



TEXAS EDUCATION AGENCY

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Jim Nelson
Commissioner of Education

February 4, 2002

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I.D. # 42412

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FEB 05 2002

OPINION COMMITTEE

The Honorable John Cornyn
Attorney General of Texas
Price Daniel Building
P.O. Box 12548
Austin, Texas 78711

RQ- 0506-JC

ATTENTION: Opinion Committee

Re: Request for Attorney General Opinion regarding school counselor records

Dear General Cornyn:

At the request of Cisco I.S.D., I am seeking your opinion regarding the relationship of Section 26.004 of the Education Code and Section 611.0045 of the Health and Safety Code. I am enclosing correspondence from the attorney representing the district in which the attorney presents an apparent conflict between those statutes as applied to counseling records maintained by a public school counselor.

In addition to the state laws cited by the school district's counsel, please consider as well the application of the federal Family Educational Rights and Privacy Act (20 U.S.C. 1232g). That Act (FERPA) protects the confidentiality of education records but also provides parental access to those records. However, the definition of "education records" in the regulations implementing FERPA excludes records that "are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record." (34.C.F.R. §99.3) Please consider the application of this exclusion to public school counseling records, as well as any other relevant considerations under FERPA in determining parental rights to such records in question.

The question presented is whether either Section 26.004 of the Education Code or FERPA result in a parental right to records that overrides the provisions of Section 611.0045 of the Health and Safety Code. The relationship of these laws as applied to school counseling records is a significant statewide issue for our public schools.

If you have any questions, please contact David Anderson, General Counsel, at 463-9720.

Sincerely,


Jim Nelson
Commissioner of Education



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LEGAL SERVICES

December 21, 2001

David Anderson, Chief Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701

Mr. Stephen Mills, Executive Director
Texas State Board of Examiners of Professional Counselors
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756

Re: Request for Agency Opinion Regarding School Counselor Records

Dear Mr. Anderson and Mr. Mills:

I would respectfully request an opinion from your agencies in an attempt to reconcile what appear to be conflicting obligations under state law as to school counselors. More specifically, I seek clarification from your agency in resolving the conflict between a school district's duty to allow parents to review their child's educational/student records under the Section 26.004 of the Texas Education Code; and a professional counselor's duty to maintain the confidentiality of mental health records when, in her professional judgment, the counselor believes releasing those records to the parent would be harmful to the student's physical, mental or emotional health.¹

The undersigned attorney represents the Cisco Independent School District, which received a request from a parent to review his child's counseling records. The counselor informs the school administration that the child has expressly stated that he did not wish the records to be shared with the parent, and in the counselor's professional judgment, the release of the records would result in

¹As discussed below, as required under Section 611.0045 of the Texas Health and Safety Code, parents are not entitled to access to their child's mental health records when the counselor's professional opinion is that releasing those records would result in mental, physical, or emotional harm.

Letter to Mr. Anderson and Mr. Mills
December 21, 2001
Page 2

mental, physical, or emotional harm to the child. The District has not yet released any of the counselor's notes to the parent and seeks opinions from your offices in an attempt to resolve the apparent conflicting obligations of the school district.

Background

The Counselor has been counseling an elementary age student to assist the child in dealing with physical problems the child is experiencing and the underlying reasons for those problems. During these sessions, the child expressed a desire to discuss issues related to his parents' divorce, but refused to do so until the counselor assured him that the conversations would remain confidential.

The child's father has requested notes from the child's counseling sessions, claiming the divorce judgment gives him an absolute right to view the counselor's notes regarding his child.² The counselor wishes the notes to remain confidential as she believes, in her professional opinion, that releasing the notes would violate the confidentiality standards of the Texas Health and Safety Code which she must follow as a matter of law.

Parental Access to Counselor Notes

Section 26.004 of the Texas Education Code grants parents access to "all written records of a school district concerning the parent's child." The section lists documents falling under the category of student records, which include counseling records, psychological records, and counselor evaluations. The Education Code appears to leave no question as to whether a parent may review the counselor's notes concerning his child.

However, while the student's records are expressly discussed in the Education Code, the counselor must also follow the confidentiality standards set out in the Texas Health and Safety Code. Section 611.002(a) states that "communication between a patient and a professional, and record of the identity diagnosis evaluation or treatment of a patient that are created or maintained by a professional are confidential." Parents are granted access to the information if the patient is a minor under Section 611.004; however, this access is not without limitation. Section 611.0045 states, "The professional may deny access to any portion of the [confidential] record [made about the patient] if the professional determines that the release of that portion would be harmful to the patient's

² The judgement contains standard language regarding a possessory conservator's rights. Among those listed as the possessory conservator's rights are the following:

The right to access to medical, dental, and educational records of the child to the same extent as the managing conservator;

The right to consult with school officials concerning the child's welfare and educational status, including school activities.

Letter to Mr. Anderson and Mr. Mills
December 21, 2001
Page 3

physical, mental or emotional health."

The Texas Supreme Court has recently examined the issue of parental access to a child's mental health records outside the school context. In *Abrams v. Jones* the Court examined a situation almost identical to the one currently facing the District. 35 S.W.3d 620 (2000). In Abrams, the child was reluctant to talk with the counselor until she received assurance that the substance of their conversations would remain confidential, specifically as to information regarding her relationship with her father. The father sought the records relying on both his divorce decree and the parental right to the child's records under Section 611.004 of the Health and Safety Code. The Court in that case held as follows:

1. The Family Code provision allowing a divorced parent a right of access to a child's mental health records does not override the provisions of the Health and Safety Code addressing parents' rights to their child's mental health records;
2. The Health and Safety Code provision making a child's mental health records available to the parent, affords the parent no greater rights to the records than those of the patient, which can be limited under certain circumstances; and
3. Uncontradicted statements that releasing the child's mental health records would be harmful to the child, conclusively establishes harm to the child.

I attach this decision for your review.

The analysis used in *Abrams* dealt with a client/counselor relationship outside the school district setting and has not been applied to the Education Code section requiring the release of counselor records to the parent. We are seeking your opinion as to the interplay between Section 26.004 of the Education Code and Section 611.0045 of the Health and Safety Code.

Thank you for your attention to this matter.

Sincerely yours,



Angela G. Bishop

Letter to Mr. Anderson and Mr. Mills**December 21, 2001****Page 4**

cc: **Mr. Hal Porter**
Superintendent of School
Cisco Independent School District
P.O. Box 1645
Cisco, Texas 76437