

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   OWASSO INDEPENDENT SCHOOL           :

4       DISTRICT NO. I-011,               :

5       AKA OWASSO PUBLIC SCHOOLS,       :

6       ET AL.,                           :

7                   Petitioners               :

8               v.                               :   No. 00-1073

9   KRISTJA J. FALVO, PARENT AND       :

10   NEXT FRIEND OF HER MINOR           :

11   CHILDREN, ELIZABETH PLETAN,       :

12   PHILIP PLETAN AND                   :

13   ERICA PLETAN                        :

14   - - - - -X

15   Washington, D.C.

16   Tuesday, November 27, 2001

17               The above-entitled matter came on for oral  
18   argument before the Supreme Court of the United States at  
19   11:11 a.m.

20   APPEARANCES:

21   JERRY A. RICHARDSON, ESQ., Tulsa, Oklahoma; on behalf of  
22       the Petitioners.

23

24

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1 APPEARANCES:

2 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
3 Department of Justice, Washington, D.C.; on behalf of  
4 the United States, as amicus curiae, supporting the  
5 Petitioners.

6 WILFRED K. WRIGHT, JR., Claremore, Oklahoma; on behalf of  
7 the Respondent.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-1073, Jerry -- correction, Owasso Independent School District No. I-011, also known as the Owasso Public Schools, v. Kristja J. Falvo.

Mr. Richardson.

ORAL ARGUMENT OF JERRY A. RICHARDSON

ON BEHALF OF THE PETITIONERS

MR. RICHARDSON: Mr. Chief Justice, and may it please the Court:

The issue presented by this case is whether Congress, in enacting the Family Educational Rights and Privacy Act, intended to prohibit the common and longstanding practice of peer grading of routine homework papers, quizzes, and tests. Congress did not intend FERPA to apply to such routine classroom activities, because Congress was concerned only with information that might have a long-term negative impact on a student's academic or career opportunities.

QUESTION: Mr. --

QUESTION: Did you take the position in the court of appeals that there is no private contract?

MR. RICHARDSON: We did not raise that issue in the court of appeals, Your Honor. No, we did not.

1 QUESTION: The court of appeals discussed it.

2 MR. RICHARDSON: The court of appeals raised it  
3 sua sponte, and it has been raised in amicus briefs  
4 submitted -- in fact, three amici have discussed it.

5 QUESTION: Why didn't you raise the issue? Why  
6 isn't that more important than what you did raise?

7 MR. RICHARDSON: Candidly, Your Honor, we didn't  
8 raise it for a number of reasons. Number 1, because in  
9 the district court there was a Fourteenth Amendment claim  
10 which clearly was actionable under section 1983.

11 Number 2, quite honestly we believe the merits  
12 argument regarding FERPA was stronger than the section  
13 1983 argument. Remember --

14 QUESTION: Well, I just don't know if it's a  
15 good practice for you to force us to reach an issue you  
16 think is important if there's no cause of action anyway.  
17 That just doesn't seem to me an orderly way to proceed.

18 MR. RICHARDSON: Well, in hindsight I would  
19 agree with the Court that we should have approached it a  
20 different way. Please recall, however, that at the time  
21 this case was filed, at the time the court of -- at the  
22 time the district court entered its decision, and at the  
23 time the briefs were submitted in the Tenth Circuit, the  
24 Christiansen decision had not come down. We did not have  
25 the benefit -- we were under the impression, I should say,

1     that we -- that the family policy compliance officer's  
2     letter would be accorded Chevron deference, as the  
3     district court did.

4             We did not know that the Court was going to  
5     decide Christiansen and hold that such opinion letters  
6     were not entitled to such deference. We made a tactical  
7     decision to focus on the merits rather than focus --

8             QUESTION: Well --

9             MR. RICHARDSON: -- on the 1983 aspect of it.

10            QUESTION: -- you also certainly had some  
11     justification on the private cause of action. Seeing a  
12     number of decisions from this Court which have come out 5  
13     to 4 one way and then 5 to 4 the other way --

14            MR. RICHARDSON: That's very true, Your Honor.

15            QUESTION: -- you're not sure that you're going  
16     to prevail on that.

17            MR. RICHARDSON: That's very true, Your Honor.  
18     Both the decisions of this Court, with all due respect,  
19     are sometimes difficult for a practicing attorney to  
20     discern a clear line of --

21            QUESTION: They're hard for us, too.

22            (Laughter.)

23            MR. RICHARDSON: And the other factor I would  
24     say is that the two decisions that the Tenth Circuit cited  
25     from other courts of appeals, the only two decisions that

1 we were aware of from the Second Circuit, the Fay v. South  
2 Colonie School District decision, and from the Fifth  
3 Circuit, Tarka v. Cunningham, both of those courts of  
4 appeals had held that FERPA was actionable under 1983, so  
5 again, we made a strategic decision --

6 QUESTION: Well, what if we think there's a real  
7 problem with that notion under this scheme, where the  
8 whole object was to have it administratively determined  
9 and it was funding mechanism, and under the act, the  
10 penalty for not following it is a cut-off of funding.  
11 Now, what if we're quite concerned about that.

12 MR. RICHARDSON: Oh, I --

13 QUESTION: Do we send it back and let it be  
14 briefed and argued below?

15 MR. RICHARDSON: No, I don't believe so, Your  
16 Honor. The Tenth Circuit did rule on it, and we not only  
17 have -- three amici in support of the petitioners  
18 addressed it. Respondent herself did address it in her  
19 brief. The only party that really hasn't briefed the  
20 issue is petitioners. We would be the only one that would  
21 suffer any prejudice. We have endorsed the position  
22 argued by the amici in the three briefs that have raised  
23 the issue.

24 I believe it's perfectly appropriate for the  
25 Court to decide that, and I believe that the Court -- that

1 the Court's decisions do indicate that FERPA is not  
2 actionable under 1983. If you focus on the -- go back and  
3 look at the language of the statute, of course, which is  
4 the ultimate issue, there is no rights creating language  
5 in FERPA the way there is, for instance, in title 9, that  
6 the Court focused on in Canon.

7 Also, this is a Spending Clause case. There is  
8 no -- the Spending Clause, as the Court has indicated  
9 repeatedly, is in the nature of a contract and there is no  
10 unambiguous indication here that Congress --

11 QUESTION: You didn't raise this in your  
12 petition for certiorari, though, did you?

13 MR. RICHARDSON: We didn't raise it -- no, Your  
14 Honor, we didn't. We didn't raise it in the petition for  
15 certiorari because we had not raised it in the court below  
16 and, frankly, we believed that the odds of persuading the  
17 Court to grant certiorari on an issue that we had not  
18 raised and briefed below were not very good and, again,  
19 our focus had always been on the merits of the case, and I  
20 believe we should win on the merits, but I also believe  
21 that section 1983 is not -- does not provide a cause of  
22 action under FERPA.

23 FERPA says -- it uses the language, no funds  
24 shall be available to an educational agency or institution  
25 that has a policy or practice of allowing the disclosure



1 of education records. That is clearly talking about a  
2 systematic practice on the part of an educational agency  
3 or institution.

4 If a section 1983 remedy were allowed, then what  
5 about an individual teacher who, in violation of the  
6 district's own policy or practice -- the district, say,  
7 has a policy that we will not release it, yet an  
8 individual teacher makes a deliberate choice to release  
9 the information. Under 1983 that teacher would have to be  
10 held liable, it would seem to me, even though the district  
11 had done exactly what Congress commanded. The district  
12 had enacted a policy saying, don't do that, so that  
13 clearly militates against a 1983 cause of action.

14 In addition, FERPA --

15 QUESTION: Do you know anything about how this  
16 act is enforced on the Federal side? Have there been any  
17 fund terminations, because the only thing in the statute  
18 itself is fund termination, isn't that right?

19 MR. RICHARDSON: That is correct, Your Honor,  
20 and I'm not aware of any decisions. There is certainly  
21 nothing in the record to indicate that there's ever been a  
22 funding -- well, I may have overspoken. I do not recall  
23 from the record. There might be something in the lodging  
24 of those extensive letters from the FPCO, but I do not  
25 recall, and do not -- cannot represent to the Court that

1     there's anything in the record regarding there ever having  
2     been a funding cut-off.

3             QUESTION: Well, I guess we are taking you away  
4     from the question on which we granted certiorari.

5             As I understand the position of the respondent  
6     here, and tell me if I'm incorrect, if the respondent is  
7     correct, the teacher would have to keep a record of all of  
8     these quizzes as part of the permanent record, is that the  
9     necessary result of the respondent's argument?

10            MR. RICHARDSON: The respondent seems to take  
11     the position, which is contrary to what the Tenth Circuit  
12     said -- the respondent seems to take the position that  
13     only records, only grades or scores that are recorded in  
14     the teacher's grade book are education records. The Tenth  
15     Circuit clearly said that's not the case.

16            The Tenth Circuit clearly said, even if the  
17     grade is never recorded in a teacher's grade book, the  
18     mere fact that the teacher receives it and uses it for  
19     some purpose, maybe even just to evaluate her own teaching  
20     performance, and determine whether the class is ready to  
21     move on to the next lesson, that makes it an education  
22     record.

23            Respondents have backed away from that. They  
24     argue in their brief at least, or she argues in her brief  
25     at least that it has to be recorded in the teacher's grade

1 book, but we believe that even that is a far more broad  
2 definition of education records than what Congress plainly  
3 says in the statute. The statute defines education  
4 records with a two-part definition. It's those records,  
5 files, documents, or other materials that contain  
6 personally identifiable information and are maintained by  
7 an educational agency or institution, or by a person  
8 acting for an educational agency or institution.

9 Now, maintained has to have some substantive  
10 meaning, because it's half of the definition. Clearly,  
11 homework papers are personally identifiable. There's no  
12 doubt about that. But if maintained doesn't mean anything  
13 more than what the Tenth Circuit said it meant, simply  
14 possessed by a teacher for some brief period of time, then  
15 that's really writing that word out of the definition.  
16 Any document that comes across a teacher's desk would be  
17 an education record.

18 In fact, chalkboard work would have to be an  
19 education record. If a teacher asks a student to come to  
20 the chalkboard, do a math problem, that's personally  
21 identifiable information. The entire class can see this  
22 student working a math problem. That math problem is  
23 maintained on the chalkboard until the teacher directs a  
24 student either to erase it, or erases it herself, or  
25 himself.

1 QUESTION: What's your definition of maintain,  
2 what, a week, a month?

3 MR. RICHARDSON: I don't think that --

4 QUESTION: Make me an offer. What's your --

5 (Laughter.)

6 MR. RICHARDSON: Your Honor, I think that what  
7 Congress is getting at with the word maintained, it goes  
8 back to what I said in the opening statement, which is,  
9 information that could have a long-term effect on the  
10 student's career. I think Congress was talking about --  
11 and the legislative history bears this out. I know Your  
12 Honor is not particularly persuaded by that --

13 QUESTION: Some of my colleagues like that  
14 stuff.

15 (Laughter.)

16 MR. RICHARDSON: -- by that argument, but  
17 Congress was concerned about things that would have a  
18 long-term effect.

19 What I would suggest the Court focus on, is this  
20 the kind of document that's going to be looked at by a  
21 college admissions officer? Is this the kind of document  
22 that's going to be looked at by a potential employer, or a  
23 governmental agency at some point down the road?

24 QUESTION: Is there a difference between your  
25 position and -- the Government said, it means, educational

1 records means institutional records.

2 MR. RICHARDSON: No.

3 QUESTION: The kind that would be in the  
4 principal's office and not in the teacher's drawer.

5 MR. RICHARDSON: No. No, Your Honor. Our  
6 position and the Government's, with that regard I believe  
7 the Government's current position, as reflected in the  
8 brief of the United States, are consistent. I don't  
9 think --

10 QUESTION: It's not been the position that the  
11 Government, that this FPCO has taken consistently, because  
12 wasn't there -- didn't they say that the teacher's grade  
13 book --

14 MR. RICHARDSON: Yes.

15 QUESTION: -- did count as an educational  
16 record?

17 MR. RICHARDSON: Yes. The FPCO had previously  
18 taken a much broader interpretation of education records,  
19 and had taken the position which essentially seems now to  
20 be adopted by the respondent, that once the teacher  
21 main -- once the teacher receives possession of the grade,  
22 or the score, it becomes an education record. The United  
23 States has disavowed that position and said that is  
24 clearly more broad than what the -- but the key point --

25 QUESTION: But if your definition is correct,

1 and it's that limited that it's only the stuff the school  
2 keeps that will go on into the permanent record of the  
3 student, what would be the reason for that exception that  
4 the statute contains for, you know, personal notes that a  
5 teacher makes? You wouldn't need that exception. That  
6 stuff never goes down to the central office, much less is  
7 kept for, you know, for future reference.

8 MR. RICHARDSON: Well, not necessarily, Your  
9 Honor, and that -- you're referring, I believe, to the  
10 sole possession notes exception --

11 QUESTION: Sole --

12 MR. RICHARDSON: -- but that's not limited to  
13 grade books. In fact, that --

14 QUESTION: Where is it? Can we look at that?  
15 What's the section?

16 MR. RICHARDSON: Yes, Your Honor. That's  
17 section (a)(4)(B)(i).

18 QUESTION: Where is it, in the briefs?

19 QUESTION: Appendix page 4 of your brief?

20 MR. RICHARDSON: Yes. Yes. I'm sorry. B,  
21 capital (B), then small (i), the term education records  
22 does not include -- there's nothing in this definition  
23 about grade books.

24 The reference to the grade books, and it's  
25 really not a reference to grade books, it's a reference to

1 record books, is from the legislative history, where the  
2 Court -- where the Congress said, this exception was meant  
3 to apply to things used as memory aids. I would argue  
4 that a grade book is not something that is intended as a  
5 memory aid.

6 QUESTION: But my point is, you wouldn't need  
7 that exception.

8 MR. RICHARDSON: Well --

9 QUESTION: If -- that -- I mean, that exception  
10 suggests that other things that are only -- only held in  
11 the sole possession of the maker --

12 MR. RICHARDSON: I disagree that you would not  
13 need that.

14 QUESTION: -- could be within the statute. Why  
15 would you need that exception?

16 MR. RICHARDSON: Well, for instance, a  
17 document -- a counseling record, for instance, perhaps the  
18 student had experienced some emotional problems, or  
19 something --

20 QUESTION: Right.

21 MR. RICHARDSON: -- that has come to the  
22 attention of a counselor. The counselor writes a  
23 confidential memorandum to her permanent file. That is an  
24 institutional record. It's not something that's going to  
25 be thrown away, but it's also, as long as the counselor

1 doesn't put that document, that memorandum in the  
2 institution records, or doesn't show it to another person,  
3 that's a sole possession notes exception, and would not --

4 QUESTION: And you think that's the kind of  
5 thing that would come within your definition of permanent  
6 records, the kind of things that go on to college  
7 admissions offices, and so forth? That's what I thought  
8 you were saying.

9 MR. RICHARDSON: Well, I think that's --

10 QUESTION: But now you're saying, even the  
11 notes, personal notes kept by a counselor come -- would  
12 come within this statute but for that exception, right?

13 MR. RICHARDSON: Well, but for that exception.  
14 I think that's why the exception is there, is to keep  
15 materials like that from coming into the possession --

16 QUESTION: Exactly.

17 MR. RICHARDSON: -- because materials like that  
18 are maintained by an educational agency or institution.  
19 They are a -- counselors that have a record of a student  
20 with emotional problems --

21 QUESTION: So are a teacher's grade books. Why  
22 in that respect is a teacher's grade book different from  
23 the counselor's notes?

24 MR. RICHARDSON: I believe because a grade book  
25 is, in my opinion, Your Honor, more of an evaluation



1 instrument rather than a record. A transcript shows what  
2 the student earned in a grade, or in a group of grades  
3 during the course of his academic career. A grade book is  
4 more than simply a dry record of the percentages that a  
5 student achieved during his time in his class. For  
6 instance, during a relevant grading period a student might  
7 start out doing very average C work. The student then  
8 might near the end of the grading period suddenly get it,  
9 and start doing B and A work.

10 The teacher would, I think any teacher in  
11 America would look at a grade book containing those  
12 records and would not simply go, okay, the total average  
13 for this grading period is a 78.5, he or she gets a C.  
14 the teacher would look at the improvement shown in the  
15 student's performance and would in all likelihood round it  
16 up and give the student a B. The grade book is an  
17 evaluation instrument. It is not simply a collection of  
18 records.

19 QUESTION: And the counselor's notes aren't?  
20 The counselor's notes aren't?

21 MR. RICHARDSON: Well, that argument might very  
22 well apply to counselor's notes as well.

23 QUESTION: I mean, that's the problem. Your  
24 notion of what are records maintained just does not square  
25 with the existence of that exception. I mean, sometimes

1 Congress does more harm than good by putting in an  
2 exception, because the exception suggests that if it had  
3 not been there, the stuff would have been covered. Maybe  
4 Congress didn't want this stuff to be covered, but --

5 MR. RICHARDSON: Well, I think that's an  
6 alternative possibility, Your Honor, is that it's a belt  
7 and suspenders approach that Congress never intended grade  
8 books to be covered, but just in case somebody happened to  
9 be inclined to read them that way, we're going to put this  
10 exception in as well.

11 QUESTION: We usually don't interpret statutes  
12 that way.

13 MR. RICHARDSON: Well, I can understand --

14 QUESTION: You started out by referring to  
15 maintain as implying some significant period.

16 MR. RICHARDSON: Yes.

17 QUESTION: And it would be consistent with that  
18 argument that you say, well, a teacher's grade book is  
19 kept for the year, but it doesn't become normally part of  
20 the institutional records of the school, so it's not  
21 maintained for a substantial enough period of time to  
22 qualify, whereas -- and I just don't know factually about  
23 this -- maybe the guidance counselor's records are simply  
24 kept forever. I don't know. I mean, is that kind of a  
25 durational criterion something you want to stand on here?

1 MR. RICHARDSON: Not in a -- no, not a pure  
2 durational criteria. I don't think that is the key.  
3 Again, many grade books are not -- I don't think Congress  
4 meant to draw a line and say, okay, you keep it 6 months,  
5 it's maintained, if you keep it 5 months and 3 weeks and 6  
6 days it's not maintained. I don't think Congress intended  
7 to do that, and I'm not asking the Court to do that.

8 I think Congress again intended to get at  
9 records that are, as a practical matter, maintained over a  
10 long period of time that are institutional records.

11 QUESTION: But what is the definition of  
12 maintain, then, that you're using?

13 MR. RICHARDSON: The definition of maintain that  
14 I would ask the Court to adopt is its common meaning, to  
15 preserve, to retain.

16 QUESTION: Yes, but don't -- doesn't that force  
17 us into some kind of a durational -- and I'm not saying  
18 this is an objection to your argument, particularly, but I  
19 mean, doesn't this force us into some kind of a durational  
20 criterion? The record of the quiz which student A  
21 corrects the student B and calls out to the teacher, the  
22 number that student B puts on top of the quiz is a record  
23 for a short period of time.

24 MR. RICHARDSON: But it's not the kind --

25 QUESTION: I mean, something is recorded, and

1     you're saying, well, sure, they can't be getting at that,  
2     but if they're not getting at that, then it's either got  
3     to be for one of two reasons, either the kid who does the  
4     correction isn't a person who maintains, who makes a  
5     record by definition --

6             MR. RICHARDSON:   Correct.

7             QUESTION:   -- or a record is something that has  
8     got to be maintained longer than the period that it takes  
9     for some kid to call a number out to the teacher, which is  
10    a durational criteria.

11            MR. RICHARDSON:   That's true, and that's the  
12    same reason that a chalkboard, work on a chalkboard would  
13    not be maintained in the meaning of FERPA, even though it  
14    might be up there not only for a minute or two -- I mean,  
15    in some college --

16            QUESTION:   May I ask you --

17            MR. RICHARDSON:   -- courses you may have  
18    chalkboard work that's up there for a week or more.

19            QUESTION:   -- do you concede, or do you not,  
20    that the announcement by one student of another student's  
21    grades within the classroom and not outside the classroom  
22    is a release of information within (B)(i)?

23            MR. RICHARDSON:   No, absolutely not.

24            QUESTION:   Because?

25            MR. RICHARDSON:   Because it's not an education

1 record. You can only have --

2 QUESTION: Assuming it was an educational  
3 record, would you say that it's a release when it's  
4 revealed by one student to another within the classroom?

5 MR. RICHARDSON: No, I don't believe -- in the  
6 context of pure grading, it would make no sense to say  
7 that one student, that it's not a release if the student  
8 grading the paper records the grade. I mean, in that  
9 context, the Tenth Circuit's analysis would be right.

10 If it is an education record, then the fact that  
11 one student sees it is just as damning as the fact that  
12 the entire class sees it, it seems to me, but it's not an  
13 education record, therefore there's no question of  
14 release.

15 The other point I would make, going back to the  
16 grade book --

17 QUESTION: I'm slightly worried about that,  
18 because suppose that -- I take it attendance records are  
19 also -- they probably are maintained, and they are  
20 records, aren't they?

21 MR. RICHARDSON: Attendance -- well, again I  
22 would say that attendance records are not the kind of  
23 information --

24 QUESTION: Thank you, Mr. Richardson.

25 Mr. Kneedler, we'll hear from you.

1 ORAL ARGUMENT OF EDWIN S. KNEEDLER

2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

3 SUPPORTING THE PETITIONERS

4 MR. KNEEDLER: Mr. Chief Justice, and may it  
5 please the Court:

6 The Family Educational Rights and Privacy Act  
7 does not prohibit the common classroom practice of one  
8 student grading another student's paper, or other common  
9 classroom and teaching practices. FERPA regulates the  
10 records maintained by an institution, not the homework and  
11 classwork of students. Congress did not intend for FERPA  
12 to intrude into the day-to-day activities of hundreds of  
13 thousands of classrooms across the Nation, or the way in  
14 which teachers conduct the educational process in those  
15 classrooms, or the way in which students interact with  
16 each other.

17 QUESTION: Does the act cover a teacher's grade  
18 book that she keeps during the term?

19 MR. KNEEDLER: It addresses the grade book, in  
20 our view, by including it -- we think ordinarily it would  
21 come within the sole possession exception in the act.

22 Now, I think it's important to recognize that  
23 even a grade book -- there may be no one uniform practice  
24 about the way a grade book is handled. It could be that a  
25 particular school would regard the grade book as an

1 official school record from the outset, where the  
2 principal always has access to it, and the teacher is  
3 really maintaining a record on behalf of the institution  
4 in keeping the grade book.

5           You could have other school systems in which the  
6 grade book is essentially used by and for the future as a  
7 memory jog, and all that she ever discloses to the front  
8 office is the semester grade. In that event, we think  
9 that the grade book would fall within the sole possession  
10 exception, so that this is one of the things about FERPA,  
11 is that it addresses the situation in which actual record-  
12 keeping practices may vary, or let me change that, actual  
13 pedagogical practices may vary widely from school district  
14 to school district, and that's why we think importantly  
15 this act did not enter the classroom by addressing the way  
16 teachers handle papers, give feedback to students, have  
17 students grade each other's --

18           QUESTION: What about posting the results of the  
19 exam, the big exam, mid-term exam, and the student posts  
20 the results on the board.

21           MR. KNEEDLER: I think under the position we've  
22 espoused here, that would not be a violation of the act.  
23 FPCO has taken the position in the past that it would be.  
24 I think it would depend, though, or may depend on the way  
25 in which the grades were assembled.

1           I think if the teacher or professor, let's say,  
2   in college, the only grades probably ever, ever assembled  
3   or marked down for a college course may be the final exam  
4   grade. The professor may have a grade sheet, a roster in  
5   which the professor marks down the grade for everyone in  
6   that class and sends it to the registrar, and from that  
7   list puts a list of final grades for the course. I think  
8   at that point, the fact that the grades would be derived  
9   from something that would be regarded as an institutional  
10  record, in that instance I think the posting of the grades  
11  may well be a violation.

12           QUESTION: But if he posts it before he sends it  
13  on to the administration office --

14           MR. KNEEDLER: If it's posted -- and this may  
15  sound technical, but this is where the two categories we  
16  think intersect. If a grade is divulged from the paper,  
17  he takes the grade book and puts A or B or C on the paper,  
18  we don't think that the student work itself is an  
19  institutional record, and it's not --

20           QUESTION: But you're also, I think, saying that  
21  the disclosure has got to be of the record, not merely of  
22  information that may ultimately end up in a record?

23           MR. KNEEDLER: That's exactly true, and there  
24  are analogous situations in which that's true, for  
25  instance the attorney-client privilege, that the attorney



1 can't disclose something that he's learned from the  
2 client, but that doesn't mean that the same information in  
3 the possession of the client is privileged.

4 QUESTION: How is this -- the more I hear, I --  
5 there used to be schools in any case that would say, the  
6 following 10 percent of the class graduates with honors,  
7 the next 40 percent, okay, and sort of honors, and the  
8 last 60 percent, well, they graduated, didn't they. I  
9 mean, they didn't put it quite like that, but it was all  
10 public, in the newspaper.

11 MR. KNEEDLER: Yes.

12 QUESTION: Now, is that all forbidden now?

13 MR. KNEEDLER: No. Quite aside from the issue  
14 in this case, this statute contains an exception for  
15 what's called directory information, which includes common  
16 information about a student, the fact of their attendance,  
17 et cetera, and that includes honors awarded to a student.  
18 That information can be released. The school district or  
19 higher education institution has to announce a policy.

20 QUESTION: What are we dealing with here? You  
21 don't have much time, and I am concerned. Are we dealing,  
22 do you think, just with the student grading and the  
23 knowledge obtained thereby, or are we dealing with the  
24 teacher's grade book, or both?

25 MR. KNEEDLER: All that is strictly presented in

1     this case is the practice of one student grading another's  
2     paper before the teacher has gotten the papers themselves  
3     or entered them in the grade book.

4             QUESTION:  And as to that, what is your succinct  
5     explanation of why it's not covered by the statute?

6             MR. KNEEDLER:  There's no educational record  
7     maintained by the school.

8             QUESTION:  Because it isn't maintained, or  
9     because it isn't a record?

10            MR. KNEEDLER:  Well, whether it's maintained is  
11     part of the definition of educational record.  An  
12     educational record is a record or document containing  
13     information directly related to the student that is  
14     maintained by the school and, in our view, maintained in  
15     that situation means maintained as an institutional  
16     record, and we think that the act generally draws a  
17     distinction between the institutional records and the  
18     classroom records of the teacher, and I --

19            QUESTION:  Mr. Kneedler, do you have a position  
20     on the threshold question?  Is there a claim for relief, a  
21     private claim for relief?

22            MR. KNEEDLER:  We do not have a position on  
23     that.  That was not presented in the petition and  
24     therefore we did not address it in our brief, and under  
25     this Court's Air Couriers decision, the existence of a

1 cause of action is not jurisdictional and may be assumed.

2 We -- I would point out, though, that the  
3 ability of the Department of Education to cut off funds is  
4 not the sort of factor that has in other situations been  
5 thought to be sufficient to preclude a 1983 cause of  
6 action. In Blessing v. Freestone and other cases, this  
7 Court has said that that is a different sort of remedy and  
8 does not preclude a private right of action.

9 QUESTION: Mr. Kneedler, you said it doesn't  
10 include the teacher's classroom records. Why, by reason  
11 of that exception that we were talking about earlier --

12 MR. KNEEDLER: Well --

13 QUESTION: -- the sole possession exception?

14 MR. KNEEDLER: Two different questions. One is  
15 whether it covers the student's work, and we think that  
16 that --

17 QUESTION: Yes, I understand that.

18 MR. KNEEDLER: That that's not covered.

19 By teacher's records, if you mean the grade  
20 book, yes, we think that that would fall under the -- or,  
21 what we commonly call grade book, some way in which the  
22 teacher keeps track of the student's progress during the  
23 marking period or --

24 QUESTION: It's covered by the sole possession  
25 exception?

1 MR. KNEEDLER: That's correct.

2 QUESTION: Which means it would have been  
3 embraced by the statute, but for that.

4 MR. KNEEDLER: That's probably true, but it's --  
5 one thing to bear in mind here is, this act was passed in  
6 one form early in 1974. Some difficulties were  
7 identified, and it was amended and revised and elaborated  
8 upon later in 1974, and there is a description by Senators  
9 Pell and Buckley describing the original version of the  
10 act, in which they indicated that personal records were  
11 not the sort of thing that was intended to be included,  
12 because the act then used the definition of official  
13 records that were intended to be for school use, and they  
14 said that these informal notes, and I think teacher notes  
15 would be include din that, were not intended to be  
16 included in the act to begin with.

17 So I think that there is a way in which that  
18 gives emphasis to something that may well have been  
19 excluded anyway, but they do fall within the coverage of  
20 the act, because the act was revised to meet some concerns  
21 that had been raised by local school districts.

22 I did want to point out two things in response  
23 to Justice Kennedy's question. This act does not require  
24 a school district to retain any records. It may destroy  
25 records at any time. It only addresses rights of parents

1 while the records are actually retained.

2 The other point is, we don't think that there is  
3 anything talismanic about the duration --

4 QUESTION: But they don't have to be retained  
5 for 45 days or anything?

6 MR. KNEEDLER: If a request is made for them  
7 they have to be retained until the request is resolved, a  
8 request to inspect them, but if the parent or student,  
9 adult student has not requested it, nothing in this act  
10 requires the school district to keep them.

11 We don't think that duration is dispositive. We  
12 think because the act was designed -- we point this out at  
13 pages 20 and 21 of our brief, and page 23 of our brief --  
14 was intended to reach records that the school was going to  
15 be -- use to make decisions about the student in an  
16 institutional way, institutional decisions about the  
17 student, which we think are different from what goes on in  
18 the classroom in the day-to-day learning experience, and  
19 so we think that that could include records, or some  
20 materials that are kept by a principal that wouldn't  
21 necessarily go into the permanent record, but would be  
22 part of the school's overall supervision of the student  
23 for that school year, so we do not think that the duration  
24 of the period is dispositive.

25 Having said that, what gave rise to this act was

1 concerns about the sorts of things that were in the  
2 permanent institutional records of the student, the sorts  
3 of things that would follow the student, or that law  
4 enforcement officers or probation officers or others would  
5 have free access to when parents did not, and there was  
6 concern that there might be irrelevant information, or  
7 inaccurate or anecdotal information in records that would  
8 make a real difference in the child's life, and that's  
9 what this act is directed towards.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
11 Kneedler.

12 Mr. Wright, we'll hear from you.

13 ORAL ARGUMENT OF WILFRED K. WRIGHT, JR.

14 ON BEHALF OF THE RESPONDENT

15 MR. WRIGHT: Mr. Chief Justice, and may it  
16 please the Court:

17 The Family Educational Rights and Privacy Act  
18 was drafted by Senator Buckley, also known as the Buckley  
19 Amendment.

20 Senator Buckley in 1974 stated that most  
21 conscientious teachers would have no problem gaining the  
22 consent of a parent, provided the teacher has demonstrated  
23 the worth of his proposal. In other words, Senator  
24 Buckley did intend the Family Educational Rights and  
25 Privacy Act to reach out into the record keeping process

1 that included the teacher's work or the -- or the records  
2 that were being maintained by the teacher.

3 What the petitioners are requesting of this  
4 Court is to have unfettered and unshackled right to  
5 disclose exam grades to whomever they choose. If in fact,  
6 only the cumulative or the permanent or the transcript  
7 record is the only record that is an education record,  
8 then a teacher like Justice Scalia mentioned could post  
9 the exam scores in the local newspaper, if she wanted to,  
10 prior to handing them in to the central custodian. Such a  
11 result was not intended --

12 QUESTION: Well, but has that ever happened?  
13 Had any teacher ever posted exam scores in the local  
14 newspaper?

15 MR. WRIGHT: Under the facts of this particular  
16 case --

17 QUESTION: No. I say, was there any -- any  
18 incident of that sort that had ever been called to the  
19 attention of Congress? I mean, was that really what  
20 Congress was trying to prevent?

21 MR. WRIGHT: Not that particular action, but  
22 that would be a consequence of -- of finding that the  
23 education records would be just a permanent --

24 QUESTION: Well, it would be -- the consequence  
25 you describe would allow a teacher to do something that no

1 teacher has ever done.

2 MR. WRIGHT: Contrary, Your Honor, I believe  
3 that the teachers, not only in this particular case, but  
4 in many cases, especially in the -- the Krebs v. the  
5 Rutgers University case, were disclosing exam scores --

6 QUESTION: They were posting them in newspapers?

7 MR. WRIGHT: No. They weren't posting them in  
8 newspapers.

9 QUESTION: Well, that was what I asked you about  
10 because you mentioned it.

11 MR. WRIGHT: That's correct, Your Honor. They  
12 weren't posting them in newspapers.

13 QUESTION: If -- even if we -- we take the --  
14 the expansive definition that you would use, what is your  
15 response to the point that came out in -- in my exchange  
16 with Mr. Kneedler, that the -- that the mere disclosure of  
17 information, which may ultimately end up in a record, but  
18 a disclosure before that information is, in fact, recorded  
19 would not be prohibited by the act?

20 MR. WRIGHT: Here we have a situation, the facts  
21 of this case, that happened simultaneously. The teacher  
22 is gathering --

23 QUESTION: Well, do -- I don't want to cut off  
24 your answer there. But as -- as a general proposition --  
25 it may not apply here, but as a general proposition, do



1     you agree with Mr. Kneedler?

2                 MR. WRIGHT:  If it doesn't make it into the  
3     teacher's maintenance of the record.

4                 QUESTION:  No.  I think the assumption is it may  
5     well make it into.  It simply hasn't made it into the  
6     record yet.  At that point, before it makes it into the  
7     record, is the disclosure a violation of -- of the act?

8                 MR. WRIGHT:  I believe that the teacher is  
9     disclosing the information that she is intending to  
10    collect.  It would be no different than a doctor sitting  
11    five patients down in front of them, having them exchange  
12    their diagnostic test, and saying, please call out that  
13    information to me.

14                QUESTION:  Well, yes --

15                MR. WRIGHT:  That would not be permitted.

16                QUESTION:  -- we -- we don't know whether  
17    there's a statute that covers that, and we've got a  
18    statute here.

19                You're saying that the words of the statute  
20    would -- would make it an -- a violation to disclose the  
21    information that may ultimately be recorded, even before  
22    it is in fact recorded and made part of a record, as you  
23    define record.

24                MR. WRIGHT:  No.  As I define record, here we  
25    have a gathering of the information, and that's as far as

1 I'm going. And that is, the teacher is gathering the  
2 information. She is collecting it. This whole process is  
3 simultaneous. They're having the students call out the  
4 grades. Ms. Falvo's children were having to call out the  
5 grades without her consent.

6 QUESTION: Is the calling out a record? What --  
7 what does the record consist of?

8 MR. WRIGHT: That's gathering the information.  
9 The teacher writing --

10 QUESTION: What -- what is the definition of  
11 record? I mean, it -- does it include --

12 MR. WRIGHT: Records, files, documents,  
13 something --

14 QUESTION: Something written.

15 QUESTION: Yes, but when -- yes, and when the --

16 MR. WRIGHT: She's making the record.

17 QUESTION: -- when the kid speaks, nothing has  
18 been written yet.

19 QUESTION: Records, files, documents, and other  
20 materials. I don't see what there is in this case that  
21 falls within that category.

22 MR. WRIGHT: The grade.

23 QUESTION: The grade is not a record, file,  
24 document, or other material.

25 MR. WRIGHT: She's making --

1                   QUESTION:  A.  You know, I say, A.  The child  
2  shouts out, A.  That is a record?

3                   MR. WRIGHT:  And I write it down as you shout it  
4  out.

5                   QUESTION:  Oh, after you write it down, maybe  
6  when the teacher writes it down -- at most when the  
7  teacher writes it down in her grade book, you say it -- it  
8  then becomes a record.  But she doesn't disclose that  
9  grade book.  The only thing that's been disclosed is the  
10 child's, after he grades that paper, shouting out A.  What  
11 -- what is the record that has been disclosed when the  
12 child does that?

13                  MR. WRIGHT:  That is the record that has been  
14 disclosed because the teacher is making the record.

15                  QUESTION:  So you're saying the information  
16 before it becomes a -- before it becomes a record, because  
17 it doesn't become a record until the child says it, and  
18 then the teacher writes it down.  You're saying the  
19 information even before it becomes a record cannot be  
20 disclosed.

21                  MR. WRIGHT:  If she's collecting it, yes.

22                  QUESTION:  Suppose a child --

23                  QUESTION:  Where do you get that from the  
24 statute?

25                  MR. WRIGHT:  (B)(i).  It would be illogical for

1 a teacher to have a legal obligation to protect the  
2 confidentiality of that grade that she just created in her  
3 grade book, yet have the student call out the grade. It  
4 is no longer --

5 QUESTION: It may well be illogical, but I don't  
6 see anything in the statute that -- that prohibits it,  
7 anymore -- you could say it's just as illogical to  
8 prohibit the teacher from disclosing that information, but  
9 if somebody else happens to know it, for that person to be  
10 perfectly free to say, you know, Jack Smith's kid got a D  
11 in that test. Does that violate the statute? No, of  
12 course, it doesn't because the statute only covers certain  
13 things, and what it covers is records. I don't see what  
14 record has been disclosed here.

15 MR. WRIGHT: If a teacher has a legal obligation  
16 to protect the information in the grade book, if the grade  
17 book is an education record --

18 QUESTION: It isn't in the grade book yet. Your  
19 -- your objection is the child grades the paper and says  
20 to the class, says to the teacher, A. What -- what is the  
21 record that is being disclosed then?

22 MR. WRIGHT: She's making the record. The facts  
23 of this case --

24 QUESTION: Ah, yes.

25 MR. WRIGHT: -- where she's making the record.

1 QUESTION: The teacher is making the record  
2 after the child says, A.

3 MR. WRIGHT: That is true.

4 QUESTION: What about a child who -- I remember  
5 in my third grade, my teacher, who thought it was her job  
6 to teach, had problems sometimes with discipline. And I  
7 might talk too much. I used to.

8 (Laughter.)

9 QUESTION: And -- and so the teacher would say  
10 that's reasoned self-discipline. You lack it. And I'd  
11 get a check. And you'd get three checks, and you get a  
12 mark on your report card. All right? And say, Stephen,  
13 that's the third time. You now have a mark on your report  
14 card.

15 All right. Now, she did that in front of the  
16 class because she felt that this is the way I keep my  
17 class in order and it helps me teach. She did the same  
18 thing with her grades, many of them. She did the same  
19 thing with attendance, by the way. We all said, here,  
20 here, sometimes present.

21 All right. In your view, are all those things  
22 now forbidden by Senator Buckley's statute that the  
23 teacher cannot run her class that way?

24 MR. WRIGHT: Not all of those items are  
25 forbidden, Your Honor. The Socratic method is not

1 forbidden, Your Honor. Going to the chalkboard is not  
2 forbidden.

3 QUESTION: No, no. Let's use my examples. My  
4 example was I act up in class. The teacher says you get a  
5 check for reasoned self-discipline. She says to the whole  
6 class -- that's how she keeps order in her class. That  
7 used to be true in the third grade. My teacher, Miss  
8 Rosmond --

9 (Laughter.)

10 QUESTION: -- whom I recall with fondness,  
11 did --

12 (Laughter.)

13 QUESTION: All right. But now -- now, what  
14 about my example? I'd like an answer to that example.

15 MR. WRIGHT: If she's making a record, I would  
16 say that would be a disclosure.

17 QUESTION: Okay.

18 My next question is each morning we came in and  
19 said, present or here, and she'd keep a record. Now, is  
20 that also forbidden by this statute, unless you go through  
21 the elaborate procedures in the directory section, which I  
22 don't know any school that would have done for something  
23 like that? But is that, in the absence of that, also  
24 forbidden?

25 MR. WRIGHT: No. That's part of the directory

1 information.

2 QUESTION: No, no. If they don't go through the  
3 procedures. In other words, they -- the teacher doesn't  
4 announce to every parent, now we want to have a hearing  
5 for you to see whether we say to your child, here or not  
6 here.

7 MR. WRIGHT: Under your --

8 QUESTION: That would be a violation in your  
9 view on the same theory.

10 MR. WRIGHT: It'd be a violation, but it's not  
11 under the statute.

12 QUESTION: Well, all right.

13 My question ultimately then, given our examples,  
14 is do we really think that Senator Buckley intended to so  
15 interfere with the way in which a teacher would run his or  
16 her classroom --

17 MR. WRIGHT: Senator --

18 QUESTION: -- for teaching and disciplinary  
19 purposes.

20 QUESTION: And -- and if so, do we think that  
21 the Congress agreed with Senator Buckley?

22 (Laughter.)

23 MR. WRIGHT: That's correct, because in answer  
24 to -- to Justice Breyer, Senator Buckley specifically  
25 stated, some may argue that my amendment will create too

1 much additional work and red tape. To that argument, I  
2 must reply that I am no -- not so much concerned about the  
3 workload or convenience of the educational bureaucracy.

4 He was not concerned about what type of convenience.

5 Another way --

6 QUESTION: So no -- no gold stars on the -- on  
7 the paper that goes back to the student that any other  
8 student can see, or in these days, a Post-it with a happy  
9 face?

10 (Laughter.)

11 QUESTION: The Federal Government prohibits  
12 that.

13 MR. WRIGHT: He's intending to give the parent  
14 the right to consent to the release of information. We  
15 believe the grade book is information. Handing back a  
16 paper, it could be handed back to the child upside down if  
17 it has a grade on it. There are a hundred ways to skin  
18 this cat.

19 QUESTION: If I -- if I don't agree with you on  
20 this -- and I thought my examples that I gave are extreme  
21 instances, and it doesn't cover that. Can you give me any  
22 help at all as to how this statute might be interpreted to  
23 keep its basic point, which -- which might be a desirable  
24 one, but not to cover my extreme cases?

25 MR. WRIGHT: Senator Buckley said another



1 statement. Simple forms could be mailed to parents to  
2 obtain their permission for certain activities with regard  
3 to their children.

4 I would also further note that many schools  
5 already require the prior written consent of parents on a  
6 number of matters, including testing, special projects,  
7 drug programs, sex education, not to mention permission  
8 slips to go on field trips, permission slips to go play on  
9 the football team, permission slips to sell candy.

10 Parents are bombarded with consent forms. What the  
11 consent form does is it informs the parent as to what is  
12 happening to their child with respect to their education.

13 The teacher does not have the fundamental right  
14 to educate the child. Ms. --

15 QUESTION: But it gives the individual -- it  
16 gives the individual parent a veto, and that's what you're  
17 saying. You have a school district. Education is one of  
18 the -- the areas that is most traditionally handled  
19 locally. Right? And your -- your scheme is that any one  
20 parent in any classroom is going to have a veto over how  
21 that classroom operates.

22 MR. WRIGHT: Not necessarily, Your Honor. One  
23 parent has a veto with respect to their one child because  
24 they have the fundamental parental right to educate their  
25 child. The teacher does not; they do. And that's exactly

1     what Senator Buckley was -- was intending with the Buckley  
2     Amendment.

3             QUESTION:  So the rules -- any parent can make  
4     the rules for that parent's child, what that parent wants  
5     them to be, not the teacher, not the school district.

6             MR. WRIGHT:  With respect to --

7             QUESTION:  You think that's what Senator Buckley  
8     meant.

9             MR. WRIGHT:  Yes, with respect to education  
10    records, that is correct, especially scores on exams.  
11    We're dealing with a special ed student here that was  
12    being mainstreamed in the classroom and having his grades  
13    called out loud.

14            QUESTION:  As long as the teacher records them,  
15    you say that.  But I think you said all this could go on,  
16    the teacher could give a spot quiz and say, I'm not  
17    counting it today, but everybody wants to know how  
18    everybody performed, so we're going to have the grades  
19    called out.

20            MR. WRIGHT:  That's possibly true, but there are  
21    other means.  Even the district court found --

22            QUESTION:  But what is the answer to that?  Is  
23    it -- is it -- the teacher gives a quiz, has the grades  
24    called out, but doesn't record in her grade book.

25            MR. WRIGHT:  If she's not recording it in her

1 grade book, that is not a violation.

2 QUESTION: And if she says, class, I want to  
3 give you an incentive to do better, so I'm going to write  
4 down these grades but I'm going to discount -- at the end  
5 of the term I'm going to discount the lower two-thirds of  
6 them.

7 MR. WRIGHT: It's an education record. The fact  
8 that the teacher only uses three exam scores that she's  
9 written in her grade book as opposed to five exam scores  
10 does not nullify the parent's right to consent to the  
11 release of that exam grade in the classroom.

12 QUESTION: Is it perfectly clear that the  
13 disclosure of information within the classroom setting is  
14 a release of education records within the meaning of  
15 (B)(i)?

16 MR. WRIGHT: Within the meaning of (B)(i) --

17 QUESTION: Yes.

18 MR. WRIGHT: -- our interpretation is it has to  
19 be.

20 QUESTION: Why do you say that if -- if it has  
21 the more formal concern about release to the public and  
22 law enforcement and so forth? It seems to me that there's  
23 an awful lot of information about special students and  
24 others that -- that the student's classmates are  
25 inevitably going to learn about just by being in class

1     seeing what goes on in class.  It isn't, though, the --  
2     his general performance is a secret to the -- to the other  
3     -- to his classmates.

4             MR. WRIGHT:  That -- that's correct, Your Honor.  
5     In fact, FERPA is not a panacea for all performances.  In  
6     fact, the directory information exception to the education  
7     record specifically says that participation in school  
8     activities is fine.

9             QUESTION:  But this particular school activity,  
10    it's not fine.  I'm reading off the answers in -- in the  
11    presence of no one else except your classmates who  
12    generally have a pretty good idea of who the good students  
13    are and who -- who the bad students are.  But you still  
14    say that's -- that's clearly a release within the meaning  
15    of the statute in your view.

16            MR. WRIGHT:  The grade that's going in the grade  
17    book is a release, Your Honor.

18            QUESTION:  You think it's especially --  
19    especially mean with respect to this special -- special ed  
20    student who's being mainstreamed.  What -- what do you say  
21    to the petitioners' footnote in their reply brief that the  
22    record establishes that the only special education service  
23    Philip received was 45 minutes of speech therapy once a  
24    week?  And that was discontinued, with respondent's  
25    consent, prior to the end of Philip's seventh grade year.

1 That's not as appealing as your description of this -- of  
2 this student.

3 MR. WRIGHT: The fact that a special ed --

4 QUESTION: Is that -- is that what you mean by a  
5 special ed student, a student who is receiving 45 minutes  
6 of speech therapy once a -- once a week?

7 MR. WRIGHT: Yes. I think that's --

8 QUESTION: That's what you mean by a special --  
9 special ed student.

10 MR. WRIGHT: He was. He was IEP. He was in an  
11 IEP program under the IDE Act.

12 QUESTION: 45 minutes a week. Did he get  
13 anything else other than that? Of speech therapy. What  
14 did he have? A stutter perhaps?

15 MR. WRIGHT: No. He was slow in reading, Your  
16 Honor. He was slow in reading the exams, the pop quizzes,  
17 Your Honor. I mean --

18 QUESTION: Well, how would speech therapy help  
19 that?

20 MR. WRIGHT: I don't know, Your Honor. Those  
21 questions were not raised. None of those material facts  
22 were part of the record.

23 QUESTION: Well, I suggest you not paint your  
24 client as more sympathetic than he is.

25 MR. WRIGHT: I am just trying to be sensitive

1 not only to just that one child, but even to her other  
2 children who are also part of this case with respect to  
3 their A's. They were straight A students. So rather --  
4 whether one child receives low grades or whether one child  
5 receives stellar performance in the classroom, it does not  
6 matter. It is still a release of a grade. Those children  
7 know the grade. The parents of those children know the  
8 grade.

9           When a parent goes to the parent-teacher  
10 conference and she shows up and the teacher says, all  
11 right, these are the -- we're going to keep this private,  
12 it's not private information. It's already been  
13 disclosed. That information is not private. How can the  
14 teacher keep concealed that which she already revealed?  
15 And even the district court found that hard to believe.

16           And -- and that's -- that's the logic of the  
17 Tenth Circuit. The Tenth Circuit didn't prohibit the  
18 practice. The Tenth Circuit merely suggested that the  
19 statute on its face, the plain language of the statute,  
20 says, give the parent the right to consent. That was the  
21 intent of Senator Buckley: give the parent the right to  
22 consent to the release.

23           QUESTION: If it's an educational record as  
24 defined under the act and maintained as such -- and that's  
25 really the issue, whether it -- it's covered at this stage

1 of a fellow student calling out a grade.

2 MR. WRIGHT: It's covered because in the facts  
3 of this case, the teacher is using that protocol to  
4 collect the information.

5 QUESTION: Well, but that is not the text of the  
6 statute. You have to overcome the fact that the literal  
7 language wouldn't cover it.

8 MR. WRIGHT: The literal language interpreted in  
9 the context of the parent's right to consent, in other  
10 words, keeping that information confidential. If there is  
11 a legal obligation on the part of the teacher to keep that  
12 grade confidential once it's in her hands --

13 QUESTION: She had -- they have no right to keep  
14 information confidential. They have a right to keep the  
15 record confidential. If the information is obtained from  
16 some source other than the record, the statute does not --  
17 does not address its release.

18 MR. WRIGHT: I respectfully disagree. The  
19 statute specifically says, which has a policy or practice  
20 of permitting the release of education records or  
21 personally identifiable information contained therein --

22 QUESTION: Contained in the records.

23 MR. WRIGHT: She's making the record. She's  
24 maintaining the record. That has to be interpreted in the  
25 context of what we're doing here. And if we look at

1 Whalen v. Roe --

2 QUESTION: I'm way out-of-date probably, but  
3 again, when I used to be in school, grades were thought  
4 of, to some degree, as an incentive, that they weren't  
5 totally private. One of their functions is they should be  
6 at least told to other people in the class in order to get  
7 them to work harder or to strive harder.

8 Now, in -- the term of records, when they talk  
9 about records, which I don't think defines itself, is  
10 there any indication in this history that that idea that  
11 if a teacher wants to use grades as a kind of incentive  
12 device, that that should not be up to the teacher? She  
13 isn't able to do it?

14 I mean, is there -- see, records doesn't define  
15 itself, and I'm looking for a line.

16 MR. WRIGHT: Congress intended that --

17 QUESTION: In -- in the absence of some other  
18 line, I might tend to think a line should be drawn to give  
19 the teacher maximum freedom to run his or her class the  
20 way the teacher feels is best educationally. That's  
21 different from having a record in an office somewhere in  
22 the clerk's office in the school. See, that's where --  
23 that's where I'm sort of looking for, and I'm trying to  
24 get some help from you with that.

25 MR. WRIGHT: The line is the grade that is going



1 in the grade book with respect to this particular case.  
2 If the grade is going in the grade book, what she is  
3 creating, she is maintaining. If -- if that -- if  
4 maintain does not mean that she is making the record or  
5 creating the record, if we subscribe to their view that  
6 maintain means the central custodian, then the central  
7 custodian doesn't have any record either until it's  
8 actually in their hands. And then we can disclose, we can  
9 access, we -- everything.

10 QUESTION: So what -- so what if you could?  
11 Suppose you were to say that. Suppose you were to say  
12 before it becomes part of the permanent records of the  
13 school, you can disclose it to other people. You can.  
14 That's right. The teacher can tell other students. The  
15 teacher can tell the parents. The teacher can have a  
16 discussion about it. They can do a lot of those things if  
17 the teacher feels that's good educationally and the school  
18 approves. What would be so terrible about that in terms  
19 of this statute?

20 MR. WRIGHT: It would be terrible. It would be  
21 disastrous. Students, parents would not have the right,  
22 that privacy. That interest in keeping that information  
23 private would not be there. Everybody would have access  
24 to that information. In fact, that reads out of the  
25 statute (B)(i). You wouldn't have confidentiality.

1 Education records, by its plain language in the  
2 statute, means information directly related to the student  
3 and maintained by the institution or somebody acting on  
4 behalf of the institution. And clearly, by the plain  
5 language of the statute, that includes the teacher. So,  
6 yes, the teacher grade books -- the teacher grade books  
7 are education records, subject to the Family Educational  
8 Rights and Privacy Act, the privileges and the obligations  
9 that come with this particular statute.

10 QUESTION: Mr. Wright, this goes all the way  
11 through, I take it, in your view that -- take a college  
12 student. The college student can say, oh, I don't want to  
13 participate. I don't want anybody else to know what my  
14 grade is, and I'm not going to exchange papers with  
15 another person.

16 MR. WRIGHT: Precisely. We don't engage in this  
17 practice at college because we would have mutiny at all  
18 colleges. They have the capacity as adults, I'm not doing  
19 this. I'm out of this class. I don't want people knowing  
20 what my --

21 QUESTION: I understand it's a --

22 QUESTION: You're out of the college. I mean,  
23 that --

24 (Laughter.)

25 QUESTION: It's a technique that teachers do

1 use, to have students prepare and present each other's  
2 papers, that that's a technique that's quite common in  
3 colleges and professional schools.

4 MR. WRIGHT: You're referring to the -- the  
5 teacher assistant helping them grade?

6 QUESTION: No, no. The students critique each  
7 other's papers.

8 MR. WRIGHT: Okay. Student peer critiquing?  
9 That is not prohibited by FERPA. The teacher is not  
10 collecting that information. The students are making the  
11 evaluation or assessment of each other for their sole  
12 purpose, not for the purpose of the teacher recording and  
13 making --

14 QUESTION: The teacher writes down -- the  
15 teacher writes down in the book the comments that the  
16 students made and she takes that into account in the final  
17 grade in the course.

18 MR. WRIGHT: Outside of the facts of this case,  
19 that may be a violation if, in fact, she's making a record  
20 and that was the intent of the teacher to make a record.

21 QUESTION: A -- a good alternate name for this  
22 statute would have been the Anti -- the Prevention of  
23 Mutiny Among Students Act?

24 (Laughter.)

25 QUESTION: Suppose -- suppose that a school

1 district received \$100 a year in Federal funds, and this  
2 act were applied in the way you said, would that to you  
3 raise any serious concerns of federalism?

4 MR. WRIGHT: I think the funds need to be  
5 available under an applicable program, and I think the  
6 lower cases have -- have deemed that certain programs are  
7 applicable and certain others are not. Federal funding  
8 through a State agency would be an applicable program.  
9 Those facts were never raised in this particular case,  
10 never defended by petitioners as to whether or not there  
11 was any applicable Federal funding involved in this  
12 particular case.

13 The solution to the problem with respect to this  
14 issue that is before the Court, provide the parent the  
15 right to consent -- in fact, that's what they're doing in  
16 many schools or they're just, like the Tenth Circuit said,  
17 do it anonymously or don't do it at all. Have the student  
18 grade their own paper. Encourage the parent to come and  
19 -- and be informed as to what is happening --

20 QUESTION: To have the student grade their own  
21 paper might have some problems with it too.

22 (Laughter.)

23 MR. WRIGHT: I cross examined the principal with  
24 respect to that particular issue, and he said, well, we  
25 exchange papers because the students cheat. I said, well,

1 the neighbor grading the other neighbor's paper -- they  
2 don't have an opportunity to cheat? Oh, yes, you're  
3 right, Mr. Wright. They do cheat. So that doesn't  
4 preclude the students from cheating, does it? No. Well,  
5 no, they could cheat even during the exam because they  
6 could write the answers on their hand.

7 QUESTION: Well, you need two cheaters for that  
8 to work, whereas if you grade your own paper, it only  
9 takes one. Right?

10 (Laughter.)

11 MR. WRIGHT: We believe that the plain language  
12 governs what is an educational record and it does not mean  
13 the permanent transcript. If Congress had intended for  
14 education records to mean a permanent transcript, they  
15 could have easily placed language in there that said only  
16 the permanent or cumulative record of a child is an  
17 education record. They didn't say that. They even  
18 excepted out sole possession notes, which are notes of the  
19 teachers. They excepted out directory information. The  
20 Family Policy Compliance Office has consistently over the  
21 last 25 years held that the grade book is an education  
22 record.

23 A parent would like to access it. Here's the --  
24 here's another consequence, that a parent doesn't have a  
25 right to access if it's merely the permanent education

1 record of the grades. The teacher could -- could say, no,  
2 you can't see your child's grades. A parent has to have  
3 that information available to her for the purpose of  
4 making some important decisions with respect to her child,  
5 and that's exactly what Ms. Falvo went to the school  
6 district and argued. She argued that those are my  
7 children's grades. Those are between me and the teacher.  
8 I have a right to consent to their release, and I have a  
9 right to access.

10 QUESTION: Well, but a moment ago, from what you  
11 said, I thought the school district was telling her that  
12 she couldn't see her children's grades. That never  
13 happened, did it?

14 MR. WRIGHT: No, that never happened. But that  
15 happened in a particular case that has been cited by the  
16 petitioners in the State of California where a mom with a  
17 special ed child was having a hearing and needed the  
18 information in the grade book, and they said, no, FERPA  
19 doesn't apply. The grades in the grade book -- she had no  
20 evidence available to her to make an informed decision  
21 with respect to whether or not her child belonged --

22 QUESTION: But that -- that wasn't what happened  
23 here, was it?

24 MR. WRIGHT: That isn't what happened here, but  
25 that has happened, Your Honor.

1           Any further questions? Seeing none, Your Honor,  
2 we submit.

3           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.

4           The case is submitted.

5           (Whereupon, at 12:08 p.m., the case in the  
6 above-entitled matter was submitted.)