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 AMICI CURIAE IN SUPPORT OF THE DEFENDANT-APPELLANT UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES AND REVERSAL OF THE DISTRICT COURT

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-2066

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Board of Trustees for the following: Chicago State University; Eastern Illinois University; Governors State University; Illinois State University; Northeastern Illinois University; Northern Illinois University; Southern Illinois University; and Western Illinois University

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Ice Miller LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Signature: /s/ Isaac J. Colunga Date: July 20, 2011

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The amici Illinois Public Universities share a significant interest in this case because its outcome could affect the privacy of their undergraduate and graduate students and, in turn, their receipt of federal student aid—aid that is conditioned on compliance with the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, the federal student privacy law known as "FERPA." The University of Illinois is a party to this case. Chicago State University, Eastern Illinois University, Governors State University, Illinois State University, Northeastern Illinois University, Northern Illinois University, Southern Illinois University and Western Illinois University comprise the remaining four-year public institutions of higher education in Illinois. For almost four decades these institutions have complied with FERPA to maintain the privacy of their students' records.

Federal law mandates that the Illinois Public Universities, as recipients of funds administered by the U.S. Department of Education, like the University of Illinois, maintain the confidentiality of their students' records. Under FERPA, absent written consent, a judicial order, lawful subpoena, or an applicable statutory exception, an educational institution that has a policy or practice of permitting the release of student records or the "personally identifiable information" contained in student records can not receive federal funds. 20 U.S.C. § 1232g(b)(1)-(2). As with nearly all public universities in this country, the Illinois Public Universities depend heavily on federal funding to support their operating budgets, scholarship and aid programs, research grants, fellowship awards and building projects.

The Illinois Public Universities submit this amicus brief in support of the University of Illinois and urge the Court to reverse the trial court's decision. The district court held

that FERPA did not "prohibit" the University of Illinois from disclosing the names and addresses of students' parents and, thus, that the relevant exemption in the Illinois Freedom of Information Act, or "FOIA," did not apply. If affirmed, this ruling would effectively require every public university in Illinois to disclose student records containing information that any reasonably diligent member of the public—the media, included—could use to identify the students associated with those records. Given the heavy reliance by these universities on federal funding, this would have far-reaching, damaging implications. To avoid additional costly litigation on this issue, the Illinois Public Universities, as a practical matter, would be required to implement a de facto policy or practice of complying with FOIA requests that unquestionably violate FERPA and its express prohibitions. With each unlawful disclosure, the Illinois Public Universities would not only risk losing critical federal funding, but also risk breaching contracts with the federal government that expressly prohibit universities from disclosing this kind of information. These risks are simply too great for the Illinois Public Universities to stand idly by without making their position known to the Court.

The parties have consented to the filing of this brief. Neither the parties nor their counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief, and no person, its members or its counsel contributed money that was intended to fund preparing or submitting this brief.

II. ARGUMENT

A. FERPA LAWFULLY, EFFECTIVELY, AND SPECIFICALLY PROHIBITS RECIPIENTS OF FEDERAL FUNDS FROM DISCLOSING PROTECTED EDUCATION RECORDS

The district court erroneously concluded that FERPA does not prohibit the disclosure of education records by recipients of federal funds that the U.S. Department of Education ("DOE") administers. From this determination followed the court's decision that the University of Illinois must produce the records at issue because the records do not fall within the state's exemption for those records. Such a result is unacceptable, because the district court is requiring the University of Illinois to do that which it is prohibited by law from doing by virtue of having accepted federal funds. Since Congress enacted FERPA in 1974, students justifiably have come to expect that their educational records would be kept confidential. This expectation is now in serious jeopardy, as the decision below threatens to significantly undermine student privacy as well as the Illinois Public Universities' compliance with FERPA, a condition precedent for eligibility to receive federal student aide.

The decision below directly conflicts with decisions from other jurisdictions and the text of the statutes at issue, as well as the practical realities of the relationship between the federal government and state public universities that receive federal funds. Specifically, FOIA exempts from disclosure any materials that are "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). Contrary to the decision below, FERPA specifically prohibits educational institutions from disclosing education records by allowing the DOE to institute a variety of enforcement mechanisms—including the withdrawal of federal funds—if the institutions do not comply with FERPA's

requirements. FERPA's prohibitions and remedies are built into the multitude of contractual agreements between the Illinois Public Universities and the DOE.

FERPA provides, in relevant part, that "[n]o 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 . . . of students with the written consent of their parents . . ." 20 U.S.C. § 1232g(b)(1). The law also provides that funds will be withheld from institutions that release personally identifiable information contained in student records. 20 U.S.C. § 1232g(b)(2). For students attending colleges or universities, the consent for release of records must come from the student, not the parents. 20 U.S.C. § 1232g(d).

Congress created FERPA through the exercise of its powers under the Spending Clause, U.S. Const., Art. 1 § 8, cl. 1, to protect the rights of parents and students to "privacy by limiting the transferability of their records without their consent." Joint Statement, 120 Cong. Rec. 39858, 39862 (1974).[1] To achieve that end, FERPA conditioned the right to receive DOE funds on compliance with the provisions of FERPA. Compliance with FERPA is not optional for recipients; in exchange for accepting the funds, universities either comply with FERPA or risk sanction by the DOE. Of all the enforcement mechanisms available to the Secretary, the most effective is the ability to withhold federal funds. By exposing fund recipients to the various enforcement mechanisms that Congress authorized, FERPA effectively prohibits those fund recipients from violating its requirements, including the disclosure of education records.

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[1] Although the Tribune argues that Congress intended FERPA as a means of granting public access to education records, the Congressional Record establishes that Congress adopted FERPA for two different reasons: (1) to facilitate the ability of parents and students to access their education records and (2) to protect education records from disclosure absent consent by parents and students.

Congress delegated the authority to enforce FERPA to the Secretary of Education. 20 U.S.C. § 1232g(f)-(g). The statute grants to the Secretary the power to investigate, process, review, and adjudicate violations of FERPA. To remedy FERPA violations by recipients of federal funds, Congress expressly gave the Secretary the authority to withhold payments, issue administrative cease and desist orders, enter into compliance agreements, and "take any other action authorized by law with respect to the recipient." 20 U.S.C. § 1234c(a)(1-4). This includes the power to file suit for injunctive relief to stop FERPA violations and to prevent additional violations from occurring. *United States v. Miami Univ.*, 294 F.3d 797, 807-08 (6th Cir. 2002)(holding that that the phrase "take any other action authorized by law" contained in 20 U.S.C. § 1234c(a)(4) provides express authority from Congress for the Secretary to bring suit in lieu of administrative actions to enforce FERPA's provisions.).

The Sixth Circuit has recognized that "'[u]nder FERPA, schools and educational agencies receiving federal financial assistance ***must*** comply with certain conditions. One condition specified in the Act is that sensitive information about students may not be released without [the student's] consent.'" *Miami Univ.*, 294 F.3d at 809 (quoting *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 428 (2002))(emphasis added). The court then explained that "FERPA unambiguously conditions the grant of federal education funds on the educational institutions' obligation to respect the privacy of students and their parents." *Id.* Should the university fail to comply with FERPA, that university will lose its federal funding. Such a result would have a devastating impact on both students and the Illinois Public Universities.

In Fiscal Year 2010 alone, the University of Illinois received $594,325,862.00 in federal funds under various programs administered by the DOE. This sum amounted to

19.1% of the University's total operating revenues from all sources that year. Appellant's Br. at 8 (citing A.224-25 ¶¶ 26-28, A.294-95, ¶¶ 12-16, A.296-357). No one seriously disputes that the prospect of losing annual revenues in excess of $500,000,000 acts as a complete prohibition to the University's non-compliance with FERPA.

The same realities hold true for the Illinois Public Universities. As set forth more fully in the chart below, the Illinois Public Universities receive a substantial amount of federal student financial aid that they administer on an annual basis. Notably, this aid totaled more than $630,000,000 for Fiscal Year 2010.

2010 Federal Student Financial Aid

Institution	Federal Student Financial Aid 2009-10*			
	Pell Grant	Non-Pell Grant Scholarships	Loans	Total Federal Aid
Chicago State University	17,450,947	653,702	79,672	18,184,321
Eastern Illinois University	12,995,173	1,457,382	62,766,962	77,219,517
Governors State University	5,587,274	1,787,741	35,422,663	42,797,678
Illinois State University	15,787,214	2,135,383	101,730,600	119,653,197
Northeastern Illinois University	15,474,558	1,140,065	184,936	16,799,559
Northern Illinois University	25,321,643	2,780,031	123,622,798	151,724,472
Southern Illinois University Carbondale	25,398,870	9,733,200	130,346,635	165,478,705
Southern Illinois University Edwardsville	13,110,651	2,433,232	7,894,619	23,438,502
Western Illinois University	14,300,369	2,226,621	1,681,018	18,208,008
Total	145,426,699	24,347,357	463,729,903	633,503,959

*Source: Illinois Board of Higher Education Student Financial Aid Survey.

The district court's ruling in this case places the Illinois Public Universities at risk of losing these vital funds. It also exposes the Illinois Public Universities to further lawsuits that seek to characterize their compliance with FERPA as a mere "choice." This conclusion is not merely hypothetical. Recently in Ohio, ESPN Inc. filed a complaint for writ of mandamus against The Ohio State University in its efforts to obtain the educational records of student-athletes who are the subject of an NCAA investigation. In ESPN, Inc.'s memorandum in support of its writ of mandamus, it devoted a significant portion of the memorandum to the district court's underlying decision in this case. Memo. in Support of Compl. for Writ of Mandamus at 6-7, *State, ex rel. ESPN, Inc. v. The Ohio State University*, No. 11-1177 (Ohio July 11, 2011)(Exhibit 1 to Appendix). ESPN principally argued that FERPA did not prohibit disclosure of student information because The Ohio State University "could choose to reject federal education money, and the conditions of FERPA along with it . . . ." *Id.* at 7 (quoting the district court opinion, A. 6). That argument does not pass the red face test. Compliance with FERPA is not a "choice." The Illinois Public Universities are bound by FERPA because they have already accepted hundreds of millions of dollars from the federal government on the condition that they adhere to the privacy requirements of FERPA. Furthermore, even if the Illinois Public Universities had not already accepted federal funds and agreed to be bound to FERPA, declining federal funds is not a viable option for these institutions. Without federal funding, the only real "choice" left to the Illinois Public Universities is to deprive their students of access to federal financial assistance and face the real possibility of closing their doors.

B. THE LEGISLATIVE HISTORY OF FOIA REVEALS THAT THE ILLINOIS LEGISLATURE INTENDED TO PROTECT THE PRIVACY OF STUDENT INFORMATION

The General Assembly, when adopting FOIA, intended that "all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials." *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 910 N.E.2d 85, 91 (Ill. 2009); *Lieber v. Bd. of Trustees of S. Ill. Univ.*, 680 N.E.2d 374, 377 (Ill. 1997). FOIA did not create unconditional public access. In fact, not only did the General Assembly build into FOIA several exemptions, but an examination of FOIA's legislative history and statutory scheme reveals that the General Assembly never intended for public universities to disclose personal and private identifying information about their students.

When construing an Illinois statute, courts should give effect to the legislature's intent. *E.g.*, *Antunes v. Sookhakitch*, 588 N.E.2d 1111, 1114 (Ill. 1992). A court is not confined to a literal examination of the statute's express language; in fact, "[r]esort to explanatory legislative history has been declared not to be forbidden no matter how clear the words may first appear on superficial examination." *People ex. Rel. Nelson v. Olympic Hotel Bldg. Corp.*, 91 N.E.2d 597, 600 (Ill. 1950)(citing *Harrison v. N. Trust Co.*, 317 U.S. 457, 479 (1943)). To determine the legislature's intent, a reviewing court may seek guidance from legislative history. *Envirite Corp. v. Ill. EPA*, 632 N.E.2d 1035, 1037-38 (Ill. 1994). Remarks by the sponsor of legislation are especially significant, since "legislators look to the sponsor . . . to be particularly well informed about its purpose, meaning, and intended effect." *Spinelli v. Immanuel Evangelical Lutheran Congregation*, 494 N.E.2d 196, 200 (Ill. App. Ct. 1986), *aff'd*, 515 N.E.2d 1222 (Ill. 1987).

In this case, the legislative history is particularly instructive. During the early Illinois House debates on FOIA, Representative Barbara Flynn Currie, who sponsored the original Bill and later co-sponsored the 2009 amendment discussed hereinafter, noted that FOIA would "ensure that there is accountability to the people, that what we pay our bureaucrats to do for us will be open and available for us to inspect." House Debates, H.B. 234, 83d General Assembly, May 25, 1983, at 181 (Exhibit 2 to Appendix). But Representative Currie also assured the legislators that openness had limits. When responding to another representative's concerns about how far Representative Currie wished to go in her desire for openness, she made clear that "under this Bill, there is confidentiality for individual names or other identifying materials for students at the University of Illinois . . . ." House Debates, H.B. 234, 83d General Assembly, May 25, 1983, at 189 (Exhibit 2 to Appendix). This statement illustrates that the drafters of FOIA carefully balanced the public's need to know with individual privacy concerns, and specifically the privacy of information maintained by universities in Illinois about their students.

Individual privacy, especially for students, has always been a concern for the General Assembly. Legislators debated the issue at the statute's inception, and they continued to debate the issue prior to the significant amendments to FOIA that the legislature adopted in 2009, effective January 1, 2010. For example, during the Illinois House debates on May 27, 2009, Representative Roger Eddy inquired of House Speaker Michael Madigan, who co-sponsored the amending bill, stating, "I'm particularly concerned with student records and what is FOIable [sic.]." House Debates, H.B. 1370, 96th General Assembly, May 27, 2009, at 95 (Exhibit 3 to Appendix). He then asked the Speaker, "[H]as there been a change in what is FOIable under the Student Records Act

related to this Bill?," to which Speaker Madigan responded, "The answer is no." *Id.* Representative Eddy went on: "So, if we get a request for information that is currently exempt from FOIA, what we would not share regarding student records or personnel records at this time, there's nothing in here that changes that requirement at all?" "The answer is yes," Speaker Madigan responded. *Id.* at 96.

Later in the debate, Speaker Madigan yielded for questions from Representative Elaine Nekritz, who sought "to clarify the legislative intent under th[e bill]." House Debates, H.B. 1370, 96th General Assembly, May 27, 2009, at 105 (Exhibit 3 to Appendix). Specifically, Representative Nekritz asked, "What if some other State or Federal Law precludes disclosure of those records to some other party like HIPPA, an [Inspector General] report or something like that?" *Id.* Speaker Madigan assured Representative Nekritz that the Attorney General would review such disclosures in confidence, and that "[t]hey would be kept confidential." *Id.* He continued, "[I]f it were a Federal Law in conflict, why, the Federal Law would control." *Id.*

Following this debate in 2009, the General Assembly passed comprehensive amendments to FOIA. While the amendments made sweeping changes to the language of FOIA, they did not change Section 7(1)(a), which, consistent with Speaker Madigan's comments, continues to exempt from disclosure any materials that are "specifically prohibited from disclosure by federal or State law or rules and regulations implementing federal or state law." Although the General Assembly was, and still is, aware that one of FOIA's central purposes is to serve as a vehicle for acquiring information about government activities, the General Assembly never intended for the courts to allow that vehicle to encourage improper disclosure. Public institutions ought not be forced to

make disclosures of protected information in the name of FOIA, especially disclosures that violate federal law and risk the loss of critical federal funding.

C. THE COURT'S RULING SIGNIFICANTLY WEAKENS THE ABILITY OF THE ILLINOIS PUBLIC UNIVERSITIES TO PROTECT THE PRIVACY OF STUDENT INFORMATION

The district court's ruling did not consider any of the other FOIA exemptions raised by the University of Illinois in response to the Tribune's request. However, if, as the district court ruled, the FOIA's Section 7(1)(a) exemption does not protect university student records and information, only a few other exemptions potentially protect such information from disclosure. Those provisions do not adequately protect sensitive information about students.

FOIA's Section 7(1)(c) catchall provision, which protects information "the disclosure of which would constitute a clearly unwarranted invasion of privacy," might, arguably, provide some protection for identifiable information about students. 5 ILL. COMP. STAT. 140/7(1)(c). But rather than incorporating the well-defined standards developed under FERPA's statutory provisions, and implementing regulations to protect personally identifiable information about students, this exemption leaves the determination of whether an institution must disclose identifiable student records to a much less precise reasonable person standard, coupled with a blurred, uncertain balancing test. *See id.* (defining "unwarranted invasion of personal privacy" to mean the disclosure of information that is highly personal or objectionable to a reasonable person ***and*** "in which the subject's interest in privacy outweighs any legitimate public interest in obtaining the information").

To illustrate the problem this poses, suppose a FOIA applicant requests an Illinois university to release the academic transcript and records of a candidate for public office.

If the Section 7(1)(a) exemption applies, FERPA would unquestionably prohibit the release of the candidate's academic transcript, absent the candidate's consent. All education records are equally protected, whether they relate to a public figure or not. If Section 7(1)(a) does not apply, however, a court using the balancing test in Section 7(1)(c) could conclude that the public's interest in knowing the details of the candidate's collegiate history—which may include disability accommodation requests, parents' financial information as it relates to the student's applications for federal aid, admissions essays and letters of recommendation—outweighs any privacy interest a candidate might have in that information. Stripping the personal and identifiable details of academic performance and other confidential information of the well-defined protections of FERPA leaves that sensitive information vulnerable to public disclosure. The same risk of exposure would exist for individuals who, although not public figures, find themselves thrust into the public spotlight. Their student records might also be subject to disclosure, all without the consent of the individuals in question, and all the while placing the academic institutions at risk of FERPA enforcement actions.

Another FOIA exemption protects a narrow category of personally identifiable student information. Section 7(1)(j)(iii) exempts from public disclosure information concerning a university's adjudication of a student disciplinary case if the disclosure would "unavoidably reveal the identity of the student." 5 ILL. COMP. STAT. 140/7(1)(j)(iii). But this exemption is limited in that it offers no protection for records not involving disciplinary proceedings.

If Section 7(1)(a) of FOIA does not incorporate the federal statutory and regulatory prohibitions under FERPA, personally identifiable information about Illinois university students has scant and questionable protection. If a FOIA applicant can argue that a

relationship exists between sensitive confidential student information and the performance of duties by public officials or some other public interest, the Section 7(1)(c) balancing test might result in the release of private information. That disclosure not only undermines the legislature's intention to protect identifying information about university students, but also places public educational institutions in Illinois at risk of an enforcement action by the DOE, or worse—loss of federal funds.

III. CONCLUSION

The Illinois Public Universities respectfully request that the Court reverse the order of the district court and enter the relief requested by the University of Illinois.

Chicago State University Board of Trustees, Eastern Illinois University Board of Trustees, Governors State University Board of Trustees, Illinois State University Board of Trustees, Northeastern Illinois University Board of Trustees, Northern Illinois University Board of Trustees, and Southern Illinois University Board of Trustees and Western Illinois University Board of Trustees

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1. The undersigned certifies that this brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(b) because the brief contains approximately 3,450 words, excluding parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. The undersigned certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Georgia font, 12-point font size.

CERTIFICATE OF SERVICE

I, John D. Burke, an attorney, hereby certify that I caused a copy of the foregoing **BRIEF OF AMICI CURIAE IN SUPPORT OF THE DEFENDANT-APPELLANT UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES AND REVERSAL OF THE DISTRICT COURT** to be served upon the parties listed below through the CM/ECF system on July 20, 2011:

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