



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 18
Number 4 *Excerpts From the Practicing Law
Institute's 17th Annual Section 1983 Civil Rights
Litigation Program*

Article 10

May 2015

What are we making a Federal Case of? An Interdisciplinary Analysis of Education and the Right to Privacy in the Classroom

Ronnie Jane Lamm

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Education Law Commons](#)

Recommended Citation

Lamm, Ronnie Jane (2015) "What are we making a Federal Case of? An Interdisciplinary Analysis of Education and the Right to Privacy in the Classroom," *Touro Law Review*: Vol. 18: No. 4, Article 10.
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol18/iss4/10>

This Note is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

What are we making a Federal Case of? An Interdisciplinary Analysis of Education and the Right to Privacy in the Classroom

Cover Page Footnote

18-4

WHAT ARE WE MAKING A FEDERAL CASE OF?

AN INTERDISCIPLINARY ANALYSIS OF EDUCATION AND THE RIGHT TO PRIVACY IN THE CLASSROOM

*Ronnie Jane Lamm*¹

School Days

School days, school days
Dear old golden rule days
Readin' and 'ritin' and 'rithmetic
Taught to the tune of the hickory stick
You were my queen in calico
I was your bashful barefoot beau
And you wrote on my slate "I love you, Joe"
When we were a couple of kids²

I. INTRODUCTION

In the year 2001, as *Owasso v. Falvo*³ was pending before the Supreme Court, all across our nation teachers wondered if tomorrow's children would be *taught to the tune of the Supreme Court!* If Mrs. Falvo, from Oklahoma, had her way, the Supreme Court would have struck down a common pedagogical practice of peer grading⁴ of quizzes and homework. The

¹ B.A., Queens College of the City University of New York, 1968; M.S. Education, Queens College of the City University of New York, 1970; J.D. Candidate, Touro Law Center 2003. I am immensely grateful to Professor Thomas Schweitzer for his persistent and insightful guidance. This note is dedicated to my husband Michael, whose love, patience, and support have enabled me to be all that I must be.

² WILL D. COBB, *School Days* (Lyrics, 1907).

³ 534 U.S. 426 (2002), *rev'g* 233 F.3d 1203 (10th Cir. 2000).

⁴ *See, e.g.*, Brief of Amici Curiae National School Boards Association, et al. at 3, *Owasso*, 2000 U.S. Briefs 1073. Historically, teachers have had the discretion to permit their students to grade homework and test papers by

ramifications of this would have rocked the walls of classrooms across the land. The Justices' ability to reminisce and recall the educational practices of their school days will now permit teachers to continue this instructive tool of students grading students' work.⁵

As reported during oral arguments last fall, the Justices waxed nostalgic in their decision regarding children's rights to privacy in school grades. Justice Kennedy questioned: "No gold stars . . . on the paper that goes back to the student that any other student can see, or in these days, a Post-it with a happy face? The Federal Government prohibits that."⁶ In addition, Justice Breyer wistfully questioned, when recalling the daily activity of taking attendance, if when "we all said, 'here,' 'here,' sometimes 'present,'" was it an educational record?⁷ Mrs. Falvo would have liked that question answered in the affirmative.

Historically, education has been one of the most important functions of state and local governments.⁸ Despite the General Education Provisions Act⁹ and the Department of Education Organization Act of 1979,¹⁰ both legislation that prohibits the federal government from exercising control over

exchanging papers and scoring one another's work as the teacher goes over the answers aloud in class.

⁵ Respondents' Oral Argument at 36, *Owasso*, 2001 U.S. Trans. LEXIS 68. The comments during oral arguments were attributed to individual Justices by Dahlia Lithwick, *Playground Zero*, SUPREME COURT DISPATCHES (Oct. 23, 2002) available at <http://slate.msn.com/?id=2059045> (last visited January 6, 2003).

⁶ Respondents' Oral Argument at 36.

⁷ *Id.* at 34. For discussion of what is an educational record, see *infra* text accompanying note 55.

⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁹ 20 U.S.C. §§ 1221-1233h (2000) (amended to include a "prohibition against federal control of education").

¹⁰ 20 U.S.C. § 1232a (prohibiting the federal government from exercising any "direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any education institution, school, or school system or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system").

schools, other federal legislation such as FERPA,¹¹ has weakened the separation between the federal and state government in the area of public education.¹² Supreme Court decisions interpreting these type of legislative acts have promoted the federal government's role in what was traditionally state spheres.¹³ Nonetheless, historically, courts have been reluctant to intervene or second guess academic or grading evaluations by professional educators.¹⁴ In essence, in this critical case, the Court was asked

¹¹ 20 U.S.C. § 1232g.

¹² Similarly, in the area of mental health law, the United States Supreme Court has held that legislation to enforce guarantees of Fourteenth Amendment imposes congressional policy on states involuntarily. *Pennhurst v. Halderman*, 451 U.S. 1, 16 (1990).

¹³ *Id.* at 17

[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." *See Steward Machine Co. v. Davis*, 301 U.S. 548, 585-598 (1937); *see also Harris v. McRae*, 448 U.S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973); *Edelman v. Jordan*, 415 U.S. 651 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

See, e.g., South Dakota v. Dole, 483 U.S. 203, 207 (1987) (upholding the constitutionality of federal statute conditioning states' receipt of portion of federal highway funds on adoption of minimum drinking age of 21).

¹⁴ *See, e.g., Bd. of Curators v. Horowitz*, 435 U.S. 78, 91 (1978); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)

(Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of

to examine a pedagogical technique used in classrooms in local schools.¹⁵

Disturbed by the School District's grading practice, Falvo on behalf of her minor children, cast a wide net of claims in her complaint in their federal class action suit against the Owasso School District.¹⁶ Relying on 42 U.S.C. § 1983,¹⁷ Falvo brought suit in the United States District Court for the Northern District of Oklahoma against the Owasso School District, the superintendent, assistant superintendent, and principal.¹⁸ Falvo alleged that the practice of peer grading, as permitted at the Owasso School District, violated her children's right of privacy as protected by the Fourteenth Amendment.¹⁹

speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools . . .")

(quoting in part *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (Powell, J., concurring)

(Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard academic freedom. . . . [F]ar less is [a court] suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions - - decisions that require "an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision making.")

(quoting *Bd. of Curators Univ. of Mo. v. Horowitz*, 435 U.S. at 89-90).

¹⁵ *Owasso*, 534 U.S. at 426.

¹⁶ *Falvo v. Owasso*, 146 F. Supp. 2d 1137, 1140 (N.D. Okla. 1999).

¹⁷ *Falvo v. Owasso*, 233 F.3d 1203 (10th Cir. 2000).

¹⁸ *Falvo*, 146 F. Supp. 2d at 1137.

¹⁹ *Id.* at 1138. The Fourteenth Amendment assures that no person could be deprived of life, liberty, or property without due process of law; it is through this amendment that the Bill of Rights has been selectively applied to the states. U.S. CONST. amend. XIV. *See also infra* text accompanying notes 30-38.

II. THE CLAIMS

A. FERPA CLAIM PURSUANT TO SECTION 1983

The Supreme Court in *Wilder v. Virginia Hospital Association*²⁰ held, “[a] plaintiff alleging a violation of a federal statute would be permitted to sue under § 1983 unless (1) the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983, or (2) Congress has foreclosed such enforcement of the statute in the enactment itself.”²¹ In *Falvo*, the Tenth Circuit in trying to resolve the first part of this test, determined that the court must decide,

whether the provision in question was intended to benefit the putative plaintiff. If so, the provision creates an enforceable right unless it reflects merely a “congressional preference” for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.²²

Similarly, the Supreme Court held in *Dennis v. Higgins* that a broad interpretation of Section 1983 is required when there is a deprivation of any rights or immunities supported by the Constitution or laws.²³ The Court found support for this interpretation in Section 1983’s legislative history and through the Court’s prior decisions.²⁴ Thus, in order to preserve a Section 1983 claim, the court had to find that *Falvo* had either a colorable constitutional claim or a statutory claim. However, it is a long-

²⁰ 496 U.S. 498 (1990).

²¹ *Id.* at 508.

²² *Falvo*, 233 F.3d at 1211 (citing *Wilder*, 496 U.S. at 509).

²³ *Dennis v. Higgins*, 498 U.S. 439, 443 (1991).

²⁴ *Id.* (quoting *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 684 (1991)).

standing proposition that common law immunity may be a defense to a Section 1983 cause of action.²⁵

Both the Tenth Circuit and the Supreme Court expressed surprise that on appeal *Falvo* did not raise the Section 1983 claim, even though Section 1983 was the basis for the original claim.²⁶ Thus, the Court did not rule on the issue of whether FERPA is enforceable in federal court by private parties under 42 U.S.C. § 1983.²⁷ Subsequently, the Supreme Court addressed this question in *Gonzaga University v. Doe*, and held that FERPA's nondisclosure provisions created no personal right to enforce them under Section 1983, abrogating any Section 1983 claim *Falvo* could have brought.²⁸

B. RIGHT TO PRIVACY CLAIM

The Fourteenth Amendment states, "nor shall any State deprive any person of liberty . . . without due process of law."²⁹ *Griswold v. Connecticut*³⁰ is the first Supreme Court case which specifically addressed the constitutionally protected right of privacy. The Court declared a Connecticut statute that prohibited the use and distribution of contraceptives unconstitutional.³¹

²⁵ See *Hafer v. Melo*, 502 U.S. 21, 28-29 (1991) (holding immunity from suit under § 1983 is based on historical common law state interests).

²⁶ *Falvo*, 233 F.3d at 1207; *Owasso*, 526 U.S. at 430-31 (referring to *Falvo*, 146 F. Supp. 2d 1137). When this case reached the Supreme Court, the Court discussed *Falvo*'s not addressing § 1983 (citing *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998)).

The parties . . . did not contest the § 1983 issue before the Court of Appeals. That court raised the issue *sua sponte*, and petitioners did not seek certiorari on the question. We need not resolve the question here as it is our practice to decide cases on the grounds raised and considered in the Court of Appeals and included in the question on which we granted certiorari.

Bragdon, 524 U.S. at 638.

²⁷ *Owasso*, 534 U.S. at 430-31.

²⁸ 122 S. Ct. 2268, 2271-72 (2002).

²⁹ U.S. CONST. amend. XIV, § 1.

³⁰ 381 U.S. 479 (1965).

³¹ *Id.*

There were several opinions in *Griswold*.³² Justice Douglas delivered the opinion of the Court and referred to previous cases which “suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”³³ Douglas further opined that if you take the various provisions of the Bill of Rights and you consider the core, in addition to the shadowy emanations, then you have a fundamental right of privacy.³⁴ Additionally, Douglas held that this shadow of privacy emanates not through the Fourteenth Amendment Due Process Clause,³⁵ but through the First, Third, Fourth, Fifth, and Ninth Amendments, creating this zone of privacy.³⁶ Justices Goldberg and Brennan, and Chief Justice Warren concurred with Justice Douglas in his opinion.³⁷ Douglas went to great lengths to avoid an analysis of privacy rights through the substantive due process clause of the Fourteenth Amendment. Subsequent courts have not found privacy rights through Douglas’ penumbra of the Bill of Rights. Authorities have deemed the penumbral approach to be nothing more than a due process analysis.³⁸

While the Court in this case did not address the right to privacy, the district court in *Falvo* did rely on the three-part balancing test announced by the Fifth Circuit in *Flanagan v.*

³² *Id.*

³³ *Id.* at 484 (referring to *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. State of Nebraska*, 262 U.S. 390 (1923)).

³⁴ *Id.*

³⁵ *Griswold*, 381 U.S. at 484.

³⁶ *Id.*

³⁷ *Id.* at 486, 499. Justice Harlan separately concurred in the judgment of the Court, but was unable to join the opinion because he interpreted the word *liberty* in the Fourteenth Amendment as the source for a fundamental constitutionally protected right to privacy. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (announcing that a constitutional “right of privacy . . . [is] founded in the Fourteenth Amendment’s concept of personal liberty”); see also *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (finding that one type of constitutionally protected right “is the individual interest in avoiding disclosure of personal matters”).

³⁸ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, 222-23 (1997).

Munger.³⁹ In this balancing test, the court considered: “(1) if the party asserting the right ha[d] a legitimate expectation of privacy, (2) if disclosure serve[d] a compelling state interest, and (3) if disclosure c[ould] be made in the least intrusive manner.”⁴⁰ In *Flanagan*, the circuit court affirmed the district court’s grant of summary judgment against plaintiff, Flanagan, on the first prong of the test.⁴¹ Decisively, the *Flanagan* court held there is no absolute right to privacy in the content of personnel files, but only in the content of “highly personal information.”⁴² Moreover, the court found the items under review were not “highly personal” because they dealt only with the plaintiffs’ work as police officers.⁴³ As in *Flanagan*, Falvo asked the court for protection of the privacy right of an “individual interest in avoiding disclosure of personal matters.”⁴⁴ However, both the district court and the court of appeals rejected this claim as not of such “‘highly personal’ matters worthy of constitutional protection.”⁴⁵ Similar to the court’s decision in *Flanagan*, the *Falvo* court held that the quizzes and homework assignments in question were not “highly personal” because they dealt only with a child’s work as a student.⁴⁶ The Tenth Circuit *Falvo* Court referred to the holding in *Nilson v. Layton City* which held that

³⁹ 890 F.2d 1557 (10th Cir. 1989). In this case a police officer brought an action against the Chief of Police and the City claiming, among other things, a right to privacy in a public reprimand. Deputy Police Chief Flanagan joined with another officer and an investor in the operation of a video store. A small percentage of tapes offered for rental/sale had potentially explicit film covers. After an investigation it was found that Flanagan had violated off-duty employment regulations. *Id.* at 1560. The Chief of Police, thinking he had the consent of Flanagan, responded to local news reporters. *Id.* at 1561. Flanagan contended that this disclosure to the media of the reprimand was violative of his constitutional right to privacy. *Id.* at 1570.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Falvo*, 233 F.3d at 1208 (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)); see also *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 457 (1977).

⁴⁵ *Falvo*, 146 F. Supp. 2d at 1137; *Falvo*, 233 F.3d at 1203.

⁴⁶ *Falvo*, 146 F. Supp. 2d at 1140.

although it appeared the court must utilize all three prongs of the test, actual application of the test is often abbreviated.⁴⁷ The Tenth Circuit determined that if the first prong of the test was not met, there was no need to address the second and third prongs.⁴⁸

Although the emphasis in the lower courts was on the need for Falvo to demonstrate a right to privacy under FERPA and the necessity to determine if it was a “clearly established”⁴⁹ right at the time peer grading took place, in order to decide the issue of qualified immunity the Supreme Court never addressed the privacy issue.⁵⁰

C. FAMILY EDUCATION RIGHTS & PRIVACY ACT (FERPA)

The Family Education and Privacy Act mandates that School Districts that accept federal funds must adopt policies to protect the rights and privacy of students and their parents with regard to the collection, maintenance, and dissemination of students’ records.⁵¹ FERPA also gives parents access to all educational records directly related to their children under age eighteen.⁵² FERPA furthers two parent-child educational goals of

⁴⁷ *Falvo*, 233 F.3d at 1209. “Because the alleged unconstitutional conduct in this case fails to meet the first prong of this test, we hold that Mr. Nilson has no constitutional privacy in his expunged criminal record.” (citing *Nilson v. Layton City*, 45 F.3d 369, 371 (10th Cir. 1995)).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1219.

A right is “clearly established” when “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”

“Although a plaintiff need not show that the very action in question was previously held unlawful, she must demonstrate that there is a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.”

Id. (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

⁵⁰ *Owasso*, 534 U.S. at 426.

⁵¹ 20 U.S.C. § 1232g(a)(1)(A).

⁵² *Id.* § 1232g(d).

Congress: (1) allowing parents access to their children's educational records⁵³ and (2) protecting those records from access by unauthorized persons.⁵⁴

In the original version of FERPA, educational records were defined as:

any and all official records, files, and data directly related to [a student], including all material that is incorporated into each student's cumulative record folder, and intended for school use or to be available to parties outside the school or school system, and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement test scores), attendance data, scores on standardized intelligence, aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns.⁵⁵

That same year, 1974, Senators Buckley and Pell authored a FERPA amendment because:

There has been much concern that the right to a hearing will permit a parent or student to contest the grade given in the student's performance in a course. That is not intended. It is intended only that there be procedures to challenge the accuracy of institutional records which record the grade which was actually given. Thus, the parents of a student could seek to correct an improperly recorded grade, but could not through the hearing required pursuant to law contest whether the

⁵³ *Id.* § 1232g(a)(1)(A)(B).

⁵⁴ *Id.* § 1232g(b)(1)(A)-(I)(2)(A)(B).

⁵⁵ Pub. L. No. 93-380, § 513, 88 Stat. 484, 571 (1974) (codified as 20 U.S.C. §1232g) (emphasis added).

teacher should have assigned a higher grade because the parents or students believe that the student was entitled to the higher grade.⁵⁶

Although FERPA prohibits the release of educational records, it does explicitly identify certain information that may be released by a school district without first obtaining prior parental or student consent. FERPA identifies certain information as “directory information.”⁵⁷

Falvo asserted that it is “counterintuitive” to indicate that educational records do not include grades recorded on exams,

⁵⁶ Pub. L. No. 93-568, § 2, 88 Stat. 1855, 1858 (1974) (see 120 Cong. Rec. 39,862 (1974) (Joint Statement in Explanation of Buckley/Pell Amendment)). The authors of the amendment placed this joint statement concerning the proposed amendment into the Congressional Record, making clear that the change was not intended to expand the reach of the statute beyond institutional records.

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

The New York State School Boards Association, in conjunction with the New York State Bar Association, publishes *SCHOOL LAW*, New York State School Boards Association & New York State Bar Association, *SCHOOL LAW* § 2:73-74 (28th ed. 2000), a guide to be used by school board members and school administrators. Section 2:74 replies to the question: “Are students’ records accessible under FOIL?” (FOIL is the acronym for the Freedom of Information Law.)

No. FOIL exempts from disclosure records that are specifically exempted by federal or state statute (Pub. Off. Law § 87 (2)(A)). Districts may disclose what is known as ‘directory information’ about students such as their names and addresses, but only after giving public notice of the categories of information so designated, and giving parents and eligible students a reasonable period of time to inform the district that such information should not be released without their consent.

Id. § 2.74.

quizzes, and other student work.⁵⁸ The court explained in *Belanger v. Nashua, New Hampshire, School District*⁵⁹ that the change from a laundry list to “education records” along with the reading of the legislative history of the Amendment, leads the court to believe that “education records” should be read broadly.⁶⁰ The statutory list does not include students’ test scores or grades. *Falvo* quoted a United States Department of Education Family Policy Compliance Office (FPCO) opinion:

“This term [‘education records’] is broadly defined to include all records which are directly related to a student and maintained by an educational agency or institution, or a party acting for such agency or institution. Thus, the location or manner in which an education record is maintained, such as whether or not it is placed in the student’s cumulative file, does not affect its status as an education record . . . any record, such as a permanent records card, a student’s homework assignment or exam, a teacher’s grade book” are education records.⁶¹

The Supreme Court in *Skidmore v. Swift*⁶² did state that interpretations contained in agency opinion letters are “entitled to respect,” and the Court further held that the weight which a court should afford such non-binding agency interpretations “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁶³ The Tenth Circuit held that, “even if the language of FERPA was ambiguous,

⁵⁸ Respondents’ Brief at 18.

⁵⁹ 856 F. Supp. 40 (D.N.H. 1994).

⁶⁰ *Id.* at 49.

⁶¹ Respondents’ Brief at 15 n.3 (citing letter from LeRoy S. Rooker, Director, Family Policy Compliance Office, to Dr. Judith Fox, Byram Hills Central School District (June 12, 2001)).

⁶² 323 U.S. 134 (1944).

⁶³ *Id.* at 140.

the . . . [FPCO] letter and declaration would carry minimal persuasive power under *Skidmore*.”⁶⁴ Additionally, the appellate court held that the method of reporting a grade is irrelevant to its analysis, because a “disclosure occurs at the earlier stage when one student grades the work of another.”⁶⁵ This Tenth Circuit holding, that FERPA afforded Falvo a cause of action enforceable under Section 1983, and the holding that grades scored by students on student work are education records, (thus the very act of grading is an impermissible release of information to the class), was the basis for the appeal to the United States Supreme Court.⁶⁶

III. THE FACTS OF *OWASSO V. FALVO*

In the public schools of Owasso, Oklahoma, a suburb of Tulsa, some of the teachers have students grade one another’s assignments, practice tests, homework, and quizzes. The students call out their grades to the teacher when they get their papers back.⁶⁷ During the 1997-98 school year, Kristja Falvo, a mother of three students enrolled in Owasso’s public schools, complained about the practice. When Mrs. Falvo expressed her dissatisfaction with this practice to her children’s teachers, the teachers assured her that her children did not have to announce their scores, but could go to the teacher’s desk and reveal their score in confidence. Falvo was not satisfied with the teacher’s response. She complained to the school counselors and to the superintendent as well.⁶⁸ It was explained to her that teachers use peer grading because it allows them to give their students immediate feedback on the lesson. Discussion by the teacher of the correct and incorrect answers immediately after the student has performed the work reinforces both the lesson taught and the correct answer.⁶⁹

⁶⁴ *Falvo*, 233 F.3d at 1214.

⁶⁵ *Id.* at 1207 n.2.

⁶⁶ *Owasso*, 534 U.S. at 430.

⁶⁷ *Falvo*, 233 F.3d at 1207.

⁶⁸ *Id.*

⁶⁹ Petitioners’ Brief at 3, *Owasso*, 2000 U.S. Briefs 1073 (referring to the Record in the Tenth Circuit, Appellee Supp., p. 227). The significance of

Mrs. Falvo was dissatisfied with the reasons given and the solutions offered.⁷⁰ She petitioned the school district to enact a uniform policy banning peer grading in all schools: to require teachers to either grade their students' papers themselves or to allow all students to grade their own papers. The Owasso School District refused to adopt such a policy.⁷¹

The Owasso School District does not have a formal policy with respect to peer grading in its classrooms. Teachers have the discretion to permit their students to grade homework papers and tests by exchanging papers and scoring one another's work as the teacher goes over the answers aloud in class. Teachers use this practice to varying degrees.⁷² It is undisputed that teachers do not use peer grading to grade mid-term exams (nine-week tests) or final semester tests.⁷³ Falvo agreed that the use of peer grading by her children's teachers varied from teacher to teacher:

There are some teachers that grade their own papers, and there are some teachers that have the children exchange papers. There are some teachers that have them only exchange maybe daily work. It's nothing that's concrete. It's from [sic] a teacher-to-teacher situation. It depends on how the teacher wants to run her classroom.⁷⁴

Furthermore, teachers do not record or preserve every score or grade on every homework paper, quiz, or test that is corrected in class. Falvo admitted that because of this, it is

immediate feedback to a student's success in mastering the lesson was confirmed by the affidavit of one of Falvo's expert witnesses, Professor John D. Krumboltz, a Stanford education and psychology professor. Professor Krumboltz noted in his affidavit that "[r]esearch findings confirm that immediate feedback aids learning more than does delayed feedback." *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 7.

⁷² *Id.*

⁷³ *Id.* at 3.

⁷⁴ Petitioners' Brief at 2-3.

impossible to know which of the grades disclosed in class are recorded and/or used in calculating a student's final grade.⁷⁵

Falvo sought damages, a declaratory judgment, and an injunction prohibiting the Owasso School District from permitting its teachers to allow students to grade each other's papers.⁷⁶ Falvo then filed a motion for partial summary judgment, which she supported with affidavits from three college professors.⁷⁷ After Falvo filed her complaint, the United States District Court for the Northern District of Oklahoma conducted an evidentiary hearing on Falvo's request for a temporary restraining order and a preliminary injunction. The district court declined to grant injunctive relief.⁷⁸

The School District filed a cross-motion for summary judgment.⁷⁹ The School District contended that although FERPA requires educational institutions to preserve the confidentiality of education records, the legislative history of FERPA, although limited, reflects an intent by Congress to limit educational records to those central institutional records maintained in a student's permanent file.⁸⁰

With regard to Falvo's FERPA claim, the School District relied on an opinion letter issued by the Family Policy Compliance Office (FPCO),⁸¹ of the United States Department of Education that addressed the specific issue raised by the action.

⁷⁵ *Id.* at 5.

I don't know which one's do [get recorded] and I don't know if there's a way, unless you're in the classroom and watching the grade book, if you can actually keep a record of which ones do and which ones don't. And so I don't have a guarantee that any grade or any average goes into the grade book. But I believe any grade that is called out has a *potential* [emphasis added] to go into my son's, child's, my daughter's educational record.

Id. (quoting Mrs. Falvo).

⁷⁶ *Falvo*, 146 F. Supp. 2d at 1138-40.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1140.

⁸⁰ *Id.*

⁸¹ See *supra* note 61.

In that letter, FPCO concluded that using students to grade a test or homework assignment of another student and calling out that grade in class was not a violation of FERPA. FPCO stated:

FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.⁸²

IV. THE PROCEDURAL HISTORY

A. THE DISTRICT COURT DECISION

The district court denied Falvo's motion for partial summary judgment and granted summary judgment to the School District. The district court also rejected Falvo's Fourteenth Amendment right of privacy claim, concluding that "the interim test and homework assignments . . . are not 'highly personal' matters worthy of constitutional protection."⁸³ Furthermore, the court applied the test outlined in *Flanagan v. Munger*⁸⁴ and held that the grading practice did not implicate a constitutionally protected privacy interest.⁸⁵ The court also rejected Falvo's FERPA claim, deferring to the FPCO's interpretation of the statute and concluding that such an interpretation "is reasonable and does not conflict with the expressed intent of Congress."⁸⁶

⁸² Petitioners' Brief at 9; see *Falvo*, 146 F. Supp. 2d at 1139 (highlighting that the district court noted that FPCO's affidavits "largely take the form of expressing opinions as to what the law *should* be.") (emphasis in original).

⁸³ *Falvo*, 146 F. Supp. 2d at 1139.

⁸⁴ 890 F.2d 1557, 1570 (10th Cir. 1989).

⁸⁵ *Falvo*, 146 F. Supp. 2d at 1139.

⁸⁶ *Id.* at 1208.

B. THE TENTH CIRCUIT DECISION

The court of appeals affirmed in part and reversed in part the summary judgment granted by the district court.⁸⁷ The court affirmed the district court's grant of summary judgment in favor of the School District on the Fourteenth Amendment privacy claim,⁸⁸ however, it reversed the grant of summary judgment in favor of the School District on the FERPA claim.⁸⁹ As to the FERPA claim, the court affirmed the grant of summary judgment in favor of the individual defendants on Falvo's claim for monetary relief, but reversed the judgment on the plaintiff's claim for injunctive relief.⁹⁰ The court of appeals concluded that the Owasso School District's "grading practice does violate FERPA"⁹¹ and remanded the case to the district court for further proceedings.⁹²

The Tenth Circuit held that the Fourteenth Amendment violation addressed in Falvo's claim relied on a faulty premise: her belief that she should have a legitimate expectation of privacy in her children's school work and test grades.⁹³ If the parent and students did not or should not have had a legitimate expectation that their test grades would be private, they would have no Fourteenth Amendment privacy right protecting those grades from others.⁹⁴ The Tenth Circuit reasoned that although elementary and middle school grades are somewhat personal, to conclude that such information is so highly personal as to fall within the zone of constitutional protection "would trivialize the Fourteenth Amendment."⁹⁵

⁸⁷ *Id.*

⁸⁸ *Id.* at 1207.

⁸⁹ *Id.* at 1219 n.13.

⁹⁰ *Falvo*, 233 F.3d at 1219.

⁹¹ *Id.* at 1219.

⁹² *Id.* at 1220. The School District filed a petition for rehearing *en banc*. Although the court of appeals declined to grant rehearing, the court vacated its original opinion and issued a modified opinion.

⁹³ *Id.* at 1209.

⁹⁴ *Id.*

⁹⁵ *Falvo*, 233 F.3d at 1209.

Nevertheless, the court acknowledged its obligation to look to privacy statutes in considering if there was a constitutional right to privacy, as well as a greater obligation to determine first and foremost whether substantive due process rights founded in the Constitution were present.⁹⁶ On this analysis, the court of appeals upheld the district court's decision granting summary judgment in favor of the School District on the constitutional claim.⁹⁷

Finally, the *Falvo* Tenth Circuit Court, after a statutory analysis of FERPA, held that the language was "neither vague nor amorphous" and was well within the province of the court to consider.⁹⁸ Consequently, the court held that 20 U.S.C. § 1232g(b)(1) "creates an enforceable right within the meaning of Section 1983."⁹⁹

In her briefs to the Court of Appeals and the Supreme Court, *Falvo* omitted the question of a 42 U.S.C. § 1983 cause of action.¹⁰⁰ *Falvo* only relied on Section 1983 and its relation to rights under FERPA in her alternative jurisdictional argument to the Court of Appeals: "it is clear from the language and intent of FERPA that Congress enacted the statute to afford parents of public school students . . . the right to consent to the disclosure of their educational records."¹⁰¹ Nonetheless, the Court of

⁹⁶ *Id.*

⁹⁷ *Id.* at 1210.

⁹⁸ *Id.* at 1211.

⁹⁹ *Id.* at 1212.

¹⁰⁰ Respondents' Brief at 2 ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals *and included in the question on which we granted certiorari*") (citing *Bragdon*, 524 U.S. at 638) (internal citations omitted); *see also id.* (citing *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) which had declined to address an issue because it was not presented in the petition in accordance with Supreme Court Rule 14.1(a) (internal citations omitted)).

¹⁰¹ Respondents' Brief at 2. There is a consensus among "federal courts that a § 1983 civil rights lawsuit may be predicated upon a violation of FERPA." *Id.* *See, e.g.,* *Falvo*, 229 F.3d at 965 (citing *Tarka v. Cunningham*, 917 F.2d 890, 891 (5th Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21, 33 (2nd Cir. 1986); *Achman v. Chicago Lakes Indep. Sch. Dist.*, 45 F. Supp. 2d 664, 672-74 (D. Minn. 1999); *Doe v. Knox County Bd. of Educ.*, 918 F. Supp. 181, 184 (E.D. Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist.*, 876 F.

Appeals and the Supreme Court referenced Section 1983 in their decisions.¹⁰² The Tenth Circuit acknowledged that a cause of action under Section 1983 affords a comprehensive remedial scheme, but then dismissed any further discussion, and addressed Section 1983 as Falvo did, as it relates to jurisdiction (affording a litigant the opportunity to bring an action in federal court, not for the expanded remedies Section 1983 affords).¹⁰³ The Supreme Court also recognized the possibility of a Section 1983 cause of action, but noted that Falvo did not raise the issue as to remedies in the Court of Appeals or in her brief to the Court. Though the Court did not decide the Section 1983 question, the Court assumed that “in these circumstances . . . private parties may sue an educational agency under Section 1983 to enforce the provisions of FERPA here at issue.”¹⁰⁴ The Court further remarked that the Court of Appeals raised the issue *sua sponte*.¹⁰⁵

The court of appeals in *Owasso*¹⁰⁶ found, by a careful examination of the plain language of the Act,¹⁰⁷ that the specific intent of Congress was to confer rights and benefits explicitly on parents and students.¹⁰⁸ *Falvo* concluded that “[t]he benefits Congress intended to confer on parents and students are thus . . . and well within the judiciary’s competence to

Supp. 1104, 1107 (Dist. S.D. 1995); *Belanger v. Nashua, N.H. Sch. Dist.*, 856 F. Supp. 40, 47-48 (Dist. N.H. 1994); *Norwood v. Slammmons*, 788 F. Supp. 1020, 1026 (W.D. Ark. 1991)). *But see* *Gundlach v. Reinstein*, 924 F. Supp. 684, 692 (E.D. Pa. 1996); *Norris v. Bd. of Educ. of Greenwood Community Sch. Corp.*, 797 F. Supp. 1452, 1465 (S.D. Ind. 1992).

¹⁰² *Owasso*, 534 U.S. at 430-31.

¹⁰³ *Falvo*, 233 F.3d at 1211-12.

¹⁰⁴ *Owasso*, 534 U.S. at 431. *But see* *Gonzaga*, 122 S. Ct. at 2271-72 (holding that there is no § 1983 action under FERPA).

¹⁰⁵ *Owasso*, 534 U.S. at 431.

¹⁰⁶ Respondents’ Brief at 14.

¹⁰⁷ *Id.* at 4. (“The purpose of the Act is two-fold – to assure parents of students [the right to] access . . . their education records and to protect such individuals’ *rights to privacy* . . .” (citing 120 CONG. REC. 39862 (Dec. 13, 1974))).

¹⁰⁸ 120 CONG. REC. at 39862.

enforce.”¹⁰⁹ Falvo asserted that the relevant provision of FERPA was intended to benefit Falvo and her children.¹¹⁰

The court of appeals noted that the plain language of FERPA also prohibits educational institutions that receive federal funding from maintaining a policy or practice of permitting the release of education records (or personally identifiable information contained therein) of students without the written consent of their parents to anyone other than statutorily-designated authorities, which does not include other students.¹¹¹ *Falvo* contended that the Tenth Circuit correctly held that calling out or exchanging a student’s test grade at the direction of a teacher for the purpose of recording the grade in the teacher grade book nullifies any safeguard afforded a parent or student against prohibited disclosure. “Not only has the grade been revealed to other students, it is inevitably revealed to the other students’ parents. Thus, Owasso has violated FERPA by permitting its teachers to reveal Falvo’s children’s exam grades to other students without first obtaining her § 1232g(b)(1) consent.”¹¹²

The court of appeals would later question the FPCO letter, since “[a] statement of qualification contained earlier in the letter indicated that in issuing the opinion, the FPCO may not have thoroughly considered the issue before this court.”¹¹³ That portion of the letter stated, “[b]ecause you do not fully explain the details surrounding the activities you identify, it would not be appropriate for this Office to comment on whether the District’s participation in the activities would violate rights afforded.”¹¹⁴

Owasso’s counter argument to the district court and the court of appeals, was to present a 1993 letter from FPCO.¹¹⁵ The court of appeals rejected this letter as nothing more than an informal memorialization of an informal telephone

¹⁰⁹ *Id.* at 4-5.

¹¹⁰ *Id.*

¹¹¹ *Falvo*, 233 F.3d at 1213 (citing 20 U.S.C. § 1232g(b)(1)).

¹¹² Respondents’ Brief at 16.

¹¹³ *Falvo*, 233 F.3d at 1214.

¹¹⁴ *Id.* at 1216.

¹¹⁵ *Id.* at 1213.

conversation.¹¹⁶ Owasso countered this rejection and underlined FERPA's intended limitations as follows:

The FPCO specifically stated in its opinion letter that FERPA is not "intended to interfere with a school's, or classroom teacher's, ability to carry out what are generally considered to be normal and legitimate educational activities and functions."

The FPCO went on to explain that "a thoughtful, common sense, approach is necessary" in judging the impact of classroom activities on a student's rights under FERPA.¹¹⁷

The School District further countered Falvo's argument with the idea that it would be virtually impossible for a teacher to grade 140 homework papers or weekly quizzes overnight and have them ready to be returned the following day. "A teacher in such a situation would be 'overwhelmed.'"¹¹⁸ "The district court found that if teachers are not able to utilize students to grade papers, 'students will only receive their results after delay,'"¹¹⁹ and "'teachers will begin assigning less homework and quizzes,' which may also 'have a detrimental effect' upon education."¹²⁰ "In Oklahoma, teachers of grades seven through twelve may lawfully be assigned to teach up to 140 students per day."¹²¹

Falvo responded, and the Tenth Circuit agreed, that at least some grades which students give one another and report to the teacher are then recorded in the teacher's grade book. At that later time when the grades are placed in the teacher's grade book,

¹¹⁶ *Id.* at 1219.

¹¹⁷ Respondents' Brief at 29.

¹¹⁸ *Falvo*, 233 F.3d at 1219.

¹¹⁹ Petitioners' Brief at 4-5.

¹²⁰ *Id.*

¹²¹ *Id.* at 3-4. Petitioners cited an Oklahoma statute which provides:

C. Beginning with the 1996-97 school year and each school year thereafter, no teacher who is counted in class size count for grades seven through twelve shall be responsible for the instruction of more than one hundred forty (140) students on any given six-hour day.

OKLA. STAT. tit. 70, § 18-113-3 (Supp. 2000).

they are “maintained . . . by a person acting for [an educational] agency or institution” and constitute education records.¹²² The court attributed no importance to the issue of whether the teachers may record or not record the grade for use in determining the student’s final grade in the class. The court reasoned that because “at least some grades which students give one another and report to the teacher are then recorded in the teacher’s grade book, [those grades] are ‘maintained . . . by a person acting for [an educational] agency or institution’ and constitute ‘education records’.”¹²³

The court of appeals further held that the language and the legislative history of FERPA show that just such grades are education records under FERPA.¹²⁴ The court held that when a student scores another student’s homework or quiz she becomes “a person acting for [an educational] agency or institution” who “maintains” the score or grade on such paper and therefore affords the teacher the opportunity to use the grade at the teacher’s discretion.¹²⁵ The court concluded that this classroom practice violated FERPA regardless of whether the students call out their grades in class or report their grades to the teacher in private.¹²⁶ The court specifically noted that “the method of reporting the grades is irrelevant to our analysis, because a disclosure occurs at the earlier stage when one student grades the work of another.”¹²⁷

¹²² *Falvo*, 233 F.3d at 1215. The Court also noted:

The teacher might use the grade by recording it in a grade book to calculate the student’s final grade. Even if the homework or test grade never figures into the student’s final grade, the teacher must still receive the grade to use it for some other purpose, perhaps to preserve, in a grade book or otherwise, a yardstick of each student’s performance and progress to better develop effective teaching strategies.

Id. at 1216 n.11.

¹²³ *Id.* at 1213.

¹²⁴ *Id.* at 1211-12.

¹²⁵ *Id.* at 1216.

¹²⁶ *Id.* at 1215.

¹²⁷ *Falvo*, 233 F.3d. at 1215 n.10.

In response to the petition for rehearing *en banc*, four of the ten active judges on the Tenth Circuit Court of Appeals dissented from the denial of the petition for rehearing. The dissenting judges observed that the court's decision "[d]efining 'education to include grades' which students record on one another's homework and test papers and then report to the teacher . . . is a vast expansion of the actual words of the statute, and unsupported by the legislative history."¹²⁸

The School District's brief to the Supreme Court alleged that the decision of the court of appeals was "inconsistent with the plain language of FERPA" and Congress' intent.¹²⁹ The School District further contended that Congress defined education records as those records that contain personally identifiable information which are "maintained by an educational agency or institution or by a person acting for such agency or institution."¹³⁰ The School District argued in its Supreme Court brief that the court of appeals "distorted the plain meaning of the word 'maintain' by reading it to include the creation of a 'record' by a student scoring" another student's work.¹³¹ Additionally, the School District argued that "the court of appeals illogically concluded that an 'education record' is 'released' in violation of the statute at the same instant it is created 'by a person acting for' the educational agency or institution because the person who created the record knows the content thereof."¹³² Furthermore, counsel for Owasso School District asserted that "the court of

¹²⁸ *Id.* at 1204.

¹²⁹ Petitioners' Brief at 13.

¹³⁰ *Id.* (citing 20 U.S.C. § 1232g(a)(4)(A)).

¹³¹ *Id.*

¹³² *Id.* Petitioners argued that:

The court of appeals refused to follow the long-standing interpretation of FERPA followed by the Family Policy Compliance Office, the agency responsible for enforcing the statute. The FPCO's interpretation should have been accorded respect (if not deference) by the lower court because the FPCO properly recognized that Congress did not intend for FERPA to interfere with "normal and legitimate educational activities and functions."

Id.

appeals' interpretation of FERPA is far more intrusive than the court of appeals appeared to realize and will prohibit or burden a wide array of sound and beneficial educational practices followed by teachers in elementary schools, secondary schools, colleges, and universities."¹³³ Teachers' rights to choose long established pedagogical techniques will be limited by this decision.¹³⁴

The School District illustrated the impediments to education in the court of appeals' interpretation of FERPA with examples of grading as it relates to band, group, or team projects.¹³⁵

¹³³ *Id.* at 14.

¹³⁴ Greg Toppo, *Students Checking Each Other's Work May Not Make the Grade*, WASHINGTON POST, July 15, 2001, at A4 (teachers attest to the need for peer grading, when needing quick feedback, one Spanish teacher "has her students pass their work to classmates and then goes over the answers with them. In a few minutes, she knows who understood the lesson and who did not."); see *Implementing the PASS System: How Students Perceive Its Effect on Their Learning*, OREGON UNIV. SYSTEM PASS REPORTS, Fall 1998, No.1, p.7, available at <http://www.ous.edu/pass/documents/archive/publications/> (last visited on January 6, 2003). Quoting a student, concerning the benefits derived from grading peer papers, "[a]nd by correcting other people's papers, I see similar mistakes that they're making, but because I didn't write it, I have another view on it."

¹³⁵ *Falvo*, 233 F.3d at 1218 n.13. The School District justified the grading of homework and tests by other students on two grounds:

(1) it allows immediate feedback to the students; and (2) it relieves the teacher of the time-consuming task of correcting the papers. FERPA, however, forbids neither the practice nor the benefits. The statute does not prohibit students from correcting papers if done anonymously or with the consent of parents. Furthermore, the evidence establishes that not all teachers have their students grade one another's work. As a consequence, there necessarily exist further alternatives to the practice of having students correct other students' papers without parental consent or anonymity. In its petition for rehearing, the School District itself recognized two additional techniques which teachers may employ to avoid liability--collecting and passing out papers themselves or placing graded papers in sealed envelopes. There are still other means by which teachers can continue to work efficiently and effectively without violating FERPA. For example, if a teacher would like one student to collect from the others self-

In band, orchestra, and music classes, students earn the rank of "first chair," "second chair," "third chair," etc., by virtue of their performance on playing tests that occur in class. Every student in the band or orchestra knows who is first chair on any instrument. In speech, drama, and debate classes, students not only observe each other's performances, but they also often participate in evaluating those performances, and all of the students in those classes know who the teacher has selected for speech and debate competitions or for the lead roles in a class theatrical performance project. . . . [This decision would preclude the grading of team projects as well.] . . . [E]veryone on the team [would] know that his or her teammates received the same grade. Yet teachers often choose to grade such projects on a team basis for the very purpose of encouraging the students to learn to work together, apportion duties, and carry their own share of the load. Assigning a grade to the team, rather than to each individual team member, is an effective means of promoting these goals.¹³⁶

graded papers, the teacher can simply direct the students to turn their papers over so the grade is not revealed. Similarly, if a teacher does not wish to personally hand out graded papers, the teacher may have the students come to retrieve the papers one at a time, so they do not see each others' grades; alternatively, the teacher could fold over the papers to conceal the students' grades but not their names and thus allow a student to hand back the papers. The School District's protestations that this opinion somehow marks the end of the world for teachers, therefore, are greatly exaggerated.

Id. (citing 20 U.S.C. § 1232g(b)(1)).

¹³⁶ Petitioners' Brief at 36-37.

Although the court of appeals' decision was only binding in the six states of the Tenth Circuit,¹³⁷ it cast a brief cloud over many common practices in classrooms across the country and caused widespread concern and confusion, not only about the legality of peer grading, but about many other common and established educational practices. For example, the Tenth Circuit's decision called into question the propriety of allowing parent volunteers to check papers, displaying graded student artwork and science projects, and publishing honor rolls or lists of students with perfect attendance.¹³⁸

Phi Delta Kappa, an educational honor society, heralded the news of the Tenth Circuit Court of Appeals with the following headline: *A D-Grading Experience? Legal Aspects of Students Grading Papers of Other Students*.¹³⁹ It remarked in horror, "[b]y implication, the Tenth Circuit's ruling expressly applies not only to situations in which students grade fellow students' homework, tests, and 'similar' work products and the results are called out to the teacher," but to other practices as well.¹⁴⁰

¹³⁷ Oklahoma, Kansas, Utah, Colorado, New Mexico, and Wyoming are the six states comprising the Tenth Circuit.

¹³⁸ Toppo, *supra* note 134, at A4. See, e.g. Gregory H. Perry, *Volunteers Enter the Schoolhouse Gate*, 79 NEB. L. REV. 998, 999 n.7 (2000); Heather May, *Pupil Graded Work Fails Privacy Test*, SALT LAKE TRIBUNE, Sept. 7, 2000, at A1.

¹³⁹ Phi Delta Kappa, *A D-Grading Experience? Legal Aspects of Students Grading Papers of Other Students*, PHI DELTA KAPPA (Nov. 1, 2000).

¹⁴⁰ *Id.* (discussing the ramifications of the holding in the Tenth Circuit for current classroom school practices).

1) [T]he enlistment of the proverbial "teacher's pet" to help score, during free periods or after school, other students' papers; 2) the awarding of a group grade and other such practices related to cooperative or small-group learning; 3) in class announcing of students' grades; 4) displaying student papers that have earned top grades; 5) publishing the names of students on the honor roll; 6) posting lists of students' grades by name or reasonably identifiable code; and even 7) sharing individual athletic results with the media, without careful attention to the consent requirement or specific exceptions of FERPA.

V. THE SUPREME COURT DECISION

Owasso v. Falvo will stand in pedagogical legal history as the Supreme Court case that resolved the definition and scope of the ambiguous term “education records.”¹⁴¹ All other language and issues in the case, even if they were ambiguous and not well understood by the lower courts, were irrelevant to the Supreme Court.¹⁴²

The Supreme Court granted certiorari solely to decide whether peer grading violates FERPA.¹⁴³ The Court noted questions it would not address; other questions it simply did not address.¹⁴⁴ Justice Kennedy, joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, Thomas, Ginsburg, and Breyer delivered the opinion of the Court.¹⁴⁵ Justice Scalia filed a separate opinion. Although Justice Scalia concurred on the issue of “peer grading,” and “acting for,” he took exception to the majority’s narrow interpretation of “maintaining.”¹⁴⁶ In its narrow interpretation, it overturned the Tenth Circuit’s decision and boiled the entire issue down to one pivotal question: When are education records “maintained?”¹⁴⁷

Id.; see also James Rosenfeld, *Must School Districts Provide Test Protocols to Parents?* EDLAW BRIEFING PAPERS, 1-11 (May 1994); Perry A. Zirkel, *Test Protocols: Parental Access* SPECIAL EDUCATOR, 171-72 (October 1999).

¹⁴¹ See *supra* text accompanying note 55 for the definition of education records in 20 U.S.C.S. § 1232g(a)(4)(A).

¹⁴² *Owasso*, 534 U.S. at 430-31.

¹⁴³ *Owasso*, 534 U.S. at 430.

¹⁴⁴ *Id.* at 430-31. Whether FERPA provides private parties a cause of action enforceable under § 1983, Falvo’s Fourteenth Amendment claim and whether grades once turned into the teacher are then educational records, etc., are all issues either skirted or abandoned by the Court.

¹⁴⁵ *Id.* at 428.

¹⁴⁶ *Id.* at 436 (Scalia, J. concurring).

¹⁴⁷ *Id.* at 434-36.

A. PEER GRADING

The Court did not decide whether at any point peer graded assignments would ever be considered “education records.”¹⁴⁸ The Court conceded that quizzes and homework assignments contain some personal information relating to a student.¹⁴⁹ However, the Court focused on the plain language of the statute and would only consider the student’s work “education records” if it “[was] maintained by an educational agency or institution or by a person acting for such agency or institution.”¹⁵⁰

B. “MAINTAINED”

Both the petitioner and the respondent agreed that if the graded assignments were education records within the meaning of FERPA,¹⁵¹ the grading, (or if not the grading, then the actual calling out of grades would be the release of records), which is prohibited under FERPA.¹⁵²

The petitioners argued that only those grades kept in a permanent file would be “maintained” by an institution or agency.¹⁵³ The items generally kept in a permanent file would be final term averages, standardized tests, grade point averages, records of counseling, and records of disciplinary actions.¹⁵⁴ The petitioners asked the Court to imagine the magnitude of a file if every quiz and homework assignment was retained in a permanent file.¹⁵⁵

The respondent, Falvo, pointed to the exception noted in FERPA.¹⁵⁶ Falvo argued that the Tenth Circuit held that teachers’ grade books are in the excepted category. The FERPA exception

¹⁴⁸ *Owasso*, 534 U.S. at 430.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 429 (citing 20 U.S.C. § 1232g(a)(4)(A)).

¹⁵¹ See *supra* text accompanying notes 51-66.

¹⁵² *Owasso*, 534 U.S. at 431 (referencing 20 U.S.C. § 1232g(b)(1)).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 431-32.

¹⁵⁵ Petitioners’ Brief at 17.

¹⁵⁶ 20 U.S.C. § 1232g(a)(4)(B)(i).

covers: “records of instructional, supervisory, and administrative personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute.”¹⁵⁷ Furthermore, Falvo argued that if FERPA forbids teachers to share students’ grades after they have been written in the grade book, what sense would it make to permit the exposure initially?¹⁵⁸

The Supreme Court took exception to this reasoning and rejected any interpretation that would interfere with the day to day workings of schools.¹⁵⁹ The Court reaffirmed the federalism doctrine, which allocates responsibilities between the federal government and the states.¹⁶⁰

Examining if the calling out of grades would constitute an “educational record,” the Court held that to satisfy the definition of “education record,” the student papers would have to be “maintained.”¹⁶¹ Drawing upon the definition from Random House’s Dictionary,¹⁶² “‘maintain’ is ‘to keep in existence or continuance; preserve; retain.’”¹⁶³ Parsing the Act further, the Court held that the grade on a student assignment is not “contained therein” until a teacher records it.¹⁶⁴ The Court explained its reasoning as follows:

The teacher does not maintain the grade while students correct their peer’s assignments or call out their own marks. Nor do the student graders maintain the grades within the meaning of § 1232g(a)(4)(A). The word “maintain” suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is

¹⁵⁷ *Owasso*, 534 U.S. at 432 (citing 20 U.S.C. § 1232g(a)(4)(B)(i)).

¹⁵⁸ Respondents’ Brief at 17.

¹⁵⁹ *Owasso*, 534 U.S. at 432.

¹⁶⁰ *Id.* See *supra* text accompanying notes 8-14.

¹⁶¹ *Id.* at 431 (referencing §1232g(a)(4)(A)).

¹⁶² RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1160 (2d ed. 1987).

¹⁶³ *Id.*

¹⁶⁴ *Owasso*, 534 U.S. at 433.

no longer enrolled. The student graders only handle assignments for a few moments as the teacher calls out the answers. It is fanciful to say they maintain the papers in the same way the registrar maintains a student's folder in a permanent file.¹⁶⁵

C. "A PERSON ACTING FOR"

Justice Kennedy's opinion also lambasted the Tenth Circuit for mistakenly concluding that a student grader could be "a person acting for an educational institution."¹⁶⁶ The Court determined that "a person acting" for would be in an agency relationship to the school.¹⁶⁷ The Court listed those employees who would qualify: "teachers, administrators and other school employees."¹⁶⁸ The Court stated that no one would conjecture that a student is "acting for" an educational institution when he or she follows a teacher's direction to take a quiz.¹⁶⁹ How could one conjecture that students are "acting for" an educational institution when they follow a teacher's direction and correct a classmate's homework? "Correcting a classmate's homework can be as much a part of the assignment as taking the test itself."¹⁷⁰ The opinion addressed the stated requirement of FERPA to "maintain a record,"¹⁷¹ kept with the education record, listing all those who have requested access to the education record.¹⁷² The Court considered this as an extreme and unnecessary burden on students who would grade papers and then be required to maintain a record. A teacher would be required to maintain separate records for each student whenever the teacher

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* (referring to 20 U.S.C. § 1232g(a)(4)(A)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Owasso*, 534 U.S. at 433.

¹⁷⁰ *Id.* In the author's opinion Justice Kennedy sounds "pedagogically" trained in describing the benefits students receive from peer grading.

¹⁷¹ 20 U.S.C.S. § 1232g(b)(4)(A).

¹⁷² *Owasso*, 534 U.S. at 434.

needs to access the student grade book. The Court was certain that FERPA would not require this.¹⁷³

The Supreme Court reversed the decision of the Tenth Circuit and limited its holding to “this narrow point: that in all events the grades on students’ papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book.”¹⁷⁴

D. CONCURRING OPINION

In his concurring opinion, Justice Scalia took exception to the majority’s argument that had relied on a model of a “central custodian” for maintenance of records.¹⁷⁵ Scalia maintained that the majority, while relying upon the theory that excluded teachers’ grade books as part of the records kept by a “central custodian,” yet not deciding whether grade books are education records.¹⁷⁶

VI. IMPACT

Why did this case warrant Supreme Court review? What did they make a federal case of? It is not certain anyone knows, not even the Supreme Court. One could suspect that the Court saw a need to rein in lower federal courts, and not permit a whole new body of case law to develop.

Concerned educators and parents alike must now take notice of this case for other reasons. Constitutional and legal questions aside, educators must be alert to the sensitivities of children in their classroom. Common decency and good manners must dictate classroom procedures, not how many papers a

¹⁷³ *Id.* at 435-36.

¹⁷⁴ *Id.* at 436.

¹⁷⁵ *Id.* at 437 (Scalia, J. concurring). Justice Scalia disagreed with the majority which held that education records include only those documents that are kept in some central repository at the school, however, it is “fanciful to say student graders maintain the papers in the same way the registrar maintains a student’s folder in a permanent file.” *Id.*

¹⁷⁶ *Owasso*, 534 U.S. at 437 (Scalia, J. concurring).

teacher must grade, not even the “supposed educational benefits” of a particular classroom procedure. No pedagogical technique can benefit students, if even one student in a classroom is made to feel uncomfortable and less able.

Those educators who defend peer grading for its educational merits - review and re-enforcement, must also acknowledge its shortcomings. When peer grading is used, teachers often will miss the opportunity to fully understand the mistakes and needs of their students. Immature or unkind classmates may sometimes maliciously share with others the knowledge of a peer’s shortcomings. Furthermore, when peer grading is used students will often find innovative and creative means of cheating.

Those teachers who indiscriminately use peer grading can now rest easy, assured in the knowledge that a long-held teaching technique will live on. Elementary school Johnnys and Suzys will continue to be embarrassed when classmates grade their quizzes and homework and their grades are called out to the teacher. FERPA has not been violated. The strong tradition of judicial deference to the states and to educators continues. Federalism lives on. The Supreme Court in 2002 said so.

VII. CONCLUSION

The Supreme Court, in this narrow opinion, reaffirmed Congress’ intent not to intrude into the day-to-day activities of hundreds of thousands of classrooms across the nation, or the way in which teachers conduct the educational process in those classrooms, or the way in which students interact with each other. Some conservative groups, including strict constructionists and traditionalists, might applaud this decision as a limitation on the federal courts’ review of individual rights (particularly in the educational arena). This decision might also be viewed as the Court’s frustration with the lower court’s attempt to develop a whole new body of case law. Much to the dismay of other conservative groups with a long-standing interest in having FERPA interpreted broadly, in order to preserve the fundamental

rights of parents,¹⁷⁷ the justices, across the ideological spectrum, expressed concern during oral argument about expanding the federal government's classroom presence.¹⁷⁸

Educators and attorneys alike would have to agree that providing privacy to students is an important goal. Students need rights, privileges, and identities in order to be productive individuals in society. However, there is a point where one must question whether those very rules and regulations promulgated to protect our children, are truly in the best interest of the children or are simply a hindrance to the entire educational process. The Supreme Court agreed with the defendants' position that:

[Mrs.] Falvo brought this action because her children were "embarrassed" by the peer grading practiced at the Owasso School District. [All can] appreciate the desire of a parent to shield her children from life's unpleasantness. Yet prohibiting peer grading will not stop children from being embarrassed in school. Children who look different, who speak with a different accent, who run slower [sic] on the playground, who are taller or shorter or heavier or thinner than their classmates, will, at times, be teased and ridiculed by those classmates. Prohibiting peer grading will not insulate students from embarrassment.¹⁷⁹

¹⁷⁷ See Brief of Amici Curiae Capitol Resource Institute, Citizens For Better Government, in Support of Respondent, *Owasso*, 2000 U.S. Briefs 1073; Brief of Respondent, *Owasso*, 2000 U.S. Briefs 1073 (joining The Rutherford Institute). "The Rutherford Institute, a conservative legal organization that represented Paula Corbin Jones in her sexual harassment suit against [former] President Bill Clinton, entered the case to help represent the plaintiff, Kristja F. Falvo, after the court had agreed to hear the School District's appeal." Linda Greenhouse, *Justices Hear Case On Privacy of Students*, N.Y. TIMES, Nov. 28, 2001, at A23.

¹⁷⁸ Transcript, *Owasso*, 2001 U.S. Trans. LEXIS 68, at 38-45.

¹⁷⁹ Petitioners' Brief at 36-37.

VIII. POSTSCRIPT

In any event, “if you would like to grade this comment, please do not shout out the grade without my written consent, which will not be granted for anything less than an A.”¹⁸⁰

¹⁸⁰ See *supra* note 139.