OFF THE RECORD: THE EMERGING RIGHT TO CONTROL ONE'S SCHOOL FILES

I
INTRODUCTION

A law student attempting to transfer to another school was rejected on the basis of a letter written by one of his professors, falsely accusing him of dishonesty and cheating.[1] A parent found a political critique of a speech his son had delivered on a local radio program entered in the student's permanent record by the high school principal.[2] Elsewhere, when a mother was told that psychological tests revealed that her daughter should repeat kindergarten, the mother's request to see those test results was denied.[3] Another parent who had gained access to his son's school record was surprised to discover that it contained observations by his teachers that he was "strangely introspective," "unnaturally interested in girls," and, at the age of twelve, sported "peculiar political ideas."[4]

These are but a few examples of what one writer has called the "school record prison."[5] Students come and go, but the information in their school records remains behind to haunt them—or runs ahead to greet them many years later in an ill-fated employment interview. American schools today gather and create more information about students than those of any other country.[6] Sophisticated evaluation techniques, computerized storage and retrieval systems, and a philosophy that seeks to educate and socialize the "whole child," all contribute to the enthusiasm and reach of the modern data gatherers.[7] Notably absent has been the realization that information is power, and that that power can be abused. The rights of students and their parents to control what information is entrusted to school recordkeepers—and to control what is done with it—have been largely ignored. Yet those rights do exist and are beginning to be asserted against a wide range of abuses.[8]

This Note examines the substance and sources of these rights, focusing on (1) the right to inspect school records; (2) the right to have them held in con-

1. THE PRIVACY REPORT 3 (ACLU Newsletter, Vol. II, No. 4, 1975).
2. Shakin v. Schuker, No. 6312/71 (Sup. Ct. Queens Co., N.Y., Nov. 16, 1971).
3. Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuse*, 3 J. LAW & ED. 365, 367 (1974).
4. Divoky, *Cumulative Records: Assault on Privacy*, LEARNING MAGAZINE, September 1973, *reprinted in* J. RIOUX & S. SANDOW, CHILDREN, PARENTS AND SCHOOL RECORDS at 9 (1974).
5. Carey, *supra* note 3.
6. Goslin & Bordier, *Record-Keeping in Elementary and Secondary Schools*, in ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE 29, 30 (S. Wheeler ed. 1969).
7. *See* text accompanying notes 12-14 *infra*.
8. *See, e.g.*, cases cited in notes 178-80 *infra*.

fidence from noneducational personnel; and (3) the right to challenge their contents. The preliminary section briefly outlines the history and current state of school record practices; succeeding sections discuss the treatment of student/parent rights in the common law, a sampling of state statutes, and important recent federal legislation—the Family Educational Rights and Privacy Act of 1974.[9] Finally, the constitutional dimensions of these rights will be explored.

II
HISTORICAL BACKGROUND

School records first came into use in the early nineteenth century in New England, where a system of "registers" was developed principally to record enrollment and attendance figures useful to school planners.[10] The practice spread throughout the country. However, toward the end of the nineteenth century, the system underwent an important change in function. Colleges began demanding help in selecting students from greatly increased numbers of applicants; individual interviews were no longer adequate. Consequently, primary and secondary schools began to keep more extensive individual records on their students, records which would allow colleges to judge the preparation and potential performance of applicants.[11] Then, in the early 1900's, the "scientific" movement in education was born. Advances in experimental psychology and measurement techniques gave rise not only to the more ambitious goal of evaluating the entire personality of the student, but also to more efficient and uniform means of recording the success or failure of this effort. These developments, in turn, encouraged the gathering of more detailed and varied information on and from students.[12]

In 1958 and 1964 respectively, the National Association of Secondary School Principals and the United States Office of Education issued cumulative record forms and guidelines derived in part from comprehensive studies of practices in all the states. These forms illustrate the tremendous changes in recordkeeping practices accomplished in this century. Gone is the polite concern of the early New England "registers" for enrollment and attendance data in order to plan school needs and discourage class-cutting. In its place stand imperious demands for information and opinion under a variety of headings: personal identification, family and residence, physical health, personality evaluation, standardized test results (behavioral and psychological), enrollment, academic performance, transportation, tuition and special assistance.[13] Moreover, the computer has made it possible swiftly to accommodate this burgeoning mass of material and put it to ever more sophisticated uses. Florida, for example, has a centralized computer system to coordinate data on all high school students, including the following information: social security number, grade, school, address, type of curriculum, date and place of birth,

9. General Education Provisions Act § 438, 20 U.S.C. § 1232g (Supp. I, 1975).
10. Goslin & Bordier, *supra* note 6, at 34-35.
11. *Id.* at 36.
12. *Id.* at 36-39.
13. *Id.* at 39-40.

citizenship, health and physical disabilities, sex, race, religion, marital status, family background, languages spoken at home, academic record, test record, honors-work record and extracurricular activities. Hawaii and Iowa are experimenting with similar systems.[14]

Because of the tremendous increase in the scope and detail of school records, one must consider the consequences of their cumulative, often perpetual, nature. Not infrequently, the records outlive their subjects. A real or imagined childhood indiscretion or personality quirk, dutifully noted at the age of six, may turn up years later to rebut other evidence in the same folder. The student has grown and developed; but the record denies this, and its charges are in writing.[15] In later years, the thorough detail and "trustworthiness" of student files lends them crucial importance in the competition for further educational opportunity and employment. As one writer has pointed out, the files may become more important than the student himself:

> [W]hat happens to a student if his records are lost? The answer, with some assurance, is that the college will not graduate him, business corporations and public agencies will not hire him, graduate schools will not admit him, and he cannot even transfer to another program or major on the same campus.[16]

The schools have supported the trend toward comprehensive data-gathering as a means to increase individualized understanding of students and thus to plan and execute more rewarding educational programs. However, there have been few comprehensive attempts to determine the actual extent to which copious school records aid teachers and planners in their work. Researchers Goslin and Bordier conclude that "a great deal more information about most school children is collected and maintained in their permanent record files than is ever used by their teachers or counselors."[17] Indeed, the sheer wealth of record information available to teachers works to discourage meaningful consultation, except when special disciplinary or academic problems arise. Moreover, some teachers avoid examining the permanent record in order not to be influenced by the possibly inaccurate evaluations of previous instructors.[18]

While schools have probably overestimated the value of records, they have been slow to recognize the dangers inherent in the recordkeeping system, dangers arising both from their reluctance to allow access to files by students and their parents and from the easy availability of student dossiers to nonschool

---

14. Divoky, *supra* note 4, at 13; Goslin & Bordier, *supra* note 6, at 60. *See generally* A.F. WESTIN, DATA BANKS IN A FREE SOCIETY (1972). By enacting 5 U.S.C. § 552a (Supp. IV, 1974) ("Privacy Act of 1974"), Congress officially recognized the dangers posed by computer technology: "[T]he increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information . . . ." *See also* Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342 (1966).

15. Divoky, *supra* note 4, at 9.

16. Clark, *The Dossier in Colleges and Universities*, in ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE, *supra* note 6, at 69.

17. Goslin & Bordier, *supra* note 6, at 50.

18. *Id.*

personnel. A recent survey of school districts throughout the nation revealed that parents and students are granted access to records less often than are C.I.A. and F.B.I. officials, local police and health department officials, juvenile courts (without subpoena), and prospective employers.[19] Only about 16 percent of the school districts answering the survey reported that parents were allowed to inspect their child's entire file on request, while almost 60 percent grant carte blanche access to the C.I.A. and F.B.I.[20]

Without inspection rights in practice (and probably without knowledge that others *do* routinely inspect records), students and parents are ill-placed to challenge record inaccuracies and abuses. While the recently enacted Family Educational Rights and Privacy Act takes a long step toward righting this imbalance and will be considered at some length below,[21] it may be helpful first to examine the legal alternatives offered at common law and in relevant state legislation.

III
COMMON LAW

A. Inspection

There is ample support in the common law for the right of parents and majority-age students to inspect school records. The rights of parents and students are, of course, conceptually distinct, and their respective interests may conflict.[22] Thus, while the common statutory practice is to allow parents to assert rights *for* their children until the latter reach majority age,[23] some states allow minors to exercise these rights separately.[24] Moreover, parents may not waive their children's rights; juveniles and minor students are "persons" under the Constitution and may not have their constitutional rights waived by others.[25] However, for convenience in elucidating substantive rights as against school authorities and others, this Note will treat parent and student interests as if they were interchangeable.

Common law arguments for inspection rights can be developed both from the right to inspect public or quasi-public records and from parents' ancient right to control basic aspects of their children's education and upbringing. An argument based upon the latter right, as will be seen, establishes a much stronger framework for asserting, in addition to inspection rights, rights of confidentiality and challenge.

1. Public Records

At common law there are four prerequisites to the existence of public records: (1) they must be made by public officers; (2) they must be made

19. *Id.* at 56-57.
20. *Id.*
21. *See* text accompanying notes 94-160 *infra*.
22. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting).
23. *See* text accompanying note 66 *infra*.
24. *See* text accompanying notes 67-68 *infra*.
25. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969); In re Gault, 387 U.S. 1 (1967).

pursuant to legal authority; (3) they must be in writing or other permanent form; and (4) they must be maintained accurately and durably.[26] The student records of public schools or tax-supported colleges meet these basic requirements, except in jurisdictions where school teachers are not considered "public officers."[27]

The leading case on the question whether public school records should be treated as public records is *Valentine v. Independent School Dist. of Casey*.[28] In *Valentine*, plaintiff's diploma had been withheld for her failure to wear the prescribed cap and gown in a high school graduation ceremony. She sought a writ of mandamus to compel the issuance of her diploma and also a copy of her grade records. In granting the writ, the Iowa Supreme Court rejected the school district's argument that the records were the private property of the school superintendent or teachers.[29]

To establish that school records are public records is not to solve all problems of inspection, however. Historically, members of the public were not necessarily entitled to view public records. One was required additionally to show an "interest" in the information sought. Originally, this test could be met only by demonstrating that the information was needed to maintain or defend a lawsuit.[30] In more recent cases, however, courts have also granted inspection to members of the public seeking to review the performance of public officials in the discharge of their official duties.[31]

If the parental right to inspect school records were conditioned solely on showing some requisite quantum of interest, unhappy results might flow. For example, parents would not always be able to show that they needed the information to maintain or defend a lawsuit without resorting to fictional or hypothetical arguments, e.g., that the parent seeks to police the student's record for actionable libel. Of course, under the later cases, a parent might simply assert his or her interest in reviewing the effectiveness with which school officials are carrying out their duties of education. But, without more, this claim cannot be distinguished from that of any other member of the public who may take an interest in school administration. It is vitally important that such claims be distinguished in principle, since what parents are in fact demanding is not merely a right to inspect, but also the right to control inspection by others—the right of confidentiality. The doctrine of access to public records lacks the flexibility to accommodate both of these demands.

2. *Parents' Rights*

Fortunately, there is another branch of common law doctrine that will support parental inspection rights without doing violence to the equally important right of confidentiality. This doctrine states simply that parents exercise

---

26. 76 C.J.S. *Records* § 1 (1952).
27. *See, e.g.*, Cottongim v. Stewart, 283 Ky. 615, 142 S.W.2d 171 (1940).
28. 187 Iowa 555, 174 N.W. 334 (1919).
29. *Id.* at 565-66, 174 N.W. at 338.
30. State *ex rel.* Cole v. Rachac, 37 Minn. 372, 35 N.W. 7 (1887); 42 AM. JUR. *Public Admin.* § 76 (1942). *See generally* Comment, *Inspection of Public Records*, 11 KAN. L. REV. 157 (1962).
31. MacEwan v. Holm, 226 Ore. 27, 359 P.2d 413 (1961); Papadopoulos v. State Bd. of Higher Educ., 8 Ore. App. 445, 494 P.2d 260 (1972). *See also* Comment, *The Right to Inspect Public Records in Oregon*, 53 ORE. L. REV. 354 (1974).

paramount rights over the upbringing of their children, and that schools may not contravene these rights.[32] Courts relying on this doctrine have found a parental right to decide what courses a child shall be required to take, provided the decision is reasonable and not unduly burdensome to the school program.[33] In *Hardwick v. Board of School Trustees of Fruitridge School District*,[34] for example, a parent sought to prevent his child from being required to take dancing lessons at the school, arguing that this went against the family's religious principles. The California court did not rest on the constitutional/religious issue, but instead overturned the school regulation on the ground that it interfered with "the right of parents to control their own children—to require them to live up to the teachings and the principles which are inculcated in them at home under the parental authority . . . ."[35]

Two recent decisions in New York have relied on similar reasoning to support the parental right to inspect school records. In 1960 the commissioner of education held that a statute excepting pupil records from public disclosure (under another statute requiring disclosure of public records to any "qualified voter"), "merely prevents the disclosure of the communication or record to third parties, i.e., to persons other than the parent and other than the person making the record."[36] Likening the confidentiality provision to the control a patient or client is afforded over doctor-patient or attorney-client communications, the commissioner pointed out that, "since the child is a minor, and cannot exercise full legal discretion," the "clients" or "patients" are the child *and* the parent or guardian.[37] Moreover, since "the educational interests of the pupil can best be served only by full cooperation between the school and the parents, based on a complete understanding of all available information by the parent as well as the school," the commissioner concluded the "[t]he parent, as a matter of law, is entitled to such information."[38]

Shortly thereafter, in *Van Allen v. McCleary*,[39] a father who had been told by school authorities that his child was in need of psychological treatment, but who had been denied access to the reports of the school psychologist, brought suit to compel the production of all his child's school records. After a lengthy review of authority, including the *Thibadeau* decision, the court concluded that a parent has an "obvious" interest in the school records of his child, and that complete inspection is a matter of right.[40] The court stressed the long-standing common law doctrine that parents do not lose their ultimate authority over

32. The importance of this common law doctrine has perhaps been overshadowed in this century by its constitutional dimension. *See* text accompanying notes 173-77 *infra*. The best recent discussion is in Carey, *supra* note 3, at 376-79.

33. State *ex rel.* Sheibley v. School Dist. No. 1 of Dixon Co., 31 Neb. 552, 48 N.W. 393 (1891) (father wanted his child to drop the study of grammar); Morrow v. Wood, 35 Wis. 59, 17 Am. R. 471 (1874) (parent preferred that his child study arithmetic rather than geography); *cf.* Crews v. Johnson, 46 Okla. 164, 148 P. 77 (1915) (unreasonable to request that child not be taught grammar).

34. 54 Cal. App. 696, 205 P. 49 (1921).

35. *Id.* at 709, 205 P. at 54.

36. Matter of Thibadeau, 1 Ed. Dept. Rep. 607, 608 (New York State Commissioner of Education 1960). At issue was a board of education directive permitting parents to examine the entire record of their schoolchildren.

37. *Id.*

38. *Id.*

39. 27 Misc.2d 81, 211 N.Y.S.2d 501 (Sup. Ct. 1961).

40. *Id.* at 92, 211 N.Y.S.2d at 513.

their children by temporarily delegating that authority to school officials, especially where education is compulsory.[41] Moreover, the court pointed out, the fact that schools may not release information to third parties without parental consent argues strongly for a rule allowing parents to find out precisely what information is subject to release.[42]

Such an enlightened analysis of parental interests avoids the problems raised earlier concerning the inspection of public records. By emphasizing the important and specific role parents should play in the educational process, *Van Allen* stands for an absolute parental right of inspection. Parents are "interested" in their child's school records not because they are members of the public, but because they are parents. If they are to participate meaningfully in the education of their children they must be allowed to see the school records that reflect and document that education.

B. Confidentiality

While it is clear that parents of minor students have a right at common law to inspect the school records of their children, it is less clear whether, as a matter of right, student records can be kept confidential with respect to outsiders. To the extent that school records are viewed as public records, it is difficult to frame an argument by which they could be closed to the view of all outsiders. One commentator, while concluding that the best defense against loose circulation lies in statutory prohibition, nevertheless notes that inspection may be denied at common law "where such inspection or use of contents would be detrimental to public interests."[43] Following this line of reasoning, one could assert that the public interest is not served by indiscriminate dissemination of personal student data. However, this argument is not often found or well developed in the case law.[44]

---

41. Schools once had great success in the courts arguing for broad discretionary authority over their students on the ground that the institution stands in the place of the parents. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913). This "in loco parentis" theory has since come under persistent attack for the inadequacies which flow from its highly fictitious premise, and many courts, especially in the university context, have rejected it outright. *See, e.g.*, Moore v. Student Affairs Comm. of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Goldberg v. Regents of the Univ. of Calif., 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967).

There have been many other attempts to establish a theoretical framework for the legal relationship between student and *university*, particularly in terms of contract and fiduciary theories. None of these seem to have met with wide approval. *See, e.g.*, Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643 (1966); Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1967); Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1973); Note, *The Unitary Theory*, 1 J. LAW & ED. 411 (1972); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974). The extent to which these theories, especially the contract theory, apply to the relationship between student and primary or secondary school is, of course, doubtful.

42. 27 Misc. 2d at 91-92, 211 N.Y.S.2d at 512-13.

43. Strahan, *Should Colleges Release Grades of College Students to Draft Boards?*, 43 N.D.L. REV. 721, 730 (1967).

44. *Cf., e.g.*, Doe v. McMillan, 459 F.2d 1304, 1325-27 (D.C. Cir. 1972) (Wright, J., dissenting), *rev'd in part and aff'd in part*, 412 U.S. 306 (1973); Elder v. Anderson, 205 Cal. App.2d 326, 330, 23 Cal. Rptr. 48, 50-51 (1962); Van Allen v. McCleary, 27 Misc.2d 81, 91-92, 211 N.Y.S.2d 501, 512 (Sup. Ct. 1961).

Libel or slander actions are also of limited value to a parent seeking control over school records. While anyone who is the victim of defamatory communications may initiate such actions, they reach only the most serious abuses of school record confidentiality, and only after the damage has been done. Similarly, the common law right of privacy, somewhat outstripped by constitutional developments,[45] has rarely been invoked in a school records case. However, one New York court, in *Blair v. Union Free School Dist. #6, Hauppauge*,[46] has ruled that school officials may be held liable in tort for divulging to outsiders information supplied by a student in confidence. Although the complaint in *Blair* was based on a theory of negligent or intentional infliction of mental distress, and the court gave short shrift to the right of privacy, it was nevertheless persuaded by the "special or confidential relationship" between student and school:

> In order for the educational process to function in an effective manner it is patently necessary that the student and the student's family be free to confide in the professional staff of the school with the assurance that such confidences will be respected.[47]

The court seems to be hinting at the existence of a fiduciary relationship between school and student, a relationship that would place a heavy burden of responsibility on school officials in their treatment of pupil information.

To the extent that courts adopt an analysis based on a trust or fiduciary theory, they will be able to find a right of confidentiality without resort to the common law of public records. Moreover, since any diminution of the relationship of trust and confidence between student and teacher may be said to be detrimental to the public interest in education, a fiduciary analysis would also enable the courts easily to justify an exception to public access *within* the traditional common law rules.

That such a fiduciary relationship exists and may be relied upon to control the dissemination of school records has been most forcefully argued in a dissenting opinion by Judge J. Skelly Wright in *Doe v. McMillan*.[48] In *McMillan*, parents of District of Columbia schoolchildren sought damages and declaratory and injunctive relief for invasion of privacy alleged to have resulted from the circulation of a congressional report on the District of Columbia school system. The report detailed disciplinary practices in the system and included the names of students, taken from their school records, who had allegedly engaged in a variety of misdeeds ranging from theft to sexual licentiousness. Judge Wright's dissent to dismissal of the suit included a lengthy discussion of student rights in the confidentiality of their records.[49] Judge Wright, pointing out that schools collect a vast quantity of personal and potentially embarrassing information from their students "under the aura of compulsion," argued that with this power comes "a responsibility to the community" to avoid careless and harmful dissemination of the information. Moreover, schools thrive on

---

45. *See* text accompanying notes 183-90 *infra*.
46. 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971).
47. *Id.* at 253, 324 N.Y.S.2d at 228.
48. 459 F.2d 1304 (D.C. Cir. 1972), *rev'd in part and aff'd in part*, 412 U.S. 306 (1973).
49. *Id.* at 1325-27.

> a relationship of trust and confidence between teacher and pupil. At the heart of such a relationship is the guarantee that whatever is revealed to the teacher is disclosed in privacy. The student must have a reasonable expectation that his confidence will be preserved. [Citation omitted] Release of confidential information by school authorities, however, can serve only to destroy the fabric of this trust.[50]

Judge Wright's dissent was perhaps obliquely vindicated by the Supreme Court's partial reversal in *Doe v. McMillan*,[51] although only three Justices appeared there to reach the merits.[52] Still, it ranks as one of the most audacious and comprehensive judicial attempts to date to frame a common law argument for the confidentiality of school records.

C. Challenge

There is virtually no common law precedent on the question whether a student can challenge information in the school record. This issue has naturally lagged behind the more basic concerns for inspection and confidentiality, and the recognition of rights in these areas has perhaps mooted some instances of inaccurate or unfair recordkeeping.[53] No doubt most schools are willing to correct errors that are brought to their attention. Still, the right to inspect records and to have them held in some degree of confidence is based, at least in part, on the realization that mistakes are made and can injure. One would expect a right to challenge such mistakes to follow as a reasonable corollary.

Recent litigation in Maine peripherally raised this issue in an important context. In *Creel v. Brennan*,[54] a Connecticut high school student, suspecting that unfavorable comments by school officials had contributed to his rejection by four colleges, sought review and correction of the records. The high school had no copies of the reports, so the parents brought suit against Bates College (one of the schools that had rejected the applicant) to release its copies for inspection. Hence, the central issue in the case was whether a college could be compelled to release communications evaluating a rejected applicant for admission, when the applicant had reasonable cause to believe that such communication might give rise to an action for defamation. The court, discounting the college's argument that such recommendations were privileged, agreed that they should be released. While the court did *not* hold that students or parents have a common law right to challenge the contents of school records, this was the net result of the litigation, which had begun with a request to review and delete record inaccuracies. The major significance of the case, however, is the Maine court's willingness to allow *rejected* applicants to inspect the records used by colleges in evaluating their fitness for admission.[55]

Such, then, are the contours of common law rights with regard to inspection, confidentiality and challenge of school records. Inspection is solidly estab-

---

50. *Id.* at 1326.
51. 412 U.S. 306 (1973).
52. *Id.* at 328-30.
53. *See, e.g.*, Shakin v. Schuker, No. 6312/71 (Sup. Ct. Queens Co., N.Y., Nov. 16, 1971).
54. C.A. No. 3572 (Super. Ct. Androscoggin Co., Me., 1968).
55. Congress refused to go this far; the Family Educational Rights and Privacy Act of 1974 confers no rights on those who have not actually attended a particular educational institution. *See* text accompanying notes 100 and 127 *infra*.

lished as a common law right, confidentiality and challenge less well established. The common law pattern is altered, of course, in states that have enacted statutes in these areas, or where the Family Educational Rights and Privacy Act[56] is applicable. As will be seen in the next two sections, these statutes, particularly FERPA, have codified and expanded common law principles to a considerable extent, making continued reliance on them necessary in a substantially narrowed set of circumstances. Finally, where constitutional arguments can be framed,[57] the critical importance of the common law doctrines is, again, diminished.

IV
STATE STATUTES

Recently, many states have enacted statutes dealing with school records.[58] Very few of these statutes are comprehensive: many consign the enunciation of standards to regulatory bodies; others rely chiefly on guidelines drawn up by various educational agencies. About a dozen states still have no relevant statutes, regulations or guidelines at all.[59] In these states, local practice, usually unwritten, is decisive. Local practice is also important in states with legislation on the books, since most of the laws are new, relatively untested, and as yet probably unnoticed by the public at large.[60] Further, most of the laws leave large areas of practice unresolved or vest the resolution of uncertainties in the discretionary authority of local officials.[61] Perhaps the most serious problem is that almost all of the legislative attempts seem to proceed from only a partial recognition of the issues involved, or from a partial willingness to deal with them. Only a handful of states can boast of a regulatory scheme as broadly conceived as that put forward in recent federal legislation.[62]

A. Inspection

Half of the states currently provide for parent or student access to a student's public school records.[63] The California statute is typical:

> A parent or legal guardian shall be permitted to inspect the written record concerning his child or ward in any reasonable manner in consulta-

56. General Education Provisions Act § 438, 20 U.S.C. § 1232g (Supp. IV, 1974). *See* text accompanying notes 94-160 *infra*.

57. *See* text accompanying notes 161-202 *infra*.

58. J. RIOUX & S. SANDOW, CHILDREN, PARENTS AND SCHOOL RECORDS (1974) (containing a state-by-state summary of school records law as of April 15, 1974). Slightly over half the states have statutes dealing with some aspect of the subject. The statutes in effect in about twenty states were enacted since 1971. *Id.* at 5.

59. *Id.* at 5.

60. Goslin & Bordier, *supra* note 6, at 41. With respect to practices in New York, *see* A. LEVINE, E. CAREY & D. DIVOKY, THE RIGHTS OF STUDENTS 126 (ACLU 1973); *see generally* Glasser & Levine, *Student Rights in New York*, 1 J. LAW & ED. 213 (1972).

61. *See, e.g.*, KY. REV. STAT. § 160.295(6)(f) (Supp. 1974); "Cumulative Records," Alaska Admin. Manual for Secondary Schools (1969), in RIOUX & SANDOW, *supra* note 58, at 63; IOWA CODE ANN. § 68A.7 (1973).

62. *See* text accompanying notes 94-160 *infra*. The two states with the most advanced procedures are New Mexico and Massachusetts. N. Mex. Regs. § 72-6 (1972), in RIOUX & SANDOW, *supra* note 58, at 207; Mass. Proposed Regs. for Student Records (1974), in RIOUX & SANDOW, *supra* note 58, at 157-62; Mass. Gen. Laws Ann. ch. 71, §§ 34D, E, F (Supp. 1975).

tion with a certificated employee of the district when he requests to do so during regular hours of the schoolday . . . .[64]

While no state specifically forbids parent or student access, in Delaware, for example, such access is discretionary with the school's "chief administrative officer."[65]

The age at which students may see their files varies considerably. Delaware and Massachusetts permit student inspection at age fourteen,[66] and Massachusetts further specifies that, at eighteen, a student's right of inspection becomes exclusive of his or her parents.[67] California, on the other hand, permits only high school graduating seniors to see their transcripts.[68]

B. Confidentiality

Only ten states currently prohibit noneducational personnel access to records absent parent or student consent.[69] Of these, Nebraska's statute is perhaps the most categorically drawn:

> Any pupil in any public school, his parents, guardians, teachers, counselors, or school administrator shall have access to the school's files or records maintained concerning him. No other person shall have access thereto nor shall the contents thereof be divulged in any manner to any unauthorized person . . . .[70]

Massachusetts[71] and New Mexico[72] regulations similarly limit access except where confidentiality is expressly waived, and Massachusetts requires that a record be maintained of all such grants of consent.[73] Access is sometimes granted to outside agencies in the form of an exception to a confidentiality provision.[74] In about half of the states there are no statutes at all on the ques-

---

63. RIOUX & SANDOW, *supra* note 58, at 5. *See, e.g.*, FLA. STAT. ANN. § 232.23 (Supp. 1975); OKLA. STAT., tit. 70, § 6-115 (1972); WYO. STAT. ANN. § 9-692.3(d) (Supp. 1975).

64. CAL. EDUC. CODE § 10757 (West 1975).

65. DEL. CODE ANN., tit. 14, § 4111(a)(3) (1974).

66. *Id.* §§ 4111(a)(2), (b); Mass. Proposed Regs. for Student Records, Pt. I (1974), in RIOUX & SANDOW, *supra* note 58, at 157-58.

67. Mass. Proposed Regs. for Student Records, Pt. 1 (1974), in RIOUX & SANDOW, *supra* note 58, at 157-58.

68. Cal. Educ. Guidelines, tit. 5, art. 5, § 440(b)(2) (1970), in RIOUX & SANDOW, *supra* note 58, at 79.

69. RIOUX & SANDOW, *supra* note 58, at 5. *See, e.g.*, NEB. REV. STAT. § 79-4,157 (Supp. 1974); ORE. REV. STAT. § 336.195(2) (1974); TENN. CODE ANN. § 15-305 (Supp. 1974).

70. NEB. REV. STAT. § 79-4,157 (Supp. 1974).

71. Mass. Proposed Regs. for Student Records, Pt. 7 (1974), in RIOUX & SANDOW, *supra* note 58, at 160.

72. New Mex. Regs. §§ 72-6D, -6E (1972), in RIOUX & SANDOW, *supra* note 58, at 208.

73. Mass. Proposed Regs. for Student Records, Pt. 7.3 (1974), in RIOUX & SANDOW, *supra* note 58, at 160.

74. *See, e.g.*, CAL. EDUC. CODE § 10751 (West 1975):

> No teacher, principal, employee or governing board member of any public, private or parochial school providing instruction in any of grades kindergarten through 12 shall permit access to any written records concerning any particular pupil enrolled in the school in any class to any person except under judicial process unless the person is one of the following:
> . . .

tion of school record confidentiality.[75]

1. Destruction

Only about ten states permit or require the destruction of data that is no longer useful, or is otherwise inaccurate or inappropriate.[76] Nebraska, for example, requires that academic and disciplinary material be kept separately, and that "all disciplinary material shall be removed and destroyed upon the pupil's graduation or after his continuous absence from the school for a period of three years . . . ."[77] Massachusetts advises school officials to review pupil records regularly and destroy data that is misleading or dated—provided, however, that parents or students are first notified and accorded an opportunity to inspect such data.[78]

The great majority of states do not provide for the destruction of "stale" data. Some states approve the retention of information for "as long as necessary"[79] or "permanently,"[80] and some *require* that records be held forever, stored, for example, "in a fire-resistant safe or vault."[81]

2. Legal redress; privileges

About a dozen states grant privileged status to communications between students and school counselors.[82] Some states, however, limit the tort liability

---

(d) A state or local law enforcement officer, including a probation officer, parole officer or administrator, or a member of a parole board, seeking information in the course of his duties.

Cf. CAL. EDUC. CODE § 10751.5 (West 1975). One of the least forceful state statutory attempts to restrict outside access is KY. REV. STAT. § 160.295(6)(f) (1974), which simply *permits* boards of education to promulgate their own codes of student rights. However, KY. REV. STAT. § 164.283 (1971), offers greater protection to students in public higher education.

75. RIOUX & SANDOW, *supra* note 58, at 5.

76. *Id.*

77. NEB. REV. STAT. § 79-4,157 (Supp. 1974).

78. Mass. Proposed Regs. for Student Records, Pt. 6 (1974), in RIOUX & SANDOW, *supra* note 58, at 159-60.

79. Mississippi State Department of Education, A Manual of Directions for Using the Mississippi Cumulative Record Folder and Cumulative Permanent School Record (1968), in RIOUX & SANDOW, *supra* note 58, at 181.

80. Iowa Regs. § 3.3(14) (1972), in RIOUX & SANDOW, *supra* note 58, at 133. *See also* "Cumulative Records," Alaska Admin. Manual for Secondary Schools (1969), *supra* note 58 ("ad infinitum"); Alabama State Department of Education, Accreditation Standards for High Schools, standard XV, item G (1966), in RIOUX & SANDOW, *supra* note 58, at 59 ("indefinitely").

81. Iowa Regs. § 3.3(14) (1972), in RIOUX & SANDOW, *supra* note 58, at 133. *See also* Standards for Accreditation of Montana Schools § 161 (1971), in RIOUX & SANDOW, *supra* note 58, at 189.

82. RIOUX & SANDOW, *supra* note 58, at 5. The Michigan statute is one of the oldest and most absolute of the privilege provisions:

> No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution . . . who maintains records of students' behavior or who has records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from such records or such communications . . . except . . . with the consent of the person so confiding or to whom such records relate . . . .

MICH. COMP. LAWS ANN. § 600.2165 (Supp. 1975).

of school officials arising from the misuse of school records. New Jersey, for example, provides that "no liability shall attach to any member, officer or employee of any board of education permitting or furnishing" pupil records for public inspection "in accordance with rules prescribed by the state board . . . ."[83] Delaware limits liability to those cases in which "malice shall be conclusively proven."[84]

On the other hand, there is authority in two states to the effect that limitation of liability is not available for torts connected with school recordkeeping.[85] At least one court has held trustees of a high school district not to be immune from a libel suit where the trustees violated a state statute prohibiting school officials from disseminating personal information concerning pupils.[86] And, in those states without confidentiality statutes, common law principles operate with full force both to support and to deny causes of action.[87]

C. Challenge

Only five states have even regulatory authority permitting parents or students to correct, expunge, or challenge the contents of school records.[88] In New York, guidelines established in 1965 warn personnel responsible for maintaining records to consider carefully

> whether or not the record has any direct relation to the educative process and whether or not the information recorded is factually accurate, [since] educators have a grave professional and moral responsibility not to needlessly defame and injure the reputation of others, be they pupils or their parents.[89]

This suggests, if it does not quite guarantee, a student/parent right to challenge inaccurate, misleading, or irrelevant data.

Guidelines in Indiana assure to parents the right to enter "responses" into a student's record when it is felt that the record does not "fairly or accurately describe the situation."[90] Minnesota guidelines offer the right not only to enter "objections" to the record, but also to challenge its contents in an impartial hearing where the burden of proof is on the school district.[91] And Massachusetts regulations go still further, setting out a detailed procedure of appeal

---

83. N.J. REV. STAT. § 18A:36-19 (1968).

84. DEL. CODE ANN., tit. 14, § 4111(c) (1974).

85. *See* Minnesota State Department of Education, "Teacher Notes and Anecdotal Records," Guidelines for the Collection, Maintenance, and Release of Pupil Records (1973), in RIOUX & SANDOW, *supra* note 58, at 175; "Right to Examine Public School Records," Opin. Pa. Att'y Gen. (March 16, 1973), in RIOUX & SANDOW, *supra* note 58, at 244-45.

86. Elder v. Anderson, 205 Cal. App.2d 326, 23 Cal. Rptr. 48 (1962).

87. *See* text accompanying notes 22-55 *supra*.

88. RIOUX & SANDOW, *supra* note 58, at 5. These are New York, Massachusetts, Minnesota, Indiana and Pennsylvania.

89. New York State Department of Education, Manual on Pupil Records (1973), in RIOUX & SANDOW, *supra* note 58, at 215-16.

90. Indiana State Department of Public Instruction, Recommended Guidelines for Pupil Records § 4 (1973), in RIOUX &.SANDOW, *supra* note 58, at 128.

91. Minnesota State Department of Education, "Pupil and Parent Examination of Records," Guidelines for the Collection, Maintenance, and Release of Pupil Records (1973), in RIOUX & SANDOW, *supra* note 58, at 174.

that includes, finally, the right to a full-scale hearing with counsel and cross-examination privileges.[92]

At best, then, state statutory law is unsettled and incomplete, with the current trend somewhat favoring increased recognition of students' rights of access to and control over their school records. Just as common law doctrine has responded with only occasional sensitivity to the subtleties of this modern phenomenon, so state legislatures have offered piecemeal reforms, too often weighing deference to school practice more heavily in the scales than the individual's right to control his or her dossier.[93] It has remained for Congress, rarely a willing interloper in school affairs, to mount the first broadly-based assault on the "school record prison."

V
FEDERAL LEGISLATION

The Family Educational Rights and Privacy Act of 1974[94] is the first federal legislation ever to deal with the privacy rights of students and their parents. The Act attempts to lay down a comprehensive scheme of required conduct regarding the uses of school records, to establish, in the words of one of its sponsors, "a cornerstone of the protection of the rights and privacy of parents and students."[95] The Act contains three major initiatives: (1) to insure the confidentiality of student records; (2) to accord rights of inspection to parents and/or students; and (3) to afford procedures for the challenge of record information and the right to enter explanation or rebuttal of questionable information into the student's record. Before examining each of these areas in some detail, pertinent provisions of the Act defining the scope of its coverage should first be noted.

A. Applicability

The Act applies to any "educational agency or institution" which receives funds under a federal program administered by the Office of Education.[96] As a practical matter, this includes all public schools and some private schools as well.[97] The Act does not apply, however, to an institution whose students receive funds under an Office of Education program but which does not itself receive such funds.[98]

Rights under the Act are accorded to "parents" of "students" and to "eligible students." A "student" is defined as any person who attends or has attended an educational institution and with respect to whom the institution maintains "education records" or "personally identifiable information."[99]

92. Mass. Proposed Regs. for Student Records, Pts. 8, 9 (1974), in RIOUX & SANDOW, *supra* note 58, at 161.

93. Massachusetts is a notable exception. *See* text accompanying notes 67, 71, 73, 78, 92 *supra*.

94. General Education Provisions Act § 438, 20 U.S.C. § 1232g (Supp. IV, 1974) [hereinafter "FERPA" or "the Act"]. The proposed accompanying regulations, 45 C.F.R. part 99, appear in 40 Fed. Reg. 1208-16 (1975).

95. 120 CONG. REC. 13,373 (daily ed. July 24, 1974) (remarks of Senator Buckley).

96. 45 C.F.R. § 99.1(a), 40 Fed. Reg. 1210 (1975).

97. 20 U.S.C. § 1232g(a)(3) (Supp. IV, 1974).

98. 45 C.F.R. § 99.1(b), 40 Fed. Reg. 1210 (1975).

99. 20 U.S.C. § 1232g(a)(1), (2), (6) (Supp. IV, 1974).

Thus, a rejected applicant for admission to a school is not a "student" and is accorded no rights against the school to which he or she was denied admission.[100] Students' rights may be asserted by their "parents" (natural or adoptive parents, or legal guardians),[101] until the students reach the age of eighteen years or begin attending a postsecondary educational institution.[102] Such students, defined by the Act as "eligible students," acquire in place of their parents all the rights conferred by the Act.[103]

The Act defines "education records" broadly: "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution, or by a person acting for such agency or institution."[104] Four categories of information are specifically excluded from the definition: (1) notes made by teachers, supervisors, and administrative personnel which are kept in their sole possession for their own use; (2) records of a law enforcement agency which are used only for law enforcement purposes, provided the agency does not have access to the student's education records; (3) records pertaining to non-student employees of an educational institution; and (4) medical or psychiatric records used solely in the treatment of an *eligible* student, and kept confidential from those not assisting in such treatment.[105]

The exemption of these categories can be viewed as a way of specifying that they be treated as education records under certain circumstances. For example, if a school psychiatrist breaches confidentiality with the student and discusses his records with administrative personnel, those records become "education records" for purposes of the Act. Or if the police delve into school records to supplement their own, the supplemented record would then seem to be covered by the Act.[106] Similarly, the exemption for an instructor's notes is not absolute. If the notes are used solely in the course of his or her teaching, the presumption seems to be that such notes are not permanent in nature and so could not generate any stigmatizing effect upon the student. However, once the notes are allowed to reach others (not including substitute teachers), the presumption disappears, and they are considered part of the student's education records—whether or not the information is actually entered into a permanent record or cumulative folder.[107]

B. Confidentiality

The Act provides that education records[108] are not to be released without parental consent in writing to any individual, agency, or organization.[109] Again, there are specific, limited exceptions. These principally include: (1) other offi-

100. 45 C.F.R. § 99.3 (Comment), 40 Fed. Reg. 1211 (1975).
101. 45 C.F.R. § 99.3, 40 Fed. Reg. 1211 (1975).
102. 20 U.S.C. § 1232g(d) (Supp. IV, 1974).
103. *Id.*; 45 C.F.R. § 99.3, 40 Fed. Reg. 1210 (1975).
104. 20 U.S.C. § 1232g(a)(4)(A) (Supp. IV, 1974).
105. *See id.* § 1232g(a)(4)(B), for a complete list of the exceptions.
106. *See id.* § 1232g(a)(4)(B)(ii), (iv).
107. *See id.* § 1232g(a)(4)(B)(i).
108. Including information "personally identifiable" to the student, such as social security numbers. 45 C.F.R. § 99.3, 40 Fed. Reg. 1211 (1975).
109. 20 U.S.C. §§ 1232g(b)(1), (2) (Supp. IV, 1974).

cials of the same school who have a "legitimate educational interest";[110] (2) officials of other schools in which the student seeks or intends to enroll, provided the parent or eligible student is permitted to examine the information and challenge its content;[111] and (3) certain federal or state officials.[112] The Act also excepts the release of records pursuant to judicial order or subpoena, provided that the parents and student are notified of such order before complaince therewith.[113] Finally, the Act recognizes an exception allowing release of information "in connection with an emergency, [to] appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons."[114] Regulations promulgated by the Secretary of Health, Education and Welfare govern this exception, and they specify that the provision be strictly construed.[115]

The regulations provide means by which parents or eligible students may consent to the release of education records to outsiders.[116] Parents or eligible students are entitled to copies of any records so released, and their consent is effective only as to the parties they have designated.[117] Moreover, the educational institution must keep a record of all requests for access (except those originating within the institution).[118] This access record must be filed with each student's education records and must indicate specifically the legitimate basis on which access was granted in each case.[119]

C. Inspection

1. Confidential Recommendations

The most heated debate during Congressional consideration of the Act concerned parents' and eligible students' rights of access to education records.[120] The controversy centered on whether postsecondary students should be allowed to inspect confidential letters of recommendation for admission to college or graduate school.[121] Opponents argued that secrecy is necessary to ensure accuracy and frankness, to prevent spurious libel suits, and to prevent a movement away from this form of evaluation and toward heavier

---

110. *Id.* § 1232g(b)(1)(A).
111. *Id.* § 1232g(b)(1)(B).
112. *Id.* §§ 1232g(b)(1)(C), (E). *See id.* §§ 1232g(b)(1)(D), (F)-(H), for additional exceptions.
113. *Id.* § 1232g(b)(2)(B).
114. *Id.* § 1232g(b)(1)(I).
115. 45 C.F.R. § 99.35(c), 40 Fed. Reg. 1214 (1975). Among factors which are to be considered in determining whether "emergency" release of records is proper, are:

> (1) The seriousness of the threat to the health or safety of the student or other persons;
> (2) The need for such records to meet the emergency;
> (3) Whether the persons to whom such records are released are in a position to deal with the emergency; and
> (4) The extent to which time is of the essence in dealing with the emergency.

45 C.F.R. § 99.35(b)(1)-(4), 40 Fed. Reg. 1214 (1975).
116. 45 C.F.R. §§ 99.30, .31, 40 Fed. Reg. 1213-14 (1975).
117. 20 U.S.C. §§ 1232g(b)(1), (2)(A), (4)(A) (Supp. IV, 1974).
118. *Id.* § 1232g(b)(4)(A).
119. *Id.*
120. *See* N.Y. Times, Dec. 4, 1974, at 1, col. 7.
121. *Id.*; THE PRIVACY REPORT, *supra* note 1, at 4.

reliance on grades and test scores.[122] Proponents pointed out that professors unable to give unqualified recommendations should simply tell the student so when first approached; that "recommendation" letters possess great potential for harm, inadvertant or calculated, because of their basis in personal opinion; and that the asserted importance of such letters in candidate evaluation makes it all the more vital for students to see their contents.[123]

The Buckley-Pell Amendment[124] to the Act embodied Congress' uneasy compromise on this matter. To parents it extends the right to inspect any education records,[125] but as to eligible students it establishes two key exceptions: confidential letters of recommendation filed in their postsecondary records before January 1, 1975 (provided they are used for no other purposes), and other letters of recommendation to which students have effectively waived their right of access pursuant to the waiver provisions of the Act.[126] Thus, the Act represents two major victories for those (mostly college and university interests) who opposed student inspection of recommendation letters. First, applicants for admission to postsecondary programs who are rejected cannot inspect their letters of recommendation because they are not "students" under the Act.[127] Second, as to recommendation letters written for successful applicants, the Act's operation is prospective only.

Neither of these exceptions is supported in reason, nor are they consistent with other provisions of the Act about which little controversy was generated. The exclusion of rejected applicants from the Act's coverage ignores, almost by definition, the most serious abuses of the recommendation writer's responsibility. The letter writer now knows that his recommendation may be seen only by a successful applicant, not by an applicant who is rejected. If it is in his mind to sabotage the applicant, he cannot fail to see that sabotage with a vengeance is the safest and surest course. Further, it should be noted that no similar limitations are placed on student/parent access to grades, official comments, or other education records. Such records, maliciously inspired, might be just as injurious (and actionable) as libelous letters of recommendation would be,[128] but the Act evinces no concern about the "chilling" effect on sincerity or frankness occasioned by the removal of *their* confidentiality.[129]

---

122. *See, e.g.*, the argument pressed by Bates College a few years earlier, in Creel v. Brennan, C.A. No. 3572 (Super. Ct. Androscoggin Co., Me., 1968). There, the University of Maine contributed a similar view: "If disclosure of such information were made mandatory, no school could safely send us meaningful recommendations, nor would we request such information in writing." *Quoted in* M. CHAMBERS, THE COLLEGES AND THE COURTS 128 (7th ed. 1972).

123. *See* N.Y. Times, Dec. 5, 1974, at 46 (Letters to the Editor); THE PRIVACY REPORT, *supra* note 1, at 4: "[I]ncreasing numbers of teachers are adopting the practice of giving copies to their students." One study of teacher evaluations concluded that confidentiality adds nothing in terms of candor or effectiveness. Burns & Carnes, *Confidentiality of Recommendations—Is It Really Necessary?*, J. COLLEGE STUDENT PERSONNEL (November 1969).

124. S.J. Res. 40, 93d Cong., 2d Sess. (1974).

125. *See* text accompanying notes 138-42 *infra*.

126. 20 U.S.C. § 1232g(a)(1)(B), (C) (Supp. IV, 1974).

127. *See* text accompanying note 100 *supra*.

128. *See, e.g.*, the warning to teachers sounded in Minnesota State Department of Education, "Teacher Notes and Anecdotal Records," Guidelines for the Collection, Maintenance, and Release of Pupil Records (1973), in RIOUX & SANDOW, *supra* note 58, at 175; *cf.* Blair v. Union Free School Dist. #6, Hauppauge, 67 Misc. 2d 248, 324 N.Y.S.2d 222 (Dist. Ct. 1971).

129. *See* note 112 *supra*.

2. Waiver Provisions

The anomalous, privileged status of recommendation letters is reflected again in the Act's waiver provisions,[130] which apply only to inspection rights regarding letters of recommendation. Waiver is effective only with respect to the benefit immediately sought; for example, if a student decides to waive his right to inspect letters of recommendation solicited for application for admission to school X, his waiver does not carry over to a later application for admission to school Y.[131] Further, waiver "may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from" an educational institution.[132]

Opponents of the waiver provisions point out that they are at best unnecessary, at worst an invitation to subtle circumvention of rights.[133] Any rights conferred by the Act may be waived by the holder absent express statutory authority to the contrary.[134] A teacher is always free to refuse to write a letter of recommendation unless the student waives his right of inspection; the Act adds nothing in this regard. It prohibits any *requirement* of waiver but is silent on the question of less obvious inducements—for example, counseling the student that his or her signature on a waiver form is in the nature of routine formality. As one commentator warns, "[t]he waiver amendment could prove to be a dangerous loophole; its implementation will bear close watching."[135]

3. Notice of Destruction

The regulations provide that records to which parents or eligible students have requested access may not be destroyed until after such access has been granted.[136] This treatment obviates the problem of willful destruction to avoid inspection in a particular case, but it leaves a different kind of problem. What if schools decide to destroy categories of records, or parts thereof, which have already had stigmatizing effects on some students, unknown to the parents or students?[137] The statutory language does not provide for notice of contemplated deletion or destruction of records. It appears that the only practical protection against this event is for parents and eligible students to exercise their full inspection rights of all education records as soon as possible.

4. Nature of Inspection Rights

Inspection rights are summarized in the Act's accompanying regulations and include the right: (1) to be provided a list of the types of education records maintained by the school; (2) to inspect and review the content of such records; (3) to obtain copies of the records at a price not exceeding the actual cost

130. 20 U.S.C. § 1232g(a)(1)(B)(iii), (C) (Supp. IV, 1974).

131. *See* 120 CONG. REC. 21,489 (daily ed. Dec. 13, 1974) (remarks of Senator Pell).

132. 20 U.S.C. § 1232g(a)(1)(C) (Supp. IV, 1974).

133. *See, e.g.*, THE PRIVACY REPORT, *supra* note 1, at 5.

134. Even constitutional rights may be waived, provided such waiver is voluntary, Zap v. United States, 328 U.S. 624 (1945), and expressly intended. Wren v. United States, 352 F.2d 617 (10th Cir. 1965), *cert. denied*, 384 U.S. 944 (1966).

135. THE PRIVACY REPORT, *supra* note 1, at 5.

136. 45 C.F.R. § 99.14, 40 Fed. Reg. 1212 (1975).

137. Compare Massachusetts' handling of this problem in its legislation on the subject: *see* note 78 *supra* and accompanying text.

of reproducing them; (4) to receive a response to reasonable requests for explanation or interpretation of records; (5) to request a hearing to challenge the content of records; and (6) to be informed of any specific information about the student which cannot be separated for inspection from the education records of other students.[138] Requests for access must be granted within a reasonable time, but in no case later than forty-five days after a request has been made.[139]

To facilitate the exercise of these rights, educational institutions are required to inform eligible students and parents at least annually and in their own language of the requirements of the Act and the procedures established by the school to implement them.[140] The Act and regulations are silent as to the form of such notice, "because what might be reasonable for a one-room schoolhouse would not be reasonable for a university."[141] Notice must be afforded to all eligible students, and this group includes all students about whom the institution maintains records. Since it is the practice in some states to require the maintenance of public school records in perpetuity,[142] the burdens of providing notice under the Act may prove onerous indeed.

D. Challenge and Hearing

The Act requires educational institutions to provide procedures for the challenge of record information that is "inaccurate, misleading, or otherwise in violation of the privacy or other rights of students . . . ."[143] Such procedures must include an opportunity for a hearing, for the correction or deletion of challenged material, and for the insertion into the record of explanatory statements by parents or eligible students.[144] The regulations specify certain minimum due process requirements for such a hearing: (1) it must be held within a reasonable period of time following request by either party; (2) it must be conducted and decision rendered in writing by an institutional official or other party "who does not have a direct interest in the outcome of the hearing"; and (3) the parents or eligible student must be "afforded a full and fair opportunity to present [relevant] evidence."[145]

The statutory language appears broad enough to support challenges not only to facially misleading or inaccurate data, but also to the underlying basis of data generated by unfair school practices. For example, a suspension record based upon a patently unfair suspension,[146] or conclusions about a student's academic ability drawn from unreliable predictive tests[147] would seem arguably to constitute a record that is "misleading, or otherwise in violation of the privacy or other rights of students." The Buckley-Pell Statement offers some guidance on this point:

---

138. 45 C.F.R. §§ 99.13(a)-(f), 40 Fed. Reg. 1212 (1975).
139. 20 U.S.C. § 1232g(a)(1)(A) (Supp. IV, 1974).
140. 45 C.F.R. § 99.5, 40 Fed. Reg. 1211 (1975).
141. 45 C.F.R. § 99.5 (Comment), 40 Fed. Reg. 1211 (1975).
142. *See* text accompanying notes 79-81 *supra*.
143. 20 U.S.C. § 1232g(a)(2) (Supp. IV, 1974).
144. *Id.*; 45 C.F.R. § 99.20, 40 Fed. Reg. 1213 (1975).
145. 45 C.F.R. § 99.22, 40 Fed. Reg. 1213 (1975).
146. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 576 n.7 (1975).
147. *See, e.g.*, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974).

> [I]f a child has been labeled mentally or otherwise retarded and put aside in a special class or school, parents would be able to review the materials in the record which led to this institutional decision, and perhaps seek professional assistance, to see whether these materials contain inaccurate information or erroneous evaluations about their child.[148]

While it remains to be seen what firm rules limiting the scope of challenges will develop out of the practical operation of the Act, it is certainly arguable that to restrict challenges to facially inaccurate or misleading data alone would be a subversion of both the language and the intent of the Act.[149]

Another question raised by the hearing procedures concerns the provision placing the conduct and disposition of such hearings in the hands of an "institutional official or other party who does not have a direct interest in the outcome of the hearing."[150] This language seems contradictory, since any school official might be said to have a "direct interest" in the refutation of challenges to the school.[151] Nothing in the Act, regulations, or legislative history deals with this potential difficulty, and so it, too, awaits the test of practice.[152]

E. Remedies and Sanctions

The Act contemplates enforcement by threatening to deny funds under applicable Office of Education programs.[153] It establishes an Office and a Review Board to investigate and adjudicate complaints,[154] which must be received within 180 days of the act or omission complained of.[155] If, after preliminary investigation, the school is found not to be in compliance, it is notified by the Office of the steps it must take to comply and is allowed a reasonable period of time—"given all of the circumstances of the case"—to do so.[156] If the institution fails to comply with this notice, a hearing is held before the Review Board, whose decision is final unless modified by the Secretary of Health, Education and Welfare.[157] If the Secretary concludes that the institution has failed to comply and that compliance cannot be secured by voluntary means, he is di-

---

148. 120 CONG. REC. 21,488 (daily ed. Dec. 13, 1974).

149. *See* 20 U.S.C. § 1232g(a)(2) (Supp. IV, 1974); 45 C.F.R. § 99.20, 40 Fed. Reg. 1213 (1975).

150. 45 C.F.R. § 99.22(b), 40 Fed. Reg. 1213 (1975).

151. *See, e.g.*, THE PRIVACY REPORT, *supra* note 1, at 7.

152. In school disciplinary cases, courts have generally held that procedural due process requires hearing officers to be impartial, without prior involvement in the investigation or prosecution of the case. *See, e.g.*, Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866 (D.D.C. 1972) (hearing officer must not be an employee of the school system); Caldwell v. Cannady, 340 F. Supp. 835, 839 (N.D. Tex. 1972). Few decisions, however, have insisted on outside hearing officers, most courts being satisfied if there is notice, an opportunity to present evidence and cross-examine witnesses, and a decision based on substantial evidence. Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *cf.* Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971).

153. 20 U.S.C. §§ 1232g(a)(1)(A), (B), (a)(2), (b)(1), (2), (e), (f) (Supp. IV, 1974); 45 C.F.R. § 99.66, 40 Fed. Reg. 1216 (1975).

154. 20 U.S.C. § 1232g(g) (Supp. IV, 1974).

155. 45 C.F.R. § 99.65(b), 40 Fed. Reg. 1216 (1975).

156. 45 C.F.R. § 99.65(d), 40 Fed. Reg. 1216 (1975).

157. 45 C.F.R. §§ 99.67-.69, 40 Fed. Reg. 1216 (1975).

rected to order the withholding of applicable federal funds until the institution complies with the Act.[158]

In summary, the Family Educational Rights and Privacy Act of 1974 achieves major advances in substantive rights. It codifies, as only half the states have done, the common law right of parents to inspect school records. It sets stringent limits on the access of outside agencies to school records, as very few states have done. And, almost without precedent, it establishes a right to challenge the content of records.

Perhaps the most serious flaw, and the one most apt to generate litigation, is the Act's studied vagueness as to the procedures required to accommodate challenges to record information.[159] It specifies certain due process guarantees but leaves schools free to work out the details for themselves. Until the Act is tested in practice, it is difficult to predict what guidelines will evolve concerning such challenges. However, in cases involving school disciplinary proceedings, it is settled that due process safeguards should be scaled in accordance with the gravity of the threat and the importance of the interest threatened.[160] That school record abuses threaten rights of constitutional dimension is the theme of the next section.

VI
CONSTITUTIONAL CONSIDERATIONS

In circumstances to which FERPA does not apply—or does not apply forcefully enough—plaintiffs may be able to frame constitutional arguments. These arguments flow from at least four separate doctrinal sources: (1) substantive due process decisions recognizing the right of parents to oversee the upbringing of their children;[161] (2) more recent procedural due process holdings affording fair procedures for challenging decisions that may result in the denial of benefits;[162] (3) decisions establishing in the individual and the family what might be called a "pure" right of privacy from unwarranted intrusion by the state;[163] and (4) procedural due process with respect to proceedings that may tend to stigmatize.[164]

A. The State Action Problem

Recent decisions make it clear that students are "persons" under the Constitution and cannot be denied their constitutional rights simply because they

158. 45 C.F.R. § 99.66, 40 Fed. Reg. 1216 (1975). Beyond the scope of this Note are important questions concerning the preemptive effect, if any, of the Act on state statutes and common law, and the extent to which plaintiffs will be allowed direct resort to the courts before, during, or after the pursuit of their administrative remedy. The Act itself is silent on these questions, except to note that states are not precluded from enacting more extensive protections of student/parent rights. 20 U.S.C. § 1232g(b)(1) (Supp. IV, 1974). *But see* 120 CONG. REC. 21,489 (daily ed. Dec. 13, 1974) (remarks of Senator Buckley): "Of course, the provisions of the amendment do not affect whatever rights a student or his parents might have in civil proceedings, as in the case where confidentially-received material causes the student or his parents actionable damage."

159. *See* text accompanying notes 143-52 *supra*.

160. Goss v. Lopez, 419 U.S. 565 (1975).

161. *See* text accompanying notes 173-77 *infra*.

162. *See* text accompanying notes 178-82 *infra*.

163. *See* text accompanying notes 183-90 *infra*.

164. *See* text accompanying notes 191-201 *infra*.

are students.[165] Nevertheless, in asserting their constitutional claims against schools, students face a serious obstacle in the requirement of "state action."

While tax-supported educational institutions created by the state at all levels have long been recognized as falling within the domain of state action,[166] the same cannot be said with respect to schools formally designated as "private."[167] The most recent decisions suggest that the following general principles are applied in determining whether the acts of private schools qualify as state action: (1) if a court can conclude that the state is substantially involved in the funding, operation, governance, or oversight of an institution—or any combination of these factors, the so-called "indicia" of state involvement[168]—then the acts of that institution will be considered state action;[169] (2) if the state is substantially involved in an activity of the school from which the plaintiff alleges injury, then these acts of the school may be considered state action, even though no general finding of a state action is warranted.[170] Some courts, a distinct minority, have held that private schools perform a function of the state (namely, education), and that, therefore, a finding of state action is almost always appropriate.[171]

Thus, the applicability of the Constitution is not coterminous with that of FERPA. There are, no doubt, private schools receiving Office of Education funds (to which FERPA would apply)[172] but which would fail either the first or second test of state action. Similarly, schools that receive no Office of Education money might nevertheless be deeply imbued with the color of state action.

---

165. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Caldwell v. Cannady, 340 F. Supp. 835 (N.D. Tex. 1972). At the same time, courts have recognized the legitimate supervisory authority of school officials and the need to maintain discipline and order in the classroom. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. at 507, 513 (1969); Blackwell v. Issaquena Co. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149 (S.D. Tex. 1971), *vacated on other grounds*, 475 F.2d 1071 (5th Cir. 1973); General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Learning, 45 F.R.D. 133 (W.D. Mo. *en banc* 1968).

166. Brown v. Strickler, 422 F.2d 1000 (6th Cir. 1970) (municipal college); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (state university); Madera v. Board of Educ., 267 F. Supp. 356 (S.D.N.Y.), *rev'd on other grounds*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968) (public high school).

167. *See* Oefelein v. Monsignor Farrel High School, 77 Misc.2d 417, 353 N.Y.S.2d 674 (Sup. Ct. 1974) (expulsion from private high school does not constitute state action).

168. The leading case on the "indicia" test for state action is Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

169. Isaacs v. Board of Trustees of Temple Univ., 385 F. Supp. 473 (E.D. Pa. 1974); Braden v. University of Pittsburgh, 477 F.2d 1 (3d Cir. 1973).

170. Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970). *Cf.* Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

171. Belk v. Chancellor of Washington Univ., 336 F. Supp. 45 (E.D. Mo. 1970); Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La.), *rev'd on other grounds*, 306 F.2d 489 (5th Cir. 1962). *See generally* Marsh v. Alabama, 326 U.S. 501 (1946).

Examples of cases which failed to find state action are: Wahba v. New York Univ., 492 F.2d 96 (2d Cir. 1974), *cert. denied*, 419 U.S. 874 (1975); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). *See generally* Hendrickson, *"State Action" and Private Higher Education*, 2 J. LAW & ED. 53 (1973).

172. *See* text accompanying note 96 *supra*.

B. *Parental Rights and Substantive Due Process*

Once the hurdle of state action has been cleared, parents and students may take advantage of a rich and expanding arsenal of constitutional arguments. Since 1923, the Supreme Court has repeatedly held that parents have the right to control the upbringing and education of their children under the fourteenth amendment's due process guarantee, thus rendering invalid state laws prohibiting the teaching of foreign languages,[173] requiring all students to attend public schools,[174] and compelling all children to attend school through the high school level.[175] The underlying rationale of these holdings was succinctly put by the Court in *Wisconsin v. Yoder*:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition . . . .[176]

If parents are intelligently to exercise such rights and responsibilities, it is certainly arguable that they must have access to their children's school records, at least until the child reaches adulthood under state law.[177] It should follow that the right to inspect is itself constitutionally guaranteed. This proposition, however, has yet to be specifically approved by the Court.

C. *Procedural Due Process—Denial of Benefits*

Constitutional authority for the parent's right to inspect and challenge school records can be derived from a series of recent cases guaranteeing procedural due process to students adversely affected by important decisions of the school authorities. Such decisions range from summary suspensions,[178] to "tracking" or classification of students in slower programs,[179] to adjudications of mental deficiency and transfer to special facilities.[180] Where decisions by school authorities are based wholly or in part on record information, courts have held that parents have a due process right to inspect those records and to challenge their accuracy.[181] At least one court has required, further, that parents be allowed "to enter relevant comments in such school records."[182]

---

173. Meyer v. Nebraska, 262 U.S. 390 (1923).
174. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
175. Wisconsin v. Yoder, 406 U.S. 205 (1972).
176. *Id.* at 232.
177. *See* text accompanying notes 32-42 *supra*.
178. Goss v. Lopez, 419 U.S. 565 (1975), and cases cited in the lower court opinion, Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973).
179. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Mills v. Board of Educ. of Dist. of Colum., 348 F. Supp. 866 (D.D.C. 1972).
180. LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974); Pennsylvania Assoc. of Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).
181. Mills v. Board of Educ. of Dist. of Colum., 348 F. Supp. at 881: Parents must be given an opportunity "to examine the child's school records before the hearing, including any tests or reports upon which the proposed action may be based . . . ." *See also* LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Pennsylvania Assoc. of Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).
182. LeBanks v. Spears, 60 F.R.D. 135, 141 (E.D. La. 1973).

Taken together, these holdings reinforce the parent's right of inspection and begin to elaborate a constitutional right to challenge records in accordance with fundamental notions of procedural due process. The nature and scope of the challenge procedure are still vague, however, for these are questions that have never been squarely presented.

D. Privacy

A third and potentially potent constitutional argument goes both to the issue of challenging school records and to the issue of confidentiality, broadly conceived. This is the argument from the right of privacy. As one commentator puts it:

> The essence of privacy is . . . the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others.[183]

The broad contours of this right, held to emanate from several guarantees contained in the Bill of Rights, were announced by the Supreme Court in the landmark case of *Griswold v. Connecticut*.[184]

More recently, the constitutional right of privacy was used as the sole basis for decision in a case directly concerned with school information gathering and dissemination practices. *Merriken v. Cressman*[185] arose out of a drug abuse prevention program which sought to elicit information about the private lives of schoolchildren so as to predict which of the children were "potential drug abuser[s]."[186] Evaluations were conducted by means of questionnaires that asked the children detailed and intimate questions about their personal attitudes and home lives.[187] Parents were not asked for their consent and were given only a "selling device" description which emphasized the benefits and not the admitted dangers of the program. They were granted no access to the materials compiled nor any control over their use.[188] The court found the program to be a direct invasion of the parents' and students' rights of privacy and enjoined its further implementation.[189] Thus, *Cressman* marks the beginning of a realization that, under the Constitution, there is some information that a school may not collect, some questions that a school may not ask. Obviously, this constitutional argument carries the right to challenge the contents of school records into areas scarcely contemplated by the Family Educational Rights and Privacy Act.[190]

---

183. Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1189 (1965). Compare the definition appearing in A. WESTIN, PRIVACY AND FREEDOM 7 (1967): "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

184. 381 U.S. 479 (1965).

185. 364 F. Supp. 913 (E.D. Pa. 1973).

186. *Id.* at 915.

187. *Id.* at 916.

188. *Id.* at 914-17.

189. *Id.* at 921.

190. *Cf.* Wentworth v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973), 494 F.2d 1135 (D.C. Cir. 1974) (amending concurring opinion of Leventhal, J.).

E. Due Process—Stigma

A related argument appears in a line of Supreme Court holdings since *Anti-Fascist Refugee Committee v. McGrath*[191] which guarantee a right to be heard whenever "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."[192] Such "stigma" cases have arisen in a variety of contexts, including the appearance of names on subversive lists,[193] the retention of erroneous arrest records,[194] and the recording of derogatory school disciplinary information.[195] Indeed, in its recent decision in *Goss v. Lopez*,[196] the Supreme Court, upholding the procedural due process rights of public school students suspended for periods of up to ten days, pointed out that what was at issue was not only "the property interest in educational benefits temporarily denied," but also "the liberty interest in reputation."[197] The Court affirmed a lower court order to expunge all references to the suspensions from the students' files.[198]

The "stigma" rationale, though not yet directly relied upon in many school records cases,[199] offers persuasive additional support for challenges to record content and to loose confidentiality practices. The limits of the doctrine are difficult to define, however, for almost every routine academic evaluation made by schools tends to stigmatize some students relative to others, and few would argue for a rule inviting the courts to scrutinize Mary's "B" in English.[200] But records identifying Mary as a social misfit, a sexual deviant, or a potential drug user are a different matter. Courts will have to adjust the quantum of due process required to the gravity of the injury at stake.[201]

As courts balance the due process rights of students and parents against the legitimate educational and administrative interests in maintaining certain school records in certain ways, they will inevitably be led into a deeper examination of the educational process itself. Their aim, of course, will not be judi-

---

191. 341 U.S. 123 (1951).

192. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

193. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951). *Cf.* Cole v. McClellan, 439 F.2d 534 (D.C. Cir. 1970); Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970).

194. Menard v. Saxbe, 498 F.2d 1017 (D.C.Cir. 1974); Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971); United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967); Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971). On juvenile offender records, *see In re* Gault, 387 U.S. 1, 24 (1967); Coffee, *Privacy versus "Parens Patriae": The Role of Police Records in the Sentencing and Surveillance of Juveniles*, 57 CORNELL L. REV. 571 (1972).

195. Goss v. Lopez, 419 U.S. 565 (1975), and cases therein cited at 576, n.8; Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969): "It goes without saying, and needs no elaboration, that a record of expulsion from high school constitutes a lifetime stigma." *See also* Doe v. McMillan, 459 F.2d 1304 (D.C. Cir. 1972), *rev'd in part and aff'd in part*, 412 U.S. 306 (1973).

196. 419 U.S. 565 (1975).

197. *Id.* at 576.

198. *Id.* at 572.

199. *But see* Merriken v. Cressman, 364 F. Supp. 913, 920 (E.D. Pa. 1973); Doe v. McMillan, 459 F.2d 1304, 1327 n.16 (D.C. Cir. 1972) (Wright, J., dissenting).

200. *See* text accompanying notes 143-52 *supra*.

201. *See* Goss v. Lopez, 419 U.S. 565, 584 (1975), where, in upholding the due process rights of suspended students, the Court said: "[W]e have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions . . . may require more formal procedures."

cial control of the schools, nor the imposition of onerous procedures.[202] Rather, it should be simply to require that school records practices be tied to legitimate educational goals, and that the latter conform, as one would expect they naturally ought, to developing constitutional guarantees of privacy and due process.

VII

CONCLUSION

Students and their parents have long recognized the important bearing of school records on one's life, both in school and after leaving it. But it is only recently that those on whom the files are kept have begun to assert their rightful control over such records. The Family Educational Rights and Privacy Act of 1974 promises to lay the rudiments of reasonable inspection, confidentiality and challenge rights with regard to student records in most of the nation's schools. In effect, FERPA codifies the most advanced common law and state statutory developments.

Perhaps even more significant in the long run will be the new willingness of federal courts to reach the broader issues posed by school records. Student challenges to school actions are being countenanced by the courts in an expanding variety of contexts. And the records which reflect the student-school relationship are coming to be seen as part of the stake in many such disputes.

Students and parents now have a federal statutory right to inspect school records, to prevent nonschool personnel from inspecting them, and to challenge inaccuracies in them. But they have also the beginnings of more fundamental constitutional rights: namely, the right to say "no" to data gatherers who would invade the privacy of home or individual, and the right to challenge evaluations improperly made or acted upon.

Ultimately, school records pretend to be the persons whom they chronicle. It is a pretense the law must reject.

MICHEL L. STONE

202. *Id.* at 577-84. *Cf. id.* at 586-600 (Powell, J., dissenting).