Supreme Court of Ohio Clerk of Court - Filed February 04, 2015 - Case No. 2014-0749

IN THE SUPREME COURT OF OHIO

State *ex rel.* School Choice Ohio, Inc.,	:	
	:	
Relator,	:	Case No. 2014-0749
	:	
vs.	:	
	:	Original Action in Mandamus
Cincinnati Public School District, *et al.*,	:	
	:	
Respondents.	:	

BRIEF OF AMICI CURIAE OHIO SCHOOL BOARDS ASSOCIATION, BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS, AND OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS IN SUPPORT OF RESPONDENT SPRINGFIELD CITY SCHOOL DISTRICT

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TABLE OF CONTENTS

TABLE OF AUTORITIES ii

I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE 1

II. STATEMENT OF THE FACTS 2

III. ARGUMENT 2

Proposition of Law No. 1: If a school district specifically identifies "directory information" under FERPA and provides the necessary notice, it must produce records in response to a valid public records request 3

Proposition of Law No. 2: A school district retains the discretion to decide what information it considers "directory information," which governs what information can be released in response to a public records request without violating FERPA 4

Proposition of Law No. 3: The Court should avoid entanglement in the public policy debate between school choice advocates and public schools because FERPA clearly governs a school's actions 9

IV. CONCLUSION 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Cases

Phys. Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,
108 Ohio St.3d 288 (2006)..... 3

State ex rel. Barno v. Crestwood Bd. of Educ.,
134 Ohio App.3d 494 (11th Dist. 1998) 5

State ex rel. Dublin v. Delaware Cty. Bd. of Comm'rs,
62 Ohio St.3d 55 (1991)..... 5

State ex rel. ESPN v. Ohio State Univ.,
132 Ohio St.3d 212 (2012)..... 3, 4, 5

State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad,
123 Ohio App.3d 554 (10th Dist. 1997) 8

State ex rel. Lucas Cty. Bd. of Comm'rs,
88 Ohio St.3d 166 (2000)..... 7

State ex rel. The Miami Student v. Miami Univ.,
79 Ohio St.3d 168 (1997)..... 11

Sycamore Bd. of Educ. v. State ex rel. Wickham,
80 Ohio St. 133, ¶ 2 of syllabus (1909) 6

United States v. Miami Univ.,
294 F.3d 797 (6th Cir. 2002) 4, 5, 6, 9, 11

United States v. Miami Univ.,
91 F.Supp.2d 1132 (S.D. Ohio 2000) 11

Statutes

12 U.S.C. § 1232g(b)(1) 10

20 U.S.C. § 1232g(a)(5)..... 5

20 U.S.C. § 1232g(a)(5)(A) 4

20 U.S.C. § 1232g(a)(5)(B) 4

20 U.S.C. § 1232g(b)(1) 3, 5

20 U.S.C. § 1232g(b)(2) 5

34 C.F.R. 99.31(d) 6

R.C. 149.43 ..... passim

R.C. 149.43(A)(1)(v) ..... passim

R.C. 149.43(C)(1) 3

R.C. 3313.20(A) 5

R.C. 3313.47 5

R.C. 3319.321 11

I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

Today, three of Ohio's statewide educational organizations—the Ohio School Boards Association (OSBA), the Buckeye Association of School Administrators (BASA), and the Ohio Association of School Business Officials (OASBO) (collectively referred to as "statewide educational organizations" or "SEOs")—are grateful for the opportunity to appear jointly as *amici curiae* to assist the Court with solving the vexing problems posed by this litigation. BASA, OSBA, and OASBO are the three largest statewide organizations representing the concerns of public elementary and secondary schools leaders in Ohio. All are nonprofit corporations dedicated to helping their respective members more effectively serve the needs of students and the larger society they are preparing to enter.

More specifically, nearly 100% of the board members in all of the various city, local, exempted village, educational service center, and joint vocational school districts throughout the State of Ohio are members of the Ohio School Boards Association, whose activities include extensive informational support and consulting activities, such as board development and training, legal information, labor relations representation, and policy analysis. BASA currently counts in its membership over 850 active superintendents and school administrators, as well as a significant number of members who are graduate students, retirees, or persons associated with Ohio's colleges and universities. BASA is actively involved in providing programs for continuing education, effective communications, and leadership development. The membership of OASBO currently totals approximately 950 and is comprised primarily of school district treasurers, business managers, and supervisors in the fields of transportation and food service. Founded in 1936, OASBO is dedicated to learning, sharing, and utilizing better methods of

school business administration, and realizes its goals through workshops, publications, seminars, networking, and mentorship.

Through their joint appearance as *amici curiae*, BASA, OSBA, and OASBO seek to direct this Court's attention to certain issues in this case and their potential impact on school districts across Ohio. While the dispute before the Court concerns SCO and Springfield, this Court's decision will have significant effects on school districts and even other public offices depending how it is decided. First, this case will impact the breadth at which federal law is interpreted in Ohio concerning student privacy. Second, the Court's holding will consider the discretion and autonomy that school districts possess under state law. Finally, the SEOs hope to apprise the Court of relevant public policy involved and how to avoid taking either party's position on public policy. While the parties have adequately briefed the legal issues in their dispute, the SEOs believe their perspective will provide insight for the Court on all of these important issues.

II. STATEMENT OF THE FACTS

The SEOs incorporate, in its entirety, the Statement of the Case and Facts set forth by Respondent Springfield City School District.

III. ARGUMENT[1]

School districts must retain the necessary discretion to decide how to best educate their students and protect their privacy interests because they are in the best position to make such an evaluation. Unfortunately, SCO's request for mandamus seeks to obviate the discretion of Springfield, which is improper for a mandamus claim and, more importantly, violates the

[1] To the extent that the SEOs have not dealt with specific issues, they are amply briefed by both parties. As amici curiae, the SEOs have limited their role to assisting the Court with understanding their perspective in this dispute with regard to school districts across Ohio.

autonomy through which school districts in Ohio operate. Essentially, SCO has requested this Court make Springfield re-write or violate its policy under the Family Education Rights and Privacy Act (FERPA) because SCO wants information the easiest way possible.

Regardless of the outcome for SCO, courts should avoid entanglement with the day-to-day operations of public entities such as school districts when such a policy is permissible under the law. The political process provides a remedy for anyone aggrieved by this Court's following the applicable federal law, as it must. As such, the SEOs strongly urge this Court to consider the necessary discretion and autonomy afforded to school districts when evaluating each of SCO's propositions of law.

<u>Proposition of Law No. 1</u>: If a school district specifically identifies "directory information" under FERPA and provides the necessary notice, it must produce records in response to a valid public records request.

SCO's first proposition of law is nothing more than a recitation of the applicable law, which no party should contentiously dispute. In response to a public records request under R.C. 149.43, a school district must disclose personally identifiable information falling within the category of "directory information" that has been properly designated and noticed under FERPA. If such information is improperly withheld, R.C. 149.43(C)(1) provides that an aggrieved person may commence a mandamus action to order the public office to comply with the public records request. *See also Phys. Comm. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio St.3d 288, 289 (2006). If the records sought do not contain "directory information," FERPA prohibits policies or practices allowing for their release. *See* 20 U.S.C. § 1232g(b)(1); *see also State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 217-18 (2012). R.C. 149.43(A)(1)(v) explicitly provides that public records do not mean "[r]ecords the release of which is prohibited by state or federal law." Thus, "whether the release of a particular record is

prohibited by federal law necessarily implicates the interpretation of that federal law." *See United States v. Miami Univ.*, 294 F.3d 797, 810 (6th Cir. 2002).

Despite the clear language set forth in FERPA, SCO's first proposition of law inaccurately suggests that the categories of potential "directory information" constitute "directory information" no matter what. SCO glosses over the important distinction that the designation of directory information and subsequent provision of notice falls within a school district's responsibilities. *See* 20 U.S.C. § 1232g(a)(5)(A). School districts get to decide what categories of information can be provided out of the ten or more specific types of directory information listed in the statute. 20 U.S.C. § 1232g(a)(5)(B). Here, Springfield's Policy JO plainly and unequivocally declined to delineate any "directory information." (Evidence, Vol. 1, Estrop Affd., ¶ 9 (Bates 001-004)).

As argued below, FERPA prohibits Springfield from producing information that <u>could</u> be considered directory information in the absence of any designation of directory information. *See State ex rel. ESPN*, 132 Ohio St.3d at 217-18. Again, SCO attempts to blur this distinction by pushing aside the fact that Springfield has not designated any categories of directory information. When SCO argued that Springfield can provide the information that SCO seeks, it assumes that Springfield <u>must</u> designate directory information under FERPA. Thus, while the proposition of law above is clear for when directory information is designated, this case concerns whether school districts must designate directory information at all.

<u>Proposition of Law No. 2</u>: A school district retains the discretion to decide what information it considers "directory information," which governs what information can be released in response to a public records request without violating FERPA.

The crucial question for this Court to determine is whether Springfield retains the discretion to determine for itself whether it maintains any directory information at all. "The

extraordinary writ of mandamus cannot be used to control the exercise of administrative or legislative discretion." *State ex rel. Dublin v. Delaware Cty. Bd. of Comm'rs*, 62 Ohio St.3d 55, 60 (1991). FERPA allows a school district to determine the scope of directory information that it will maintain (and consequently provide), and state public records law considers that federal law in some cases might provide additional exceptions to disclosure. Once a school district decides what directory information it will maintain, only those specific categories will be available as public records. *See* 20 U.S.C. § 1232g(b)(1) and (b)(2). Any information that cannot be disclosed under FERPA remains an exception to disclosure under R.C. 149.43(A)(1)(v).

Contrary to SCO's position, FERPA prohibits schools from releasing even the directory information listed within FERPA to the extent that a school district has never specified or provided notice regarding any directory information under 20 U.S.C. § 1232g(a)(5). This Court has already held that FERPA prohibits the release of records once it is determined that it applies. *See State ex rel. ESPN*, 132 Ohio St.3d at 217-18. To hold otherwise "would be compelling educational agencies and institutions throughout Ohio to adopt 'a policy or practice' permitting the release of education records." *Id.* (*citing United States v. Miami Univ.*, 294 F.3d 797, 819-820 (6th Cir. 2002)).

School districts must possess the authority to enact policies that, within their sound discretion, are for the betterment of their own district. *State ex rel. Barno v. Crestwood Bd. of Educ.*, 134 Ohio App.3d 494, 502 (11th Dist. 1998) (recognizing necessary policy-making authority for boards of education under R.C. 3313.47 and 3313.20(A)). These principles have held true for over a century when this Court held, as follows:

> The statutes of the state relating to education which give control and management of the public schools to the boards of education of the several districts, authorize such boards to establish rules and regulations for the government of the schools, and, *so far as rules so established are reasonable*, and fairly calculated to insure

> good government and promote the ends of education, [they] will be sustained by the courts.

Sycamore Bd. of Educ. v. State ex rel. Wickham, 80 Ohio St. 133, ¶ 2 of syllabus (1909) (emphasis added). Accordingly, the SEOs find it very significant to emphasize to the Court the autonomy and discretion that Ohio law has always given schools to decide for themselves how to best protect and serve the interests of students. This case is about Springfield's efforts to do just that—make an informed decision on the privacy interests of its parents and students.

While FERPA permits the directory information to be disclosed if the district so chooses, FERPA does not compel the policies through which school districts are governed. As fully briefed by Springfield, nothing in FERPA requires designation of any directory information. *See* 34 C.F.R. 99.31(d). FERPA operates independently from Ohio public records law, so R.C. 149.43 cannot be used to control the discretion afforded to school districts to make their own decisions under FERPA. Nor does R.C. 149.43 conflict with FERPA because R.C. 149.43(A)(1)(v) excepts records from disclosure if excepted under federal law. *See United States v. Miami Univ.*, 294 F.3d at 811.

As fully analyzed in Springfield's Merit Brief, FERPA is a privacy statute rather than a disclosure statute. When school districts decide what to include as directory information, they weigh the obvious compromise to students' privacy versus the administrative convenience of designating certain information as publicly available based upon a "passive consent" arrangement. Before enacting Policy JO, Springfield provided a type of notice that required the parents to affirmatively "opt out" of disclosure—this is "passive consent." (*See* Evidence, Vol. 1, Estrop Affd. at ¶ 5; Vol. 2, Ex. X). The affirmative action required typically leads to few opt outs.

After it enacted Policy JO, Springfield provided a notice where parents could "opt in" by completing a consent form that allowed the Superintendent to exercise discretion for whom would receive any directory information. (*See* Evidence, Vol. 1, Estrop Affd. at ¶¶ 11-12). Such consent is "active consent." Since enactment of Policy JO, parents now retain greater control over their students' information. Instead of a passive action allowing disclosure of private information, they must affirmatively opt in for Springfield to have the power to disclose any private information. (*Id.*). Importantly, this is a prime example of a policy decision affecting the students' privacy. The Court should not upset a school district's desire to serve its students when its actions remain entirely consistent with federal and state law.

Likewise, SCO mischaracterizes Springfield's policy as an effort to exclude a class of records from disclosure. SCO's case law is inapposite to the situation where Springfield has lawfully enacted a policy that sets forth the parameters for what will be disclosed regarding students' personally identifiable information. Springfield has not unilaterally attempted to make some well-known public record unavailable through policy, such as school board meeting minutes or a treasurer's financial reports. Instead, Springfield enacted policy that is lawful under authority given to it by FERPA.

Both of the cases offered by SCO to suggest that Springfield has enacted a policy to exclude records differ because the public offices sought to unilaterally exclude an explicit public record without some lawful authority for the exception. In *State ex rel. Lucas Cty. Bd. of Comm'rs*, this Court refused to allow the Ohio EPA to designate its records as "trade secrets" because the General Assembly decided whether it had that authority. *See* 88 Ohio St.3d 166, 171 (2000). Likewise, this Court struck down the Bureau of Workers Compensation's efforts to allow itself to prohibit disclosure of public records under its own, inherent rule-making authority.

See State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad, 123 Ohio App.3d 554, 559 (10th Dist. 1997).

Much differently, Springfield lawfully enacted a policy under FERPA—federal law on the topic of student data privacy. Neither of the cases offered above involved entities that acted under actual authority of law like FERPA. Even inherent rule-making authority for administrative bodies fails to compare with Springfield's passing of valid policies under federal law. Simply put, Springfield cannot produce any directory information to SCO under R.C. 149.43 or else violate FERPA. Much more than internal policy violations are at issue. This Court should not require schools or other public entities to violate FERPA or any federal law in the interest of disclosure of public records, especially when R.C. 149.43 provides an exception in this very instance.

Springfield's decision to not designate any directory information affects its daily operations, which falls within the sound discretion of school districts. Congress enacted FERPA to ease the administrative burden when dealing with directory information. *See* SCO's Merit Brief, p. 24. Based upon Springfield's policy, no such information can be provided as a matter of course. Each and every mundane request for this information must be evaluated by Springfield's Superintendent to ensure that it falls with the acceptable parameters of parental consent. (Evidence, Vol. 1, Estrop Affd., ¶ 12). Emails get circulated every school day providing a list of students and their status on disclosure. (*Id.*).

For example, a parent's explicit refusal to consent to the Superintendent's discretion or failure to return a consent form both qualify as a denial of consent. (*Id.*). Parents may even consent to other policies and deny consent to the disclosure of student information through discretion of the Superintendent. (*Id.* at ¶ 11). Accordingly, most requests must be evaluated on

a case-by-case and even student-by-student basis. While SCO suggests that Springfield passed its policies to keep the information from SCO, Springfield's policy and ramifications support Springfield's intent on protecting its families. Without any authority to the contrary, this Court should affirm school districts' rights to exercise discretion on how they lawfully protect the privacy interests of their students.

<u>Proposition of Law No. 3</u>: The Court should avoid entanglement in the public policy debate between school choice advocates and public schools because FERPA clearly governs a school's actions.

FERPA governs Springfield's handling of student directory information, so the Court does not need to engage in public policy analysis when federal law clearly applies. As the Sixth Circuit has held, federal laws determine whether FERPA prohibits the release of education records, despite the openness required by R.C. 149.43 or any other state law. *United States v. Miami Univ.*, 294 F.3d at 810. While this Court liberally construes open access to records, such a liberal construction is inapplicable when the question is whether FERPA allows the release of what SCO seeks. In fact, this Court avoids the creation of public policy altogether by allowing Springfield to decide for itself whether to designate any directory information under the clear authority of FERPA.

To the extent that SCO suggests that Springfield has unfairly singled out SCO's request for information, the remedy is not through this Court or any other state court in Ohio. Congress passed FERPA; only Congress can change FERPA. True enough, this Court's concern may rest with the concept that SCO suggests that the Superintendent has exercised discretion in a manner that has left SCO as the only requester whose request was not honored. *See* SCO's Merit Brief, pp. 33-35. Because Springfield has closely followed what FERPA allows, strict adherence to the

FERPA requirements avoids any entanglement with public policy between school choice advocates and Springfield. If any "fix" is warranted, the legislature should enact such a change.

Expanding upon this concept, once Springfield has designated no directory information, neither educational records nor any personally identifiable information[2] may be disclosed under federal law and is excepted from the definition of public records under R.C. 149.43(A)(1)(v). Before any such information gets disclosed, written parental consent is absolutely necessary. 12 U.S.C. § 1232g(b)(1). Beyond Springfield's Policy JO, parents may give written consent to the Superintendent providing him with discretion to turn over the information for "Superintendent Approved Purposes." (Evidence, Vol. 1, Estrop Affd., ¶ 11d, Ex. G). Even if the Superintendent wishes to exercise discretion to turn over the type of information typically identified as directory information, only information for those students who have returned the written consent forms may be disclosed. (*Id.* at ¶ 12). Even if SCO only wants information from parents whose consent has already been received, their purpose was limited to affording discretion to the Superintendent to decide when the information should be disclosed. Such a limited consent is neither prohibited by FERPA or any Ohio law, and this Court is bound to interpret the law. If either Ohio or federal law is distasteful to some, only the political process should resolve such an outcome otherwise fully supported by the applicable laws (or lack thereof).

This Court's decision closely adhering to FERPA also avoids any negative implications on Ohio's public records laws. By following FERPA, the Court's opinion says nothing about the openness required under R.C. 149.43. Because FERPA governs Springfield's decisions regarding directory information in this case, R.C. 149.43(A)(1)(v)'s exception to disclosure applies. Such a result makes sense to avoid conflict between FERPA and R.C. 149.43, which

[2] In Springfield's case, this includes all information listed as directory information under FERPA because Springfield has not designated any directory information for prior notice.

also avoids any consideration of public policy. *See United States v. Miami Univ.*, 294 F.3d at 811 (*citing State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168, 170-71 (1997)).

Adherence to federal law also prevents inconsistences with applying R.C. 3319.321 because only "designated" directory information under FERPA is governed by R.C. 3319.321. It is undisputed that Springfield has not designated any directory information, so R.C. 3319.321 does not apply. Instead, the plain language of R.C. 3319.321 was intended to prevent different categories of designated directory information from being offered to the representatives of different industries listed in the statute. Such is not the case here because FERPA governs what gets disclosed. Likewise, the consent form utilized by Springfield complies with FERPA, so to force Springfield to turn over records merely because other entities have received them puts Springfield at risk of violating FERPA. Thus, the Court should decline to order disclosure to prevent any conflicts with FERPA and R.C. 3319.321.

To the extent that SCO has alleged irreparable harm if it cannot obtain the directory information, it is a harm that FERPA was not designed to correct. The District Court made it clear in *Miami University* that it would not second guess Congress with regard to the privacy concerns versus openness of records. *See United States v. Miami Univ.*, 91 F.Supp.2d 1132, 1159 (S.D. Ohio 2000). Without a showing of any violation, SCO lacks irreparable harm caused by Springfield.

Notwithstanding, SCO's suggestion of irreparable harm is unsupported by facts in the record. SCO wants the Court to believe that it needs the information it seeks from Springfield so that it can disseminate its message concerning other educational options; however, mailing is clearly not its only option to get its message to parents. The following means all accomplish the same objective: television, radio, electronic marketing, billboards, newspaper advertisements,

flyers, or even asking Springfield to send the flyers home with students. Even if SCO was entitled to obtain the most effective means to spread its message, there is no evidence in the record that these other messages are not more effective anyway. Thus, once this Court determines that FERPA applies, it can avoid any policy implications with its decision by allowing the political process to cure any unfairness that it believes has been created.

IV. CONCLUSION

This Court should deny School Choice Ohio's request for mandamus requiring the Springfield City School District to produce students' records because doing so would violate FERPA. In its attempts to respect its students' privacy, Springfield designated no directory information that can be provided as an exception to FERPA's strict privacy requirements. Under R.C. 149.43(A)(1)(v), "public record" does not mean records protected by federal law. As such, FERPA prohibits Springfield from disclosing what School Choice Ohio seeks, as recognized by Ohio law. For these reasons and all others provided above, the *Amici Curiae* respectfully request that the Court deny mandamus relief for School Choice Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Amici Curiae was served this 4th day of February, 2015, on the following via email pursuant to Ohio Rule of Civil Procedure 5(B)(2)(f) and S.Ct.Prac.R.3.11(B)(1):

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