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"That's Not What FERPA Says!": The Tenth Circuit Court Gives Dangerous Breadth to FERPA in its Confusing and Contradictory *Falvo v. Owasso Independent School District Decision*

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"THAT'S NOT WHAT FERPA SAYS!": THE TENTH CIRCUIT COURT GIVES DANGEROUS BREADTH TO FERPA IN ITS CONFUSING AND CONTRADICTORY *FALVO V. OWASSO INDEPENDENT SCHOOL DISTRICT* DECISION

I. INTRODUCTION

Falvo v. Owasso Independent School District[1] began in an Oklahoma District Court as a suit by Kristja Falvo on behalf of her children against the school district and several teachers and administrators within the district. Ms. Falvo's middle school children were affected by the district's grading practices, and Ms. Falvo sought relief in court. When the district court granted summary judgment to the school district, she appealed. The 10th Circuit Court judges who heard the case on appeal held that the grading practices in question infringed on the children's right to privacy as delineated in the Family Educational and Right to Privacy Act (FERPA).[2] As a Federal appeals decision, *Falvo* directly affects all school districts within the 10th circuit's boundaries.[3] As a case of first impression on this issue, it may also be influential for other circuits deciding similar issues.

This note will discuss both procedural and substantive arguments on the FERPA issues addressed by the 10th Circuit Court. Part I introduces the case and its history; Part II discusses the procedural arguments, focusing on those against the 10th circuit's ruling; Part III examines the substantive arguments against the 10th Circuit Court's decision on the merits in *Falvo*. Part IV is the conclusion.

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1. 220 F.3d 1200, 146 ED. LAW REP. 641, 2000 CJ C.A.R. 4563 (10th Cir. Oklahoma 2000), withdrawn on denial of rehearing *en banc* and replaced by 229 F.3d 956 (10th Cir. 2000).

2. 20 U.S.C.A. §1232.

3. The Tenth Circuit encompasses Oklahoma, Utah, and Wyoming.

A. Background

The story began in 1997 when Ms. Falvo's children complained about being embarrassed in class.[4] The family had recently moved into the district, and was unfamiliar with a grading practice common in many school districts around the nation; peer-to-peer grading. Students were asked to exchange quiz papers, grade those quiz papers according to guidelines set by the teacher, and give the quizzes back to their original owners. They then had the option of either telling the teacher their scores orally in front of the class, or coming up to the teacher and privately reporting their score.

The more Ms. Falvo heard about this and how it affected her children, the less she liked it.[5] She talked to administrators, including the superintendent[6] of the school district, about changing the policy. Administrators did not see a problem, especially in light of the fact that many student-graded quizzes never make it into the gradebook,[7] and that students who may be embarrassed by the process have the opportunity to report their grades in confidence.[8] Ms. Falvo adamantly felt that the grading practice should be changed.[9] She then asked for a temporary injunction to stop teachers from using this grading practice. The court did not issue an injunction, choosing instead to grant the school district more time to prepare a defense. Meanwhile, Ms. Falvo filed suit claiming 14th Amendment and FERPA violations. The district court agreed with the school

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4. Scott Cooper, *Grading System is Challenged*, TULSA WORLD, Oct. 11, 1998 at 19.

5. Scott Cooper , *Owasso Case Before Judge*, TULSA WORLD, Oct. 15, 1998 at 11, explaining Falvo's concerns: ridicule of her son and targeting of her daughter which she attributes to the grading practice.

6. "Published Opinions," compiled by Anthony Sammons, THE JOURNAL RECORD, 8/10/00 J. Rec.; 2000 WL 14297550.

7. Falvo v. Owasso Indep. Sch. Dist., 229 F.3d 956, 970 (stating at least *some* grades are then recorded in the teachers gradebook).

8. *Id.* at 962.

9. "There comes a time when I have to say it's time to make a change." Cooper, *supra* note 4, at 19; "[Falvo's] goal is for the district to adopt a policy prohibiting students from grading other tests and reading grades aloud." Cooper, *supra* note 5, at 11; "I felt very strongly about it. I felt there was a large population of students being exposed to this grading practice, and it was affecting their learning." Kelly Kurt, *Peer Grading Fails in Court Test*, TULSA WORLD, Aug. 2, 2000 at 19; "It wasn't that I was angry and wanted to get at teachers. I just wanted to change policy." Diane Plumberg, *Nation to Feel Effects of the Grading Lawsuit*, THE DAILY OKLAHOMAN, Aug. 6, 2000 at 4-A.

district that both of those claims should be dismissed. Ms. Falvo then attempted to eradicate the grading practice by amending her complaint so that it included a cause of action brought under Individuals with Disabilities Education Act (IDEA)[10] on behalf of her mainstreamed son. However, the court disallowed the amendment because it was filed too late.

Ms. Falvo appealed the case. After the parties had presented their arguments, the court issued an opinion written by Judge Murphy in which the dismissal of the 14th amendment claim was upheld, but the dismissal of the FERPA claim was overturned. The court held that the grading practice was illegal not because the students reported their grades aloud, but because students had access to each other's work.[11]

In order for this rationale to work legally, the court decided that the "education record," which under FERPA could not be disclosed without permission, consisted of the student work itself.[12] The school district asked the court for a rehearing en banc, but the request was denied by a 9-to-4 vote. However, Judge Murphy did consider the school district's points after a fashion, withdrawing the previous opinion and replacing it with one addressing those issues. As of this writing it is uncertain whether the school district will file further appeals.

B. Initial Concerns

There are some good reasons why Judge Murphy ruled the way he did. However, better reasons indicate that *Falvo* only makes for confusing and impractical law. In the wake of the *Falvo* decision, school districts within the 10th circuit have earnestly attempted to comply.[13] They have sent home a flurry of permission forms asking parental sanction for grading practices which used to be taken for granted by students, teachers, and parents alike. School officials have speculated as to whether they can allow displays of student art. Teachers debate if they can afford to keep checking for cognition by giving quizzes and not be snowed under with the paperwork of grad-

10. Ms. Falvo wanted to claim that the grading practice violated IDEA privacy right provisions.

11. 20 USCA § 1232(g)(b)(1) ". . .policy or practice of permitting the release of education records. . . ."

12. *Falvo*, 229 F.3d at 971.

13. Jennifer Toomer-Cook, *School Ruling Affects Utahns*, THE DESERET NEWS, Sept. 9, 2000 at B0.1.

ing it all themselves. Parents are confused by the paperwork now necessary so that their children can engage in normal and everyday school activities.

II. PROCEDURAL HISTORY AND ANALYSIS

A. Improper Ruling on Appeal from Summary Judgment

Falvo came to the 10th circuit in the posture of an appeal from summary judgment for the school district. As such, Judge Murphy and the other judges needed to interpret all evidence in the light most favorable to Ms. Falvo and her children, which they did. However, they should have stopped at the interpretation. Instead of remanding for a trial, they went ahead and ruled on several issues, most notably the expansion of the definition of "education record" and the creation of an agency relationship between the students and the school. Regardless of FERPA's ambiguity or lack thereof, another appellate court has stated that "the existence of facts giving rise to a principle-agent relationship is generally a question reserved for the trier of fact."[14] Thus, if nothing else, the 10th Circuit Court should have remanded this decision back to the trial level for a determination of fact.

B. Authority to Bring the Claim

Because the FERPA statute only offers administrative remedies,[15] courts are in dispute about whether it is possible to bring a private action to enforce redress of statutory violations. As of 1998, when *Falvo* was filed in district court, most courts[16]

14. Knapp v. Hill, 276 Ill. App. 3d 376, 382 (1995).

15. 20 U.S.C.S. §1232g(g) (West 2000).

16. Odom v. Columbia University, 906 F. Supp. 188, 105 Ed. Law Rep. 491 (1995); Tarka v. Franklin, 891 F.2d 102, 104 (5th Cir. 1989); Norris v. Board of Educ., 797 F. Supp. 1452, 77 Ed. Law Rep. 255, (S.D. Ind. 1992); Klein Indep. Sch. Dist. V. Mattox, 830 F.2d 576 (5th Cir. 1987), cert. denied, 458 U.S. 1008 (1998); Fay v. South Colonie Central Sch. Dist., 802 F.2d 21 (2d Cir. 1986); Girardier v. Webster College, 563 F.2d 1267 (8th Cir. 1977); Krebs v. Rutgers, 797 F. Supp. 1246 (D.N.J. 1992); Francois v. Univ. of District of Columbia, 788 F. Supp. 31 (D.C. 1992); Tombrello v. USX Corp., 763 F. Supp. 541 (N.D. Ala. 1991); Smith v. Duquesne Univ., 612 F. Supp. 72 (W.D. Pa. 1985), aff'd 787 F.2d 583 (3d Cir. 1986); Price v. Young, 580 F. Supp. 1 (E.D. Ark. 1983). *See also* Lewin v. Medical College of Hampton Roads, 910 F. Supp. 1161 (E.D. Va. 1996); Doe v. Gonzaga Univ., No. 94-203120-6 (Wash. Sup. Ct. 1997).

had held that FERPA does not provide a private right of action.[17] However, there is a growing trend to allow private actions based on another federal statute, which allows private class actions to force government compliance with other statutes.[18] The standard for allowing these class actions is a bit counter-intuitive. The underlying statute (in this case, FERPA) must both give the plaintiff an enforceable right and not provide another means of redress. In order for Ms. Falvo to win, the court should have found more than that the school district was in violation of FERPA.[19] It had to decide that FERPA gave her an enforceable right which was not taken away by express or implied congressional action,[20] and that this right was in fact violated by the grading practices in question. Of course, the 10th Circuit Court did decide that.[21] Whether it should have is another matter.

C. §1983 Enforceable Right and Binding Obligation

The basic elements of a §1983 claim are: 1) is the plaintiff an intended beneficiary of the statute; 2) are the plaintiff's claims too "vague and amorphous" for the court to enforce; 3) does the statute impose a binding obligation on the state?[22] Few would doubt that the statute was intended to benefit students and the parents of minor children. Indeed, Senator Buckley, who proposed the statute, wanted students and parents to be able to view education records in order to check for inaccuracies.[23] The statute names those who would benefit.[24] There is

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17. For evidence that Congress did not intend to create a private right of action, *see* the "Joint Statement." *See* also Suter v. Artist M., 503 U.S. 347 (1992) (must look to entire legislative enactment when determining the existence of a private right).

18. U.S.C.A. §1983 (West 2000); imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." (*quoted in* 117 S.Ct. 1353); Ralph Mawdsley, *Litigation Involving FERPA*, 110 EDUC. LAW REP. 897, 910-11 (1996).

19. Golden Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989) (holding that, in order to use §1983 to enforce other statutes, the plaintiff must claim that there was a violation of a federal right, not merely of federal law).

20. Ackerly Communications of Florida, Inc. v. Henderson, 881 F.2d 990 (11th Cir. 1989) (no §1983 private right because Congress created an exclusive remedy); Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423 (1987).

21. *Falvo,* 229 F.3d at 966.

22. Blessing v. Freestone, 520 U.S. 329 (1997) *quoting* Wilder v. Virginia Hospital Assn. 496 U.S. 498 (1990).

23. Nicholas Trott Long, *Privacy in the World of Education: What Hath James Buckley Wrought?*, 46 Feb R.I.B.J. 9 (1998); Mawdsley, *supra* note 18,.

also little doubt that Ms. Falvo's claim was very specific. She identified a particular grading practice and asked the court to eradicate it. She thus clearly meets the second element.[25] The third element is a little trickier, though. Some evidence supports the contention that the 10th circuit was misled in finding that FERPA imposes a binding obligation on the states to comply. In order to examine this we need to know what courts mean when they say "binding obligation."

1. Congressional Intent

There is a difference between a binding obligation that Congress places on the states and Congressional preference for a state action to occur. The first will fulfill the §1983 binding obligation element; the second will not. The single penalty provided in the statute seems to weigh on the side of congressional preference rather than congressional mandate; the only repercussion for disobeying FERPA provisions is a withdrawal of federal funding.[26] "[FERPA] conditions the receipt of federal education funding on compliance, rather than directly requiring deference to it."[27] There are no criminal sanctions. There is no personal liability. In fact, Senator Buckley was quite concerned that teachers not bear the burden of possible violations. If Congress had really wanted to express a mandate that FERPA be followed, it would have imposed private individual civil sanctions rather than rely upon contractuality.[28] If Congress were interested in creating a binding obligation carrying a private right of action, it would have anticipated and welcomed the possibility of actions by affected citizens against the persons committing the violations.

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24. 20 U.S.C.S. §1232g(b) & (e).

25. For claims that have been found "too vague and amorphous," *see id.* at 344 ("the Court of Appeals erred . . . in taking a blanket approach to determining whether Title IV-D creates rights.") For an example of a sufficiently well-defined claim, *see* Parry v. Crawford, 990 F. Supp. 1250 (D. Nev 1998).

26. 20 U.S.C.A. §1232(g) (West 2000).

27. Sandra L. Macklin , *Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321 (Fall 1999).

28. Federal funds may be withdrawn if they are used in ways inconsistent with the terms on which they were given; the Supreme Court has said that this is based upon contract theory.

2. Congressional Remedies Provision

Congress did provide a remedy for violations. It is an administrative remedy, but a remedy nonetheless. As set forth in the statute, the Family Policy Compliance Office in the Department of Education is in charge of overseeing FERPA violations and investigating claims.[29] The way the remedy is carried out seems to indicate a preference on the part of Congress rather than a mandate. Parents and students alleging violations have the opportunity to request a hearing from the Office. "There is no timeline for processing these complaints, no administrative hearing provisions, and no framework for judicial review. There are no remedies for parties injured by [FERPA] violations and the only sanction available against schools has never been imposed."[30]

While this history may indicate the need for FERPA violations to be accessible through a §1983 claim, it also shows that Congress did not intend to create an obligation for the schools to follow the policy. Furthermore, a viable minority rule regarding FERPA's administrative enforcement possibilities states that, "[s]ection 1983 does not create a private right for damages where the federal statute provides an exclusive administrative enforcement mechanism."[31]

The 10th Circuit Court was wrong in finding that the statute gave Ms. Falvo and her children an enforceable civil rights claim. It should have dismissed the case on the grounds that she did not meet all elements of a §1983 claim.

D. Statutory Construction

The 10th Circuit Court also erred in its refusal to look at Department of Education practices when it interpreted the statute. The Court held that FERPA is plain on its face, and therefore no other tools of statutory construction were necessary.[32] If the statute were indeed plain on its face, the court would be correct. However, legal scholars' confusion and the opinion's internal inconsistency shows that FERPA is not clear

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29. 20 U.S.C.A. §1232(g) (West 2000); Mawdsley, *supra* note 18, ; Macklin, *supra* note 27.

30. Lynn M. Daggett, *Bucking Up Buckley I: Making the Federal Student Records Statute Work,* 46 CATH. U. L. REV. 617 (Spring 1997).

31. Norris v. Board of Education, 797 F. Supp. 1452, 1464 (1992).

32. *Falvo*, 229 F.3d at 968.

within its four corners.

III. ANALYSIS OF *FALVO* 'S MERITS

A. FERPA's Language

In *Falvo*, the 10th Circuit Court determined Owasso's grading policy is a violation of FERPA because student-to-student grading is considered an improper maintaining of an educational record. In this section, the discussion will focus on the arguments against this interpretation of FERPA, and why the 10th Circuit Court was unnecessarily broad in interpreting that student-to-student grading is a violation thereof.

FERPA tells us that, "[n]o Funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students . . . ."[33] "For the purposes of this section, the term 'education records' means. . . 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."[34]

First, the 10th Circuit Court concluded that a student's grade, *before* reaching the teacher's grade book, constitutes an "education record." The court states: "There is no dispute that the grades which students place on each other's papers and then report to the teacher 'contain information directly related to a student' and thus satisfy the first element of the statutory definition for 'education record.'"[35] This may be true, especially since it appears that Congress intended the statute's language to be broad with this element of "education record." But the court continues to carve out a broad interpretation with the second element of "education record":

> The grade the correcting student places on the paper is also "maintained", because that student is preserving the grade until the time it is reported to the teacher for further use. In sum, the grades which students mark, at the teacher's direction, on each other's homework and test papers and later re-

33. 20 U.S.C.S. §1232g(b)(1) (West 2000).

34. *Id.* at (a)(4)(A).

35. *Falvo*, 229 F.3d at 970.

port to the teacher are "maintained. . . by a person acting for [an educational] agency or institution."[36]

The court obviously had a very difficult choice to make with this case, choosing between the embarrassment of students and creating a policy that may encourage massive confusion and inefficiency for teachers. But what the court seemed to miss in deciding for the students is that making this grading system a violation of FERPA is both a legal contradiction and a moot point in the classroom itself.

The court claimed that its finding was "[b]ased purely on the language of the statute itself. . ."[37] and argued that Congress was clear in its intent to protect grade disclosure in teachers' grade books, and that FERPA is unambiguous in its language. When a grade is *actually in* a teacher's grade book, it may be an "education record" that is "maintained" according to the statute Also, the court rightly decided that the narrow exception Congress provided grade books applies only when the teacher discloses her grade book to a substitute.[38] However, it is doubtful that Congress intended for the interpretation of "maintained by. . . a person acting for [an educational] agency or institution" to be so broad as to include student-to-student grading.

B. The Ambiguity of FERPA's Language

1. Agency

One must assume that Congress intended an agency relationship to apply when it chose the phrase "person acting for such institution or agency." Agency, as defined by Black's Law Dictionary, is "a fiduciary relationship created by express or implied contract or by law, whereby one party (the agent) may act on behalf of another party (the principal) and bind that other party by words and actions." [39] Agent is defined as "one who is authorized to act for or in place of another; a representative."[40] Courts have narrowly construed agency relationships between students and schools; they are hesitant to assign the

36. *Id.* at 971.
37. *Id.* at 969.
38. *See id.* at 970.
39. BLACK'S LAW DICTIONARY 63 (6th ed. 1990).
40. *Id.* at 62.

agent label to students because of potential liability.[41] In conjunction with Black's definition of "agent" ("one who is *authorized* to act for or in place of another,")[42] the decision in *Booker v. Chicago Board of Education*[43] should be persuasive. The court in *Booker* said that the student hall monitor had no responsibility given her by the teacher because "her function was to report any misbehavior to the teacher."[44] The hall monitor had no authority to decide what comprised the infractions, only that the infractions happened. It is the same situation with students grading other students' papers—the grading student has no authority to decide what is a right or wrong answer; she can only mark answers "correct" or "incorrect" according to what the teacher tells her is "correct" and "incorrect."

Since a student in almost all cases does not fit the definition of "agent," the court incorrectly stated that the FERPA statute is "unambiguous." There is no legislative history explaining what the phrase meant to the legislators, nor is there any further guidance from Congress as to what "maintaining" and "person acting" specifically refers. If Congress was unwilling to define this further, the court may decide its breadth but not without admitting that it is unclear on its face.

2. Consent

Referring to the consent requirement in an agency relationship, the court in *Wickey v. Dawn Sparks* stated, "[a]gency is a relationship resulting from the manifestation of consent by one party to another that the latter will act as an agent for the

41. *See* Booker v. Chicago Board of Education, 75 Ill. App. 3d 381 (1979), where the court found a student hall monitor was not an agent of the school when she assaulted another student in a school bathroom; Knapp v. Hill, 276 Ill. App. 3d 376 (1995) where the court found no agency relationship where a student was directed by a teacher to bring his car into the shop area and drive it out again when class was over, stating "such control alone is insufficient to establish a principal-agent relationship" *Id.* at 380; Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999), where the Court found a school district can be held liable for student-on-student sexual harassment *only for that district's own failure* to respond to such harassment, but not liable for the *student's* inappropriate behavior, thus coming under sexual discrimination and violating Equal Protection; Christensen v. Des Moines Still College of Osteopathy & Surgery, 248 Iowa 810 (1957), where the court found an agency relationship where a medical intern performs as a practitioner of the medical profession under the guidance of college-affiliated hospital staff.

42. BLACK'S LAW DICTIONARY 62 (6th ed. 1990) (emphasis added).

43. 75 Ill. App. 3d 381 (1979).

44. *Id.* at 455.

former."[45] Students certainly do not consent to being agents for the school, nor do their parents, thus the student cannot be considered an agent of the school.

3. The Rooker Letter

The *Falvo* court should not have dismissed consideration of the "Rooker Letter" as it did. The "Rooker Letter," written by the Director of the Family Policy Compliance Office (FPCO) within the United States Department of Education, LeRoy S. Rooker, was a 1993 response to inquiries made by the New York State United Teachers union representative about the legality under FERPA of certain school policies. The Rooker Letter states that

> FERPA would not prohibit teachers from allowing students to grade a test or homework assignment of another student or from calling out that grade in class, even though such grade may eventually become an education record. Such papers being graded and the grades which will be assigned would fall outside the FERPA definition of education records as they are not, strictly speaking, "maintained" by an educational agency or institution at that point.[46]

The 10th Circuit Court claims that "the Rooker letter. . . [is] bereft of any reasoning underlying the rather conclusory opinion that grades written down by other students and announced to the teacher are not 'maintained' as required under FERPA".[47] Ironically, the court commits the same error it condemns by neglecting to give any definable reason for why it rules that grades written down *are* "maintained" under FERPA. Similarly, the court only states that "in so assisting the teacher, the correcting student becomes a 'person acting for [an educational] agency or institution.'"[48] In this, the court actually creates a tautology; the court says that the student is acting as the school's agent because the student assists that teacher in an agent capacity. It is both inequitable and legally impractical for the court to adopt this circular logic.

Under *Chevron, U.S.A., Inc. v. Natural Resources Defense*

45. 642 N.E.2d 262, 269 (2d D.Ct. 1994).

46. Rooker Letter (Dept. of Educ. 1993).

47. *Falvo*, 229 F.3d at 969.

48. *Id.* at 971.

Council, Inc.,[49] a court must defer to the reasonable interpretation set out in a regulation pronounced by the agency in charge of administering the statute, *when that statute the court is asked to construe is ambiguous*. Even though the Supreme Court recently stated in *Christensen v. Harris County*[50] that, "the Chevron deference does not extend to an interpretation contained in an opinion letter issued by the administering agency,"[51] the Court also stated that, "interpretations contained in agency opinion letters 'are entitled to respect.'"[52] Even if the deference is not necessary, because FERPA is ambiguous, the 10th Circuit Court should have given greater respect than it did to the "Rooker Letter."

C. Practical Impact

1. Implications for the Teachers

In the wake of the *Falvo* decision, school teachers have had to make drastic changes to accommodate this new law. But there is one situation in which there has been no change,and is proper within the 10th Circuit Court's interpretation of FERPA: students who are teachers' assistants (T.A.'s). To be able to record grades in the teachers' grade books, these student T.A.'s must sign a confidentiality statement and in essence contract to become a school official in that capacity. Many teachers, even before the 10th Circuit Court's ruling, were following this policy. The point is this: if the student T.A. must sign a contract to become an agent of the school, how does it make sense for every other student to become that school's same agent when they do not consent to contract, make no agreement with the teacher or the school, and do not even record the grades in the teacher's grade book?

While Ms. Falvo's feelings are understandable, and the embarrassment her children suffered unfortunate, this case involved an individual privacy issue, not a statutory privacy issue, i.e. this problem should have been handled by the teacher on an individual basis between the Falvo children, the teacher,

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49. 467 U.S. 837 (1984).

50. 120 S.Ct. 1655 (2000).

51. *Falvo*, 229 F.3d at 969.

52. *Id.* at 969, *quoting Christensen*, 120 S.Ct. at 1663; *See also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

and Ms. Falvo. In fact, Ms. Falvo apparently never tried to talk to her children's teachers—she went directly to the school counselors and the superintendent to have the grading policy ceased schoolwide. She could have asked the teacher to call for her children's grades in confidence. She could have consulted the teacher about a trusted friend that could possibly grade her children's papers instead of someone who would make fun of them. She may have wished to avoid making the situation worse for her children, and instead sought a pre-emptive strike by circumventing the teachers' authority altogether. Unfortunately, pre-emptive strikes sometimes create much larger problems than the ones they try to avoid in the first place. In this case, Ms. Falvo wanted more than just to alleviate her own children's embarrassment; she sought to rescue all children from the grading policy, assuming she knew best for all the students' situations, with the sad result of unnecessarily expanding the scope of a federal statute.

2. Implications for the Students

The last point that requires discussion is the practical effect this decision has had on the students themselves. Again, the 10th Circuit Court clearly wanted to relieve the children of any future embarrassment. But what Judge Murphy and the two other panel judges did not realize is that children know who is getting good grades and who is getting the bad grades anyway. In fact, some students even call aloud just after the grading is done, "Hey, who has my test? Whad'I get?" Even when numbers are given to the students to ensure confidentiality, many students ask who has their numbered test. Students generally want the immediacy of having their papers graded. The *Falvo* decision may eradicate the procedure of peer grading, but it does nothing to really protect privacy in the classroom, and we cannot expect the courts to silence each individual child at that point. Granted, the students can grade their own papers, and some teachers have had to adopt this tactic with careful hesitation.[53] But why does the solution have to be so confined? The

53. It is more likely that cheating would occur when students grade their own papers than if they were to grade another's papers. It also causes serious inefficiency if the teachers had to grade all the homework assignments themselves. Ms. Falvo did state that her A-student eighth grader was hurt by another student who bullies her and grades her papers wrong when they are right, *see* Scott Cooper, *Owasso Case Before Judge*, Tulsa World, Oct. 15, 1998, at 11; that is where the teacher has the ulti-

solution is not so limited as the 10th Circuit Court would have one believe.

D. Public Policy

The *Falvo* decision is bad policy for several reasons. First, it places control for teaching methods not in the hands of local authorities or even local parent-teacher associations, but in the hands of the federal government. School functions have traditionally been kept at a level of local control. While "local" does sometimes mean as broad a territory as the state, it has never meant an area as large as that encompassed by a federal Circuit Court's jurisdiction. Local control is a better because it enables the parents of the children at the schools to have a voice on what goes on with their specific children. *Falvo* takes this choice away from many parents in the realm of the 10th circuit.

This is not to say that Ms. Falvo did not have noble intent, nor that FERPA in any respect fails to protect individual privacy rights. However, Ms. Falvo and the 10th Circuit Court neglect to distinguish between knowledge of grades and disclosure of grades—"[FERPA's] apparent purpose is to ensure access to educational records for students and parents and to protect the privacy of such records *from the public at large*."[54] When the court decided that knowledge of grades equals disclosure of an education record, it took a logical leap into territory which has never before been addressed and which leads to abundant policy problems. Perhaps calling the grades out in class steps over that knowledge-disclosure line, a problem which again could have been dealt with by simply discussing it with the teacher. But there is nothing convincing about Johnny knowing that Susie got a 13/16 on her spelling test, writing that score on her paper, and giving it back to her to give to the teacher to record that in itself constitutes a violation of FERPA.

It is also bad public policy to declare that the student work itself is the education record. While this may make sense when

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mate and final say in the grade received by all students. But was Ms. Falvo worried about the grading policy itself, or the fact that her child was being bullied? The next court deciding this issue should carefully distinguish between a serious breach of privacy and the all-too-common bullying of other students before ruling on such a far-reaching policy.

54. Student Press Law Center v. Alexander, 778 F.Supp. 1227, 1228 (emphasis added).

teachers maintain the works in locally-mandated portfolios, it leads us to the anomalous situation of kindergartners not being able to display their art in the classroom without parental consent. What about art class? The point is that the *Falvo* decision makes it difficult or impossible for some educational purposes to be fulfilled. Displaying student art and papers creates an incentive for students do their best work, and shows examples of how to do assignments. Teachers commonly use student-graded quizzes as a check of what the students understand. There are those who would scoff at these possibilities, and currently there is no indication that *Falvo* will be interpreted even more broadly to exclude any and all displays. But as commonly discussed in law classrooms around the nation, there is definitely potential for that slippery slope.

IV. CONCLUSION

If teachers cannot use the tool of peer to peer grading, they are left with three unsavory choices: 1) grade the papers themselves; 2) have the students grade their own; or 3) forego the comprehension checks. The first option is impractical simply because of the time it would take. The second carries an inherently greater likelihood of cheating. With the third option, teachers would be less effective because they would not have the information necessary to tailor their lessons to each class. Of course students would want to protect the privacy of their portfolios. But those are already protected by the fact that the teacher maintains them.[55] They do not need additional protection. There is nothing in the 10th Circuit Court or the Supreme Court case history dictating the *Falvo* decision of the court of appeals. In fact, there is enough ambiguity as to the construction of statutory elements of the claims to allow for another decision. Substantive and policy arguments show why the school district should have been favored in this matter. The district followed practice set by the Education Department. The Education Department, as the education agency of the Federal government, has the job of setting such practices.

55. Like a gradebook, portfolios would be maintained by an agent of the school, and therefore not classifiable as "released."

Hopefully, when other circuits address this issue as they eventually must, they will recall the policy nightmare of *Falvo* and make a better choice.

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