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CONFIDENTIALITY AND THE LAW

In an increasingly complex society, parents have concerns that personal information about their children in school records is accurate and that access is restricted to those individuals with a justifiable purpose for their use of that information. At the same time, teachers, counselors, and school administrators must be aware of the rights afforded students and their parents regarding school records. Hence, the notions of confidentiality in the schools and protection of student privacy have recently received much attention. The aim of this paper is to introduce readers to the laws that govern and protect students, teachers, and school counselors, and the issues surrounding confidentiality in the schools.

The laws safeguarding the confidentiality of student information are established in four main congressional acts.

- The Family Educational Rights and Privacy Act (FERPA, 1974), also known as the Buckley Amendment, is the major legislation that sets parameters on accessibility and disclosure of student records.
- The Grassley Amendment (1994) to the Goals 2000: Educate America Act of 1994 details privacy of student participation in surveys, analysis, and evaluation.
- Drug and alcohol treatment records of students kept by any institution receiving federal assistance are protected under Drug Abuse Office and Treatment Act (1976).
- Records of students in special education are affected by the above laws plus the Individuals

with Disabilities Education Act (IDEA, 1997).

These four acts provide a structure for laws concerning confidentiality and its application as a safeguard for students and professionals. These laws specify certain requirements and obligations of participating agencies, including local educational agencies (LEA), in the control and disbursement of records, and provide parents and students rights to access these records. The four acts will be discussed in the sections that follow along with their implications for school counselors.

FERPA

The Family Educational Rights and Privacy Act of 1974, also known as the Buckley Amendment, is a four-part act that gives parents and students who have reached the age of majority the right to review and inspect school records. Part one of the Buckley Amendment states that school districts receiving federal funds must comply with FERPA or risk losing their funding. Part two states that schools must receive parental consent before evaluating or admitting students in school programs that would change their values or behavior. Part three addresses federal funding and denies such funds to schools that do not restrict unauthorized access to student information and protect the privacy of their records. Finally, part four protects children who are being used to gather data for federal surveys (FERPA, 1974).

FERPA applies to all educational records that are defined as any personally identifiable record collected, maintained, or used by a school that the student has attended. Personal logs, treatment records, and directory information, however, are exceptions to the above act. The above mentioned are excluded for the following reasons: Personal logs are records of instructional, supervisory, administrative, and associated educational personnel that are the sole possession of the individual and have not been shared with any other peer or professional. Treatment records are records of a physician, psychiatrist, psychologist, or other recognized professional acting in his or her role as a professional and used only in connection with the treatment of the student. Directory information are records that include the student's demographic information, grade or field of study, participation in extracurricular activities, physical descriptions, and dates of attendance (FERPA, 1974; Underwood & Mead, 1995).

School records may not be released without the consent of the parents and written consent must be obtained for special education students. Schools must inform the parents before a disclosure of student information. (See table, Consent Exceptions.) Additionally, Parents have the right to challenge the information contained in the records if they believe it to be inaccurate or misleading. The school must provide an opportunity for a hearing if they disagree or refuse to alter the record.

Amendments to the FERPA regulations (1974) were made in response to the passage of the Improving America's School Act (1994). The following is a summary of these changes. First, the new changes give educational agencies greater flexibility by removing a previous regulatory provision requiring schools to adopt a formal, written, student-records policy. Instead, the school may include additional information in the annual notification of rights. A model notification is included in the appendix of the regulations. Second, state educational agencies must afford parents and eligible students access to education records that they maintain. Third, the amendments clarify that an educational agency or institution initiating legal action against a parent or eligible student must make a reasonable effort to notify, in advance, the parent or student of its intent to disclose the information from education records to a court of law. Fourth, FERPA was amended so that a school is not required to notify a parent or eligible student before complying with certain subpoenas if the court has ordered notification not be made. Fifth, FERPA was amended to allow disclosures of education

records, without prior consent, to certain state and local officials, pursuant to a State statute that allows the disclosure in connection with a juvenile justice system. Sixth, the amendments clarify that an educational agency may include information in a student's education records concerning disciplinary action taken against a student for conduct that posed a significant risk to that student or other members of the school community. Seventh, in connection with the previous amendment, clarification was made that an educational agency may disclose information without prior consent to those who have legitimate educational interests in the behavior of the student. Eighth, if a third party discloses information in violation of FERPA, that agency is prohibited from accessing education records for a period of not less than 5 years. Finally, the amendments clarify that a person filing a complaint under FERPA must have legal standing, that is must be a parent of an eligible student affected by the violation (AACRAO Government Relations, 1999).

Grassley Amendment

The Grassley Amendment (1994) replaced and modified the Hatch Amendment to the General Education Provisions Act. The Hatch Amendment speaks to the protection of pupil rights in conjunction with any survey, analysis, or evaluation of any applicable program within the school setting. This amendment applies to all programs where federal money is involved in the implementation or maintenance of the program. The Grassley Amendment expanded language to cover all surveys, analysis, or evaluation projects. It also grants individuals the right to inspect materials (e.g. manuals, tapes, films) used in connection with any survey, analysis, or evaluation. Written consent of parents or eligible students by school districts must be secured for the above activities before information is collected that reveals:

- Political affiliations
- Mental or psychological problems
- Sexual behavior or attitudes
- Illegal, anti-social, self-incriminating, and demeaning behavior
- Critical appraisals of other individuals with whom the students have a close family relationship
- Legally recognized privileged or analogous relationships, such as those of physicians, lawyers, or ministers
- Income, except for that information required to determine eligibility for financial assistance

The statute does not apply to information gathering that is entirely voluntary.

Difficulties exist as a result of the Grassley Amendment (FERPA, 1974). First, although it requires written consent from parents, the words informed consent do not appear in the law. This may create difficulties as parents may give consent without being truly informed and thus fully understanding the consent they are providing to the school or researcher. Additionally, on June 6, 1991, the U.S. Department of Education revised federal regulations concerning research with human beings, experimental procedures used in public schools to develop new instructional methods. Curricula or classroom management techniques are now exempt from the regulations. No institutional review board (IRB) review is necessary for experiments in public schools and therefore, no protections gained from IRB review are afforded to students. No explanation of potential risks is necessary. No permission is necessary. Protection has been essentially stripped away from children. U.S. children can legally be forced to take part in experiments to develop new instructional methods and curricula (psychological and otherwise) despite the objections of their parents. New ideas can legally be tested in individual public school classrooms with no accountability if something goes wrong. The revised regulations appear in the Federal Register, volume 56, Section 117, dated June 18, 1991, on page 28012.

Drug Abuse Office and Treatment Act

Confidentiality of records of persons receiving drug or alcohol abuse treatment are protected under federal law (Drug Abuse Office and Treatment Act, 1976). This statute applies to any program assisted in any way by the federal government. These requirements apply to all records relating to the identity, diagnosis, prognosis, or treatment of any student involved in any federally assisted substance abuse program. All records must be maintained in a locked and secure area. Since these regulations are generally more strict, they should be maintained separately from other educational records. Records, generally, may not be disclosed without written consent of the student. Under applicable state law, minor clients with legal capacity must give consent for any release of information, including to the minor's parents. If state law requires parental consent to obtain treatment, then both parent and student must give consent before disclosure of information. Three disclosures may be made without consent:

- To medical personnel in the case of a bona fide medical emergency
- To qualified personnel conducting scientific research or audits without individual identities disclosed
- To any person with an appropriate court order

Treatment records can not be used to conduct a criminal investigation or substantiate criminal charges against a person (Yeager, 1994).

IDEA

The Individuals with Disabilities Education Act (1997) requires procedures to provide a free and appropriate public education (FAPE) for all children with disabilities. Inherent within FAPE are safeguards prohibiting the disclosure of any personally identifiable information.

Clear guidelines have been set forth for public schools when collecting, storing, releasing, or destroying personally identifiable information on students. These guidelines are set forth in federal legislation and state educational plans and include any participating agency that collects, maintains, or uses personally identifiable information.

Under laws governing confidentiality, participating agencies must have written procedures, in the primary language of the parents, that notify parents of their right to inspect records, and how information is stored, disclosed, retained, and destroyed. In addition, annual notice must be given to parents on their right to file a complaint or amend their child's records.

Parental Rights

Participating agencies, including local educational agencies (LEA), have specific responsibilities to parents in regards to confidential information. Most importantly, each LEA must have a "written authorization for release of information" form that designates that the school district will not release any personally identifiable information regarding a child except with written permission by the parents, specifying the records to be released, reasons for such release, and to whom the records would be released. This information may not be distributed to any other party without the written consent from the parents and may only be used for the purpose for which the disclosure was made. The LEA must have an established procedure to be followed in the event a parent refuses to give consent (Underwood & Mead, 1995).

One individual (e.g., a school administrator) in each participating agency is designated to provide oversight in all matters relating to confidentiality issues. Parents must be given the

name of this individual and to whom they may address their requests to examine their child's records. All persons who participate in the collection or use of confidential information must receive training in the policies and procedures for handling confidential data. Each school district or participating agency must maintain for public inspection a current listing of employees by name and position who may have access to the personally identifiable data. The agency must obtain parental consent before disclosing student information to anyone other than those officials of educational agencies using the records for educational purposes. Anyone, other than personnel specified in the current listing of persons having access to student information, must receive parental permission and sign a record of disclosure. A record of disclosure must be kept on each request permitting access to confidential information. The disclosure must show the name of the party, the date access was given, and the purpose for which the party is authorized to view the records (Underwood & Mead, 1995).

LEAs may presume that either parent of the student has the authority to inspect records of the student unless the LEA has been provided evidence that there is a legally binding instrument, state law, or court order governing such matters as divorce, separation, or custody, which provides to the contrary. Authorized representatives of the parents have the right to inspect and review records, with written parental consent. There are instances when written parental consent is not necessary. These have been referred to above in the discussion of FERPA.

Additionally, LEAs must permit a parent of a student or eligible student who is, or has been, in attendance in the district to inspect and review the educational records of the student. States may grant students access to records prior to age 18 (Underwood & Mead, 1995). Such requests for student records shall be complied with within a reasonable time and in no event longer than 45 days after the request has been made. The right to inspect and review educational records by parents includes reasonable requests for explanations and interpretations of the records and the right to obtain copies of the records. A fee for copies may be charged, although not for retrieval of information, unless the fee would prevent a parent from having access to the records.

Parents also have the right to have their child's records amended. If a parent believes that records on file are inaccurate, misleading, or violate the privacy or other rights of the student, the parent may request that the agency amend the records. The agency shall decide whether to amend the record in a timely manner. If the school district, or agency, decides to refuse to amend the records, it shall so inform the individual and at the same time advise the parent(s) of the right to a hearing. Parent(s) or eligible students have the right to place a statement in the record setting forth the reasons for disagreeing with the decision of the school district.

After records are no longer needed for educational purposes, they may be destroyed within 5 years, unless there is an outstanding request to inspect or review them. Under IDEA personally identifiable information on a student with disabilities may be retained permanently unless the parents or eligible student request that it be destroyed. Destruction of records is the best protection against improper or unauthorized disclosure. However, the records may be needed for other purposes. The agency should remind parents that the records may be needed by the student or parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain a permanent record of the student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed without time limitation.

In addition to the rights of parents, school personnel are often confronted with the difficult task of responding to requests for information from noncustodial or nonresidential parents. Under FERPA, "parent" means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian. Further, the legislation states that an educational agency shall give full rights under the Act to either parent, unless

the agency has been provided with evidence that there is a court order, state statute, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights. This means that a school district must provide access to parents unless there is a legally binding document that specifically removes that parent's FERPA rights to have access to knowledge regarding his or her child's education. These provisions may best be understood by separating custody, which determines where a child will live and the duties of the person with whom the child lives, and FERPA, which establishes the parents' right of access to and control of education record related to the child (U.S. Department of Education, 1999). School counselors must be aware of state laws which may affect these rights as well as school policy. As families redefine themselves, the definition of parent is sometimes blurred and the decisions difficult, many times resulting in litigation.

Roles and Responsibilities of Counselors and Educators

Confidentiality is a concept that is based on ethical principles (American Counseling Association, 1995) and is important to the counseling relationship because it facilitates trust and the establishment of a therapeutic relationship. It is important to note, however, that what is ethical behavior under professional codes of ethics is not necessarily legal and vice versa. However, confidentiality has gained legal status throughout the United States through licensing laws for counselors with several states specifically granting the right of privileged communication to school counselors. It should be noted that this privilege belongs to the client and not the counselor.

Breach of confidence is considered unprofessional conduct and is grounds for disciplinary action and sometimes legal action (McCarthy & Sorenson, 1993). There are exceptions however. For example, confidentiality does not promise complete nondisclosure in cases of child abuse or when the school counselor believes there is imminent danger to the client or others. Educators are required to report suspected child abuse and neglect to the proper authorities. In fact, all states have enacted legislation that imposes penalties against counselors and educators who fail to file a report of suspected child abuse (McCarthy & Sorenson, 1993). Other examples of the exception to nondisclosure address the counselor's duty to warn parents when they have information regarding a student's intent to commit suicide (American Counseling Association, 1995). *Tarasoff v. Regents of the University of California* (1976) is the defining case regarding a counselor's duty to warn potential victims they may be in danger. These duties may apply to a greater extent to teachers, school counselors, and school psychologists because their claim to privileged communication is not as widely recognized by law as that of psychiatrists, attorneys, and doctors (*Tarasoff v. The Regents of The University of California*, 1976).

Currently under debate is the controversial issue concerning students with HIV or AIDS who are engaging in activities that may transmit the virus. The American School Counselor Association recommends members notify the sexual partners of HIV positive clients and the appropriate public health officials (McGowan, 1991). This is relevant when clients refuse to disclose the information on their own.

Privileged communication is a legal concept that is defined by statute and applies to communication that originates in a confidential relationship. As previously noted, some states have enacted specific right of privileged communication for school counselors, others have not. A recent court decision known as the Jaffee decision may have given mental health counselors privileged communication in federal cases. The U.S. Supreme Court held that the communications between psychotherapists and their patients are privileged and do not have to be disclosed in cases heard in federal court (*Jaffee v. Redmond et al.*, 1996). This case has yet to be tested and does not apply to cases other than those in federal court (Remley,

Herlihy, & Herlihy, 1997).

Additionally, federal regulations under the Drug Abuse Office and Treatment Act (1976) now guarantee confidentiality to youths receiving alcohol and other drug services. These laws and regulations protect any information about a youth if the youth has received alcohol and/or drug related services of any kind including school-based identification. Any individual making an unauthorized disclosure faces a criminal penalty and a fine. When a teacher, counselor, or other school professional identifies student behaviors that could indicate a drug and/or alcohol problem, they can discuss this with the student or other school personnel. However, from the time an evaluation is conducted and/or a student assistance program begins alcohol or drug related counseling, the federal regulations are in effect (Coll, 1995).

Conclusion

There are many facets to confidentiality and clear guidelines as to the roles and responsibilities of professionals involved with students. Educators and school counselors alike need to be informed of the state and federal laws as well as local school policies so they are aware of the professional implications. School records, confidentiality, and privileged communications overlap and may cause conflict between ethical and moral obligation, and legal responsibility. Educators and counselors may look to professional codes of ethics and the law for guidance when faced with these issues. It should be emphasized however that many times there are no clear answers and that many gray areas still exist.

Although it is impossible for school counselors to be fully aware of all legal principles affecting their work, it is essential that they continually seek to stay abreast of changes in legal and ethical dictates that affect confidentiality. Professional associations such as the American School Counselor Association and the American Counseling Association produce documents that update counselors on ethical and legal changes. The text *Legal Aspects of Special Education and Pupil Services* (Underwood & Mead, 1995), Henderson and Hall's (1998) chapter on ethical and legal issues, and various Internet websites such as the American School Counselor Association (<http://www.schoolcounselor.org/>), the Department of Education's online pamphlets (<http://www.access.gpo.gov/nara/cfr/>) and AACRAO Government Relations (<http://aacrao.com/policy/govrel>) are excellent resources for school counselors to stay abreast of changes in legal and ethical policy. In addition, school counselors must remember to consult with one another, use standards of best practice as accepted by their particular institution, and remain aware of changes as they occur in the field of school counseling at the state and national levels. School counselors may wish to contact their state school counselor association for information on laws governing practice in that particular state. Ultimately, both educators and counselors must see that the best standards of practice are continually maintained with regard to confidentiality in order to best serve the students with whom they work.

Consent Exceptions

Informed Consent is not necessary when:

1. Disclosing information to school officials, including teachers, who are determined to have legitimate educational interest in the record
2. Complying with a judicial order or subpoena
3. Authorized federal, state, or local officials, in connection with the audit and evaluation of a federally or state-supported program, request student information
4. An emergency requires information to protect the safety of the student or others
5. Parents of an adult pupil who is dependent on the parent for federal income tax purposes request information

6. The officials of other schools in which the student seeks to enroll request information, provided the opportunity for a hearing is allowed
7. The student applies for financial aid
8. Organizations conduct educationally related studies, ensure the confidentiality of the information, and the data is destroyed in a timely manner (FERPA, 1974; Underwood & Mead, 1995).

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