

**THE LOS ANGELES UNIFIED SCHOOL DISTRICT'S CURRENT
ADMINISTRATION OF THE ARMED SERVICES VOCATIONAL
APTITUDE BATTERY VIOLATES NCLB, FERPA, THE CALIFORNIA
CONSTITUTION, AND CALIFORNIA STATUTES**

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I. INTRODUCTION

Congress and the California legislature recognize that students and their parents entrust schools with their personal information with the expectation that this information will be used by the schools to serve the best interests of the students. Congress and the California legislature also recognize that the highly sensitive nature of a student's personal information can be used by individuals and organizations to manipulate an impressionable child. Additionally, as the Supreme Court has acknowledged, minors are vulnerable and unable to "make critical decisions in an informed and mature manner," which is why parents must sometimes make decisions on their behalf. (*Bellotti v. Baird* (1979) 443 U.S. 622, 623.) In light of these principles, it is not surprising that Congress and the California legislature have afforded parents almost absolute control over their children's education records, granting parents the right to regulate the dissemination of this information under most circumstances.

Currently, schools in the Los Angeles Unified School District administer the Armed Services Vocational Aptitude Battery ("ASVAB"). At the outset, It is important to note that ASVAB test results contain a student's name, address, telephone number, date of birth, social security number, sex, ethnic group identification, plans after graduation, as well as those areas of academia and extracurricular activities that are of particular interest to the student. (68 Fed.Reg. 65045.) Unless a school restricts the disclosure of students' ASVAB test results to the military, military recruiters are able to access these test results, and the highly personal information contained therein, as soon as seven days after the test results are mailed to the schools that administered the ASVAB. With this sensitive data, military recruiters can then tailor recruiting methods to individual students, enabling the recruiters to mount a barrage of intimate and intimidating attacks on impressionable minors absent parental supervision.

Because the decision of whether to enlist in the military is a decision that can carry serious, far-reaching consequences, many parents try to limit the military from contacting their children. Many parents recognize that students who are contacted by military recruiters may be subject to peer and social pressure to enlist in the armed services. Federal and state laws reflect a confluence of concerns about military access to a child's personal information. Both Congress and the California legislature have granted parents the right to determine when, if at all, the military is allowed to access their child's education records, and the personal information contained therein. By limiting military access to education records, parents are able to distance military recruiters from their children so that the decision of whether to enlist in the military is made in consultation with those who love and care for the child, and not solely in consultation with people whose very job it is to recruit the child for the military.

This memorandum addresses the Los Angeles School District's ("District") legal obligations to protect the privacy interests of its students as well as their parents when it administers the ASVAB. This memorandum has been divided into seven sections: Section II provides background information on the relevant federal and state privacy statutes that protect students' education records and the personal information contained therein as well as an overview of the ASVAB. Section III discusses the laws and regulations that govern a school's ability to disseminate a student's education records to third parties, such as military recruiters. Section IV analyzes the laws and regulations that govern a school's ability to disseminate a student's directory information to third parties, and focuses particularly on the parental interests affected when a school releases a student's directory information after receiving a parent's request not to release that information. Section V examines the constitutional rights affected by the District's current administration of the ASVAB, and analyzes a privacy claim and equal protection claim under the California Constitution. VI highlights the specific situations in which the District, by releasing ASVAB test results to military recruiters absent prior parental consent, violates federal and state statutes as well as state constitutional principles; VI also proposes a policy that the District could adopt to ensure compliance with the relevant statutory

and constitutional mandates. Section VII is a brief conclusion.

II. BACKGROUND INFORMATION

A. The Family Educational Rights and Privacy Act of 1974

The Family Educational Rights and Privacy Act of 1974 (20 U.S.C. § 1232g - “FERPA”) was enacted “in the wake of apparent abuses of student privacy” and as a result of a need for more parental and student control of education records. (5 Rapp, Education Law (42nd ed. 2006) Education Records Management and Retention, § 13.04.) FERPA’s structure has two basic parts: the information that is protected, and the practices to regulate and protect that information. First, the information that is subject to FERPA’s regulation and protection consists of “education records.” Education records are “records, files, documents, and other materials which...contain information directly related to a student; and...are maintained by an educational agency or institution or by a person acting for such agency or institution.” (20 U.S.C. § 1232g(a)(4)(A).) Second, the regulatory framework for FERPA prohibits disclosure of education records (or personally identifiable information contained therein) in the absence of a parent or eligible student’s¹ prior written consent. (20 U.S.C. § 1232g(b)(1).) For the purposes of this memorandum, it will be assumed that the student taking the ASVAB is not an eligible student and that the school is therefore required to obtain parental consent before releasing that student’s education records.

It is important to note that there is a category of “personally identifiable information” that

¹ As enacted, FERPA extends rights to “parents of students.” (See, e.g., 20 U.S.C. § 1232g(a)(1)(A), (B).) “Whenever a student has attained eighteen years of age, or is attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.” (20 U.S.C. § 1232g(d); see also 34 C.F.R. § 99.5(a).) Thus, an “eligible student” means “a student who has reached 18 years of age or is attending an institution of postsecondary education.” (34 C.F.R. 99.3.)

It is also important to note that a student under eighteen who is still in high school but who is taking college courses has access to records held by the college, but access rights to records held by the high school still belong to the parents. (National Forum on Education Statistics, Forum Guide to Protecting the Privacy of Student Information: State and Local Education Agencies (2004) at 12-13.)

FERPA permits a local educational agency to disclose absent prior parental consent. Under FERPA, an educational agency may release “directory information”² without first obtaining the consent that is necessary to release education records. (20 U.S.C. § 1232g(b)(1).) However, the discretion to release directory information is not self-implementing. Rather, if a school district has a policy for disclosing directory information, it must give public notice of what is considered directory information and must also notify parents that they may refuse to allow the agency to release this directory information without the parents’ prior consent, i.e., the parents’ right to “opt out” of this public, nonconsensual disclosure of directory information. (20 U.S.C. § 1232(a)(5)(B).) Thus, where an objection to disclosure of directory information is made, that information may not be disclosed except in accordance with the procedure established as to non-directory information, i.e., the educational agency must obtain the signed and dated written consent of the parent prior to disclosing this information. (34 C.F.R. § 99.30(a).)

Although FERPA provides no private remedy to aggrieved students, FERPA does confer upon both students and parents the right to file a complaint with the Secretary of the Department of Education. (34 C.F.R. § 99.63.) Where an educational agency or institution fails to comply with FERPA, the Secretary may “[w]ithhold further payments under any applicable program; [i]ssue a compliant to compel compliance through a cease-and-desist order; or [t]erminate eligibility to receive funding under any applicable program.” (34 C.F.R. § 99.67(a).) In addition to the usual enforcement methods, the Department of Education may seek declaratory and injunctive relief to enforce FERPA. (20 U.S.C. § 1234(c).)

² Directory information includes, but is not limited to, the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.” (34 C.F.R. 99.3; see also 20 U.S.C. § 1232g(a)(5)(A).)

B. The California Education Code

California Education Code Section 49060 and its accompanying provisions were enacted “to resolve potential conflicts between California law and the provisions of Public Law 93-380 [FERPA] regarding parental access to, and the confidentiality of, pupil records in order to insure the continuance of federal education funds to public educational institutions within the state....” (Cal. Ed. Code, § 49060, [detailing legislative intent].) Like FERPA, the California Education Code has two basic parts: the information that is protected, and the practices to regulate and protect that information.

Similar to FERPA, the California Education Code protects education records³ and regulates the dissemination of these records to third parties. (See Cal. Ed. Code, § 49076.) Additionally, the California Education Code, like its federal counterpart, authorizes schools to release directory information without prior consent provided that notice of this practice is provided to parents and that parents are afforded the opportunity to notify the school that a student’s information not be released. (See Cal. Ed. Code, § 49073.)

Although the relevant sections of the California Education Code mirror FERPA in many respects, there are important differences. First, FERPA does not actually prohibit the release of education records; rather, FERPA conditions the availability of federal funds on conformance with its provisions. (See 20 U.S.C. § 1232g(b)(1).) In contrast, the California Education Code explicitly prohibits the release of education records except in certain limited circumstances. (See Cal. Ed. Code, § 49076.) Second, while the California Education Code, like FERPA, authorizes schools to release directory information, the California legislature, unlike Congress, has declared its intent “that school districts minimize the release of pupil telephone numbers in the absence of express parental

³ The California Education Code uses the term “pupil record” in lieu of “education record.” However, because the definitions of “pupil record” and “education record” are substantially similar, when addressing the relevant provisions of the California Education Code this memorandum will refer to “pupil records” as “education records.” (See Cal. Educ. Code, § 49061(b); compare with 20 U.S.C. § 1232g(a)(4)(A).)

consent.” (Cal. Ed. Code, § 49073.5.)

C. The No Child Left Behind Act

On January 8, 2002, President Bush signed into law the No Child Left Behind Act of 2001 (20 U.S.C. § 6301 et. seq. - “NCLB”). This legislation addresses academic standards, teacher quality and school safety, and expands federal involvement in the design of state testing and accountability systems. Buried deep within the law’s 670 pages is a provision that requires public secondary schools to provide military recruiters not only with access to facilities, but also with contact information for every student.

NCLB mandates that schools receiving funding under that Act “shall provide, on a request made by military recruiters or an institution of higher education, access to secondary school students names, addresses, and telephone listings.”⁴ (20 U.S.C. § 7908(a)(1).) Upon such a request, school districts are required to provide student names, addresses, and telephone listings to military recruiters unless a parent has elected to “opt out” of the public, nonconsensual disclosure of directory information or has opted out of a specific notice provided by the school regarding disclosure to the military. (*Ibid.*)

D. The Armed Services Vocational Aptitude Battery

The ASVAB is an “aptitude” test designed and administered by the United States Military. Although the military markets the ASVAB as a “free” career interest test that schools can use in place of more expensive interest tests, no correlation has been established between ASVAB scores and civilian career skills. (Central Committee for Conscientious Objectors, *ASVAB: A Wolf in Sheep’s Clothing?* <<http://www.objector.org/before-you-enlist/asvab.html>> (as of Aug. 14, 2006).) However, research has shown a strong relation between ASVAB scores and future occupational success in the military. (See W.S. Sellman, *Predicting Readiness for Military Service* (Report Prepared for the National Assessment Governing Board, Sept. 30, 2004) at 7.)

⁴ This requirement also exists under the National Defense Authorization Act for Fiscal Year 2002. (10 U.S.C. § 503.)

While the military tells schools that the function of the ASVAB is “to help students learn more about themselves and the world of work” (DD Form 1304-5CM at 1 - “ASVAB Counselor Manual”⁵), Department of Defense (“DoD”) directives state that the purpose of the ASVAB is actually to “provide the Military Services with access to the high school market and recruiters with prequalified recruiting leads.” (DoD Directive No. 1304.12E.) Joe Flanagan, Army Education Service Officer, confirms military deception. He has stated that “[t]he ASVAB is the ‘wolf in sheep’s clothing’ that encourages students to join the military.” (Central Committee for Conscientious Objectors, *ASVAB: A Wolf in Sheep’s Clothing?* <<http://www.objector.org/before-you-enlist/asvab.html>> (as of Aug. 14, 2006).) Stated otherwise, the ASVAB is not so much a general career interest test as it is a military recruiting tool.

ASVAB test results contain a student’s name, social security number, address, telephone number, date of birth, sex, ethnic group identification, educational grade, his or her plans after graduation, individual item responses to ASVAB subtests, and ASVAB scores. (68 Fed.Reg. 65045.) Whether this highly personal information is released to military recruiters depends entirely upon the Recruiter Release Option selected by the school that is administering the ASVAB. The Recruiter Release Options that a school may select are as follows:

⁵ The “ASVAB Counselor Manual” is a technical supplement to the ASVAB. The military provides this manual to schools that are considering, or that have decided, to administer the ASVAB. The document is designed to help counselors, administrators, and teachers administer the ASVAB and can be downloaded by accessing the following site:

http://www.asvabprogram.com/downloads/asvab_counselor_manual.pdf

Recruiter Release Options	
Option	Instructions for providing access to student test information to recruiting services
1	Provide student test information to recruiting services no sooner than 7 days after mailed to school
2	Provide student test information to recruiting services no sooner than 60 days after mailed to school
3	Provide student test information to recruiting services no sooner than 90 days after mailed to school
4	Provide student test information to recruiting services no sooner than 120 days after mailed to school
5	Provide student test information to recruiting services no sooner than the end of the SY for that specific school or 30 June
6	Provide student test information to recruiting services no sooner than 7 days after mailed to school with instruction that no telephone solicitation by recruiters will be conducted as a result of test information provided
7	Invalid test results. Student test information is not provided to recruiting services
8	Access to student test information is not provided to recruiting services

(USMEPCOM Reg. 601-4, Ch. 3, § 2.)⁶

As is demonstrated by the above chart, Option 8 is the only Recruiter Release Option that prevents military recruiters from accessing students' ASVAB test results. Thus, Option 8 is the only option that provides plenary protection to students' personal information and that prevents military recruiters from using the ASVAB test results as a recruiting tool. In contrast, Options 1 through 6

⁶ Hereafter USMEPCOM Regulations will be referenced only by their regulation number, chapter, and section. For example, USMEPCOM Regulation 601-4, Chapter 3, section 2 will be cited as 601-4, 3-2.

allow military recruiters to access students' ASVAB test results at varying times after the results are mailed to the school.⁷

Not all schools exercise their right to select a Recruiter Release Option. It is important to note that if a school does not select a Recruiter Release Option, then the Military Entrance Processing Station ("MEPS") – the entity that scores and processes the ASVAB – will select a default option for the school. The default option selected is "Option 1. No special instructions." This option allows military recruiters to access the students' test results as soon as seven days after the results are mailed to the school.

It is also important to note that when students take the ASVAB, they must first sign a Privacy Act Statement. (DD Form 1304-5AS.) If a student does not sign this form, then the student's test will not be scored or processed. (601-4, 4-4.a.; see also DD Form 1304-5AS.) Although the military requires students to sign a Privacy Act Statement before their tests are scored and processed, ultimately schools – by exercising their right to select a Recruiter Release Option – control the release of students' ASVAB test results to military recruiters.

Military regulations provide that when a school offers the ASVAB a "school official will determine the recruiter release option." (601-4, 5-3.d.) "The access option chosen by the school will be honored without discrimination and without adverse effect of quality or priority of service to the school." (601-4, 3-2.a.) Although the ASVAB Counselor Manual states that "the option [a school official] select[s] will apply for all students taking the ASVAB test," military regulations provide that "the school official may request a split option and assign more than one option in the same session."⁸ (601-4, 3-2.b.) Even if a school has neglected to select a Recruiter Release Option resulting in military personnel selecting Option 1 as a default option, "[t]he MEPS may use a split

⁷ Option 7 is not a Recruiter Release Option that school officials may select; rather, it may only be assigned by military personnel in order to invalidate a test. (See 601-4, 3-3.)

⁸ It is unclear why there is this discrepancy. After much research, I was unable to discern any plausible reason why the ASVAB Counselor Manual and military regulations differ.

option...to score the results of a specified student when notified by the school official or parent that a parent has opted out of providing student information access and a separate release option for the remainder of the session.” (601-4, 3-2(b).) Thus, before, during, and even after the administration of the ASVAB, school officials determine whether or not military recruiters may access the students’ ASVAB test results.

III. EDUCATION RECORDS AND THE PARENTAL CONSENT REQUIREMENT

Both Congress and the California legislature recognize the importance of protecting the privacy rights of students and have enacted statutes that specifically regulate a local educational agency’s ability to disseminate the confidential education records of its students. FERPA (20 U.S.C. § 1232g), a federal law, and California Education Code Section 49076 limit who can access a student’s education record without the consent of the student’s parent. These privacy laws establish regulations that educational agencies must follow so that information about children is available only to individuals and organizations who are authorized to know such information.

This Section will first examine whether ASVAB test results are education records within the meaning of FERPA and the California Education Code and whether schools must obtain the consent of parents before releasing a student’s test results to military recruiters. After determining that ASVAB test results are education records within the meaning of both statutes and that most of the information contained within those test results are subject to the parental consent requirement,⁹ this Section will then analyze the legal effect of the Privacy Act Statement that students sign when they take the ASVAB.

⁹ For the purposes of this memorandum, the “parental consent requirement” refers to the provisions in FERPA and the California Education Code that prohibit a school from releasing a student’s education record if the school has not first obtained a parent’s prior consent.

A. ASVAB Test Results are Education Records Within the Meaning of FERPA and California Education Code Section 49076

An “education record” is defined quite broadly by both FERPA and the California Education Code. According to FERPA, any recorded information that is created or maintained by a school, or school employee, or person “acting for” a school, that is directly related to a particular student, is an education record. (See 20 U.S.C. § 1232g(a)(4); 34 C.F.R. 99.3.) Similarly, under the California Education Code, an education record means “any item of information directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means.” (Cal. Ed. Code, § 49061(c).)

The ability to identify the particular students who are the subject of the records is usually the most critical consideration in determining whether particular records are education records. The record must contain “personally identifiable” information about a student, such as the individual’s name, parent or other family member’s name, address or family’s address, “personal identifiers such as social security numbers,” lists of personal characteristics that would result in easy traceability, or other similar information. (See 34 C.F.R. § 99.3 [listing the categories of personally identifiable information that qualify as education records]; compare with Cal. Ed. Code, § 49061(c).) Essentially, the law regards as an education record “most information that teachers, school administrators, and education officials maintain about students in a tangible format, whether in electronic, photographic, or paper files.” (National Forum on Education Statistics, Forum Guide to Protecting the Privacy of Student Information: State and Local Education Agencies (2004) at 10 - “Forum Guide”.)

ASVAB test results contain a student’s name, social security number, address, telephone number, date of birth, sex, ethnic group identification, educational grade, plans after graduation, individual item responses to ASVAB subtests, and ASVAB scores. (68 Fed.Reg. 65045.)

The myriad information contained within ASVAB test results allows a military recruiter to readily identify a particular student based on the specificity of the information contained within those results.

In addition, the ASVAB is administered by school officials, on school property, during school hours. After the ASVAB test is scored and processed by the MEPS, school counselors receive a copy of the ASVAB test results for each student. (ASVAB Counselor Manual at 21.) Thus, because ASVAB test results contain information that is directly related to a student and that is maintained by a school, the ASVAB test results are education records under both FERPA and the California Education Code.

B. ASVAB Test Results are Subject to the Parental Consent Requirement

Under FERPA, “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records...of students without the written consent of their parents....” (20 U.S.C. § 1232g(b)(1).) Unlike FERPA, the California Education Code does not merely condition the availability of funds on an educational agency or institution’s practice of permitting nonconsensual disclosure of education records. Rather, the California Education Code explicitly prohibits the release of education records without written parental consent. (Cal. Ed. Code, § 49076 [“A school district is not authorized to permit access to pupil records to any person without written parental consent....”].)

It is important to note that while FERPA and California Education Code Section 49076 restrict disclosure of education records without prior parental consent, there are two relevant exceptions to this general rule. First, one type of information that is not subject to the parental consent requirements of FERPA and the California Education Code is “directory information.”¹⁰

¹⁰ Under FERPA, the term “directory information” includes the following: “the student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.” (20 U.S.C. § 1232g(a)(5)(A).)

Similarly, the California Education Code defines “directory information” as “one or more

Second, both statutes, under certain circumstances, permit the disclosure of education records to certain officials and organizations without consent of the parent.

FERPA and the California Education Code allow school systems to establish a policy that designates some types of information as directory information. (20 U.S.C. § 1232g(a)(5)(B); Cal. Ed. Code, § 49073.) If a school district has a policy for disclosing directory information, it must give public notice of what is considered in this category and indicate that parents may refuse to allow the agency to release any or all of this information to anyone who requests it inside or outside of the school, i.e., to “opt out.” (*Ibid.*) Such notification can occur through a school newsletter, student handbook, or some other publication that parents can be expected to receive.

The District recently released the “Parent Student Handbook” for the 2006-2007 school year. In this handbook, the District notifies parents that:

Any and all of the following items of directory information relating to a pupil may be released to a designated recipient upon request unless a written request is on file to withhold its release.

Name
Address
Telephone
Date of birth
Dates of attendance
Previous school(s) attended.

(Los Angeles Unified School District, Parent Student Handbook 2006-2007 (2006), at 7 - “Parent Student Handbook”.)¹¹

Thus, pursuant to District policy, and within the statutory authorization of FERPA and the California Education Code, the District is permitted to release a student’s name, address, telephone,

of the following items: pupil's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous public or private school attended by the pupil.” (Cal. Educ. Code, § 49061(c).)

¹¹ This handbook can be viewed by visiting: <http://notebook.lausd.net>> and accessing the “Parents/Guardians Resource” section of the website.

date of birth, dates of attendance, and previous school(s) attended. However, ASVAB test results also contain a student's social security number, sex, ethnic group identification, his or her plans after graduation, individual item responses to ASVAB subtests and ASVAB scores. (68 Fed.Reg. 65045.) Because a student's social security number, sex, ethnic group identification, plans after graduation, individual item responses to ASVAB subtests and ASVAB scores are all "personally identifiable information" about a student, and because this information is not designated as directory information under the District policy, this information is then subject to the parental consent requirement unless the second exception to the parental consent requirement applies.

As mentioned above, under some circumstances education records may be released to particular individuals or entities outside the agency or school without prior parental consent. Most of these nonconsensual disclosure circumstances are related to the educational function of the institution, such as disclosures within the institution itself for "legitimate educational interests," disclosures to other educational agencies from which the student may be seeking services, disclosures to federal and state authorities for auditing and evaluating, and disclosures in applications for financial aid. (See generally 20 U.S.C. 1232g(b)(1); see also 34 C.F.R. § 99.31.) Although the California Education Code's exceptions for nonconsensual disclosure of education records differ slightly from those in FERPA, the minor differences are not relevant for the purposes of this discussion. (See Cal. Ed. Code, § 49076 [listing circumstances when a school district is authorized to permit access to education records without written parental consent].)

Presumably, by including such an exhaustive list of exceptions to the parental consent requirement, Congress and the California legislature, when enacting FERPA and the California Education Code respectively, determined when the nonconsensual release of a child's education records would be least harmful to the child's right to privacy and least intrusive to a parent's right to determine who may access his or her child's education records. The military does not fall within one of the many enumerated exceptions to the general rule that a local educational agency or institution must obtain parental consent before releasing a student's education records or the

personally identifiable information contained therein. (20 U.S.C. § 1232g(b)(1); Cal. Ed. Code, § 49076.) Therefore, because the ASVAB test results contain personally identifiable information that qualify as education records and because neither FERPA nor the California Education Code approve of nonconsensual disclosure of education records to military recruiters, an educational agency or institution must obtain a parent's written consent before releasing a student's education records to military recruiters.

C. The Student-Signed Privacy Act Statement Does Not Satisfy the Parental Consent Requirement

As stated earlier, each student who takes the ASVAB must sign a Privacy Act Statement. (601-4, 4-4.a.; see also DD Form 1304-5AS.) While the District may argue that this signed statement authorizes the school to release the ASVAB test results to military recruiters, students are ordinarily not permitted to consent to the release of their own education records.

As enacted, FERPA extends rights to "parents of students." (See generally 20 U.S.C. § 1232g(d).) The permission or consent required of and the rights accord to the parents of the student are only transferred to a student when the "student has attained the age of eighteen or is attending an institution of postsecondary education." (*Ibid.*) The California Education Code contains substantially similar language. (See Cal. Ed. Code, § 49061(a) ["If a pupil has attained the age of 18 years or is attending an institution of postsecondary education, the permission or consent required of, and the rights accorded to, the parents or guardian of the pupil shall thereafter only be required of, and accorded to, the pupil."].) Thus, until they are eighteen, students do not have the power of consent over the disclosure of their high school records; only their parents do. Therefore, a Privacy Act Statement signed by a minor student does not satisfy the "consent" requirements of FERPA and the California Education Code.

As discussed above, a peculiarity arises when a school releases ASVAB test results to military recruiters. Some of the information contained within those results is directory information and can therefore be released without prior parental consent. However, most of the information contained within the ASVAB is considered an education record (or personally identifiable

information) and is therefore subject to the parental consent requirements of FERPA and California Education Code Section 49076. Because parents, not high school students, control the release and dissemination of student education records, the student-signed Privacy Act Statement does not excuse schools from their responsibility to obtain parental consent before releasing a student's ASVAB test results to military recruiters. Because the student-signed Privacy Act Statement cannot serve as a substitute for parental consent, that Statement does not relieve a school of liability under FERPA and the California Education Code. Therefore, for the reasons stated above, if a minor student takes the ASVAB, the District's failure to obtain the parent's consent before allowing military recruiters access to the ASVAB test results constitutes a violation of FERPA and California Education Code Section 49076.

IV. DIRECTORY INFORMATION AND THE DISTRICT'S OBLIGATION TO COMPLY WITH A PARENT'S OPT OUT REQUEST

As mentioned in Section III, FERPA and the California Education Code permit schools and agencies to release a student's directory information without parental consent so long as the school or agency notifies parents of this practice and permits them to request that this information not be released, i.e., "opt out." (20 U.S.C. § 1232(a)(5)(B); Cal. Ed. Code, § 49073.) Stated otherwise, the release of directory information is governed by specific disclosure rules under FERPA and the California Education Code that are different from education records in general. Additionally, NCLB affects these privacy statutes in the following way: Even if an agency does not disclose "directory information" under FERPA and the California Education Code, the agency must still provide military recruiters access to secondary students' names, addresses, and telephone listings. (20 U.S.C. § 7908(a)(1).) However, like FERPA and the California Education Code, NCLB requires the local education agency to notify parents of this practice and the parents right to "opt out" of this disclosure. (20 U.S.C. § 7908(a)(2).)

This Section examines the interplay among NCLB, FERPA, and the California Education Code with respect to limiting military access to a student's directory information. Specifically, this Section analyzes the parental interests affected by a local education agency or institution's disclosure

of directory information via ASVAB test results after subsequently receiving the parents' "opt out" request.

A. NCLB, FERPA, and the California Education Code Grant Parents "Opt Out" Rights

It is important to understand the similarities between the relevant statutes. All three statutes, NCLB, FERPA, and the California Education Code, provide parents with the opportunity to "opt out" of having directory information released to the military. (20 U.S.C. § 7908(a)(2); 20 U.S.C. § 1232g(a)(5)(B); Cal. Ed. Code, § 49073.) Presumably, by incorporating an "opt out" provision in the relevant statutes, Congress and the California legislature recognized that a parent has the right to determine whether his or her child's personal information is released to the military.

The District's current policy considers a student's name, address, telephone number, date of birth, dates of attendance, and previous school(s) attended directory information for FERPA and California Education Code purposes. (Parent Student Handbook at 7.) Additionally, the District notifies parents that pursuant to NCLB the school routinely discloses names, addresses, and telephone numbers to military recruiters upon request, subject to a parent's request not to disclose such information without written consent. Thus, the District is complying with the notification requirements of NCLB, FERPA, and California Education Code Section 49073 and is in fact informing parents of their right to "opt out."

B. A School that Receives An "Opt Out" Request May Only Release A Student's Information if a Parent Withdraws this Request

Although the District is complying with the notification requirements of NCLB, FERPA, and California Education Code Section 49073, the District is not complying with the "opt out" requests of parents. A school that has received an "opt out" request may only subsequently release a student's information if the school receives prior written parental consent overriding the previous "opt out" request. Neither FERPA nor California Education Code Section 49073 permit a student or a school to override the "opt out" request of a parent. Rather, the right to "opt out" is a right afforded solely to parents and the right to redact an "opt out" request is only granted to high school students once

they attain the age of eighteen. (See 20 U.S.C. § 1232g(d); Cal. Ed. Code, § 49061(a).) While NCLB permits a secondary school student or parent to request that the student’s name, address, and telephone listing not be released without prior parental consent, NCLB does not permit a child to override this “opt out” request.¹² (20 U.S.C. § 7908(a)(2).)

ASVAB test results contain a student’s directory information as defined by District policy, included in which is his or her name, address, and telephone listing. By releasing ASVAB test results to military recruiters the District is thus releasing a student’s directory information. When a parent submits an “opt out” request, the means of how directory information is disclosed is irrelevant. Rather, the critical consideration is whether local educational agencies or institutions release a student’s information in contravention of the parent’s “opt out” request. Thus, when a school administers the ASVAB and fails to select Option 8, those parents who have submitted “opt out” requests are aggrieved by the District’s failure to comply with these requests.

C. The Student-Signed Privacy Act Statement Does Not Permit a School to Release the Student’s Directory Information After Subsequently Receiving An “Opt Out” Request

While a student who takes the ASVAB is required to sign a Privacy Release Statement in order for his or her results to be scored, this “release” does not relieve the school of potential liability under NCLB, FERPA, or the California Education Code. As stated above in Section III, the signed Privacy Act Statement only relieves a school of liability if the student who signed the “release” had reached the age of eighteen. (20 U.S.C. § 1232(a)(5)(B); 49061(a).) Further, California has a history of affording parents deference in the decisions they make on behalf of their children. In *Hohe v. San Diego Unified School District* (1990) 224 Cal.App.3d 1559, the court held that while minors are free to disaffirm contracts signed only by themselves, they cannot disaffirm contracts made by their

¹² Further, it is actually unclear whether a secondary student must be eighteen in order to make an “opt out” request. There is a dearth of legislative history on this provision and no court has interpreted this provision.

parents or guardians. *Hohe* demonstrates that, in California jurisprudence particularly, a minor child is not permitted to override the decisions that his or her parents make on their child's behalf.

In summary, NCLB, FERPA, and California Education Code Section 49073 permit a school to release a student's directory information without prior written consent so long as the school notifies the parents of this policy. All three statutes also grant parents the right to "opt out" of this public, nonconsensual disclosure. If a parent requests that his or her child's information not be released, the school is legally obligated to comply with this request. Thus, when the District releases students' information via ASVAB test results despite having received an "opt out" request, the District violates the clear mandates of NCLB, FERPA, and the California Education Code. Such defiance is not only a gross violation of federal and state law, it is also a gross violation of student and parent privacy interests.

V. CONSTITUTIONAL RIGHTS AFFECTED WHEN THE DISTRICT ADMINISTERS THE ASVAB

By not selecting Option 8 when it administers the ASVAB, the District is violating not only statutory rights, it is also violating constitutional rights. This Section will examine the privacy interests affected by the District's administration of the ASVAB. First, this Section will discuss how the District's violation of student informational privacy and parental autonomy privacy can form the basis for a state privacy claim under the California Constitution. Second, this Section will examine the District's failure to adopt a uniform policy with respect to Recruiter Release Options in light of an equal protection claim.

A. The State Right of Privacy

Constitutional modes of privacy protection are either explicit in a constitutional document or implicit: that is, judge-made or judicially recognized. Although the United States Supreme Court has developed a judicially recognized right of privacy under the federal Constitution,¹³ the Supreme

¹³ Claims to a federal constitutional right of privacy have been recognized in federal litigation at least since the late nineteenth century; however, the United States Supreme Court did not assert the existence of a right of privacy under the federal Constitution until 1965. In *Griswold v. Connecticut*, Justice Douglas, writing the opinion for the court, asserted the existence of a right

Court has never made a broad general finding of a constitutional right of privacy nor has the federal Constitution been explicitly amended to this effect. Thus, at least under the federal Constitution, Americans do not have an *explicit* constitutional right to privacy.

In contrast, the right of privacy is an explicit constitutional guarantee under California's state constitution. The right of privacy became an enumerated "inalienable" right in the California Constitution after the electorate approved an initiative measure in November 1972.¹⁴ By elevating the right to be free from personal invasions to constitutional stature, the electorate dramatically expanded the right of privacy under California law to protect "all people" from unwarranted governmental intrusions. Indeed, as many courts have noted, the election brochure states: "The right to privacy is much more than 'unnecessary wordage.' It is fundamental to any free society.... This simple amendment will extend various court decisions on privacy to insure protection of our basic rights."¹⁵ (See, e.g., *White v. Davis* (1975) 13 Cal.3d 757, 775, fn. 11; *Porten v. University of California* (1976) 64 Cal.App.3d 825, 842, citing Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 28.)

of privacy against the state predating the Bill of Rights. (See generally, *Griswold v. Connecticut* (1965) 381 U.S. 479.)

¹⁴ Hereafter the November 1972 initiative measure will be referred to as the Privacy Initiative.

Article I, section 1 of the California Constitution (as reworded by constitutional amendment) now reads: "All people are by nature free and independent, and have certain *inalienable* rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (Emphasis added.) On the basis of such constitutional language, individuals can use the courts to assert claims for privacy against either state or private entities.

¹⁵ In *White v. Davis*, the California Supreme Court pointed to the election brochure argument as the only legislative history available in construing the constitutional amendment. In footnote 11 at page 775, the court stated: "California decisions have long recognized the propriety of resorting to such election arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people. [Citations omitted]." (*White, supra*, 13 Cal.3d at p. 775.)

Until recently, the California courts had not articulated a clear statement of the elements of a cause of action for invasion of the state right of privacy. After the California Supreme Court's decision in *Hill v. National Collegiate Athletic Association*, however, it is now well-established that there are three elements of a cause of action for invasion of the state right of privacy. (*Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 35-38.) Pursuant to *Hill*, to establish a violation of the state constitutional right of privacy, a plaintiff must (1) identify a legally protected privacy interest, (2) have a reasonable expectation of privacy in the circumstances, and (3) must prove that the defendant's conduct constitutes a serious invasion of privacy. (*Id.* at 38-39; see also *American Academy of Pediatrics v. Lungren* (1994) 7 Cal. 4th 307, 330 - "*Lungren*".)

1. A Specific Legally Protected Privacy Interest

The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. (*Hill, supra*, 7 Cal. 4th at 35.) As the California Supreme Court has observed, "[l]egally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." (*Hill, supra*, 7 Cal. 4th at 35.)

Education records contain highly sensitive and confidential information. It is for that very reason that the federal and state legislatures have enacted various statutes which limit a school's ability to disseminate the information contained within those records. Although education records are clearly protected by statute, presently there appears to be only one published case that deals with the constitutional protection of education records.

In *Porten v. University of San Francisco*, a college student sued the University of San Francisco for disclosing grades he earned at Columbia University to a third party without first obtaining his consent. (*Porten, supra*, 64 Cal.App.3d at 825.) After consulting statutory authority

in the California Education Code and FERPA, the court held that the plaintiff had stated a prima facie violation of California's constitutional provision. (*Id.* at 843-844.)

Porten was decided in 1976, eighteen years before the California Supreme Court developed the three-part test articulated in *Hill*. Thus, the court in *Porten* never explicitly stated that students have a specific, legally protected privacy interest in their education records. However, by concluding that the plaintiff had stated a prima facie violation of California's constitutional privacy provision, necessarily the court must have found that educational records are constitutionally protected. Indeed, it is not unreasonable for a court to conclude that students have an interest in precluding the dissemination or misuse of their sensitive and confidential educational records, i.e., students have an informational privacy interest. Therefore, based on the decision in *Porten*, a student should be able to satisfy the first element of the *Hill* test by identifying a specific, legally protected (informational) privacy interest in his or her education records. (*Hill, supra*, 7 Cal. 4th at 35.)

With respect to the privacy interests of parents, California cases unequivocally establish that the interest in autonomy privacy protected by the California constitutional privacy clause includes a parent's right to direct the manner in which they rear their children. (See, e.g., *Gibson v. Gibson* (1971) 3 Cal.3d 914, 921; *Emery v. Emery* (1955) 45 Cal.2d. 421, 429-430; *Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1410-1411.) As these cases explain, the right to choose the activities in which a child may participate and with whom a child may associate implicate a parent's fundamental right to make child rearing decisions. (*Brekke, supra*, 25 Cal.App.4th at 1410, citing *Troxel v. Granville* (2000) 530 U.S. 57, 72-73.)

When a parent submits an "opt out" form to his or her child's school, requesting that the student's directory information not be released to the military, the parent is making a child rearing decision. In essence, the parent is attempting, to the best of the parent's ability, to prevent the military from contacting the child. Regardless of the reason behind this decision, by limiting military access to a child's information, a parent is making an intimate personal decision on behalf of his or her child. As recognized by both the United States Supreme Court and the California Supreme

Court, a parent has a fundamental autonomy privacy interest in making this decision without observation, intrusion, or interference. (*Troxel, supra*, 530 U.S. at 72-73; *Gibson, supra*, 3 Cal.3d at 921.) Therefore, a parent who submits an “opt out” request to his or her child’s school has a specific, legally protected (autonomy) privacy interest. (*Hill, supra*, 7 Cal. 4th at 35.)

2. A Reasonable Expectation of Privacy

The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy on the plaintiff’s part, i.e., “an objective entitlement founded on broadly and widely accepted community norms.” (*Hill, supra*, 7 Cal. 4th at 36-37.) When analyzing this element, a court will inquire into “whether the particular circumstances in which an alleged intrusion of privacy arises demonstrate that the plaintiff had a reasonable expectation of privacy in that context.” (*Lungren, supra*, 16 Cal. 4th at 338.)

The United States Supreme Court has held that the “customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.” (*Whalen v. Roe* (1977) 429 U.S. 589, 602.) Throughout a student’s academic career, teachers and administrators often remind the student that educational records are highly confidential and that third-party access to that information is restricted. Based on this nuance of socialization alone, a student has a reasonable expectation that his school work will be kept private.

In addition, the particular setting surrounding the actual administration of the ASVAB increases the student’s reasonable expectation of privacy. The ASVAB is administered on school grounds, during school hours, and by school officials, much like any other district- or state-mandated test. Based on this test-taking setting, a student reasonably expects that the ASVAB test results, much like his or her California Standardized Testing and Reporting results, will not be released to unauthorized personnel. Although the District may argue that the Privacy Act Statement which students sign before taking the ASVAB eliminates all reasonable expectations of privacy, the Privacy

Act Statement does not clearly mention that test results will be sent to military recruiters.¹⁶ Further, students are repeatedly told by the school *and military* officials who administer the test that the ASVAB is a career/vocational test and not a military test. Thus, the ambiguity of the Privacy Act Statement when taken in conjunction with the statements made by the school and the military regarding the purpose of the ASVAB do not diminish a student's reasonable expectation of privacy. If anything, they bolster this expectation. Therefore, based on the context in which the ASVAB is administered and the circumstances surrounding that administration, a student has a reasonable expectation of privacy under the circumstances. (See *Hill, supra*, 7 Cal. 4th at 36-37.)

With respect to parents' reasonable expectation of privacy, it is important to first recognize that parents entrust schools with their children's personal information with the expectation that schools will safeguard the information collected about and from students. As the Office of the General Counsel's Help Manual states: "School Administrators are not expected to be family law experts. They are expected, however, to be sufficiently familiar with the laws to understand who may make educational decisions regarding children, who may have access to students, and who may have access to students records." (Office of the General Counsel, OGC Help Manual (2003), § III.)¹⁷ This expectation of privacy is further bolstered by the notices parents receive from the school district at the beginning of each school year.

NCLB, FERPA, and the California Education Code mandate that local educational agencies provide notice to parents of currently enrolled students of the applicable statutes' policies and practices with respect to directory information. (20 U.S.C. § 7908(a)(2); 20 U.S.C. §

¹⁶ The Privacy Act Statement (release) lists six purposes for authorizing the disclosure of the test. Not one of these purposes mentions sending the scores to military recruiters. Although the Statement mentions that the test results will "establish eligibility for enlistment" (see DD Form 1304-5AS), this statement does not unequivocally provide that the results will be sent to *military recruiters* so that military recruiters can use these results as recruiting tools.

¹⁷ This manual can be viewed at the Office of the General Counsel's website:
http://www.lausd.k12.ca.us/lausd/offices/general_counsel/.

1232g(a)(5)(B); Cal. Ed. Code, § 49073.) This notice must “effectively” inform parents of their rights and must provide the content of directory information, the school’s intent to regularly disclose without permission, and the process for objecting to such disclosure.

By notifying parents that they have the right to “opt out,” parents reasonably expect that the school will comply with their request. In addition, “[e]xpectations of privacy are legitimate if the information which the state possesses is highly personal or intimate.” (*Mangels v. Pena* (10th Cir. 1986) 789 F.2d 836, 839.) ASVAB test results contain a student’s name, social security number, address, telephone number, date of birth, sex, ethnic group identification, educational grade, his or her plan’s after graduation, individual item responses to ASVAB subtests, and ASVAB scores. (68 Fed.Reg. 65045.) Because of the highly personal information contained within ASVAB test results, concomitant with the parents’ reasonable expectation that a school will comply with their “opt out” request, parents, like students, have a reasonable expectation of privacy under the circumstance.¹⁸ (See *Hill, supra*, 7 Cal. 4th at 36-37.)

3. A Serious Invasion of Plaintiff’s Privacy Interest

The third essential element of a state constitutional cause of action for invasion of privacy is a serious invasion of plaintiff’s privacy interest. (*Hill, supra*, 7 Cal. 4th at 37.) “Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.” (*Ibid.*)

The California Supreme Court has emphasized that informational privacy is the “core value furthered by the Privacy Initiative” (*Hill, supra*, 7 Cal. 4th at 35) and has also stated that the Privacy Initiative is directed at four principal “mischiefs.”¹⁹ Here, the unauthorized transmittal of ASVAB

¹⁸ It is important to note that if the school does notify students and parents that the ASVAB will be sent to military recruiters, this second element cannot be satisfied. As of now, it is unclear exactly what school officials tell students and parents when they administer the ASVAB.

¹⁹ The four principal “mischiefs” which the California Supreme Court has stated the Privacy Initiative addresses are: “(1) ‘government snooping’ and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a

test results to military recruiters falls within the proscribed third “mischief” – “the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third part.” (*White v. Davis, supra*, 13 Cal.3d 757, 775.)

The military advises school counselors to “emphasize [to students] that the ASVAB Career Exploration Program can give students an idea of their current interests, strengths and weaknesses, and help them learn about a wide range of careers regardless of their post-high school plans.” (ASVAB Counselor Manual at 14.) Thus, students who take the ASVAB are led to believe that the purpose of the ASVAB is to help them identify their career interests; students are never told that the ASVAB scores will be sent to and used by military recruiters for recruiting purposes. Therefore, when the District releases the ASVAB scores to military recruiters, the District is “misusing information gathered for one purpose [to help students identify future career paths] in order to serve other purposes [to provide military recruiters with “prequalified leads”].²⁰ (See DoD Directive No. 1304.12E.)

Because this invasion of privacy concerns “the core value” protected by California Constitution, article I, section 1, informational privacy, and because of the misrepresentations made to minors by responsible school and military officials, a court would likely consider the unauthorized dissemination of ASVAB test results to military recruiters to be a serious invasion of the student’s privacy interest. (*Hill, supra*, 7 Cal. 4th at 37.)

With respect to the privacy interests of parents, it is first important to note that although the Privacy Initiative was adopted to address four “principal mischiefs,” courts have held that the right

specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records.” (*White v. Davis, supra*, 13 Cal.3d at p. 775.)

²⁰ Although the Privacy Act Statement that students are required to sign when they take the ASVAB states that one of the “principal purpose(s)” of scoring and processing the test is “to establish eligibility for enlistment,” this language does not clearly indicate to the student that his test will be used for recruiting purposes.

of privacy encompasses a diverse range of personal freedoms. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 211.) Included in this range of personal freedoms is “perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court]”: the interest of parents in the “care, custody, and control of their children.” (*Troxel, supra*, 530 U.S. at 65; *Brekke, supra*, 25 Cal.App.4th at 1409-1411.)

California courts recognize that parenting is a protected fundamental right. (See *In re Carmaleta B.* (1978) 21 Cal.3d 482, 489; *Odell v. Lutz* (1947) 78 Cal.App.2d 104, 106.) Accordingly, under California law, a child’s welfare must be threatened before the state may intervene in parental decisionmaking. Given that the critical importance of the right to parent has been reaffirmed and reaffirmed in California courts (see, e.g., *In re B.G.* (1974) 11 Cal.3d 679, 698-699; *In re Marriage of Jenkins* (1981) 116 Cal.App.3d 767, 774), a court would likely consider any interference in a parent’s “opt out” choice to be a serious invasion of the parent’s autonomy privacy interest. (*Hill, supra*, 7 Cal. 4th at 37.)

4. Balancing Interests Under the State Constitution Right of Privacy

The California Supreme Court has clarified that “the three ‘elements’ set forth in *Hill* properly must be viewed simply as ‘threshold elements’ that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision.” (*Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 893.) If a plaintiff is able to satisfy the threshold elements of *Hill*, the court must then determine the appropriate legal standard to be applied in determining whether the challenged government action violates state constitutional privacy principles. Where the case involves an invasion of an interest fundamental to personal autonomy, a “compelling interest” must be present to overcome the vital privacy interest. (*Hill*, 7 Cal. 4th 1, 34, fn. omitted). If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed. (*Ibid.*).

It is unclear whether a court would apply the “compelling interest” test or a balancing test if students brought a privacy claim against the District. Although informational privacy is the “core

value furthered by the Privacy Initiative” (*Hill, supra*, 7 Cal. 4th at 35), some courts have applied general balancing tests when a plaintiff has alleged an invasion of the state right of informational privacy. (See, e.g., *Doyle, supra*, 32 Cal.3d at 18-21; *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652.) In contrast, it is likely that a California state court would apply a “compelling interest” test if parents alleged an invasion of autonomy privacy particularly because both the United States Supreme Court and California Supreme Court have recognized that child rearing is a fundamental right of personal liberty under the federal and state Constitutions, respectively. (*Whalen, supra*, 429 U.S. at 599-600; *People v. Privitera* (1979) 23 Cal.3d 697, 702.) The applicable standard of review may actually be a moot point, however, particularly because when a plaintiff is confronted with a defense based on countervailing interests, the “plaintiff may undertake the burden of demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant’s conduct that would minimize the intrusion on privacy interests.” (*Hill, supra*, 7 Cal. 4th at 38, citing *Whalen, supra*, 429 U.S. at 600-602.)

When a school offers the ASVAB, the military allows the school to select the Recruiter Release Option. “The access option chosen by the school will be honored without discrimination and without adverse effect of quality or priority of service to the school. (601-4, 3-2.a.) If a school official selected Option 8, this would minimize, if not eliminate, the intrusion on the privacy interests of both students and parents. The availability of this protective measure, compounded with how easily the school could implement it, should make the applicable standard of review irrelevant and allow students and parents alike to defeat any defense set forth by the District.

The California Constitution creates an affirmative right of privacy in “all people.” (Cal. Const. art. I, § 1.) Not only can students and parents state a prima facie cause of action for violation of this state constitutional provision, students and parents can effectively demonstrate that “the availability and use of protective measures, safeguards, and alternatives,” particularly a District requirement mandating that schools select Option 8, “would minimize the intrusion on privacy interests.” (*Hill, supra*, 7 Cal. 4th at 38, citing *Whalen, supra*, 429 U.S. at 600-602.) Therefore, for

the reasons stated above, the manner in which the District currently administers the ASVAB violates both students and parents state constitutional right of privacy.

B. Equal Protection Under The California Constitution²¹

Article I, section 7, subdivision (a) of the California Constitution provides in pertinent part that “[a] person may not be...denied equal protection of the laws....” The equal protection clause requires that “persons under like circumstances be given equal protection and security in the enjoyment of personal and civil rights...and the prevention and redress of wrongs.” (8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 705.) Stated otherwise, the equal protection clause requires that persons similarly situated receive equal treatment. (*Grand Central Liquors, Inc. v. Michalko* (1988) 201 Cal. App. 3d 997, 1002.)

One of the purposes of the equal protection clause is “to secure every person against intentional and arbitrary discrimination by state officials, whether brought about by the express terms of a statute or by its improper enforcement by duly constituted state agents.” (*Cotton v. Municipal Court for San Diego Judicial District* (1976) 59 Cal App 3d 601, 605.) California courts have recognized that discrimination in the enforcement or administration of a statute is as much a denial

²¹ At the outset, it is important to note that this Section will examine an equal protection claim under the California Constitution rather than the federal Constitution. When a court examines an equal protection claim, the court must determine the appropriate standard for reviewing the allegedly unconstitutional classification. If a plaintiff is able to prove that the state action impinges on the exercise of a fundamental right, then the court will impose a requirement of strict judicial scrutiny, as opposed to the more traditional (and less demanding) rational basis standard. (*Weber v. City Council of Thousand Oaks* (1973) 9 Cal.3d 950, 958.)

The standard applied by a court in equal protection adjudication is often outcome determinative. This Section examines the equal protection claim with the purpose of crafting an argument that would require the court to impose the strict scrutiny standard. The fundamental right furnishing the basis for invoking strict scrutiny must be explicitly or implicitly guaranteed by the applicable Constitution. (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 61). Because some of the rights furnished in support of this argument are recognized as “fundamental rights” under the California Constitution, but not the federal Constitution, an aggrieved parent and/or student would find greater protection under the state equal protection clause than the federal equivalent. For that reason, the analysis in this Section is confined solely to the California Constitution.

of equal protection as is the enactment of a statute which is discriminatory in the first place. (*Hinman v. Department of Personnel Admin.* (1985) 167 Cal.App.3d 516, 525.)

1. A Classification that Affects Two or More Similarly Situated Groups in an Unequal Manner

The “first prerequisite” to an equal protection claim is ““a showing that ‘the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.’” (*People v. Massie* (1998) 19 Cal. 4th 550, 571, [citations omitted].) Although the constitutional guaranty of equal protection of the laws does not require absolute equality, it does require “that persons similarly situated with respect to the legitimate purpose of the law receive like treatment....” (*People v. Caddick* (1984) 160 Cal.App.3d 46, 50-51, citing *People v. Romo* (1975) 14 Cal.3d 189, 196.)

State and federal laws regulate the nonconsensual disclosure of education records. (See FERPA, 20 U.S.C. § 1232g; Cal. Ed. Code, § 49076.) These laws were specifically promulgated to ensure that students personal information is kept confidential. It is important to note that whether a school complies with these laws is inextricably linked to the Recruiter Release Option selected by the school when it administers the ASVAB. Because the equal protection clause requires that “persons under like circumstances be given equal protection and security in the enjoyment of personal and civil rights...and the prevention and redress of wrongs” (8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 705), all students in the Los Angeles Unified School District should receive the same level of protection under these state and federal laws.

When students take the ASVAB, neither the students nor their parents are authorized to select the Recruiter Release Option; rather, only school officials may decide whether the students’ ASVAB test results will be released to military recruiters. (601-4, 5-3.d, [“The school official will determine the recruiter release option except where circumstances require the assignment of option 7.”].) If a school official selects Options 1 through 6, then the military is granted access to these results. However, if the school official selects Option 8, then the military is not permitted to access these results without prior parental consent.

Currently, the District has not implemented a uniform policy that requires schools to select a specific Recruiter Release Option. Because of this failure, each school in the Los Angeles Unified School District is permitted to select, with the exception of Option 7 which can only be selected by military personnel, any one of the many Recruiter Release Options. Since the level of protection afforded to students with respect to their privacy interests is dependent upon which Recruiter Release Option is selected by their school, the failure of the District to adopt a uniform policy has resulted in similarly situated students receiving disparate levels of privacy protection.²²

For example, if Student X attends School 8, which implements Option 8, and Student Y attends School 1, which implements Option 1, School 8 will administer the ASVAB without violating Student X's privacy interests. In contrast, School 1, by selecting Option 1, violates Student Y's privacy interests when it releases Student Y's test results to military recruiters. Student Y's rights are the same rights as Student X and are protected by the same statutes and constitutions. In addition, Student Y is a student in the same district taking the same test. By allowing school officials to arbitrarily select the Recruiter Release Option when the school administers the ASVAB, the District has adopted a classification that affects two or more similarly situated people in a drastically unequal manner even though the equal protection clause demands "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." (*Romo, supra*, 14 Cal.3d at 196.)

The District's failure to adopt a uniform policy not only creates disparities with respect to the amount of protection afforded to students' privacy rights, this failure also creates disparities with respect to the students' education rights. Public education is an obligation which California assumed by the adoption of the state Constitution. (*San Francisco Unified School District v. Johnson* (1971)

²² It is important to note that if the District adopts a uniform policy that requires schools to implement Options 1 through 6, this may in fact defeat an equal protection argument for most students. However, implementing Option 8 does not remedy the statutory violations of NCLB, FERPA, and the California Education Code or the violations of the state constitutional right of privacy.

Cal.3d 937, 951-952; Cal. Const. art. IX, § 5.) As the California Supreme Court has recognized, “in view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.” (*Butt v. State of California* (1992) 4 Cal. 4th 668, 680-681, citing *Jackson v. Pasadena City School District* (1963) 59 Cal.2d 876, 880.)

While the District does offer the ASVAB to all students, and allows students to take it on a voluntary basis, for some students the cost of taking the ASVAB is greater than it is for others. The ASVAB is marketed as a “free” vocational aptitude test. But the ASVAB is truly only “free” if the school selects Option 8 when it administers the test. A hidden cost of the ASVAB is the unauthorized dissemination of private education records. For students who attend a school that selects Options 1 through 6, they unknowingly pay this cost. Moreover, students who are aware of Option 8 and who choose not to sign the Privacy Act Statement because they know that the results will be furnished to military recruiters are denied the right to take the ASVAB. (See DoD Issuance 1304.12E, 3.2.3. [“Each applicant must sign a copy of the current Enlistment Testing Program Privacy Act Statement before taking the test. Applicants refusing to sign the agreement shall be excused from the testing sessions.”].) Thus, the “vocational aptitude test” furnished by the District is not available to all on an equal basis.

In *Butt v. State of California*, the California Supreme Court held that “California constitutional principles require State assistance to correct basic ‘interdistrict’ disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.” (*Butt, supra*, 4 Cal. 4th at 681.) Local districts are the State’s agents for local operation of the common school system. (*Hall v. City of Taft* (1956) 47 Cal.2d 177, 181.) Thus, districts, similar to the state, have a “broad responsibility to ensure basic educational equality under the California Constitution.” (*Ibid.*) Although *Butt* dealt with “interdistrict” disparities, the basis of the decision rested on education disparities generally. Thus, *Butt* can be

extended to cover “intradistrict” disparities and pursuant to *Butt* the District is required to correct these “intradistrict” disparities.

2. Classifications that Infringe upon Fundamental Rights May Be Upheld Only if in Furtherance of a Compelling State Interest

Once a court concludes that there is a classification and the equal protection clause is applicable, the court must then determine what standard to apply in ascertaining the constitutionality of the classification. In equal protection cases “not involving suspect classifications or the alleged infringement of a fundamental interest, the classification is upheld if it bears a rational relationship to a legitimate state purpose.” (*Weber v. City Council of Thousand Oaks* (1973) 9 Cal.3d 950, 958.) However, where the classification infringes on a fundamental interest, “the classification must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a compelling state interest.” (*Ibid.*)

The fundamental right furnishing the basis for applying strict scrutiny must be explicitly or implicitly guaranteed by the Constitution. (*Adams v. Superior Court* (1974) 12 Cal.3d 55, 61). In equal protection adjudication, the California Supreme Court has directed all courts “to reference California law and the full panoply of rights – which includes all protections of the California Declaration of Rights – Californians have come to expect as their due.” (*Serrano v. Priest* (1976) 18 Cal.3d 728, 764.)

California constitutional principles recognize the right of privacy as a fundamental right. (*Long Beach City Employees Association v. City of Long Beach* (1986) 41 Cal.3d 937.) Although the federal Constitution does not recognize the right to education as a fundamental right for equal protection purposes (see *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1), the California Supreme Court has held that, under the California Constitution, “education is a fundamental interest.” (*Serrano v. Priest* (1976) 18 Cal.3d 728, 765.) As stated above, by releasing ASVAB test results to military recruiters, the District violates the informational privacy rights of students. Additionally, because the District has failed to adopt a uniform policy that requires schools

to implement a specific Recruiter Release Option, the ASVAB is not being offered to all students on an equal basis. Thus, the District is also violating student's education rights.

Because the District's adopted classifications affect fundamental interests, the District must justify its action by showing that the classification is necessary to further a compelling state interest. (*Weber, supra*, 9 Cal.3d at 958.) Where a state is required to justify its action by showing a compelling state interest, the state must also show that its actions are narrowly tailored to achieve that end. (*San Francisco Fire Fighters v. Board of Supervisors* (1992) 3 Cal.App.4th 1482, 1496.) The mere fact that Option 8 is available to school officials and is not implemented is evidence that the District is not narrowly tailoring its actions. It is unclear exactly what legitimate end the District is attempting to further by allowing schools to arbitrarily select the Military Recruiter Release Option. Absent this legitimate end and any indicia of a compelling state interest, it is unlikely that the District would be able to pass the strict scrutiny test and thus prove that its classification is constitutional.

The District's failure to mandate that schools select Option 8 has resulted in unequal protection of the privacy and education interests of students. The equal protection clause was enacted to ensure that similarly situated persons are not subjected to the arbitrary discrimination of state actors, "whether brought about by the express terms of a statute or by its improper enforcement...." (*Cotton, supra*, 59 Cal App 3d at 605.) For the reasons stated above, the District's failure to provide equal protection of the laws to students has created substantial "intradistrict" disparities that are violative of the equal protection clause.

VI. THE PROBLEMS WITH THE DISTRICT'S CURRENT POLICY AND A PROPOSAL TO REMEDY ITS DEFICIENCIES

In October of 2005 the District announced a new policy regarding military access right to student information. (See Los Angeles Unified School District Policy Bulletin, BUL-2067.0.)²³ While the District's new guidelines better protect the rights of students and parents, the District's current administration of the ASVAB still violates the relevant provisions of NCLB, FERPA, the California Education Code and the California Constitution. This Section outlines the numerous statutory and constitutional violations that occur when the District administers the ASVAB. This Section then proposes a policy that will ensure that the District is in compliance with the applicable statutory and constitutional provisions when they administer the ASVAB.

A. The District's Current Administration of the ASVAB Violates NCLB, FERPA, the California Education Code and the California Constitution

The District's current policy does not ensure that, since ASVAB test results are education records, they are not released to military recruiters without parental consent. Necessarily then, the District policy also does not ensure that a student's directory information will not be released via ASVAB test results if the school has received an "opt out" request. Based on this policy, the District is violating the NCLB, FERPA, the California Education Code and the California Constitution in the following five ways:

1. It is a violation of FERPA and California Education Code Section 49076 to release a student's ASVAB test results to military recruiters without obtaining parental consent.
2. It is a violation of NCLB, FERPA, and California Education Code Section 49073 to release a student's directory information to the military via ASVAB test results without parental consent if the school has received an "opt out" request.
3. The District violates a student's state constitutional right of informational privacy when it releases his or her education records to unauthorized individuals such as military recruiters.

²³ This bulletin can be accessed at:

<http://militaryfreeschools.org/PDF/Bull2067%5B1%5D.PDF>.

4. The District violates a parent's state constitutional right of autonomy privacy when it releases a child's directory information to military recruiters after the parent has submitted an opt out request, thereby interfering with a child rearing decision that the parent made on the child's behalf.
 5. The District violates a student's right to equal protection of the laws by allowing school officials to arbitrarily select Recruiter Release Options when they administer the ASVAB.
- B. The District Must Establish a New Policy to Ensure that Schools No Longer Violate NCLB, FERPA, the California Education Code, and the California Constitution**

Pursuant to FERPA and California Education Code Section 49076, a school is not authorized to release educational records without prior written consent of the parent or an eligible student. As mentioned in Section III, students who take the ASVAB must sign a Privacy Act Statement. Under FERPA and the California Education Code, high school students are authorized to release their educational records to third parties only if the high school student has reached the age of eighteen. Therefore, unless the high school student is no longer a minor, the Privacy Act Statement is not enforceable and the District is required to obtain the written consent of the student's parents before releasing the student's educational record to the military.

In addition, NCLB, FERPA, and California Education Code Section 49073 provide that a school that has received an "opt out" request is not authorized to release directory information without prior written parental consent. The District's current policy states that:

[t]o ensure consistency with the opt-out provisions for release of contact information to the military, it is recommended that students taking the ASVAB use the school's address, rather than their residential address, on the ASVAB form.

(BUL-2067.0.) There are two problems with this specific clause. First, the District's duty to comply with "opt out" requests is a duty that cannot be delegated to the student. Rather, the District, not the students, must take affirmative action to ensure that "opt out" requests are honored. Second, even if students place the school's address in place of their own, the military will still receive a student's name and telephone number, two pieces of data that are considered directory information under the relevant statutes. Stated otherwise, even if a school fully complies with the District's policy, the

school would only partially comply with the “opt out” request. Therefore, because an “opt out” request specifies that directory information – name, telephone number, *and* address – not be released to the military, the failure to restrict military access to all three pieces of information is a violation of NCLB, FERPA, and the California Education Code.

When a school releases education records in violation of FERPA and the California Education Code, the school also violates a student’s constitutional right of privacy. When a school releases directory information in contravention of a received “opt out” request, the school violates not only NCLB, FERPA, and the California Education Code, the school also violates a parent’s constitutional right of privacy. Thus, the state constitutional right of privacy is inextricably tied to the violations of the relevant statutes. Therefore, to ensure that schools comply with the relevant federal and state privacy laws, which would necessarily eliminate any state privacy claims, the District should incorporate the following guidelines into its policy:

1. The District shall notify parents that the ASVAB is a test designed and administered by the military. This notification shall take place one week before the test is administered.
2. During the administration of the ASVAB, the District shall require principals to protect students’ privacy by implementing “ASVAB Option 8” for all students. This will ensure that the school fully complies with all “opt out” requests and education record confidentiality. The District shall only release ASVAB test results to the military if the school has received prior written authorization as required by NCLB, FERPA and the California Education Code.

Option 8 is the only Recruiter Release Option that protects a student’s personal information from military recruiters. By selecting Option 8, a school ensures that education records are not released without parental consent. Further, Option 8 is the only option that honors a parent’s “opt out” request. Option 8 ensures that both the statutory and constitutional privacy interests of students are not violated, and ensures that schools do not impermissibly interfere with a parents’ constitutional privacy interests. Thus, the only way a school can administer the ASVAB without violating the privacy interests of students and parents is to select Option 8. Further, by requiring *all* schools in the Los Angeles Unified School District to select Option 8, the District will also correct “intradistrict” disparities that currently form the basis for equal protection claims.

VII. CONCLUSION

Access to student's information by military recruitment has always been strictly guarded. In contrast to the disclosure of information to military recruiters, the nonconsensual disclosure of information in the educational context, via SATs, higher education financial aid, and higher education applications, poses little risk of harming the student. Releasing information in the education context, unlike in the military context, will not subject a child to the possibility of a life under the Military Code of Justice, a term in Iraq, or loss of limb or death. Because of this, both Congress and the California legislature have included provisions that allow academic officers and institutions access to a student's information while, at the same time, minimizing a child's contact with the military.

Federal and state laws afford parents plenary power over the military's access to their child's information. The District is required to enforce the relevant provisions of NCLB, FERPA, and the California Education Code. However, for the reasons stated above, the Los Angeles School District is currently violating several provisions of the relevant statutes. By failing to adopt a uniform policy that requires schools to select Option 8 when they administer the ASVAB, the District has allowed schools to violate the state constitutional right of privacy of children and parents as well as the children's right to equal protection of the law. To ensure that these violations no longer occur when a school administers the ASVAB, the District should therefore adopt a policy that requires all schools to select Option 8.