

## **REVISITING THE PURPOSE AND EFFECT OF FERPA**

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#### **HOW IT ALL BEGAN**

“It all started innocently enough back in the 1820s, when schools in New England began keeping registers of enrollment and attendance. In the 180-odd years since, the student record has grown to grotesque proportions. Like Frankenstein’s monster, it now has the potential to destroy those it was created to protect.

Educators have constructed this monster in the name of efficiency and progress, adding a piece here and there, tinkering with new components, assuming all the while they were creating a manageable servant for school personnel. But what they failed to foresee was the swift development of modern communications technology and the widening employment of that technology by a social system increasingly bent on snooping.

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... by 1970, almost any government agent could walk into a school, flash a badge and send a clerk scurrying to produce a file containing the psychiatric and medical records of a former student. It was unlikely that the student would even know about the intrusion into his private life. A mother could be coolly informed that she had no right to see the records that resulted in her [child] being transferred to a class for the mentally retarded. A father attending a routine parent-teacher conference about his outgoing son could discover the boy’s anecdotal record comments that he was “strangely introspective” in the third grade, “unnaturally interested in girls” in the fifth, and had “developed peculiar ideas” by the time he was 12 - judgments that the father could neither retroactively challenge or explain.

During the months that the author served on the New York City board of education's committee to revise student records (as chairman of the subcommittee on safeguarding and dissemination), these incidents occurred:

A secretary at a private tutoring agency calls a public junior high school to inquire about a child's reading level. The principal opens the child's record and gratuitously informs the unseen caller that the child has a history of bedwetting, his mother is an alcoholic, and a different man sleeps at the home every night. When the disclosures are reported to the board of education, the principal denies the incident and his immediate superiors back him up.

A teacher of a child entering a new school gets this summary of the student's past academic year: "A real sickie - absent, truant, stubborn and very dull. Is verbal only about outside, irrelevant facts. Can barely read (which was huge accomplishment to get this far). Have fun."

A black father who works for the school system has a friendly teacher show him his bright daughter's "confidential" record. In it is a five-page critique of how his own community activities as a "black militant" are causing his daughter to be "too challenging" in class."

"Cumulative Records: Assault on Privacy", Diane Divokey, 120 Congr. Rec. 36,528, 36,529.

The foregoing essay was published in the Congressional Record on November 17, 1974, the very day that FERPA became effective as a federal law. It seemed an appropriate way to begin this reflection on FERPA, a way to remind ourselves of the historical context in which it was adopted. President Ford signed FERPA into law on August 21, 1974, some two weeks after he took office. This was in the aftermath of Watergate and President Nixon's resignation. Congress and the public were crying out for greater openness and there was a very palpable sense of distrust in government.

Quite interestingly, FERPA was never considered by a congressional committee and was passed through an amendment to the General Education Provisions Act, on the floor of the Senate (Section 513 of P.L. 93-380 (The Education Amendments of 1974)). Thus, in revisiting

FERPA, we are constrained in the legislative history available to us.

We do know that Senator Buckley, the principal sponsor of FERPA, was passionate in his concern for privacy of student records and the right of access to records. His motivations and concerns are amply documented in the Congressional Record as exemplified below:

“Mr. President, as more stories come out in the media about the abuses of personal data by schools and Government agencies, the public and Congress have come increasingly aware of the problems such abuses pose. In addition, the revelations coming out of Watergate investigations have underscored the dangers of Government data files, and have generated increased public demand for the control and elimination of such activities and abuses. It is appropriate, therefore, that we take this opportunity to protect the rights of students and their parents and to prevent the abuse of personal files and data in the area of federally assisted educational activities.

Many absurd and sometimes tragic examples of similar abuses exist. Let me recount one of the cases described in the recent article, “How Secret School Records Can Hurt Your Child,” in Parade magazine:

The parents of a junior high student are told their daughter won't be able to attend graduation ceremonies because she's a “bad citizen.” What has she done that's bad, the parents ask? Well, the principal says, the school had a whole file on her “poor citizenship,” but the parents can't know what's in that file. In this Catch-22 case, one of the few to get a legal hearing, the New York State Commissioner of Education, Ewald B. Nyquist, stated flatly that the school's argument that it was acting in the best interest of the student in refusing to reveal the information to the parents - had no merit. The commissioner concluded: “It is readily apparent that no one had a greater right to such information than the parents.” 120 Congr. Rec. 14580 (May 14, 1974).

The primary source of legislative history/legislative intent concerning FERPA is contained in the “Joint Statement in Explanation of Buckley/Pell Amendment”, 120 Congr. Rec. 39862-39866. As articulated in the “Joint Statement”, the purposes of FERPA are to provide a right of access to educational records and to protect individual rights to privacy by limiting the transferability of records without a student or parent's consent.

FERPA was clearly intended to restore the trust of America's parents by allowing them

access to their children's school records. It was further intended to curb the prevalent practice within our schools of maintaining **lots** of information about children that strained the bounds of appropriateness and relevancy. The injustices that were the impetus behind the law were occurring in our elementary and secondary schools. The inclusion of higher education was somewhat of an after thought. Think how different our lives would be if higher education had not been included within FERPA's provisions.

## **I. HOW HAS FERPA CHANGED IN THE PAST 27 YEARS**

The broad purposes of FERPA as articulated in the "Joint Statement" in 1974, have not changed. In fact, the "Joint Statement" still remains the primary source for defining the underlying purposes of FERPA. What has however changed in the past 27 years is public opinion and advocacy concerning certain public policy issues, most notably campus safety and security. FERPA has been amended eight times since 1974 and six of the eight amendments have occurred since 1990. Beginning with the passage of the Campus Security Act, we have seen a clear policy shift in the direction of overriding personal privacy protections where campus safety and security issues are concerned.

Examples of FERPA amendments during the 1990's that illustrate this policy shift include:

- Institutions may disclose to an alleged victim of a crime of violence the results of disciplinary proceedings conducted by the institution against the alleged perpetrator of the crime, regardless of the outcome (Campus Security Act of 1990).
- Institutions may include in a student's records relevant information concerning disciplinary action 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" (Improving America's School Act of 1994)
- Institutions may disclose disciplinary actions taken against students to teachers and school officials, including those in other schools, who have a legitimate

educational interest in the behavior of the student. (Higher Education Amendment of 1998)

- Institutions may disclose the final results of any disciplinary proceeding involving a crime of violence or nonforcible sex offense to anyone, including the public, if the institution determines the student committed a violation of its rules or policies with respect to the crime. (Higher Education Amendments of 1998)
- Institutions may disclose to a parent or legal guardian information concerning violations of a law or institutional policy concerning the use or possession of alcohol or drugs for students under 21 who have been found to have violated an institutional policy or rule (Higher Education Amendments of 1998)
- Campus law enforcement records were excluded from the protection of FERPA as an educational record (FERPA Amendment, 1992)

In addition to actual amendments to FERPA, there were other laws adopted during the 1990's that further diminish FERPA's guarantees of privacy. These include:

- the Campus Sexual Assault Victim Bill of Rights Act (20 U.S.C. Sec. 1092(f)(7)) (passed in 1992, this law requires that victims of sexual assaults be informed of the outcome of disciplinary proceedings)
- the Solomon Amendment, passed in 1996, provides for military access to student recruitment information;
- and in the context of international students in F, J and M Visa categories, INS regulations which require colleges and universities to collect and report certain information (name, address, academic status, full time attendance, disciplinary action taken as a result of conviction of a crime) to the federal government.

And, this trend continues in the 21<sup>st</sup> century. FERPA's first amendment of the new millennium was via the Campus Sex Crimes Prevention Act (P.L. 106-386, Section 1601). This law provides for the tracking of convicted sex offenders who are working at or attending institutions of higher education. Once this law goes into effect on October 28, 2002, registered

sex offenders will be required to report to the appropriate state authority each institution of higher education at which they are either employed or attending as a student. State authorities will then disclose this information to local law enforcement agencies within the jurisdiction of the higher education institution. Each higher education institution will be required to notify the campus community where they can find information concerning registered sex offenders and must document compliance with this requirement in their annual campus security report due October 1, 2003. This law will likely become the source of much media coverage. Surely, among our nation's colleges and universities, there will be revelations of sex offenders working amongst us, attending our institutions and perhaps living in our residential facilities. As noted below, the law amended FERPA to allow for the release of information related to the conviction of sex offenders who are students.

(d) AMENDMENT TO FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974- Section 444(b) of the General Education Provisions Act

(20 U.S.C. 1232g(b)), also known as the Family Educational Rights and Privacy Act of 1974, is amended by adding at the end the following:

“(7)(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071) concerning registered sex offenders who are required to register under such section.

“(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.’.

The most recent amendment to FERPA is within the context of the USA PATRIOT ACT, a broad sweeping law designed to assist the government in its fight against terrorism. One can expect additional amendments to FERPA based on home land security needs and one can also expect that the on-going advocacy for greater day to day safety and security on our campuses to continue. As an example, one proposed bill, “Bryan’s Law” (H.R. 401), would require institutions of higher education to notify parents of missing person reports about their children.

## CONTEMPORARY ISSUES

### September 11th

The events of September 11<sup>th</sup> have touched our lives in ways that can not be described. Given the enormity of the tragedy, it seems trite to discuss September 11<sup>th</sup> and its aftermath in the context of FERPA. But, the truth is that the days and weeks after September 11<sup>th</sup> brought with it requests for information from federal, state and local law enforcement, campus police, worried parents, the media, and local and state governing boards. We were vitally concerned that we protect our international students' rights under FERPA, and yet were faced with a true national emergency. And, how does one not share some bit of information with a concerned parent calling from Saudi Arabia who is having difficulty making contact with their son or daughter?

On October 4, 2001, the American Association of Collegiate Registrars and Admission Officers (AACRAO) published the results of a national survey of colleges and universities which they conducted in the aftermath of September 11<sup>th</sup>. Questions and responses relevant to our discussion of FERPA are cited below.

### **PRELIMINARY Results of the AACRAO Survey on Campus Consequences of the September 11 Attacks**

#### Requests for Student Information

1.1 Have any law enforcement officials requested information from your office in connection with the September 11 attacks?

Response:	Count:
No, we have not been contacted.	968
Yes, we have been contacted by one agency.	170
Yes, we have been contacted by more than one agency.	50

1.2 Please indicate which law enforcement entity contacted your office. Please mark all that apply.

Response:	Count:
Immigration and Naturalization Service (INS)	56
Federal Bureau of Investigation (FBI)	149
Other federal authorities (please specify)	18

	State or local authorities (please specify)	66
1.3	What did the contact ask for? Please mark all that apply	
	Response:	Count:
	Records of all students on F1-J1 visas	40
	Records of some students on F1-J1 visas	27
	Records of all students in a particular program	34
	Records of students based on ethnicity	16
	Records of particular individuals	121
	Other (please describe)	36
1.4	What specific student information did they request? Please mark all that apply.	
	Response:	Count:
	Directory information	149
	Non-directory information from education records	99
	Other records (please describe)	40
1.5	Was the request accompanied by a subpoena?	
	Response:	Count:
	Yes	12
	No	192
	There was more than one request, and the answer is different for each. (Please explain.)	10
1.6	Did you seek advice from General Counsel?	
	Response:	Count:
	Yes	86
	No	129
	There was more than one request and the answer is different for each. (Please explain.)	3
1.7	What action did you take?	
	Response:	Count:
	Released records	159
	Did not release records	8
	Other (please explain)	48
1.8	Did you inform the students whose records were released?	
	Response:	Count:
	Yes	10
	No	176
	There was more than one request, and the answer is different for each. (Please explain.)	11

1.9	Did the agency tell you not to inform the students?	
	Response:	Count:
	Yes, but we were only verbally asked not to inform the student(s).	12
	Yes, the subpoena instructed us not to inform the student(s).	9
	No	181
	If more than one agency contacted you and in each case the answer is different, please mark here and explain.	5
3.4	Have there been any incidents of harassment against foreign students, Muslim students, or students of Arab or South Asian descent?	
	Response:	Count:
	Yes (please describe)	160
	No	707
	Don't Know	325
3.5	Has the campus community made efforts to reach out to foreign students, Muslim students, or students of Arab or South Asian descent?	
	Response:	Count:
	Yes (please describe)	602
	No	200
	Don't Know	376

On October 26, 2001, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (“USA PATRIOT”) Act of 2001 (P.L. 107-560. This anti-terrorism bill will have a significant impact on our institutions in the years to come. Provisions of particular relevance to our student population include:

- the full implementation and expanded monitoring of foreign students and the inclusion of air flight schools, language training schools, and vocational schools within the coverage of monitoring requirements (Section 416)
- enhanced surveillance procedures, including expanded authority to intercept wire, oral and electronic communications related to terrorism or computer fraud and abuse; expanded authority to share criminal investigative information; expanded reach of subpoenas and court orders in obtaining technology related information; expanded internet surveillance (Sections 201 – 212)
- federal law enforcement may access student information from the National

Center for Education Statistics (Section 508)

- FERPA has been amended to allow an assistant attorney general or higher ranking federal officer or employee to obtain a court order upon certification to the court that there are “specific and articulable” facts giving rise to the belief that the education records likely contain information relevant to an authorized investigation or prosecution of domestic or international terrorism. An institution is immune from liability for the good faith release of these records in response to an ex-parte order of the court (thus, no liability if the student is not notified prior to release of the educational record). FERPA record keeping requirements do not apply. (Section 507)

### **Technology**

The increased use and sophistication of technology on our campuses has created extremely complex questions concerning what an “educational record” is, who “maintains” these records and who has a right of access to these records.

FERPA has not been amended to address student access and confidentiality in the digital age and many questions remain unanswered. How does an institution respond to a request by a parent for his/her daughter’s student computer password? Are records “maintained” by the institution when a student owns his/her computer but uses the university server? Can we share educational records with students via electronic transmission (for instance, e-mailing students their grades vs. mailing grades)? Is the use of a personal identification number sufficient security to allow access to on-line educational information (on-line registration/access to class schedule/financial holds)? Can we honor on-line requests by students for the release of educational information to third parties?

### **State Public Records Laws**

For those at public institutions within states with very broad public records law, there are considerable challenges in analyzing public records requests vis a vis FERPA requirements. Litigation in Ohio concerning the issue of whether disciplinary records are educational records

subject to FERPA's protections is a good example of how contentious these issues can become. Given a very savvy media and public, there are frequent "rubs" with FERPA. This might include a media request for educational records about a deceased student (federal FERPA rights cease at the time of death); a student newspaper's request for institutional records of parking tickets about a star athlete (are parking tickets a public record or student record?); a bank's request for a list of names of students who have issued bad checks to the institution (can we even share this information with prosecutors for the purpose of criminal enforcement?); or a request from a local community college for the names and addresses of all applicants who were denied admission to your institution.

Increasingly, students use state public records laws as a means of gaining access to information that might be useful to appeals, such as grade appeals. This might include a request for grade distributions within a class or even grade distributions within a class by gender or race; or might include a request for actual copies of the tests of other students with names redacted.

The implications of state public records law have been ignored within FERPA and this continues to create significant challenges for many.

### **Court Decisions**

There are two recent court decisions related to FERPA that are worthy of some discussion.

Doe v. Gonzaga University, 2001 WL 578520 (Wash) – In 1992, John Doe, an elementary education major at Gonzaga University had a sexual relationship with a fellow education major Jane Doe. A year later, a college of education faculty member who specializes in teacher certification overheard a conversation between two students about date rape on campus and specific mention of John Doe and Jane Doe. Believing that Jane Doe might have been date raped by John Doe, the faculty member shared with Gonzaga's director of field experience what she had overheard and the two decided that they needed to investigate the matter further. In addition to talking to alleged witnesses and Jane Doe, school of education officials contacted an investigator with the state agency that certifies teachers. They spoke with the state investigator by phone numerous times about the allegations of John Doe's sexual misconduct. John Doe was identified by name during these discussions. John Doe was not informed of the investigation nor interviewed as a part of the investigative process. In February of 1994, the dean of the school of

education concluded that she could not sign the moral character affidavit required as a part of John Doe’s application for teacher certification. John Doe was not informed of any of this until March 4, 1994 when he received a letter explaining that the dean would not sign the affidavit required for his application for certification to teach. The dean to refused to tell John Doe who had made the allegations and John Doe and his family were told there were no appeals rights. John Doe subsequently sued Gonzaga for defamation, negligence and breach of an educational contract and further alleged violation of his civil rights under 42 U.S.C. Section 1983 for violation of FERPA.

Following trial, the jury returned the following verdict in favor of John Doe:

Defamation	500,000
Breach of Educational Contract	55,000
Negligence	50,000
Invasion of Privacy	100,000
<b>Violation of “FERPA” Rights</b>	<b>150,000</b>
<b>Punitive Damages for FERPA violation</b>	<b>300,000</b>

On appeal, the court of appeals reversed the negligence, invasion of privacy, FERPA and breach of contract awards and remanded the case for a new trial on the defamation claim.

John Doe then appealed to the Washington Supreme Court. On appeal, the Washington Supreme Court reinstated the jury verdict as to the defamation, invasion of privacy, violation of FERPA rights and breach of contract claims.

This case is worthy of mention for several reasons. First, the facts illustrate the difficult issues which institutions face when affidavits of character must be completed in connection with professional licensure. Faculty feel quite strongly about their professional responsibility in regard to certification and never wish to certify a student who is not competent, stable or whom they believe has engaged in an act of serious misconduct. The “how to” of the investigation requires close collaboration between academic personnel and legal counsel.

Secondly, it is interesting that Gonzaga's violation of FERPA was in the context of its sharing of information with a state licensing agency with which it works so closely on a routine basis. It is clear that Gonzaga officials did not perceive discussions with the state licensing agency as outside of the permissible scope of FERPA. School of education officials readily admitted that they had spoken with state licensing officials about other student concerns as they arose. Thus, the question becomes one of whether a student who knows that the institution will be providing information to a licensing agency as a part of the licensure process impliedly waives his or her FERPA rights. This was clearly the view of the state court of appeals. In reversing the jury award for FERPA violation, the court of appeals had reasoned that "even if FERPA did create individual rights enforceable under section 1983, we would nonetheless hold that a teacher candidate waives those rights when he or she applies for teacher certification." Doe v. Gonzaga Univ., 99 Wn. App. at 357.

The Washington Supreme Court disagreed with this conclusion and in doing so provides useful guidance concerning the issue of waiver of rights:

Waiver is the intentional and voluntary relinquishment of a known right; it may be either express or implied. Jones v. Best, 134, Wn. 2d 232, 241, 950 p. 2d 1 (1998). To constitute implied waiver, there must be unequivocal acts or conduct evidencing intent to waive; intent will not be inferred from doubtful or ambiguous factors. Wagner v. Wager, 95 Wn.2d 94, 102, 621 p.2d 1279 (1980). Under the facts of this case, no such waiver by John Doe is demonstrated. In addition, John Doe's application for teacher certification had not been submitted to OSPI when personally identifiable information about his alleged sexual misconduct was communicated by Gonzaga. The Courts of Appeals holding that teacher candidates waive their FERPA rights enforceable under section 1983 when applying for certification cannot be supported. 2001 WL 578520.

Thirdly, in reinstating the FERPA award, the Washington Supreme Court held that FERPA creates individual rights that are privately enforceable under section 1983. Given the split of authority on this issue, the Doe v. Gonzaga case is significant as to this question of law. Even more importantly, the U.S. Supreme Court has just granted certiorari in the Gonzaga case and will likely rule on this issue of law.

Finally, the success of the plaintiff's FERPA claims (damages awards totaling \$450,000) is

noteworthy and depending upon the ruling of the U.S. Supreme Court, might be the start of a new trend in litigation.

Falvo v. Owasso Independent School District - All of us will be watching with interest how the United States Supreme Court deals with the case out of the United States Court of Appeals for the Tenth Circuit which deals with FERPA.

While the Supreme Court's decision will be interesting in any event, it is, first, important to understand the decision of the Court of Appeals which the Supreme Court has decided to review. Falvo v. Owasso Independent School Dist., 233 F. 3d 1203 (10th Cir. 2000). It is both the backdrop for the Supreme Court's decision and has some interesting points in it, as well.

First, there are some points about the context in which the case arose that are worth noting. It involved sixth to eighth grade students, not college students. The Supreme Court's application of FERPA in this context, however, could, nevertheless be applicable to the college environment. The school district involved was in Tulsa, Oklahoma. The plaintiff, a mother of three students, brought the law suit as a class action, but all court rulings were based on applying the law to the facts involving her children, before the class action certification issue was resolved. One of her children was a special education student and her lawyers argued that he had a heightened expectation of privacy under the Individuals with Disabilities Education Act (IDEA). The trial court ruled that she had not made an IDEA claim in her complaint and did not consider that argument. Thus, no matter what the Supreme Court rules, the question about whether students and their parents have a heightened expectation of privacy under the IDEA will have to be resolved in other litigation. This case arose as to the 1997-98 and 1998-99 school years. The plaintiffs sued the school district and various school district administrators.

Chief Judge Murphy of the Court of Appeals described the issue before that court as follows:

"In the instant case, this court must decide whether a practice employed by pre-secondary school teachers ... of allowing their students both to grade one another's tests and other work and to call out their own grades in class (the 'grading practice') violates either the Fourteenth Amendment to the United States Constitution or [FERPA]."

The trial court had granted summary judgment to the defendants, meaning that it had ruled against the claims that either the 14th Amendment or FERPA had been violated and that it had ruled in favor of the school district, on all points. The Court of Appeals reviewed the trial judge's ruling "de novo;" this means that because it was a question of law (with facts not in dispute) that it was not bound by the trial judge's decision on what the law requires.

The court noted, in footnote 2, that it concentrated on the practice of allowing one student to see and to grade another's papers, rather than on the practice of calling out the grades as the sharing of papers and mutual grading was the first possible violation.

The Court of Appeals affirmed the trial court's decision to grant summary judgment for the school district on the claim under the 14<sup>th</sup> Amendment. The 14th Amendment provides, in pertinent part, "nor shall any State deprive any person of ... liberty ... without due process of law." U.S.Const. Amend 14, Section 1. The Supreme Court held, in *Roe v. Wade*, that a constitutional "right of privacy ... [is] founded in the Fourteenth Amendment's concept of personal liberty." 410 U.S. 113, 153 (1973). Subsequent cases have held, however, the Tenth Circuit explained, that this right warrants constitutional protection as to specific information only if the information is "highly personal or intimate." The Tenth Circuit held that the expectation of privacy on grading matters did not reach this constitutional level. Here is how they explained it.

"Although this court acknowledges that the school work and test grades of pre-secondary school students constitute somewhat personal or intimate information, we cannot conclude that these grades are so highly personal or intimate that they fall within the zone of constitutional protection; to hold otherwise would trivialize the Fourteenth Amendment. ...

[W]e cannot say the right to prevent disclosure of pre-secondary school work and test grades is a 'deeply rooted notion[ ] of fundamental personal interest [ ] derived from the Constitution.'"

The Court of Appeals then considered the claims the plaintiffs had raised under FERPA. As to FERPA, the Court of Appeals disagreed with the trial judge. It ruled in favor of the plaintiffs, finding that the grading practice would, indeed, be a violation of FERPA.

On the FERPA claim, the Court of Appeals first addressed whether it had jurisdiction under 42 USC Section 1983. It held that it did. In doing so, it reached two findings which compelled this result. First, it concluded that FERPA created an "enforceable right" under Section 1983 which was neither vague nor amorphous. The right was the right of the parents that the school district not disclose education records to unauthorized individuals without consent. Second, it held that, although the Secretary of Education could cut off funding for such a violation, that did not constitute such a comprehensive scheme "sufficient to indicate a congressional intention to foreclose Section 1983 remedies." Thus, it concluded it had jurisdiction to hold the FERPA claim on the merits and to grant injunctive relief, for example, if it found that there had been a policy of violating FERPA.

As noted above, the Court of Appeals found that the grading practice of allowing students to grade other's work would violate FERPA. In so doing, it discussed several points.

First, it rejected the advice of Mr. LeRoy Rooker, the Director of the Family Policy Compliance Office of the US Department of Education. In 1993, he had written an advice letter approving the type of policy challenged here and, in 1999, in this litigation, he confirmed that it was the policy of his office to approve this type of practice. It found unpersuasive the "rather conclusory opinion" "that grades written down by other students and announced to the teacher are not 'maintained' as required under FERPA."

The Tenth Circuit said it found a FERPA violation "based purely on the language of the statute itself." It held that the FERPA definition of "education records" was "clear on its face." The statute defines "education records" to be "those records, files, documents, and other materials which --(i) contain information directly related to a student; and (ii) are maintained ... by a person acting for [an educational] agency or institution." FERPA, Section 1232g(a)(4)(A).

The Court noted that the grades noted by the grading student "contain information directly related to a student" as required by FERPA. The Court held that the teacher was a person acting for an educational institution, as also required by FERPA (and that there was no exception applicable such as the teacher's sole notes exception). It also held that the fellow student, when correcting the assignment and noting a grade, also becomes a person acting for the school within the meaning of FERPA.

In an interesting aside, the Tenth Circuit noted that a parent could challenge--in the FERPA-required hearing--the "accuracy of the individual homework and test grades used to calculate the final semester grade." The Court also noted that FERPA did not forbid the practice (just the privacy violation): it said such grading could be done if done anonymously or with parental permission. FN 13. It observed: "The School District's protestations that this opinion somehow marks the end of the world for teachers, therefore, are far exaggerated." *Id.*

Thus, the Court of Appeals reversed the summary judgment in favor of the school district and ordered that the case be returned to the trial judge. It noted that judgment could not be entered in favor of the school district unless there was a finding, upon remand, "that the [illegal] actions of an employee were representative of an official policy or custom of [the School District], or were carried out by an official with final policy making authority with respect to the challenged action." FN 15. The Court of Appeals also affirmed the trial judge's grant of summary judgment in favor of the school administrators on the claims for monetary relief

because, it held, they were entitled to "qualified immunity." Of course, what actually happens in the case next will depend on the order of the United States Supreme Court.

It was in this context that the Falvo case was taken by the United States Supreme Court for review. There will be further discussion of Falvo in the oral presentation at the conference.