

10-1-2016

## Making the Grade: School-Based Telemedicine and Parental Consent

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### Recommended Citation

Emily G. Narum, *Making the Grade: School-Based Telemedicine and Parental Consent*, 53 SAN DIEGO L. REV. 745 (2016).  
Available at: <https://digital.sandiego.edu/sdlr/vol53/iss3/7>

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# Making the Grade: School-Based Telemedicine and Parental Consent

EMILY G. NARUM\*

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\* © 2016 Emily G. Narum. J.D. 2017 Candidate, University of San Diego; B.S. 2013, Family Human Services, University of Oregon. I would like to express my thanks to my editor Hannah Brown and to each member of the San Diego Law Review. Thank you to Jon for your support. Thank you to my grandparents, J. & J. Pike for allowing me to commandeer your dining room table while writing this Comment.

## I. INTRODUCTION

“Quality health care no longer requires a health care provider and a patient to be in the same room at the same time.”<sup>1</sup> Apparently, with the introduction of telemedicine in schools—enabling physicians to treat and diagnose patients from hundreds of miles away through video conferencing technology<sup>2</sup>—a child’s parent does not need to be in the room either.<sup>3</sup>

Imagine Grace, a ten-year-old fourth grader, whose mother signed a form at the beginning of the school year permitting Grace to receive telemedicine services while at school. Months later, Grace is at school and experiences itching and discomfort in her genital area.<sup>4</sup> Grace’s teacher, noticing Grace’s discomfort, escorts her to the school nurse. The nurse believes Grace might have a yeast infection or some other rash,<sup>5</sup> and contacts a doctor Grace has never met before to conduct a visual exam of Grace’s genital area via telemedicine. The exam, which takes place in the school nurse’s office, requires Grace to undress while the nurse uses a camera to transmit live video to the doctor. After a ten-minute examination, the doctor assures the nurse that Grace is fine and sends her back to class.

Grace’s mother learns about the examination from Grace after school and is outraged by what she feels is an invasion of Grace’s privacy. Moreover, she believes the exam is a violation of her own right to consent to and manage Grace’s medical treatment. Grace’s mother claims that she never would have signed the medical treatment form permitting such personal inspections without prior notification from the school. Parental

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1. *Meeting the Health Care Needs of California’s Children: The Role of Telemedicine*, CHILDREN’S P’SHIP 1 (Mar. 2008), [http://www.childrenspartnership.org/wp-content/uploads/2016/06/Meeting-the-Health-Care-Needs-of-Californias-Children%E2%80%9494The-Role-of-Telemedicine\\_March-2008.pdf](http://www.childrenspartnership.org/wp-content/uploads/2016/06/Meeting-the-Health-Care-Needs-of-Californias-Children%E2%80%9494The-Role-of-Telemedicine_March-2008.pdf) [<https://perma.cc/7K5M-DWXQ>].

2. “Telemedicine” and “telehealth” have been used interchangeably. However, telemedicine “refers specifically to the provision of health care services and education over a distance, through the use of telecommunications technology[.]” while “[t]elehealth is a broad term used to refer to the provision of health care services, health care education and health information services at a distance.” *Telehealth, Telecare and Telemedicine. . . What’s the Difference?*, GLOBALMED, <http://archive-com.com/page/2998316/2013-10-10/http://www.globalmed.com/additional-resources/telehealth-telecare-and-telemedicine-whats-the-difference.php> (last visited July 29, 2016).

3. *Georgia Partnership for Telehealth Joins GaHIN to Improve Care at School Clinics*, GA. HEALTH INFO. NETWORK (June 3, 2015) [hereinafter *Georgia Telehealth*], <http://www.gahin.org/media/press-release/georgia-partnership-telehealth-joins-gahin-improve-care-school-clinics> [<https://perma.cc/44GT-CCBS>].

4. Although Grace’s character is hypothetical, her experience is not. *See* *Hearing v. Sliwowski*, 712 F.3d 275, 277 (6th Cir. 2013).

5. For more information on telemedicine providers that solicit the diagnosis and treatment of yeast infections and UTI’s see *Tele-Urology*, TELESPECIALISTS, <http://www.tele-specialists.com/tele-urology.php> [<https://perma.cc/XX7G-8XTA>] (last visited July 29, 2016).

consent to these specific telemedicine services is foundational to children's Fourth Amendment rights to be free from unreasonable searches,<sup>6</sup> and to parents' rights under substantive due process provided by the Fourteenth Amendment.<sup>7</sup> Current state laws, however, do not adequately protect these rights.

Questions of parental consent regarding school-based telemedicine services have been asked and unanswered.<sup>8</sup> As schools implement telemedicine programs, they greatly expand the range and type of health care services offered to children.<sup>9</sup> The issue of consent arises because—before a child may receive any telemedicine services—parents must sign consent forms that are vague, ambiguous, and do not adequately describe or anticipate the broad scope and type of medical services that may be administered to students. Because the consent forms are vague, parents are under-informed about what types of services may in fact be provided to their children. As this Comment will address, providing medical services that reach beyond parental consent raises multiple constitutional issues.

This Comment advocates for a uniform state-by-state regulation, requiring schools to obtain parental consent immediately before any telemedicine service is provided to their children at school. Alternatively, the constitutional issues could be eliminated if telemedicine consent forms enumerate a finite and limited list of what medical services may be provided. These reforms will ensure not only that parents' and children's constitutional rights are protected, but also that schools and doctors provide the most informed health care services. Part II describes a background of school-based health, as well as the benefits and risks of offering telemedicine in schools. Part III explains the Fourteenth Amendment constitutional right of parents to

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6. See *Hearing*, 712 F.3d 275, 281–83 (6th Cir. 2013) (holding that a school nurse who conducted a visual exam of a six year-old student's genitals was entitled to qualified immunity because existing precedent did not warn the nurse that her medical assessments were subject to the Fourth Amendment's reasonableness requirement).

7. U.S. CONST. amend. XIV § 1.

8. See Bradley J. Kaspar, *Legislating for a New Age in Medicine: Defining the Telemedicine Standard of Care to Improve Healthcare in Iowa*, 99 IOWA L. REV. 839, 842 (2014) (“What risks associated with telemedicine does the physician need to disclose to the patient—or the child’s guardian in this example—before treating her?”); Tara Garcia Mathewson, *Privacy Laws Could See Overhaul on Campuses*, EDUC. DIVE (July 2, 2015), <http://www.educationdive.com/news/privacy-laws-could-see-overhaul-on-campuses/401192/> [<https://perma.cc/RP9P-JK43>].

9. See NAT'L ASS'N OF SCH. NURSES, THE USE OF TELEHEALTH IN SCHOOLS (2012), <http://www.nasn.org/PolicyAdvocacy/PositionPapersandReports/NASNPositionStatementsFullView/tabid/462/smId/824/ArticleID/52/Default.aspx> [<https://perma.cc/Z89M-7WNG>].

control and manage the health care of their minor children, and the Fourth Amendment right of children to be free from unreasonable searches and seizures. Part IV argues that states that do not require immediate parental consent before providing telemedicine services violate the Constitution because telemedicine parental consent forms are too vague and ambiguous and therefore do not adequately protect the rights of parents to control the medical care of their children. The section compares various state laws and regulations regarding telemedicine and highlights the lack of legislation protecting the right of parents to consent to medical treatment.

This Comment ultimately argues that states should implement a uniform standard that requires schools to contact parents immediately before administering any telemedicine services, or alternatively, that requires states to provide telemedicine consent forms with a restricted, limited list of telemedicine services that the school may provide.

## II. SCHOOL-BASED TELEMEDICINE

The use of medicine in schools began in 1903 with the goal of managing contagious conditions that kept children out of school.<sup>10</sup> The nation's first school nurse, Lina Suthers, asserted that the goal of school medicine was "keeping the children in the classroom and under treatment."<sup>11</sup> Since then, the primary purpose of school medicine has been to ensure immunization compliance, screen for vision and hearing impairments, and refer students to physicians for diagnosis and prescriptions for other illnesses.<sup>12</sup> Over time, case law, legislation, and other regulations have expanded the kind and range of health care available at school.<sup>13</sup> Generally, teachers and other qualified school personnel may administer prescription medication to a student only with previously written parental consent.<sup>14</sup> Many states also

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10. ROBERT WOOD JOHNSON FOUND., CHARTING NURSING'S FUTURE 2-3 (Aug. 2010), [http://www.rwjf.org/content/dam/farm/reports/issue\\_briefs/2010/rwjf64263](http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2010/rwjf64263) [<https://perma.cc/533P-KJ3D>]. Other articles have cited the beginning of school medicine as 1902. Sarah D. Cohn, *Legal Issues in School Nursing Practice*, 12 J.L. MED. & ETHICS 219, 219 (1984).

11. ROBERT WOOD JOHNSON FOUND., *supra* note 10, at 3.

12. *Id.* at 2.

13. See Charles J. Russo & David A. Dolph, *School Nurses: On the Front Line of Keeping Students Healthy*, 293 EDUC. LAW REP. 1 (2013) (discussing how the responsibilities of school nurses have changed over time).

14. See, e.g., CAL. EDUC. CODE § 49423 (West 2016) (permitting school personnel to assist students in the administration of an epinephrine prescription so long as there is written statements from the doctor and parent authorizing such assistance); WASH. REV. CODE ANN. § 28A.210.260 (West 2016) (authorizing school nurses and other trained personnel to administer specified medications, so long as the "public school district or private school is in receipt of a written, current and unexpired request from a parent"); *Am. Nurses Ass'n v. Torlakson*, 304 P.3d 1038, 1041 (Cal. 2013).

require parental consent each time the school nurse administers over-the-counter medication such as Advil or Tylenol.<sup>15</sup>

The role of school-based health care has expanded dramatically with the introduction of telemedicine.<sup>16</sup> Telemedicine is a method of providing medical services by connecting health care providers and patients using two-way video, e-mail, phones, and other forms of communication technology.<sup>17</sup> The development of telemedicine launched with the space program in the 1960s, when The National Aeronautics and Space Administration (NASA) began using telemedicine to monitor the medical condition of astronauts.<sup>18</sup> Today, there are approximately 200 telemedicine networks, providing services in over half of United States hospitals,<sup>19</sup> as well as schools, nursing homes, assisted living facilities, prisons, and many other patient sites.<sup>20</sup> Market research organizations have found that the telemedicine market growth rate has risen between 18%–30 % per year, and anticipate that the market will grow from 9.6 billion dollars in 2013 to 38.5 billion dollars in 2018.<sup>21</sup> However, telemedicine laws and regulations have struggled to keep up with the rapid growth.<sup>22</sup>

15. See, e.g., ALA. ADMIN. CODE r. 610-X-7-.02 (2016) (“Over-the-counter (OTC) medications may be administered to school children by the school nurse with a parent’s written authorization . . .”). Some parents have highlighted the inconvenience of regulations that require parental consent every time before an over-the-counter drug, such as Tylenol or Advil is administered. See Lisa Belkin, *Sending Drugs to School with Your Child*, N.Y. TIMES (Feb. 4, 2009, 1:06 PM), [http://parenting.blogs.nytimes.com/2009/02/04/sending-drugs-to-school-with-your-child/?\\_r=0](http://parenting.blogs.nytimes.com/2009/02/04/sending-drugs-to-school-with-your-child/?_r=0) [<https://perma.cc/PSL9-PNH6>].

16. See NAT’L ASS’N OF SCH. NURSES, *supra* note 9.

17. *What Is Telemedicine?*, AM. TELEMEDICINE ASS’N, <http://www.americantelemed.org/about-telemedicine/what-is-telemedicine#.VgbYxelSzzI> [<https://perma.cc/YMZ9-QA7H>] (last visited July 29, 2016); see, e.g., Abby Goodnough, *Modern Doctors’ House Calls: Skype Chat and Fast Diagnosis*, N.Y. TIMES, July 12, 2015, at A1.

18. Patricia C. Kuszler, *Telemedicine and Integrated HealthCare Delivery: Compounding Malpractice Liability*, 25 AM. J.L. & MED. 297, 300 (1999).

19. *Telemedicine Frequently Asked Questions (FAQs)*, AM. TELEMEDICINE ASS’N, <http://www.americantelemed.org/about-telemedicine/faqs#.Vd936-lSzzI> [<https://perma.cc/67J7-U4LT>] (last visited July 29, 2016).

20. Ryan J. Spaulding, Gary Doolittle & Deborah L. Swirczynski, *School-Based Telehealth*, in TELEMEDICINE TECHNICAL ASSISTANCE DOCUMENTS 267, 267 (Joseph Tracey ed., 2004), <https://www.nachc.com/client/getting.started.telemedicine.pdf>.

21. Krista Drobac, *2015: Another Unstoppable Year for Telehealth*, INSTITUTE FOR HEALTH CARE CONSUMERISM, [http://www.theihcc.com/en/communities/health\\_access\\_alternatives/2015-another-unstoppable-year-for-telehealth\\_i7gjbohl.html](http://www.theihcc.com/en/communities/health_access_alternatives/2015-another-unstoppable-year-for-telehealth_i7gjbohl.html) [<https://perma.cc/F63S-XSCE>] (last visited July 29, 2016).

22. Virginia Rowthorn & Diane Hoffman, *Legal Impediments to the Diffusion of Telemedicine*, 14 J. HEALTH CARE L. & POL’Y 1, 42 (2011) (“Telemedicine is moving ahead

In February 1998, TeleKidcare, a Kansas-based program out of the University of Kansas Medical School, became one of the first programs to provide telemedicine services in school health centers, marking the beginning of the expansion of school-based medical care.<sup>23</sup> From the program's start, TeleKidcare trained school nurses on the uses and protocols of telemedicine and linked those nurses with off-site physicians who provided the medical consultations for students.<sup>24</sup> Closely reflecting the creed of the nation's first school nurse,<sup>25</sup> advocates of school-based telemedicine state that the goal of telemedicine in schools is "to improve the seat time—the time spent learning in the classroom—and not being out for the doctor's appointments."<sup>26</sup>

Since the TeleKidcare pilot program, telemedicine has rapidly expanded in elementary, middle and high schools for a number of reasons.<sup>27</sup> Today, there are about twenty-five telemedicine programs that partner primary and secondary schools with local medical schools and hospitals, serving hundreds of schools across the country.<sup>28</sup> The development and cost-efficiency of technology has made telemedicine equipment more economically practical for schools to purchase and use.<sup>29</sup> Policy makers have also enthusiastically promoted telemedicine in schools because of a growing national sentiment that embraces and advocates health care as a social right.<sup>30</sup> In response to this sentiment, policy makers, politicians, and foundations have placed high importance on providing medical access to children who otherwise have little or no access to it.<sup>31</sup> These efforts have been directed not only towards

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on many fronts – the technology is there, the willingness of practitioners to provide and patients to accept telemedicine is there, and even the funding is there. However, in some ways, the law is not there.”)

23. Spaulding et al., *supra* note 20, at 270–71.

24. Gary C. Doolittle, Arthur R. Williams & David J. Cook, *An Estimation of Costs of a Pediatric Telemedicine Practice in Public Schools*, 41 MED. CARE 100, 101 (2003).

25. ROBERT WOOD JOHNSON FOUND., *supra* note 10, at 2.

26. Eric Wicklund, *Taking Telemedicine to School*, MOBI HEALTH NEWS (Aug. 25, 2015), <http://mobihealthnews.com/news/taking-telemedicine-school> [https://perma.cc/JL7H-UM83].

27. Doolittle et al., *supra* note 24, at 101.

28. Hallie Levine Sklar, *Telemedicine In Schools*, PARENTS, <http://www.parents.com/health/doctors/telemedicine-in-schools/> [https://perma.cc/QF75-RHNM] (last visited July 29, 2016); *see also* Adam Rubenfire, *Texas Allows Medicaid Funding for School Telemedicine Visits*, MOD. HEALTHCARE (Aug. 28, 2015), <http://www.modernhealthcare.com/article/20150828/NEWS/150829932> [https://perma.cc/WJE2-ZYBL].

29. *See* Sklar, *supra* note 28.

30. Doolittle, et al., *supra* note 24, at 101.

31. *See* Lindsey Leininger & Helen Levy, *Child Health and Access to Medical Care*, 25 FUTURE CHILD. 65, 79 (2015); *see also* CHILDREN'S P'SHIP, *supra* note 1, at 11 (“[T]here has been particular attention paid in the last couple of years to increasing access to health care for children by decreasing the number of uninsured children and by increasing

rural children who live in geographically isolated areas, but also towards children who live in overpopulated urban areas and are unable to receive regular medical treatment.<sup>32</sup>

Proponents of school-based telemedicine boast of its many benefits and its potential to meet the chronic illnesses and the behavioral and mental health issues that face many families today.<sup>33</sup> Indeed, numerous reports show that children are unhealthier today than ever before.<sup>34</sup> These reports advocate for affordable and accessible health care to combat the significant increase in children with chronic diseases such as obesity, asthma, and behavioral and developmental disorders such as autism and attention deficit disorder.<sup>35</sup>

One of the primary benefits associated with school-based telemedicine is the reduced amount of time parents must miss work to drive their children to the doctor's office.<sup>36</sup> In current school-based programs, schools simply require parents to sign a general consent form at the beginning of the school year, allowing their child to participate in the telemedicine program.<sup>37</sup> Many advocates of school-based telemedicine programs tell stories of children with working parents, who, because of telemedicine programs in schools, can Skype with a physician while sitting in the school nurse's office.<sup>38</sup> The school nurse and telemedicine physician may test the child for strep,

the number of and capacity of school-based health centers. . . . Telemedicine can also help school-based health centers meet the health care needs of the children they serve.”).

32. See Doolittle et al., *supra* note 24, at 101.

33. AM. TELEMEDICINE ASS'N, MEDICAID BEST PRACTICE SCHOOL-BASED TELEHEALTH 2 (July 2013), <http://www.amdtelemedicine.com/telemedicine-resources/documents/ATAstate-medicare-best-practice-school-based-telehealth.pdf> [https://perma.cc/2JWD-QPQY].

34. *The Health-e-Access Telemedicine Program*, ASS'N OF MATERNAL & CHILD HEALTH PROGRAMS 1–2 (2011), <http://www.amchp.org/programsandtopics/BestPractices/InnovationStation/ISDocs/Health-e-access-program.pdf>.

35. CHILDREN'S P'SHIP, *supra* note 1, at 1.

36. *Georgia Telehealth*, *supra* note 3 (“Students receive quality care without having to miss class. Parents don't have to leave work and lose wages to take their child to see the doctor. If a specialist visit is needed, it doesn't require hours in the car to reach a large healthcare center; the child can be examined right from the school clinic.”). For a discussion on the stress employed parents experience while managing a child's chronic illness, see Debra A. Major, *Utilizing Role Theory to Help Employed Parents Cope with Children's Chronic Illness*, 18 HEALTH EDUC. RES. 45, 54 (2003).

37. See *infra* p. 759 and note 90.

38. See Marsha Sills, *Telemedicine Clinic at Carencro School Helps Keep Students in Classroom*, ACADIANA ADVOCATE (Dec. 2, 2014, 4:47 PM), <http://theadvocate.com/news/acadiana/10926299-123/telemedicine-clinic-at-carencro-school> [https://perma.cc/25AQ-2F6X].

diagnose and manage the child's asthma, and prescribe medications without making a parent miss work to drive the child to the doctor's office.<sup>39</sup>

While the current and potential benefits of telemedicine are many, critics have voiced concerns and questions over potential issues in school-based services.<sup>40</sup> The main concern, raised by policy makers and health care providers, and the focal issue of this Comment, is the issue of parental consent.<sup>41</sup> Providing telemedicine services in school nurses' offices augments the traditional role and scope of school medicine.<sup>42</sup> Bringing telemedicine to schools has the effect of requiring school health personnel to assist in the diagnosis of illnesses and diseases, assist with mental health treatment, and participate in follow-up care—medical services that have traditionally fallen outside the scope of school-based medicine.<sup>43</sup> With such a dramatic expansion of services offered at the school, parents may not fully understand the wide range of medical services schools now offer when they sign vague forms permitting their child to receive telemedicine treatment at the beginning of the school year.<sup>44</sup>

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39. See Kasper, *supra* note 8, at 841, 858; see also CHILDREN'S P'SHIP, *supra* note 1, at 2.

40. The National Association of School Nurses acknowledges that schools face many challenges in successfully implementing telemedicine services, including patient confidentiality, documentation processes, coordination of services, and many others. See NAT'L ASS'N OF SCH. NURSES, *supra* note 9. Some of these concerns include the risk that the treating physicians are not typically the child's primary care doctor, and will be treating the child without a full health history or current list of the child's allergies. Susan D. Hall, *New Texas Law Supports School-Based Telemedicine*, FIERCE HEALTHCARE (Aug. 24, 2015, 10:31 AM), <http://www.fiercehealthcare.com/it/new-texas-law-supports-school-based-telemedicine> [https://perma.cc/ZE6U-SM7M].

41. See Alana Rocha, Justin Dehn & Edgar Walters, *Law Could Bring Remote Doctor Visits to Schools*, TEX. TRIB. (Aug. 23, 2015), <https://www.texastribune.org/2015/08/23/law-could-bring-remote-doctor-visits-schools/#> [https://perma.cc/FLP7-J693]; Hall, *supra* note 40; NAT'L ASS'N OF SCH. NURSES, *supra* note 9.

42. See Spaulding et al., *supra* note 20, at 304; see NAT'L ASS'N OF SCH. NURSES, *supra* note 9.

43. See NAT'L ASS'N OF SCH. NURSES, *supra* note 9. School nurses have traditionally served students by administering medication and first aid, ensuring immunization compliance, screening for vision and hearing impairments, and referring students to physicians. See ROBERT WOOD JOHNSON FOUND., *supra* note 10, at 2–3.

44. See Hall, *supra* note 40 (“[P]arents who will be required to sign myriad consent forms at the beginning of the school year might not fully understand what they’re permitting.”).

### III. PARENTAL CONSENT AND MINORS' HEALTH CARE UNDER SUBSTANTIVE DUE PROCESS AND THE FOURTH AMENDMENT

There are many positive benefits to parents being involved in their child's medical care and education.<sup>45</sup> Studies have found that parental engagement in medical decision-making may lower instances of children's hospitalization and the cost of medical care,<sup>46</sup> and reduce the effects and prevalence of chronic illnesses such as obesity.<sup>47</sup> On the other hand, studies have found that parents who are not as actively engaged in communicating with their child's physician may experience a sense of diminished empowerment in their role of providing and caring for their child.<sup>48</sup>

The Constitution protects the right of parents to consent to the medical treatment of their children,<sup>49</sup> and a violation of that right is relevant under both the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment.<sup>50</sup> Under substantive due process,<sup>51</sup> the United States Supreme Court has consistently upheld parents' rights to control the education, medical care, and general upbringing of their child,<sup>52</sup> justified by the belief that parents act in the best interest of their child.<sup>53</sup> The Court has held that "the Due Process Clause of the Fourteenth Amendment protects the

45. See CTRS. FOR DISEASE CONTROL & PREVENTION, PARENT ENGAGEMENT: STRATEGIES FOR INVOLVING PARENTS IN SCHOOL 6–7, 14, 24 (2012).

46. See Kerry Grens, *Decision Sharing Tied to Lower Cost for Kids' Care*, REUTERS (Dec. 21, 2011, 1:29 PM), <http://www.reuters.com/article/2011/12/21/us-decision-sharing-tied-idUSTRE7BK1MS20111221> [<https://perma.cc/KNN2-TLT2>]; see also CHILDREN'S P'SHIP, *supra* note 1, at 5, 8 (reporting that in a New York study, ninety-four percent of children's chronic illness problems would have led to an emergency room or doctor's office visit children if not managed by telemedicine).

47. See Ana C. Lindsay et al., *The Role of Parents in Preventing Childhood Obesity*, 16 FUTURE CHILD. 169, 175 (2006).

48. Major, *supra* note 36, at 54.

49. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

50. See *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1222 (10th Cir. 2003).

51. See U.S. CONST. amend. XIV § 1.

52. See, e.g., *Troxel*, 530 U.S. at 66; *Pierce*, 268 U.S. at 534–35; *Meyer*, 262 U.S. at 399.

53. See *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (noting the right arises from "traditional presumption that the parents act in the best interests of their child."). However, the doctrine of *parens patriae* embodies the principle that the state has an obligation to protect those minor children who cannot protect themselves. Christine M. Hanco, *Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 899, 904–05 (2000).

fundamental right of parents to make decisions concerning the care, custody and control of their children.”<sup>54</sup> However, the Court has never defined the precise scope of a parent’s right to direct their child’s medical care.<sup>55</sup> The Court acknowledged that like most rights, a parent’s right to direct the medical care of their child is not absolute.<sup>56</sup>

There are exceptions to the general rule that parents must provide consent for their child’s medical treatment. For example, many states have enacted laws that enable minors to seek medical advice treatment relating to pregnancy, abortions, sexually transmitted diseases, and counseling and treatment for drug and alcohol abuse.<sup>57</sup> Additionally, a state may take medical custody of a child whose parents refuse to consent to life-saving medical treatment.<sup>58</sup>

When state actors violate a parent’s right to consent to the medical treatment of their child, that parent may bring two constitutional causes of action: first, under substantive due process; and second, on behalf of their child’s Fourth Amendment right to be free from unreasonable searches.<sup>59</sup> Although the traditional cases involving Fourth Amendment searches arise from searches conducted by law enforcement or in criminal investigations, the Court has also extended the right to protect people from unreasonable invasions of privacy during medical examinations. In *Dubbs v. Head Start*, the Court explained:

The focus of the [Fourth] Amendment is thus on the security of the person, not the identity of the searcher or the purpose of the search. The Supreme Court has posed the Fourth Amendment inquiry in terms of whether the governmental conduct at issue compromises “an expectation of privacy that society is prepared to consider reasonable.”<sup>60</sup>

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54. *Troxel*, 530 U.S. at 66.

55. See James G. Dwyer, *Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights*, 82 CAL. L. REV. 1371 (1994).

56. Lee Black, *Limiting Parent’s Rights in Medical Decision Making*, 8 AMA J. ETHICS 678, 679 (2006) (citing *Custody of a Minor*, 393 N.E.2d 836 (Mass. 1979)).

57. For example, California Family Code section 6926 provides that children over the age of twelve “may consent to medical care related to the diagnosis or treatment of [a] disease” as it relates to drug problems or sexually transmitted diseases. CAL. FAM. CODE § 6926 (West 2012); see also Cara D. Watts, *Asking Adolescents: Does a Mature Minor Have a Right to Participate in Health Care Decisions?*, 16 HASTINGS WOMEN’S L.J. 221, 223 (2005); Maya Manian, *Functional Parenting and Dysfunctional Abortion Policy: Reforming Parental Involvement Legislation*, 50 FAM. CT. REV. 241, 242 (2012).

58. Jennifer E. Chen, *Family Conflicts: The Role of Religion in Refusing Medical Treatment for Minors*, 58 HASTINGS L.J. 643, 655 (2007) (“[W]here parents assert the right of refusal, the decision seems to turn on a number of factors relating to the strength of the state’s interest which includes the danger to the child, the potential success of the treatment being refused, and the danger to others in the case of communicable diseases.”).

59. See *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1202 (10th Cir. 2003); *Hearing v. Sliwowski*, 712 F.3d 275, 281–82 (6th Cir. 2013).

60. *Dubbs*, 336 F.3d at 1206 (quoting *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987)).

Federal appellate courts have found that when a child's Fourth Amendment right is violated, parents have standing to bring a claim on behalf of that child.<sup>61</sup> Although the Fourth Amendment protects any individual from unreasonable searches by public employees,<sup>62</sup> it is well-established that a search performed with valid consent is constitutionally permissible.<sup>63</sup> Because parents, not the children themselves, hold the right to consent to the medical treatment of their minor children, the Fourth Amendment requires an analysis of whether parental consent exists regarding a minor's medical treatment.<sup>64</sup> Therefore, a parent's consent, or lack thereof, is critical to analyzing whether a child's Fourth Amendment right is violated.<sup>65</sup>

Before proceeding, it is important to distinguish the type of "parental consent" protected under the constitution from the type of "informed consent" that state laws currently regulate.<sup>66</sup> These two types of consent, while related in the medical decision-making process, are distinct in both their requirements and application. "Parental Consent," as analyzed in this Comment under Constitutional standards, may also fairly be described as *parental permission*.<sup>67</sup> It requires that parents give physicians permission to provide treatment for their child.<sup>68</sup> On the other hand, "informed consent" is a technical term that requires a physician to explain in great detail the nature of the patient's illness or condition, the risks and potential benefits in different treatment alternatives, and the probability of the different treatment success rates.<sup>69</sup> Informed consent is required in all medical contexts, whereas this Comment discusses the type of parental consent analogous to "parental permission."

61. *See id.* at 1204.

62. U.S. CONST. amend. IV; *see* *New Jersey v. T.L.O.* 469 U.S. 325, 333 (1984) ("[The Fourth Amendment's] prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.").

63. *See* *U.S. v. Soriano*, 361 F.3d 494, 501 (9th Cir. 2004); *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Dubbs*, 336 F.3d at 1201.

64. *See Dubbs*, 336 F.3d at 1207.

65. *Id.*

66. *See* Ingrid Dreezen, *Telemedicine and Informed Consent*, 23 *MED. & L.* 541, 542–43 (2004).

67. *See, e.g.,* Marcela G. del Carmen & Steven Joffe, *Informed Consent for Medical Treatment and Research: A Review*, 10 *ONCOLOGIST* 636, 640 (2005); Committee on Bioethics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 *PEDIATRICS* 314 (1995).

68. *See* del Carmen & Joffe, *supra* note 67, at 640.

69. Committee on Bioethics, *supra* note 67, at 314.

Some states specify an additional type of “informed consent” required for telemedicine services.<sup>70</sup> The 2015 annual report from the Center for Connected Health Policy notes that twenty-nine states have regulations regarding informed consent for telemedicine services in their statutes, administrative codes or Medicaid policies.<sup>71</sup> In addition to traditional informed consent laws, the Federation of State Medical Boards advises states to adopt informed consent statements directly relating to the additional risks inherent in the practice of electronic medicine.<sup>72</sup> Although many state codes and regulations mandate that a physician explain these risks to their patients, it is questionable how physicians might satisfy these requirements in the school-based setting, and how the requirements meet Constitutional standards, when a parent is neither present nor contacted for the child’s treatment.

#### IV. GAPS IN REGULATION: TELEMEDICINE AND PARENTAL CONSENT

Telemedicine regulation is a patchwork of education, Medicaid, Medicare, and physician licensing laws.<sup>73</sup> Between January 2015 and July 2015, forty-two states introduced over 200 separate pieces of legislation relating to telemedicine.<sup>74</sup> However, none of this legislation specifically required telemedicine providers to obtain parental consent immediately before administering telemedicine services.

Due to the lack of legislation, schools that ask parents to sign ambiguous parental consent forms at the beginning of the school year and require no further consent for telemedicine treatment may technically comply with general state law, yet still violate parents’ constitutional rights. Current

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70. See Rowthorn & Hoffman, *supra* note 22, at 36–37 (discussing California’s telemedicine informed consent statute and the problems surrounding it). However, some health policy groups advocate that these informed consent requirements should be repealed. CTR. FOR CONNECTED HEALTH POL’Y, ADVANCING CALIFORNIA’S LEADERSHIP IN TELEHEALTH POLICY 12, 37 (Feb. 2011), <http://cchpca.org/sites/default/files/resources/Telehealth%20Model%20Statute%20Report%202-11.pdf> [https://perma.cc/8W4U-HR4K] [hereinafter CAL. TELEHEALTH REPORT].

71. See CTR. FOR CONNECTED HEALTH POL’Y, STATE TELEHEALTH LAWS AND MEDICAID PROGRAM POLICIES (July 2015), <http://cchpca.org/sites/default/files/resources/STATE%20TELEHEALTH%20POLICIES%20AND%20REIMBURSEMENT%20REPORT%20FINAL%20%28c%29%20JULY%202015.pdf> [https://perma.cc/XP7A-8BTS] [hereinafter 50 STATE TELEHEALTH REPORT].

72. FED’N OF STATE MED. BDS., MODEL POLICY FOR THE APPROPRIATE USE OF TELEMEDICINE TECHNOLOGIES IN THE PRACTICE OF MEDICINE 5 (Apr. 2014), [http://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB\\_Telemedicine\\_Policy.pdf](http://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf) [https://perma.cc/K76C-625J].

73. See Hilary Daniel & Lois Snyder Sulmasy, *Policy Recommendations to Guide the Use of Telemedicine in Primary Care Settings*, 163 ANNALS INTERNAL MED. 787, 793 (2015).

74. CAL. TELEHEALTH REPORT, *supra* note 70.

state telemedicine laws and regulations that do not specifically require parental consent for telemedicine services do not adequately protect parents' substantive due process rights and students' Fourth Amendment rights.

#### *A. Telemedicine Laws: State-by-State Analysis*

There is currently no state legislation requiring schools to contact parents immediately before telemedicine services are provided. This failure runs the risk that public schools, nurses, and doctors are violating parents' due process rights and their children's Fourth Amendment rights.

Most states derive their telemedicine and school-based health care regulations from their Medicaid laws.<sup>75</sup> One of the more recent Medicaid legislative developments to expand telemedicine in public schools is Texas House Bill 1878. The bill, enacted September 2015, regulates when Medicaid may cover and reimburse telemedicine services provided in public schools.<sup>76</sup> After several drafts and revisions, the bill passed with a unanimous vote.<sup>77</sup> The final draft added a section mandating that Medicaid could cover telemedicine services only if “[t]he parent or legal guardian of the patient provides consent before the service is provided.”<sup>78</sup> The Texas bill is the only state legislation that requires parental consent for telemedicine treatment provided at schools, yet nonetheless fails to require that the parents give consent immediately before the treatment is provided.<sup>79</sup> Notably, parental consent is only required for telemedicine services covered by Medicaid, yet does not address parental consent standards for telemedicine services not reimbursed by Medicaid.<sup>80</sup> Nonetheless, such legislation demonstrates policy makers' awareness of the need for parental consent.

Nebraska's legislative history illustrates an unsuccessful attempt to pass school-based telemedicine laws. In 2013, the Nebraska Legislature introduced Legislative Bill 556, which originally included authorization for school-based telemedicine.<sup>81</sup> As introduced, the bill stated that “[p]roviding

75. See 50 STATE TELEHEALTH REPORT, *supra* note 71.

76. See H.B. 1878, 84th Leg., 2015 Reg. Sess. (Tex. 2015) (codified at TEX. GOV'T CODE ANN. § 531.0217 (West 2016)).

77. See *Record Vote Taken*, TEX. LEGISLATURE ONLINE, <http://www.legis.state.tx.us/BillLookup/RecordVote.aspx?LegSess=84R&Bill=HB1878&RcdVtNo=794&Ch=H&Dt=05/08/2015> (last visited July 29, 2016).

78. Tex. H.B. 1878.

79. See 50 STATE TELEHEALTH REPORT, *supra* note 71, at 191.

80. See Tex. H.B. 1878.

81. Legis. B. 556, 103d Leg., 1st Sess. (Neb. 2013).

centralized telehealth medical and behavioral health services for children in public schools will help parents access health care for their school children; . . . [p]roviding such services will allow the parents and child to see, hear, and interact with a physician or behavioral health professional[.]”<sup>82</sup> Although the bill encouraged parents to be involved in the treatment of their children, it had no language requiring parents to consent to telemedicine services. In a Senate floor debate, proponents of the bill acknowledged that:

Some parents have expressed concern that this bill aims to circumvent parental authority and judgment. I want to clarify that that is not the intent. This bill does not change the requirement that parents must consent to all medical treatment. Parents have also expressed concerns that physicians, schools, children, and parents would be required to participate in telehealth . . . .<sup>83</sup>

Although Senator McGill acknowledged that parents must still consent to all medical treatment, the bill provided no textual assurance of such. Ultimately, the sections of the bill that authorized school-based telemedicine were completely eliminated and the bill was signed into law without reference to school-based telemedicine.<sup>84</sup> As a result, Nebraska currently has no legislation that allows telemedicine in schools.<sup>85</sup>

Georgia is another state that has pioneered the adoption of telemedicine regulations. Georgia enacted its Telemedicine Act in 2005, which requires every health policy to include payment for telemedicine services.<sup>86</sup> The Official Code of Georgia authorizes telemedicine in schools, provided that:

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82. *Id.*

83. *Hearing on Legis. B. 556 Before the Health & Human Servs. Comm.* 103d Leg., 1st Sess., 10 (2013) (statement of Sen. Amanda McGill), <http://www.legislature.ne.gov/FloorDocs/103/PDF/Transcripts/Health/2013-02-14.pdf> [<https://perma.cc/9ER3-X374>].

84. AM. TELEMEDICINE ASS’N, *supra* note 33, at 3.

85. Nebraska law outlines mandatory and optional coverage for many health care services, but telemedicine is not among them. NEB. REV. STAT. ANN. § 69-911(1)–(2) (West 2016). Nebraska’s telehealth laws do not address school-based use of telemedicine. NEB. REV. STAT. ANN. § 71-8506 (West 2016). However, Nebraska does provide rules and regulations regarding oral and dental telemedicine use and references “charitable oral health services” provided to schools. NEB. REV. STAT. ANN. § 85-1414.01(3) (West 2016).

86. GA. CODE ANN. § 33-24-56.4(b)(1) (2010).

A Georgia licensed physician, physician assistant, or advanced practice registered nurse . . . [i]s providing medical care by electronic or other such means at the request of a . . . Public School Nurse . . . and the physician . . . is able to examine the patient using technology and peripherals that are equal or superior to an examination done personally by a provider within that provider's standard of care[.]<sup>87</sup>

Parental consent to medical treatment is not addressed in Georgia's regulations or statutory law, but can be found in Georgia's Medicaid Telemedicine Handbook.<sup>88</sup> In order to be eligible for Medicaid reimbursement and coverage, the handbook requires that "[i]f the member is a minor child, a parent/guardian must present the child for telemedicine services and sign the consent form unless otherwise exempted by State or Federal law. The parent/guardian need not attend the telemedicine session unless attendance is therapeutically appropriate."<sup>89</sup> This parental consent provision provided in the handbook is vague and ambiguous. It fails to provide any explanation of how a parent may "present the child for telemedicine services," or what *presenting* the child practically requires.<sup>90</sup> It may require a parent to physically bring their child to the place where they will receive telemedicine services, or perhaps in the school-based context, simply require a parent to give permission before the telemedicine services are provided. However the conjunctive clause, "*and* sign the consent form," seems to suggest that signing a consent form in and of itself is not enough.<sup>91</sup> The parent must make some present, affirmative action by presenting the child for telemedicine services at the time the child needs the services, rather than simply signing a consent form at the beginning of the school year. Furthermore, it is

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87. GA. COMP. R. & REGS. 360-3-.07 (2013).

88. GA. DEP'T OF CMTY. HEALTH, GEORGIA MEDICAID TELEMEDICINE HANDBOOK 5 (Jan. 2016), <https://www.mmis.georgia.gov/portal/Portals/0/StaticContent/Public/ALL/HANDBOOKS/Telemedicine%20Handbook%20JAN%202016%2004-01-2016%20142436.pdf> [<https://perma.cc/9FNG-3ASR>].

89. *Id.* at 4–5. A similar Nebraska statute does not address school-based telemedicine specifically, but states that when providing mental health services to a child, "[i]n cases in which there is a threat that the child may harm himself or herself or others, before an initial telehealth service the health care practitioner shall work with the child and his or her parent or guardian to develop a safety plan[.]" therefore requiring that the parent participate in the telemedicine mental health services when appropriate. NEB. REV. STAT. § 71-8509(b) (2013).

90. GA. DEP'T OF CMTY. HEALTH, *supra* note 88, at 5.

91. *Id.*

uncertain what kind of services fall under the “therapeutically appropriate” requirement.<sup>92</sup>

An analysis of telemedicine laws in Texas, Nebraska, and Georgia demonstrates those Legislatures’ battles to provide and pay for health care in the school environment without jeopardizing parental rights. In attempting to ensure that children receive medical treatment without requiring a parent to come to the school and miss work, these states’ laws do not require schools to notify parents before or when a child receives services.<sup>93</sup> The very policies that attempt to help parents may actually end up violating their constitutional rights.

Remember ten year-old Grace? If Grace was a fourth grader in Coffee County, Georgia, her mother would have signed a consent form permitting Grace to receive telemedicine services at any one of Coffee County’s eight public elementary schools.<sup>94</sup> Coffee County School District partners with Emory Medical School to provide telemedicine services to students and faculty in Coffee County schools. The telemedicine consent form Grace’s mother would sign is available on the school district’s website.<sup>95</sup> The form requires parents to “authorize any physician or designated health/mental health professional (nurse practitioners, physician assistants, college student interns, etc.) working for the clinic to provide such medical tests, procedures, and treatments as are reasonably necessary or advisable for the medical evaluation and management of my child’s health or mental health care.”<sup>96</sup> While the form encourages parents to be present when the child is treated, the form nonetheless states that “[i]f a parent/guardian cannot be present,

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92. School health staff should be able to make accurate assessments of both a student’s physical and mental health conditions: “[u]nderstanding the relationship between frequent health office visits or somatic complaints as a sign of underlying problems, which may be organic or psycho-emotional in origin, requires the unique skill set of the school nurse.” NAT’L ASS’N OF SCH. NURSES, MENTAL HEALTH OF STUDENTS (June 2013), <https://www.nasn.org/PolicyAdvocacy/PositionPapersandReports/NASNPositionStatementsFullView/tabid/462/ArticleId/36/Mental-Health-of-Students-Revised-June-2013> [<https://perma.cc/5SUZ-H6GG>].

93. See Legis. B. 556, 103d Leg., 1st Sess. (Neb. 2013); GA. COMP. R. & REGS. 360-3-.07 (2013). Opponents to Texas Bill 1878 were concerned that “the bill would not . . . specifically require parental notification for treatment. Under the bill, if parents signed a form at the beginning of a school year consenting to medical treatment for their child, they could inadvertently consent to mental health treatment through telemedicine as well.” TEX. H. RES. ORG., DAILY FLOOR REPORT, 84th Leg. No. 65 at 104–05 (May 7, 2015).

94. *Coffee Telehealth*, COFFEE CTY. SCH. SYS., <http://www.coffee.k12.ga.us/?DivisionID=16267&ToggleSideNav=ShowAll> [<https://perma.cc/PAW8-HJDN>] (last visited July 29, 2016).

95. *Patient Consent/Refusal Form*, COFFEE CTY. SCH. SYS., <http://www.coffee.k12.ga.us/Default.asp?PN=Forms&L=1&DivisionID=16267&LMID=713413&ToggleSideNav=ShowAll> [<https://perma.cc/CLK6-A3NH>] (last visited Sept. 10, 2015) [hereinafter *Coffee Consent Form*].

96. *Id.*

the child will still be treated. Someone from the clinic will make contact with the parent/guardian to inform them of the outcome,” and does not specifically state if a child will be treated whether the parent is contacted or not.<sup>97</sup>

While this form may not violate Georgia statutory law, it certainly may contradict the regulations set out for Medicaid reimbursement.<sup>98</sup> If Grace’s family was on Medicaid, the services provided to her in the school health office may not qualify for Medicaid coverage under Georgia law because Grace’s mother did not “present” her for medical services and because her mother should have arguably been there for therapeutic support. Whether Grace’s family is under Medicaid or not, the requirements for Medicaid coverage *are not* the same as the requirements under state law. The Coffee County consent form would not violate Georgia statutory law because the Georgia Code is silent as to whether parents must give immediate consent to telemedicine treatment.<sup>99</sup> Because Georgia statutory law lends no remedy for Grace’s mother’s complaint, her claims would instead be analyzed under common law constitutional rights cases like the Tenth Circuit case, *Dubbs v. Head Start*.<sup>100</sup>

### *B. Parental Consent and Public School Medical Treatment*

In the 2003 case *Dubbs v. Head Start*, eight parents brought constitutional rights claims against the Tulsa, Oklahoma Community Action Project (CAP), an organization that oversaw the Head Start preschool their children attended.<sup>101</sup> In that case, a number of preschool children were given full physical and genital examinations at school by nurses hired by CAP.<sup>102</sup> Before the examinations, administrators of CAP told the two nurses that

97. *Id.*

98. GA. DEP’T OF CMTY. HEALTH, *supra* note 88. The schools, while not legally bound to follow the Medicaid regulations, have a strong interest in doing so. One of the primary obstacles in expanding school-based telemedicine is the lack of funding and insurance. A 2009 report stated that over half of states require some type of Medicaid, Children’s Health Insurance Program (CHIP), or private health insurance to pay telemedicine physicians. CHILDREN’S P’SHP, *supra* note 1, at 8. Although many of the school-based pilot programs are funded by grants, providing Medicaid coverage is key in maintaining the programs. Spaulding et al., *supra* note 20, at 278 (“It is expected that insurance reimbursement will significantly increase the likelihood of long-term sustainability.”).

99. GA. COMP. R. & REGS. 360-3-.07 (2016).

100. *See* *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003).

101. *Id.* at 1197.

102. *Id.*

CAP had obtained consent from the parents for the exams, and the nurses proceeded with the exams without ever seeing consent forms.<sup>103</sup>

The parents brought their claims against both CAP, who authorized the exams, and the nurses, who conducted the exams.<sup>104</sup> The parents argued that the examinations violated both the children's Fourth Amendment rights against unreasonable searches and seizures, as well as the parents' substantive due process right to control the care, custody and management of their children.<sup>105</sup> The district court reasoned that under a substantive due process analysis, the physical examinations did not "shock the conscience of the court,"<sup>106</sup>—the required standard of other Fourteenth Amendment violations—and granted summary judgment for the CAP administrators and nurses. On appeal, the Tenth Circuit reversed the summary judgment for the defendants and remanded the case back to the district court.<sup>107</sup>

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103. *See id.* at 1199.

104. *Id.* at 1197.

105. *Id.* at 1201–02. The parents also alleged the same claims under state tort assault and battery claims and under the Oklahoma Constitution. *Id.* at 1218–19. We might consider the reason why a parent would pursue a federal constitutional claim instead of a state constitutional claim or tort claim. Proving and measuring damages under the federal constitution is different than state torts. In his article, Anthony DiSaro explains the difficulty in measuring damages for constitutional violations and explains that "the concept of compensatory damages under § 1983 should be defined expansively. An individual who is deprived of a constitutional right can seek redress for intangible harms, such as 'mental and emotional distress' or 'impairment of reputation, . . . personal humiliation, and mental anguish and suffering,' but those injuries cannot be presumed." Anthony DiSaro, *When a Jury Can't Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS L. REV. 333, 356 (2012) (citing *Carey v. Phipps*, 435 U.S. 247, (1978), and *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986)). *See also* John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 CONN. L. REV. 723, 755, 768 (2008) (arguing that state tort law is inconsistent and inferior in regulating interactions between government officials and individuals.).

106. *Dubbs*, 336 F.3d at 1201.

107. *Id.* at 1204. The case then settled out of court. *Id.* at 1202. Compare a similar sequence of cases, where the underlying issue was whether Sliwowski, a school nurse who conducted a visual exam of a child's genital area without consent of the child's parent violated the child's Fourth Amendment rights. *Hearing v. Sliwowski*, 712 F.3d 275, 278 (2013), *remanded sub nom.* *Hearing v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:10-cv-0746, 2014 U.S. Dist. LEXIS 112241 (M.D. Tenn. Aug. 8, 2014), *overruled sub nom.* by *Hearing v. Sliwowski*, 806 F.3d 864 (6th Cir. 2015). There, the 2013 Sixth Circuit Court of Appeals did not reach the merits of the Fourth Amendment claim, but rather found the nurse Sliwowski was entitled to qualified immunity and remanded to the district court. *Hearing*, 712 F.3d at 281–83. On remand, a jury found Sliwowski did *not* violate the child's Fourth Amendment Rights, however, the district court opinion provides no record of what standard—"shocks the conscience" or the "fundamental rights"—the jury was instructed to consider the Fourth Amendment right under. *See infra* note 115 and accompanying text. Most significantly, the district court issued an injunction against the County, ordering the county to train school nurses and personnel on children's Fourth and Fourteenth Amendment rights. *Hearing*, LEXIS 112241, at \*24–25. This injunction was subsequently reversed

The Tenth Circuit reversed the lower court’s ruling, finding that the “district court misapprehended the legal standard applicable to purported substantive due process rights that—like the right to consent to medical treatment for oneself and one’s minor children—may be ‘objectively, deeply rooted in this Nation’s history and tradition.’”<sup>108</sup> The court concluded that although the “shocks the conscience” standard typically applies to tortious conduct under the Fourteenth Amendment, the standard does “not exhaust the category of protections . . . or eliminate more categorical protection for ‘fundamental rights’ as defined by the tradition and experience of the nation.”<sup>109</sup>

Having emphasized the fundamental liberty of parents to consent, control, and manage the care of their children, the Tenth Circuit focused its analysis for both claims on whether the parents consented to the examinations. However, the court stated that even if the parents did not actually consent to the exams, so long as it was “objectively reasonable for the official to believe that the scope of a person’s consent permitted him to conduct the search,” then the children’s and parents’ rights would not have been violated.<sup>110</sup>

Over the argument of defendants, the court found that the parents did not in fact consent to the physical and genital exams of their children, and furthermore, that it was not reasonable for defendants to believe the parents consented.<sup>111</sup> In reaching its holding, the court analyzed three forms CAP

by the Sixth Circuit on the grounds that the judge erroneously issued equitable relief because the jury found no underlying Fourth Amendment violation, because the plaintiffs lacked standing to ask for equitable relief, and did not themselves ask for equitable relief in their complaint. *Hearing*, 806 F.3d at 867–68. This string of decisions is important because it demonstrates that although the jury ultimately found the genital examination did not violate the child’s Fourth Amendment rights, the court clearly believed such types of genital examinations should not be conducted without parental consent. It is for that reason the District Court ordered the injunction against the city. *Hearing*, LEXIS 112241, at \*24–25.

108. *Dubbs*, 336 F.3d at 1203 (quoting *Washington v. Gluksberg*, 521 U.S. 702 (1997)); *see also* *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

109. *Dubbs*, 336 F.3d at 1203.

110. *Id.* at 1207 (citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). Fourth Amendment claims are analyzed on the traditional “objective reasonableness” standard, but these standards have sometimes been relaxed in the school setting. However, Fourteenth Amendment claims in school settings are traditionally analyzed under the “shocks the conscience” standard. Nicole Mortorano, *Protecting Children’s Rights Inside of the Schoolhouse Gates: Ending Corporal Punishment in Schools*, 102 GEO. L.J. 481, 496 n.106 (2014).

111. *Dubbs*, 336 F.3d at 1212.

provided to the parents at the beginning of the school year.<sup>112</sup> The first form titled “Parent Consent Form” contained the parents’ written consent for *specified* tests that, “if needed,” would be performed at the school.<sup>113</sup> Those tests included “tuberculosis, speech/language, dental, developmental screening, hearing, hemoglobin/HCT, vision screening, and hearing screening.”<sup>114</sup> The second form, titled “Authorization for Treatment of Minors,” required parental consent for a physician or dentist to diagnose and treat the student, and in the case of emergency, transport the child to a medical facility.<sup>115</sup> This second form stated:

We, the undersigned parent(s) or legal guardian of the minor . . .  
Do hereby authorize any x-ray examination, anesthetic, dental, medical or surgical diagnosis or treatment by any physician or dentist licensed by the State of Oklahoma . . . . It is understood that this consent is given in advance of any specific diagnosis or treatment being required, but is given to encourage those persons who have temporary custody of the minor, and said physician or dentist to exercise his/their best judgment as to the requirements of such diagnosis or medical or dental or surgical treatment.<sup>116</sup>

Analyzing the parental consent form, the Tenth Circuit affirmatively rejected defendants’ claim that such a form authorized the physical examinations of the students: “[p]utting aside the fact that the first paragraph contains garbled syntax and evidently is missing some words, it does not grant consent for the type of examination at issue here.”<sup>117</sup> The court ultimately found the parents’ written consent applied only to the diagnosis or treatment—not to the general physical examinations.<sup>118</sup> In addition, the court noted that the consent was expressly for any “physician or dentist”

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112. *Id.* at 1211–12.

113. *Id.* at 1210.

114. *Id.* at 1199.

115. *Id.* It is neither contested nor criticized that all schools may perform reasonable emergency treatment, including transporting a student to the hospital, without parental consent. See Comm. on Pediatric Emergency Med. and Comm. on Bioethics, *Policy Statement—Consent for Emergency Medical Services for Children and Adolescents*, 128 PEDIATRICS 427, 427 (2011).

116. *Dubbs*, 336 F.3d at 1211–12.

117. *Id.* at 1212.

118. *Id.* at 1211. In the case, CAP administrators argued that “diagnosis” includes examination, to which the court responded that “consent forms for parents of children in Head Start programs should not be an exercise in obfuscation and misdirection.” However, the court did not cite any particular definition for “treatment” or “diagnosis.” *Id.* at 1210. Compare the dictionary definition of “diagnose” as “to recognize (as a disease) by signs and symptoms.” MERIAM-WEBSTER MEDICAL DESK DICTIONARY (Rev. ed., 2005) (ebook). Is it reasonable for an individual to believe this definition of “diagnosis” included physical examinations?

to diagnose or treat the child, while in the current case, CAP employed two nurses to conduct the exams.<sup>119</sup>

The court could have held that, although the parents did not consent to general physical exams of children, it nonetheless may have been reasonable for CAP administrators to believe that the examinations were within the scope of parental consent. Yet, the court affirmatively declined such a finding. The court instead stated that, “[t]he question is what a ‘typical reasonable person’ would understand from the form[,]” and did not agree with the district court that there was no issue of material fact regarding “the objective reasonableness of CAP’s belief that it had consent based on these forms.”<sup>120</sup> The Tenth Circuit found that parental consent did not in fact cover the physical examinations, nor could the administrators have reasonably believed the consent covered the physical examinations, and reversed and remanded the parents’ due process violation claim.<sup>121</sup>

A court adjudicating ten-year-old Grace’s claim from Coffee County, Georgia is in the Eleventh Circuit and therefore not bound by *Dubbs v. Head Start*. However, many Eleventh Circuit opinions acknowledge parents’ rights to control and manage the medical treatment of their children,<sup>122</sup> and *Dubbs* is nonetheless persuasive. In analyzing Grace’s mother’s claims, several points of analysis are important under *Dubbs*: first, whether the strict Fourteenth Amendment “shocks the conscience” standard applies, or a more liberal standard for “fundamental rights”; second, whether the nurse objectively believed the treatment was within the scope of the consent Grace’s mother provided; and third, whether relief will be barred by qualified immunity.

119. *Dubbs*, 336 F.3d at 1211–12. This point is relevant in the current discussion of school-based telemedicine. Some of the current telemedicine consent forms provide long lists of health care providers, ranging from doctors, to physicians assistants and even college interns. See *Coffee Consent Form*, *supra* note 95.

120. *Dubbs*, 336 F.3d at 1211. The court also noted that the plaintiff’s expert doctor testified that a reasonable *physician* would have understood that the consent forms provided would not have included onsite physical examinations. *Id.*

121. *Id.* at 1222.

122. See e.g., *Doe v. Pub. Health Tr.*, 696 F.2d 901, 909 (11th Cir. 1983) (“[T]he Supreme Court has consistently acknowledged the constitutional stature of the family, and of the parent-child relationship.”); see also *Robertson v. Hecksel*, 420 F.3d 1254, 1257 (11th Cir. 2005) (“A parent’s due process right in the care, custody, and control of her children is ‘perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.’” (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000))).

## 1. Fourteenth Amendment Standard

The first and perhaps most important part of the Tenth Circuit's holding is that an action for a violation of a substantive due process "fundamental right" may not be analyzed under the "shocks the conscience" standard.<sup>123</sup> Five years after *Dubbs*, the Tenth Circuit affirmed that "the 'shocks the conscience' and 'fundamental liberty' tests are two separate approaches to analyzing governmental action under the Fourteenth Amendment."<sup>124</sup> However, the court explained that the two standards "are not mutually exclusive[.] Courts should not unilaterally choose to consider only one or the other of the two strands. Both approaches may well be applied in any given case."<sup>125</sup> Notably in *Dubbs*, the appellate court did not make its own finding on whether the physical examinations violated such a standard, nor did it expressly overrule the district court's finding that the genital examinations *did not* shock the conscience of the court.<sup>126</sup>

Many courts still apply the "shocks the conscience" standard to Fourteenth Amendment fundamental right cases, rather than the less stringent standard applied in *Dubbs*.<sup>127</sup> In an Eleventh Circuit case, *K.A. ex rel. J.A. v. Abington Heights School District*, a high school administrator detained a student who later claimed his fundamental right to liberty under the Fourteenth Amendment was violated.<sup>128</sup> The court stated that, "[d]eprivation violates due process only when it shocks the conscience, which encompasses only the most egregious official conduct."<sup>129</sup> Similarly, in the Third Circuit case *McCurdy v. Dodd*, the court held that "[i]n the context of parental liberty interests . . . the Due Process Clause only protects against deliberate violations of a parent's fundamental rights—that is, where the state action at issue was specifically aimed at interfering with protected aspects of the parent-child

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123. *Dubbs*, 336 F.3d at 1203.

124. See *Miller v. Laverkin City*, 528 F.3d 762, 769 (10th Cir. 2008). Negligence alone is insufficient to meet the "shocks the conscience" standard. In *P.J. ex rel. Jensen v. Utah*, the court even held that "an intentional or reckless abuse of power that causes the plaintiff injury does not, of itself, meet the 'shocks the conscience' standard. Rather, there must be 'a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.'" No. 2:05-CV-739 TS, 2008 WL 4372933, at \*15 (D. Utah Sept. 22, 2008).

125. See *Miller*, 528 F.3d at 769.

126. *Dubbs*, 336 F.3d at 1203.

127. Some have criticized the use of the "shocks the conscience" standard. See, e.g., Rosalie B. Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 315 (2010) (arguing that where fundamental rights are concerned, the court should not exclusively look at the shocks the conscience standard).

128. *K.A. ex rel. J.A. v. Abington Heights Sch. Dist.*, 28 F. Supp. 3d 356, 368 (M.D. Pa. 2014).

129. *Id.*

relationship.”<sup>130</sup> Finally, in *Adkins v. Luzerne County Children & Youth Services*, a case in which a father lost custody of his children, the federal district court held that the social worker’s conduct in removing the children “was not grossly negligent or so arbitrary as to ‘shock the conscience.’”<sup>131</sup>

These cases demonstrate that courts do not typically evaluate a parent’s right to control the custody or care of his or her children under a less-demanding “fundamental right” standard; rather, courts continue to evaluate these claims under the “shocks the conscience” standard. Although the district court in *Dubbs* found that the physical examinations of the preschoolers did not shock the conscience of the court, the appellate court declined to apply the facts to this standard.<sup>132</sup>

## 2. Form Analysis: The Issue of Consent

The next point of analysis is whether Grace’s mother, by signing the telemedicine form, consented to the genital examination. More specifically, the issue is whether the Head Start Administrator’s belief that the consent obtained on the form covered a genital examination was objectively reasonable. As instructed by *Dubbs*, the objective standard asks what a typical reasonable person would have understood the forms to authorize during the examination.<sup>133</sup> Most importantly, in situations where the wording is ambiguous, the court in *Dubbs* held the “common-law rule to construe ambiguous language against the interest of the party that drafted it”<sup>134</sup> applied to interpreting these type of consent forms. Therefore, where it is ambiguous as to whether the form objectively encompassed parents’ consent, a court will be inclined to interpret the form in favor of the parent.

The Coffee County consent form authorizes any “physician or designated health/mental health professional (nurse practitioners, physician assistants, college student interns, etc.) working for the clinic to provide such medical tests, procedures, and treatments as are reasonably necessary or advisable

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130. *McCurdy v. Dodd*, 352 F.3d 820, 827–28 (3d Cir. 2003).

131. No. 3:CV-01-0470, 2005 WL 2129921, at \*22 (M.D. Pa. Sept. 2, 2005).

132. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1211 (10th Cir. 2003). Even if it was clear a “shocks the conscience” standard applies, the standard itself has not been applied uniformly amongst cases. See Clifford B. Levine, *United Artists: Reviewing the Conscience Shocking Test Under Section 1983*, 1 SETON HALL CIR. REV. 101, 112–15 (2005) (noting the varying interpretation of the “shocks the conscience” standard and how a majority of courts may apply an “improper motive” test).

133. *Dubbs*, 336 F.3d at 1211.

134. *Id.* at 1205.

for the medical evaluation and management of my child's health or mental health care."<sup>135</sup> The "reasonably necessary or advisable" language used here is notably vague.<sup>136</sup> In the medical context, the scope of "reasonably necessary" can be read both narrowly and broadly. "Necessary" invokes a requirement of immediacy and severity.<sup>137</sup> The question then becomes how liberally or narrowly the court will interpret "necessary."<sup>138</sup> For example, testing for sexually transmitted diseases is certainly necessary in terms of severity, but may not be *immediately* necessary. It is hard to think of a medical situation where treatment could not be argued to be "reasonably necessary or advisable."

Additional factors may also affect a determination of reasonableness. It is fair to speculate that the reasonableness of a telemedicine treatment may change if the case involved a female nurse conducting a genital examination of a twelve-year-old boy rather than a five-year-old girl. Indeed, the United States Supreme Court has held that the age and gender of a child is important in analyzing unreasonable search and seizure claims.<sup>139</sup> Consider a situation where a parent has two children, a daughter and a son, and although the parent would sign the exact same form for both children, the form may permit different services for each child based on the circumstantial reasonableness.

Telemedicine consent forms also authorize mental health services.<sup>140</sup> Although providing mental health services without parental notification

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135. *Coffee Consent Form*, *supra* note 95.

136. Author Ken Adams criticizes the ambiguity of the phrase "reasonably necessary." He argues that "[s]omething is necessary, or it's not. What purposes does *reasonably* serve?" Ken Adams, *Using "Reasonable" and "Reasonably" in Contracts*, ADAMS ON CONTRACT DRAFTING (Apr. 18, 2011), <http://www.adamsdrafting.com/using-reasonable-and-reasonably-in-contracts/> [<https://perma.cc/7B8C-SS4J>]. Indeed, the goal of training school employees on Fourth Amendment searches at school is to *remove* the subjective interpretation of what is "reasonable": "to ensure that the children's Fourth Amendment rights are not subject to the discretion of the school official in the field." *Hearing v. Metro. Gov't of Nashville & Davidson Cty.*, No. 3:10-cv-0746, 2014 U.S. Dist. LEXIS 112241, at \* 24 (M.D. Tenn. Aug. 8, 2014).

137. *Necessary*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 776 (10th ed. 1997) ("Indispensable, essential.").

138. For a statutory definition of "medically necessary" see N.Y. COMP. CODES R. & REGS. tit. 18 § 513.1(c) (2011) ("Necessary to prevent, diagnose, correct or cure a condition" to "restore the recipient to his or her best possible functional level; or improve the recipient's capacity for normal activity.").

139. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1984) ("[N]ot excessively intrusive in light of the age and sex of the student[.]"); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 370 (2009) (noting the same).

140. *School Based Wellness Center Telemedicine Program*, HOWARD CTY. SCH. HEALTH DEP'T, <http://sfes.hcpss.org/sites/default/files/SBWC%20Telemedicine%20Consent%20Form%202006-25-2015.pdf> [<https://perma.cc/GDW3-BA32>] (last visited July 29, 2016) [hereinafter *Howard Consent Form*]; *see Coffee Consent Form*, *supra* note 95.

may not violate a student's Fourth Amendment rights,<sup>141</sup> they may violate a parent's due process rights if the treatment exceeded the scope of the parent's consent. Consider the real-life example of a mother who found out her son's school selected him to participate in group therapy sessions for children with divorced parents.<sup>142</sup> The mother had no idea this therapy was taking place.<sup>143</sup> A nurse or teacher may have believed the therapy was "reasonably necessary or advisable," possibly because the child was acting out in class or expressed emotions about his parents' divorce. Under the *Dubbs* analysis, the issue for the court would be whether the "reasonably necessary" language on the consent form objectively encompassed the mother's consent. The mother would likely be justified in believing the medical consent form she signed at the beginning of the school year did not encompass such mental health treatment.

The Coffee County consent form is not alone in its ambiguous reach. A consent form for a school district in Howard County, Maryland uses similar language.<sup>144</sup> The consent form states that "[s]chool-Based Wellness Center telemedicine services may include, *but are not limited to* . . . [m]edical care and treatment, including diagnosis of acute and chronic illness and disease . . . ."<sup>145</sup> Similarly, a telemedicine consent form in Jeff Davis County,

141. This would likely not be a "search or seizure" under the Fourth Amendment.

142. This is a true story told by a mother at the Legislative Hearing for Nebraska Legislative Bill 556. While the counseling sessions in that case did not involve a therapist providing services via telemedicine, it is easy to change the facts to create a hypothetical in which the therapist runs the treatment group via telemedicine rather than in person. The mother in Nebraska expressed that:

I was not once informed that my child was going to be in this class. I was livid, and my school administrators heard about it immediately. . . . But that is something that I want to see in [the Nebraska Telemedicine Bill], that it's enforced that it has to be a parental consent, because there can't be closed-door meetings, . . . I'm the parent. I work very, very hard and I love my children and I believe that all of you that are parents love your children and you know what's best for your children. But I'm the parent for my children.

*Hearing on Legis. B. 556, supra* note 83, at 10 (statement of Christine Bates). Similarly, the National Association of School Nurses released a position statement on students' mental health, advocated that school medicine should "promote family-centered care by connecting parents and children with school and community resources for mental health services and monitoring continued treatment and follow-up. By joining forces with other health professionals in the school and the community, school nurses can act as strong advocates for child mental health programs in the political and public arena." NAT'L ASS'N OF SCH. NURSES, *supra* note 92.

143. *Id.*

144. *Howard Consent Form, supra* note 140 (emphasis added).

145. *Id.* (emphasis added).

Georgia instructs parents to “authorize any physician or physician-designated health professional working for the clinic to provide such medical tests, procedures, and treatments as are reasonably necessary or advisable for the medical evaluation and health care management of the child listed above.”<sup>146</sup> Still another consent form from the Yancy and Mitchell County School Districts in rural Tennessee requires the parent to “consent in advance to [his or her] child having access to *any or all*-available services . . . .”<sup>147</sup> Like the Coffee County form, none of the above forms require the school to contact a parent before the nurse provides treatment or evaluation.<sup>148</sup> Analyzing these three parental consent forms under substantive due process and Fourth Amendment claims, the critical question is whether a typical reasonable person would believe the genital examination was “reasonably necessary,” as stated on the form. Furthermore, pursuant to *Dubbs*, if the court finds the consent form language ambiguous, the court will construe all ambiguities against the drafter.<sup>149</sup>

The *Dubbs* court also found that although the Head Start consent forms may have authorized doctors or dentists to diagnose and treat the preschool students, the form said nothing about *nurses* providing treatment,<sup>150</sup> showing just how strictly a court will interpret the scope of consent. The Coffee County form provides a wide range of physicians that may consult with the students in Georgia, including doctors, registered nurses, physician assistants, and even college interns.<sup>151</sup> However, other consent forms—like those provided in Maryland—do not provide a similar list.<sup>152</sup>

The vague language used in many telemedicine parental consent forms fails to adequately inform parents of the medical and mental health treatment that a nurse may administer to their children. The “reasonably necessary” language is open to much speculation and interpretation. What could be reasonable for a female nurse to provide a five-year-old girl may not be reasonable for her thirteen-year-old brother—yet their parent would sign the same consent form for both children. Furthermore, courts may interpret

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146. *Student Enrollment Packet*, JEFF DAVIS CTY. 3 (2015–2016), <https://www.jeff-davis.k12.ga.us/images/docs/services/forms/Student%20Enrollment%20Packet.pdf> [<https://perma.cc/8CL7-5AMC>].

147. *Minor Patient Registration*, MY HEALTH-E-SCHOOLS, <http://crhi.org/docs/2013%20Combined%20Student%20Enrollment.pdf> [<https://perma.cc/TRE6-RUS5>] (last visited July 30, 2016) (emphasis added).

148. Although not provided on the actual consent form, the provider’s website does state that parents will be contacted before the child sees a physician. *Frequently Asked Questions About Telemedicine*, CTR. FOR RURAL HEALTH INNOVATION, <http://crhi.org/faq.html> [<https://perma.cc/TZ3E-GKSW>] (last visited July 30, 2016).

149. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1208 (10th Cir. 2003).

150. *Id.* at 1212.

151. *Coffee Consent Form*, *supra* note 95.

152. *Howard Consent Form*, *supra* note 140.

“reasonably necessary” liberally to include treatment of illnesses that are necessary in the broad sense of the idea that it is necessary to treat eventually, but may not be *immediately* necessary. Based on how broadly or narrowly the court interprets the form, a nurse may be justified in placing the student in counseling sessions with a psychiatrist or many other situations a parent never contemplated when signing the consent form at the beginning of the school year. Because of the potential ambiguity in telemedicine consent forms, anything short of notifying parents immediately before the exam runs the risk of violating both parents’ substantive due process and children’s Fourth Amendment rights.

### 3. *Qualified Immunity*

If the trier of fact finds that a constitutional violation actually occurred, the qualified immunity doctrine presents a second hurdle for relief.<sup>153</sup> Under the qualified immunity doctrine, a government official will be liable for constitutional violations brought under 42 U.S.C. § 1983 only if the right was “clearly established” in the circumstances of the case.<sup>154</sup> While the doctrine serves to allow government officials to exercise reasonable discretion without fear of punishment, it can also bar injured parties from obtaining relief.<sup>155</sup>

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153. Traditionally, the court has chosen to consider qualified immunity first. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) (noting that because qualified immunity is intended to grant immunity from suit and not just a defense, the court has repeatedly “stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” (citations omitted)). However, some courts will rule on the merits before analyzing a qualified immunity defense. *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (establishing a two-pronged inquiry for suits involving qualified immunity, wherein courts must first consider the merits of the constitutional claim before analyzing a defendant’s claim of qualified immunity), *receded from by* *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that “the *Saucier* protocol should not be regarded as mandatory in all cases . . . [although] it is often beneficial.”). For a detailed discussion of the debate that this issue has raised amongst scholars, see James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011).

154. *Pearson*, 555 U.S. at 231 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

155. See John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1297 (2012). In his article, John Jefferies similarly argues that there is a “lack of fit” between the qualified immunity doctrine and constitutional rights: “[q]ualified immunity works less well for other rights. It works least well when constitutional doctrine is stated at a very high level of generality, unaccompanied by particularizing doctrine. As applied to those rights, qualified immunity can be analytically troubling.” John C. Jefferies Jr., *What’s Wrong with Qualified Immunity*, 62 FLA. L. REV. 851, 859–60 (2010).

In *Hearing v. Sliwowski*, the Sixth Circuit sought to determine whether it was clearly established that a school nurse's medical treatment had to be "reasonable"—a standard required for other Fourth Amendment searches.<sup>156</sup> In *Hearing*, a school nurse conducted a genital visual examination of a six-year-old girl without obtaining consent from her parent.<sup>157</sup> The student's mother brought a claim alleging the exam was in violation of the student's Fourth Amendment right.<sup>158</sup> The court accepted the nurse's qualified immunity defense and declined to reach the merits of the case.<sup>159</sup> The court found that although the Fourth Amendment reasonableness standard did in fact apply to medical treatment rendered by a school nurse, that standard was not "clearly established" in that circuit's precedent, finding in favor of the defendant nurse.<sup>160</sup>

In *PJ v. Wagner*, the Tenth Circuit similarly addressed the qualified immunity defense when it considered whether two parents' substantive due process rights to control the medical treatment of their child were clearly established.<sup>161</sup> In that case, the parents refused to consent to chemotherapy for their son, despite multiple doctors advising that chemotherapy was necessary to save his life.<sup>162</sup> Against the will of the parents, the juvenile court ordered the child to undergo chemotherapy.<sup>163</sup> The parents brought suit against the government officials and doctors who participated in the treatment.<sup>164</sup> The court held that the right of a parent to control the medical treatment of their son in the case's specific facts was not clearly established, and therefore the qualified immunity defense applied.<sup>165</sup>

Both *Wagner* and *Hearing* demonstrate that although the substantive due process right to control the medical treatment of one's child is a well-established right, the unique jurisdiction and circumstances of each case may result in a court finding that the right was not so "clearly established" that the defendant would not have reasonably known that his or her conduct was unlawful.<sup>166</sup> The court adjudicating Grace's mother's claims—asking whether the school nurse was entitled to qualified immunity—would consider both the jurisdiction and the unique circumstances of the case in deciding

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156. *Hearing v. Sliwowski*, 712 F.3d 275, 279 (6th Cir. 2013).

157. *Id.* at 277.

158. *Id.*

159. *Id.*

160. *Id.* at 282.

161. *PJ v. Wagner*, 603 F.3d 1182 (10th Cir. 2010).

162. *Id.* at 1188.

163. *Id.* at 1190.

164. *Id.* at 1194–95.

165. *Id.* at 1201.

166. *See Jefferies, supra* note 155, at 858–59.

whether it was clearly established that her actions violated the Fourth Amendment or the mother's substantive due process rights.<sup>167</sup>

The degree and type of liability facing the providing doctors is also uncertain. As previously stated, due process and the Fourth Amendment only apply to the actions of public officials. While the court considered the nurses in *Dubbs* to be public officials because they were health department employees,<sup>168</sup> doctors providing telemedicine services are typically not employed by the school, but are independent contractors with private telemedicine companies.<sup>169</sup> Therefore, the court would likely not consider a doctor providing telemedicine services a "public official," and his actions would not be subject to either the Fourth Amendment or due process claims.<sup>170</sup>

All things considered, the outcome of Grace's mother's claims is unclear, as the analytical journey under *Dubbs* is wrought with many uncertainties. First, the court may choose to adopt the Fourteenth Amendment "shocks the conscience" or the "fundamental rights" standard of review. Second, the court may find the nurse's actions were objectively within the "reasonably necessary" requirement as provided on the parental consent form.<sup>171</sup> Finally, the court may apply the qualified immunity doctrine and find that Grace's rights were not clearly established in the specific jurisdiction or context

167. See *Ashcroft v. Al-Kidd*, 563 U.S. 731, 746 (2011) ("When faced with inconsistent legal rules in different jurisdictions," public officials "should be given some deference for qualified immunity purposes, at least if they implement policies consistent with the governing law of the jurisdiction where the action is taken."). Of further note is what type of damages or relief a plaintiff pursuing a constitutional claim of this sort is seeking. James Pfander suggests that when a plaintiff seeks only nominal relief, the qualified immunity defense should not apply because defendants do not face real liability. Pfander, *supra* note 153, at 1622–23.

168. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1198 (10th Cir. 2003).

169. See Nathaniel M. Lacktman, *Telemedicine Providers: Are My Doctors Employees or Independent Contractors?*, HEALTH CARE LAW TODAY (July 7, 2015), <https://www.healthcarelawtoday.com/2015/07/07/telemedicine-providers-are-my-doctors-employees-or-independent-contractors/> [<https://perma.cc/RV37-Z9E4>].

170. See Andrew W. Weis, *Qualified Immunity for "Private" § 1983 Defendants After Filarsky v. Delia*, 30 GA. ST. U. L. REV. 1037, 1062–64 (2013).

171. A traditional Fourth Amendment analysis, which in the context of searches at schools usually involves school staff searching for illegal drugs or weapons, requires the court to analyze the reasonableness of the search. An article by Aileen Che illustrates the importance of students' bodily integrity, that although "students have a diminished expectation of privacy once they enter school premises, . . . students still have a significant privacy interest in their bodies." Aileen Che, *Is the Fourth Amendment Failing Our Students?*, 29 CHILD. LEGAL RTS. J. 89, 90 (2009).

of the case. As a result, these uncertainties leave us with a need for a uniform standard.

## V. THE NEED FOR A UNIFORM STANDARD

State legislatures should begin to draft legislation requiring schools to notify parents and obtain parental consent immediately prior to providing telemedicine services at school, or alternatively, require consent forms not including any “reasonably necessary” or “not limited to” language.<sup>172</sup>

State legislatures, not Congress, should be the bodies to enact mandatory parental consent legislation.<sup>173</sup> While Congress may regulate some medical areas under the Commerce Clause, the majority of medical lawmaking and enforcement is left to the individual states and state medical boards.<sup>174</sup> Telemedicine regulation regarding parental consent should be uniform across the states in order to accomplish the goal of providing assurance for both parents and health care providers that all telemedicine services are consented to.

The parental consent requirements should be uniform because substantive due process and Fourth Amendment rights apply equally across the United States. This is significant because, as previously discussed, relief for violations of these universal rights under the qualified immunity doctrine may depend on whether the right was “clearly established” in a particular jurisdiction.<sup>175</sup> If every state required parental consent before a physician provided telemedicine services, the laws of that state would guarantee relief for parents and children, and thus, parents would not need to bring a constitutional rights claim subject to the shifting “clearly established”

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172. Legislatures are both expanding and restricting telemedicine use. For example, a federal district court recently enjoined the Texas Medical Board from enforcing a law that bars physicians from using telemedicine to prescribe medication when the physician has never met the patient in person. *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529 (W.D. Tex. 2015); see Dionne Lomax & Kate F. Stewart, *Injunction Blocks Implementation of Texas Telemedicine Regulations*, NAT'L L. REV. (June 4, 2015), <http://www.natlawreview.com/article/injunction-blocks-implementation-texas-telemedicine-regulations#sthash.R4naIvOo.dpuf> [<https://perma.cc/L26H-BGNN>].

173. Issues in telemedicine regulation have invited debates as to whether physician's licenses should be nationally regulated, or left to state legislators. See Carl F. Ameringer, *State-Based Licensure of Telemedicine: The Need for Uniformity but Not a National Scheme*, HEALTH CARE L. & POL'Y 55, 62 (2011) (arguing that federal regulation of telemedicine licensures would be too difficult to implement and should be left to state medical boards); see also Susan E. Volkert, *Telemedicine: RX for the Future of Health Care*, 6 MICH. TELECOMM. TECH. L. REV. 147, 174 (2000) (addressing various proposals for a national telemedicine licensure scheme).

174. See Drew Carlson & James N. Thompson, *The Role of State Medical Boards*, 7 AMA J. OF ETHICS (Apr. 2005), <http://journalofethics.ama-assn.org/2005/04/pfor1-0504.html>.

175. See *supra* Part IV.B.3.

standard. Furthermore, different jurisdictions may choose to analyze a substantive claim based on either the traditional and high “shocks the conscience” standard or the more liberal “fundamental rights” standard. Establishing a uniform standard requiring schools to notify parents and obtain their consent prior to telemedicine treatment will eliminate these potential problems. Additionally, uniformity across the states is important because students may commute across state boundaries to go to school, or may attend a school in a bi-state school district.<sup>176</sup> If every state had the same requirements, parents would know the same standards apply regardless of where they live and where their child attends school. Furthermore, telemedicine services are unique in that they have a greater ability to provide treatment across state boundaries.<sup>177</sup> A uniform consent standard would facilitate the practice of a physician in Alabama who provides telemedicine services to a school in Arkansas and may not know what parental consent standards he must adhere to.<sup>178</sup> The requirement that physicians must be licensed in the state where they practice telemedicine largely remains unchanged.<sup>179</sup> However, in some instances, physicians may counsel patients in a state where they do not hold a medical license.<sup>180</sup>

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176. The Delmar School District in southwest Delaware is home to both Delaware and Maryland. *Our History*, DELMAR SCH. DIST., [http://www.delmar.k12.de.us/apps/pages/index.jsp?uREC\\_ID=275974&type=d](http://www.delmar.k12.de.us/apps/pages/index.jsp?uREC_ID=275974&type=d) [https://perma.cc/4YB4-NHQV] (last visited July 30, 2016).

177. While there is great potential for telemedicine to be used across state lines, individual state rules and regulations make doing so difficult. LATOYA THOMAS & GARY CAPISTRANT, 50 STATE TELEMEDICINE GAPS ANALYSIS, PHYSICIAN PRACTICE STANDARDS & LICENSURE 9 (May 2015), <http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis—physician-practice-standards-licensure.pdf?sfvrsn=14> [https://perma.cc/TN8B-AG65].

178. Issues of consent have also been analyzed under medical malpractice law. Fleisher and Dechene discuss the issue of medical consent as it applies to tort, noting that the practice of telemedicine “raises novel informed consent issues and more than one type of consent may be necessary.” LYNN D. FLEISHER & JAMES C. DECHENE, TELEMEDICINE AND E-HEALTH LAW 1–54 (2006).

179. *Credentialing and Licensing*, TELEHEALTH RES. CTR., <http://www.telehealthresourcecenter.org/toolbox-module/credentialing-and-licensing#do-the-telemedicine-providers-have-to-be-credentia> [https://perma.cc/YC4R-39HP] (last visited July 30, 2016). However, there are advancements towards recognizing multi-state licenses. See FED’N OF STATE MED. BOARDS, INTERSTATE MEDICAL LICENSURE COMPACT REPRESENTATIVES GATHER FOR INAUGURAL MEETING (Oct. 30, 2015), [https://www.fsmb.org/Media/Default/PDF/Publications/compact\\_commission\\_meeting\\_oct2015.pdf](https://www.fsmb.org/Media/Default/PDF/Publications/compact_commission_meeting_oct2015.pdf) [https://perma.cc/UB6E-A3A8].

180. TELEHEALTH RES. CTR., *supra* note 179.

Recent debate on the standard of care and licensure to practice telemedicine has mostly suggested that the location of the patient, not the physician, controls the applicable standard of care.<sup>181</sup> The issue of consent would likely follow this pattern, applying the rules and requirements of the patient's, not the physician's state.<sup>182</sup> A uniform standard would similarly assure parents that no matter which state their child attends school in, their right to consent is supported by state statutory law.

Finally, a uniform standard requiring parental consent immediately before telemedicine treatment is provided will protect the autonomy of parents whose children are in private school. The United States Supreme Court decisions in *New Jersey v. T.L.O.* and subsequent cases have maintained that Fourth Amendment claims only apply to employees of public schools and not private schools.<sup>183</sup> Justice Scalia stated that when parents enroll their children in private school, private school officials “stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.”<sup>184</sup> By sending their child to a private school, parents in essence provide an automatic layer of consent. Likewise, a private actor cannot violate parents' substantive due process rights to control the medical care or education of their child.<sup>185</sup> Although a parent of a private school student may not be able to bring constitutional violation claims, that parent's interest in controlling the medical care of his or her child is just as strong as parents of public school students.<sup>186</sup> A uniform standard requiring parental consent to telemedicine services would therefore additionally serve to protect the interests of parents at private schools who might otherwise not have a claim.

#### A. Proposed Legislation

The following text is a model framework for state legislators to adopt into the states' health, family or education codes,<sup>187</sup> and apply to all schools utilizing telemedicine services.

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181. Ameringer, *supra* note 173, at 58.

182. *Id.*

183. See *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1984); see *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 370 (2009).

184. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–55 (1995).

185. See Jack M. Beermann, *Why Do Plaintiffs Sue Private Parties Under Section 1983?*, 26 *CARDOZO L. REV.* 9, 11 (2005).

186. As the California Children's Partnership emphasizes, regardless of public or private nature of the school, “it is critical that programs communicate with parents before and after the telehealth visit and help parents access any needed follow-up care.” *CHILDREN'S PARTNERSHIP*, *supra* note 1, at 10.

187. However, in his article, Carl Ameringer examines how overlooking state medical board administration may impede well-intentioned public policy because of the state medical

I am the parent/guardian of \_\_\_\_\_ (minor's name). I \_\_\_\_\_ (Give/ Do Not Give) consent for \_\_\_\_\_ (Child's Name) to be evaluated and diagnosed in the school-based telemedicine program operated by the school nurse at \_\_\_\_\_ (elementary/middle/high school). In the event the school nurse believes it would be beneficial for my child to have a telemedicine consultation with a physician, registered nurse, or physicians' assistant, the school nurse will contact me and obtain my consent. The nurse will specify the type of treatment and the name of the physician. Although I am not required to be physically present for the treatment of my child, I understand that I am encouraged to participate in my child's medical treatment as much as possible.

I understand that telemedicine services will not be provided before I am contacted and consent to the treatment. However, in case of a medical emergency, all services reasonably necessary will be administered for the health and safety of my child even if I cannot be contacted.

I further understand that I may withdraw my consent for my child to be eligible for telemedicine services at any time during the school year.

Other policy makers have suggested similar requirements.<sup>188</sup>

Alternatively, the telemedicine form could provide an enumerated and finite list of services that may be rendered in school-based telemedicine. As illustrated in Dubbs, where the parental consent form provided a limited list of medical treatment options, a school or medical care provider could not exceed that list without violating constitutional rights.<sup>189</sup> Where there is a finite list of services and no ambiguous "reasonably necessary" or "not limited to" language that is open for interpretation, the rights of parents to control the medical care of their children would be similarly protected.

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board's primary role in protecting consumers. While Ameringer's argument is focused on the issue of national telemedicine physician licensure, here also, implementing consent standards should take into account the important role the medical board plays in managing medical practice. Leaving the rules and regulations up to the Department of Health and Human Services or State Department of Education may overlook the significant role of the medical board in providing consumer protection for medical services. Ameringer, *supra* note 173, at 70.

188. Spaulding et al., *supra* note 20, at 307. One protocol procedure provides that [i]f the child has a fever, contact parent and advise physician's care or offer telemedicine consult. a. If the parent agrees to the telemedicine consult, [1] perform a rapid strep test [2] proceed with routine process to schedule a telemedicine visit b. If the parent does not want to schedule a telemedicine visit, ask the parent to make arrangements for the child to return home and again, advise physician's care.

*Id.*

189. See *supra* Part IV.B.

### B. Potential Counterarguments

Requiring schools to obtain parental consent immediately before a student is provided with telemedicine services could diminish some of its benefits. Certainly, it would be reasonable to contend that if a parent is unable to answer his or her phone while at work, or if the parent does not have a cell phone, the nurse might hold the student out of class for a longer time than what would be ideal.<sup>190</sup> However, requiring schools to contact parents immediately before medical treatment is provided, or alternatively, sign a form authorizing a limited number of telemedicine services, would not result in throwing the baby out with the bathwater. The parent would still not be required to miss work, and once the parent could be contacted and give permission, the child would be able to see a physician without waiting for the parent to come to the school. The balancing of interests in this case, keeping the child in the nurse's office for an extra half hour, or providing medical treatment a parent is not aware of and did not consent to, is not ultimately a very persuasive argument to forego seeking parental consent.<sup>191</sup>

Furthermore, there are additional positive benefits in requiring schools to contact parents and obtain consent immediately prior to providing telemedicine services. When the school nurse speaks with a parent, the nurse not only obtains the parent's consent, but can also ask about any health concerns the child has had in the last few days, potential illnesses the child's siblings might currently have, or a number of other things that would be relevant to providing care. The parent would also be able to talk to the child, providing therapeutic support for treatment that might be more invasive

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190. One of the primary objectives and benefits of school-based telemedicine is to keep healthy children in their classrooms for as much time as possible. However, this would not be the first time that protecting a constitutional right results in inefficient or costly side effects. See e.g., Harold L. Holliday & David Whipple, *Free Speech and the Right of Municipalities to Regulate the Use of Public Places*, U. KAN. CITY L. REV. 191, 202–04 (1950) (discussing the sometimes costly and inconvenient action police officers and municipalities must take in order to protect an individual's freedom of expression); *Bounds v. Smith*, 430 U.S. 817, 825 (1976) (“[T]he cost of protecting a constitutional right cannot justify its total denial.”); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (striking down social security regulations that violated equal protection, where “administrative efficiency” was the sole justification for the regulations). Here too, the fact that protecting a constitutional right comes with costs, or is not in every way “efficient,” does not justify denying the right.

191. See *supra* note 190. The court has placed a high value on the parent's interest, holding such parental rights are “objectively deeply rooted in this Nation's history and tradition.” *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

to the child's privacy. Finally, the parent would be able to speak with the health care provider and hopefully establish a more primary care relationship.<sup>192</sup>

Other scholars have argued that requiring a parent to consent to medical treatment could complicate or confuse laws which enable minors of a certain age to seek medical services related to pregnancy or drug and alcohol treatment.<sup>193</sup> Generally, nurses are free to counsel a teenage student about resources available to him or her regarding sexually transmitted diseases or pregnancy;<sup>194</sup> however, this would not change under this Comment's proposal. Rather, the consent requirements this Comment proposes would have the effect of maintaining the current status quo. Minors of a certain majority age would continue to be able to seek medical counsel and services from the school nurse regarding pregnancy or substance abuse issues as provided by law.<sup>195</sup>

Finally, the proposed legislation includes a "reasonableness" standard for emergency situations, which may similarly lead to subjective judgments as to whether something is an emergency.<sup>196</sup> However, the emergency clause must be included despite possible inconsistencies because emergency care and the transportation of a child to a hospital or physician has always been allowed and expected even if a parent cannot be reached.<sup>197</sup>

192. As part of the new Texas legislation, the hope of legislators was not just for the child to see the physician during one isolated telemedicine meeting, but to establish a regular primary care relationship and conduct appropriate follow-up care. See H.B. 1878, 84th Leg., 2015 Reg. Sess. (Tex. 2015); see also Spaulding et al., *supra* note 20, at 283–84 (noting that when the child has a primary care physician, the telemedicine provider should be in communication with that physician).

193. See Hanisco, *supra* note 53, at 905.

194. See Camille Waters, *A, B, C's and Condoms For Free: A Legislative Solution To Parents' Rights and Condom Distribution in Public Schools*, 31 VAL. U. L. REV. 787, 788 (1997).

195. See *supra* p. 754 and note 57.

196. See e.g., Tyler Pratt, *The Fourth Amendment's Shortcomings for Police during School Shootings*, 44 VAL. U. L. REV. 1095, 1141 (2009) (discussing the subjectivity problems that arise with the "reasonableness test" in law enforcement responses).

197. The Council on School Health recommends that in an event of an emergency where the child needs to be transported to the hospital, a school staff member accompanies the child and assumes *in loco parentis* status (in absence of the parent). Council on School Health, *Medical Emergencies Occurring at School*, 122 PEDIATRICS 887, 890 (2008). The *loco in parentis* doctrine may also justify the school taking custodial care of a child's safety. See Alysia B. Koloms, *Stripping Down the Reasonableness Standard: The Problems with Using In Loco Parentis to Define Students' Fourth Amendment Rights*, 39 HOFSTRA L. REV. 169, 170 n.8, 184–85 (2010).

## V. CONCLUSION

Telemedicine has and will continue to benefit children,<sup>198</sup> parents, schools and entire communities through school-based care.<sup>199</sup> The primary purpose of telemedicine in schools—to increase classroom seat time<sup>200</sup>—will not be diminished by requiring schools to contact parents immediately before telemedicine services are offered, or by requiring that all consent forms contain a finite and limited list of services. Such consent requirements will secure the administration of basic health care needs for children—like testing for strep and monitoring a child’s asthma—and protect parental rights to control their children’s medical care and children’s rights to be free from unreasonable searches protected by the Fourth Amendment.

The valuable partnership goal of schools and the health care community to reach underprivileged and isolated children should continue to develop without jeopardizing fundamental constitutional rights. Implementing a uniform standard amongst states and requiring schools to contact parents immediately before a physician provides telemedicine services—or alternatively, requiring all telemedicine consent forms provide a limited list of services—will allow parents to make the most informed decisions about their children’s health care and will assure that doctors and nurses act with appropriate consent.

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198. Danielle Abril, *Exclusive: Children’s Health Telehealth Pilot Leads to Rollout at 57 North Texas Schools*, DALL. BUS. J. (Aug. 13, 2015, 12:06 PM), <http://www.bizjournals.com/dallas/blog/techflash/2015/08/childrens-health-telehealth-pilot-leads-to-rollout.html>.

199. See CHILDREN’S P’SHIP, *supra* note 1, at 1.

200. See Wicklund, *supra* note 26.