



STATE OF INDIANA

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Via email transmission

July 18, 2016

Ms. Leann Burke
Dubois County Herald

Re: Informal Inquiry 16-INF-21; Complaint against the Northeast Dubois School Corporation

Dear Ms. Burke:

This is in response to your informal inquiry regarding whether the Northeast Dubois School Corporation ("Corporation") violated the Access to Public Records Act. As of the writing of this opinion, the Corporation has not responded to your inquiry, despite an invitation by this office to do so.

BACKGROUND

You seek a determination as to whether the Corporation violated the APRA. On April 19, 2016 a complaint was made to the Corporation regarding a coach at Dubois Middle School. The Coach allegedly threw volleyballs at a student during practice. You sought a copy of the surveillance video from gym cameras (as did the mother of the student) and were told by the school corporation attorney the records were considered educational records deemed confidential under FERPA (Family Educational Rights and Privacy Act).

ANALYSIS

I noted in *Informal Inquiry 16-INF-07* that athletics has traditionally been held to be a state function by Indiana Courts. Further, the practice took place on school grounds and was supervised by a school employee.

Under Indiana Code § 20-33-7-1

"Education records" means information that:

- (1) is recorded by a nonpublic or public school; and
- (2) concerns a student who is or was enrolled in the school.

Under Indiana Code § 20-33-7-3, a school corporation . . . may not disclose or report on the education records of a child, including personally identifiable information contained in the education records, without the consent of the child's parent, except under certain circumstances.

There is no dispute the record you have requested depicts students, is directly related to the school's duty to provide education, and is maintained by the school. Previous counselors have opined FERPA should be read broadly. In *Opinion of the Public Access Counselor 06-FC-191*, Counselor Davis noted the following:

First, the School has shown 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.

Counselor Davis and other counselors before me have maintained a broad interpretation of the term educational record. I generally disfavor such broad interpretation of statute, and note the purpose of the APRA is to inform the public. However, while I have held the APRA's exemptions should be applied judiciously, FERPA is a different statute. The purpose of FERPA is to protect students and their privacy. That being said, the U.S. Department of Education has some limited issued guidance regarding surveillance videos – updated as recently as October 2007. The guidance from the DOE's Family Policy Compliance Office states at <http://www2.ed.gov/policy/gen/guid/fpc/brochures/elsec.html>:

Images of students captured on security videotapes that are maintained by the school's law enforcement unit are not considered education records under *FERPA*. Accordingly, these videotapes may be shared with parents of students whose images are on the video and with outside law enforcement authorities, as appropriate. Schools that do not have a designated law enforcement unit might consider designating an employee to serve as the "law enforcement unit" in order to maintain the security camera and determine the appropriate circumstances in which the school would disclose recorded images.

According to this unofficial guidance, the mother of the students would have standing to request the video and share with the Herald at her discretion. It does not appear as if the DOE would consider the Herald have the same standing. If they are not educational records, however, neither FERPA nor Indiana Code § 20-33-7-1 would apply. Given this unofficial guidance was subsequent to the PAC opinion in 2006, this Office's position is general surveillance videos are not germane to a student's performance and are not intended to be considered educational videos. (*See also Formal Opinion of the Public Access Counselor 14-FC-272*).

While Indiana Courts have not ruled on the matter, other states have found that surveillance videos are not educational in nature and are public record (*Rome City School Dist. v. Grifasi*, 806 N.Y.S.2d 381 (N.Y. Sup. Ct. 2005) (Video surveillance tape not an education record under FERPA, and therefore subject to disclosure); *Lindeyan v. Kelso School Dist.*, 172 P.3d 329 (Wash. 2007) (Video subject to disclosure under state law).

Please do not hesitate to contact me with any questions.

Best regards,

A handwritten signature in black ink, appearing to read 'LH Britt', with a long, sweeping underline that extends to the left and then curves back under the signature.

Luke H. Britt
Public Access Counselor