

IN THE SUPREME COURT OF OHIO

STATE EX REL. : Case No. 2014-0749
SCHOOL CHOICE OHIO, INC., :
 :
Relator, :
 :
vs. : Original Action in Mandamus
 :
CINCINNATI PUBLIC SCHOOL :
DISTRICT, et al., :
 :
Respondents. :

MOTION FOR ORAL ARGUMENT OF RESPONDENT, SPRINGFIELD CITY
SCHOOL DISTRICT

Lawrence E. Barbieri (#0027106)
Counsel of Record
Scott A. Sollmann (#0081467)
Attorneys for Respondent,
Springfield City School District
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
5300 Socialville-Foster Road, Suite 200
Mason, Ohio 45040
Phone: (513) 583-4200
Fax: (513) 583-4203
Emails: lbarbieri@smbplaw.com
rsollmann@smbplaw.com

David T. Movius, Esq. (#0070132)
Counsel of Record
Matthew J. Cavanagh, Esq. (#0079522)
Mark J. Masterson, Esq. (#0086395)
Attorneys for Relator, State ex rel.
School Choice Ohio, Inc.
MCDONALD HOPKINS LLC
600 Superior Avenue, E., Suite 2100
Cleveland, Ohio 44114
Phone: (216) 348-5400
Fax: (216) 348-5474
Emails: dmovius@mcdonaldhopkins.com
mcavanagh@mcdonaldhopkins.com
mmasterson@mcdonaldhopkins.com

Karen W. Osborn, Esq. (#0065341)
Attorney for Respondent,
Springfield City School District
Martin, Browne, Hull & Harper, PLL
One South Limestone Street, 8th Floor
P.O. Box 1488
Springfield, Ohio 45501
Phone: (937) 324-5541
Fax: (937) 325-5432
Email: kosborn@martinbrowne.com

Mark H. Troutman, Esq. (#0076390)

Counsel of Record

Mark Landes, Esq. (0027227)

***Attorneys for Amici Curiae Ohio School
Boards Association, Buckeye Association
of School Administrators, and Ohio
Association of School Business Officials***

ISAAC WILES BURKHOLDER & TEETOR, LLC

Two Miranova Place, Suite 700

Columbus, Ohio 43215

Phone: (614) 221-2121

Fax: (614) 365-9516

Emails: mt troutman@isaacwiles.com

mlandes@isaacwiles.com

Pursuant to S.Ct.Prac.R. 17.02, Respondent Springfield City School District (“Springfield”) hereby moves for oral argument on the merits of this original action in mandamus filed by Relator State ex rel. School Choice Ohio, Inc. (“SCO”). In determining whether to grant oral argument when it is not required, the Court considers such factors as “whether the case involves a matter of great public importance, complex issues of law or fact, a substantial constitutional issue, or a conflict between courts of appeals.” *State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.*, 81 Ohio St.3d 283, 286, 1998-Ohio-471, 690 N.E.2d 1273. Oral argument is warranted in this case for the following reasons: 1) the privacy of students’ educational records, which is of great public importance both locally and throughout the State of Ohio, would be jeopardized by School Choice Ohio’s desired interpretation of the Family Education Rights and Privacy Act, 20 U.S.C. 1232g (“FERPA”), and Ohio’s analogous statute, R.C. 3319.321; 2) the decision of the Court will have a wide-ranging effect on the manner in which educational agencies and institutions throughout Ohio’s school districts determine policies with respect to students’ educational records; 3) SCO’s interpretation of FERPA and R.C. 3319.321 would deprive superintendents and boards of education throughout Ohio of the long-standing discretion they have needed to operate their agencies and institutions; and 4) such deprivation would lead to a slippery slope of oversight by the courts acting as “Super Boards of Education.” Additionally, oral argument is warranted in the event the Court considers SCO’s assertion of a right to access students’ education records under R.C. 3319.321 as contrary to its prior holding.

A. The Privacy of Students' Educational Records Is of Great Public Importance.

In this action, SCO challenges the public policy protecting the privacy of students' educational records, which has been clearly and unambiguously expressed by the federal and state legislatures in FERPA and R.C. 3319.321. SCO does so by arguing "the policy underlying FERPA favors deference to state laws such as Ohio's Public Records Act" and any inconsistency should be resolved "in favor of disclosure." (SCO's Brief, p. 29.) Adoption of such an interpretation would jeopardize the privacy of students' education records found to be of utmost importance by Congress and the General Assembly and would convert these privacy statutes into disclosure statutes.

Until the legislature has spoken to the contrary, "Congress, through FERPA, has balanced the interests of privacy versus public disclosure and the Court is in no position to second guess it." *U.S. v. The Miami University*, 91 F.Supp.2d 1132, 1159 (S.D. Ohio, E.D. 2000). "Congress holds student privacy interests in such high regard" that it "places the privacy interests of students and parents above the federal government's interest in obtaining necessary data and records." *U.S. v. Miami University*, 294 F.3d 797 (6th Cir. 2002). Any change to public policy as a result of this Court's decision in this case would be of "great public importance" so as to justify oral argument. *State ex rel. United Auto., Aerospace & Agric. Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, 844 N.E.2d 335, ¶¶24-33.

B. The Decision of the Court Will Affect the Right of Educational Agencies and Institutions Throughout Ohio to Determine Their Policies Regarding Students' Educational Records.

Although the case before the Court arises out of Springfield's refusal of SCO's requests for students' personally identifiable information contained in education records for the 2013-2014 School Year, a decision by the Court will not be limited to Springfield or its student records policy. In this case, SCO challenges not only Springfield's Policy JO adopted in June of 2013

for the 2013-2014 School Year, but Springfield's right to adopt any change in policy. A decision will affect not only the policies with respect to students' educational records adopted by Springfield, as well as agencies and institutions throughout Ohio, but the right of these agencies and institutions to change these policies according to changes in the circumstances in which they must operate.

First, unlike the situation in *McGinty, supra*, in which the Court found oral argument was not warranted as there was no "evidence or argument that this case will affect more administrators than McGinty," a decision in the case at bar will affect school districts beyond Springfield. The evidence reveals SCO makes record requests to treasurers of school districts throughout Ohio. SCO then uses the looming threat of a mandamus action for a violation of Ohio's Public Records Act if the recipients do not accede to the requests. The fact SCO initiated this action against both Springfield and Cincinnati Public School District for similar refusals to release requested records proves a decision by this Court will extend beyond Springfield and the records requests at issue in this case.

Second, SCO does not object only to Policy JO, which was adopted in June of 2013, but to Springfield initiating any revision to its students' records policy whatsoever. Throughout its merit brief, SCO refers to Springfield's "long-standing policy" of designating "directory information" for release under FERPA. (SCO's Brief, pp. 2, 23, 27.) SCO objects to any revision to this policy challenging Springfield's ability to "unilaterally" revise "an internal policy that was in place for more than two decades." (SCO's Brief, p. 27.) Such an argument ignores the ever evolving circumstances of school districts, as well as the change in superintendents and members of board of directors who may bring their own ideas and experiences to the district, which require revisions to policies.

C. SCO Seeks to Deprive Superintendents and Boards of Education of the Discretion Needed to Operate.

This case is also of great public importance because SCO seeks to deprive Springfield's Superintendent and Board of Education of discretion to adopt and implement its policy pertaining to students' educational records. First, SCO would deprive Springfield's Board of Education of the discretion to determine whether or not to designate any of its students' personally identifiable information as "directory information" in spite of the discretion expressly granted educational agencies and institutions to make such determinations in the clear and unambiguous language of these statutes. SCO argues Springfield is required by Ohio's Public Records Act to release all students' personally identifiable information if that information falls within the categories of information Springfield is permitted to designate as "directory information." (SCO's Brief, p. 23.) SCO argues, "because Springfield can, it must." (SCO's Brief, p. 29; SCO's Reply Brief, p. 2.) However, simply because a statute provides a school board may take some action does not mean the school board must take that action. The school board retains discretion whether or not to do so. *State ex rel. Mack v. Bd. of Ed. of Covington*, 1 Ohio App.2d 143, 146-47, 204 N.E.2d 86, 89 (Ohio App. 2nd Dist. 1963). In *Mack*, the court found although a statute provided a school board may admit an unimmunized student, the school board retained the discretion not to do so. *Id.* The discretion provided by the statute in *Mack*, as well as the discretion provided by FERPA and R.C. 3319.321, merely reflects the longstanding discretion accorded boards of education to operate their districts.

SCO's argument would allow the exception for "directory information" to swallow the rule itself. It would convert FERPA from a privacy statute to a disclosure statute. This conversion would contradict interpretations of FERPA by courts, including this Court, as well as by the Family Policy Compliance Office, the agency tasked with administering FERPA. Acceptance of

this argument would affect school districts throughout Ohio as it would eliminate their discretion as to whether and what information to designate as “directory information.” It would further require all districts to operate under the same policies regardless of differing circumstances.

Second, SCO argues the Consent Form entitles SCO to the release of students’ information contrary to the express language of the Consent Form by which parents consented to the limited release of limited information for limited purposes “approved by the Superintendent.” SCO disregards entirely the discretion granted the Superintendent by parents. SCO also ignores the expansion of power provided to parents by the Consent Form and the affirmative consent it requires as compared to the “opt-out” provision under the former Policy JO designating “directory information.”

If the Court were to order release of students’ information to SCO based upon the Consent Form, Springfield would no longer utilize the Consent Form. This would reduce Springfield’s ability to partner with entities providing clear benefits to its students without additional effort to obtain parental consent to each request, which SCO itself argues would have “the potential to hamper the district’s day-to-day operations.” (SCO’s Brief, p. 14.) This Court has found “[s]uch a result is not in line with the policy behind the Public Records Act.” *State ex rel. Perrea v. Cincinnati Pub. Schools*, 123 Ohio St.3d 410, 2009-Ohio-4762, 916 N.E.2d 1049, ¶32. In *Perrea*, the relator sought disclosure of semester exams. Cincinnati Public Schools claimed it would no longer administer the exams if the Court ordered disclosure. The Court recognized disclosure would reduce CPS’s “ability to evaluate student learning” if it no longer administered the exams and such a result of the application of the Public Records Act was unreasonable. *Id.*

D. The Deprivation of Discretion in the Area of Students' Educational Records Would Be a First Step Toward the Courts Becoming a "Super Board of Education" in Ohio.

Although the Court might order a board of education to exercise its discretion, it may not control the exercise of that discretion as SCO would have the Court do in this case. *State ex rel. Mack v. Bd. of Ed. of Covington*, 1 Ohio App.2d 143, 146-47, 204 N.E.2d 86, 89 (Ohio App.2nd Dist. 1963). There is no end to the challenges to the exercise of discretion by boards of education if the Court takes this first step.

E. Consideration of SCO's Argument R.C. 3319.321 Provides a Right to Access Students' Educational Records to Nonparents Would Warrant Oral Argument as Contrary to the Court's Prior Holding.

SCO asserts causes of action under R.C. 3319.321 alleging Springfield has "violated School Choice Ohio's clear legal rights under Revised Code 3319.321(B)(2)(a)." (Am. Compl., ¶80.) The Court has found R.C. 3319.321 creates a right of access to students' education records in favor of a parent. *State ex rel. Brown v. Lemmerman*, 2010-Ohio-137, ¶ 12, 124 Ohio St. 3d 296, 298, 921 N.E.2d 1049, 1052. However, in *Brown*, the Court specifically held, "This statute does not confer any rights on nonparents to public school records of children." Springfield is entitled to oral argument in the event the Court considers deviating from its holding in *Brown*.

Springfield argues SCO lacks standing to assert claims for failure to comply with FERPA and R.C. 3319.321 in light of the fact these statutes were intended to protect the privacy of students' education records to the benefit of students and their parents. SCO does not challenge this argument with respect to FERPA, but does argue it has standing under R.C. 3319.321. (SCO's Reply Brief, p. 6.) In doing so, SCO entirely ignores the fact R.C. 3319.321 was "passed in order to bring the state's public schools into compliance with federal law." Franklin B. Walter, 1987 Ohio Atty.Gen.Ops. No. 87-037 (1987). It further ignores the fact R.C. 3319.321,

like FERPA, is not a disclosure statute, but “a privacy statute in that it makes a narrow class of government-held information, public school student records, confidential.” 1988 Ohio Atty.Gen.Ops. No. 88-103. As the Court has not specifically addressed the matter of standing of entities other than parents or eligible students to demand access to students’ education records under R.C. 3319.321(B)(2)(a), this case presents a novel issue for which oral argument will assist the Court.

F. Oral Argument Would Be Beneficial to the Resolution of this Case.

In addition to the arguments above regarding the reasons this case is of great public importance, oral argument would allow the parties to further address several issues. First, oral argument would allow the Court to clarify the correct time period for which the records requests were denied by Springfield, which records requests are the subject of this mandamus action. Although SCO argues in its reply brief that it “made its requests now before the Court in late 2013 and early 2014 ‘for 2014-2015,’” (SCO’s Reply Brief, p. 1), such an argument is contradicted by the evidence in the form of the public records requests themselves. The October 22, 2013, public records request, the first of three requests directed to Springfield’s Treasurer and attached as exhibits to the Affidavit Sarah Pechan filed in support of SCO’s original Complaint, specifically requested “Student’s grade level for the 2013-14 school year” and “Student’s school building for the 2013-14 school year.” (Springfield’s Submission of Evidence, Vol. 1, Estrop Aff., Ex. H (Bates 140-42).) The second request on January 9, 2014, was in direct response to Springfield’s refusal to provide the information requested in October 22, 2013. The third request on February 24, 2014, specifically references and reiterates the two earlier requests. The records at issue are those for the 2013-2014 School Year. Students’ records for the 2014-2105 School Year would not have existed until the beginning of that School Year in the

late Summer of 2014 and could not, therefore, have been the subject of this action filed on May 12, 2014.

Second, oral argument would allow Springfield to fully address its partnership with those entities to which students' information was released pursuant to the Consent Form and the manner in which this partnership distinguishes these entities from SCO thereby supporting the reasonableness of the Superintendent's differing treatment of these entities. Rather than being either "routine" or done "for pecuniary interests" as argued by SCO, (SCO's Brief, p. 19), the evidence reflects these releases were to entities offering clear benefits to Springfield's students and there is no evidence of any abuse by the Superintendent of his discretion. Again, courts have consistently recognized the broad discretion of school district superintendents and boards of education. Congress and the General Assembly have similarly recognized this discretion in FERPA and R.C. 3319.321. If the use of discretion in compliance with these statutes results in a denial of SCO's requests or requires SCO to obtain the information it seeks in some other manner, SCO must address such concerns with the legislatures and not the Court.

This case is of great public importance as it involves the privacy of students' educational records and the Court's decision will necessarily affect the policies of school districts throughout the State of Ohio. For these reasons, as well as the other reasons stated above, Springfield respectfully requests the Court grant oral argument in this case.

Respectfully Submitted,

/s Lawrence E. Barbieri
Lawrence E. Barbieri (#0027106)
Counsel of Record
Scott A. Sollmann (#0081467)
Attorneys for Respondent,
Springfield City School District
SCHROEDER, MAUNDRELL, BARBIERE & POWERS
5300 Socialville-Foster Road, Suite 200
Mason, Ohio 45040
Phone: (513) 583-4200
Fax: (513) 583-4203
Email: lbarbieri@smbplaw.com
ssollmann@smbplaw.com

/s Karen W. Osborn
Karen W. Osborn, Esq. (#0065341)
Attorney for Respondent,
Springfield City School District
Martin, Browne, Hull & Harper, PLL
One South Limestone Street, 8th Floor
P.O. Box 1488
Springfield, Ohio 45501
Phone: (937) 324-5541
Fax: (937) 325-5432
Email: kosborn@martinbrowne.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via regular U.S. mail, postage prepaid this 18th day of February, 2015, upon the following:

David T. Movius, Esq. (#0070132)
Counsel of Record
Matthew J. Cavanagh, Esq. (#0079522)
Mark J. Masterson, Esq. (#0086395)
Attorneys for Relator
MCDONALD HOPKINS LLC
School Choice Ohio, Inc.
600 Superior Avenue, E., Suite 2100
Cleveland, Ohio 44114
Phone: (216) 348-5400
Fax: (216) 348-5474
Emails: dmovius@mcdonaldhopkins.com
mccavanagh@mcdonaldhopkins.com
mmasterson@mcdonaldhopkins.com

Mark H. Troutman, Esq. (#0076390)
** Counsel of Record**
Mark Landes, Esq. (#0027227)
Attorneys for Amici Curiae Ohio School Boards Association, Buckeye Association of School Administrators, and Ohio Association of School Business Officials
ISAAC WILES BURKHOLDER & TEETOR, LLC
Two Miranova Place, Suite 700
Columbus, Ohio 43215
Phone: (614) 221-2121
Fax: (614) 365-9516
Emails: mtroutman@isaacwiles.com
mlandes@isaacwiles.com