

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX. REL.,)	
SIDNEY SOUFFRANCE,)	Supreme Court Case No. 2011-0823
)	
Relator-Appellant,)	On Appeal from the Hamilton County
)	Court of Appeals, First Appellate
v.)	District, Case No. C 110090
)	
LIFE SKILLS CENTER OF)	
CINCINNATI, INC.,)	
)	
Respondent-Appellee.)	

MERIT BRIEF OF RESPONDENT/APPELLEE LIFE SKILLS CENTER OF CINCINNATI, INC.

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I. STATEMENT OF CASE AND FACTS

Relator Sidney Souffrance (“Souffrance”) brings this direct appeal from the judgment of the Court of Appeals of Ohio for the First District (“First District”) denying his petition for a writ of mandamus to compel Life Skills Center of Cincinnati, Inc. (“LSC”) to produce records related to former students who attended class with Souffrance and Kelly Lynn Vaughn in 2002. (*See* Mot. to Dis., T.R. 4 at p. 5).

LSC is a non-profit community charter school providing educational, vocational, and career placement services to at-risk students. (*See* Mot. to Dis., T.R. 4, at p. 5). In 2002, Souffrance enrolled as a student at LSC. (*See* Mot. to Dis., T.R. 4, at p. 5).

On June 28, 2005, Souffrance was indicted for engaging in forced sexual conduct with Ms. Vaughn in violation of R.C. § 2907.02(A)(2). (*See* Mot. to Dis., T.R. 4, at p. 5).

On March 17, 2006, a jury trial was held in the Court of Common Pleas for Hamilton County, Ohio, and Souffrance was convicted of one count of rape. Souffrance was sentenced to seven (7) years in prison and is serving his sentence at the London Correctional Institution located in London, Ohio. (*See* Mot. to Dis., T.R. 4, p. 5).

On January 6, 2011, Souffrance sent a letter to LSC titled PUBLIC RECORDS REQUEST. The letter requested attendance records, addresses, and telephone numbers of all LSC students in Lab No. 3 & 4 for 1st and 2nd session from May 2002 to June 2002. The January 6, 2011 letter also requested “user terminal records” pertaining to Souffrance and Ms. Vaughn. (*See* Compl. In Mand, T.R. 1, Ex A).

~~On January 13, 2011, Susan Steinhauer, Chief Legal Officer at White Hat Management, LLC (“White Hat”) administrator for LSC, sent a letter to Souffrance confirming receipt of the January 6, 2011 letter, and informing Souffrance that LSC required signed authorizations from~~

the individual students whom Souffrance was requesting information. (*See* Compl. In Mand, T.R. 1, Ex. D).

On January 18, 2011, Souffrance sent a letter to Records Custodian at LSC making the identical request reflected in the January 6, 2011 letter, but adding “3rd session.” (*See* Compl. In Mand, T.R. 1, Ex. B).

On February 14, 2011, Souffrance filed a Complaint for Writ of Mandamus Compelling Production Of Or Access To Public Record allegedly maintained by the Records Custodian for LSC (“Complaint”). (*See* Compl. In Mand, T.R. 1)

On March 9, 2011, LSC filed a Motion to Dismiss asserting: (1) the requested records were prohibited from disclosure under the Family Educational Rights and Privacy Act (“FERPA”) 20 U.S.C. §1232g(b) and (d); (2) Souffrance did not sufficiently identify the records requested; and (3) Souffrance’s request did not pertain to “records.”¹ (*See* Mot. to Dis., T.R. 4).

On March 21, 2011, Souffrance filed Relator’s Reply to the Motion to Dismiss, setting forth similar to arguments asserted in the Merit Brief of Appellant; namely that the requested information pertains to individuals who are no longer “students” and therefore the FERPA did not prohibit disclosure. (*See* Reply to Mot. Dis., T.R. 7).

The same day, Souffrance filed a Motion for Summary Judgment arguing LSC did not promptly provide records and on that basis alone he was entitled to the writ of mandamus and statutory damages. (*See* Mot. Sum. Jud., T.R. 6).

On March 31, 2011, LSC filed an Opposition to Relator’s Motion for Summary Judgment, arguing Souffrance had presented no evidence in support of summary judgment, and,

¹ Respondent provided Relator with his entire educational record prior to filing its Motion to Dismiss, thereby mooting any claim regarding his own educational record. *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm.* 120 Ohio St.3d 372, 384, 899 N.E.2d 961, 973 (2007).

even if he had, LSC was prohibited from disclosing requested information under state and federal law. (*See* Opp. to Mot. Sum. Jud., T.R. 8).

On April 20, 2011, the First District refused to issue the writ, and entered judgment in favor of LSC dismissing the Complaint. (*See*, Entry, T.R. 12) (Appx. 1).

On May 13, 2011, Souffrance filed a Notice of Appeal with the Supreme Court of Ohio asserting this case constitutes a substantial constitutional question and is of great public or general interest. Souffrance did not file a Memorandum in Support of Jurisdiction with the Notice of Appeal. (Appx. 2).

On July 6, 2011, Souffrance filed a Merit Brief arguing three propositions of law: (1) records of non-students are public records; (2) FERPA does not prohibit disclosure of non-student records; and (3) R.C. § 149.43 imposes a duty on LSC to produce the requested records.

II. LAW AND ARGUMENT

The sole issue presented on appeal is whether the First District, in refusing to issue the writ, abused its discretion. *State, ex rel. Casey Outdoor Advertising, Inc. v. Ohio Dept. of Transp.* 61 Ohio St. 429, 430, 575 N.E.2d 181, 183 (1991) (denial of writ reviewed under abuse of discretion standard). Because LSC was prohibited by state and federal law from disclosing student educational records, and Souffrance does not have a clear legal right to the requested information, the First District did not abuse its discretion when refusing to issue the writ and properly dismissed the Complaint. Accordingly, LSC respectfully moves the Court to affirm the judgment of the First District.

Counter Proposition of Law No. 1:

**LSC IS PROHIBITED FROM DISCLOSING STUDENT EDUCATIONAL RECORDS
UNDER STATE AND FEDERAL LAW**

Revised Code § 149.43(A) defines “public record” as:

Records kept by any public office, including but not limited to state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. “Public record” does not mean:

(v) Records the release of which is prohibited by state or federal law;

In this matter, Souffrance requested information and documents expressly excluded from the statutory definition of “public record” because state and federal law prohibits disclosure of student information without written authorizations from the individual students subject to the requests. *See* R.C. § 3319.321 (A) and (B) (no person shall release, or permit access to, directory information concerning students without written consent of parent or student if student is over eighteen years of age); *see also* 20 U.S.C. § 1232g(b) and (d) (written authorization and release required under FERPA). Souffrance has not provided the required authorizations. The United States Congress and the Ohio State Legislature have conclusively demonstrated the sensitive nature of student educational records by enacting legislation which prohibits disclosure without the written consent of a parent, or student when the student is over the age of eighteen. The ~~legislation applies a broad brush when determining what type of records and information~~ constitutes student records. R.C. § 3319.321 (B)(1) (“directory information” means student’s name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities or sports, weight, height, dates of attendance, date of graduation,

and awards received); *U.S. v. Miami U.* 294 F.3d 797, 812 (6th Cir. 2002); *citing* 20 U.S.C. § 1232g(a)(4)(A) (educational records defined as those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution). LSC's requirement that Souffrance obtain written authorizations from the individual students prior to disclosing confidential educational records comports with the protections embodied under FERPA and the Ohio Revised Code. Thus, the Court should affirm the decision of the First District in denying the writ.

In his Brief, Souffrance argues the faulty proposition that disclosure of the requested educational records and information is not prohibited under the FERPA because the individual students are no longer enrolled in LSC. However, 20 U.S.C. § 1232g(a)(6) states:

For the purposes of this section, the term "student" includes any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution.

Thus, FERPA prohibits disclosure of student educational records whether the individual is a past or present student so long as the educational institution or agency maintains records of the student's attendance. Despite arguments presented in the Merit Brief of Appellant, the only way an individual can be deemed a "non-student" is if the individual did not attend LSC, in which case there would be no records to produce. Accordingly, the Court should affirm the decision of the First District in denying the writ because disclosure of the requested information is prohibited by state and federal law.

Counter Proposition of Law No. 2

**SOUFFRANCE DOES NOT HAVE CLEAR LEGAL RIGHT
TO THE REQUESTED INFORMATION**

Souffrance's request for "computer user terminal records" is overly broad and ambiguous in that Souffrance cannot present a clear legal right to the requested information. *State ex rel. Ney v. Neihaus* 33 Ohio St.3d 118, 119, 515 N.E.2d 914, 916 (1987) (mandamus only issued upon a showing that: (1) relator has a clear legal right to the relief requested; (2) respondent is under a clear legal duty to perform the requested act; (3) relator has no plain and adequate remedy in the ordinary course of law); *State ex rel. Middletown Bd. of Edn. v. Butler Cty. Budget Comm.* 31 Ohio St.3d 251, 253, 510 N.E.2d 383, 384 (1987), citing *State ex rel. Westchester v. Bacon* 61 Ohio St.2d 42, 399 N.E.2d 81 (1980) paragraph one of the syllabus. LSC is not required to keep "computer user terminal records" and therefore such information cannot be deemed a "public record." R.C. § 3319.32 (schools are required to keep records as to exhibit students names, studies, standing, and character of work); *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Cincinnati Bd. of Edu.*, 99 Ohio St.3d 6, 8 788 N.E.2d 629,632 (2003) ("kept" is the past participle of "keep" which means to "preserve" "maintain," "hold," "detain," or "retain" or continue to have in one's possession or power especially by conscious or purposive policy). The Ohio Public Records Act requires only the disclosure of records, and because Souffrance is seeking information which is not kept as public record, the Court should affirm the denial of the writ and dismissal of the Complaint.

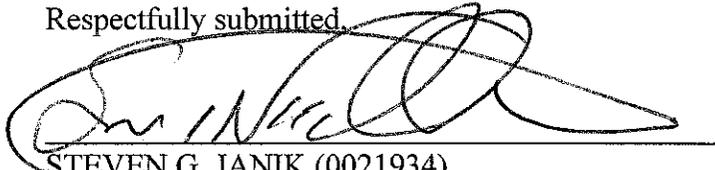
Moreover, R.C. § 149.43 creates no affirmative duty to create records by compiling information. *State ex rel. White v. Goldsberry* 85 Ohio St.3d 153, 154, 707 N.E. 496, 497 (1999) (Ohio Public Records Act does not impose duty to create new records by searching information in existing records). Souffrance is seeking information, not records, related to former student

who attended LSC and the Ohio Public Records Act does not require LSC to create records to satisfy ambiguous requests for information. Souffrance has no clear legal right to the requested information, and the Court should affirm the decision of the First District to deny the writ and dismiss the Complaint.

III. CONCLUSION

Based upon the foregoing reasons, LSC respectfully moves this Honorable Court to affirm the denial of a writ of mandamus and dismissal of the Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular

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IN THE SUPREME COURT OF OHIO

State of Ohio ex rel.)
Sidney Souffrance,)
)
Appellant,)
v.)
)
John Doe,)
Records Custodian for)
Life Skills Center,)
)
Appellee.)

Case No.: _____

On Appeal from the Hamilton
County Court of Appeals,
First Appellate District.

Court of Appeals
Case No. C 1100090

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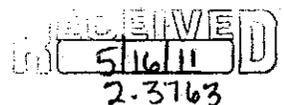
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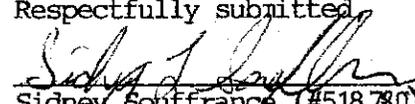
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Notice Of Appeal Of Appellant Sidney L. Souffrance

Relator Sidney L. Souffrance hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals case No. C 1100090 on April 20th, 2011.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted


Sidney Souffrance (#518.780)
Relator, Pro se

Certificate of Service

I hereby certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for appellees, (listed below), on 0 . .2011.

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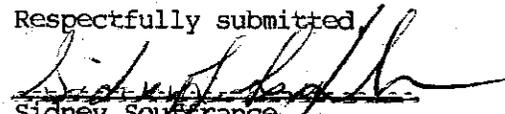
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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ENTERED
APR 20 2011

STATE OF OHIO EX REL.
SIDNEY SOUFFRANCE,

APPEAL NO. C-110090

Relator,

vs.

ENTRY GRANTING MOTION
TO DISMISS PETITION
FOR WRIT OF MANDAMUS

JOHN DOE, Records Custodian,
Life Skills Center,



D92747343

Respondent.

This cause came on to be considered upon the relator's petition for a writ of mandamus, the respondent's motion to dismiss, and the relator's memorandum in opposition.

The Court finds that the motion to dismiss is well taken and is granted under Civ.R. 12(B)(6). The relator has not established a clear legal duty on the part of respondent to provide the records requested. The relator's request for school records of the other student are not subject to release under 20U.S.C.A. 1232g, and as a result, they are not considered public records available for inspection and copying under R.C. 149.43(A)(1)(v).

The petition for writ of mandamus is dismissed. The relator's motion for summary judgment is overruled as moot. The motion of LS Cincinnati, LLC for leave to intervene is similarly overruled as moot.

To The Clerk:

Enter upon the Journal of the Court on APR 20 2011 per order of the Court.

By: _____

Presiding Judge

(Copies sent to all counsel)