Supreme Court of Ohio Clerk of Court - Filed January 15, 2015 - Case No. 2014-0749

Case No. 2014-0749

IN THE

Supreme Court of Ohio

STATE EX REL. SCHOOL CHOICE OHIO, INC.,

Relator,

v.

CINCINNATI PUBLIC SCHOOL DISTRICT ET AL.,

Respondents,

Original Action in Mandamus

MERITS BRIEF OF RELATOR SCHOOL CHOICE OHIO, INC.

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INTRODUCTION

This case is about whether an Ohio public school district that fears losing an increasing share of its state funding can purposefully avoid complying with Ohio's Public Records Act by invoking a federal statute that specifically allows it to disclose the requested records to suppress the requesting party's ability to disseminate information to students and their families about the school choice options available to them under Ohio law. School Choice Ohio respectfully submits that the answer to this question must be "no."

Starting in 1995, when the General Assembly implemented Ohio's first school choice program to provide scholarships for students in the Cleveland School District—which at the time was under the supervision of the U.S. District Court for the Northern District of Ohio—Ohio has implemented multiple school choice scholarship programs to help Ohio's children receive the education they need. These programs serve two important purposes. First, they provide a direct and immediate outlet for students that have been assigned to poorly-performing traditional public schools or schools that do not otherwise meet their needs. Second, and most relevant to this case, school choice programs create incentives for systemic improvement as traditional public schools seek to maintain their enrollment levels—and per-pupil funding—in the face of new alternatives. School Choice Ohio, Inc. ("School Choice Ohio") works to maximize both by reaching out to Ohio families to inform them about the education options available for their children.

To fulfill that mission, School Choice Ohio makes annual public records requests of Ohio school districts for current contact and related information for students eligible to take advantage of Ohio's school choice programs. Nearly every district readily provides

their public records containing the information School Choice Ohio needs. But not Springfield City School District ("Springfield").

Fearing that it would lose even more of its state funding if additional students were to take advantage of Ohio's school choice programs, Springfield has carried out an "aggressive" plan to "fight back" by trying to silence School Choice Ohio. As part of its plan, Springfield changed a long-standing policy pursuant to which it had for years disclosed the records and information at issue as "directory information" under the Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA"). Having changed that policy, Springfield has refused School Choice Ohio's public records request on the basis that, due to its policy change, FERPA now prohibits it from releasing the records School Choice Ohio requested for the 2014-2015 school year.

The Court should reject Springfield's cynical attempt to avoid competition and preserve its state funding by keeping its students and their families ignorant of their options under Ohio law.

Despite Springfield's machinations, FERPA does not prohibit it from producing the records School Choice Ohio requested. On the contrary, Springfield could readily produce those records by giving the same "directory information" notice it provided for many years before changing its policy in direct response to School Choice Ohio's requests, and FERPA specifically allows it to produce those records to comply with a judicial order compelling production. Moreover, FERPA does not apply at all to the many families who have expressly consented to the district releasing that same information pursuant to the new policies and practices Springfield adopted to mitigate the effect of changing its "directory information"

policy. Finally, irrespective of its public records obligations, R.C. 3319.321 requires Springfield to produce the information School Choice Ohio requested because the district has produced that same information to other third parties.

Simply put, Springfield has no legitimate basis to withhold production of the public records that School Choice Ohio requested. The Court therefore should find that FERPA does not prohibit Springfield from producing the public records School Choice Ohio requested, grant the requested writ of mandamus, and enter an order compelling Springfield to (i) produce all of the public records School Choice Ohio requested, (ii) amend its policies and practices to be consistent with its obligations under Ohio law, including R.C. 149.43 and R.C. 3319.321, (iii) pay School Choice Ohio statutory damages, and (iv) reimburse School Choice Ohio for its attorneys' fees and expenses, including court costs, in an amount to be determined following entry of the Court's order on the merits.

STATEMENT OF THE CASE AND RELEVANT FACTS

A. School Choice Ohio Works to Educate Families Regarding Their School Choice Rights and Opportunities

1. School Choice in Ohio

Ohio's almost twenty-year experience with school choice in many respects grew out of the landmark civil rights case that led to the desegregation of the Cleveland School District, *Reed v. Rhodes*, Case No. 1:73 CV 1300, in the U.S. District Court for the Northern District of Ohio.

Finding that the Cleveland School District was in a "crisis of magnitude," Judge Krupansky in 1995 took the extraordinary—and necessary—measure of placing the entire Cleveland School District under state, instead of local, control. *See Reed v. Rhodes*, N.D.

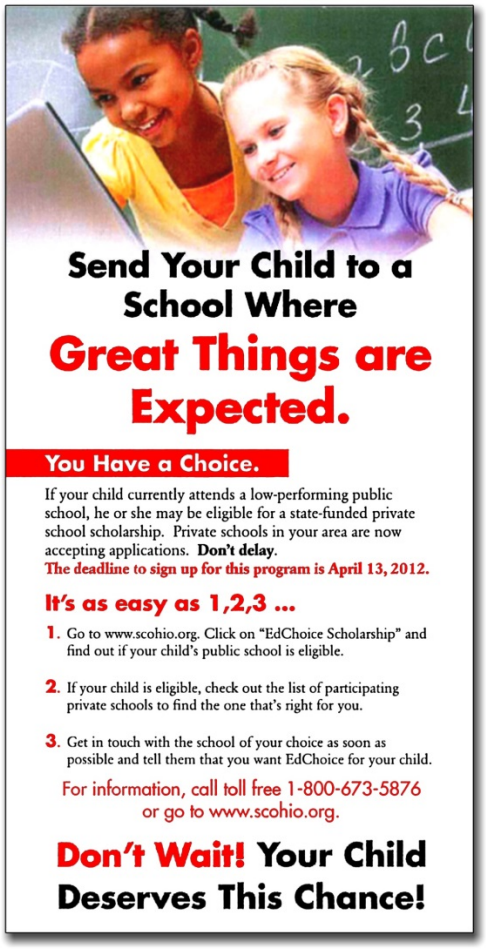
Ohio No. 1:73 CV 1300 (Mar. 3, 1995). Shortly thereafter, the General Assembly enacted the "Cleveland Scholarship and Tutoring Program" to provide scholarships for students in the Cleveland School District to attend private schools within the district or public schools bordering the district. *See* R.C. 3313.974 to 3313.979 (Anderson 1999 and Supp. 2000).

School choice in Ohio has grown substantially since 2002, when the U.S. Supreme Court affirmed the constitutionality of the Cleveland Scholarship and Tutoring Program in *Zelman v. Simmons-Harris,* 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002). After an initial expansion in 2003 to provide school choice scholarships to parents of Ohio students on the autism spectrum, the General Assembly brought school choice to the entire state by enacting the Educational Choice Scholarship Program, commonly referred to as "EdChoice." *See* R.C. 3310.01 *et seq*. Initially, EdChoice provided for up to 14,000 scholarships for Ohio students who were attending, entering, or assigned to attend low-rated public schools, as identified by the Ohio Department of Education. *See* R.C. 3310.03. After increasing the number of available scholarships to 60,000 in 2011, Ohio substantially expanded the scope of EdChoice in 2013 to also make eligible students whose family income is at or below 200 percent of the federal poverty guidelines. *See* R.C. 3310.032.

2. <u>School Choice Ohio's Outreach Efforts</u>

School Choice Ohio, a Columbus-based not-for-profit corporation, is the only statewide organization that educates parents on their education options and advocates for the expansion of quality options for every Ohio child. (Affidavit of Sarah Pechan ("Pechan Aff."), filed on May 12, 2014, ¶ 2.)

A key component of School Choice Ohio's mission involves reaching out to eligible families to educate them about their school choice options under Ohio law. (Pechan Aff. ¶ 3.) The following is a representative example of the types of educational materials that School Choice Ohio distributes:



(SCO Exh. G:0195.[1]) To carry out its educational mission, School Choice Ohio needs to know which students are eligible for Ohio's school choice options and how to contact their families. (*Id.*) Ordinarily, School Choice Ohio obtains that information by making public records requests to school districts in Ohio. (*Id.* ¶ 4.) It then then uses the information it

[1] Citations to "SCO Exh." refer to the evidence filed by School Choice Ohio on January 5, 2015, with the relevant page(s) identified by exhibit letter followed by a colon and the relevant page number(s).

receives to reach out to the families of students who may be eligible for Ohio's school choice programs by mail, phone, email, social media and community events to inform them about the education options available for their children. (*Id.* ¶ 3.)

Most districts readily comply with School Choice Ohio's public records requests because the contact and related information School Choice Ohio requests qualifies as "directory information" that can be released without parental consent under FERPA. (Pechan Aff. ¶ 4.) Springfield, however, has actively and improperly resisted School Choice Ohio's public records requests over multiple years, including School Choice Ohio's public records request for the 2014-2015 school year, which is the request at issue in this case.

B. Springfield's "Aggressive Plan" to "Fight Back" Against School Choice Ohio To Stem The Decline Of Its State Funding

1. Springfield's "Aggressive" Retention Initiative

During the most recent school year, Springfield had 7,660 students enrolled across ten elementary schools, three middle schools, one high school, one preschool and one alternative school. (Affidavit of Dale R. Miller, SCSD Evidence Vol. 3 ("Miller Aff."), ¶ 2.[2]) Of Springfield's sixteen schools, seven received Performance Index of "D" or "F" for the 2013-2014 school year and are designated public school under EdChoice for the 2014-2015 school year due to poor performance. (*See* Ohio Dep't of Ed., *EdChoice Scholarship Program, List of Designated Public Schools*, http://education.ohio.gov/getattachment/Topics/Other-Resources/Scholarships/EdChoice-Scholarship-Program/ECDesignatedPublicSchools2014_2015.pdf.aspx (accessed Jan. 11, 2015).)

[2] Citations to "SCSD Evid. Vol. _" refer to the evidence filed by Springfield City School District on December 31, 2014.

Over many years, its poor performance has led Springfield to lose tens of millions of dollars in state funding as its students choose to enroll in private schools with the assistance of EdChoice and other state scholarships. (Miller Aff. ¶¶ 4-6.) For the 2011-2012 school year, students taking advantage of Ohio school choice programs including EdChoice led to a nearly $12.5 million reduction in Springfield's funding from the State of Ohio. (*Id.* ¶ 4.) Its losses increased to more than $13 million the following year as additional students took advantage of Ohio's school choice programs. (*Id.* ¶ 5.)

Faced with having to compete to survive, Springfield decided to "fight back." (Jan. 31, 2013 email from C. Mohr to K. Robertson, SCO Exh. J:0076-77.) That led Springfield to devise and implement an "aggressive program to retain students it was losing to other schools," which it dubbed the "Retention Initiative." (Affidavit of Dr. David Estrop, SCSD Evidence Vol. 1 ("Estrop Aff."), ¶ 3.) Springfield's Retention Initiative included an "Economic Necessity" assessment that included a detailed analysis of how many of Springfield's potential students were taking advantage of Ohio's school choice programs:

Springfield

Economic Necessity and Opportunity

Choosing Other High School:
Open enrolled out (county schools) => 290
(open enrolled in: 53)
Net Loss: 237 students = $1,353,243

EdChoice vouchers =64
Catholic Central => 35; Emmanuel => 25
Net Loss: 64 students = $300,800

Community Schools =241
Lifeskills => 137; ECOT => 40; OVA=>20;
Net Loss: 241 students = $1,769,181

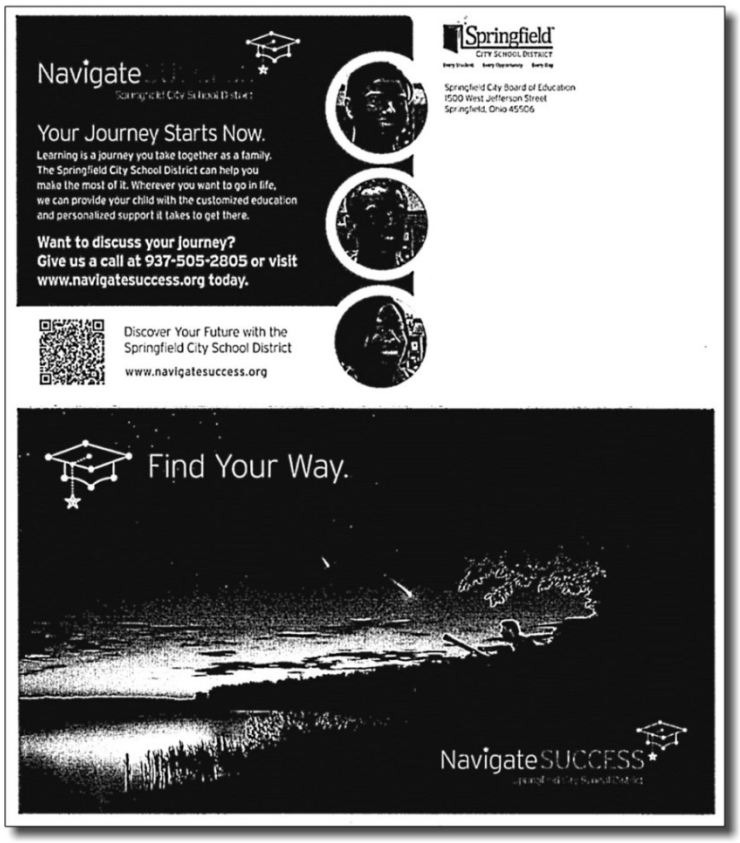
TOTAL NET LOSS (grades 9-12) 542 students
More than $3,423,224

Every Student | Every Opportunity | Every Day

(SCO Exh. J:0086.) Springfield then set out to determine "appropriate strategy and tactics" to respond to the "increasingly competitive environment" it was facing:

(SCO Exh. J:0080.) One of Springfield's strategies has been to control and suppress, to the greatest extent possible, the dissemination of school-choice related information to its students and their families.

One of Springfield's many tactics for carrying out that strategy has been to engage in a concerted effort to "publicize the opportunities" available to its students. (SCO Exh. J:0084, 0089.) That effort includes sending direct-mail advertising to the families of its students at the same addresses that School Choice Ohio has requested. (*Id.* at Exh. J:0089.) The following shows an example of Springfield's self-promotional direct mailings:



(SCO Exh. K:0029.) At the same time, as School Choice Ohio would soon learn, Springfield's tactics also include escalating efforts to silence School Choice Ohio's message by starving it of the basic information it needs to communicate its information regarding Ohio's school choice programs to the same students and families that Springfield has been targeting with its direct mailings—namely, the same contact information Springfield uses to send its own promotional materials.

2. Springfield Attempts to Thwart School Choice Ohio's Public Records Request for the 2013-2014 School Year

Springfield's first tactic for suppressing School Choice Ohio's outreach efforts was to actively resist for as long as possible the public records request School Choice Ohio made in anticipation of the 2013-2014 school year for as long as it could. While Springfield

ultimately had to turn over the records School Choice Ohio requested, its tactic set the stage for its complete refusal of School Choice Ohio's request for the following year.

School Choice Ohio's January 29, 2013, public records request called for Springfield to produce records of (i) the names and contact information for all students enrolled in grades 7-11 and (ii) all students enrolled in the seven Springfield school buildings that had been designated under EdChoice due to their overall poor performance, namely:

- Fulton Elementary School
- Keifer Academy
- Kenwood Elementary School
- Lincoln Elementary School
- Perrin Woods Elementary School
- Snyder Park Elementary School
- Warder Park-Wayne Elementary School

(Jan. 29, 2013 email from L. Graham to C. Mohr, SCO Exh. J:0105-109.) Initially, Springfield refused that request, claiming that School Choice Ohio had not "disclosed the intended use of the information" to enable the district to "make [an] independent determination of whether the intended use complies with Ohio law." (Jan. 31, 2013 letter from C. Mohr to L. Graham, SCO Exh. J:0069.) While School Choice Ohio believed that objection was legally improper, it affirmatively represented that the purpose of its request "is to share information with families about the[ir] public school options" and that School Choice Ohio is a 501(c)(3) non-profit organization. (Jan. 31, 2013, email from L. Graham to C. Mohr, SCO Exh. J:0104.) That, however, was not enough for Springfield, which responded:

> Indicating that School Choice is a 501 c (3) is insufficient. Please provide us with information about School Choice Ohio that enables us to determine if your request complies with Ohio Law.

(Feb. 4, 2013 email from C. Mohr to L. Graham, SCO Exh. J:0103-4.) School Choice Ohio responded by re-affirming that it would not use the requested information for profit-making activities and that it was the reason for its request was to inform parents about their public school options, and it provided the address for its website in case Springfield for some reason felt it needed even more information. (Feb. 4, 2013 email from L. Graham to C. Mohr, SCO Exh. J:0120.)

But that still wasn't enough for Springfield. No longer able to dispute that School Choice Ohio does not engage in profit-making activities, Springfield next demanded to review and approve the content of School Choice Ohio's intended mailings as a precondition to producing the requested public records, stating:

> In order for us to determine whether the records you are seeking are permitted to be released, ***we require a more specific description of the information about public school options which you intend to share with our students. If you have a letter or brochure you intend to mail, please send us a copy.*** If you do not yet have a final product, please describe the substance of the information you intent to mail.

(Feb. 5, 2013 email from C. Mohr to L. Graham, SCO Exh. J:0102; emphasis added.) Despite the clear impropriety of Springfield's demand, School Choice Ohio through counsel provided the materials that it intended to send Springfield students and families and made it clear that it would consider legal action if Springfield did not provide the requested records. (Apr. 9, 2013 letter from J. Abrams, Esq. to C. Mohr, SCO Exh. J;0178-0193.)

With its delay tactics fully exhausted and litigation imminent, Springfield finally agreed to produce the requested records on April 17, 2013. (Apr. 17, 2013 letter from C. Mohr to L. Graham, SCO Exh. J:0194-196.) But Springfield still was not done. Having received an

advance copy of what School Choice Ohio intended to distribute, Springfield tried to squelch its message by threatening to sue School Choice Ohio:

> To the extent that you publish or disseminate information to the students or parents of students of these schools indicating that the student attends a "failing" school, we are prepared to take any and all actions necessary to remedy such false and misleading statements of fact. I sincerely hope that such action will not be necessary.

(*Id.* at J:0196.) Despite that hollow threat, School Choice Ohio distributed its materials to Springfield students and families, confident that it would prevail in any legal challenge that Springfield might bring over whether it is misleading to characterize a school within EdChoice due to poor performance as "failing." Springfield apparently reached the same conclusion, because it never made good on its threat of legal action.

There can be no doubt that Springfield targeted School Choice Ohio with its suppression and delay tactics because it contemporaneously honored a similar request by a different third party, Global Impact STEM Academy ("Global Impact"). In an April 17, 2013, letter Global Impact asked Springfield to produce

> the following Directory Information: *Name, Address, Telephone Number & Email Address, if the latter two are also on record with your school system* for all eighth grade students and all seventh grade students who are enrolled in your school district as of the date of this letter of request.

(Apr. 17, 2013 letter from Carl J. Berg to Dr. David Estrop, SCO Exh. J:0199; emphasis in original.) Although Global Impact did not certify that it would not use that information for a profit-making plan or activity as required by R.C. 3319.321(A), Springfield did not raise that issue at all, let alone make the same demands for further information that it made of School Choice Ohio. Nor did Springfield demand to see an advance copy of the materials that Global Impact intended to distributed using that information. Instead, Springfield

promptly approved the request and provided nearly all of the requested information just five days later. (Apr. 22, 2013 letter from D. Miller to C. Berg, SCO Exh. J:0200.)

3. Springfield Changes Its Policies for the 2014-2015 School Year to Stymie School Choice Ohio's Next Public Records Request

After coming up short in its effort to resist School Choice Ohio's public records request for the 2013-2014 school year, Springfield decided to shift tactics for the following year. Instead of repeating its previously-unsuccessful campaign of obstruction, delay and intimidation, Springfield decided to instead try to completely block School Choice Ohio's request for the 2014-2015 school year by changing its "Policy JO," which sets forth Springfield's policy on disclosing "directory information" under FERPA.

For more than twenty years, Springfield's Policy JO designed nearly every category of personally-identifiable student information allowed under FERPA as "directory information," including the following:

- Student name, address and telephone number
- Date and place of birth
- Participation in officially recognized activities and sports
- Achievement awards and honors
- Weight and height of members of athletic teams
- Dates of attendance and graduation

(2013-2014 Policy JO, SCO Exh. K:0025-27.) Having made those designations, Springfield provided the parents of its students notice that, in compliance with FERPA, these categories of personally-identifiable information would be "disclosed without prior written consent except when the request is for a profit-making plan or activity" unless a parent has "affirmatively withdrawn their consent to release in writing." (*Id.* at K:0026.)

Unhappy that it had to provide School Choice Ohio public records containing information in these "directory information" categories, Springfield in early 2013 came up with a new plan: it decided to eliminate its designations of "directory information" and then claim that, as a result of that change, FERPA prohibits it from releasing records containing that information to School Choice Ohio. As administrator Kim Fish conceded in an email to the district's superintendent, Dr. David Estrop, Springfield's plan was devised in direct response to the recent expansion of "the potential for more for profit schools to come in to Ohio as online schools [and] vouchers." (Jan. 5, 2013 email from K. Fish to D. Estrop, SCO Exh. G:0065.) As Ms. Fish more succinctly stated in a subsequent email, Springfield mad that change for purely "defensive reasons." (Apr. 25, 2013 email from K. Fish to J. Callan, SCO Exh. G:0115.) Putting its plan into action, Springfield adopted its revised Policy JO, by which it purported to not designate any categories of "directory information" for current students, on June 13, 2013. (Policy JO, SCO Exh. C:0005-7.)

Outside of the public records issue, Springfield's changes to Policy JO had the potential to hamper the district's day-to-day operations. Since it no longer designated any categories of "directory information," Springfield could no longer take advantage of the FERPA safe-harbor for disclosing that information without parental consent. *See* FERPA, 20 U.S.C. § 1232g(a)(5)(A). Springfield thus put itself in the position of needing parental consent <u>each and every time</u> it wants to engage in routine activities for a school district, such as introducing its football team before a game, distributing a playbill identifying the actors in a student play, or publishing the names of students in a yearbook. *See* 34 C.F.R. § 99.30 (written consent must expressly "[s]tate the purpose of the disclosure").

Undeterred, Springfield came up with a novel plan that it hoped would solve the problem it created by changing Policy JO: instead of providing its usual "directory information" notice at the start of the school year under the former iteration of Policy JO, it would instead distribute a new "consent" form, entitled "Consent for Disclosure of Student Information for Superintendent Approved Purposes" (the "Consent for Disclosure") by which it would have parents would grant their consent for the district to release <u>the exact same categories of information it previously designated as directory information:</u>

Consent for Disclosure (2014-2015)	**Policy JO (2013-2014)**
Student's name →	Student's name
Student's address →	Student's address
Student's telephone number (unless designated as "unlisted" on Student's registration forms) →	Telephone number(s)
Date and place of birth →	Student's date and place of birth
Participation in officially recognized activities and sports →	Participation in officially recognized activities and sports
Weight and height of members of athletic teams →	Student's weight and height, if a member of an athletic team
Dates of attendance →	Dates of attendance ("from and to" dates of enrollment)
Date of graduation →	Date of graduation
Awards received →	Student's achievement awards or honors

Compare Consent for Disclosure, SCO Exh. J:0060, *with* 2013-2014 Policy JO, SCO Exh. K:0026. Springfield also included a "trap door" in its Consent for Disclosure that Springfield hoped would give it more control over student information that it otherwise had under state and federal law by wording it to only allow disclosure of student information "to third parties for purposes approved by the Superintendent or his designee." (Consent for Disclosure, SCO Exh. J:0060.) That way, as administrator Kim Fish explained,

Springfield purported to reserve for its superintendent the discretion "to consider whether or not the [requesting] organization is approved to receive directory information." (Aug. 28, 2013 email from K. Fish to D. Estrop, SCO Exh. J:0125.)

To ensure that a maximum number of parents granted consent, Springfield tried to make it invisible to students and their families by including the Consent for Disclosure as part of the packet of the policies and consents it distributes at the start of each school year. (SCO Exh. J:0053-60.) That packet also includes the district's "Acceptable Use Policy" for students to use of district computers, an authorization for parent-teacher email communications, and a media consent authorization. (*Id.*) Springfield also provided parents with a single, unified consent form, entitled "Student Acceptable Use Policy & Directory Information Consent" (the "Directory Information Consent Form") so the could easily sign off on all four policies and consents at once. (SCO Exh. J:0052.) Tellingly, Springfield did not inform parents why it was including the Consent for Disclosure.

Using its Directory Information Consent Form, Springfield succeeded in obtaining consent from the parents of a substantial number of Springfield students at the start of the 2014-2015 school year to disclose exactly the same the categories of information it previously designated under Policy JO, but only to "third parties for purposes approved by the Superintendent or his designee." (*See* SCO Exh. J:0060; SCO Exh. K:0034-0069.)

4. Springfield Denies School Choice Ohio's Public Records Request For 2014-2015 While Granting Similar Third Party Requests

Just as it had done in previous years, School Choice Ohio sent a written public records request to Springfield on October 22, 2013, seeking records with the following

"directory information" for students enrolled in the district so it could communicate with families of students regarding their full range of education options:

a. Student and parent's/guardian's name

b. Parent's/Guardian's complete address, including email address

c. Parent's/Guardian's telephone contact information

d. Student's grade level for the 2013-14 school year

e. Student's school building for the 2013-14 school year

(Oct. 22, 2013 email from K. Frazier to D. Miller, SCO Exh. J:0139-42.) Barely two hours after the district received School Choice Ohio's request, Superintendent Estrop memorialized his decision to deny School Choice Ohio's request based on the district's revisions to Policy JO, stating:

> Correct, we do not provide them any information. I would suggest we send them our newly developed and approved Board Policy on this subject. ***Then if they have any questions, send them to our attorneys.***

(Oct. 22, 2013 email from D. Estrop to L. Baldwin, SCO Exh. J:0135, emphasis added.) Following that instruction, district treasurer Dale Miller emailed revised Policy JO to School Choice Ohio with a note saying: "Attached is the Springfield City School District Board of Education policy related to Student Records and Directory Information." (Oct. 22, 2013 email from D. Miller to K. Frazier, SCO Exh. J:0139-145.) Mr. Miller did not, however, disclose that Springfield had implemented its new Consent for Disclosure and Directory Information Consent Form procedure, under which the district could have disclosed records having the information School Choice Ohio had requested for any students whose parents had granted their consent. (*See id.*)

On January 9, 2014, School Choice Ohio again requested in writing that Springfield provide the "directory information" it needed. (Jan. 9, 2014 email from K. Frazier to D. Miller, SCO Exh. J:0146-147.) Springfield responded on January 13, 2014, by once again refusing to provide that information based on its changes to Policy JO. (Jan. 13, 2014 letter from D. Miller to K. Frazier; SCO Exh. J:0152-53.) Unlike its first refusal, however, Springfield provided a written explanation as required by R.C. 149.43(B)(3), stating that FERPA precluded it from providing the requested records because, under Policy JO, Springfield "has not designated any category of personally identifiable information of current students as 'directory information.'" (*Id.* at J:0152.) But once again, Springfield failed to disclose that many district parents had granted the consent necessary for the district to disclose that information under FERPA using the district's Directory Information Consent Form. (*Id.*)

On February 24, 2014, School Choice Ohio sent by certified U.S. mail another written public records request to Springfield that renewed its October 22, 2013, public records request and further requested public records regarding, among other things, the district's policies and decision making process regarding "directory information," any exceptions or failures by the district to follow those policies, and documents regarding disclosures of "directory information" to representatives of the armed forces, charitable institutions, employers and institutions of higher education for the 2012-13 and 2013-14 school years. (SCO Exh. F:0001-4.) In its April 4, 2014, response, Springfield once again denied School Choice Ohio's requests based on Policy JO. (SCO Exh. G:0001-4.) It did, however, provide documents responsive to School Choice Ohio's additional public records

requests, including its new Consent for Disclosure and Directory Information Consent Form and copies of internal emails that confirm Springfield changed Policy JO and adopted its new procedures specifically to create a basis to deny public records requests of the type made by School Choice Ohio. (*See, e.g.,* SCO Exh. G:0005-68, G:0080-98, G:114-119, G:124-131, G:0160-161.)

Springfield's documents also revealed that the district routinely disclosed similar information to other third parties that the district viewed as more favorable to its pecuniary interests. For example, Superintendent Estrop personally approved a request for student names, addresses, phone numbers, school, grade, homeroom and student ID numbers requested by Clark State Community College on August 7, 2013, stating:

> I hereby approve the request below since Clark State Community College partners with the Springfield City School District relative to the Champion City Scholar Program which provides full scholarships for 40 students in Springfield each year.

(Aug. 7, 2013, email from D. Estrop to L. Baldwin and D. Miller, SCO Exh. J:0172-73. *See also* SCO Exh. J:0257-258.) Superintendent Estrop similarly approved an August 27, 2013, request by Springfield Christian Youth Ministries on the same day that request was made, stating: "Permission is granted since this organization partners with us." (Aug. 27, 2013 email from F. Bosland to L. Baldwin, SCO Exh. J:0119; Aug. 27, 2013, email from D. Estrop to L. Baldwin, D. Miller and K. Fish; SCO Exh. J:0118.) The next day, a district employee informed Springfield Christian Youth Ministries that the request was approved and that the requested information would be provided "once we receive all consent forms." (Aug. 28, 2014 email from M. Jones to F. Bosland, SCO Exh. J:215.) Springfield also granted a significant number of similar requests from a range of third parties, including Global

Impact STEM Academy (SCO Exh. J:0198), the Clark County Health Department (SCO Exh. J:0222-224), Perrin Woods Promise Team (SCO Exh. J:0225-226), the U.S. Navy (SCO Exh. J:0262-267), and the Rotary Club of Springfield (SCO Exh. J:0247-48, J:0252-256).

With its self-interested and disparate treatment of School Choice Ohio laid bare by own documents, School Choice Ohio realized that that Springfield would not comply with its obligations under Ohio's Public Records Act without being compelled. School Choice Ohio accordingly filed its Complaint for Alternative and Peremptory Writs of Mandamus on May 12, 2014 (which it amended on October 22, 2014).

Based on these facts, and for the reasons set forth below, School Choice Ohio respectfully asks this Court to grant the requested writ of mandamus and enter an order compelling Springfield to (i) produce all of the public records School Choice Ohio requested, (ii) amend its policies and practices to be consistent with its obligations under Ohio law, including R.C. 149.43 and R.C. 3319.321, (iii) pay School Choice Ohio statutory damages, and (iv) reimburse School Choice Ohio for its attorneys' fees and expenses, including court costs, in an amount to be determined following entry of the Court's order.

SCHOOL CHOICE OHIO'S PROPOSITIONS OF LAW

Proposition of Law No. 1: Records containing personally-identifiable information within the categories of "directory information" under FERPA are "public records" that must be produced in response to a proper request under R.C. 149.43.

The Court should grant the writ School Choice Ohio seeks and compel Springfield to produce all of the requested records because Springfield has a clear legal duty to perform its obligations under the Public Records Act and School Choice Ohio has a clear legal right to that performance. *See State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174, ¶ 6 ("Mandamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act."). *See also* R.C. 149.43(C)(1).

The Public Records Act commands that "all public records" are open to the public for inspection and copying, and defines "public record" as "records kept by any public office." R.C. 149.43(B)(1). The Public Records Act thus implements Ohio's policy that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006–Ohio–1825, 848 N.E.2d 472, ¶ 20. This Court accordingly will "construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records." *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008–Ohio–4788, 894 N.E.2d 686, ¶ 13.

As a "school district unit" subject to R.C. 149.43, Springfield has a clear legal duty to allow and provide access to its public records, including the records School Choice Ohio has requested. *See* R.C. 149.43(A)(1). Springfield's public records include information within the categories requested by School Choice Ohio that the district has stored in

multiple databases. (*See* Response to Interrogatory 30, SCO Exh. I:0012-13.) *See State ex rel. Cincinnati Post, v. Schweikert*, 38 Ohio St.3d 170, 172, 527 N.E.2d 1230 (1988) (public records include compilation of information that documents operation of public office). SCO therefore has a clear legal right to receive the records it requested from Springfield. *See State ex rel. Margolius v. City of Cleveland*, 62 Ohio St.3d 456, 459-60, 584 N.E.2d 665 (1992) (compelling production of electronic database of public records).

In resisting production, Springfield contends that the requested records are not public records under R.C. 149.43(A)(1)(v) because the release of information contained in them is "prohibited" by the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g, ("FERPA"). Springfield therefore bears the burden of establishing that FERPA actually prohibits it from releasing its records containing that information to School Choice Ohio. *See State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St. 3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23 ("Exceptions to disclosure under the Public Records Act are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception."). Springfield cannot meet that burden because the requested records do not "fall squarely within" that exception. *See id.* ("A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.")

As discussed in detail below, Springfield cannot rely on FERPA to avoid its clear legal duties under the Public Records Act because FERPA does not "prohibit" the district from releasing the requested records. On the contrary, FERPA allows Springfield to release its responsive records upon providing routine advance notice to parents—which the

district did for decades before changing Policy JO to thwart School Choice Ohio—and FERPA expressly authorizes this Court to grant the relief School Choice Ohio seeks. Finally, FERPA allows Springfield to release the requested records for any of the many district students whose parents already granted the district their affirmative consent.

For each of these reasons, Springfield has an clear legal duty to provide the requested Student Information records and School Choice Ohio has a clear legal right to request and receive the public records that contain that information. The Court therefore should reject Springfield's invocation of FERPA as a shield against complying with its Public Records Act and grant the writ School Choice Ohio has requested because

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> **Proposition of Law No. 2:** Although FERPA requires notice before a school district releases certain types of personally-identifiable information, it does not "prohibit" the release of information that can be designated as "directory information."

FERPA affirmatively permits Springfield to release the records School Choice Ohio requested upon notice to parents because the information they contain qualifies as "directory information" under FERPA. The fact that Springfield refuses—because it fears that students might leave and take their state funding with them if their parents find out that they have school choice options under Ohio law—does not mean that FERPA "prohibits" the release of those records. The Court therefore should compel Springfield to immediately provide any advance notice that FERPA may require and then produce all of the records that School Choice Ohio requested.

A. FERPA Does Not "Prohibit" The Release of <u>Information That Can Be Designated As "Directory Information"</u>

Broadly speaking, FERPA restricts schools receiving federal funds from "releasing, or providing access to, any personally identifiable information in education records" except in the circumstances enumerated in that statute. 20 U.S.C § 1232g(b)(1), (b)(2). This Court previously addressed the interaction between FERPA and Ohio's Public Records Act in *State ex rel. ESPN v. Ohio State University,* 132 Ohio St.3d 212, 970 N.E.2d 939, 2012-Ohio-2690, holding that "FERPA, *if applicable*, does constitute a prohibition on the release of records under R.C. 143.43(A)(1)(v)." *Id.* at ¶ 25 (emphasis added). Consistent with that holding, the records School Choice Ohio requested are "public records" and must be produced because FERPA does not apply in a way that "prohibits" their release.

As originally enacted, FERPA strictly prohibited schools from making otherwise-routine disclosures of student information without obtaining parental consent on a case-by-case basis. *See* P.L. 93-380, at § 513, Aug. 21, 1974, effective Nov. 19, 1974. Congress quickly determined that the new consent requirement was imposing a significant and unintended burden on a school's day-to-day operations. As FERPA's primary sponsors, Senators James Buckley and Claiborne Pell, explained in a joint statement:

> A literal interpretation of [FERPA's consent requirement] has led school attorneys around the country to advise their clients no longer routinely to print football players' weights in athletic programs and to seek written consent of the cast of the school play that their names may be printed in the program. This narrow reading of the law is not what its author intended[.]

120 Congr. Rec. 39862, 39863 (1974) (Joint Statement of Sens. Buckley and Pell). To address this problem, Congress promptly amended FERPA, effective retroactive to FERPA's original enactment, to allow schools to disclose student names and other routine information—

called "directory information"—with relative ease. *See* P.L. 93-568, Dec. 31, 1974, effective Nov. 19, 1974; 120 Congr. Rec. at 39862-39866 ("[T]hese amendments specifically provide that a school may safely provide what is termed "directory information"—such personal facts as name, address, and telephone number—to third parties without fear of having its Federal funds withdrawn.").

As amended, FERPA now allows schools to engage in routine disclosures of certain personally-identifiable "directory information"—which Congress had determined would not be considered harmful if released by a school—without prior parental consent. *See* 20 U.S.C. § 1232g(a)(5). The categories of "directory information" under FERPA include (but are not limited to):

- Student name, address and telephone number
- Date and place of birth
- Major field of study
- Participation in officially recognized activities and sports
- Weight and height of members of athletic teams
- Dates of attendance
- Degrees and awards received
- The most-recent previous educational agency or institution attended

20 U.S.C. § 1232g(a)(5)(A). Instead of obtaining parental consent before disclosing information within these categories, as FERPA originally required, the amendment allows schools to release personally-identifiable information in these categories once it gives "public notice of the categories of information which it has designed as [directory information] with respect to each student" and afford parents "a reasonable period of time" to opt out of such disclosures. *Id.* at § 1232g(a)(5)(B). Once such notice is given, a school

district may disclose "directory information" for any student whose parents have not opted out in full compliance with FERPA. *See id.*

B. Springfield Cannot Limit Its Obligations Under The Public Records Act Changing Merely Its Policy JO

The student information in the records School Choice Ohio requested qualifies as "directory information" that FERPA allows Springfield to produce upon giving notice to the parents of its students. Springfield nonetheless contends that, because it unilaterally changed its Policy JO, FERPA now prohibits it from releasing those records. The Court should reject Springfield's contention as contrary to both FERPA and R.C. 149.43. FERPA, however, allows Springfield to produce those records in just the same manner as it did before Springfield changed Policy JO.

A "record" is not a "public record" under the Public Records Act if its release is "prohibited by state or federal law." R.C. 149.43(A)(1)(v). In construing this exception, the Court previously held that "prohibit" means "to forbid by law" and "to prevent." *State ex rel. Besser v. Ohio State University*, 87 Ohio St.3d 535, 539, 721 N.E.2d 1044(2000). FERPA permits Springfield to produce the records School Choice Ohio requested, so that exception does not apply in this case. Springfield therefore cannot carry its burden of proving that it is prohibited by federal law from releasing the records at issue.

Springfield does not directly assert that FERPA itself *forbids* or otherwise *prevents* it from releasing records to any third party. Instead, Springfield asserts that its changes to Policy JO have render it wholly incapable of releasing the same types of records it previously released as a matter of course. That, however, does not mean *FERPA itself* prohibits the release of the requested records, which is what Springfield must prove. All it

means is that *Springfield's own policy*, which it changed solely to create the argument it now makes, is the issue. Springfield, however, does not have the authority to except records from Ohio's Public Record Act by unilaterally changing an internal policy that was in place for more than two decades.

Under Ohio law, a "public office" subject to R.C. 149.43(A)(1) may not unilaterally change the public records status of its records by changing its policies or regulations. *See State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environ. Prot. Agency*, 88 Ohio St.3d 166, 171, 724 N.E.2d 411 (2000); *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad*, 123 Ohio App. 3d 554, 559, 704 N.E.2d 638 (1997). For example, this Court in *Lucas County* held that the Ohio EPA could not unilaterally "bestow confidential trade secret status on records that do not constitute trade secrets" to refuse a public records request because it was not granted that power by the General Assembly. *See Lucas Cty. Bd. of Commrs.*, 88 Ohio St.3d at 171, 724 N.E.2d at 417. Similarly, the court in *Gallon* held that the Ohio Bureau of Workers Compensation lacked the authority to promulgate rules that would exempt its records from the Public Records Act, stating:

> BWC claims that because its administrative rule was promulgated, pursuant to R.C. 119.03, it has the authority to prohibit the disclosure of records. We disagree. To accept BWC's argument would mean that any state agency with rule-making power under R.C. Chapter 119 could exempt its records from the public records statute. Such an interpretation of R.C. 149.43(A)(1) would eviscerate the public records statute.

Gallon, 123 Ohio App. 3d at 558, 724 N.E.2d at 641. The same is true here. As a "public office" subject to R.C. 149.43, the General Assembly has not bestowed on Springfield the power, ability or discretion to change the public records status of a record merely by unilaterally changing a policy that otherwise would have allowed its release. Indeed, unlike

the Ohio EPA and BWC, Springfield has no statutory rule-making authority. Springfield therefore cannot block its own ability to produce the requested records under FERPA merely by changing one of its internal policies.

FERPA also does not prohibit production in this case because it includes an express exception for compliance with a court order. This Court previously resolved a similar situation under the Health Insurance Portability and Accountability Act ("HIPAA") in *State ex rel. Cincinnati Enquirer v. Daniels,* 108 Ohio St.3d 518, 2006-Ohio-1215, 844 N.E.2d 1181. In that case, the Cincinnati Enquirer requested records of notices issued to owners of property reported to be the residences of children whose blood tests indicated elevated lead levels. *Id.* at ¶ 1. Cincinnati and the Cincinnati Health Department denied that request under 149.43.(A)(1)(v) on the basis that HIPAA prohibited them from releasing records that might contain protected health information. *Id.* In response, the Cincinnati Enquirer argued that HIPAA did not restrict the release of those records because the statute permitted disclosure if "required by law." *Id.* ¶ 25 (citing 45 C.F.R. § 164.512(a)(1)). As a result, this Court was faced with

> a problem of circular reference because the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law.

Id. at ¶ 26. The Court resolved that circular reference in favor of requiring production under R.C. 149.43 because HIPAA was not intended to conflict with a covered entity's other legal obligations. *See id.* at ¶¶ 27-28, 30.

The Court should reach the same conclusion in this case. Under FERPA, an a school district may disclose personally-identifiable information contained in educational records

"in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency." 20 U.S.C. § 1232g(b)(2)(B). Thus, similar to the HIPAA provisions at issue in *Daniels*, FERPA allows a school district to disclose student information as needed to comply with its legal obligations upon reasonable parental notice. *Id.* Moreover, the policy underlying FERPA favors deference to state laws such as Ohio's Public Records Act. As FERPA's legislative history teaches, "[FERPA] was not intended, in establishing a minimum Federal standard for record confidentiality and access, to preempt the States' authority in the field." 120 Congr. Rec. at 39863 (Joint Statement of Sens. Buckley and Pell). The Court therefore has the ability to resolve the "circular reference" between FERPA and Ohio's Public Records Act in favor of disclosure.

The simple and controlling fact is that Springfield, if it so chose, could produce the records School Choice Ohio requested in full compliance with FERPA in multiple ways. It could produce them by merely designating the information in those records as "directory information" and providing sufficient parental notice. *See* 20 U.S.C. § 1232g(a)(5)(B). Or, it could produce them in to comply with an order issued by this Court after giving notice by publication. *See* 20 U.S.C. § 1232g(b); 34 C.F.R. § 99.3. *See also Rios v. Read,* 73 F.R.D. 589, 600 (E.D.N.Y. 1977) (where "exceptionally large numbers of students are involved," publication provides sufficient notice under FERPA). Thus, there can be no doubt that FERPA does not prohibit Springfield from releasing the records School Choice Ohio requested. And because Springfield can, it must.

C. Springfield's Desire to Preserve its State Funding Does Not Justify Its Refusal to Produce the Requested Records

Since Springfield has both the ability and the clear obligation to comply with School Choice Ohio's public records request, the reasons behind why it adopted its "aggressive" "Retention Initiative" further refute its pretextual justifications for its actions.

"The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people[.]" *Patterson v. Ayers*, 171 Ohio St. 369 (1960). A public office therefore cannot create an exception to the Public Records Act based on a balancing of policy interests to justify a refusal to allow access to its public records. *See State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶ 31. Instead, "in enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure." *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 172, 1994-Ohio-246. Springfield's attempt to amend Policy JO to exempt the records School Choice Ohio requested violates these fundamental tenants of Ohio law.

There is little reason to doubt that Springfield is concerned with the impact of school choice on its bottom line. But that is one of the very purposes of school choice. In addition to providing an outlet for students assigned to poorly-performing schools, school choice incentivizes a district to aggressively pursue systemic improvement so it can maintain its enrollment levels—and the state funding that follows. But that does not mean Springfield has carte blanche discretion to manipulate its policies to erect a wall to keep its

students in and competition out. The Public Records Act is clear: a public office only can refuse to produce its public records based on a federal statute if that statute actually *prohibits* it from doing so. That is not the case here because, even though it does not want to, Springfield has the ability to produce the requested records in full compliance with all of FERPA's requirements.

For these reasons, the Court should reject Springfield's attempts to create a pretext for refusing School Choice Ohio's public records request and enter an order compelling it promptly produce the requested records after affording it reasonable (but no more) time to provide any notice that FERPA may require before doing so.

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Proposition of Law No.3: FERPA does not prohibit a school district from releasing education records for any students whose parents have consented to their release.

A public office to which the request is directed must produce all of its public records that are not exempted from production. *See* R.C. 149.43(B)(1) ("If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt."). Therefore, at a minimum, Springfield must produce its records containing the information School Choice Ohio requested for every student whose parent consented to disclosure under

Springfield's Consent to Disclose/Directory Information Consent Form procedure because FERPA does not restrict the release of those records.

As discussed above, FERPA permits a school district to disclose personally-identifiable information if a parent has consented. *See* 20 U.S.C. § 1232g(b)(1). That is true irrespective of whether the information at issue *also* qualifies as "directory information" because the "directory information" provisions are a separate exception to FERPA's consent requirement, not an additional requirement that must be met prior to disclosure. *Id.* As such, FERPA does not "prohibit" Springfield from releasing its records containing personally-identifiable information for the students for which it has already obtained parental consent. Springfield therefore cannot rely on the exception for "records the release of which is prohibited by state or federal law" at R.C. 149.43(A)(1)(v) to deny School Choice Ohio's request records for any students where consent has been granted.

Springfield's own administration of its Consent for Disclosure/Directory Information Consent Form procedures is consistent with this conclusion. As discussed above, Springfield already released the same information School Choice Ohio seeks to at least Clark State Community College, Springfield Christian Youth Ministries, Global Impact STEM Academy, the Clark County Health Department, Perrin Woods Promise Team, the U.S. Navy, and the Rotary Club of Springfield during the 2014-2015 school year. There is no reason under FERPA or Ohio's Public Record Act that Springfield cannot release that same information to School Choice Ohio in response to its public records request. Therefore, at a minimum, School Choice Ohio is entitled to receive, and the Court should compel Springfield to provide, records containing the information School

Choice Ohio seeks for *at least* the students whose parents have already granted their consent to the district.

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> **<u>Proposition of Law No. 4</u>:** If a school district produces categories of directory information to third parties, Revised Code 3319.321 prohibits it from imposing additional burdens on the release of those categories of information to other third parties.

Under Ohio law, a school district cannot impose any burden on the release of information that qualifies as "directory information" unless it imposes that same burden on all third parties. R.C. 3319.321. In relevant part, R.C. 3319.321 provides:

> [N]o school district board of education shall impose any restriction on the presentation of directory information that it has designated as subject to release in accordance with the "Family Educational Rights and Privacy Act of 1974," 88 Stat. 571, 20 U.S.C. 1232q, as amended, to representatives of the armed forces, business, industry, charitable institutions, other employers, and institutions of higher education unless such restriction is uniformly imposed on each of these types of representatives[.]

R.C. 3319.321(B)(2)(a). Therefore, wholly independent of its obligations under Ohio's Public Records Act, R.C. 3319.321 compels Springfield to present and provide to School Choice Ohio all of the information it has requested because the district has presented and provided the same types of information to third parties without restriction.

Since Springfield changed Policy JO and implemented its new Consent for Disclosure/Directory Information Consent Form procedures for the 2014-2015 school year, it has approved at lest seven third-party requests for the exactly the same types of information that School Choice Ohio requested:

Third Party	Requested Information
Clark State Community College	Student ID number, first name, last name, school number, grade, street address, city, state, zip code, phone number and homeroom for all eighth graders enrolled in Springfield schools.
Springfield Christian Youth Ministries	Name and addresses for all students enrolled at Kenwood Elementary and Snyder Park Elementary and all girls enrolled at Hayward Elementary, Roosevelt Elementary and Schaefer Elementary.
Global Impact STEM Academy	Name, address and email addresses for all seventh, eighth and ninth grade students enrolled in Springfield schools.
Clark County Health Department	Name, student ID number and date of birth for all elementary students in Springfield schools.
Perrin Woods Promise Team	Name, address, parent name/s and contact numbers for all students enrolled in grades K-3 at Perrin Woods Elementary School.
U.S. Navy	Full name, address and phone number for all eleventh and twelfth grade students enrolled in Springfield schools.
Rotary Club of Springfield	Names of students assigned to specific teachers at Fulton Elementary, Perrin Woods Elementary, Simon Kenton Elementary, Snyder Park Elementary, Warder Wayne Elementary, Shaefer Middle School, Roosevelt Middle School and Springfield High School.

In each case, Springfield provided the requested information without meaningful restriction. (*See* SCO Exh. J:0172-74 (Clark State), J:215 (Springfield Youth Ministries), J:0198 (Global Impact STEM Academy), J:0222 (Clark County Health Department), J:0225 (Perrin Woods Promise Team), J:0262-263 (U.S. Navy), J:0247 (Rotary Club of Springfield).)

Because Springfield provided the same information School Choice Ohio seeks to each of these groups without restriction, it must also provide it to School Choice Ohio without restriction. R.C. 3319.321(B)(2)(a). The Court therefore should grant the requested writ and enter an order compelling Springfield to produce the its records containing the requested information for the independently-sufficient reason that R.C. 3319.321 imposes on Springfield a clear legal duty to make that information available to School Choice Ohio

and gives School Choice Ohio a clear legal right to receive the records and information it requested on the same terms that Springfield already has provided it to other third parties.

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Proposition of Law No. 5: School Choice Ohio is entitled to recover its attorneys fees and costs and statutory damages.

A. The Court Should Award School Choice Ohio Its Attorney Fees

This Court may award attorneys' fees "[i]f the court renders a judgment that orders" production of records. R.C. 149.43(C)(2)(b). If attorneys' fees are appropriate, the Court may reduce or not award the fees, but only "if the court determines both of the following:

> (i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section; [and]
>
> (ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct."

R.C. 149.43(C)(2)(c)(i). To decide whether attorneys' fees are appropriate, the Court may consider whether there is a public benefit conferred by the relator seeking disclosure. *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 33.

Here, attorneys' fees are appropriate and the Court here should exercise its discretion to award them to School Choice Ohio. School Choice Ohio seeks the names and contact information for students solely so it may apprise their families of the school choice options offered by the State of Ohio. While those students have received mailings from Springfield touting itself, they are entitled to know—as Paul Harvey would call say— "the rest of the story" about their education options, and then make a fully informed decision about their children's education—one of the most important decisions about a child's future. Indeed, for Ohio's school choice programs to work, Ohio families need to know about the available programs. School Choice merely seeks to provide that information. Thus, the disclosure School Choice Ohio seeks would strongly benefit the public consistent with the policies embodied by Ohio's school choice programs.

As explained above, the law clearly required Springfield to provide School Choice Ohio with the basic student information that it sought—and to which it is entitled under the law. Therefore, consistent with the "remedial" nature of the attorney fee allowance, School Choice Ohio should be compensated for the attorneys' fees that Springfield's tactical machinations forced it to incur.

Furthermore, the Court should not reduce or disallow fees because the record does not support a finding as to either, let alone both, of the reasonableness subparts of the attorney-fee portion of the Act. As to subsection (C)(2)(c)(i), as explained above, no well-informed public office or official would reasonably believe that it had could vest itself with the power and authority to deny a public records request by merely changing one of

its internal policies, especially when that public office or official was simultaneously providing the same records to more favored third parties.

And as to subsection (C)(2)(c)(ii), no well-informed public office or official would reasonably believe that withholding the public records would serve the public policy behind FERPA. Springfield has refused to produce the records as part of an "aggressive" plan to keep students and their families in the dark about alternative educational options to protect and maintain its budget. Springfield's its failure to comply with the Public Records has nothing to do with FERPA and the private student information (*i.e.*, non-directory information) it is designed to protect. This is further confirmed by Springfield producing the very same information sought by School Choice Ohio to other third-parties that Springfield perceives as no threat to its budget.

For these reasons, the Court should award School Choice Ohio its attorneys' fees and expenses, including court costs and without reduction, in an amount to be determined following entry of the Court's order on the merits of this case.

B. <u>The Court Should Award School Choice Ohio Statutory Damages</u>

Under the Public Records Act, a prevailing relator that requested the records by certified mail "shall" be awarded statutory damages of $100 for each business day during which the public office failed to comply, up to a maximum of $1,000. R.C. 149.43(C)(1). School Choice Ohio submitted its public record request to Springfield by certified mail. (SCO Exh. F:0001-4.) Because Springfield has failed to comply with that request and Ohio's Public Records Act for more than 10 business days, this Court should award the maximum statutory damages of $1,000 to School Choice Ohio. Although the Court may

reduce or not award statutory damages if it determines that both of the reasonableness subparts in the Act, (C)(1)(a) and (b), are met, neither of those subparts have been met for the same reasons the same subparts have not been met under the attorney fee analysis.

CONCLUSION

For the foregoing reasons, Springfield has a clear legal duty to produce the public records School Choice Ohio requested, and School Choice Ohio has a clear legal right to receive them. The Court therefore should grant the requested writ of mandamus and enter an order compelling Springfield to (i) produce all of the public records School Choice Ohio requested, (ii) amend its policies and practices to be consistent with its obligations under Ohio law, including R.C. 149.43 and R.C. 3319.321, (iii) pay School Choice Ohio statutory damages, and (iv) reimburse School Choice Ohio for its attorneys' fees and expenses, including court costs, in an amount to be determined following entry of the Court's order on the merits of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Merits Brief of Relator School Choice Ohio, Inc.*** was served this 15th day of January, 2015, on the following via email pursuant to Oho Rule of Civil Procedure 5(B)(2)(f) and S.Ct.Prac.R. 3.11(B)(1):

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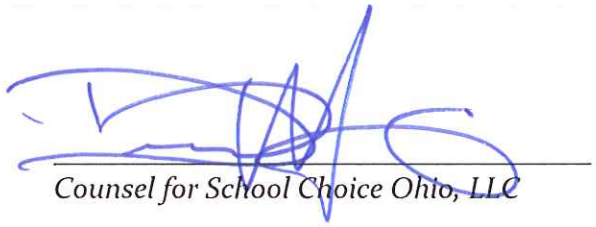

Counsel for School Choice Ohio, LLC

APPENDIX

Revised Code 149.43 1

Revised Code 3319.321 11

20 U.S.C. § 1232g 14

Ohio Revised Code 149.43 Availability of public records for inspection and copying.

(A) As used in this section:

(1) "Public record" means 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 any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth

services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of executives of long-term services and supports administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

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

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(y) Records listed in section 5101.29 of the Revised Code;

(z) Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section;

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;

(bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been

reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, probation officer, bailiff, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life

insurance benefits, provided to a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, "investigator of the bureau of criminal identification and investigation" has the meaning defined in section 2903.11 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)

(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for

the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering

information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9)

(a) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, probation officer's, bailiff's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, community-based correctional facility employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

(b) Division (B)(9)(a) of this section also applies to journalist requests for customer information maintained by a municipally owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.

(c) As used in division (B)(9) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)

(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable,

that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)

(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time

allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)

(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)

(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or database by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

3319.321 Confidentiality.

(A) No person shall release, or permit access to, the directory information concerning any students attending a public school to any person or group for use in a profit-making plan or activity. Notwithstanding division (B)(4) of section 149.43 of the Revised Code, a person may require disclosure of the requestor's identity or the intended use of the directory information concerning any students attending a public school to ascertain whether the directory information is for use in a profit-making plan or activity.

(B) No person shall release, or permit access to, personally identifiable information other than directory information concerning any student attending a public school, for purposes other than those identified in division (C), (E), (G), or (H) of this section, without the written consent of the parent, guardian, or custodian of each such student who is less than eighteen years of age, or without the written consent of each such student who is eighteen years of age or older.

(1) For purposes of this section, "directory information" includes a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, date of graduation, and awards received.

(2)

(a) Except as provided in division (B)(2)(b) of this section, no school district board of education shall impose any restriction on the presentation of directory information that it has designated as subject to release in accordance with the "Family Educational Rights and Privacy Act of 1974," 88 Stat. 571, 20 U.S.C. 1232q, as amended, to representatives of the armed forces, business, industry, charitable institutions, other employers, and institutions of higher education unless such restriction is uniformly imposed on each of these types of representatives, except that if a student eighteen years of age or older or a student's parent, guardian, or custodian has informed the board that any or all such information should not be released without such person's prior written consent, the board shall not release that information without such person's prior written consent.

(b) The names and addresses of students in grades ten through twelve shall be released to a recruiting officer for any branch of the United States armed forces who requests such information, except that such data shall not be released if the student or student's parent, guardian, or custodian submits to the board a written request not to release such data. Any data received by a recruiting officer shall be used solely for the purpose of providing information to students regarding military service and shall not be released to any person other than individuals within the recruiting services of the armed forces.

(3) Except for directory information and except as provided in division (E), (G), or (H) of this section, information covered by this section that is released shall only be transferred to a third or subsequent party on the condition that such party will not permit any other party to have access to such information without written consent of the parent, guardian, or custodian, or of the student who is eighteen years of age or older.

(4) Except as otherwise provided in this section, any parent of a student may give the written parental consent required under this section. Where parents are separated or divorced, the written parental consent required under this section may be obtained from either parent, subject to any agreement between such parents or court order governing the rights of such parents. In the case of a student whose legal guardian is in an institution, a person independent of the institution who has no other conflicting interests in the case shall be appointed by the board of education of the school district in which the institution is located to give the written parental consent required under this section.

(5)

(a) A parent of a student who is not the student's residential parent, upon request, shall be permitted access to any records or information concerning the student under the same terms and conditions under which access to the records or information is available to the residential parent of that student, provided that the access of the parent who is not the residential parent is subject to any agreement between the parents, to division (F) of this section, and, to the extent described in division (B)(5)(b) of this section, is subject to any court order issued pursuant to section 3109.051 of the Revised Code and any other court order governing the rights of the parents.

(b) If the residential parent of a student has presented the keeper of a record or information that is related to the student with a copy of an order issued under division (H)(1) of section 3109.051 of the Revised Code that limits the terms and conditions under which the parent who is not the residential parent of the student is to have access to records and information pertaining to the student or with a copy of any other court order governing the rights of the parents that so limits those terms and conditions, and if the order pertains to the record or information in question, the keeper of the record or information shall provide access to the parent who is not the residential parent only to the extent authorized in the order. If the residential parent has presented the keeper of the record or information with such an order, the keeper of the record shall permit the parent who is not the residential parent to have access to the record or information only in accordance with the most recent such order that has been presented to the keeper by the residential parent or the parent who is not the residential parent.

(C) Nothing in this section shall limit the administrative use of public school records by a person acting exclusively in the person's capacity as an employee of a board of education or of the state or any of its political subdivisions, any court, or the federal government, and nothing in this section shall prevent the transfer of a student's record to an educational institution for a legitimate educational purpose. However, except as provided in this section, public school records shall not be released or made available for any other purpose. Fingerprints, photographs, or records obtained pursuant to section 3313.96 or 3319.322 of the Revised Code, or pursuant to division (E) of this section, or any medical, psychological, guidance, counseling, or other information that is derived from the use of the fingerprints, photographs, or records, shall not be admissible as evidence against the minor who is the subject of the fingerprints, photographs, or records in any proceeding in any court. The provisions of this division regarding the administrative use of records by an employee of the state or any of its political subdivisions or of a court or the federal government shall be applicable only when the use of the information is required by a state statute adopted before November 19, 1974, or by federal law.

(D) A board of education may require, subject to division (E) of this section, a person seeking to obtain copies of public school records to pay the cost of reproduction and, in the case of data released under division (B)(2)(b) of this section, to pay for any mailing costs, which payment shall not exceed the actual cost to the school.

(E) A principal or chief administrative officer of a public school, or any employee of a public school who is authorized to handle school records, shall provide access to a student's records to a law enforcement officer who indicates that the officer is conducting an investigation and that the student is or may be a missing child, as defined in section 2901.30 of the Revised Code. Free copies of information in the student's record shall be provided, upon request, to the law enforcement officer, if prior approval is given by the student's parent, guardian, or legal custodian. Information obtained by the officer shall be used solely in the investigation of the case. The information may be used by law enforcement agency personnel in any manner that is appropriate in solving the case, including, but not limited to, providing the information to other law enforcement officers and agencies and to the bureau of criminal identification and investigation for purposes of computer integration pursuant to section 2901.30 of the Revised Code.

(F) No person shall release to a parent of a student who is not the student's residential parent or to any other

person, or permit a parent of a student who is not the student's residential parent or permit any other person to have access to, any information about the location of any elementary or secondary school to which a student has transferred or information that would enable the parent who is not the student's residential parent or the other person to determine the location of that elementary or secondary school, if the elementary or secondary school to which the student has transferred and that requested the records of the student under section 3313.672 of the Revised Code informs the elementary or secondary school from which the student's records are obtained that the student is under the care of a shelter for victims of domestic violence, as defined in section 3113.33 of the Revised Code.

(G) A principal or chief administrative officer of a public school, or any employee of a public school who is authorized to handle school records, shall comply with any order issued pursuant to division (D)(1) of section 2151.14 of the Revised Code, any request for records that is properly made pursuant to division (D)(3)(a) of section 2151.14 or division (A) of section 2151.141 of the Revised Code, and any determination that is made by a court pursuant to division (D)(3)(b) of section 2151.14 or division (B)(1) of section 2151.141 of the Revised Code.

(H) Notwithstanding any provision of this section, a principal of a public school, to the extent permitted by the "Family Educational Rights and Privacy Act of 1974," shall make the report required in section 3319.45 of the Revised Code that a pupil committed any violation listed in division (A) of section 3313.662 of the Revised Code on property owned or controlled by, or at an activity held under the auspices of, the board of education, regardless of whether the pupil was sixteen years of age or older. The principal is not required to obtain the consent of the pupil who is the subject of the report or the consent of the pupil's parent, guardian, or custodian before making a report pursuant to section 3319.45 of the Revised Code.

20 U.S.C. § 1232g. Family educational and privacy rights

(a) Conditions for availability of funds to educational agencies or institutions; inspection and review of education records; specific information to be made available; procedure for access to education records; reasonableness of time for such access; hearings; written explanations by parents; definitions

(1)

(A) No funds shall be made available under any applicable program to any educational agency or 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 of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. If any material or document in the education record of a student includes information on more than one student, the parents of one of such students shall have the right to inspect and review only such part of such material or document as relates to such student or to be informed of the specific information contained in such part of such material. Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.

(B) No funds under any applicable program shall be made available to any State educational agency (whether or not that agency is an educational agency or institution under this section) that has a policy of denying, or effectively prevents, the parents of students the right to inspect and review the education records maintained by the State educational agency on their children who are or have been in attendance at any school of an educational agency or institution that is subject to the provisions of this section.

(C) The first sentence of subparagraph (A) shall not operate to make available to students in institutions of postsecondary education the following materials:

(i) financial records of the parents of the student or any information contained therein;

(ii) confidential letters and statements of recommendation, which were placed in the education records prior to January 1, 1975, if such letters or statements are not used for purposes other than those for which they were specifically intended;

(iii) if the student has signed a waiver of the student's right of access under this subsection in accordance with subparagraph (D), confidential recommendations—

(I) respecting admission to any educational agency or institution,

(II) respecting an application for employment, and

(III) respecting the receipt of an honor or honorary recognition.

(D) A student or a person applying for admission may waive his right of access to confidential statements described in clause (iii) of subparagraph (C), except that such waiver shall apply to recommendations only if (i) the student is, upon request, notified of the names of all persons making confidential recommendations and (ii) such recommendations are used solely for the purpose for which they were specifically intended. Such waivers may not be required as a condition for admission to, receipt of financial aid from, or receipt of any other services or benefits from such agency or institution.

(2) No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at

such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to insure that the records are not inaccurate, misleading, or otherwise in violation of the privacy rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

(3) For the purposes of this section the term "educational agency or institution" means any public or private agency or institution which is the recipient of funds under any applicable program.

(4)

(A) For the purposes of this section, the term "education records" means, except as may be provided otherwise in subparagraph (B), 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.

(B) The term "education records" does not include—

(i) records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute;

(ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement;

(iii) in the case of persons who are employed by an educational agency or institution but who are not in attendance at such agency or institution, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other purpose; or

(iv) records on a student who is eighteen years of age or older, or is attending an institution of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his professional or paraprofessional capacity, or assisting in that capacity, and which are made, maintained, or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice.

(5)

(A) For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized 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.

(B) Any educational agency or institution making public directory information shall give public notice of the categories of information which it has designated as such information with respect to each student

attending the institution or agency and shall allow a reasonable period of time after such notice has been given for a parent to inform the institution or agency that any or all of the information designated should not be released without the parent's prior consent.

(6) 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.

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of federally-supported education programs; recordkeeping

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

(A) other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required;

(B) officials of other schools or school systems in which the student seeks or intends to enroll, upon condition that the student's parents be notified of the transfer, receive a copy of the record if desired, and have an opportunity for a hearing to challenge the content of the record;

(C) (i) authorized representatives of (I) the Comptroller General of the United States, (II) the Secretary, or (III) State educational authorities, under the conditions set forth in paragraph (3), or (ii) authorized representatives of the Attorney General for law enforcement purposes under the same conditions as apply to the Secretary under paragraph (3);

(D) in connection with a student's application for, or receipt of, financial aid;

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

(i) before November 19, 1974, if the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve the student whose records are released, or

(ii) after November 19, 1974, if—

(I) the allowed reporting or disclosure concerns the juvenile justice system and such system's ability to effectively serve, prior to adjudication, the student whose records are released; and

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student.

(F) organizations conducting studies for, or on behalf of, educational agencies or institutions for the purpose of developing, validating, or administering predictive tests, administering student aid programs, and

improving instruction, if such studies are conducted in such a manner as will not permit the personal identification of students and their parents by persons other than representatives of such organizations and such information will be destroyed when no longer needed for the purpose for which it is conducted;

(G) accrediting organizations in order to carry out their accrediting functions;

(H) parents of a dependent student of such parents, as defined in section 152 of title 26;

(I) subject to regulations of the Secretary, in connection with an emergency, appropriate persons if the knowledge of such information is necessary to protect the health or safety of the student or other persons;

(J)

(i) the entity or persons designated in a Federal grand jury subpoena, in which case the court shall order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished to the grand jury in response to the subpoena; and

(ii) the entity or persons designated in any other subpoena issued for a law enforcement purpose, in which case the court or other issuing agency may order, for good cause shown, the educational agency or institution (and any officer, director, employee, agent, or attorney for such agency or institution) on which the subpoena is served, to not disclose to any person the existence or contents of the subpoena or any information furnished in response to the subpoena; and

(K) the Secretary of Agriculture, or authorized representative from the Food and Nutrition Service or contractors acting on behalf of the Food and Nutrition Service, for the purposes of conducting program monitoring, evaluations, and performance measurements of State and local educational and other agencies and institutions receiving funding or providing benefits of 1 or more programs authorized under the Richard B. Russell National School Lunch Act (42 U.S.C. 1751 et seq.) or the Child Nutrition Act of 1966 (42 U.S.C. 1771 et seq.) for which the results will be reported in an aggregate form that does not identify any individual, on the conditions that—

(i) any data collected under this subparagraph shall be protected in a manner that will not permit the personal identification of students and their parents by other than the authorized representatives of the Secretary; and

(ii) any personally identifiable data shall be destroyed when the data are no longer needed for program monitoring, evaluations, and performance measurements.

Nothing in subparagraph (E) of this paragraph shall prevent a State from further limiting the number or type of State or local officials who will continue to have access thereunder.

(2) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection, unless—

(A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, and with a copy of the records to be released to the student's parents and the student if desired by the parents, or

(B) except as provided in paragraph (1)(J), such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency.

(3) Nothing contained in this section shall preclude authorized representatives of (A) the Comptroller General of the United States, (B) the Secretary, or (C) State educational authorities from having access to student or other records which may be necessary in connection with the audit and evaluation of Federally-supported education programs, or in connection with the enforcement of the Federal legal requirements which relate to such programs: *Provided*, That except when collection of personally identifiable information is specifically authorized by Federal law, any data collected by such officials shall be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and such personally identifiable data shall be destroyed when no longer needed for such audit, evaluation, and enforcement of Federal legal requirements.

(4)

(A) Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information. Such record of access shall be available only to parents, to the school official and his assistants who are responsible for the custody of such records, and to persons or organizations authorized in, and under the conditions of, clauses (A) and (C) of paragraph (1) as a means of auditing the operation of the system.

(B) With respect to this subsection, personal information shall only be transferred to a third party on the condition that such party will not permit any other party to have access to such information without the written consent of the parents of the student. If a third party outside the educational agency or institution permits access to information in violation of paragraph (2)(A), or fails to destroy information in violation of paragraph (1)(F), the educational agency or institution shall be prohibited from permitting access to information from education records to that third party for a period of not less than five years.

(5) Nothing in this section shall be construed which may be necessary in connection with the audit and evaluation of any federally or State supported education program or in connection with the enforcement of the Federal legal requirements which relate to any such program, subject to the conditions specified in the proviso in paragraph (3).

(6)

(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding—

(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.

(7)

(A) Nothing in this section may be construed to prohibit an educational institution from disclosing information provided to the institution under section 14071 of title 42 concerning registered sex offenders who are required to register under such section.

(B) The Secretary shall take appropriate steps to notify educational institutions that disclosure of information described in subparagraph (A) is permitted.

(c) Surveys or data-gathering activities; regulations

Not later than 240 days after October 20, 1994, the Secretary shall adopt appropriate regulations or procedures, or identify existing regulations or procedures, which protect the rights of privacy of students and their families in connection with any surveys or data-gathering activities conducted, assisted, or authorized by the Secretary or an administrative head of an education agency. Regulations established under this subsection shall include provisions controlling the use, dissemination, and protection of such data. No survey or data-gathering activities shall be conducted by the Secretary, or an administrative head of an education agency under an applicable program, unless such activities are authorized by law.

(d) Students' rather than parents' permission or consent

For the purposes of this section, whenever a student has attained eighteen years of age, or is to prohibit State and local educational officials from having access to student or other records attending an institution of postsecondary education, the permission or consent required of and the rights accorded to the parents of the student shall thereafter only be required of and accorded to the student.

(e) Informing parents or students of rights under this section

No funds shall be made available under any applicable program to any educational agency or institution unless such agency or institution effectively informs the parents of students, or the students, if they are eighteen years of age or older, or are attending an institution of postsecondary education, of the rights accorded them by this section.

(f) Enforcement; termination of assistance

The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means.

(g) Office and review board; creation; functions

The 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 and complaints which may be filed concerning alleged violations of this section. Except for the conduct of hearings, none of the functions of the Secretary under this section shall be carried out in any of the regional offices of such Department.

(h) Disciplinary records; disclosure

Nothing in this section shall prohibit an educational agency or institution from—

(1) including appropriate information in the education record of any student concerning disciplinary action taken against such student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community; or

(2) disclosing such information to teachers and school officials, including teachers and school officials in other schools, who have legitimate educational interests in the behavior of the student.

(i) Drug and alcohol violation disclosures

(1) In general

Nothing in this Act or the Higher Education Act of 1965 [20 U.S.C. 1001 et seq., 42 U.S.C. 2751 et seq.] shall be construed to prohibit an institution of higher education from disclosing, to a parent or legal guardian of a student, information regarding any violation of any Federal, State, or local law, or of any rule or policy of the institution, governing the use or possession of alcohol or a controlled substance, regardless of whether that information is contained in the student's education records, if—

(A) the student is under the age of 21; and

(B) the institution determines that the student has committed a disciplinary violation with respect to such use or possession.

(2) State law regarding disclosure

Nothing in paragraph (1) shall be construed to supersede any provision of State law that prohibits an institution of higher education from making the disclosure described in subsection (a) of this section.

(j) Investigation and prosecution of terrorism

(1) In general

Notwithstanding subsections (a) through (i) of this section or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to—

(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and

(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.

(2) Application and approval

(A) IN GENERAL.—An application under paragraph (1) shall certify that there are specific and

articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).

(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).

(3) Protection of educational agency or institution

An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.

(4) Record-keeping

Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection.