

AN ANALYSIS OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT
AS INTERPRETED BY THE UNITED STATES SUPREME COURT

IN *OWASSO V. FALVO*

by

RHONDA LEIGH WILSON

(Under the Direction of John Dayton)

ABSTRACT

The question of whether or not peer grading violated the privacy rights of students became an issue for determination by the United States Supreme Court when the Court agreed to hear *Owasso v. Falvo* (2002). The privacy rights of students in public educational institutions are protected by the Family Educational Rights and Privacy Act (FERPA) [1974], and this act is administered by the Family Policy Compliance Office of the United States government. *Owasso v. Falvo* (2002) stands as the first case involving the FERPA to be argued before the United States Supreme Court.

The purpose of this study was to provide a thorough review and analysis of *Owasso v. Falvo* (2002) from its inception to its final dispensation in the United States Supreme Court. By reviewing the relevant legal history and the current status of the law concerning the FERPA, this study will help to clarify significant statutory ambiguities and specific legal parameters of the FERPA as applied to the practice of peer grading in the public schools.

This study used legal research methodology. The data for this study include a thorough review of the legal history of the FERPA (1974). Information about each of the FERPA's nine amendments and about the questions and concerns the language of this statute has generated throughout its history was also discussed. Other relevant statutes, court cases, and scholarly commentary provided further data for this study. The current status of the FERPA as it applied to the practice of peer grading in the public schools was provided by a thorough analysis of *Owasso v. Falvo* (2002).

The decision of the United States Supreme Court in *Owasso v. Falvo* (2002) was that the practice of peer grading does not violate students' privacy rights under the FERPA (1974), at least during the initial stage until the teacher collects and records the students' grades.

INDEX WORDS: Owasso, Falvo, Owasso v. Falvo, Falvo v. Owasso, The Family Educational Rights and Privacy Act, FERPA, students' privacy rights, educational privacy rights, peer grading

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DEDICATION

This dissertation is dedicated to Marvin L. Wilson and Elizabeth G. Wilson, my parents. These two people have been the single most important positive influence in my life. They have guided me when I needed guidance, supported me when I needed support, and loved me at all times.

Completing this dissertation gives me a great sense of achievement. It has been an arduous yet fulfilling task. Sadly, I lost my mother before I was able to complete this work, but I believe that she knows I have completed my dissertation and is proud of my accomplishment. My father, the man who taught me that I could do anything that I put my mind to doing, has been beside me every step of the way. His belief in my ability to complete this task and his steadfast support of my efforts to do so have allowed me to finally reach this goal.

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CHAPTER 1

OVERVIEW OF THE STUDY

Problem Statement

The Family Educational Rights and Privacy Act (FERPA), a Congressional act that was enacted in 1974, was brought before the United States Supreme Court for interpretation for the first time in 2002. According to its authors, the FERPA was written to give parents and students a federally protected right to the confidentiality and accuracy of educational student records (“Joint Statement,” 1974, p. 39862). It was constructed as a funding act that applied to all public and private elementary, secondary, or post-secondary schools and any state or local education agency that received federal funds. The Family Policy Compliance Office (FPCO) in the “Legislative History of Major FERPA Provisions” stated, “[The] FERPA is a ‘Spending Clause’ statute enacted under the authority of Congress in Art. I § 8 of the U.S. Constitution to spend funds to provide for the general welfare. (‘No funds shall be made available under any applicable programunless statutory requirements are met.’)” (2001, p.2). During the 30 years that the FERPA has been in existence, it has been amended nine times and has been a factor in many cases in the state and lower federal courts. Because of the ambiguities in its wording and in its purpose, the FERPA has left open the door to litigation. *Owasso Independent School District v. Falvo* (2002) stands as a landmark case in education law because in 2002, for the first time in history, the United States Supreme Court agreed to hear a FERPA case and give its interpretation of this significant federal education law.

The Family Educational Rights and Privacy Act is divided into two parts. First, it gives students the right to (a) inspect and review their own education records, (b) request corrections to these records, (c) halt the release of personally identifiable information, and (d) obtain a copy of their institution's policy concerning access to educational records. (20 U.S.C. § 1232g[a]) Second, it prohibits educational institutions from disclosing personally identifiable information in education records without the written consent of the student, or if the student is a minor, the student's parents. (20 U.S.C. §1232g[b]) Any educational agency that fails to comply with the restrictions of the FERPA runs the risk of losing any federal funding that it is receiving. (20 U.S.C. §1232g)

Under each of the two parts of the FERPA (1974), there are several exceptions that do allow the release of student records to certain parties and that do allow the release of student records under particular circumstances. There are also specific school records that are exempt from the FERPA protection. *Owasso v. Falvo* (2002) asked the Court to interpret the scope of the act itself and in particular, its exceptions and exemptions with regard to education records.

As mentioned earlier, the FERPA (1974) is a spending clause statute that was written to allow denial of the allocation of federal funds to educational institutions that do not meet the requirements set up within its framework. "In accordance with the statute, the Secretary [of Education] has designated an office and review board within the Department [of Education] to investigate, process, review, and adjudicate FERPA violations and complaints of alleged FERPA violations" (Legislative History, 2001, p.10). "Any action to terminate Federal financial assistance may be taken only if the Secretary finds that there has been a failure to comply, and compliance cannot be secured voluntarily" (Legislative History, 2001, p. 10). Although there has been ongoing debate as to what rights and remedies the Family Educational Rights and

Privacy Act of 1974 actually provides, it is a statute that has long been embraced by social conservatives and parental-rights advocates.

Owasso v. Falvo (2002) is the first FERPA (1974) case that the Supreme Court has agreed to hear. Through the FERPA the law protects the privacy of students from “the increasingly intrusive demands for information by public schools,” says a brief filed in support of the Falvo family by the Eagle Forum (2001, p.1). The Bush administration counters this with its own brief by the solicitor general that states,

[The] FERPA applies to final course grades, student grade point averages, standardized-test scores, attendance records, intelligence tests, psychological tests, aptitude and vocational tests, disciplinary records, and individualized education plans. [The] FERPA does not, however, apply to the handling of the work product of students themselves, such as routine homework assignments or tests or other classroom activities. (2002, p.12).

Falvo focuses on the issue of privacy and claims that one student grading another student’s paper and then calling out the grade for the teacher to record in her grade book is a violation of privacy under the FERPA and under the Constitution of the United States, 42 U.S.C. § 1983.

The Owasso School District maintains that there is no violation of privacy because students do not have a guarantee of privacy in schoolwork completed on a daily basis such as homework, class work, quizzes, etc., and students grading other students’ papers are still just students with no duty due to the school as its agents.

The Supreme Court in agreeing to hear arguments in *Owasso v. Falvo* (2002) addressed the following questions:

1. When students in a class grade the papers of other students in the class, are the student graders acting as agents for the school system?

2. When students grade the papers of other students, does this practice violate the privacy of the students involved?
3. When grades are written on students' papers by other students, are these grades considered to be education records?
4. What specifically constitutes an educational record?

In its 2002 opinion on *Owasso v. Falvo*, the Supreme Court gives some guidance as to what rights and remedies the Family Educational Rights and Privacy Act of 1974 provides, and it clarifies its interpretation of “educational records,” (20 U.S.C. § 1232g(a)(4)(A)(ii) of “maintained,” (id.) and of “an educational agency or institution or by a person acting for such agency or institution” (id.) in the actual text of the FERPA document.

The Supreme Court determined that the FERPA (1974) was and is a spending clause and that it had never been held to confer enforceable rights. Rather than the FERPA being policed by the courts and in accordance with the FERPA itself, “the Secretary [of Education] has designated an office and review board within the Department [of Education] to investigate, process, review, and adjudicate FERPA violations and complaints of alleged FERPA violations” (Legislative History, 2001, p.10). The typical remedy under the FERPA would be for the federal government to terminate funding to the offending entity. “Any action to terminate Federal financial assistance may be taken only if the Secretary finds that there has been a failure to comply, and compliance cannot be secured voluntarily” (Legislative History, 2001, p.10). The Court further held that a violation of rights, not laws, gives rise to an action under 42 U.S.C. § 1983, and that 42 U.S.C. § 1983 allows for a remedy only if the plaintiff has been deprived of rights, privileges, or immunities that are secured by the federal Constitution and laws. Chief Justice William Rehnquist wrote for the majority opinion in *Gonzaga v. Doe* (2002, p. 283), “Accordingly,

where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action.”

In *Owasso v. Falvo* (2002) the educational institution prevailed. For many educators and educational organizations this is a definite victory. The court’s decision clarifies some of the parameters of the FERPA (1974), and these clarifications allow for the continuation of what some educators see as valid teaching techniques. According to Elaine Cassel, a practicing attorney in Virginia who also teaches law and psychology, the court’s decision about what constitutes an educational record “may affect not only the traditional classroom, but the virtual classroom, too” (2002, p.2). Cassel notes that, “What in a traditional class is transitory may become an educational record when captured on a computer” (2002, p.2). Given that this is the information age and that many classes are now being taught over the world-wide web, the Court’s decision may help clear the way for more accessibility of knowledge through on-line computer instruction/classes by limiting the possibility of FERPA issues evolving from this type of classes.

The purpose of this study is to provide a thorough review and analysis of the landmark case, *Owasso v. Falvo* (2002), from its inception to its final dispensation in the United States Supreme Court. By reviewing the relevant legal history and the current status of the law concerning the FERPA (1974), this study will help to clarify significant statutory ambiguities and specific legal parameters of the FERPA as applied to the process of grading student work in public educational institutions.

Definitions of Terms

The following section gives the definitions of some of the legal terms that are used throughout this work. The definitions are taken from the 1990 edition of *Black's Law Dictionary*.

Amicus Curiae - Means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views. Such amicus curiae briefs are commonly filed in appeals concerning matters of a broad public interest; e.g. civil rights cases. Such may be filed by private persons or the government.

Certification - The formal assertion in writing of some fact. Used in *Owasso v. Falvo* to refer to a judge's order that allows a suit to be maintained as a class action.

Certiorari - Latin. To be informed of. A writ of common law origin issued by a superior court to an inferior court requiring the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. It is most commonly used to refer to the Supreme Court of the United States, which issues the writ of certiorari as a discretionary device to choose the cases it wished to hear.

Damages - A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his personal property or rights, through the unlawful act or omission or negligence of another.

Declaratory Judgment - Statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. A binding adjudication of the

rights and status of litigants even though no consequential relief is awarded. Such judgment is conclusive in a subsequent action between the parties as to the matters declared and, in accordance with the usual rules of issue preclusion, as to any issues actually litigated and determined.

De Novo - Anew; afresh; a second time.

En Banc - Refers to a session where the entire membership of the court will participate in the decision rather than the regular quorum.

Injunction - A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. A prohibitive, equitable remedy issued or granted by a court at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose forbidding the latter from doing some act which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law.

In Pari Materia - Upon the same matter or subject. Statutes “in pari material” are those relating to the same person or thing or having a common purpose. This rule of statutory construction, that statutes which relate to the same subject matter should be read, construed and applied together so that the legislature’s intention can be gathered from the whole of the enactments, applied only when the particular statute is ambiguous.

Subject Matter Jurisdiction - Term refers to court’s consideration; the thing in dispute; the right which one party claims as against the other.

Qua - Latin. Considered as; in the character or capacity of.

Qualified Immunity - Affirmative defense which shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.

Summary Judgment - Procedural device available for prompt and expeditious disposition of controversy without trial when there is no dispute as to either material fact or inferences to be drawn from undisputed facts, or if only question of law is involved.

Research Questions

1. What is the relevant legal history of the Family Educational Rights and Privacy Act?
2. What is the current legal status of the Family Educational Rights and Privacy Act?

Procedures

This study used legal research methodology. Research was focused on an analysis of federal statutes, federal regulations, case law, reports and summaries from government agencies, and legal articles and scholarly commentary. Some historical documentation was included, but given that the FERPA (1974) did not have a lengthy history behind its creation nor its interpretation by the Court, the historical data were somewhat limited. The basic data for this study were derived from an intensive study of *Owasso v. Falvo* (2002). This study analyzed the case law as filed in each court preceding the United States Supreme Court, and in the Court itself, along with briefs from plaintiffs and respondents at various stages of the procedure. Scholarly articles published in education journals, legal journals, and law reviews were reviewed, and pertinent information from each area has been included in this study.

Amendments to the FERPA and court cases referenced in the primary case have been identified and analyzed. “Findlaw,” “Lexis-Nexis,” “Thomas,” “ERIC,” “U.S. Department of Education,”

and “U.S. Department of Justice,” databases provided the historical documents and accounts, relevant law and education journal articles, and relevant court opinions referenced in this study.

Chapter 2 is a review of the literature pertaining to the case featured in this study, *Owasso v. Falvo* (2002), and of the cases, codes, statutes, and other documentation concerned in the decision of the Supreme Court in this case. Included are significant passages of government documents such as the General Education Provisions Act (GEPA) called “Protection of the Rights and Privacy of Parents and Students” (1965), the Campus Security Act (1990), the Improving America’s Schools Act (1994), the Higher Education Amendments of 1998, and the Patriot Act (2001). Also included are significant state and federal appellate court opinions regarding the FERPA (1974). Each entity referenced contains pertinent information that has a valid relevance to this study.

The data presented in chapter 2 are arranged topically, but within each topic the information is presented in chronological order. This format is used to provide the reader with an accurate historical perspective on the development of the Family Educational Rights and Privacy Act (1974) and as a prelude to the in-depth discussion of *Owasso v. Falvo* (2002) that follows in Chapter 3 of this study. Each of the nine amendments to the FERPA (1974) will be discussed and the clarification of terminology brought about by each will be noted. The progress to the U.S. Supreme Court of the target case will be outlined so that its history can be easily followed through the lower courts.

Chapter 3 is an analysis of the current legal status of the FERPA (1974). The current text of the FERPA, U.S. Supreme Court and federal appellate court opinions in *Owasso v. Falvo* (2002), and other sources will be combined to define the current legal status of the FERPA. Chapter 4 concludes with findings and conclusions based on the information in chapters 2 and 3.

Limitations of the Study

The focus of this study is on the Family Educational Rights and Privacy Act (1974) and on its recent interpretation by the U.S. Supreme Court. The findings of this study are limited to published documents involving the FERPA, amendments to the FERPA, state and federal appellate court opinions involving the FERPA, and the U.S. Supreme Court opinion in *Owasso v. Falvo* (2002). A discussion of lower court decisions in this case is included to provide relevant background and a historical timeline for the case. This study is intended only to provide information, not to provide legal advice.

CHAPTER 2

REVIEW OF THE LITERATURE

Introduction

This chapter reviews the relevant literature concerning the Family Educational Rights and Privacy Act (FERPA) (1974) and its interpretation by the courts in *Falvo v. Owasso* (1999/2000). The content of the Family Educational Rights and Privacy Act is outlined, and each of the nine amendments to the FERPA is discussed as to the changes it made in the original FERPA document. The general provisions of The Hatch Amendment, 20 U.S.C. § 1232h, are outlined in connection with the FERPA. 42 U.S.C. § 1983 and Amendment Fourteen of the United States Constitution are included in pertinent part because along with the FERPA they provide the basis for the cause of action in *Owasso v. Falvo* (2002). Other relevant cases involving one or more of these laws are also discussed. The chapter is arranged topically, but within each topic the information is presented in chronological order. This format is used to provide the reader with an accurate historical perspective on the development of the Family Educational Rights and Privacy Act and as an overview of *Falvo v. Owasso* (1999/2000) in the lower courts. It provides the foundation for the discussion of the United States Supreme Court's decision in *Owasso v. Falvo* (2002) which follows in Chapter 3 of this study.

The FERPA

The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) is a Federal law. It was written to protect the privacy and accuracy of student

education records. This law applies to all schools that receive any funds under any applicable program of the U.S. Department of Education. The FERPA (1974) gives parents certain rights with respect to their children's education records. The rights of the parents transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have transferred are called 'eligible students. (Legislative History, 2001, p.3) The FERPA is a "spending clause" statute, and as such, it allows the government to withhold funds from any educational institution that fails to meet the conditions of the statute. The actual FERPA document begins,

Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions. (20 U.S.C. 1232g)

This means that the FERPA basically addresses three pertinent questions:

1. Under what circumstances does the U.S. Department of Education have the right to withhold funding from an educational institution?
2. Who has access to a student's educational records, and under what circumstances is that access allowed?
3. What are the rights of privacy that a student and his/her parents have to prevent access by a third party to the student's educational records.

In addition to addressing these three questions, the FERPA defines certain educational terms that are specific to the language of the act: educational agency or institution, education records, directory information, and student.

Historical Development of the FERPA (1974)

The Family Educational Rights and Privacy Act was signed into law by President Gerald Ford on August 21, 1974. It came into being under the Education Amendments of

1974, and had an effective date of November 19, only 90 days after its enactment. The FERPA was enacted as a new § 438 of the General Education Provisions Act (GEPA) called “Protection of the Rights and Privacy of Parents and Students,” codified at 20 U.S.C. § 1232g. (Legislative History, 2001, p.1)

The Family Educational Rights and Privacy Act (1974) was commonly referred to as the Buckley Amendment after its principal sponsor Senator James Buckley of New York” (The Family Educational Rights and Privacy Act (FERPA) and Student Privacy, 2003, p.3). The FERPA actually came into being because Senator Buckley and some of the other members of Congress had been reading recent articles in both education journals and the popular press which had expressed a growing concern about the manner in which permanent student records were maintained in public schools. In response to this growing concern, Senator Buckley introduced a measure to Congress in which he referred to a March 1974 article in *Parade* magazine, the Sunday newspaper insert, titled “How Secret School Records Can Hurt Your Child.” The article discussed school records that included not only “hard data, such as IQ scores, medical records, and grades,” but also information such as teacher anecdotes and disciplinary reports “routinely filed away in school offices or stored in computer databanks” (Case, 2001, p.2). Senator Buckley also referenced a publication entitled, “Guidelines for the Collection, Maintenance, and Dissemination of Pupil Records,” published by the Russell Sage Foundation. The Russell Sage Foundation had conducted a survey that collected data about how public school systems maintained student education records. The results of the survey formed the basis of their subsequent publication of “Guidelines for the Collection, Maintenance, and Dissemination of Pupil Records.” “In a speech in 1975, Senator Buckley explained that the recommendations in

the Guidelines ‘in large part formed the basis’ of the amendment that he proposed and that became [the] FERPA” (Brief for the United States, 2001, p.24).

“Traditional legislative history for [the] FERPA [1974] as it was first enacted is unavailable because the act was offered as an amendment on the Senate floor to a bill extending the Elementary and Secondary Education Act of 1965 and was not the subject of committee consideration” (The Family, 2003, p.3). Almost immediately after its passage, problems with the wording of the act were brought to the attention of its supporters, and just four months after its initial enactment, Senators Buckley and Pell sponsored major amendments to the FERPA. These amendments were enacted on December 31, 1974, and made retroactive to November 19. (Legislative History, 2001, p.1) The FERPA amendments presented by Senators Buckley and Pell on December 13, 1974, “introduced the major source of legislative history for the amendment, which is known as the ‘Joint Statement in Explanation of Buckley/Pell Amendment’ (“Joint Statement”)” (Legislative History, 2001, p.1). The “Joint Statement” was printed “at a time when no committee hearings had been held and no other document existed that spelled out the intentions of [the] FERPA’s sponsors... [and] has become important to judges forced to interpret the statute” (Baker, 1997, p. 726) because “it provides significant insight into the intent behind the act” (Dinger, 2001, p. 578).

In the “Joint Statement” the purpose of the FERPA (1974) was said to be two fold. It was to assure parents of students and “eligible” students who were attending an institution of postsecondary education access to their education records. The second purpose was to protect the aforementioned individuals’ rights to privacy by limiting the transferability of their records without their consent. In the “Joint Statement” the Secretary of Health, Education and Welfare was charged with the enforcement of the provisions of the Act. Any educational institution’s

failure to comply with the FERPA's provisions could lead to the withdrawal of all assistance from the Office of Education to that educational agency or institution. (1974, p.39862)

In the "Joint Statement" the authors further commented that, "Since the passage of the Act, commonly referred to as the Buckley Amendment, after its principal sponsor, a number of ambiguities in its provisions have come to light" (1974, p.39862). It was their hope that the amendments to the Act would clarify the issues that had been raised and make the FERPA more understandable to those under its jurisdiction.

"Initially, [the] FERPA applied to 'any State or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other education institution'" (20 U.S.C. §1232g,subsec.(b), 1974.). In the "Joint Statement" the authors noted:

Existing law lists specifically, at several points in the Act, the institutions and agencies to which the provisions apply. However, these lists are not always identical, creating questions of the applicability of the Act to certain institutions under certain circumstances. The amendments, to standardize the Act's applicability, define the term "educational agency or institution" as any public or private agency or institution which is the recipient of funds under any applicable program. This definition serves to clarify a number of issues. First, it makes uniform the Act's applicability under all its subsections, so that no question remains of a school's inclusion under one part of the Buckley Amendment but not under another. Second, by defining the term generically rather than specifically, the amendment eliminates the possibility that any agency or institution not meeting the specific definition might fall outside the Act's coverage. Finally, by explicitly limiting the definition to those institutions participating in applicable programs, the amendment makes it clear that the Family Educational Rights and Privacy Act applies only to Office of Education programs and those programs delegated to the Commissioner of Education for administration. (1974, p.39862)

At the time of its enactment in November of 1974, the FERPA allowed that

[P]arents [are provided] with the right to inspect and review any and all official records, files, and data directly related to their children, 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. (§513 P.L. 93-380, 1974)

After the passage of the 1974 Amendments to the FERPA, “education records are described as those records, files, documents, and other materials maintained by a school or by one of its agents” (Joint Statement, 1974, p.39862). Though parents and students have the right to access these education records, the amendments make certain relevant exceptions as follows:

1. The private notes and other materials, such as a teacher’s daily record book, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aids would not be available to parents or students, provided they are not revealed to another person, other than in the case of a substitute who performs another’s duties for a temporary period.
2. The law enforcement records of a law enforcement unit associated with a school would be excluded if its personnel are not allowed access to a student’s education records, and if its records on a student are used solely for law enforcement purposes and are only available to other law enforcement officials of the same jurisdiction.
3. The employment records of a person not attending a given school would not be available to him, even though he has been a student at another school, if they are used for other than employment purposes.
4. College students would not be able directly to inspect medical, psychiatric, or similar records which are used solely in connection with treatment purposes and only available to recognized professionals or para-professionals in connection with such treatment. Such students would, however, be able to have a doctor or other professional of their choice inspect their records.
5. The 1974 Amendments also note that the law does not alter the confidentiality of communications otherwise protected by law. (Joint Statement, 1974, 39862)

“As originally enacted, all FERPA (1974) rights transfer from parents to students who are 18 years old or attending postsecondary institutions. The term ‘eligible students’ is regulatory” (Legislative History, 2001, p.3).

Since postsecondary students have the same right to inspect and review their educational records as their parents had to inspect and review these records, the 1974 amendments to [the] FERPA limited this right so that students do not have access to (1) financial records of their parents, and (2) confidential letters of recommendation placed in records before January 1, 1975, or if the student has voluntarily waived access to these letters, provided that the waiver cannot be required as a precondition of admission, employment, or receipt of awards. In order to ensure that a rejected applicant was not given the right to

challenge letters of recommendation or the institution's admission decision, "student" was defined as "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information but does not include a person who has not been in attendance at such agency or institution." (Legislative History, 2001, p.3)

Included as a precursor to the enforcement clause of the FERPA (1974), the "Joint Statement"

clarified that agencies and institutions may not have "a policy or practice of permitting the release of [or providing access to] education records (or personally identifiable information) contained therein other than directory information" without a parent's prior written consent. Directory information in the 1974 amendments was defined to include "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" Educational agencies and institutions were required to provide public notice of any designated categories of directory information and to allow a reasonable time for parents to refuse to allow release of directory information without prior consent. (Legislative History, 2001, p.4)

When the FERPA (1974) was first enacted, it contained five exceptions to its prior written consent rule for disclosure of educational records. It allowed disclosure to:

- (a) "other school officials, including teachers within the educational institution or local educational agency who have legitimate educational interests...;
- (b) officials of other schools or school systems in which the student intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record...;
- (c) authorized representatives of
 - (i) the Comptroller General of the U.S.;
 - (ii) the Secretary;
 - (iii) an administrative head of an education agency (as defined in section 409 of GEPA) (deleted after reorganization of the Department); or
 - (iv) State educational authorities...;
- (d) appropriate officials in connection with a student's application for, or receipt of, financial aid...; and
- (e) designees of a judicial order or any lawfully issued subpoena, upon condition that parents and students were notified in advance of compliance by the education institution or agency.... (Legislative History, 2001, p.5-6)

The 1974 Amendments made certain changes and/or clarifications to the five areas of exception to the prior written consent rule. The Amendments:

- (a) clarified that the agency or institution determines which school officials
- (b) have “legitimate educational interests”...;
- (c) added “seeks or” before “intends to enroll”...;
- (d) provided that any information collected and used by these officials should not allow the “personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed”...; and
- (e) stated their intention that this exception should allow the use of social security numbers in connection with a student’s application for, or receipt of, financial aid. (Legislative History, 2001, p. 5-6)

Along with these changes the 1974 Amendments added five additional exceptions to the prior written consent rule. It allowed for the exception to extend to:

- (a) state and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to State statute adopted prior to November 19, 1974, (“grandfather clause”)...;
- (b) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and improving instructions, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted...;
- (c) accrediting organization in order to carry out their accrediting functions;
- (d) parents of dependent students as defined in the Internal Revenue Code; and
- (e) appropriate persons in connection with an emergency, if the knowledge of such information is necessary to protect the health and safety of the student or other persons.... (Legislative History, 2001, p.6)

The FERPA (1974) required that a record be kept of each person requesting to see student records. There was to be a form that the person must sign, and this form would indicate the person’s “legitimate educational or other interest” in the requested record and would be kept permanently with the student’s educational record. The 1974 Amendments modified this provision so that the person requesting information did not have to sign the record document, but the school remained responsible for maintaining records of those making requests for student

files. School officials with legitimate educational interests were excluded from this records requirement. (Legislative History, 2001, p.9)

The FERPA (1974) was to be administered and enforced by the United States Department of Health, Education, and Welfare. The 1974 Amendments strictly “prohibit the regionalization of the enforcement of the FERPA by providing that, except for the conduct of hearings, none of the functions of the Secretary may be carried out in any regional offices of the Department” (Legislative History, 2001, p.10).

The 1974 Amendments “strengthened the right of students to a hearing to challenge the content of records they believe are inaccurate, misleading, or otherwise in violation of the privacy or other rights of students and to an opportunity to correct any inaccurate or misleading information. The Amendments also gave students the right to insert a written explanation regarding the contents of records” (The Family, 2003, p.4).

The “Joint Statement” did not clarify all of the ambiguities in the FERPA (1974) as evidenced by the fact that after 1974, the Family Educational Rights and Privacy Act was amended another eight times. August 6, 1979,

Congress clarified that [the] FERPA does not prohibit state and local educational officials from having access to student or other records that might be necessary in connection with the audit or evaluation of any federal- or state-supported education program. The amendments were enacted to correct an ‘anomaly’ caused by the Department of Education’s interpretation of [the] FERPA as precluding state auditors from requesting student records in order to conduct state audits of local and state-supported programs. (The Family, 2003, p.4)

The Campus Security Act enacted November 8, 1990, “allowed post-secondary institutions to disclose to the alleged victim of a violent crime the results of any disciplinary proceeding conducted by the institution against the alleged perpetrator of the crime, regardless of the outcome of the proceeding” (The Family, 2003, p.4). “The Clery Act, Title 2 of the Student

Right to Know and Campus Security Act (1990), requires schools beginning in 2003 to notify the campus community about where public information about registered sex offenders on campus may be obtained” (The Family, 2003, p.4-5).

At the request of the Secretary of Education, the FERPA (1974) was again amended July 23, 1992. Congress amended the “law enforcement unit exception” to eliminate the unworkable and unintended results of the prohibition on sharing education records with the law enforcement unit” (Legislative History, 2001, p.3).

“[The] FERPA was amended to exempt records created for law enforcement purposes and maintained by law enforcement units of educational institutions from the definition of educational records. This means that law enforcement records, such as police crime logs, are not protected from disclosure by [the] FERPA. In fact, the Clery Act (1990) requires any educational institution receiving federal funds to keep their police logs available for public inspection during normal business hours” (The Family, 2003, p.4).

The Improving America’s Schools Act (IASA) enacted October 20, 1994, made numerous changes in the FERPA (1974). It “extended the right to inspect and review education records maintained by state educational agencies that are not otherwise subject to [the] FERPA” (The Family, 2003, p.4). These Amendments “added a requirement that the specific educational interests of the child for whom consent would otherwise be required are included among legitimate educational interests of school officials” (Legislative History, 2001, p.5). The IASA

limited challenges to the violation of the ‘privacy rights of students,’ deleting the reference to ‘other rights.’ The purpose was to ensure that parents do not attempt to use [the] FERPA (1974) to enforce rights under other laws, such as the Individuals with Disabilities Education Act (IDEA). (Legislative History, 2001, p.4)

The 1994 Amendments also

added a new subsection (h) regarding treatment of disciplinary records, which states that nothing in [the] FERPA prohibits an agency or institution from including in a student’s records appropriate information regarding disciplinary actions taken against the student for ‘conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community,’ or from disclosing that information

to teachers and other school officials who have a legitimate educational interest in the student's behavior. (Legislative History, 2001, p.4)

Teachers and other school officials could include teachers and school officials in other schools who have a legitimate interest in the disciplinary record of a particular student (Legislative History, 2001, p.5).

One of the five original exceptions to the prior written consent rule of the FERPA (1974) was designees of a judicial order or any lawfully issued subpoena. The 1994 Amendments

added a new, related exception for law enforcement purposes that allows agencies and institutions to disclose information to designees of a Federal grand jury subpoena without first notifying parents or students, and to designees in any other subpoena issued for a law enforcement purpose with notice to parents or students at the discretion of the court or other issuing agency. (Legislative History, 2001, p.6)

The 1994 Amendments eliminated the "grandfather clause" of the 1974 Amendments and "substituted an exception for disclosure to State and local officials in connection with the state's juvenile justice system under specified conditions" (Legislative History, 2001, p.7).

Additionally, the 1994 Amendments addressed the issue of organizations conducting studies in which educational records were used and the requirement that all student records were to be destroyed upon completion of the study. The 1994 Amendments "added that if an organization conducting studies fails to destroy information in violation of the requirements, the educational agency or institution may not permit access to that organization for not less than five years" (Legislative History, 2001, p.7).

As first enacted, [the] FERPA (1974) required the recipient of funds to inform parents and eligible students of their rights. The 1994 IASA amendments changed the term to 'effectively informs' to ensure that agencies and institutions carry out this requirement in a way that ensures that parents and students actually receive notice. (Legislative History, 2001, p.9)

Congress amended the FERPA (1974) October 20, 1998 by enacting the Higher Education Amendments of 1998. These amendments

clarified that schools may disclose to the public the final results of any disciplinary proceeding in which a student has been found responsible for a crime of violence or nonforcible sex offense. Although [the] FERPA does not require schools to release this information, many public schools may have to release it under their state open-records laws. However, private schools are not required to release this information, and some states' educational privacy laws protect it from disclosure as well. Congress added nonforcible sex offenses to the list of crimes in which the victim is entitled to learn the outcome of any disciplinary proceeding against the perpetrator and clarified that only "final results" of disciplinary proceedings (the name of the student who was found responsible for the offense the violation committed, and the sanction imposed by the school) may be disclosed. Congress also added an amendment that allows post-secondary institutions to inform parents if their child has violated a law or school rule governing the use or possession of alcohol or illegal drugs. This amendment applies to post-secondary students under 21 years old regardless of whether the student is a financial dependent for tax purposes. However, the amendment does not supersede any state laws that may prohibit such disclosure. The regulations issued following the 1998 amendments added two new categories of potential student directory information to the list of information about a student that can be disclosed without his or her consent: photographs and e-mail addresses. The regulations also clarified that student "dates of attendance" that may be released as directory information includes the academic terms during which a student was enrolled, not the student's daily presence in school. (The Family, 2003, pp.4-5)

"The Higher Education Amendments of 1998 added a provision that also allows disclosure to authorized representatives of 'the Attorney General for law enforcement purposes' under the same conditions as apply to the Secretary under this provision" (Legislative History, 2001, p.6).

"Congress added an amendment clarifying that [the] FERPA (1974) does not prohibit educational institutions from disclosing information about registered sex offenders on their campuses" (The Family, 2003, p.5). This amendment was enacted October 28, 2000, with the passage of the 2000 Campus Sex Crimes Prevention Act which "added a new subsection (b)(7) to the statute to ensure that an educational institution may disclose information concerning registered sex offenders provided to it under state sex offender registration and community notification programs" (Legislative History, 2001, p.8).

With the passage of the Patriot Act of October 26, 2001,

Congress added an amendment allowing the attorney general or a designated representative of the attorney general ‘to apply for an ex parte’ court order requiring an educational institution to permit the attorney general to collect, retain, disseminate, and use education records relevant to an authorized investigation or prosecution of an act of domestic or international terrorism. (The Family, 2003, p.5)

The Attorney General must certify that there are specific facts giving reason to believe that the records are likely to contain the required information. An educational agency or institution that in good faith produces records in accordance with the court’s order is not liable to any person for that production. (Legislative History, 2001, p.8)

The Patriot Act (2001) excludes from the record keeping requirement of the FERPA, “disclosures in response to a court’s ex parte order based upon the Attorney General’s certification regarding terrorism investigations and prosecutions” (Legislative History, 2001, p.9).

Another requirement of the Patriot Act (2001) was that the Student and Exchange Visitor Information System (SEVIS) be fully implemented by January 1, 2003. The Immigration and Naturalization Service (INS) was responsible for this implementation as follows:

The INS, in conjunction with a number of other federal agencies, is currently in the initial stages of implementing the Student and Exchange Visitor Information System (SEVIS). [The] SEVIS is an Internet-based system that allows schools to transmit student information to the INS for purposes of tracking and monitoring non-immigrant and exchange students. Accessible information includes a student’s personally identifiable information, admission at port of entry, academic information, such changes in program of study, and disciplinary information. Schools will be required to transmit such information to the INS for the duration of a student’s stay in the United States. (The Family, 2003, p.9)

In order to meet the requirements of the SEVIS, documents formally protected by the FERPA (1974) will be disclosed to the INS.

Finally, January 8, 2002, “Congress made technical corrections to the text of the statute” (The Family, 2003, p.5).

The No Child Left Behind Act of 2001, P.L. 107-110 (Jan. 8, 2002), addresses the disclosure of directory-type information (students' names, addresses, and telephone listings) to military recruiters. Congress included similar language in the National Defense Authorization Act for Fiscal Year 2002. Both laws, with some exceptions, require schools to provide directory-type information to military recruiters who request it. (Legislative History, 2001, p.5)

Also, in the No Child Left Behind Act,

the Elementary and Secondary Education Act (1965) is amended to require each state to provide an assurance to the Secretary that it has a procedure in place to facilitate the transfer of disciplinary records regarding a student's suspension or expulsion to any elementary or secondary school where the student is enrolled or intends to enroll. (Legislative History, 2001, p.5)

The following table presents the public laws and their dates of enactment through which Congress amended the FERPA:

PUBLIC LAW NUMBER	PUBLIC LAW TITLE	EFFECTIVE DATE
93-568	Buckley/Pell Amendment (December 31, 1974)	Nov. 19, 1974
96-46	Amendments to the Education Amendments of 1978	Aug. 6, 1979
96-88	Establishment of the Department of Education	October, 1979
101-542	Campus Security Act	Nov. 8, 1990
102-325	Higher Education Amendments of 1992	July 23, 1992
103-382	Improving America's Schools (renumbered GEPA)	Oct. 20, 1994
105-244	Higher Education Amendments of 1998	Oct. 7, 1998
106-386	Campus Sex Crime Prevention Act	Oct. 28, 2000
107-56	USA PATRIOT Act of 2001	Oct. 26, 2001

(Legislative History, 2001, p.1)

The FERPA (1974) Today

The Family Educational Rights and Privacy Act (1974) is codified in the United States Code Service under §1232 of Title 20. General Provisions Concerning Education General Requirements and Conditions Concerning Operation and Administration of Education Programs: General Authority of Secretary Administration: Requirements and Limitations. In the Code, §1232 is the Regulations; §1232g is the Family Educational Rights and Privacy Act; and §1232h is the Protection of Pupil Rights Amendment, also known as the Hatch Amendment. In the Federal Register, Part V Department of Education, 34. C.F.R. Part 99 is the Family Educational Rights and Privacy Act: Final Rule. In this section of the Federal Register, the federal regulations under which the FERPA operates are listed and explained.

Protection of Pupil Rights Amendment (1978)

The Protection of Pupil Rights Amendment (PPRA) (20 U.S.C. § 1232h; 34 CFR Part 98, 1978) applies to programs that receive funding from the U.S. Department of Education (ED). The PPRA is intended to protect the rights of parents and students in two ways: It seeks to ensure that schools and contractors make instructional materials available for inspection by parents if those materials will be used in connection with an ED-funded survey, analysis, or evaluation in which their children participate; and It seeks to ensure that schools and contractors obtain written parental consent before minor students are required to participate in any ED-funded survey, analysis, or evaluation that reveals information concerning: 1. Political affiliations; 2. Mental and psychological problems potentially embarrassing to the student and his/her family; 3. Sex behavior and attitudes; 4. Illegal, anti-social, self-incriminating and demeaning behavior; 5. Critical appraisals of other individuals with whom respondents have close family relationships; 6. Legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers; or 7. Income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program). (U.S. Department of Education, 1978)

Civil Action for Deprivation of Rights (1871)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (42 U.S.C. § 1983, 1871)

U. S. Constitutional Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article. (U.S.Constitution,1868)

Case Law

October 6, 1998, Kristja J. Falvo filed a lawsuit in the United States District Court for the Northern District of Oklahoma on behalf of herself and her three minor children against the Owasso Independent School District, Superintendent Dale Johnson, Assistant Superintendent Lynn Johnson, Principal Rick Thomas, and John Doe (1-50). Falvo alleged that the practice of peer grading as permitted at her children's schools in the Owasso Independent School District violated her children's right of privacy. She further alleged that her children's right of privacy was protected by the Fourteenth Amendment and the confidentiality requirements of the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. Falvo sought monetary damages, a declaratory judgment, and an injunction prohibiting the Owasso School District from allowing students to grade each other's papers. (Daly, 2001, p.2) The lawsuit was filed pursuant to 42 U.S.C. § 1983. Falvo has asked for a temporary restraining order to curtail the process of peer grading practiced in the Owasso schools. An evidentiary hearing on the temporary restraining order and a preliminary injunction was conducted on October 14, and on October 16, the district court declined to grant the requested injunctive relief. Falvo moved the court for certification of a class. Before a ruling could be made on the issue of class certification, alleging that she and her children are entitled to damages because the defendants have violated their rights under both the Fourteenth Amendment and the FERPA (1974), Falvo moved the district court on February 3, 1999, for declaratory and summary judgment. (Daly, 2001, p.2) The following pages will outline the various case law and other legal documents that have been used to determine both Falvo's and her minor children's rights under the law.

Falvo v. Owasso (1999): District Court

Kristja J. Falvo is the mother of four children, three of whom are in the Owasso Independent School District in Tulsa, Oklahoma. One of these three children, Philip Pletan, is attending special education classes and is also mainstreamed into some regular education classes. His special education classes include focused help for language problems, but in order to give him more chances for social interaction including proper use of language, he attends a regular English class three days a week.

The Owasso school district does not have a formal policy specifically instructing teachers as to how they must grade their students' work. Consequently, teachers go about this process in a number of different ways. Some teachers grade all of the work themselves; some teachers have students grade their own papers while calling the correct answers aloud to the class; and finally, some teachers utilize a method known as peer grading. In peer grading, students exchange papers and then grade them while the teacher calls aloud the correct answers. After the papers are graded, the teacher may elect to record the grades in any of a number of different ways. The teacher may simply take up the papers and record the grades in the grade book; the teacher may have the students' call aloud the grades of the papers they graded; the teacher may have the students return the papers to their owners and then have the students call aloud their own grades; or the teacher may have the students bring their papers to the desk and tell the teacher their grades in private. There is not a set pattern for grading papers nor for recording grades.

In some of Pletan's classes the teachers chose to use peer grading and to have the students call aloud the grades on the papers the students graded. Falvo takes exception to this practice. She feels that peer grading is humiliating for her son because quite often he does not make very good grades. Falvo alleges that her son has been subjected to name calling and

severe teasing because peer grading allows other students to know his grades. She further contends that this practice even bothers her two daughters who are older and both straight A students. The girls, Elizabeth and Erica, are not subjected to the name calling or teasing, but they are subjected to pressure by other students in their classes who often want the girls to mark the papers they are grading higher than the papers actually deserve to be marked.

Falvo first took her concerns about the peer grading practices to her children's school counselors. She asked that the practice of peer grading be stopped in all classes of the Owasso Public Schools. The counselors did not have the authority to tell teachers how to conduct their classes so Falvo went to the school administration. She again asked that the practice of peer grading be curtailed and that the schools grading policies be changed to reflect that peer grading was disallowed in all Owasso schools. The school's response to Falvo was that students always had the option of having their grades told to the teacher in confidence. She was assured that students were not allowed to grade any type of comprehensive exams and that letter grades from report cards or permanent transcripts were never revealed to other students. Having received no satisfactory resolution at the school level, Falvo next went to the superintendent and then finally to the district board of education. She wrote letters explaining that the peer grading practice was humiliating to her children and damaging to their self-esteem. She asked for a change in policy that would disallow the practice of peer grading, and she further asked for an apology to be made to her children. Her letters garnered no response so she hired an attorney to further communicate with the school district, and in October of 1998, Falvo on behalf of her children, Elizabeth Pletan, Phillip Pletan, and Erica Pletan, filed a class action suit against the Owasso Independent School District No. 1-011, Dale Johnson, Lynn Johnson, Rick Thomas, and Does 1 through 50. This lawsuit was filed pursuant to 42 U.S.C. § 1983 and alleged that the practice of peer grading

violated her children's Fourteenth Amendment privacy rights and the Family Educational Rights and Privacy Act (1974). (Falvo v. Owasso, 1999) In her complaint, Falvo relies on the FERPA, 20 U.S.C. § 1232g(b)(1), which provides that an educational agency or institution "which has a policy or practice of permitting the release of educational records . . . of the students without the written consent of their parents" (20 U.S.C. § 1232g(a)(4)[A]) is in violation of the FERPA.

The Family Educational Rights and Privacy Act (20 U.S.C. § 1232g) defines "education records" as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are 'maintained' by an educational agency or institution or by a person acting for such agency or institution." (1974). The suit was filed in the United States District Court for the Northern District of Oklahoma. "Before the district court resolved whether to certify the class, Falvo moved for declaratory and summary judgment on her two claims. The School District filed a cross-motion for summary judgment on both claims" (Falvo v Owasso, 1999). "The district court concluded that the grading practice did not implicate any constitutionally protected privacy interest. Additionally, the court ruled that the grades students receive on exams are not 'educational records' under [the] FERPA" (Daly, 2001,p.2). The court denied the plaintiffs' motion for partial summary judgment and granted the defendants' cross-motion for summary judgment. The plaintiffs' motion for class certification was denied as moot. (Falvo v. Owasso, 1999, p. 1139)

In the district court the Owasso Independent School District used as its principal defense a letter written by LeRoy S. Rooker, the Director of the Family Policy Compliance Office (FPCO), a department within the United States Department of Education. The FPCO has as its mission the effective implementation of two laws that seek to ensure student and parental rights

in education: the Family Educational Rights and Privacy Act and the Protection of Pupil Rights Amendment. (About the Family Policy Compliance Office, 2002, p. 1)

In addition to the *Rooker letter*, the Owasso School District explained the rationale behind their teachers' use of peer grading as a teaching method. The School District noted:

Oklahoma teachers of grades 7-12 can lawfully be assigned up to 140 students per day. The school district argues that by peer grading the teachers can

1. provide immediate feedback;
2. cover more material and assign significantly more work than would be possible if the teacher had to grade every individual homework paper;
3. avoid the temptation to cheat that students would experience if they graded their own papers;
4. reinforce the lesson by returning the papers to their owners as soon as they are corrected. The teachers do not record or preserve every score or grade on every homework paper, quiz, or test that is corrected in class. Only some grades are recorded in a teacher's record book. (Daly, 2001, p.1-2)

The district court based their decision in large part on Rooker's letter of July 15, 1993, which was written in response to Raupp, II, as detailed in the Rooker Declaration. In this particular letter Rooker states that in his opinion the FERPA (1974) does not prohibit teachers from allowing one student to grade the paper of another student or from calling out the grade in class. (1993, p.1) Specifically, Rooker writes,

[the] 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. (1993, p.1)

"The rationale of the *Rooker letter* is that grades on interim tests and homework assignments are not 'maintained' by an educational agency or institution at the point of grading" (Falvo v. Owasso, 1999, p. 1139). The plaintiffs in this case strongly objected to the judge's opinion stating,

such an interpretation is contrary to congressional intent, because Congress has defined the word ‘maintain’ in another statute as including any collection or use of the material. 5 U.S.C. § 552a(a)(3). Plaintiffs describe this separate statutory scheme, the Privacy Act, as ‘[the] FERPA’s sister statute’, and apparently seek to incorporate that Act’s definition into [the] FERPA. (Falvo v. Owasso, 1999, p. 1139)

Judge Kern refers to *Underwood v. Wilson* (1998) when he writes, “In the absence of definition within the statute, statutory terms are to be construed in accordance with their ordinary meaning.” He follows by stating to the petitioners,

The term ‘maintain’ is not defined in [the] FERPA; therefore, the ordinary meaning of ‘preserve’ or ‘retain’ is appropriate. If Congress wished to incorporate into [the] FERPA the special definition given ‘maintain’ in the Privacy Act, Congress knew how to do so. There is no authority holding that the Privacy Act and [the] FERPA are to be construed in pari material, and the Court declines to do so. In sum, the Court finds deference is due the Department of Education’s interpretation of [the] FERPA because it is reasonable and does not conflict with the expressed intent of Congress. (Falvo v. Owasso, 1999, p. 1139)

“The Secretary of Education has been delegated by Congress with the task of enforcing [the] FERPA. 20 U.S.C. § 1232g(f)” (Falvo v. Owasso, 1999, p. 1139). The Court quoted *United States v. Riverside Bayview Homes, Inc.* (1985) when it stated that under this case, “An agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress”(p. 131). Because of the precedents set in the aforementioned cases and the lack of definition within the statute itself, the *Rooper letter* (1993) becomes the definitive voice heard by the court in this case.

On the Fourteenth Amendment claim, the district court looked to *F.E.R. v. Valdez* (1995) for guidance, and in this case, “it is established that there is a constitutional right to privacy in preventing disclosure by the government of personal matters” (p. 1535). For resolution of this type of claim, the court turned to *Flanagan v. Munger* (1989) and the three-part balancing test. This test can be traced back to several other cases involving constitutional rights,

and it becomes an important element to the resolution of *Falvo v. Owasso* (1999/2000) in the lower courts and to *Owasso v. Falvo* (2002) in the Supreme Court.

In *Flanagan* (1989), three police officers filed a lawsuit in the district court against Chief of Police James Munger and the city of Colorado Springs, Colorado. The officers filed against Chief Munger claiming that he had violated their first amendment rights, state constitutionally protected privacy rights, a number of federal and state procedural due process rights, and equal protection rights. Officer Flanagan also filed a separate complaint against Chief Munger alleging that he had retaliated against Flanagan by denying him reappointment to a position that he had held for ten years.

The Court in *Flanagan* (1989) must consider:

1. if the party asserting the right has a legitimate expectation of privacy,
2. if disclosure serves a compelling state interest, and
3. if disclosure can be made in the least intrusive manner. (p. 1570)

The question in this case is about the absolute right to privacy in the content of personnel files, and the decision made by the court in this case is that the absolute right to privacy only attached to “highly personal information” and that items dealing only with the plaintiffs’ work as police officers is not “highly personal.” (*Flanagan v. Munger*, 1989, p. 1570)

The court in *Falvo v. Owasso* (1999) must decide whether the grades in question are “highly personal information” and by applying the three-prong test, ascertain whether or not they are constitutionally protected. Using this standard, the court in *Falvo* concludes that “interim tests and homework assignments deal with a student’s performance qua student” and that they are “not ‘highly personal’ matters worthy of constitutional protection” (*Falvo v. Owasso*, 1999, p. 1140). Having reached the conclusion that plaintiffs did not enjoy a legitimate

expectation of privacy in the student work in question, it is not necessary for the court to go any further with the three-prong balancing test. The plaintiffs' constitutional claim of violation of Fourteenth Amendment rights fails.

The court order issued by Judge Terry C. Kern stated,

Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c) F.R.Cv.P. When applying this standard, the Court views the evidence and draws reasonable inferences therefrom in the light most favorable to the nonmoving party. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998). (*Falvo v. Owasso*, 1999, p. 1138)

Judge Kern further stated:

[The] FERPA provides in pertinent part that an educational agency or institution 'which has a policy or practice of permitting the release of educational records...of students without the written consent of their parents' is in violation of [the] FERPA. 20 U.S.C. §1232g(b)(1). This provision contains certain qualifications and exceptions that are not applicable here. [The] FERPA defines 'educational records' as 'those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.' 20 U.S.C. § 1232g(a)(4)(A). (*Falvo v. Owasso*, 1999, p. 1138)

Following these standards, this Court decides in favor of the School District.

Even though the district court found in favor of the Owasso Independent School District, Judge Kern did expound on the practice of peer grading. The court stated that,

it would be hard-pressed to find that this grading practice at the Owasso School District is supported by a compelling state interest. The record reflects that many teachers, even in this immediate geographical area, do not employ the student grading method. Therefore, a showing stronger than merely pronouncing 'education' as a compelling state interest would have to be made before it could be demonstrated to this court's satisfaction that the grading method under review could not undergo modification while still properly educating students. (*Falvo v. Owasso*, 1999, p. 1140)

The Owasso Independent School District argued in this case that they were entitled to summary judgment based upon qualified immunity. The district court disagreed citing *Mick v.*

Brewer, (1996) and stating, “because the rights of privacy under [the] FERPA and the Fourteenth Amendment were clearly established at the time of the alleged violations, the defendants are not entitled to qualified immunity” (p. 1134).

On the plaintiffs’ motion for class certification the district court addressed the merits initially and found that the named plaintiffs had failed to present a claim which survived summary judgment, and therefore, no ruling on class certification was necessary. (*Falvo v. Owasso*, 1999, p. 1140)

Falvo filed a motion in the appellate court moving

for reconsideration and clarification of the district court’s judgment, arguing the court should have granted relief in favor of Philip Pletan on the Fourteenth Amendment claim because, as a special education student, he had a legitimate expectation of privacy in his grades under the Individuals with Disabilities Education Act (IDEA) [1997]. The district court denied that motion, concluding that because Falvo did not make a distinct claim under [the] IDEA, she could not premise a Fourteenth Amendment claim on that statute. (*Falvo v. Owasso*, 2000, p. 962)

Appellate Court: Standard of Review

Falvo filed an appeal with the United States Court of Appeals for the Tenth Circuit. After having reviewed the findings of the district court, the appellate court stated that the case before them required that they decide whether or not peer grading violated “either the Fourteenth Amendment to the United States Constitution or the Family Educational Rights and Privacy Act (FERPA) (1974). Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we conclude that although the Fourteenth Amendment does not preclude the grading practice, [the] FERPA does” (*Falvo v. Owasso*, 2000, p. 961).

A unanimous panel of the Tenth Circuit held that the grades being recorded on the student exams are “education records” and, thus, that the custom of releasing these grades without Falvo’s consent violated her rights under [the] FERPA [1974]. Section 1232g(b)(1) of the Act prohibits an educational institution 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 the designated authorities,” which do not include other students.

The Tenth Circuit explained that there is no dispute that the grades students place on each other’s papers and then report to the teacher “contain information directly related to a student.” It further held that the language of the statute indicated that Congress intended the term “education records” to include grade books and that grades being recorded by the teacher were necessarily being “maintained” by a person acting for the educational institution. (Daly, 2001, p.2)

The appellate court also disagreed with the lower court on the question of qualified immunity for the defendants. Judge Murphy, writing the opinion, states,

The individual defendants, however, are entitled to qualified immunity because it was not clearly established law that the grading practice violated [the] FERPA [1974]. This court therefore affirms the district court’s grant of summary judgment in favor of all defendants on the constitutional claim and reverses the grant of summary judgment in favor of the School District on the FERPA claim. (*Falvo v. Owasso*, 2000, pp. 961-962)

The appellate court remanded the case for further proceedings.

Citing *Bancoklahoma Mortgage Corporation v. Capital Title Company* (1999), the appellate court in *Falvo v. Owasso* (2000) conducts a de novo review of the district court’s summary judgment decision.

We review a district court’s decision on summary judgment de novo, *Dye v. United States*, 121 F.3d 1399, 1403 (10th Cir. 1997). ‘We apply the same standard under Rule 56(c) F.R.Cv.P. used by the district court: we determine whether any genuine issue of material fact was in dispute, and, if not, whether the moving party was entitled to judgment as a matter of law.’ (*Bancoklahoma*, 1999, p.1097)

According to Rule 56(c) F.R.Cv.P., summary judgment is appropriate

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (*Bancoklahoma*, 1999, p.1097)

The court refers to *Committee to Save the Rio Hondo v. Lucero* (1996), “We view the evidence and draw any inferences in the light most favorable to the party opposing summary judgment” (p. 450). The appellate court in *Falvo v. Owasso* (2000) stated,

Although the instant case involves cross-motions for summary judgment, this court nonetheless views the evidence in a manner most favorable to Falvo, because she is the party challenging the district court's grant of summary judgment. (p. 963)

Fourteenth Amendment Claim

On the Fourteenth Amendment claim, the three-part balancing test from *Flanagan v. Munger* (1989) is again cited as one of the deciding factors. This time the Appellate Court also references this test in *Denver Policemen's Protective Association v. Lichtenstein* (1981), *Martinelli v. District Court* (1980), and *Nilson v. Layton City* (1995). Falvo fails the first prong of this test, and based on *Nilson v. Layton City* (1995), the remaining two prongs are moot. In *Nilson*, the Court held that, "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" (1995, p. 371). Likewise since "Falvo and her children do not have a legitimate expectation of privacy in the children's school work and test grades, they have no Fourteenth Amendment privacy right protecting those grades from disclosure" (Falvo v. Owasso, 2000, p. 964).

Still contending that she and her children have a legitimate expectation of privacy in the children's grades, Falvo claims that the FERPA (1974) and the IDEA (1997) provide that expectation. The Appellate Court disagrees with this contention citing *Mangels v. Pena* (1986) as the basis for its decision. In *Mangels*, the court explained, "Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution. . . . Any disclosed information must itself warrant protection under constitutional standards" (1986, p. 839). Similarly, the appellate court states that, "contrary to Falvo's contention, neither [the] FERPA nor [the] IDEA can create a

Fourteenth Amendment privacy right; rather, the grades themselves must warrant constitutional protection” (Falvo v. Owasso, 2000, p. 964), and they do not do so.

Falvo and her children therefore lack a sufficiently legitimate expectation of privacy in those grades to claim a constitutional right in their protection. This court concludes the district court properly granted summary judgment in favor of the defendants on Falvo’s Fourteenth Amendment claim. (Falvo v. Owasso, 2000, p. 964)

FERPA Claim

Having dispensed with the Fourteenth Amendment claim, the Appellate Court turned its attention to Falvo’s FERPA (1974) claim. The question as to whether or not the alleged FERPA violation is actionable under 42 U.S.C. § 1983 may implicate both the appellate court’s and the district court’s subject matter jurisdiction over Falvo’s FERPA claim. (Falvo v. Owasso, 2000, p. 965) Under *Maine v. Thiboutot* (1980), *Fay v. South Colonie Cent. Sch. Dist.* (1986), *Tarka v. Cunningham* (1990), *Norwood v. Slammons* (1991), *Norris v. Board of Educ.* (1992), *Middlesex County Sewerage Authority v. National Sea Clammers Association* (1981) *Belanger v. Nashua* (1994), *Maynard v. Greater Hoyt Sch. Dist. No. 61-4* (1995), *Doe v. Knox County Bd. of Educ.* (1996), *Gundlach v. Reinstein* (1996), and *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144* (1999), each of the respective courts concluded that a violation of the FERPA may be the basis for a civil rights lawsuit under 42 U.S.C. § 1983. In *Tarka*, it is stated that, “an action under 42 U.S.C. § 1983 may nevertheless be premised on an alleged violation of FERPA rights”(1989, p.890). In *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the district court decided that “[the] FERPA creates an interest that can be vindicated in a [42 U.S.C.] §1983 action because Congress did not create so comprehensive a system of enforcing the statute as to demonstrate an intention to preclude a remedy under [42 U.S.C.] §1983” (1981, p.20). In *Belanger v. Nashua*, the court noted that, “Before addressing the question of whether the requested records are ‘education records’ as defined by [the]

FERPA..., the court must determine whether the plaintiff has a cause of action under [42 U.S.C.] § 1983 for the alleged violation of [this] statute” (1994, p. 42). Even though the parties to the case in *Falvo v. Owasso* (2000) have not raised this issue, it is one that the appellate court must address. The court states,

Heeding the lesson of *Steel Company v. Citizens for a Better Environment* (1998), we will assume, without deciding, that subject matter jurisdiction is implicated by the question whether [42 U.S.C.] § 1983 provides a remedy for the alleged FERPA violation and thus resolve that question before addressing the merits of Falvo’s FERPA claim. (*Falvo v. Owasso*, 2000, p. 966).

In *Wilder v. Virginia Hospital Association* (1990), the Supreme Court examined the question as to whether or not a plaintiff who was alleging a violation of a federal statute could sue under 42 U.S.C. § 1983. In resolving this issue, the Supreme Court came up with two requirements that must be met:

1. the statute [does] not create enforceable rights, privileges, or immunities within the meaning of [42 U.S.C.] § 1983, or
2. Congress has foreclosed such enforcement of the statute in the enactment itself. (1990, p. 498).

In its examination of the [42 U.S.C.] § 1983 issue in *Falvo v. Owasso* (2000), the appellate court turned to the Wilder test (*Wilder*, 1990). The court stated,

The plain language of the relevant provision of [the] FERPA [1974], 20 U.S.C. § 1983g(b)(1), reveals that it is intended to protect the privacy of students and their parents. Moreover, the sponsors of the amendment to [the] FERPA which added this particular provision stated, “The purpose of the Act is two-fold - to assure parents of students . . . access to their education records and to protect such individuals’ rights to privacy by limiting the transferability of their records without their consent.” 120 Cong. Rec. 39862 (Dec. 13, 1974) (Joint Statement in Explanation of Buckley/Pell Amendment). The relevant provision of [the] FERPA, therefore, was intended to benefit Falvo and her children. Additionally, this provision reflects a binding obligation on schools, rather than a mere Congressional preference for a certain kind of conduct. Under the provision, an educational agency or institution is absolutely precluded from receiving federal funds if it maintains a policy or practice of allowing disclosure of education records to unauthorized

individuals or entities without parental consent. See 20 U.S.C. § 1232g(b)(1). The language of this provision is akin to other statutory language which the Supreme Court has interpreted as creating “precise requirements.” *Suter v. Artist M.*, 503 U.S. 347, 361 n.12, 118 L.Ed. 2d 1,112 S. Ct. 1360 (1992); see also *Belanger*, 856 F. Supp. At 46,47. Finally, as this court’s statutory analysis, *infra*, makes clear, the interest which Falvo asserts is neither vague nor amorphous and is thus within the competence of the judiciary to enforce. We therefore conclude 20 U.S.C. § 1232g(b)(1) creates an enforceable right within the meaning of § 1983. (*Falvo v. Owasso*, 2000, p. 966)

Since it is the conclusion of the court that “20 U.S.C. § 1232g(b)(1) creates an enforceable right within the meaning of [42 U.S.C.] §1983” (*Falvo v. Owasso*, 2000, p. 967), the appellate court announces that it does have “subject matter jurisdiction over Falvo’s appeal of the district court’s dismissal of her FERPA [1974] claim, because the specific violation of [the] FERPA which she alleged is actionable under [42 U.S.C.] §1983”(Falvo, 2000, p. 967).

The appellate court in *Falvo v. Owasso* (2000) found that the district court erred in granting deference to the *Rooker letter* (1993). It found that “the meaning of the terms ‘education records’ and ‘maintain’ are clear from the statute itself, and a court can only defer to an agency’s interpretation if a statute is deemed ambiguous” (*Falvo v. Owasso*, 2000, p. 969). It cited *Chevron, U.S.A., Inc. v. Natural Resources Defense Council* (1984) which held “that when a court is asked to construe an ambiguous statute, it must defer to the interpretation set out in a regulation promulgated by the agency charged with administering the statute, so long as the agency’s interpretation is reasonable” (p. 842) In *Christensen v. Harris County* (2000), the Supreme Court held that even if the relevant statutory language was ambiguous, *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by an administering agency. The Supreme Court did say that even though such letters may not deserve deference, they are “‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*” (*Christensen*, 1944, p. 576). “In *Skidmore* (1944), the Court earlier stated 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' (p. 134)" (Falvo v. Owasso, 2000, p. 969).

Given the appellate court's opinion about the *Rooker letter*, it is no surprise that they disagreed with the finding of the lower court in this matter. The appellate court stated, "Based purely on the language of the statute itself, this court concludes the grades which students record on one another's homework and test papers and then report to the teacher constitute 'education records' under [the] FERPA [1974]" (Falvo v. Owasso, 2000, p. 969). According to a definitive rule of statutory construction in *United States v. Nordic Village, Inc.* (1992), "A statute must, if possible, be construed in such a fashion that every word has some operative effect" (p. 36). The court held that the language of the Family Educational Rights and Privacy Act has an operative effect.

The Owasso Independent School District petitioned the appellate court for rehearing, and in its petition it cited two provisions within the FERPA (1974), 20 U.S.C. §§ 1232g(a)(2), 1232g(b)(4)(A), that it contends "demonstrate Congressional intent to exclude student-graded work from the definition of 'education records'" (Falvo v. Owasso, 2000, p. 972). Referring to the first section, the School District contends that Congress could not possibly have intended for a parent to be able to challenge in a hearing every grade his or her child receives, and that the intent of Congress was to allow this right to attach only to "educational records" not to daily work recorded in a teacher's grade book. (Falvo v. Owasso, 2000, p. 972)

"The School District contends Congress defined 'education records' as records that contain personally identifiable information and are 'maintained by an educational agency or institution or by a person acting for such agency or institution.' The School District argues that the appellate court distorted the plain meaning of the word 'maintain' by reading it to include the creation of a 'record' by a student scoring the homework paper, quiz, or test" (Daly, 2001, p.2-3).

The School District further argues that according to the second section mentioned, “education records” can only be interpreted to mean institutional records of cumulative averages/permanent grades maintained in a centralized location within the school. The court disagrees with each of the School District’s arguments concerning the interpretation of the pertinent subsections of 20 U.S.C. § 1232g and denies their petition. The court finds that the grades in question are to be considered “education records” and that they are “maintained” within the meaning of the statute. (Falvo v. Owasso, 2000, p. 971)

Qualified Immunity Claim

On the issue of qualified immunity the district court denied the petition of the individual defendants because it concluded that, “qualified immunity does not protect the individual defendants because ‘the rights of privacy under [the] FERPA (1974) and the Fourteenth Amendment were clearly established at the time of the alleged violations’” (Falvo v. Owasso, 2000, p. 1140). Falvo asserts that the appellate court cannot properly decide this matter, but according to *Schalk v. Gallemore* (1990) this affirmation is inaccurate. The court quotes *Schalk*, “Because we may affirm the trial court’s decision on any grounds supported in the record, we proceed to consider the qualified immunity defense” (1990, p. 498).

When a qualified immunity defense is raised in a 42 U.S.C. § 1983 lawsuit by a public official, the plaintiff to the suit bears the burden of establishing “that the defendant’s actions violated a federal constitutional or statutory right and that the right violated was clearly established at the time of the conduct at issue” (*Horstkoetter v. Department of Pub. Safety*, 1998, p. 1277). In *Anderson v. Creighton* (1987), a right is “clearly established” when “the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right” (p. 640).

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” (Horstkoetter v. Department of Public Safety, 1998, p. 1278).

Finding that Falvo cannot show evidence to the contrary, the court decides that in spite of its judicial view of the *Rooker letter* and subsequent *Rooker declaration*, “the FPCO’s statutory interpretation contained in those documents suggests that the right which we elucidate today was not clearly established. The individual defendants are thus entitled to qualified immunity in the instant suit” (Falvo v. Owasso, 2000, p. 974).

The court states in *Falvo v. Owasso* (2000),

We recognize the existence of authority, albeit not in this Circuit, which holds that qualified immunity is unavailable to a defendant who violates a right arising from an unambiguous statute. See *Jackson v. Rapps*, 947 F.2d 332, 339 (8th Cir. 1991). The rule does not apply in the instant case, however, because prior to this court’s construing [the] FERPA and concluding it unambiguously prohibits the grading practice, the very agency charged with administering that statute, the FPCO, had put forward a directly contrary interpretation. See 20 U.S.C. § 1232g(f), (g) (designating to the Secretary of Education the authority to enforce and address violations of [the] FERPA and to establish a review board to investigate, process, review, and adjudicate such violations); 34 C.F.R. §99.60(b) (“The Secretary [of Education] designates the [FPCO] . . . to: (1) Investigate, process, and review complaints and violations under [FERPA] and this part; and (2) Provide technical assistance to ensure compliance with [FERPA] and this part.”) We cannot expect educators to more accurately interpret a law than that law’s administering agency; educators should be able to rely on the FPCO’s opinions, in the absence of already existing, conflicting case law, regarding permissible practices under [the] FERPA. To apply the rule set out by the Eighth Circuit in *Jackson* in the instant case, therefore, would undermine the purpose of qualified immunity, which aims to protect all but the objectively unreasonable. See *Anderson v. Creighton*, 483 U.S. 635, 639, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987)” (Falvo v. Owasso, 2000, p. 974).

Citing *Jones v. City & County of Denver* (1988) and *DeVargas v. Mason & Hanger-Silas Mason Co.* (1988), the appellate court reminds Falvo that their decision to allow qualified immunity only applies to monetary damages. “Falvo may pursue a claim for injunctive relief against these individual defendants in their official capacities” (Falvo v. Owasso, 2000, 974).

Dissenting Opinion

After the Tenth Circuit Court of Appeals issued its opinion, the Owasso Independent School District filed a petition for a rehearing en banc. The motion was denied, but Judge Paul J. Kelly submitted a dissenting opinion in which three other judges joined.

Judge Kelly writes that the appellate court has determined that the FERPA (1974) is violated by the grading practice that allows students to grade the assignments of other students because the grades constitute “education records,” 20 U.S.C. §1232g(a)(4)(A), that cannot be released to other students. In making this determination, Kelly states, “Defining ‘education records’ to include ‘grades which students record on one another’s homework and test papers and then report to the teacher,’ Amended Ct. Op. at 22, is a vast expansion of the actual words of the statute, and unsupported by the legislative history” (Falvo v. Owasso, 2000, p. 1201).

It is Kelly’s contention that neither the grades that students write on the papers of other students nor the graded papers themselves meet the second element of the definition of “education records” as it is stated within the statute, 20 U.S.C. §1232g(a)(4)(A)(ii).

““Neither the papers nor the grades placed upon them are ‘records, files, documents or other materials which ... are maintained by an educational agency or institution or by a person acting for such agency or institution’ 20 U.S.C. §1232g(a)(4)(A)(ii). The papers (or at least the responses) belong to the students” (Falvo v. Owasso, 2000, p. 1202).

Kelly further states that the teachers certainly may act for the agency or institution in recording the grades in the grade book, spreadsheet, etc. because the teacher is under contract to that agency or institution, “but it is one step removed to say that the teacher’s potential receipt of that grade makes every uncompensated student that participates in the grading process ‘a person acting for such agency or institution’” (Falvo v. Owasso, 2000, p. 1202).

Continuing the opinion, Kelly notes that it is documented within the statute that “education records” do not include “records of instructional...personnel...which are in the sole

possession of the maker thereof and which are not accessible or revealed to any person except a substitute” 20 U.S.C. §1232g(a)(4)(B)(i). In *Falvo*, no one has even suggested that the teacher’s grade book has been made “accessible or has been revealed to any person except a substitute, or released to any person or group not within the exceptions created by the statute” 20 U.S.C. §1232g(b)(1). “If the teacher’s grade book normally does not constitute an ‘education record,’ how can it be that individual grades on papers can be ‘education records?’” (*Falvo v. Owasso*, 2000, p. 1202).

The court in its ruling found that if a teacher revealed to a third party the grades in her grade book, the grade book would become an “educational record” and the grades prior to being entered into the grade book were also protected because they were disseminated to other students. Judge Kelly states that, “the statute makes no mention of grades prior to entry being ‘education records,’ and had Congress intended such an important change in this sensitive area, surely Congress would have included express language to that effect” (*Falvo v. Owasso*, 2000, p. 1202). The court maintained that it based its decision “purely on the language of the statute itself, *id.* at 22, and attributes [**] its conclusions solely to Congressional intent”(Falvo v. Owasso, 2000, p. 1202). Kelly rebuts the appellate court’s decision with,

There is an obvious difference, however, between grades entered in a grade book (a collective record of the teacher) and the individual grades (on student papers) that are not recorded in a grade book. Surely Congress could have [*1203] intended to protect one in limited circumstances, and not the other. Likewise, there is a difference between a final grade placed on a transcript and the individual scores that determine the final grade” (*Falvo v. Owasso*, 2000, p. 1203).

In the footnotes to the dissenting opinion, the legislative history of the FERPA (1974) is supported as an important resource to the accurate interpretation of the term, “education records.” It is strongly suggested that the statute is unclear on its face as to exactly what

constitutes an “education record,” and because of that ambiguity, it is appropriate to consult the legislative history of the FERPA for clarification of the term. (Falvo v. Owasso, 2000, p. 1203)

The practical application of the court’s decision in this case is a slippery slope. If grades cannot be revealed to other students, then such important school practices as the giving of academic awards, the determination of athletic eligibility, etc. will become a dangerous process. Likewise such routine things as students passing out graded papers to the class will no longer be possible. Judge Kelly contends that teachers are overworked and underpaid and that the courts’ interpretation of “education records” will place them under the constant threat of lawsuits over grades. He finds it hard to believe that this is what Congress meant when it sought to protect the students’ rights to privacy. (Falvo v. Owasso, 2000, p. 1203)

Scholarly Commentary

In 1996, the concept of peer grading was addressed in an article by Friedman in which he writes about Andy, a young man who likes his math class but does not always do well on the assignments in the class. Andy’s math teacher often has the students exchange homework papers and grade them as the class goes over the correct solution of the problems. When the class is finished going over the assignment, the students retrieve their papers, and then as the teacher calls out each student’s name, the student is to call out his grade so that the teacher can record it in her grade book. The teacher calls out Andy’s name, and Andy has to respond that his grade is an embarrassing 25.

In his article, “Who Needs To Know That Andy Got A D?” Friedman discusses the FERPA (1974) and makes note of the fact that it disallows the disclosure of personal information in records to third parties without the student’s or his parents’ written consent. He states, “that legislation was generally intended to deal with the use of students’ centralized records and not

information generated at the classroom level” (1996, p.2). Friedman further comments that since classroom grades are generally used to assign course grades, grades that are a part of a student’s centralized record, maybe the FERPA could be extended to include a student’s work product. (1996, p.2) Though Friedman would certainly empathize with Falvo, he would agree with the district court’s interpretation of the FERPA.

“Protecting the Privacy of Student Education Records” (1997) is an article based on a brochure of the same title. The brochure is edited for and published by the National Forum on Educational Statistics and is provided to give parents and their students a brief overview of their rights within the FERPA (1974). The article states, “Education records include a range of information about a student that is collected in schools, such as: . . . grades, test scores, courses taken, academic specialization and activities, and official letters regarding a student’s status in school” (“Protecting the Privacy,” 1997, p.2). The definition of “education record” produced in this article includes demographic information, special education records, disciplinary records, health records, personal information such as social security number, picture, etc., and directory information, but conspicuously lacking in this definition is any mention of class work and/or homework. (“Protecting the Privacy,” 1997, p.2) Again, the interpretation of the FERPA sides with the district court.

The FERPA (1974), also known as the Buckley Amendment, provides that in order to receive federal funds, educational agencies must comply with three mandates: educational agencies’ student records

1. are to be kept confidential, normally requiring parental consent for access by third parties,
2. may be accessed on request by the student’s parents, and
3. may be challenged by parents if claimed to be misleading, inaccurate, or in violation of students’ privacy rights.” (Daggett, 1997a, pp.2-3)

Under Buckley, “Records” are defined quite broadly. “Any recorded information that is created or maintained by a school, school employee, or a person ‘acting for’ a school, that is directly related to a particular student, is a record for Buckley Amendment purposes” (Daggett, 1997a, p.4). “Moreover, student information does not have to be in the official student file to be a Buckley record” (Daggett, 1997a, p.4). “Finally, records containing information about more than one student, such as a teachers’ grade book, must be edited prior to access, so that information about other identifiable students is not disclosed” (Daggett, 1997a, p.4). Using Daggett’s interpretation of the FERPA, the appellate court has made the right ruling.

The Buckley Amendment (FERPA) (1974) contains two administrative enforcement proceedings. A complaint may be logged with the FPCO, and that office will then investigate and try to resolve the situation. If an amicable resolution is not possible, the FPCO can “in limited egregious circumstances” (Daggett, 1997b, p.5) initiate the proceedings to withhold federal funding from the educational agency or institution involved. Daggett notes, “attempts to create a private cause of action for Buckley violations have been singularly unsuccessful. In addition, common law tort claims appear equally lacking in potential” (1997b, p.5).

Early in Buckley’s history, a series of attempts were made to create a private cause of action under it. However, courts are unanimous in holding that, primarily because of an absence of legislative intent to do so, Buckley itself does not provide the right to file a private lawsuit to challenge alleged violations.(Daggett, 1997b, p.6)

Where a public school violates Buckley, a civil rights lawsuit may be possible. Several courts have held that a [42 U.S.C. §] 1983 action may be brought to vindicate Buckley violations, and the specter of such claims has been touted as the best way to enforce Buckley. In fact, numerous [42 U.S.C. §] 1983 claims alleging Buckley violations have been brought in the last ten years. Of these cases, one court awarded nominal damages of one dollar. Another issued a preliminary injunction against a university practice which likely violated Buckley. No reported decisions awarded actual damages or attorneys’ fees. (Daggett, 1997b, p.7).

In short, one can win the lawsuit, but it may not be a profitable win.

Bell, Associate Legal Counsel for the National Association of Secondary School Principals, thought of peer grading as a “very benign” practice when she was in school, but she says she knows better now. In her article, “Court Rules that Peer Grading Unlawful,” Bell says that peer grading was “put to the test and failed” (2000, p.1). Writing about *Falvo v. Owasso* (2000) in the Tenth Circuit, she further says,

The court reasoned that since students became aware of other student’s grades through the peer grading procedure, the system caused protected information, i.e. the students’ grades, maintained by the school to be disclosed without proper authorization, thereby violating [the] FERPA [1974]. (Bell, 2000, p.1)

What was once considered a benign and commonplace practice, has now become a federal offense.

Following her initial article and writing for the *National Association of Secondary School Principals Bulletin* in 2001, Bell continues her discussion of *Falvo v. Owasso* (2000) by stating,

“There are two philosophical issues imbedded in *Falvo*. First is the issue of student privacy; second is the issue of parental rights. *Falvo* asks whether or not a student’s right to privacy is compromised contrary to the law as set forth in FERPA when students are forced to trade papers with their classmates and grade them. It is easy to concede that a student loses some privacy when forced to trade papers with a classmate. What is not clear is whether a student’s right to privacy extends as far as their homework or a pop quiz. What is also in dispute is whether FERPA, which has become the vehicle to challenge peer grading, was intended to protect the individual graded assignments of students. While the latter issue requires detailed attention to the statute and the intent of Congress in passing the statute, the former issue is a question of higher constitutional magnitude, which could have been the motivating factor for the courts in accepting the decision. . . . The second philosophical issue imbedded in *Falvo* is the parents’ right to have control over their child’s education. In addition to privacy rights, parental rights are the basis for Ms. *Falvo*’s case, that parents, not teachers, should have the right to decide who sees her children’s grades. (2001, pp. 1-2)

Because of the magnitude of these two philosophical issues in *Falvo v. Owasso* (2000), this case becomes a major factor in deciding the extent of privacy rights students have in the classroom and the amount of control parents have over issues of grade disclosure. This case pairs easily with other educational cases heard during the 2002 term, *Board of Education of Independent*

School District Number 92 of Pottawatomie County v. Earls, Zelman v. Simmons-Harris, and *Gonzaga v. Doe*, to lay the framework within which student and parental rights must be contained.

Writing for the *Brigham Young University Education and Law Journal*, Bennett and Brower discuss *Falvo v. Owasso* (2000) in the Tenth Circuit. In the notes and comments to their article, “That’s Not What FERPA Says!” the authors state that, “The Tenth Circuit Court Gives Dangerous Breadth to FERPA in its Confusing and Contradictory *Falvo v. Owasso Independent School District Decision*” (2001, p.1). The authors of this document disagree with the Tenth Circuit’s findings in this case. Bennett and Brower write that, “*Falvo* only makes for confusing and impractical law” (2001, p.2). On the appeal from summary judgment the authors contend that Judge Murphy and the other judges erred when they did not remand the case for trial.

Instead of remanding for a trial, they went ahead and ruled on several issues, most notably the expansion of the definition of ‘education record’ and the creation of an agency relationship between the students and the school. Regardless of [the] FERPA’s ambiguity or lack thereof, another [appellate court] has stated that ‘the existence of facts giving rise to a principle-agent relationship is generally a question reserved for the trier of fact. Thus, if nothing else, the Tenth Circuit Court should have remanded this decision back to the trial level for a determination of fact. (2001, p.2-3)

It is questionable as to whether or not *Falvo* actually had the authority to bring the claim; the authors think maybe not. The basic elements of a 42 U.S.C. § 1983 claim appear to be satisfied until one reaches the third one which asks, “Does the statute impose a binding obligation on the state?” (Bennett and Brower, 2001, p.3). The authors tell the reader that the Tenth Circuit Court might have been “misled in finding that [the] FERPA [1974] imposes a binding obligation on the states to comply. In order to examine this we need to know what courts mean when they say ‘binding obligation’”(2001, p.3).

Bennett and Brower attack the decision of the Tenth Circuit Court by stating, “But what the court seemed to miss in deciding for the students is that making this grading system a violation of [the] FERPA is both a legal contradiction and a moot point in the classroom itself” (2001, p.4). Bennett and Brower take issue with the court’s claim that its finding was “based purely on the language of the statute itself...” (Falvo v. Owasso, 2000, p. 970) and its argument that Congress was clear in its intent to protect grade disclosure in teachers’ grade books, and that the FERPA is unambiguous in its language. They find it very “doubtful that Congress intended for the interpretation of ‘maintained by...a person acting for [an educational] agency or institution’ to be so broad as to include student-to-student grading” (2001, p.4). They contend,

One must assume that Congress intended an agency relationship to apply when it chose the phrase “person acting for such institution or agency.” Agency, as defined by *Black’s Law Dictionary*, is “a fiduciary relationship created by express or implied contract or by law, whereby one party (the agent) may act on behalf of another party (the principal) and bind that other party by words and actions.” Agent is defined as “one who is authorized to act for or in place of another; a representative.” Courts have narrowly construed agency relationships between students and schools; they are hesitant to assign the agent label to students because of potential liability. In conjunction with Black’s definition of “agent” (“one who is authorized to act for or in place of another,”) the decision in *Booker v. Chicago Board of Education* should be persuasive. The court in *Booker* said that the student hall monitor had no responsibility given her by the teacher because “her function was to report any misbehavior to the teacher.” The hall monitor had no authority to decide what comprised the infractions, only that the infractions happened. It is the same situation with students grading other student’s papers - the grading student has no authority to decide what is a right or wrong answer; she can only mark answers “correct” or “incorrect” according to what the teacher tells her is “correct” and “incorrect.”

Since a student in almost all cases does not fit the definition of “agent,” the court incorrectly stated that the FERPA statute is “unambiguous.” Referring to the consent requirement in an agency relationship, the court in *Wickey v. Dawn Sparks* stated, “agency is a relationship resulting from the manifestation of consent by one party to another that the latter will act as an agent for the former.” Students certainly do not consent to being agents for the school, nor do their parents, thus the student cannot be considered an agent of the school. (2001, p.5)

In conclusion to their article, Bennett and Brower note that,

There is nothing in the Tenth Circuit Court or the Supreme Court case history dictating the *Falvo* decision of the appellate court. In fact, there is enough ambiguity as to the construction of statutory elements of the claims to allow for another decision. Substantive and policy arguments show why the school district should have been favored in this matter. (2001, p. 7)

Dinger in his article, “Johnny Saw my Test Score, So I’m Suing My Teacher: *Falvo v. Owasso Independent School District*, Peer Grading, and a Student’s Right to Privacy Under the Family Educational Rights and Privacy Act,” states,

In holding that the term “education records” as used in [the] FERPA [1974] includes teacher grade books and grades on student papers, the Tenth Circuit reached a legally incorrect and unsupportable result. A look at the statute itself, its legislative history, and the existing Department of Education interpretations of the statute provide solid evidence that the result reached by the Tenth Circuit was erroneous. Further, a look at the real-world effects of *Falvo* as they relate to statements evidencing congressional intent also supports the view that the Tenth Circuit made a mistake when it held as it did.

In reaching the conclusion that it did, the *Falvo* court relied on a novel and never before used interpretation of the education record provisions of [the] FERPA. An examination of the language of the statute that defines the term “education records,” as well as that portion of the statute that lists exclusions to that category of documents, demonstrates that the court went well beyond the plain language of [the] FERPA in formulating its interpretation of that statute. (2001, p.12)

The *Falvo* court should have looked to the legislative history when it was determining whether grades on individual student papers constitute “education records,” and had it done so, it would have found that the interpretation of the statute set forth in its opinion is inconsistent with congressional intent. The key place in the legislative history of [the] FERPA that the court could have looked at is the list of non-education records contained in the Joint Statement. (2001, p. 16)

The Joint Statement reads:

The amendment makes certain reasonable exceptions to the access by parents and students to school records. The private notes and other materials, such as a teacher’s daily record book, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aids would not be available to parents or students, provided they are not revealed to another person, other than in the case of a substitute who performs another’s duties for a temporary period. (1974, p. 38860)

Dinger continues:

Certainly a teacher's grade book, which is likely what the Joint Statement means when it refers to a "daily record book," is a memory aid in that it helps a teacher remember past performance when determining a student's final grade. Thus, according to this statement, so long as the grade book is not made accessible to unauthorized persons, no access to the book need be given to parents (meaning the book is not an education record, as parents have access to education records). (2001, p. 17)

Dinger speaks about the landmark case of *Brown v. Board of Education* (1954) when he writes:

Chief Justice Warren wrote: "Today, education is perhaps the most important function of state and local governments....It is the very foundation of good citizenship....It is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Moreover, he continued, "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Justice Warren's prophetic words still ring true today. As such, any judicial or legislative decision that has the potential of having a lasting effect on our educational systems should be analyzed and tested with extreme care. *Falvo v. Owasso* (2001) is just such a decision. (2001, p.21)

In conclusion Dinger states, "Falvo was wrongly decided" by the Tenth district court. (2001,p.21) The court's interpretation of "education records" goes beyond the language of the statute and of the intent of Congress. It makes teacher grade books into education records when the statute dictates that they are not, and by extension, then makes grades on student papers education records which Dinger says is a "totally ridiculous notion" (2001, p.21). The *Falvo v. Owasso* (2001) court ignored clear evidence of congressional intent when it refused to consider the legislative history of the FERPA. The Tenth Circuit Court of Appeals specifically held that,

It need not look to the legislative history because 'the statutory language defining 'education records' is clear on its face. . . . It is because expressions in legislative history often lack the precision and clarity which we expect from the language of enacted statutes that this court generally does not look to such history when construing a statute unless the statutory language is ambiguous. In this case, once again, the court found no ambiguity in

the statutory language, and therefore no compelling reason to examine the legislative history. (Dinger, 2000, p. 590)

Dinger determines that in all of these areas the court made serious errors and that these mistakes need to be remedied. (2000, p.21)

The Owasso Independent School District appealed this case to the United States Supreme Court, and it was argued before the Court on November 27, 2001. The Court issued its decision in this case on February 19, 2002, and *Owasso Independent School District No. I-011, AKA Owasso Public Schools, Et. Al., Petitioners v. Kristja J. Falvo, Parent and Next Friend of her Minor Children, Elizabeth Pletan, Philip Pletan, and Erica Pletan* became the first FERPA case to be adjudicated by the United States Supreme Court. This fact makes *Owasso Independent School District v. Falvo* (2002) a landmark education case and the focus of Chapter 3 of this study.

CHAPTER 3
AN ANALYSIS OF THE U.S. SUPREME COURT'S
INTERPRETATION OF FERPA

Introduction

This chapter provides an in-depth analysis of *Owasso v. Falvo* (2002), as it was decided by the United States Supreme Court. There are a number of briefs that were written on this case and submitted for consideration by the Supreme Court. The Brief for Petitioners, the Brief for the United States, the Brief for Respondents, and the Reply Brief for Petitioners will be discussed in detail. In each brief the writers have given a summary of the facts of the case and then given their perspective of the decisions filed in the lower courts. Since the facts of the case are undisputed in *Owasso v. Falvo* (2002), they are reviewed in detail in the discussion of the Brief for Petitioners and will generally not be reiterated each time they appear in other briefs discussed. However, even though the facts may be basically the same, differences in the briefs are found, and also disputes arise when the discussion turns to the decisions made by each of the lower courts. These decisions are where the focus of this chapter will be placed. The opinion of the Court as delivered by Justice A. Kennedy and the concurring opinion of Justice A. Scalia are also reviewed in this chapter.

Brief for the Petitioners

August 23, 2001, counsel for the petitioners, the Owasso Independent School District, filed a brief on writ of certiorari to the United States Court of Appeals for the Tenth Circuit. In this brief the petitioners stated the question being presented to the court as follows:

Whether the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (“FERPA”), which requires educational institutions to preserve the confidentiality of “education records,” prohibits public school teachers of presecondary school students from utilizing their students to grade each other’s homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class. (Brief for Petitioners, 2001, p.1)

The facts of this case are based on evidence that is undisputed by either party. The Owasso Independent School District does not have a formal grading policy that addresses peer grading. Teachers in this district are allowed to use various methods of grading in their classes, and some teachers do on occasion use the method known as peer grading. Falvo does not argue this fact. She acknowledges that some of her children’s teachers use this grading method while others do not. Both parties to the case acknowledge that peer grading is never used to grade mid-term nor final exams.

Rationalizations for using peer grading include the fact that peer grading allows for immediate feedback. Teachers using this method of grading feel that it allows them to discuss the correct and incorrect answers with their students immediately after the students have completed the work. They feel that this reinforces the material that they are trying to teach.

The significance of 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. Professor Krumboltz noted in his affidavit that “research findings confirm that immediate feedback aids learning more than does delayed feedback.” (Brief for Petitioners, 2001, p.12)

Petitioners further argue that it would be virtually impossible for many teachers to grade every assignment given to their students every day. In Oklahoma teachers of grades 7 through 12 can legally teach up to 140 students per day. Conceivably a teacher could have 140 homework papers, 140 class work assignments, and 140 quizzes to grade overnight. This would be an impossible task. Teachers of grades K through 6 are limited to a class size of 20 students, but when you consider that they teach basically seven different subjects to those 20 students each

day, their work load would be consistent with the teachers of grades 7 through 12. Thus, the argument can be made that without peer grading “students will only receive their results after delay,” which “may have a detrimental effect upon both teaching and learning” (Brief for Petitioners, 2001, p.39).

Another argument for the use of peer grading is that it “allows teachers to cover more material and assign significantly more work than would be possible if the teacher had to grade every individual homework paper” (Brief for Petitioners, 2001, p. 36).

Since cheating is another issue faced by schools, teachers prefer to have students exchange papers for grading because it helps take away the temptation to cheat. It has also been established that students tend to be more careful about marking errors when they are grading someone else’s paper. It is easier to unintentionally overlook mistakes on one’s own paper than it is on someone else’s paper.

Once the students have graded the papers, the teacher may ask for the scores. At this point each student has the choice of calling out his grade or of taking the paper to the teacher’s desk and showing her the grade in confidence. Students in the Owasso School District are not required to call aloud grades in class.

One other fact is stressed, and that is that teachers do not record every grade a student makes in class. “Falvo admitted that because of this, it is impossible to know which of the grades that may be disclosed in class are selected by the teacher for recording and/or use in calculating a student’s final grade” (Brief for Petitioners, 2001, p. 6).

The point is stressed that each time “one of Falvo’s children has approached a teacher at the Owasso School District to request a change in that teacher’s grading practices, the teacher has accommodated that request” (Brief for Petitioners, 2001, p. 20). Falvo is not satisfied with the

accommodations made by the teachers and wants the grading policy of the entire school district to be changed to totally disallow peer grading. When the school district refuses to put in place such a policy, Falvo files suit against the Owasso School District.

The decision of the district court concerning the FERPA (1974) issue was overturned by the appellate court. The Brief for Petitioners gives 5 points in its argument against the ruling of the appellate court. These points are as follows:

1. The plain language of [the] FERPA shows that Congress did not intend the term “education records” to include grades on routine homework assignments, quizzes, and tests.
2. The Court of Appeals’ interpretation of “education records” cannot be reconciled with other provisions of the statute.
3. The Court of Appeals should have deferred to the established and long-standing interpretation of the Family Policy Compliance Office.
4. The Legislative History supports the Family Policy Compliance Office’s interpretation and refutes the analysis of the Court of Appeals.
5. The Court of Appeals’ interpretation of [the] FERPA needlessly burdens sound education. (Brief for Petitioners, 2001, pp. 15-41)

Discussing point number 1, the Brief for Petitioners (2001) holds that the reasoning behind the appellate court’s decision is “seriously flawed” (p. 18). The meaning of the word “maintain” is distorted. “A fundamental canon of statutory instruction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning” (Perin v. United States, 1979, p. 42). In the Brief for the United States of this case, it is noted that “the ordinary meaning of the word ‘maintain’ is ‘to keep in existence or continuance; preserve, retain’” (2001, p.12).

Writers of the Brief for Petitioners argue that when students score other students’ papers, they are not “preserving existing information; they are creating new information. Until the paper has been scored and the number of correct or incorrect answers totaled, there exists no ‘record’ to be ‘maintained’” (2001, 17). They state,

If Congress had meant for the word “maintain” to include the creation or collections of information, it certainly would have said so. Under the plain and ordinary meaning of the word “maintain,” only those final grades that are recorded on the student’s transcript and preserved in the educational agency’s permanent, institutional records are “maintained” within the meaning of [the] FERPA [1974]. (Brief for Petitioners, 2001, p.17)

The appellate court held that when a student grades the paper of another student, he is maintaining the grade as information until the teacher can make further use of the grade. The Brief for Petitioners argues that if this were the case, a student’s work on a chalkboard could meet the definition of being maintained. The appellate court further held “that the ‘record’ created when one student scores another’s homework or test paper is ‘released’ by the very act of creating it” (Brief for Petitioners, 2001, p. 18). In this context a student grading another student’s paper is “a person acting for” the school and the very act of grading the paper of another is a “release” of information, a “disclosure” (Brief for Petitioners, 2001, p. 18).

The Brief for Petitioners argues,

This is both unreasonable and unsound. The statute cannot plausibly be interpreted to mean that when an educational agency or institution appoints a student to act as its agent in preparing a record, the very act of preparation by such agent constitutes an unlawful “release” or disclosure of that record. If that were the law, no educational agency or institution (including colleges and universities) could utilize students as teaching assistants to grade or record the grades of examination papers, reports, or written laboratory observations. It cannot plausibly be claimed that Congress intended this result. (2001, p. 19)

Point number 2 challenges the appellate court’s interpretation of the term “education records.” The Brief states, “The straight-forward reading of the words of the statute is confirmed when the phrase ‘education records’ is considered in the context of other provisions of [the] FERPA” (Brief for Petitioners, 2001, p.19). Quoting from *Davis v. Michigan Department of Treasury* (1989), the authors of the Brief for Petitioners further write, “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (p. 809). This is again supported by *Bailey v.*

United States (1995) which holds that, “We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme” (1995, p. 145).

The appellate court interprets the term “education records” in such a manner that it is “inconsistent with two separate substantive components of the statute itself” (Brief for Petitioners, 2001, p.20). These two components are: the right of a parent to a hearing to challenge an education record and the responsibility of the educational institution to keep a record of all persons who access student records. Using the interpretation given the term “education record” by the appellate court, a parent would have the right to challenge any grade on any homework, class work, quiz, etc. That could mean literally thousands of hearings that the schools would have to hold. Additionally, every time a parent asked to see his student’s paper(s), that viewing would have to be recorded by the teacher. This would create an impossible record-keeping task for any teacher, and that fact alone “leaves no doubt that Congress did not intend for the routine grades recorded by teachers on a daily basis to fall within [the] FERPA’s [1974] definition of ‘education records’” (Brief for Petitioners, 2001, p. 24). To further complicate this issue, if a student who grades another student’s paper is an agent for the school and is maintaining a record for the school of that grade as Falvo contends, then strictly speaking that student would also have to maintain a written access record. No reasonable person would suggest that Congress intended to impose this type of duty on student assistants, adult volunteers, or students simply grading a classmate’s paper in a class. (Brief for the Petitioners, 2001, p. 24) “As Justice Ginsburg noted in her concurring opinion in *Things Remembers, Inc. v. Petraraca* (1995), ‘It would show little respect for the legislature were courts to suppose that lawmakers meant to enact an irrational scheme’” (p. 124).

When constructing the FERPA (1974), Congress provided in the language of the statute itself for a “single school official (and his assistants) to be ‘responsible for the custody’ of education records” (Brief for Petitioners, 2001, p.24). The writers of the Brief for Petitioners argue that “this language reflects a Congressional intent that there be a central custodian of education records at each educational agency” (2001, p.24). This central custodian could not be a student who is simply grading another student’s paper in a teacher’s classroom.

In point 3 of the Brief for Petitioners’ discussion, the Family Policy and Compliance Office (FPCO) is discussed. The FPCO is the government office that is charged with the responsibility of administering the FERPA (1974). Since the FERPA is a spending clause statute, it is necessary that the FPCO monitor educational institutions that are receiving federal monetary support to be sure that the institutions are meeting the requirements of the statute. The FPCO is also responsible for withdrawing funding from any educational institution that is not meeting the requirements of FERPA. Given that the FPCO has this much responsibility for the administration of the FERPA, it should follow that the FPCO would also have a major voice in any FERPA issue. In the district court the FPCO did have a strong voice in that the court based its ruling in *Falvo v. Owasso* (1998) on a letter that was written by its Director. In the appellate court the FPCO did not have any influence at all on the decision in this case. The appellate court overturned the ruling of the district court, and based on two reasons, the appellate court essentially ignored the letter from the FPCO’s Director. The appellate court held that the language of FERPA was clear and did not therefore need interpretation by the FPCO. It further maintained that the Director’s letter did not “have ‘the power to persuade’ and therefore was not ‘entitled to respect’ under this court’s decision in *Skidmore v. Swift & Co.* 323 U.S. 134 (1944)” (Brief for Petitioners, 2001, p.27).

The appellate court criticized the FPCO letter, but it failed to give any additional information that the letter actually did not cover. The Brief for Petitioners argues that unless one can point to a specific omission, it is difficult to believe that the letter was in fact faulty. The Brief further notes that the FPCO letter not only states a specific opinion on the issue in question, it goes on to explain the rationale behind the opinion. It is the contention of the writers of the Brief for Petitioners that “the FPCO correctly discerned Congress’ intent and rightly anticipated that a contrary interpretation [of the FERPA] would have chaotic consequences” (2001, p. 29).

The legislative history of FERPA (1974) is discussed in point 4 of the Brief for Petitioners’ argument. Again, the term “education records” is at issue. In its initial version FERPA did not use the term “education records.” Instead the FERPA applied to

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. (Brief for Petitioners, 2001, p. 30)

In order to clarify the statute, this list of protected records was replaced with the term “education records” and a definition for that term was included in the statute. Senators Buckley and Pell authored a “Joint Statement” that was placed into the Congressional Record. The “Joint Statement” was written to further explain the statute and the changes that were being made to it. The “Joint Statement” made it clear “that the change [that replaced the list of protected information with the term ‘education records’] was not intended to expand the reach of the statute beyond institutional records” (Brief for Petitioners, 2001, p. 30).

Senators Buckley and Pell also addressed the hearing right granted parents and eligible children by FERPA (1974) as follows:

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 teacher should have assigned a higher grade because the parents or students believe that the student was entitled to the higher grade. ("Joint Statement," 1974, p. 20)

According to Senators Buckley and Pell, the right to a hearing applies only to institutional records, and since that is the case, the Brief for Petitioners notes, "the term 'education records' should be interpreted consistently with that intent" (2001, 32).

The sole possession exception in the FERPA (1974) excludes homework, class work, etc. from the definition of "education records." Again, the "Joint Statement" is responsible for clarifying the FERPA. It states,

The amendment makes certain reasonable exceptions to the access by parents and students to school records. The private notes and other materials, such as a teacher's daily record book, created by individual school personnel (such as teachers, deans, doctors, etc.) as memory aids would not be available to parents or students, provided they are not revealed to another person, other than in the case of a substitute who performs another's duties for a temporary period. (Brief for Petitioners, 2001, p.32)

If a grade book must be revealed to another person who is not a substitute before it becomes an education record, it would mean that not all grade books are education records. The teacher who shows her grade book to another teacher, counselor, administrator, etc. would have a grade book that is an education record while the teacher who does not show her grade book to anyone else would simply have a personal record of her students. "This is unsound and illogical" (Brief for Petitioners, 2001, p.32).

The Brief for Petitioners mentions a situation in which a parent complained to the Office of Civil Rights of the United States Department of Education about the fact that her student's teacher had intentionally destroyed her grade book and by extension had destroyed the child's academic record in the class. The Office of Civil Rights replied to the complainant that the grade book was "not a document that is reviewed by other staff or kept as part of the formal educational record" (2001, p.32). The California State Department of Education further informed the Office for Civil Rights that "a teacher's record book is a personal record which is not a part of the educational records maintained by the district..." (2001, p.32). This incident shows that two separate governmental agencies have held that teachers' grade books are not education records.

The last point addressed by the Brief for Petitioners is that the decision of the appellate court has "caused wide-spread concern and confusion, not only about the legality of peer grading, but about many other common and well established educational practices" (2001, p.36). For example, 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" (2001, p. 36) are all common practices that have been called into question by this decision. These are just a few instances, but there are a myriad of situations that could be effected by this decision.

Peer grading is called "an established and pedagogically useful educational tool" (Brief for Petitioners, 2001, p.37) because it allows for immediate feedback on assignments and "has educational benefits that support its continued use" (Brief for Petitioners, 2001, p. 37). Because there are benefits to the practice of peer grading and

because there is no indication that Congress intended [the] FERPA to alter these practices, the School District Defendants submit that here must be some strong

countervailing principle to justify departing from the analysis followed by the FPCO and invalidating an educational practice as old as our nation. (Brief for Petitioners, 2001, p. 41)

The petitioners maintain that no such principle has been established by Falvo, and therefore, the decision of the appellate court should be reversed.

Brief for the United States as Amicus Curiae Supporting Petitioners

The question to be examined in the brief presented by the United States addresses the issue of whether or not allowing students to grade each other's homework and test papers while the teacher is orally going over the correct responses in class is a violation of the FERPA's (1974) prohibition against the release of education records. The United States filed this brief at the Court's invitation at the petition stage of this case.

Writers of this brief begin by giving in its statement to the Court the statutory framework of the FERPA (1974). They discuss the provisions of the FERPA which outline that federal funding of public schools may be curtailed if a school does not meet the strict requirements for releasing educational information about the school's students. They note the persons who may have access to student records, the conditions under which that access is granted, and also the penalties a school may incur for not meeting the FERPA requirements in this area.

This brief details the meaning of education records as follows:

The term "education records" is defined by FERPA to mean: those records, files, documents, and other materials which – (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. 1232g(a)(4)(A). FERPA excludes from that definition several specific categories of records. The first exception is for "records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." 20 U.S.C. 1232g(a)(4)(B)(i). Other exceptions cover certain law enforcement, employment, and medical records. 20 U.S.C. 1232g(a)(4)(B)(ii)-(iv). 229 F.3d 956 (10th Cir. 2000) (No. 00-1073). (Brief for the United States, 2001, p. 12)

This information is given a great deal of importance as it is the foundation of the argument the writers of this brief will put forth.

The next section of this brief gives a summary of the facts of the case and the decisions filed in the lower courts. Since the facts are not at issue, the major focus is on the decisions of the lower courts.

The district court held that allowing a student to grade the paper of another student and to have students call out their grades in class does not violate FERPA [1974]. *Id.* at B2-B4. The court relied (*id.* at B2-B3) on the Department of Education's interpretation of FERPA set forth in a letter dated July 15, 1993, from the Department's Family Policy Compliance Office (see *id.* at F3-F6) that FERPA does not prohibit the practices at issue here. The court noted that the Department of Education is the agency charged with enforcing FERPA, see 20 U.S.C. 1232g(f) and, as such, its interpretation of the statute "is entitled to deference if it is [*6] reasonable and not in conflict with the expressed intent of Congress." Pet. App. B3 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985)). The court rejected respondent's contention that it should adopt the definition of "maintain" in the Privacy Act of 1974, 5 U.S.C. 552a(a)(3), which includes "collect," "use," and "disseminate" material. The court emphasized that Congress did not choose to incorporate that special definition into [the] FERPA. The court instead construed "maintain" in accordance with its ordinary meaning of "preserve" or "retain" and held that the Department of Education's interpretation of FERPA was reasonable in light of that construction and did not conflict with the expressed intent of Congress. Pet.App. B4. n4. (Brief for the United States, 2001, p.3)

The district court rejected Falvo's argument that the grading practices of the Owasso School District violated the Fourteenth Amendment. The court held that a student's "interim tests and homework assignments are not 'highly personal' matters worthy of constitutional protection" (Brief for the United States, 2001, p.3). The Fourteenth Amendment claim was affirmed by the appellate court so it is not an issue for the Supreme Court to consider and therefore not an issue of focus for this brief.

The main issue in this brief is that "the appellate court reversed the judgment of the district court on the FERPA [1974] claim" (Brief for the United States, 2001, p.3). The appellate court based its decision on its belief that "the terms 'education records' and 'maintain' are 'clear

from the statute itself” (Brief for the United States, 2001, p.3). The court held that “deference ... was not due the Department of Education’s interpretation...” (Brief for the United States, 2001, p.3).

Turning to its own analysis of the statutory terms, the court stated that the only disagreement was over whether the grades placed by one student on the paper of another are “maintained... by a person acting for [an educational] agency or institution,” for purposes of the second element of the statutory definition of the term “education records.” . . . The court concluded that the grades become education records at least at that time because, in its view, a teacher’s grade book and the grades it contains are “maintained . . . by a person acting for” an educational institution and therefore are “education [records]” Pet. App. A21-A24. The Court then concluded that the grades are also “maintained . . . by a person acting for” the school, and therefore are “education [records],” even at what the court acknowledged to be “the more preliminary stage when one student writes the grade of another student on the homework or test, the correcting student is a “person acting for [an educational] agency or institution.” Ibid. (quoting 20 U.S.C. 1232g(a)(4)(ii). And the court held that the student is “maintaining” the grade by marking the homework or test paper, “because the student is preserving the grade until the time it is reported to the teacher for further use.” Ibid. (Brief for the United States, 2001, p.3)

Arguments made by Owasso which stated that the other provisions of the FERPA(1974) did not in any way intend for the definition of “education records” to include the grading of one student’s paper by another student were discounted by the appellate court. Owasso further argued that a broad definition of “education records” which included such would be

inconsistent with the statutory requirement that educational institutions provide parents with a right to a hearing to challenge education records, 20 U.S.C. 1232g(a)(2), and maintain a record of all persons who have requested or obtained access to a student’s education records, 20 U.S.C. 1232g(b)(4)(a). (Brief for the United States, 2001, p.8.)

This reasoning by Owasso was also discounted by the court which felt that the authors of the FERPA could certainly have meant to give parents the right to challenge any homework or test grade given their student.

The appellate court did agree with the district court on the issue of qualified immunity. It held that “the individual petitioners were entitled to qualified immunity from liability for money

damages because it was not clearly established that the challenged grading practice violated [the] FERPA (1974)” (Brief for the United States, 2001, p.9).

Writers of the Brief for the United States argue that the definition of the term “education records” should refer to records that are “retained or preserved as institutional records, not student homework or classroom work” (2001, p.11). They maintain that the FERPA (1974) does not prohibit the practice of having one student grade another student’s work while the teacher calls out the correct answers. Neither does it prohibit students’ calling out their grades in class on homework and classroom work. Their conclusions are

supported by the text of the statutory definition of ‘education records,’ numerous other provisions of [the] FERPA that use the term ‘education records’ or are otherwise worded in a way that refers to institutional records, [the] FERPA’s statutory history, and the legislative record before Congress. (Brief for the United States, 2001, p. 11)

By defining the statute’s scope in terms of records “maintained” by “an educational agency or institution,” or by “a person acting for such agency or institution,” Congress addressed [the] FERPA [1974] to records that are maintained, as an institutional matter, by school officials, and that therefore are of some lasting significance outside the classroom. By contrast, the definition’s text is not naturally read to encompass materials that are handled by numerous individual teachers as part of the ongoing educational process in their separate classrooms. It follows that the homework and classroom assignments of students are outside [the] FERPA’s focus on institutional records. (Brief for the United States, 2001, p.12)

They further argue that the FERPA (1974) lists various items in its definition of “education records,” and these items “connote in this setting the school’s documentation of a student’s performance, not the actual performance (i.e., the student’s work product, such as homework and classroom assignments) itself” (Brief for the United States, 2001, p.12). Other words such as “materials” and “maintained” should be defined from their context and interpreted by the standard tools of statutory construction.

The point is made that,

The fact that a particular classroom practice may disclose a grade given on a particular homework or classroom assignment does not mean that the practice violates [the] FERPA [1974]. Many educational practices inevitably reveal aspects of a student's academic abilities and are weighed as a part of a student's final course evaluation, including, for example, the public display of science projects, the posting of a classroom chart that records the number of books read by each student throughout the school year, students' handing back graded homework and classroom assignments, and teachers' posting of homework or classroom assignments. [The] FERPA does not invalidate such common and longstanding teaching methods. (Brief for the United States, 2001, p.9)

Another argument put forth in support of the petitioner's assertions is one concerning those documents that are indeed protected by the FERPA (1974). Documents, records, etc. protected by the FERPA cannot be released without parental consent. Parents have the right to inspect and review their student's records. If the parents feel that their child's records are in any way inaccurate, misleading, or in violation of their privacy rights, they have the right to challenge the content of the record. The parents have the right to have a written explanation of their concerns placed into their child's record. The school has the responsibility of maintaining a written record of every person who accesses the education records of any student for any reason.

That [the] FERPA [1974] grants such extensive procedural rights strongly supports the conclusion that the "education records" to which those rights attach consist only of the materials, typically permanent in nature, that are part of a school's institutional records pertaining to a student and therefore have the potential for the sort of lasting impact on the student that would warrant the formal procedural protections.... It seems impossible, if not implausible," that all schools throughout the country must provide the right to a hearing to challenge each of the "thousands of grades a student might receive over time" and maintain a record of access to each piece of homework and classroom work. (Brief for the United States, 2001, p.18)

Imposing on schools throughout the nation the burden and cost of the procedural requirements for parental inspection, hearings, correction of records, and documentation of access with regard to every student homework assignment and classroom exercise would have constituted a major and intrusive departure from ordinary educational practices. There is no indication that Congress intended that the enactment of [the] FERPA [1974], including its definition of "education records," would have that effect. To the contrary, when Congress enacted the definition of "education records," the accompanying "Joint Statement" by Senators Buckley and Pell, the proponents of the

amendment in the Senate, explicitly stated that the amendment was “not intended to overturn established standards and procedures for the challenge of substantive decisions made by institutions.” 120 Cong. Rec. 39,862 (1974). The “Joint Statement” emphasized, “There has been much concern that the right to a hearing will permit a parent or student to contest the grade given 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” 120 Cong. Rec. 39,862 (1974). (Brief for the United States, 2001, p.19)

Remembering that the FERPA (1974) was originally enacted as Section 513(a) of the Education Amendments of 1974, Public Law Number 93-380, 88 Stat. 571 and as such was found to be ambiguous and difficult to understand, it is important to note that the term “education records” was not used in the original document. Instead there was a long list of what was to be covered by the FERPA, and in this listing no reference was made to homework or classroom assignments. When the FERPA was amended a short few months after it was originally written, it inserted the term “education records” to take the place of the long, detailed listing of what was to be covered by this statute. “Thus, the subject of [the] FERPA as originally enacted was institutional records, not a student’s homework or classroom assignments” (Brief for the United States, 2001, p.23). Also, an explanatory document was inserted into the Congressional record of the FERPA which stated that, “[the] FERPA applied to ‘official records or files or data’ that were ‘intended for school use or to be available to parties outside the school or school system’” (Brief for the United States, 2001, p.23). Grades on individual student work would not fall under this umbrella.

Brief of Respondents on the Merits

Respondent Falvo presents the question for consideration by the Supreme Court a little differently than the petitioners do. The question presented is,

Whether the Family Educational Rights and Privacy Act [1974], 20, U.S.C. § 1232 g (“FERPA”), which requires educational institutions to preserve the confidentiality of “education records,” prohibits public school teachers of pre-secondary school students from utilizing their students to grade each other’s homework papers, quizzes, and tests by having the students exchange papers and mark the correct and incorrect answers thereon as the teacher goes over the answers aloud in class. (Brief of Respondents, 2001, p.1)

The issue of whether the Respondents could bring a 42 U.S.C. § 1983 action against Petitioners for violations of [the] FERPA (1974) has not been raised in the question presented or briefed by the Petitioners, and accordingly should not be considered by the Court” (Brief of Respondents, 2001, p. 2). The Respondents elect to comment on this issue just in case the Court decides to address it. They note that the appellate court in this case had observed that “a consensus has developed among the federal courts that a 42 U.S.C. § 1983 civil rights lawsuit may be predicated upon a violation of [the] FERPA” (Brief of Respondents, 2001, p. 2).

In *Blessing v. Freestone*, 520 U.S. 329 (1997), this Court explained that a plaintiff seeking [42 U.S.C.] § 1983 redress must assert the violation of a federal right. To determine whether a federal statute confers a right enforceable under [42 U.S.C.] § 1983, a court must consider the following factors: (1) whether the plaintiff is an intended beneficiary of the statute; (2) whether the plaintiff’s asserted interests are not so vague and amorphous as to be beyond the competence of the judiciary to enforce; and (3) whether the statute imposes a binding obligation on the State actor. 520 U.S. at 340-341. Since Falvo’s specific, asserted claims under [the] FERPA satisfied each of these three criteria, the Tenth Circuit correctly held that Falvo may maintain a [42 U.S.C.] § 1983 action. (Brief of Respondents, 2001, p.2)

Respondents begin their statement of the facts of the case by stating, “The Owasso School District has a district-wide custom of permitting its teachers to circumvent [the] FERPA’s (1974) prohibition against the nonconsensual release of student grades” (Brief of Respondents, 2001, p.8). They maintain that students are required to grade the work of other students and then call aloud the grades that they have placed on the papers. Respondents state, “The practice occurs in all courses and is prevalent throughout the school district from elementary through high school” (Brief of Respondents, 2001, p.9).

The Brief of Respondents continues by noting that in spite of the prevalence of the practice of peer grading in the Owasso School District, not all teachers subscribe to this practice. They give this fact as evidence that there is no pedagogical value to the practice of peer grading. There are alternative methods of grading which can be utilized without jeopardizing the learning of the students or without placing an insurmountable burden on the teachers.

The principal of an Owasso elementary school has her teachers either grade the exam, quizzes, and homework themselves or, alternatively, requires that the individual student grade his or her own exam, quizzes or homework. (Record in the Tenth Circuit, Appellant App., p.178) There is no evidence that this particular elementary school assigns any less work or that the absence of this practice at this school has had any detrimental effect upon the children's education or their teachers' ability to educate. (Brief of Respondents, 2001, p. 10)

Respondents argue that grade books are "education records" within the meaning of the FERPA (1974) and as such may not be disclosed through the process of peer grading. They further argue that the grades that are being recorded by the teacher while being called aloud by the individual students are being "maintained by a person acting for the educational institution" (Brief of Respondents, 2001, p. 12).

The Brief of Respondents presents its argument based on 5 specific topics, and these topics are as follows:

1. The decision of the tenth circuit is in harmony with the plain language and purpose of the federal statute.
2. The tenth circuit correctly rejected the FPCO's informal letter opinion under Chevron, Skidmore, and Christensen.
3. Recent FPCO opinions find that grades on exams, quizzes and other student work are "education records" subject to the privileges and rights afforded parents and student under [20 U.S.C.] § 1232g(B)(1).
4. The legal obligation to keep grades private necessarily prohibits releasing the grades while collecting them.
5. The Tenth Circuit's decision has no negative consequences. (2001, pp. 14-37)

The Respondents claim that the appellate court is directly in line with the language of the FERPA and its meaning as intended by Congress. The court stated,

Since Congress intended [the] FERPA to preclude a teacher from revealing to one student the grades of another student when written in a grade book, it would be incongruous to permit a teacher to disclose or allow the dissemination of those grades to other students immediately before recording them in the grade book. (Brief of Respondents, 2001, p. 15)

In further support of their position the Respondents quote the Congressional Record pertaining to the FERPA (1974) which states,

The proposed amendments define “education records” in order to make clear what document[s] and other material parents and students will have access to.... Parents and students should have access to everything in institutional records maintained for each student in the normal course of business and used by the institution in making decisions that affect the life of the student. (pp. 39858-39859)

Respondents note that even though the language of the statute is unambiguous and actually perfectly clear in its meaning, the legislative statements recorded in the Congressional Record “clearly lend support to the conclusion that the congressional intent was to fashion a broad definition of ‘education records’ that would include ‘everything’ that is ‘used by the institution’” (Brief of Respondents, 2001, p. 15). The respondents interpret this to include grades placed on student work by other students and teachers’ grade books.

There is some student information that can be released without parental consent, and this information is called, “directory information.” Grades of any description are not listed as part of the “directory information,” and according to the Respondents, this means that they are then to be considered “education records.” (Brief of Respondents, 2001, p. 21)

The appellate court held that a teacher’s grade book was not a sole possession record. Only records that are in the sole possession of the teacher and are not revealed to anyone else other than a substitute acting for that teacher are called sole possession records. The Respondents contend that by its very nature, a grade book cannot be a sole possession record. Grade books are often shown to students and parents during parent-teacher conferences. In

certain situations, grade books are also shown to other teachers, counselors, and/or administrators. Because of the fact that information in grade books is sometimes shared with others, grade books and the grades within them must be considered “education records” under the definitions found in the FERPA (1974).

The Brief of Respondents contends that Owasso’s arguments in this case are further “undermined by its own written FERPA (1974) policy” (2001, p.21).

The Owasso FERPA policy provides, in part, that “sole possession” records are not “education records” only if they meet the following three criteria.

1. It was made as a personal memory aid;
2. It is in the personal possession of the individual who made it; and
3. Information contained in it has never been revealed or made available to any other person except the maker’s temporary substitute.

As does 20 U.S.C. § 1232g(a)(4)(B)(i), subsection (3) of the Owasso policy clearly mandates that a teacher cannot reveal the “information” to anyone other than a substitute. In fact, the school district specifically states that in order to qualify as a sole possession record “it must never have been revealed or made available” to any other person except the substitute. Thus, Petitioners’ own legal interpretation of [the] FERPA specifically provides that the “information” must never have been revealed to anyone. (Brief of Respondents, 2001, p. 23)

According to the Respondents’ logic, this shows that the papers being graded by students and the grades being called aloud in class are both “education records” because the grades are being recorded in a teacher’s grade book which is also an “education record” rather than a “sole possession” of the teacher. (Brief of Respondents, 2001, p.24)

In the second topic of their argument Respondents agree with the findings of the appellate court in the issue of the Rooker letter. First they maintain that since the wording of the statute is plain and unambiguous on its surface, it naturally follows that the term “education records” is clearly defined without any possibility of question as to its meaning. It is generally accepted that, “A court may only defer to an agency’s interpretation if a statute is deemed ambiguous under Chevron, 467 U.S. at 842-44...” (Brief of Respondents). Since the Respondents hold that

the statute is not ambiguous, they contend that the Rooker letter is superfluous and should be ignored. Secondly, the appellate court explained that, “Even if the relevant statutory language was ambiguous, the Supreme Court recently announced that *Chevron* deference does not extend to an interpretation contained in an opinion letter issued by the administering agency under *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000)” (Brief of Respondents, 2001, p. 27).

The court of appeals found the Rooker letter was “bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not maintained” by the school district. The Rooker letter ignored the broad language of the term “education records,” the narrow term defining “directory information,” and the stated purpose of [the] FERPA [1974] to prohibit the release of confidential grade information. (Brief of Respondents, 2001, p. 29)

Moving on to topic 3, the discussion begins with the information that there were other FPCO letters that did not agree with the Rooker letter. There is only one Rooker letter that is originally presented in evidence in *Owasso v. Falvo*, but the Respondents contend that there are additional FPCO letters that support their contention “that an educational institution cannot, under any circumstances, release grades that are being recorded by the teacher to any person other than the student or parent unless the parent has provided written consent” (Brief of Respondents, 2001, p.29) They state that,

Recently disclosed FPCO letters dating back to 1988 reveal that it has been the consistent and unwavering policy of the DOE to interpret the phrase “education records” in the broadest possible sense, to include many types of information not maintained in a central register. (Brief of Respondents, 2001, p. 30)

The other FPCO letters support various contentions such as: test papers are considered education records once they are collected, grades on a group oral presentation are education records, and student exams and homework assignments that have not been returned are education records. (Brief of Respondents, 2001, p. 31) Respondents feel that these letters were intentionally

omitted from the discussion in *Falvo v. Owasso* (1998, 2000) because they would have taken away from the strength of the *Rooker letter* that was presented.

Topic 4 addresses the legal obligation of teachers to keep their students' grades private. Respondents make the point that the FERPA (1974) prohibits a teacher from releasing personally identifiable grade information without parental consent. If a teacher cannot release a student's grade, then it should automatically follow that a teacher cannot allow the grade to be released by a student while collecting that grade. Calling grades aloud so that the teacher can record the grades in a grade book releases the grade to every student in the classroom. This practice would be prohibited under this interpretation of the FERPA.

The Petitioners mentioned several negative effects that would flow from the decision made in *Falvo v. Owasso* (2000) by the appellate court. In topic 5 the Respondents contend that this does not have to happen. Students could grade their own papers and deliver them personally to the teacher for recording. Artwork could be displayed without students' names or without a grade attached. Student identification numbers or exam numbers could be used and teachers could then have students grade the papers and still safeguard the students' personal grade information. There are a number of ways that the practice of peer grading could be modified to protect the anonymity of students and still not over-burden teachers.

The final conclusion of the Brief of Respondents is that "Congress intended to fashion a broad definition of 'education records' to include student grades being recorded and maintained in the teacher's grade book" (2001, p.37).

Reply Brief for Petitioners

The first issue addressed in the Reply Brief for Petitioners is the "question of whether or not the Respondent can bring an action against Petitioners under 42 U.S.C. § 1983. Though it is

true that the Petitioners did not address this issue in their brief to the Supreme Court, the issue has been thoroughly briefed by Amici supporting the Petitioners, by the Respondents, and by Amici supporting the Respondents.

This Court has on a number of occasions considered and ruled on issues that were not raised in the petition for certiorari “because the issues were so integral to decision of the case that they could be considered “fairly subsumed” by the actual questions presented. *Kolstad v. American Dental Assn.*, 527 U.S. 526, 540 (1999), quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U. S. 20, 37 (1991) (Stevens, J., dissenting) (citing cases). The Court has addressed issues not specifically raised in the petition for certiorari not only when the parties have briefed the issue, *Oklahoma Tax. Comm. v. Potawatomi Tribe*, 498 U.S. 505, 512 (1991), but also when the issue has been raised by an amicus. *Teague v. Lane*, 489 U.S. 288, 300 (1989).

Because both the parties and their amici have raised and addressed this issue, and because this issue is “fairly subsumed” within the question on which this Court granted certiorari, the Court should also determine whether Congress, in enacting [the] FERPA [1974] , established a right of action enforceable under 42 U.S.C. § 1983. (Reply Brief for Petitioners, 2001, p.1)

Petitioners reiterate that the FERPA (1974) was never intended to interfere with the manner in which teachers conduct their classrooms nor in the manner in which they conduct activities therein. They stress that the FERPA was designed to apply only to institutional records, “especially those records that follow a student through his or her educational career and might effect the student’s employment or post-secondary educational opportunities” (Reply Brief, 2001, p.2). Their position is further supported by the four appellate court justices who dissented from the denial of the Petitioners’ petition for an en banc hearing. These justices are quoted as stating, “defining ‘education records’ 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 [is] unsupported by the legislative history” (Reply Brief, 2001, p.3).

The opinions of the Respondents about the text of the statute is argued at length by the Petitioners in their Reply Brief. The Petitioners again put forth the opinion that Congress did not intend to include the daily work of students nor the teacher's grade book in the definition of "education records." They observe that by the very wording of the statute, "Congress was limiting 'education records' to those 'records, files, documents, and other materials' that are kept, preserved, or retained by an educational agency or institution" (Reply Brief, 2001, p. 3). The Petitioners further state, "The most logical way to give effect to this limitation is by applying [the] FERPA [1974] only to the institutional records of an educational agency or institution" (Reply Brief, 2001, p. 3).

The appellate court first ruled that a teacher's grade book is an "education record," and then the court ruled that the scores on the peer graded papers that are later maintained in the grade book are also "education records."

But because the record establishes that the disclosure of the score on a peer-graded paper occurs before the teacher ever records the scores in a grade book, the lower court was forced to take its analysis one step further and find that scores are maintained "at the more preliminary stage when one student simply writes the grade of a fellow student on homework and test papers." The court concluded that such peer-graded scores are education records even if the score is never recorded in the teacher's grade book. (Reply Brief, 2001, p. 4)

It is significant that the Respondents do not seem to question "that peer graded work is not an education record if the score is not recorded in the teacher's grade book" (Reply Brief, 2001, p.4). In fact the Brief of Amici Curiae Council of Counseling Psychology Training Programs, et alia, in Support of Respondent expressly states that "[the] FERPA (1974) is violated only if the teacher, without parental consent, shares the grade book information about one child with someone not eligible to receive it" (2001, p. 18).

The Respondents conclude,

It seems indisputable that the mere fact that other students may have knowledge of information contained in a student's education records will not result in a violation of [the] FERPA unless the information was disclosed from the education records and did not come from another source. (Reply Brief, 2001, p.4)

In peer grading as described by both Respondents and their Amici, the disclosure of grades on peer graded work that may at some point be recorded in the teacher's grade book does not violate the FERPA (1974) because the disclosure "comes from the homework papers rather than from the teacher's grade book" (Reply Brief, 2001, p.4).

The Petitioners take exception to the Respondents' repeated reference to the peer graded "exams." It is an undisputed fact that "no teacher at the Owasso School District utilizes peer grading to score semester exams or mid-semester (9-weeks) tests" (Reply Brief, 2001, p.4). The Petitioners also note that it is misleading to refer to Philip Pletan, Falvo's son, as a "special education student" as the Respondents repeatedly do. According to Petitioners, Pletan receives speech therapy for 45 minutes once a week. This service should in no way reflect on the ability of Pletan to complete regular written schoolwork. It is also noteworthy that this service has been discontinued at Falvo's request so Pletan can no longer be considered in any way a "special education student."

Another argument for respondents is that by focusing solely on scores that end up in the teacher's grade book, a second flaw in the lower court's analysis of this issue can be seen. "[N]o disclosure of an education record occurs when one student grades another student's paper if neither student knows whether the score placed on such paper is actually recorded in the grade book" (Reply Brief, 2001, p. 6). The Respondent Falvo actually testified in court to the fact that there is no way to know which grades get recorded in the teacher's grade book and which do not.

Following the rationale of the Brief of Respondents and the brief of Amici supporting Respondents, peer graded papers are not then education records. (Reply Brief, 2001, p.6)

The Respondents have argued that a teacher's grade book is not a "sole possession" exception in the FERPA (1974) because peer grading automatically causes disclosure and eliminates the grade book from being excluded from the definition of "education records." If peer graded papers are not education records until they are recorded in a grade book, then they cannot automatically cause a grade book to become an education record. Given this, a teacher's grade book can still be considered a "sole possession notes record" that is excluded from the definition in the FERPA of education records until such time as the teacher herself reveals the contents of her grade book to a person other than her substitute. (Reply Brief, 2001, p.7)

Concerning the text of the FERPA (1974) with regards to the obligation it imposes on school systems to provide for parents to be able to challenge the accuracy of their child's education records, "[e]ither Congress did intend to grant parents the right to a due process hearing to challenge the score recorded on routine homework papers, or the Tenth Circuit interpreted 'education records' far more broadly than Congress intended" (Reply Brief, 2001, p.9) The Petitioners support the latter contention.

About the requirement that a record must be kept of each person that views a child's education record, the Petitioners have this to say,

If, as the Tenth Circuit held, the myriad routine student papers that come across a teacher's desk each day are "education records," then every teacher is the custodian of those records and has the obligation under subpart (b)(4)(A) [of the FERPA] to maintain an access record. Nothing in the text or legislative history of [the] FERPA [1974] suggests that Congress ever contemplated burdening every teacher in the nation with this record-keeping requirement. (Reply Brief, 2001, p.10)

In its discussion of the legislative history of the FERPA (1974), the Reply Brief for Petitioners reiterates the point that Congress intended that "education records" be only those

records which are maintained by the educational institution and which as noted by Senators Buckley and Pell have the power to affect a student's future, "particularly in connection with subsequent academic and employment opportunities" (2001, p. 11). The Petitioners find another supporter of their stance in Congressman Kemp of New York who, when discussing the FERPA in the House of Representatives, referred to "education records" as those records that are "available to such diverse entities as the military services, actual or potential employers, and institutions of higher learning" (Reply Brief, 2001, p.13). As the petitioners end their discussion of this topic, they state, "The Tenth Circuit's analysis expands [the] FERPA far beyond what was contemplated by Congress" (Reply Brief, 2001, p.14).

The Respondents contend that the adoption of the appellate court's analysis of the FERPA (1974) would have no negative effect on education. The Petitioners respond by discussing some of the limitations that this analysis would place on teachers and schools. For example, under the FERPA students under the age of 18 enrolled in pre-secondary schools have no right of access to their "education records." It is only with the consent of their parents that the students may view these records. If, as the appellate court held, routine homework, class work, quizzes, and tests are considered "education records", then teachers cannot return graded work to students without first gaining consent to do so from their parents. If a teacher cannot return a student's graded paper, that teacher can neither discuss with that student the errors he made nor the ways in which to correct those errors. The Petitioners contend that this would have a definite negative effect on the child's learning and on the teacher's ability to instruct the child. (Reply Brief, 2001, p. 15)

In their original brief Petitioners compared work on a chalkboard to peer graded papers and argued that neither constituted an "education record." The Eagle Forum Education and

Legal Defense Fund submitted a brief in support of the Respondents in which it contends that student work on a chalkboard is not an “education record” because it is erased. The Petitioners state, “This position flies in the face of the Tenth Circuit’s conclusion that a peer graded homework paper is ‘maintained’ by the student who scores the paper, regardless of whether the score is ever recorded in the teacher’s grade book” (Reply Brief, 2001, p.15).

The Petitioners caution that

[t]he analysis of the lower court, if adopted by this Court, will unquestionably result in the federalization of education in the guise of protecting student privacy rights under [the] FERPA. Federal courts will be asked to evaluate and oversee the daily activities in the classrooms of our nations schools – both public and private- notwithstanding this Court’s repeated warning that educational policy decisions are best left to local educational professionals. (Reply Brief, 2001, p.19)

According to the final statements of the Petitioners, Congress never intended to take control of public education out of the hands of local education officials and place it in the hands of the federal government. The Petitioners conclude that the decision of the appellate court is erroneous because this is just what it does.

Current Status of the FERPA(1974) With Regards to Peer Grading

Having discussed four of the briefs in the *Owasso v. Falvo* (2002) case, it is appropriate to now focus on the decision made in this case by the United States Supreme Court. The Supreme Court decision is that “[The] School-class practice called peer grading [is] held not to violate [the] Family Educational Rights and Privacy Act of 1974 (20 USCS 1232g), at least during [the] initial stage until [the] teacher collected and recorded [the] students’ grades” (*Owasso v. Falvo*, 2002, p.426).

In its summary of the facts of *Owasso v. Falvo* (2002), the Supreme Court notes that “[the] FERPA [1974] provides that items are protected ‘education records’ only if they ‘are maintained’ by an educational agency or institution or by a person acting for such agency or

institution” (*Owasso v. Falvo*, 2002, p. 429). The district court granted summary judgment in favor of *Owasso*, and “expressed the view that (1) grades put on a student’s papers by another student did not constitute ‘education records’ under [the] FERPA [1974], and (2) accordingly, peer grading did not violate [the] FERPA” (*Owasso v. Falvo*, 2002, p. 430). The Tenth Circuit Court of Appeals reversed in part and remanded in part the decision of the district court. The appellate court expressed the view that

1. the mother [*Falvo*] could sue under [42 U.S.C. §]1983 to enforce [the] FERPA’s terms; and
2. peer grading violated [the] FERPA, as
 - (a) the grades marked by students on each other’s work were “education records” protected by [the] FERPA, and
 - (b) so, the very act of grading was an impermissible release of the information to the student grader. (*Owasso v. Falvo*, 2002, p. 430)

The Supreme Court reversed and remanded the decision of the appellate court.

In *Owasso v. Falvo* (2002) the Supreme Court held that “peer grading does not violate [the] FERPA [1974]” (*Owasso v. Falvo*, 2002, p. 426). In the analysis of this decision the Court begins by addressing the question as to whether or not the FERPA provides private parties with a cause of action that is enforceable under 42 U.S.C. § 1983. Justice Kennedy in writing the opinion for the Court about this issue states,

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 v. Abbott*, 524 U.S. 624, 638, 141 L. Ed 2d 210, 118 S. Ct. 1003 (1998). In these circumstances we assume, but without so deciding or expressing an opinion on the question, that private parties may sue an educational agency under [42 U.S.C.] § 1983 to enforce the provisions of [the] FERPA here at issue. Though we leave open the [42 U.S.C.] § 1983 question, the Court has subject-matter jurisdiction because respondent’s federal claim is not so “completely devoid of merit as to involve a federal controversy.” *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998) (citation omitted). With these preliminary observations concluded, we turn to the merits. (*Owasso v. Falvo*, 2002, p. 431).

Justice Kennedy makes note of the fact that both parties to the suit seem to agree that

if an assignment becomes an education record the moment a peer grades it, then the grading, or at least the practice of asking students to call out their grades in class, would be an impermissible release of the records under [the FERPA] Without deciding the point, we assume for the purposes of our analysis that they are correct. (*Owasso v. Falvo*, 2002, p. 431)

Justice Kennedy continues by recognizing that the parties disagree about whether or not peer graded assignments are “education records.” He continues by reiterating the fact that even though the papers certainly contain personally identifiable information, “they are records under the Act only when and if they ‘are maintained’ by an educational agency or institution or by a person acting for such agency or institution” (*Owasso v. Falvo*, 2002, p. 431). The Petitioners and the United States as *amicus curiae* assert that the definition of “education records” applies only to permanent records that an institution or agency keeps on their students. They do not agree with the appellate court and the Respondents that the daily work of students is to be considered as such. Justice Kennedy writing for the Supreme Court has this to say about the issue:

The Court of Appeals’ logic does not withstand scrutiny. Its interpretation, furthermore, would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation’s schools. We would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation. This principle guides our decision. (*Owasso v. Falvo*, 2002, p. 4)

Two statutory indicators tell us that the Court of Appeals erred in concluding that an assignment satisfies the definition of education records as soon as it is graded by another student. First, the student papers are not at that stage “maintained” within the meaning of [20 U.S.C.] § 1232g(a)(4)(A). The ordinary meaning of the word “maintain” is “to keep in existence or continuance; preserve; retain.” *Random House Dictionary of the English Language* 1160 (2d ed. 1987). Even assuming the teacher’s grade book is an education record – a point the parties contest and one we do not decide here – the score on a student-graded assignment is not “contained therein,” [20 U.S.C.] § 1232g(b)(1), until the teacher records it. The teacher does not maintain the grade while students correct their peers’ assignments or call out their own marks. Nor do the student graders maintain the grades within the meaning of [20 U.S.C.] § 1232g(a)(4)(A). The word

“maintain” suggests [the] 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 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. (*Owasso v. Falvo*, 2002, p.433)

According to Justice Kennedy, the appellate court was incorrect in holding that a student grader was “a person acting for” an educational institution within the definition of the FERPA (1974). “The phrase ‘acting for’ connotes agents of the school, such as teachers, administrators, and other school employees” (*Owasso v. Falvo*, 2002, p. 433). Justice Kennedy explains that a student who is grading the paper of another student is simply following the directions of his teacher just as he is when he completes any other task the teacher assigns. He states,

Correcting a classmate’s work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on. We do not think [the] FERPA [1974] prohibits these educational techniques. We also must not lose sight of the fact that the phrase “by a person acting for [an educational] institution” modifies “maintain.” Even if one were to agree students are acting for the teacher when they correct the assignment, that is different from saying they are acting for the educational institution in maintaining it. (*Owasso v. Falvo*, 2002, pp. 433-434).

Other sections of the statute are also addressed by Justice Kennedy. He refers to *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 in writing, “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (*Owasso v. Falvo*, 2002, p.434). He uses as an example the requirement in the FERPA (1974) which requires that a record be kept of every person who accesses a student’s records. The record must give the name of the person and the reason the person has for accessing the record. This record must be kept for every student in the

educational institution, and it may only be made available to parents and to school personnel who have an interest in the child's education. (*Owasso v. Falvo*, 2002, p.434)

Under the Court of Appeals' broad interpretation of education records, every teacher would have an obligation to keep a separate record of access for each student's assignments. Indeed, by the court's logic, even students who grade their own papers would bear the burden of maintaining records of access until they turned in the assignments. We doubt Congress would have imposed such a weighty administrative burden on every teacher, and certainly it would not have extended the mandate to students. (*Owasso v. Falvo*, 2002, p. 434)

The fact that the record of access must be maintained on each student in the institution and must be kept with education record of each child suggests that,

Congress contemplated that education records would be kept in one place with a single record of access. By describing a "school official" and "his assistants" as the personnel responsible for the custody of the records, [the] FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar, not individual assignments handled by many student graders in their separate classrooms. (*Owasso v. Falvo*, 2002, p.434).

About the issue of the hearings that must be provided for parents who wish to question the accuracy of their student's education record, Justice Kennedy comments, "It is doubtful Congress would have provided parents with this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes" (*Owasso v. Falvo*, 2002, p. 434).

The Court agrees with the Petitioners that the "Respondent's construction of the term 'education records' to cover student homework or classroom work would impose substantial burdens on teachers across the country" (*Owasso v. Falvo*, 2002, p. 435). Justice Kennedy writes,

Indeed, the logical consequences of respondent's view are all but unbounded. At argument, counsel for respondent seemed to agree that if a teacher in any of the thousands of covered classrooms in the Nation puts a happy face, a gold star, or a disapproving remark on a classroom assignment, the federal law does not allow other students to see it.

We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of [the] FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it. (*Owasso v. Falvo*, 2002, p. 436)

In the conclusion of the Court's opinion Justice Kennedy pulls all of the above cited reasons together and states,

For these reasons, even assuming a teacher's grade book is an education record, the Court of Appeals erred, for in all events the grades on students' papers would not be covered under [the] FERPA at least until the teacher has collected them and recorded them in his or her grade book. We limit our holding to this narrow point, and do not decide on the broader question whether the grades on individual student assignments, once they are turned in to the teacher, are protected by the Act. (*Owasso v. Falvo*, 2002, p.436)

Justice Scalia concurred only with the judgment of the Court stating that

I agree with the Court that peer graded student papers do not constitute "education records" while they remain in the possession of the peer grader because, as the Court explains, a student who grades another's work is not "a person acting for" the school in the ordinary meaning of the phrase. (*Owasso v. Falvo*, 2002, p.437)

Prior to being heard by the United States Supreme Court, this case was under scrutiny by the Family Policy Compliance Office. The FPCO had issued a statement that it would be reviewing the FERPA (1974), would be considering what constituted an education record, and would be releasing some explanatory information about the issue in the near future. When the Court agreed to hear *Owasso v. Falvo* (2002), the FPCO decided that it would defer to the decision issued by the Court. The current status of the FERPA with regards to peer grading is that peer grading does not violate the FERPA and that peer graded papers while still in the hands of peer graders do not constitute "education records" under the FERPA.

CHAPTER 4

FINDINGS AND CONCLUSIONS

The Family Educational Rights and Privacy Act of 1974 was written to give parents and students a federally protected right to the confidentiality and accuracy of educational student records. The FERPA prohibits educational institutions from disclosing personally identifiable information in education records without the written consent of the student, or if the student is a minor, the student's parents. (20 U.S.C. §1232g[b]) All educational agencies and institutions that receive federal funds are governed by this Act, and the federal government may withhold funding from any educational entity that does not meet the conditions of the FERPA. The FERPA is under the direct control of the Family Policy Compliance Office, and all complaints, enquiries, etc. concerning the FERPA are to go to the FPCO for resolution.

Historically, the FERPA (1974) has been a statute that is somewhat difficult to understand and apply. When it was first enacted in 1974, its language immediately became a subject for debate, and only four months later, the "Joint Statement in Explanation of Buckley/Pell Amendment" was written. Speaking about the FERPA in this document, the statement was made that a number of "ambiguities in its provisions have come to light" (1974, p.39862). Because of this problem, the first amendments to the FERPA were passed to "remedy certain omissions in the provisions of existing law and to clarify other portions of the Act which have been the subject of extensive questioning and concern" (1974, p. 39862). In its 30 year history the FERPA has been amended a total of 9 times, and regardless of its various amendments, this statute is still somewhat non-specific and open to interpretation.

In *Owasso v. Falvo* (2002), the FERPA (1974) is again under scrutiny because of the ambiguities found in its wording and in its purpose. In this case the Supreme Court was asked to interpret the FERPA's meaning and its application to the practice of peer grading. More specifically, the Court was asked to address the question of whether or not peer grading violates the FERPA. In order to decide this issue, the Court determined that it had to examine the language of the FERPA, specifically the terms, "education records," "maintained," and "person acting for."

Prior to the appearance of *Owasso v. Falvo* (2002) before the Supreme Court, the district court and the court of appeals had radically differing opinions about how the FERPA (1974) should be interpreted in this case. The main issue in both courts was focused on the interpretation of the FERPA's definition of "education records." The district court held that peer grading did not violate the FERPA because the papers being graded by students were not "education records." The court of appeals held that peer grading did violate the FERPA because the peer graded papers were "education records." Because of these differing opinions, it was left up to the Supreme Court to step in and make a definitive decision as to how the FERPA should be interpreted on the issue of peer grading. In a 9-0 ruling the Court established the current legal status of the FERPA with regards to this issue by holding that the practice of peer grading, one student marking the paper of another student while the teacher calls out the correct answers, does not violate the FERPA.

The Court based its decision primarily on the definition of the term "education records" as that particular definition is written in the FERPA (1974). The FERPA defines "education records" as "those records, files, documents, and other materials which contain information

directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution” (20 U.S.C. § 1232g (a)(4)[A]).

In interpreting the definition of “education records,” the Court decided that student papers graded by peer graders are not “education records” at the time of their grading. These papers can only become “education records” under the FERPA when and if they “are maintained by an educational agency or institution or by a person acting for an educational agency or institution” (20 U.S.C. § 1232g (a)(4)[A]).

Moving to the next term in question, the Court agreed with Petitioners that the term “maintained” as used within the FERPA (1974) must be interpreted by its ordinary meaning which is “to keep in existence or continuance; preserve; retain. Random House Dictionary of the English Language 1160 (2nd ed. 1987)” (*Owasso v. Falvo*, 2001, p. 433). This decision was based on *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, which states that, “It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme” (*Owasso v. Falvo*, 2002, p. 431). The Court reasoned that “maintained” referred to student records being kept in a central location by a specific person such as a registrar and that a student did not “maintain” the paper he/she was grading as the word “maintain” must be interpreted in this context.

Still looking at the definition of “education records,” the Court further decided that a student grader is not “a person acting for” an educational agency or institution within the definition of the FERPA (1974). The phrase “acting for” connotes an agency relationship between the school and such persons as teachers, administrators, and other school personnel. (*Owasso V. Falvo*, 2002, p. 431). The Court felt that it was an obvious conclusion that a student could not be acting as an agent of the school.

After determining what it considered the appropriate boundaries for the terms “education records,” “maintained,” and “person acting for . . . ,” the Court was able to determine that in its opinion the school-class practice called peer grading did not violate students’ privacy rights under the FERPA, at least during the initial stage until the teacher collects and records the students’ grades. (*Owasso v. Falvo*, 2002, p. 426)

The research for this dissertation shows that the lower courts in *Owasso v. Falvo* (2002) considered a number of issues that the Supreme Court did not. In its review of this case the Court did not decide whether or not a private party could bring a lawsuit under 42 U.S.C. § 1983 for a violation of the FERPA (1974). It should be noted that this particular issue was later decided by the Court in *Gonzaga v. Doe*, in which the Court stated that "42 USCS 1983 claim for alleged violation of Family Educational Rights and Privacy Act of 1974 (FERPA) held foreclosed, because relevant FERPA provisions held to create no personal rights to enforce under 1983" (2002, p. 273).

The Court in *Owasso v. Falvo* specifically limits its holding to the grades that are placed on student papers by peer graders, and in doing so comes to the conclusion that until such time as the teacher records these grades in her grade book, these grades are not protected by the FERPA. The Court does not address the broader issue of whether or not these grades are protected by the FERPA once they are turned in to the teacher. Additionally, the Court does not address the issue of whether or not a teacher’s grade book is an “education record” protected by the FERPA. Finally, instead of specifically defining what “education records” are, the Court addresses the issue only under the very specific facts of *Owasso v. Falvo* (2002). Given that there are still questions created by the FERPA’s current language and that there are questions that the Court has left unanswered and therefore open to interpretation, it is certainly possible that litigation

addressing these issues may be forthcoming in future courts. It is also possible that the Court's decision in *Gonzaga v. Doe* which curtailed the possibility of receiving monetary damages in cases based on FERPA may make such cases somewhat less appealing to future plaintiffs. Without knowing the future, it might certainly be to the advantage of educators to act on the side of caution and treat the teacher grade book as an "education record" protected by the FERPA.

Even though the Court left several questions unanswered in its decision, *Owasso v. Falvo* (2002) still remains an important landmark in education law. It is the first case involving the FERPA (2002) to be decided by the United States Supreme Court. This case is also significant because the Court used *Owasso v. Falvo* (2002) to “expand our understanding of confidentiality and how it relates to education records, student privacy, and grading” (Daly, 2001, p.3).

Traditionally, local and state school boards with very little input from the courts or the federal government have controlled the policies and practices of public schools. Following this tradition, the Court's decision in *Owasso v. Falvo* (2002) indicates that the Court is still unwilling to delve too deeply into this area. It is not willing to upset what it calls the “balance of federalism” (*Owasso v. Falvo*, 2002, p.436) by forcing teachers and school systems to abandon their customary practices of teaching. In the end the Court prefers to leave educational policies, procedures, and practices up to the educators. (*Owasso v. Falvo*, 2002, p.436)

The current legal status of the FERPA (1974) remains virtually unchanged by *Owasso v. Falvo* (2002). Even so, the Court's decision to hear this case brought public attention to the fact that the FERPA's language raises many questions and leaves much open to discussion and interpretation. This public attention may in turn cause the Legislature and/or the Department of Education to look more closely at the FERPA and to take the necessary steps to amend the

current laws or create new laws and regulations that would clarify the FERPA and make it more understandable to the educators, students, and parents who must function within its guidelines.

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