

## Privacy or Safety? The Use of Cameras to Combat Special Ed Abuse

Sarah M. Benites

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# Privacy or Safety? The Use of Cameras to Combat Special Ed Abuse

Sarah M. Benites

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## ABSTRACT

Self-contained classroom students face abuse from educators at disproportionate rates compared to general education students. To combat the abuse, several jurisdictions, including Massachusetts, have proposed or enacted bills enabling cameras to be placed in self-contained classrooms. This has sparked privacy concerns, particularly regarding whether the usage would amount to an infringement on the Fourth Amendment rights of students and educators. This note argues that surveillance is an ineffective deterrent to prevent violent and abusive behavior and should not justify bypassing potential privacy and constitutional violations. It outlines the relevant case law regarding students and teachers and apply these standards to the context of the self-contained classroom. Additionally, it examines the potential policy considerations relating to surveillance usage.

## AUTHOR'S NOTE

Sarah M. Benites received her B.A. in Law and Society and Psychology from Anna Maria College. She expects to receive her J.D. from the University of Massachusetts School of Law in 2025. The author would like to dedicate this article to her family and friends whose unwavering love and support made this note possible. She would like to express a special thank you to her mother whose passion and dedication as a special education teacher continue to inspire her. Thank you to all the educators who have positively impacted her academic journey and to educators across the country who are overworked and undervalued but continue to advocate for the best interests of their students. Thank you to Professor Rebecca Flanagan for her guidance in the creation of this piece. Finally, the author would like to express her deepest gratitude to the UMass Law Review and, specifically, her editing team for their contributions to this note.

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## INTRODUCTION

In 2019, personnel at John F. Kennedy Elementary School, in Randolph, MA, were placed on leave following allegations of assaulting disabled children.<sup>1</sup> A six-year-old girl in the accused teacher's classroom suffered from scratches on her arm.<sup>2</sup> Her parents echoed the unfortunate experience of many parents of special education students in stating, "It's like, you can't sleep. You have rocks in your stomach. How to (sic.) you send your child to school every day?"<sup>3</sup> Eric Batson, a 6-year-old autistic and mostly non-verbal child attending the elementary school, began coming home from school with bruises and scratches on his body, specifically his ribs, arms, and thighs, about a month into the school year.<sup>4</sup> According to his mother, Eric began displaying odd behavior, such as refusing to get ready for school and telling her, "no school, no school."<sup>5</sup> A staff member reported that she witnessed a teacher verbally and physically abusing special education students on multiple occasions.<sup>6</sup> Unfortunately, such an experience is not unique to the special education students at John F. Kennedy Elementary School.

The Peck School in Holyoke, Massachusetts, used dangerous restraints on disabled students, specifically those with emotional

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<sup>1</sup> Bob Ward, *Teacher Accused of Mistreating Special Needs Students at Randolph School*, BOSTON 25 NEWS (Jan. 28, 2019, 10:55 PM), <https://www.boston25news.com/news/teacher-accused-of-mistreating-special-needs-students-at-randolph-school/911204283/> [https://perma.cc/U84U-8CY4].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Michael Rosenfield, *Special Education Teacher Charged With Assault on Disabled Person*, NBC BOSTON, <https://www.nbcboston.com/news/local/randolph-special-education-teacher-charged-with-assault-on-a-disabled-person/2565/> [https://perma.cc/F92B-GGJ6] (last updated Feb. 27, 2019, 8:09 PM); Jim Morelli, *Randolph Teacher Accused of Abusing Special Needs Students Appears in Court*, BOSTON 25 NEWS (Mar. 11, 2019, 10:59 PM), <https://www.boston25news.com/news/randolph-teacher-accused-of-abusing-special-needs-students-appears-in-court/929430646/> [https://perma.cc/WVJ9-Y478].

<sup>5</sup> Morelli, *supra* note 4.

<sup>6</sup> Nia Hamm & Karla Rendon-Alvarez, *Authorities Investigate Alleged Mistreatment of Students at Randolph Elementary School*, NECN, <https://www.necn.com/news/local/massachusetts/randolph-elementary-school-mistreatment-students-allegations/3485/> [https://perma.cc/GH6K-SD63] (last updated Jan. 19, 2019, 12:32 PM).

disabilities, on a consistent basis.<sup>7</sup> Such restraints included pressing the child's body against the ground, on their stomach, with either one adult using their body weight to hold the child down by their arms or two adults pinning the child's arms and legs to the ground.<sup>8</sup> Such restraints place the child at risk of asphyxiation or injury.<sup>9</sup> The school also utilized forced seclusion, where the children, many of whom were already suffering from post-traumatic stress disorder, were placed in a locked closet with no lights.<sup>10</sup>

Children with disabilities are more than twice as likely to experience physical abuse than their counterparts.<sup>11</sup> These children face additional barriers to reporting the abuse than children without disabilities, including the inability to recognize the abuse and the inability to ask for help because of their disability.<sup>12</sup> Essentially, non-verbal students are unable to communicate the abuse, as was the case for Eric Batson, whose father stated, “[h]e doesn’t have a voice. He can’t tell anybody

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<sup>7</sup> David M. Perry, *When Teachers Abuse Disabled Children*, PACIFIC STANDARD, <https://psmag.com/social-justice/teachers-abusing-disabled-children> [<https://perma.cc/9G8A-VKNB>] (last updated June 14, 2017).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Reiter et al., *Adolescents With Intellectual Disabilities as Victims of Abuse*, 11 J. INTELL. DISABILITIES 371, 372 (July 20, 2007), <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=68df47a88d4d184b25b75b061bcd66b70d8bf420> [<https://perma.cc/Z2LW-ATKA>].

<sup>12</sup> Sam Franklin, *Children With Disabilities*, SAFEGUARDING COMPANY (Aug. 20, 2019), <https://www.thesafeguardingcompany.com/resources/blog/disabled-children/> [<https://perma.cc/B7EV-MX95>] (stating such barriers are that disabled children may be unable to recognize the abuse or ask for help, may rely on their abuser to meet their needs affecting their ability to speak out, signs of abuse and neglect may be mistaken as part of their condition, professionals may not be trained to spot the signs, may not know where to find help as a result of the isolation experienced by the children and their families, abusers may blame the abuse on the difficulty in caring for the child, professionals may overlook parent's inadequacy in meeting the child's needs, and child protection professionals may not have the necessary skills to communicate with the child or to accurately ask or understand their needs); Sara C. Heintzelman & Justin M. Bathon, *Caught on Camera: Special Education Classrooms and Video Surveillance*, 12 INT'L J. EDUC POL'Y & LEADERSHIP 1, 2 (2017), <https://files.eric.ed.gov/fulltext/EJ1166871.pdf> [<https://perma.cc/3YJG-CRE3>] (“Although some students can verbally share their disapproval of this popular practice, others with more severe disabilities cannot always alert or communicate with adults.”).

what’s going on.”<sup>13</sup> Children with disabilities are especially vulnerable to abuse given the segregation into special education classrooms, if their specific diagnosis requires.<sup>14</sup>

Specifically, in a school setting, students with disabilities are subjected to violent physical disciplinary practices at disproportionately high rates.<sup>15</sup> Students with disabilities make up only fourteen percent of the nationwide student population; however, nineteen percent of students who are subjected to corporal punishment are students with disabilities.<sup>16</sup> Students are usually punished for behaviors relating to their disability, much of which they struggle to or cannot control.<sup>17</sup> For instance, students with autism are likely to be punished for behaviors that stem from their difficulty understanding or implementing “appropriate social behavior,”<sup>18</sup> which is a central feature of autism spectrum disorder.<sup>19</sup> Students with disabilities are also twenty times

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<sup>13</sup> Rosenfield, *supra* note 4.

<sup>14</sup> Pat Amos et al., *Will Cameras Make Classrooms Safer?*, TASH (Jan. 2015), <https://tash.org/wp-content/uploads/2015/01/Cameras-in-School-Final.pdf> [<https://perma.cc/9CQ5-3GWL>].

<sup>15</sup> Alice Farmer, *Impairing Education Corporal Punishment of Students with Disabilities in US Public Schools*, HUM. RTS. WATCH 1, 2, 6 (Aug. 11, 2009), <https://www.aclu.org/report/impairing-education-corporal-punishment-students-disabilities-us-public-schools> [<https://perma.cc/PW7K-2KKA>] (listing such disciplinary practices as hitting the children with instruments such as rulers, pinching or striking the student, grabbing the student with forces that produces bruises, and bruising or injuries resulting from restraint techniques).

<sup>16</sup> *Id.* at 2-3 (defining corporal punishment as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort”).

<sup>17</sup> *Id.* at 5; Honig v. Doe, 484 U.S. 305 (describing the disciplinary procedure afforded to a disabled student); Brandi Tanner, *Manifestation Determination Review (MDR) Overview*, YOUR IEP SOURCE, <https://youriepsource.com/manifestation#:~:text=A%20manifestation%20determination%20review%20is,may%20result%20in%20disciplinary%20action> [<https://perma.cc/2G9Z-3BDW>] (last visited Dec. 3, 2023). The purpose of the review is to determine whether the behavior was the result of the student’s disability or the failure of the school to implement the student’s IEP. *Id.*

<sup>18</sup> Farmer, *supra* note 15.

<sup>19</sup> Scott Bellini, *Making (and Keeping) Friends: A Model for Social Skills Instruction*, IND. RES. CTR. FOR AUTISM, <https://www.iidc.indiana.edu/irca/articles/making-and-keeping-friends.html#:~:text=Impairment%20in%20social%20functioning%20is,and%20taking%20another%20person%27s%20perspective> [<https://perma.cc/QBA4-Q25W>] (last visited Dec. 2, 2023) (stating “impairment in social functioning is a central feature of ASD” with such deficits including responding to the initiations of others, reading non-verbal cues, and understanding the perspective of another).

more likely than their counterparts to be physically restrained, which includes mechanical restraints.<sup>20</sup>

Parents are left feeling helpless in protecting their children from such abusive tactics.<sup>21</sup> Complaints and requests for nonviolent disciplinary tactics have gone unanswered.<sup>22</sup> Out of fear for their child's well-being, many parents have made the difficult decision to sacrifice their child's education for their physical well-being, leading them to withdraw their child from school.<sup>23</sup>

Statistics and the unfortunate experiences of special education students like those at John F. Kennedy Elementary School and the Peck School, coupled with the school district's inability or unwillingness to remedy the abuse, have resulted in a push for cameras in special education classrooms, specifically in self-contained classrooms.<sup>24</sup> Several states have proposed bills to implement this proposed solution.<sup>25</sup> Within the last eight years, Texas, Georgia, West Virginia, Florida, and

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<sup>20</sup> Perry, *supra* note 7; Christina A. Samuels, *Cameras in Special Ed. Classrooms a Complex Issue*, EDUCATION WK. (Sept. 20, 2016), <https://www.edweek.org/teaching-learning/cameras-in-special-ed-classrooms-a-complex-issue/2016/09> [<https://perma.cc/V9XG-S5MU>] (stating that 67% of students restrained or secluded during the 2013-2014 school year despite those receiving special education services accounting for only 12% of the national student population).

<sup>21</sup> Farmer, *supra* note 15, at 6.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> The term self-contained classroom most often refers to students with disabilities in a smaller educational setting in which they are generally taught by one special education teacher for all subjects. Carol Baidridge, *Self-Contained Classroom Benefits and Drawbacks*, VERYWELL FAMILY, <https://www.verywellfamily.com/self-contained-classroom-1449203> [<https://perma.cc/2SPB-R5A3>] (last updated Nov. 22, 2022); Luke Dalien, *Self-Contained Classroom Defined*, SPECIAL ED RES., <https://specialedresource.com/self-contained-classroom-defined> [<https://perma.cc/PN23-HEJ4>] (last visited Dec. 2, 2023); Laurie Mefford, dissertation, *Factors Influencing Intermediate School's Classroom Structures: Self-Contained Versus Departmentalized Structures*, WILLIAM WOODS UNIV. PROQUEST DISSERTATIONS PUBL'G (2019).

<sup>25</sup> Maureen Van Stone et al., *Bringing Legislation on Cameras in Classrooms into Focus*, COUNCIL PARENT ATT'YS & ADVOCES. (2021), [https://cdn.ymaws.com/www.copaa.org/resource/dynamic/blogs/20210809\\_125939\\_11544.pdf](https://cdn.ymaws.com/www.copaa.org/resource/dynamic/blogs/20210809_125939_11544.pdf) [<https://perma.cc/WPS9-PKDE>] (stating that Texas, Georgia, West Virginia, Louisiana, New Jersey, Massachusetts, New York, Arkansas, and Nevada have proposed bills involving cameras in special education classrooms).

Louisiana have enacted laws that place cameras in special education classrooms.<sup>26</sup>

In 2019, a bill was introduced in the Massachusetts Legislature on precisely this issue.<sup>27</sup> The bill provides for the placement of cameras within self-contained classrooms within Massachusetts schools.<sup>28</sup> The board of trustees or the school committee, as well as the principal, assistant principal, any staff member assigned to work in a special education setting, or a student's parent, can provide a written request for the placement of such cameras.<sup>29</sup> Ultimately, the bill failed in the 2019 session.<sup>30</sup>

These bills and the idea of having cameras in the classroom have generated a great deal of controversy, with nearly every group involved remaining split as to whether to support the bill, including teachers, parents, and disability groups.<sup>31</sup> Disability groups fear that such

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<sup>26</sup> Amanda Engel, *MD Lawmakers Considering Cameras in Special Ed Classrooms; Several States Have Similar Laws*, WMAR 2 NEWS, <https://www.wmar2news.com/infocus/md-lawmakers-considering-cameras-in-special-ed-classrooms-several-states-have-similar-laws> [<https://perma.cc/RMJ7-9ACZ>] (last updated Feb. 3, 2022, 6:19 PM).

<sup>27</sup> H.R. 3758, 191st Sess. (Mass. 2019).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Stone et al, *supra* note 25. The reason for the failure of the bill is unclear. *An Act Requiring the Monitoring and Documentation of School Discipline*, MALEGISLATURE.GOV, <https://malegislature.gov/Bills/191/H3758> [<https://perma.cc/6AWP-N7RV>] (last visited Apr. 4, 2024). Without explanation, the Massachusetts Senate did not take further action following an investigation by the Department of Education. *Id.*; Compare Kim Riley, *Community Weighs Cameras-in-Classrooms Proposal For Special Ed Students*, ROYAL EXAM'R (July 14, 2023), <https://royalexaminer.com/community-weighs-cameras-in-classrooms-proposal-for-special-ed-students/> [<https://perma.cc/5NMY-PSLJ>] (expressing concern that sensitive information about the students would be captured on camera and the cameras themselves may create a false sense of security that would push parents to request their child be placed in a self-contained classroom even if that is not the least restrictive environment to meet their needs), *with* Amos, *supra* note 14. This bill would violate provisions of the IDEA. *Id.*

<sup>31</sup> Mallory Sofastall, *Disability Community at Odds on Bill Requiring Cameras in Special Education Classrooms*, WMAR 2 NEWS, <https://www.wmar2news.com/news/state/disability-community-at-odds-on-bill-requiring-cameras-in-special-education-classrooms> [<https://perma.cc/ER66-WG7Q>] (last updated Mar. 19, 2021); *see, e.g.*, Amos et al., *supra* note 14 (voicing their concerns regarding the bills pushing for cameras in special education classrooms and offering alternative solutions); Jillian Atelsek, *Bill Requiring Cameras in Maryland Special Education Classrooms Fail Again*, FREDERICK NEWS POST (Apr. 21, 2022),



cameras will be ineffective in preventing abuse and will cause other harms, including the potential for the cameras to be used for discipline and lead to violations of the Individuals with Disabilities Education Act (IDEA)'s least restrictive environment provision.<sup>32</sup> Sarah Griffith, a special education teacher and a parent in a district that proposed such cameras, voiced her concern regarding such bills stating that educators feel as though the policy is discriminatory.<sup>33</sup> She fears the cameras have the potential to cause or increase anxiety, hindering the students.<sup>34</sup> Many students are in integrated classrooms at times throughout the day where cameras will not be placed so Griffith doubts that the policy is going to sufficiently protect them.<sup>35</sup> Many of those voicing their concerns focus specifically on the potential privacy impacts that may result, should the cameras be placed.<sup>36</sup> Shea Steele-Kuhn, a parent in a

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[https://www.fredericknewspost.com/news/education/bill-requiring-cameras-in-maryland-special-education-classrooms-fails-again/article\\_e28fbe30-70b6-55a7-b1f9-75ef10efcf52.html](https://www.fredericknewspost.com/news/education/bill-requiring-cameras-in-maryland-special-education-classrooms-fails-again/article_e28fbe30-70b6-55a7-b1f9-75ef10efcf52.html) [<https://perma.cc/5D3B-F43N>] (stating the Maryland chapter of the American Civil Liberties Union opposed the Maryland bill to provide cameras in the classroom whereas other disability rights groups and parents endorse the bill believing it will increase the safety of special education students).

<sup>32</sup> Amos et al., *supra* note 14; 20 U.S.C. §1412(5)(A) (2023) (providing the least restrictive environment provision requires that children with disabilities be removed from regular educational settings only when the nature or severity of the disability makes placement in a regular class setting with supplementary services unsatisfactory); *see infra* Part VI.B (discussing the least restrictive environment practices and students' expectation of privacy).

<sup>33</sup> Riley, *supra* note 30 ("I would like to let you know that a growing number of our educators are becoming concerned with the conversation surrounding these policies . . . . First and foremost, we feel this is a very discriminatory policy. . . . Our students are dispersed throughout the building . . . [s]o unless we're going to put cameras in every single part of that building, I do not feel that this policy is going to protect them.").

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Sarah Ritter, 'Huge Invasion of Privacy': KCK Teachers Denounce Adding Cameras in Every Classroom, KANSAS CITY STAR, <https://www.kansascity.com/news/local/education/article267849162.html> [<https://perma.cc/3U7H-EPCD>] (last updated Oct. 26, 2022, 8:56 AM); Vanessa Murphy & Bill Roe, *Controversial Bill Could Add Cameras to Classrooms With Special Needs Students*, 8 NEWS NOW, <https://www.8newsnow.com/news/local-news/i-team-controversial-bill-could-add-cameras-to-classrooms-with-special-needs-students/> [<https://perma.cc/TLD9-Z3MW>] (last updated Feb. 8, 2019, 12:07 AM) (quoting a spokesperson from the Clark County School District, a district pursuing such cameras, stating "[w]e also have some legal concerns as well because it's not

district pushing to implement such cameras, voiced her concern regarding the privacy implications of the student in that others would be privy to the information, specifically other parents, and the potential that such footage may be released on the internet.<sup>37</sup>

Along with such social and practical concerns, the bills have sparked some constitutional concerns. These concerns are as to whether the use of cameras in self-contained classrooms violates teachers' and students' reasonable expectation of privacy under the Fourth Amendment, made applicable to the states by the Fourteenth Amendment, and Article 14 of the Massachusetts Declaration of Rights.<sup>38</sup> While there has been litigation regarding the Fourth Amendment within schools, there has been no binding litigation in Massachusetts specifically on the expectation of privacy within self-contained classrooms or the use of cameras in such classrooms.<sup>39</sup> Therefore, there is no clear answer as to whether such bills would violate the Fourth Amendment protections.

Given that surveillance has failed as a deterrent for other types of malfeasance, it is unlikely to deter violence in a special education program, and studies examining this area have yielded conflicting results.<sup>40</sup> Moreover, unless the surveillance footage is constantly

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just about the one student and concern. There are privacy concerns for the staff members in the classroom, for the other students in the classroom."); Heintzelman & Bathon, *supra* note 12 (stating "[n]ew pressures to put cameras in classrooms have caused teachers to respond with resistance, citing constant video surveillance as a violation of their privacy rights).

<sup>37</sup> Riley, *supra* note 30 ("I understand that through the policy that the principal would be privy to this information, that other parents would be privy to this information . . . I did see that the photos, that their images would be blurred, but it said 'possibly be blurred.' It doesn't say that it would for sure be blurred. I'm worried about my child being in a fishbowl. I don't want my child to be in the experiment for this, and then something goes completely wrong.").

<sup>38</sup> See Heintzelman & Bathon, *supra* note 12 (When video surveillance is in place, some feel that their privacy and freedom is no longer a right due to being under constant watch).

<sup>39</sup> Stone et al., *supra* note 25.

<sup>40</sup> Sierra Cistone, *School Surveillance Tech Does More Harm Than Good*, *ACLU Report Finds*, THE GUARDIAN (Oct. 4, 2023), <https://www.theguardian.com/technology/2023/oct/04/school-surveillance-tech-aclu-report> [<https://perma.cc/5V3A-4BN7>]; Chase Thiel et al., *Monitoring Employees Makes Them More Likely to Break Rules*, HARVARD BUS. REV. (June 27, 2022), <https://hbr.org/2022/06/monitoring-employees-makes-them-more-likely-to-break-rules> [<https://perma.cc/MC4M-QEXL>] (reporting studies found that monitored employees were "substantially more likely to take unapproved breaks, disregard instructions, damage workplace property, steal office equipment, and

monitored, it is unlikely that the cameras would effectively facilitate the intervention necessary to prevent abuse.<sup>41</sup> Instead, it may drive the abuse into other areas of the school that are not monitored rather than eliminating the behavior.<sup>42</sup> Essentially, cameras in self-contained classrooms are ineffective in preventing the physical and verbal abuse of special education students when balanced against the risk of impeding on students' and teachers' privacy rights within Massachusetts school districts.<sup>43</sup> Thus, cameras alone, without additional safeguards, are insufficient to protect rights and are likely to produce a false sense of security; therefore, schools should be hesitant to implement them.<sup>44</sup>

Abuse in self-contained classrooms is certainly an issue nationwide, particularly in states where it is more prevalent and has resulted in the death of students.<sup>45</sup> However, it is important to note that even in Massachusetts, a state ranking amongst the top in the country regarding education, mistreatment remains a pressing concern within its schools.<sup>46</sup> This paper will examine the potential privacy impacts of placing cameras within self-contained classrooms, specifically under the Fourth Amendment. It will also explore the effectiveness of the cameras as a solution to physical and verbal abuse of students with disabilities at the hands of school personnel in Massachusetts schools. Additionally, it will argue that any renewed attempts to implement cameras should be discouraged until privacy concerns are adequately resolved. Part I examines the historical application of the Fourth Amendment within

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purposefully work at a slow pace, among other rule-breaking behaviors” and were more likely to cheat than those who did not believe they were being monitored).

<sup>41</sup> Amos et al., *supra* note 14.

<sup>42</sup> *Id.*

<sup>43</sup> *See generally id.*

<sup>44</sup> *Id.*

<sup>45</sup> Heather Ridgeway, *Local Special Needs Student's Death Linked to Illegal Restraint*, DALLAS EXPRESS (Nov. 17, 2022), <https://dallasexpress.com/education/local-special-needs-students-death-linked-to-illegal-restraint/> [<https://perma.cc/RZZ2-UPNK>].

<sup>46</sup> Melissa Ellin, *Mass. Ranks 5th in the Nation for Education, 1st for Student Success*, BOSTON.COM (Jan. 30, 2023), <https://www.boston.com/news/schools/2023/01/30/massachusetts-education-ranking-schoolaroo/> [<https://perma.cc/X5W5-A5AF>]; *Massachusetts Public Schools are America's Best, Report Says*, CBS NEWS (July 24, 2023, 12:32 PM), <https://www.cbsnews.com/boston/news/massachusetts-public-school-rankings-education-wallethub/> [<https://perma.cc/YU7E-DY4P>].

public schools and the legal test for determining the existence of the reasonable expectation of privacy. Part II discusses the protection against unreasonable searches and seizures of public school students, while Part III discusses such protection pertaining to government employees and teachers. Part IV explores whether students and teachers within self-contained classrooms in Massachusetts schools have a reasonable expectation of privacy based on the tests illustrated in Part I and if the cameras would violate the Fourth Amendment against unreasonable searches and seizures. Part V argues that surveillance is too ineffective of a method to deter the abuse to warrant bypassing such potential privacy concerns. Part VI discusses policy considerations, particularly the potential harm the surveillance could cause teachers and students.

## **I. BACKGROUND OF FOURTH AMENDMENT LAW AND PUBLIC SCHOOLS**

In the 18<sup>th</sup> Century, American colonists living under British tyranny were subjected to the Crown's Writs of Assistance. Intended to aid British agents in enforcing trade and navigation laws, these writs served as a "General Warrant." It allowed the King's agents to break into and search any home for illegal goods without specifying either the home or the goods beforehand.<sup>47</sup> Furthermore, these writs authorized suspicionless searches; the government was not required to have any facts indicating that the person possessed illegal goods inside the home prior to conducting the search.<sup>48</sup> In 1761, attorney and Founding Father James Otis attacked the Writs of Assistance before the Massachusetts Superior Court. Otis declared the Writs to be:

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<sup>47</sup> *Writs of Assistance 1761-72*, THE FOUNDERS' CONST., <https://press-pubs.uchicago.edu/founders/documents/amendIVs2.html> [<https://perma.cc/AGJ7-MFRC>] (last visited Feb. 17, 2024) ("By this Act of Parliament . . . intitled an Act for preventing Frauds and regulating Abuses in His Majesty's Customs, . . . it is lawful for any Officer of His Majesty's Customs, authorized by Writ of Assistants under the Seal of His Majesty's Court of Exchequer, to take a Constable, Headborough, or any other public Officer inhabiting near unto the Place, and in the Day Time, to enter and go into any House, Shop, Cellar, Warehouse or Room, or other Place, and in Case of Resistance to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring any kinds of Goods or Merchandize whatsoever, prohibited or uncustomed; and to put and secure the same in His Majesty's Storehouse, next to the Place where the Seizure shall be made.").

<sup>48</sup> *Id.*

[T]he worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English lawbook. . . . One of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Customs-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court, can inquire. . . . Thus, reason and the constitution are both against this writ. Let us see what authority there is for it. Not more than one instance can be found of it in all our law books; and that was in the zenith of arbitrary power namely in the reign of Charles II, when star-chamber powers were pushed to extremity by some ignorant clerk of the exchequer. But had this writ been in any book whatever, it would have been illegal. All precedents are under the control of the principles of law.<sup>49</sup>

Although these writs were only one of many injustices imposed by British rule, they nevertheless served as a spark that helped ignite the flame of the Revolution.<sup>50</sup>

Following the War for Independence—and during the ratification process of our own Constitution—the injustices brought about by British rule still hung over our Founders' heads. Anti-Federalists, who opposed our new Constitution because it did not contain a Bill of Rights, argued that “in forming a government on its true principles, the foundation should be laid . . . by expressly reserving to the people such of their essential natural rights as are not necessary to be parted with.”<sup>51</sup> Thus, in 1791, our Constitution was amended to include the Bill of Rights. The express purpose behind the Bill of Rights is “to prevent misconstruction or abuse of [the government's] powers.”<sup>52</sup>

One of the greatest abuses of government still fresh in our Founders' minds was the Crown's Writs of Assistance. As such, the Fourth Amendment to the Constitution provides that:

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<sup>49</sup> *Speech Against Writs of Assistance*, TEACHING AM. HIST., <https://teachingamericanhistory.org/document/speech-against-writs-of-assistance/> [<https://perma.cc/SE5T-J4SB>] (last visited Mar. 3, 2024).

<sup>50</sup> *Chimel v. California*, 395 U.S. 752, 761 (1969) (noting that the history of abuses was felt so deeply in “the Colonies as to be one of the potent causes of the Revolution”).

<sup>51</sup> ANTIFEDERALIST NO. 84 (“Brutus”).

<sup>52</sup> H.R.J. Res. 1, 1st Cong. (1789).

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>53</sup>

There are few protections as essential to the concept of ordered liberty as the right to be free from unreasonable searches or seizures; these fundamental principles are so deeply rooted in our nation's history that neither justice nor liberty would exist if they were to be sacrificed.<sup>54</sup> Thus, the warrant requirement limits the government's authority to conduct a search by requiring its agents to place before an antecedent neutral magistrate the facts and circumstances demonstrating probable cause. This "procedure under the aegis of judicial impartiality"<sup>55</sup> imposes "the deliberate, impartial judgment of a judicial officer . . . between the citizen and the [state] to assess the weight and credibility of the [officer's] information."<sup>56</sup> Furthermore, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."<sup>57</sup>

In *Katz v. United States*, the Court noted that the Fourth Amendment "protects people, not places."<sup>58</sup> The Court further provides that where an individual seeks to preserve an area as private, even if the area is accessible to the public, there may be constitutional protections.<sup>59</sup> However, a person does not have Fourth Amendment protection in information that he knowingly exposes to the public.<sup>60</sup>

In his concurring opinion, Justice Harlan provided a two-part test for determining when government action constitutes a search within the meaning of the Fourth Amendment.<sup>61</sup> The test focuses on determining whether the individual has a reasonable expectation of privacy in order to then determine if a search took place.<sup>62</sup> To satisfy the first prong of the test, the individual must have "exhibited an actual (subjective)

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<sup>53</sup> U.S. CONST. amend. IV.

<sup>54</sup> *Byrd v. United States*, 584 U.S. 395, 402 (2018).

<sup>55</sup> *United States v. Jeffers*, 342 U.S. 48, 51 (1951).

<sup>56</sup> *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

<sup>57</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (internal citations omitted).

<sup>58</sup> *Id.* at 351.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>62</sup> *Katz*, 389 U.S. at 351.

expectation of privacy.”<sup>63</sup> Second, such an expectation must be “one that society is prepared to recognize as ‘reasonable.’”<sup>64</sup> The Court has since reiterated that Harlan’s two-part test is the governing approach.<sup>65</sup>

While *Katz* found that the Fourth Amendment protection followed the person, the *in loco parentis* doctrine allowed courts to refrain from questioning the legality of searches and seizures of students conducted by school officials.<sup>66</sup> The *in loco parentis* doctrine is defined as “in the place of a parent; instead of a parent; charged, factitiously, with a parent’s rights, duties, and responsibilities.”<sup>67</sup> Under the *in loco parentis* doctrine, courts did not consider teachers to be government actors but rather private individuals acting as a substitute for the parent.<sup>68</sup> Teachers were afforded the same right to search a child’s belongings as a parent, meaning that the court could avoid the question of the applicability of the Fourth Amendment within the public school systems.<sup>69</sup>

The continued acceptance of the *in loco parentis* doctrine was called into question in *Tinker v. Des Moines Independent Community School District*. The *Tinker* Court established that students and teachers retain their constitutional protections within the schools, stating that students and teachers do not “shed their constitutional rights . . . at the schoolhouse gate.”<sup>70</sup> The Court later officially denounced the *in loco parentis* doctrine, at least in terms of searches and seizures, in *New*

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 N.Y.U.L. REV. 1077, 1083 (1991); see also *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *Smith v. Maryland*, 442 U.S. 735, 740 (1979).

<sup>66</sup> Kevin V. Maltby, *The Question of Reasonableness in Massachusetts Public School Searches*, 6 SUFFOLK J. TRIAL APP. ADVOC. 177, 178 (2001); see Jacqueline A. Stefkovich et al., *Law Enforcement Officers in Public Schools: Student Citizens in Safe Havens?*, 1999 BYU EDUC. & L. J. 25, 27 (1999) (stating the *in loco parentis* doctrine allowed the courts to “sidestep the question of applicability of the Fourth Amendment”).

<sup>67</sup> *In Locos Parentis*, THE L. DICTIONARY, <https://thelawdictionary.org/in-loco-parentis/> [<https://perma.cc/96K7-QQGN>] (last visited Dec. 3, 2023); Alysa B. Koloms, Note, *Stripping Down the Reasonableness Standard: The Problems with Using In Loco Parentis to Define Students’ Fourth Amendment Rights*, 39 HOFSTRA L. REV. 169, 184 (2010).

<sup>68</sup> Maltby, *supra* note 66; see M. Teresa Harris, *New Jersey v. T.L.O.: New Standard for Review or New Label?*, 9 AM. J. TRIAL ADVOC. 157, 163-64 (1985).

<sup>69</sup> Maltby, *supra* note 66, at 178-79; Harris, *supra* note 68.

<sup>70</sup> *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

*Jersey v. T.L.O.*, stating, “school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.”<sup>71</sup> The Court clarified that it is “indisputable . . . that the Fourth Amendment protects the rights of students against encroachment by public school officials.”<sup>72</sup> Thus, the Fourth Amendment protections apply to students in classrooms, and teachers are effectively the government action aspect that triggers these protections.

## II. PUBLIC SCHOOL STUDENT’S FOURTH AMENDMENT RIGHTS

### A. T.L.O. Standard

The Court first addressed school officials’ authority to conduct searches of students on school property in *T.L.O.*<sup>73</sup> In *T.L.O.*, a teacher discovered two high school freshmen smoking in the bathroom, which violated a school rule.<sup>74</sup> School staff searched T.L.O.’s purse, finding evidence of marijuana use, and continued to search the purse more thoroughly, finding several items associated with marijuana and the sale of drugs.<sup>75</sup> Disciplinary charges were brought against T.L.O. using the evidence seized as the basis of the charge.<sup>76</sup>

T.L.O. challenged the charges claiming that the search violated the Fourth Amendment and moved to suppress the evidence, which the juvenile court denied.<sup>77</sup> The juvenile court found the search to be reasonable, utilizing the following standard:

[A] school official may properly conduct a search of a student’s person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies.<sup>78</sup>

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<sup>71</sup> *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985); Koloms, *supra* note 67, at 184.

<sup>72</sup> *T.L.O.*, 469 U.S. at 334.

<sup>73</sup> *See* Koloms, *supra* note 67, at 171.

<sup>74</sup> *T.L.O.*, 469 U.S. at 328.

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

<sup>76</sup> *Id.* at 329.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 329-30 (finding that the school official had well-founded suspicion T.L.O. violated a school rule so the initial decision to search the purse was reasonable



The United States Supreme Court granted certiorari to address several legal issues.<sup>79</sup> First, the Court described the appropriate standard to determine the constitutionality of searches and seizures conducted by school officials on school property.<sup>80</sup> The Court refused to develop a uniform formalistic approach, instead advocating for a context-based inquiry to determine what is considered a reasonable search.<sup>81</sup> Such an inquiry requires balancing the student's legitimate expectation of privacy with the school's "equally legitimate need to maintain an environment where learning can take place."<sup>82</sup>

The Court expressly rejected the argument that students have no legitimate expectation of privacy.<sup>83</sup> The Court refused to equate students with prisoners who have no reasonable expectation of privacy.<sup>84</sup> The Court reasoned that the argument that students have no legitimate need to bring personal items to school is not "well-anchored in reality."<sup>85</sup> The Court acknowledged, however, that flexibility is required to accomplish the difficult task of maintaining discipline within schools.<sup>86</sup>

To achieve such a balance, the school setting requires easing restrictions that the public authority is ordinarily subjected to when conducting searches, such as the warrant requirement.<sup>87</sup> If the school was required to obtain a warrant to conduct such searches, this would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>88</sup> The Court found support in precedent allowing a warrantless search to be conducted where obtaining the warrant would frustrate the government's purpose

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and after finding evidence of marijuana in plain view, he was entitled to conduct a more thorough search).

<sup>79</sup> *Id.* at 331.

<sup>80</sup> *T.L.O.*, 469 U.S. at 331.

<sup>81</sup> *Id.* at 337; Koloms, *supra* note 67, at 173.

<sup>82</sup> *T.L.O.*, 469 U.S. at 337, 340.

<sup>83</sup> *Id.* at 338 (stating "[a]lthough this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy").

<sup>84</sup> *Id.* at 339.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 339-40.

<sup>87</sup> *Id.*

<sup>88</sup> *T.L.O.*, 469 U.S. at 340.

for conducting the search.<sup>89</sup> Therefore, the Court held that school officials do not need to obtain a warrant to conduct a search of the student under their authority.<sup>90</sup>

Modifications to the level of suspicion the official must possess to justify the search are also necessary.<sup>91</sup> Ordinarily, the standard required to justify a search conducted by a government actor is that of “probable cause.”<sup>92</sup> However, while probable cause and the warrant requirement bear on the reasonableness of the search, there are circumstances in which neither is required.<sup>93</sup> The Court adopts a “reasonable suspicion” standard rather than the usual probable cause standard in cases involving searches conducted by school officials.<sup>94</sup>

*T.L.O.* illustrated a twofold inquiry to determine the reasonableness of a search conducted by a school official.<sup>95</sup> First, the search must be justified at its inception, meaning there are “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>96</sup> Second, the search must be “reasonably related in scope to the circumstances which justified the interference in the first place.”<sup>97</sup> Such a requirement is satisfied where the measures are reasonably related to the objectives of the search and are not “excessively intrusive” given the age and sex of the student as well as the nature of the alleged infraction.<sup>98</sup>

### **B. Massachusetts Application of the T.L.O. Standard**

The Massachusetts Supreme Judicial Court adopted the *T.L.O.* standard in *Commonwealth v. Carey*, which determined the constitutionality of a search of a student’s locker conducted by school officials.<sup>99</sup> The court discussed the student’s expectation of privacy in

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *T.L.O.*, 469 U.S. at 340.

<sup>95</sup> *Id.* at 341-42.

<sup>96</sup> *Id.* at 341.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 342.

<sup>99</sup> *Commonwealth v. Carey*, 554 N.E.2d 1199, 1202 (Mass. 1990).

lockers and found that the search did not violate the Fourth Amendment.<sup>100</sup>

The court began its inquiry by addressing whether a student has a reasonable expectation of privacy in a locker.<sup>101</sup> The Court in *T.L.O.* did not determine if a student's expectation of privacy in a locker was reasonable; however, courts prior to *T.L.O.* have ruled that students have no expectation of privacy. Lockers are school property, given to students for the limited purpose of storing legitimate items on the premises.<sup>102</sup> The school retains a right of access if it believes the locker is being used for an illegitimate purpose by maintaining the key or combination.<sup>103</sup> Following *T.L.O.*, other cases have held that students do retain a reasonable expectation of privacy in their lockers.<sup>104</sup> Ultimately, the court in *Carey* declined to rule on the expectation of privacy issue as the administrators' actions were justified under the Fourth Amendment.<sup>105</sup> The court found that the administrator's search of the locker was justified at its inception and in scope.<sup>106</sup> Given the administrators' knowledge of a past incident and the eyewitness's report of seeing the gun, along with the failure to find the gun on Carey's person or his recent whereabouts, the search was justified "at its inception and in its scope."<sup>107</sup>

*Carey*, however, only addressed the issue regarding a violation of a school rule that prohibited the possession of contraband on the premises. The Massachusetts Supreme Judicial Court later inquired as to whether a public school administrator may search a student on the basis that a student violated a school rule that is unrelated to the possession of contraband or the threat of violence in *Commonwealth v. Damian*.<sup>108</sup>

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<sup>100</sup> *Id.*; Maltby, *supra* note 66, at 189, 191. The court decided *Carey* solely based on *T.L.O.* and the Fourth Amendment rather than addressing whether article 14 of the Massachusetts Constitution requires the same standard. The court later addressed such a question in *Commonwealth v. Snyder*, finding that article 14 imposed no higher standard than probable cause but did not decide whether a stricter standard of reasonableness than that required by the Fourth Amendment is required by article 14. *Id.*

<sup>101</sup> *Carey*, 554 N.E.2d at 1201.

<sup>102</sup> *Id.* at 1202; *People v. Overton*, 24 N.Y.2d 522, 524 (1969).

<sup>103</sup> *Carey*, 554 N.E.2d at 1202.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1204.

<sup>107</sup> *Id.*

<sup>108</sup> *Commonwealth v. Damian*, 752 N.E.2d 679, 680 (Mass. 2001).

The court concluded that a violation of a school rule, standing alone, may or may not elicit the requisite suspicion to conduct a search, but it is entirely dependent on the context of the situation.<sup>109</sup>

### C. Suspicionless Searches and Seizures

The issue of suspicionless searches of students was addressed in *Veronia Sch. Dist. 47J v. Acton*, where the Supreme Court found that the Veronia School District 47J's mandatory drug test policy did not violate the Fourth Amendment despite lacking individual suspicion.<sup>110</sup> Veronia School District 47J adopted the Student Athlete Drug Policy, which authorized urinalysis drug testing of students participating in the district's athletic programs.<sup>111</sup> The policy was in response to an increase in drug use correlated with the increase in disciplinary problems where student-athletes were found to be the leaders of such activities.<sup>112</sup> By choosing to participate in athletic programs, students voluntarily subjected themselves to greater regulations than those of other students.<sup>113</sup> Given that the conditions under which the tests are conducted are nearly identical to that of the regular use of a public restroom, any compromise of the student athletes' privacy is negligible.<sup>114</sup> Moreover, the testing was limited to drugs rather than any other conditions, and the results were disclosed to only a limited group of school personnel rather than to law enforcement or used for disciplinary purposes.<sup>115</sup> The nature of the government's concern, however, is great given the impact of drugs on children and the effects of a drug-infested school on education.<sup>116</sup> While the Court found that the search did not violate the Fourth Amendment based on the balancing test, the Court cautioned that not all suspicionless searches will be found to be constitutional.<sup>117</sup>

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<sup>109</sup> *Id.* at 682-83 (holding the search was unreasonable because the only basis for the search was Damian's truant behavior and his failure to bring his mother to school, and there was no evidence suggesting Damian possessed contraband or violated any law or school rule other than truancy).

<sup>110</sup> *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995).

<sup>111</sup> *Id.* at 648.

<sup>112</sup> *Id.* at 648-50.

<sup>113</sup> *Id.* at 657.

<sup>114</sup> *Id.* at 658.

<sup>115</sup> *Id.* at 661-62.

<sup>116</sup> *Vernonia*, 515 U.S. at 658.

<sup>117</sup> *Id.* at 665 (finding the most important factor, in this case, was that the government acted in furtherance of its responsibilities as guardian and tutor of the children

Massachusetts courts have not yet decided whether school officials can conduct suspicionless searches and seizures.<sup>118</sup> However, courts in other jurisdictions have held that a search is justified at its inception only where there is individualized suspicion that the search will produce evidence of the violation and, therefore, is only a constitutional search where such individualized suspicion exists.<sup>119</sup>

#### **D. Level of Intrusion and Justification of Strip Searches in Schools**

The scope of a search on school property is limited to the areas where the school official has a reasonable suspicion that contraband will be found. Furthermore, a search of an area that is intrinsically private requires a greater degree of justification.<sup>120</sup> In *Safford Unified Sch. Dist. #1 v. Redding*,<sup>121</sup> the assistant principal, acting on a report that middle schooler Savana Redding had given pills to other students, searched Redding's bag.<sup>122</sup> The search did not yield any evidence of contraband

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that were entrusted in their care and found imperative that the primary guardians of the district's school children appeared to agree with the policy).

<sup>118</sup> Wendy Wolf & Perry Moriearty, *School Search and Seizure: An Overview of the Law*, COMM. FOR PUB. COUNS. SERVS., <https://www.publiccounsel.net/wp-content/uploads/2014/08/school-search-and-seizure.pdf> [<https://perma.cc/F84A-MYTL>] (last updated 2010).

<sup>119</sup> *Id.*

<sup>120</sup> *See, e.g., Willis v. Anderson Cmty. Sch. Corp.*, 158 F.3d 415, 420 (7th Cir. 1998) (“to be reasonable under the Fourth Amendment, a [school] search must ordinarily be based on individualized suspicion of wrongdoing” (quoting *Chandler v. Miller*, 520 U.S. 305, 313 (1997))); *In the Interest of Doe*, 887 P.2d 645, 655 (1994) (concluding “individualized suspicion is a necessary element in determining reasonableness”).

<sup>121</sup> *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377 (2009); *see* Wolf & Moriearty, *supra* note 118; *see, e.g., Commonwealth v. Almeida*, 366 N.E.2d 756, 759 (1977) (finding a search justified by reasonable suspicion rather than probable cause is “ordinarily characterized by a ‘pat-down’ of the outer clothing” and such is still considered a “serious intrusion on the sanctity of the person and is not to be taken lightly”); *Commonwealth v. Mercado*, 663 N.E.2d 243, 246 (1996) (a search must be “strictly tied to and justified by the circumstances which rendered its initiation permissible” (quoting *Commonwealth v. Silvia*, 318 N.E.2d 895, 899 (Mass. 1974))); *T.L.O.*, 469 U.S. at 346 (stating a search is reasonable “when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction”).

<sup>122</sup> *Redding*, 557 U.S. at 368.

or pills.<sup>123</sup> Redding was then sent to the nurses' office, where she was instructed to remove all of her clothing except for her bra and underwear.<sup>124</sup> She was instructed to pull the elastic on her underwear as well as pull her bra and shake it out.<sup>125</sup> The search did not produce any evidence of drugs or contraband.<sup>126</sup> Redding's mother filed suit claiming that the strip search violated Redding's Fourth Amendment rights.<sup>127</sup>

While the search of Redding's backpack was justified, the greater degree of intrusion associated with strip searches requires treating such searches as categorically distinct.<sup>128</sup> Thus, searches conducted by school officials require "distinct elements of justification" to intrude beyond a student's outer clothing and belongings.<sup>129</sup> The Court found that Redding's privacy interest greatly outweighed the school's interest in maintaining a safe environment, as there was no indication that the pills posed a danger based on the power or quantity of the drug.<sup>130</sup> Furthermore, there was no reason to suggest that Redding was carrying drugs in her underwear.<sup>131</sup> Thus, the school official exceeded the permissible scope of the search.

### III. FOURTH AMENDMENT RIGHTS OF TEACHERS AND GOVERNMENT EMPLOYEES

The Court has repeatedly held the Fourth Amendment protects public employees from unreasonable searches by their employers.<sup>132</sup> *Tinker*, which established that students maintain their constitutional rights in schools, also established that teachers do not lose their Fourth Amendment protections simply by virtue of being a government

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 369, 374.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 369.

<sup>127</sup> *Id.*

<sup>128</sup> *Redding*, 557 U.S. at 373-74.

<sup>129</sup> *Id.* at 374.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 375-76 (finding that Redding's expectation of privacy was inherent in her account that the search was "embarrassing, frightening, and humiliating" which is consistent with experiences of other adolescents similarly searched).

<sup>132</sup> *See, e.g., O'Connor v. Ortega*, 480 U.S. 709 (1987).

employee.<sup>133</sup> In *O'Connor v. Ortega*, the Court addressed the Fourth Amendment rights of an employee following a search of Dr. Ortega's office conducted by his employer.<sup>134</sup> The Court rejected the argument that "public employees can never have a reasonable expectation of privacy in their workplace . . . merely because they work for the government instead of a private employer."<sup>135</sup> However, some government offices may be so open as to make any expectation of privacy unreasonable.<sup>136</sup> Such a determination must be made on a case-by-case basis which involves a balancing of governmental and private interests.<sup>137</sup> Additionally, in *Mancusi v. Deforte*, the Court found that an employee had a reasonable expectation of privacy in his office despite the space being shared.<sup>138</sup> The Court stated that one does not relinquish such an expectation of privacy simply because the office is shared.<sup>139</sup>

Despite such a willingness to find an expectation of privacy for public employees, courts have seemingly been reluctant to find that teachers and school staff have a reasonable expectation of privacy in the classroom.<sup>140</sup> A New Hampshire court found that a janitor had no reasonable expectation of privacy in a classroom because it was not his personal space, despite being the only person with access to the room at the time of the recording.<sup>141</sup> Similarly, an Ohio state court held that

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<sup>133</sup> *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>134</sup> *Ortega*, 480 U.S. at 718-19 (holding that Dr. Ortega may not have a reasonable expectation of privacy in his office but did have such an expectation in his desk and file cabinets).

<sup>135</sup> *Id.* at 717.

<sup>136</sup> *Id.*; *see, e.g.*, *Nelson v. Salem State College*, 845 N.E.2d 338, 346 (Mass. 2006) (finding no reasonable expectation of privacy existed for the employee because the office was open to the public, patrons were not required to check in, many others had access to the office whom the employee did not know, and others had keys to access the office even when the door was locked).

<sup>137</sup> *Ortega*, 480 U.S. at 717, 722; *see e.g.*, *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 599 (2008) (recognizing that the privacy interest of public employees must be balanced against the realities of the workplace).

<sup>138</sup> *Mancusi v. Deforte*, 392 U.S. 364, 369-70 (1968) (finding that DeForte had an occupied a "private" office and would be entitled to expect that he would not be disturbed).

<sup>139</sup> *Id.* at 369.

<sup>140</sup> Dakota Brewer, *Smile, You're on Camera: a Discussion of the Privacy Rights of Teachers in the Modern Day Classroom*, 2019 BRIGHAM YOUNG U. EDUC. L. J. 139, 149 (2019), <https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1418&context=elj> [<https://perma.cc/AB5S-WYJJ>].

<sup>141</sup> *Id.* at 150; *New Hampshire v. McLellan*, 744 A.2d 611, 614 (N.H. 1999).

school custodians had no reasonable expectation of privacy in the school break room because it was a public space that was shared with colleagues.<sup>142</sup>

Such a trend is likely due to courts viewing classrooms as a public setting.<sup>143</sup> A California court found that a teacher had no reasonable expectation of privacy in his classroom because communications and activities in a classroom can almost never be confined to the classroom.<sup>144</sup> An Illinois court had similar reasoning in determining that special education teachers had no reasonable expectation of privacy.<sup>145</sup> The court determined that the classroom was a public space where teachers communicated with members of the public and such communications are virtually certain to be repeated.<sup>146</sup> The court noted, however, that portions of areas used as the teacher's office space could be reserved for exclusive use and thus may give rise to a reasonable expectation of privacy.<sup>147</sup>

There have been rare instances where courts have found that a school staff member has a reasonable expectation of privacy. *Long v. Texas* involved a coach who was surreptitiously recorded by a student in a locker room while giving a speech to his players.<sup>148</sup> The court focused on the location where the speech took place rather than evaluating the speech itself. The court found several facts to be persuasive: the coach's ability to exclude others from the locker room; the coach's belief that the room was restricted to players and coaches; the student had to pose as one of the types of individuals who had access to the room; and the additional privacy granted by the entry.<sup>149</sup> The court compared *Long*, which dealt with oral communication to a room full of students and coaches,<sup>150</sup> to *Mancusi*, despite it pertaining to tangible documents.<sup>151</sup> The court attempted to distinguish the case from the

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<sup>142</sup> Brewer, *supra* note 140; Brannen v. Bd. Of Educ., 761 N.E.2d 84, 91-92 (Ohio Ct. App. 2001).

<sup>143</sup> Brewer, *supra* note 140, at 150.

<sup>144</sup> *Id.*; Evens v. Superior Court of L.A., 91 Cal. Rptr. 2d 497, 499 (Cal. App. Dep't Superior Ct. 1999).

<sup>145</sup> Plock v. Bd. of Educ., 545 F. Supp. 2d 755, 758 (N. D. Ill. 2007).

<sup>146</sup> *Id.*

<sup>147</sup> Plock, 545 F. Supp. 2d at 757.

<sup>148</sup> Long v. State, 535 S.W.3d 511, 515 (Tex. Crim. App. 2017).

<sup>149</sup> *Id.* at 530; Brewer, *supra* note 140, at 153.

<sup>150</sup> Long, 535 S.W.3d at 525; Brewer, *supra* note 140, at 153.

<sup>151</sup> *Mancusi*, 392 U.S. at 364, 372.



precedent that established that a classroom was a public space falling outside of the zone of privacy, but the circumstances clearly established that the locker room was functioning as a classroom.<sup>152</sup> This poses the question as to whether it was the characteristics of a locker room, which are similar to that of a self-contained classroom, that gave rise to the court's determination rather than the specific facts or the reasonableness of any such belief of privacy.

#### IV. APPLICATION OF FOURTH AMENDMENT RIGHTS TO SELF-CONTAINED CLASSROOMS

##### A. Nature and Characteristics of a Self-Contained Classroom

Students in self-contained classrooms possess a wide variety of disabilities, including autism spectrum disorder (ASD), attention deficit hyperactivity disorder (ADHD), multiple handicaps, severe intellectual disabilities, emotional disturbances, and “serious or fragile medical conditions.”<sup>153</sup> As such, the students’ capacity to understand or form a sense of privacy varies.<sup>154</sup> Students in self-contained classrooms, specifically those with severe or profound disabilities, are highly dependent on teachers and school staff for their basic needs, such as toileting and feeding.<sup>155</sup> Students confined to wheelchairs may need assistance with undressing or transferring to the toilet or, if the student wears diapers, the staff is required to change the student’s diapers.<sup>156</sup>

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<sup>152</sup> *Id.* at 154.; *Long*, 535 S.W.3d at 525.

<sup>153</sup> *Baindridge*, *supra* note 24.

<sup>154</sup> Maria Ginevra et al., *The differential Effects of Autism and Down’s syndrome on Sexual Behavior*, 9 AUTISM RESEARCH 131 (2015). Studies have shown that individuals with severe intellectual disabilities possess a lesser knowledge of privacy and privacy rules. *Id.* However, studies have also shown that those posing different types of developmental disabilities display different levels of understanding when it comes to privacy which makes determining if an expectation of privacy exists amongst all the students within the self-contained classroom even more difficult. *Id.*

<sup>155</sup> *See, e.g.*, Kristy Pruitt, *What Does a Special Education Teacher Do?*, ALLIANT INT’L UNIV., <https://www.alliant.edu/blog/what-does-special-education-teacher-do> [<https://perma.cc/WK7Y-4LNN>] (last updated May 22, 2023); *Toileting in the Multiple Disabilities Classroom*, SIMPLY SPECIAL ED, <https://www.simplyspecialed.com/toileting-in-the-multiple-disabilities-classroom/> (last visited Dec. 29, 2023) [<https://perma.cc/H2S5-D2SU>].

<sup>156</sup> The Department of Education recognizes that diapering may be necessary as the department provides requirements that school staff change the diaper when soiled as well as to keep clean and dry clothes should they become soiled. However, the

Dr. Ben Springer, a special education coordinator at a school in Utah that has implemented cameras in self-contained classrooms, discussed concerns regarding such cameras and highlighted the lack of public understanding of self-contained classrooms.<sup>157</sup> Students in self-contained classrooms, particularly those with severe disabilities, may engage in inappropriate behavior.<sup>158</sup> Dr. Springer provides the example where “a student struggl[es] with self-stimulating behavior and starts masturbating in class ... [which] is on video.”<sup>159</sup> While the general public may believe such situations are rare, individuals with intellectual disabilities frequently engage in sexually inappropriate behavior such as masturbating, genital exposure, and undressing in public.<sup>160</sup>

The amount and types of services for special education students are topics that invoke many discussions among school staff members. Such discussion is not limited to the child’s educational services; many children receive services like physical and occupational therapy, which is not as prevalent in general education classrooms.<sup>161</sup> Many self-contained classrooms contain nurses to assist students with medical disabilities.<sup>162</sup> Moreover, a school is required to provide a full-time,

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area in which changing areas are to be placed is not specified. Though many self-contained classrooms with students requiring bathroom assistance have a restroom in the classroom, the department allows for the use of portable “potty chairs” in a “separate area” rather than a bathroom so long as it is placed in a “private” area but does not specify what constitutes a private area. 603 MASS. CODE REGS. §§ 18.03-18.04 (2016).

<sup>157</sup> Ashlee Ivie, *Cameras in Self-Contained Classrooms: Legal, Professional and Student Implications*, J. AM. ACAD. SPECIAL EDUC. PROS., 72, 81 (2016).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 81 (stating “we do not live in a data secure enough world where I would feel comfortable with that” providing another area of concern should cameras be implemented).

<sup>160</sup> Ferhat Yaylaci & Ali Gul, *Case Report: A Case of Intellectual Disability with Inappropriate and Challenging Sexual Behavior that was Treated with GNRH Analogues*, 50 PSYCHOPHARMACOLOGY BULL. 51 (2020); Stein et. al., *The Importance of Sexuality Education for Children With and Without Intellectual Disabilities: What Parents Think*, 36 SEXUALITY & DISABILITY 141 (2017).

<sup>161</sup> *Severe and Multiple Disabilities*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com> [<https://perma.cc/4E6F-UWF2>] (last visited Feb. 20, 2024).

<sup>162</sup> Reighlah Collins, *A School’s Obligation to Provide Nursing Services Under IDEA, Section 504*, EDUCATIONNC (Dec. 9, 2019) <https://www.ednc.org/perspective-a-schools-obligation-to-provide-nursing-services-under-idea-section-504/> [<https://perma.cc/K5PK-PH5M>].

one-on-one nurse for eligible students receiving medical services.<sup>163</sup> Such medical services can involve catheters, feeding tubes, tracheotomies, or medical care for students having seizures.<sup>164</sup> Although children in general education classrooms may have medical conditions, medical emergencies occur far less frequently in general education classrooms than in self-contained classrooms. The unique characteristics of self-contained classrooms and the students contained therein indicate that—from a privacy perspective—self-contained classrooms must be treated as categorically distinct from general education classrooms.

## **B. A Student’s Legitimate Expectation of Privacy**

### **1. Subjective Expectations of Privacy**

To determine whether students in self-contained classrooms possess a legitimate expectation of privacy, it must first be determined whether they possess a subjective expectation of privacy. Assuming *arguendo* that any given student being injured by these cameras does assert a subjective expectation of privacy, the first issue is whether the student can still maintain an expectation of privacy in the information he “knowingly exposes” to the public.<sup>165</sup> For starters, there are many instances where the student is not exposing themselves at all; rather, the student is being exposed by a third party. As discussed previously, a student who experiences a medical emergency will be treated by the school nurse or ones who require diapering will be changed by the staff. In such situations, the staff member is the one exposing the student rather than the student purposely and voluntarily exposing himself. And under such circumstances—even during medical emergencies—it is well established that a person can still manifest a legitimate expectation of privacy.<sup>166</sup> Therefore, it is clear that a student can still manifest a

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<sup>163</sup> *Id.*

<sup>164</sup> *Medical Needs in the Special Education Classroom*, FULLSPEDAHEAD (Dec. 20, 2021) <https://www.fullspedahead.com/medical-needs/> [<https://perma.cc/9SF2-DGQR>].

<sup>165</sup> *Katz*, 389 U.S. at 351 (noting that “what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection”).

<sup>166</sup> *See Cady v. Dombrowski*, 413 U.S. 433 (1973) (noting that, despite the Defendant’s severe level of intoxication and desperate need for medical treatment, he could still manifest a legitimate expectation of privacy to the contents of his vehicle); *see also Caniglia v. Strom*, 593 U.S. 194 (2021) (noting that a Defendant

subjective expectation of privacy even whilst receiving medical attention in an exposed position.

Although the argument can be made that students with disabilities who “masturbate” in the middle of the classroom are “knowingly exposing” their body parts to the public such that they cannot be protected under the Fourth Amendment, this argument is constitutionally defective. Students with disabilities are neither “knowingly” nor “voluntarily” exposing themselves. A person only acts “knowingly” when he acts intelligently and with full knowledge of the consequences.<sup>167</sup> Furthermore, the test for voluntariness “remains that which has been the only clearly established test in Anglo-American courts for two hundred years.”<sup>168</sup> A voluntary decision *must* be the product of a “free and unconstrained choice by its maker.”<sup>169</sup> It requires both “a rational intellect and a free will.”<sup>170</sup> The “line of distinction is that at which governing self-direction is lost and compulsion, *of whatever nature or however infused*, propels or helps to propel” the result.<sup>171</sup> Indeed, due process “derives much of its meaning from a conception of fundamental fairness that emphasizes the right to make vital choices voluntarily . . . . This right requires vigilant protection if we are to safeguard the values of private conscience and human dignity.”<sup>172</sup>

For these special education students, the overwhelming evidence indicates that they are not exposing themselves knowingly or voluntarily. Students are placed into self-contained classrooms because they have particular needs; their cognitive abilities are significantly less than that of a general education student; they are provided with teams of nurses, doctors, and other support staff to ensure their basic needs are being met; and they possess a wide variety of mental and cognitive disabilities ranging from ASD and ADHD to severe intellectual

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who required immediate mental health treatment still possessed a legitimate expectation of privacy).

<sup>167</sup> *Iowa v. Tovar*, 541 U.S. 77 (2004); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Haley v. Ohio*, 332 U.S. 596, 601 (1948); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>168</sup> *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

<sup>169</sup> *Id.*

<sup>170</sup> *Townsend v. Sain*, 372 U.S. 293, 307 (1963).

<sup>171</sup> *Culombe*, 367 U.S. at 602 (emphasis added).

<sup>172</sup> *Colorado v. Connelly*, 479 U.S. 157, 176 (1986) (Brennan, J., dissenting).

disabilities and serious brain injuries.<sup>173</sup> All of these factors indicate that self-contained classroom students are incapable of acting intelligently, within the legal context, and fully understanding the consequences of their actions; their choices are neither the product of “rational intellect” nor “free will.” To ignore the effects of these diagnoses on a person’s “knowing” or “voluntary” choice is to disregard over two centuries of constitutional jurisprudence. Therefore, these special education students can assert a subjective expectation of privacy in their private classrooms, which are separate from the general student body.

## 2. Society’s Willingness to Recognize the Expectation

Given the intimate and inherently private nature of self-contained classrooms, this subjective manifestation of privacy is objectively reasonable. As noted above, many state laws already prohibit the use of camera surveillance in areas such as bathrooms and locker rooms.<sup>174</sup> The intimate nature of self-contained classrooms provides many of the same privacy concerns as school bathrooms and locker rooms; as is the case with bathrooms and locker rooms, students in self-contained classrooms are frequently unclothed and in an exposed position.<sup>175</sup> Many state legislators have responded to these privacy concerns by requiring a heightened level of privacy in areas of the classroom where the students are likely to be exposed. In Massachusetts, regulations specify that all “potty chairs” must be placed in a “private area” of the classroom.<sup>176</sup> This policy is indicative of lawmakers’ willingness to recognize that students have a reasonable expectation of privacy in areas where they are likely to be undressed. Thus, society is clearly willing to recognize that an expectation of privacy in a private area of the classroom is as reasonable as an expectation of privacy within a

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<sup>173</sup> Baidridge, *supra* note 24.

<sup>174</sup> John Fox, *Are Security Cameras Allowed In Bathrooms?*, SAFENOW, (Mar. 19, 2022) <https://safenow.org/are-cameras-allowed-in-bathrooms/> [<https://perma.cc/2455-T9ZP>]; Maria Sanchez, *Are There Cameras In School Bathrooms? A Detailed Look*, SAVE OUR SCHOOLS, <https://www.saveourschoolsmarch.org/are-there-cameras-in-school-bathrooms/> [<https://perma.cc/5NF5-L4PP>] (last updated Nov. 15, 2023) (stating that some states prohibit cameras from areas where there is a reasonable expectation of complete privacy such as bathrooms, changing rooms, or any area where a person may be undressed).

<sup>175</sup> *See supra* Part IV.A.

<sup>176</sup> 603 MASS. CODE REGS. § 18.04 (2016).

bathroom stall because both are locations in which people are likely to be unclothed.

While recording an exposed student in a “private area” of the classroom is certainly an invasion of privacy, it is reasonable to extend this protection to all areas of the self-contained classroom. As noted above, urgent situations often arise when a student with a disability is unable to get from the “non-private” area to the “private area” of the classroom in time.<sup>177</sup> During these urgent situations, a student will find himself as exposed in the “non-private” area of the classroom as he or she would be in that “private area.” Recognizing the impossibility of knowing in advance which “non-private” area will turn into a “private area” by way of an accident or incident, the only viable solution is to recognize that a self-contained classroom, by virtue of its very nature and purpose, is in itself a private area. Attempting to further draw arbitrary distinctions within the classroom between “private” and “non-private” areas serves only to ignore the daily struggles that these students face. Thus, it is objectively reasonable for a special education student to have an expectation of privacy in *all* sections of the self-contained classroom.

Furthermore, given the extent of medical services provided in the classroom, a student’s expectation of privacy is reasonable in all areas of the classroom. While laws such as HIPAA do not directly apply to school staff, these laws nevertheless recognize the need for privacy in medical situations involving medical treatment and disclosures of sensitive medical information.<sup>178</sup> Furthermore, FERPA, which *does* apply to schools, provides even greater protection than HIPAA insofar as medical information is concerned. Under FERPA, “school nurses are not allowed to share [personally identifiable information] with a student’s physician without obtaining written consent” from the student.<sup>179</sup> Although there is an exception to the consent requirement when disclosing medical information to teachers, even this exception is limited to those teachers with “legitimate educational interests” in the

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<sup>177</sup> See *supra* Part IV.A.

<sup>178</sup> *HIPAA and FERPA Basics*, AM. ACAD. OF PEDIATRICS, <https://www.aap.org/en/patient-care/school-health/hipaa-and-ferpa-basics/> (last updated Nov. 17, 2022) (emphasis added) [<https://perma.cc/3C84-8GX7>] (“When sharing information, providers *must* be mindful of the major federal privacy protections that govern the disclosure of information about students and patients: the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule”).

<sup>179</sup> *Id.*

child.<sup>180</sup> Thus, the legislature's intent behind both HIPAA and FERPA is clear: students and patients have a right to privacy in their medical records and treatment. The recognition of a need for privacy in these medical situations is further evidence that an expectation of privacy in these situations is objectively reasonable under the Fourth Amendment.

Lastly, many school districts already forbid the use of surveillance in the school nurse's office. For instance, Westford Public Schools' policy expressly states that cameras are prohibited in such areas because students receiving medical treatment in these areas have a reasonable expectation of privacy.<sup>181</sup> It would be counterintuitive to claim that a student has a reasonable expectation of privacy while receiving medical treatment in a nurse's office, but that the same student receiving the same medical treatment has almost no expectation of privacy in a self-contained classroom—especially given the recognition that students in these classrooms often require the same type and frequency of medical services—if not more—than students in a nurse's office. Insofar as the type and frequency of medical treatment are concerned, the only distinction between a self-contained classroom and a nurse's office is in name only. This nominal distinction is insufficient to claim that students should have a lesser degree of privacy in a self-contained classroom than in a nurse's office. Thus, it is reasonable to find that students have the same expectation of privacy in a self-contained classroom as in a school nurse's office.

“Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality . . . for individuals with disabilities.”<sup>182</sup>

Should the courts determine that these students have no legitimate expectation of privacy, that would open the door to individuals with any type of cognitive disability receiving drastically reduced constitutional protections. Moreover, it would deny these students constitutional protection in areas where general education students may harbor a

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<sup>180</sup> 20 U.S.C. § 1232g(b).

<sup>181</sup> See e.g., *Protocol for Security Cameras and Visually Recorded Data*, WESTFORD PUB. SCH. (Nov. 19, 2018), [https://www.westfordk12.us/sites/g/files/vyhlf5181/f/uploads/p5326\\_protocol\\_f\\_or\\_security\\_cameras\\_and\\_visually\\_recorded\\_data.pdf#:~:text=The%20cameras%20shall%20not%20be,conference%20rooms%2C%20staff%20lounges](https://www.westfordk12.us/sites/g/files/vyhlf5181/f/uploads/p5326_protocol_f_or_security_cameras_and_visually_recorded_data.pdf#:~:text=The%20cameras%20shall%20not%20be,conference%20rooms%2C%20staff%20lounges) [https://perma.cc/TYY9-LHNW].

<sup>182</sup> 20 U.S.C. § 1400 (2023).

reasonable expectation of privacy, such as public restrooms, locker rooms, and other inherently private places. This policy would only serve to leave an already vulnerable group even more vulnerable.

Special education students harbor a subjective expectation of privacy in a self-contained classroom. This expectation of privacy is no less reasonable than an expectation of privacy in bathrooms, locker rooms, or doctor's offices. Therefore, placing cameras in self-contained classrooms constitutes a "search" within the meaning of the Fourth Amendment because it intrudes upon a student's legitimate expectation of privacy.

### 3. Unreasonable Search

The school's "search" of self-contained classrooms is conducted outside the purview of the judicial warrant process and is thus, *per se*, unreasonable under the Fourth Amendment.<sup>183</sup> This places the burden on the government to prove that the circumstances of the search fit within a "jealously and carefully drawn" exception to the warrant requirement.<sup>184</sup> Here, the government is unable to meet its heavy burden.

First, recording students in a self-contained classroom does not fit within *T.L.O.*'s "special need" exception. The search does not arise from individualized suspicion or any potential wrongdoing on the part of the students.<sup>185</sup> Rather, cameras are a precautionary measure to ensure that the teacher is not engaging in wrongdoing.<sup>186</sup> However, there is neither evidence that the instances of abuse are increasing nor that such abuse is a widespread issue within Massachusetts schools.<sup>187</sup> Instead,

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<sup>183</sup> *Katz*, 389 U.S. at 357.

<sup>184</sup> *Ybarra v. Illinois*, 444 U.S. 85 (1979).

<sup>185</sup> Mike McShane, *Please Don't Put Cameras In Classrooms*, FORBES (Feb. 14, 2022) <https://www.forbes.com/sites/mikemcshane/2022/02/14/please-dont-put-cameras-in-classrooms/?sh=3948b6734954> [https://perma.cc/A7B8-KYC6] (noting that the camera would capture multiple students in the classroom rather than the only one specific student and as such the recording may capture information about the other students).

<sup>186</sup> Heintzelman & Bathon, *supra* note 12 (stating that lawmakers are introducing such bills as a means to prevent abuse of special education students, specifically to curtail the use of physical restraint and seclusion tactics).

<sup>187</sup> *Student Restraints Report-Public Schools*, DEP'T ELEMENTARY & SECONDARY EDUC., <https://profiles.doe.mass.edu/statereport/restraints.aspx> [https://perma.cc/PG4P-ZLJ4] (last updated Dec. 14, 2023) (reporting the total number of restraints in MA Public Schools in 2016-2017 was 9,070 with 2,314



evidence indicates that the number of restraints is decreasing, which shows even less of a need to implement such cameras.<sup>188</sup> Thus, the government is unable to meet its burden by articulating any specific facts indicating that this search of the student is justified at the outset. Furthermore, given the reasonably foreseeable likelihood that these cameras capture medical emergencies, accidents, or any other incident in which a student is unclothed, such a search goes beyond the mere outer layers of clothing. Thus, the school would be required to possess distinct elements of justification regarding the necessity of the search. Beyond the school's inability to voice any specific and articulable facts to justify the search, the school is also unable to proffer any evidence to show a distinct justification for such a revealing search. Also, according to the failed Massachusetts bill, those wanting the cameras to be placed in the room need only request that the cameras be installed.<sup>189</sup> The bill does not require any suspicion of abuse in the classroom.<sup>190</sup> Therefore, this search—conducted outside the judicial warrant process, and without the protection of an antecedent neutral magistrate imposed between the citizen and the government—is highly intrusive, is conducted with an utter disregard for the students' legitimate expectation of privacy, and is made without requiring any distinct justification.

Additionally, there are several alternatives that may more efficiently eliminate such abuse without intruding on any potential privacy expectations. Students in self-contained classrooms generally spent their entire day within the self-contained classroom, secluded from the other students, but there has been a recent push to increase such students' integration in regular education classrooms.<sup>191</sup> Inclusion “involves carefully assessing a child's needs and then implementing a strategic plan to support that child within the general classroom setting.”<sup>192</sup> This is accomplished through an education team rather than

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students restrained while in 2021-2022 1,998 students were restrained and there was a total of 6,787 restraints occurred); *see e.g.*, *Vernonia*, 515 U.S at 648-50.

<sup>188</sup> Student Restraints Report-Public Schools, *supra* note 188.

<sup>189</sup> H.R. 3758, 191st Sess. (Mass. 2019).

<sup>190</sup> *Id.*

<sup>191</sup> Grace Chen, *Understanding Self-Contained Classrooms in Public Schools*, PUB. SCH. REV., <https://www.publicschoolreview.com/blog/understanding-self-contained-classrooms-in-public-schools> [<https://perma.cc/6ATY-PSQ6>] (last updated May 10, 2023).

<sup>192</sup> Hannah Grieco, *Students With Disabilities Deserve Inclusion. It's Also the Best Way to Teach*, EDUC. WEEK (May 7, 2019),

one educator, as is the case in self-contained classrooms.<sup>193</sup> Inclusive placement can be achieved through the use of accommodations such as guided notes and extended time, paraprofessionals or one-on-one support, and an inclusion support teacher.<sup>194</sup> Individualized Education Programs (IEPs) provide the level of integration, determining the amount of time in which the student will be placed in a regular education classroom.<sup>195</sup> Inclusion programs increase the visibility and transparency of the students placed in self-contained classrooms, which is essential to improving classroom safety.<sup>196</sup> The Individuals with Disabilities Education Act's (IDEA) requirement that students be placed in the least restrictive environment has promoted the push for inclusion, which is even more evident today.<sup>197</sup> Other legislation, such as the No Child Left Behind Act, has also pushed for inclusion practices within public schools.<sup>198</sup> Therefore, such an alternative solution, which promotes the same goals in a manner that is considerably less intrusive than cameras, is already in motion and can provide many benefits to

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learning/opinion-students-with-disabilities-deserve-inclusion-its-also-the-best-way-to-teach/2019/05 [https://perma.cc/PUV4-GDME].

<sup>193</sup> *Id.*

<sup>194</sup> *Inclusive Practice in Massachusetts*, MASS. DEP'T ELEMENTARY & SECONDARY EDUC., <https://www.doe.mass.edu/eval/guidebook/edprep/InclusivePractice.pdf> [https://perma.cc/Z8BX-AF9E] (last visited Feb. 19, 2024).

<sup>195</sup> Chen, *supra* note 192.

<sup>196</sup> Amos, *supra* note 14. ("The inclusion of and provision of supports for students with complex support needs in general education classrooms and throughout the school building creates networks of caring and trusting relationships, visibility, and transparency, which are key elements of classroom safety." Research has shown that "students with complex support needs and challenging behaviors exhibit more appropriate and less disruptive behaviors when they are taught with their same-age peers in general education contexts.") *Id.*

<sup>197</sup> Darren W. Minarik & Timothy Lintner, *The Push for Inclusive Classrooms and the Impact on Social Studies Design and Delivery*, 50 SOC. STUD. REV. 52, 53 (2011), <https://www.libproxy.umassd.edu/login?url=https://www.proquest.com/scholarly-journals/push-inclusive-classrooms-impact-on-social/docview/890178863/se-2?accountid=14573> [https://perma.cc/TPS6-LN44]; *What Is Inclusion in Education?*, WE ARE TEACHERS (Jan. 6, 2023), <https://www.weareteachers.com/what-is-inclusion-in-education/> [https://perma.cc/W9DG-82RG].

<sup>198</sup> Minarik & Lintner, *supra* note 198.

general and special education students.<sup>199</sup> In Massachusetts, many public schools utilize inclusion practices, given the majority of special education students spend most of their day in classrooms with general education students.<sup>200</sup> As such, disability groups are advocating for inclusion as a means to remedy and prevent the abuse at the hand of educators and the student's peers.<sup>201</sup>

In order to increase transparency and trust between the parties, several disability organizations suggest increasing communications between parents and school staff, particularly in regard to any incidents

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<sup>199</sup> See generally Thomas Hehir et. al., *Review of Special Education in the Commonwealth of Massachusetts: A Synthesis Report*, MASS. DEP'T ELEMENTARY & SECONDARY EDUC. (Aug. 2014), <https://www.bostonpublicschools.org/cms/lib/MA01906464/Centricity/Domain/249/Hehir%20SynthesisReport.pdf> [https://perma.cc/FEZ7-M3BS]; SARIKA S. GUPTA ET AL., *FIRST STEPS TO PRESCHOOL INCLUSION: HOW TO JUMPSTART YOUR PROGRAMWIDE PLAN*, 34-43 (2014). Research has shown students who have been immersed in general education settings exhibit greater positive social and emotional behavior in comparison to those students with disabilities placed in a separate or more restrictive educational setting. Further research surrounding Learning Experiences and Alternative Programs (LEAP) has shown students with autism placed in LEAP programs demonstrated less severe autistic behavior than those who were not placed in such programs and that the students maintained such improved behaviors in moving to general education settings. Child growth and development expectations in early childhood education are greater in inclusive classrooms than in segregated settings, which allows for greater achievement, confidence, and independence later in life. Given the push for inclusion is rather recent, the long-term impact of inclusion continues to emerge. However, research has shown that students who were placed in inclusive classroom settings at a young age and continued to be included in such settings have demonstrated the following: a greater understanding of socially acceptable behavior, increased social interactions, and less stigma associated with pull-out services. Inclusion also has been shown to provide academic benefits including higher test scores and graduation rates in comparison to segregated students. *Id.*; *Benefits Of Inclusion In Early Childhood Education*, STAR BRIGHT BOOKS, <https://starbrightbooks.com/blog/benefits-of-inclusion-in-early-childhood-education/> [https://perma.cc/P9WA-A9H6] (last visited Feb. 19, 2024) (noting benefits of inclusion to children with or without disabilities include “positive self-image, friendship and social skills, problem-solving, and respect for others.”).

<sup>200</sup> *Inclusive Practice in Massachusetts*, *supra* note 195 (“Approximately 60% of [Massachusetts students eligible for special education services] spend the majority of their school day in classrooms with their non-disabled peers.”).

<sup>201</sup> Amos, *supra* note 14.

occurring in the classroom that result in injury.<sup>202</sup> Massachusetts law requires that parents are verbally notified within twenty-four hours of the restraint, and written notice of the restraint is provided within three school days of the incident.<sup>203</sup> The written notice must be detailed; it must include the information of the staff member involved, those who observed the restraint, the type and length of the restraint, and the date.<sup>204</sup> The notice must also include the events leading up to and after the use of the restraint, as well as other tactics used to calm the student.<sup>205</sup> This allows for little room to question any suspicious marks on the child or, where the child is verbal, statements made by the child regarding the use of any restraints.

The increased communication between parent and teacher allows for greater consistency between home and school, specifically regarding behavior plans and incentives, which may help with behaviors in the classroom and reduce the need to resort to restraints or hands-on tactics to control such behavior.<sup>206</sup> Educators should promote parent participation to increase trust between the parties and allow parents to see first-hand what is happening in their child's school and classroom. Parent involvement and participation in their child's school and education are imperative for supporting a safe and inclusive school environment.<sup>207</sup> Massachusetts schools have already implemented such methods, which may have attributed to the decrease in the abuse of special education students, particularly the use of physical restraints.<sup>208</sup> This has left little need to implement surveillance in self-contained

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<sup>202</sup> *Id.*; Heintzelman & Bathon, *supra* note 12; McShane, *supra* note 186 (stating parents and teachers should employ regular channels of communication as a means to increase trust and transparency).

<sup>203</sup> 603 Code Mass. Regs. § 46.06 (2016); *School Restraint, Time Out, and Seclusion Laws in Massachusetts*, DISABILITY L. CTR, <https://www.dlc-ma.org/wp-content/uploads/2017/12/Special-Education-Restraint-and-Seclusion.pdf> [https://perma.cc/H5MF-258M] (last updated Nov. 2017).

<sup>204</sup> *School Restraint, Time Out, and Seclusion Laws in Massachusetts*, *supra* note 203.

<sup>205</sup> *Id.*

<sup>206</sup> *See* Amos, *supra* note 14.

<sup>207</sup> Amos, *supra* note 14.

<sup>208</sup> *See, e.g., Increasing Inclusion Practices in Boston Public Schools*, BOS. PUB. SCHS. (2013), <https://www.bostonpublicschools.org/cms/lib/MA01906464/Centricity/Domain/249/2013-06-20%20Inclusion%20plan%20FINAL.pdf> [https://perma.cc/B62G-9SBH].

classrooms and to warrant a bypassing of potential privacy concerns associated with the usage of such cameras.

### C. A Teacher's Legitimate Expectation of Privacy

#### 1. Subjective Expectations of Privacy

Teachers are likely to harbor a subjective expectation of privacy within the classroom where the teacher does not share the space with other staff members. Most self-contained classrooms only have one special education teacher,<sup>209</sup> so the teacher within the self-contained classroom likely believes that they have some expectation of privacy within the classroom. While the teacher does not have exclusive use of the classroom, those who can enter the classroom with permission are limited to a specific group of people: school administrators, students, paraeducators, and those invited to enter, such as parents and other staff members.<sup>210</sup> Those invited are generally only permitted to enter upon certain circumstances, usually requiring prior arrangements to be made with the teacher and the school, and generally must register with and receive permission from the office prior to entry.<sup>211</sup> For instance, parents are generally only able to enter their child's classroom during events or meetings, essentially only for the purpose for which they were invited.<sup>212</sup>

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<sup>209</sup> Luke Dalien, *supra* note 24; Dana R. Wiggins, A Qualitative Study on Teacher Perceptions of Self-Contained and Departmentalized Classrooms at the Elementary Level (2018) (Dissertation, Columbus State University), [https://csuepress.columbusstate.edu/cgi/viewcontent.cgi?article=1418&context=theses\\_dissertations](https://csuepress.columbusstate.edu/cgi/viewcontent.cgi?article=1418&context=theses_dissertations) [<https://perma.cc/T646-B9PU>] (noting “[i]n a self-contained classroom, the student has one teacher who teaches independently in isolation throughout the school day, and students stay in the same classroom.”); Jen Sobieski, *Special Education Classrooms: The Pros and Cons of Each Learning Environment*, FRENALYTICS (Apr. 14, 2022), <https://www.frenalytics.com/blog/special-education-classrooms-the-pros-and-cons-of-each-learning-environment/> [<https://perma.cc/5589-VQ7T>]; 603 Code Mass. Regs. § 28.00(7)(f) (2022).

<sup>210</sup> *Plock*, 545 F. Supp. 2d. at 758.

<sup>211</sup> See, e.g., *School Access For Visitors*, BOSTON PUB. SCHS., <https://www.bostonpublicschools.org/Page/8266#> [<https://perma.cc/5A88-MZHH>] (last visited Jan. 1, 2024); *Visitors To The School During The School Day*, SCH. DIST. JEFFERSON, [https://www.sdoj.org/cms\\_files/resources/KKA.pdf](https://www.sdoj.org/cms_files/resources/KKA.pdf) [<https://perma.cc/2YW8-SZPB>] (last visited Feb. 8, 2024) (stating “[p]ersons wishing to visit the schools are strongly encouraged to make advance arrangements for their proposed visit with the appropriate teacher . . .”).

<sup>212</sup> See RCW 28A.605.020; Philoron Wright, *There are rules involved in visiting child's school*, THE GAINESVILLE SUN (Sept. 20, 2006),

## 2. Society's Willingness to Recognize the Expectation

Though it is rather clear that teachers possess a subjective expectation of privacy, it is less clear as to whether society is willing to recognize that expectation as reasonable. Many will argue that such a belief is unreasonable, given that the teacher does not have exclusive use of the classroom.<sup>213</sup> As mentioned, there are other groups of individuals permitted to enter the classroom.<sup>214</sup> However, such entries generally occur only with the teacher's permission.<sup>215</sup> Teachers also have the ability to remove some individuals from the classroom under certain conditions.<sup>216</sup> Moreover, the fact that others are able to use the space does not necessarily mean that their expectation of privacy is not objectively reasonable.<sup>217</sup> For instance, several individuals may live in one home and have access to several rooms, but that does not necessarily mean that they do not have an expectation of privacy from the

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<https://www.gainesville.com/story/news/2006/09/21/there-are-rules-involved-in-visiting-childs-school/31496577007/> [https://perma.cc/ZN4Y-VSDN]; Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015); *Plock*, 545 F. Supp. 2d. at 758 (noting that “classrooms are open to students, other faculty, administrators, substitute teachers, custodians, and, on occasion, parents.”).

<sup>213</sup> *Plock*, 545 F. Supp. 2d. at 758; Jen Sobieski, *Special Education Classrooms: The Pros and Cons of Each Learning Environment*, FRENALYTICS (Apr. 14, 2022), <https://www.frenalytics.com/blog/special-education-classrooms-the-pros-and-cons-of-each-learning-environment/> [https://perma.cc/VW6Z-KQN7].

<sup>214</sup> *Plock*, 545 F. Supp. 2d. at 758 (noting that “classrooms are open to students, other faculty, administrators, substitute teachers, custodians, and, on occasion, parents”).

<sup>215</sup> See *supra* notes 213 and 214.

<sup>216</sup> *Teacher Removal of Students from the Classroom*, GOOCHLAND COUNTY PUB. SCH., <https://sites.google.com/a/glnd.k12.va.us/studentconduct/code-of-student-conduct/teacher-removal-of-students-from-class> [https://perma.cc/CET2-BSPB] (last visited Mar. 3, 2024); *New York School Discipline Laws & Regulations: Teacher Authority to Remove Students from Classrooms*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'T, [https://safesupportivelearning.ed.gov/discipline-compendium?state=New%20York&sub\\_category=Teacher%20Authority%20to%20Remove%20Students%20From%20Classrooms](https://safesupportivelearning.ed.gov/discipline-compendium?state=New%20York&sub_category=Teacher%20Authority%20to%20Remove%20Students%20From%20Classrooms) [https://perma.cc/8Z24-GW4X] (last visited Mar. 3, 2024).

<sup>217</sup> *Mancusi v. Deforte*, 392 U.S. 364, 369 (1968) (finding that the fact that the space was shared did not require a finding that any expectation of privacy was unreasonable).

government.<sup>218</sup> Similarly, there have been cases where the Court previously found an expectation of privacy where the individual did not have sole access, so the lack of complete exclusivity is not necessarily dispositive in all cases.<sup>219</sup>

It may be argued that the teacher does not have a reasonable expectation of privacy under the third-party doctrine because the teacher has no reason to believe what is said in the room will not leave the room. Under the third-party doctrine, where one voluntarily shares information with a third party, any expectation of privacy is inherently unreasonable as they essentially assume the risk that others will reveal what was said.<sup>220</sup> However, confidentiality laws further complicate this issue. Teachers are generally bound by confidentiality rules, including FERPA,<sup>221</sup> meaning the information discussed about a student cannot be reiterated to someone who is not on the student's educational team. Thus, the teacher's belief that what was discussed in that room would not go beyond the limited number of individuals on the team is reasonable and may support the expectation of privacy.

In a recent decision, the court seemingly recognized the importance of maintaining some level of confidentiality regarding IEP meetings, given the nature of the discussions that occur in such meetings.<sup>222</sup> The first circuit refused to categorize an IEP meeting as public space in examining a First Amendment case, noting that access to such a meeting was restricted to a small group of individuals and that the IEP meeting involved "the discussion of sensitive information about the student."<sup>223</sup> Much of what is discussed at an IEP meeting is discussed amongst the

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<sup>218</sup> *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *see also* *U.S. v. Matlock*, 415 U.S. 164 (1974) (noting that a Defendant who shared a home with others nevertheless had a legitimate expectation of privacy from law enforcement officials).

<sup>219</sup> *See supra* Part III.

<sup>220</sup> Ash Wold, *Katz in the Digital Age: Why The Katz Subjective Prong Must Be Restrengthened*, 52 *SOUTHWESTERN L. REV.* 174, 177 (2023), [https://www.swlaw.edu/sites/default/files/2023-05/Article%2013\\_Wold%20Note.pdf](https://www.swlaw.edu/sites/default/files/2023-05/Article%2013_Wold%20Note.pdf) [<https://perma.cc/Q5QF-47YZ>].

<sup>221</sup> 20 U.S.C. §1232g (1974). The Family Educational Rights and Privacy Act (FERPA) is a federal law applicable to all schools receiving federal funding and aims to protect the privacy of student's educational records which gives certain parental rights regarding the educational records and access to such records. *Family Educational Rights and Privacy Act*, U.S. DEP'T EDUC., <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> [<https://perma.cc/Y2PH-FMX8>] (last updated Aug. 25, 2021).

<sup>222</sup> *Pitta v. Medeiros*, 90 F. 4th. 11, 16-17 (1st Cir. 2024).

<sup>223</sup> *Id.*

IEP in the classroom in a less formalized manner.<sup>224</sup> This shows that the First Circuit Court may be more willing to find that the teacher's expectation of privacy is reasonable given the sensitive nature of the information discussed within the classroom.

Lastly, it is unclear if there would be a greater inclination for the court to find a reasonable expectation of privacy in a self-contained classroom, given their similarities to locker rooms.<sup>225</sup> In the past, courts have found an expectation of privacy in locker rooms by using similar reasoning and working around previous cases.<sup>226</sup> Therefore, it remains rather unclear as to whether such an expectation of privacy will be found to be reasonable.<sup>227</sup> However, given the need to balance any such expectation with the interest of the employer, it is unlikely that courts would find in favor of teachers under such circumstances. The interest in this case is protecting the physical safety of the students and creating a safe educational environment which would be granted tremendous weight by the courts. As such, the courts would likely find that any such privacy interest would have to yield to the interest of the school.

## V. SURVEILLANCE EFFECTIVENESS IN DETERRING OR PREVENTING UNWANTED BEHAVIOR

Due to the novelty of the bills, there is no empirical evidence showing that the cameras have made any strides in fulfilling their purpose, i.e., preventing the abuse of students at the hands of educators.<sup>228</sup> While surveillance can be used to document abuse, it is unlikely that the usage of such surveillance will prevent the abuse unless the cameras are monitored at all times, which is prohibited in many of

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<sup>224</sup> *Id.* at 15 (quoting a manual that lists the topic discussed as “how the student’s disability affects the students learning, ... how the student performs today ... the areas that are affected by the disability [and] the supports and services the student needs for success” as well as “other behaviors and personal characteristics of the student.”).

<sup>225</sup> See *supra* Part IV.B.

<sup>226</sup> See *supra* Part III.

<sup>227</sup> Issues of contract law and the involvement of unions further complicate such matters. One or both of these may dictate that the teacher possesses no reasonable expectation of privacy within the school or their classroom.

<sup>228</sup> Mallory Sofastall, *Disability Community at Odds on Bill Requiring Cameras in Special Education Classrooms*, WMAR 2 NEWS, <https://www.wmar2news.com/news/state/disability-community-at-odds-on-bill-requiring-cameras-in-special-education-classrooms> [https://perma.cc/ER66-WG7Q] (last updated Mar. 19, 2021).



the proposed or enacted bills.<sup>229</sup> Given the lack of availability of empirical research, a comparison must be made to other areas that have enacted similar surveillance tactics to deter unwanted behavior in order to examine the potential effectiveness of the use of cameras in self-contained classrooms to deter abuse.

Many argue that the use of surveillance is a valuable tool in deterring unwanted behavior, particularly unlawful behavior, but various studies on the effectiveness of surveillance have yielded conflicting results.<sup>230</sup> A study conducted to examine CCTV in deterring crime showed mixed results among the three different settings.<sup>231</sup> The study showed that CCTV had a small but significant effect in the UK but had no effect in the North American evaluations.<sup>232</sup> Some studies suggest that individuals will adapt their behavior or move the unwanted activity to an area that is not under surveillance rather than stopping the conduct.<sup>233</sup> TASH, a disability rights organization, has noted the potential for the abuse to “go underground” as a result of the cameras rather than to prevent or deter such abuse.<sup>234</sup> The abuser may simply move such conduct to areas outside of the purview of the camera, such as bathrooms.<sup>235</sup>

Body-worn cameras, implemented for a similar purpose which was to reduce police violence, have also shown divergent results.<sup>236</sup> Given

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<sup>229</sup> Amos et al., *supra* note 14; Heintzelman & Bathon, *supra* note 12 (quoting a security consultant in stating “cameras without eyes watching in real time can be a waste of school money and only serve as a means to assign blame after a breach occurs”).

<sup>230</sup> Jansen et. al., *The Influence of the Presentation of Camera Surveillance on Cheating and Pro-Social Behavior*, FRONTIERS IN PSYCH. (Oct. 16, 2018), [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6198084/#:~:text=Compared%20to%20a%20control%20situation,%2Dsocial%20behavior%20\(2b\)\[https://perma.cc/KPD4-65UN\]](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6198084/#:~:text=Compared%20to%20a%20control%20situation,%2Dsocial%20behavior%20(2b)[https://perma.cc/KPD4-65UN]).

<sup>231</sup> Brandon C. Welsh & David P. Farrington, *Crime Prevention Effects of Closed Circuit Television: A Systematic Review*, HOME OFFICE (Aug. 2002), [https://popcenter.asu.edu/sites/default/files/Responses/video\\_surveillance/PDFs/Welsh&Farrington\\_2002.pdf](https://popcenter.asu.edu/sites/default/files/Responses/video_surveillance/PDFs/Welsh&Farrington_2002.pdf) [https://perma.cc/4QW9-DRYL].

<sup>232</sup> *Id.*

<sup>233</sup> *Why Surveillance Cameras Are Bad?*, KENTFAITH (Aug. 18, 2023, 10:05 AM), [https://www.kentfaith.com/blog/article\\_why-surveillance-cameras-are-bad\\_10318](https://www.kentfaith.com/blog/article_why-surveillance-cameras-are-bad_10318) [https://perma.cc/7UE4-5V8Z].

<sup>234</sup> Amos et al., *supra* note 14.

<sup>235</sup> *Id.*

<sup>236</sup> Jennifer Lee, *Will Body Cameras Help End Police Violence?*, AM. CIV. LIBERTIES UNION WASH. (June 7, 2021), <https://www.aclu-wa.org/story/%C2%A0will->

that police are also government employees tasked with protecting vulnerable members of society, a comparison to the use of body-worn police officers can be made to examine the potential effectiveness of the use of surveillance to deter violence. A comprehensive review of over seventy studies on the effect of body-worn cameras has shown no statistically significant difference or impact in deterring police violence.<sup>237</sup> A study conducted in Washington, D.C., which included over 2,000 police officers, showed body cameras did not reduce police misconduct as there was “no statistically significant impact on officer use of force, civilian complaints, or arrests for disorderly conduct by officers.”<sup>238</sup> Two other studies were recently conducted to determine the effectiveness of body-worn cameras, a meta-analysis conducted in 2020 and a study conducted in 2021.<sup>239</sup> The 2020 meta-analysis showed uncertainty as to whether body cameras had any effect in reducing police misconduct.<sup>240</sup> The 2021 study showed a 10% decrease in force, but the authors admitted that there may have been site bias impacting the results and acknowledged that such cameras are not a “panacea to police violence.”<sup>241</sup>

Despite claims that surveillance within United States public schools improves student safety, an ACLU report has found that surveillance has not shown such improvement, rather posing additional harm to students.<sup>242</sup> Claims that surveillance improves student safety are nearly impossible to prove and can mislead school officials and administrators in deciding whether to implement such methods.<sup>243</sup> Moreover, many of

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body-cameras-help-end-police-violence%2%A0 [https://perma.cc/2JX7-N58H].

<sup>237</sup> *Id.* (describing that studies have shown body-worn cameras may offer benefits while others have shown no impact or even possible negative impacts).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> Jennifer Lee, *Will Body Cameras Help End Police Violence?*, AM. CIV. LIBERTIES UNION WASH. (June 7, 2021), <https://www.aclu-wa.org/story/%2%A0will-body-cameras-help-end-police-violence%2%A0> [https://perma.cc/2JX7-N58H].

<sup>243</sup> Cistone, *supra* note 40 (highlighting a national survey conducted by YouGov examining student perceptions and effects on students showed “heightened anxiety, unease, and fear” as well as diminished trust between students and school staff); *School Security Measures and their Impact on Students*, NSAP (2018), <https://www.studocu.com/ph/document/southwestern-university-phinma/bs-nursing/school-security-measures-impact/34824225> [https://perma.cc/7BAB-

these claims come from surveillance companies with motivations of their own, who rarely provide any evidence supporting their position.<sup>244</sup>

Given that surveillance has proven rather ineffective in other spheres, it is unlikely that the use of cameras in self-contained classrooms alone will successfully deter unwanted or violent behavior. Rather, the abuse may simply be driven into areas that are not under such surveillance. Along with the lack of conclusive evidence of surveillance as a successful deterrence, surveillance has been shown to have a negative effect on the subject of monitoring and may further harm rather than protect students.<sup>245</sup>

## VI. POTENTIAL NEGATIVE EFFECTS OF SURVEILLANCE ON STUDENTS AND SCHOOL STAFF.

The use of cameras may impact other policy matters, such as the possibility of camera abuse or dissuading students from reporting abuse in other aspects of their lives. An ACLU report found that the use of surveillance technology has a chilling effect on students, making them less likely to seek out help or report dangerous behaviors.<sup>246</sup> Since students are aware that they are being recorded, with both audio and video, it may prevent students from reporting abuse they may be experiencing at home.<sup>247</sup> Students may fear that someone could use the recording against their parents to later prove accusations of abuse.<sup>248</sup> Therefore, they may avoid confiding in their teacher about any safety concerns outside the classroom. The same may be true regarding

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DH3B] (“There is no clear evidence that the use of metal detectors, security cameras, or guards in schools is effective in preventing school violence, and little is known about the potential for unintended consequences that may accompany their adoption.”).

<sup>244</sup> *Id.*; see generally, Mark Keierleber, *New Report: School Shootings Spawned ‘Digital Dystopia’ of Student Surveillance*, THE 74, <https://www.the74million.org/article/new-report-school-shootings-spawned-digital-dystopia-of-student-surveillance/> [<https://perma.cc/4VL3-LRPE>] (last updated Oct. 4, 2023).

<sup>245</sup> See *infra* Part VI.

<sup>246</sup> Cistone, *supra* note 40; Amos et al., *supra* note 14 (stating students are more likely to feel safe and report crimes or problems where they have a more positive attitude of toward and trust and surveillance can create fear, mistrust, and victimization among school staff and teachers).

<sup>247</sup> Cistone, *supra* note 40.

<sup>248</sup> Keierleber, *supra* note 244 (reporting twenty-two percent of students are concerned that surveillance could be shared with law enforcement).

accusations of bullying. Thus, the cameras will be counterintuitive to their purpose, which is to protect students from harm.

Abuse of such cameras is a great concern to many advocating against their usage. Disability organizations are worried that rather than monitoring teacher abuse, the students themselves will become the targets of such surveillance.<sup>249</sup> For instance, videos resulting from the surveillance may be used in a due process hearing or to justify a referral to juvenile justice.<sup>250</sup> In addition to the misuse of cameras pertaining to the students, administrators may use the cameras to control or punish teachers for infractions entirely unrelated to the abuse of students. Abuse of surveillance footage by people in power has shown to be an issue in recent years, as evidenced by police officers using surveillance to target certain groups of people based on their political opinions or race.<sup>251</sup> Such an abuse of power can lead to harassment, discrimination, and false accusations of misconduct.<sup>252</sup> The quality of surveillance equipment, lighting, and the angle of the camera may capture unidentifiable individuals or indiscernible actions, which may lead to false accusations of misconduct.<sup>253</sup> It is possible for such false accusations of misconduct to be used as a means of harassment or retaliation as well.

Perhaps the greatest risk associated with placing cameras in these classrooms is the potential for footage, likely to contain a great deal of sensitive information and images, to be hacked or leaked.<sup>254</sup> Schools are not immune from cyberattacks which have been evident in recent years.<sup>255</sup> UMass itself has fallen victim to a data leak, compromising the information of thousands of students.<sup>256</sup> This occurs at the K-12 level as

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<sup>249</sup> Amos et al., *supra* note 14.

<sup>250</sup> *Id.*

<sup>251</sup> *Why Surveillance Cameras Are Bad?*, *supra* note 233.

<sup>252</sup> *Id.*

<sup>253</sup> Amos et al., *supra* note 14.

<sup>254</sup> McShane, *supra* note 185.

<sup>255</sup> Sean Lyngaas, *Ransom Attack Closes Schools in Nantucket*, CNN (Jan. 31, 2023, 3:51 PM), <https://www.cnn.com/2023/01/31/politics/ransomware-attack-schools-nantucket/index.html> [<https://perma.cc/5D7C-3YS7>] (showing in 2022 alone, “forty-five US school districts operating 1, 981 schools were hit by ransomware.”).

<sup>256</sup> Colin A. Young, *Massachusetts Says 134,000 were affected by UMass Chan Data Breach*, CBS NEWS (Aug. 15, 2023, 8:44 PM), <https://www.cbsnews.com/boston/news/umass-chan-data-breach-massachusetts-moveit/> [<https://perma.cc/8LJR-JRAB>].

well. The Nantucket school district, serving 1,700 students, was forced to close four schools following a ransom attack.<sup>257</sup> Within the last few years, in an attempt to expose the dangers of mass surveillance, hackers were able to break into security cameras placed in schools, hospitals, factories, jails, and offices.<sup>258</sup> Such access went unhindered for two days, during which they accessed the live stream of tens of thousands of cameras.<sup>259</sup> Given the sensitive nature of the self-contained classroom, specifically the potential for bodily exposure of minors, this is a risk that school districts should not take.

## VII. CONCLUSION

“It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”<sup>260</sup> The Court must recognize the “imperative of judicial integrity.” For “nothing can destroy a government more quickly than . . . its disregard of the charter of its own existence.”<sup>261</sup>

While the purpose of the bills providing cameras in self-contained classrooms is admirable in seeking to protect a vulnerable class of students, the implementation of such cameras raises credible concerns. It prompts questions about whether the use of surveillance in self-contained classrooms poses a violation of students’ and teachers’ Fourth Amendment protections against unreasonable searches and seizures. Self-contained classrooms pose challenges not faced by regular education classrooms, which gives rise to such privacy concerns, particularly the increased potential for the capturing of bodily exposure. The effectiveness of surveillance to deter unwanted behavior in other spheres has proven inconclusive at best. Meanwhile, there are less invasive and perhaps more effective alternatives that schools can implement to promote transparency and visibility of students in order to curtail the abuse that occurs in such settings. Several Massachusetts school districts have already implemented these alternatives. Thus, surveillance within self-contained classrooms in Massachusetts school

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<sup>257</sup> Lyngaas, *supra* note 255.

<sup>258</sup> *Security Camera Hackers Access Live Feeds at Hospitals, Workplaces, Schools*, NBC NEWS (Mar. 11, 2021, 8:21 AM), <https://www.nbcnews.com/tech/security/security-camera-hackers-access-live-feeds-hospitals-workplaces-schools-n1260637> [<https://perma.cc/W3KQ-HNDN>].

<sup>259</sup> *Id.*

<sup>260</sup> *Mapp v. Ohio*, 367 U.S. 643, 647 (1961).

<sup>261</sup> *Id.*

districts is too ineffective to permit the bypassing of potential privacy implications, especially considering available alternatives. Massachusetts should lay to rest legislation pursuing cameras in self-contained classrooms and should instead focus on implementing methods that have proven successful and do not impinge students' and teachers' constitutional rights.