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## School counseling and confidentiality

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## School counseling and confidentiality

### Abstract

School counselors are continually challenged with legal and ethical issues. According to Remley (2002), school counselors seem to face more legal and ethical issues than counselors who practice in other settings. Numerous situations or topics can be placed under the term legal issue or ethical issue, however, this author has chosen to concentrate on the legal and ethical issue of confidentiality in counseling. There seems to be much confusion among school counselors dealing with confidentiality issues. According to Mitchell, Disque, and Robertson (2002) "Research indicates that counselors struggle when faced with issues surrounding confidentiality rights of minors and rights of parents" (p. 156). Clarification is needed regarding what confidentiality is, whom confidential rights belong to in the school setting, and when to breach these confidentiality rights. In this paper, the meaning of and the need for confidentiality will be clarified. Informed consent practices and rights of minors, parents, and third parties will be addressed. Finally, record-keeping procedures, how to respond to demands for information, and the limitations of confidentiality will be addressed.

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SCHOOL COUNSELING AND CONFIDENTIALITY

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According to Remley (2002), school counselors seem to face more legal and ethical issues than counselors who practice in other settings. Numerous situations or topics can be placed under the term legal issue or ethical issue, however, this author has chosen to concentrate on the legal and ethical issue of confidentiality in counseling. There seems to be much confusion among school counselors dealing with confidentiality issues. According to Mitchell, Disque, and Robertson (2002) "Research indicates that counselors struggle when faced with issues surrounding confidentiality rights of minors and rights of parents" (p. 156).

Clarification is needed regarding what confidentiality is, whom confidential rights belong to in the school setting, and when to breach these confidentiality rights. In this paper, the meaning of and the need for confidentiality will be clarified.

Informed consent practices and rights of minors, parents, and third parties will be addressed. Finally, record-keeping procedures, how to respond to demands for information, and the limitations of confidentiality will be addressed.

Considering the fact that school counselors are dealing with more legal and ethical issues than counselors in other settings (Remley, 2002), it is important and necessary for counselors to be educated about their rights and responsibilities as a professional. Confidentiality with clients in the counseling setting can be a difficult topic to understand, especially when dealing with minor clients in the school setting due to the confusion of whether confidentiality rights belong to minor clients or to their parents. In order for counselors to do their job effectively, they need to be aware of rights of the client and the counselor, as well as what confidentiality is and its limitations. Keeping sessions confidential may be the key to forming trusting and comfortable counselor/client relationships. However, situations such as the Tarasoff case have raised questions in the minds of counselors about when parents, guardians, and other third parties have the right to information revealed in counseling sessions.

The purpose of this paper is to educate and inform school counselors about the topic of confidentiality: what it is, why we need it, and the rights associated with confidentiality. In addition, keeping confidentiality and the limitations of it will be described.

### Confidentiality, Privacy, and Privileged Communication

At times, the words confidentiality, privacy, or privileged communication, are used interchangeably. These words do have very similar meanings, but there are important distinctions among them.

### *Confidentiality*

Confidential, as defined by Webster's dictionary (2001), means "entrusted with private or secret matters" (p.305). When a client enters a counseling relationship, he or she has a right to confidentiality, which implies that the information shared in the counseling session will remain confidential. The counselor, in turn, has the legal and ethical duty to keep that information confidential.

Confidentiality between the counselor and client is important for two main reasons. First and foremost, genuine counseling does not occur without the client trusting his or her counselor. Building that necessary trust starts with assuring the client that what he or she says in the session will remain confidential. If a client does not feel the information revealed in the counseling session will remain confidential, the client may not disclose. Stone and Isaacs (2003) stated that "Counselors must have the trust of minor clients or these students will not seek help or share information when there is danger to themselves or others" (p.141). Counselors should always remember that they are there for the child and should avoid doing anything that may jeopardize the relationship. In addition, it is the counselor's ethical and legal obligation to keep information from the counseling sessions confidential. Breaking confidentiality may have serious legal and professional consequences.

There are, however, limitations to the promise of confidentiality.

According to Mitchell, Disque, and Robertson (2002), both the law and the ethical codes agree that "... confidentiality is to be broken in cases where child abuse is suspected, in cases of harm to self such as attempted suicide, and in cases where clear and imminent danger to others is threatened" (p.156). These limitations will be discussed more thoroughly in this paper.

### *Privacy*

According to Stromberg and colleagues (1993, as cited in Corey, Corey, and Callanan, 2003), privacy refers to the "... constitutional right of an individual to decide the time, place, manner, and extent of sharing oneself with others" (p.199). The preamble of the American School Counseling Association's Ethical Standards for School Counselors states "Each person has the right to privacy and thereby the right to expect the counselor-client relationship to comply with all laws, policies, and the ethical standards pertaining to confidentiality" (Guillot-Miller & Partin, 2003, p.53). Privacy for a minor client may be an issue counselors need to address when situations arise such as parents wanting access to their child's school records or third parties wanting access to a client's diagnosis and prognosis. In these situations, the client may not be given the right to decide if, when, or where the information will be shared, or how much information will be revealed. Allowing parents access to private information regarding their minor children may seem to violate the children's right to privacy. Although the

children may feel their rights are violated, parents have legal rights that allow them to be informed of certain information because the federal Family Educational Rights and Privacy Act gives parents the right to review the education records of their minor children (Dickson, 1998).

In order to help minimize privacy issues, counselors and other professionals should inform their clients that information such as school grades or records may be revealed to parents. Furthermore, counselors should always exercise caution when discussing work publicly. When writing reports or consulting, they should only reveal what is necessary to the purpose of the communication. One last caution area involves using fax machines, telephones, or computers. It is the counselors' responsibility to make sure fax transmissions and emails arrive with the confidential information securely protected, and that telephone calls are made in a private area and are kept professional and brief.

### *Privileged Communication*

According to Corey et al. (2003), "Privileged communication is a legal concept that protects against forced disclosure in legal proceedings that would break a promise of privacy" (p.198). Originally there was some confusion as to whether or not school counselors were protected by privileged communication laws because the laws in many states covered professional mental health therapists and not school counselors. In 1974 the Privileged Communication Committee of the American School Counseling Association (ASCA) conducted a

survey and found that 16 states provided full or partial protection to school counselors (Sheeley & Herlihy, 1987). However, these privileged communication laws do not automatically exempt counselors from testifying in court. There are many factors that determine what information may or must be revealed in court testimony, and counselors should always check their state policy regarding privilege communication laws.

### Informed Consent

O'Donohue and Ferguson (2003) defined the informed consent process as "...the proper occasion for an explicit explanation of the client's rights and the limits of confidentiality" (p.290). Informed consent allows the client the opportunity to consider the consequences of disclosing information in the counseling session. Typically, informed consent discussions take place early on in the counseling process; however, counselors should view it as an on-going process and not try to cover every possible consideration in the first session (Glosoff & Pate, 2002). The counselor will also want to consider the age of the client when discussing informed consent issues and adapt the information to the comprehension level of the client (O'Donohue & Ferguson, 2003). For example, describing confidentiality to a seven-year-old will need to be done more simply than when describing it to a fifteen-year-old. Allowing for questions from the client regarding informed consent is also very important.

According to Corey et al. (2003), clients also have a right to understand in advance the circumstances under which the counselor is required or allowed to share information about the client to third parties. If clients are not informed of exceptions in regard to confidentiality, they have not made a genuinely informed consent to treatment (Corey et al. 2003).

According to Stone and Isaacs (2003), the counselor is often times the one who is seen as the critical person for receiving information about the threat of violence or identifying students who may be possible perpetrators. The counselor's role as this recipient is far less complicated with an informed consent policy or guideline to help protect minors while also responding to the rights of parents and society (Stone & Isaacs, 2003).

One last piece of information regarding informed consent is that at times counselors need to audio or video tape their counseling sessions with clients. According to Fisher (2003), counselors must obtain permission from the client, or from the parent or legal guardian in the case of counseling minors, before audio or video images of the client may be taken.

### Rights of Minors

Eighteen is typically considered to be the legal age of majority, therefore persons under the age of eighteen can legally be defined as minors. Virtually all school children under this definition would be classified as minors. Keeping that in mind, Remley and Herlihy (2001) noted that the ethical right to privacy in the

counseling relationship belongs to the minor, however, the legal right belongs to his or her parent or guardian. This is the basis of much controversy over rights of minor clients versus rights of parents or legal guardians. Does the school counselor maintain client confidentiality at all times which is his or her ethical and professional duty, or does the counselor break confidentiality when dealing with minor clients in order to actively involve parents and guardians in a process that may be affecting their children's lives?

Many counselors believe their duty of confidentiality lies with the client and not the parents. Remley and Herlihy (2001) stated that school counselors do not need parental permission prior to providing counseling to students unless there is a school policy or state or federal law stating that they do. In addition, Welfel (2002) noted that minors' rights have increased since a 1967 Supreme Court ruling that concluded that equal protection granted by the Fourteenth Amendment and the Bill of Rights was not solely for adults (Welfel, 2002). These are two indications that laws regarding confidentiality among minors in counseling are unclear.

Daniels and Jenkins (2000) compiled a summarized list of parental rights in school settings. They stated that parents have the right to:

- Withdraw their child from religious worship or religious education
- Receive information about the context of school sex education programs

- Withdraw their child from sex education sessions (apart from the national curriculum)
- Opt out of medical and dental examinations of their child at school
- Make a complaint about the school's discharge of its responsibilities regarding the curriculum
- Receive reports on the child's progress at school
- Be consulted in the making of an Education Supervision Order for their child
- Appeal against a decision by the head teacher to exclude their child permanently from school
- Be informed about and vote in a secret ballot on charges in the school's grant-maintained status (p.76).

Although this is a somewhat extensive list, one must note that nowhere does it state that parents or guardians have the right to be informed of confidential discussions between counselors and clients (Daniels & Jenkins, 2000).

Corey et al. (1998) stated, "If parents or guardians of minors request information about the progress of counseling, the therapist is expected to provide some feedback" (p.204). This may indicate some feedback can legally be expected however specific information does not need to be revealed. Welfel (2002) noted the age and maturity of the minor is usually directly related to whether or not confidentiality is honored. The maturity of the minor is based on

the minors' understanding of the nature, risks, and benefits of counseling which would impact their ability to give informed consent (Welfel, 2002). Thus, there appears to be a link between the degree that students understand the rights and issues of the counseling relationship and the degree that confidentiality is honored. Generally, the more mature the minor, the greater the measure of confidentiality that young person is given in counseling.

The American School Counselors Association (ASCA) seems to be conflicted in regards to its Ethical Standards for School Counselors. It states both the need to respect minor clients' confidentiality in counseling sessions as well as the need to respect the rights and responsibilities of parents and guardians (Mitchell, Disque, & Robertson, 2002). The bottom line is, school counselors need to be aware of state laws and always use professional judgment regarding when, how much, and to whom he or she reveals confidential information. This will assure that counselors are acting in "good faith" for the betterment of clients.

### Responding to Demands for Information

#### *Demands from Parents*

Remley and Huey (2002) designed an ethics quiz for school counselors in order to review the American School Counseling Association (ASCA) Ethical Standards of School Counselors and the American Counseling Association (ACA) Code of Ethics. One of the scenarios on the quiz is as follows:

A middle school counselor receives a call from the mother of a student the counselor has been seeing recently related to the student's reluctance to participate in group activities. The student has been talking to the counselor about his shyness, anxiety around peers, negative self-concept, and interest in developing more self-confidence. The mother tells the counselor that her son has told her he is seeing the counselor. The mother thanks the counselor for talking to her son, asks what her son has been talking about in the counseling sessions, and inquires as to whether there is any way in which she can be helpful. The counselor thanks the mother for her call and explains that the counseling relationship is confidential and that she cannot disclose what the student has been talking to her about. She tells the mother she will contact her if there is anything she needs to know (p.5).

Would you agree or disagree with the counselor's response in this situation?

Remley and Huey disagreed. The American School Counseling Association (ASCA) standards (1998) require school counselors to consider the ethical responsibilities to the student while still providing parents with accurate and relevant information in a caring manner. The ACA code allows parents or guardians to be involved in the counseling process as appropriate (Remley & Huey, 2002). Remley and Huey felt in this situation that the ethical obligations to both student and mother should have been met. One possibility would be for the

counselor to ask the client to discuss with his mother information regarding his sessions. A second possibility would be to have a counseling session with both the mother and the son. One final possibility would be for the counselor to provide general information to the mother regarding her son's sessions (Remley & Huey, 2002).

Respecting confidentiality of minor clients as well as providing parents and guardians with the information they may rightfully need or want is difficult to do. According to Kaplan (1996), some parents complain about counselors not allowing parents to make informed decisions about their child's involvement in counseling activities. For example, small group counseling for children of alcoholics may be called a share group, which can be misleading for some parents (Kaplan, 1996). So what can school counselors do to respond to the demand for information from parents and guardians? Mitchell et al. (2002) offered a few suggestions.

First, the counselor needs to ask the client if the release of information to a parent is something he or she wants. If the client gives up his or her right to confidentiality, there is no conflict regarding whether or not to disclose the information. If the client does not wish for information to be shared with his or her parent, the counselor may want to practice empathetic listening skills and allow the parent to vent his/her emotions. School counselors need to be aware of where the parent is coming from and the concerns he or she may have for his or

her child. This process will help develop a rapport between the counselor and parent and may help diffuse the issue of the confidential information being revealed.

A second approach is for the counselor to reframe the parents' concerns in a manner that may provide an alternate viewpoint regarding their child's growth in dealing with problems. Encouraging the parent to understand that children sharing personal information with an outside source is an important developmental step and shows the child's willingness to solve problems without having to be overly dependent on family members.

One last approach for counselors may be to share the ethics codes with parents, stressing the significance of confidentiality. The counselor at this point may also want to explain that his or her job is not to be the informer between clients and their parents. If parents are still requesting information, counselors may also suggest that the parent ask his or her child about the sessions. In addition, counselors should be working with the minor clients to teach the communication skills necessary to initiate a discussion with his or her parents regarding the counseling sessions (Mitchell et al., 2002). If all of the above approaches fail, the school counselor may still be left with the decision of whether to breach confidentiality or to remain silent. A convincing argument can probably be made either way, and again, the counselor will need to use his or her best judgment when deciding how much, if any, information should be revealed.

*Demands from Faculty and Administration*

Parents are not the only ones who demand information on counseling clients. School counselors are often faced with other school personnel such as staff and administrators who require information on student clients. Ferris and Linville (1985) suggested that before any incidences arise, school counselors explain to the school staff the function of a school counselor and the implications of confidentiality and privileged communication and why it is important. Ferris and Linville also recommended that school counselors should not contribute to discussions where confidential information regarding a student may be disclosed. Glossoff and Pate (2002) suggested that the counselor start each year by sending information to parents, teachers, and administrators about the role of the counselor, possible benefits of counseling, the nature of guidance and counseling activities, and pertinent information about confidentiality. In addition, counselors may wish to educate students about these issues through assemblies or class presentations. Informing staff, students, and parents about the parameters of confidentiality when it is not related to one specific child is the first step.

School counselors are often in situations such as individualized educational program meetings for students where others attending may have a general idea of the student's counseling goals in relation to academic and social goals. The counselor is expected to report on the students' progress in reaching these goals. However, in these situations, the counselor still needs to reveal only

essential information and should not disclose specific details of the counseling sessions. According to Glossoff and Pate (2002), two good questions for counselors to ask themselves before disclosing information in these situations are "Do team members need to know this?" and "How will knowing this help the team make decisions that will facilitate the student's educational progress?" (p.24).

At times school counselors may have student interns who are counseling under their supervision for a period of time. According to Herlihy, Gray, and McCollum (2002), counseling interns may sometimes be hesitant to share information with the supervising counselor due to the ethical obligation of confidentiality. Interns and the supervising counselor should understand that sharing confidential information with someone who needs to know for supervision purposes is acceptable.

### Record Keeping

According to Corey et al. (2003), not only is record keeping required in all settings, it may also be the least expensive and most effective form of liability insurance. Failing to keep records may deprive counselors of information and evidence he or she may need if ever involved in a disciplinary action (Corey et al., 2003). This is especially true when documenting crisis situations. Counselors who keep records of their actions regarding clients who may potentially harm themselves or someone else may have a safeguard in the event of a lawsuit.

In school settings, it may be difficult to keep up with record keeping due to student-to-counselor ratios, which may be as high as 1-to-400. Regardless of ratios however, it is important that school counselors attempt to maintain records on students in order to demonstrate that the quality of counseling is in line with an acceptable standard of care. This may be especially important when working with students experiencing severe social or emotional problems (Corey et al., 2003).

According to Luepker (2003), records kept on students should convey in plain language the work the student is doing in counseling to help solve his or her problems. The notes added to a client's record should be done as soon as possible after the session and should include both the time and the date. Counselors entering records into the computer should check to make sure the computer program stamps the date and time on each entry. In case of a subpoena, this would protect the counselor from being accused of adding or deleting material at a later date (Corey, 2003).

School counselors must also be aware of the difference between administrative and clinical records. According to Corey et al.(2003), administrative records are cumulative files, which are available to other school personnel as well as parents. Clinical records are the case notes, which document important events in the counseling relationship. Counselors and other staff members must remember to refrain from making negative or judgmental

*comments in a student's cumulative folder as these folders follow the students from school to school and can provide a slanted or unfair opinion of the student.*

### Limitations to Confidentiality

There are three specific instances when the client's right to confidentiality must be broken. The Ethical Standards for School Counselors (ASCA, 1998) and the Code of Ethics and Standards of Practice (ACA, 1995) both agree that counselors must take action and break confidentiality if first, clients are in danger of hurting themselves, second, if clients are in danger or hurting someone else, or third, if there is suspected child abuse or neglect (ASCA, 1998, & ACA, 1995).

#### *Reporting Potential Harm to Self*

According to Corey et al. (2003), "As part of the informed consent process, therapists must inform clients that they have a legal and ethical obligation to break confidentiality when they have good reason to suspect suicidal behavior" (p.219). This legal obligation applies to all students, even those who feel it is their life and they can take it if so inclined. Even with this legal obligation to report, however, many counselors are still conflicted when dealing with the issue. The conflict among counselors reporting suicidal behavior is not a conflict over whether or not to break confidentiality and report, the conflict lies in deciding when to take the suicidal behavior or hints seriously enough to report the situation. Determinations are hard to make; however, counselors are expected to recognize warning signs, and although every suicidal threat is to be taken

seriously, counselors must exercise their professional judgment in deciding whether the client is currently at risk. Remley and Herlihy (2001, as cited in Corey et al., 2003), "counselors can be accused of malpractice for neglecting to take action to prevent harm when a client is likely to commit suicide, yet they are also liable if they overreact by taking actions that violate a client's privacy when there is not a justifiable basis for doing so" (p. 219). Counselors are not expected to always make correct assessments of suicide risk. What counselors are expected to do is make assessments from an informed position and carry out their professional obligations in a manner comparable to what other professionals would do in similar situations. Hermann (2002), conducted a study of legal issues encountered by school counselors and perceptions of their preparedness to respond to legal challenges. Out of the two hundred and seventy three counselors who participated, nearly three-fourths felt well prepared to determine if a client was suicidal. According to Corey et al. (2003), if a counselor does make a determination that a student is at risk of suicide, he or she should take the least intrusive steps necessary to prevent the harm.

### *Reporting Potential Harm to Others*

Corey et al.(2003) stated that breaching confidentiality to warn or protect potential victims is permitted and often required by law. Probably the most well known case involving the duty to warn is the Tarasoff v Regents of the University of California, 1974. This case involved a graduate student at the University of

California Berkeley's counseling center who threatened to kill his girlfriend during a therapy session and then carried out the threat. The girlfriend's family subsequently sued the school because the therapist had failed to warn the girlfriend of the potential danger. According to Isaacs (1997), the court ruled that when a patient presents a danger of violence to themselves or someone else as determined by the therapist or the standards of the therapists' profession, he or she has an obligation to protect the intended victim against such danger. This ruling impacted the view mental health therapists had of their legal responsibilities.

However, in the school setting, especially in elementary schools, counselors see themselves as removed from the implications of Tarasoff. It has only been more recently that school counselors are finding themselves faced with duty to warn issues, in part because counselors are finding that their young clients are more frequently exposed to violence and more willing to commit violent acts. According to Isaacs (1997), there has also been an increase in cases involving young students bringing weapons to school or threatening to harm themselves or others.

A school counselor's duty to warn may be governed by state statute, ethics, case law, school board policy, or a combination of these (Isaacs, 1997). Regardless of what governs the decision however, the fact remains that school counselors are faced with breaching confidentiality and losing trust, or maintaining confidentiality in cases where there is a potential risk of a third party

being in danger. Hermann and Remley (2000, as cited in Corey et al., 2003) stated,

As school violence and school security increase, students are likely to continue to engage in court battles against educators seeking lost constitutional protections. And educators face even more litigation as those injured seek to find someone to blame for the unfortunate societal phenomenon of guns and violence in schools (p.215).

When dealing with duty to warn obligations, school counselors must realize the importance of documentation. Documenting work when dealing with potentially violent clients such as keeping accurate notes of threats and recording steps the counselor has taken to protect others can be useful in protecting the counselor should legal implications arise. It is very difficult to decide when breaching confidentiality is justified to protect potential victims, and school counselors may want to consult with a supervisor, another professional, or an attorney when deciding whether or not to breach confidentiality.

#### *Reporting Suspected Child Abuse*

According to Dove, Miller, and Miller (2003), each state has its own unique definition of child abuse, but they offered this generic definition: "Any mistreatment or neglect of a child that results in non-accidental harm or injury and which cannot be reasonably explained. Child abuse can include physical abuse, emotional abuse, sexual abuse, and neglect" (p.21).

Legislators feel that because educators have prolonged contact with children as part of their professional duties, they are more likely to observe changes in the health and behavior of children they deal with than others. Because of this ability to observe, educators are placed in a position of responsibility to protect children. This responsibility to protect children is so great that "... all 50 states have enacted laws that mandate school professionals to report suspected child abuse and neglect" (Dove et al., 2003, p.23).

Counselors not only have a legal obligation to report, they also have an ethical and moral obligation. Helping students realize their potential as an effective member of society, and protecting them from conditions that may be harmful to their learning or health and safety is a counselor's moral and ethical obligation. Not reporting suspected child abuse would go against these obligations.

The mandatory reporting system has been set up to accept a high rate of false identifications of suspected abuse in order to maximize the number of accurate reports. This means that if counselors or other educators even suspect the possibility of abuse, they must report to child protective services or law enforcement, regardless of whether they believe or can prove the abuse is truly occurring (Dove et al., 2003). When indicators do arouse reasonable suspicion, the abuse must be reported immediately.

Educators need to understand that the legal mandate to report must be made by the original observer. What this means for counselors is that if the counselor is the one who suspected the abuse, they must also be the one to report it. In addition, if another faculty member suspects the abuse, the counselor cannot report the suspected abuse for that faculty member.

When reporting suspected child abuse, counselors are advised not to notify parents prior to contacting child protective services or law enforcement. According to Dove et al.(2003), contact with parents may interfere with investigations and it violates confidentiality of the student. Counselors should also understand that mandated reporters are protected from liability when reports are filed in good faith, and counselors are actually putting themselves at risk for liability by failing to report.

### Conclusion

Confidentiality issues in school counseling can be very complex and confusing for some counselors. Knowing the right thing to do in all situations is not always possible, and school counselors need to remember that they are there for the student, and any action they take to help or protect the student is going to be a positive or necessary one. Reviewing state and school policies in dealing with confidentiality is important, as well as acting in good faith for the betterment of the client.

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