



# STATE OF INDIANA

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November 18, 2010

Ms. Christina Sepiol  
9529 Walnut Dr.  
Munster, IN 46321

*Re: Formal Complaint 10-FC-250; Alleged Violation of the Access to Public Records Act by the School Town of Munster*

Dear Ms. Sepiol:

This advisory opinion is in response to your formal complaint alleging the School Town of Munster (“Munster”) violated the Access to Public Records Act (“APRA”), Ind. Code § 5-14-3-1 *et seq.*, by denying you access to public records. A copy of Munster’s response to your complaint is enclosed.

## BACKGROUND

In your complaint, you allege that you submitted a records request to Munster on October 15, 2010. On October 18th, Munster denied your request. Many aspects of your request sought access to a number related to placements of students on the continuum of services in special education. You state that your “request for information did not require the disclosure of personally identifiable information about any student.” You also sought access to the number of due process hearing requests filed within the last five years, but Munster denied that request “on the basis of confidentiality.” Moreover, Munster denied your request for access to “past complaints filed against the School Town of Munster lodged by other agencies . . . despite the ability of the public agency to redact any personally identifiable information.” You deny that your requests lacked the reasonable particularity required by section 3 of the APRA.

Attorney Monica Conrad responded to your complaint on behalf of Munster. She denies that Munster violated the APRA. Ms. Conrad notes that Munster provides no special education services itself, but ensures that special education services are provided through a joint service supply agency, the West Lake Special Education Cooperative (“West Lake”). She acknowledges that on October 6th, you filed a complaint with the Indiana Department of Education (“DOE”) asserting violations of the Individuals with Educational Disabilities Act (“IDEA”), 20 U.S.C. § 1400 *et seq.* On October 8th, you filed another complaint with DOE’s Family Policy Compliance Office (“FPCO”) alleging

violations under the Family Education Rights and Privacy Act (“FERPA”) against Munster and West Lake.

Subsequently, you submitted your October 15th records request, which included over 25 distinct requests. Munster acknowledged your request the same day and advised that it would respond by the next business day regarding the substance of your request. Munster advised you that it would provide documents responsive to many of your requests within various timeframes. However, many of your requests sought information regarding statistics on special education services provided by West Lake. Munster denied those requests on the basis that Munster does not maintain records containing the information. Further, Munster objected to your request for statistical information on the basis that the information is confidential under FERPA. With regard to your request for due process hearings held within the last five years, Munster does not have a record responsive to that request. With regard to redacted copies of written hearing decisions, Munster denied that request on the basis of FERPA. As to your request for copies of complaints brought against Munster by other agencies, Munster cited to I.C. § 5-14-3-4(a)(3) and I.C. § 5-14-3-4(b)(8) in its denial.

Ms. Conrad notes that on the same day that you filed your complaint with this office, you submitted a records request to West Lake that was substantially similar to your October 15th request to Munster. West Lake responded to that request by informing you that it would release available documents, including statistical information on student placements. Moreover, since you filed your complaint, Munster has produced records responsive to many of the items in your October 15th request. Consequently, the only records still at issue, according to Munster, are (1) the number of due process hearings filed against Munster and redacted copies of each request for the past five years; (2) the disposition of each request for a due process hearing or redacted copies of the written decisions of hearing officers resulting from each of the requests for due process hearings; and (3) copies of any complaints against Munster lodged by any other agency, including but not limited to the Office for Civil Rights of the U.S. Department of Education, OSERS, and the DOE.

## ANALYSIS

The public policy of the APRA states, “[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.” I.C. § 5-14-3-1. Munster concedes that it is a “public agency” under the APRA. I.C. § 5-14-3-2. Accordingly, any person has the right to inspect and copy Munster’s public records during regular business hours unless the public records are excepted from disclosure as nondisclosable under the APRA. I.C. § 5-14-3-3(a).

As an initial matter, Munster did not violate the APRA by failing to produce records in response to your request to the extent you requested information rather than records. The APRA requires that requests for access to public records “identify with

reasonable particularity the *record* being requested...” I.C. § 5-14-3-3(a)(1) (emphasis added). Nothing in the APRA requires a public agency to answer general questions or to create records in response to a request. *Op. of the Public Access Counselor 10-FC-86*. “[T]he APRA governs access to the public records of a public agency that exist; the failure to produce public records that do not exist or are not maintained by the public agency is not a denial under the APRA.” *Op. of the Public Access Counselor 01-FC-61*; *see also 10-FC-56* (“Where records are not yet created, a public agency does not violate the APRA by refusing to produce them.”). Consequently, it is my opinion that Munster did not violate the APRA by failing to produce the number of due process hearings filed against Munster if Munster does not maintain a record containing that information.

As to the actual records that you requested, one exception to the public’s general right to inspect and copy a public record applies when federal law classifies a record as confidential. I.C. § 5-14-3-4(a)(3). Here, Munster cites to the Federal Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232(g), for its argument that your request for due process hearing decisions. FERPA operates to classify all “education record[s]” as confidential: “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 a record that is 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. Munster argues that no amount of redaction could ensure the confidentiality of the identities of the students involved in the due process hearings because the decisions have identifying information throughout. If that is indeed the case, then it is my opinion that Munster acted appropriately by denying your request for copies of the decisions. As Munster points out, the public access counselor has previously opined that if even a redacted version of an educational record could lead to the identification of a student, the record need not be produced. *Op. of the Public Access Counselor 07-FC-327*.

As to the complaints made against Munster by other agencies, Munster argues that such records are exempt under both FERPA and the APRA’s exception for personnel files of public employees, I.C. § 5-14-3-4(b)(8). Personnel files of public employees are generally excepted from disclosure at the discretion of the agency, except for the enumerated items specifically required by the APRA to be disclosed. I.C. § 5-14-3-4(b)(8). Munster avers that if the complaint from another agency is contained within a student’s files, it is exempt from disclosure for the same reason that the due process hearing records are exempt. If the complaints are maintained in Munster employees’ personnel files, they are exempt under subsection 4(b)(8) at Munster’s discretion. I agree, although I note that if there are other records maintained by Munster outside of either students’ files or personnel files (a fact that is not in the record before me), Munster bears the burden to demonstrate that they are exempt from disclosure under the APRA or another applicable law.

Finally, Munster notes that it denied your request for personnel records of a group of Munster employees on the basis that the APRA does not require an agency to disclose

personal information generally for a group of employees. I agree. In the APRA's exception for personnel files of public employees, there is a provision noting that "[t]his subdivision does not apply to disclosure of personnel file information generally on all employees or for groups of employees without the request being particularized by employee name." I.C. § 5-14-3-4(b)(8).

#### CONCLUSION

For the foregoing reasons, it is my opinion that Munster did not violate the APRA.

Best regards,

A handwritten signature in black ink that reads "Andrew J. Kossack". The signature is written in a cursive, slightly slanted style.

Andrew J. Kossack  
Public Access Counselor

Cc: Monica J. Conrad