Student Privacy Rights—History, *Owasso*, and FERPA

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The Family Educational Rights and Privacy Act ("FERPA") was enacted in 1974 to safeguard the privacy rights of students and make their educational records accessible to them. In the past, education records were available to outside authorities while students and parents were limited in their access. FERPA has had a positive impact on students, parents, and educational authorities. Issues still remain, however, such as state open records laws and plagiarism detection software. The goals of FERPA are laudable and students, parents and educators must remain vigilant in protecting the privacy of education records.

INTRODUCTION

The Family Educational Rights and Privacy Act ("FERPA") was enacted in 1974 to safeguard the privacy rights of students and to make their educational records freely accessible to them (Family Educational Rights and Privacy Act, 1974). In this paper, we will first discuss the history of student privacy rights and examine FERPA in detail. We will then examine cases involving FERPA such as *Owasso v. Falvo,* and will end discussing the impact FERPA has on students, parents, faculty and educational authorities.

HISTORY OF EDUCATIONAL RECORDS

A "student" is "any person with respect to whom an educational agency or institution maintains education records" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(6)). According to FERPA, these education records are "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" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(D)(4)(A)). Thus, this broad definition means that educational records could include information on a student's background, academic performance, and grades, as well as the results of any standardized tests, psychological evaluations, disability reports, and also any anecdotal

remarks made by teachers or school authorities regarding the academic performance or personal behavior of the student (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(D)(3)).

All educational institutions that receive federal funds fall under the jurisdiction of FERPA (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(D)(3)). According to FERPA, any such institution can lose its governmental funding if it prevents parents or students from accessing, reviewing or challenging the content of these student records, does not allow them to correct or change inaccurate information, makes available these records to outside parties without their written consent, or fails to inform parents or students (if they are eighteen or older) of their privacy rights under FERPA (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(A) and (B) and (D)(2), (b)(1), (e)). This statute, thus, has broad application, as well as provides broad privacy protection; which we will discuss in more detail below, after we examine the history of student privacy rights.

History of Educational Record Keeping in Elementary and Secondary School

In the 1950s, the trend to attend school gained considerable momentum as people began to recognize the benefits of education (Wheeler, 1969). The U.S. has witnessed a significant increase in the number and variety of schools and school systems ever since (Wheeler, 1969). The demand for trained professionals encouraged school authorities to identify early indicators of hidden talents and other qualities such as creativity, level of social adjustment and intellectual potential among students (Wheeler, 1969). This resulted in the creation of school records that contained students' personal information such as their family background information, information on childhood struggles, as well as identification of other personal characteristics that could influence or predict future academic performance (Wheeler, 1969).

Several factors have led to the maintenance of elaborate educational records by schools (Wheeler, 1969). First, because schools now endeavor to create an environment that accommodates different learning abilities, it is becoming essential to gather information related to a student's family background, home environment and any learning disabilities that might hinder intellectual growth (Wheeler, 1969). Second, the increasing involvement of state and federal authorities in educational matters, such as financing special programs, requires schools to maintain information on students' attendance, minimum performance levels, standardized test results and even their student ethnicity (Wheeler, 1969). Finally, computers and the resultant ease of standardized testing to evaluate the intellectual potential of students have contributed to the maintenance of fairly uniform student records (Wheeler, 1969).

In 1925, the National Education Association Committee on Uniform Records and Reports, in an attempt to make educational records uniform and comparable, prescribed a list of data variables to be present in all student records (Wheeler, 1969). In 1927, the American Council on Education devised the first set of student record forms that required several layers of information at the college, secondary and elementary school level with a view to be able to direct the students "instructionally, personally and vocationally" (Wheeler, 1969, p. 38). The forms were revised by the Smith Committee in 1941 to cover a wide range of information ranging from a student's academic aptitude and performance, health and physical characteristics, interests, work experience, and parental background, to behavioral attributes such as creativity, responsibility, adjustability and emotional stability (Wheeler, 1969). In 1964, the U.S. Office of Education prepared a handbook that acted as a guideline for schools to include various items of academic and non-academic information on students (Wheeler, 1969).

History of Educational Record Keeping in Colleges and Universities

In colleges and universities, educational records include transcripts from previous educational institutions, remarks of the admission personnel, grades earned each semester, grade averages, official transcripts of the current university and sometimes even recommendation letters (Wheeler, 1969). The important difference between university and school records is that while school records related to different aspects of students are kept at a centralized location, university records pertaining to one student are kept in different places by different authorities across the university such as faculty members, the admission office, the graduate school, departmental committees, the counseling office, the security office,

the health center, etc. (Wheeler, 1969). The sharing of this scattered information held in the hands of different professionals generally depends on the "norms of sharing" of their profession (Wheeler, 1969, pp. 80-83). For example, while psychiatrists and psychologists may typically deny access to a student's information to faculty, campus administrators, and outsiders; security officers that keep information related to students' minor criminal violations, political activity, drug abuse, photographs etc. are expected to share this information with law enforcement (Wheeler, 1969, pp. 80-83). Prior to the enactment of FERPA, there was no law that specifically protected the rights of students and parents to access these records.

History of Privacy Rights

Although not a student right to privacy case, the earliest recognition of the right of privacy dates back to 1933 when Utah attempted to develop a code for the right of privacy by protecting any unauthorized names or pictures to be used for public advertising (Utah Code, 1933). The right of privacy was applicable to individuals as well as public institutions (Butler, et al., 1972). Subsequent court cases upheld the importance of privacy rights. In 1952, in *Public Utilities Commission of the District of Columbia v. Pollak*, Justice Douglas' dissent declared that, "Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom" (Public Utilities Commission of the District of Columbia, 1952, p. 467). More than a decade later, in 1965, Justice Douglas wrote the majority opinion in *Griswold v. Connecticut* and the Court held that a right to privacy exists even if it is not explicitly listed in the first eight amendments (Griswold, 1965). The Court stated that case law "suggest[s] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" and that the right to privacy is contained within the "penumbras" of the First, Third, Fourth and Fifth Amendments (Griswold, 1965, p. 484). Since 1965, we thus have had a constitutional right to privacy which supports the student privacy rights granted under FERPA.

Student Privacy Rights Prior to FERPA

Before the enactment of FERPA, parents and students had little access to these records while they were readily available to outside authorities without requiring the consent of parents or students (Carey, 1974). For example, in Montgomery County, Pennsylvania, students perceived to be potential drug abusers were made to answer in-depth questionnaires that could potentially be made available to district attorneys involved in investigating adolescent crimes (Carey, 1974). Furthermore, students and teachers were asked to identify other students who engaged in any kind of inappropriate behavior (Carey, 1974). This problem of easy access to student information by outside parties was exacerbated when centralized automated records of one individual, collected from various agencies, could be retrieved by different authorities through remote-access systems, thus exposing the individual to scrutiny possibly detrimental to his/her interest (Carey, 1974).

This vesting of authority with school and local authorities to grant or deny access of educational records to parents or students created three problems (Andersen, 1975). First, parents were forced to make major decisions about the academic future of their children without being able to access any information contained in these records that may have been relevant to their decision making (Andersen, 1975). Second, because parents could not access these records, they could not check for any subjective, misleading, incorrect or inappropriate information contained in these records (Andersen, 1975). Since these records also contained results of personality tests, psychological assessments and professional remarks by teachers, they were of a very personal nature (Andersen, 1975, p. 75). The final problem was that these records were conveniently made available to outside authorities who would then use them to make significant decisions about students' futures (Andersen, 1975). Arthur Miller in *The Assault on Privacy* claims that once personal information of a data subject is fed into a computerized file, even the data operators have little control over who is able to access it (Miller, 1971).

State statutes, before the passing of FERPA, did not guarantee parental access to school records and left the right to access these records at the discretion of the state or local school authorities involved

(Carey, 1974). For example, a New Jersey statute stated that, “public inspection of pupil records may be permitted and any other information relating to the pupils or former pupils may be furnished in accordance with the rules prescribed by the state board and no liability shall attach to any member, officer or employee of any board of education permitting or furnishing the same accordingly” (Carey, 1974, p. 370). According to the Russell Sage Foundation Survey (Wheeler, 1969), data related to difficult children--often of questionable validity--predisposed the authorities to a negative bias against such children especially when they were already potential victims of discrimination (Carey, 1974).

According to a survey conducted by David Goslin and Nancy Bordier using a sample of 54 schools, nearly half of the schools completely denied access to permanent student records to parents (Wheeler, 1969). The survey results also indicated that almost all schools were open to providing access to educational records to the juvenile courts, the FBI or the CIA (very likely without the consent of the students or their parents) (Wheeler, 1969). Records that were usually denied to the parents mainly dealt with “test scores, personality data, teacher reports, and other confidential documents such as delinquency reports” (Wheeler, 1969, p. 56).

Although students did not have any explicit legal rights to access their educational records before FERPA was enacted, several court cases upheld and supported the right of students to examine their educational records. For example, in *Valentine v. Independent School District of Casey,* the court held that because school records were not the private property of school authorities, they were in the nature of public records (Valentine v. Independent School District of Casey, 1919). In *Van Allen v. McCleary,* the parent of a student requested the school records of his son after he was told by faculty members that his son needed psychological treatment (Van Allen v. McCleary, 1961; Carey, 1974). The court, once again, held that parents had the right to access their children’s school records. Thus, before the enactment of FERPA, a parent had the right to inspect his/her child’s educational records owing to his/her “parental” interest in the child as individual states gave students and parents the right to educational records; as discussed above.

According to a survey conducted on rules formulated by state boards on student records, most states gave explicit rights to the students and parents to inspect educational records (Butler et al., 1972). For example, the New Mexico State Department of Education made a distinction between sensitive and non-sensitive student records and required the permission of the student before divulging any sensitive information to outsiders (Butler et al., 1972). The New Jersey Board required the permission of the local board of education for student records to be shared with any outside party (other than educational employees) (Butler et al., 1972). The New Jersey Board also allowed for unlimited access of educational records to students after they turned 21; after which access was completely denied to the parents (Butler et al., 1972).

Minnesota’s Department of Education assigned all records to two categories--the permanent records that contained all the academic information of students and the cumulative records that comprised all personal information such as personality tests and psychological evaluations (Butler et al., 1972). The Board required cumulative records to be screened thoroughly to be sure that they were accurate and unbiased before being passed on to another educational institution (Butler et al., 1972). The permanent files were allowed to be released upon request to parents, students, “a bona-fide institution of higher learning,” or a prospective employer (Butler et al., 1972, p. 47, 59-61). The cumulative records were accessible to parents and students but their access to outside parties required the authorization of the superintendent (Butler et al., 1972).

Historically, there was also an attempt to safeguard the privacy of computerized personal data (Secretary's Advisory Committee on Automated Personal Data Systems, 1973). In 1972, a Special Advisory Committee was created to enumerate the adverse consequences of computerized personal data systems and to provide suggestions on how to safeguard the interest of the individual data subjects in such systems (Secretary's Advisory Committee on Automated Personal Data Systems, 1973). The committee observed that it would not be desirable to allow total control of such information either with the authorities that maintain such data or with the data subjects (Secretary's Advisory Committee on Automated Personal Data Systems, 1973). Thus, in view of “fair information practice,” it made the

following suggestions: i. Databases that store personal information of individuals should not be kept fully confidential; ii. The individual should have knowledge of what information is being maintained about him and whether it is being used for a purpose other than the one it was intended for; iii. The individual should have the right to review and correct his personal information; iv. The organization should have the responsibility to ensure that the data is reliable and is protected against any wrongful use (Secretary's Advisory Committee on Automated Personal Data Systems, 1973).

Initially, the Special Advisory Committee had suggested the creation of a "centralized federal agency" that would manage all computerized personal databases (Secretary's Advisory Committee on Automated Personal Data Systems, 1973). However, it later observed that it would be more appropriate to prohibit the organization that maintained personal data systems from engaging in inappropriate practices by imposing financial penalties on them (Secretary's Advisory Committee on Automated Personal Data Systems, 1973). In this regard, the Committee prescribed the following for all authorities maintaining a computerized personal database: that the authorities i. shall assign one person to be responsible for the database, ii. shall explain the safeguard requirements and the penalties associated with their non-compliance to the employees of its organization, iii. shall take appropriate steps to the protect the data from any potential security threats, iv. shall not communicate any part of such database to any outside authority unless such an authority is also committed to follow the fair information practices, v. shall inform the individual subjects, upon request, of their legal rights to provide or not provide their personal information, vi. shall make such data fully available to the individual subjects, vii. shall inform the individual subjects of all uses their personal information is put to and also the entities using such information, viii. shall inform the individual subjects if their personal information is demanded under any mandatory legal requirements, and ix. shall allow the individuals to review or challenge the accuracy, completeness or even the need for their personal information to be a part of such database (Secretary's Advisory Committee on Automated Personal Data Systems, 1973). The Committee observed that these should be the minimum requirements to safeguard the privacy rights of individuals who are the data subjects of computerized personal databases (Secretary's Advisory Committee on Automated Personal Data Systems, 1973).

While the prevalence of computers is an issue that makes the protections provided by FERPA even more important today, certain internet and computer programs make FERPA protections very important to students and parents. One such program that has led to close examination is Turnitin (Department of Education, 2006). Turnitin.com (hereafter, Turnitin) is a website that provides a plagiarism check service to students and professors (Department of Education, 2006). This website contains around 4.5 billion pages that also include 10 million student papers submitted and stored in the website (US Department of Education, 2006). A student or a professor who wants to determine if a paper involves any plagiarism, may submit that paper to Turnitin (Department of Education, 2006). Turnitin, upon the receipt of any such paper, prepares a "fingerprint" of this paper and scans it against the existing papers to produce an originality report (Department of Education, 2006). This helps capture any sections of the paper that are an exact match of existing papers in the database of Turnitin (Department of Education, 2006). A professor or student who submits a paper to Turnitin also has the right to disallow their papers to be used for further plagiarism checks (Department of Education, 2006).

In 2005, St. Thomas Aquinas College asked the Department of Education whether the use of Turnitin to conduct a plagiarism check violated the privacy rights of students under FERPA (US Department of Education, 2006). The Department of Education responded in January, 2006 that a paper written by a student *did* fall under the term "educational records" as defined by FERPA (Department of Education, 2006). However, according to the Department of Education, as long as a paper submitted to Turnitin to perform a plagiarism check was kept anonymous and all personal information associated with the student's identity was kept confidential, the act of submitting student papers to Turnitin did not violate FERPA (Department of Education, 2006).

The Department of Education indicated that under FERPA, no part of the educational record or personal information of a student can be made available to an outside party without the written consent of the parent or a student above the age of eighteen (US Department of Education, 2006). Thus, where an

instructor or a professor suspects a student to be guilty of plagiarism as per the results of Turnitin, he/she cannot disclose the identity of the student to another instructor or professor without the written consent of the student (Department of Education, 2006).

EXAMINATION OF THE LAW: FAMILY EDUCATIONAL AND PRIVACY RIGHTS

As discussed above, the Family Educational Rights and Privacy Act was enacted in 1974 and was designed to protect the rights of parents and students in student educational records (Family Educational Rights and Privacy Act, 1974). An "educational agency or institution" which fails to comply with FERPA loses funding and this applies to any agency or institution receiving federal funds, thus, FERPA has very broad application (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(D)(3)).

FERPA also defines educational records broadly. As discussed above, these records are defined in FERPA as "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" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(D)(4)(a)). FERPA defines a student as "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(D)(6)). FERPA also does not allow unrestricted publication of "directory information" which includes such information as "the student's name,…date and place of birth, major field of study, participation in officially recognized activities and sports,…dates of attendance, degrees and awards received,…." (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(D)(5)(a)). Other than this directory information, institutions cannot release educational records without written parental consent with the exception of school officials and teachers with "legitimate educational interests," and school officials at other schools where the "student intends to enroll" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(1)(A)-(K)). Educational institutions are also not permitted to release "personally identifiable information in education records" (other than the directory information described above) unless there is written parental consent or the institution is complying with a judicial order or a subpoena with notification to the parents and student (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(2)(A)(B)).

FERPA also gives parents broad rights over the education records of their children. FERPA gives parents the "right to inspect and review the education records of their children" and states that educational institutions must give parents access "within a reasonable period of time" and not more than forty-five days from the time of request (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(1)(A)). Under this law, parents also have the right to a hearing to "challenge the content" of education records to ensure accuracy and have the opportunity to correct information (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (d)). Students over eighteen or those attending "an institution of postsecondary education" have these same rights (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (d)).

Regarding other third parties, every institution must keep a record with a student's education records of other agencies which "have requested or obtained access" to these records and also state the "legitimate interest" each agency had in obtaining the information (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(4)(A)). This information is only permitted to these third parties if the third parties will not allow access to the information without written parental consent (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(4)(B)).

FERPA also allows exceptions for crime victims. A college or university is permitted to disclose information to a victim of violence (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(6)(A)). The alleged perpetrator is also allowed to receive information regarding the final results of such a disciplinary proceeding if this proceeding determines that the student "committed a violation of the institution's rules or policies with respect to such crime or offense" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(6)(B)). The "final results" allowed to be disclosed include the name of the student, the violation and imposed sanction and may include any other student name if that

student gave written consent (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(6)(C)(i)(ii)).

As mentioned above, FERPA is primarily concerned with non-disclosure, however, in some circumstances disclosure is permitted. The Act ends by stating that an institution may include in the education record information regarding disciplinary action against a 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" and this information may be disclosed to teachers and school officials in that or other schools "who have legitimate educational interests in the behavior of the student" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (b)(1)(2)). FERPA also allows disclosing to a parent or guardian information regarding the violation of any law, or any rule of the institution regarding drug or alcohol use if the student is younger than twenty-one and this activity resulted in a disciplinary violation (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (i)(1)(A)(B)).

CASE LAW: <u>OWASSO INDEPENDENT SCHOOL DIST. NO. I-011 V. FALVO</u>

Courts have interpreted FERPA and have thus given us guidance on the application of the law. An important case in this area is *Owasso v. Falvo*.

In the *Owasso* case, the U.S. Supreme Court granted certiorari to "decide whether peer grading violates FERPA" (Owasso, 2002, p. 430). In the case, the Court assumed 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 records" under FERPA (Owasso, 2002, p. 431). The question then becomes "whether peer-graded assignments constitute education records at all" because the "papers do contain information directly related to a student, but 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, 2002, p. 431).

The parties in the case disagreed as to whether or not these assignments are education records. According to the school district, education records would not include "student homework or classroom work" (Owasso, 2002, p. 431, 432). The respondent parent, on the other hand, argued that education records include "student-graded assignments" (Owasso, 2002, p. 432). Respondent and the Court of Appeals argued that FERPA contains an exception for records that are in the "possession of the maker" (i.e. a teacher) and inaccessible to others except for a substitute and thus, this exception would not be necessary unless grades and grade books were education records (Owasso, 2002, p. 432). The Court disagreed with this interpretation and stated that a student-graded assignment does not fall under the education records definition of FERPA once it is graded by another student (Owasso, 2002). According to the Court, when assignments are graded by other students, they are not, at that point, "'maintained' within the meaning of" FERPA because at that point, the assignment and its grade is not in the teacher's grade book and does not become part of the grade book until the teacher records it within the grade book (Owasso, 2002, p. 432, 433). Because the student graders only possess assignments for a few minutes as the answers are called, these papers are not maintained by the students (Owasso, 2002). The Court also stated that these student graders are not "acting for" an educational institution in these situations (Owasso, 2002, p. 433). The Court explained that "'acting for' connotes agents of the school" and if students are not acting for a school when they take a quiz, then they are also not acting for a school when they grade assignments per the teacher's instructions (Owasso, 2002, p. 433). The Court continued by explaining that even if student graders are acting for the teacher when grading the assignment, they are not "acting for the educational institution in maintaining it" as required to trigger the FERPA provisions (Owasso, 2002, p. 4303, 434).

The Court also pointed out that if this "broad interpretation of education records" is accepted, then "every teacher would have an obligation to keep a separate record of access for each student's assignments" (Owasso, 2002, p. 434). The Court did not follow this interpretation because the Court believed that Congress, in passing FERPA, planned that education records would be kept together "with a single record of access" (Owasso, 2002, p. 434). This would obviously be a lighter burden on schools and

school officials. Also, "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, 2002, p. 434, 435).

The Court held that if they followed the respondent's definition of education records "to cover student homework or classroom work" that this "would impose substantial burdens on teachers across the country" (Owasso, 2002, p. 434, 435). The Court held that Congress did not mean to do this and so, the Court held that even if a teacher's grade book is an education record, grades on student's papers are not covered by FERPA until the grades are recorded in the grade book (Owasso, 2002). The Court stated that this ruling is narrow and does not "decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by the Act" (Owasso, 2002, p. 436).

In this case, we have guidance on what is and what is not an education record under FERPA. Under FERPA, we now understand that grades alone are not education records. If the grades are not recorded in a grade book yet, they are not education records subject to the privacy protection afforded by FERPA. Teachers may therefore allow student grading of other students' work and may call out student grades in class. At this point, privacy protections have not attached because the grades are not maintained within a grade book yet. Once the grades are written in a grade book, however, *Owasso* appears to state that FERPA privacy protections are triggered and these grades are protected by FERPA.

Direct Effect on Educators and Students Related to Peer Grading

On the surface, the *Owasso* case appears to have only minor effects due to its narrow coverage. In fact, the Court deliberately avoided any general clarifications of "education records," but it did rely on the FERPA definition of them 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 (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g (a)(4)(a))." Limiting the decision to the period of time immediately after the papers have been graded by peers, but before they have been entered into the grade book, the Court wrote that "we limit our holding to this narrow point, and do not decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by the Act (Owasso, 2002, p. 436)." In so doing, the most apparent implication of the case is that peer grading can continue, which is possibly a positive result. The Court acknowledged that peer grading creates a better learning experience through repetitive review and immediate feedback, and that it is a practice that teaches students how to provide feedback to others. Finally, the practice of peer grading saves time for instructors, allowing additional time for the preparation of teaching material (Owasso, 2002).

Another option is self-grading, and while this practice would probably lead to more cheating, it would force a student to observe their own mistakes immediately after the completion of an assignment. Feedback would therefore be more reliably provided to the student, who presumably would be less interested in which specific items a peer missed. It is also questionable how much students are really learning about providing feedback to others by merely checking off correct and incorrect answers on another student's work.

An academic article that followed the *Owasso* case attempted to determine empirically whether peer grading is actually beneficial to student learning. Sadler and Good (2006) performed an experiment in a middle school science classroom, varying whether teachers did all of the grading, students graded their own papers, or students graded their peers' papers. The authors found strong improvement in subsequent test scores for students grading their own work, relative to students whose papers were graded by their teachers, indicating that the immediate feedback was helpful. However, students whose papers were graded by peers did not show any improvement in the next test, calling in to question whether students truly absorb any feedback when not looking at their own paper. One caveat of the study, however, is that the authors observed more cheating on self-graded papers, although the improved performance in this condition was verified by the study authors.

While these findings question the effectiveness of peer grading, its limitation to middle school science students does not preclude the possibility that peer grading is effective for this group if administered

differently, nor does it rule out peer grading as a viable alternative in other classrooms. Instructors wishing to implement peer grading could, perhaps, avoid some of the embarrassment issues by giving students identification numbers that effectively makes the peer grading anonymous. In addition, instructors wishing to harness the advantages of immediate feedback could accomplish this through the use of online homework systems. This tool allows students to complete their assignments at a computer terminal and receive an indication immediately afterwards of which questions were answered correctly. While these techniques were not readily available during the *Owasso* case, much research has now been performed on the process across academic disciplines. The pros and cons of these systems are not the topic of this paper, but most studies (e.g., Cheng, Thacker, Cardenas, and Crouch, 2004; Gaffney, Ryan, and Wurst, 2010) have indicated that they lead to an improvement in student learning.

Indirect Effects on Schools

Other Academic Practices and Policies

Beyond the judgment pertaining to the issue of peer grading, the Court's decision can have additional implications affecting students, teachers, and administrators. For example, one could argue that if peer grading is a violation of FERPA, then students might also resist work at a chalkboard or whiteboard. To the extent that students are graded on their in-class work, any comments from the instructor on the correctness of the student's response could constitute an announcement of a grade. Going further, the Court decided that "the logical consequences of [the] respondent's view are all but unbounded" (Owasso, 2002, p. 435) and stated that even gold stars and happy faces would be prohibited under FERPA.

The decision also sends a signal of the Court's reluctance to interfere in the educational policies adopted by instructors. In reaching its decision, the Court accepted the school district's arguments on the merits of the peer grading technique and stated that by siding with the Respondent, "the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country…and we do not interpret the statute to require it" (Owasso, 2002, p. 436). Consistent with this philosophy, the Court exercised a reluctance to interfere in state matters, writing that a ruling in support of the Respondent "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" (Owasso, 2002, p. 432). The Court clearly showed deference to federalist principles in writing that it 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 [the] decision" (Owasso, 2002, p. 432).

Extracurricular Activities

Although not directly discussed by the Court, the findings are also significant to students working on school newspapers. The Reporters Committee for Freedom of the Press, et al., filed a brief of *amici curiae* in support of the Petitioner (Owasso, 2002). Adopting the arguments in the brief, the National Scholastic Press Association (NSPA) subsequently heralded the Court's decision as a victory for the freedom of school journalists, releasing them from the constraints of FERPA, based on the applicability of FERPA's education records requirements to the school's agents (Heistand, 2002). The Court wrote that, "The phrase 'acting for' connotes agents of the school, such as teachers, administrators, and other school employees" (Owasso, 2002, p. 433). The Court thus omitted students from this connotation.

Furthermore, the Court's argument was applied to a case in which students were following the orders of their teacher. As the NSPA has noted, a case involving student journalists would be even further removed from the school agent criterion because they act with more autonomy than students in a classroom following their teacher's instruction. The NSPA has pointed out that in the past, university officials have claimed that student journalists are acting for the school and are therefore prohibited from including information that would identify students. The decision in *Owasso* frees students from this constraint. Finally, student journalists at public universities would no longer be considered acting for the state and may, the NSPA has argued, therefore be legally justified in deciding which third-party material to exclude (such as advertisements and letters to the editor). At the same time, the fact that journalists

would not be considered agents of the school should also free the school from liability concerns pertaining to the actions of the newspaper (Heistand, 2002).

Education Records – What Happens After the Grades Are Recorded?

The dilemma considered by the Court in labeling education records is representative of a history of uncertainty on the subject. *Gonzaga University v. Doe* holds that "much of the statute's key language is broad and nonspecific. The statute, for example, defines its key term, 'education records,' [with a] kind of language [that] leaves schools uncertain as to just when they can, or cannot, reveal various kinds of information" (Gonzaga, 2002, p. 292). In *Owasso*, the Court decided that peer grading does not violate FERPA. It remains unclear, however, whether grades are subject to FERPA once the students have informed the instructor of the grade. The Court avoided a decision on this issue, stating that "grades on students' papers are not covered by the Act *at least* until the teacher has recorded them. The Court does not reach the broader question whether the Act protects grades on individual assignments once they are turned in to teachers" (Owasso, 2002, p. 436 (emphasis added)). In fact, whether a grade book is included under FERPA becomes immediately intertwined with the larger issue of whether protected records are those maintained by a "central custodian" (Owasso, 2002, p. 435). In concurring with the decision as written by Justice Kennedy, Justice Scalia wrote that in its comments about grade books and central custodians, the Court had used a reasoning that was "incurably confusing" (Owasso, 2002, p. 437).

Arguments Against Gradebooks as Education Records

While the Court avoided a decision on entries within the grade book, it is instructive to examine the issue in order to make inferences about the legal composition of education records, specifically as they relate to a central custodian. Some of the arguments used by the Court would appear to refute the notion that individual grades in a grade book are education records, because they would apply equally well to the peer-assigned grades that were deemed not to be included under FERPA. In particular, the Court described the procedures that FERPA allows for contesting education records, including regulated hearings, attorney representation and an adjudication process. The Court wrote that, "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" (Owasso, 2002, p. 435). Presumably, if this reasoning were to apply to grades before they were entered into an instructor's grade book, they would apply to grades afterwards as well.

In addition, the Court noted that FERPA refers to a single access record that must exist with a student's education records. In so doing, the Court concluded that, "this suggests Congress contemplated that education records would be kept *in one place*…FERPA implies that education records are institutional records kept by a *single central custodian*, such as a registrar" (Owasso, 2002. p. 435-435, (emphasis added)). The central custodian argument, one would imagine, would eliminate the possibility that grade books can be considered education records under FERPA.

Arguments in Support of Grade Books as Education Records

Conversely, the Court mentioned, without rejecting, an argument used by the Respondent and the Tenth Circuit Court of Appeals supporting the concept of grade books as education records (Owasso, 2002). This argument is predicated on the fact that FERPA outlines an exception to the definition of education records for "records of instructional, supervisor, and administrative personnel…which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute" (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g(a)(4)(B)(i)). It is implicit in the drafting of this exception that other items in the teacher's possession, and outside the hands of a central custodian, could be considered education records (Conn, 2003). Otherwise, the sole possession exception would not have been necessary. It would be difficult to propose a more important item in the teacher's possession pertaining to a student's academic record than the grade book. These grade books, furthermore, are clearly "maintained" by someone "acting for" the educational institution.

Consequently, while the U.S. Supreme Court did not rule on the matter, it acknowledged that grade books were considered education records by the Tenth Circuit (Owasso, 2002).

Justice Scalia, in concurring only with the judgment that peer grading was not a violation of FERPA, complained that the Court erred in relying on an argument that educational records were maintained by a central custodian. As Justice Scalia noted, the Court did not actually reject the Court of Appeals' reasoning that the sole possession exception would have been "superfluous" if the central custodian argument was valid, and that "we do not … read statutes in such fashion as to render entire provisions inoperative" (Owasso, 2002, p. 437). Justice Scalia complained of an apparent contradiction, referring to the sole possession exception in Section 1232g(a)(4)(B)(i) by stating that, "worse still, while thus relying upon a theory that plainly excludes teachers' grade books, the Court protests that it is not deciding whether grade books are education records...the Court's endorsement of a 'central custodian' theory of records is … seemingly contrary to Section 1232g(a)(4)(B)(i), and (when combined with the Court's disclaimer of any view upon the status of teachers' grade books) incurably confusing" (Owasso, 2002, p. 437).

Advice for Practitioners Regarding the Extent of Education Records

It is advisable for practitioners to err on the safe side by treating grade books as education records. Of course, if one were to treat grade books as education records, it would therefore follow that a practitioner should reject the central custodian argument in determining what to treat as education records according to FERPA, in spite of the Supreme Court's reliance on this theory. For example, the Catholic University of America's (CUA) Office of General Counsel cautions against any reliance on the central custodian argument, stating that the Court's opinion "fails to recognize the myriad of places that student records are actually found at an educational institution" and that the Court, while aware of computer record-keeping ability, did not recognize the "practical impossibility" of the central custodian argument (Catholic University of America Office of General Counsel). Consequently, CUA counseled faculty to disregard the physical location of information in determining whether something was an education record.

ENFORCEMENT OF FERPA

Knowing what FERPA does and does not cover is important, but how is the Act enforced? What happens when FERPA is violated? When FERPA is violated by an educational institution, enforcement of the statute then becomes an issue. *Owasso* examines issues of individual recourse against an offender, and governmental action against an offending organization is possible as well (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g(f)). Enforcement of FERPA is discussed in more detail below: can a Fourteenth Amendment claim be filed? Does FERPA allow for a private cause of action? What other enforcement mechanisms, if any, are available?

Fourteenth Amendment Claims

Before reaching the Supreme Court, the *Owasso* case was heard by the U.S. Court of Appeals for the Tenth Circuit (Falvo, 2000). The appellate court considered the Falvo claim that rights under the Fourteenth Amendment had been violated, and their decision was not reconsidered by the Supreme Court. The appellate court remarked that, "In *Roe v. Wade* (Roe, 1973), the Supreme Court announced that a constitutional 'right of privacy … [is] founded in the 14th Amendment's concept of personal liberty" (Falvo, 2000, p. 1219.). The court then quoted *Whalen v. Roe* (Whalen, 1977), stating that "[this privacy right] is the individual interest in avoiding disclosure of personal matters" (Falvo, 2000, p. 1219). Elaborating still further, the court cited *Nilson v. Layton City* (Nilson, 1995) and stated that these matters would need to be "highly personal or intimate" in order to afford constitutional protection (Falvo, 2000, p. 1219). Consequently, the Fourteenth Amendment claim regarding "liberty" ultimately rests on the extent to which the records are "highly personal" (Falvo, 2000, p. 1209). A complete analysis of a Fourteenth Amendment claim, according to the court, would involve a three-part test based on *Nilson* (and other cases with a similar finding) in which the court "must consider, (1) if the party asserting the right has a

legitimate expectation of privacy [in that information], (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner" (Mawdsley and Russo, 2002, p. 10). For the first item to be true, the court noted that "federal privacy statutes standing alone cannot be the basis" and ultimately decided that it "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" (Falvo, 2000, p. 1209). As a result of this ruling, it is unlikely that anyone protesting a FERPA violation will find recourse in a Fourteenth Amendment claim.

Private Cause of Action and Individual Rights Within FERPA

In *Gonzaga University v Doe*, the U.S. Supreme Court heard a case stemming from a student's failure to receive an affidavit of good moral character from Gonzaga. As summarized in the opinion (Gonzaga, 2002), the student needed the affidavit to become a new teacher in Washington, but Gonzaga's teacher certification specialist had overheard negative remarks about the student's sexual conduct. After the specialist notified the state certification agency of the student's identity and of the allegations, the student sued the university due to an alleged FERPA violation. An initial jury sided with Doe, but this was overturned by the Washington Court of Appeals in favor of Gonzaga, only to be reversed again by the Washington Supreme Court. The latter court had ruled partially for Doe by saying that, while FERPA did not include a private cause of action, it did create a federal right subject to Section 1983 of the Civil Rights Act (Gonzaga, 2002). Section 1983, Civil action for deprivation of rights, states that, "Every person who…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" (Civil Rights Act, 1871, 42 U.S.C. §1983).

The differing opinions of the lower courts in this single case was reflective of a history of disparate judgments throughout state and federal courts on the issue of Section 1983 claims, and the U.S. Supreme Court admitted that, "The fact that all of these courts have relied on the same set of opinions from this Court suggests that our opinions in this area may not be models of clarity" (Gonzaga, 2002, p. 278). In deciding *Gonzaga*, the Court stated that it hoped "to resolve the conflict…and in the process resolve any ambiguity in our own opinions" (Gonzaga, 2002, p. 278). The Court noted, however, that it has typically "rejected attempts to infer enforceable rights from Spending Clause statutes whose language did not unambiguously confer such a right upon the Act's beneficiaries" (Gonzaga, 2002, p. 274), and that under Section 1983, "it is *rights*, not the broader or vaguer 'benefits' or 'interests,' that may be enforced" (Gonzaga, 2002, p. 283). In *Gonzaga*, the Court ruled that FERPA not only omits a private cause of action, it furthermore does not allow for a Section 1983 claim. Moreover, *Gonzaga* makes it less likely that the Court will hear further FERPA cases, making the ambiguities in the scope of education records unlikely to be resolved by the Court.

Enforcement Mechanisms

In deciding *Gonzaga*, the U.S. Supreme Court described the enforcement procedure available under FERPA by stating that, "FERPA directs the Secretary of Education to enforce its nondisclosure provisions and other spending conditions……and to terminate funds only upon determining that a recipient school is failing to comply substantially with any FERPA requirement and that such compliance cannot be secured voluntarily" (Gonzaga, 2002, p. 273). Going further, the Court points out that isolated incidents do not trigger financial penalties under FERPA because FERPA refers to issues of "institutional 'policy or practice,' not individual instances of disclosure…[and] have an 'aggregate' focus" (Gonzaga, 2002, p. 275). Consequently, it is quite difficult for an institution to actually be penalized for a FERPA violation by the FPCO, and no institution has lost federal funds from this (LoMonte, 2012; Silverblatt, 2013). As to whether individuals may sue for damages and privately enforce FERPA, *Gonzaga* has eliminated much threat from this and from further action at the regional level, with the Court stating that "it is implausible to presume that Congress … intended private suits to be brought before thousands of federal- and state-court judges" (Gonzaga, 2002, p. 275).

RECENT CONTROVERSIES WITH FERPA

Even though FERPA offers students and their parents a great deal of protection, recent controversies with FERPA have arisen. First, some have argued that schools are not releasing enough information. Silverblatt (2013) believes that schools are improperly using FERPA to protect information that does not fit into the definition of an education record and that these denials are contrary to state open records laws. Silverblatt thus proposes that FERPA be amended to penalize schools for violating state open records laws. Second, legal commentators have remarked that a recent U.S. Supreme Court ruling in *National Federation of Independent Business v. Sebelius* (National, 2012) could question the constitutionality of FERPA. Frank Lomonte, executive director of the Student Press Law Center, cites the opinion regarding the attachment of federal Medicaid subsidies to compliance with Congressional stipulations (LoMonte, 2012). Lomonte writes that the Court examined the history of the Spending Clause and quotes the decision as asserting that, "[T]he financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement' – it is a gun to the head" (LoMonte, 2012). Given that an enforced FERPA violation would remove all federal funding from a school, Lomonte argues that the lack of any moderate penalties put FERPA in the same category.

A final area of controversy involves state laws. Each state is governed by open records laws that affect public schools (Silverblatt, 2013). While these laws typically give deference to the protections afforded by FERPA, they do create the possibility of conflict when a state law authorizes a disclosure that is protected under FERPA. It is not obvious that the Supremacy Clause would apply because FERPA only financially penalizes a school for disclosure without expressly forbidding it (Family Educational Rights and Privacy Act, 1974, 20 U.S.C § 1232g(a),(b)). In other words, one might argue that a school has the freedom to reject federal funding and ignore FERPA in order to follow the state law. Hughes cites non-FERPA cases that could justify this interpretation but has observed that courts have "not been eager to jeopardize federal funding of the schools in their jurisdiction" (Hughes, 2001, p. 21). In addition to open records laws, states have differing privacy laws that afford levels of protection within its jurisdiction. As a result, the actual level of privacy protection an individual has varies by state (Macklin, 2000; Silverblatt, 2013). While FERPA can be perceived as helpful legislation, knowledge of the above controversies is essential to a full understanding of the Act and its ramifications.

CONCLUSION

In the past, education records were available to outside authorities while students and parents were limited in their access. FERPA not only makes education records accessible to students and parents, but limits access to education records by others. Issues still remain, however, such as state open records laws and plagiarism detection software. The goals of FERPA are laudable and students, parents and educators must remain vigilant in protecting the privacy of education records while confronting issues that could reduce student privacy rights.

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