

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

REPLY BRIEF OF RELATOR SCHOOL CHOICE OHIO, INC.

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INTRODUCTORY STATEMENT

Immediately going all-in, Springfield City School District opens its brief by declaring that “this case has nothing to do with Ohio’s Public Records Act.” (Springfield Br. at 1.) While Springfield may wish that were true, this case has *everything* to do with Ohio’s Public Records Act and, more specifically, whether Ohio law gives a public office the power and discretion to unilaterally place its records beyond the Public Records Act’s reach.

Defying the entire written record, Springfield contends that School Choice Ohio, Inc. seeks to assert private rights under the Family Education Rights and Privacy Act (“FERPA”) and the similar provisions of R.C. 3319.321(B). However, the *only* reason those statutes are at issue is because Springfield invoked them as a pretext for denying School Choice Ohio’s public records requests under R.C. 149.43(A)(1)(v). Springfield therefore bears the burden of proving that it is “prohibited” by FERPA and R.C. 3319.321(B) from releasing the requested records, and that is a burden Springfield cannot carry.

Springfield strays further from the facts by floridly—and falsely—accusing School Choice Ohio of intentionally “misrepresent[ing] the time period for which it requested Springfield’s education records as the current 2014-2015 School Year.” (Springfield Br. at 3.) Each year, School Choice Ohio requests contact information for currently-enrolled students so it can reach out regarding their school choice options for the following academic year. Thus, School Choice Ohio made its January 2013 public records request “in anticipation of the 2013-2014 school year,” and it made the requests now before the Court in late 2013 and early 2014 “for 2014-2015.” (See Merits Br. at 2, 6, 9 and 16.)

Springfield also tries to sully School Choice Ohio by painting it as “simply a marketer of school choice to students in Ohio which takes no responsibility for the outcomes of its marketing efforts unless that outcome is a ‘success story.’” (Springfield Br. at 15.) That conflates School Choice Ohio’s status as a private, not-for-profit corporation with its own status as a school district that exists solely under the auspices of Ohio law. No matter how much Springfield dislikes Ohio’s school choice programs or how badly it wants to silence School Choice Ohio’s message, School Choice Ohio has every right under Ohio law and the First Amendment to obtain and use contact information for Springfield’s students to communicate with their families regarding their school choice options.

Ultimately, Springfield relegates these matters to the sideline by admitting it “could have designated and released the information under the ‘directory information’ exception.” (Springfield Br. at 27.) This admission should be dispositive. Since Springfield *can* release the records School Choice Ohio requested, it *must*. Springfield therefore cannot carry its burden of proving that it is “prohibited” from releasing the records at issue and the Court should grant the writ School Choice Ohio seeks.

ARGUMENT IN REPLY

Springfield does not directly respond to School Choice Ohio’s propositions of law as required by S.Ct.Prac. R. 16.03(B)(1). Instead, it needlessly complicates what is otherwise a straight-forward public records case by so scattering its response across eight counter-propositions that its own explanatory footnote (fn. 7, p. 16) cannot correlate its arguments to School Choice Ohio’s propositions. School Choice Ohio therefore responds to Springfield’s counter-propositions in the context of the propositions in its Merits Brief.

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.

Springfield makes three procedural counter-propositions for why it believes the Court should never reach the merits of School Choice Ohio’s first proposition: (i) that Springfield lacks the capacity to be sued (counter-proposition 1); (ii) that School Choice Ohio lacks standing to assert its mandamus claims (counter-proposition 3); and, (iii) that private rights of action do not exist under FERPA or R.C. 1399.321(B) (counter-proposition 4). Each of Springfield’s procedural arguments misses the mark.¹

A. Springfield Has The Capacity To Be Sued

Whether a party lacks the capacity to sue or be sued is not jurisdictional. *See Beaver Excavating v. Testa*, 134 Ohio St.3d 565, 2012-Ohio-5776, 983 N.E.2d 1317, fn. 1. Rather, lack of capacity is an affirmative defense that must be pled with particularity. *See* Civ.R. 9(A) (requiring lack of capacity to be pled with particularity). A respondent thus waives any lack of capacity defense that it does not aver with particularity in its responsive pleading. *See State ex rel. Downs v. Panioto*, 107 Ohio St.3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶ 30 (reversing writ of prohibition where failure to assert lack of capacity waived defense). Springfield generally averred that School Choice Ohio lacks capacity to bring this suit, but it did not aver at all, let alone with particularity, that it lacked the capacity to be sued by

¹ Springfield also contends—in a footnote—that School Choice Ohio’s Amended Complaint does not comply with the affidavit requirement of R.C. 2731.04 and S.Ct.Prac.R. 12.02(B)(1). (Springfield Br. at 3, fn.2.) That is incorrect. Consistent with Civil Rule 10(C), Springfield’s Amended Complaint (which is identical to its initial complaint other than to correct the caption and a handful of legal citations) references, cites to, and is fully supported by Ms. Pechan’s May 12, 2014, Affidavit. (*See* Am. Cmpl. ¶¶ 22-25, 27-50.)

School Choice Ohio. It then litigated this case to the brink of a decision before raising it for the first time. Springfield therefore has waived lack of capacity to be sued as defense.

But even if Springfield had pled a lack of capacity, and done so with particularity, its defense would fail because the Public Records Act authorizes mandamus actions against school districts. R.C. 149.43(C)(1) authorizes an aggrieved party to bring a mandamus action against any “public office,” which is defined in section (A)(1) as including “school district units.” R.C. 149.43(A)(1), (C)(1). School districts, including Springfield, therefore are *sui juris* with respect to mandamus claims under the Public Records Act. *See State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d 1049, ¶ 14 (“It is unquestioned here that [Cincinnati Public Schools] is a public office for purposes of the Public Records Act.”); *State ex rel. Bowman v. Jackson City School Dist.*, 2011-Ohio-2228 (4th Dist.), ¶ 9 (“It is undisputed that the Jackson City School District is a public office subject to R.C. 149.43.”).

Accordingly, School Choice Ohio believes that it properly brought this case against Springfield. However, out of an abundance of caution, School Choice Ohio will be filing a conditional motion for leave to amend its complaint under Civil Rules 15(A) and 15(B) to re-caption this case as being brought against the “Springfield City School District Board of Education.” The Court therefore can ensure that this case is decided on its merits by granting School Choice Ohio leave to amend if it concludes that Springfield is not *sui juris* with respect to School Choice Ohio’s current complaint.² *See Peterson v. Teodosio*, 34 Ohio

² If the Court grants School Choice Ohio’s motion, all references in School Choice Ohio’s Merits Brief and this Reply will apply equally to the Springfield City School District Board of Education.

St.2d 161, 175, 297 N.E.2d 113 (1973) (“The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies.”).

B. School Choice Ohio Has Standing To Assert Its Claims

Springfield’s argument that School Choice Ohio lacks standing because it is outside FERPA’s and R.C. 33919.321’s “zone of interests” misapprehends School Choice Ohio’s claims. School Choice Ohio did not bring this case to compel Springfield’s performance under FERPA or the first paragraph of R.C. 3319.321(B). School Choice Ohio brought this case to compel Springfield to perform its obligations under the Public Records Act and under R.C. 3319.321(B)(2)(a), and it is squarely within the “zone of interests” for each.

Standing exists where a party has suffered (1) an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief. *Moore v. Middleton*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Springfield’s failure to produce the public records School Choice Ohio requested has caused it to suffer an injury, traceable directly to Springfield, that can be redressed by the relief that School Choice Ohio seeks.³ School Choice Ohio therefore has standing to bring and maintain its Public Records Act mandamus claims against Springfield. *See* R.C. 149.43(C)(1) (aggrieved person “may commence a mandamus action to obtain a judgment that orders the public office ... to comply with” Public Records Act). *See also*, *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees*, 108 Ohio

³ Contrary to the suggestion of Springfield’s *amici*, School Choice Ohio does not ask this Court to somehow judicially change FERPA. (*See* Amici Br. at 9-10.) School Choice Ohio merely asks the Court to compel Springfield’s compliance with the obligations already imposed on it by Ohio law.

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.”).

The same is true with respect to Count IV of School Choice Ohio’s complaint, under which it asks the Court to compel Springfield to comply with the prohibition in R.C. 3319.321(B)(2)(a) against imposing any burden on the release of information that qualifies as “directory information” that is not uniformly imposed on all third parties. Springfield does not address this subsection of R.C. 3319.321, choosing instead to focus entirely on the first paragraph of subsection (B). It therefore is undisputed that School Choice Ohio has standing to bring its mandamus claim under R.C. 3319.321(B)(2)(a) because Springfield’s failure to comply with its obligations under that subsection has caused it to suffer a redressable injury that is traceable to Springfield.

**C. School Choice Ohio Does Not Claim Or Assert
Private Rights Of Action Under FERPA or R.C. 3319.321**

Finally, Springfield argues that School Choice Ohio’s claims must fail because neither FERPA nor R.C. 3319.321 provide for a private right of action. Like with respect to standing, Springfield’s argument misapprehends School Choice Ohio’s claims. School Choice Ohio does not claim or assert any private rights of action under FERPA or the first paragraph of R.C. 3319.321(B); it asserts mandamus claims against Springfield under R.C. 2731.01 to compel Springfield’s performance of its obligations under R.C. 149.43 and R.C. 3319.321(B)(2)(a). School Choice Ohio’s claims therefore are properly before this Court.

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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.”

As a public office asserting R.C. 149.43(A)(1)(v), Springfield bears the burden of establishing that state or federal law prohibits it from releasing the records at issue. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23. Despite that burden, Springfield candidly admits that it “could have designated and released the information” within in the records at issue “under the ‘directory information’ exception.” (Springfield Br. at 27.) Taken at face value, Springfield’s admission concedes that it is not “prohibited” from complying with School Choice Ohio’s request.

Nevertheless, Springfield contends that it is “prohibited” from disclosing the records at issue for three reasons (which it scatters across four counter-propositions), namely: (i) that the opinion in *State ex rel. ESPN, Inc. v. Ohio State University* effectively excludes from R.C. 149.43 all records within FERPA’s purview (counter-proposition 2); (ii) that it has the power and discretion to place its records beyond the Public Records Act’s reach (counter-propositions 5 and 6); and (iii) that the policies underlying FERPA and the first paragraph of R.C. 3319.321(B) trump School Choice Ohio’s public records and First Amendment rights (counter-propositions 6 at 7). Springfield is wrong on all three counts.

A. Springfield’s Reliance on *State ex rel. ESPN, Inc.* Is Misplaced

This Court did not hold in *State ex rel. ESPN, Inc. v. Ohio State University*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, that FERPA always prohibits disclosure of personally-identifiable information in “education records,” as Springfield argues.

The primary issue in *ESPN* was whether FERPA, which Congress enacted pursuant to its spending authority, ever could qualify as a federal law that prohibits the release of records under R.C. 149.43(A)(1)(v). *ESPN* at ¶¶ 18-25. Relator ESPN argued that FERPA could not because “it merely penalizes those educational agencies and institutions that have a policy or practice of permitting the release of [student educational records] without parental consent by withholding federal funding.” *Id.* at ¶ 20. Rejecting ESPN’s argument, this Court held that “FERPA, *if applicable*, does constitute a prohibition on the release of records under R.C. 143.49(A)(1)(v).” *Id.* at ¶ 25 (emphasis added).

The Court’s use of the phrase “if applicable” in *ESPN* does not mean that the Public Records Act *never* requires production of records that fall within FERPA’s definition of “education records,” as Springfield argues. While FERPA generally prohibits the release of “education records” without consent, it includes at least sixteen exceptions, including in connection with financial aid, to comply with a judicial order or subpoena, *and* disclosures of personally-identifiable information that qualifies as “directory information.” 34 C.F.R. § 99.31. Neither party raised, and the Court did not consider, any of these exceptions in *ESPN*, let alone find that they are irrelevant to the question of whether FERPA “applies” for purposes of R.C. 149.43(A)(1)(v). Springfield therefore must establish that FERPA actually applies in a way that prohibits it from releasing the particular records at issue in this case, which Springfield cannot do.

B. Springfield Does Not Have the Power Or Discretion To Place Its Records Beyond The Reach Of Ohio’s Public Records Act

Springfield argues in its fifth counter-proposition that FERPA constitutes an absolute bar for purposes of R.C. 149.43(A)(1)(v) because it *allows*—but does not *require*—

it to designate and disclose the categories of personally-identifiable information contained in the records School Choice Ohio requested. The question is not whether Congress delegated the decision of what categories of information to designate as “directory information” to the states, because it did. *See* 20 U.S.C. § 1232g(a)(5)(A), (B). The question is whether Ohio law affords Springfield the discretion to manipulate its designations to create a pretextual basis for denying School Choice Ohio’s requests, which it does not.

Springfield does not have the broad power or unfettered discretion to manipulate its “directory information” designations to intentionally interfere with its public records obligations that it and its *amici* suggest. A school district exists as “a mere instrumentality of the state to accomplish its purpose in establishing and carrying forward a system of common schools throughout the state.” *Cincinnati Bd. of Edn. v. Volk*, 72 Ohio St. 469, 485, 74 N.E. 646 (1905). As such, a school district and its board have “no more authority than that conferred upon them by statute, or what is clearly implied therefrom.” *Hall v. Lakeview Local School Dist. Bd. of Edn.*, 63 Ohio St.3d 380, 383, 588 N.E.2d 785, 788 (1992). Therefore, unless preempted by federal law, the General Assembly may enact laws limiting any discretion that a district might otherwise have under federal law. *See State ex rel. Core v. Green*, 160 Ohio St. 175, 115 N.E.2d 157, syl. ¶ 1 (1953) (“By Sections 1, 2 and 3 of Article VI of the Ohio Constitution, the General Assembly is given broad powers to provide a thorough and efficient system of common school by taxation and for the organization, administration, and control thereof.”)

FERPA does not alleviate Springfield of its public record obligations because it does not preempt Ohio’s Public Records Act. Express preemption occurs when Congress

explicitly defines “the extent to which its enactments pre-empt state law,” and implied preemption occurs when Congress creates a “scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,’ or where an Act of Congress ‘touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990), quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947). FERPA does not include an express preemption clause and its legislative history teaches that FERPA “was not intended ... to preempt the States’ authority in the field.” 120 Congr. Rec. 39862, 39863 (1974) (Joint Statement of Sens. Buckley and Pell). FERPA therefore does not confer on an Ohio school district any power or the discretion to manipulate its directory information policies to avoid its Public Records Act obligations because whatever discretion a district might have under FERPA must be exercised consistent with the district’s concurrent obligations under Ohio law.

Nevertheless, Springfield cites the decisions in *Nichols v. W. Local Bd. of Ed.*, 127 Ohio Misc.2d 30, 2003-Ohio-7359, 805 N.E.2d 206 (C.P.), and *State ex rel. Mack v. Bd. of Ed. of Covington*, 1 Ohio App.2d 143, 204 N.E.2d 86 (2d Dist. 1963), to argue that the Court must defer to its decision to change Policy JO for what it called “defensive reasons” (*i.e.*, to resist School Choice Ohio’s public records requests). (Springfield Br. at 33-35.) The school policies at issue in those cases, however, were implemented consistent with authority granted by the General Assembly. In *Nichols*, the Pike County Court of Common Pleas deferred to a district’s policy under which it excluded a parent from school activities

because R.C. 3313.20 authorized the policy in question. *See Nichols* at ¶ 5. Similarly, the court in *Mack* deferred to a district’s policy compelling vaccinations because R.C. 3313.671 authorized it to refuse unvaccinated students. *See Mack* at 148-49. Neither case applies under the facts of this case because the Revised Code does not grant Springfield the power or discretion to unilaterally change the public records status of the records at issue.

Springfield does not address, let alone distinguish, this Court’s decision in *State ex rel. Lucas County Board of Commissioners v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 724 N.E.2d 411 (2000), or the decision in *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad*, 123 Ohio App. 3d 554, 704 N.E.2d 638 (1997), which confirm that a public office cannot unilaterally change the public records status of its own records by changing its policies or regulations. The attempt by Springfield’s *amici* to distinguish these cases is incorrect because, just like in this case, the state entities in *Lucas County* and *Gallon* similarly purported to act under the authority of law—*i.e.*, R.C. 3734.12 and 1333.61 in *Lucas County* and R.C. 4121.441 *et seq.* in *Gallon*. (*See Amici Br.* at 8.) Moreover, neither Springfield or its *amici* cite even one case where an Ohio court permitted a school district or any other division of the State to withhold public records based on a voluntary and unilateral change to an internal policy.

Springfield’s and its *amici*’s arguments directed to the regulations promulgated under FERPA by the U.S. Department of Education are misplaced because School Choice Ohio made its requests under the Public Records Act, not FERPA. It therefore does not matter whether the federal regulations, or even FERPA itself, are permissive or mandatory with respect to the designation of categories of “directory information.” For purposes of the

exception for “[r]ecords the release of which is prohibited by state or federal law,” all that matters is that Springfield is *able* to produce the requested records in compliance with FERPA. Springfield did so in the past, and it can do so now. (See Springfield Br. at 27.) Springfield therefore has the ability to produce the requested records without violating FERPA, so the release of those records is not “prohibited” by FERPA for purposes of R.C. 149.43(A)(1)(v). See *State ex rel. Besser v. Ohio State University*, 87 Ohio St.3d 535, 539, 721 N.E.2d 1044 (2000) (“prohibit” means “to forbid by law” and “to prevent.”).

Finally, Springfield is neither beyond the powers of this Court nor entitled to a presumption that it acted in good faith as it and *amici* suggest because it abused any discretion it might otherwise be entitled to exercise under Ohio law. Springfield does not deny that it changed Policy JO solely as a pretext for denying School Choice Ohio’s public records requests. Nor does Springfield deny that it did so hoping to protect its pecuniary interest by stemming the rising tide of departing students (and their state funding) by cutting off School Choice Ohio’s ability to communicate with Ohio families regarding their school choice options. At the same time, Springfield continues to honor similar public records requests by others that it views as more friendly, or at least less threatening to its pecuniary interests, as a matter of course. Springfield therefore abused any discretion that it might otherwise have had, so its pretextual changes to Policy JO are not entitled to any deference whatsoever. See *Clay v. Harrison Hills City School Dist. Bd. of Ed.*, 102 Ohio Misc.2d 13, 23, 723 N.E.2d 1149 (1999) (no deference is warranted where superintendent or board of education abuses its discretion).

C. Springfield Cannot Avoid Its Public Records Act Obligations By Invoking Policy Considerations

The Court should reject Springfield's sixth and seventh counter-propositions, under which it asks the Court to find that the policies underlying FERPA and the first paragraph of R.C. 3319.321(B) are superior to School Choice Ohio's rights under the Public Records Act, R.C. 3319.321(B)(2)(a), and the First Amendment.

Springfield cannot rely on competing public policy arguments to nullify School Choice Ohio's rights under the Public Records Act. *See State ex rel. WBNX TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1496, ¶ 31. Instead, "[i]t is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices." *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 266, 602 N.E.2d 1159 (1992). For R.C. 149.43(A)(1)(v), the General Assembly balanced the relevant considerations by only excluding from the Public Records Act those records that state or federal law actually prohibits a public office from releasing. Springfield therefore cannot invoke general public policy considerations relating to FERPA or the first paragraph of R.C. 3319.321(B) to avoid its Public Records Act obligations when the statutes themselves do not prohibit it from releasing the records School Choice Ohio requested.

Springfield also cannot justify its refusal to release the requested records by arguing that School Choice Ohio does not actually need them to carry out its mission. As this Court previously held, "public offices are obligated to honor public-record requests regardless of the requester's reasons for or objectives in requesting the records." *Rhodes v. New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 951 N.E.2d 782, ¶ 21. The Court

therefore cannot balance what School Choice intends to do with the requested records (so long as it is not for a profit making activity) against Springfield's desire to silence it.

Nor should this Court accept Springfield's offer to review and distribute School Choice Ohio's materials or *amici's* suggestion that School Choice Ohio can use alternate media in lieu of the requested public records. Springfield's proposal is legally irrelevant, as a public office cannot avoid its obligations under the Public Records Act by contending there is—in its estimation—a better way. Separate from that, Springfield's proposal would inevitably lead to censorship, or outright muting, of School Choice Ohio's speech. Given Springfield's past objections to School Choice Ohio's message, and its prior attempt to use those objections to justify withholding student contact information from School Choice Ohio, Springfield would no doubt subject School Choice Ohio materials to a secretive, wholly discretionary, and non-appealable approval process, which would constitute an unconstitutional prior restraint on School Choice Ohio's speech.⁴ See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

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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.

Springfield does not directly respond to School Choice Ohio's Proposition of Law No. 3. But from the arguments disbursed throughout its brief, it appears that Springfield

⁴ If Springfield believes that School Choice Ohio uses information in the records at issue to disseminate false information, its remedy is a civil action for defamation, not the exercise of self help to deprive School Choice Ohio its rights under the Public Records Act.

believes it has absolute discretion refuse School Choice Ohio's requests even for those students for whom it received consent because the consent it requested and received was limited to "purposes approved by the Superintendent or his designee." Thus, in Springfield's world, whether its superintendent or his designee "approves" of a purpose is controlling—if they do, FERPA does not apply; if they do not, FERPA bars any release under the Public Records Act. In essence, Springfield believes it has devised a way to opt out of the Public Records Act without suffering the consequences of not designating any directory information. That cannot be correct, either as a matter of policy or in practice.

Ohio law does not afford a district (or its superintendent) power or discretion to refuse a public records request under R.C. 149.43(A)(1)(v) if it can be fulfilled in compliance with applicable law. *See* R.C. 149.43(B)(1) ("Upon request ... all public records responsive to the request *shall* be made available"; emphasis added). Because Springfield has received parental consent, FERPA does not apply in a way that prohibits Springfield from releasing the requested records for those students. *See* 20 U.S.C. § 1232g(b)(1), (2). Accordingly, all that stands between School Choice Ohio and the records for students for whom Springfield received consent is Springfield's subjective disapproval of what it perceives to be the purpose for which School Choice Ohio requested those records. That is not enough for Springfield to withhold the records School Choice Ohio requested.

Springfield does not have the power or discretion to unilaterally deny School Choice Ohio's request based on its disapproval of School Choice Ohio and its mission. Springfield already released records of exactly the same type School Choice Ohio requested to at least eight third party requesters. It therefore cannot legitimately dispute that FERPA *permits* it

to release such records to School Choice Ohio. The Public Records Act does not put School Choice Ohio at the mercy of its Springfield's unilateral application of subjective and unwritten criteria for determining whether a request is for "purposes approved by the Superintendent or his designee." Nor is it up to Springfield to decide whether to provide records based on whether it believes School Choice Ohio's outreach efforts would "provide clear and direct services and benefits to Springfield's students." (See Springfield Br. at 14.) Springfield therefore cannot rely on the exception in R.C. 149.43(A)(1)(v) for "records the release of which is prohibited by state or federal law" to withhold the requested records for at least those students whose parents have consented. See R.C. 149.43(B)(1) (requiring production of all non-exempt records).

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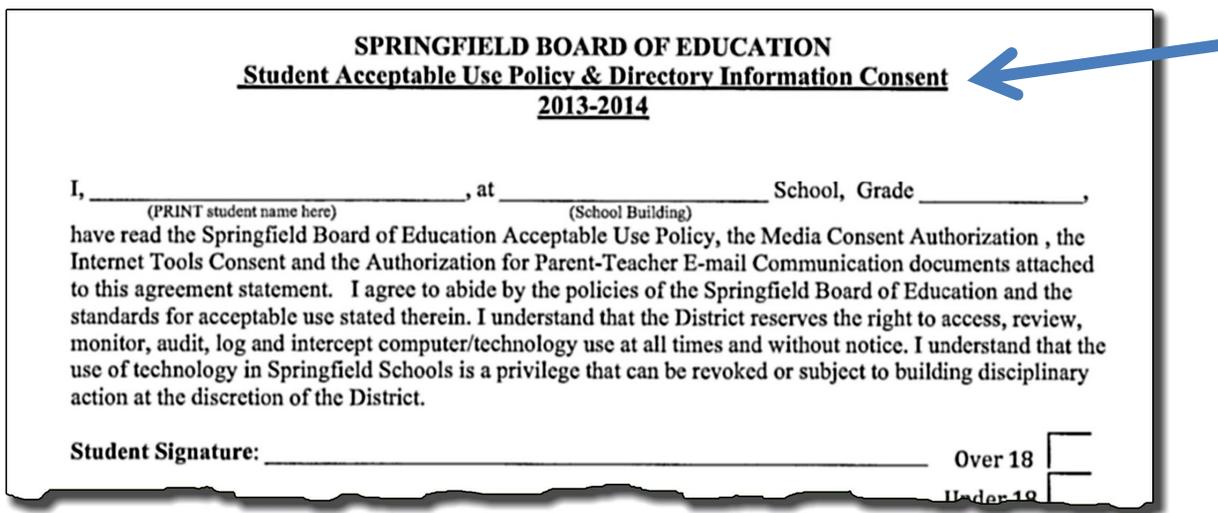
Proposition of Law No. 4: If a school district produces categories of directory information to third parties, Revised Code 3319.321 prohibits it from imposing additional burdens on the release of those categories of information to other third parties.

Elevating form over substance, Springfield asserts that the non-discrimination requirements in R.C. 3319.321(B)(2)(a) do not apply because Policy JO no longer designates any categories of information as "directory information" under FERPA. (Springfield Br. at 38.) Springfield, however, cannot opt itself out of R.C. 3319.321(B)(2)(a) by replacing one of its policies with another policy that has a nearly identical scope and effect.

R.C. 3319.321(B)(2)(a) applies to any "directory information" that a district "has designated as subject to release in accordance with [FERPA.]" R.C. 3319.321(B)(2)(a). According to Springfield, that applies only if a district has designated entire "categories of

information” for release under FERPA without parental consent. See 20 U.S.C. § 1232g(a)(5)(B). However, R.C. 3319.321(B)(2)(a) does not require designation of entire categories; it applies with equal force to information regarding even a single student so long as that information has been designated for release “in accordance with” FERPA.

Despite its changes to Policy JO, Springfield continues to designate directory information as being “subject to release in accordance with” FERPA on a student-by-student basis. When it amended Policy JO, Springfield simultaneously rolled out its new consent-driven policy using the following “Student Acceptable Use Policy & Directory Information Consent” form, which Springfield clearly identifies as being directed to the disclosure of “directory information”:



SPRINGFIELD BOARD OF EDUCATION
Student Acceptable Use Policy & Directory Information Consent
2013-2014

I, _____, at _____ School, Grade _____,
(PRINT student name here) (School Building)
have read the Springfield Board of Education Acceptable Use Policy, the Media Consent Authorization, the Internet Tools Consent and the Authorization for Parent-Teacher E-mail Communication documents attached to this agreement statement. I agree to abide by the policies of the Springfield Board of Education and the standards for acceptable use stated therein. I understand that the District reserves the right to access, review, monitor, audit, log and intercept computer/technology use at all times and without notice. I understand that the use of technology in Springfield Schools is a privilege that can be revoked or subject to building disciplinary action at the discretion of the District.

Student Signature: _____ Over 18
Under 18

(SCH Exh. J:0052.) Using this “Directory Information Consent” form, Springfield designates, on a student-by-student basis, exactly the same directory information it designated on a category-by-category basis under the previous iteration of its Policy JO. (See Merits Brief at 15.) Having done so, Springfield has effectively “designated” that same information as “directory information” “as subject to release in accordance with” FERPA for

each student who has opted in to Springfield's new policy and procedure. Springfield therefore should not be heard to argue that it has not designated any directory information for release "in accordance with" FERPA for purposes of R.C. 3319.321(B)(2)(a).

Because Springfield "designated" directory information for release "in accordance with "FERPA," R.C. 3319.321(B)(2)(a) expressly prohibits it from imposing any restriction on School Choice Ohio that it did not impose the other third parties to which it released the same type of information. Springfield already released the same information to at least eight other third parties without restriction. The Court therefore should compel Springfield to comply with its obligations under R.C. 3319.321(B)(2)(a) by ordering it to release the requested records for every student for which it has received consent via its Student Acceptable Use Policy & Directory Information Consent" form or otherwise.

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

Springfield changed Policy JO and denied School Choice Ohio's public records request because it wanted to silence School Choice Ohio so fewer students would leave for other schools, taking their state funding with them. So, in a sense, Springfield was right when it opened its brief by declaring that "this case has nothing to do with Ohio's Public Records Act." To Springfield, this case is about money.

But this case is about much more to School Choice Ohio and the public interest. The purpose of school choice is to provides a direct and immediate outlet for students assigned to poorly-performing or otherwise inappropriate schools and to incentivize

public schools to innovate and improve. As a not-for-profit corporation that relies entirely on private donations, School Choice Ohio works to further these goals by educating Ohioans—specifically, the families of eligible students—about their school choice options under Ohio law. Disclosure of the student contact information School Choice Ohio needs to fulfill its public-interest mission therefore would confer a substantial public benefit. See *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 33. The Court accordingly should grant School Choice Ohio a full award of statutory damages, attorneys’ fees and costs to impress upon Springfield in a way that it will understand that it cannot single out School Choice Ohio or anyone else with a message it does not like by denying them the public records they need to exercise their First Amendment Rights.

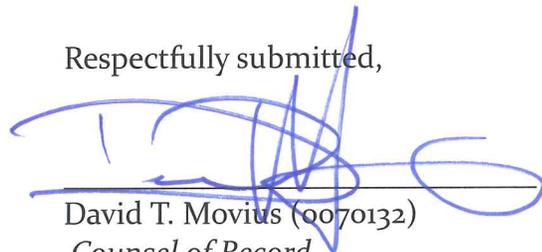
Trying to avoid that result, Springfield claims that damages and fees are not warranted because it “reasonably believed it had discretion to adopt Policy JO and to choose not to designate or release any ‘directory information’ for current students” and because its superintendent “reasonably believed he was complying with the intent of FERPA in denying SCO’s request.” (Springfield Br. at 45.) Springfield, however, refused to allow any discovery of “the factual bases for its Seventh Defense ... that ‘at all times pertinent it acted reasonably, in good faith, upon advice of counsel, in accordance with law and in the exercise of its statutory duties and responsibilities’” by asserting attorney-client privilege and work product immunity. (Resp. to Interrog. 26, SCO Exh. I:0011.) The Court should hold Springfield to its objection and award School Choice Ohio statutory damages, fees and costs because the record does not otherwise include any basis for the Court to conclude that “a well-informed public office or person responsible for the requested public

records reasonably would believe” that (a) refusing School Choice Ohio’s request “did not constitute a failure to comply with” the Public Records Act and (b) doing so would serve the public policy that underlies FERPA and 3319.321(B).

CONCLUSION

For the foregoing reasons and those stated in its opening Merits Brief, 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(B)(2)(a), (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

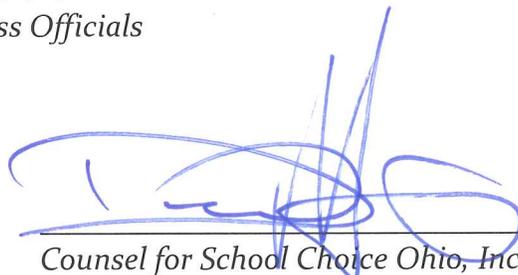
I hereby certify that a true and correct copy of the foregoing *Reply Brief of Relator School Choice Ohio, Inc.* was served this 11th day of February, 2015, on the following via email pursuant to Ohio Rule of Civil Procedure 5(B)(2)(f) and S.Ct.Prac.R. 3.11(B)(1):

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