

July 8, 2005 Confidentiality of Educational Records of the Charles A. Beard Memorial School Corporation under the Federal Educational Records Privacy Act and the Access to Public Records Act

July 8, 2005

Jeff Eakins
Editor
The Banner
24 N. Washington St.
P.O. Box 116
Knightstown, IN 46148

Re: Informal Inquiry Response; Confidentiality of Educational Records of the Charles A. Beard Memorial School Corporation under the Federal Educational Records Privacy Act and the Access to Public Records Act.

Dear Mr. Eakins:

You have requested an informal opinion from the Office of the Public Access Counselor. Pursuant to IC 5-14-4-10(5), I am issuing this letter in response to your request.

BACKGROUND

On May 27, 2005 you wrote to the Office of the Public Access Counselor to request an informal opinion on whether the Charles A. Beard Memorial School Corporation ("CAB") is improperly applying the Federal Educational Records Privacy Act ("FERPA") and the Access to Public Records Act ("APRA") to deny you access to public records. Your letter of informal inquiry was received on May 31, 2005.

Your letter stated that you submitted a request for records to the CAB on April 27, 2005. You requested "copies of all reports filed with the superintendent's office since January 1, 1996, involving suspected violations by students of CAB policies regarding alcohol or other intoxicants." You also state that you specifically asked that nondisclosable information be redacted or otherwise removed as required by IC 5-14-3-6(a).

You received a response dated May 2, 2005 from CAB superintendent Dr. Hal Jester. He stated, "There are no reports of 'suspected' violations regarding alcohol or intoxicants filed with this office." He did provide you with some of the information that you requested.

You have pointed out two statutes that you believe require the superintendent to maintain the records you seek. First, IC 20-8.1-12-2 provides:

"If a person other than a member of the administrative staff who is an employee of a school corporation has personally observed:

- (1) a violation described in section 1 of this chapter; or
- (2) a delinquent act that would be a violation under section 1 of this chapter if the violator was an adult/ in, on, or within one thousand (1,000) feet of the school property of the school corporation employing the person, the person shall immediately report the violation in writing to a member of the administrative staff for the school corporation employing the person."

IC 20-8.1-12-2. A violation under section 1 of that chapter would include offenses involving minors and alcohol and offenses related to controlled substances. IC 20-8.1-12-3 provides:

"A member of the administrative staff who, based on personal knowledge or on the report of another employee of the school corporation, believes that a person has committed a violation described in section 1 of this chapter or a delinquent act that would be a violation described in section 1 of this chapter if the violator was an adult in, on, or within one thousand (1,000) feet of the school property of the school corporation employing the member, shall immediately report:

- (1) a general description of the violation;
 - (2) the name or a general description of each violator known to the member;
 - (3) the date and place of the violation;
 - (4) the name or a general description of each person who the member knows witnessed any part of the violation; and
 - (5) a general description and the location of any property that the member knows was involved in the violation;
- in writing to a law enforcement officer."

IC 20-8.1-12-3. Based on these two statutes you made a second request for records to the CAB on May 19 and requested copies of any and all written reports prepared by the CAB pursuant to these two statutes. Your letter indicates that you requested that any non-disclosable information be redacted.

Dr. Jester replied by letter dated May 23, 2005. According to your complaint, he stated, "The information requested in these items does not exist in report form, but in individual student records. After consultation with the legal staff of the Indiana School Board Association it is our

belief that the release of information requested in Items No. 1 and No. 2 would constitute a violation of the Federal Educational Records Privacy Act.”

ANALYSIS

Any person may inspect and copy the public records of any public agency, except as provided in section 4 of the APRA. IC 5-14-3-3(a). Section 4 of the APRA states,

“The following public records are excepted from section 3 of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:

...

(3) Those required to be kept confidential by federal law.”

IC 5-14-3-3(a)(3). Under this section of APRA, if the Federal Educational Records Privacy Act (“FERPA”) applies to the CAB’s records, then the CAB may not disclose the records.

Educational Records are Confidential for purposes of the APRA.

The Federal Educational Records Privacy Act 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 educational records, or personally identifiable information contained therein, of students without the written consent of their parents. 20 USCS §1232g(b)(1) and (b)(2). The Indiana Court of Appeals has said, “[i]n the strictest sense, FERPA does not ‘require’ educational institutions to do or not do anything, but instead operates to withhold federal funding to those institutions which have a policy or practice of permitting the release of education records without parental or student consent.” *Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustee. of Ind. Univ.*, 787 N.E.2d 893, 903-904 (Ind. Ct. App., 2003). The Court held that, “for purposes of I.C. § 5-14-3-4(a)(3), FERPA is a federal law which requires education records to be kept confidential.” *Id.*

The Court of Appeals noted the decisions of the Sixth Circuit Court of Appeals and the Department of Education (“DOE”), that disciplinary records are education records that must be kept confidential. *Id. at 907*. The Sixth Circuit stated, “we must conclude that student disciplinary records remain protected under the term “education records.” *United States v. Miami Univ.*, 294 F.3d 797, 813 (6th Cir., 2002). The Sixth Circuit cited a 1995 decision of the DOE,

“Based on the broad definition of ‘education records,’ which includes those records, files, documents, and other materials that contain information directly related to a student, except those that are specifically excluded by statute, all disciplinary records, including those related to non-academic or criminal misconduct by students, are ‘education records’ subject to FERPA.”

60 Fed. Reg. 3464, 3465 (1995). It is clear that the CAB's records related to reports of student violations under IC 20-8.1-12-2 and -3 are disciplinary records, and are confidential records under the FERPA and IC 5-14-3-4(a)(3).

Redaction of Confidential Educational Records

The Court of Appeals also held, however, that educational records may be redacted.

“Although FERPA contains no redaction provision, neither does it prohibit such. Moreover, the Sixth Circuit gave tacit approval to the redaction of student records in the *Miami University* case. 294 F.3d at 811. APRA permits redaction in that it specifically mandates separation of discloseable from non-discloseable information contained in public records containing both. I.C. § 5-14-3-6(a). Therefore, if a public record contains some information which qualifies under an exception to public disclosure, instead of denying access to the record as a whole, public agencies must redact or otherwise separate those portions of the record which would otherwise render it non-disclosable.”

Indiana Newspapers at 908.

The Court of Appeals was careful to emphasize that public agencies must redact *any* information which could lead to the identity of any present or former students. *Id.* at 909. The court does not limit the redaction only to “personally identifiable information” as defined at 34 C.F.R. §99.3. In fact, in reaching its decision the court relied on a decision of the Sixth Circuit Court of Appeals that allowed for the redaction of the exact date and time of the alleged incident.

The APRA provides that,

“If a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of a request under this chapter, separate the material that may be disclosed and make it available for inspection and copying.”

IC 5-14-3-6(a). Therefore, if the CAB can separate the nondisclosable information in such a way that no present or former students could be identified, then it must provide the disclosable portion of the information.

Reports Made Pursuant to IC 20-8.1-12 Regarding Persons Who Are Not Students or Former Students of the CAB.

FERPA covers only the educational records of students and former students of the school. Therefore, reports made pursuant to IC 20-8.1-12 that concern persons who are not students or former students would not be confidential under FERPA and IC 5-14-3-4(a)(3). If the school has such reports (and if you intended to request “any and all” such reports) the CAB may not withhold them from disclosure based on this exemption.

The School Board is not Required to Research

Under the APRA, a public agency is required to respond to requests for public records that are maintained or filed by or with those agencies. Public records requests are also supposed to be stated with "reasonable particularity" so that the public agency can locate the public records in question. IC §5-14-3-3(a)(1). If a request is not reasonably particular, the public agency may ask for clarification. If a request is particular, but the records are not kept in one central location, the public agency may provide the requestor an opportunity to perform his or her own research. Nothing in the APRA requires a public agency to perform this research for a requestor, but the agency may do so. *See Opinion of the Public Access Counselor, 02-FC-29.*

You did not provide a copy of your request so it is difficult to determine whether your request was reasonably particular. I will note that if you did not provide a timeframe for the records requested in your May 19th letter, which requested "copies of any and all written reports prepared by any CAB employee or administrator pursuant to [IC 20-8.1-12-2 and -3]," then your request most likely was not reasonably particular.

According to your letter, Dr. Jester stated that the information you seek is contained within individual student files. If the CAB is able to identify the individual files within which the information is located, it must provide the redacted information from those files. The CAB can identify individual files if it maintains separate records that would allow the CAB to go to a particular student's file, or if staff at CAB are able to recall what students have had reports filed. This latter instance would likely lead to more recent reports but not reports made from as early as 1996. However, CAB is not required to individually search through all of the student files to identify which student records hold reports made about the student under IC 20-8.1-12-2 and -3.

Please feel free to contact me if you have any questions.

Sincerely,

April Schultheis
Staff Attorney

cc: Dr. Hal Jester