PROTECTING OUR STUDENTS: THE NEED FOR AUDIOVISUAL MONITORING IN SPECIAL NEEDS CLASSROOMS

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I. INTRODUCTION

It's a well-known scenario; parents send their children off to school believing they will be protected and cared for until they are once again safely returned to the confines of their homes, never imagining that the very educators trusted to care for these children might be the ones causing them harm. While teacher abuse of the students entrusted to their care has always been considered an anomaly, recently this proposition has come into question.[1] A barrage of cases has come to light showing this type of abuse to be a frequent and devastating occurrence.[2] For most students, there exists an ingrained remedial safety net that prevents a singular such occurrence from becoming a recurring cycle. The student's ability to communicate his or her experience with a family member or school official allows for the abuse to be discovered and proper action to be taken. Yet it has become apparent that a particular class of individuals, special needs children, are more susceptible to this abuse, but face communication barriers making them unable to report it.[3] Special needs children, particularly those who are nonverbal or have been diagnosed with autism, are less able to prevent this type of abuse and unable to bring it to light once it occurs.[4]

Within the last few years, concerned parents of special needs children have become increasingly aware of incidents of physical and verbal abuse taking place within their local school systems.[5] Now, they are raising a public outcry hoping for legislative or judicial intervention to prevent their children from being abused.[6] Due to the lack of oversight

1. *See* Christina Ng, *Cameras in the Classroom a Crusade for Parents of Special-Needs Kids,* ABC NEWS (Sept. 5, 2012), http://abcnews.go.com/US/cameras-classroom-crusade-parents-special-kids/story?id=17150926#.UKmOIodpco5.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See generally* Karla Akins, *Parents of Special Needs Kids Advocate for Cameras in the Classroom*, EXAMINER.COM (Sept. 19, 2012), http://www.examiner.com/article/parents-of-special-needs-kids-advocate-for-cameras-the-classroom (listing numerous examples of teachers physically abusing special needs students from cases reported across the country).

6. Ng, *supra* note 1.

in the public schools,[7] these parents have had to resort to drastic measures to uncover the abuse and bring it to the attention of the school system.[8] School districts, however, have overwhelmingly failed to take the remedial measures parents are increasingly demanding—surveillance equipment in the classroom.[9]

This Note argues that audiovisual surveillance should be provided for special needs classrooms in the public school systems, and specifically, that this surveillance should fall under the umbrella of "related services" under the Individuals with Disabilities in Education Act (IDEA).[10] This Note will analyze this proposition by first examining IDEA itself as well as its legislative history and judicial interpretation.[11] Next, specific cases seeking the installation of audiovisual monitoring will be analyzed as well as the courts' response to requests for this type of relief.[12] Finally, the privacy concerns of both the teachers and students will be addressed in order to determine the feasibility of such a mandate.

II. BACKGROUND

A. Recognizing the Need for Change

A recent ABC news segment featured on *World News with Diane Sawyer* documented the phenomenon of teachers exploiting the vulnerabilities of their special needs students.[13] It chronicled how parents have joined forces in a "grassroots movement to put cameras in classrooms."[14] According to the segment, parents in numerous states have turned to the internet and social media in an effort to advance their cause by starting petitions, posting videos, creating Facebook pages, and even penning letters to the President.[15] Most of these individuals are the

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7. *See generally* Laura Hibbard, *Stuart Chaifetz, Father, Puts Wire on Son with Autism, Records Verbal Abuse from Teachers*, HUFFINGTON POST (Sept. 24, 2012, 10:41 AM), http://www.huffingtonpost.com/2012/04/23/stuart-chaifetz-father-wire-son-records-teacher-abuse_n_1447330.html (discussing a father finding his own evidence of teacher abuse that had been going undiscovered by the school system).

8. *See id.*

9. Ng, *supra* note 1.

10. Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1482 (West 2013).

11. *See infra* Part III.

12. *See infra* Part II.C.

13. *See* Ng, *supra* note 1.

14. *Id.*

15. *Id.*

parents of children who are either verbally limited or completely unable to speak.[16]

B. Akian Chaifetz: A Case Study

Examining the case of 10-year-old New Jersey elementary school student Akian Chaifetz provides perhaps the most illuminating example of the typical struggle of parents attempting to undertake this type of investigation.[17] Akian has Autism.[18] His father, Stuart, became concerned when Akian's elementary school reported Akian was repeatedly having violent outbursts at school, including lashing out at his teacher and the teacher's aide.[19] Akian would come home from school distressed, but like all of the students in Aiken's classroom, his communication difficulties prevented him from relaying what had transpired to his parents.[20] Stuart Chaifetz's options for discovering the underlying source of Akian's anger were severely limited, so he did something not many parents would consider: he sent his 10-year-old son to school wearing a wire.[21]

The evidence Chaiftez uncovered upon reviewing the hidden audiotape clearly showed that Akian, as well as the other students in his class, suffered verbal abuse and other indignities at the hands of his teacher and teacher's aide, substantially and catastrophically interfering with his right to receive an appropriate education.[22] The recording indicated that the teachers were working while under the influence of alcohol, and were speaking about their alcohol abuse and sexual activity during class time and in front of the students.[23] In addition to the inappropriate class discussions, the recording also shows the teachers verbally abusing Akian; one of the teachers can even be clearly heard calling Akian a "bastard."[24]

Akian's story also typifies the inherent difficulties facing parents of special needs children who would seek reassurance that their concerns

16. *Id.*

17. *See* Hibbard, *supra* note 7; *see also* Christina Ng, *New Jersey Autistic Boy Records Teachers' Alleged Abuse*, ABC NEWS (April 25, 2012), http://abcnews.go.com/US/jersey-autistic-boy-records-teachers-alleged-abuse/story?id=16209626#.UKmTo4dpco4.

18. Hibbard, *supra* note 7.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Hibbard, *supra* note 7.

were being taken seriously because, when confronted with this evidence, the school district failed to terminate the teacher's employment.[25] Where school districts refuse to take appropriate remedial actions, parents are left with no assurance that these types of behaviors will not recur, leaving their children vulnerable. The only way to prevent such abuse is to create a system of oversight for protecting children whose communication skills prevent their reporting inappropriate actions to a parent or school official.

It would be tempting to classify this situation as an isolated incident, inadequate to require a nation-wide change in public school policies. However, cases such as this one are coming to light on a much more frequent basis.[26] Just this year, a teacher in Richmond, Texas was accused of physically and verbally abusing students whose difficulty communicating prevented their parents from learning about the crime.[27] In Ohio, in a situation very similar to that of Mr. Chaiftez, the parents of a special needs student sent their daughter to school with a tape recorder under her clothes to record the verbal abuse she was receiving from her teachers.[28]

These are just a few of the many frightening acts that have been brought to light in recent years.[29] Parents and advocates alike are using

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25. *Id.*

26. *See* Akins, *supra* note 5.

27. Rucks Russell, *FBISD Teacher Accused of Abusing Special-Needs Students*, KHOU HOUSTON, TEXAS (June 20, 2012, 12:31 PM), http://www.khou.com/news/FBISD-teacher-accused-of-abusing-special-needs-students-159676325.html.

28. Scott Stump, *Teachers Caught on Tape Bullying Special-Needs Girl*, TODAY PARENTING (Nov. 15, 2011, 10:32 AM), http://www.today.com/id/45302947/ns/today-parenting_and_family/t/teachers-caught-tape-bullying-special-needs-girl/#.UKmZ5odpco4.

29. Akins, *supra* note 5; *see also* Rex Dalton, *Special Education Teacher Allegedly Abused Students*, VOICE OF OC (April 17, 2012, 5:22 PM), http://voiceofoc.org/oc_central/article_9c2dc086-88ec-11e1-8e2b-001a4bcf887a.html (detailing the account of an Orange County teacher who physically abused and verbally humiliated a class of special needs students, most of whom were nonverbal); *'He was Treated Like Trash': Mom Furious as She Finds out Her Autistic Son was STUFFED IN A BAG by School Workers After He 'Misbehaved'*, THE DAILY MAIL (Dec. 23, 2011, 6:51 AM), http://www.dailymail.co.uk/news/article-2077841/Sandra-Baker-finds-autistic-son-Christopher-STUFFED-IN-A-BAG-school-workers.html (describing a Kentucky mother who found her autistic son stuffed in a bag by school workers who claimed they wanted to teach him a lesson after he misbehaved); Dean Praetorius, *Special Needs Teacher Accused of Using Vinegar-Soaked Cotton Balls to Discipline Students*, HUFFINGTON POST (Oct. 2, 2011, 6:17 PM), http://www.huffingtonpost.com/2011/10/02/special-needs-teacher-vinegar-cotton-balls_n_991231.html (alleging a Texas teacher was discovered using vinegar-soaked cotton balls as a form of punishment by making special needs students hold them in their mouths).

these documented cases to create a platform from which to call for reform in the public school system.[30] These scenarios are not infrequent, and because they are occurring in the public schools, activists have to work within the confines of federal law in order to establish policy aimed at curbing this abuse.[31]

C. The Creation of the Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act (IDEA)[32] was originally enacted by Congress in 1975 as a way to "ensure that children with disabilities have the opportunity to receive a free appropriate public education, just like other children."[33] Previously known as the Education for All Handicapped Children Act, the statute's self-proclaimed purpose is to "ensure that the rights of children with disabilities and parents of such children are protected."[34]

IDEA states that schools must provide "appropriate special education and *related services*, and aids and supports in the regular classroom" to children covered by the Act.[35] It is under this umbrella of "related services" that proponents of classroom monitoring systems insist they be

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30. Ng, *supra* note 1.

31. *See id.* Ng provides the account of Katie Kelly, a Florida psychologist and special education attorney who describes the frequency of these stories of abuse as "horror story after horror story" and that she is "continually 'stunned' at how many cases are reported, as well as the ones she imagines are not reported." *Id.* The article also explains the significance of the fact that these stories involve students who are nonverbal. Attorney Kelly believes the number of reported cases is just "the tip of the iceberg" because "[w]hen you're dealing with kids who can't talk or who have very low verbal skills and you're seeing this amount of reporting, it seems to me that there are more parents out there who aren't discovering it." *Id.*

32. Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1482 (West 2013).

33. *IDEA—the Individuals with Disabilities Education Act*, NATIONAL DISSEMINATION CENTER FOR CHILDREN WITH DISABILITIES, http://nichcy.org/laws/idea (last visited May 23, 2014). Unfortunately, the National Dissemination Center for Children with Disabilities (NICHCY) is no longer in operation because its funding from the U.S. Department of Education was terminated on September 30, 2013. Most of the center's resources, however, will be moved to the Center for Parent Information and Resources (CPIR). *Id.*

34. 20 U.S.C.A. § 1400(d)(1)(B) (West 2013). An expanded description of the statute's purpose reads as follows: "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C.A. § 1400(d)(1)(A) (West 2013).

35. 20 U.S.C.A. § 1400 (c)(5)(D) (West 2013) (emphasis added).

administered.[36] IDEA provides some guidance as to what constitutes a related service. It states that related service means "developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education."[37]

While the Act specifically allows for certain accommodations to be provided as related services, the list is not exhaustive. Because the Act does not definitively and exclusively elaborate on what constitutes a "related service," it has been left to the courts to determine how far these bounds can be stretched and what the term can reasonably be thought to encompass.[38]

The legislative history of IDEA provides some insight into what purpose Congress intended the Act to serve.[39] The Supreme Court reflected on this legislative history, describing the Act's purported function as opening the door for handicapped children to receive a public education.[40] The Court specifically stated that the Act was not intended to "impose upon the [s]tates any greater substantive educational standard

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36. *See* J.T. v. Missouri State Bd. Of Educ., No. 4:08CV1431RWS, 2009 U.S. Dist. LEXIS 7864 (E.D. Mo. Feb. 4, 2009) (seeking audiovisual monitoring of the special needs student as a related service under IDEA).

37. 20 U.S.C.A. § 1401(26)(A) (West 2013). A full description of related services under IDEA includes:

> [T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id.

38. *See id.* This definition of related services allows the possibility for wide latitude in judicial interpretation of what might constitute "other supportive services." Because the statute does not purport to list every service that could constitute such a supportive service, courts have discretion in determining which services should be covered by IDEA.

39. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 192 (1982) (holding that a sign-language interpreter is not required as a supportive service when the Act's requirement of a "free and appropriate education" is satisfied and does not require states to maximize each child's potential).

40. *Id.*

than is necessary to make such access to public education meaningful."[41] Further, the Court expounded on the idea that states must be left to form their own views of what the most appropriate education methods are, and that if the requirements of the act have been met, the specifics as to methodology must be left to the states.[42]

1. Supreme Court Interpretation of "Related Services"

The Supreme Court has considered what falls within the general parameters of a related service, but only in the context of medical services. In *Cedar Rapids Community School District v. Garret F.*, the Supreme Court found that continuous nursing was a related service under IDEA.[43] In *Cedar Rapids*, a student who used a wheelchair and was dependent upon a ventilator required one-on-one nursing care.[44] The Court found that the school was required to provide continuous nursing because IDEA specifically states that related services encompass school health services.[45]

However, this case featured a strong dissent, with two central arguments as to why this type of service was not required under IDEA.[46] First, the dissent argued that this type of service fell within the medical exception and thus the school was not required to administer continuous nursing.[47] Second, it argued that in interpreting the Spending Clause, legislation must be narrowly interpreted.[48] The dissent claimed this narrow interpretation was needed "in order to avoid saddling the States with obligations that they did not anticipate" and that Congress took steps to limit the fiscal burden of this legislation by requiring states to provide only "appropriate" education rather than requiring them to "maximize the potential of disabled students."[49]

The Supreme Court again addressed the issue of related services in *Irving Independent School District v. Tatro*,[50] where the Court was faced with the question of whether the Act requires a school district to provide

41. *Id.* The court also claimed an apparent "legislative conviction" that schools' strict compliance with the procedural safeguards of the Act would be sufficient to satisfy Congress's intent in creating Individual Education Plans. *Id.* at 206.
42. *Id.* at 206-07.
43. 526 U.S. 66 (1999).
44. *Id.* at 69.
45. *Id.* at 73-77.
46. *Id.* at 79-85 (Thomas, J., dissenting).
47. *Id.* at 81-82 (Thomas, J., dissenting).
48. *Id.* at 84 (Thomas, J., dissenting).
49. *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 84-85.
50. 468 U.S. 883 (1984).

a handicapped child with clean intermittent catheterization (CIC) during school hours.[51] The Court held that catheterization every three hours was considered a related service because without it, the student could not attend classes and benefit from special education.[52]

The Court also established a bright-line test for related services in the medical context—the service must be a supportive service required to assist a handicapped child to benefit from special education and must not be excluded by definition as a medical service.[53] Although this test was used primarily in the medical context, future analysis of supportive services will rest on whether the service is required to allow a student to benefit from special education.[54]

2. Unreported Cases Elaborate on the Bounds of a "Related Service"

Unreported cases have dealt more specifically with the possibility of extending the definition of related services to cover audiovisual monitoring systems. In one such case, *J.T. v. Missouri State Board of Education*, the petitioners sought relief in the form of requesting that audiovisual recording systems be put in place to monitor their son in the classroom.[55] In that case, a student required stretching as part of his individual education plan (IEP), but his teachers failed to perform the stretching techniques.[56] This left the student consistently sitting in his wheelchair for the entirety of the school day, ultimately resulting in his body conforming to the shape of the chair.[57] Because this case only dealt with a motion for summary judgment, the court, sitting in the Eastern District of Missouri, did not rule on the ultimate issue of whether the school would be required to implement a surveillance system. Rather, the court stated that it could not conclude as a matter of law (based on the

51. *Id.* at 885.

52. *Id.* at 890. The Court held that CIC services "are no less related to the effort to educate than are services that enable a child to reach, enter, or exit a school." *Id.* at 891.

53. *Id.* at 890.

54. The current cases considering audiovisual monitoring as a related service do not decide whether it would be appropriate in each case, but decide only whether summary judgment is appropriate based on the facts alleged. However, the cases all contain language to the effect of "this Court may order audiovisual monitoring of Plaintiff if the monitoring assists in providing Plaintiff with special education and related services." C v. Missouri State Bd. of Educ., No. 4:08CV1853, 2009 U.S. Dist. LEXIS 81625, at *17 (E.D. Mo. Sept. 8, 2009).

55. No. 4:08CV1431RWS, 2009 U.S. Dist. LEXIS 7864, at *16 (E.D. Mo. Feb. 4, 2009).

56. *Id.* at *3.

57. *Id.*

record in this case) that the requested relief, namely a surveillance system, would not provide the student with a service intended to assist him to receive special education.[58] The court further held that "the IDEA does not specify the type of relief available except that it must be 'appropriate' in light of the purpose of the IDEA."[59] The court determined that this means a judicial body "may order audiovisual monitoring of a student if the monitoring assists in providing that student with special education and related services."[60]

In fact, the case of *J.T.* is strikingly similar to several other federal cases arising from the Eastern District of Missouri.[61] In total, four cases arose in the span of one year, all concerning students from the same school and all demanding the placement of audiovisual monitoring within public spaces in that school.[62] Unfortunately, each of these cases dealt with a motion for summary judgment, and thus no finding was made on the ultimate issue of whether allegations of abuse are sufficient to justify requiring the installation of a classroom surveillance system.[63]

D. Privacy Concerns

If surveillance were considered to constitute a related service under IDEA, it would most certainly trigger privacy concerns. In the preeminent privacy law case of *Katz v. United States*, Justice Harlan in his concurrence wrote that an expectation to a right of privacy must be

58. *Id.* at *20.

59. *Id.* at *18.

60. *Id.*

61. *See* B.A. v. Missouri, No. 4:09CV1269, 2010 WL 1254655 (E.D. Mo. Mar. 24, 2010) (detailing case of a student at the Mapaville State School for the Severely Handicapped who alleged that verbal and physical abuse and neglect deprived him of a free and appropriate public education); *see also* C. v. Missouri State Bd. Of Educ., No. 4:08CV1853HEA, 2009 U.S. Dist. LEXIS 81604 (E.D. Mo. 2009) (alleging oral and physical abuse of students at Mapaville State School for the Severely Handicapped where lack of supervision resulted in a meaningless and trivial education); C.S. v. Missouri State Bd. Of Educ., 656 F. Supp. 2d 1007 (E.D. Mo. 2009) (outlining the case of a student at Mapaville State School for the Severely Handicapped who was subjected to oral and physical abuse and neglect at the school); J.T. v. Mo. State Bd. Of Edu., No. 4:08CV1431RWS, 2009 U.S. Dist. LEXIS 7864 (E.D. Mo. Feb. 4, 2009) (describing the case of a severely disabled student attending Mapaville State School for the Severely Handicapped and alleging the school failed to provide the stretching techniques outlined in his IEP, provided inadequate supervision, and was guilty of profound incompetence and neglect).

62. *See supra* note 61.

63. *See supra* note 61.

one that "society is prepared to recognize."[64] Because the surveillance would occur in public school classrooms, and because the cameras would be primarily placed with the purpose of detecting teacher abuse, any right to privacy of the teacher must be examined. The right to privacy, if any exists, of a teacher in his or her classroom has been interpreted to be severely limited.[65] In *Plock v. Board of Education*, a federal court in Illinois held that a teacher could not have a reasonable expectation of privacy throughout his entire classroom because the room was not solely reserved for the "teacher's exclusive, private use."[66]

However, the teacher is not the only individual that may have a right to privacy in the classroom. When considering video surveillance in a public school setting, the privacy concerns of the students must also be taken into account. The Family Educational Rights and Privacy Act (FERPA) was enacted in 1974 due to an overwhelming concern over the recordkeeping practices of schools.[67] FERPA provides that "no funds shall be made available under any applicable program to any educational institution which has a policy of denying, or which effectively prevents, the parents . . . the right to inspect and review the education records of their children."[68] This Act also provides that where the records contain information on more than one student, the parent only has the right to inspect or to be informed on the part of such material that relates to his or her student.[69] The ramifications of this Act must be considered where audiovisual surveillance could create, in effect, student records requiring special consideration as to who has the right to review the recordings.[70] Before these records can be created, however, it must be determined whether audiovisual monitoring can in fact constitute a related service under IDEA.

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64. 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating that the placement of wiretaps in public telephone booths violated the reasonable expectation of privacy upon which the defendant justifiably relied).

65. *See, e.g.*, Plock v. Bd. of Educ., 545 F. Supp. 2d 755 (N.D. Ill. 2007) (holding special education teachers have no reasonable expectation of privacy in communications in their classrooms and thus the proposed audio monitoring of their classrooms through audiovisual equipment would not violate the Fourth Amendment); *see also* Roberts v. Hous. Indep. Sch. Dist., 788 S.W.2d 107 (Tex. Ct. App. 1990) (finding a teacher did not have a reasonable expectation of privacy in her classroom such that videotaping would violate that privacy right).

66. *Plock*, 545 F. Supp. 2d at 757.

67. JAMES A. RAPP, EDUCATION LAW, Ch. 13, (Matthew Bender & Co. Inc. 2012).

68. Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232g (1)(A) (West 2013).

69. *Id.*

70. IDEA requires that only qualified individuals may review educational records. *See infra* note 83.

III. ANALYSIS

A. Audiovisual Surveillance as a Related Service Under IDEA

When determining whether special needs students' particularly exploitable vulnerabilities necessitate audiovisual monitoring of their classrooms, it is important to consider all the possible ramifications of such an action. Whether they are effectively being denied access to a free and appropriate education must be analyzed in context.[71] This requires first determining whether Congress (and subsequent judicial interpretation) intended such a remedy to be available.

In *Cedar Rapids Community School District v. Garret F.*, Justice Thomas, in a dissent joined by Justice Kennedy, argued that the Court had gone too far in expanding the definition of a related service and that this expansion impermissibly exceeded the bounds of what Congress intended the statute to require.[72] One argument in particular that could apply to the idea of mandatory installation of audiovisual equipment is Thomas's careful stressing of the fact that "Congress enacted IDEA to increase the *educational* opportunities available to disabled children."[73] Because the main concern in *Cedar Rapids* was whether the service constituted a "medical service" under the statute,[74] the analysis is somewhat flawed when applying it to a mandatory monitoring system. However, under Justice Thomas's view, monitoring would probably not be considered a required related service because it is not strictly educational in nature.

In accordance with the Act, students must be given access to a free and appropriate education[75] and not necessarily the best education possible under the circumstances. In addition, Thomas's argument that Congress consciously made the decision to include some things but not others when it defined the bounds of related services lends credence to

71. *See* Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400(d)(1)(A) (West 2013) (declaring that the purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education . . .").

72. Cedar Rapids Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 80 (1999) (Thomas, J., dissenting).

73. *Id.* at 82 (emphasis added).

74. In *Cedar Rapids*, the Court had to determine whether the definition of related services under IDEA required a public school to provide nursing services to a ventilator-dependent student during school hours. Because IDEA specifically excludes medical services from being covered under the Act, the bulk of the Court's analysis was spent determining whether this nursing service fit within that exemption. *Id.*

75. *See* 20 U.S.C.A. § 1400(d)(1)(A) (West 2013) (declaring that the purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education . . .").

the idea that if Congress had intended extra services (such as audiovisual monitoring) to be included under the statute, it would have stated so explicitly.[76] Running counter to his argument, however, is the fact that the very thing the plaintiffs in these cases allege is the denial of a free, appropriate education.[77] The abuse, neglect, and failure to follow the IEPs put in place by the school are alleged to deprive the student of his rights under IDEA.[78]

B. The Costs of Allowing Audiovisual Surveillance as a Related Service Under IDEA

The Thomas dissent also raises the specter of Congress's spending power as well as the issue of states' rights.[79] Thomas concluded that because IDEA was enacted utilizing Congress's spending power, it amounts to a contract between the federal government and the states.[80] This contract, he contends, must be narrowly construed "in order to avoid saddling the [s]tates with obligations that they did not anticipate."[81] This argument seems more congruent with how the Supreme Court might view audiovisual monitoring, if such a case were brought before it. This type of monitoring comes at significant expense, which the states would be forced to pay if monitoring were concluded to be a "related service."[82] In addition to the upfront costs of actually installing the surveillance equipment in every classroom and public hallway are the costs associated with the continuous monitoring of the video feed by qualified

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76. *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 82. In the context of the medical services being discussed in this case, Justice Thomas argued that "where Congress decided to require a supportive service . . . that appears 'medical' in nature, it took care to do so explicitly. . . . Indeed, when it crafted the definition of related services, Congress could have, but chose not to, include 'nursing services' in this list." *Id.*

77. *See generally* 20 U.S.C.A. § 1400(d)(1)(A) (declaring that the purpose of IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education . . .").

78. *See generally id.*

79. *Cedar Rapids Cmty. Sch. Dist.*, 526 U.S. at 83.

80. *Id.* at 84.

81. *Id.*

82. Exact figures for this type of project are hard to determine. However, in a recent article about retrofitting area buses with audio/visual surveillance systems, the Rockford Mass Transit District disclosed that it cost $7,400 to install the equipment in each of its vehicles. While not completely analogous to retrofitting classrooms with similar equipment, it is apparent from this number that creating a monitoring system in schools would be a pricey endeavor. Susan Johnson, *RMTD Buses Install Audio/Video Monitoring*, THE ROCK RIVER TIMES, April 25 - May 1, 2012, http://rockrivertimes.com/wpapp/news/2012/04/25/rmtd-buses-install-audiovideo-monitoring/.

personnel.[83] However, it is important to note that, to date, the Court has never seen excessive costs as a barrier to requiring a service to be provided if the Court were to find it was covered by IDEA.[84]

Lastly, Thomas's dissent seems to blend cohesively with the stated legislative intent of IDEA espoused by the Court in *Board of Education of the Hendrick Hudson Center School District v. Rowley*.[85] There, the Court's claims that Congress did not intend to impose greater burdens on the states directly coincides with Thomas's argument for construing the statute narrowly.[86] These views create the impression that if the Court were asked to rule on the issue of audiovisual monitoring today, it could rely on these principles to deny parents' demand for more oversight in the schools. However, other Supreme Court decisions show that the analysis may not be so cut and dry.[87]

C. Applying the Tatro Test for Related Services

The Court in *Irving Independent School District v. Tatro* established a bright-line test that alleged related services must meet in order to be deemed appropriate under IDEA.[88] Although the test was developed primarily to deal with issues in the medical setting, it is useful in a preliminary manner to classify all potential claims. If potential claims for services do not meet the standard articulated by the Supreme Court in *Tatro,* they cannot be considered a related service under IDEA.[89] The *Tatro* test asks two central questions: (1) is the service a supportive service required to assist a handicapped child to benefit from special education, and if so, (2) is it already explicitly excluded by Congress as a medical service?[90] The second aspect of this test is easily satisfied when dealing with abused disabled children such as in the present case. There

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83. "Unlike FERPA, IDEA requires that persons collecting or using education records are to receive training or instruction regarding proper policies and procedures regarding such records." JAMES A. RAPP, EDUCATION LAW (Matthew Bender & Co. Inc. 2012).

84. *See* Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984). Providing catheterization services to a student was found to be a required service under IDEA and thus the Court required the school to provide the service regardless of the incredibly high costs associated with such a mandate.

85. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist., v. Rowley, 458 U.S. 176 (1982).

86. *Id.* at 176-79.

87. *See Tatro*, 468 U.S. at 883 (holding that the school district must provide clean intermittent catheterization as a related service under the Education of the Handicapped Act).

88. *Id.* at 890.

89. *Id.*

90. *Id.*

is no dispute that monitoring systems do not constitute medical services under IDEA.[91] The first element of this test is slightly more ambiguous and provides an opportunity for future policy to be shaped by judicial interpretation.[92]

There is little doubt that monitoring classrooms to prevent child abuse would assist children in benefitting from special education.[93] The question in dispute becomes whether the service constitutes a *required supportive service*.[94] Parents dealing with these types of cases argue that inadequate supervision, and in many cases actual physical abuse, deny their children the reasonable accommodations needed to allow the child the ability to fully benefit from his or her public education programs.[95] Specifically, a common assertion is that requiring surveillance would constitute a reasonable accommodation because the child's inability to communicate any abuse or neglect denies them the right to the free and appropriate education mandated by IDEA.[96] This claim seems to satisfy the *Tatro* test,[97] and in the few cases asking for this relief, the courts seem to agree.[98]

D. Costs of Denying Classroom Monitoring as a Related Service

While a limited number of cases exist asking for this specific type of relief, the few that have addressed the issue agree that judges cannot

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91. Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1450 (West 2013).

92. Because IDEA only defines "related services" in terms of encompassing necessary "supportive services," but then fails to define the second term at all, the door is open for courts to develop their own interpretation of what they believe Congress intended to include. This lack of a definitive list of supportive services means that as the problems and challenges facing children covered by the act continue to expand, judicial bodies have the latitude to expand the definition as they see fit, allowing the act to change with the times.

93. The Missouri cases show this principle. Each case requested audiovisual monitoring as relief in order to provide the students access to a "meaningful education." *See generally* C v. Mo. State Bd. of Educ., No. 4:08CV1853, 2009 U.S. Dist. LEXIS 81604 (E.D. Mo. Sept. 8, 2009).

94. Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 890 (1984).

95. J.T. v. Mo. State Bd. Of Edu., No. 4:08CV1431, 2009 U.S. Dist. LEXIS 7864, at *9 (E.D. Mo. Feb. 4, 2009).

96. *Id.* at *24.

97. *Tatro*, 468 U.S. at 890.

98. Each of the four cases allows that audiovisual monitoring *may* be allowable relief under the IDEA depending on the facts of a particular case. One court stated, "I cannot conclude as a matter of law that the requested surveillance would not provide J.T. with a service calculated to assist him in receiving special education." *J.T.*, 2009 U.S. Dist. LEXIS 7864, at *20; *see also B.A.*, 2010 WL 1254655, at *15; C.S. v. Missouri, 670 F. Supp. 2d 972, 985 (E.D. Mo. 2009); *C*, 2009 U.S. Dist. LEXIS 81625, at *19-20.

categorically deny the validity of monitoring systems as a potential form of relief.[99] The problem then, may lie not in the refusal of the judiciary to recognize the need for this type of relief, but rather the painstaking process families must go through in order to obtain a declaration that their requests are valid.[100] Four Missouri cases provide a case study on the current administrative system's systematic denial of relief.[101] Each case alleges abuse and neglect of special needs students attending the same state school for the severely handicapped, Mapaville State School.[102] The barrage of recent cases making their way into the media illustrates the fact that the situation at Mapaville is not unique.[103]

In studying the Mapaville cases, the failure to recognize the need for a monitoring system at each step of the administrative process can provide insight into the challenges parents are facing on a national scale. Each of these cases went first to an administrative hearing where the Chief Hearing Officers (CHOs) unanimously denied audiovisual surveillance as an appropriate remedy.[104] In fact, in *C v. Missouri State Board of Education*, the CHO granted summary judgment for the school solely due to the fact he found that audio/visual monitoring can never constitute appropriate relief within the meaning of the IDEA.[105] In every one of these cases, summary judgment was granted in favor of the school

99. *See supra* note 98.

100. In one case, the Chief Hearing Officer (CHO) granted a motion for summary judgment for the school, not because he found abuse did not occur, but because he thought the requested relief was inappropriate. The parents then had to appeal the decision to the courts and are still waiting for a final determination of their claim. *See C*, 2009 U.S. Dist. LEXIS 81625, at *31-32.

101. *See supra* note 61.

102. All four plaintiffs attended Mapaville State School for the Severely Handicapped, and each of the complaints alleged systematic problems within the school. One complainant "alleges his experience at Mapaville is not abnormal because Mapaville's inadequacies are systemic. Staff are unsupervised and unaccountable for their failures to effectuate IEP goals or otherwise treat the students with human dignity." *J.T.*, 2009 U.S. Dist. LEXIS 7864, at *4. *See also B.A.*, 2010 U.S. Dist. LEXIS 28054; *C.S.*, 670 F. Supp. 2d at 972; *C*, 2009 U.S. Dist. LEXIS 81625.

103. *See* Akins, *supra* note 5.

104. *See J.T.*, 2009 U.S. Dist. LEXIS 7864, at *5-6 (denying requested relief); *B.A.*, 2010 U.S. Dist. LEXIS 28054, at *5; *C.S.*, 670 F. Supp. 2d at 977; *C*, 2009 U.S. Dist. LEXIS 81625, at *5.

105. *C.*, 2009 U.S. Dist. LEXIS 81625, at *5. The exact language the CHO used when explaining why he denied summary judgment was that he did so "on the sole ground that, categorically, under any circumstances, audio/visual monitoring is not 'appropriate relief' under the IDEA." *Id.*

and audiovisual monitoring relief was denied as inappropriate under the IDEA.[106]

The parents, left with few options, brought their claims to federal court.[107] The school once again argued for summary judgment by virtue of its insistence that audio/visual monitoring could never be required under IDEA.[108] Future cases cannot rely on these decisions as a guidepost, however, because not only are they unreported, but each decision was written at the summary judgment stage.[109] Rather than an affirmation that schools can be required to install monitoring systems, the cases instead merely find that, "based on the record, the court cannot conclude as a matter of law that the requested surveillance would not provide Plaintiff with a service calculated to assist him in receiving special education."[110]

E. Arguments for Legislative Action to Clarify the Relief Allowed under IDEA

In light of the constant stream of cases alleging the mistreatment of special needs students in schools,[111] the legislature should act to clarify the appropriate scope of relief under IDEA. Congress should do so by stating unambiguously that classroom surveillance can be required as part of a child's IEP when requested by a parent/guardian. This would clarify the situation for the courts as well as for the numerous administrative officials who are erroneously throwing out cases with valid claims requesting legally permissible relief.[112] Legislative action would also minimize needless congestion of the court system with claims that could be handled more expediently at the administrative level. Once the administrative CHOs begin properly applying the law, courts will be less likely to be drawn into this struggle, the result being that hearings can once again refocus on the specific facts alleged and whether the claims justify relief.

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106. *J.T.*, 2009 U.S. Dist. LEXIS 7864, at *5-6 (denying requested relief); *B.A.*, 2010 U.S. Dist. LEXIS 28054, at *5; *C.S.*, 670 F. Supp. 2d at 977; *C*, 2009 U.S. Dist. LEXIS 81625, at *5.

107. *See, e.g.*, *C*, 2009 U.S. Dist. LEXIS 81625.

108. *Id.* at *5.

109. *See supra* note 102.

110. *See, e.g.*, *C*, 2009 U.S. Dist. LEXIS 81625 at *19-20.

111. *See* Ng, *supra* note 1.

112. *See C*, 2009 U.S. Dist. LEXIS 81625, at *5 (granting summary judgment for defendant based on the CHO's invalid assumption that audiovisual monitoring could never be required under the IDEA).

F. Privacy Concerns when Creating Surveillance Tapes

Audiovisual monitoring may be the easiest way to detect teacher abuse, but the creation of videotapes recording a classroom's occupants provides significant concerns for the privacy of the individuals involved. Numerous courts have recognized the inherently intrusive nature of video surveillance and the immediate negative response individuals feel when they discover they have been under such surveillance.[113] Although it is evident from case law that a teacher does not have an expectation of privacy in his classroom,[114] privacy concerns of the students are not quite as clear.[115] In each of the cases presented, one particular student's rights were at issue. However, even when the monitoring is put in place at the impetus of a particular individual, every student in the classroom will necessarily be monitored in the exact same way. Although the privacy rights of students are limited in some respects while they are in a public school, their constitutional rights do not disappear.[116] When this surveillance occurs, videotape is created and it becomes a student record requiring specific and careful consideration under FERPA.[117]

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113. Brannum v. Overton Cnty. Sch. Bd., 516 F.3d 489, 496 (6th Cir. 2008); *see also* United States v. Anderson-Bagshaw, 509 F. App'x 396, 421 (6th Cir. 2012) (stating that "covert video surveillance is a severe intrusion into a person's privacy expectations, which provokes an immediate negative visceral reaction, and, raises the spectre of the Orwellian state" (quoting United States v. Cuevas-Sanchez, 821 F.2d 248, 251 (5th Cir. 1987))).

114. *See* Plock v. Bd. Of Educ., 545 F. Supp. 2d 755 (N.D. Ill. 2007).

115. *See id.* (finding no expectation of privacy for teachers within their classrooms that would prevent installation of audiovisual equipment).

116. *See* Doe v. Little Rock Sch. Dist., 380 F.3d 349, 353 (8th Cir. 2004) (finding that "schoolchildren are entitled to expect some degree of privacy in the personal items that they bring to school" and that "[p]ublic school students' privacy interests . . . are not nonexistent"); *see also Brannum*, 516 F.3d at 494 (holding students have a legitimate expectation of privacy in the locker room setting and that "the privacy right involved here is one protected by the Fourth Amendment's guarantee against unreasonable searches, and that in this case, the defendants violated the students' rights under the amendment"). This conclusion shows that any analysis of surveillance in the classroom must necessarily meet the standards established under the Fourth Amendment to protect citizens from unreasonable search and seizure.

117. Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232(g) (West 2013); *see also* RAPP, *supra* note 67, at § 13.04[7]. The author states, "[a]n 'education record' is, first of all, a 'record'. Under FERPA, a 'record' is 'any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche'" *Id.*

1. FERPA Allows the Educational Records to Remain Private While Providing Monitoring for Unsafe Situations

FERPA requires that parents be given the right to inspect their student's education records while also limiting that parent's review to the portion of the record that relates to his or her own child.[118] As the world continues moving firmly into the technological age, the scope of student records has only increased. As these records become more voluminous, concerns that the records could be used to invade a student's privacy as well as fears that the confidential information might be used in a way that causes harm to the student, will rise.[119] Schools are increasingly recognizing that there are situations in which information should be shared due to safety concerns of both the school as well as the larger community.[120] While in most cases this might mean sharing student records to prevent student-committed crimes, it could also be taken to mean that educational records must be shared when the safety of the students themselves is at risk.

FERPA places another restriction on the release of student records.[121] The Congressional policy behind FERPA shows that "a party seeking to access student records must demonstrate a genuine need for the information sought, which must outweigh the privacy interests of the students."[122] These guideposts provide some assurance that even with the creation of audiovisual records of students, the records will only be viewed by those who have met the strict standards set under FERPA. Further, only community safety is seen as a need of great enough import to supersede FERPA protections and allow disclosure of the records to an outside source.[123]

2. Allowing Record Sharing Under FERPA

Creation of audiovisual records for the purpose of supervising classrooms and monitoring teacher performance also seems to fit with the trend towards opening records to appropriate sources.[124] "Rather than

118. 20 U.S.C.A. § 1232(g) (West 2013); *see also* RAPP, *supra* note 67, at § 13.04[1] (stating that student records are defined as "documents or other materials maintained by an educational agency or institution that contain information directly related to individual students").

119. RAPP, *supra* note 67, at § 13.04[1].

120. *Id.*

121. RAPP, *supra* note 67, at § 13.04[2][c][ii].

122. *Id.*

123. *Id.*

124. *Id.*

promote information territorialism, the trend is to open records in some circumstances to better assure that needed services and supervision will be provided and to increase school and community safety."[125] This information sharing, although limited to these specific circumstances where safety is an issue, will better serve students and preserve the welfare of the entire community.[126]

FERPA provides a baseline level of privacy upon which students and their parents are entitled to rely. There are limited exceptions to this privacy, however. The Developmental Disabilities Assistance and Bill of Rights Act[127] provides just that kind of exception. This Act allows advocacy agencies general authority to investigate reported incidents of abuse and neglect, or situations in which there is probable cause to believe such an incident has occurred.[128]

One issue with student records under IDEA is that the Act provides that the educational institution has to allow the parents of a disabled child the opportunity to access all records that relate to the student's educational placement.[129] By creating more records of the children in these special needs classrooms, the school would necessarily be opening up these records for review by concerned parents or guardians. Because the very reason the records are needed is due to the parent's suspicion the school is failing to comply with the requirements of federal law,[130] it should not be surprising that these records would be open for parent review. By following the directives set forth in both FERPA as well as IDEA itself, parents and schools alike can be reasonably assured that the privacy of these students is being protected. In addition, "unlike FERPA, IDEA requires that persons collecting or using education records are to

125. *Id.*

126. *Id.*

127. The Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C.A. § 15001 (West 2013).

128. RAPP, *supra* note 67, at [3][g]. Once again, student privacy is seen as vitally important and is only outweighed by allegations of abuse or neglect.

129. Individuals with Disabilities Education Act, 20 U.S.C.A. § 1415(b)(1) (West 2013). The school must provide "an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." *Id.*

130. There is evidence schools are failing to follow the IEPs of the special needs children placed into their care, which are mandated under IDEA. Failing to follow these programs can have dire consequences for the children being deprived of the education Congress intended. In the case of one plaintiff, the school's failure to implement stretching exercises in accordance with his IEP resulted in regression of his gross motor skills, regression in general flexibility, and regression of cognitive and language skills. *See* J.T. v. Mo. State Bd. Educ., No. 4:08CV1431RWS, 2009 U.S. Dist. LEXIS 7864, at *3-5 (E.D. Mo. Feb. 4, 2009).

receive training or instructions regarding proper policies and procedures regarding such records."[131] This lessens the concern that the records will be handled improperly or will be viewed by unqualified individuals. Privacy concerns, while valid, are outweighed by the need to provide for the safety and welfare of the students.

IV. CONCLUSION

When parents are fearful of sending their children to school because they no longer trust the educators to provide for their child's care, the system has failed. No parent should feel that his only option is to strap a recording device to his child's body to determine what kinds of indignities his child is suffering at the hands of an abusive teacher and an unresponsive school system.[132] Special needs children are particularly vulnerable due to their difficulties with communication, and without cameras in the classroom, there may be no way to detect or prevent these acts.

Luckily for these children, IDEA provides for the provision of certain services, enabling them to take full advantage of their right to a free and appropriate education. Courts, however, have been hesitant to extend this definition to cover the installation of audiovisual equipment in the classroom. Numerous court battles have ensued, wasting both time and valuable resources debating whether this surveillance could be considered a related service under the Act. This judicial ineconomy, caused by statutory ambiguity, needs to be rectified. Congress must act to clarify the matter, and explicitly state that audiovisual equipment can be a required related service under IDEA. By amending the Act in this manner, courts will be able to refocus on determining whether the facts in specific cases justify relief, rather than spending considerable judicial resources questioning if the requested relief is even a permissible remedy. More importantly, parents, like Mr. Chaiftez, will be granted the peace of mind that comes with knowing that proper oversight is in place, and students, like Akian, will be spared the embarrassment and heartache that come with being the victim of abuse.

131. RAPP, *supra* note 67, at [4][b].
132. *See generally* Hibbard, *supra* note 7.