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## **U. of I. disclosure appeal gets under way in federal court**

**In battle stemming from Tribune investigation, university argues Family Education Rights and Privacy Act of 1974 bars it from releasing applicant info**

By Antonio Olivo, Tribune reporter

July 14, 2011

The University of Illinois on Wednesday filed its opening brief in an appeal to a federal court ruling that a privacy law governing financial aid does not bar the school from releasing information about hundreds of well-connected college applicants.

In an ongoing legal dispute that stems from the Tribune's 2009 "Clout Goes to College" investigation, U. of I. officials have argued that releasing grade-point averages, standardized test scores and other details about so-called Category I applicants would violate the federal Family Education Rights and Privacy Act of 1974, also known as FERPA.

A ruling in March by federal Judge Joan Gotschall that FERPA does not specifically prohibit the release of the records "is wrong as a matter of law," the university argued in its opening brief filed in the 7th U.S. Circuit Court of Appeals.

Because the U. of I. had already accepted FERPA money prior to Freedom of Information Act requests filed by the Tribune that also sought parents' names, the university was bound by the privacy requirement when it declined to release those details, the new brief argues.

The dispute between the university and the Tribune is also under way in a Sangamon County court. More than 5,200 pages of documents the university did provide were the basis of the Tribune's "Clout Goes to College" series, which outlined how some underqualified but politically connected students were admitted to the university over more qualified applicants.

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ADMISSIONS PROCESS CONTROVERSY

# UI appeals ruling ordering disclosure of information

Newspaper had sued for access to names, addresses of parents of some applicants

By The News-Gazette

URBANA — The University of Illinois filed an appeal Wednesday on a March 2011 federal district court ruling that ordered the disclosure of Category I information sought by the Chicago Tribune.

U.S. District Judge Joan B. Gottschall ruled for the Tribune, writing that it was not clear that a federal educational privacy law specifically prohibited the release of

admissions information. If the UI chose to, she wrote, it could forgo federal funding to comply with the Tribune's Freedom of Information requests.

The UI argues that student and family information has been protected by federal privacy regulations for almost 40 years. In a press release, the UI said it was "determined to protect the privacy of student educational records and the federal funding upon which both students and the university rely."

In its appellate brief, UI attorneys argued that the district court's ruling runs counter to law that subjects it "to a compulsory, enforceable legal obligation to protect the private records of its students against unauthorized disclo-

sure."

That refers to the 1974 federal Family Educational Rights and Privacy Act, known as FERPA.

The Tribune sued the UI for denying a December 2009 state FOIA request seeking the names and addresses of the parents of certain Urbana-Champaign campus applicants who subsequently enrolled. During the spring and summer of 2009, the Tribune and The News-Gazette reported a once-secret admissions process in which the children of politically connected parents and donors gained entry into the UI over better-qualified applicants. The controversy led to the resignations of President B. Joseph White and Chancellor Richard Herman.

# EPIC - Electronic Privacy Information Center

## Chicago Tribune v. **University of Illinois**

Concerning the Privacy of Education Records Under FERPA

### Top News

### Background

The central issue in *Chicago Tribune* is whether the Family Educational Rights and Privacy Act (FERPA) barred the release of university admission records under Illinois' Freedom of Information Act (FOIA).

The FOIA provides that "each public body shall make available to any person for inspection or copying all public records, except as otherwise stated in Section 7 of this Act" 5 *Ill. Comp Stat.* 140/3 (a). Section 7 provides a list of exemptions from the general open access policy, the first of which prevents the release of "information 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).

FERPA provides that "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).

In *South Dakota v Dole* it was held that 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. 483 *U.S.* 203, 206-07, 107 *S Ct.* 2793, 97 *L. Ed.2d* 171 (1987).

In *Bowie v Evanston Community School*, the Supreme Court recognized that Illinois public policy encourages the free flow of information and open access to official records. 128 Ill. 2d 373, 131 Ill. Dec. 182, 538 N.E.2d 557, 559 (1989).

In *Gonzaga University v Doe*, the Supreme Court construed FERPA as not forbidding Illinois officials from taking any action, but rather setting conditions pursuant to the receipt of federal funds, and imposing requirements on the Secretary of Education to enforce the spending conditions by withholding funds in certain situations. 536 U.S. 273, 278-79, 122 S.Ct. 2268, 153 L. Ed. 2d 309 (2002).

In *United States v Miami University*, the Sixth Circuit granted the federal government an injunction preventing Miami University from releasing certain education records following a request under Ohio's FOIA, which contained a similar exemption to that of Illinois, for information "the release of which is prohibited by state or federal law." The Sixth Circuit viewed Spending Clause conditions as similar to those of contracts between state and federal government, allowing the federal government the right to enforce the state's promise to abide by FERPA conditions once it has accepted federal education funds. 294 F.3d 797 (6th Cir. 2002).

In *Southern Illinoisan v Illinois Dept. of Public Health*, the Supreme Court acknowledged that although FOIA aims to protect personal privacy, there are exceptions to the general rule of disclosure that must be construed narrowly. 300 Ill. Dec. 329, 844 N.E.2d at 15 (2006).

In May 2009, the Chicago Tribune published a series of articles entitled "Clout Goes to College" regarding University of Illinois admission practices, which involved an investigation into a list of applicants, which it labeled "Category I", many of whom included the relatives of influential individuals who were alleged to have received preferential treatment throughout the admissions process. As a result, the Governor of Illinois convened a commission to study the admissions process.

The Chicago Tribune submitted a FOIA request, 5 Ill. Comp. Stat 140/1, seeking to inspect: the public records of each attending Category I applicant admitted, the names and addresses of said applicants' parents, the identities of individuals who had made the request and become involved in the application process, and records concerning the identity of the University officials to whom the request was made, forwarded, and any documents reflecting changes in the application status as a result.

The University of Illinois denied the request, relying on the section 7(1)(a) exemption and taking the position that federal law, specifically FERPA, prohibited the release of the requested information. The Tribune responded with a letter appealing the denial to the University's President, who responded by contending that FERPA prevented release of the records.

On January 27, 2010 the Tribune filed an action for declaratory relief seeking a declaration from the court that FERPA does not bar the release of the records in question. The parties filed cross-motions for summary judgment. The Tribune made four arguments, the third of which the court favored: that FERPA does not "prohibit" the release of education records, so the FOIA exemption relied upon by the University is inapplicable.

The opinion of the United States District Court, N.D. Illinois Eastern Division, was delivered on March 7, 2011. It granted the Tribune's motion for summary judgment and denied that of the University, holding that FERPA does not prohibit the release of education records, and thus did not provide authority for the University to withhold its admission records requested under the FOIA.

The court held that section 7(1)(a) of FOIA applies only when a federal or state law "specifically prohibits" a certain disclosure, interpreting "prohibit" as "to forbid by authority" or "prevent from

doing something". It relied on *Gonzaga* as authority that FERPA does not forbid Illinois officials from taking action, but rather sets conditions on the receipt of federal funds. *Miami University* was cited, but distinguished, because that opinion included an important caveat limiting the obligation imposed by FERPA on schools accepting federal funds to federal government action to enforce FERPA.

Notice of appeal to the United States Court of Appeals (Seventh Circuit) was filed by the Board of Trustees of the University of Illinois on May 10, 2011.

### **EPIC's Interest in *Chicago Tribune v. University of Illinois***

EPIC supports the rights of students to keep their educational records confidential. EPIC recently submitted comments in opposition to the Department of Education's proposed amendments to expand the exemptions available under the Family Educational Rights and Privacy Act of 1974 (FERPA). While EPIC also supports public disclosure of government records through the Freedom of Information Act (FOIA) in order to improve government accountability, EPIC has filed amicus briefs in numerous cases that balance protecting individual privacy with compelled government disclosure.

In FCC v. AT&T, 131 S.Ct. 1177 (2011), EPIC submitted an amicus brief urging the Court to reject AT&T's personal privacy claim under FOIA exemption 7(C). The Supreme Court was considering whether AT&T could invoke personal privacy rights under FOIA to prevent disclosure of documents that the company had submitted to a federal agency. EPIC argued that while individuals have personal privacy interests in records held by federal agencies, the interpretation that corporations have personal privacy interests is inconsistent with the purpose of FOIA and common understandings of privacy. The Court found that FOIA exemption 7(C) did not protect the personal privacy of corporations.

In Doe v. Reed, 130 S.Ct. 2811 (2010), EPIC filed an amicus brief supporting the right to anonymous political speech and arguing that open government statutes should not compel disclosure of political referendum petition signatures. In making this argument, EPIC balanced the privacy interests of signatories with government disclosure requirements. The Supreme Court considered whether disclosure of these signatures was constitutional under a state Public Records Act. The Court held that, generally, the disclosure of signatures under the state open records law would not violate the First Amendment interests of the signatories because the disclosure requirements were sufficiently related to the state's interest in ensuring the integrity of elections.

In Ostergren v. Cuccinelli, 615 F.3d 263 (4th Cir. 2010), EPIC filed an amicus brief in support of Ostergren's non-commercial, re-publishing of state officials' social security numbers that she obtained from publicly available documents on her website. EPIC argued that this was protected speech, as it was a means of advocating against the state's improper dissemination of social security numbers. In deciding whether a Virginia informational privacy statute was unconstitutional as applied to Ostergren's website, the 4th Circuit Court of Appeals found that the statute was not narrowly tailored to the state's interest in protecting privacy since the state failed to redact the documents before making them publicly available online and that Ostergren's re-publishing of the records was protected by the First Amendment.

In BATF v. City of Chicago, 537 U.S. 1229 (2003), EPIC's amicus brief suggested that the government use technology to encode personal information before releasing it, thus reconciling public oversight of government activity with protection of individuals' privacy rights. In that case, the Supreme Court was scheduled to consider whether the Bureau of Alcohol, Tobacco, and Firearms (BATF) could withhold records of individuals' firearm purchases requested by the City of Chicago as part of another case challenging the marketing and distribution of firearms to city residents. EPIC

argued that it was the intent of Congress to maximize both the public's access to government information and to safeguard personal privacy to the greatest extent feasible. The Supreme Court decided not to consider the case, and remanded it to the 7th Circuit, after Congress passed legislation that prohibits the BATF from spending agency funds on disclosure of records regarding firearm ownership.



## Official: State funds an issue in university aspirations

Board of Higher Education chief says state's woes could complicate prospect of Peoria getting a four-year state university

By **John Sharp (jsharp@pjstar.com)**  
of the Journal Star

Posted Jul 13, 2011 @ 09:41 PM

PEORIA — A state university in Peoria involves "many questions that need to be answered" but should be explored, said the director of the state agency in charge of reviewing and determining the fate of new university program requests.

George Reid, executive director of the Illinois Board of Higher Education, said Wednesday he had been unaware of Peoria's interest in making a four-year state university a "high priority" for the city, adding that now is "not the best financial time to establish a new institution" with the state struggling to pay its bills.

He said he was caught by surprise by the attention last week surrounding the City Council's wishes to have the exploration of a setting up a public university placed as a city priority.

"We know many of the existing colleges and universities already have a debt owed to them (from) the state in the hundreds of millions of dollars," Reid said. "If there is a way to (establish a new university) that wouldn't add to that burden, we'd certainly want to investigate that and give it a fair reading."

If Peoria pursues a new four-year public university, it will need to win approval from the board and the Illinois General Assembly. There have been no new public universities established in Illinois since the late 1960s when Governors State University in University Park and Sangamon State University (now the University of Illinois at Springfield) opened.

Adding branches for existing universities also faces state scrutiny.

"All public universities are heavily burdened right now with the financial situations," said Bob Blankenberger, deputy director for academic affairs at the Illinois Board of Higher Education. "For them to add full branch campuses would be something difficult to achieve."

One possible avenue, Blankenberger said, is for a university to expand its off-campus programming into a city like Peoria.

John Erwin, president of Illinois Central College and one of the strongest proponents for exploring a Peoria university concept, said critics of the plan - which include a host of university and college officials who are citing financial obstacles as being a definite roadblock - should wait before passing judgment until city officials and local state lawmakers explore it more.

He said two ICC-owned buildings, the Thomas and Perley buildings in Downtown Peoria, could offer an opportunity for a new institution or the University of Illinois to establish a program that could benefit the region.

"As far as location, it's a prime place," Erwin said, noting proximity to the museum block, riverfront and the CityLink bus transportation terminal.

Thomas Hardy, executive director for university relations at the **University of Illinois**, said he wasn't aware of any consideration about the university extending its presence in Peoria. The university already has a city presence with the University of Illinois at Springfield hosting classes Downtown as well as the University of Illinois' College of Medicine's facility.

"I see that a number of people point out that it's a good aspiration for the city to have, but obviously a lot needs to be done in terms of fleshing that out and developing it," Hardy said.

Erwin said the need is there, with Illinois State University - the closest four-year state institution - "36 miles away, one way."

ICC, a community college, enrolls about 13,000 students each year.

"With the price of gasoline, driving five days a week, you're putting 400 miles on your car just for a class," Erwin added.

He also said the rise of online classes doesn't resolve a persistent demand for classroom instruction, especially for teachers seeking advanced degrees who need a face-to-face learning atmosphere.

"Geography still matters," he said.

### Establishing a new university

- State law requires public universities get the approval of the Illinois Board of Higher Education to add any "new unit of instruction, research or public service" including "the establishment of a college, school, division, institute, department or other unit in any field of instruction, research or public service not included in the program of the institution." The law also requires this approval for the establishment of any new branch or campus.

- The board evaluates new units of instruction, research or public service by applying the following six criteria:

- 1) Mission and objectives, such as making sure they are consistent with the mission of the college or university.
- 2) Academic control providing that design, conduct and evaluation of the unit of instruction, research or public service are under the direct and continuous control of the sponsoring institution's established processes for academic planning and quality maintenance.
- 3) Adequately prepared and responsible faculty and staff.
- 4) Quality support services such as clinical laboratories and libraries.
- 5) A financial commitment to support the unit of instruction, research or public service and projections of revenues necessary to support the institution.
- 6) Meeting a statewide educational need and priority that is not currently met by existing institutions and units of instruction, research or public service.

Source: Illinois State Board of Higher Education

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**THE WALL STREET JOURNAL.**

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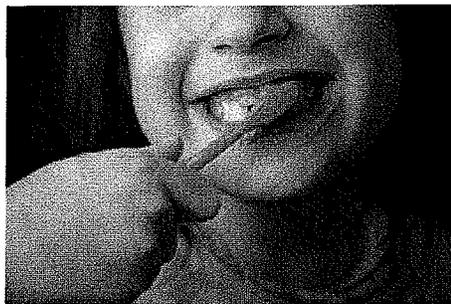
JULY 13, 2011, 3:41 PM ET

## Not Enough Americans Have Access to Dental Care: Report

We don't typically consider oral health as part of overall health, and that's a mistake, according to a [new report from the Institute of Medicine](#).

Because the diseases of the mouth are inextricably linked to overall health, "the unmet oral health needs of millions of Americans cannot be neglected," the report says.

"Almost one third of the population reports some difficulty in accessing dental care," Caswell Evans, Jr., an author of the report and associate dean of prevention and public health sciences at the [University of Illinois at Chicago College of Dentistry](#), tells the Health Blog.



Some people lack dental insurance even though they have private health insurance. (The [CDC reported](#) last year that of the 172 million Americans under age 65 with private health insurance, about 27% don't have dental coverage.)

Others who lack coverage are retired — [Medicare doesn't cover dental care](#), with some exceptions when it's in connection with covered procedures, like a jaw reconstruction. Some are poor; states aren't required to provide dental coverage to adults under Medicaid. And while kids are covered by Medicaid and the Children's Health Insurance Program, payment rates are so low many have trouble finding a dentist who will treat them.

The report calls for a host of systemic changes intended to improve access to care, including training non-dental health pros such as pediatricians and nurses to play a bigger role in oral care, a reassessment of state practice laws to be sure they promote access to care, establishing CMS-funded state demonstration projects to include essential health benefits in adult Medicaid coverage and increasing Medicaid and CHIP reimbursement rates. (A [study](#) appearing in this week's edition of the Journal of the American Medical Association found that higher Medicaid reimbursement rates were associated with more kids and teens getting dental care.)

In a statement, the American Dental Association praises the focus on oral health access but reaffirms its opposition to allowing non-dentists to perform functions like extractions. "Everyone deserves a dentist," the ADA says. State laws vary greatly in what they permit non-dentists to do without supervision — seven states require a dentist to be present when a hygienist applies sealants, the report says. Specially-trained dental therapists in Alaska, meantime, can [drill and fill cavities](#) — but only in Alaska Natives.

The authors said they were cognizant of the financial pressures facing the federal and state governments. Evans says marginal increases in Medicaid reimbursement rates wouldn't be terribly burdensome, though. And the authors said they hope that providing access to basic care might save money in the long run by preventing patients from [showing up in the ER](#) with more advanced complaints.

More than a decade ago, a [U.S. Surgeon General's report](#) also called for a "national effort to improve oral health among all Americans."

**VOICE OF THE PEOPLE**

**Pension priorities**

The Tribune's July 5 editorial "Rescuing public pensions" is centered on the false premise that Illinois' current pension plans for public employees are "doomed" and unsustainable.

The truth is that the state's pension plans are sustainable.

When public pensions are not properly funded on a timely basis — as we have seen for decades in Illinois — state costs increase as the government plays catch-up.

Two-thirds of the state's \$6.4 billion pension contribution for fiscal year 2012 is the cost of "kicking the can down the road."

While it is true that taxpayers — including teachers and public employees — foot the entire bill, in reality the amount of tax dollars needed to help fund the state's current pension obligation is \$1.6 billion.

The remainder is debt service and paying off an unfunded liability.

This is an important distinction.

It is often falsely claimed that public employees receive "lavish" pensions.

Adding the cost of paying down debt to the actual cost of benefits lends credence to this misconception.

In recent months, the central question raised by the Tribune in the court of public opinion is whether tax dollars should be spent on pensions or on other state programs, not whether the state has the money to pay its pension obligations.

This is, correctly, a conversation about spending priorities, not pension sustainability.

Teachers' Retirement System, the state's largest public pension plan with 372,000 members, is committed to being a trusted partner in the ongoing discussion over public pensions.

But as this conversation continues, it is vital to keep in mind that correct facts, the Illinois Constitution, state laws and prior judicial rulings do matter, however inconvenient they may seem in the court of public opinion.

— Dick Ingram, executive director, Teachers' Retirement System of the State of Illinois, Springfield

# THE CHRONICLE

of Higher Education

## Students

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July 14, 2011

### **Recession Reshaped College Enrollment Patterns, but the Sky Didn't Fall**

*By Eric Hoover*

As the recession's grip tightened during the summer of 2008, dire predictions swirled on campuses everywhere. Enrollment chiefs huddled with presidents and trustees, bracing for an era of heightened uncertainty. They worried that the number of applicants would dwindle and the number of dropouts would surge.

Three years later, many are still trying to understand how the economy has changed the enrollment landscape. A storm has hit, for sure. But what's the damage?

Not as severe as various forecasters had feared, according to a [report](#) released today by the National Student Clearinghouse Research Center.

The findings suggest that the recession's effect on college enrollment—among traditional-age, first-time students—was mild. Over all, enrollments of new students rose to 2.135 million in 2010, up from 1.997 million in 2006, an increase of 6.8 percent. The sharpest one-year jump, in 2009, followed the recession's onset by a couple of years; 2010 brought a slight decline, with two-year colleges accounting for most of the dip.

Enrollments of new students at four-year colleges remained relatively stable. Public institutions, many bursting at the seams and operating on slashed budgets, saw modest increases in all but one year. Private colleges appear to have maintained their "market share" despite the many grave predictions about their ability to keep up their enrollments.

"The news of our demise is greatly exaggerated," Don Hossler, the center's executive director and a professor of educational leadership and policy studies at Indiana University at Bloomington, says of four-year institutions in general. "I was expecting more dramatic data, and thus far, the changes are not that dramatic."

*Where Students Go, and How*

Nonetheless, the report illuminates emerging trends in the college-going patterns of recent high-school graduates. A major story line of

the past five years has been the increase in traditional-age students who enrolled in community colleges. In 2006, 41.7 percent of traditional-age students enrolled at two-year colleges; in 2009, 44.5 percent did so. Between 2008 and 2009, enrollments of traditional-age, first-time students at two-year colleges increased by 8.3 percent.

The report suggests that this trend was driven by two groups of students: those who, in a better economy, might have chosen to attend other (and costlier) types of institutions, and those who otherwise would have joined the work force after graduating from high school.

Mr. Hossler suspects that the recent surge also resulted from the strategies, such as highly focused marketing, that community colleges used to attract younger students. In turn, the 5.1-percent decline in the number of traditional-age students entering community colleges in 2010 may well reflect the capacity strains at those institutions, as well as signs of economic recovery.

The new report, "National Postsecondary Enrollment Trends: Before, During, and After the Great Recession," examines the cohorts of students who enrolled in colleges between the fall of 2006 and the fall of 2010, providing a unique and timely snapshot of where—and how—students are going to college. The report is the first in a series of analyses that the organization plans to release in the coming months.

The National Student Clearinghouse, a nonprofit group, collects data from colleges several times a year, on a voluntary basis. Its vast database comprises "student level" data, and provides an unduplicated headcount of students, both full time and part time, enrolled at participating colleges. (By contrast, the Integrated Postsecondary Education Data System, maintained by the National Center for Educational Statistics, contains institutional-level data that cannot distinguish if students are enrolled in multiple institutions in a year or, if they transfer permanently, where they go.) In other words, the National Student Clearinghouse—which tracks 93 percent of enrollments at all postsecondary institutions—is able to develop a clearer picture of the various paths individual students take through higher education.

This is especially important at a time when student "mobility" is becoming more and more common. Adult students aren't the only ones who may transfer to another college or study at multiple institutions to earn a degree; many recent high-school graduates are doing the same.

Given that fact, the authors of the report explored the distinction between retention (a student's continuing enrollment at the same college) and persistence (a student's continuing enrollment in *any* college). First- to second-year persistence rates, they found, were about 13 percentage points higher than retention rates across cohorts of students who enrolled between 2006 and 2009. This finding, the authors wrote, affirms that "much research based on retention measures ... underestimates the number of students who continue in higher education." Moreover, they found that community colleges had the greatest gaps between retention and persistence rates.

Despite the handwringing about retention in an era of financial crisis, the recession seems to have done little to prevent students from staying enrolled beyond their first year. The report did not reveal significant drops in retention rates over all, as one would have expected to see if large numbers of students had transferred to lower-cost institutions. Persistence rates, too, held steady.

#### Regional Enrollment Patterns

The report also examined enrollment patterns in different regions. Over all, colleges in the South enrolled the greatest number of first-time students, followed by the Midwest, the West, and the Northeast. From 2006 to 2009, most of the increase happened in the South and the West, and the two regions saw nearly all of the decline in 2010. The two regions enrolled larger proportions of part-time students. The report speculates that as California and other nearby states "experienced economic hardship before states in other regions, students in Western states may also have felt the impact earlier—and perhaps to a greater degree."

Mr. Hossler cautions that the report does not reveal the many winners and losers in the recession-era enrollment picture. After all, even the best data do not capture the why of enrollment outcomes. Some institutions have maintained their enrollments by raising their discount rates to unsustainable levels or by rushing to use more-sophisticated enrollment-management techniques, such as assessing applicants' likelihood of attending. Others, it seems, have coasted on their prestige.

Although Mr. Hossler describes many of the findings as encouraging, he suggests that the recession's effects on college choices and educational paths may yet take years to fully emerge. High-school sophomores in 2008, Mr. Hossler muses, may have already formed a "psychic connection" with a particular college, or a specific type of college, that cemented their enrollment decisions. But what about eighth graders, especially those whose parents did

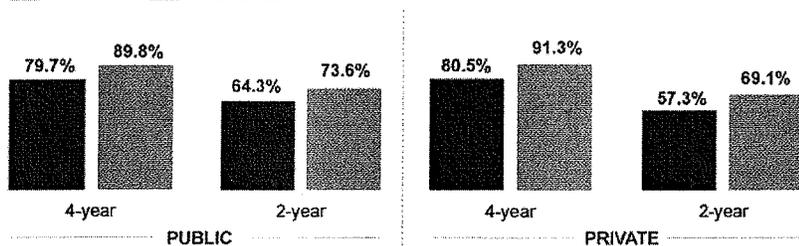
not attend college: How might the stagnant economy alter their thinking about college?

"It may be a little early to get complacent," he says.

### Retention and Persistence Rates Compared

Rates for beginning full-time students from the fall of 2008 to the fall of 2009

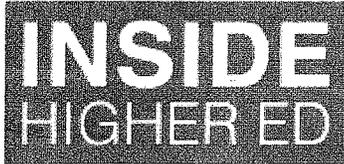
■ Retention ■ Persistence



National Student Clearinghouse Research Center

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## Quick Takes

July 14, 2011

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### House Panel's Bill Would Reallocate NSF Funds for 2012

WASHINGTON -- The House Appropriations Committee on Wednesday approved [a subcommittee's bill](#) that would increase spending on the National Science Foundation's research by \$43 million with funds reallocated from the agency's education and equipment budgets. [The legislation](#) backed by the committee -- which will now go to the full House -- would keep the NSF's overall budget at \$6.86 billion in 2012, flat from this year but \$900 million less than President Obama requested. But the additional funds for research would come at the expense of a \$26 million cut from the agency's education and human resources directorate and a \$17 million shave from its research equipment and facilities fund.