expanded the term "school officials" to include consultants, volunteers, and other parties who provide services that the educational agency would otherwise use its employees to perform.[64] These school officials can review students' education records, including school surveillance videos, when they have a "legitimate educational interest" in doing so.[65] It is the school's responsibility to set out a written standard for determining when there is a legitimate educational reason for inspecting education records, according to FERPA regulations.[66] The FPCO indicated on its website that "[g]enerally, a school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility."[67]

Only one court held that an individual could obtain access to an education-record school surveillance video under the school official exception to FERPA's parental consent requirement. In *Medley v. Board of Education of Shelby County*,[68] the Kentucky Court of Appeals held that videotapes of a teacher's classroom were education records under FERPA.[69] The court also held that the videos had to be disclosed to the teacher because she was a school official under

[63] *Id.*

[64] 34 C.F.R. § 99.31(a)(1).

[65] 20 U.S.C. 1232g(b)(1)(A) (2006).

[66] 34 C.F.R. § 99.31(a)(1) (requiring that the school make the determination as to what constitutes "legitimate educational interests").

[67] FERPA FREQUENTLY ASKED QUESTIONS - FERPA FOR SCHOOL OFFICIALS, FAMILY POLICY COMPLIANCE OFFICE, http://familypolicy.ed.gov/faq-page/ferpa-school-officials#t69n90 (last visited Apr. 12, 2017).

[68] 168 S.W.3d 398 (Ky. Ct. App. 2004).

[69] *Id.* at 404.

FERPA.[70] In this case, Debbie Medley, a special education teacher, made an open records request to view video recordings of her own classroom.[71] The cameras were installed in her classroom to monitor her performance after students in her classroom complained that she had treated them inappropriately.[72] Medley said she would like to view the videos "to evaluate [her] performance, as a teacher, as well as the management of [her] classroom."[73] In this case, all parties agreed the video was an education record under FERPA.[74] On that basis, the school district and then later the state attorney general denied the teacher's request, claiming that FERPA prohibited the release of the videotapes to the teacher.[75] The Kentucky Court of Appeals, however, said the school district and the state attorney general failed to take the school official exception into consideration when they reviewed the teacher's request.[76] According to the Kentucky Court of Appeals, the school official exception applies to "teachers within the educational institution . . . who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required."[77] Thus, the court found that the teacher's request should not have been considered as having been made by "a member of the public."[78] Rather, the teacher's

[70] *Id.*

[71] *Id.* at 401.

[72] *Id.*

[73] *Id.*

[74] Medley v. Board of Education of Shelby County, 168 S.W.3d 398, 402 (Ky. Ct. App. 2004).

[75] *Id.* at 404.

[76] *Id.*

[77] *Id.* at 403.

[78] *Id.* at 404.

request should have been judged in light of her position as a teacher.[79] The Kentucky Court of Appeals then reversed and remanded the case back to the trial court for a hearing on the issue of whether the teacher had an educational interest in viewing the video.[80]

A school can choose to designate school resource officers (SROs) as school officials. [81] In fact, in 2008, the FPCO recommended that schools designate members of their "law enforcement unit,"[82] which typically includes school resource officers, as school officials with a legitimate educational interest so they can have access to students' education records without parental permission.[83] According to the FPCO, such access enables SROs to "perform their professional duties and assist with school safety matters."[84] According to FERPA regulations, SROs will be considered "school officials" with "legitimate educational interests," only if they:

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[79] *Id.*

[80] Medley v. Board of Education of Shelby County, 168 S.W.3d 398, 404 (Ky. Ct. App. 2004) (explaining that because the trial court record was void of any discussion of Medley's educational interest in the videotapes, other than the statement made in her initial request that the videotapes would be beneficial to improving her teaching performance and help her manage her class, the court reversed and remanded for a hearing on the issue of whether Medley had an educational interest in the video). The status of this case was not available on Westlaw.

[81] *School resource officers are on-site law enforcement. Education Under Arrest: The Case Against Police in Schools*, JUSTICE POLICY INSTITUTE (Nov. 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf ("Not all police are SROs, but all SROs are police . . . . SROs are typically accountable first to the police department and then to the school, which might pay part of an SRO's salary or administrative cost.").

[82] Under FERPA, a "law enforcement unit" is "an individual or a division of an educational agency that is officially authorized by that agency to (1) enforce any local, State, or Federal law or (2) maintain the physical security and safety of the agency or institution." 34 C.F.R. § 99.8.

[83] *Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools*, FAMILY POLICY COMPLIANCE OFFICE (Oct. 2007) [hereinafter *Balancing Student Privacy*], https://www2.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf ("Many school districts employ security staff to monitor safety and security in and around schools. Some schools employ off-duty police officers as school security officers, while others designate a particular school official to be responsible for referring potential or alleged violations of law to local police authorities. Under FERPA, investigative reports and other records created and maintained by these law enforcement units are not considered education records subject to FERPA."). *See* discussion *infra* Part II.

[84] *When can law enforcement unit officials serve as "school officials"?*, *FERPA Frequently Asked Questions*, FAMILY POLICY COMPLIANCE OFFICE, http://familypolicy.ed.gov/content/when-can-law-enforcement-unit-officials-serve-"school-officials" (last visited Apr. 12, 2017).

> Perform[] an institutional service or function for which the agency or institution would otherwise use employees; [Are] under the direct control of the agency or institution with respect to the use and maintenance of education records; [Are] subject to the requirements . . . that [a student's] personally identifiable information from an education record [may be used] only for the purposes for which the disclosure was made.[85]

SROs designated as school officials can access and share student education records within the school, but cannot share those records with the local police department, unless another exception applies.[86]

While courts have yet to rule on SRO access to school surveillance videos, one court documented a disagreement between a school district and its director of security on this issue. In *Merrill v. Winston-Salem Forsyth County Board of Education*,[87] the court held that a school employee was properly dismissed despite his claim that his discharge from employment violated his right to free expression under the North Carolina Constitution.[88] In this case, Patrick Merrill, the school's director of security, said he was fired for advocating for SROs to get access to school surveillance videos without first getting approval from the school district's legal team.[89] An incident on a school bus that led an SRO to request school surveillance videos from school administrators sparked the controversy.[90] Instead of immediately handing over the video, the assistant principal checked with one of the school district's staff attorneys who said the SRO needed a subpoena to obtain the video because the video contained confidential information

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[85] 34 CFR § 99.31.

[86] *When can law enforcement unit officials serve as "school officials"?*, *FERPA Frequently Asked Questions*, FAMILY POLICY COMPLIANCE OFFICE, http://familypolicy.ed.gov/content/when-can-law-enforcement-unit-officials-serve-"school-officials" (last visited Apr. 12, 2017).

[87] 791 S.E.2d 2016 WL 6080858 (N.C. Ct. App. 2016).

[88] *Id.*

[89] *Id.* This approval system/procedure was written into the SROs' contracts with the school district. *Id.*

[90] *Id.*

protected by FERPA.[91] In response, Merrill emailed the school district attorneys about their "mistakenly [sic] legal advice" and said, "[W]e allow law enforcement access to our cameras."[92] When the attorneys' decision did not change, Merrill reached out to a law professor for the law professor's opinion on the matter.[93] The law professor provided Merrill with a memo supporting his interpretation of FERPA and stating that, in his opinion, the school attorneys "had not kept up with current FERPA law."[94] Merrill forwarded this information to the school attorneys.[95] Within a month, Merrill was terminated for his "attempt to undermine the legal advice of [the school] district's Chief Legal Counsel."[96] The court ultimately held Merrill's right to free expression was not violated because the speech at issue dealt with his own employment and not a matter of public concern.[97] While freedom of expression and discharge from employment were the legal issues before the court, the court's lengthy discussion of a dispute over SRO access to school surveillance footage shows that this is an area of law in which additional guidance from the FPCO could be beneficial. The court did not say anything about how the SRO access issue should have been resolved.

Emergency Access

[91] *Id.*

[92] *Id.*

[93] 791 S.E.2d 2016 WL 6080858 , at *2 (N.C. Ct. App. 2016).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

FERPA permits school officials to disclose school surveillance videos that are education records to appropriate parties in emergency situations.[98] In order for this exception to apply, there has to be knowledge that confidential information is necessary to protect the health or safety of the student or other individuals.[99] According to FPCO guidance, "Disclosures made under the health or safety emergency provision must be related to an actual, impending, or imminent emergency, such as a natural disaster, a terrorist attack, a campus shooting, or the outbreak of an epidemic disease."[100] For example, if a school official can explain why, based on all the information then available, the official reasonably believes that a student poses a significant threat of substantial bodily harm to any person, the school official may disclose personally identifiable information from education records without consent "to any person whose knowledge of the information will assist in protecting a person from threat."[101] While the Department of Education defers to school administrators and requires only a rational basis for the educational institution's decision, FPCO guidance does make it clear that disclosures should not be made simply to prepare for an emergency when the likelihood of an emergency is unknown.[102] Courts have yet to decide a case in which the issue was whether a school surveillance video should be released under the emergency exception.

Persons Designated in a Lawfully Issued Subpoena or Judicial Order

[98] *See* 34 CFR §§ 99.31(a)(10) and 99.36.

[99] *Id.*

[100] *Id.*

[101] Family Policy Compliance, Office U.S. Dep't of Educ., Addressing Emergencies on Campus (June 2011), http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf.

[102] *Id.*

FERPA permits schools to disclose students' education records to the entity or person designated in a lawfully issued subpoena or court order.[103] Typically, this provision requires schools to make a reasonable effort to notify the student whose records are being subpoenaed before complying with the subpoena or court order.[104] Parents have an opportunity to challenge them.[105] This notice requirement may be skipped in cases where the issuing court or agency deems that it is necessary.[106] Furthermore, a school can be ordered by a court not to disclose to anyone the existence or contents of the subpoena or judicial order.[107]

There has been one case in which disclosure of school surveillance turned on a court order. In *Goldberg v. Regional School District #18*,[108] the Superior Court of Connecticut held school bus surveillance videos were education records under FERPA, but that the videos could be disclosed to the parents because the videos were material and necessary to aid the resolution of a related criminal case.[109] Jean and James Goldberg, the parents of a student diagnosed with autism, requested videotapes from the school district when they heard their child was being

[103] *See* § 99.31(a)(9)(i) and (ii).

[104] 34 CFR § 99.31(a)(9).

[105] *Id.*

[106] *Id.*

[107] *Id.*; FERPA FREQUENTLY ASKED QUESTIONS, FAMILY POLICY COMPLIANCE OFFICE, http://familypolicy.ed.gov/content/may-schools-comply-subpoena-or-court-order-education-records-without-consent-parent-or ("For example, when a parent is a party to a court proceeding involving child abuse and neglect or dependency matters, and the order is issued in the context of that proceeding, additional notice to the parent by the educational agency or institution is not required, the school does not have to notify the parent.") (last visited Apr. 12, 2017).

[108] Goldberg v. Reg'l Sch. Dist. No. 18, No. KNLCV146020037S, 2015 WL 4571079, at *2–3 (Conn. Super. Ct. June 26, 2015).

[109] *Id.*

bullied on the bus.[110] The school district denied the parents' request to view the video because it determined the video was an education record for the student bullies as well as the bullied child.[111] The Goldbergs then filed a petition for a bill of discovery for the videotapes.[112] The Superior Court of Connecticut agreed that FERPA prohibited education records that contain personally identifiable information from being released without parental consent.[113] However, the court observed that FERPA allows the release of information without parental consent when "such information is furnished in compliance with judicial order. . . upon condition that parents and the students are notified . . . in advance of the compliance therewith by the educational institution."[114] When deciding on a judicial order for education records, the court explained, "[c]ourts must balance all the facts and interests in favor of and in opposition to disclosure of education records within the meaning of FERPA."[115] In this case, Connecticut Superior Court found that the parents had a "good faith basis" for requesting access to the school surveillance

[110] *Id.* at *2. The parents were told by more than one person that two students who rode the bus "forcibly pushed their child against the inside walls and/or windows of the bus and hit the petitioner over the head with backpacks while riding to and from the school on numerous occasions." The parents were also told that the bus driver encouraged these actions and joined in by mocking their child. When the parents asked their child about these incidents, he responded by going into a fetal position and/or putting his head under a pillow. Based on this information, the court determined, "there is no reason to expect he will be able to testify, at least with substantial clarity, to what happened." *Id.*

[111] *Id.*

[112] *Id.* ("A bill of discovery is appropriate for evidence believed in good faith to be material and necessary to aid in the proof of another action pending or about to be brought.")

[113] *Id.*

[114] Goldberg v. Reg'l Sch. Dist. No. 18, No. KNLCV146020037S, 2015 WL 4571079, at *1 (Conn. Super. Ct. June 26, 2015) (explaining that "[t]he legal basis for the granting of [a bill of discovery] as it pertains to FERPA is that FERPA explicitly contemplates that courts will, from time to time, order disclosure of student educational records and permits compliance with such orders without consent, written or otherwise, of the student or the student's parent or guardian.").

[115] *Id.*

videos.[116] The court said, "[T]he videos are actually material and necessary because the videos are objective evidence of what did and did not take place within the camera's view and because [the child] cannot be expected to articulate what happened to him, let alone testify about it, in the foreseeable future."[117] Thus, the court ordered the school district to provide the tapes to the parents of the student victim and to notify the parents of the other students on the tape of the court-ordered disclosure.[118]

School Surveillance Videos that are not Education Records under FERPA

FERPA exempts several categories of student information from its broad definition of education records. [119] Under FERPA, education records do not include: (a) records kept in the sole possession of the maker,[120] (b) records created and maintained by a law enforcement unit,[121] (c) records relating to an individual who is employed by a school that are made and maintained in the normal course of business,[122] and (d) records on a student who is eighteen years of age or older which are made or maintained by a health care professional who is treating the student.[123] FERPA regulations state that records about an individual who is no longer a student are exempt

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[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *See id.*; 20 U.S.C. § 1232g(a)(1)(4)(B) (explaining that these records are not "education records").

[120] 34 C.F.R. § 99.3 (stating that these are "[r]ecords that are kept in the sole possession of the maker, [] used only as a personal memory aid, and not accessible or revealed to any other person except a temporary substitute for the maker or the record."). A school official's notes regarding a telephone conversation or face-to-face conversation with a parent would be an example. FERPA FREQUENTLY ASKED QUESTIONS, FAMILY POLICY COMPLIANCE OFFICE, http://familypolicy.ed.gov/faq-page (last visited Apr. 12, 2017).

[121] 34 C.F.R. § 99.3; *see infra* pp. 18–10.

[122] 34 C.F.R. § 99.3; *see* Klein Indep. Sch. Dist. v. Mattox, 830 F.2d 576, 579 (5th Cir. 1987) (stating that a teacher's college transcript was not a record under FERPA).

[123] 34 C.F.R. § 99.3 (excluding as remedial or other activities that are part of the school's instructional program).

as well.[124] When a record is not an education record under FERPA, it can be released without parent consent to specific parties delineated in the statute. To date, the FPCO and courts have considered only the issue of whether a school surveillance video can be released under the law enforcement exemption, not the other three exemptions.

Anyone can access school surveillance videos if those videos are law enforcement records and not education records under FERPA.[125] In 1992, FERPA was amended to exempt "law enforcement records" from the definition of "education records."[126] FERPA regulations explain that law enforcement records are "those records, files, documents, and other materials that are: (1) created by a law enforcement unit; (2) created for a law enforcement purpose; and (3) maintained by the law enforcement unit."[127] A "law enforcement unit" is defined as "an individual or a division of an educational agency that is officially authorized by that agency to (1) enforce any local, State, or Federal law or (2) maintain the physical security and safety of the agency or institution."[128] If the law enforcement unit also performs non-law enforcement functions for the school, including the investigation of incidents or conduct that leads to a disciplinary proceeding against a student, the law enforcement unit does not lose its status.[129]

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[124] 34 C.F.R. § 99.3 (referring to alumni records).

[125] *See Addressing Emergencies on Campus*, U.S. DEPT. OF EDUC. (June 2011), http://www2.ed.gov/policy/gen/guid/fpco/pdf/emergency-guidance.pdf (last viewed Sept. 6, 2011) (stating that "schools may disclose information from law enforcement unit records to anyone . . . without consent from parents or eligible students.")

[126] 20 U.S.C. §1232g(a)(4)(ii) (2006).

[127] 34 C.F.R. § 99.8.

[128] *Id.*

[129] *Id.*

When Congress amended FERPA to distinguish law enforcement records from education records, it had colleges and universities in mind because they have police departments.[130] Before the 1992 amendments, FERPA prohibited campus law enforcement records from being disclosed to the public.[131] As a result, schools were sometimes forced to choose between noncompliance with state public record laws and noncompliance with FERPA.[132] This conflict was discussed in detail at a 1992 congressional hearing.[133] Speakers at the hearing emphasized that noncompliance with FERPA potentially jeopardizes an institution's federal funding whereas complying with FERPA placed colleges and universities in the "unfortunate position of appearing to use [FERPA] to cover up campus crime."[134] It was a lose-lose situation. Congress therefore amended FERPA to exempt from its definition of education records "any records maintained by a law enforcement unit of the educational agency or institution that were created by such law enforcement unit for the purpose of law enforcement."[135]

In 2007, FPCO issued informal guidance on school surveillance videos maintained by law enforcement units that said: "Images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under

[130] Comm. On Labor & Human Res., U.S. Senate, REP. On Reauthorizing the Higher Educ. Act of 1965 (Nov. 12, 1991), https://archive.org/stream/ERIC_ED340276/ERIC_ED340276_djvu.txt.

[131] *Id.*

[132] *Id.* This is not always the case. For example, North Carolina public records law says that records are public unless there is an exception in the law. FERPA is one such exception, so there is no conflict between the two laws. N.C. GEN. STAT. § 132.

[133] Comm. On Labor & Human Res., U.S. Senate, REP. On Reauthorizing the Higher Educ. Act of 1965 (Nov. 12, 1991), https://archive.org/stream/ERIC_ED340276/ERIC_ED340276_djvu.txt.

[134] *Id*.

[135] *Id.*

FERPA."[136] One would assume that means those records would be public unless some other law forbade disclosure. However, the FPCO said "these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate." [137] This appears to be another instance of confusing guidance by the FPCO. The FPCO also recommends that schools designate a law enforcement unit (if they do not have one) "to maintain school security camera[s] and determine the appropriate circumstances in which the school would disclose recorded images."[138] This is interesting because there is nothing prohibiting a school from releasing school surveillance videos if they are not considered education records under FERPA.

Two courts have considered whether a school surveillance video was a law enforcement record. In one case, a student requested access and, in the other case, a parent requested access. The courts ruled that the school surveillance videos could be released in both cases because the videos were law enforcement records, not education records under FERPA. In *Rome City School District Disciplinary Hearing v. Grifasi*,[139] a New York trial court held that a school surveillance video of an altercation between students was not an education record under FERPA. Mark Grifasi Jr., a student who was suspended from school for his involvement in the fight, requested access to the school surveillance footage of the fight.[140] The school denied the student's request, citing FERPA's prohibition against releasing education records without the consent of other

[136] Balancing Student Privacy, *supra* note 71. If the very same video was recorded by other school officials, courts would use the two-prong education record test to determine whether the video is an education record under FERPA that could not be released without parental consent or the consent of students who are eighteen and older.

[137] *Id.*

[138] *Id.*

[139] Rome City Sch. Dist. v. Grifasi, 806 N.Y.S.2d 381 (N.Y. Sup. Ct. 2005).

[140] *Id.* at 382.

parents whose children were involved in the fight and caught on video.[141] The court disagreed, finding the school video to be a law enforcement record that could be released, not an education record.[142] According to the court:

> [E]ducation records are defined as records, files, documents and other material which contain information directly related to a student and such education records do *not* include records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.[143]

The court found the purpose of the school surveillance in this case was to help maintain the physical security and safety of the school building.[144] The court therefore concluded that the videotape was not an education record under FERPA because it did not pertain to the educational performance of the students captured on the tape.[145] Because the video was deemed a law enforcement record rather than an education record under FERPA, Grifasi was able to view the video without the consent of other parents and without redactions.

In *Bryner v. Canyons School District*,[146] the Utah Court of Appeals also held that the video of a student who was caught fighting on school surveillance cameras was not an education record as defined by FERPA. In this case, the Utah Headliners Chapter of the Society of Professional Journalists filed an amicus brief arguing that the surveillance video was not an education record because it was "akin to a law enforcement record,"[147] not an education

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[141] *Id.*

[142] *Id.* at 383.

[143] *Id.*

[144] *Id.*

[145] Rome City Sch. Dist. v. Grifasi, 806 N.Y.S.2d 381 (N.Y. Sup. Ct. 2005).

[146] 351 P.3d 852 (2015).

[147] *Id.* at 856.

record.[148] The court determined that Bryner failed to show the video was a law enforcement record.[149] The court said, "Even assuming the Video was created for a law enforcement purpose, i.e., security, '[r]ecords created ... for a law enforcement purpose that are maintained by a component of the educational agency or institution other than the law enforcement unit' are not law enforcement records."[150] In other words, the court found the video at issue was not a law enforcement record because the school, not the law enforcement unit, maintained it.

School Surveillance Videos under State Privacy and Access Laws

Ten states expressly recognize a right to privacy in their constitutions, [151] but courts have yet to find that a state constitution prohibits school surveillance videos from being disclosed. Three courts ruled that school surveillance videos had to be released under state public record laws despite state student privacy laws. Two courts prohibited the disclosure of a video that would have been disclosed under FERPA.

State Constitutions

One court has discussed whether a state's constitution limits the disclosure of a school surveillance video. In *State v. Mart*,[152] the court held that a school surveillance video of students fighting on a bus had to be disclosed despite the school district's argument that students had a

[148] *Id.* at 859.

[149] *Id.*

[150] *Id.*

[151] *Privacy Protections in State Constitutions*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 3, 2015), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx ("Constitutions in 10 states—Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington—have explicit provisions relating to a right to privacy.").

[152] 697 So. 2d 1055 (La. Ct. App. 1st Cir. 1997).

protected privacy interest in the videotape under the Louisiana constitution.[153] In this case, a local television station and a local newspaper requested access to a school bus surveillance video under Louisiana's Public Records Law.[154] The law favors disclosure.[155] However, the school district argued that the privacy interests of the students depicted in the videotape outweighed the public's access rights.[156] The court set forth the following test to determine if withholding the video was justified:

> First, the custodian or individual claiming the privacy right must prove that there is a reasonable expectation of privacy against disclosure of the information to a person entitled to access to the public information. If, and only if, a reasonable expectation of privacy against disclosure is found, a court must weigh or balance the public records disclosure interest against the privacy interest.[157]

The *Mart* court considered whether the students had a reasonable expectation of privacy under the Louisiana constitution.[158] Under the Louisiana constitution, the court said, a reasonable expectation of privacy exists when an individual has a subjective expectation of privacy that society is prepared to recognize as reasonable.[159] The school district argued the students had a reasonable expectation of privacy that their reactions to the fight would not be shared with the

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[153] *Id.* at 1059. The Louisiana Constitution also provides that "no person shall be denied the right to examine public documents except in cases established by law." La. Const. art. 1 § 5.

[154] *Id.* at 1057. Louisiana's Public Records Law grants persons 18 and older the right to "inspect, copy or reproduce or obtain a reproduction of any public record," except as otherwise provided by law. . . . In this case, the court found the tape to be a public record under Louisiana law because it was a "reproduction prepared for use by a parish school system during the course of its duty to provide public transportation to its students." La. Const. art. 1 § 5.

[155] *Id.* at 1059 (explaining that "[a]ny request for a public record must be analyzed liberally in favor of free and unrestricted access to the record. The right of access may be denied only when a law, specifically and unequivocally, provides against access to the public record.")

[156] *Id.*

[157] *Id.* at 1060.

[158] La. Const. art. 1 § 5.

[159] State v. Mart, 697 So. 2d 1055 (La. App. 1st Cir. 1997).

public.[160] The school district also argued that that expectation was objectively reasonable because FERPA has recognized that students have a privacy interest in their education records.[161] The court found the students had no subjective expectation of privacy because they were riding on a public school bus, their actions were visible to all those around them, and they knew they were being recorded.[162] The court found the students had no objective expectation of privacy because the court said FERPA was enacted to "control the careless release of educational information by education institutions . . . [not] to grant individual students the right of privacy."[163] Because no reasonable expectation of privacy against disclosure was found, the court's analysis stopped here. There was no privacy right to weigh against the disclosure.

State Student Privacy Laws

Forty-nine states have student privacy laws,[164] and some of them offer greater student privacy protections than FERPA does.[165] There are four court cases in which disclosure of school

[160] *Id.* at 1059.

[161] *Id.*

[162] *Id.* at 1060.

[163] *Id.* (citing Red & Black Publishing Co., Inc. v. Bd. of Regents, 262 Ga. 848, 427 S.E.2d 257, 261 (Ga.1993); Student Bar Association Board of Governors, School of Law, University of North Carolina at Chapel Hill v. Byrd, 293 N.C. 594, 239 S.E.2d 415, 419 (N.C.1977).

[164] *See, e.g.*, Ala. Educ. Code 16-44B-1; Alaska Admin. Code. tit. 4 § 07.060(a); Ariz. Rev. Stat. Ann. § 15-1042(J); Ark. Code. Ann. § 6-18-109: Cal. Educ. Code § 49076(a), 49077; Colo. Rev. Stat. § 22-1-123(1); Conn. Gen. Stat. § 10-10a; 14 Del. Admin. Code § 294; D.C. Code Ann. § 38-355; Fla. Stat. § 1002.22; Ga. Code Ann. § 20-2-660 – 20-2-668; Haw. Rev. Stat. § 302D-23; Idaho Code Ann. § 33-133; 105 ILCS 10/1-10; Ind. Code § 20-33-7-1; Iowa Code § 22.7; Kan. Stat. Ann. §§ 72-6215 – 72- 6223; Ky. Rev. Stat. Ann. §§ 160.700 – 160.730; La. Revised Statute § 17-3914; Me. Rev. Stat. tit. 20-A, § 951; Md. Code. Ann. Educ. §§ 4-131; Mass Gen. Laws ch. 71, § 34D; Mich. Comp. Laws § 388.1601; Minn. Stat. § 13.32; Miss. Code Ann. §§ 37- 15-1; Mo. Rev. Stat. §161.096; Montana Code Ann. (2015): 20-1- 213(5); Neb. Rev. Stat. § 7-2,104; Nev. Rev. Stat. § 392.029; N.H. Rev. Stat. Ann. §189;65; N.J. Admin. Code § 6A:32-7.1; N.M. Code R. § 6.29.1.9(E); New York State Education Law § 2-c; N.C. Gen. Stat. §§ 115C-402; N.D. Cent. Code § 15.1-07-25.1; Ohio Revised Code § 149.011; Okla. Stat. tit. 70, § 3-168; Or. Rev. Stat. § 326.565; 22 Pa. Code § 51.72; R.I. Gen. Laws § 16-71- 1; S.C. Code 1976 § 59-1-490; SDCL § 13-3-51; Tenn. Code § 49-1- 702; Tex. Gov. Code §552.114; Utah Code Ann. § 53A-1-711; VA ST § 22.1-287; RCW 28A.600.475; Wis. Stat. Ann. § 126-94-16.1; Wyo. Stat. Ann. § 21-2-202.

[165] For example, Illinois allows for a private right of action if a school or school district violates a student's privacy rights and FERPA does not. *See* 105 ILCS 10/1.

surveillance video turned on whether a state student privacy law limited the disclosure of the video under the state's open record law, and in two of those cases students' video records were prohibited from being disclosed.

In *WFTV, Inc. v. School Board of Seminole*,[166] Florida's Second District Court of Appeal held that the state's student privacy law prohibited the disclosure of the school bus surveillance video, even if the personally identifying information was redacted. In this case, a broadcast television station sued the school board seeking disclosure of a redacted school bus surveillance video under the section of the Florida constitution that guarantees public access to government records.[167] The school district denied the television station's request, arguing that the video was a confidential record under the state student privacy statute that is similar to FERPA.[168] While WFTV agreed that the school surveillance video falls under the category of "records and reports" protected by the state student privacy statute, it did not agree that the entire surveillance video was exempt from disclosure.[169] WFTV argued that the school board was required to redact the personally identifiable information from the surveillance video "pursuant to [the Florida constitution] and provide public access to the redacted documents."[170] Florida's Second District

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[166] WFTV, Inc. v. Sch. Bd. of Seminole, 874 So. 2d 48 (Fla. Dist. Ct. App. 2004).

[167] *Id.* at 50. The Florida constitution states: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Fla. Const. art. I, § 24.

[168] *Id.* The Florida law said: "Every pupil or student shall have a right of privacy with respect to the educational records kept on him or her. Personally identifiable records or reports of a pupil or student, and any personal information contained therein, are confidential and exempt from the provisions of [the Florida constitution]. No [public school] . . . shall permit the release of such records, report or information without the written consent of the pupil's or student's parent or guardian, or of the pupil or student himself or herself if he or she [is over 18], to any individual, agency, or organization." Fla. Stat. Ann. § 228.093 (West).

[169] *WFTV*, 874 So. 2d at 55.

[170] *Id.* at 52.

Court of Appeal reviewed Florida's student privacy law and determined that the television station was incorrect in assuming it could receive a redacted version of the video.[171] According to the court, Florida's student privacy statute allows only students to request and receive the partial release of information contained in their confidential records and reports.[172]

In that same case, the District Court of Appeal of Florida refused WFTV's request for the court to construe the section of Florida's student privacy laws pertaining to personal information in harmony with FERPA.[173] The court said it declined to do so because FERPA has been interpreted to protect only personally identifiable information.[174] According to the court, "The State of Florida goes beyond the funding conditions specified in FERPA and protects the privacy of its students in its educational institutions by preventing the release of 'any personal information' contained in records or reports which permit the personal identification of a student."[175] Thus, the court determined that Florida's student privacy law protects even redacted versions of confidential records and reports because "personal information" under the state law is more encompassing than "personally identifiable information" under FERPA.[176] As a result, the District Court of Appeal of Florida held that the school board could not disclose the records to the television station, even if the personally identifying information was redacted.[177]

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[171] *Id.* at 55.

[172] WFTV, Inc. v. Sch. Bd. of Seminole, 874 So. 2d 48, 55(Fla. Dist. Ct. App. 2004).

[173] *Id.* at 58.

[174] *Id.*

[175] *WFTV*, 874 So. 2d at 59 (quoting Florida's student privacy law) (explaining that personally identifiable records or reports of a pupil or student, and any personal information contained therein, are confidential and exempt from the provisions of [Florida's student privacy law].

[176] *Id.*

[177] *Id.*

In *Tampa Television, Inc. v. School Board of Hillsborough County*,[178] the Florida District Court of Appeals denied a local television station access to a school bus surveillance video of a student who pulled out a gun on the bus because the video was considered a "student record" or "report" under Florida's student privacy law.[179] Under Florida's student privacy law, student records and reports "mean any and all official records, files, and data directly related to pupils and students which are created, maintained, and used by public educational institutions."[180] The law goes on to provide a laundry list of examples of "[m]aterials which shall be considered as a part of a pupil's or a student's record," including "verified reports of serious or recurrent behavior patterns; and any other evidence, knowledge, or information recorded in any medium, including . . . film."[181] The court determined that the video fit into the category of "student records and reports" because it "could be used to produce verified reports of serious or recurrent behavior patterns."[182]

In *Medley v. Board of Education of Shelby County*,[183] the Court of Appeals of Kentucky held that the Kentucky Family Educational Rights and Privacy Act (KFERPA), a statute similar to FERPA, prohibited a school from releasing records to the public but not to teachers. In this case, a special education teacher requested to see videotapes of her classroom so she could use them to evaluate and improve her teaching performance.[184] The school district and attorney

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[178] 659 So. 2d 331 (Fla. App. 1995) (Parker, J., concurring).

[179] *Id.* at 331.

[180] Fla. Stat. Ann. § 228.093(2)(e)(West).

[181] *Id.*

[182] *Tampa Televisions*, 659 So. at 331.

[183] 168 S.W.3d 398, 404 (Ky. Ct. App. 2004).

[184] *Id.* at 401.

general said KFERPA prohibited the requested disclosure.[185] The Kentucky Court of Appeals said that the school district and the attorney general failed to consider the fact that the teacher was entitled to see the videos because KFPERA said, "Educational institutions shall not permit the release or disclosure of records, reports, or identifiable information on students to third parties ... without parental or eligible student consent except to:(a) Other school officials, including teachers, with legitimate education interests and purposes."[186] The court further explained that the teacher's request to see the video should have been granted if she had a legitimate educational interest and purpose in viewing the video.[187] Because that issue was not considered at the trial court, the Kentucky Court of Appeals reversed and remanded for a hearing on the issue of whether Medley had a legitimate educational interest and purpose.[188] If the court finds her interest to indeed be legitimate, the teacher must be afforded the opportunity to view the videotapes.[189]

In *Lindeman v. Kelso Sch. Dist. No. 458*,[190] the Supreme Court of Washington held that a state student privacy law did not prohibit the release of a school bus surveillance video to the parents of one student involved in a fight. Therefore, the surveillance video had to be disclosed under Washington's public records law.[191] In this case, the parents of an elementary school student who was involved in a fight on a school bus filed suit under the state's public records law

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[185] *Id.*

[186] *Id.* at 403.

[187] *Id.* at 405.

[188] *Id.*

[189] Medley v. Bd. of Educ. of Shelby Cnty., 168 S.W.3d 398, 405 (Ky. Ct. App. 2004).

[190] Lindeman v. Kelso Sch. Dist. No. 458, 172 P.3d 329 (Wash. 2007).

[191] *Id.* at 330.

to require the school district to produce a redacted version of the video.[192] Washington's public records law requires state and local agencies to disclose all public records upon request, unless the record falls within a specific statutory exemption.[193] An agency withholding public records bears the burden of proving the applicability of an exemption.[194] The school district refused the parents' disclosure request under the student file exemption in the state student privacy law.[195] The state student privacy law exempts from disclosure "[p]ersonal information in any files maintained for students in public schools, patients or clients of public institutions or public health agencies, or welfare recipients."[196] The court found the surveillance video did not fit within this student file exemption because "[t]he videotape from the surveillance camera differs significantly from the type of record that schools maintain in students' personal files." According to the court, "[t]he student file exemption contemplates the protection of material in a public school student's permanent file, such as a student's grades, standardized test results, assessments, psychological or physical evaluations, class schedule, address, telephone number, social security number, and other similar records," and not maintaining the safety and security of students on school buses.[197] Thus, the court held the security videotape was not legally withheld as a student file document under the state's student privacy law.[198]

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[192] *Id.*

[193] *Id.*

[194] *Id.* at 331.

[195] *Id.*

[196] Lindeman v. Kelso Sch. Dist. No. 458, 172 P.3d 329, 333 (Wash. 2007).

[197] *Id.*

[198] *Id.*

Conclusions

School surveillance videos that are determined to be education records under FERPA are unlikely to be disclosed to the general public. Education records are records that are directly related to the student and maintained by the school. If the court determines a video is an education record, it then considers whether the video contains personally identifiable student information that would prohibit the unredacted video from being shared without parental consent or the consent of students who are 18 and older.

School surveillance videos that meet a FERPA exception may only be disclosed to appropriate parties under certain circumstances. School officials such as school administrators and teachers can access education-record school surveillance videos if they have a legitimate educational interest. Police and health care professionals can access education-record school surveillance videos in emergency situations. The media and others can access education-records school surveillance videos with a court order. Determining whether a person can access school surveillance videos under these categories is pretty straightforward because access rights are clearly spelled out in the federal statute.

School surveillance videos that fall under a FERPA exemption are the least protected because they are not education records. For example, a school surveillance video that is maintained by a law enforcement unit for a law enforcement purpose can be accessed and used by police without restriction. Law enforcement records are also less protective of students' privacy because they can be released to the public without parental consent. Courts have yet to consider whether school surveillance videos fit into other FERPA exemption categories.

Finally, forty-nine states have student privacy laws, and some of them offer more privacy protection for students than FERPA does. For example, in *WFTV, Inc. v. School Board of*

Seminole, news organizations were unable to obtain access to redacted versions of a school surveillance video because Florida's student privacy law prevents the release of any personal information in a student's record, not just the personally identifiable information that is protected by FERPA. This means that in Florida information that pertains to students is protected even if it does not identify them. On the other hand, the state student privacy law applied in *Medley v. Board of Education of Shelby County* is very similar to FERPA. This case discussed whether school officials should have access to a student education records, one of the same issues that courts have grappled with under federal law.

Scholars have been trying to make sense of the varying and conflicting FPCO guidance and court decisions regarding the disclosure of school surveillance videos for the past twenty years. The FPCO has not issued an informal response on the subject since 2008. As a result, there is a lot of guesswork left to school districts. Given that all districts cited FERPA (or similar state privacy laws) in response to record requests, it appears that school districts err on the side of not releasing records. While this may seem like a good thing from a student privacy standpoint, it has produced a few odd results. Consider the number of claims brought by parents to access school surveillance videos of their own children. FERPA was enacted to give parents greater access and control over their children's records, but schools have tried to block that access citing FERPA. In one case, a parent was allowed to access a school surveillance video only because courts ruled it was not considered an education records under FERPA. In another case, a parent could not access a school surveillance video without bearing the cost of redactions. More clarification on the subject of school surveillance is needed so access to school surveillance records will be fair and consistent.

CHAPTER 4: SUMMARY AND BEST PRACTICES

Introduction

Consider the following hypothetical: Two students are fighting in a public school hallway. Other students crowd around the fight. Some eventually get involved as peacemakers, and others encourage the fight to continue. School resource officers wearing body cameras record the altercation, and the school maintains the recordings. Based on school video surveillance case law, it is unlikely that any of the students who were filmed could successfully challenge the recording because courts would find students have no reasonable expectation of privacy in a public school hallway. Most federal and state privacy laws require a person to prove she had a reasonable expectation of privacy in order to have any chance of successfully claiming a legal right to privacy.

The question of who could get access to the videotape is not as straightforward. For the most part, whether the video could be disclosed to students, parents, school officials, law enforcement, or media depends on whether and for whom the video is considered an education record under the Family Educational Rights and Privacy Act (FERPA). Based on the U.S. Department of Education's Family Policy Compliance Office's most recent guidance, the video would be considered an education record for those students involved in the fight, and, potentially, for those who have witnessed the fight as well. This means that only parents of students in the video, students in the video who are eighteen and older, and school officials with a legitimate educational interest can view the video without parental consent. If the School Resource Officers have been designated as school officials by the school, they may view the video for internal purposes but may not share the video with outside law enforcement. Outside law enforcement and media would need parental consent to view the video unless an exception to FERPA applies.[1]

School administrators, the FPCO, and courts have been wrestling with school video surveillance questions like the ones above for the past thirty years. Because of the increased use of body cameras in schools and cameras on buses, the need to address these issues is increasingly urgent. While courts have yet to address video surveillance of students in areas other than a school locker room under federal and state privacy laws, cases involving school employees' privacy rights suggest that students probably have no right to challenge video surveillance in common areas on school grounds. Students' rights to challenge surveillance may depend on their state's eavesdropping law.

[1] For example, "FERPA [] allows the non-consensual disclosure of personally identifiable information from education records if the disclosure is to comply with a judicial order or lawfully issued subpoena," including search warrant presented by police. *Letter Re: Shelton State Community College*, FERPA ONLINE LIBRARY (Feb. 28, 2007).

When it comes to access to school videos, new questions have arisen because of the increased police presence on public school campuses and the fact that the school-law enforcement relationships are not always clearly defined.[2] For example, one school district in Virginia had a disagreement with its local police department because the school district "wants in-school sheriff's deputies, who've been wearing the cameras . . . to announce when they are recording, to blur the faces of students who are not directly involved in recorded incidents, and to provide the school with copies of the recordings," but the county's sheriff refused because he did not want to have two sets of recording policies for his officers.[3]

This fourth and final chapter of this thesis summarizes the answers to the research questions posed in chapter one. This chapter concludes with a set of best practices for public schools that are considering adopting or increasing school video surveillance.

What Legal Rights, if any, do Students have to be Free from Public School Video Surveillance? How do Courts Decide?

Students and school employees have challenged school video surveillance under the Fourth Amendment, state constitutions, state tort law, state eavesdropping statutes, and school policies. An analysis of the relevant statutory and case law clearly demonstrates that students' legal rights to be free from silent school video surveillance are very limited. Students can be recorded without their permission or their parents' permission in most areas on a public school's campus, but they cannot be recorded in areas in which they change clothes. Students may have

[2] Linnea Nelson *et al.*, *The Right to Remain a Student: How California School Policies Fail to Protect and Serve*, ACLU-CA REPORT, Oct. 2016, https://www.aclusocal.org/wp-content/uploads/2016/10/The-Right-to-Remain-a-Student-ACLU-CA-Report.pdf ("School districts' relationships with law enforcement fall into three general categories. First, some school districts hire and oversee their own law enforcement officers, who are employees of the school district. . . . They possess the same general powers as other sworn law enforcement officers in a state, including the power to question, detain, and arrest. Second, some school districts enter into agreements with county or municipal police departments to station law enforcement officers on or around school campuses rotating basis. Third, many school districts do not maintain a permanent police presence in their schools.").

[3] Evie Blad, *Body Cameras on School Police Spark Student Privacy Concerns*, EDUCATION WEEK (Mar. 3, 2015), http://www.edweek.org/ew/articles/2015/03/04/body-cameras-on-school-police-spark-student.html.

an easier time challenging a school's audio recording than a school silent recording of images. For example, a student could argue she has a reasonable expectation of privacy in conversations made in a teacher's office under the Fourth Amendment, or she could argue she has a right to be free from being recorded without her consent under a state's eavesdropping law, if that eavesdropping law requires consent from more than one party to record.

Fourth Amendment

Students have a right to be free from school video surveillance under the Fourth Amendment if they have a reasonable expectation of privacy in the place where they were recorded and if the recording is reasonable.[4] Most school video surveillance cases turn on whether there is a reasonable expectation of privacy. A reasonable expectation of privacy exists when a person has an actual (subjective) expectation of privacy that society is prepared to recognize as reasonable.[5]

The Reasonable Expectation of Privacy Test

In 2008, in *Brannum v. Overton County School Board*, [6] the U.S. Court of Appeals for the Sixth Circuit recognized that students had a reasonable expectation of privacy in school locker rooms where they change clothes.[1] According to the Sixth Circuit, "[S]tudents using locker rooms could reasonably expect that no one, especially the school administrators, would videotape them, without their knowledge, in various states of undress while they changed their clothes for an athletic activity."[7] *John Doe (1-3) v. Dearborn Public School*,[8] a case involving

[4] U.S. CONST. AMEND. IV.

[5] Katz v. United States, 389 U.S. 347 (1967).

[6] 516 F.3d 489 (6th Cir. 2008).

[7] *Id.* at 496.

[8] No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

school video surveillance of gym teachers in a locker room/office, further supports the principle that students have a reasonable expectation of privacy in areas where they change clothes. Like the *Brannum* court, the *Dearborn* court said that the gym teachers' expectations of privacy were reasonable in an area where they changed from "street clothes to athletic clothes and to disrobe in order to shower after conducting physical education classes."[9]

Students may also have a reasonable expectation of privacy in school offices. In *Chadwell v. Brewer*,[10] the U.S. District Court for the Western District of Virginia found that a teacher had at least some expectation of privacy in his office. The court based its decision on the teacher's exclusive use of the office, noting that the office itself was located at the end of a dead-end hallway and was rarely used by anyone other than the teacher.[11] Students obviously do not have offices, but they might be able to show that they have a reasonable expectation of privacy in a teacher's office by satisfying reasonable-expectation-of-privacy considerations discussed by courts in other cases such as *John Doe (1-3) v. Dearborn Public School*:

> [W]hether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a reasonable expectation of privacy . . . . [And] what the person wanted to protect his privacy from, for example, non-family members, non-employees of a firm, strangers passing by on the street or flying overhead in airplanes. This inquiry, therefore, focuses on the government intrusion at issue.[12]

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[9] *Id.* at *5.

[10] 59 F. Supp. 3d 756, 765 (W.D. Va. 2014).

[11] *Id.*

[12] No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

A student who is having a confidential meeting with a teacher may be able to successfully argue that a school office is a place "based on . . . . confidentiality" that gives rise to a reasonable expectation of privacy.[13]

School employee cases suggest that students have no reasonable expectation of privacy in common areas on school grounds or a diminished expectation of privacy at most.[14] Three courts have found that school employees have no reasonable expectation of privacy in a school classroom, one court found school employees have no reasonable expectation in a school break room, and one court found school employees enjoyed a diminished expectation of privacy on a school bus. In each of these cases, the court described these places as "accessible" or "public property, being operated for a public purpose." This same reasoning could easily apply to school cafeterias, hallways, and parking lots.

The Reasonableness Test

If a court decides that a person has a reasonable expectation of privacy in an area, the court must then determine whether the video surveillance is reasonable.[15] Determining the reasonableness of video surveillance conducted by school officials involves a twofold inquiry: (1) whether the search was justified at its inception, and (2) whether the search was permissible in its scope.[16] It is not difficult to satisfy the justification prong of the reasonableness test. Schools typically argue safety and security reasons justify video surveillance, and, thus far,

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[13] *Id.* at *5.

[14] School-employee video surveillance cases did not define a diminished expectation of privacy, but it seems to fall somewhere between the privacy expectations one might have in places retained for his or her exclusive use and public places in which one has no reasonable expectation of privacy. *See* State v. Duchow, 749 N.W.2d 913, 922 (Wis. 2008).

[15] New Jersey v. T.L.O., 469 U.S. 325, 326 (1985); Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 495 (6th Cir. 2008) ("[T]he ultimate measure of the constitutionality of [a search] is one of "reasonableness.").

[16] *Id*. at 341.

courts have always accepted schools' safety and security arguments.[17] For example, in *Brannum v. Overton County School Board*,[18] the one case in which students challenged school video surveillance of their school locker room under the Fourth Amendment, the Sixth Circuit said installing cameras for security reasons was "an appropriate and common sense purpose and not one subject to our judicial veto."[19] However, in that same case, Sixth Circuit said that the scope of the search – "video recording and image storage of the children while changing their clothes" – was excessive because there was nothing in the record to indicate that the school district had concerns about safety and security in the school locker rooms to reasonably justify the installation of the cameras to record all the activities there. [20] The Sixth Circuit appears to analyze the issue of whether the surveillance of students was justified under the "permissible in its scope" prong of the reasonableness test before the "justified in its inception" prong of the reasonableness. [21]

School employee cases provide additional insight into what makes school video surveillance permissible in scope or not.[22] Based on a review of school employee cases presented in Chapter Two, video surveillance is likely to be permissible in scope when the school video surveillance is used over a limited period of time to confirm or deny an individual's

[17] O'Connor v. Ortega*,* 480 U.S. 709 (1987).

[18] 516 F.3d 489 (6th Cir. 2008).

[19] *Id.*

[20] *Id.* In order for such measures to be reasonable in scope, they "must be congruent to the need for such a search in order to serve the policy goal of school safety and security." *Id*.

[21] *Id.* at 496.

[22] Courts determine whether an employee search is permissible in its scope by considering whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the misconduct." *Dearborn,* No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008) (quoting *T.L.O.*, 469 U.S. at 346).

particularized suspicion of wrongdoing.[23] Video surveillance is also more likely to be considered permissible in its scope when the school is making a visual record of activities without an audio recording.[24] Finally, courts seem to disagree about how much the method of surveillance itself should be factored into the reasonableness of the surveillance. The *Brannum* court described video surveillance as "inherently intrusive . . . [because] a video camera 'sees all, and forgets nothing.'"[25] However, the court deciding *Brannen v. Kings Local School District Board of Education*[26] explained, "The mere fact that the observation is accompanied by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutional forbidden one."[27]

State Law

Students and school employees also have challenged school video surveillance under state constitutions, state tort law, and state eavesdropping statutes. All but two of these challenges were unsuccessful. The outcomes of the state law cases mirrored the Fourth Amendment cases because, for the most part, these state cases turned on whether a person had a reasonable expectation of privacy in the place she was recorded.

The gym teachers in *John Doe (1-3) v. Dearborn Public Schools*[28] were able to demonstrate they had a right of privacy in locker room/office where they changed their clothes. Proof of a reasonable expectation of privacy was required to meet their common law tort of

[23] Chadwell v. Brewer, No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

[24] Brannen v. Kings Local Sch. Dist. Bd. of Educ., 761 N.E.2d 84, 92 (Ohio Ct. App. 2001).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

intrusion claim. On the other hand, the bus driver in *State v. Duchow*[29] lost his state eavesdropping statute claim because Wisconsin's eavesdropping law protects only "oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception."[30] The court explained the bus driver had no reasonable expectation that his statements would be kept private because the bus was public property and being operated for a public purpose, and the bus "had windows through which [the bus driver] and [the student] could be seen."[31]

Plock v. Board of Education of Freeport School District Number 145[32] was one of the few cases in which a school's plan to record its teachers was successfully challenged without requiring the teachers to prove they had a reasonable expectation of privacy in the area where they would be recorded.[33] The teachers argued that Illinois's eavesdropping law prohibited the school from recording them without their consent.[34] The *Plock* court decided that the school's audio recording would violate the state eavesdropping law, noting that the nature of teachers-student conversations in a classroom is very different from that of a town hall speech that is open to the public.[35] The court recognized that teachers and students have an interest in not allowing their conversations to be recorded because teachers give students life advice in addition to

[29] 749 N.W.2d 913 (Wis. Sup Ct. 2008).

[30] *Id.* at 925.
[31] *Id.* at 922.

[32] 920 N.E.2d 1087 (2009).

[33] *Id.* at 1094–95.

[34] 720 ILCS 5/14—1(d) (West 2006) (requiring the consent of all parties to the conversation in order to record the conversation).

[35] Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145, 920 N.E.2d 1087, 1092 (2009).

classroom instruction.[36] The *Plock* court also addressed the school district's argument that its recording should be allowed for public policy reasons – safety and security.[37] In its response, the *Plock* court said that safety and security were not the only public interests at stake.[38] The court said protecting privacy was an important interest as well.[39] The court further explained that it was not persuaded by the school district's public policy argument because there were other means of protecting students that did not involve video or audio surveillance, such as the already established teacher and administrative presence in the classroom.[40] All courts that are deciding school video surveillance issues should consider students' privacy interests in not being recorded.

What do FERPA, State Laws, and Courts Say about who can Access Public School Surveillance Footage and under What Circumstances?

Most of the time, school video surveillance captures students walking to and from their destinations, and nobody ever seeks access. However, when school video surveillance captures misconduct, such as student theft or fighting, there often are a number of persons interested in gaining access to the video. Federal and state privacy laws, along with state public record laws, govern the disclosure of school surveillance video.

FERPA

Parents and students over eighteen years of age can access and decide whom else gets access to school surveillance videos when those videos are considered education records under

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

FERPA.[41] There are a few exceptions to this rule, however. The school official-exception allows teachers, administrators, and school resource officers to access school education-record surveillance videos when those people have a legitimate educational interest in doing so.[42] The emergency access exception permits school officials to disclose school surveillance videos that are education records to appropriate parties, such as police, in emergency situations.[43] And another exception under FERPA permits schools to disclose students' education records to the entity or persons designated in a lawfully issued subpoena or judicial order.[44]

Over the years, the U.S. Department of Education's Family Policy Compliance Office (FPCO) has issued conflicting informal guidance on the disclosure of school surveillance videos. In 2004, the FPCO said a school surveillance video is an education record for everyone in the video and that video could not be released without redactions or without the consent of every parent who had a child in the video.[45] In 2006, the FPCO issued guidance that said the video is an education record for only those students who are the focus of the video.[46] This change meant that those requesting access no longer needed the consent of parents who had children in the

[41] 20 U.S.C. § 1232g(a)(1)(A)(2006). The responsibility for enforcing FERPA lies with the secretary of the Department of Education, who may withhold payment or terminate funding to any school or program in violation of FERPA, but this has never happened.

[42] 20 U.S.C. 1232g(b)(1)(A) (2006).

[43] *See* 34 CFR §§ 99.31(a)(10) and 99.36.

[44] *See* § 99.31(a)(9)(i) and (ii).

[45] Bryner v. Canyons Sch. Dist., 351 P.3d 852, 858 (Utah Ct. App. 2015) (citing *Letter re: Berkeley County Sch. Dist.,* 7 FERPA Answer Book 40, 104 LRP Publications 44490 (Feb. 10, 2004)).

[46] *See* Bryner v. Canyons Sch. Dist., 351 P.3d 852, 858 (Utah Ct. App. 2015) (quoting Opinion of the Texas Attorney General, OR 2006-07701 (July 18, 2006) ("[T]he [FPCO] ... has determined that videotapes of this type do not constitute the education records of students who did not participate in the altercation.... The [FPCO] has, however, determined that the images of the students involved in the altercation do constitute the education records of those students. Thus, FERPA does apply to the students involved in the altercation.").

background of those videos.[47] In its 2006 guidance, the FPCO also recommended that all parents with children who are the focus of the video be able to access that video without each other's consent.[48] Finally in 2016, according to the National School Boards Association, the FPCO reportedly has said that a video can be an education record for a student witness in the background of the video, even though that student is not the focus of the video.[49] The rule seems to have changed again, requiring the parent of the student witness to be consulted in addition to those parents who are the focus of the video in order for third parties to access the school surveillance video.

Courts are not in agreement about whether school surveillance videos that are non-academic can be education records. For example, in 2015 the Utah Court of Appeals said, "[N]othing in the plain language of the statute limits the application of FERPA to only academic records."[50] And in 2016, a New York trial court concluded a video did not meet FERPA's "directly related to a student" requirement because the video did not relate "in any way to the educational performance of the students depicted."[51] While there does not seem to be any sort of consensus on whether non-academic videos are education records, this issue seems more settled

[47] *Id.*

[48] *Id.*

[49] Thomas E. Myers, *2016 FERPA Update: Back to the Basics (Or Back to the Future?)*, 2016 SCH. L. SEMINAR, (National School Boards Association, Fort Worth, TX), Apr. 7–9, 2016, *available at* https://cdn-files.nsba.org/s3fs-public/01-Myers-2016-FERPA-Update-Paper.pdf.

[50] *Id.*

[51] *Id.*

in cases that do not involve school surveillance videos; in those cases, non-academic records were considered education records.[52]

When a school surveillance video is not considered an education record under FERPA, it can be released to third parties without parental consent. According to FERPA regulations, an education record does not include: (a) records that school officials use as memory aids, (b) records created and maintained by a law enforcement unit, (c) records made and maintained by school employees in their normal course of business, and (d) records on a student who is eighteen years of age or older which are made or maintained by a health care professional who is treating the students.[53] To date, the FPCO and courts have considered only the issue of whether a school surveillance video falls under the law enforcement records exemption.

FERPA regulations explain that law enforcement records are "those records, files, documents, and other materials that are: (1) created by a law enforcement unit, (2) created for a law enforcement purpose, and (3) maintained by the law enforcement unit.[54] The FPCO has issued informal guidance on how FERPA's law enforcement amendment applies to the disclosure of K-12 public school surveillance videos. In 2008, the FPCO said, "Images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under FERPA."[55] The FPCO advised "schools that do not have a designated law enforcement unit [to] consider designating an employee to serve as the

[52] *See, e.g.*, Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426 (2002) (holding that tests that students exchanged and graded were education records under FERPA); Zaal v. Maryland, 602 A.2d 1247 (Md. 1992) (holding school guidance counselors' notes are education records under FERPA).

[53] 20 U.S.C. § 1232g(a)(1)(4)(B) (2006).

[54] 34 C.F.R. § 99.8.

[55] Balancing Student Privacy and School Safety: A Guide to the Family Educational Rights and Privacy Act for Elementary and Secondary Schools, FAMILY POLICY COMPLIANCE OFFICE (Oct. 2007) [Hereinafter Balancing Student Privacy], https://www2.ed.gov/policy/gen/guid/fpco/brochures/elsec.pdf.

'law enforcement unit' in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images."[56] This is one area where more guidance from the FPCO is needed because of the changing nature of relationships between schools and law enforcement.

State Law

Ten states expressly recognize a right to privacy in their constitutions, but courts have yet to find that a state constitution prohibits school surveillance videos from being disclosed. [57] In the only case litigated on this point, *State v. Mart*,[58] the court held that a school surveillance video of students fighting on a bus had to be disclosed despite the school district's argument that students had a protected privacy interest in the videotape under the Louisiana constitution.

Forty-nine states have student privacy statutes, and some of them offer greater student privacy protections than FERPA does.[59] For example, in *WFTV, Inc. v. School Board of*

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[56] *Id.*

[57] *Privacy Protections in State Constitutions*, NAT'L CONFERENCE OF STATE LEGISLATURES (Dec. 3, 2015), http://www.ncsl.org/research/telecommunications-and-information-technology/privacy-protections-in-state-constitutions.aspx ("Constitutions in 10 states—Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington—have explicit provisions relating to a right to privacy.").

[58] State v. Mart, 697 So. 2d 1055 (La. App. 1st Cir. 1997).

[59] *See*, *e.g.*, Ala. Educ. Code 16-44B-1; Alaska Admin. Code. tit. 4 § 07.060(a); Ariz. Rev. Stat. Ann. § 15-1042(J); Ark. Code. Ann. § 6-18-109: Cal. Educ. Code § 49076(a), 49077; Colo. Rev. Stat. § 22-1-123(1); Conn. Gen. Stat. § 10-10a; 14 Del. Admin. Code § 294; D.C. Code Ann. § 38-355; Fla. Stat. § 1002.22; Ga. Code Ann. § 20-2-660 – 20-2-668; Haw. Rev. Stat. § 302D-23; Idaho Code Ann. § 33-133; 105 ILCS 10/1-10; Ind. Code § 20-33-7-1; Iowa Code § 22.7; Kan. Stat. Ann. §§ 72-6215 – 72- 6223; Ky. Rev. Stat. Ann. §§ 160.700 – 160.730; La. Rev. Stat. § 17-3914; Me. Rev. Stat. tit. 20-A, § 951; Md. Code. Ann. Educ. §§ 4-131; Mass Gen. Laws ch. 71, § 34D; Mich. Comp. Laws § 388.1601; Minn. Stat. § 13.32; Miss. Code Ann. §§ 37- 15-1; Mo. Rev. Stat. §161.096; Montana Code Ann. (2015): 20-1- 213(5); Neb. Rev. Stat. § 7-2,104; Nev. Rev. Stat. § 392.029; N.H. Rev. Stat. Ann. §189;65; N.J. Admin. Code § 6A:32-7.1; N.M. Code R. § 6.29.1.9(E); New York State Education Law § 2-c; N.C. Gen. Stat. §§ 115C-402; N.D. Cent. Code § 15.1-07-25.1; Ohio Rev. Code § 149.011; Okla. Stat. tit. 70, § 3-168; Or. Rev. Stat. § 326.565; 22 Pa. Code § 51.72; R.I. Gen. Laws § 16-71- 1; S.C. Code 1976 § 59-1-490; SDCL § 13-3-51; Tenn. Code § 49-1- 702; Tex. Gov. Code §552.114; Utah Code Ann. § 53A-1-711; VA ST § 22.1-287; RCW 28A.600.475; Wis. Stat. Ann. § 126-94-16.1; Wyo. Stat. Ann. § 21-2-202.

Seminole,[60] the Florida's Second District Court of Appeal held the state's student privacy law prohibited the disclosure of school bus surveillance video, even if the personally identifying information was redacted. The court explained that while FERPA protects "personally identifiable information," the Florida statute protects "personal information," which is more encompassing than FERPA's personally identifiable information.[61]

School Policies

Students have a right to challenge school video surveillance under a school policy if the policy prohibits surveillance.[62] However, students must be aware that a school can change its policy at any time. One teacher sued her school district for violating its own policy that prohibited involuntary videotaping but lost her case because the policy was obsolete.[63] The court would not allow the teacher to hold the school district to its old policy.[64]

What Best Practices should Public Schools follow when they are Considering Adopting or Increasing School Video Surveillance Measures?

Research conducted for this thesis suggests that schools are increasingly using video surveillance.[65] Based on the limited school video surveillance case law, courts have determined that schools are within their legal bounds to record their students in common areas, especially if the recording does not involve sound. Courts seem to have fully embraced the idea that students are members of a special group in society that need to be protected, but only one court has

[60] WFTV, Inc. v. Sch. Bd. of Seminole, 874 So. 2d 48 (Fla. Dist. Ct. App. 2004).

[61] *Id.*

[62] *See* Roberts v. Houston Indep. Sch. Dist., 788 S.W.2d 107, 111 (Tex. App. 1990), *writ denied* (June 27, 1990).

[63] *Id.*

[64] *Id.*

[65] *See*, *e.g.*, Lucinda Gray, et al., U.S. Dep't of Educ., Public School Safety and Discipline: 2013–14 (2015), Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Public School Safety and Discipline: 2013–14 (2015), https://nces.ed.gov/pubs2015/2015051.pdf.

considered the possibility that protection might mean less school video surveillance rather than more school video surveillance in common areas like classrooms.

As discussed in Chapter One of this thesis, a school's decision to subject a student to school video surveillance may chill her creativity and growth may alter her self-image, and may create records that could follow her long after her schooling has ended.[66] The importance of protecting student privacy becomes clear when a world without it is considered. Imagine a student trying to move forward after making a poor decision that was recorded on school surveillance cameras. Even if future employers do not hold it against her, she may hold it against herself, limiting her own possibilities for growth and change. As Bryan Warnick, an Ohio State University professor, noted in his research on school video surveillance: "Places of human growth and development [like schools] need to be places that possess a certain type of forgiveness . . . . The presence of video cameras and recordings sends a message of neither forgiveness nor forgetfulness."[67]

School districts have the authority and opportunity to create policies that offer student privacy protections beyond what state and federal laws provide. Yet, past studies have shown that most districts across the nation choose not to do so.[68] School districts should create policies

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[66] *See, e.g.*, Daniel J. Solove, *A Taxonomy of Privacy*, 154 UNIV. OF PENN. L. REV. 477, 493 (2006); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1397–98 (2000); danah boyd, *Making Sense of Privacy and Publicity*, SXSW (Austin, TX, Mar.13, 2010), http://www.danah.org/papers/talks/2010/ SXSW2010.html.

[67] Warnick, *supra* note 20, at 319.

[68] *See, e.g.*, CROCKFORD, K. & ROSSMAN, J., BACK TO THE DRAWING BOARD: STUDENT PRIVACY IN MASSACHUSETTS K-12 SCHOOLS, ACLU Foundation of Massachusetts (2015), *available at* https://aclum.org/app/uploads/2015/10/back_to_the_drawing_board_report_large_file_size.pdf; JOEL REIDENBERG ET AL., FORDHAM CTR. L. & INFO. POL'Y, PRIVACY AND CLOUD COMPUTING IN PUBLIC SCHOOLS (2013) [hereinafter FORDHAM CLIP STUDY], *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi? article=1001&context=clip (finding "fewer than 7% of school districts have safeguards in place that restrict the sale of student information by vendors;" "[f]ewer than 20% of school districts have proper policies in place for the usage of cloud services;" and "[a]t least 25% of school contracts for classroom functions involved no financial payment").

that balance student privacy needs in addition to school security needs. These best practices would meet both needs.

Schools Should Think Harder about the Justification for School Video Surveillance

Before adopting video surveillance, schools should clearly articulate the purpose of the surveillance. Then, surveillance measures should be limited to what is necessary to achieve that purpose. The principal purpose of school video surveillance should be to keep schools safe, not to catch students in the act of misbehaving so that they can be suspended, expelled, or prosecuted.

While it is probably legal for schools to silently record students in classrooms, gymnasiums, cafeterias, parking lots, hallways, and stairwells, it is unlikely that video surveillance measures are necessary in all of those locations. Schools should avoid recording students in areas like classrooms, cafeterias, and gymnasiums for two reasons: (1) these are areas in which schools should encourage creativity and self discovery and (2) teachers and administrators are likely to be present in these areas, which means that school safety issues could be addressed without the use of school video surveillance. On the other hand, under the Fourth Amendment, school video surveillance of parking lots, hallways, and stairwells may be justified because these areas are more likely to be unmonitored by teachers and administrators due to a lack of school resources. Therefore, video surveillance in those areas would make sense as a security measure. To avoid legal liability, schools should not install surveillance cameras in an area where there is a "reasonable expectation of privacy." Courts have established that students and teachers have a reasonable expectation of privacy in school locker rooms and bathrooms, or anywhere else someone could be undressing.[69] Furthermore, school-employee school video

[69] Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 499 (6th Cir. 2008) (holding that surreptitious video surveillance of a student locker room violates the Fourth Amendment).

surveillance cases suggest that students may also have a reasonable expectation of privacy in a school office, if that student is discussing her grades, family issues, or other confidential information.

Consider the Scope of the Video Surveillance

One court determined that recording teachers is reasonable if the recording was limited in time and focused squarely on the area of concern (i.e. the camera was positioned exactly in the part of a school office where a theft was expected). However, in one school bus surveillance case, the court showed that there are circumstances where recording more rather than less (i.e. focusing the recording on only one person) can be less invasive. While choosing the scope of surveillance is dependent on why the video surveillance is needed in the first place, data minimization is one of the most important Fair Information Practice Principles (FIPPs) – a set of principles that are the backbone of privacy law.[70] This best practice guide recommends limiting the scope of surveillance to what is necessary not only as a means of limiting a school's liability but also as a security measure. According to the Federal Trade Commission, storing a large amount of data may make a business or entity "a more enticing target for data thieves or hackers."[71]

Notify Students, Parents, and School employees.

Notices should be placed around the school, in the school's handbook, and on the school's website to inform all persons what areas in the school will be subjected to video surveillance. This will help schools avoid liability because it will be harder for students to claim

[70] Maureen K. Ohlhausen, *The Power of Data*, Federal Trade Commission (2014), https://www.ftc.gov/system/files/documents/public_statements/299801/140422georgetownbigdataprivacy.pdf.

[71] *FTC Report on Internet of Things Urges Companies to Adopt Best Practices to Address Consumer Privacy and Security Risks*, Federal Trade Commission (2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-report-internet-things-urges-companies-adopt-best-practices.

they had a reasonable expectation of privacy in an area if a sign is clearly posted notifying the student that she is being recorded. Notice also will help schools deter misconduct.

Schools Should Carefully Consider Whether Video Surveillance will be Maintained by Schools Officials or a Law Enforcement Unit

Under FERPA, schools maintain "education records" and law enforcement units maintain "law enforcement records." When law enforcement units maintain school surveillance videos, they can be released to the public without parental consent or the consent of students who are over eighteen. When schools maintain school surveillance videos they are considered education records under FERPA, which cannot be released without parental consent or the consent of a student who is eighteen or older unless an exception applies. Having the school maintain the videos may provide greater protection to student privacy, but it comes at a cost. Transparency will be sacrificed. For example, parental access may be limited depending on which FPCO guidance, if any, a school district decides to follow in determining whether school video surveillance footage can be disclosed.[72] Additionally, news organizations argue that they are able to do a better job as a government watchdog when they have access to such information.[73] On the other hand, students who have already paid for the consequences of their actions may end up paying for those consequences again and again if the surveillance footage of their misbehavior is aired on the news.

[72] School districts and courts have handled the release of education-record school surveillance videos to parent in very different ways. *See* Bryner v. Canyons Sch. Dist., 351 P.3d 852, 857 (Utah Ct. App. 2015) (holding that the video surveillance tape was an education record under FERPA that could not be released to the parent of a student involved in an altercation unless that parent paid the cost of having the video redacted; Jacobson v. Ithaca City Sch. Dist., 53 Misc. 3d. 1091, 1093 (N.Y. Supp. Ct. 2016) (holding the parent of a student involved in an altercation could obtain copies of the video surveillance was not an education record under FERPA); Rome City Sch. Dist. v. Grifasi*,* 806 N.Y.S.2d 381 (N.Y. Sup. Ct. 2005) (a student was able to obtain access to a surveillance video of an altercation that he was involved in because court found it was s law enforcement, which can be disclosed to the public without parental consent or consent of a student who is eighteen or older).

[73] *See FERPA and Access to Public Records*, STUDENT PRESS L. CTR. 1 (2016), http://du1hnuqovpr1r.cloudfront.net/20160413711l3MOalqW/dist/img/ferpa_wp.pdf.

If schools decide to maintain school surveillance videos, those who are designated to help or protect students still will be able to obtain access under one of FERPA's exceptions. For example, FERPA's health or emergency exception and FERPA's court order exception provide police with opportunities to access school surveillance video both in emergency situations and to conduct investigations as long as they have probable cause. Therefore, this best practice guides recommends that school officials, rather than law enforcement units, maintain school surveillance videos.

Establish Good Security Measures

Video surveillance data should be protected through suitable security measures. All video recordings must be stored in a secure place to prevent unauthorized access and to ensure confidentiality. In school surveillance cases, courts have noted when schools' security measures were inadequate. For example, in *Brannum v. Overton County School Board*, [74] a case involving a school's video surveillance of students in a school locker room, the court expressed its concern about the fact that "[n]either [the assistant principal] nor anyone else had ever changed the system password or username from its default setting."[75] In *John Doe (1-3) v. Dearborn Public School*,[76] a case involving the video surveillance of school employees in a school locker room, the court noted that images from the concealed camera were displayed on a monitor located in the main office copy room, making it possible for passersby to view the footage easily.[77] While these details were mentioned in the fact sections rather than the discussion sections of the courts' opinions, the courts clearly frowned these practices.

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[74] 516 F.3d 489 (6th Cir. 2008).

[75] *Id.* at 492.

[76] No. 06-CV-12369-DT, 2008 WL 896066 (E.D. Mich. Mar. 31, 2008).

[77] No. 06-CV-12369-DT, 2008 WL 896066, *1 (E.D. Mich. Mar. 31, 2008).

Suggestions for Further Research

Future studies are needed to examine the extent to which courts do and should consider a school's surveillance measures when determining whether a student's privacy rights have been violated. This case review has provided a close look at how courts arrived at conclusions about whether school video surveillance videos violate students' privacy rights. Only a few courts have discussed video surveillance as a search method and, as discussed above, those courts seem to disagree about how much the method of surveillance itself should be factored into the reasonableness of the surveillance. One court said that school video surveillance in general is "inherently intrusive . . . [because] a video camera 'sees all, and forgets nothing."[78] Another court explained, "The mere fact that the observation is accompanied by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutional forbidden one."[79] Fourth Amendment cases outside the public school context may provide more insight about how courts perceive video surveillance and other emerging technologies. This research could suggest how courts will rule in school surveillance cases involving emerging technologies.[80]

Future studies also are needed to examine school district policies to learn how schools are handling school video surveillance. In particular, researchers could learn which areas on a school's campus are under school video surveillance and to whom those videos are being

[78] Brannum v. Overton Cty. Sch. Bd., 516 F.3d 489, 495 (6th Cir. 2008).

[79] Brannen v. Kings Local Sch. Dist., 761 N.E.2d 84 (Ohio Ct. App. 2001).

[80] This includes facial recognition, Global Positioning System (GPS) monitoring, and Radio-frequency identification (RFID), which uses electromagnetic fields to automatically identify and track tags attached students' ID cards, and biometric monitoring.

disclosed. Given school districts' great authority to create, implement, and enforce educational policy, there is a great deal of insight to be gained from such research.

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