Legal and Ethical Considerations for School Counselors

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Training Agenda

- Part I: General Responsibilities and Risks
- Part II: Parents and Confidentiality
- Part III: Student Bullying
- Part IV: Student Health and Safety
- Part V: Enrollment and Attendance
- Part VI: Counseling on Sensitive Topics
Part I:
General Responsibilities and Risks

- The responsibilities of a counselor are defined by statute, and individual job descriptions issued by the school, as well as local district policies, rules and regulations.

- The counselor’s primary responsibility under statute is to counsel students re: academic, career, personal and social abilities.

- Other common responsibilities include:
  - Building the master schedule, changing student classes
  - Testing coordination
  - Section 504 coordination
Part I: General Responsibilities and Risks

- Standard of Care in Performing Duties
  - Depends on the license held by the counselor
  - The SBEC school counselor certification does not involve a specific standard of care.
  - School counselors must comply with the Texas Educators’ Code of Ethics that applies to other educators.
  - Standards of care or ethical standards created by organizations such as the American School Counselor Association (ASCA) serve as guidance for school counselors in the absence of a specific standard of care put in place by the state.
Part I: General Responsibilities and Risks

Governmental Immunity

- A defense available to Texas educators by virtue of their status as government employees.
- Protects the educator from the filing of a lawsuit and/or being held liable in certain situations.
- Claims barred by immunity are primarily personal injury claims, such as:
  - Playground injuries
  - Slip-and-fall accidents
  - Sports-related injuries
  - Injuries/accidents in the classroom
Part I: General Responsibilities and Risks

There are limits to the protection of governmental immunity.

Educators have no immunity for criminal acts.

Other exceptions to immunity include:

- Use of excessive force in the disciplinary process
- Use, operation, or maintenance of a motor vehicle
- Failure to report child abuse or neglect
- Certain federal civil rights claims filed under Section 1983 alleging violation of Constitutional rights.
Part II: Parents and Confidentiality

- Counselors are often caught in the middle of family disputes.

- Is there a difference between the rights of married parents and the rights of divorced or separated parents?
  - Only to the extent the general rights of a parent have been modified or restricted by a valid court order.
  - Generally, all parents have equal rights to participation in their child’s education, which includes making educational decisions, and receiving student records and information.

- Dad insists that you recap for him every conversation that you have with mom...do you have to?
  - No. Dad may have the right to receive information about his child, but he does not have any right to know what has been discussed between you and mom. Not to say that information is confidential, but unless you have it in written form, you have no obligation to recite it back to dad.
Part II: Parents and Confidentiality

**Access to Student Records**
- The Family Educational Rights and Privacy Act (FERPA) controls.
- Other state and federal laws address the retention or disclosure of student records in specific situations.

**FERPA – in a nutshell** (See board policy FL)
- Federal law enforced by the Department of Education and tied to federal funding received by educational institutions
- Grants parents the right to access and prevent disclosure of student education records
- Limits a school’s ability to use or disclose student information without parental consent
Part II: Parents and Confidentiality

What records are covered by FERPA?

Start with the assumption that every document which identifies a student (by name or otherwise) and relates to that student’s status as an enrolled student in your school is an education record for that student.

What records are NOT covered by FERPA?

Personal notes or sole possession notes – designed to protect private notes and “memory aids” that are not and have not been accessed by or revealed to anyone else except a temporary sub for the maker.

Law enforcement records that are maintained for law enforcement purposes by law enforcement.
Part II: Parents and Confidentiality

What records are NOT covered by FERPA?

- Records of former students if the records record or relate only to events that occurred after the student graduated.
- Records of deceased students.
- Peer graded papers, as in classroom assignments and papers that are graded by other students.

Who has the right to access education records?

- Parents – including biologic, adoptive, foster, and any other individual standing in the place of the parent.
- Eligible student – once the student turns 18, s/he exercises the rights formerly exercised by the parents.
Part II: Parents and Confidentiality

Who else has the right to access education records?

- Parents of an eligible student – after the student turns 18, the parents may still access their child’s education records if the child is listed as a dependent for income tax purposes.

- School officials, including teachers, counselors, and any other school employees with a “legitimate educational interest” in the records (i.e., you need to review the records to do your job).

- Officials of another school where the student seeks or intends to enroll.

- Financial aid disclosures.
Part II: Parents and Confidentiality

Who else has the right to access education records?

- Anyone with a lawfully issued subpoena or court order.
- Anyone can receive “directory information” if the parent has consented to its release.
- Appropriate officials in a health and safety emergency, e.g.:
  - Disclosing the identity of a school shooter to police
  - Disclosing the identity of a student with a dangerous communicable disease to local health officials
- Anyone, if the records are sufficiently de-identified.
- This is not an exhaustive list, but note that law enforcement is NOT on this list.
Part II: Parents and Confidentiality

Responding to Requests for Student Records

- Requests from parents, eligible students, or their authorized representative:
  - Must provide requested access as soon as reasonably possible but no later than 45 calendar days after request is made.
  - Parent may review/inspect the records at the school free of charge.
  - May charge the parent for the cost of copies ($0.10 per page) if requested.
Part II: Parents and Confidentiality

- **Responding to Requests for Student Records**
  - Requests from anyone else:
    - Generally considered a request for public information under the Public Information Act.
    - 10 business days to take required action (with some exceptions).
    - Student records generally are not subject to disclosure under the PIA unless they can be sufficiently de-identified.
  - **Subpoena/Court Order/Warrant**
    - Can be disclosed if instrument is lawfully issued.
    - Send to district’s legal counsel for review.
    - Parents must be notified before disclosure.
Part II: Parents and Confidentiality

**Counselor-Student Communications**

- Trusting relationship between counselor and student often causes counselors to be uncomfortable when it comes to sharing the details of their communications.
- Texas law does not recognize special protection for counselor-student communications.
- A counselor’s personal notes can be withheld from disclosure under FERPA, but are subject to subpoena, court order or warrant for production.
- Counselors may also be asked to share this information with administrators, parents, or CPS investigators.
Part III: Student Bullying

- Law and board policy requires a school to take prompt action to address bullying.

- The counselor’s role as confidant is vital to the school’s ability to identify and address student bullying and harassment.

- Policies to know:
  - FFH (Local) – Discrimination and Harassment
  - FFI (Local) – Bullying
Part III: Student Bullying

Definition of Bullying (per Education code):

- Written or verbal expression, including through electronic means, or physical conduct that occurs on school property, at school events or activities, or in a school vehicle; and

- (1) The expression or conduct has the effect of physically harming a student, damaging a student’s personal property, or placing a student in reasonable fear of harm to person or property; or

- (2) The expression or conduct is sufficiently severe, persistent, and pervasive that the action or threat creates an intimidating, threatening, or abusive educational environment for the student.

The conduct must also exploit an imbalance of power between the student perpetrator and victim and interfere with a student’s education or substantially disrupt the operation of the school.
Part III: Student Bullying

Schools are required by state law to address bullying, but bullying itself is not a violation of the law.

Board Policy FFI (Local) typically requires:

- An employee who receives a report of bullying or has any reason to believe that bullying may be occurring must immediately make a report to the campus principal.
- Bullying should be promptly investigated and action taken to prevent recurrence of the conduct.
Part III: Student Bullying

- When bullying is based on a protected characteristic, it may amount to unlawful discrimination.

- Protected characteristics include:
  - sex/gender,
  - race,
  - national origin,
  - disability

- The school may be held liable if it knew or should have known of the conduct and did not take reasonable action to prevent or stop it.
Part III: Student Bullying

**Off-campus bullying**

- By definition, off campus bullying conduct isn’t “bullying” under state law.
- Often, off-campus bullying conduct is not subject to punishment or discipline by the school.
- In the alternative, counselors will often be asked to work with student perpetrators and victims towards appropriate social interactions.
- This counseling serves many purposes, such as showing that the school is taking proactive steps to address bullying, discrimination or harassment.
Part IV:
Student Health and Safety

- Abuse and Neglect
Part V: Enrollment and Attendance

- Enrollment of students by individuals other than their parent or legal guardian.
Part VI: Handling Dangerous Students

- Is there a duty to inform parents or administration that a student has threatened to commit suicide?
  - An affirmative duty? No.
  - But should you? Yes.

- What if a student asks that you not tell anyone about what you have discussed?
  - Understand that you cannot make that promise with absolute certainty.

- Is there a duty to warn staff or administration when a student makes a dangerous threat?
  - Staff – no
  - Administration – recommended, depending on the circumstances surrounding the threat and the manner in which it is made
Part VII: Counseling on Sensitive Topics

Can you refer a student to an outside health care provider?

Not unless the school first:

1. obtains written consent from parent or guardian;
2. discloses to the parent any relationship between the counselor/school and outside provider;
3. informs student and parents of alternate public or private sources of treatment available in the area;
4. obtains approval of appropriate school officials; and
5. specifically prohibits any disclosure of student education records to the outside provider except as allowed by law.
Part VII: Counseling on Sensitive Topics

When can a minor consent to medical treatment without parental consent?

- Child may consent to medical, dental, psychological, and surgical treatment by a licensed physician or dentist if the child:
  - Is on active duty with Armed Services;
  - Is 16 years old and financially dependent (lives separate from parent/guardian OR manages own financial affairs);
  - Consents to diagnosis and treatment of a communicable disease required by law to be reported;
  - Is unmarried and pregnant and consents to related treatment other than an abortion;
  - Consents to examination for drug or chemical addiction;
  - Consents for medical treatment for the minor’s own biological child if minor is unmarried and has actual custody of the child.
Part VII: Counseling on Sensitive Topics

When can a minor consent to counseling without parental consent?

- Suicide prevention
- Abuse
- Dependency