



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free: 1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

responded to the Complainant's original request, HSE first stated that the teacher had been suspended "due to not implementing instructions for classroom management strategies" and in a later statement said that the teacher was suspended "due to not following Board of School Trustees Policy G02.06" and would not provide further detail. The Complainant filed his complaint (17-FC-09) alleging that HSE had not fulfilled its statutory obligations to provide the factual basis for the teacher's suspension. In my advisory opinion, I said that I did not fault HSE for being careful in issuing a vague statement, but I also said that I thought their response leaned towards lacking sufficient detail. *See 17-FC-09*. While I did not find HSE to be in violation of the APRA, I concluded by stating that I trusted HSE to "take these considerations under advisement and craft a factual basis which strikes a balance between employee-student privacy expectations and a reasonably transparent description of what actually took place." *See 17-FC-09*.

Upon receiving the Complainant's new request, HSE responded through its attorney that because I had not found HSE in violation of the APRA in 17-FC-09, HSE was not statutorily obligated to provide further detail and that doing so would compromise records protected by the Family Educational Rights & Privacy Act ("FERPA").

ANALYSIS

The public policy of the APRA states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." *See Indiana Code § 5-14-3-1*. The Hamilton Southeastern School District is a public agency for the purposes of the APRA. *See Indiana Code § 5-14-3-2(n)*. Accordingly, any person has the right to inspect and copy HSE's disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. *See Indiana Code § 5-14-3-3(a)*.

Pursuant to Indiana Code § 5-14-3-4(b)(8) personnel files are not disclosable except for:

- (A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency
- (B) information relating to the status of any formal charges against the employee; and
- (C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free: 1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

The name of the suspended teacher was subsequently released to the Complainant. But as HSE correctly states, factual basis is not defined in the APRA and accordingly, HSE has refused to provide any additional detail regarding the factual basis that led to the suspension beyond its first vague response.

Factual Basis

The Complainant suggested that the appropriate measure for a factual basis is the journalistic standard: who, what, when, where, why, and how. HSE responds that a "short, cursory statement" has been the minimum requirement for a factual basis under the APRA since at least 2011, as discussed in 11-FC-149. However, in 16-FC-164, I rejected this standard, stating:

"Factual basis" is not a term of art. It should include actual facts of the misdeeds supporting a policy violation. It does not have to be a detailed narrative or include names of victims or specific summaries, but it should give the reader a reasonable idea of why someone was fired, suspended or demoted.

The only definition of "factual basis" appears in Ind. Code § 35-35-1-3, the statute governing voluntary plea agreements for criminal convictions. While not controlling upon APRA, it is at least instructive to an extent. Courts are not to "enter judgment upon a plea of guilty or guilty but mentally ill at the time of the crime unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea." Ind. Code § 35-35-1-3(c). Like the APRA, factual basis is not defined in this statute, but case law has provided that "[f]actual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty." *Butler v. State*, 658 N.E.2d 72, 1995. In other words, the "[f]actual basis requirement primarily ensures that when a plea is accepted there is sufficient evidence that a court can conclude that the defendant could have been convicted had he stood trial." *Id.*

I do not consider "factual basis" in a criminal setting to be completely analogous to public employee discipline, but it is not wholly distinguished either. To say that a short, cursory statement which only makes a vague reference to a policy violation is a sufficient factual basis would be similar to saying that a prosecutor's statement that a defendant violated a section of the criminal code would be a sufficient factual basis for a voluntary plea agreement.

HSE appears to misinterpret the intent of the APRA in favor of "legitimate privacy interests of employees" of which they have cited no basis or authority. Public school employees, including teachers, coaches, administrators, superintendents and school board members work for and on behalf of the public at large. They are servants of the people. Therefore it stands to reason the taxpayers who pay their salaries have



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

PUBLIC ACCESS COUNSELOR
LUKE H. BRITT

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free: 1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

the right to know, to a certain extent, when a public employee has misbehaved and how. For that assignment, HSE has received a grade of 'incomplete.'

FERPA

Under FERPA, the U.S. Department of Education may withhold funding to public and private schools for the unauthorized release of education records. "Education records" are broadly defined as:

"those records, files, documents, and other materials, which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. §1232g(a)(4)(A).

The withdrawal of funding is the only recognized remedy available at law for failing to comply with FERPA. There is no private cause of action for the release of student records. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). I cannot foresee that releasing additional details regarding the factual basis for the teacher's suspension, with no mention of the student(s) involved, would result in HSE schools losing their funding from the Department of Education. Simply put, I cannot fathom a scenario where HSE would be at any reasonable risk of liability were a legitimate factual basis provided.

HSE argues that the Complainant's request is a "targeted request" under 34 C.F.R. § 99.3, which provides that "[i]nformation requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates" constitutes personally identifiable information of students, and that HSE reasonably believes the Complainant (and the HSE community) knows the identity of a student involved. However, I cannot agree that this is a targeted request by the Complainant. The Complainant has been clear that he has no interest in the identity of the student(s) who may be involved in this disciplinary action. Complainant has not requested any information directly related to a student.

Ind. Code § 5-14-3-6(a) provides that "[i]f a public record contains disclosable and nondisclosable information, the public agency shall, upon receipt of request under this chapter, separate the material that may be disclosed and make it available for inspection and copying." HSE has not provided sufficient information to give the Complainant a reasonable idea of why the teacher was suspended. The Complainant mentions that he has repeatedly asked for the date of the incident, a fact that does not implicate any student's identity, but HSE will not provide this date. I am inclined to agree with the Complainant that HSE is conveniently using FERPA to avoid releasing any facts at all surrounding the employee suspension to protect an unrecognized and overprotective notion of public employee privacy. I will also note that I have discussed this matter with the Indiana Department of Education. While it



STATE OF INDIANA

ERIC J. HOLCOMB, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)234-0906
Fax: (317)233-3091
Toll Free: 1-800-228-6013
Email: pac@in.gov/opac
Website: www.IN.gov/pac

recognizes the importance of student privacy (as does this Office), it does not consider the release of a factual basis for employee discipline to be a compromise of student privacy if the student is not identified.

To be clear, I have discussed this matter at length with HSE and their argument is not ill-intentioned or in bad faith. However, as the State of Indiana's authority on matters of public access, I gave the school an opportunity to correct what I determined to be a deficiency. Therefore I consider the non-compliance of my recommendation in *Opinion of the Public Access Counselor 17-FC-09* to be a violation of the spirit and intent of Ind. Code § 5-14-3-4(b)(8)(C).

Regards,

Luke H. Britt

A handwritten signature in black ink, appearing to read "LHB", written over a light blue horizontal line.

Public Access Counselor

Cc: Mr. Seamus Boyce, Esq.