Students as Research Subjects

The Privacy Rights of Students and Their Families

By Robyn Rone

From time to time, third parties contact local education agencies (LEAs) seeking to conduct research using students or their education records. At other times LEAs themselves may seek out third parties to conduct research on their students. In these situations federal law imposes a duty to protect the privacy rights of students and students' families.

A recent case from the Ridgewood, New Jersey, Public School System (Ridgewood) presents a range of the legal issues that can arise when students are used as research subjects. Using the Ridgewood case as a starting point, this article discusses the two federal statutes that primarily regulate student privacy: the Family Educational Rights and Privacy Act (FERPA) and the Protection of Pupil Rights Amendment (PPRA).[1] The article also considers constitutional issues that may arise when an LEA allows researchers access to students or student records. It concludes with a discussion of privacy-protection policies an LEA may want to consider in such situations.

The Ridgewood, New Jersey, Public School System

During the fall of 1999, Ridgewood administered a survey to its middle and high school students. The survey was designed to measure the strength of various attributes and experiences known to promote a healthy adolescence.[2] It contained a number of personal questions, such as:

- How many times have you had alcohol to drink . . . in your lifetime? During the last 12 months? During the last 30 days?
- In the last two weeks . . . how many cigarettes have you smoked?
- How many times have you used cocaine?
- Have you ever tried to kill yourself?
- Have you ever had sexual intercourse?
- When you have sex, how often do you and/or your partner use birth control such as birth control pills, a condom, foam, diaphragm, or IUD?[3]

Ridgewood sent a letter to all parents notifying them that the survey would be administered in the fall. The letter disclosed that the survey sought information about such at-risk behaviors as substance abuse, sexual activity, stress, and depression; it emphasized that participation in the survey was voluntary and anonymous. In addition, the letter informed parents that a copy of the survey was available for inspection at local schools.[4] Ridgewood directed teachers administering the survey to inform students that the survey was anonymous and voluntary and that any student could choose not to complete it. After the survey was administered, answer booklets were secured in a locked office before being sent for tabulation to the research institute that created the survey. After tabulation, the institute destroyed the answer booklets and released a summary of the results to the public.

Despite these precautions, controversy erupted soon after the survey was administered. One student claimed that her teacher told her she was required to take the survey; another claimed that a teacher told the class they would be "cutting class" if they

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1. 20 U.S.C. § 1232g (2005) and 20 U.S.C. § 1232h (2005), respectively.

Other federal statutes that have provisions dealing with student privacy include the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1491 (2005); the National School Lunch Act, 42 U.S.C. §§ 1771–1791 (2005); USA Patriot Act, Pub. L. No. 107-56, 5 Stat. 272 (2001) (codified as amended in scattered sections of 50 U.S.C.); the Children's Online Privacy Protection Act, 47 U.S.C. § 231 (2005); and the Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

2. These and subsequent facts are culled from the judicial opinions issued in *C.N. v. Ridgewood*, 146 F. Supp. 2d 528 (D.N.J. 2001), *aff'd in part, rev'd in part*, 281 F.3d 219 (3d Cir. 2001); *C.N. v. Ridgewood*, 319 F. Supp. 2d 483 (D.N.J. 2004).

3. *Search Institute Profiles of Student Life: Attitudes and Behaviors* (Minneapolis: Search Institute, 1996). Information on the survey is available on the Institute's Web site at www.search-institute.org/surveys.

4. *Ridgewood*, 319 F. Supp. 2d at 486.

left the room during the survey. One teacher admitted that he may have forgotten to tell his students that participation in the survey was voluntary before he passed it out.

Unhappy parents brought a lawsuit against Ridgewood and certain of its officials, alleging that the survey violated FERPA and PPRA, as well as the students' and parents' constitutionally protected right of privacy and the parents' right to direct the education and upbringing of their children (among other rights).[5]

The Family Educational Rights and Privacy Act

The *Ridgewood* parents alleged that the survey violated FERPA, though the judicial opinions in the case do not make clear on what specific grounds they based this claim. As discussed below, this claim was unsuccessful.

FERPA, in relevant part, prohibits federal funding of an educational agency or institution that has a policy or practice of disclosing personally identifiable information from a student's education record without written parental consent.[6] The act defines *education records* as any records, files, documents, or other materials containing information directly related to a student and maintained by an educational agency or a person acting for the agency.[7] Unless a specific exception provides otherwise, the statute requires an LEA, before releasing student information to third parties, to notify the affected student's parents; the notice must specify what records will be released, the reasons for the release, and the person or entity to which they are being released.[8]

FERPA does, however, allow LEAs to release education records without parental consent to nine categories of recipients. For this discussion, the most important exception allows release to organizations conducting studies for or on behalf of the LEA to (1) develop, validate, or administer predictive tests; (2) administer student aid programs; or (3) improve instruction.[9] All such studies must be "conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it was obtained."[10]

The above discussion illustrates why the Ridgewood survey did not fall afoul of FERPA. First, FERPA protects from disclosure only *personally identifiable* information from a student's education record. The anonymity of the Ridgewood survey, as conceived and (largely) administered, the aggregation of the data collected, and the destruction of the individual answer booklets following the data aggregation made correlation of individual answers with individual students virtually impossible. In fact, there is a sound argument to be made that the survey answers did not meet the definition of educational records at all and so were not covered by FERPA.[11] Further, even when information is personally identifiable, FERPA allows its disclosure to certain groups, including legitimate researchers, as long as the information is destroyed when no longer needed for its original purposes. The arrangements for the Ridgewood survey satisfied both these conditions. Finally, even in the absence of these two conditions removing the Ridgewood survey from FERPA's purview, the statute's language makes clear that it is concerned with *policies* or *practices* that violate its provisions. In this case—in which the complaint involved administration of a single survey that, school officials made abundantly clear, was voluntary and anonymous—it is hard to imagine that the isolated actions of a few confused teachers would provide a basis for a violation.

One other important point about FERPA bears mentioning. In *Ridgewood*, the parents ultimately consented to dismissal of their FERPA claim because of a 2002 Supreme Court opinion, *Gonzaga University v. Doe*.[12] In that case, the Court held that FERPA creates no individually enforceable rights; in other words, parents cannot seek judicial redress for FERPA violations, although they may file complaints through the Department of Education (DOE).[13]

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5. *Ridgewood*, 146 F. Supp. 2d 528 (D.N.J. 2001), *aff'd in part, rev'd in part* 281 F.3d 219 (3d Cir. 2001).

6. 20 U.S.C § 1232g(b)(1), (2)(a); 34 C.F.R. § 99.30. FERPA's privacy protections transfer from parents to students once students attain the age of eighteen or begin attending a postsecondary educational institution. *Id.* at § 1232g(d). Similarly, the privacy protections of the Protection of Pupil Rights Amendment (hereinafter PPRA) transfer at age eighteen or with a declaration of emancipated minor status. 20 U.S.C. § 1232h(c)(5)(B). For the sake of simplicity, this article will speak only in terms of privacy protections granted to *parents*, with the understanding that in appropriate cases these may actually belong to the students themselves.

7. 20 U.S.C. § 1232g(a)(4)(A).

8. Sec. 1232g(b). An LEA can only transfer personal information to a third party on the condition that that party will not disclose it to any other party without the written consent of parents. Each LEA must also maintain in each affected student's education records a list of all individuals or organizations that have requested or obtained access to the record. Sec. 1232g(b)(4).

9. Sec. 1232g(b)(1)(F).

10. 34 C.F.R. § 99.34.1(a)(6). Other exceptions are school officials with a legitimate educational interest; a school to which a student is transferring; specified officials for audit or evaluation purposes; appropriate parties in connection with financial aid to a student; accrediting organizations; appropriate officials possessing a judicial order or lawfully issued subpoena; appropriate officials in cases of health and safety emergencies; and state and local authorities within a juvenile justice system, pursuant to a specific state law. 20 U.S.C. § 1232g(b)(1)(A)–(J); 34 C.F.R. § 99.34.1.

11. *Ridgewood*, 319 F. Supp. 2d 483, 494.

12. 536 U.S. 273 (2002).

13. Parents who believe that an LEA has violated FERPA can file

As this discussion shows, school officials administering surveys don't need to be concerned about FERPA unless

- the LEA plans to collect personally identifiable information from students,
- it plans to disclose that information to third parties not falling within any of FERPA's nine exempt categories, and
- it intends to make that disclosure without parental consent.

The Protection of Pupils' Rights Amendment

The *Ridgewood* parents also alleged that the survey violated the Protection of Pupils' Rights Amendment, because the LEA did not obtain written parental consent before administering the survey, provide adequate notice about when and how the survey would be administered, or explain how parents could opt their children out of participation.[14]

It seems likely that the Supreme Court's *Gonzaga* opinion—which ruled that FERPA creates no privately enforceable rights—would also block judicial enforcement of individual complaints under PPRA.[15] This is presumably why the *Ridgewood* parents voluntarily dropped this statutory claim from their suit along with the FERPA claim. Nonetheless, PPRA's provisions speak more directly to the issue of students as research subjects than FERPA's do, and school officials should be aware of them.

PPRA regulates the collection and disclosure of personal information obtained directly from students through surveys, evaluations, or analysis. For example, PPRA requires schools to notify parents at least annually of scheduled activities that will involve (1) the collection, disclosure, or use of personal information about students for the purpose of marketing or selling that information (or otherwise providing that information to others); or (2) the administration of any required survey containing questions about

1. the student or of the student's parents' political affiliations or beliefs;
2. mental or psychological problems of the student or the student's family;
3. sex behavior or attitudes;
4. illegal, antisocial, self-incriminating, or demeaning behavior;
5. critical appraisals of individuals with whom respondents have close family relationships;
6. legally recognized privileged or analogous relationships such as those of with lawyers, physicians, and ministers;
7. the student's or parents' religious practices, affiliations, or beliefs; or
8. income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such a program).[16]

PPRA also requires LEAs to offer parents an opportunity to opt students out of these activities.[17]

When a required survey seeking to elicit information on one of the above eight categories is funded, even in part, by the DOE, the LEA must obtain written parental consent to a student's participation.[18] To clarify, when a survey is required but is *not* funded by DOE, parents must be allowed to opt their students out of participation; when a survey is required *and* is financed with DOE funds, a student—through written parental consent—must opt in. When participation in a survey is voluntary, PPRA does not apply.

The *Ridgewood* parents failed to show that the survey they complained of violated PPRA. First, they apparently did not establish whether the survey was part of a program administered by DOE.[19] If it was not, the LEA was not obligated to obtain prior parental consent but merely had to allow parents to opt students out of it. Further, PPRA's notification and consent provisions only apply to surveys

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a complaint with the Family Policy Compliance Office of the DOE. If this office finds that an LEA has violated the statute, it may ask school officials to confirm that it has taken specific steps to comply and give the LEA a reasonable time to comply voluntarily before either withholding federal funds or terminating the LEA's eligibility to receive them. 20 U.S.C. § 1232g(g); 34 C.F.R. §§ 99.63, 99.66.

14. *Ridgewood*, 146 F. Supp. 2d 528, 531–32.

15. PPRA, like FERPA, directs parents who believe a violation has occurred to file complaints with the Family Policy Compliance Office of DOE (which the parents in *Ridgewood* did). That office may terminate federal funding to the LEA if its investigation finds that a school or school district is not voluntarily complying with the statute. 20 U.S.C. § 1232h(e), (f); 34 C.F.R. §§ 98.5-98.10.

16. Sec. 1232h(c)(2)(B), (C).

17. Sec. 1232h(c)(2)(A)(ii).

18. Sec. 1232h(b).

19. There is some conflict as to whether the survey was administered as part of an "applicable program" under DOE. Although an "applicable program" is defined as any program for which the Secretary or Department of Education has administrative responsibility as provided by law or by delegation of authority pursuant to law, courts have held that where no federal funds are used in a program, it cannot be challenged under PPRA. *See* Altman v. Bedford Cent. Sch. Dist., 45 F. Supp. 2d 368 (S.D.N.Y. 1999); Herbert v. Reinstein, 976 F. Supp. 331 (E.D. Pa. 1997). A letter from DOE's Office of Management to Dr. Frederick J. Stokley, Superintendent of Ridgewood Schools, indicates that the survey was funded in part with DOE money. "Complaint Nos. H-0159, H-0160, H-0162, and H-0163: Protection of Pupil Rights Amendment," December 18, 2001. On the other hand, the federal court for the District of New Jersey found no evidence that the survey was financed with federal funds; the court appeared to conclude that it was paid for solely with township funds. *Ridgewood*, 146 F. Supp. 2d at 537.

that students are required to answer. In spite of allegations of isolated misadministration, the Ridgewood survey was clearly conceived of and administered in a voluntary fashion.

Under PPRA, as under FERPA, school officials need only keep a few clear rules in mind with regard to individual surveys. First, the only surveys covered by PPRA both *require* student participation and address at least one of the eight topics listed above. Second, if the survey is in no way DOE-funded, the LEA need only give parents the opportunity to opt their children out of participation. Conversely, if the survey is, in any part, DOE-funded, the LEA must obtain written parental consent before requiring students to answer its questions.

With regard to the subject of surveys and information-gathering more generally, PPRA does require LEAs to develop written policies for parental notice and consent. These will be discussed in the final section of the article.

The Constitutional Issues

Although *Gonzaga* prevents parents from bringing lawsuits alleging that a survey violated FERPA—and probably prevents them from bringing similar suits under PPRA—they may pursue claims alleging other rights violations. For example, as they did in *Ridgewood*, parents or students, or both, may allege that a survey violated their right to privacy.[20] If an LEA were to administer a survey that is covered by FERPA, PPRA, or both, it is highly probable that compliance with the provisions of those statutes would steer the LEA safely away from any other statutory or constitutional law violations. By obtaining parental consent—(1) to disclosure of personally identifiable student information collected in a survey, or (2) to student participation in a required, DOE-funded survey covering at least one of the eight PPRA-covered personal topics, or (3) to both—LEAs would build a strong defense that parents have waived the right to assert such claims. As the Supreme Court has held that many constitutional rights may be waived by voluntary consent, it is always a good idea to obtain parental consent.[21]

Consent can, however, be a slippery issue. For one thing, consent must be voluntary. As the *Ridgewood* court suggested, it is not the mere asking of personal questions that invades privacy, it is the *compulsion* to answer them.[22] What constitutes compulsion will vary with the circumstances, but a good working definition might be that when something detrimental follows a student's refusal to answer survey questions, an agreement to answer those questions was not voluntary.[23]

A concept related to voluntary consent is *informed* consent. Parents cannot be deemed to have consented to their children's participation in a survey without full knowledge of the circumstances surrounding it: the kind of questions that will be asked, the anonymity or nonanonymity of answers, to whom answers will be disclosed, how answers will be used, and how answer sheets or booklets will be handled after the data is extracted from them. The Ridgewood officials did a fairly good job of providing this information (although it appears that they did not explain how the data would be handled after it was collected). In a letter to parents they explained the purpose of the survey: that it was voluntary and anonymous, and that survey items sought "information about at-risk behaviors such as substance abuse, sexuality, stress and depression."[24] They also made the survey available for parental review in the main offices of both middle and high schools.

Another issue that arises with the consent defense is What type of consent will suffice to waive objections to a survey? Courts have recognized two types of consent—active and passive. *Active* consent means that an individual gave verbal or written consent before engaging in an activity implicating his or her constitutional rights. *Passive* consent simply means that an individual had the opportunity not to participate in an activity affecting his or her constitutional rights and, understanding the constitutional implications of the activity, chose to participate anyway. In effect, it's the difference between opting in and not opting out.

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20. The *Ridgewood* parents also alleged violations of the First Amendment right against compelled speech and the Fifth Amendment right against self-incrimination. *Ridgewood*, 146 F. Supp. 2d, 528 (2001); *Ridgewood*, 319 F. Supp. 2d 483 (2004). Neither of these claims have very strong legal legs in the survey context—particularly in cases like *Ridgewood*, where the survey was anonymous and voluntary—and so will not be addressed in this article.

21. *See, e.g.,* Miranda v. Arizona, 484 U.S. 436 (1976); Fuentes v. Shevin, 407 U.S. 67, 92 (1971).

22. *Ridgewood*, 319 F. Supp. 2d at 494, (quoting National Federation of Federal Employees v. Greenberg, 983 F.2d 286, 294 (D.C. Cir. 1993)). *See also* Merriken v. Cressman, 364 F. Supp. 913, 919 (E.D. Pa. 1973) (quoting Brady v. U.S., 397 U.S. 742, 748 (1969)).

23. Note that the detrimental result must involve something to which the student would normally be entitled, not a mere benefit. So, for instance, if school officials conditioned a student's continued right to participate in extracurricular activities on providing answers to a survey, survey participation would not be voluntary (though this exclusion would not, in itself, be sufficient reason to find the survey administration unconstitutional—only sufficient to prevent the school from using the consent defense). On the other hand, if school officials merely rewarded students who answered survey questions with a free soda and the opportunity to leave school early on the day of the survey, being deprived of this benefit would not render the consent involuntary.

24. *Ridgewood*, 319 F. Supp. 2d 483, 486.

Again, the success of a consent defense will depend on the circumstances. It seems likely that passive consent can be adequate to waive subsequent objections to the disclosure of personal matters, but only if the quality of the information that led to the passive consent was sufficient to make it informed.

The privacy interest in avoiding disclosure of personal information

There may be one small glitch in this line of defense, however. Under both FERPA and PPRA, notification and consent rights belong solely to a student's parents, unless the student has reached eighteen years of age, is an emancipated minor, or is attending a postsecondary education institution.[25] Therefore, if parents consent to the participation of their child in a required survey, under those statutes an LEA may apparently require the student, who may be sixteen or seventeen years old, to answer very personal questions that he or she would rather not answer. In this context, the question arises: Do students themselves have a constitutionally protected privacy interest that prevents LEAs from compelling them to disclose personal information in answer to researchers' questions? This question breaks down into two subsidiary questions: What is the right to informational privacy, and to what extent do students possess it independent of their parents?

The contours of the right to informational privacy are murky, at best. Although the U.S. Supreme Court has identified a constitutionally protected *interest* in "avoiding disclosure of personal matters,"[26] the Court has never actually found a violation of the right to informational privacy. Whether such a right exists is a topic of ongoing conflict among the federal circuit courts,[27] although the Fourth Circuit (which has jurisdiction over North Carolina) has recognized it in some contexts.[28] In any event, assuming for the sake of argument that a constitutionally protected right to informational privacy does exist, it does not seem to do much to limit an LEA's ability to compel a student to answer survey questions.

To the extent that it exists, the right to informational privacy is limited to information in which an individual has a reasonable expectation of privacy, so any information available in a public record would not be protected.[29] Further, the information must be of an extremely personal or intimate nature—for example, concerning the status of one's health or certain other medical information.[30] Survey questions concerning a student's sexual feelings or activity, illegal drug use, or contraceptive practices may satisfy these requirements.

But finding that information is entitled to privacy protection is only the beginning of the constitutional analysis. If the information an LEA obtains from a student is entitled to constitutional protection, the right to keep it private may still be outweighed by an LEA's legitimate governmental purpose in disclosing it.[31] Further, this balancing test is tipped in favor of the government when the information gathered is carefully handled: the individual interest in protecting privacy is significantly less important when the information is disclosed to a limited number of individuals and is not publicly disseminated.[32] Other factors courts have used in weighing these competing interests include (1) the type of record requested; (2) the potential for harm in any subsequent nonconsensual disclosure; (3) the degree of the need for access; and (4) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest favoring access.[33] Given that both FERPA and PPRA make provision for LEA access to private student information and contain safeguards to prevent excessive disclosure, LEAs seem to have a good chance of prevailing in this weighing process—again, assuming that they follow statutory requirements.

Ridgewood provides an example of this analysis. The court agreed that the information obtained from students was of a personal nature and therefore entitled to privacy protections; nonetheless, it found no privacy violation, because the information was obtained in a completely *anonymous* manner, was safely secured, and, when the results were eventually released in aggregated form, was not identifiable with individual students.[34]

Just as the contours of the right to informational privacy are murky, so is the extent to which students—independent of their parents—possess constitutional informational privacy rights. In other words, can parents waive their children's constitutional rights by providing their consent to personally invasive research? The younger students are, the more likely that informed parental consent constitutes a full

25. *See* note 6, above.

26. Whalen v. Roe, 429 U.S. 589, 599–600 (1977).

27. *Compare, e.g.*, J.P. v. DeSanti, 653 F.2d 1080 (6th Cir. 1981) *with* U.S. v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980).

28. Walls v. City of Petersburg, 895 F.2d 188 (4th Cir. 1990) (some right to privacy in personal financial information); *but see* Ferguson v. City of Charleston, 186 F.3d 469, 483 (4th Cir. 1999) (declining to decide whether right to privacy in medical records exists).

29. *Walls*, 895 F.2d at 192, 193–94.

30. *See, e.g.,* Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994); Fraternal Order of Police v. Philadelphia, 812 F.2d 105, 112–13 (3d Cir. 1987).

31. *Ferguson*, 186 F.3d at 482 (quoting Bloch v. Ribar, 156 F.3d 673, 684 (6th Cir. 1998)).

32. *Id.* (quoting American Fed'n of Gov't Employees, AFL-CIO v. Dep't of Housing and Urban Dev., 118 F.3d 786, 793 (D.C. Cir. 1997)).

33. *Ridgewood*, 319 F. Supp. 2d at 495 (citing U.S. v. Westinghouse Electric Corp., 638 F.2d 570, 578 (1980)).

34. *Id.* at 496.

waiver of privacy rights for both parent and child. Concerning older students, however, the answer is less clear.

It is well established that children do not shed their constitutional rights at the schoolhouse gate; but it is equally well established that the nature of those rights is shaped by what is appropriate for children in school and is not co-extensive with the rights afforded adults under the Constitution.[35] Against the constitutional rights of students, courts weigh the legitimate interests of schools and educators in maintaining a safe and orderly environment where learning can take place.[36] Particularly in the context of the Fourth Amendment (which prohibits unreasonable searches and seizures by government officials), court decisions have restricted students' privacy rights and legitimate privacy expectations more and more in recent years.[37]

Now, of course, there is a distinction between information sought to avert perceived imminent danger or disciplinary problems (as when school officials conduct suspicionless drug testing, for example) and information sought to determine the extent of at-risk behaviors in a student population (as Ridgewood's survey attempted to do). But the difference is one of degree. Courts are traditionally wary of substituting their judgment for that of professional educators, and the *Ridgewood* court shared that wariness: "Questioning the wisdom of the survey is simply not within the judicial domain. At the same time, it is clear that the government has a legitimate and substantial interest in studying the significant problems that affect today's youth."[38] If such a legitimate governmental interest in disclosing personal information can outweigh an individual's interest in confidentiality, it seems likely that an LEA's interest in promoting student welfare and creating an environment conducive to learning can trump a student's individual right to informational privacy. This is especially true when the LEA handles the information carefully.

Nonetheless the status of the law in this area is far from clear, and discretion is in order. Some LEA officials may decide to give students themselves the opportunity to choose whether to participate in research activities that intrude into the private sphere.

Parental autonomy in making important decisions

The U.S. Supreme Court has recognized the right of citizens to independence in making certain kinds of important decisions. One area of privacy to which it has applied this right is the parental right to direct the raising and education of their children. Indeed, the Court has recently observed that parental rights concerning the care, custody, and control of their children are "perhaps the oldest of the fundamental liberty interests recognized by this Court."[39] The claim to this right interweaves aspects of both privacy and liberty interests, but for purposes of this article, they will be treated as one.

The typical parental intrusion claim concerns a government's attempts to eliminate or usurp a parent's role in the custody or nurture of a child.[40] So, for example, successful complaints of this type have challenged government efforts to control parents' right to send their children to private schools, laws requiring public school attendance, and court judgments giving the rights of grandparents precedence over parents' rights.[41] In a situation in which an LEA seeks to obtain or disclose personal student information for legitimate research purposes, it is hard to imagine any intrusion on parental rights rising to the level of grievousness required for this kind of constitutional violation. This is especially so if we assume that the LEA makes even token efforts to follow the requirements of PPRA or FERPA, as appropriate.

Take, for example, the Ridgewood parents who claimed that their constitutional right to make decisions with respect to the care and control of their children without governmental interference had been violated. The district court considered as one general privacy claim the parents' claims that the survey (1) constituted an unreasonable intrusion into the household in violation of the Fourth and Fourteenth Amendments and (2) violated the substantive due process rights of parents to raise their children as they see fit. The court dismissed these claims, emphasizing that the LEA's actions simply did not rise to the level of a constitutional violation. Another crucial point was the fact that the school system "played no part in any sort of compulsion of the students and that their best efforts were directed to ensuring that parents were the final arbiters as to whether their children took the survey."[42]

Again, like the right to informational privacy, the parents' right to direct their children's education and upbringing—even if the court were fully persuaded that the right was infringed—could be outweighed by a sufficiently important governmental interest. How weighty this interest

35. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *see, e.g.,* Goss v. Lopez, 419 U.S. 565, 581–82 (1975).

36. *See, e.g.,* New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985).

37. *See, e.g.,* Vernonia School District 47J v. Acton, 529 U.S. 217 (2000); *T.L.O.*, 469 U.S. 325; Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004); *In re* J.F.M., 607 S.E.2d 304 (N.C. App., 2005).

38. *Ridgewood*, 319 F. Supp. 2d at 497.

39. Troxel v. Granville, 530 U.S. 57, 65 (2000). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

40. *Ridgewood*, 146 F. Supp. 2d 528, 539 (citing Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000)).

41. Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); *Troxel*, 530 U.S. 57.

42. *Ridgewood*, 319 F. Supp. 2d 483, 498.

must be, however, is the subject of much debate. The Fourth Circuit, for example, has declared that unless the parental right to direct a child's education is infringed along with another, fundamental right (such as the right to freedom of religion or expression), the government need only put forward a rational reason for engaging in the conduct that parents object to.[43]

Instituting a Policy

When an LEA decides to allow its students or records to be used for research, it should be aware that privacy rights may be implicated. LEAs can best avoid privacy violations and claims of privacy violations by following the requirements set out in both FERPA and PPRA, whenever they apply. Even though FERPA and, presumably, PPRA, cannot be enforced through private lawsuits, an LEA may still be subject to investigation and reprimand by the Family Compliance Office of the DOE for statutory violations. Further, LEA officials could face claims that they should be held privately liable for constitutional violations. As discussed above, obtaining parental—and possibly student—consent to the collection or disclosure of personal information will go a long way toward eliminating most potential claims of informational privacy—as will protecting anonymity and careful handling of information.

Let's reiterate, then, the FERPA and PPRA requirements that LEAs need to consider in the process of deciding whether to use or grant use of students or student records for research purposes.

Requests by researchers for education records fall under FERPA. The statute prohibits federal funding of LEAs that have a policy or practice of releasing education records to a third party for research without written consent from parents, *unless* that party is conducting studies for or on behalf of the LEA to develop, validate, or administer predictive tests or student aid programs, or to improve instruction. FERPA imposes a further condition: such studies must be conducted in a manner that "will not permit the personal identification of students and their parents by persons other than representatives of such organizations" and that ensures that the "information will be destroyed when no longer needed for the purpose for which it was obtained."[44]

Therefore, FERPA concerns arise only when an LEA seeks to disclose personally identifiable student information to unauthorized third parties without parental consent. If any doubt exists as to whether the use of student education records for research meets FERPA requirements, the best policy is always to obtain written parental consent to the record release.

Under PPRA parents must consent, in writing, before a student can be compelled to participate in certain DOE-funded surveys. The requirement covers surveys seeking information concerning (1) political affiliations or beliefs of the student or student's family; (2) mental or psychological problems of the student or student's family; (3) sex behavior or attitudes; (4) illegal, antisocial, self-incriminating, or demeaning behavior; (5) critical appraisals of other individuals with whom the student has close family relationships; (6) legally recognized privileged or analogous relationships, such as those with lawyers, doctors, and ministers; (7) religious practices, affiliations, or beliefs of the student or student's family; or (8) family income (other than that required by law to determine eligibility for participation in a program or for receiving federal financial assistance under such program).[45]

In addition, PPRA requires school systems receiving federal funds to implement policies, in consultation with parents, that

- give parents the right to inspect surveys created by third parties within a reasonable period of time after a request to do so, but in any event before the survey is administered;
- protect student privacy in the event that the survey contains questions about one of the eight regulated topics (above);
- provide notice to parents, at least annually at the beginning of the school year, of the specific or approximate dates when the LEA plans to administer any survey seeking information from one of the eight regulated topics; and
- offer parents an opportunity to opt their children out of participation in any non-DOE-funded survey covered by the policy.[46]

One topic that neither FERPA nor PPRA addresses is how school officials should determine when to grant researchers' requests for access to students or student records. The National Forum on Education Statistics, in its comprehensive guidebook, *Forum Guide to Protecting the Privacy of Student Information: State and Local Education Agencies*, outlines several vital components of this analysis:[47] it covers the perceived benefits of the research, potential invasions of students' privacy, the reputation of the requester, and

43. Herndon v. Chapel Hill-Carrboro City Board of Educ., 89 F.3d 174, 178–79 (4th Cir. 1996).

44. 34 C.F.R. § 99.34.1(a)(6).

45. 20 U.S.C. § 1232h(b).

46. Sec, 1232h(c)(1), (2).

47. Pub. No. 2004-330 (Washington, DC: 2004). This extremely valuable resource can be ordered through the U.S. Department of Education or online at http://nces.ed.gov/forum/publications.asp (last viewed July 14, 2005).

the availability of staff to monitor the records release and research activities.[48]

The *Forum Guide* also suggests that the release of data to researchers outside the LEA should be considered a "loan" of data, meaning that recipients do not own them; LEA officials should therefore request that all data be returned or copies destroyed when researchers have completed their work. The guide further recommends that LEAs develop written policies that: describe all the relevant federal and state laws; explain procedures for requesting access to data, along with the name of the official designated to handle requests; list criteria for accepting or denying a request; and specify minimum expected security arrangements and other relevant requirements.[49]

The guidebook further recommends that LEAs direct researchers to submit requests for access to student information on the research organization's letterhead and to specify the following: type of data requested; reasons for the request; description of how the data will be used, analyzed, presented, and reported; names and titles of officials in charge of the research; estimated amount of time the data will be needed; desired medium of release; and the researchers' plan to secure the privacy of the records.[50]

Of course, local school officials always have the prerogative to reject research propositions from outside parties. They should exercise that right (in accordance with their written policy and its criteria) when they believe the research will not serve their students or the school system well or when the privacy of students and their families will not be protected. Finally, even if no statute requires these steps, in some situations an LEA that allows researchers access to private student information can *best* protect itself, its students, and its parents by fully informing parents (and older students) of the planned research, obtaining written parental consent, and making sure that the students themselves (especially older ones) have the opportunity to choose whether or not to participate.

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48. In considering the reputation of the researchers, an LEA may want to determine whether an independent body has reviewed the ethical implications of the research proposal and approved it. For example, federal law requires that any entity seeking federal funding for a research project or program involving human subjects submit an assurance by an institutional review board (IRB) confirming that the research proposal adequately protects the rights of the human subjects of the research. 42 U.S.C. § 289(a). In considering whether to approve a research project involving human subjects, an IRB must find that (1) the risks to human subjects is minimal; (2) the risks are reasonable in relation to the anticipated benefits; (3) informed consent will be sought (with exceptions); and (4) the project has guidelines concerning the ways the privacy of the human subjects will be protected. 45 C.F.R. § 46.111(a). For a more detailed look at the law and policy guiding such boards, see the *Institutional Review Board Guidebook* at http://www.hhs.gov/ohrp/irb/irb_guidebook.htm (last viewed April 4, 2005).

49. Besides FERPA and PPRA, relevant federal legislation may include the laws listed in note 1 above.) Related state laws are N.C. Gen. Stat. § 115C-402 (hereinafter G.S.) (governing the maintenance and confidentiality of student records); G.S. 115C-47(8) and 115C-230 (authorizing LEAs to sponsor or conduct educational research that may improve the school system under their jurisdiction); G.S. 115C-13 (prohibiting the State Board and superintendent from disclosing any information that LEAs cannot lawfully disclose); and G.S. 115C-174.13 (prohibiting the public disclosure of personally identifiable test scores, except as permitted under FERPA).

50. *Forum Guide,* p. 75.