No. 11-2066

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

CHICAGO TRIBUNE COMPANY,

Plaintiff/Appellee,

v.

UNIVERSITY OF ILLINOIS
BOARD OF TRUSTEES,

Defendant/Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 10 C 568
The Honorable Joan B. Gottschall, Judge Presiding

BRIEF OF APPELLANT THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS

Samuel K. Skinner
Gregory E. Ostfeld
Greenberg Traurig, LLP
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
(312) 456-8400

Attorneys for Appellant
The Board of Trustees of
the University of Illinois

ORAL ARGUMENT REQUESTED

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Appellate Court No: 11-2066

Short Caption: Chicago Tribune Company v. University of Illinois Bd. of Trustees

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Attorney's signature: /s Gregory E. Ostfeld Date: July 13, 2011

Attorney's Printed Name: Gregory E. Ostfeld

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: Greenberg Traurig, LLP
77 W. Wacker Dr., Suite 3100
Chicago, Illinois 60601

Phone number: (312) 456-8400 Fax Number: (312) 456-8435

E-Mail Address: OstfeldG@gtlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The district court had original federal question jurisdiction over this declaratory judgment action pursuant to 28 U.S.C. § 1331, because it arises under the statutes and laws of the United States, specifically, the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g ("FERPA"). The controversy between the parties is "definite and concrete, touching the legal relations of parties having adverse legal interests," and is "real and substantial[.]" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (*citing Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937)). Plaintiff Chicago Tribune Company (the "Tribune") made a request to Defendant The Board of Trustees of the University of Illinois (the "University") for certain records under the Illinois Freedom of Information Act, 5 ILCS 140/1 *et seq*. ("FOIA"). (A.12-13, ¶ 8, A.16-17). The University denied both the request and the Tribune's administrative appeal on the grounds that the University is specifically prohibited from disclosing the requested records under FERPA. (A.13, ¶¶ 9-11, A.18-26). The Tribune then filed this action, seeking a declaration that FERPA does not prohibit the University from disclosing the requested records.

These circumstances present a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Medimmune*, 549 U.S. at 127 (*quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). The interpretation of a federal law, FERPA, lies at the heart of the dispute, and the Tribune's Complaint properly pleads and presents a pure federal question with respect to the parties' opposing constructions of FERPA. (A.12-15, ¶¶ 3, 9, 11-20). These conflicting interpretations of a federal statute

"involve a federal controversy." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (*quoting Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974)). *See also Owasso Independent School Dist. No. 1-011 v. Falvo*, 534 U.S. 426, 431 (2002) (holding that federal court had jurisdiction where plaintiff pled a FERPA action that was not "completely devoid of merit").

Win or lose, a declaratory judgment as to whether FERPA specifically prohibits the University from disclosing the records requested by the Tribune "will settle the particular controversy and clarify the legal relations in issue." *Sears Roebuck and Co. v. Am. Mut. Liability Ins. Co.*, 372 F.2d 435, 438 (7th Cir. 1967). Accordingly, this declaratory action presents an actual controversy and is appropriate for the exercise of federal question jurisdiction. *See NUCOR Corp. v. Aceros y Maquilas de Occidente, S.A.*, 28 F.3d 572, 579 (7th Cir. 1994) (*citing Nationwide Mut. Fire Ins. Co. v. Willenbrink*, 924 F.2d 104, 105 (6th Cir. 1991)). Additionally, because the outcome implicates federal rights and duties under FERPA--the University's right to obtain federal funding and its accompanying duty to safeguard the privacy of student education records and personally identifiable information--the district court had federal question jurisdiction irrespective of the fact that a state FOIA statute is also involved. *See Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 254 n. 19 (7th Cir. 1981) (*citing Rath Packing Co. v. Becker*, 530 F.2d 1295, 1305-06 (9th Cir. 1975)) (holding that federal question jurisdiction applies where an action "implicates federal rights," regardless of the fact that the federal statute may also afford a defense to a state law action).

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, as this is an appeal from a final decision of the district court. The University appeals from a final

Order and Judgment dated March 7, 2011 and entered on March 9, 2011, granting summary judgment in favor of the Tribune and against the University. (A.1-9). The University filed a Motion to Amend or Correct Judgment on April 4, 2011, pursuant to Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(a), requesting that the district court amend its Judgment to describe the declaratory relief granted to the Tribune, in compliance with *American Interinsurance Exchange v. Occidental Fire and Cas. Co. of North Carolina*, 835 F.2d 157, 159 (7th Cir. 1987), and related cases. (Dkt. No. 33). The district court granted that request by Minute Entry dated April 13, 2011, and entered April 14, 2011. (A.10). That Minute Entry evinces the district court's "unambiguous intent to render a final judgment," and therefore satisfies the standard for appellate jurisdiction of a final decision under 28 U.S.C. § 1291. *Alpine State Bank v. Ohio Cas. Ins. Co.*, 941 F.2d 554, 559 (7th Cir. 1991). The University timely filed its Notice of Appeal on May 10, 2011. (Dkt. No. 40).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Did the district court err in declaring that FERPA does not "specifically prohibit" the University from disclosing student records containing personally identifiable information in response to the Tribune's FOIA request?

STATEMENT OF THE CASE

I. Nature Of The Case

This is a declaratory judgment action examining whether FERPA specifically prohibits the University from disclosing student records containing personally identifiable information, including the names and addresses of students' parents, in response to a FOIA request. The Tribune issued a FOIA request to the University on December 10, 2009 (the "Request"), seeking disclosure from the University of the names and addresses of applicants' parents and the identity of individuals who made a request or otherwise became involved in such applicants' applications, for all "Category I" applicants who were admitted and subsequently attended the University of Illinois. (A.61, ¶¶ 7-8; A.95-96, ¶¶ 7-8). "Category I" refers to a list of applicants whom the Tribune reported were closely tied to "clout-heavy" patrons such as Tony Rezko. (A.61, ¶ 6; A.95, ¶ 6).

Although the University had previously produced more than 5,200 pages of FERPA-compliant records to the Tribune in response to prior FOIA requests, which the Tribune used to report extensively on the "Category I" story beginning in May 2009, the University denied this new Request and the Tribune's subsequent appeal. (A.61-62, ¶¶ 9-13; A.96, ¶¶ 9-13; A.225, ¶¶ 29-31, A.263, ¶¶ 14-16). The University denied the Request on the grounds that the requested records were "education records" that contained "personally identifiable information," and FERPA provides that no federal funds shall be made available to any educational institution that has a policy or practice of permitting the release of such "education records" or "personally identifiable information" unless there is written student consent, a judicial order or lawfully issued subpoena, or an

applicable statutory exception. 20 U.S.C. § 1232g(b)(1)-(2). (A.61-62, ¶¶ 9-13; A.96, ¶¶ 9-13). Because the University accepts federal funds, and there was no written consent, order or subpoena, or applicable exception permitting disclosure under FERPA, it concluded that the FERPA-protected records requested by the Tribune are exempt from disclosure under Section 7(1)(a) of FOIA, which exempts records that are "specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a). (A.61-62, ¶¶ 9-13; A. 96, ¶¶ 9-13). Following the denial of its Request and appeal, the Tribune commenced this action, seeking a declaration that the records requested by the Tribune are not protected by FERPA. (A.11-26).

II. Course Of Proceedings And Disposition Below

The Tribune filed its Complaint on January 27, 2010. (A.11-26). The University filed its Answer on March 5, 2010. (A.27-35). The Tribune filed a motion for summary judgment on April 2, 2010. (A.36-A.90). The University filed its response and cross-motion for summary judgment on April 30, 2010 and May 5, 2010. (A.91-A.144). The Tribune filed its reply on May 21, 2010. (A.145-A.216).

The district court entered its Order and Judgment granting the Tribune's motion for summary judgment and denying the University's cross-motion for summary judgment on March 7, 2011. (A.1-9). The district court concluded that FERPA "does not forbid Illinois officials from taking any action," but rather "sets conditions on the receipt of federal funds[.]" (A.5). Because Illinois "could choose to reject federal education money, and the conditions of FERPA along with it," the district court concluded that "it cannot be said that FERPA prevents Illinois from doing anything." (A.6). On the

University's motion, the district court subsequently amended the Judgment on April 13, 2011 to describe the declaratory relief granted to the Tribune, and declared that FERPA does not apply to the Tribune's Request, so as to exempt the requested information from disclosure under Section 7(1)(a) of FOIA. (Dkt. No. 33; A.10).

On April 12, 2011, the University filed a motion to stay the district court's judgment pending appeal. (A.217-357). The Tribune filed its response to the motion to stay on April 18, 2011. (A.358-369). The district court granted the motion to stay on April 20, 2011. (A.370). In granting a stay, the district court expressed concern that the result of its ruling is "somewhat appalling" due to the "overwhelming" and "catastrophic" injury to the students involved if the University were to disclose their records. (A.373, A.376). Accordingly, the district court stated, "I think the Seventh Circuit ought to opine before all of this is made public" and before "lots of people are irreparably injured, which they will be," in order to "avoid a whole lot of disaster to people" in the event that the Seventh Circuit were to disagree with the district court's ruling. (A.373-74, A.377).

The University timely filed its Notice of Appeal on May 10, 2011. (Dkt. No. 40).

STATEMENT OF FACTS

I. The University's Acceptance of Federal Funds and the FERPA Funding Conditions

The Board of Trustees of the University of Illinois is a state authority that exercises final authority over and is the governing body of the University of Illinois. (A.60, ¶ 2; A.94, ¶ 2). The University of Illinois has campuses in Chicago, Springfield, and Urbana-Champaign. (*Id.*). Total enrollment at the University for the most recent academic year was approximately 77,000 undergraduate, graduate, and professional students. (A.223-24, ¶ 23, A.262, ¶ 9).

The University accepts federal funds that are subject to funding conditions set by FERPA. Well over half of all the funds used to pay students' tuition and fees comes from applicable U.S. Department of Education ("DOE") loan and financial aid programs covered by FERPA, constituting a significant portion of the University's annual operating revenues. (A.223-24, ¶ 23, A.293-295, ¶¶ 8-16, A.296-357). In Fiscal Year 2010 (the year of the Tribune's Request), the University received $448,883,775.00 in student loans and capital contributions disbursed from or through the DOE. (A.224, ¶ 24, A.293, ¶¶ 8-9, A.296-97). The University also received $145,552,087.00 in student financial assistance and other federal funding from the DOE, of which $71,628,791.00 consists of student financial assistance and the remaining $73,923,296.00 consists of grants and other federal funding. (A.224, ¶ 25, A.293-94, ¶¶ 10-11, A.298-99). In all, approximately 63.2% of the University's total student tuition and fees, and approximately 19.1% of the University's total operating revenues from all sources, come from federal student loans, student financial assistance, capital contributions, grants, and other federal funding. (A.224-25, ¶¶ 26-28, A.294-95, ¶¶ 12-16, A.296-357).

II. The University's FERPA-Compliant Privacy Policies

The University collects and maintains a broad range of records and information regarding current and former students and their parents, including, but not limited to: (a) student and parent names, addresses, dates of birth, hometowns, phone numbers, genders, and Social Security numbers; (b) application and admission materials; (c) personal essays submitted in support of admission or residency applications, (d) high school transcripts and other post-secondary academic records; (e) ACT, SAT, placement, and proficiency scores; (f) letters of recommendation; (g) comments from high school administrators or counselors; (h) student financial information; (i) parent financial information; (j) applications for financial aid, scholarships, or other financial assistance; (k) payment records and histories; (l) grades and academic transcripts; (m) enrollments, registrations, and schedules; (n) graduation records; and (o) disciplinary records. (A.222, ¶ 18, A.267, ¶ 6).

It is University policy to comply fully with FERPA, and the policies adopted by the University with respect to privacy, record access, and release of educational records and information are based upon FERPA. All information maintained by the University and directly related to a student "in attendance" is considered part of the student's educational records, and may not be released to or accessed by anyone without the express written consent of the student, unless the information falls within one of FERPA's limited exceptions, such as the exception for "directory information." All other "non-directory" educational record information is classified as "high risk" under the University's data classification standard, and therefore may not be released or accessed without either the student's express written consent or under prescribed limited

exceptions. (A.222-23, ¶ 19, A.267-68, ¶¶ 7-9, A.271-76).

The University's policies with respect to the privacy of student records and information, including the University's policy to comply fully with FERPA, are set forth in the Student Code, on the University's campus web sites, in annual notifications to students, and in various other publications and notifications to students and parents. (A.223, ¶ 20, A.268-69, ¶¶ 9-12, A.277-90). The University does not have a policy, nor has it advised students or parents of a policy, that student records and information that are otherwise protected from disclosure under FERPA may be subject to disclosure in response to a FOIA request. (A.223, ¶ 21, A.269, ¶ 13).

The University regards the unauthorized access, disclosure, or release of any "non-directory" educational record information to be harmful and invasive of student privacy. The potential harm or invasion varies based on the student's individual circumstances. Foreseeable harms to the University, its students, and parents include, but are not limited to: the stigma or prejudice to the academic process from releasing a student's grades or test scores; the stigma, personal violation, or injury to the financial aid process from releasing a student's or parents' financial information; the personal violation of having a student's residency application disclosed to public scrutiny; the threat of identity theft; and the stigma and personal violation from releasing a student's disciplinary records. (A.223, ¶ 22, A.269-70, ¶¶ 14-15).

III. The University's Compliance With FERPA in Responding to FOIA Requests

The University receives hundreds of FOIA requests every year. It received 505 FOIA requests in 2009, 605 requests in 2010, and 153 requests from January 1, 2011

through March 18, 2011. (A.221, ¶ 14, A.262, ¶¶ 6-8). These requests frequently call for records or information that is covered by FERPA. (A.221, ¶ 14, A.262, ¶ 10).

The University responds to FOIA requests that call for records or information covered by FERPA by (a) producing in unredacted form all responsive records that are not covered by FERPA, (b) producing in redacted form all responsive records that are covered by FERPA, but which can be produced in redacted form consistent with FERPA, (c) withholding all responsive records that are covered by FERPA, and which cannot be produced in redacted form consistent with FERPA, and (d) informing the requesting party of the University's response, including whether the University has redacted or withheld records. (A.221, ¶ 15, A.262-63 ¶ 11). In some instances, particularly since the amendment of FOIA in January 2010 removed the *per se* privacy exemption for student information, FERPA has provided the University's sole basis to redact or withhold FERPA-exempt information in response to a FOIA request. (A.221-22, ¶ 16, A.263, ¶ 12).

IV. The Tribune's Initial FOIA Requests and the University's Response

The Tribune owns and operates the *Chicago Tribune*, a daily newspaper in the Chicago metropolitan area. (A.60, ¶ 1; A.94, ¶ 1). Between April 2009 and December 2009, the University received at least 15 FOIA requests from Jodi S. Cohen, Stacy St. Clair, and/or Tara Malone of the *Chicago Tribune*, all but one of which sought documents, records, or other information relating to admissions issues at the University and/or "Category I" applicants to the University (collectively, the "Tribune Admissions Requests"). (A.225, ¶ 29, A.263, ¶ 14). The University produced more than 5,200 pages of documents in response to the Tribune Admissions Requests, some of which were produced in unredacted form and some of which were redacted to remove FERPA-

protected information. (A.225, ¶ 30, A.263, ¶ 15)

V. The "Clout Goes To College" Series of Articles

Beginning in 2009, the Tribune gathered information and published a series of articles in the *Chicago Tribune*, known as the "Clout Goes To College" articles, relating to the University's admissions process, primarily at the Urbana-Champaign campus. (A.61, ¶ 5; A.95, ¶ 5). These articles reported that the University maintained a list, known as "Category I", of certain applicants to the University of Illinois who were closely tied to clout-heavy patrons. (A.61, ¶ 6; A.95, ¶ 6; A.225, ¶ 31, A.263, ¶ 16). Since May 2009, the *Chicago Tribune* has published dozens of articles and editorials relating to admissions at the University and/or "Category I" applicants to the University. Many of these articles contain information that appears to have been obtained as a result of the University's responses to the Tribune Admissions Requests. (A.225, ¶ 31, A.263, ¶ 16).

VI. The University's Request to the Department of Education for Guidance on the Status of Admissions Records Under FERPA, and the Department of Education's August 6, 2009 Opinion Letter

The "Clout Goes To College" articles resulted in a state investigation by the Office of the Illinois Governor Admissions Review Commission (the "Commission"), and, ultimately, wholesale changes to the University's leadership and admissions practices. (A.2). On June 23, 2009, in response to a Request for Documents from the Commission seeking various student admissions records, the University sent a letter to the U.S. Department of Education (the "DOE"), seeking written guidance regarding whether complying with the Request for Documents would "run afoul of the student privacy rights and concerns reflected in and through FERPA." (A.96-97, ¶¶ 1-2, A.100, ¶ 6,

A.102-106). The DOE responded with an opinion letter to the University on August 6, 2009. (A.97, ¶ 3, A.101, ¶ 8, A.107-09). The letter states, in relevant part, "Once an applicant becomes a student in attendance, then ***all information*** provided in connection with the admissions process that the institution maintains would be considered 'education records' subject to FERPA." (A.97, ¶ 4, A.108) (emphasis added).

VII. The December 10, 2009 FOIA Request and the University's Response

In its Request dated December 10, 2009, the Tribune sought additional records from the University. (A.61, ¶ 7; A.95, ¶ 7). The Request asked that the University make available for inspection and copying:

> the following public records with regard to each applicant in Category I (and/or the equivalent designation in the professional schools) who was admitted to the University of Illinois and subsequently attended the University of Illinois: the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in the such [sic] applicants' applications. Further, please provide any records about the identity of the University official to whom the request was made, any other university officials to whom the request was forwarded, and any documents which reflect any changes in the status of the application as a result of that request.

(A.61, ¶ 8; A.95-96, ¶ 8).

In a letter dated December 21, 2009, the University denied the Request. (A.61, ¶ 9; A.96, ¶ 9). The University stated that the requested information is protected by FERPA, and therefore exempt from disclosure under Section 7(1)(a) of FOIA. (A.62, ¶ 10; A.96, ¶ 10).

In a letter dated December 24, 2009, the Tribune appealed the University's denial of its Request. (A.62, ¶ 11; A.96, ¶ 11). The University denied the Tribune's appeal in a letter dated December 30, 2009, stating that, "it would not be appropriate for the University of Illinois to produce the information that you have requested, which in our

opinion would be in violation of FERPA, without receiving direction to do so from either the Family Policy Compliance Officer of the U.S. Department of Education or an appropriate court of law." (A.62, ¶¶ 12-13; A.96, ¶¶ 12-13).

SUMMARY OF ARGUMENT

The district court's ruling that FERPA does not "forbid" or "prevent" the University "from doing anything" because the University "could choose to reject federal education money, and the conditions of FERPA along with it," misconstrues the nature of Congress's authority under the Spending Clause and unnecessarily presents the University with a false Hobson's Choice. When the University agreed to accept federal funds from the DOE, it undertook an affirmative obligation to comply with FERPA's funding conditions. That obligation is mandatory and enforceable, not voluntary. The district court's alternative of having the University "choose" to reject federal funds and the conditions of FERPA--aside from its calamitous implications for student privacy and the University's ability to obtain and provide funding for student tuition and other operations--is not a real "choice" at all, because the University has already accepted the federal funds and is thus required to abide by FERPA's privacy requirements.

The district court's error lies in viewing the University's choice prospectively, as though the University had not already accepted federal funds and FERPA's conditions by the date of the Tribune's Request. In reality, of course, the University made the decision to accept federal funds long before December 10, 2009, and consequently subjected itself to FERPA's privacy requirements and the DOE's statutory authority to enforce those requirements. To suggest that the University is not prohibited by FERPA from violating the privacy terms to which it is already bound, merely because it could make the ruinous choice to withdraw from FERPA-regulated funding going forward, is wrong as a matter of law. The theoretical ability to opt out of Spending Clause legislation in the future does not relieve a recipient from its affirmative obligation to comply with

the conditions applicable to it for funds that it has already accepted. Once the University accepted federal funds, it became subject to a compulsory, enforceable legal obligation to protect the private records of its students against unauthorized disclosure. Thus, FERPA-protected records are indeed "specifically prohibited from disclosure" within the meaning of FOIA.

As a result of its categorical exclusion of FERPA from FOIA's statutory exemption, the district court never reached the issue that occupied most of the parties' attention below, which was whether the records sought by the Tribune in its Request actually qualify as "education records" containing "personally identifiable information" under FERPA. It is clear, however, that the records sought by the Tribune are in fact subject to FERPA's privacy requirements pursuant to the statute's plain language, implementing regulations, legislative history, and administrative guidance.

Under FERPA, no federal funds shall be made available to any educational institution that has a policy or practice of permitting the release of "education records" or "personally identifiable information" contained in such records, unless there is written consent, a judicial order or lawful subpoena, or an applicable statutory exception. 20 U.S.C. § 1232g(b)(1)-(2). FERPA and its implementing regulations define "education records" as records containing information "directly related to a student" that are maintained by an educational agency or institution. 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3. The regulations further define "personally identifiable information" to include "[t]he name of the student's parent or other family members," "[t]he address of the student or student's family[.]" and other information that would enable the student to be identified "with reasonable certainty." 34 C.F.R. § 99.3.

Consistent with these definitions, student records of the type sought in the Tribune's Request are clearly "education records," as they directly relate to students who were "admitted to the University of Illinois and subsequently attended the University of Illinois[.]" (A.61, ¶ 8; A.95-96, ¶ 8). Records responsive to the Request could include students' applications for admission, parental financial aid documents, recommendations from any individuals who "became involved in" the students' applications, and internal correspondence relating to each student's admission to the University. Such records are not merely connected or associated with students, but lie at the core of their status as students, defining the very process by which applicants became admitted students at the University. The DOE's well-reasoned August 6, 2009 opinion letter confirms that all records kept in connection with the admissions process are considered "education records" subject to FERPA once an applicant becomes a student. (A.97, ¶ 4, A.108).

Moreover, the Request explicitly seeks "personally identifiable information," including parents' names and addresses, which could readily be used to identify "Category I" students with reasonable certainty. Indeed, the very aim of the Request on its face is to identify the "Category I" students, or at least their parents, and the students' "clout-heavy" sponsors. Such disclosures would subject the "Category I" students to the "catastrophic" injury of public exposure and ridicule that the district court feared when it granted the University's motion to stay. (A.373, A.376). FERPA's legislative history reflects a serious concern on the part of Congress that the privacy rights of students and their parents be defended against such unauthorized disclosures. *See* Joint Statements, 120 Cong. Rec. 39858, 39862-63 (1974).

The Tribune's other argument below, that it has a First Amendment right of access to student records, is simply inconsistent with longstanding First Amendment precedent in this area. The Supreme Court has long rejected the view presented by the Tribune that the First Amendment creates a broad constitutional right of access to government records or proceedings. The precedent relied upon by the Tribune concerns the public's much more limited right of access to criminal trials, proceedings, and records, which are areas that have historically been open to the press and general public. No similar historical right of public access exists with respect to student records, and the First Amendment does not guarantee the press a constitutional right of access to information that is not available to the public generally. The Constitution is not itself a Freedom of Information Act, and Congress and the state legislatures have reasonable discretion to draw the legislative boundaries defining the scope of public access to government records. FERPA represents a reasonable exercise of Congress' discretion to exclude student education records and personally identifiable information from the public record, and the First Amendment need not and does not override Congress' reasoned judgment in this area.

Although the University certainly takes no issue with FOIA's salutary goal of promoting open government and free access to information, that objective must be balanced carefully against FERPA's assurance of individual privacy. Here, the Tribune's Request seeks public disclosure of personally identifiable information that would enable anyone to identify the "Category I" students with reasonable certainty, subjecting those students to an enormous risk of exposure, ridicule, and public embarrassment. Students applying for admission entrust the University with intimate and private details of their

lives, including their grades, their test scores, the events (good and bad) that have shaped their characters, and their families' financial circumstances. These students quite reasonably expect that the information they entrust to the University will remain private, and not be shared with the world. The University's obligation under FERPA to honor the trust reposed in it by young people who want to attend college, and the families who encourage and support them in that effort, is no less important to the public good than FOIA's promotion of open government. For these reasons, the district court's decision should be reversed, and judgment should be entered in favor of the University on the grounds that the records the Tribune seeks in its Request are exempted from FOIA because FERPA specifically prohibits their disclosure.

ARGUMENT

I. Standard of Review

This Court "review[s] the district court's decision on the parties' cross-motions for summary judgment *de novo*, construing all facts and inferences in favor of the party against whom summary judgment was granted." *Gross v. PPG Industries, Inc.*, 636 F.3d 884, 888 (7th Cir. 2011) (*citing Sellers v. Zurich Am. Ins. Co.*, 627 F.3d 627, 631 (7th Cir. 2010)). Summary judgment is appropriate "when there are no genuine issues of material fact and judgment as a matter of law is warranted for the moving party." *Id.* (*citing* Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986)).

II. The District Court Erred in Finding That FERPA Does Not Specifically Prohibit The University from Doing Anything, and in Holding That FERPA Does Not Fall Within FOIA's Exemption for Records Specifically Prohibited from Disclosure Under Federal Law

The district court erroneously concluded that FERPA does not prevent the University "from doing anything," because it "does not forbid Illinois officials from taking any action," but instead "sets conditions on the receipt of federal funds[.]" (A.5-6). The district court's holding fails to account for the mandatory nature of funding conditions set by Congress under the Spending Clause once the federal funds carrying such conditions have been accepted. FERPA's requirements become compulsory obligations upon the acceptance of federal education funding through the DOE, and having accepted such funding, the University is specifically prohibited from disclosing education records and personally identifiable information in violation of FERPA. Moreover, FERPA's mandate of enforcement action against any educational institution that violates its conditions, up to and including stripping such institutions of hundreds

of millions of dollars of federal funds on which both the institutions and their students rely, is a "prohibition" under any reasonable interpretation of the statute. Consequently, under both the plain language of Section 7(1)(a) of FOIA and governing precedent construing that provision, FERPA-protected records are within the scope of Section 7(1)(a)'s exemption for records that are "specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a).

A. FERPA's Statutory Funding Conditions Under the Spending Clause Impose an Enforceable, Affirmative Obligation Upon the University Not to Disclose Records in Violation of FERPA.

FERPA invokes Congress' power under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1, to condition the receipt of federal funds "on certain requirements relating to the access and disclosure of student educational records." *Gonzaga University v. Doe*, 536 U.S. 273, 278 (2002). Sections 444(b)(1) and (2) of FERPA provide that "[n]o funds shall be made available under any applicable program to any educational agency or institution" that has a "policy or practice" of "permitting the release" or "releasing, or providing access to" either "education records" or "personally identifiable information" contained in such records, other than directory information or records falling within ten other defined exceptions, unless there is "written consent" from the parents or student, or such information "is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena[.]" 20 U.S.C. § 1232g(b)(1)-(2). The statute further "directs the Secretary of Education to enforce this and other of [FERPA's] spending conditions," and to "establish an office and review board within the Department of Education for 'investigating, processing, reviewing, and adjudicating violations of [FERPA].'"

Gonzaga, 536 U.S. at 278 (*quoting* 20 U.S.C. § 1232g(f)-(g)).

The Supreme Court has long held that Spending Clause legislation like FERPA is "much in the nature of a ***contract***: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (emphasis in original) (*quoting Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 17 (1981)). The agreement to comply with these funding conditions subjects the recipient to federal enforcement action in accordance with the unambiguous terms of the statute setting the funding conditions. *See id*. For example, the Supreme Court and this Court have held that a school district that accepts federal funding under the Individuals with Disabilities Education Act ("IDEA") is subject to administrative and judicial action to enforce the legislation's funding conditions. *See Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 79 (1999) (affirming administrative law judge's determination that school district was required to provide continuous nursing services to a quadriplegic student under IDEA); *Bd. of Educ. of Oak Park and River Forest High School Dist. No. 200 v. Kelly E.*, 207 F.3d 931, 935 (7th Cir. 2000) (holding that acceptance of federal funds under IDEA abrogated Eleventh Amendment immunity to federal enforcement actions).

Likewise, the Supreme Court and this Court have held that educational institutions and other state recipients of federal funding under Title IX of the Civil Rights Act of 1964, the Americans With Disabilities Act, or the Rehabilitation Act subject themselves to liability through private suits, because they accepted the funding

with notice that the applicable legislation affords such a remedy.[1] *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181-82 (2005) (Title IX); *Barnes*, 536 U.S. at 187 (Americans With Disabilities Act and Rehabilitation Act); *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 641 (1999) (Title IX); *Franklin v. Gwinnett Cty. Public Schools*, 503 U.S. 60, 74-75 (1992) (Title IX); *Cherry v. Univ. of Wisconsin System Bd. of Regents*, 265 F.3d 541, 555 (7th Cir. 2001) (Title IX and Equal Pay Act). "States that accept federal money, as Illinois has done, must respect the terms and conditions of the grant." *Bd. of Educ. of Oak Park*, 207 F.3d at 935. Recipients of federal funds "must take the bitter with the sweet"; having accepted the money, they must comply with the statutory conditions. *Id.*

In light of these principles, the district court erred when it found that FERPA does not prevent the University "from doing anything." (A.5-6). It is true that, ***prior*** to accepting federal funds subject to the conditions of FERPA, the University "could choose to reject federal education money, and the conditions of FERPA along with it[.]" (A.6). Once the University accepted funding conditioned on FERPA, however, it agreed to comply with FERPA's conditions. *Barnes*, 536 U.S. at 186. Having knowingly accepted the statutory conditions, FERPA "imposes enforceable, affirmative obligations" upon the University. *United States v. Miami University*, 294 F.3d 797, 809-10 (6th Cir. 2002) (*citing Wheeler v. Barrera*, 417 U.S. 402, 427 (1974), *modified on another ground*, 422 U.S. 1004 (1975)). These contractual obligations may be enforced through, among other remedies, the exercise of a court's equitable powers. *See Miami University*, 294 F.3d at

[1] FERPA, by comparison, does not contain a private right of action, and is instead enforced by the DOE. *See Gonzaga*, 536 U.S. at 278; *United States v. Miami University*, 294 F.3d 797, 809 n. 11 (6th Cir. 2002).

809 (*citing Rosado v. Wyman*, 397 U.S. 397, 420-22 (1970); *Pennhurst*, 451 U.S. at 29).

The district court's decision in this case is directly contrary to the ruling in *Miami University*. In that case, the Sixth Circuit carefully reviewed the text and legislative history of FERPA, and concluded that Miami University of Ohio and The Ohio State University should be enjoined under FERPA from disclosing student disciplinary records to *The Chronicle of Higher Education*, a national weekly newspaper that requested the records under the Ohio Public Records Act, Ohio Rev. Code § 149.43 (the "Ohio Act"). *Id.* at 811-15. Like Illinois' FOIA, the Ohio Act provides for broad, open access to all public records upon request, but contains an exception for records "the release of which is prohibited by state or federal law." *Id.* at 803 (*citing* Ohio Rev. Code § 149.43(A)(1)(*o*)). The Sixth Circuit concluded that the privacy restrictions contained in FERPA constitute a prohibition on the disclosure of a student's education records and personally identifiable information, and not merely a funding condition. FERPA "unambiguously conditions the grant of federal education funds on the educational institutions' obligation to respect the privacy of students and their parents." *Id.* at 809 (*citing* 20 U.S.C. § 1232g(b)(2)). Thus, "[o]nce the conditions and the funds are accepted, the school ***is indeed prohibited*** from systematically releasing education records without consent." *Id.* (emphasis added).

The district court did not address *Miami University* at length, but simply stated that, "[e]ven if this court were to accept the Sixth Circuit's reasoning … the opinion in *Miami University* included an important caveat: 'We limit this conclusion, that the FERPA imposes a binding obligation on schools that accept federal funds, to federal government action to enforce FERPA.'" (A.6 (*quoting Miami University*, 294 F.3d at

809 n. 11)). That "caveat" is not a relevant distinguishing characteristic. The footnote that the district court quotes from *Miami University* was simply reinforcing the point that "FERPA does not create ***personal rights*** that an ***individual*** may enforce through 42 U.S.C. § 1983." 294 F.3d at 809 n. 11 (*citing Gonzaga*, 536 U.S. 273) (emphasis added). That is immaterial to the present case, which does not involve an individual action to enforce FERPA. Like Miami University of Ohio and The Ohio State University, the University of Illinois "accept[s] federal funds," and is thus subject to FERPA's "binding obligation," regardless of whether or not the University is the subject of an enforcement action.

The sizeable majority of courts to consider this issue have held, as the Sixth Circuit did, that FERPA forbids the disclosure of education records and personally identifiable information. *See, e.g., Sherry v. Radnor Township School Dist.*, No. 265 C.D. 2010, __ A.3d ____, 2011 WL 1226262, *7-8 (Commonwealth Ct. Pa. Apr. 4, 2011) (holding that FERPA "preclude[s]" and "exempt[s] from disclosure" even de-identified student disciplinary records, because such records are "education records"); *Rim of the World Unified School Dist. v. Superior Ct. of San Bernardino Cty.*, 104 Cal.App.4th 1393, 1398-99 (Cal. Ct. App. 4th Dist. 2002) (recognizing that it is "quite foreseeable that a federal court acting under authority of FERPA could issue an order enjoining the release" of education records by a recipient of federal funds, and therefore holding that FERPA preempts state law that conflicts with FERPA's privacy requirements); *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana*

University, 787 N.E.2d 893, 903-04 (Ind. App. 2003).[2] In fact, at least one of the authorities cited by the Tribune to the district court acknowledged that FERPA is compulsory. *See Board of Education of Colonial School Dist. v. Colonial Educ. Ass'n*, No. 14383, 1996 WL 104231, *5 (Del. Ch. Feb. 28, 1996) (finding that FERPA "does impose a binding obligation on the government unit that accepts designated federal funds," and that its language "reveals a congressional intent to impose obligations directly on educational agencies or institutions") (*quoting Belanger v. Nasua, New Hampshire School Dist.*, 856 F. Supp. 40, 46 (D.N.H. 1994)).

Although a handful of cases have suggested that FERPA is just a funding condition and not an explicit prohibition on the release of FERPA-protected records, these cases are sparse in their discussion and make the same mistake as the district court in this case; they do not address the mandatory and enforceable nature of a Spending Clause condition once funding has been accepted. *See United States v. Haffner*, No. 3:09-cr-337-J-34-TEM, 2010 WL 5296920, *15 (M.D. Fla. Aug. 31, 2010); *Bauer v. Kincaid*, 759 F. Supp. 575, 591 (W.D. Mo. 1991) .

B. FERPA's Prohibition on the Disclosure of Private Student Records Is Within the Scope of Section 7(1)(a) of FOIA.

Due to its misunderstanding of the mandatory and enforceable nature of Spending Clause conditions upon acceptance of federal funds, the district court further erred in its conclusion that the requirements of FERPA are outside the scope of Section

[2] *See also Disability Law Center of Alaska, Inc. v. Anchorage School Dist.*, 581 F.3d 936, 939 (9th Cir. 2009) ; *A.B. v. Clarke County School Dist.* No. 3:08-CV-041, 2009 WL 902038, *9 & *12 (M.D. Ga. March 30, 2009); *Interscope Records v. Does 1-14*, 558 F. Supp.2d 1176, 1180 (D. Kan. 2008); *MacKenzie v. Ochsner Clinic Foundation*, No. Civ. A. 02-3217, 2003 WL 21999339, *3-5 (E.D. La. Aug. 20, 2003); *DTH Publishing Corp. v. University of N. Carolina*, 496 S.E.2d 8, 12 (N.C. 1998).

7(1)(a) of FOIA, which exempts records that are "specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or State law." 5 ILCS 140/7(1)(a). The district court observed that Section 7(1)(a) "applies only when a federal or state law 'specifically prohibit[s]' a certain disclosure." (A.5). Finding that "[t]he ordinary meaning of 'prohibit' is 'to forbid by authority' or 'to prevent from doing something,'" the court found Section 7(1)(a) inapplicable based on its finding that FERPA "does not forbid Illinois officials from taking any action." (*Id*. (*quoting Webster's Ninth New Collegiate Dictionary* 940 (1985))). That conclusion is erroneous, because the University was forbidden by FERPA from disclosing education records and personally identifiable information once it accepted federal funds.

A court's "primary objective" in construing a statute "is to ascertain and give effect to the intent of the legislature." *People ex rel. Madigan v. Kinzer,* 232 Ill.2d 179, 184 (2009). The "best indication of legislative intent is the language employed by the General Assembly, which must be given its plain and ordinary meaning." *Id*. Thus, "[w]hen statutory language is plain and unambiguous, the statute must be applied as written without resort to aids of statutory construction." *Id*. As the district court found, the ordinary meaning of "prohibit" is "to forbid by authority or command." *Webster's Third New Int'l Dictionary* 1813 (1993). *See also Black's Law Dictionary* (9th ed. 2009) (defining "prohibit" as "[t]o forbid by law" or "[t]o prevent or hinder").

By declaring that "[n]o funds shall be made available" to any educational institution that has a policy or practice of "permitting the release" or "releasing, or providing access to" education records or personally identifiable information, 20 U.S.C. § 1232g(b)(1)-(2), FERPA forbids by authority and command the disclosure of such

records and information by any educational institution that accepts federal funds subject to FERPA's conditions. By accepting such funds, the University agreed to comply with FERPA's statutory conditions. *Barnes*, 536 U.S. at 186; *Board of Educ. of Oak Park*, 207 F.3d at 935. Therefore, the University "is indeed prohibited" from releasing student education records and personally identifiable information in contravention of FERPA's privacy requirements. *Miami University*, 294 F.3d at 809. That is why, consistent with the ordinary meaning of "prohibit," many courts, including this Court, have described FERPA's privacy requirements as a ***prohibition*** on the disclosure or dissemination of covered education records. *See Shockley v. Svoboda*, 342 F.3d 736, 738 (7th Cir. 2003) (observing that FERPA "prohibits certain disseminations of student academic files"); *Disability Law Center of Alaska, Inc. v. Anchorage School Dist.*, 581 F.3d 936, 939 (9th Cir. 2009) ("FERPA and IDEA prohibit education agencies from disclosing 'educational records' or 'personally identifiable information contained therein' without parental consent or court order."); *Miami University*, 294 F.3d at 809 ("Once the [FERPA] conditions and the funds are accepted, the school is indeed prohibited from systematically releasing education records without consent.").[3]

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[3] *See also A.B. v. Clarke County School Dist.*, No. 3:08-CV-041 (CDL), 2009 WL 902038, *9 (M.D. Ga. Mar. 30, 2009) ("IDEA and FERPA prohibit dissemination of educational records to third parties without consent."); *Arista Records LLC v. Does 1-19,* 551 F. Supp.2d 1, 5 (D.D.C. 2008) ("Although FERPA generally prohibits disclosure of certain records by federally-funded educational institutions, the act expressly authorizes disclosure of a student's 'directory information' pursuant to a lawfully-issued subpoena or court order."); *Interscope Records v. Does 1-14*, 558 F.Supp.2d 1176, 1180 (D. Kan. 2008) ("FERPA generally prohibits disclosure by federally-funded educational institutions of certain student records[.]"); *Jennings v. University of North Carolina at Chapel Hill*, 340 F.Supp.2d 679, 681 (M.D.N.C. 2004) ("FERPA prohibits institutions that receive federal funding from releasing a student's educational records without written parental consent."); *Storck v. Suffolk County Dept. of Social Services*, 122 F. Supp.2d 392, 402 (E.D.N.Y. 2000)

Indeed, even if the only consequence of disclosing FERPA-protected records would be to force the University to "choose to reject federal education money," that is still a prohibition under any reasonable, practical construction of the term. FERPA mandates that the DOE take "appropriate actions" to enforce its terms and to deal with violations, up to and including "action to terminate assistance" where the Secretary of Education determines that there has been a "failure to comply" and that "compliance cannot be secured by voluntary means." 20 U.S.C. § 1232g(f). Requiring the University to forego hundreds of millions of dollars in funding, including student loans and financial assistance that the University's students rely upon to attend college at all, is so harsh a consequence that it is simply implausible to view FERPA's conditions as anything short of a prohibition. "[T]he intent of Congress to withhold millions of federal dollars from universities that violate [FERPA] is ample prohibition, regardless of how the word 'prohibit' is construed by the plaintiffs." WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION § 8.7.2, p. 509 (2007) (*quoting Shreveport Professional Chapter of Society of Professional Journalists v. Louisiana State University, Shreveport*, No. 393, 332 (1st Jud. Dist. Ct., Caddo Parish, La., Mar. 4, 1994)).

In addition to the plain language of the statute, Illinois precedent makes clear that an explicit textual prohibition on disclosure is not required to invoke the exemption under Section 7(1)(a) of FOIA. In *Kibort v. Westrom*, 371 Ill.App.3d 247, 249-50 (2nd Dist. 2007), the plaintiff brought an action under FOIA to examine certain election

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("One section of FERPA, 20 U.S.C. § 1232g(b)(2), prohibits educational institutions that receive federal funds from releasing educational information unless, *inter alia,* such information is furnished in compliance with a lawfully issued subpoena, and the parents are made aware of the subpoena prior to disclosure.").

records that the Illinois Election Code requires to be sealed and preserved. *Id*. at 250. In addressing Section 7(1)(a), the plaintiff argued that the cited provisions of the Election Code do not, by their terms, specifically prohibit the public disclosure of such sealed records. *Id*. at 255 (*citing* 10 ILCS 5/17-20, 17-22). The appellate court "reject[ed] plaintiff's assertion that section 7(1)(a) of [FOIA] applies only in instances where the relevant statute specifically provides that it is exempt from the provisions of [FOIA] or otherwise contains an explicit prohibition against public disclosure." *Id*. at 256. Instead, the court interpreted the plain language of section 7(1)(a) "to mean that records are exempt from disclosure under [FOIA] in instances where the plain language contained in a State or federal statute reveals that public access to the records was not intended." *Id*. (*citing Roulette v. Department of Central Management Services*, 141 Ill.App.3d 394, 400 (1st Dist. 1996)).

Here, as in *Kibort*, the plain language of FERPA is quite clear that public access to "education records" and "personally identifiable information" was not intended, except under limited circumstances not applicable to this case. *See* 20 U.S.C. § 1232g(b)(1)-(2). Thus, consistent with *Kibort*, such records are exempt from disclosure under Section 7(1)(a). The district court sought to distinguish *Kibort* on the theory that, although the election code at issue there "did not specifically state that disclosure was prohibited under FOIA," it still "directed state officials to handle the ballots in a manner which would not have been consistent with permitting inspections under FOIA." (Dkt. No. 31: Opinion, p. 6 (*citing Kibort*, 862 N.E.2d at 614-15). The court found that FERPA "can be distinguished" from *Kibort*, because, "[u]nlike the state election code, FERPA does not impose any requirement on state officials," insofar as "[t]he state has the

option to choose whether or not to accept FERPA's conditions." (A.7). That is just another expression of the district court's flawed premise that FERPA's conditions are non-binding, when in fact those conditions are mandatory and enforceable against an educational institution, like the University, that has accepted federal funds. FERPA, much like the election code, directs educational institutions who accept federal funds to preserve student education records and personally identifiable information in a manner that would not be consistent with permitting inspections under FOIA.

C. The District Court's Ruling Is Neither Narrow Nor Limited.

The district court characterized its ruling as "narrow." (A.4, A.6). Its implications, however, are anything but narrow. Indeed, it is difficult to overstate how far-reaching the consequences of the ruling are with respect to both student privacy and University funding. By its own terms, the district court's opinion states that the University's "choice" in responding to FOIA requests seeking FERPA-protected records is "to reject federal education money, and the conditions of FERPA along with it." (A.6). Thus, the opinion eliminates FERPA altogether as an exemption to disclosure under FOIA, notwithstanding that FERPA has defined the national standard to protect the privacy of education records for the past 37 years. The district court evidently believed that the enormous consequences of such a "choice" might be mitigated, because there are "other provisions of FOIA" that may "prevent the disclosure of portions" of the records sought by the Tribune's Request. (A.7).

The problem, however, is that there is no other FOIA exemption whose protections correspond with FERPA's privacy requirements, particularly after the amendment of FOIA in January 2010 to remove the *per se* privacy exemption for

student information. *See* 5 ILCS 140/7. Today, the nearest equivalent is the exemption for "[p]rivate information[.]" 740 ILCS 140/7(1). The definition of "private information," however, is limited to "unique identifiers" like social security numbers and driver's license numbers. 740 ILCS 140/2(c-5). FERPA defines the "education records" and "personally identifiable information" that are subject to its protections much more broadly, to include all records that "contain information directly related to a student," as well as "[t]he name of the student's parent or other family members," "[t]he address of the student or student's family," and "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3. The effect of the district court's ruling is therefore quite expansive. It leaves the University in the position of being compelled to produce private, FERPA-protected education records and personally identifiable information (aside perhaps from "unique identifiers") in violation of its own privacy policies when responding to FOIA requests, even at the cost of "choos[ing] to reject" hundreds of millions of dollars in student loans, financial assistance, and other federal funds.

The Tribune also argued below, based on the Supreme Court's ruling in *Gonzaga* and related authority, that a single instance of responding to the Tribune's Request would not be sufficiently "systemic" to constitute a "policy" of disclosing education records in violation of FERPA, and therefore likely would not subject the University to liability or penalty under FERPA. (A.47-49). Even if that were to turn out to be correct--a heavy risk to ask the University to shoulder--the Tribune's argument misses the point.

As observed in *Indiana Newspapers*, any single party seeking disclosure of education records under FERPA could argue that its individual request constitutes a "singular instance" of releasing information, and therefore is not "systemic" and does not constitute a "policy" of violating FERPA. 787 N.E.2d at 904. Yet if this Court were to endorse that argument, "public disclosure of such materials could soon become a commonplace occurrence." *Id*. It cannot be the case that FOIA and FERPA were designed to reward the first requestor seeking confidential education records by granting public disclosure in response to the first request, then denying all subsequent requests for the same information. By holding categorically that FERPA never provides a basis to withhold education records or personally identifiable information in response to a FOIA request, the district court has effectively imposed upon the University a "policy or practice" of disclosing FERPA-protected records in response to FOIA requests.

III. The District Court's Ruling Is Not Defensible on Any Other Basis Argued by the Tribune in the Proceedings Below

Although the district court did not reach any of the Tribune's other arguments, this Court may consider "any basis" for summary judgment "supported in the record." *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 629 F.3d 697, 723 (7th Cir. 2011). The Tribune presented several other arguments below in support of its motion for summary judgment, primarily that the records sought in the Request do not qualify as "education records" under FERPA. The Tribune asserted that the materials it seeks do not contain "the academic and educationally-related information that [FERPA] was intended to protect." (A.41-42). That is wrong as a matter of law. FERPA prohibits the University

from disclosing those documents in its possession that are "directly related to" students, as well as personally identifiable information (including parents' names and addresses) contained in such documents. 20 U.S.C. § 1232g(a)(4)(A). The statute does not, by its plain language, confine the meaning of "education records" to "academic and educationally-related information," nor is it at all clear how such ambiguous, content-based exceptions could ever provide meaningful guidance to students, parents, educational institutions, or the courts. There is no colorable basis in the text, regulations, precedent, legislative history, or administrative interpretation of FERPA to insert an exception for student admissions records, which clearly are "directly related to" the admitted students in question, and by the very terms of the Tribune's Request contain personally identifiable information.

A. Student Admissions Records Are "Education Records" and Parental Information Is "Personally Identifiable Information" Under the Plain Language of FERPA and the Regulations Implementing Its Terms.

The plain language of FERPA and its implementing regulations are unambiguous in prohibiting disclosure of precisely the categories of information sought by the Tribune in its Request. "Statutory interpretation begins with the plain language of the statute." *United States v. Ye*, 588 F.3d 411, 414 (7th Cir. 2009) (*quoting United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008)). This Court "assumes that the purpose of the statute is communicated by the ordinary meaning of the words Congress used; therefore, absent any clear indication of a contrary purpose, the plain language is conclusive." *Id*. To the extent there is any ambiguity in the statutory language, the DOE, as the agency tasked with administering FERPA, is entitled to deference in its

interpretation of the statute "so long as the statute itself is silent or ambiguous on the issue and the agency's interpretation is not arbitrary or capricious." *Disability Law Center of Alaska, Inc. v. Anchorage School Dist.*, 581 F.3d 936, 939-40 (9th Cir. 2009) (*citing Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984)).

Section 444(b)(1) of FERPA provides: "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 parent or student consent, other than ten defined exceptions not applicable here. 20 U.S.C. § 1232g(b)(1) (emphasis added). Section 444(b)(2) similarly provides: "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," unless there is "written consent" from the parents or student, or such information "is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena[.]" 20 U.S.C. § 1232g(b)(2) (emphasis added).

FERPA defines "education records" as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution," with certain exceptions that do not apply in this case, such as law enforcement and medical records. 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3. The regulations implementing FERPA further define "personally identifiable information" to

include, *inter alia*, "[t]he name of the student's parent or other family members," "[t]he address of the student or student's family," and "[o]ther information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty." 34 C.F.R. § 99.3.

The Tribune does not dispute that its Request includes categories of "personally identifiable information." The Request seeks "names of the applicants' parents" and "the parents' addresses," both of which are expressly incorporated in the definition of "personally identifiable information," and either of which would easily enable a reasonable person in the community to identify putative "Category I" students with reasonable certainty. *See* 34 C.F.R. § 99.3. The Tribune asserts, however, that the records it seeks are not "education records." (A.42-47). That interpretation cannot prevail.

The statutory definition of "education records" includes three elements: (1) "records, files, documents, and other materials," that (2) "contain information directly related to a student," and (3) "are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The first and third elements are not in dispute; the Request seeks "records" and is directed to the University, which all parties agree is an "educational institution." (SUF, ¶ 9). *See* 20 U.S.C. § 1223g(a)(3) (defining "educational institution"); 34 C.F.R. § 99.1 (same). The Request is also directed to "students," as it only seeks records for applicants who were "admitted to the University of Illinois and subsequently attended the University of Illinois." (A.61, ¶ 8; A.95-96, ¶ 8).

The Tribune focused its efforts below solely on the second element, asserting that student records containing parents' names and addresses are not "education records," because they purportedly do not contain "the academic and educationally-related information that [FERPA] was intended to protect[.]" (Dkt. No. 15: Memo, p. 4). The most basic problem with the Tribune's position is that FERPA's definition of "education records," by its own plain language, is not limited to "academic and educationally-related information." Rather, it encompasses all information "directly related to a student." 20 U.S.C. § 1232g(a)(4)(A). "Related" means "[b]eing connected; associated." *American Heritage Dictionary of the English Language* (4th ed. 2006). That meaning has remained essentially unchanged since Congress passed FERPA in 1974. *See American Heritage Dictionary of the English Language* (1973) (defining "related" as "[c]onnected; associated"). Thus, pursuant to FERPA's own definition, "education records" include all records, files, documents, and other materials that are directly connected or associated with a student.

The Tribune asserted below that it has not made an "abstract request" for "legitimate" records, but rather a more targeted request for "Category I" information reflecting "illegitimate deal making" under a "shadow process" that operated under a "different set of rules" from the University's official admissions process. (Dkt. No. 27: Reply, p. 3). The Tribune characterizes the records it seeks as a "ledger of political favors." (*Id.*, p. 14). The Tribune neglects to mention that it has filed and is currently pursuing a separate, state court action seeking, among other information, students' grade point averages and ACT scores. *See Chicago Tribune Company v. University of Illinois Board of Trustees*, No. 09-MR-431 (7th Jud. Cir. Sangamon Cty.). Regardless,

even looking only to the Request in this case, the Tribune seeks, *inter alia*, ***all*** records for "Category I" students containing the names of applicants' parents and parents' addresses, the identity of individuals who "made a request or otherwise became involved in" the students' applications, the identity of the University official to whom the request was made, and any other University official to whom the request was forwarded. (A.61, ¶ 8; A.95-96, ¶ 8).

These search terms sweep far beyond a mere "ledger of political favors," which is the type of record that the University has already produced in response to the Tribune's prior FOIA requests. Rather, the current Request encompasses numerous categories of "legitimate" records disclosing personally identifiable information. Records responsive to the Tribune's Request could include students' applications for admission, parental financial aid documents, recommendations from any individuals who "became involved in" the students' applications, and internal correspondence relating to each student's admission to the University. Whether or not such documents are deemed to be "academic" or "educationally-related," which they certainly appear to be, they plainly are connected and associated with individual students, and therefore satisfy FERPA's definition of "education records." The Tribune's interpretation cannot be reconciled with the text of the statute, and suggests no meaningful criteria that students, parents, educational institutions, or the courts could employ in distinguishing which documents are "academic and educationally-related," and which are not.

This plain language construction of "education records" under FERPA is supported by the *Miami University* decision, which is the leading authority interpreting FERPA in the context of a newspaper's request for documents containing students'

personally identifiable information. *See Miami University*, 294 F.3d at 811-15. Similar to the Tribune's argument in the present case, the *Chronicle of Higher Education* in *Miami University* asserted that Congress did not intend FERPA "to protect records other than those records relating to individual student academic performance, financial aid or scholastic probation." *Id*. at 811. The Sixth Circuit disagreed, finding that, "[u]nder a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university." *Id*. at 812. Regarding the proposed alternative definition limiting education records to certain academic and educationally-related categories, the Sixth Circuit responded: "Notably, Congress made no content-based judgments with regard to its 'education records' definition. We find nothing in the statute or its legislative history to the contrary, and the various state court and federal district court cases cited by *The Chronicle* do not sway our conclusion." *Id*. *See also Connoisseur Communication of Flint v. Univ. of Michigan*, 584 N.W.2d 647, 649 (Mich. App. 1998) (holding that a Student-Athlete Automobile Information Sheet is an "education record" because it is "directly related to a university student" and "maintained by the university in its files").

The Tribune further argued below that its Request is narrowly tailored, because the records it seeks are for "applicants," not "students" at the University, and pertain to identities of parents and public officials rather than students' academic standing or performance. (Dkt. No. 15: Memo, pp. 8-9). The distinction between "applicants" and "students" is misleading, because the Request on its face seeks records "with regard to each applicant in Category I … who was admitted to the University of Illinois ***and subsequently attended the University of Illinois***." (A.61, ¶ 8; A.95-96, ¶ 8)

(emphasis added). Thus, by its own terms, the Request is directly ***solely*** to those applicants who became students of the University.

Likewise, the fact that the Request asks for parents' identities rather than students' identities is a distinction without a difference. The definition of "personally identifiable information" expressly includes parents' names and addresses. 34 C.F.R. § 99.3. The Tribune cannot credibly suggest that disclosing the names of Category I students' parents and the parents' addresses would not allow a reasonable person in the school community to identify the student with reasonable certainty, or the Tribune itself to identify the Category I students and publish their identities and alleged relationships to individuals such as Tony Rezko.

B. The Tribune's Authorities Do Not Support Disclosure of the Education Records and Personally Identifiable Information Sought by the Tribune.

In an effort to support its content-based definition of "education records," the Tribune offered a number of inapposite and erroneous authorities below. (*See* Dkt. No. 15: Memo, pp. 4-9). Notably, most of these authorities are part of the line of case law that the Sixth Circuit repudiated in *Miami University*, when the court held that the definition of "education records" does not involve "content-based judgments," and is not limited to documents "relating to individual student academic performance, financial aid or scholastic probation." *See* 294 F.3d at 811. *Compare with State ex rel. The Miami Student v. Miami University*, 680 N.E.2d 956, 958-59 (Ohio 1997) (finding that "education records" are those relating to "student academic performance, financial aid, or scholastic probation"); *Bd. of Education of Colonial School Dist. v. Colonial Educ. Ass'n*, No. 14383, 1996 WL 104231, *6 (Del. Ch. Feb. 28, 1996) (same); *Red & Black*

Publishing Co., Inc. v. Bd. of Regents, 262 Ga. 848, 852, 427 S.E.2d 257, 261 (Ga. 1993) (same); *Bauer*, 759 F. Supp. at 591.

Miami University was unequivocal, and correct, in its rejection of this line of cases. It commenced as a result of the Ohio Supreme Court's ruling in *The Miami Student*, relying on the Georgia Supreme Court's ruling in *Red & Black Publishing*, that disciplinary records are not "education records" as defined by FERPA. *See* 294 F.3d at 803 (*citing The Miami Student*, 680 N.E.2d at 958; *Red & Black Publishing*, 427 S.E.2d 257). Based on its plain language construction of FERPA, described above, the Sixth Circuit concluded that the Ohio Supreme Court "misinterpreted a ***federal*** statute—erroneously concluding that student disciplinary records were not 'education records' as defined by the FERPA[.]" 294 F.3d at 810 (emphasis in original). Describing this as an "erroneous conclusion," the Sixth Circuit observed that "federal courts owe no deference to a state court's interpretation of a federal statute," and therefore declined to follow *The Miami Student* line of cases. *Id.* at 810-11.

In addition to the erroneous statutory analysis in the Tribune's precedent, its cases are also inapposite on the facts, the law, or both. Several involve circumstances in which the courts found FERPA inapplicable because the requested records either never contained or had redacted all personally identifiable information. *See National Collegiate Athletic Ass'n v. Associated Press*, 18 So.3d 1201, 1211 (Fla. App. 2009); *Bd. of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press*, 337 Mont. 229, 236, 160 P.3d 482, 487-88 (Mont. 2007); *The Miami Student*, 680 N.E.2d at 959.

The remaining cases involve records that either expressly fall outside the statutory definition of "education records" or are subject to a specific statutory exclusion

under FERPA. In *National Collegiate Athletic Ass'n*, the court held that the requested documents were not "education records," because they pertain to allegations of misconduct by the university athletic department, and "do not contain information directly relating to a student[.]" 18 So.3d at 1211 (*citing* 20 U.S.C. § 1232g(a)(4)(A)). In *Red & Black Publishing*, the court found that the requested student disciplinary records were not "education records," because they were not "maintained by an educational agency or institution[.]" 427 S.E.2d at 261. In *BRV, Inc. v. Superior Court*, 49 Cal.Rptr.3d 519 (Cal. App. 2006), the court concluded that the requested investigative report was not a "pupil record" under California's counterpart to FERPA, because it was not an "institutional record[] maintained in the normal course of business by a single, central custodian of the school[.]" *Id*. at 526. In *Bauer*, the court found that the requested criminal investigation and incident report records sought from campus police were not "education records," because FERPA "specifically exempts" such records under its "law enforcement" exception. 759 F. Supp. at 589-91 (*citing* 20 U.S.C. § 1232g(b)(4)(B)(ii)). In *Colonial School Dist.*, the court concluded that the requested disclosure was outside the scope of FERPA, because the requested information did not "constitute a file, document, paper, etc.," and was akin to "criminal investigation reports," which are specifically excluded from "education records" under FERPA. 1996 WL 104231, at *5-6 (*citing* 20 U.S.C. § 1232g(a)(4)(A); *Bauer*, 759 F. Supp. at 590). *See also Hampton Bays Union Free School Dist. v. Public Employment Relations Bd.*, 878 N.Y.S.2d 485, 488 (N.Y. App. Div. 2009) (holding that teacher disciplinary records cannot be equated with student disciplinary records, because they do not contain "information directly related to a student").

One of the Tribune's principal authorities, *Kirwan v. The Diamondback*, 721 A.2d 196 (Md. 1998), involved a request for records relating to parking tickets accumulated by student-athletes on the basketball team. The court found that such records are not "education records," because they do not "relate to academic matters or status as a student." *Id.* at 204 (emphasis added). Thus, *Kirwan* involves another "content-based judgment" of the type rejected by the Sixth Circuit in *Miami University*. But even accepting *Kirwan*'s construction *arguendo*, its reasoning would still hold the records requested by the Tribune in this case to be "education records." Unlike parking tickets, the Request seeks documents and information going to the very heart of one's "status as a student," as they involve the process by which an applicant became an admitted student attending the University. Indeed, *Kirwan* recognized that, in passing FERPA, Congress "was greatly concerned with the systematic violation of students' privacy." *Id.* (*citing* 120 Cong. Rec. 13951 (1974)). The production of a student's personal records cannot help but implicate that privacy concern.

Finally, the Tribune sought to invoke *Disability Rights Wisconsin, Inc. v. State of Wisconsin Dept. of Public Instruction*, 463 F.3d 719 (7th Cir. 2006), for the propositions that FERPA does not support a "blanket nondisclosure policy," that it "requires a balancing of privacy and public interests," and that the Tribune's "watchdog" role as a member of the press outweighs the students' privacy interests under FERPA. (Dkt. No. 15: Memo, p. 8). The University has never asserted a "blanket nondisclosure policy," but it undoubtedly has a duty to comply with the plain language of FERPA. *Disability Rights Wisconsin* does not create a broad "balancing" test to replace the textual definition of "education records" under FERPA. It involved a narrow set of circumstances and a

narrow solution. This Court held that FERPA did not preclude the Wisconsin Department of Public Instruction from turning over records of its own investigation of student abuse to a state-designated protection and advocacy agency whose mandate was to protect mentally ill students. *See id*. at 723-24. The Court noted that, because the information sought was limited to student names, it may be "directory information" that is subject to disclosure without consent under FERPA. *Id*. at 730 (*citing* 20 U.S.C. § 1232g(b)(1)-(2); 34 C.F.R. § 99.3). To the extent that the disclosure "might implicate FERPA," however, the Seventh Circuit concluded that the disclosure of such information to a state-designated agency charged with protecting the very students about whom the information is sought harms neither the students nor their parents, and thus whatever privacy interests there are "are frequently outweighed by [the agency's] broad mandate to investigate and remedy suspected abuse or neglect." *Id*. (*citing Ala. Disabilities Advocacy Prog. v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492, 497 (11th Cir. 1996)). *Disability Rights Wisconsin* does not create a broad carve-out to FERPA that permits a news organization, as a putative "watchdog" for the public's "right to know," to obtain access to private student records.

C. The Legislative History of FERPA Confirms that the Tribune Is Seeking Private Information Protected by FERPA.

The Tribune made several selective references to the legislative history of FERPA to support its case before the district court, asserting that Congress wanted to "take the lid off secrecy in our schools," and intended to "prevent educational institutions from operating in secrecy." (Dkt. No. 15: Memo, pp. 5-7 (*citing Kirwan*, 721 A.2d at 204; 120 Cong. Rec. at 13952)). Notably, however, the portion of the legislative record on which

the Tribune relies is the May 9, 1974 record when FERPA was first introduced, seven months ***before*** Congress amended FERPA to clarify its terms and to include the defined term "education records." (*See* Dkt. No. 15: Memo, Exh. 1). Even in the May 1974 legislative history, Senator Buckley expressed grave concerns regarding the "larger problem of the violation of privacy and other rights of children and their parents that increasingly pervades our schools," and emphasized that one of the purposes of FERPA was to "affirm the privacy and rights of children and their parents" so that children would not be "exclude[d]" from the protection of a "'personal shield for every American' against all invasions of privacy." 120 Cong. Rec. at 13951-52. (Dkt. No. 15: Memo, Exh. 1). Senator Buckley's statement regarding taking "the lid off secrecy in our schools" was made in regard to the provisions of FERPA requiring that parents be given access to their own children's educational records; he did not advocate offering a similar right to newspapers and the public. *Id*. at 13952.

The legislative history when Congress amended FERPA on December 13, 1974 (the "December Amendments") is even more explicit in stating the intent of Congress to protect student privacy. *See* Joint Statements, 120 Cong. Rec. 39858-66 (1974) (Dkt. No. 23: Response Memo, Exh. 1). The December 1974 joint statement explained that the purpose of FERPA "is two-fold—to assure parents of students, and students themselves if they are over the age of 18 … access to their education records and ***to protect such individuals' rights to privacy by limiting the transferability of their records without their consent***." *Id*. at 39862 (emphasis added). The statement also expressed the legislators' intent that, with the adoption of the December Amendments, "parents and students may properly begin to exercise their rights under the law, and ***the***

protection of their privacy may be assured." *Id*. at 39863 (emphasis added).

With regard to the inclusion of the term "education records" in the December Amendments, the statement explained that its inclusion was a "key element" in the amendment, and expressed the intention that the term include "***all information***—with certain limited exceptions—that an institution keeps" on a student, "particularly when the institution may make important decisions affecting his future, or may transmit such personal information to parties outside the institution." *Id*. (emphasis added). That statement supports *Miami University*'s broad construction of "education records," rather than the content-based restrictions suggested by the Tribune.

Indeed, the Sixth Circuit closely examined the legislative history of FERPA, including the December Amendments, when it construed "education records" in *Miami University*. The court noted that Congress "enacted the FERPA 'to protect [parents' and students'] rights to privacy by limiting the transferability of their records without their consent." 294 F.3d at 806 (*citing* 120 Cong. Record at 39862). Moreover, the court conducted a "detailed study of the statute and its evolution by amendment," and found that Congress intended to include student disciplinary records within the meaning of "education records," because FERPA developed statutory exemptions allowing the release of certain student disciplinary records in several discrete situations. *Id*. at 812. Those exemptions would be rendered superfluous if "education records" excluded all disciplinary records. *Id*. at 812-813.

A similar analysis applies here. Even as Congress passed the December Amendments to add the defined term "education records," it also added an exception to prevent parents and students from reviewing a limited subset of records as "education

records" under FERPA. Specifically, as amended by the December Amendments, FERPA states that the right of parents and students to review their own education records "shall not operate to make available to students in institutions of postsecondary education … 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[.]" 20 U.S.C. § 1232g(a)(1)(C)(ii). In addition, if the student has signed a waiver of his right of access, the December Amendments also exclude from disclosure "confidential recommendations … respecting admission to any educational agency or institution." 20 U.S.C. § 1232g(a)(1)(C)(iii)(I). The legislative history explains that this exception was added to address a concern expressed by institutions of higher education, who typically solicit "letters of recommendation ***for admission*** … under a promise that such letters will not be available to the student, to his parents, or to third parties not associated with the purpose of the recommendation." 120 Cong. Rec. at 39863 (emphasis added).

Just as the Sixth Circuit found that the inclusion of exemptions for a subset of disciplinary records would be rendered superfluous if no disciplinary records were "education records," so too the inclusion by Congress of an exception for one type of admissions record--letters of recommendation--would be rendered superfluous if Congress intended for all admissions records to be excluded from the definition of "education records." "It is well established that a court must avoid an interpretation of a statutory provision that renders other provisions superfluous." *Miami University*, 294 F.3d at 813 (*citing Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 877 (1991)). Here, the existence of the letter of recommendation exemption only makes

sense if the term "education records" includes admissions records. Moreover, the fact that Congress excluded even students and parents from reviewing letters of recommendation under FERPA speaks to the protected status of such records in connection with the Tribune's demand for records containing "the identity of the individuals who made a request or otherwise became involved in" applicants' applications. (A.61, ¶ 8; A.95-96, ¶ 8). The Tribune cannot obtain records by FOIA request that even the students and parents themselves are not permitted to see.

D. The DOE's August 6, 2009 Opinion Letter Interpreting FERPA Further Confirms that the Tribune's Request for Information Runs Afoul of FERPA's Statutory Protections.

In addition to the statutory text, precedent, and legislative history, the DOE has also provided guidance to the University in the form of its August 6, 2009 opinion letter in response to the University's June 23, 2009 inquiry. (A.97, ¶ 3, A.101, ¶ 8, A.107-09). The response letter states, in relevant part, "Once an applicant becomes a student in attendance, then all information provided in connection with the admissions process that the institution maintains would be considered 'education records' subject to FERPA." (A.97, ¶ 4, A.108). Although agency opinion letters do not receive *Chevron* deference, they are "'entitled to respect' … to the extent that [they] have the 'power to persuade.'" *Centra, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 578 F.3d 592, 601 (7th Cir. 2009) (*quoting Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (internal citation omitted)). Here, the DOE's opinion letter is well-reasoned, taking into account the applicable statutory text and controlling regulations, and makes a persuasive case for the inclusion of information provided in connection with the admissions process as part of the institution's education records. That opinion

is entitled to this Court's respect.

IV. Applying FERPA to Preserve the Privacy of Student Records Does Not Violate the First Amendment

For its final argument to the district court, the Tribune relied on the Missouri district court's opinion in *Bauer* to assert that applying FERPA to deny the Tribune's Request would be unconstitutional under the First Amendment, on the theory that one purpose of the First Amendment is to combat "secrecy" and "to enable the public to scrutinize the actions of government through access to government information." (A.49-51 (*citing Bauer*, 759 F. Supp. at 594; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The Supreme Court, however, has long rejected the view that the First Amendment creates a broad constitutional right of access to government information. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978). The present case presents no circumstances requiring this Court to depart from decades of precedent to create a new constitutional right of access.

Bauer involved a request for access to records relating to criminal investigation and incident reports, which are expressly exempted from FERPA. *See Bauer*, 759 F. Supp. 589-91. Its First Amendment analysis focused entirely on constitutional precedent involving the public's right of access to information "concerning crime in the community" and "activities of law enforcement agencies." *Id.* at 593-94 (*citing Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980); *Houston Chronicle Publishing Co. v. Houston*, 531 S.W.2d 177, 186 (Tex. Civ. App. 1975)). Even in that context, other courts have declined to follow *Bauer*. *See Norwood v. Slammons*, 788 F.Supp. 1020, 1027 (W.D. Ark. 1991). While it is true that the Supreme Court has at

times recognized "a First Amendment right of access to criminal trials, proceedings, and records," it has never extended that right into a general right of access to any and all information of public concern. *Miami University*, 294 F.3d at 820-21 (*citing Richmond Newspapers*, 448 U.S. at 580). Thus, in *Miami University*, the Sixth Circuit held that the denial of access to student disciplinary records under FERPA does not violate the First Amendment. *Id.* at 820-24.

The First Amendment "does not guarantee the press a constitutional right of special access to information not available to the public generally[.]" *Houchins*, 438 U.S. at 11 (*quoting Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972)). Notwithstanding the Supreme Court's recognition of our "profound national commitment" to the principle of "uninhibited" public debate in *Sullivan*, 376 U.S. at 270, appeals to the need for "informed public debate" do not create a constitutional rationale for a broad First Amendment right of access. *See Houchins*, 438 U.S. at 13-15. "There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would ... be at large to fashion *ad hoc* standards, in individual cases, according to their own ideas of what seems 'desirable' or 'expedient.'" *Id.* at 14. In short, "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." *Id.* (*citing* Stewart, "Or of the Press," 26 Hastings L.J. 631, 636 (1975)). The Constitution "establishes the contest, not its resolution," and Congress "may provide a resolution, at least in some instances, through carefully drawn legislation." *Id.* at 14-15. That is what Congress did when it enacted FERPA. It resolved the contest by declaring that education records and personally identifiable information

would not be subject to public disclosure. *See Miami University*, 294 F.3d at 820-24.

In its reply brief below, the Tribune questioned the "continued vitality" of *Houchins*, in light of the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980). (A.213). In *Richmond Newspapers*, however, the Court merely recognized that media representatives "enjoy the same right of access as the public" to criminal trials, and that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." *Id*. at 572-73. That is an issue that the Court had previously recognized remained open following *Houchins*. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 391-92 (1979). Yet the Supreme Court has never departed from nor diluted its unambiguous conclusion in *Houchins* that the press is entitled to no general, constitutional right of special access to information that is not available to the public generally.

Even in those narrow instances where the Supreme Court has recognized a qualified right of access, *i.e.* in the context of access to criminal proceedings, the Court has required a showing that "the place and process have historically been open to the press and general public." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8 (1986). The Tribune has not made and cannot make any showing that student records have historically been open to the press and general public. To the contrary, as the Eighth Circuit recognized in *Webster Groves School Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1375 (8th Cir. 1990), FERPA reflects the state's interest in protecting students' personally identifiable information from public disclosure, and is sufficient to deny a qualified right of access to student education records containing personally identifiable information.

Congress made a reasoned determination almost four decades ago regarding how best to balance the public's right to know against the individual privacy rights of students and parents, and concluded that students' education records containing personally identifiable information should be protected from disclosure. That legislative judgment has stood the test of time, and the circumstances of this case do not warrant the extraordinary remedy of granting the Tribune a new constitutional right of access to students' records.

CONCLUSION

For the reasons stated herein, the University respectfully requests that this Court reverse the order of the district court, enter judgment in favor of the University on the Tribune's declaratory judgment claim, declare that the University is not required to produce the requested records in response to the Tribune's Request, because such production is specifically prohibited by FERPA and is therefore exempted from disclosure under section 7(1)(a) of FOIA, 5 ILCS 140/7(1)(a), and grant such other and further relief as the Court finds to be necessary and appropriate.

Dated: July 13, 2011

Respectfully submitted,

s/Gregory E. Ostfeld

Samuel K. Skinner
Gregory E. Ostfeld
Greenberg Traurig, LLP
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
Telephone: (312) 456-8400
Facsimile: (312) 456-8435
E-mail: skinners@gtlaw.com
ostfeldg@gtlaw.com

Attorneys for Appellant
The Board of Trustees of
the University of Illinois

CERTIFICATE OF COMPLIANCE WITH F.R.A.P RULE 32(A)(7)

The undersigned counsel for Appellant The Board of Trustees of the University of Illinois certifies that the foregoing Brief of Appellant The Board of Trustees of the University of Illinois complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). According to the word count function of Microsoft Word 2000, the word-processing system used to prepare this brief, there are 13,987 words, including footnotes, from pages 1-53 in this brief.

s/Gregory E. Ostfeld

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

The undersigned counsel for Appellant The Board of Trustees of the University of Illinois certifies that the Required Short Appendix and Separate Appendix of Appellant The Board of Trustees of the University of Illinois contain and include all materials required by Circuit Rule 30(a) and (b) of the United States Court of Appeals for the Seventh Circuit.

s/Gregory E. Ostfeld

No. 11-2066

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHICAGO TRIBUNE COMPANY,

Plaintiff/Appellee,

v.

UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES,

Defendant/Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 10 C 568
The Honorable Joan B. Gottschall, Judge Presiding

REQUIRED SHORT APPENDIX OF APPELLANT THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS

Samuel K. Skinner
Gregory E. Ostfeld
Greenberg Traurig, LLP
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
(312) 456-8400

Attorneys for Appellant
The Board of Trustees of
the University of Illinois

ORAL ARGUMENT REQUESTED

INDEX TO APPENDIX

Required Short Appendix

Separate Appendix

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Joan B. Gottschall	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	10 C 0568	**DATE**	3/7/2011
CASE TITLE	Chicago Tribune Company vs. University of Illinois Board of Trustees		

DOCKET ENTRY TEXT

Enter Order. Plaintiff Chicago Tribune Company's motion for summary judgment [14] is granted. Defendant University of Illinois Board of Trustees' motion for summary judgment [17] is denied. Judgment entered for plaintiff. Civil case terminated.

Docketing to mail notices.
*Mail AO 450 form.

Courtroom Deputy Initials:	RJ/JK

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO TRIBUNE COMPANY	)	
	)	
Plaintiff,	)	Case No. 10 C 0568
v.	)	
	)	Judge Joan B. Gottschall
UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES,	)	
	)	
Defendant.	)	

ORDER

I. BACKGROUND

Beginning in May 2009, the Chicago Tribune published a series of articles about admission practices at the University of Illinois. The series, titled "Clout Goes to College," detailed the newspaper's investigation into a list of applicants, known as "Category I, which included the relatives of certain influential individuals. Some of these applicants appeared to have received preferential treatment in the admissions process. The series received a great deal of attention, and the Governor of Illinois convened a commission to study the admissions process.

Plaintiff Chicago Tribune Company ("Tribune"), the publisher of the newspaper, submitted a request under the Illinois Freedom of Information Act ("FOIA"), 5 Ill. Comp. Stat. 140/1 et seq. through one of its reporters. The request sought to inspect:

> the following public records with regard to each applicant in Category I (and/or the equivalent designation in the professional schools) who was admitted to the University of Illinois and subsequently attended the University of Illinois: the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in such applicants' applications. Further, please provide any records about the identity of the University official to whom the request was made, any other university officials

> to whom the request was forwarded, and any documents which reflect any changes in the status of the application as a result of that request.

(Compl., Ex. A.)

Defendant Board of Trustees of the University of Illinois ("University") denied the Tribune's request. FOIA required that the University's denial of the request be made in writing; that the writing specify the exemption authorizing the denial; and that the writing include "a detailed factual basis and a citation to supporting authority." 5 Ill. Comp. Stat. 140/9. In a letter to the Tribune, a University official explained that FOIA provides an exemption from its disclosure requirements for "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law." 5 Ill. Comp. Stat. 140/7(1)(a). The University took the position that a federal law, specifically the Family Education Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g(b)(1), prohibited the release of the requested information. The letter also concluded that:

> In addition, and for your convenience and consideration, I note that based upon the language of your request, we would anticipate that additional exemptions of the Illinois FOIA likely would apply if all the responsive records were gathered and reviewed. For example, we would expect that responsive documents would contain information exempt from disclosure pursuant to several provisions of the Act, including the following: section 7(1)(b)(i) ("files and personal information maintained with respect to . . . students . . . receiving . . . educational . . . services . . . from . . . public bodies"); section 7(1)(b) (unwarranted invasion of personal privacy); and section 7(1)(f) (drafts/predecisional deliberative communications).

(Compl., Ex. B.)[1] The Tribune wrote a letter to the president of the University seeking to appeal the denial of the request. (Compl., Ex. C.) University President Joseph White responded and reiterated the University's position that FERPA prevented the University from releasing the records.

[1] Shortly after the University denied the Tribune's request, Section 7(1)(b) of FOIA was amended. However, current law still provides exemptions for "[p]rivate information," 5 Ill. Comp. Stat. 140/7(1)(b), and "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," *id.* § 7(1)(c).

On January 27, 2010, the Tribune filed this action for declaratory relief asking the court declare that FERPA does not bar the release of the requested records. The relief sought in this case is quite narrow. Neither party has asked the court to opine generally on the propriety of the Tribune's request. Nor has the court been asked to consider any of the other FOIA exemptions mentioned in the University's letter denying the request. The parties have filed cross-motions for summary judgment. The facts are, essentially, uncontested.

II. ANALYSIS

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party is so entitled if no reasonable fact-finder could return a verdict for the nonmoving party." *Patton v. MFS/Sun Life Fin. Distribs., Inc.*, 480 F.3d 478, 485 (7th Cir. 2007).

Illinois FOIA provides that "Each public body shall make available to any person for inspection or copying all public records, except as otherwise provided in Section 7 of this Act." 5 Ill. Comp. Stat. 140/3(a). Section 7 of FOIA provides a list of exemptions from the general policy of open access. The first exemption prevents the release of "[i]nformation specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or state law." 5 Ill. Comp. Stat. 140/7(1)(a). The University relies on the following provision of FERPA in defending its decision to deny the Tribune's request:

> 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 . . .) of students without the written consent of their parents to any individual, agency, or organization . . . .

20 U.S.C. § 1232g(b)(1).

The Tribune makes four arguments in support of its motion for summary judgment. First, it contends that the records it has requested are not "education records," but rather records that "pertain to possible misconduct and politically-motivated favoritism by public officials." Second, these are records of applicants to the University, not "students." Third, FERPA does not "prohibit" the release of education records, so the FOIA exemption cited by the university is inapplicable. Fourth, even if FERPA does prevent the release of the requested documents, the Tribune contends that the First Amendment protects the newspaper's access to these important public records. The court agrees with the Tribune's third argument, which is dispositive.

In construing an Illinois statute, the Illinois Supreme Court directs a court to "ascertain and give effect to the intent of the General Assembly. *Southern Illinoisan v. Illinois Dept. of Public Health*, 844 N.E.2d 1, 14 (Ill. 2006). That "inquiry begins with the plain language of the statute." *Id*. Illinois public policy encourages the free flow of information and open access to official records. *Bowie v. Evanston Cmty. Consol. Sch. Dist. No. 65*, 538 N.E.2d 557, 559 (Ill. 1989). To that end, the Illinois Supreme Court has given FOIA a "liberal construction." *Id*. Although FOIA seeks to protect personal privacy, exceptions to the general rule of disclosure must be construed narrowly. *Id*; *Southern Illinoisan*, 844 N.E.2d at 15.

Section 7(1)(a) of FOIA applies only when a federal or state law "specifically prohibit[s]" a certain disclosure. The ordinary meaning of "prohibit" is "to forbid by authority" or "to prevent from doing something." Webster's Ninth New Collegiate Dicitionary 940 (1985). But FERPA, enacted pursuant to Congress' power under the Spending Clause, does not forbid Illinois officials from taking any action. Rather, FERPA sets conditions on the receipt of federal funds, and it imposes requirements on the Secretary of Education to enforce the spending conditions by withholding funds in appropriate situations. *Gonzaga University v. Does*, 536 U.S.

273, 278-79 (2002). Under the Spending Clause, Congress can set conditions on expenditures, even though it might be powerless to compel a state to comply under the enumerated powers in Article I. *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987). Illinois could choose to reject federal education money, and the conditions of FERPA along with it, so it cannot be said that FERPA prevents Illinois from doing anything.

In *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the Sixth Circuit held that the federal government was entitled to an injunction preventing Miami University from releasing certain education records pursuant to a request under Ohio's Freedom of Information Act. The Ohio FOIA contained a exemption, similar to Illinois', for information, "the release of which is prohibited by state or federal law." The Sixth Circuit analogized Spending Clause conditions to contracts between the states and the federal government. Under this theory, the federal government has a right to enforce the state's promise to abide by the conditions of FERPA once it has accepted federal education funds. *Id.* at 809. Even if this court were to accept the Sixth Circuit's reasoning, however, the opinion in *Miami University* included an important caveat: "We limit this conclusion, that the FERPA imposes a binding obligation on schools that accept federal funds, to federal government action to enforce FERPA." *Id.* at 809 n.11.

The University also cites *Kilbort v. Westrom*, 862 N.E.2d 609 (Ill. App. Ct. 2007), for the proposition that FERPA need not explicitly prohibit the disclosures in order for the Section 7(1)(a) exemption to apply. *Kilbort* concerned a FOIA request to examine ballots and other election materials. The *Kilbort* court concluded that state election law, which directed officials to preserve ballots in a certain manner, barred access to the ballots through FOIA. The law required the election judge to:

> [F]old or roll all of the ballots which have been counted by them, . . . securely bind them, lengthwise and in width, with a soft cord . . . and wrap the same with heavy wrapping paper on which the judges of election shall write their signature and seal the package with filament over the signatures and around the package lengthwise and crosswise, . . . and enclose the ballots so wrapped . . . in a secure canvass covering . . . . The precinct judges of election shall elect 2 judges . . . who shall immediately return the ballots, in such sealed canvass covering, to the election authority . . . . Upon receiving the ballots so returned, the election authority shall carefully preserve the ballots for 2 months, subject to their examination in a discovery recount proceeding in accordance with law. . . . At the expiration of that time such election authority shall remove the same from original package and shall destroy the same, together with all unused ballots returned from the polling places. If any contest of election is pending at such time in which such ballots may be required as evidence, and such election authority has notice thereof the same shall not be destroyed until after such contest is finally determined.

Id. at 613-14 (quoting 10 Ill. Comp. Stat. 5/17-20). Although the election code did not specifically state that disclosure was prohibited under FOIA, the law directed state officials to handle the ballots in a manner which would not have been consistent with permitting inspections under FOIA. *Id.* at 614-15. *Kilbort*, decided by an appellate court, is not binding here but, in any event, can be distinguished. Unlike the state election code, FERPA does not impose any requirement on state officials. The state has the option to choose whether or not to accept FERPA's conditions.

The court's decision in this case is a narrow one. As explained above, the University has identified other provisions of FOIA which may prevent the disclosure of portions of the records requested by the University. The court does not intend to discount the potential privacy interests implicated by the Tribune's request. The only question presented by this lawsuit is whether FERPA "specifically prohibits" the requested disclosure. The court must follow the command of the Illinois Supreme Court to construe the exemptions to FOIA narrowly. FERPA does not specifically prohibit Illinois from doing anything, so the University may not use the federal law as authority to withhold the records pursuant to 5 Ill. Comp. Stat. 140/7(1)(a).

III. CONCLUSION

Accordingly, the Tribune's motion for summary judgment is granted. The University's motion for summary judgment is denied.

ENTER:

/s/
JOAN B. GOTTSCHALL
United States District Judge

DATED: March 7, 2011

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

Chicago Tribune Company
Plaintiff
v.
University of Illinois, Board of Trustees
Defendant

Civil Action No. 10 C 568

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

☑ other: It is hereby ordered that summary judgment is entered in favor of Plaintiff and against Defendant.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Joan B. Gottschall on a motion for summary judgment.

Date: 03/07/2011

MICHAEL W. DOBBINS, CLERK OF COURT

/s/ Rhonda Johnson
Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 4.2
Eastern Division

Chicago Tribune Company

Plaintiff,

v.

Case No.: 1:10−cv−00568
Honorable Joan B. Gottschall

University of Illinois Board of Trustees

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, April 13, 2011:

MINUTE entry before Honorable Joan B. Gottschall: Defendant's motion to amend or correct judgment [33] is granted. It is hereby ordered that judgment [32] entered 3/7/2011 is amended to include the following: The Court grants declaratory relief to Plaintiff Chicago Tribune Company, and hereby declares that the Family Education Rights and Privacy Act, 20 U.S.C. §§ 1232g et seq., does not apply to Plaintiff Chicago Tribune Company's Request for certain records dated December 10, 2009, so as to exempt the Requested Information from disclosure under the Illinois Freedom of Information Act, 5 ILCS 140/7(1)(a). Remaining parts of judgment to stand. Mailed notice(rj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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CERTIFICATE OF SERVICE

I, Gregory E. Ostfeld, an attorney, hereby certify that I caused a copy of the foregoing **BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS** to be served upon the parties listed below through the CMS/ECF system and by messenger on July 13, 2011.

James Andrew Klenk
Natalie J. Spears
SNR Denton LLP
233 South Wacker Drive
Suite 7800
Chicago, IL 60606
E-mail: jklenk@sonnenschein.com
nspears@sonnenschein.com

s/Gregory E. Ostfeld
Gregory E. Ostfeld
Greenberg Traurig, LLP
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
Telephone: (312) 456-8400
Facsimile: (312) 456-8435
E-mail: skinners@gtlaw.com
ostfeldg@gtlaw.com

Attorneys for Appellant
The Board of Trustees of
the University of Illinois