

# International Developments

## Student Privacy and Classroom Pedagogies: An American Perspective

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### Introduction

The U.S. Constitution's protection of 'the right of persons to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures'<sup>1</sup> underlies the concept of privacy in American law. This concept creates an expectation that, except for certain situations where probable cause exists,<sup>2</sup> a person's private life should be free from government scrutiny. However, government intrusions into persons' lives occur other than by searches and seizures. For example, public school districts in the United States are required by state laws to keep records on their students. The critical issue for students is the extent to which they may maintain an expectation of privacy in the information contained in those records.

The nature of a student's privacy interest in records is arguably different from that of persons in their homes<sup>3</sup> or their automobiles<sup>4</sup> because teachers and other educational personnel require on-going knowledge about a student's performance and progress in school. However, students' interest in their records should not be devoid of privacy expectations. For students, then, the privacy interest becomes who should have access to their education records and to whom the information contained in the records can be revealed without their consent?<sup>5</sup>

This concern about the privacy interests of public school students led, in part, in 1974 to Congress' enactment of the *Family Educational Rights and Privacy Act (FERPA)*.<sup>6</sup> In FERPA, Congress granted parents the right of access to their children's education records,<sup>7</sup> but otherwise balanced the privacy rights that students have in their records with the interests that others might have in access to, and disclosure of, those records.<sup>8</sup> For much of the almost thirty years of its existence, FERPA's interpretation and implementation was the sole responsibility of the U.S. Department of Education.<sup>9</sup> Only relatively recently have federal courts become involved in interpreting FERPA,<sup>10</sup> but without any guidance, at that time, from the Supreme Court.

All of that changed in 2002 when the Supreme Court, for the first time, in *Owasso Independent School District v. Falvo* ('*Owasso*'),<sup>11</sup> rendered a decision interpreting FERPA. The purposes of this article are to examine the district, court of appeals, and Supreme Court decisions in *Owasso* and to analyse how the Supreme Court's decision will impact on the operation of public schools.

## **Family Educational Rights and Privacy Act (FERPA)**

Congress passed FERPA to accomplish two important purposes within educational institutions receiving funds administered by the U.S. Department of Education. First, FERPA assures access by parents to the education records of their dependent children.<sup>12</sup> Second, FERPA protects the confidentiality of student records by prohibiting disclosure of those records without the student's prior consent, with two exceptions: (1) educational institutions can reveal 'directory information',<sup>13</sup> about students, unless students (or their parents if the student is under age 18) object to some or all of the information;<sup>14</sup> (2) educational institutions can reveal information to certain entities,<sup>15</sup> such as the juvenile justice system<sup>16</sup> and accrediting agencies,<sup>17</sup> or under certain circumstances, such as in responding to subpoenas<sup>18</sup> or in emergencies 'to protect the health or safety of the student or other persons'.<sup>19</sup>

FERPA defines 'education records' as 'records, files, documents and other materials which contain information directly related to a student and [which] are maintained by an educational ... institution or by a person acting for such ... institution'.<sup>20</sup> Not included among the definition of education records are 'records of instructional ... personnel ... which are in the sole possession of the maker ... and which are not accessible or revealed to any other person except a substitute'.<sup>21</sup>

Enforcement of FERPA is the responsibility of the U.S. Department of Education with complaints filed with the Department's Family Policy Compliance Office.<sup>22</sup> However, parents also have enforcement rights and are entitled to 'an opportunity for a hearing ... to challenge the content of ... education records'.<sup>23</sup> Courts have consistently refused to recognise a private cause of action to enforce the statute.<sup>24</sup> FERPA does not provide for damages and, thus, remedies under the statute are limited to declaratory and injunctive orders. Federal District Appeals Courts are split as to whether a remedy of damages under section 1983 of the *Civil Rights Act of 1964*<sup>25</sup> is possible for FERPA violations,<sup>26</sup> and, to date, the Supreme Court has not resolved the conflict.<sup>27</sup>

## **Facts of the Case**

In *Owasso*, parents of elementary public school students sought a declaratory judgment and damages relief under section 1983 for violations of FERPA and the constitutional right of privacy as a result of a grading practice used by teachers of plaintiffs' children. Plaintiffs alleged that the following classroom practices violated both FERPA and the Constitution: students exchanged papers and graded each others' work as teachers went over the answers; and, teachers permitted students to announce their grades aloud after the papers had been graded and returned.<sup>28</sup>

## **District and Court of Appeals Decisions**

A federal District Court granted summary judgment for the defendant school district on the FERPA claim because the grades being revealed to students did not constitute 'education records'<sup>29</sup> within the meaning of FERPA. The court analysed plaintiffs' constitutional privacy claim under a three-part balancing test: (1) whether a student had a legitimate expectation of privacy; (2) whether disclosure served a compelling state interest; and, (3) whether disclosure had been made in the least intrusive manner.<sup>30</sup> The court determined that it need go no further than the first part of the test, finding that disclosure did not reach tests or letter grades from report cards or permanent records,

and, in any case, students had the option to relate their grades on items graded in class to the teacher in confidence.<sup>31</sup> However, the court was troubled under the second part of the test because ‘it would be hard-pressed to find that grading practice at the Owasso School District is supported by a compelling state interest’.<sup>32</sup>

The Tenth Circuit affirmed the decision of the District Court on the constitutional issue of privacy, but reversed the court on the FERPA violation. The Court of Appeals agreed, using the same three-part balancing test, finding that students did not have a legitimate expectation in privacy in school work and test scores so as to invoke due process rights. However, the students’ privacy right under FERPA was actionable because grades, revealed to other students through the teachers’ practice of permitting students to grade one another’s work, were education records. To support its conclusion, the court applied syllogistic reasoning: the contents of a teacher’s grade book revealed to someone other than a substitute is a violation of FERPA; in Owasso Public Schools, student grades are revealed to other students when they grade other students’ assignments and report grades from those assignments to the teacher; therefore, the grading of other students’ papers and the reporting of those grades violates FERPA. As the Supreme Court was later to point out, the syllogism fails at its minor premise because it assumes that students in grading other students’ assignments and reporting grades perform a function as agents for the school district and that the grades have become ‘education records’ even before they are entered into the grade book.

Having found a violation of the statute, the Tenth Circuit had to determine whether section 1983 provided an appropriate remedy. The court found no statutory remedy to address potential problems in *Owasso*. It observed that the parent hearing remedy provided in the statute would be ineffective since it would not reach the student who acts ‘out of juvenile malice’ to grade another student’s paper lower than the grade earned.<sup>33</sup> Thus, this left the plaintiffs’ section 1983 damages challenge as the most effective remedy for addressing a problem that could not be dealt with under the statute. As a final parting shot, the Tenth Circuit discounted the school district’s practical concern as to how individual teachers under FERPA would be able to maintain access records for each student-recorded grades.<sup>34</sup> In addition, it dismissed the school district’s pedagogical arguments that class grading benefits student learning and student grading of papers allows teachers more time to assist students.<sup>35</sup>

### **Supreme Court Decision**

On appeal to the Supreme Court, the Court unanimously<sup>36</sup> reversed the Tenth Circuit.<sup>37</sup> The Court considered *Owasso* solely as a matter of statutory interpretation without addressing whether a private cause of action exists under section 1983.<sup>38</sup> The Court offered five reasons why FERPA does not include student-graded assignments. The Court undertook a narrow interpretation of FERPA guided by the underlying principle that education is a state, not a federal, responsibility. Thus, the Court was reluctant to interpret FERPA in a manner that would effect ‘a substantial change in the balance of federalism’.<sup>39</sup>

First, the Court refused to interpret FERPA to mean, as the Tenth Circuit had, that a teacher ‘maintains’ a student’s grade while an assignment is being graded by another student and before the grade is entered into the teacher’s grade book. Quite simply, ‘[t]he teacher does not maintain the grade while students correct their peers’ assignments or call out their marks’.<sup>40</sup> The

statutory concept of maintaining records applies to those records ‘kept in a filing cabinet in a records room at the school or on a permanent secure database’.<sup>41</sup> As the Court pointedly observes, ‘it is fanciful to say that [students] handl[ing] assignments for a few moments as the teacher calls out the answers’ is the same as ‘the registrar maintain[ing] a student’s folder in a permanent file’.<sup>42</sup>

Second, a student grader is not ‘a person acting for’ an educational institution within the terms of FERPA. The term applies to employees of the school district and student graders do not take on that function simply because they grade papers as directed by their teacher. The FERPA phrase, ‘by a person acting for’, modifies ‘maintained,’<sup>43</sup> and a student who acts for the teacher in correcting an assignment ‘is different from saying they are acting for the educational institution in maintaining it’.<sup>44</sup> As support for the proposition that students do not act for the school in grading papers, the Court embraces a school district pedagogical argument dismissed by the Tenth Circuit:

Correcting a classmate’s work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on.<sup>45</sup>

Third, FERPA does not require a record of access for each student assignment that is graded by other students. The Court adopts the school district’s practical concerns about such access records that had been discounted by the Tenth Circuit. The Court reasoned that, were the logic of the Tenth Circuit followed, not only would teachers have to keep an access record for each of a student’s assignments, but ‘students who grade their own papers would bear the burden of maintaining records of access until they turned in the assignments’.<sup>46</sup> The Court doubted that Congress intended to impose ‘such a weighty administrative burden on each teacher, and certainly it would not have extended the mandate to students’.<sup>47</sup> By requiring ‘a record’ of access for each student, the Court opined that Congress intended that ‘education records would be kept in one place with a single record of access’.<sup>48</sup>

Fourth, FERPA’s requirement of parent hearings to contest the accuracy of their child’s education records argued against the use of ‘this elaborate procedural machinery to challenge the accuracy of the grade on every spelling test and art project the child completes’.<sup>49</sup> The thrust of the Court’s argument is that, by providing a statutory remedy, Congress intended that a parent’s remedy would be narrowly limited ‘to challenge the content of [a] student’s education records . . .’<sup>50</sup> An expansive interpretation of education record to include class assignments with the statutory right of parent to a hearing with notice, impartial hearing official, and full and fair opportunity to present evidence<sup>51</sup> could have the effect of burying school officials in hearings, and the Court found no legislative intent to support this interpretation.

The Court’s fifth reason for not adopting the FERPA interpretation of the Tenth Circuit involved practical considerations, some of which had been raised by the school district before the Court of Appeals and had been dismissed. If graded assignments in class were education records, a ‘substantial burden’ would be imposed on teachers. Teachers would have to spend their time correcting assignments rather than spending the time ‘teaching and in preparation’. Teachers would

not be available ‘to give students immediate guidance’ and would have ‘to abandon other customary practices, such as group grading of team assignments’. Even such practices as a teacher ‘put[ting] a happy face, a gold star, or a disapproving remark on a classroom assignment’ would come within FERPA.<sup>52</sup> The Court doubts that ‘Congress meant to intervene in this drastic fashion with traditional state functions’.<sup>53</sup>

### **Analysis and Implications**

The Supreme Court’s decision in *Owasso* on only narrow statutory grounds leaves unanswered three broad issues that cover the range of constitutional and statutory remedies and classroom practices. (1) To what extent can the federal government define the limits of grading practices in public schools within the limits of federalism in the Tenth Amendment? (2) What constitutional and policy issues are raised when students and parents challenge a school’s grading process on constitutional grounds? (3) In the light of the Supreme Court’s apparent endorsement of a peer grading and reporting process, to what extent should school districts prohibit, continue, or reinstate that process?

### **Federalism and Public Schools**

The Tenth Amendment of the U.S. Constitution provides that all powers not delegated to the federal government are reserved to the states.<sup>54</sup> One such power not delegated to any branch of the federal government is that of education. Although states have the implied authority to provide education, federal incursions into education can occur under the delegated powers, such as the power to control interstate commerce.<sup>55</sup> One of the most prominent methods of intrusion has been through the power of the purse, that is, by way of the provision of federal money to states (for distribution to local school districts) on condition that states meet requirements imposed by Congress.<sup>56</sup> One such example of this intrusion is FERPA where, in order for school districts to receive federal funds, they must ensure confidentiality and protection from disclosure of student education records.

In deciding *Owasso*, the Supreme Court left unresolved the critical question for purposes of federalism of whether teacher grade books are subject to the statute. The Court was obviously troubled by the Tenth Circuit’s interpretation of FERPA that ‘would effect a drastic alteration of the existing allocation of responsibilities between States and the National Government’.<sup>57</sup> The Court hesitated to expand the reach of the statute ‘unless that is the manifest purpose of the legislation’.<sup>58</sup> In other words, one can argue that the Court’s judicial restraint is guided not by Tenth Amendment principles of federalism, but by the absence of congressional intent.

FERPA provides that teacher grade books are education records only when they are revealed to someone other than a substitute. Thus, if one assumes that grade books are not education records, parents would not have a statutory remedy until after grades are posted to report cards that are distributed by schools. In other words, parents are entitled to a hearing to challenge grades only after the cumulative effect of all grades is reported as a final average. If Congress were to adopt the Tenth Circuit’s reasoning whenever peer grading is used, parents would be entitled to a hearing after every peer-graded assignment.

Nothing in the Supreme Court's opinion would suggest that Congress could not extend the reach of FERPA to include all peer-graded assignments as education records. If Congress were to amend FERPA in this way, one can query whether the reach of Congress' power has not significantly diluted federalism. If Congress can use its power of the purse to encourage schools to discontinue use of a widely accepted pedagogy (peer grading) because of the prospect of facing parent hearing over class assignments, one could argue that control over education in the United States is a state responsibility except when the federal government chooses to act.

### **Constitutional Issues and Student Grades**

Although the Supreme Court sidestepped constitutional issues in *Owasso*, the case raises two possible constitutional issues that could have been addressed. The first, and most obvious, is whether students have a privacy right in their grades under the Fourteenth Amendment's liberty clause<sup>59</sup>. A second derivative issue is whether a parent's privacy right and right to direct their children's education under the liberty clause extends to the grading and reporting process.

Both the District Court and Tenth Circuit applied the same tripartite test<sup>60</sup> and determined on the merits that students do not have a constitutional expectation of privacy in their grades. In relying on its own prior decisions,<sup>61</sup> the Tenth Circuit acknowledged that although 'the school work and test grades of pre-secondary students constitute somewhat personal or intimate information, we cannot conclude that these grades are so highly personal or intimate that they fall within the zone of constitutional protection'.<sup>62</sup> The court refused to find privacy protection simply because two federal statutes, FERPA and IDEA, 'provide just such an expectation'.<sup>63</sup> In other words, a statutory grant of privacy cannot be ratcheted into a constitutional claim unless the area of protection itself is 'highly personal or intimate'.

The Supreme Court has thus far provided no privacy precedent concerning FERPA but it has decided two cases involving alleged privacy interests of students. In *New Jersey v. T.L.O.* ('T.L.O.'),<sup>64</sup> the Court upheld a search of a student's purse that produced evidence of drug dealing. However, even in upholding the search, the Court categorically rejected the claims of the school district that students had no expectation of privacy in personal articles brought into the school. The Court opined that 'schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them on school grounds'.<sup>65</sup> In striking a balance between 'the schoolchild's expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place',<sup>66</sup> the Court imposed a reasonable suspicion standard on searches and kept intact the interest of students not to have their privacy 'invaded more than is necessary to achieve the legitimate end of preserving order in the schools'.<sup>67</sup>

In *Vernonia School District v. Acton* ('*Vernonia*'),<sup>68</sup> the Court upheld random, 'suspicionless' drug testing for all athletes in a school district. Collecting urine samples under a 'suspicionless' standard was permissible because athletes, who must suit up for games in locker rooms and who voluntarily subject themselves to a degree of regulation that is higher than for other students, have a diminished expectations of privacy.<sup>69</sup>

In a continuum of student expectations of privacy, the Supreme Court has gone from legitimate expectations of privacy in *T.L.O.* to diminished expectations in *Vernonia*. Although the Court in *Owasso* did not address the constitutional privacy question, if the Tenth Circuit's approach were adopted, students in *Owasso* would have no expectations.

The current status of student privacy is difficult to assess because *T.L.O.*, *Vernonia*, and *Owasso* address such different factual backgrounds. The difficulty in drawing any conclusions is that the three cases look at three different kinds of school environments – a macro environment affecting all students where school authority to search extends throughout the entire school (*T.L.O.*), an extended micro-environment affecting only students participating in athletics where school authority to drug test protects the safety and health of the athletes (*Vernonia*), and a micro environment affecting only students in certain classrooms where teachers want to use a particular kind of pedagogical technique (*Owasso*).<sup>70</sup>

This analysis of environments suggests that the closer one is to a micro environment, the greater the deference and the less the student expectation of privacy. The results of the *T.L.O.-Vernonia-Owasso* cases suggest that the greatest judicial deference, and thus the least student privacy, should be given to what happens in the micro environment of each classroom where the issue is protection of the core of the school's educational purpose, namely issues of pedagogy, curriculum, and teaching and learning. If so, as one moves away from the classroom teaching-learning environment, students will likely have progressively greater expectation of privacy, until one arrives at *T.L.O.* where student privacy can be intruded upon only when the school has reasonable suspicion. In the middle category of extended micro-environment, one can argue that random 'suspicionless' drug testing for athletes in *Vernonia* is permissible because participation in athletics involves major elements of teaching and learning, more similar to the classroom in *Owasso*, than general student searches in *T.L.O.*

However, as schools have attempted to extend random drug testing beyond athletics either to all students within the school<sup>71</sup> or to students in all extracurricular activities,<sup>72</sup> courts have struggled to find a constitutional theory to rationalise the balancing of student privacy with deference to school authorities' decisions.<sup>73</sup> The environment analysis provides a possible rationale. Random drug testing of all students in a school is as far removed from the micro-environment of the classroom as was the student search in *T.L.O.*, and thus, arguably, should be permissible only where schools have reasonable suspicion. Random drug testing of non-athletic extracurricular activities may depend on the extent to which the pedagogical and instructional qualities of the classroom are present.<sup>74</sup> To borrow from the analysis of the *Equal Access Act*,<sup>75</sup> the more that these non-athletic extracurricular activities look like instructional extensions of the classroom, perhaps, the more likely that *Vernonia* will apply. On the other hand, the more that student groups are organised for largely social and service purposes, the less likely that *Vernonia* will apply.

An ancillary constitutional issue concerns whether the parent in *Owasso* would have had claims under the liberty clause, either for a violation of privacy or for a violation of the right to direct the education of their children. Neither liberty clause claim was raised in *Owasso*, although a parent did raise a section 1983 claim for alleged violation of privacy rights under FERPA and IDEA. The Tenth Circuit discussed briefly, and then dismissed, the parent's section 1983 claim on the grounds that a privacy claim cannot be based solely on the existence of federal privacy

statutes.<sup>76</sup> In essence, the court found that the parent's privacy claim was no greater than that of the child. Thus, since the child had no expectation of privacy in the grading process, neither did the parents. There is no reason to expect that a parental constitutional privacy claim under the liberty clause would have had any more success than a section 1983 claim had in *Owasso* for alleged federal statutory violations.

Likewise, the parent in *Owasso* would probably not have been successful in alleging a violation of the right to direct her children's education. Although the Supreme Court has upheld on three occasions the right of parents to make religious educational venue choices for their children where the state has sought to prohibit or severely restrict where education could occur,<sup>77</sup> no court has upheld the parent's right to intrude into the public schools and effect curricular or pedagogical changes.<sup>78</sup> The Supreme Court's description of peer grading in *Owasso* seems strikingly similar to the kinds of pedagogies that lower federal courts have consistently held are beyond the reach of a parent to direct under the liberty clause.

### **Grading and Recording Practices**

A Tenth Circuit dissenting judge in *Owasso*, speaking for three colleagues, chronicled some of the 'practical difficulties with the court's [majority's] decision'.<sup>79</sup> Noting that '[o]ur teachers are overworked and underpaid ...'<sup>80</sup> the dissent observed that, if the majority position prevailed, 'care must be taken to assure that no student learns the grade of another', which could include distributing awards based on grades, determining that an athlete is academically ineligible, and handing back a stack of graded papers alphabetised by name.<sup>81</sup>

Although the Supreme Court's decision should allay fears that such practices violate FERPA, one cannot be certain how school districts will respond to the decision. Now that the Court has held that the practice of peer grading of assignments does not violate FERPA, will schools nonetheless order discontinuance of this practice, thus forcing teachers to resume the grading of all student assignments? In other words, will school districts transform a permitted practice into a prohibited one? Despite the Court's endorsement of the pedagogical value of peer grading, how will the added time the teacher must take to grade all assignments and then go over them in class after they are returned to students affect the amount of instructional time available in class for new material? As the Court iterated, peer grading 'is a way to teach material again in a new context ...'<sup>82</sup>

Arguably, one could reason that the Supreme Court, in refusing to find a FERPA violation, has opted to permit efficiency in instruction to prevail over the perceived embarrassment of some students as a consequence of the peer grading and reporting process, even though, in *Owasso*, no student was required to report his/her grade out loud to the teacher.<sup>83</sup> Rather than have classroom efficiency paralysed by the veto of just one student's alleged embarrassment, the Court refused to interfere with time-tested and time-honoured methods of classroom management. Indeed, as the Court suggested, the underlying premise of the plaintiffs' claim that peer grading led to 'severe embarrass[ment]' could just as easily, and more properly, be changed to the observation that '[peer grading] helps show students how to assist and respect fellow students'.<sup>84</sup>

The question is whether school districts will take advantage of the opportunity presented to them in *Owasso*. Just as the Supreme Court gave public schools broad authority to control



curriculum within their schools in *Hazelwood School District v. Kuhlmeier*,<sup>85</sup> *Owasso* gives schools broad authority to determine appropriate pedagogies to assist student learning. Whether a school will cease using a peer grading pedagogy that helps a teacher ‘discover whether the students have understood the material and are ready to move on’<sup>86</sup> may depend on a variety of factors. Presumably, the Court’s unanimous opinion in *Owasso* has laid to rest any concerns about legal vulnerability that school districts may have about peer grading and oral reporting of grades. What remains for districts may be such non-legal concerns as the loss of self-esteem of students who habitually do poorly, the undercutting of efforts to use co-operative learning techniques, or the reliability of peer grading. *Owasso* frees school districts from the haunting spectre of legal liability and permits them to direct their attention to selecting appropriate pedagogies to effect student learning.

The Supreme Court’s decision in *Owasso* does not suggest any limitations on the kinds of student papers that teachers can permit peers to grade. Although the District Court observed that ‘students [did] not grade 9-week exams given at Owasso Public Schools,’<sup>87</sup> it is not clear why this kind of assignment would be different from the peer graded assignments upheld by the Supreme Court. If FERPA protection as an education record does not attach until after a grade is recorded in a teacher’s grade book, then any student assignments, including tests, would seem to be fair game for peer grading. Since the Court places great stock in peer grading as a valuable tool for teaching and learning, schools should have wide latitude in determining whether, and how extensively, they would like to use peer grading.

The Tenth Circuit’s concern about ‘juvenile malice’ in peer grading,<sup>88</sup> while a potential problem to be aware of, should not be a determining factor in prohibiting peer grading. To prohibit a useful pedagogical technique because of the abuse of one or more students is analogous to prohibiting free speech because of the ‘heckler’s veto’.<sup>89</sup> If teachers find peer grading to be a valuable teaching and learning vehicle, then attention should be directed toward punishing the abusers rather than depriving the non-abusing students of an effective learning strategy.

## **Conclusion**

The Supreme Court in *Owasso* has exercised judicial restraint by not intruding into the classroom operation of public schools. Instead of creating an enforceable right for parents that could have opened the litigation floodgates for schools, the Court has refused to be drawn into questions of classroom management. The Court was clear, subject to amendment of FERPA by Congress, that peer grading is a matter of pedagogy and not a proper matter within the expertise of courts. Whether Congress would choose to extend the reach of FERPA to classroom pedagogies is unknown.

The Court has provided a workable theory for balancing student privacy and school management of its academic programs. The more that the issues pertain to the teaching and learning in the classroom, the less likely that courts should intervene. The debate regarding what methodologies are appropriate in a class need to be played out in a forum other than the courtroom.

What this case means for school officials is that they have the responsibility to determine what pedagogies they will permit in their schools. Schools need to engage in dialogue with their

teachers concerning what approaches to learning should be permitted and the extent to which individual teachers will be free to select among acceptable pedagogies for classroom instruction.

In light of the Court's decision that parents have no enforceable right to prohibit a particular pedagogy, an open question exists for some as to whether school officials will still want to notify parents of the pedagogies that will be used in the district. Peer grading has gained notoriety because of *Owasso*, but it is obviously not the only classroom pedagogy. If the district is going to notify parents as to peer grading, what about others that teachers use which some parents may find objectionable, such as role playing or group problem solving?<sup>90</sup> Where will the district draw the line as to which pedagogies occurring in the classroom need to be brought to the attention of parents? If the parents need to be notified, should they also have the opportunity to sign consent forms as to whether they want their children to participate in a particular pedagogy?

Perhaps, the lesson from the Court in *Owasso* is that school officials should be less concerned about student embarrassment over failure and more concerned about the learning that should be taking place in the classroom. When many students, especially in urban schools, are performing abysmally on proficiency exams, schools may be better served to adopt pedagogies such as peer grading that not only help students learn from their mistakes, but also can be used to teach respect for each student's abilities.

## **Keywords**

Students' right to privacy, peer grading, US Constitution.

## **Endnotes**

1. U.S. CONST. amend. IV.
2. The Fourth Amendment provides that a warrant to search a person or a person's home or effects 'shall [not] issue, but upon probable cause ...'
3. See *Kyllo v. U.S.*, 121 S.Ct. 2038 (2001) where the Court refused to lower the level of protection for home occupants from police use of infrared scanners.
4. In a case decided under a State of New Jersey constitutional provision similar to the Fourth Amendment, the Supreme Court of New Jersey held that law enforcement officials could no longer use the intimidation of their presence to solicit consent searches of the automobiles of persons whom they have stopped for traffic violations. The court stated that, henceforth, officials must have a reasonable and articulable suspicion before they could search vehicles. See *State v. Carty*, \_\_\_ A.2d \_\_\_ (2002 WL 334169) (N.J. 2002).
5. See *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921 (6<sup>th</sup> Cir. 2000) where the Sixth Circuit Court found no privacy violation for a football student placed on 'hold' as to his participation after the coach, on the recommendation of the principal, checked the student's medical records in his student file to learn that the student was a hemophiliac and had hepatitis B.
6. 20 U.S.C. § 1232g.
7. See 20 U.S.C. § 1232g(a)(1)(A) and (B).

8. For a list of exceptions to a student's privacy interests protecting access to or disclosure, see generally, 20 U.S.C. § 1232g(b)(1)(A)-(J).
9. See 20 U.S.C. § 1232g(f) where '[t]he Secretary [of Education] shall take appropriate actions to enforce this section ...' and (g) where '[t]he Secretary shall establish or designate an office and review board within the Department for the purpose of investigating, processing, reviewing, and adjudicating violations of this section ...'
10. Federal courts have consistently held that FERPA does not grant a private cause of action, (*see, e.g., Frazier v. Fairhaven Sch. Committee*, 122 F.Supp.2d 104 [149 Ed.Law Rep. 423] (D.Mass. 2000)), but have divided as to whether a claim can be brought under section 1983, (*cf. Tarka v. Cunningham*, 917 F.Supp. 890 [63 Ed.Law Rep. 746] (5<sup>th</sup> Cir. 1990) [section 1983 claim possible]) with *Gundlach v. Teinstein*, 924 F.Supp. 684 [109 Ed.Law Rep. 1194] (E.D.Pa. 1996) [section 1983 not possible]).
11. *Falvo v. Owasso Indep.Sch.Dist.* No. I-001, 146 F.Supp.2d 1137 [155 Ed.Law Rep.272] (N.D.Okla. 1999), rev'd, 233 F.3d 1201 [149 Ed.Law Rep. 662] (10<sup>th</sup> Cir. 2000), rev'd and remanded *Owasso Indep.Sch.Dist. No. I-011 v. Falvo*, 122 S.Ct. 934 (2002)
12. FERPA specifically provides that no funds will be available to any educational institution which 'has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school ... the right to inspect and review the education records of their children'. For parents of students who have reached 18 or how have graduated from high school, parents still have access to a child's records if a child is 'a dependent student of such parents'. 20 U.S.C. § 1232g(a)(1)(A).
13. Directory information includes the following: 'the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognised activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student'. 20 U.S.C. § 1232g(a)(5)(A).
14. See 20 U.S.C. §1232g(a)(5)(A) and (B) which identifies the content of 'directory information' and the notice which must be given to students, and parents of students under 18 and who have not yet graduated from high school, about the directory information to be revealed and the right to object to release.
15. For a complete list of exceptions, see 20 U.S.C. 1232g(b)(1)(A)-(J).
16. 20 U.S.C. §1232g(b)(1)(E)(ii).
17. 20 U.S.C. §1232g(b)(1)(G).
18. 20 U.S.C. §1232g(a)(2)(B) (student and parents must be notified of subpoena prior to the institution's compliance).
19. 20 U.S.C. §1232g(b)(1)(I).
20. 20 U.S.C. §1232g(a)(4)(A).
21. 20 U.S.C. §1232g(a)(4)(B)(i) and (ii).
22. 20 U.S.C. §1232g(f) and (g).
23. 20 U.S.C. §1232g(a)(2).
24. See *Frazier v. Fairhaven Sch. Committee*, 122 F.Supp.2d 104 [149 Ed.Law Rep. [423]] (D.Mass. 2000); *Hatfield v. East Grand Rapids Pub. Schs.*, 960 F.Supp. 1259 [118 Ed.Law Rep. [257]] (W.D. Mich. 1997); *Belanger v. Nashua, N.H., Sch. Bd.*, 856 F.Supp. 40 [93 Ed.Law Rep. [570]] (D.N.H.

- 1994); *Morris v. Board of Educ. Of Greenwood Community Sch. Corp.*, 797 F.Supp. 1452 [77 Ed.Law Rep. [255]] (S.D.Ind. 1992).
25. Section 1983 is solely a remedies statute for damages and creates no substantive rights of its own. The statute provides in part: 'Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...'
  26. For cases supporting a section 1983 claim under FERPA, see *Tarka v. Cunningham*, 917 F.2d 890 [63 Ed.Law Rep. [746]] (5<sup>th</sup> Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 [35 Ed.Law Rep. [71]] (2d Cir. 1986); *Achman v. Chisago Lakes Indep. Sch. Dist.* No. 2144, 45 F.Supp.2d 664 [135 Ed.Law Rep. [143]] (D.Minn. 1994); *Doe v. Knox County Bd. Of Educ.*, 918 F.Supp. 181 [108 Ed.Law Rep. [134]] (E.D.Ky. 1996); *Maynard v. Greater Hoyt Sch. Dist.* No. 61-4, 876 F.Supp. 1104 [98 Ed.Law Rep. [126]] (D.S.D. 1995); *Belanger v. Nashua N.H. Sch. Dist.*, 856 F.Supp. 40 [93 Ed.Law Rep. [570]] (D.N.H. 1994); *Norwood v. Slammons*, 788 F.Supp. 1020 [74 Ed.Law Rep. [128]] (E.D.Pa. 1996). For cases denying a section 1983 claim, see *Gundlach v. Teinstein*, 924 F.Supp. 684 [109 Ed.Law Rep. [1194]] (E.D.Pa. 1996); *Norris v. Board of Educ. Of Greenwood County Sch. Corp.*, 797 F.Supp. 1452 [77 Ed.Law Rep. [255]] (S.D.Ind. 1992).
  27. The Supreme Court has granted certiorari in *Gonzaga University v. Doe*, 122 S.Ct. 865 (2002) to consider a decision of the Supreme court of Washington upholding a section 1983 private cause action by a student against a university under FERPA. See *Doe v. Gonzaga Univ.*, 24 P.3d 390 [154 Ed.Law Rep 963] (Wash. 2001)
  28. *Owasso*, 146 F.Supp.2d at 1138.
  29. *Id.* at 1138, 1139.
  30. *Id.* at 146 F.Supp.2d at 1139, citing to *F.E.R. v. Valdez*, 58 F.3d 1530 (10<sup>th</sup> Cir. 1995) (patients whose records had been seized when their psychiatrist was investigated for Medicare fraud had no constitutional claim to privacy because of the government's compelling interest in investigating fraud).
  31. *Owasso*, 146 F.Supp.2d at 1140.
  32. *Id.*
  33. 233 F.3d at 1217.
  34. The reasoning of the school district is that, since FERPA requires that those maintaining education records must have an 'access record' for each education record, teachers would have to prepare an access record for each assignment students grade 'identifying that person's [i.e., the students grading papers] ... interest in accessing the student's [i.e., the student whose work is being graded] education records [i.e., the assignment being graded]'. *Id.* at 1218. A teacher supervising the maintenance of such access records for each student's assignment would most probably more than consume whatever time the teacher would save by having the students grade other students' papers rather than grading papers her/himself. For the requirement regarding keeping access records, see 20 U.S.C. 1232g(b)(4)(A).
  35. *Id.* at 1218, note 13 (the school district argued that student grading of papers 'allows for immediate feedback to the students' and 'relieves the teacher of the time-consuming task of correcting the papers'.)
  36. The Court's opinion was written by Justice Kennedy, with a concurring opinion by Justice Scalia.
  37. A unanimous Court is unusual especially in education cases. In order to find another education case where the members of the Court unanimously concurred in the judgment, one must go back almost a

decade to *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 [83 Ed.Law Rep. 30] (1993) where the Court upheld, under free speech, the right of a church to show a religious film series on public school property during non-school hours.

38. The Court follows its time-honored practice of not resolving a case on constitutional grounds if it can be resolved on statutory grounds. See *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) where, in a dispute involving whether the *National Labor Relations Act (NLRA)* applied to union representation of lay teachers in religious schools, the Court limited its inquiry to a statutory interpretation of NLRA that Congress had not expressed an intent to include religious schools within the statute, without addressing the constitutional question whether application of NLRA to religious schools would violate the Establishment Clause.
39. *Owasso*, 122 S.Ct. at 940.
40. *Id.*
41. *Id.*
42. *Id.*
43. 20 U.S.C. § 1232g(a)(4)(A)(ii) defines education records as those that 'are maintained by an educational ... institution or by a person acting for such ... institution'.
44. *Owasso*, 122 S.Ct. at 941.
45. *Id.*
46. *Id.* at 942.
47. *Id.*
48. *Id.*
49. *Id.*
50. 20 U.S.C. § 1232g(a)(2).
51. For hearing requirements, see 34 C.F.R. § 99.22.
52. *Owasso*, 122 S.Ct. at 942-43
53. *Id.* at 943.
54. U.S.Const. amend. X.
55. See *U.S. v. Lopez*, 514 U.S. 549 (1995) where the Court held that the *Gun-Free School Zones Act*, making it a federal offense for any individual knowingly to possess firearm at place that individual knows or has reasonable cause to believe is school zone, exceeded Congress' commerce clause authority, since possession of gun in a local school zone was not economic activity that substantially affected interstate commerce.
56. Among the federal statutes that require reception of federal assistance before they can be invoked as a remedy are title IX that prohibits discrimination on the basis of gender [20 U.S.C. §§ 1681-86] and title VI that prohibits discrimination on the basis of race and national origin [42 U.S.C. § 2000d].
57. *Id.* at 949.
58. *Id.* at 950.
59. See *Roe v. Wade*, 410 U.S. 113 (1973) where the Court announced a privacy interest in independence in making certain kinds of important decisions under the liberty clause of the Fourteenth Amendment, and *Whalen v. Roe*, 429 U.S. 589, 599 (1977) where the Court recognised an 'individual interest in avoiding

disclosure of personal matters' in a case where the State of New York required copies of all prescriptions for certain regulated drugs be sent to a state department.

60. For a statement of the tripartite test, *see supra* note 22 and accompanying text.
61. In *Denver Policemen's Protective Ass'n v. Lichtenstein*, 660 F.2d 432 (10th Cir.1981), the Tenth Circuit adopted a test for determining whether information contained in personnel files is of such a highly personal or sensitive nature that it falls within the zone of confidentiality. 'In applying this test the court must consider, (1) if the party asserting the right has a legitimate expectation of privacy, (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner'. *Id.* at 435. See also, *F.E.R. v. Valdez*, 58 F.3d 1530 (10<sup>th</sup> Cir. 1995) (state seizure of psychiatrist's records to investigate Medicare fraud did not violate patient privacy); *Flanagan v. Munger*, 890 F.2d 1557 (10<sup>th</sup> Cir. 1989) (police chief's disclosure of reprimands against police officers for operating adult video store not violation of privacy even if it violated free speech).
62. *Owasso*, 233 F.3d at 1209.
63. *Id.*
64. 469 U.S. 325 [21 Ed.Law Rep. 1122] (1985).
65. *Id.* at 339.
66. *Id.* at 340.
67. *Id.* at 343.
68. 515 U.S. 646 [101 Ed.Law Rep. 37] (1995).
69. *Id.* at 656-57.
70. The peer-grading and reporting process was not widely accepted within the Owasso Public Schools so the students affected depended on the pedagogy selected by individual teachers. *See Owasso*, 146 F.Supp.2d at 1140.
71. *See Tannahill v. Lockney Indep. Sch. Dist.*, 133 F.Supp.2d 919 [152 Ed.Law Rep. 549] (N.D.Tex. 2001) where the court invalidated a random drug testing policy for all students in grades 6-12.
72. *See e.g., Todd v. Rush Schs.*, 133 F.3d 984 [125 Ed.Law Rep. 18] (7<sup>th</sup> Cir. 2000).
73. *Cf. Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 [144 Ed.Law Rep. 866] (7<sup>th</sup> Cir. 2000) (school policy requiring random drug testing for all students in non-athletic extracurricular activities upheld) with *Earls v. Bd. of Educ. of Tecumseh Pub. Schs.*, 242 F.3d 1264 [151 Ed.Law Rep. 752] (10<sup>th</sup> Cir. 2001) (school policy requiring random drug testing of students participating in non-athletic extracurricular activities invalidated)
74. *See Earls v. Board of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264 [151 Ed.Law Rep. 752] (10<sup>th</sup> Cir. 2001), cert granted 534 U.S. \_\_\_\_ (2001) where the Court will review the extension of random drug testing to all student in extracurricular activities.
75. 20 U.S.C. § 4071 (statute requires schools with limited open forum that prohibit schools with noncurricular-related student-initiated and student-led clubs from refusing to permit religious clubs from meeting). *See Bd. of Westside Community Schs. v. Mergens*, 496 U.S. 226 [60 Ed. Law Rep. 320] (1990)
76. *See Owasso*, 233 F.3d at 1209.
77. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (Court struck down state statute prohibiting use of a foreign language in non-foreign language courses); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)

- (Court struck down state statute requiring that all students attend public schools); *Yoder v. Wisconsin*, 406 U.S. 205 (1972) (Court invalidated application of state's compulsory attendance law that would have required Amish parents to send their children for two years to public high schools).
78. See e.g., *Mozert v. Hawkins County Sch. Bd.*, 827 F.2d 1058 [41 Ed.Law Rep. 473] (6<sup>th</sup> Cir. 1987) (parent who objected on religious grounds to school's reading series for her child was not entitled to have school authorities substitute an alternative reading series); *Settle v. Dickson County Pub. Sch. Bd.*, 53 F.3d 152 [100 Ed.Law Rep. 32] (6<sup>th</sup> Cir. 1995) (parent claim of free speech claim violation where teacher had erroneously denied a student's request to write a biography on Jesus Christ was denied in deference to school's authority to determine curriculum). But see, *C.H. v. Oliva*, 195 F.3d 167 [139 Ed.Law Rep. 180] (3d Cir. 1999), rev'd in part on procedural grounds 226 F.3d 198 [148 Ed.law Rep. 585] (3d Cir. 2000) where a student whose religious artwork was removed, and then replaced in a less prominent place, may have a free speech claim).
  79. *Id.*
  80. *Id.*
  81. *Id.*
  82. *Owasso*, 122 S.Ct. at 941.
  83. See *Owasso*, 146 F.Supp.2d at 1140.
  84. *Owasso*, 122 S.Ct. at 941.
  85. 484 U.S. 260 [43 Ed.Law Rep. 515] (1988) (Court upheld, over free speech claim of students, authority of school officials to control the content of school newspaper which was part of the school's curriculum, using a reasonableness standard).
  86. *Owasso*, 122 S.Ct. at 941.
  87. *Owasso*, 146 F.Supp.2d at 1140.
  88. See *Owasso*, 233 F.3d at 1217.
  89. The concept of the 'heckler's veto' owes its origin to *Terminiello v. U.S.*, 337 U.S. 1 (1949) where the Court reversed the conviction of a person for allegedly causing a disturbance during his speech in a building. The Court observed that, 'a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger ... That is why freedom of speech ... is ... protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest'. *Id.* at 3. See also *Jones v. Board of Regents of University of Ariz.*, 436 F.2d 618 (9<sup>th</sup> Cir. 1970) In striking down a university regulation prohibiting handbills on campus, the court invoked the concept of the 'heckler's veto' to support the student's exercise of free speech'

Jones was lawfully and nonviolently exercising rights guaranteed to him by the Constitution of the United States. It is clear to us that the police had the obligation of affording him the same protection they would have surely provided an innocent individual threatened, for example, by a hoodlum on the street. A politically motivated assault is no less illegal than assaults inspired by personal vengeance or by any other unlawful motive. Indeed, in this case, the action of the police was misdirected. It should have been exerted so as to prevent the infringement of Jones' constitutional right by those bent on stifling, even by violence, the peaceful expression of ideas or views with which they disagreed.

*Id.* at 621.

90. *See e.g., Mozert*, supra note 59 at 479 where the parent objected to methodologies that might be used to present concepts objectionable to her religious beliefs.