

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**SOUTHERN DOOR EDUCATIONAL
SUPPORT PERSONNEL ASSOCIATION, Complainant,**

vs.

SOUTHERN DOOR COUNTY SCHOOL DISTRICT, Respondent.

Case 34
No. 59010
MP-3659

Decision No. 29959-A

Appearances:

Attorney David B. Kundin, Executive Director, Bayland Teachers United, 1136 North Military Avenue, Green Bay, Wisconsin 54303, appearing on behalf of the Complainant.

Pinkert, Smith, Weir, Jenkins, Nesbitt, Hauser & Weber, S.C., by **Attorney Randall J. Nesbitt**, 454 Kentucky Street, P.O. Box 89, Sturgeon Bay, Wisconsin 54235-0089, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 28, 2000, Southern Door Educational Support Personnel Association, hereafter Association or Complainant, filed a complaint with the Wisconsin Employment Relations Commission. Complainant is alleging that the Southern Door County School District, hereafter District or Respondent, has engaged in prohibited practices contrary to Sec. 111.70(3)(a)1, Stats., by disciplining an employee. On August 22, 2000, the Commission appointed Coleen A. Burns, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats. Hearing on the complaint was held on October 9, 2000 in Brussels, Wisconsin. The record was closed on December 27, 2000, upon receipt of post hearing written argument.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

Dec. No. 29959-A

FINDINGS OF FACT

1. Southern Door County School District, hereafter District or Respondent, is a municipal employer, with offices located at 8240 Highway 57, Brussels, Wisconsin 54204. As the District's Director of Pupil Services, Shar Staadt-Scherschel is an agent of the District. Dyan Pasono is the Principal of the District's Middle School.

2. Southern Door Educational Support Personnel Association (SDESPA), hereafter Complainant or Association, is a labor organization with offices located at 1136 North Military Avenue, Green Bay, Wisconsin 54303. Attorney David B. Kunding is the Executive Director of Bayland UniServ and represents the Association for purposes of collective bargaining.

3. The Association is the exclusive collective bargaining representative of the bargaining unit consisting of all regular full-time and regular part-time employees employed by the District, excluding professional, supervisory, confidential and managerial employees. The Association and the District are parties to a collective bargaining agreement covering the period from July 1, 1999 to June 30, 2000. Delores Jeanquart, a library aide employed by the District, is the President of the Association.

4. Russell Hoelscher is employed by the District in the position of Licensed Special Education Associate and, as such, is a member of the collective bargaining unit represented by the Association. Hoelscher provides assistance to Special Education students, under the direction of teacher Mary Ellen Kovaleski. In March 2000, Hoelscher received an oral reprimand from Staadt-Scherschel. Following this reprimand, Hoelscher contacted Bayland UniServ and, on several occasions, discussed various employment concerns with Kunding, in his capacity as a representative of the Association. Among the concerns discussed with Kunding were the March, 2000 oral reprimand and an upcoming evaluation of Hoelscher by Staadt-Scherschel. The job description for Hoelscher's position includes the following:

...

QUALIFICATIONS

...

4. Ability to maintain confidentiality.

PERFORMANCE RESPONSIBILITIES

...

B. Possess knowledge of and maintain student and program confidentiality.

...

5. Hoelscher prepared a letter dated May 22, 2000, which states as follows:

Dear Ms. Stadt-Scherschel,

I realize that my yearly evaluation is coming up, and I wanted you to have this letter so that you are completely informed before making your evaluation of me. In addition to meeting my core responsibilities and duties this year as an aide in Ms. Kovaleski's classroom, I have volunteered time, materials and assistance that go above and beyond the duties and responsibilities as an aide in the following areas:

1. Provided materials and taught an Active Listening Unit that emphasized respect for others
2. Provided own time, equipment and material to produce Wanted Posters of Mrs. Kovaleski's CD students that emphasized each student's interests and strong points (copies in student's Life Books)
3. Provided own time and equipment to enhance Mrs. Kovaleski's production of the Wizard of Oz.
4. Provided own time, materials and equipment to teach a Photography Unit this semester during 8th Hour Life Skills class
5. Provided own time, materials and equipment to produce photographs to enhance CD Students Life Books
6. Provided own time, materials and equipment to design and implement two contracts with (Student Name) and (Student Name) to encourage reading appreciation and positive behavior
7. Willingly went along on all Special Ed. field trips this year including Christmas shopping, The Rushes 3-day trip, the Neuville Museum, and the Newport State Park trip.

In addition to the above, this school year I have also:

- Provided transportation to school for (Student Name) until other arrangements were made, as per your request.
- Supervised Mr. Donley's 2nd Hr. IT classes until Mr. Donley arrived from the high school.

- Provided assistance in Mr. Vandervelden's 7th Hr. IT class, as requested by Mrs. Kovaleski
- Modified instruction and assistance to (Student Name) for Science, as requested by you and D. Pasono
- shown initiative when dealing with problem students and problem situations
- Done whatever duty was asked of me regarding lunchroom duty.
- Attempted to effectively, cheerfully and honestly communicate with all staff members, even when some members did not communicate effectively, cheerfully or honestly with me.
- Taken responsibility for my actions, and said I'm sorry when an apology was the right thing to do

In short, as past evaluations also indicate, I always give my overall best effort to the aide's position, and know that I have done a good job this year as well.

Sincerely,

Russ Hoelscher /s/
Russ Hoelscher

cc: Ms. Dyan Pasono Principal, Southern Door Middle School
Mrs. Mary Ellen Kovaleski, CD Teacher, Southern Door Middle School
Mrs. Delores Jeanquart, Bayland Representative, Southern Door Middle School
Mr. Dave Kundin, President, Bayland Uniserve

In the above letter, (Student Name) replaces a student name that was contained in the original letter. At the time that he prepared this letter, Hoelscher knew that each of the three students identified by name was a Special Education student in the District. Hoelscher delivered this letter to Stadt-Scherschel via inter-departmental mail and mailed a copy of this letter to Kundin. Hoelscher sent the letter to Kundin, in his capacity as attorney and Association representative, for the purpose of making a record. Hoelscher considers communications to Kundin to be confidential. In the morning of May 26, 2000, Hoelscher asked Stadt-Scherschel if she had received the letter of May 22, 2000. At that time, Stadt-Scherschel acknowledged receiving this letter and asked Hoelscher if he had mailed a copy of this letter to

Kundin. Hoelscher confirmed that he had mailed a copy of the letter to Kundin. Later that day, Hoelscher met with Stadt-Scherschel to discuss disciplinary issues, one of which involved the letter of May 22, 2000. At this meeting, and at the meeting involving the oral reprimand, Hoelscher had Association representation. On May 30, 2000, Stadt-Scherschel issued the following letter to Hoelscher:

Dear Mr. Hoelscher:

This letter is documentation of our meeting on Friday, May 26, 2000, which also included Suzie Weidner, Union Representative and Dyan Pasono, Middle School Principal. You have been suspended for two days without pay, May 30 and 31, 2000. The reason for the suspension includes release of confidential information to an outside party regarding students with disabilities obtained as part of your work and insubordination to your supervising teacher, Mary Ellen Kovaleski.

I received a letter from you, dated May 22, 2000, which included the names of three special education students that you released to an outside party, Dave Kundin of Bayland UNE. On May 26, 2000, you verbally confirmed to me that the letter had been sent and that Mr. Kundin had received it. Performance responsibilities outlined in the job description for special education associates includes the maintenance of student and program confidentiality. Confidential student information cannot be released without written consent of the parents and no such release exists in this case. The master contract indicates that release of confidential information regarding students is cause for immediate suspension or discharge.

Previous oral reprimand was provided to you on March 1, 2000, which addressed concerns with your relationships with other school staff members which included Mrs. Kovaleski. You have demonstrated difficulty and failure to comply with Mrs. Kovaleski's directives on a number of occasions. At our conference in March, we had discussed the issue of your pursuit of personal interests in conjunction with students programming. I had advised you that student needs were the priority, not your personal needs and interests. Mrs. Kovaleski informed me that you went ahead and developed a behavioral contract for students with an incentive plan and this was done against her directive. You have been observed by her to become angry and uncooperative when she does not agree with your ideas for projects. On May 25, 2000, you confronted Mrs. Kovaleski on an issue of concern to you and spoke to her in a loud and angry voice, which was witnessed by another teacher. When Mrs. Kovaleski, informed you that she would not discuss the issue with you without the presence of an administrator, you continued to confront her until

staff member intervened to end it. This behavior is considered to be insubordination of a severe nature and is not consistent with performance responsibilities outlined for the special education associate position which include communicating effectively and working cooperatively with the supervising teacher. Your pattern of insubordination and refusal to follow district policies and guidelines is a serious concern and has a negative impact on the educational program.

You are hereby advised that any further incidents may result in further disciplinary action, up to and including discharge.

Prior to the end of the 1999-2000 school year, Hoelscher served the two-day suspension. Hoelscher did not have the consent of any student's parent, or guardian, to disclose any information contained in his letter of May 22, 2000. Hoelscher could have conveyed all relevant information to Staadt-Scherschel in his letter of May 22, 2000, without having named any student.

5. The students named in Hoelscher's letter of May 22, 2000 are children with disabilities under the Individuals with Disabilities Education Act (IDEA). These students are protected by, and the District is subject to, the requirements of the IDEA. When Hoelscher provided a copy of his letter of May 22, 2000 to Kundin, Hoelscher disclosed information to Kundin that is confidential under the Individuals with Disabilities Education Act (IDEA). At the time of this disclosure, this confidential information was not needed by the Association to rebut, or respond to, any information contained in Hoelscher's personnel file. Nor was this confidential information needed to assist the Association in asserting any right guaranteed by Sec. 111.70(2), Stats. When the District disciplined Russell Hoelscher for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work", Respondent disciplined Russell Hoelscher for disclosing to David B. Kundin information that is confidential under the IDEA.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Complainant Southern Door Educational Support Personnel Association (SDESPA) is a labor organization within the meaning of Sec. 111.70(1)(h), Stats.
2. Respondent Southern Door County School District is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. Russell Hoelscher is a municipal employee within the meaning of Sec. 111.70(1)(i), Stats.

4. Russell Hoelscher's disclosure to David B. Kundin of information that is confidential under the Individuals with Disabilities Education Act is not lawful concerted activity within the meaning of Sec. 111.70(2), Stats.

6. By disciplining Russell Hoelscher for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work," Respondent has not interfered with, restrained or coerced a municipal employee in the exercise of rights guaranteed by Sec. 111.70(2), Stats., and, therefore, the Respondent has not violated Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The Complaint is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

Southern Door School District

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

BACKGROUND

On June 28, 2000, Complainant Southern Door Educational Support Personnel Association filed a prohibited practice complaint alleging that the Respondent Southern Door County School District has violated Sec. 111.70, Stats., by disciplining an employee. On September 22, 2000, the Respondent filed its answer to the prohibited practice complaint and denied that it has violated Sec. 111.70, Stats., as alleged by Complainant.

At hearing, Complainant alleged that Respondent's conduct violated Sec. 111.70(3)(a)1 or 3, Stats. Complainant's post-hearing written arguments address only the alleged violation of Sec. 111.70(3)(a)1, Stats. Accordingly, the Examiner considers Complainant to have abandoned all other claims of prohibited practices against the Respondent.

POSITIONS OF THE PARTIES

Complainant

There is little, if any, factual dispute. The Southern Door Educational Support Personnel Association (SDESPA) is a labor organization within the meaning of MERA and the exclusive collective bargaining representative for a bargaining unit of certain employees of the District. The Association is affiliated with Bayland UniServ. David B. Kundin is the Executive Director of Bayland UniServ and represents the Association with respect to collective bargaining matters.

The present case presents two issues. First, whether the "disclosures" Russell Hoelscher made to his Association representative violated relevant law regarding the confidentiality of student records. If they did, the second issue is whether the District violated Sec. 111.70, Stats., by imposing discipline on him for making that disclosure. The discipline can only be appropriate if the information disclosed was, in fact, confidential.

The letter of May 22, 2000 included names of students, without any identifying information that would suggest to the reader of that letter that the students were "special education" students. Additionally, the May 22, 2000 letter was not disseminated to the general public, but rather, was shared with one person, i.e., the attorney who was Russ Hoelscher's authorized Association representative.

Since the May 22, 2000 letter was not a student record it was not subject to the confidentiality requirements of Wisconsin and Federal law. The District relies upon an opinion letter filed by the Wisconsin Department of Public Instruction and three IDEA investigations, all conducted by the same individual at DPI. Clearly, these “cases” carry no legal authority, nor should they be given any. Especially when they are weighed against the extensive NLRB, WERC, and Federal Court authority relied upon by the Complainant.

Inasmuch as the Association exists and functions within the context of the employment relationship, it is arguable that there was no “impermissible” “disclosure” at all. Even if the information were confidential, and even if there were an “impermissible disclosure” within the meaning of the laws governing confidentiality, the District does not necessarily have the right to discipline Russ Hoelscher. It is a balance between labor laws and the confidentiality statutes that must be weighed in determining whether the District engaged in prohibited practices in this case.

The employment relationship between the District and Russ Hoelscher is governed by the Municipal Employment Relations Act. Hoelscher was seeking the assistance of his lawful collective bargaining representative as he responded to material in his personnel file. Thus, he was engaged in lawful, concerted activity.

The imposition of discipline on an employee who participates in concerted activity has a reasonable tendency to interfere with, or restrain Hoelscher, and other municipal employees, from exercising their rights under Sec. 111.70. Thus, the discipline is impermissible and constitutes a prohibited practice by the District.

The District has violated Sec. 111.70(3)(a)(1), Stats., by its decision to discipline Russ Hoelscher for sharing the May 22, 2000 letter with his authorized Association representative. The remedy sought by the Association for this violation is as follows: Instruct the District to cease and desist from committing such prohibited practices; to change the May 30, 2000 disciplinary letter to reflect that there is only one reason for that discipline; to order the District to post the appropriate compliance notices; and to order the District to pay the Association’s fees and costs in this action; as well as any other remedial action deemed appropriate by the Commission.

Respondent

Russell Hoelscher sent a letter containing the personal identities of three District Special Education students to two individuals outside of the Southern Door Special Education program who had no educational interest in these individuals, i.e., Delores Jeanquart and B. Kundin. No parental consent was given before, or after, the disclosure of the identities of the three District Special Education students.

Section 34 CFR 99.30 indicates that personally identifiable information of students may not be disclosed by any educational agency or institution except with written consent of the parents. Section 34 CFR 99.3 defines personally identifiable information to include the name of the student.

Hoelscher has acknowledged that he disclosed the names of three students involved in the special education program to sources outside the School District who had no legitimate educational interests in those children. Hoelscher further acknowledges that he had no consent from the parents for that disclosure and that he did not seek the consent of the parents after the disclosure.

The regulations providing protection of personally identifiable information relating to special education students are very strict. If the School District permits improper disclosure of student information, it is subject to sanction by the Wisconsin Department of Public Instruction and the federal agency responsible for implementing the applicable federal regulations.

As set forth in the position description of Russell Hoelscher, confidentiality is an important part of his position and he was subject to District policies regarding student information confidentiality. By disclosing the identities of three District Special Education students, Hoelscher not only violated federal law, but also, violated District policies. There is no recognized exception permitting employees to violate District policies and federal laws if the violation involves union activities.

The District is not attempting to prevent employees from exercising their statutory rights to representation. As Stadt-Scherschel testified, it was not the fact that the letter had been shared with Association representatives that was of concern to the District, rather it was that the letter contained personally identifiable student information.

It cannot reasonably be argued that disclosure to Association representatives is in itself confidential. In this case, the letter containing the confidential information was filed with the complaint and, thus, was available to the public. It was only after Respondent requested a substitution of the record, with the names deleted, that the information was no longer available to the public.

Given the clear proof of violation of District policies and federal law with respect to disclosure of confidential information, the District was clearly within its rights to discipline Russell Hoelscher. The discipline, which involved other infractions, was not inappropriate. Rather it would have been inappropriate for the District to ignore Russell Hoelscher's breach of confidentiality. Respondent respectfully requests that the complaint be dismissed with prejudice.

DISCUSSION

By letter dated May 30, 2000, the District's Director of Pupil Services, Shar Staadt-Scherschel suspended Russell Hoelscher for two days without pay for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work and insubordination to your supervising teacher, Mary Ellen Kovaleski." The District's conduct in disciplining Hoelscher for "insubordination" is not at issue in this proceeding. Rather, in this proceeding, Complainant challenges only the District's decision to discipline Hoelscher for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work."

Complainant alleges that the District's discipline of Hoelscher for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work" violates Sec. 111.70(3)(a)1, Stats. Section 111.70(3)(a)1, Stats., makes it a prohibited practice for a municipal employer:

1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

The "sub. (2)" rights referenced above are the rights guaranteed by Sec. 111.70(2), Stats., which states as follows:

RIGHTS OF MUNICIPAL EMPLOYEES Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, . . .

Section 111.07(3), Stats., which is made applicable to this proceeding by Sec. 111.70(4)(a), Stats., provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence."

As set forth above, municipal employees, such as Hoelscher, have a Sec. 111.70(2) right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. The issue to be decided is whether Hoelscher's "release of confidential information to an outside party regarding students with disabilities obtained as part of your work" is a lawful, concerted activity within the meaning of MERA.

As set forth in the disciplinary letter of May 30, 2000, the outside party to whom Hoelscher released the “confidential” information is David B. Kundin. At all times material hereto, Kundin has represented Hoelscher on behalf of the Association. Thus, when Respondent disciplined Hoelscher for “release of confidential information to an outside party regarding students with disabilities obtained as part of your work”, Respondent disciplined Hoelscher for providing information to his union representative.

At the time that Hoelscher provided a copy of the May 22, 2000 letter to Kundin, Hoelscher was seeking Kundin’s assistance in helping Hoelscher with various issues involving Hoelscher’s employment with the District. Among these employment issues were a previous discipline and an upcoming evaluation.

The Examiner is persuaded that, by providing the letter of May 22, 2000 to Kundin, Hoelscher was engaged in concerted activity within the meaning of MERA. As set forth above, however, MERA provides protection to concerted activity that is lawful. Respondent argues that the activity for which Hoelscher was disciplined was not lawful because Hoelscher disclosed information that is confidential under federal law and Board policy.

The federal laws relied upon by the Respondent are the Family Educational Rights and Privacy Act (FERPA) and the Individuals with Disabilities Education Act (IDEA). It is undisputed that the District is subject to FERPA and IDEA.

Respondent argues that, by naming Special Education students in the letter of May 22, 2001, Hoelscher disclosed to Kundin “personally identifiable information” contrary to the requirements of FERPA. In making this argument, Respondent relies upon the Code of Federal Regulations (CFR), specifically, 34 CFR 99.

The authority for 34 CFR 99 is 20 U.S.C. 1232g. 20 U.S.C. 1232g(b)(1) is entitled “Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas; audit and evaluation of Federally-supported education programs; recordkeeping.” This provision of the US Code restricts funding 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 other than directory information, as defined in paragraph (5) of subsection (a)) of students without the written consent of their parents to any individual, agency or organization”, other than those specifically listed in 20 U.S.C. 1232g(b)(1).

Those specifically listed in 20 U.S.C. 1232g(b)(1) do not include Bayland UniServ Director Kundin, or any other Association Representative, and Hoelscher did not have the written consent of any student’s parent, or guardian, to release any information contained in the letter of May 22, 2000. Thus, if the information released by Hoelscher is confidential under FERPA, then Hoelscher has violated FERPA as alleged by the Respondent.

As Respondent argues, 34 CFR 99.3 expressly recognizes that “personally identifiable information” includes “the student’s name.” Complainant argues that the names of the students are not protected under FERPA because it is “directory information.” However, under 20 U.S.C. 1232g(a)(5)(A), to be considered “directory information,” student names must be designated “directory information” by the District. The record fails to establish that the District has made such a designation.

Complainant also argues that the names of the students are not protected under FERPA because the names are not information from the student’s educational records. By its title and content, 20 U.S.C. 1232g(b)(1), regulates the release of “education records” and “personally identifiable information” contained in an “educational record.” Thus, it is reasonable to conclude that, to be protected under FERPA, the student’s name must be derived from an “educational record.”

34 CFR 99.30, relied upon by Respondent, states, in pertinent part, that:

(a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student’s education records, except as provided in Sec. 99.31.

1/

1/ Sec. 99.31 identifies conditions under which prior consent is not required to disclose personally identifiable information. One of these conditions is “directory information,” which has been discussed above. The record does not demonstrate that Hoelscher’s release of information to Kundin falls within any Sec. 99.31 exception to the consent requirement of Sec. 99.30.

Although the language of 34 CFR 99.30 differs from that of its authorizing statute, 20 U.S.C. 1232g(b)(1), the language of this provision also supports the conclusion that FERPA protects “personally identifiable information” that is derived from an “education record.”

The conclusion that FERPA protects information that is derived from an “education record” is consistent with the finding of the United States District Court, E.D. New York, in *FRASCA V. ANDREWS*, 463 F.SUPP.1043 (1979), at page 1050, where the Court states:

. . . the so-called “Buckley Amendment” part of which, 20 U.S.C. 1232g, prevents disclosure by a school district of certain information about students which is deemed to be confidential. Although some of the information in Exhibit “B”

would fall within the scope of the Buckley amendment if the source of that information had been school records, the prohibitions of the amendment cannot be deemed to extend to information which is derived from a source independent of school records. . . .

20 U.S.C. 1232g(a)(4) defines “education records” as records, files, documents and other materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. The portion of 34 CFR 99.3 that derives its authority from 20 U.S.C. 1232g(a)(4) defines “education records” as follows: “(a) The term means those records that are: (1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.”

Undoubtedly, the District maintains “education records” that contain the names of the students identified in the letter of May 22, 2000. It would not be reasonable to conclude, however, that such information is only derived from an education record. Rather, it is evident that such information may also be discovered by virtue of Hoelscher’s personal contacts with the students.

In summary, the Examiner is persuaded that FERPA protects information that is derived from an “education record.” Inasmuch as the record fails to establish that the allegedly confidential information, *i.e.*, the names of three Special Education students, was derived from an “education record”, the Examiner is not persuaded that Hoelscher has violated FERPA as alleged by the Respondent.

In arguing that Hoelscher has violated federal law, Respondent also relies upon letters issued in four IDEA Complaint Investigations. IDEA is the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et. Seq., the regulations for which are set forth in 34 CFR 300.

The IDEA provides children with a disability with protections in addition to those provided by FERPA. The Special Education students named by Hoelscher in his letter of May 22, 2000 are children with a disability under 34 CFR 300.7.

20 U.S.C. 1417(c), Confidentiality, states:

The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

Unlike the language of FERPA discussed above, in the IDEA, personally identifiable information is not linked to an education record. Thus, one may reasonably conclude that, to be protected under the IDEA, personally identifiable information need not be derived from an “education record.”

34 CFR 300.571, Consent, which derives its authority from 20 U.S.C. 1412(a)(8), 1417(c), states:

(a) Except as to disclosures addressed in Sec. 300.529(b) for which parental consent is not required by Part 99, parental consent must be obtained before personally identifiable information is--

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement of this part.

(b) An educational agency or institution subject to 34 CFR part 99 may not release information from education records to participating agencies without parental consent unless authorized to do so under part 99.

(c) The SEA shall provide policies and procedures that are used in the event that a parent refuses to provide consent under this section.

The above language also supports the conclusion that, to be protected under the IDEA, “personally identifiable information” need not be derived from an “education record.”

The four IDEA Complaint Investigation letters are not precedential. Nonetheless, they do contain opinions of individuals with responsibility to interpret applicable federal and state statutes and regulations. These opinions are consistent with the conclusion that “personally identifiable information” derived from an “education record” is protected under the IDEA, as well as under FERPA. These opinions, however, neither support, nor rebut, the conclusion that the IDEA also protects “personally identifiable information” that is not derived from an “education record.”

34 CFR 300.500, which derives its authority from 20 U.S.C. 1415(a), states that

...

(3) Personally identifiable means that information includes—

- (i) The name of the child, the child's parent, or other family member;
- (ii) The address of the child;
- (iii) A personal identifier, such as the child's social security number or student number; or
- (iv) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

...

Thus, the names of the Special Education students identified in Hoelscher's letter of May 22, 2000 are "personally identifiable information" within the meaning of the IDEA.

The IDEA, like FERPA, provides exceptions to the general prohibition against the release of personally identifiable information without parental consent. Hoelscher's disclosure of the names of Special Education students to Kundin does not fall within one of these exceptions.

In summary, upon review of the IDEA and its applicable federal regulations, the Examiner is persuaded that, to be protected under the IDEA, "personally identifiable information" may be, but need not be, derived from an "education record." Thus, the fact that the record fails to establish that Hoelscher obtained the Special Education student's names from an education record does not mean that Hoelscher has not disclosed confidential information within the meaning of the IDEA.

As is recognized in 34 CFR 300.500, the IDEA seeks to protect against the disclosure of information that would make it possible to identify a child with a disability with reasonable certainty. The letter of May 22, 2000 does not expressly identify each named student as a child with a disability. However, Hoelscher identifies himself as an Aide in Mrs. Kovaleski's classroom and identifies Mrs. Kovaleski as a "CD Teacher." Given these identifiers, Hoelscher's statement that he "Provided own time, materials and equipment to design and

implement two contracts with (Student Name) and (Student Name) to encourage reading appreciation and positive behavior” makes it possible to identify students as children with a disability with reasonable certainty.

While it is not evident that Hoelscher obtained the names of the identified Special Education students from education records, it is evident that he obtained the information disclosed in the letter of May 22, 2000 in the course of his employment with the District. By naming the Special Education students in his letter of May 22, 2000 and providing Kundin with a copy of this letter, Hoelscher disclosed, without parental consent, personally identifiable information that would identify a student as a child with a disability receiving Special Education services from the District. By this conduct, Hoelscher disclosed information that is confidential under the IDEA.

As Complainant argues, in interpreting MERA, the Commission balances employee rights against employer rights. There may be instances in which Association access to information protected under the IDEA is relevant and reasonably necessary to the exercise of rights guaranteed under Sec. 111.70(2), Stats. This is not such an instance.

As Hoelscher acknowledged at hearing, he could have conveyed all pertinent data to Stadt-Scherschel in his letter of May 22, 2000, without naming the Special Education students. Thus, notwithstanding Complainant’s arguments to the contrary, the information protected by the IDEA was not needed by the Association to rebut, or respond to, any information contained in Hoelscher’s personnel file. Nor was the information needed to assist the Association in asserting any other right guaranteed by Sec. 111.70(2), Stats.

CONCLUSION

When Hoelscher provided Kundin with a copy of his letter of May 22, 2000, Hoelscher disclosed information to Kundin that is confidential under the IDEA. Having concluded that Hoelscher disclosed information that is protected from disclosure under federal law, the undersigned need not, and does not, address Respondent’s argument that Hoelscher disclosed information that is confidential under Board Policy.

By disciplining Hoelscher for “release of confidential information to an outside party regarding students with disabilities obtained as part of your work,” Respondent disciplined Russell Hoelscher for disclosing information to Association Representative Kundin that is confidential under the IDEA. Under the facts of this case, this disclosure of information is not lawful concerted activity within the meaning of MERA.

Respondent did not interfere with, restrain, or coerce any municipal employee in the exercise of rights guaranteed by Sec. 111.70(2), when Respondent disciplined Hoelscher for “release of confidential information to an outside party regarding students with disabilities

obtained as part of your work.” Thus, Respondent did not violate Sec. 111.70(3)(a)1, Stats., when it disciplined Russell Hoelscher for “release of confidential information to an outside party regarding students with disabilities obtained as part of your work.” Accordingly, the Complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of July, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

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