

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.

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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1 P R O C E E D I N G S

2 (11:11 a.m.)

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

7 Mr. Richardson.

8 ORAL ARGUMENT OF JERRY A. RICHARDSON

9 ON BEHALF OF THE PETITIONERS

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

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

21 QUESTION: Mr. --

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

24 MR. RICHARDSON: We did not raise that issue in
25 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.)

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