



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2009

Ms. Mari McGowan
Abernathy Roeder Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-11878

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 353372.

The Mansfield Independent School District (the "district"), which you represent, received a request for certain risk counselor notes and records pertaining to the requestor's child. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You state you have notified the risk counselor of the request pursuant to section 552.304 of the Government Code. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the information you have submitted.

We note the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA") does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ *See* 20 U.S.C. § 1232g(d). Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note a parent has a right of access to his or her child’s education records. *See* 20 U.S.C § 1232g(a)(1)(A); 34 C.F.R. § 99.3. You state the submitted information does not consist of education records as defined by FERPA.² Therefore, we will address your argument against disclosure of the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Mental health records are confidential under section 611.002 of the Health and Safety Code, which provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). You state, and provide documentation showing, the risk counselor who created the records at issue is a “licensed professional counselor.” This office has determined a “licensed professional counselor” is within the definition of professional as provided by section 611.001. *See* Attorney General Opinion JC-0538 (2002). A patient is defined as “a person who consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder, including alcoholism or drug addiction.” Health & Safety Code § 611.001(1). You state the student consulted the risk counselor for evaluation and the submitted records are patients records created for the evaluation of the patient. Thus, we find the submitted information is subject to section 611.002.

Sections 611.004(a) states a professional may disclose confidential information only to a person who has the written consent of the patient or the parent if the patient is a minor. *See id.* § 611.004(a)(4). Section 611.0045 states “[t]he professional may deny access to any

²Questions concerning FERPA should be directed to the Family Policy Compliance Office of the United States Department of Education at 400 Maryland Avenue, S.W., Washington, D.C. 20202-0498 or at (202) 260-3887.

portion of a record if the professional determines that release of that portion would be harmful to the patient's physical, mental, or emotional health." *Id.* § 611.0045(b). In addition, the Texas Supreme Court has determined that "[b]ecause subsection (b) [of section 611.0045] may limit a patient's rights to his or her own records, subsection (b) can also limit a parent's or third party's right to a patient's records when the third party or parent stands in the patient's stead." *Abrams v. Jones*, 35 S.W.3d 620, 626 (Tex. 2000). In this instance, the requestor is the parent of the minor patient whose records are at issue. However, you have provided a statement from the professional in which she denies the requestor access to the records and states release of the records would be harmful to the patient's physical and emotional health. Thus, section 611.0045 does not provide the requestor a right of access to the information. Consequently, the information is confidential under section 611.002(a).

However, section 26.004 of the Education Code states, in pertinent part:

A parent is entitled to access to all written records of a school district concerning the parent's child, including:

...

(5) counseling records;

(6) psychological records[.]

Educ. Code § 26.004. The information consists of the requestor's child's counseling and psychological records. Thus, section 26.004 provides the requestor a right of access to the submitted information. Consequently, section 26.004, which grants the requestor access to the submitted information conflicts with section 611.002, which makes the information confidential because the professional denied the requestor access to the submitted information under section 611.0045. A court will harmonize statutes to give effect to each unless the statutes are irreconcilable. *See* Gov't Code § 311.026(a); *see La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 565 (Tex. 1984); *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). This office determined section 611.0045 and section 26.004 may be harmonized by construing section 611.0045 as an exception to section 26.004 when, as here, the records are created and held by a professional as defined by section 611.001(2). *See* Attorney General Opinion JC- 0538 (2002). Thus, because the professional determined release of the submitted information would harm the patient's physical and mental health, we find the district must withhold the submitted information under sections 611.002 and 611.0045(b).³

³ We note section 611.045(e) provides the professional who denies access to records shall provide such records to another professional chosen by the patient who is treating the patient for the same or a related condition. Health & Safety Code § 611.045(e). Additionally, an individual denied records may petition a district court for the appropriate relief. *See id.* § 611.005.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/eeg

Ref: ID# 353372

Enc. Submitted documents

c: Requestor
(w/o enclosures)