

November 27, 2006

Jeff Parrott
Reporter
South Bend Tribune
225 W. Colfax
South Bend, IN 46626

Re: Formal Complaint 06-FC-191; Alleged Violation of the Access to Public Records Act by the South Bend Community School Corporation

Dear Mr. Parrott:

This is in response to your formal complaint alleging that the South Bend Community School Corporation (“School”) violated the Access to Public Records Act (“APRA”) by refusing to disclose a copy of a surveillance videotape made by the School of a school bus incident and an incident inside the School gymnasium. I find that the surveillance videotapes are confidential under federal law, and the School was required to deny the records.

BACKGROUND

You describe in your formal complaint two surveillance videotapes that are maintained by the School. One involved a video taken in the Clay High School auxiliary gymnasium on February 14, 2006. Another involved what you described as a school bus video; as stated by the School, this video involved an incident that occurred on a school bus of the School corporation. You requested copies of both tapes on or about October 18, 2006. You state that you disagree with the School’s basis for the denial of the videotapes as educational records under the federal Family Education Rights Act.

I sent a copy of your complaint to the School. The School responded through its counsel, Randolph R. Rompola. Mr. Rompola’s letter is enclosed for your reference.

The School relied on the Family Education Rights and Privacy Act (commonly called “FERPA”) as well as the Indiana Access to Public Records Act to deny the videotapes. The facts

surrounding the two incidents are described in the School's complaint response. Following an altercation in the Clay High School gymnasium, officials investigating the attack reviewed the surveillance video and filed a report with the St. Joseph County Police Department, and disciplined the perpetrators. Typically, the videos are recycled every thirty days. In this case, because of the nature of the events depicted on the video, the video was included with the report of the incident. The parents of the victim filed a tort claim lawsuit against the School in St. Joseph County in connection with the incident.

On October 19, during the afternoon bus route, the bus pulled over to let a funeral procession pass when a student asked the driver to be allowed to exit the bus. When the driver denied the request, the student broke out a window. Following your October 20 request for the videotape of this incident, the School denied your request on the basis that the video constituted a student education record. In the course of investigating the bus incident, School officials learned that, in fact, no taping of the incident occurred. This was because the driver of the bus was driving a different bus than normally assigned, and this substitute bus, while equipped with a camera, did not have a videotape loaded in the camera. Therefore, although the School believed that it did have a videorecording of the incident on the bus, it did not. Therefore, it cannot provide a record that does not exist. The School has now informed you of this development.

In the remainder of the complaint response, the School sets forth various case authorities that the School says supports its contention that the videotapes are education records as defined in the FERPA, the tapes are not susceptible to redaction, and the tapes do not fall within the exclusion from FERPA for law enforcement unit records.

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the Access to Public Records Act ("APRA"). Ind. Code 5-14-3-3(a). The burden of proof is on the public agency denying the record to sustain its denial. IC 5-14-3-1.

One of the exceptions to the right to inspect and copy a public record is for a record that is required to be kept confidential under federal law. IC 5-14-3-4(a)(3). This was the exception utilized by the School with respect to the videotapes. The federal law cited by the School was the Family Education Rights and Privacy Act (FERPA), as set out in 20 U.S.C. §1232g.

You state only that you disagree with the School that the videotapes are excepted from disclosure as education records, without stating the specific basis for your disagreement. The School has presented a comprehensive analysis of the federal law, attempting to anticipate your objections to the exemption's application.

It is my opinion that the School has discharged its burden of showing that the videotape falls within the exemption to disclosure. First, the School has shown that the videotape (in the singular, since the videotape from the bus does not exist) depicts students, and is therefore an education record in the broad sense in which most authorities believe Congress intended. Second, the School has argued that the School maintains the record; accordingly, the record is

not that of a law enforcement unit of the School. Third, the School cannot redact the record as would normally be required under the APRA.

Education Record is Broadly Defined

An “education record” is the information that is protected as confidential under the FERPA (“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...”). 20 U.S.C. §1232g(b)(1). “Education record” is defined as those records that are directly related to a student; and maintained by an educational agency or institution or by a person acting for such agency or institution. 34 C.F.R. 99.3. “Record” means any information recorded in any way, including but not limited to video tape. 34 C.F.R. 99.3 (defining “record.”) “Personally identifiable information” includes, but is not limited to, a list of personal characteristics that would make the student’s identity easily traceable, or other information that would make the student’s identity easily traceable. 34 C.F.R. 99.3 (defining “personally identifiable information.”) Hence, if you intend to argue that a videotape depicting students could not be an “education record” protected by FERPA, the above definitions and the case authority cited by the School in its response should put that contention to rest. The videotape, to the extent that it contains depictions showing students, is an “education record.”

I assume that the *Tribune* disagrees that the FERPA requires an education record to be kept confidential under federal law. You have put forth a case from Louisiana, *Louisiana v. Mart*, 697 So.2d 1055 (La. Ct. App. 1997) in which the appellate court held that the FERPA is not a law that “specifically and unequivocally” precludes public access under Louisiana’s public access statute and constitution to a videotape of a beating on a school bus. In its holding, the court opined that the FERPA merely acts to control the careless release of education information by an educational institution by threatening to withhold federal funds for doing so.

As recently as 2003, an Indiana appellate court considered other case authority utilizing the same line of reasoning but rejected it, holding that for purposes of Indiana Code 5-14-3-4(a)(3), the FERPA is a federal law that requires education records to be kept confidential. *Indianapolis Star v. The Trustees of Indiana University*, 787 N.E.2d 893, 904. Accordingly, in Indiana, education records are protected under FERPA and the APRA.¹

The Record Is Not A “Law Enforcement Unit Record”

According to the School, counsel to the *Tribune* has written the School to suggest that the videotape is a “law enforcement unit record” and is therefore exempt from the definition of “education records” under the FERPA. See 34 CFR 99.3.² Under 34 CFR 99.8, records of a law

¹ Authority in another jurisdiction has held that a disciplinary record maintained by a university was an education record that was exempt under the “federal law” exemption of Ohio’s public records law, in *United States v. Miami University*, 294 F.3d. 797 (6th Cir. 2002). The School has stated that the videotape has been maintained by the School as a disciplinary record

² The term “education records” does not include records of the law enforcement unit of an educational agency or institution, subject to the provisions of 34 CFR §99.8.

enforcement unit means records, files, documents, or other materials that are created by a law enforcement unit; created for a law enforcement purpose; and maintained by the law enforcement unit. 34 CFR 99.8(b)(1). A law enforcement unit means any "...component of an educational agency or institution...that is officially authorized or designated by that agency or institution to enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State or Federal law against any individual or organization other than the agency or institution itself, or maintain the physical security and safety of the agency or institution." 34 CFR 99.8(a)(1).

Hence, in order for the videotape to be a law enforcement unit record, it must have three characteristics: 1) be created by the law enforcement unit; 2) be created for a law enforcement purpose, and 3) be maintained by the law enforcement unit. Specifically excluded from the ambit of "law enforcement unit record" are those records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of the educational agency or institution *other than* the law enforcement unit. 34 CFR 99.8(b)(2).

I am not privy to the *Tribune's* argument or to any facts regarding the School's law enforcement unit. But the School has argued that the School's law enforcement unit neither created the video surveillance recordings nor maintains them. Rather, the videotape has been maintained by the School within its disciplinary records. Also, the surveillance activity is not for a law enforcement purpose, but rather the surveillance cameras are installed to protect the safety of students and employees and to deter violations of school policies.

On the evidence before me, I find that the videotape is not a "law enforcement unit record." Hence, it is an education record subject to the confidentiality provisions of the FERPA and IC 5-14-3-4(a)(3).

Redaction of the Videotape

Under the APRA, if a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under the APRA, separate the material that may be disclosed and make it available for inspection and copying. IC 5-14-3-6(a). The videotape contains the images of several students. If the School had the consent of the parents of each student depicted in the videotape, the School would no longer have a basis in the FERPA to not disclose the record. In the alternative, if the School had no consents or the consent of only some of the parents of the students, the School would have to remove the images of the non-consenting students. The School has said that it does not have the technological means to remove the images from the videotape, including not just faces but voices, clothing, and other identifiable information.

Again, *Indianapolis Star v. The Trustees of Indiana University, supra*, is instructive. The Court of Appeals observed that IC 5-14-3-6(a) would apply to require that the University separate purely factual material from the material that may be withheld because it was deliberative, where the factual material is not "inextricably linked" with the non-disclosable material. *Id. at 914*. Although the *Indianapolis Star* case holding was in the context of the deliberative materials exception, I see no rationale for distinguishing the holding concerning

redaction from this situation, where the non-disclosable material is confidential under federal law. Since under the APRA, the School may not disclose the education record because it is confidential, if the School cannot separate disclosable information on the videotape from the nondisclosable information because it is “inextricably linked” then the School may not disclose the videotape in its entirety.

CONCLUSION

For the foregoing reasons, I find that the South Bend Community School Corporation did not violate the Access to Public Records Act.

Sincerely,

Karen Davis
Public Access Counselor

cc: Randolph R. Rompola