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**Legal aspects of the role of the public school counselor in North  
Carolina**

**Herndon, Eleanor Hunter, Ed.D.**

**The University of North Carolina at Greensboro, 1990**

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LEGAL ASPECTS OF THE ROLE OF THE  
PUBLIC SCHOOL COUNSELOR IN  
NORTH CAROLINA

by

Eleanor Hunter Herndon

A Dissertation Submitted to  
the Faculty of the Graduate School at  
The University of North Carolina at Greensboro  
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Approved by

  
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APPROVAL PAGE

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The role of the school counselor in North Carolina expanded greatly between 1970 and 1990. During the 1980s, counselors became increasingly involved with the American legal system as defendants and plaintiffs, friends of the court, expert witnesses, and witnesses of fact. Because of this association with the courts, counselors need to know and understand the laws and regulations pertaining to their role. This dissertation provides a comprehensive review of the critical legal issues facing the school counselor of the 1990s and pertinent laws and legislative enactments determining the legal aspects of the school counselor's role. This study compiled a resource of legal information, with particular reference to North Carolina, that could assist school counselors in making ethical and legal decisions. Based upon an analysis of the data, the following conclusions were drawn:

1. School counselors are unclear about their ethical and legal responsibilities to students, students' parents, and the school system.
2. Legal problems for school counselors exist in areas related to student privacy, child abuse reporting, and liability.
3. Counselors are legally vulnerable because they work with minors.
4. New state and federal laws and case law affects the school counselor's duties and responsibilities.
5. Counselors need staff development in the following areas: legal limitations of confidentiality with students, interpretation of laws and

legislative enactments affecting their jobs, and the relation of ethical standards to legal principles.

6. Counselor education programs need required formal coursework on ethical and legal issues.

7. Persons responsible for supervision of school counselors need current and accurate information about laws which affect school counselors.

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## CHAPTER I

### INTRODUCTION

The profession of public school counseling began in 1908 with a clear-cut function of providing vocational advice for young men. It has expanded to a role of services that include individual and group personal guidance and counseling, management of student records, and consultation with teachers, parents, and agencies.<sup>1</sup> The American School Counselor Association in 1988 adopted the following definition of the school counselor:

School counselors are specifically credentialed professionals who work in school settings with students, parents, educators, and others within the community. They design and manage comprehensive developmental guidance programs to help students acquire skills in the social, personal, educational, and career areas necessary for living in a multicultural society. School counselors accomplish this by using such interventions as guiding and counseling students individually or in small groups, by providing information through group guidance, by contributing to the development of effective learning environments, by providing student advocacy, and by consulting with others.<sup>2</sup>

The counselor has been described as "a front-line mental health professional and educator in the schools."<sup>3</sup>

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<sup>1</sup>Bruce Shertzer and Shelley C. Stone, Fundamentals of Guidance, 2d ed. (Boston: Houghton Mifflin Co., 1971), 40.

<sup>2</sup>American School Counselor Association Governing Board, Definition of a School Counselor (Alexandria, Virginia: American School Counselor Association, 1988).

<sup>3</sup>Walter R. Bailey, Norma K. Deery, Mary Gehrke, Nancy Perry, and Jim Whittledge, "Issues in Elementary School Counseling: Discussion With American School Counselor Association Leaders," Elementary School Guidance and Counseling 24 (October 1989): 5.

The literature has identified the following major social, political, educational, and economic influences that will impact on the counselor's role by the year 2000: violence, alcohol and drug abuse, intolerance, gang activity, physical and sexual abuse, sex education, computer technology, changing values, health practices, poverty, changing family structure, and childhood fears.<sup>4</sup>

Each of these has legal and ethical implications for counselors. In order to fully assist students and avoid litigation, it is important for counselors to understand their ethical codes, and be familiar with the pertinent state and federal laws.

The ethical codes of professional organizations require counselor members to "respect the integrity and promote the welfare of the client,"<sup>5</sup> but another standard suggests responsibilities are owed to other publics as well.<sup>6</sup> Knowing what to do to be most helpful and yet remain ethical and within legal boundaries can be confusing and complex. Counselors often find that they lack critical legal and ethical knowledge to make appropriate decisions when faced with a dilemma. Indeed, authors of Ethical Standards Casebook

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<sup>4</sup>Michael A. Crabbs, "Future Perfect: Planning for the Next Century," Elementary School Guidance and Counseling 24 (December 1989): 160.

<sup>5</sup>American Association for Counseling and Development, The Ethical Standards (Alexandria, Va.: American Association of Counseling and Development Press, 1988), B1.

<sup>6</sup>*Ibid.*, A2. "The member has a responsibility both to the individual who is served and to the institution within which the service is performed to maintain high standards of professional conduct. . . . The acceptance of employment in an institution implies that the member is in agreement with the general policies and principles of the institution. "

reported that school counselors rely heavily on personal opinion rather than the law as a yardstick for solving counseling dilemmas.<sup>7</sup>

A survey of school counselors in 1981 reported that 50 percent of the elementary school counselors surveyed believed that they should inform a minor's parents if a felony had been committed. Among the middle school counselors, 33 percent and among the high school counselors, 25 percent did not even respond to the question, which could indicate they did not know.<sup>8</sup>

Ten years, from 1978 to 1989, saw an increase in the litigation of school counselors, particularly in the area of negligence.<sup>9</sup> Prior to that time, it was principally teachers of physical education, vocational education, and science who had good reason to fear lawsuits for negligence.<sup>10</sup> In addition, the increase in school violence during the 1980s led to increased legal implications for school counselors.

The Center for Disease Control suggested in 1989 that 50 percent of the nation's eighth graders and 26 percent of the tenth graders will be involved in at least one brawl during a given school year.<sup>11</sup> With this increase in violence

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<sup>7</sup>R. Callis, S. K. Pope, and M. E. DePauw (eds.), Ethical Standards Casebook (Alexandria, Va.: American Association of Counseling and Development Press, 1982), 206.

<sup>8</sup>Carol A. Wagner, "Confidentiality and the School Counselor," Personnel and Guidance Journal 59 (January 1982): 305.

<sup>9</sup>Thomas S. Krieshok, "Psychologists and Counselors in the Legal System: A Dialogue with Theodore Blau," Journal of Counseling and Development 66 (October 1987): 69.

<sup>10</sup>*Ibid.*, 86.

<sup>11</sup>"Teens Careless with Health, Study Says," San Francisco Chronicle, 17 July 1989, B6.

at school, counselors are expected to diagnose which students are dangerous and are being held legally liable for their actions.<sup>12</sup>

Although the number of lawsuits against school counselors is not widespread, it is likely that litigation in the area of negligence will continue to increase.<sup>13</sup> Hudgins and Vacca cited three possible reasons for this increasing legal concern on the part of educators:

1. The law itself has become more complex; problems that were previously resolved easily and without challenge are more likely to reach court.

2. Today's electorate is better informed than ever before and therefore is more likely to challenge an educator's decision.

3. People have been encouraged to challenge school authority in court, because the courts have not only been more willing to entertain lawsuits, but have increasingly made judgments in the plaintiff's favor.<sup>14</sup> The fact that society is willing to litigate underscores the need for school counselors to have current and accurate legal information.

The outlook for counselor positions in the North Carolina public schools is positive. The 1988 Statistical Profile for North Carolina listed 1,982

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<sup>12</sup>Douglas R. Gross and Sharon E. Robinson, "Ethics, Violence and Counseling: Hear No Evil, Speak No Evil," Journal of Counseling and Development 65 (March 1987): 345.

<sup>13</sup>Louis Fischer and Gail Paulus Sorenson, School Law for Counselors, Psychologists and Social Workers (New York: Longman, 1985), ix.

<sup>14</sup>H. C. Hudgins and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, 2d ed. (Charlottesville, Va.: Michie, 1985), 23.

school counselors in North Carolina.<sup>15</sup> The Basic Education Plan for North Carolina, established by the State Board of Education and the State Legislature, proposes to allot one counselor for every 400 students by 1992.<sup>16</sup> The increasing number of counselors and expanded expectations for them heighten the need to ensure that current and accurate information is available regarding their legal duties and responsibilities. If North Carolina school counselors have access to and familiarity with the pertinent laws and court cases impacting upon their jobs, the possibility of encountering a lawsuit is greatly reduced.

#### Statement of the Problem

The role of the school counselor in North Carolina expanded greatly between 1970 and 1990. During the 1980s, school counselors became increasingly involved with the American legal system as defendants and plaintiffs, friends of the court, expert witnesses, and association with the courts as witnesses of fact.<sup>17</sup> Because of this, the obligation to know and understand legal boundaries and responsibilities has expanded. Laws and regulations in the critical areas of privacy,<sup>18</sup> liability,<sup>19</sup> and child abuse

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<sup>15</sup>North Carolina Department of Public Education, Statistical Profile: North Carolina Public Schools (Raleigh: North Carolina State Board of Education, Department of Public Education, 1988).

<sup>16</sup>The Basic Education Plan for North Carolina Schools (Raleigh: State Board of Education, 1984).

<sup>17</sup>Krieshok, 86.

<sup>18</sup>Lou Culler Talbutt, "Libel and Slander: A Potential problem for the 1980s," The School Counselor 30 (January 1983): 164.

reporting<sup>20</sup> increased during the 1970s and 1980s, making it likely that counselors will face increasing litigation in those areas in the 1990s.

Unfortunately, many school counselors do not have a working knowledge of the laws or ethical codes and have tended to rely on their personal beliefs and feelings when faced with ethical dilemmas.<sup>21</sup> This is partly due to the time constraints upon public school counselors and the high ratio of students to counselors.

Furthermore, an analysis of North Carolina graduate program catalogues reveals that no courses on legal issues are required in counselor education. In addition, there is no statewide handbook available from the state education agency which outlines laws and regulations affecting the role of school counselors.

If counselors are to work effectively in school settings and protect the rights of students and themselves, it is critical that, in addition to understanding the profession's ethical codes, they also know state and federal statutes and case law impacting upon their role. The problem for this study was to identify the critical legal issues impacting upon the counselor's duties in the school and to compile into one reference the state and federal statutes and case law which can serve as a resource to school counselors as they face ethical and legal dilemmas in their work.

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<sup>19</sup>Donald H. Henderson, "Negligent Liability and the Foreseeability Factor: A Critical Issue for School Counselors," Journal of Counseling and Development 2 (October 1987): 86.

<sup>20</sup>Pamela Paisley, "Prevention of Child Abuse and Neglect: A Legislative Response," The School Counselor 34 (January 1987): 226.

<sup>21</sup>William H. Van Hoose, "Ethical Principles in Counseling," Journal of Counseling and Development 65 (November 1986): 168.

### Purpose and Significance of the Study

The purposes of this study are (1) to identify from the literature the critical legal issues affecting the role of the school counselor, (2) to review and analyze state and federal statutes that determine the role of the school counselor in North Carolina in those areas, (3) to review and analyze case law relative to practice of school counselors in those areas, (4) to form a legal reference for North Carolina public school counselors to assist them in professional decision-making; and (5) to provide information to school systems for counselor inservice.

### Questions to be Answered

1. What are the critical school counseling issues which have legal implications for the 1990s?
2. What are the federal and state statutes and court decisions in those areas which determine the legal duties and responsibilities of school counselors in North Carolina?
3. Based on the results of court cases since 1965, what specific issues related to school counseling currently are being litigated?
4. What specific trends and issues can be identified from the analysis of the court cases?
5. In which of these areas should professional staff development and counselor education programs be enhanced in order to assist counselors to perform more effectively in North Carolina public schools?

### Delimitations of the Study

This study is limited to state and federal laws and court cases affecting public school counselors only, with particular reference to North Carolina, using the time frame 1965-1990.

### Methodology

The methodology used for this study was that of legal research as defined by Hudgins and Vacca,<sup>22</sup> which involves an analysis of judicial decisions from which legal principles are derived. The study of case law was supplemented with an analysis of statutory law, both state and federal, when applicable. Laws and court decisions were the primary sources. Secondary sources such as legal encyclopedias, law reviews, educational articles, and books offered supplementary information.

Legal research begins with the framing of a problem as a legal issue; for this study, the specific issue was the legal aspects of the role of the school counselor in North Carolina. The statutes that might control that issue were investigated and collected; then a bibliography of court decisions was built. Each court decision was read and analyzed around three major areas: the facts, the decision and rationale, and the implications. After all the relevant statutes and court decisions had been researched and analyzed, the secondary sources were examined.

In order to determine whether a need existed for this study, the investigator obtained a computer search of recent dissertation topics related to school counseling legal and ethical issues from Educational Research

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<sup>22</sup>Hudgins and Vacca, 24.

Information Center (ERIC), Education Information Services in Raleigh, North Carolina, and Educational Research Service in Arlington, Virginia. Summaries of dissertations were read in Dissertation Abstracts and where pertinent, complete copies of dissertations were borrowed and read.

Journal articles and other literature relevant to the subject were located using such research tools as the Index to Legal Periodicals, the Education Index, Current Law Index, Reader's Guide to Periodical Literature, Current Index to Journals in Education, and Resources in Education. In order to locate federal and state court cases, copies of the NOLPE School Law Reporter, School Law News, School Law Bulletin, Corpus Juris Secundum, Shepard's Citations, West Education Law Reporter, and the Southeastern Reporter, which covers North Carolina cases, were reviewed.

Cases were read and categorized according to the issues identified in the literature as having significant current legal implications for school counselors, particularly in the state of North Carolina.

### Organization of the Study

Chapter I includes an introduction, need for the study, statement of the problem, purpose and importance of the study, questions to be answered, delimitations of the study, the organization of the study, and definitions of terms.

Chapter II contains a review of the literature in which major legal issues for school counselors are identified. In addition, the professional ethical standards are discussed as they relate to these legal issues.

Chapter III presents a narrative discussion of the legal aspects of the role of the school counselor.

Chapter IV contains a listing and discussion of litigated court cases since 1965 affecting the role of the school counselor. The first category of cases includes United States Supreme Court decisions. Other cases selected for review were those related to the issues identified in the literature that pose legal dilemmas for school counselors. This chapter can serve as a legal reference for North Carolina school counselors.

Chapter V provides answers to the research questions posed in the first chapter as well as a summary of the study, conclusions drawn from the study, and recommendations to counselors and educators.

#### Definition of Terms

For the purposes of this study, the following selected terms are defined:

Ad Judicium. To summon to court.

Case. A general term for an action, cause, suit, or controversy, at law or in equity; a question contested before a court of justice.

Case Law. Reported cases that form a body of jurisprudence, or the law of a particular subject as evidenced or formed by the adjudged cases, in distinction to statutes and other sources of law.

Certiorari. A writ from a superior to an inferior court directing that a certified record of its proceedings in a designated case be sent up for review.

Constitutional Law. Rights and privileges granted or given to each citizen of a state by the constitution of that state.

Common Law. A body of decisions and legal principles laid down by judges.

Duces Tecum. The name of certain species of writs, of which the subpoena duces tecum is the most usual, requiring a party who is summoned to appear in court to bring with him some document, piece of evidence, or other thing to be used or inspected by the court.

General State Statute. A statute relating to the whole community, or concerning all persons generally, as distinguished from a private or special statute.

Horn-Book. A primer; a book explaining the rudiments of any science or branch of knowledge. The phrase "horn-book law" is a colloquial designation of the most familiar principles of law.

In Loco Parentis. In the place of a parent, with a parent's rights, duties, and responsibilities.

Judicial Decision. An opinion or determination of the judges in causes before them.

Liable. Bound or obliged in law or equity; responsible; chargeable; answerable.

Minor. An infant or person who is under the age of legal competence, in most states, eighteen.

Ordinance. A rule established by municipal or other authority; a law or statute.

Parens Patriae. In the United States, the state, as a sovereign, referring to the sovereign power of guardianship over the persons under disability, such as minors.

Plaintiff. A person who brings an action; the party who complains or sues in a personal action.

Remand. To send back.

Shepardize. The process of checking the status of cases or statutes in the various National Reporters in order to determine similar court cases having an effect on a statute or court case.

Summary Judgment. Any proceeding by which a controversy is settled, case disposed of, or trial conducted in a prompt and simple matter, without the aid of a jury or indictment.

## CHAPTER II

### REVIEW OF THE LITERATURE

This chapter will present information from the professional literature regarding major legal issues related to school counseling. Discussions of the current status of school counseling in the United States and the relationship of the professional counseling associations to the legal role of the school counselor are presented. In addition, major litigated areas in school counseling are identified and school counselors' knowledge of legal and ethical responsibilities are discussed.

#### The Current Status of School Counseling

Two decades ago, the counseling profession was overwhelmed by many social and political upheavals that characterized the 1960s.<sup>1</sup> Some counselors in that time period practiced theoretical models that were incapable of dealing with the societal problems emerging from issues such as civil rights, the Vietnam war, the women's liberation movement, the countercultures, drugs, and alienation of youth from adults.<sup>2</sup> The school counselor's role today comprises far more than academic advice, career development, and personal counseling. The changing structure of the family, increased societal mobility,

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<sup>1</sup>Roger F. Aubrey and Judith Lewis, "Social Issues and the Counseling Profession in the 1980s and 1990s," Counseling and Human Development 15 (June 1983): 1.

<sup>2</sup>Ibid., 1.

the weakening of traditional values, and the impact of change itself have redefined the job description of all helping professionals, including school counselors.

The traditional model in the 1960s called for counselors to concentrate on direct counseling service to individual students. In the 1980s, counselors served as a consultant to adults who affected the development of a student. This changing role was clearly reflected in a 1984 survey of educators' perceptions of the counselor's role. In a questionnaire sent to principals and counselors in upper and middle grades schools, both principals and counselors believed that individual counseling should receive the greatest emphasis in a counseling program, but rated consultation to teachers, students, and parents as next highest.<sup>3</sup> Ethical questions regarding this role have been raised about maintaining the privacy rights of students when consulting with different people.<sup>4</sup> In addition to personal counseling and consultation, other broad functions of school counselors include coordination or program services and classroom guidance lessons that teach life skills.<sup>5</sup>

The legal status of the counselor in North Carolina is that of teacher.<sup>6</sup> Counselors are part of the professional or instructional staff and are

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<sup>3</sup>Patricia A. Ferris and Malcolm E. Linville, "The Child's Rights: Whose Responsibility?" Elementary School Guidance and Counseling 19 (February 1985): 172.

<sup>4</sup>Ibid.

<sup>5</sup>Walter R. Bailey, Norma K. Deery, Mary Gehrke, Nancy Perry, and Jim Whittedge, "Issues in Elementary School Counseling: Discussion with American School Counselor Association Leaders," Elementary School Guidance and Counseling 24 (October 1989): 5.

<sup>6</sup>North Carolina, General Statute 115-C 325. System of Employment of Public School Teachers.

employees of their local school board. State education codes require that all individuals serving as guidance counselors be certified by the state and be a graduate of a state-accredited program leading to a master's degree in counseling.<sup>7</sup> In North Carolina, the requirement for certification in counseling may vary from 36 to 54 semester hours, depending upon the institution.<sup>8</sup>

In a recent survey of heads of state departments of education, 63 percent indicated an improvement in respect for school counseling services by the public.<sup>9</sup> The issue of accountability, however, was identified as the primary issue facing school counselors in the next twenty years.<sup>10</sup> Therefore, although the public has greater respect for the profession of school counseling, there is also a higher level of expectation.

In North Carolina, the Council for the Accreditation of Counseling and Related Educational Programs (CACREP) was established as a guide for state-approved program standards in counselor education programs.<sup>11</sup> This guide is used by the state's counselor education programs to develop the essential components of professional training. State and national licensure for school

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<sup>7</sup>John J. Schmidt, State Coordinator for School Counseling Programs, North Carolina State Department of Public Instruction, Raleigh, North Carolina, telephone interview by author, 22 march 1989.

<sup>8</sup>Robert L. Barret and John J. Schmidt, "School Counselor Certification and Supervision: Overlooked Professional Issues," Counselor Education and Supervision 26 (September 1986): 50.

<sup>9</sup>Pamela O. Paisley and Glenda T. Hubbard, "School Counseling: State Officials' Perceptions of Certification and Employment Trends," Counselor Education and Supervision 29 (December 1989): 62.

<sup>10</sup>Ibid., 67.

<sup>11</sup>Ibid.

counselors has been available since 1977 through the National Board for Certified Counselors (NBCC).<sup>12</sup> Increasing numbers of licensed counselors supported by professional organization statements about counselor duties and responsibilities have improved the professional image. This improvement has paralleled an increasing awareness by the organizations of the need for risk management. As one measure of this, the American Association of Counseling and Development has encouraged its members to secure extra liability protection. Additionally, national counselor education workshops on risk management have been emerging.<sup>13</sup>

Since 1965, there has been a substantial rise in litigation related to school personnel.<sup>14</sup> The number of school counselors who have been sued is negligible, although some writers believe that school counselors' competence may become a more common legal issue in the future.<sup>15</sup> While it would be prohibitive to cover comprehensively all the legal issues related to school counselors in the United States in general, and even in North Carolina, the legal and ethical concerns revealed by much of the literature are consistently identified by school counselors as the same dilemmas. Those concerns are (a)

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<sup>12</sup>National Board for Certified Counselors, Alexandria, Virginia.

<sup>13</sup>Lou Culler Talbutt, Law and Virginia Public School Counselors (Ed.D. dissertation, Virginia Polytechnic Institute and State University, 1979), 10.

<sup>14</sup>Louis Fischer and Gail Paulus Sorenson, School Law for Counselors, Psychologists, and Social Workers (Longman: New York, 1985), p. ix.

<sup>15</sup>Vernon Lee Sheeley and Barbara Herlihy, "Counseling Suicidal Teens: A Duty to Warn and Protect," The School Counselor 37 (November 1989): 90.

limitations by the professional codes of ethics;<sup>16</sup> (b) rights related to student privacy;<sup>17</sup> (c) child abuse reporting;<sup>18</sup> and (d) liability, including malpractice, libel, and slander.<sup>19</sup> The remainder of this chapter will review each problem area.

### Professional Ethical Standards and the Law

For the profession of counseling, a general framework of ethical standards is provided by the American Association for Counseling and Development (AACD) which has 50,000 members nationally.<sup>20</sup> Branch associations of AACD have been created to meet specific professional needs of AACD members. For example, the American School Counselor Association (ASCA) is a branch composed primarily of counselors who work in schools. Which ethical code a counselor adheres to depends upon which professional identity a counselor chooses. Counselors belonging to more than one organization may find that on certain issues, ethical standards differ, creating conflicts.

The AACD adopted its first code of ethics in 1961 under the name American Personnel and Guidance Association, with code revisions in 1974,

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<sup>16</sup>Theodore P. Remley, Jr., "The Law and Ethical Practices in Elementary and Middle Schools," Elementary School Guidance and Counseling 19 (February 1985): 181.

<sup>17</sup>Robert L. Stenger, "The School Counselor and the Law: New Developments," Journal of Law and Education 15 (Winter 1986): 105.

<sup>18</sup>*Ibid.*

<sup>19</sup>Ronald W. Eades, "The School Counselor or Psychologist and Problems of Defamation," Journal of Law and Education 15 (Winter 1986): 117.

<sup>20</sup>Lou Culler Talbutt, "Ethical Standards: Assets and Limitations," The Personnel and Guidance Journal (October 1981): 110.

1981, and 1988.<sup>21</sup> The published ethical standards offer some legal protection in the form of broad principles which must be interpreted and applied to a given situation; they do not address the behavior of counselors in every situation.

Stude and McKelvey pointed out that ethical codes are binding only on members of the profession who belong to the association adopting the code.<sup>22</sup> Adherence to ethical standards therefore requires the counselor to use professional judgment. Moreover, each new situation presents a potentially new interpretation of the code. Nonmembers are expected to adhere to ethical standards also. Talbutt explains that they provide some protection in case of litigation.<sup>23</sup> For example, it would be important during litigation for the court to know that a counselor's actions were consistent with the ethical standards. In the absence of clear statutes or case law involving the conduct of a counselor, the courts generally apply the standard of care given by other counselors. In doing this, the court would look to the ethical standards to determine liability.<sup>24</sup>

Two major limitations with ethical standards are cited by Talbutt. First, there are conflicts within the standards. Counselors, for example, have a

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<sup>21</sup>Ibid.

<sup>22</sup>E. W. Stude and James McKelvey, "Ethics and the Law: Friend or Foe?" Personnel and Guidance Journal 34 (1979): 453.

<sup>23</sup>Talbutt, "Ethical Standards," 110.

<sup>24</sup>Bruce Hopkins and Barbara S. Anderson, The Counselor and the Law (Alexandria, Va.: American Association of Counseling and Development Press, 1985), 40.

responsibility to the student, to the institution, to the parents, and to other students. Section A:2 of the AACD Ethical Standards states the following:

The member has a responsibility both to the individual who is served and to the institution within which the service is performed to maintain high standards or professional conduct....The acceptance of employment in an institution implies that the member is in agreement with the general policies and principles of the institution.<sup>25</sup>

Second, there are legal and ethical issues not covered by the standards which cannot reflect all laws. Therefore, the standards must be supplemented by other information such as legal principles and case law.<sup>26</sup> However, for many school counselors, it is unclear whether legal responsibility should take precedence over professional ethics or vice versa. Huey stated, "Ethical codes do not supersede the law and they should never be interpreted so as to encourage conduct that violates the law."<sup>27</sup>

Mabe and Rollin, insisting that "awareness of a code's limitations is a key element in developing professional responsibility,"<sup>28</sup> listed five limitations and problems with codes of ethics for counseling:

1. Some issues cannot be handled in the context of a code — for example, the conflict between autonomy and welfare. When should a counselor decide to intervene, for instance, in a situation that involves a

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<sup>25</sup>American Association of Counseling and Development, Ethical Standards, (Alexandria, Va.: American Association of Counseling and Development Press, 1988), A:2.

<sup>26</sup>Talbutt, "Ethical Standards," 1981, 110.

<sup>27</sup>Wayne C. Huey, "Ethical Concerns in School Counseling," Journal of Counseling and Development 64 (January 1986): 321.

<sup>28</sup>Alan R. Mabe and Stephen A. Rollin, "The Role of a Code of Ethical Standards in Counseling," Journal of counseling and Development 64 (January 1986): 294.

student who is considering suicide or who is threatening to harm another student?

2. There is no provision for enforcing the code through discipline — for example, by publishing the names of those who have violated the code. Counselors who are not members of one of the professional organizations presently are not required to adhere to the standards.

3. The issues in the code may be addressed in other forums with the results sometimes at odds with the code. For example, the court system's interpretation of laws may reach different conclusions than the codes have about appropriate counselor responses.

4. Possible conflicts are associated with codes, between the counselor's values and code, and between the code and school practice. For example, on the issue of confidentiality, codes differ in the flexibility given to breaching confidential information.

5. The code covers only a limited number of issues. Changes in society can result in a code's being out of step with the social consensus. Additionally, new court decisions may force the codes to be redefined. For example, computer technology raises legal questions related to student privacy but the standards do not address these concerns.<sup>29</sup>

Although ethics and laws are often mentioned interchangeably, the law is a separate concept that needs differentiation to be fully understood by counselors. Law has been defined as "a body of principles, standards, and rules that govern behavior by creating obligations as well as rights, by

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<sup>29</sup>Ibid., 295.

imposing penalties."<sup>30</sup> There are three basic sources of law: The Constitution of the United States, statutes, and common law.<sup>31</sup> Constitutions and statutes are passed by state and federal legislative bodies. Common law is inherited from America's English ancestors and accepted as the traditional standard of behavior in the United States. As the judiciary interprets the Constitution, statutes, and the common law, it often changes the application of laws through its decisions.

### Privacy

#### Overview

Three kinds of legal privacy have been identified in the literature: (1) autonomy privacy, which is the right to make personal decisions, such as whether to have a child; (2) information privacy, which is the ability to control and limit information about oneself, such as that shared in counseling; and (3) security privacy, which is associated with the Fourth Amendment of the United States Constitution and guarantees certain liberties.<sup>32</sup> Protecting privacy in counseling is complex because of the potential for conflicting demands on school counselors by students, parents, and the school system for information. Another complication exists because counselors work with minors.

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<sup>30</sup>H. C. Hudgins and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, 2d ed. (Charlottesville, Va.: Michie, 1985), 2.

<sup>31</sup>Remley, 181.

<sup>32</sup>Steven R. Smith, "Privacy, Dangerousness and Counselors," Journal of Law and Education 15 (Winter 1986): 122.

With the ratification of the Twenty-sixth Amendment in 1971, which gave 18 year olds the right to vote in federal elections, many states made 18 the age of majority.<sup>33</sup> Persons under the age of majority are referred to as minors. Some argue that each minor's capacity to make sound decisions should be evaluated before the right to make decisions is given to parents.<sup>34</sup> The age of the student is important in determining the degree of privacy that is granted. Certainly, older pupils have an interest in privacy, but at the same time, parents have a strong interest in knowing about their children and ordinarily have a legal right to make most decisions for their minor children.<sup>35</sup> The issues of confidentiality, privileged communication, student records, as well as issues related to student's medical needs all relate to some aspect of privacy. Additionally, a counselor's appraisal of a student as dangerous to himself or others raises questions about privacy.

### Confidentiality

The historical rationale for confidentiality in counseling settings has its roots in the physician-patient relationship.<sup>36</sup> Around the sixteenth century, doctors began to realize that if they could ensure confidentiality, they could stop disease from rapidly spreading from people who feared detection would

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<sup>33</sup>Stenger, 106.

<sup>34</sup>Remley, 182.

<sup>35</sup>Vernon Lee Sheeley and Barbara Herlihy, "Counseling Suicidal Teens: A Duty to Warn and Protect," The School Counselor 37 (November 1989): 93.

<sup>36</sup>Kathryn M. Denkowski and George C. Denkowski, "Client-Counselor Confidentiality: An Update of Rationale, Legal Status, and Implications," The Personnel and Guidance Journal (February 1982): 371.

cause them social isolation.<sup>37</sup> The ethical standards of the profession advocate confidentiality in order to promote client disclosure and trust.

Confidentiality is an ethical term. It is important in any counseling relationship to establish a feeling of trust, which cannot be maintained without assurance that the confidential relationship between client and counselor will not be breached. This is true whether the client is an adult, a child, or a student. But the responsibility of a counselor to keep confidences may be outweighed by a higher duty to give out information.<sup>38</sup>

The ethical standards are general about which issues require confidentiality, and school counselors are often unsure about their legal responsibility to protect communications with students.<sup>39</sup> The ASCA ethical standards state that "the counselor protects the confidentiality of information received in the counseling process as specified by law and ethical standards."<sup>40</sup> This standard does not suggest an age limit for offering confidentiality. Another standard states that "the counselor informs the appropriate authorities when the counselee's condition indicates a clear and imminent danger to the counselee or others."<sup>41</sup> But it can be difficult to accurately predict a student's potential for dangerousness.

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<sup>37</sup>Ibid.

<sup>38</sup>Sheeley and Herlihy, "Counseling Suicidal Teens," 93.

<sup>39</sup>Douglass R. Gross and Sharon E. Robinson, "Ethics, Violence, and Counseling: Hear No Evil, See No Evil?," Journal of Counseling and Development 65 (March 1987): 340.

<sup>40</sup>American School Counselor Association, Ethical Standards, (Arlington, Va.: American School Counselor Association Press, 1984), A8.

<sup>41</sup>Ibid., A9.

Maintaining confidentiality becomes difficult because of the nature of the counselor's work setting. School counselors work in informal areas, such as the playground, cafeteria, and hallways as well as the privacy of their offices. Counselors may wonder if these interactions constitute counseling sessions in the eyes of the court. Fischer and Sorenson argue that "it is not the formality of the setting, but rather the intention of the parties that determines whether an exchange is counseling."<sup>42</sup>

Some writers believe it is better not to give a blanket promise of confidentiality to students.<sup>43</sup> The ASCA standards state that the counselor "informs the counselee of the purpose, goals, techniques, and rules of procedure under which he/she may receive counseling assistance at or before the time when the counseling relationship is entered."<sup>44</sup> Prior notice includes the possible necessity for consulting with other professionals, the limits of privileged communication, and other legal or authoritative restraints. Regarding confidentiality, Wagner found the following results from a 1981 survey of counselors:

(a) The younger the client, the greater was the counselor's allegiance to the parent.

(b) Sixty-five percent of the counselors would release information to an outside source at the parent's request, even if the student disagreed.

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<sup>42</sup>Fischer and Sorenson, 19.

<sup>43</sup>Richard R. DeBlassie, "The Counselor, Privileged Communication, and the Law," Educational Leadership 33 (April 1976): 522.

<sup>44</sup>American School Counselor Association, Ethical Standards, A3.

(c) Sixteen percent of the respondents did not know their state laws pertaining to privileged communication.<sup>45</sup>

### Privileged Communication

Counselors often interchange incorrectly the terms confidentiality and privileged communication. Important distinctions can be made between the two concepts, however. Sheeley and Herlihy defined confidentiality as "the ethical obligation to maintain secrets."<sup>46</sup> Knapp and Vandercreek defined confidentiality as "the ethical rule not to release client information."<sup>47</sup> In discussing confidentiality from a legal perspective, however, Burgum and Anderson referred to confidentiality as "an exchange of information between two people in a professional-client situation whose confidential relationship has been expressly recognized by statute or common law."<sup>48</sup> Communications protected by statute are privileged and is a legal concept dealing with the admissibility of evidence into court.<sup>49</sup> Herlihy and Sheeley defined privilege as a "legal concept that regulates privacy protection and confidentiality by protecting clients from having their confidential

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<sup>45</sup>Carol Ann Wagner, "Confidentiality and the School Counselor," Personnel and Guidance Journal 59 (1981): 305.

<sup>46</sup>Sheeley and Herlihy, "Counseling Suicidal Teens," 93.

<sup>47</sup>Samuel Knapp and Leon Vandecreek, "Privileged Communications and the School Counselor," The Personnel and Guidance Journal 62 (October 1983): 83.

<sup>48</sup>T. Burgum and S. Anderson, The Counselor and The Law, Alexandria, Va.: American Association of Counseling and Development Press, 1975, 15.

<sup>49</sup>Knapp and Vandecreek, 83.

communications disclosed in court without their permission."<sup>50</sup> Our legal system has historically protected several types of relationships deemed important: doctor-patient and attorney-client. One layer of legal protection is confidentiality, which restricts or limits third parties from having access to information that occurred within those relationships. A second layer is in the law of privileged communications which acts as a bar to the professional being forced to testify about a client's statements.<sup>51</sup>

The professional codes of ethics impose only a moral and not a legal obligation, and cannot be relied on as a means to guarantee confidentiality in specific situations. For example, counselors have no legal grounds for upholding their confidentiality promises when they are called on to testify in court unless those communications are protected by state statutes.

A study conducted in 1985 determined which of the 50 states extended privilege through statute to school counselors. Prescribed privileged communication statutes and other protections for the personal privacy of students' disclosures to school counselors have been established in 20 states as of 1986.<sup>52</sup> The state statutes vary in terms of exceptions to the rule of privilege. For example, an exception in reporting child abuse or neglect is included in the statutes in four states. North Carolina exempts child abuse

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<sup>50</sup>Barbara Herlihy and Vernon Lee Sheeley, "Privileged Communication in Selected Helping Professions: A Comparison Among Statutes," Journal of Counseling and Development 65 (May 1987): 479.

<sup>51</sup>David N. Sandberg, Susan K. Crabbs, and Michael A. Crabbs, "Legal Issues in Child Abuse: Questions and Answers for Counselors," Elementary School Guidance and Counseling 22 (April 1988): 268.

<sup>52</sup>Herlihy and Sheeley, "Privileged Communication," 479.

information from the privilege statute.<sup>53</sup> Additionally, in three states including North Carolina, the claim to privilege may be denied when the presiding judge compels disclosure in the interest of the administration of justice.<sup>54</sup>

In nine states, including North Carolina, the privilege may be waived in writing, in open court by the pupil-client, or when the student is represented by a parent, guardian, or legal custodian.<sup>55</sup> If the privilege is waived, counselors have no recourse but to testify, because the privilege belongs to the counselee. A 1970 case in California, In Re Lifschutz, determined that a psychiatrist was under no duty to withhold information vital in a client's lawsuit if the client waived the privilege.<sup>56</sup>

Because of these exceptions in the statutes, it is important for counselors to know under what circumstances their communications are covered. To qualify for privilege, communications must take place in a counseling relationship.<sup>57</sup> This may make it difficult for counselors to ensure confidentiality because students often disclose information to counselors in the presence of others. Such information would not be privileged because it would suggest to the court that the student-counselee was not concerned about confidentiality. The rules of confidentiality and privilege need to be

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<sup>53</sup>North Carolina, General Statute 7A-551. Privileges Not Grounds for Excluding Evidence.

<sup>54</sup>North Carolina, General Statute 8-53.4 (1981).

<sup>55</sup>Herlihy and Sheeley, "Privileged Communication," 479.

<sup>56</sup>In Re Lifschutz, 467 P.2d 557 85 Cal. Rptr. 829 (1970).

<sup>57</sup>Knapp and Vandecreek, 84.

understood not only by counselors, but by students and other professionals in the school.

### Student Records

Maintaining the privacy of school records was a problem for many educational institutions into the 1970s.<sup>58</sup> In 1974, the Family Educational Rights and Privacy Act (FERPA), or the Buckley Amendment, became law.<sup>59</sup> This federal legislation was a result of parental pressure for access to their children's school records, and an effort to ensure the educational privacy rights of parents and their children.

Because counselors have a duty to safeguard the privacy rights of students, they are often assigned the duty to maintain and disseminate information within the cumulative records in a school. No one charged with handling school records may release information to outside sources without the written permission of the parents or the eligible student. However, there are inconsistent procedures in the schools. In some schools, student records may be managed by teacher aides or student workers. In a 1981 survey, Wagner found 50 percent of elementary, middle, and secondary counselors were concerned about secretarial handling of confidential material.<sup>60</sup>

The primary purpose of the privacy act is to give parents access to their child's records (and to the student when he reaches 18) while denying access

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<sup>58</sup>Margaret M. Walker and Marva J. Larrabee, "Ethics and School Records," Elementary School Guidance and Counseling 19 (February 1985): 40.

<sup>59</sup>The Family Educational Rights and Privacy Act, 20 U.S.C. sec. 1232g (1976).

<sup>60</sup>Carol Ann Wagner, "Elementary School Counselors' Perceptions of Confidentiality with Children," School Counselor 25 (1978): 241.

to other persons without the parents' consent.<sup>61</sup> The law exempts records that are made by a counselor for his own use, so long as he does not share them with another person. Once he does, the record becomes part of the education record and available to parents.<sup>62</sup> The right of a parent or student to gain access to records does not end when the student leaves school. He may return at any time and see the remaining records required by law: adequate identification data (including date of birth), attendance data, grading, and promotion data.

A persistent issue for counselors is clarification of whether the custodial parent can legally control access to his or her child's education records and can prevent the noncustodial parent from seeing them.<sup>63</sup> The federal regulations that implement FERPA are clear, however:

An educational agency or institution may presume that either parent of the student has authority to inspect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a state law or court order granting such matters as divorce, separation, or custody, which provides to the contrary.<sup>64</sup>

Even if the noncustodial parent has been denied visitation rights by court order, he or she probably has not lost access to school records. Obtaining access to school records need not involve any direct contact with the child,

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<sup>61</sup>Anne M. Dellinger, North Carolina School Law: The Principal's Role, Chapel Hill: The University of North Carolina at Chapel Hill (1981), 22.

<sup>62</sup>Ibid.

<sup>63</sup>Helen Aiello and Charles W. Humes, "Counselor Contact of the Noncustodial Parent: A Point of Law," Elementary School Guidance and Counseling 21 (February 1987): 177.

<sup>64</sup>Federal Register (June 17, 1976), vol. 71, p. 118.

and unless counselors have documentation present in the file to prohibit contact of the noncustodial parent, it is quite appropriate to involve both of the child's parents.<sup>65</sup>

Certain privacy rights for students and parents were being secured during the 1970s and 1980s, while violence in the schools was on the increase nationwide.<sup>66</sup> In 1983, Boston's Safe Schools Commission found that (a) three out of ten students admitted to carrying a weapon to school; (b) half of the teachers and 40 percent of the students were victims of crime; and (c) nearly four in ten students often feared for their safety in school or reported avoiding corridors and bathrooms.<sup>67</sup> The Working Group of School Violence and Discipline reported in 1984 that widespread victimization of students and teachers in the form of shootings, stabbings, assaults, and larceny were plaguing American education.<sup>68</sup>

This increase in school violence raised questions about the school's responsibility to protect others from violent students and violent students from themselves. Unfortunately, information that could relate to a student's violent behavior is often in the possession of the counselor and not subject to inspection by anyone.<sup>69</sup> This restricted access to student records conflicts with

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<sup>65</sup>Douglas S. Pungert, "The Nontraditional Family: Legal Problems for Schools," 15 School Law Bulletin (April 1984): 1.

<sup>66</sup>National School Boards Association, Toward Better and Safe Schools: A School Leaders Guide to Delinquency Prevention (Alexandria, Va.: National School Boards Association Press, 1984), 11.

<sup>67</sup>*Ibid.*, 13.

<sup>68</sup>*Ibid.*, 12.

<sup>69</sup>Family Educational Right to Privacy Act, 20 U.S.C. Section 1232g (a) (b) (B) (i) (1982).

the duty of care that teachers and counselors are expected to exercise to avoid civil liability for crimes committed by students at school.<sup>70</sup> Baker suggested that the FERPA provisions need to be revised since they "disable school officials from sharing information that bears on a student's proclivity to violence."<sup>71</sup>

A related concern is knowing what legal obligation counselors have to report criminal activity that they suspect, observe, or learn from counseling sessions.<sup>72</sup> Often a counselor is the first to receive incriminating information from students and must decide when to share it with the principal. Counselors are advised to distinguish between information from students about events that have already occurred and information on events that are planned.<sup>73</sup> Information shared in confidence about past events should not be divulged, but impending crimes should be revealed to school or law enforcement agencies.<sup>74</sup> This should be undertaken without identifying the students.

If a student reveals in a counseling setting that he or she is in danger, then counselors have a duty to breach the confidence, according to Dr. Duane Brown, professor of counseling psychology at the University of North

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<sup>70</sup>Mary Gordon Baker, "The Teacher's Need to Know Versus the Student's Right to Privacy," Journal of Law and Education 16 (Winter 1987): 79.

<sup>71</sup>*Ibid.*, 90.

<sup>72</sup>L. Poindexter Watts, "The Duty to Report a Crime," The School Law Bulletin (Summer 1983): 22.

<sup>73</sup>Dellinger, 29.

<sup>74</sup>*Ibid.*

Carolina at Chapel Hill.<sup>75</sup> Although danger is open to interpretation, it could include potential suicidal students, sexual abuse, and certain cases of pregnancy that put a girl in mental or physical jeopardy.

Public disclosure of private facts that the public has no right to know, however, may be a cause of action for invasion of privacy. Counselors who work, for example, with suicidal youths should guard against actions that could be alleged as negligent, such as not making a proper referral for treatment. The counselor and student-counselee association is viewed by many courts as a relationship of care. Therefore, the counselor must take necessary action to act in the place of the student's parents to protect the student.

The legal term for the relationship of educator to pupil is "in loco parentis" which means in the place of the parents.<sup>76</sup> Blackstone wrote in 1884 the following explanation:

a parent may delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parents that of restraint, and correction as may be necessary to answer the purposes for which he is employed.<sup>77</sup>

The concept of in loco parentis has undergone considerable change since its inception. Originally, the doctrine was intended to cover disciplinary matters such as corporal punishment. By the 1970s, however, it had been

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<sup>75</sup>Dr. Duane Brown, Professor of Counselor Education, University of North Carolina, Chapel Hill, Telephone Interview (January 14, 1989).

<sup>76</sup>Hudgins and Vacca (1985), 290.

<sup>77</sup>John Blackstone, Commentaries of the Law of England (ed. T. Cooley, Publ. 1984), 453.

extended to cover issues of the students' right to due process, to freedom from search and seizure, and other basic rights. Because of the in loco parentis doctrine, educators have been charged with acting in the best interests of the student, as would their parents. At the same time, there is a corresponding responsibility to act for the well-being of all other students in the school.<sup>78</sup> As a result of court decisions, school authorities now cannot make arbitrary decisions regarding student discipline without being challenged.

The leading Supreme Court case restricting the in loco parentis doctrine was Ingraham v. Wright in 1977.<sup>79</sup> The actual incident occurred in 1970 in which two junior high boys were paddled with a wooden paddle, causing injuries that lasted several days. The issue before the Court was whether the Eighth Amendment's prohibition of "cruel and unusual punishments" applied to corporal punishment in public schools and, if it did not, whether the due process clause of the Fourteenth Amendment granted any procedural protections to the students before punishment was administered.<sup>80</sup> The 5-4 decision against the plaintiffs reflected the societal division on the issue of corporal punishment, but the dissenting justices believed that the Eighth Amendment was meant to protect all persons from abusive treatment. The courts have set minimum procedures that school boards and administrators must meet before taking disciplinary action against students. The courts

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<sup>78</sup>Dellinger, 27.

<sup>79</sup>Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L. Ed.2d 711 (1977).

<sup>80</sup>Fischer and Sorenson, 168.

have, nevertheless, not interfered with school disciplinary matters unless educators act arbitrarily, capriciously, or unreasonably.<sup>81</sup>

### Medical Concerns of Minors

Fischer and Sorenson reported that giving birth control or abortion-related advice can lead to legal problems for counselors.<sup>82</sup> Even though the United States Supreme Court has held that minors have a right to make decisions for themselves concerning contraception and abortion through Roe v. Wade in 1974,<sup>83</sup> this right has been challenged every year since abortion was legalized. Abortion-related counseling may be restricted by some school board policies. If school boards decide to develop guidelines related to abortion and contraceptive counseling, it is appropriate as long as the policies are in line with laws.<sup>84</sup>

If there is no written school system policy to the contrary, counselors may advise students about birth control, abortion, and related issues. Incompetent advice, or advice which goes against written board policy, however, would place a counselor in jeopardy of liability.<sup>85</sup>

Two ethical standards relate to this issue: The AACD standards state that "members must recognize their boundaries of competence and provide only those services and use only those techniques for which they are qualified by

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<sup>81</sup>Hudgins and Vacca, 290.

<sup>82</sup>Fischer and Sorenson , 50.

<sup>83</sup>Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973).

<sup>84</sup>Fischer and Sorenson, 58.

<sup>85</sup>Ibid.

training or experience;"<sup>86</sup> and that "when the client's condition indicates that there is clear and imminent danger to the client or others, the member must take reasonable personal action or inform responsible authorities."<sup>87</sup>

Clearly, a pregnant 13-year-old who seeks an abortion or is considering carrying the baby to full term is potentially in danger. Remley warned that the counselor who does not strongly urge parental involvement or who fails to refer the student for proper medical treatment and advice is taking questionable action.<sup>88</sup>

Acquired Immune Deficiency Syndrome (AIDS) is an infectious disease that counselors will deal with in the schools either in a counseling or an educational role. The American School Counselor Association (ASCA) passed in 1987 a resolution entitled "Education and AIDS," which stated that ASCA was to take an active role in educating students about AIDS.<sup>89</sup> The recent development of this disease raises the question of at what point counselors breach a confidential relationship with a counselee who has the AIDS virus to protect the general public. The applicability of the term "clear and imminent danger to self or others" is not clear as applied to students with AIDS.<sup>90</sup> What is clear is the need for counselors to learn more about the

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<sup>86</sup>American Association of Counseling and Development, A7.

<sup>87</sup>Ibid., B4.

<sup>88</sup>Remley, 186.

<sup>89</sup>Jim R. Holder, "AIDS: A Training Program for School Counselors," The School Counselor 36 (March 1989): 305.

<sup>90</sup>Lizbeth A. Gray and Anna K. Harding, "Confidentiality Limits with Clients who Have the AIDS Virus," Journal of Counseling and Development, 66 (January 1988): 219.

disease in order to understand better how to counsel victims, their families, and learn what constitutes a dangerous situation.

### Child Abuse and Neglect

The National Center for Child Abuse and Neglect reports over one million cases of child abuse a year.<sup>91</sup> There are no reported cases involving counselors who failed to report abuse, but in North Carolina, an assistant superintendent was found guilty of not reporting suspected abuse, a misdemeanor, in the 1986 case State v. Frietag in Wake County.<sup>92</sup> It was the Landers v. Flood case in 1976 which established that a physician could be held liable for money damages for failure to report a case of child abuse or neglect.<sup>93</sup>

By 1974, the National Child Abuse and Prevention and Treatment Act had been passed.<sup>94</sup> This law defined child abuse and neglect and mandated that states develop plans for identification, reporting, investigation, prevention, and treatment.

In 1983, North Carolina passed legislation which established the Children's Trust Fund to develop primary prevention programs across the state.<sup>95</sup> The Funds come from grants, donations, and marriage license fees, and are administered through the Division of Community Schools by the

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<sup>91</sup>Fischer and Sorenson, 191.

<sup>92</sup>State v. Frietag (Unreported, Wake County District Court), January 31, 1986.

<sup>93</sup>Landers v. Flood, 551 P.2d 389 (Cal. 1976).

<sup>94</sup>Child Abuse and Prevention and Treatment Act, Public Law 93-247, 1976.

<sup>95</sup>Prevention of Child Abuse and Neglect Article, N. C. Gen. Stat. 110-149 91983).

State Board of Education.<sup>96</sup> Prevention programs are those which affect children and families before a substantial incident of child abuse or neglect has occurred. Recommendations for grants to be awarded to schools, agencies, and organizations are awarded annually.<sup>97</sup>

David Sandberg, an attorney specializing in law relating to children, has written that often counselors are concerned that their reports may be unfounded which would lead to lawsuits by angry parents.<sup>98</sup> The law, however, requires only that the report rest on "suspected" abuse or neglect, with the Department of Social Services determining whether the suspicion is accurate. North Carolina has passed a statute allowing immunity from civil or criminal liability for persons reporting in good faith.<sup>99</sup>

Counselors may be concerned when making a report about who in the school has a need to know the facts of a case. Sandberg and his associates strongly recommend that the principal be informed when a report has been filed.<sup>100</sup> As the school leader, the principal needs to know who might come to the school to investigate the claim and what repercussions might be forthcoming because of the report. Permission to report, however, is not

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<sup>96</sup>Pamela O. Paisley, "Prevention of Child Abuse and Neglect: A Legislative Response," The School Counselor 34 (January 1987): 226.

<sup>97</sup>North Carolina Department of Public Instruction, The Children's Trust Fund Brochure (Raleigh: North Carolina Department of Public Instruction, 1983), 1.

<sup>98</sup>Sandberg et al., 268.

<sup>99</sup>North Carolina, General Statute, sec. 7A-550 (1988 Supp.).

<sup>100</sup>Sandberg et al., 268.

required, nor should the facts of a case be detailed with anyone other than the Department of Social Services.<sup>101</sup>

Whether it is appropriate to allow social service case workers to interview a child reported for suspected child abuse or neglect on campus without first informing the parent(s) was answered in a 1984 North Carolina Attorney General's opinion. It stated that "it is our opinion that there is no legal requirement that the parents be present or be given prior notice of the interview."<sup>102</sup> The rationale was that parents more often than not are the perpetrators of the abuse or neglect and therefore the presence of the parents at the interview can substantially impede the investigation. In the 1986 case, Wilson County Department of Social Services v. Wilson County Board of Education, the court decided that social service workers could interview a child suspected of being abused on school grounds without parental notification.<sup>103</sup>

The General Statutes chapter on school law contains a specific statute that requires school personnel to report suspected juvenile abuse and neglect.<sup>104</sup> A companion statute states that information given to a school counselor may be "privileged."<sup>105</sup> That privilege is waived in child abuse

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<sup>101</sup>Dellinger, 12.

<sup>102</sup>Rufus Edmiston, North Carolina Attorney General Written Opinion, 27 April 1984.

<sup>103</sup>Wilson County Department of Social Services v. Wilson County Board of Education, No. 86 CVD 286 (D.N.C. final order filed April 25, 1986).

<sup>104</sup>North Carolina, General Statute, chap. 7A, sec. 115 C-400 (1983).

<sup>105</sup>North Carolina, General Statute, sec. 9-53.4 (Supp. 1985).

hearings, and counselors, like all other educators, are required to report to the county director of social services.

### Liability

The literature indicates that in most litigation against school counselors, the claim against the counselor is that there was negligence in the performance of a duty.<sup>106</sup> Malpractice is a form of negligence for which counselors might be liable. Fischer and Sorenson listed the following areas in which counselors are vulnerable to charges of malpractice: giving birth control advice; giving abortion-related advice; making a statement that might be defamatory; and violating the privacy of records.<sup>107</sup> In addition, failure to take steps to prevent others in school from harm by other students may place a counselor in legal jeopardy.<sup>108</sup>

School counselors may be accused of negligence for not warning family members of a student's potential suicidal tendencies, which would lead to liability.<sup>109</sup> The responsibility to warn is clearly stated in the AACD ethical standards:

When the client's condition indicates that there is clear and imminent danger to the client or others, the member must take reasonable

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<sup>106</sup>Donald H. Henderson, "Negligent Liability and the Foreseeability Factor: A Critical Issue for School Counselors," Journal of Counseling and Development 2 (October 1987): 86.

<sup>107</sup>Fischer and Sorenson, 50.

<sup>108</sup>Henderson, 86.

<sup>109</sup>Sheeley and Herlihy, "Counseling Suicidal Teens," 92.

personal action or inform responsible authorities. Consultation with other professionals must be used where possible.<sup>110</sup>

The ASCA ethical standards also address this issue by stating that the counselor "informs the appropriate authorities when the counselee's condition indicates a clear and imminent danger to the counselee or others."<sup>111</sup> Even though the ethical standards create an obligation to warn, the legal obligation is less clear. There is some case law, such as the 1976 Tarasoff v. The Regents of the University of California, that has interpreted the mental health professional's role as one with a duty to warn victims of dangerous clients. There has not been enough litigation to determine whether counselors are legally bound to warn known victims, or whether they have a duty to warn parents of their child's emotional condition. At the university level, a case was heard in which the parents of a student who committed suicide sued an employee in the counseling department for failure to inform them of their daughter's condition.<sup>112</sup>

In Phyllis P. v. The Superior Court of the State of California County of Los Angeles, East District, the court ruled that a "special relationship" existed between the school and the parent of an 8-year-old student, and that a duty of care was breached when the parent was not informed of sexual assaults on the student.<sup>113</sup> The same legal standard of foreseeability is critical in Summers v. Milwaukee Union High School District No. 5 (1971). In both cases, the courts

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<sup>110</sup>American Association of Counseling and Development, Ethical Standards, A4.

<sup>111</sup>American School Counselor Association, Ethical Standards, A9.

<sup>112</sup>Bogust v. Iverson, 102 N.W.2d 228 (Wisc. 1960).

<sup>113</sup>Phyllis P. v. The Superior Court of the State of California County of Los Angeles, East District, 228 Cal. Rptr. 776, 183 Cal. App.3d 1193 (1986).

stressed that the educator is expected to act in a reasonably prudent manner under the circumstances and provide a standard of care consistent with the professional standards and with what the typical counselor would provide.

### Defamation

Another area of negligence in which counselors are vulnerable is defamation,<sup>114</sup> which refers to libel and slander of a person's character or reputation. Libel means defamation in written form, and slander is expressed by word of mouth.<sup>115</sup> Counselors could very well face litigation if the following elements of a tort of libel and slander are present: (1) A false statement concerning another was published or communicated; (2) The statement brought hatred, disgrace, ridicule, or contempt on another person; (3) Damages resulted from the statement.<sup>116</sup>

Counselors have many opportunities for defamation that could result in litigation. First, counselors hear private conversations and have access to records and personal information. Second, counselors communicate with many people during the school day who may pressure them to reveal confidential information. It is important to remember that public disclosure of private facts that the public has no right to know may lead to liability. For

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<sup>114</sup>Lou Culler Talbutt, "Libel and Slander: A Potential Problem for the 1980s," The School Counselor 30 (January 1983): 164.

<sup>115</sup>Hudgins and Vacca, 1985, 76.

<sup>116</sup>Talbutt, "Libel and Slancer," 165.

example, a false statement about a student may give a cause for a charge of defamation.<sup>117</sup>

Two common defenses for defamation are truth and privileged communication.<sup>118</sup> Truth is a defense unless the statements are malicious. For example, if a counselor referred a suicidal student to a hospital and sought consultation with a psychiatrist, the fact that the student was suicidal would be defense against defamation.

Privilege is a defense if the communication was made to a third person who had a legitimate interest or duty to know the information, such as a psychiatrist.<sup>119</sup> For example, when school counselors have reason to believe from information that a student is dangerous to himself or to others, the counselor has an ethical duty to let proper authorities know. Such communication is privileged and a counselor would not be liable for libel or slander.

In the 1956 Iverson v. Frandsen case, libel charges were placed against a psychologist for language used in a psychological report that characterized a student's intellect.<sup>120</sup> The court ruled that even though the report described the student as intellectually slow, the psychologist acted properly, within the expectations of his job description, the professional ethical code, and intended no malice.

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<sup>117</sup>Ronald Eades, 119.

<sup>118</sup>Lou Talbutt, "Libel and Slander," 166.

<sup>119</sup>Ibid.

<sup>120</sup>Iverson v. Frandsen (10th Cir., 237 F.2d 898, 1956).

### The Constitutional Tort

Counselors, teachers, and other educators have always been liable for damages for negligence, failure to provide due care, and malpractice. But another kind of tort emerged during the middle sixties which has related to the constitutionally guaranteed rights of students, as defined in the Fourteenth Amendment to the Constitution of the United States.<sup>121</sup>

The constitutional tort relies on the Civil Rights Act of 1871, Section 1983, which states the following:

Every person who under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.<sup>122</sup>

Historically, children have not been considered as full citizens, and have not had the full protection of certain constitutional rights afforded to adults.<sup>123</sup> But students were placed under the protection of Section 1983 in a 1975 landmark Supreme Court case in which several students were denied their constitutional right to due process procedures before a suspension.<sup>124</sup>

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<sup>121</sup>United States Constitution, amend. IV, sec. 1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>122</sup>Civil Rights Act, 42 U.S.C. Section 1983 (1871).

<sup>123</sup>Bryson and Bentley, 60.

<sup>124</sup>Wood v. Strickland, 420 U.S. 322.

Criteria for school board immunity from liability were outlined in the court's decision as follows:

A school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the students.<sup>125</sup>

Counselors who knowingly deny a student rights granted by the Constitution may be liable for money damages. Hudgins and Vacca viewed the constitutional or civil rights tort, Section 1983, as the "most significant malpractice law for people in public education in this country."<sup>126</sup>

#### The Status of Counselors' Legal Knowledge

Studies conducted in the last few years have illustrated how mental health professionals, including counselors, react in ethical or legal conflict situations. Tymchuk and others investigated ethical decisions that psychologists made in clinical situations. He found that "when legal standards exist, the decision-making process appears to be facilitated."<sup>127</sup>

Much from the literature indicates that counselors are unclear about their legal responsibilities on issues of privacy rights, confidentiality,

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<sup>125</sup>Wood v. Strickland, 420 U.S. 308, 95 S. Ct. 992, 43 L.Ed.2d at 322.

<sup>126</sup>Hudgins and Vacca, 1985, 320.

<sup>127</sup>A. J. Tymchuk, R. Drapkin, S. Major-Kingsley, A. B. Ackerman, E. W. Coffman, and M. S. Baum, "Ethical Decision-making and Psychologists' Attitudes Toward Training in Ethics," Professional Psychology, 1113 (1982): 412, cited in Nancy S. Hinkeldey and Arnold R. Spokane, "Effects of Pressure and Legal Guideline/Clarity on Counselor Decision-making in Legal and Ethical Conflict Situations," Journal of counseling and Development 64 (December 1985): 240.

privileged communication,<sup>128</sup> and school records and negligent liability.<sup>129</sup> In a national survey of school counselors in 1981, 16 percent of the respondents did not answer the question when asked if they were aware of their state laws pertaining to privileged communications.<sup>130</sup> In a related survey, elementary school counselors were often unsure of the privacy rights of their students, particularly if the counselor had knowledge of criminal activity.<sup>131</sup> Confusion was noted between the concepts "confidentiality" and "privilege" in a 1978 study which found that half of the mental health professionals surveyed misinterpreted the concepts.<sup>132</sup> Jagim and others appraised mental health professionals' knowledge of and attitudes toward issues of confidentiality, privilege, and third-party disclosures. Most participants agreed on the obligation to keep confidential shared client information, but half of the respondents misinterpreted the concept of privilege.<sup>133</sup>

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<sup>128</sup>Theodore P. Remley, Jr., "The Law and Ethical Practices in Elementary and Middle Schools," Elementary School Guidance and Counseling 19 (February 1985): 181.

<sup>129</sup>Robert L. Stenger, "The School Counselor and the Law," Journal of Law and Education 15 (Winter 1986): 105.

<sup>130</sup>Wagner, "Confidentiality and the School Counselor," 306.

<sup>131</sup>Wagner, "Counselors' Perceptions of Confidentiality," 240.

<sup>132</sup>R. Jagim, W. Sittman, and J. Noll, "Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure," Professional Psychology, 9 (1978): 458, cited by Nancy C. Hinkeldey and Arnold R. Spokane, "Effects of Pressure and Legal Guideline Clarity on Counselor Decision-Making in Legal and Ethical Conflict Situations," Journal of Counseling and Development 64 (December 1985): 240.

<sup>133</sup>R. Jagim, W. Wittman, and J. Noll, "Mental Health Professionals' Attitudes Toward Confidentiality, Privilege, and Third-Party Disclosure," Professional Psychology 9 (1978): 458, cited in Hinkeldey and Spokane, p. 240.

School counselors are expected to turn to supervisors for advice on sensitive legal issues. But Peer found in a 1982 survey of state guidance directors that only 62 percent were certain whether pupil clients of secondary school counselors were protected by privileged communication statutes.<sup>134</sup> A later survey with the same population found that 78 percent were certain.<sup>135</sup>

In the area of child abuse, mental health workers' knowledge of and compliance with laws about child abuse reporting was examined in 1978. The authors found that many professionals were unfamiliar with both the privileged communication laws and the child abuse reporting regulations of their states.<sup>136</sup>

### Summary

The review of the literature indicates that school counselors are unclear about their ethical and legal responsibilities to students, students' parents, and the school system. The following issues may pose legal problems for school counselors: (1) limitations of the professional codes of ethics; (2) rights related to student privacy; (3) reporting of child abuse and neglect; (4) responsibilities with dangerous students; and (5) liability.

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<sup>134</sup>G. G. Peer, "The Status of Secondary School Guidance: A National Survey," School Counselor 32 (1985): 181.

<sup>135</sup>Vernon Lee Sheeley and Barbara Herlihy, "Privileged Communication in School Counseling: Status Update," School Counselor 34 (March 1987): 269.

<sup>136</sup>J. Swoboda, S. Elwork, A. Sales, and B. D. Levine, "Knowledge of and Compliance with Privileged Communication and Child-Abuse Reporting Laws," Professional Psychology 9 (1978): 448.

Counselors are legally vulnerable because (a) they work with minors, (b) they must interpret ethical standards that are general and that sometimes conflict with certain laws, (c) they must accurately assess dangerous situations, and (d) they must guard the individual privacy rights of students while ensuring the safety of others in the school.

Counselors tend to rely more on personal beliefs than the law when solving counseling dilemmas and there are deficiencies in their knowledge of state and federal laws affecting their role in the school.

School case law in the recent past indicates that counselors can expect litigation in the following areas: privacy, negligence, school records, child abuse reporting, and claims that students' constitutional rights were denied.

### CHAPTER III

#### LEGAL ASPECTS OF THE ROLE OF THE SCHOOL COUNSELOR

Chapter III identifies the legal aspects of the school counselor's role related to the issues found in the review of the literature. Additional school case law and federal and state legislation that chronicles the effect of government and the courts on those issues are presented.

While case law directly related to school counselors is limited, since 1970, state and federal legislation and relevant court cases have influenced the duties and responsibilities of all school personnel, including counselors. A discussion of trends in the schools and the philosophical direction of the courts resulting from those influences follows.

#### Impact of Legislative Enactments and Court Decisions

After 1965, political and social pressures brought about legislative enactments and court rulings that pervaded all aspects of education. Those decisions reflected a society that was experiencing changes in values, focusing on the rights of individuals as well as those of the greater society. Diane Ravitch wrote in The Troubled Crusade that "in elementary and secondary schools, almost no area of administrative discretion was left uncontested."<sup>1</sup> Students were demanding new rights and freedoms, political action groups

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<sup>1</sup>Diane Ravitch, The Troubled Crusade: American Education, 1945-1980 (Basic Books: New York, 1983), 268.

asserted themselves over text books, and racism and immorality in the schools were targeted by various groups.

This period paralleled the expansion of the counselor's role in the schools from giving individual vocational advice to meeting the many educational and emotional needs of a diverse student population.

While education had been exclusively handled by the states and the local school boards prior to 1965, the impact of federal government intervention after that was dramatic. Between 1964 and 1976, the number of federal regulations increased from 92 in 1965 to nearly 1,000 in 1977 while the number of pages of federal legislation affecting education increased from 80 to 360.<sup>2</sup> Some of these legislative enactments had negative consequences. For instance, the Family Educational Rights and Privacy Act, Public Law 93-380, was intended to protect the rights of students by allowing them greater access to their educational records. The result was to create a climate in which letters of recommendation, being no longer confidential, became worthless to college admissions officials, who therefore gave greater weight to the Scholastic Aptitude Test scores.<sup>3</sup>

The federal courts also became deeply involved in educational matters after 1965. The number of federal court decisions affecting education grew from 729 between 1956 and 1966 to more than 1,200 in the next four years.<sup>4</sup>

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<sup>2</sup>Ibid., 312.

<sup>3</sup>Ibid.

<sup>4</sup>Ibid.

The impact of congressional legislation and court cases significantly altered many aspects of school operations. Some of these are discussed below

The Family Educational Rights and  
Privacy Act, P.L. 93-380

While the Constitution does not specifically address itself to the question of student privacy and confidentiality of records, the courts have recognized that personal privacy is a constitutionally protected right.<sup>5</sup> For example, a court decided in Merriken v. Cressman that a program that identified potential drug users was an invasion of their right to privacy.<sup>6</sup> The premise was that negative labeling such as "drug user" would have a long-term negative effect on the students. This case strengthened the argument that many parents and legislators were developing to change the way schools maintained and disseminated students' educational records.

Prior to 1974, access to student school records was controlled by local school board regulations and common law principles.<sup>7</sup> In Van Allen v. McCleary, a New York court recognized parents' interest in their children's school records and concluded that the parent had a right to inspect the

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<sup>5</sup>Joseph E. Bryson and Charles P. Bentley, Ability Grouping of Public School Students: Legal Aspects of Classification and Tracking Methods (Charlottesville, Va.: Michie, 1980), 86.

<sup>6</sup>Merriken v. Cressman, 364 F.Supp. 913, 921 (E.D. Pa. 1973).

<sup>7</sup>Mary Gordon Baker, "The Teacher's Need to Know Versus the Student's Right to Privacy," School Law Bulletin (Winter 1987): 73.

records.<sup>8</sup> That right could be restricted only by legislative or constitutional limitations, not school board policies.<sup>9</sup>

The Russell Sage Foundation reported that typically neither parents nor students understood their rights, and because they were ignorant about the contents of the educational records, they did not challenge the accuracy of its contents.<sup>10</sup>

Congress responded to court decisions such as Merriken, to the Sage Foundation report, and to parental pressure with the passage of The Family Educational Rights and Privacy Act (FERPA) of 1974, called the Buckley Amendment. This law prescribed standards for all public schools that keep student records and receive federal funds from the U. S. Commissioner of Education. The general intent of the act is that schools not reveal private information from student records to anyone without the consent of the student or his parents.

Specifically, the essence of those standards of the FERPA are that (1) parents of a child who is under age 18 and has never attended an educational institution beyond the high school level must be allowed to look at that child's school records; (2) students on reaching age 18 or attending an institution beyond the high school level – called "eligible students" in the regulations – must be allowed to look at their own school or college records, and their parents no longer may do so; and (3) schools and colleges may not

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<sup>8</sup>Van Allen v. McCleary, 27 Mis.2d 81, 211 N.Y. S.2d 501, 513 (N.Y. App. Div. 1961).

<sup>9</sup>Baker, 74.

<sup>10</sup>Ibid.

release information about students or let anybody else look at their records – with certain exceptions listed in the statute – unless the parent or eligible student has given written consent.

To ensure these rights, the FERPA law spells out regulations for schools which must do the following:

1. Adopt a written policy statement covering the subjects detailed in Section 99.5 of the regulations.
2. Give annual notice to parents or eligible students of their several rights under the act, as described in Section 99.6 of the regulations.
3. Allow parents or eligible students to "inspect and review" the school records maintained on their children or themselves.
4. Receive and consider a parent's or eligible student's request to amend the student's record and, if the request is denied, inform the requestor of the right to a hearing.
5. When a hearing is requested, provide it within a reasonable time.
6. If, after a hearing, the decision is to amend the record, the institution must do so accordingly and give written notice to the requestor.
7. Decide – and include in its institutional policy statement – the criteria for determining who among the institution's own employees has a "legitimate educational interest" in looking at a student's record.
8. Make a record, to be kept with a student's record, of every person who requests or obtains access to that student record, except that no record need be kept for the institution's own employees who have authorized access.
9. When an institution makes an authorized disclosure of personally identifiable information from a student record, the disclosure

must nevertheless be on condition that the disclosee not in turn release the information to a third party without the consent of the parent or the eligible student.

Furthermore, FERPA stated that an institution may do these things:

1. Give students more "rights" than are given to parents of students.
2. Charge a fee for copies and records made for parents or students, but the fee must not "effectively prevent" inspection of the record.
3. Destroy student records.
4. Release to anyone "directory information" about a student.

However, an institution must not do these things:

1. Insist that a parent or student waive any "right" provided by the Buckley Amendment.
2. Charge a search or retrieval fee in connection with student records.
3. Disclose personally identifiable information from a student record, or disclose the record itself, to anyone.

In North Carolina, several statutes relate to student records,<sup>11</sup> which are defined as any written documents kept by the school or a person acting for the school which relate directly to a particular student. This definition includes every item contained in a North Carolina student's cumulative record folder: standardized test scores, grades, teacher evaluations, health data, and disciplinary actions. Anne Dellinger, a lawyer with the Institute of

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<sup>11</sup>North Carolina, General Statute 115C-3: Access to information and public records.; North Carolina, General Statute 115C-114: Records; privacy and expunction.; North Carolina, General Statute 115C-402: Student records, maintenance, contents, confidentiality.

Government at The University of North Carolina cited nine categories of persons who are exceptions to the rule that private information from student records may not be released without the consent of the student or parents.

1. School employees with a legitimate educational interest.
2. Officials of a school to which a student is going to transfer or has transferred.
3. State and local government officials who are auditing schools.
4. Government officials named in a statute (such as child abuse reporting cases) requiring information available only on the records.
5. Financial aid officials at a college or the like where the student has applied for financial aid.
6. Researchers for educational testing organizations if the student cannot be personally identified through the research.
7. Health officials in an emergency to protect the student's health and safety.
8. Certain high-ranking state or federal education officials.
9. Officials of accrediting agencies.<sup>12</sup>

Any other persons are entitled only to directory information, unless they have a court order or consent from the student or his parents. Directory information is defined as the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic

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<sup>12</sup>Anne Dellinger, North Carolina School Law: The Principal's Role (The Institute of Government: The University of North Carolina at Chapel Hill, 1981): 24.

teams, dates of attendance, degrees and awards received, the school last attended, and similar information.<sup>13</sup>

Even though it is the principal's responsibility to ensure that records are safeguarded, this function is routinely assigned to counselors. Anne Dellinger summarized the school's duties: (1) to seek the consent of the student's parents and the student when someone asks to see a student's records; (2) to keep a list of all persons who request access to the record and their interest in seeing it; (3) to adopt a written policy on access to records which must do the following:

- (a) explain students' and parents' rights under the FERPA Act;
- (b) explain how students and parents may gain access to the student's records;
- (c) state the amount charged for copies and explain under what circumstances the school will not furnish copies;
- (d) name the kinds and locations of education records the school keeps;
- (e) describe what information the school will release without consent (directory information);
- (f) explain that a list is kept of every person who requests access to a student's records;
- (g) explain the procedure for correcting or disputing the record.

Copies of the policy must be available for any parent or student who asks for one. In addition, the school must make reasonable efforts to notify

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<sup>13</sup>North Carolina, General Statute 115-165.1 (1978).

parents and students of their rights each year. The penalty for a deliberate and continued violation is a cutoff of federal funds.<sup>14</sup>

#### Court Decisions Interpreting P.L. 93-380 (FERPA)

Since 1974, several court decisions have interpreted the Buckley Amendment. In Board of Education v. Butcher, the court held that student records, without identifying data, could be subpoenaed in a case involving the competence of a tenured teacher.<sup>15</sup> In Mattie T. v. Johnston, the court had to balance the need for privacy with the need for confidential records during litigation to enforce the education rights of Hispanics and the handicapped.<sup>16</sup> In a somewhat related case, Frasca v. Andrews, the editor of a high school newspaper brought an action against a school principal on the grounds that his seizure of the newspaper violated the First Amendment to the United States Constitution guaranteeing freedom of expression.<sup>17</sup> The principal's reasoning was that it contained a letter criticizing a student government officer's academic average, and appeared to be in violation of FERPA.<sup>18</sup> The court ruled that this was not a violation when the information obtained is from a source independent of the school records.<sup>19</sup>

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<sup>14</sup>Dellinger, 26.

<sup>15</sup>Board of Education v. Butcher, 402 N.Y. S.2d 626 (Sup. Ct. 1978).

<sup>16</sup>Mattie T. v. Johnston, 74 F.R.D. 34 (W.D. Okla. 1976).

<sup>17</sup>Frasca v. Andrews, 463 F.Supp. 1043 (E.D. N.Y. 1979).

<sup>18</sup>Joan G. Brannon, "Student Records: Six Years After Buckley," School Law Bulletin 12 (January 1981): 15.

<sup>19</sup>Ibid., 20.

FERPA does not address the issue of whether a school counselor, with good reason, may contact a noncustodial parent to share information without notifying the custodial parent. This can be a highly emotional issue and presents a dilemma for counselors, particularly in the elementary grades. There is some case law that gives direction, however. In Page v. Rotterdam-Mohonasen Central School District, the court decided that noncustodial parents could obtain information about their child's progress at school.<sup>20</sup> The court pointed out that educators and school districts are charged with the duty to act in the best educational interests of the children in their care. The regulation is clear that either parent may obtain information unless barred by state law, court order, or a legally binding instrument.<sup>21</sup> North Carolina attorney Doug Punger stated that he "is not aware of any litigation on this question in North Carolina and that access to a child's records may be the only means available for a noncustodial parent to follow his child's development."<sup>22</sup>

In Fay v. South Colonie Central School District, a 1986 suit was brought by a noncustodial parent against a school system for failing to provide him with requested school records over a period of time.<sup>23</sup> Since there is no private right of action under FERPA, however, the parent used the

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<sup>20</sup>Page v. Rotterdam-Mohonasen Central School District, 441 N.Y. S.2d 323, 109 Misc.2d 1049 (N.Y. 1981).

<sup>21</sup>"Privacy Rights of Parents and Students," Federal Register 45 (May 9, 1980): 30913-30918.

<sup>22</sup>Doug Punger, "The Nontraditional Family: Legal Problems for Schools," School Law Bulletin 15 (April 1984): 3.

<sup>23</sup>Fay v. South Colonie Central School District, 802 F.2d 21 (2nd Cir. 1986).

constitutional tort discussed earlier, Section 1983, stating that the school system denied him a "right," his right to review the records, granted by law.<sup>24</sup> The appeals court dismissed the constitutional claims because the case was considered by the court to be a family law claim.

These decisions by the courts clearly imply that students and their parents have privacy rights and interests which the schools must attend to. In addition, that right of privacy is always balanced by a greater need for information or justice in the eyes of the court. In such dilemmas, it is important that counselors maintain a liberal stance with parents who seek information about their child, and a conservative position toward anyone else seeking confidential information.

#### The Hatch Amendment

Since the early 1960s, some parents have been concerned over what they perceived to be nonacademic, psychosocial programs conducted in elementary and secondary schools and the invasion of family privacy in the classroom.<sup>25</sup> Senator Orin Hatch of Utah introduced in 1978 an amendment, which was passed by Congress, that allowed parents the right to examine the instructional materials being used in federally funded programs or projects. Further, the amendment required that prior written parental consent be obtained before requiring students to submit to psychiatric or psychological

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<sup>24</sup>Ibid.

<sup>25</sup>Frank Burtnett, The Hatch Amendment Regulations: A Guidelines Document, Alexandria, Va.: American Association of Counseling and Development (1986), 4.

examination, testing, or treatment.<sup>26</sup> Because of the nature of their work with students in group counseling, testing, and use of psychometric instruments, the Hatch Act has legal implications for school counselors. Complaints by parents related to materials are directed to the Family Education Rights and Privacy Act office in Washington.<sup>27</sup> It is interesting to note that between 1980 and 1984 the department reported only 12 to 14 complaints about methods, materials, and procedures.<sup>28</sup> Section 439(b) summarizes the contents that apply to school counselors and psychologists:

No student shall be required, as part of any applicable program to submit to psychiatric examination, testing, or treatment, or psychological examination, testing, or treatment, in which the primary purpose is to reveal information concerning:

- a. political affiliations;
- b. mental and psychological problems potentially embarrassing to the student or his family;
- c. sex behavior and attitude;
- d. illegal, anti-social, self-incriminating, and demeaning behavior;
- e. critical appraisals of other individuals with whom respondents have close family relationships;
- f. legally recognized privileged relationships, such as those of lawyers, physicians, and ministers; or
- g. income (other than required by law) to determine eligibility for participation in a program or for receiving financial assistance under such program, without the prior consent of the student or in the case of an unemancipated minor, without the prior written consent of the parent.<sup>29</sup>

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<sup>26</sup>Ibid., 5.

<sup>27</sup>Ibid., 9.

<sup>28</sup>Ibid., 26.

<sup>29</sup>General Education Provisions Act, Public Law 90-247, sec. 439 (b).

Even though very few complaints have been registered since the Hatch Amendment went into effect, it is appropriate that counselors create an open-door policy with parents in terms of their goals, policies, and procedures. In this way, they will better anticipate community reactions.

### State Legislative Enactments

State legislation since 1980 has had considerable impact upon the role of the North Carolina school counselor. After the General Assembly passed the Elementary and Secondary Education Reform Act in June 1984, the Department of Public Instruction revised the North Carolina Standard Course of Study.<sup>30</sup> There are three publications outlining the basic education plan for North Carolina public school children: The Basic Education Program for North Carolina's Public Schools, The North Carolina Standard Course of Study, and The Teacher Handbook for the Competency-Based Curriculum.<sup>31</sup>

The Basic Education Program, which has the force of law, includes statewide comprehensive guidance instruction and specifies how guidance goals fit into other curriculum areas such as health education.<sup>32</sup> These activities include decision making, productive problem solving, handling emotions, goal setting, and interpersonal relations.<sup>33</sup> The Competency-Based

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<sup>30</sup>North Carolina Department of Public Instruction, North Carolina Standard Course of Study and Introduction to the Competency-Based Curriculum (Raleigh: NCDPI, 1985), v.

<sup>31</sup>North Carolina Department of Public Instruction, Teacher handbook: Guidance K-12, Raleigh, N.C. (1985), p. 2.

<sup>32</sup>Trudy Ennis, "Prevention of Pregnancy Among Adolescents: Part 2. Legal Framework for Local School Board Policy," School Law Bulletin (Summer, 1989): 1.

<sup>33</sup>*Ibid.*

Curriculum incorporates guidance strategies to assist students with effective life skills. The counselor as consultant may assist teachers in understanding the legal implications of confidentiality with school records, the appropriateness of educational materials, the importance of child abuse reporting procedures, and medical needs of minors.

The Legal Aspect of Confidentiality and  
Privileged Communication

North Carolina General Statute 8-53.4 - School Counselor Privilege.

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open court waives the privilege conferred. Any resident or presiding judge in the district in which the action is pending may compel disclosure, either at the trial or prior thereto, if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be the district court judge, and if the case is in superior court the judge shall be a superior court judge.<sup>34</sup>

In North Carolina, a judge may compel a counselor, in the interest of justice, to testify. The courts, when confronted with this, must weigh a person's need for privacy with the public need to know. Four criteria set forth in Wigmore on Evidence are used to determine whether the privilege should prevent disclosure:

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<sup>34</sup>North Carolina, General Statute 8-53.4 (1987).

1. Communications must originate in confidence of nondisclosure.
2. The element of confidentiality must be essential to maintenance of the relationship of the parties.
3. The relationship is one that in the opinion of the community should be fostered.
4. The injury of the relationship as a result of disclosure must exceed the benefit gained by correct disposition of litigation.<sup>35</sup>

Privileged communication runs counter to the common law need to know all evidence that is applicable, so counselors must never see it as an automatic assumption. It is always open to a judge's interpretation. For example, in a 1986 court case, the privilege was upheld. In State v. Newell, the requested files in an indecent liberties trial were found to be under counselor privilege, and the judge ruled that the request amounted to "a fishing expedition" rather than specific, helpful information.<sup>36</sup>

Privacy and confidentiality must always be balanced in terms of protecting a student from himself or others. If a relationship of care exists, counselors are expected to act "in loco parentis." In Tarasoff v. The Regents of the University of California, "duty to warn" was established for mental health workers.<sup>37</sup> When there is a known victim, counselors must take reasonable action to prevent violence. But counselors must distinguish between information from students about past events and information on events that

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<sup>35</sup>VIII Wigmore on Evidence, Section 2285 (3d ed.).

<sup>36</sup>State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

<sup>37</sup>Tarasoff v. Regents of the University of California, 131 Cal. Rpt. n.14, 551, P.2d 334 (1976).

are planned.<sup>38</sup> The counselor must report impending crimes to school or law enforcement authorities and can do so without identifying particular students.<sup>39</sup>

Dellinger reminds counselors that they are not prohibited through North Carolina General Statute 8-53.4 from revealing anything to anyone learned in the counseling relationship. The statute applies only to the admissibility of evidence in civil or criminal actions.<sup>40</sup> The duty to warn and special relationship are two concepts related to establishing negligence.

### Tort

A tort is "a civil wrong other than a breach of contract for which a court will provide a remedy in the form of damages."<sup>41</sup> For a tort to occur, there must be (a) a duty owed by one person to another, (b) a breach of that duty, and (c) a reasonable foreseeable resulting injury or damage. In addition, the duty must be one imposed by law, not by private agreement or contract.<sup>42</sup>

In determining whether the degree of care provided to the plaintiff was adequate, the courts use the "reasonable person" standard. If it can be proven that the defendant-counselor failed to provide the standard of care that a

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<sup>38</sup>Dellinger, 29.

<sup>39</sup>Ibid.

<sup>40</sup>Ibid.

<sup>41</sup>H. C. Hudgins and Richard S. Vacca, Law and Education: Contemporary Issues and Court Decisions, 2d ed. (Charlottesville, Va.: Michie, 1985), 75.

<sup>42</sup>Ibid., 76.

reasonable person would have provided under the same or similar circumstances, then a case of negligence is highly likely.<sup>43</sup>

In negligence cases, a duty may be defined as an obligation, recognized by law, requiring one person to conform to a particular standard of conduct towards the care of another person.<sup>44</sup> Therefore, when a counselor fails to provide the proper degree of care that is required and a student is injured as a consequence, charges of negligent nonfeasance or misfeasance result.

Nonfeasance is the failure of the defendant to perform a duty that should have been performed. Misfeasance is the improper performance of a duty.<sup>45</sup>

#### Court Decisions Interpreting Negligence

In most negligence suits, foreseeability plays a critical role in determining whether a standard of care that was provided was "reasonable" under the existing circumstances. There is case law that provides counselors with the court's current stance on negligence issues.

In Summers v. Milwaukee, a counselor was sued for negligence in her failure to foresee harm to a student assigned to physical education classes who had known back problems.<sup>46</sup> The counselor should have known, in the eyes of the court, that the physical education classes would pose a hazard.

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<sup>43</sup>Louis Fischer and Gail P. Sorenson, School Law for Counselors, Psychologists and Social Workers (New York: Longman, 1985), ix.

<sup>44</sup>Donald Henderson, "Negligent Liability and the Foreseeability Factor: A Critical Issue for School Counselors," Journal of Counseling and Development 66 (October 1986): 86.

<sup>45</sup>H. C. Black, Black's Law Dictionary, 5th ed., St. Paul, MN: West, 1984.

<sup>46</sup>Summers v. Milwaukee, 481 P.2d 369 (1971).

In Gammon v. Edwardsville Community Unit School District No. 7, a counselor was sued for failure to provide a standard of care to a student counselee who had informed the counselor of an impending fight with a fellow student.<sup>47</sup> Instead of protecting the victim, the counselor put the student in jeopardy by taking no steps. In another case, a counselor was sued for negligence even though she had consulted with the parents of a student and had referred the student for psychiatric treatment for emotional disturbance.<sup>48</sup> This court ruled in favor of the counselor and said she was entitled to "good faith immunity," because she had consulted within the parents and sought the advice of the school psychologist before the referral was made.

#### The Application of the Fourteenth Amendment to Student Rights

Prior to the 1970s, students were generally not afforded the same constitutional rights as adults in terms of procedural due process. This was tested in a landmark 1967 case, In re Gault.<sup>49</sup> The question was whether a minor was entitled to Fourteenth Amendment due process rights before being committed to a juvenile home. The Supreme Court set the following constitutional protections:

1. a specific notice of the charges
2. notification of the right to counsel

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<sup>47</sup>Gammon v. Edwardsville Community Unit School District, No. 7, 403 N.E.2d 43 (1980).

<sup>48</sup>Roman v. Appleby, 558 F.Supp. 449 (E.D. Pa., 1983).

<sup>49</sup>In re Gault 387 U.S. 1, 87 S.Ct. 1428, 18 L. Ed.2d 527 (1967).

3. privilege against self-incrimination
4. the right to confront and cross-examine witnesses.<sup>50</sup>

A later case further established procedural due process rights of students prior to their expulsion.<sup>51</sup> The court ruled that a student has an "entitlement" to a public education, a property right protected by the Fourteenth Amendment.<sup>52</sup> That right can only be taken away through due process procedures. Denial of students' constitutional rights by school officials can be a cause for a Section 1983 action, the constitutional tort defined in Chapter II. It was Wood v. Strickland, in 1975, which determined that school board members could be sued by students who are denied their constitutional rights.<sup>53</sup> This case also involved a suspension in which several students were sent home for the remainder of the year without due process rights for spiking punch at a school party.

These decisions of both the Supreme Court and the North Carolina Court of Appeals have held that minors are afforded many of the same constitutional protections as adults.

#### Statutes Governing Health Issues

##### North Carolina General Statute 90-21.5 (a) 1985. Health Services

Any minor may give effective consent to a physician licensed to practice medicine in North Carolina for medical health services for the prevention,

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<sup>50</sup>Hudgins and Vacca, 301.

<sup>51</sup>Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L. Ed.2d 725 (1975).

<sup>52</sup>Ibid.

<sup>53</sup>Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L. Ed.2d 214 (1975).

diagnosis and treatment of (i) venereal disease (ii) pregnancy (iii) abuse of controlled substances or alcohol, and (iv) emotional disturbance.

North Carolina General Statute 90-21.5 (b).

Any minor who is emancipated may consent to any medical treatment, dental and health service for himself or for his child.

North Carolina General Statute 7A-726 (1983).

An unwed minor parent in North Carolina is emancipated only if she applied to a court for emancipation and has been so adjudicated. Only a 16 or 17 year old may seek emancipation.

In most states, parental consent is legally required for minors to enter into a relationship with health care professionals. North Carolina, through a statutory provision, allows minors to seek health services, including abortions. In addition, North Carolina has no statutory requirement that parents be notified about their minor children who seek contraceptive or abortion advice. But counselors should be cautious about giving advice in this area. The justification for allowing minors to seek treatment without parental consent is that they might not obtain this needed treatment without such a right.<sup>54</sup>

Fischer and Sorenson have reported that giving birth control or abortion-related advice can lead to legal problems for counselors.<sup>55</sup> A case in 1989, Arnold v. Board of Education of Escambia County, involved parents

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<sup>54</sup>Gerald Corey, Marianne Schneider Corey, and Patrick Callahan, Issues and Ethics in the Helping Professions, 3rd ed., (Pacific Grove, Calif.: Brooks/Cole, 1988), 312.

<sup>55</sup>Fischer and Sorenson, 50.

bringing suit against a counselor for allegedly "coercing" their child to have an abortion and not informing the parents of the girl's condition.<sup>56</sup>

Some school boards may decide to develop policies related to abortion and contraceptive counseling and other health areas such as drugs and alcohol abuse. As long as the policies are in line with laws, it is very appropriate to establish guidelines.<sup>57</sup> This may mean that school boards may ask counselors to refer any student with medical questions about drugs, contraceptives, or abortion to the school nurse for medical advice. Counselors need to be aware of local school board policies that may restrict their actions.

If there is no written school system policy to the contrary, counselors may advise students about birth control, abortion, and related issues.<sup>58</sup> Incompetent advice or advice which goes against written board policy would most certainly place a counselor in jeopardy of liability, however.<sup>59</sup>

#### Legal Precedents Affecting Privacy Rights of Students

Many of the same constitutional rights that apply to adults now apply to minor students. In the area of privacy, for instance, minor students in North Carolina may receive, without parental consent, medical treatment for

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<sup>56</sup>Arnold v. Board of Education of Escambia County, 880 F.2d 305 (11th Cir. 1989).

<sup>57</sup>Fischer and Sorenson, 58.

<sup>58</sup>Ibid., 59.

<sup>59</sup>Ibid.

venereal disease, pregnancy, drug abuse, and emotional disturbance.<sup>60</sup> These health services have been extended to include the right to obtain an abortion.<sup>61</sup> It is important for counselors to know the legal rationale for this right, but to be cognizant of present legislation before the courts.

In 1973, Roe v. Wade legalized abortion under certain conditions.<sup>62</sup> Two other Supreme Court decisions extended the right to minors to obtain an abortion without the consent of a parent. Planned Parenthood v. Danforth in 1976 held that minors have the same right as adult women to secure an abortion without state restriction, unless a significant state interest justifies different treatment.<sup>63</sup> The Court demonstrated further acceptance of a minor's right to make an independent abortion decision in Bellotti v. Baird.<sup>64</sup> The courts ruled that parental consent for an abortion was not required unless the state could provide an alternative procedure where authorization could be obtained.<sup>65</sup>

The woman's right to obtain an abortion was challenged in many states in the 1980s. In July of 1989, a case in Missouri, Reproductive Health Services v. Webster, reinforced the right of states to limit abortion.<sup>66</sup> Some political

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<sup>60</sup>North Carolina, General Statute 90-21.5 (a) 1985.

<sup>61</sup>Ennis, 7.

<sup>62</sup>Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973).

<sup>63</sup>Nanette Dembitz, "The Supreme Court and a Minor's Abortion Decision," Columbia Law Review 80 (1980): 1254.

<sup>64</sup>Bellotti v. Baird, 443 U.S. 622, 652-56 (1979).

<sup>65</sup>Ennis, 7.

<sup>66</sup>Reproductive Health Services v. Webster, 88.605.

analysts view this ruling as the first real crack in the legal foundation of Roe v. Wade.<sup>67</sup> It clearly invites state legislatures to experiment with new laws designed to limit access to abortion; this will further define the legal duties of counselors. As long as Roe v. Wade is the law of the land, however, minors may consider abortion decisions a private matter. Counselors can be guided by certain ethical standards when assisting minor students in the counseling process. Three ethical standards apply:

1. The counseling relationship, and information resulting therefrom must be kept confidential, consistent with professional obligations.<sup>68</sup> A counselor may encourage a student to involve appropriate adults, but should not report information without the student's permission.

2. When the student's condition indicates that there is clear and imminent danger to the student or others, the counselor must take reasonable personal action or inform responsible authorities.<sup>69</sup> Counselors will always be in a position to make judgments in this area. The obvious referral for the student is a school nurse who can determine medical needs.

3. Counselors recognize their boundaries of competence and provide only those services and use only those techniques for which they are qualified by training or experience.<sup>70</sup> Referrals to a medical doctor or nurse who is

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<sup>67</sup>Newsweek (17 July 1989): 4.

<sup>68</sup>American Association of Counseling and Development, Ethical Standards (Alexandria, Va.: AACD, 1988): B2.

<sup>69</sup>Ibid., 4.

<sup>70</sup>Ibid., A7.

qualified to determine medical needs are appropriate. Counselors who incompetently advise students may be sued for malpractice.

### AIDS

Acquired Immune Deficiency Syndrome is an infectious disease that counselors increasingly will deal with in the schools, either in a counseling or an educational role. The American School Counselor Association (ASCA) in 1987 passed a resolution entitled Education and AIDS, which states that ASCA is to take an active role in educating students about AIDS.<sup>71</sup> The recent development of this disease raises an ethical question: at what point may a counselor breach a confidential relationship with a counselee who has the AIDS virus in order to protect the general public? The applicability of the term "clear and imminent danger to self or others" from the AACD Ethical Standards is not clear when applied to students with AIDS.<sup>72</sup>

If counselors are aware that a student is infected with the AIDS virus, a report can be made in confidence to the principal. At that point, the principal will inform the superintendent who informs the local director of the health department. It is the health department director who determines what action is to be taken or what other person needs to know. The role of the counselor in the 1990s will likely include educating students, their families, and others about AIDS, as well as counseling victims of AIDS.<sup>73</sup>

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<sup>71</sup>Jim R. Holder, "AIDS: A Training Program for School Counselors," The School Counselor 36 (March 1989): 305.

<sup>72</sup>Lizabeth A. Gray and Anna K. Harding, "Confidentiality Limits with Clients Who Have the AIDS Virus," Journal of Counseling and Development 66 (January 1988): 219.

<sup>73</sup>Holder, 305.

### Child Abuse and Neglect

#### General Statute Section 115C-400 - School personnel to report child abuse.

Any person who has cause to suspect child abuse or neglect has a duty to report the case of the child to the Director of Social Services of the county, as provided in G.S. 7A-543 to 7A-552.

#### General Statute Section 7A-550 - Immunity of persons reporting under this law.

Anyone who makes a report pursuant to this Article, cooperates with the county department of social services in any ensuing inquiry or investigation, testifies in any judicial proceeding resulting from the report, or otherwise participates in the program authorized by this Article, is immune from any civil or criminal liability that might otherwise be incurred or imposed for such action provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed.

The National Center for Child Abuse and Neglect reports over one million cases of child abuse a year.<sup>74</sup> While there are no reported cases imposing civil liability on counselors for failure to report, in North Carolina, one assistant superintendent was found guilty of failing to report, a misdemeanor,<sup>75</sup> and there have been cases against physicians and hospitals. In 1974, Congress passed the Child Abuse Prevention and Treatment Act,<sup>76</sup> which required all states to establish procedures for identification, reporting, investigation, and treatment.

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<sup>74</sup>Fischer and Sorenson, 191.

<sup>75</sup>State v. Freitag (unreported, Wake County District Court, January 31, 1986).

<sup>76</sup>Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C.

North Carolina, in 1983, passed legislation known as the Prevention of Child Abuse and Neglect Article.<sup>77</sup> The purpose of the legislation was outlined in the statutes and was in response to more than 27,000 cases of abuse and neglect in 1982.<sup>78</sup> The Children's Trust Fund was established to develop primary prevention programs across the nation.<sup>79</sup> Prevention programs are those which affect children and families before a substantial incident of child abuse or neglect has occurred. The North Carolina Children's Trust Fund is administered through the Division of Community Schools by the State Board of Education.<sup>80</sup> The funds come from grants, donations, and marriage license fees. Recommendations for grants to be awarded annually to school systems, agencies, and organizations interested in primary prevention are awarded annually.<sup>81</sup>

The laws of privilege worked well until the rise in public awareness of child abuse in the 1970s and 1980s. Now every state has exceptions to privileged communication concerning child abuse.<sup>82</sup> In terms of reporting

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<sup>77</sup>Prevention of Child Abuse and Neglect Article, North Carolina, General Statute 110-149 (1983).

<sup>78</sup>Pamela O. Paisley, "Prevention of Child Abuse and Neglect: A Legislative Response," The School Counselor 34 (January 1987): 227.

<sup>79</sup>Ibid.

<sup>80</sup>Ibid.

<sup>81</sup>North Carolina Department of Public Instruction, The Children's Trust Fund Brochure (Raleigh, N.C.: NCDPI, 1983), 1.

<sup>82</sup>David N. Sandberg, Susan K. Crabbs, and Michael A. Crabbs, "Legal Issues in Child Abuse: Questions and Answers for Counselors," Elementary School Guidance and Counseling 22 (April 1988): 269.

child abuse, society has made a judgment that there is greater public good in protecting children against abuse than in guaranteeing confidentiality and privilege. Counselors play a vital role in assisting students after reports are made through counseling and support.

### Summary

Legally, schools remain a responsibility of state government; therefore school officials, teachers, and counselors are agents of the state when performing their duties. Various legislative enactments and landmark court cases have shed new light on the duties and responsibilities of school counselors. There are ethical and legal responsibilities in the following areas identified in Chapter II as dilemmas for school counselors:

1. To protect innocent people who may be injured by dangerous students.
2. To assess and intervene effectively with students who may be suicidal.
3. To follow the provisions of the Family Educational Rights and Privacy Act when maintaining and disseminating school records.
4. To maintain confidentiality with anyone within the counseling relationship except in circumstances which pose a threat to someone.
5. To adhere to the rules of privilege as set forth by state statute in judicial proceedings.
6. To recognize a minor's rights to privacy guaranteed by the Constitution, particularly minors seeking medical attention, including contraception and abortion.

7. To not defame a student by disclosing private facts.
8. To report suspected child abuse and neglect of juveniles up to age 18.
9. To follow a duty of care owed to students under their supervision through competent advice and careful professional judgment.
10. To understand the concept that, while school officials may control student conduct, students are afforded due process rights under the Fourteenth Amendment and schools must function within the Bill of Rights when disciplining students.

## CHAPTER IV

### REVIEW OF COURT DECISIONS

The cases selected for review in this chapter are those which have legal implications for the counselor's role in the public schools.

Drawing specific conclusions and generalizations is difficult in legal research. Although a legal precedent has been established concerning a particular issue, an individual still has the right to pursue a grievance in court.<sup>1</sup> In addition, even though the legal issues may be similar to questions already decided by the courts, individual aspects of a particular case may produce a different ruling. A court decision relates to the particulars of that case,<sup>2</sup> but from various court cases, certain legal precedents have been established and have evolved to become what is known as "case law." Often in judicial rulings, judges will depend heavily upon decisions rendered in similar situations and the opinions of other judges. The decisions reached by the United States Supreme Court establish the greatest precedent since the rulings are binding throughout the land.<sup>3</sup>

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<sup>1</sup>Alan Abeson, "Litigation," in Public Policy and Education of Exceptional Children, ed. Frederick J. Weintraub (Reston, Virginia: Council for Exceptional Children, 1976), 254.

<sup>2</sup>Joseph E. Bryson and Charles P. Bentley, Ability Grouping of Public School Students (Charlottesville, Va.: Michie, 1980), 50.

<sup>3</sup>Abeson, 254.

### Organization of Cases Selected for Review

Each of the cases selected for review in this chapter meets one or more of the following criteria:

1. The case is considered to have been a landmark case in the broad areas of student rights, student privacy, or liability for counselors.
2. The case helped to establish precedent or "case law" in a particular area that has legal implications for the role of the school counselor in the identified areas.
3. The issues in the case relate to one of the following subtopics:
  - a. Student's right to an education
  - b. Student's right to due process
  - c. Student's right to privacy
  - d. Liability for school counselors
  - e. Child abuse reporting

The first series of court cases selected for review are those United States Supreme Court landmark decisions relating to the broad constitutional issues of students' rights at school. The cases were selected because each set legal precedents for decisions in cases involving students' constitutional guarantees. Included in this category are the following cases:

1. Tinker v. Des Moines Independent Community School District (1969)
2. Planned Parenthood of Central Missouri v. Danforth (1976)
3. Goss v. Lopez (1975)
4. Wood v. Strickland (1975).

The second category of cases reviewed in this chapter consists of those State Supreme Court, United States District Court, and Circuit Court of Appeals cases that have significantly contributed to the establishment of the "case law" or legal precedent in the areas of confidentiality, and privacy of educational records. Included in this category are the following cases:

1. In re Lifschutz (1970);
2. Page v. Rotterdam-Mohonasen Central District (1981); and
3. State v. Newell (1986).

The third category of cases reviewed are those from both state and federal courts relating to liability issues for school counselors. Included in this category are the following cases:

1. Summers v. Milwaukee Union High School (1971);
2. Tarasoff v. The Regents of the University of California (1976); and
3. Gammon v. Edwardsville Community Unit School District No. 7 (1980).

The last category of cases reviewed are related to the Child Protective Services reporting laws. Included in this category are the following cases:

1. Roman v. Appleby (1983); and
2. State v. Freitag (1986).

The cases are presented in a chronological sequence to illustrate how court decisions might reflect trends in litigation.

Cases Contributing Significantly to the  
Establishment of Case Law in  
Areas of Student Rights

Tinker v. Des Moines  
393 U.S. 503 (1969)

Facts. This case was on appeal from the United States District Court. The facts involved three students wearing black armbands to protest the Vietnam War. Anticipating a protest, the principals of the Des Moines, Iowa schools had hurriedly adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused, he would be suspended. The Tinker children and Chris Echardt wore black armbands to school and were sent home until they would come back without them. The parents claimed under 42 U.S.C. Section 1983, that the civil rights of their children had been denied, the right to free expression under the First Amendment to the Constitution. They sought nominal damages and injunctive relief.

Decision. The United States Supreme Court reversed the United States District Court decision and remanded the case. The form of relief was left to the discretion of the District Court. Chief Justice Abe Fortas stated that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."<sup>4</sup> The school's denial of the students' symbolic expression of protest violated that constitutional right

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<sup>4</sup>393 U.S. at 740.

since the expression did not "materially" or "substantially" disrupt the work of the school.<sup>5</sup>

Among the legal principles established in this decision are the following:

1. First Amendment rights of free expression are available to teachers and students. Justice Fortas explained "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>6</sup>

2. The legal standard of "material and substantial" disruption was set for future courts to use when settling issues involving student expression.

Discussion. The implication in this decision for all public school personnel is that school officials do not possess absolute authority over students who are persons under the Constitution. As such, they enjoy most of the same rights of the First Amendment as adults. The Court recognized that school was not the same open forum as other public areas, and student expression could be regulated somewhat. But the standard had to be that the expression would result in "material and substantial" disruption of the learning process.

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<sup>5</sup>Ibid.

<sup>6</sup>Ibid.

Planned Parenthood of Missouri v. Danforth  
428 U.S. 52 (1976)

Facts. Two Missouri-licensed physicians, along with Planned Parenthood, brought suit challenging the constitutionality of the Missouri Abortion Statute. Among the provisions under attack were the following:

1. Defining viability as that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life supportive systems;
2. Requiring that before submitting to an abortion during the first 12 weeks of pregnancy, a woman must consent in writing;
3. Requiring the written consent of the spouse of a woman unless a physician certifies it was necessary to preserve the mother's life; and
4. Requiring the written consent of a parent or person in loco parentis to the abortion of an unmarried woman under age 18.

Decision. Justice Harry Blackmun delivered the opinion which was affirmed in part and reversed in part, and remanded for further proceedings.

1. Definition of viability does not conflict with Roe v. Wade and is not unconstitutional. Additionally, viability is not up to the courts, but rather the medical community to determine.
2. Written consent from the woman before abortion is not unconstitutional. The decision to abort is stressful, important, and a written consent attests to a level of awareness on the part of the woman.
3. Written consent from the woman's husband is unconstitutional, since the State cannot delegate to a spouse veto power over what Roe v. Wade guaranteed.

4. The requirement of consent from an unmarried minor's parent is unconstitutional. The State "may not constitutionally impose a blanket provision during the first 12 weeks of her pregnancy, there being no significant state interest."<sup>7</sup>

Discussion. This decision does not suggest that every minor, regardless of age or maturity, could give consent for termination of her pregnancy. It expands Roe v. Wade in that it affords a mature minor the opportunity to make the private decision about an abortion with her doctor. Justice Blackmun stated the following: "Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors are protected by the Constitution and possess constitutional rights."<sup>8</sup> The Court indicated that it recognized the State's broad authority to regulate the activities of children, and its obligation to safeguard the family. At the same time, it was difficult for the Court to conclude that providing a parent with absolute power to overrule a decision to terminate a pregnancy would serve to strengthen the family unit.<sup>9</sup> In addition, it made no sense to the Court that a married 18-year-old was exempt from obtaining permission for an abortion, yet her unmarried counterpart was restricted by law.

This case provided further interpretation of the Roe v. Wade decision in terms of whether minors had the same rights as adults. It provided further clarification that minors are persons under the Constitution. It is important

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<sup>7</sup>428 U.S. at 75.

<sup>8</sup>*Ibid.*, 74.

<sup>9</sup>*Ibid.*, 75.

for school counselors to understand what rights a pregnant minor seeking an abortion has under the law.

Goss v. Lopez  
419 U.S. 565 (1975)

Facts. This case was an appeal by administrators of the Columbus, Ohio Public School System (CPSS), which challenged the federal court decision that various high school students in the CPSS were denied due process of law guaranteed by the Fourteenth Amendment. The students had temporarily been suspended without a hearing before or after the suspension. School administrators contended that because there was no constitutional right to an education, the Due Process clause did not protect the students from suspension.

Decision. The United States Supreme Court held that education was a property right protected by the United States Constitution. Justice Byron White writing for the Court stated:

Having chosen to extend the right to an education to people of appellees class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures to determine whether the misconduct has occurred.<sup>10</sup>

The Court addressed the question of whether suspensions of ten days or less should be afforded due process procedures. Justice White wrote that "at the very minimum, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing."<sup>11</sup>

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<sup>10</sup>419 U.S. at 576.

<sup>11</sup>Ibid.

Discussion. Among the legal principles that this decision helped to establish are the following:

1. The Fourteenth Amendment prohibits state officials (including school personnel) from denying to students "liberty" or "property" without due process of law.
2. Suspension longer than "a trivial period" is a serious event and cannot be imposed without minimum due process.
3. Students have a legitimate entitlement to a public education as a property interest.

The Goss case is important because it established that all students must have substantive and procedural due process before disciplinary action can occur. This means the rule itself must be fair and the rule must have been fairly enforced.

Wood v. Strickland  
420 U.S. 308 (1975)

Facts. Students in an Arkansas high school were expelled from school for violating a school regulation prohibiting the use of alcoholic beverages at school. They brought suit against the school board and two administrators based on 42 U.S.C. Section 1983 claiming that their federal constitutional rights to due process were denied. The District Court ruled in favor of defendants on the ground that there was no proof of malice. The Court of Appeals ruled that there had been a violation of students' substantive due process and it reversed and remanded the case for a new trial. On Certiorari, the issue before the Supreme Court was whether the application of due

process by the Court of Appeals was warranted and whether that court decision was correct.

Decision. The Supreme Court ruled that evidence was available supporting the charges of denial of due process rights and found the contrary judgment of the Court of Appeals was "improvident."<sup>12</sup> The case was remanded for further proceedings back to the District Court. Justice Byron White expressed the majority assenting viewpoint by writing that

the official must be acting sincerely that he is doing right, but an act violating a students' constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice.<sup>13</sup>

Discussion. This decision holds school officials responsible for actions violating students' constitutional rights. Ignorance of clearly established laws would not be an excuse. This decision follows the standard set in Tinker v. Des Moines and Goss v. Lopez in the following ways:

1. Public high school students have certain rights guaranteed by the Constitution of the United States.
2. Public high school students have substantive procedural rights while at school.
3. Students may not be expelled without due process procedures.
4. School officials must operate within the laws and the Bill of Rights.

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<sup>12</sup>420 U.S. 308 at 227.

<sup>13</sup>Ibid.

Justice John Powell dissented in part to this decision. He expressed the opinion that the decision imposed a higher standard of care upon public school officials, sued under Section 1983, than any other official. He wrote that "this harsh standard requiring knowledge of what is characterized as settled, indisputable law, leaves little substance to the doctrine of qualified immunity."<sup>14</sup> The concern was that the average lay board member would have to know current law, an unreasonable standard.

This decision follows yet another claim against the schools for failing to view students as persons under the Constitution. Time and again the courts had addressed this issue and established precedent for what rights students have at school. Tinker v. Des Moines in 1969, Goss v. Lopez in 1975, and Givens v. Poe in 1972 all dealt with student rights under the Constitution. Although Section 1983 was not intended to correct school officials' errors in disciplinary procedures, it has figured significantly in actions against school officials related to inappropriate disciplinary measures. A Section 1983 action may be used against any public school employee if there is a constitutional violation. It is up to the court to determine whether the complaint rises to the level of Constitutional deprivation.

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<sup>14</sup>Ibid., 229.

Cases Contributing Significantly to Case Law in  
the Area of Educational Records

In re Lifschutz  
467 P.2d 557

Facts. Psychiatrist Joseph E. Lifschutz sought a writ of habeas corpus to secure his release after his imprisonment for refusing to obey an order of the San Mateo County Superior court instructing him to answer questions and produce records relating to communications with a former patient, Housek. Dr. Lifschutz contends the court order was invalid as unconstitutionally infringing on his personal rights of privacy, his right to practice his profession, and the privacy of his former patient.

The original proceeding involved a suit brought by Housek against Arabian for damages resulting from an assault. Housek's complaint alleged the assault caused him "physical injuries, pain, suffering, and severe and emotional distress." He also stated he had received psychiatric treatment over a six-month period ten years earlier from Dr. Lifschutz. The medical records and Dr. Lifschutz were subpoenaed. Housek did not claim the psychotherapist/patient privilege, but Dr. Lifschutz refused to reveal any information, resulting in the contempt of court ruling.

Decision. The Supreme Court of California agreed that the trial court's order requiring the production of records from Dr. Lifschutz was valid. They further agreed that the trial court properly adjudged Dr. Lifschutz in contempt of court for intentionally violating the valid court order. The petition for a writ of habeas corpus was denied. The Court held that no constitutional right

enables a psychotherapist to assert absolute privilege concerning all communications.

Justice John Tobriner relied on the California Evidence Code which indicates that "the psychotherapist cannot claim the privilege of the patient if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure."<sup>15</sup>

Discussion. This decision makes clear to whom the statutory privilege of confidentiality belongs. The privilege established in the California Evidence Code is a privilege of the patient, not the psychotherapist. The psychiatrist cannot assert his patient's privilege if that privilege has been waived or if the communication in question falls within the statutory exceptions to the privilege. One of the issues before the court was to determine "how to accommodate the conceded need of confidentiality in the psychotherapeutic process with the societal needs of access to information for the ascertainment of truth in litigation."<sup>16</sup> The Court felt that in instances in which a patient has chosen to forego the confidentiality of the privilege, the Court would question any impairment to the practice of psychotherapy. The implication for school counselors in this decision is that the privilege of confidentiality belongs to the client, and when waived, the counselor has no claim to withhold information requested. Another implication for counselors is that in North Carolina any judge can compel disclosure of

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<sup>15</sup>467 P.2d at 577.

<sup>16</sup>Ibid, p. 561.

confidential communications, including records.<sup>17</sup> As Remley stated, "the laws of discovery state that litigants should have access to all information relevant to a case being litigated."<sup>18</sup> It is important for counselors to know that professional ethical codes have limitations and that they do not supersede a court order.

Page v. Rotterdam-Mohonasen Central School District  
441 N.Y. S.2d 323 (1981)

Facts. The natural father of a fifth grader, Eric Page, asked for a court order directing the school district to allow him to inspect his son's records and provide him with conferences. The father was separated from Eric's mother who had legal custody and had presented a signed statement to the school indicating that she did not wish the school to transmit records to the natural father. The school system complied with the mother's request and refused to allow the father access to records.

Decision. The Court submitted judgment for Mr. Page, granting the relief requested in all respects. Justice Minor wrote "while legal custody may be in one or both of the parents, the fact that it is placed in one does not necessarily terminate the role of the other..."<sup>19</sup> The decision clarified the intent of the Family Educational Rights and Privacy Act of 1974 (FERPA) in two ways:

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<sup>17</sup>North Carolina, General Statute 8-53.4, Art. 7 (1987).

<sup>18</sup>Theodore P. Remley, Jr., "Counseling Records: Legal and Ethical Issues," in Ethical Standards Casebook, ed. Barbara Herlihy and Larry B. Golden (Alexandria, Virginia: American Association of Counseling and Development, 1990), 166.

<sup>19</sup>441 New York, S.2d at 325.

1. The FERPA states that funds shall not be available to educational agencies which deny to parents the right to inspect and review the education records of their children.<sup>20</sup>

2. FERPA allows inspection by either parent, without regard to custody, unless such access is barred by state law, court order, or legally binding instrument.<sup>21</sup>

Discussion. Mr. Page was not asking for custody rights to be changed, only to participate in his son's educational development. The court surmised that educators are charged with the duty to act in the best educational interests of children. That being the case, the child's interests dictate that educational information be made available to both parents of every school child "fortunate enough to have two parents interested in his welfare."<sup>22</sup>

This decision clarifies FERPA guidelines and directs counselors to work with noncustodial family members. Even though it might cause some inconvenience, it is important to include them in the educational development of their children upon their request. This can be a highly emotional issue for parents; therefore policies and procedures should be written and available at the beginning of the year. Schools can assume, unless there is a legal document to the contrary, that both parents have access to educational records.

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<sup>20</sup>20 U.S.C.A. Section 1232 g.

<sup>21</sup>Ibid.

<sup>22</sup>441 New York, S.2d at 325.

State of North Carolina v. William K. Newell, III  
(1986) No. 8628SC259

Facts. This case was an appeal by the defendant who was convicted by a trial court of taking indecent liberties with a child. In appealing, the defendant contended that the trial court erred in quashing subpoenas "duces tecum" issued by the defendant upon the Eliada Home for Children for the production of all of its files and records relating to the victim and another witness, both of whom were residents of the home.

Decision. The North Carolina Court of Appeals held that the defendant had a fair trial, free from prejudicial error. The court contended that since the subpoenas called for all files and records relating to the victim and another witness, the subpoena amounted to "a fishing expedition."<sup>23</sup> Only a tiny fraction of them were material to the inquiry, according to Justice Hedrick, and a good many were privileged under North Carolina General Statute 8-53.8 (counselor privilege).

Discussion. In this case, the subpoenas called indiscriminately for "all files and records," a very broad category which the court felt certain would include items completely irrelevant to the inquiry. Since many of the records were protected by the counselor privilege statute, the defendant was not entitled to "search them through for evidence."

The defendant argued that "something in the juvenile record may be relevant to impeach the testimony of a witness." The statute the defendant claimed gave him grounds for his motion required that evidence had been available which was unknown or unavailable to the defendant at the time of

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<sup>23</sup>8628 SC 259 at 709.

the trial.<sup>24</sup> But in order for the court to grant such a motion, "the new evidence does not merely tend to contradict, impeach, or discredit the testimony of a former witness."<sup>25</sup> The court felt this requirement was not met.

This decision clarified the North Carolina counselor privilege statute 8-53.8 in the following ways:

1. G.S. 8-53.8 prohibits client information from being shared in a legal proceeding without the client's consent.
2. The information requested under subpoena must be relative to the inquiry. The purpose of a subpoena "duces tecum" is to require production of specific items, and it must specify with as much precision as possible what items are sought.

This decision is important in that it further establishes a standard for appropriate access to student educational records. Because it is a court of appeals decision, lower courts will use the decision as a standard in future court decisions related to release of privileged information.

Cases Contributing Significantly to Case Law  
in the Area of Liability

Summers v. Milwaukee Union High School District No. 5  
481 P.2d 369

Facts. This case was an appeal by the defendant school system asking the court to allow its motion for a redirected verdict on the ground that there was

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<sup>24</sup>North Carolina, General Statute 15A 1415 (b) (6).

<sup>25</sup>8628 SC 259 at 710.

insufficient evidence to support the plaintiff's claim of negligence that defendant knew, or should have known, that requiring the plaintiff to perform a particular exercise could result in serious physical injury.

The facts of the initial proceeding involved a high school student, Summers, who suffered a compression fracture of two vertebrae after performing an exercise required in physical education class. The school district required a certain number of physical education credits for graduation. When plaintiff was a freshman and a sophomore, she was excused from physical education by a doctor's note because of a back condition. These doctors' excuses were part of the permanent record of the plaintiff.

The plaintiff's doctor requested a list of the exercises and type of gymnastics the plaintiff was required to perform in school. The plaintiff's mother relayed that request to the plaintiff's counselor. The request was made at least four times, the last being one week prior to the accident. The list was never provided. The doctor testified that he would have recommended that she not participate in the injuring springboard exercise had he known she was to do so.

Decision. The Court of Appeals denied the defendant school system's motion for a redirected verdict and affirmed the lower court's jury verdict for the plaintiff. In reaching the decision, Judge Foley wrote "a person is bound not only by what he knows but also by what he might have known had he exercised ordinary diligence."<sup>26</sup> Had it not been for the defendant's failure to

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<sup>26</sup>481 P.2d at 370.

furnish the requested list of exercises, the defendant presumably would have been advised by the doctor of its potential hazard to the plaintiff.

Discussion. This decision underscores the element of foreseeability in cases of negligence. It is foreseeability of harm which in turn gives rise to duty to take reasonable care to avoid the harm. Those supervising school children are expected to exercise reasonable care for their protection. The defendant school system's contention that there was no evidence that it could have known, or should have known, that the back condition created a hazard of injury was without merit due to the fact that (1) critical information about the back condition was already in the student record, and (2) the counselor failed to produce the exercise list, which prevented the doctor from acting.

Tarasoff v. Regents of The University of California  
551 P.2d 334 (Cal. 1976)

Facts. This case came on appeal from the parents of Tatiana Tarasoff who was murdered by the client of the main defendant psychologist. The client, Podder, revealed in confidence his intention to murder his former girlfriend, whereupon the psychologist reported the information to the campus police and had him detained at the campus hospital. The hospital released him shortly, finding no reason to keep him, and he subsequently killed Miss Tarasoff. The parents of Tarasoff brought suit for \$10,000 punitive damages and asked the court to determine if the following complaints were causes of actions against the defendants. The following allegations were made against the campus hospital director and university psychiatrist:

1. Failure to detain a dangerous patient
2. Failure to warn the victim or her parents of her grave danger
3. Abandonment of a dangerous patient

Decision. The Court concluded that the plaintiffs could amend their complaints to state a cause of action against the therapists by asserting that the therapists did determine that Poddar presented a serious threat to Tarasoff, or should have so determined based on their professional judgment. Their failure to act was a failure to provide reasonable care to one with whom a "special relationship" existed, a known victim.

The majority of the Court, in imposing a duty on the defendant-therapists, stated the following:

Once a psychotherapist in fact determines or under applicable professional standards, reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.<sup>27</sup>

The Court totally disregarded the defendant's argument that it would be unreasonable to impose such a duty on therapists because they are unable to predict violent behavior accurately. Justice Tobriner wrote "the risk that unnecessary warnings may be given is a reasonable price to pay for the lives of possible victims that may be saved."<sup>28</sup>

Discussion. The Court based its decision on the California Evidence Code which specified no course of action once a determination of client

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<sup>27</sup>551 P.2d at 345.

<sup>28</sup>Ibid.

dangerousness has been made.<sup>29</sup> The Court then turned to common law and decided the relationship was "special" which created a duty to exercise care for the safety of third parties.

This decision determined that mental health professionals in California do have a duty to warn known victims and should disclose confidential information about a patient when the risk is the danger of violent assault on the public. It did not include a duty to warn when the risk of injury is self-inflicted harm or mere property damages.

There are no definitive guidelines provided in this case as to whether a school counselor is under a legal obligation to warn others about possible harm. The implication in this decision for counselors is that the courts, when looking at liability issues, will look for the existence of a "special" relationship. If it exists, counselors may be expected to take reasonable action, which may include warning a known victim.

The law of torts recognizes that school personnel have a duty of care toward students that includes taking reasonable steps any ordinary adult should be capable of during an emergency.<sup>30</sup> Further litigation in this area will most likely occur before any definitive legal duty for school counselors is clear.

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<sup>29</sup>West's Annotated California Codes. Evidence Code. (St. Paul, Minn.: West Publishing Co., 1966), Sec. 1094.

<sup>30</sup>William Prosser, Law of Torts, 3d ed. (St. Paul, Minn.: West Publishing Co., 1964), sec. 54, p. 338.

Gammon v. Edwardsville Community Unit School District No. 7  
403 N.E.2d 43

Facts. Plaintiff Gammon was an eighth grade student at Edwardsville Junior High. She was informed by telephone, by a classmate, of threats made against her by another student, Cindy Ladd, while she was absent from school. Upon returning to school, she became apprehensive when she was told that the threatening student wanted to see her in the rest room. Instead, she went to a guidance counselor for help. The counselor met with both students and was able to see considerable anger on the part of Ladd. When Ladd left the guidance office, the counselor admitted she knew she was still quite angry. Gammon was told by the counselor to avoid her that day. The counselor did not notify disciplinary personnel or playground supervisors. When Gammon entered the play yard, Ladd struck her in the left eye with her fist. A serious fracture resulted to the orbit which required surgery to correct.

The plaintiff contended that the school's response to a known threat of violence on school premises was inadequate, and that the counselor's inactions constituted willful and wanton conduct.

Decision. The Illinois Appeals Court reversed the decision of the circuit court and remanded the case. Willful and wanton conduct is defined as an act

committed under circumstances exhibiting a reckless disregard for the safety of others, such as failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of reasonable care.<sup>31</sup>

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<sup>31</sup>82 Ill. App.3d at 586.

In deciding this case, the court heard ample evidence that the risk of harm was brought to the attention of the counselors and that supervision necessary to maintain discipline aimed at avoiding a confrontation between the two pupils was not provided. The court viewed the counselor's actions as "putting the plaintiff back in the position she had been prior to going to her office for help."<sup>32</sup>

Discussion. Justice Harrison pointed out that public schools have a duty to provide for the physical safety of its students. The Illinois statute states that

Teachers and other certified educational employees shall maintain discipline in the schools, including school grounds which are owned or leased by the board and used for school purposes and activities. In all matters relating to the discipline and conduct of the schools and the school children, they stand in the relation of parents and guardians of the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.<sup>33</sup>

In meeting that responsibility, teachers and school officials stand in the same position as do parents and guardians (in loco parentis). A breach of that duty requires more than common negligence according to the court. Willful and wanton conduct must be shown. The court felt, based on the evidence, that it could not say that the action did not demonstrate an utter indifference to or conscious disregard for the safety of the plaintiff. That would be determined by a jury once the case was remanded to a lower court.

This decision sets precedent in establishing the significance that foreseeability plays in negligence cases. The duty of school officials to guard

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<sup>32</sup>Ibid.

<sup>33</sup>Ibid.

students from physical injury is well recognized in the law of torts.<sup>34</sup> For a tort to occur, there must be (a) a duty owed by one person to another, (b) a breach of that duty, and (c) a reasonably foreseeable resulting injury or damage.<sup>35</sup> School personnel act in the place of the students' parents and as such, they have a duty of care.

The legal implications of this decision for counselors is that they exercise reasonable professional judgment and if they determine that students pose a serious danger of violence to others, they are obliged to exercise reasonable care to protect them.

Cases Contributing Significantly to Case  
Law in the Area of Child Protective  
Services Reporting Law

Roman v. Appleby  
558 F.Supp. 449 (1983)

Facts. Roman, a former high school student in the Downingtown (Pennsylvania) Senior High School, and his parents brought this civil rights action against the school system, the school counselor Appleby, Chester County Children's Services (CCCS), and Hendry, a social worker for CCCS, alleging violations of rights guaranteed under the First and Fourteenth Amendments of the United States Constitution and Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. Plaintiffs also asserted pendent state claims for negligence and defamation.

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<sup>34</sup>Prosser, sec. 54, p. 338.

<sup>35</sup>Dellinger, 16.

Appleby had conducted a series of eight counseling sessions with Roman, a tenth grade student. It was her opinion that he exhibited certain conduct consistent with emotional disturbance and mental instability. She consulted with the parents and asked them to contact Crisis Intervention for counseling for their son. The Romans did not seek help. Appleby then made an oral referral to CCCS and recommended that Roman be compelled to undergo psychiatric testing. The social worker assigned to the case, Hendry, contacted the parents. CCCS filed a petition to have Roman adjudicated a dependant. That petition was subsequently dismissed by the court. Appleby wrote a report of her discussions with Roman and delivered it to CCCS and Hendry. CCCS delivered it to Roman's personal physician. Several counts were alleged by the plaintiffs:

1. A series of federal constitutional violations under 42 U.S.C. Section 1983: the First Amendment right to free expression of religion; the right to maintain a private family relationship without interference; the Fourteenth Amendment right to due process, and the Fourteenth Amendment right to equal protection of the law.
2. Gross negligence and wanton recklessness, failure to use due care and failure to conduct a reasonable investigation before contacting the Child Protective Agency.
3. Claim of libel based on defendant's release of Appleby's report to persons at CCCS and Roman's doctor.
4. Invasion of privacy due to the nature of the counseling sessions covering issues such as religion, sex, and family issues.

Decision. The Court decided with the Downington School District and Chester County Children's Service and dismissed the causes of action against Appleby and Hendry and all state claims against Appleby and Hendry. A motion for summary judgment was granted. The Court, in ruling for Appleby and Hendry, felt the defense of immunity was supported by the provisions of the Child Protective Services Law of 1975, which required school counselors to report suspected neglect or abuse and allowed immunity from prosecution for persons acting in good faith.

Discussion. Roman and his parents were specific in their Section 1983 claim in terms of the violation, the time, place, and the person responsible. But the Court agreed with the defense of qualified or good faith immunity. Good faith immunity will defeat Section 1983 claims so long as the official conduct did not violate 'clearly established statutory or constitutional rights of which a reasoned person would have known.'<sup>36</sup> By relying upon the objective reasonableness of an official conduct, as measured by reference to clearly established law, a court is now permitted to resolve insubstantial claims through summary judgment. There were two questions for the Court:

1. Did Appleby violate clearly established law by conducting eight interviews with Roman and referring the matter to Child Protective Services?
2. Did Hendry violate clearly established law when she provided an affidavit for use in a petition to have Roman adjudicated a "dependent" pursuant to the Juvenile Act of 1972?

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<sup>36</sup>558 F.Supp. at 455.

The Court said they did not, and in fact that they were functioning within their job descriptions. In addition, the parents of Roman were never denied due process procedures, and in fact, were kept informed from the beginning by the counselor. Due process allows for a meaningful opportunity to be heard and a proper place and time. This occurred. Judge Giles expressed the competing constitutional claims found in a school setting when he wrote that

students, teachers, parents, administrators, and the state as *parens patriae* all have legitimate rights to further their respective goals. Sometimes these rights clash. Thus, while there is a constitutional right to freedom of religion, it is not absolute and may be circumscribed by a compelling state interest.<sup>37</sup>

The parents may have been embarrassed by the petition, but the action was not a result of malice nor without due process. This decision is important in that it explains that school personnel must (1) be in violation of clearly established law not to be covered by the doctrine of immunity, or (2) not functioning within the boundaries of their job descriptions. School personnel such as counselor Appleby may exercise independent judgment in their decision-making without fear of losing qualified immunity.

State v. Freitag  
(Unreported, Wake Country District Court)  
January 31, 1986

Facts. Two 8-year-old girls were allegedly touched on their breasts, sides, and buttocks by a male substitute teacher in the cafeteria as they stood in line. The girls' parents were informed that day. The Assistant

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<sup>37</sup>Ibid., 456.

Superintendent for Personnel of the Wake County School System, Dr. William Freitag, was contacted the same day at the direction of the school principal and given the details. He was led to believe the parents would be satisfied if the teacher would be removed from the substitute list. The teacher was subsequently removed. Dr. Freitag did not report the case as the law required, because he did not think it constituted child abuse. The case was reported to the district attorney's office by the mother of one of the students and Dr. Freitag was charged with failure to report suspected child abuse in violation of G.S. 7a-543.

Decision. Dr. Freitag was found guilty of a misdemeanor and fined \$100.00. The District Court judge was unpersuaded by the defense that it was not the place of the superintendent to report since he did not consider the incident child abuse.

Discussion. Freitag's attorney argued that as head of the personnel department, Freitag was not the administrator with primary responsibility for or experience with child abuse issues. In addition, he noted that if Dr. Freitag was guilty of violating the reporting statutes, the same would be true for all the school officials with knowledge of the incident, as well as the parents of the children.

This decision appears to conflict with the General Statute which states that school teachers are not included in the definition of caretaker.<sup>38</sup> Also, the reporting statute does not apply to incidents involving anyone who is not

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<sup>38</sup>North Carolina, General Statute 7A-517 (5).

a "caretaker" of the child.<sup>39</sup> This decision amounted to a slap on the wrist and a reminder that all educators are mandated to report any incident of suspected child abuse or neglect. In addition, it served as a reminder that it is not up to the reporter to substantiate the abuse, but rather the Department of Social Services. This case also serves as an example of how circumstances of a given case can affect the interpretation of existing statutes in a court decision.

### Summary

Drawing specific conclusions from legal research is very difficult. However, based on an analysis of the cases since 1965, the following general conclusions concerning the legal aspects of the school counselor's role can be made:

1. All protections of the First Amendment and the Bill of Rights apply to the actions of public school officials just as do those of the Fourteenth Amendment. Thus, the authority of school officials must be exercised within the rights guaranteed by the Constitution.
2. Courts will hold counselors to a standard of care generally accepted by counselors in the particular community or area. The facts of a situation will always be carefully considered by the court, and counselors are expected to use care appropriate to the situation. The greater the danger, the more care one must use.

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<sup>39</sup>North Carolina, General Statute 7A-517 (1) "An abused juvenile is any juvenile less than 18 years of age whose parent or other person responsible for his care commits, permits, or encourages the commission of vaginal intercourse, or any sexual act...by, with, or upon, a juvenile."

3. Counselors, like all other educators, are required to report suspected child abuse and neglect.
4. Counselors cannot plead ignorance of the law nor disregard settled, undisputable law when supervising students.
5. Counselors who advise incompetently or carelessly and cause harm can be held liable. The question courts will ask is "How would a reasonably competent counselor behave under these circumstances?"
6. Counselors do not own the privilege of confidentiality; it belongs to the counselee, and can be waived at any time.

The analysis of legal principles indicates that counselors need not be overly fearful of working with minors if they use reasonable care, consult with colleagues, and follow the law and ethical standards.

CHAPTER V  
SUMMARY, CONCLUSIONS, AND LEGAL TRENDS  
AFFECTING SCHOOL COUNSELING

Summary

This study was designed to identify the critical legal issues impacting upon the school counselor's duties and responsibilities and to compile the state and federal statutes and case law on those issues, thus providing a resource for counselors who are confronted with ethical and legal dilemmas. With such a resource, school counselors and other educators can function more effectively and with more confidence in their knowledge of pertinent laws.

The purpose of this study was not to cover every legal issue related to public school counselors, but rather to identify the most critical and current legal problems that exist, and to report which issues are presently being litigated. Therefore, the effort was confined to pertinent issues posing legal and ethical concerns for school counselors, particularly in the state of North Carolina.

As a guide for educational and legal research, several questions were formulated and listed. While the review of the literature considered both educational and judicial issues associated with the legal aspects of the public school counselor's role, most of the questions could be answered by reviewing the statutory provisions and judicial decisions affecting the school counselor's role. The major portions of Chapters III and IV comprise the

answers to these questions which counselors and other educators might use in determining appropriate responses to legal and ethical dilemmas.

The first question in the introductory chapter asked what were the critical school counseling issues which have legal implications for the 1990s. A review of the literature identified the following legal problems for school counselors:

(1) Limitations of the professional codes of ethics

Professional ethical codes sometimes conflict with the law and often do not give clear direction on what appropriate action a counselor should take. They are guidelines only and must be supplemented with knowledge of accepted, established law.

(2) Rights related to student privacy

School counselors often incorrectly interchange the concepts of confidentiality and privileged communication. Confidentiality is an ethical guarantee that counselors will maintain the privacy of a counseling relationship; privilege is a legal right granted by state statute, covering confidential communication between a school counselor and a client in a judicial proceeding. North Carolina has such a statute, but many states do not extend this privilege to school counselors. In regard to school records, school counselors must safeguard a student's educational record and limit access of persons to that information without the express written consent of the student or his parents. It is important that all parents have access to records, unless there is a court order prohibiting that access.

(3) Child abuse reporting procedures

Counselors are required by state statute to report all cases of suspected child abuse and neglect. Counselors are immune from liability for reporting, if they do so in good faith. Counselors in North Carolina are expected to inform the principal when a report is made, but to keep confidential the particular facts of a case. Additionally, social workers may interview suspected victims at school without parental notification.

(4) Liability issues including malpractice, libel, and slander

Counselors may be legally vulnerable to liability if they do not maintain a level of care that a responsible counselor in similar circumstances would be expected to exercise. The literature suggests that counselors may be sued for malpractice for giving incompetent birth control advice, abortion-related advice, making defamatory statements, and violating the privacy of records. Counselors are expected not to release private information for public disclosure.

(5) Issues related to the constitutional tort

Students may bring an action against a counselor who knew or should have known that the student's rights guaranteed under the Constitution were being deprived. This Section 1983 action is the basis of many cases being heard at the appellate and Supreme Court levels. Additionally, counselors are legally vulnerable because they work with minors. They not only have duties to ensure the privacy rights of their counselees but also have certain legal responsibilities to the counselee's parents.

The second question in the introductory chapter asked what federal and state statutes and court decisions in the identified areas determine the legal

duties and responsibilities of school counselors in North Carolina. A review of the state and federal statutes and case law relative to the practice of school counselors in those areas provided the following conclusions:

1. The courts have consistently recognized that personal privacy is a constitutionally protected right.
2. The Family Educational Rights and Privacy Act of 1974, called FERPA, or the Buckley Amendment, guarantees parents access to any educational records of their child. Records maintained by the counselor in the form of counseling notes are not considered educational records.
3. The right of privacy is always balanced by a greater need for information or justice in the eyes of the courts.
4. The Basic Education Program of North Carolina has the force of law and includes statewide comprehensive guidance curricula.
5. North Carolina school counselors' communications in counseling are privileged, as provided by General Statute 8-53.4.
6. Privacy and confidentiality must always be balanced in terms of protecting a student from himself or others.
7. If a relationship of care exists, counselors are expected to act "in loco parentis," in the place of a student's parents.
8. In determining whether the degree of care provided to a plaintiff by a school counselor was adequate, the courts use the "reasonable person" standard. The question "How would a reasonably competent counselor behave under these circumstances?" will usually be asked.
9. A counselor who provides competent information about contraception and family planning services will not be found negligent by a

court. If, however, local school board policy forbids such practice, a counselor may be disciplined.

10. All protections of the First Amendment and the Bill of Rights apply to the actions of public school officials towards students just as do those of the Fourteenth Amendment. Thus, the authority of school officials must be exercised within the rights guaranteed by the Constitution of the United States.

11. Generally, the courts assume an attitude of nonintervention in school matters. The appellate level and Supreme Court will intervene only when a constitutional question is at issue.

The third question posed in the introductory chapter considered the kinds of litigation since 1965 that were related to school counseling. Chapter IV listed selected court cases and the decisions which affected the role of the school counselor. The cases were grouped into the following categories to illustrate the following legal issues:

1. Students' constitutional guarantees,
2. Confidentiality and privacy of educational records,
3. Liability of school counselors,
4. Child Protective Service reporting laws.

Within each group, the cases were listed in chronological order to reflect any trends by the courts. The selection of cases was based upon landmark decisions since 1965 or those that helped to establish precedent in an area having implications for school counselors. The analysis of the court cases in each identified area leads to the following conclusions:

1. The state, federal, and Supreme Courts are reluctant to intervene in school matters unless there is a constitutional question at issue. In fact, only a few school-related conflicts heard by the federal courts ever reach the Supreme Court.

2. In the recent past, however, the number of education-related issues being decided by the Supreme Court has increased. In most of these, the claim has been that a state's legislation or the policies of school boards have violated a student's constitutional rights or some federal law such as the Civil Rights Act of 1871.

3. Students have a legal entitlement to an education as illustrated through decisions such as Tinker v. Des Moines, Goss v. Lopez. These two cases represent, in fact, a startling shift by the courts in doctrine and attitude. The statement that "students do not shed their constitutional rights...at the schoolhouse gate" diminished the "in loco parentis" doctrine significantly as the courts viewed students more as individuals with rights than simply as students under the authority of school officials.

4. A minor's right to privacy in regard to health services, including abortion, under certain circumstances, was decided with the Roe v. Wade, Bellotti v. Baird, and Planned Parenthood v. Danforth decisions.

5. Students have a right to due process protections guaranteed under the Fourteenth Amendment, as decided in cases such as In re Gault and Goss v. Lopez.

6. Parental access to students' educational records, as guaranteed by the Family Educational Rights and Privacy Act, was clarified in Page v.

Rotterdam, which specified that any parent had access, unless there was a court order to the contrary.

7. On the issue of child abuse reporting, all fifty states have mandated reporting laws. Limited case law illustrates that counselors can be held liable for failing to report, but will be immune from liability if they report in good faith.

8. Counselors who use reasonable care in their work will generally not be held liable for malpractice by the courts. They will be held to a standard of care generally accepted by counselors in that particular situation and community.

The fourth question asked what specific trends and issues could be identified from an analysis of the court cases. Although each case stands alone based on the particular circumstances, the following conclusions about possible trends and issues that counselors can expect from the judiciary can be drawn from the analysis of the cases:

1. Since 1965 the number of education-related issues being decided by the Supreme Court has increased.

2. Schools can expect litigation in the following areas in the 1990s: privacy, negligence, child abuse reporting, and claims related to students' constitutional rights.

3. The power of schools no longer derives from parental power. The cases in this study confront real student rights issues and represent a shift from thinking of students as people who were only to obey, to thinking of them as people with rights. Historically, the courts have not considered that the Constitution applied to students in schools. The cases since 1965 illustrate

that schools must function consistently within the boundaries of the Constitution.

4. The power of school authorities through the "in loco parentis" doctrine has been diminished since 1965. Originally intended to give disciplinary powers to school officials, the doctrine provided them qualified immunity prior to the Tinker and Goss cases. More recently, because of established case law guaranteeing certain rights to students, the "in loco parentis" doctrine has been interpreted as a responsibility to supervise students and protect them from harm just as their parents would.

5. The issue of parental consent before a minor can obtain contraceptives or a state-funded abortion will be an issue for the 1990s. The decision in the 1989 case, Webster v. Reproductive Health Services, suggests that the William Rehnquist Court may in the near future overturn the controversial landmark decision Roe v. Wade, passed in 1974. Legislation and case law on this issue will have a direct bearing on the school counselor's role in the future.

6. The expectation of confidentiality between school counselors and their clients is being increasingly legislated by state laws. Since 1975 twenty states have passed statutes protecting counselors' confidential communications in judicial proceedings.

7. Child abuse and neglect reporting statutes for the 1990s may be amended to include psychological abuse and neglect as well as minor physical abuse since all are harmful to children.

The aforementioned trends and possible future directions of the courts and legislatures are based upon interpretations of court cases and are not to be

implied as steadfast and conclusive. In fact, what is held as constitutional today may be reinterpreted by future courts.

The fifth question in the introductory chapter asked which of these trends and issues should be included in professional staff development and counselor education programs in order to assist counselors to perform more effectively in the schools. The answer to this question is evident from the review of the literature, which reported the status of counselors' legal knowledge related to each of the identified issues. Based upon an analysis of the literature, the following conclusions are presented:

1. All counselor education programs could consider incorporating a required course on ethical and legal issues.
2. Practicing school counselors could receive ongoing staff development opportunities to discuss issues related to privacy, confidentiality, and privilege. A case study approach with a school board lawyer present would greatly enhance the counselor's expertise and confidence on these issues.
3. Persons responsible for supervision of school counselors could research established case law in the identified critical areas--for example, liability--and provide discussion of possible implications for the counseling role.
4. Counselors could become familiar with the intent of the Family Educational and Right to Privacy Act and conduct inservice education for school staff members.
5. Counselors could receive staff development on the ethical and legal limitations of confidentiality with students. Again, a case study

approach could effectively assist counselors in knowing when it is appropriate to breach confidentiality.

6. Counselors should receive staff development on interpreting the laws and legislative enactments that affect their role in the schools. Included in this would be basic legal principles and techniques for conducting simple legal research.

7. Counselors should receive staff development on the relation of ethical standards to legal principles. There is a need to understand how they complement and supplement one another.

### Implications

School counselors in the 1990s will undoubtedly be expected to maintain a high level of professional conduct in school settings which increasingly reflect the values, problems, and turmoil found in society. Counselors will be expected to primarily advocate for the interests of individual students with whom they counsel, but must also ensure the rights of other students and their families.

The professional ethical codes provide a framework for behavior, but ultimately the counselor must be prepared to make sound decisions that are founded on ethical principles grounded in theory rather than intuition. If counselors add basic legal principles and case law to this knowledge, they will approach problems with additional confidence.

Society today is more willing than ever to litigate, and even though school counselors, particularly in North Carolina, have been fortunate to be sued infrequently, there are signs that this may change. Additionally, state

legislatures are increasingly protecting the privacy of student information shared with school counselors through state privilege statutes. Since this varies from state to state, and because each statute has exceptions within it, it will become important for counselors to know what confidences are protected in the future. The following recommendations can assist new and established counselors to maintain an ethical balance in their profession of advocacy and professionalism.

### Recommendations

1. Adhere to the ethical standards of the professional organization to which you belong. Understand that they will be guidelines only and that professional interpretation will always be a necessity. By definition, a dilemma is a situation where there are two or more competing solutions that may be justified.
2. Consult with colleagues about dilemmas. Not only is this an effective way to practice ethical and legal decision-making, it promotes consensus about how a community of counselors would respond in certain situations.
3. Know local, state, and federal established laws affecting your role. Ignorance is not accepted by the courts. Understand that students are persons under the law and are protected by the Constitution.
4. Attend seminars and promote staff development on ethical and legal issues related to school counselors. Laws change and courts reinterpret past laws. It is important to know about changes that affect the practice of counseling and to convey those changes to others in the school.

5. Practice within the job description of school counselor. Avoid offering advice or counsel in areas for which you are not trained or qualified. A strong referral component is essential to adequate school counseling programs.

6. Maintain adequate records documenting procedures such as handling school records, reporting child abuse, referring suicidal students for medical attention. When counselors can defend measures taken that are appropriate and reasonable, and help students, it is difficult to prove negligence, or willful and wanton conduct.

7. Avoid being too legalistic. It is important that counselors practice with accurate information and professionalism, but at the same time not be so fearful of lawsuits that they become paralyzed and thus ineffective.

8. Be knowledgeable about guidelines for local school board malpractice insurance coverage in your job area. If it is not adequate, inquire about malpractice coverage from the professional organizations.

9. Know your community in terms of norms, and values in order to anticipate possible reactions to sensitive and controversial issues such as the medical needs of minors. Programs that educate and inform can be established that create a sense of trust between schools and community before controversial issues arise.

#### Recommendations for Further Study

The focus of this study was to identify current critical legal issues for school counselors and the controlling state and federal statutes addressing

those issues. The literature review and analysis of the data imply a need for future study in the following related areas:

1. How do school counselors reach ethical conclusions in solving dilemmas with students they counsel? A mode of ethical decision-making proposed by Karen Kitchener would be useful in such a study.
2. How do school counselors respond in work settings that do not appreciate professional ethical codes and legal guidelines? For example, if an administrator of a school does not encourage reporting of suspected child abuse, how do school counselors react in terms of following the law and ethical guidelines?
3. What is the relationship between gender and school counselor advocacy for students in schools?
4. What is the perceived role of the school counselor by counselors, teachers, and administrators in educating co-faculty about the legal rights of students and their families?
5. What technological and social changes have occurred since 1974 which impact on PL 93-380, the Buckley Amendment? Are there indications that it may need amending?

### Concluding Statement

Through a study of the literature, the critical legal issues for school counselors were identified. State, federal, and local statutes that determine the role of school counselors in those areas were compiled. The results of this study could be valuable to counselors, counselor educators, and other educators as (a) a legal resource for making professional decisions, (b) a legal

reference for understanding the court's past and current positions in the identified areas, and (c) a source of information for possible staff development opportunities.

Today's educator is dealing with an informed public more likely to litigate than ever before. This dissertation provides an added source of information to counselors and other educators who are involved in protecting the rights of students they advise. Through an analysis of current literature, statutes, and legal interpretations relating to the role of the school counselor, a clearer understanding of the legal aspects of that role can be realized.

Finally, if counselors expect to work effectively in school settings in ways that protect their students and themselves, they must have current and accurate information regarding the legal aspects of their role. There are local, state, and federal laws which the school counselor must be familiar with in order to practice in a society with diverse and changing values. Knowing pertinent laws will increase counselors' abilities to make decisions that ensure students' rights. Counselors need not fear litigation when they practice professional judgment, consult with colleagues, adhere to ethical standards, and know pertinent, established laws. For any educator involved in supervising students, an increased awareness of current principles and enactments in these critical areas is advantageous. New interpretations of the laws will undoubtedly affect communities' and school boards' expectations of the school counselor's role in the future.

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## APPENDIX A

### ETHICAL STANDARDS OF THE AMERICAN ASSOCIATION FOR COUNSELING AND DEVELOPMENT

#### **Section A: General**

1. The member influences the development of the profession by continuous efforts to improve professional practices, teaching, services, and research. Professional growth is continuous throughout the member's career and is exemplified by the development of a philosophy that explains why and how a member functions in the helping relationship. Members must gather data on their effectiveness and be guided by the findings. Members recognize the need for continuing education to ensure competent service.

2. The member has a responsibility both to the individual who is served and to the institution within which the service is performed to maintain high standards of professional conduct. The member strives to maintain the highest levels of professional services offered to the individuals to be served. The member also strives to assist the agency, organization, or institution in providing the highest caliber of professional services. The acceptance of employment in an institution implies that the member is in agreement with the general policies and principles of the institution. Therefore the professional activities of the member are also in accord with the objectives of the institution. If, despite concerted efforts, the member cannot reach agreement with the employer as to acceptable standards of conduct that allow for changes in institutional policy conducive to the

positive growth and development of clients, then terminating the affiliation should be seriously considered.

3. Ethical behavior among professional associates, both members and nonmembers, must be expected at all times. When information is possessed that raises doubt as to the ethical behavior of professional colleagues, whether Association members or not, the member must take action to attempt to rectify such a condition. Such action shall use the institution's channels first and then use procedures established by the Association.

4. The member neither claims nor implies professional qualifications exceeding those possessed and is responsible for correcting any misrepresentations of these qualifications by others.

5. In establishing fees for professional counseling services, members must consider the financial status of clients and locality. In the event that the established fee structure is inappropriate for a client, assistance must be provided in finding comparable services of acceptable cost.

6. When members provide information to the public or to subordinates, peers, or supervisors, they have a responsibility to ensure that the content is general, unidentified client information that is accurate, unbiased, and consists of objective, factual data.

7. Members recognize their boundaries of competence and provide only those services and use only those techniques for which they are qualified by training or experience. members should only accept those positions for which they are professionally qualified.

8. In the counseling relationship, the counselor is aware of the intimacy of the relationship and maintains respect for the client and avoids engaging in activities that seek to meet the counselor's personal needs at the expense of that client.

9. members do not condone or engage in sexual harassment which is defined as deliberate or repeated comments, gestures, or physical contacts of a sexual nature.

10. The member avoids bringing personal issues into the counseling relationship, especially if the potential for harm is present. Through awareness of the negative impact of both racial and sexual stereotyping and discrimination, the counselor guards the individual rights and personal dignity of the client in the counseling relationship.

11. Products or services provided by the member by means of classroom instruction, public lectures, demonstrations, written articles, radio or television programs, or other types of media must meet the criteria cited in these standards.

### **Section B: Counseling Relationship**

This section refers to practices and procedures of individual and/or group counseling relationships.

The member must recognize the need for client freedom of choice. Under those circumstances where this is not possible, the member must apprise clients of restrictions that may limit their freedom of choice.

1. The member's primary obligation is to respect the integrity and promote the welfare of the client(s), whether the client(s) is (are) assisted

individually or in a group relationship. In a group setting, the member is also responsible for taking reasonable precautions to protect individuals from physical and/or psychological trauma resulting from interaction within the group.

2. Members make provisions for maintaining confidentiality in the storage and disposal of records and follow an established record retention and disposition policy. The counseling relationship and information resulting therefrom must be kept confidential, consistent with the obligations of the member as a professional person. In a group counseling setting, the counselor must set a norm of confidentiality regarding all group participants' disclosures.

3. If an individual is already in a counseling relationship with another professional person, the member does not enter into a counseling relationship without first contacting and receiving the approval of that other professional. If the member discovers that the client is in another counseling relationship after the counseling relationship begins, the member must gain the consent of the other professional or terminate the relationship, unless the client elects to terminate the other relationship.

4. When the client's condition indicates that there is clear and imminent danger to the client or others, the member must take reasonable personal action or inform responsible authorities. Consultation with other professionals must be used where possible. The assumption of responsibility for the client's(s') behavior must be taken only after careful deliberation. The client must be involved in the resumption of responsibility as quickly as possible.

5. Records of the counseling relationship, including interview notes, test data, correspondence, tape recordings, electronic data storage, and other documents are to be considered professional information for use in counseling, and they should not be considered a part of the records of the institution or agency in which the counselor is employed unless specified by state statute or regulation. Revelation to others of counseling material must occur only upon the expressed consent of the client.

6. In view of the extensive data storage and processing capacities of the computer, the member must ensure that data maintained on a computer is: (a) limited to information that is appropriate and necessary for the services being provided; (b) destroyed after it is determined that the information is no longer of any value in providing services; and (c) restricted in terms of access to appropriate staff members involved in the provision of services by using the best computer security methods available.

7. Use of data derived from a counseling relationship for purposes of counselor training or research shall be confined to content that can be disguised to ensure full protection of the identity of the subject client.

8. The member must inform the client of the purposes, goals, techniques, rules of procedure, and limitations that may affect the relationship at or before the time that the counseling relationship is entered. When working with minors or persons who are unable to give consent, the member protects these clients' best interests.

9. In view of common misconceptions related to the perceived inherent validity of computer-generated data and narrative reports, the member must ensure that the client is provided with information as part of

the counseling relationship that adequately explains the limitations of computer technology.

10. The member must screen prospective group participants, especially when the emphasis is on self-understanding and growth through self-disclosure. The members must maintain an awareness of the group participants' compatibility throughout the life of the group.

11. The member may choose to consult with any other professionally competent person about a client. In choosing a consultant, the member must avoid placing the consultant in a conflict of interest situation that would preclude the consultant's being a proper party to the member's efforts to help the client.

12. If the member determines an inability to be of professional assistance to the client, the member must either avoid initiating the counseling relationship or immediately terminate that relationship. In either event, the member must suggest appropriate alternatives. (The member must be knowledgeable about referral sources so that a satisfactory referral can be initiated.) In the event the client declines the suggested referral, the member is not obligated to continue the relationship.

13. When the member has other relationships, particularly of an administrative, supervisory, and/or evaluative nature with an individual seeking counseling services, the member must not serve as the counselor but should refer the individual to another professional. Only in instances where such an alternative is unavailable and where the individual's situation warrants counseling intervention should the member enter into and/or maintain a counseling relationship. Dual relationships with clients that

might impair the member's objectivity and professional judgment (e.g., as with close friends or relatives) must be avoided and/or the counseling relationship terminated through referral to another competent professional.

14. The member will avoid any type of sexual intimacies with clients. Sexual relationships with clients are unethical.

15. All experimental methods of treatment must be clearly indicated to prospective recipients, and safety precautions are to be adhered to by the member.

16. When computer applications are used as a component of counseling services, the member must ensure that: (a) the client is intellectually, emotionally, and physically capable of using the computer application; (b) the computer application is appropriate for the needs of the client; (c) the client understands the purpose and operation of the computer application; and (d) a follow-up of client use of a computer application is provided to both correct possible problems (misconceptions or inappropriate use) and assess subsequent needs.

17. When the member is engaged in short-term group treatment/training programs (e.g., marathons and other encounter-type or growth groups), the member ensures that there is professional assistance available during and following the group experience.

18. Should the member be engaged in a work setting that calls for any variation from the above statements, the member is obligated to consult with other professionals whenever possible to consider justifiable alternatives.

19. The member must ensure that members of various ethnic, racial, religious, disability, and socioeconomic groups have equal access to computer

applications used to support counseling services and that the content of available computer applications does not discriminate against the groups described above.

20. When computer applications are developed by the member for use by the general public as self-help/stand-alone computer software, the member must ensure that: (a) self-help computer applications are designed from the beginning to function in a stand-alone manner, as opposed to modifying software that was originally designed to require support from a counselor; (b) self-help computer applications will include within the program statements regarding intended user outcomes, suggestions for using the software, a description of the conditions under which self-help computer applications might not be appropriate, and a description of when and how counseling services might be beneficial; and (c) the manual for such applications will include the qualifications of the developer, the development process, validation data, and operating procedures.

### **Section C: Measurement & Evaluation**

The primary purpose of educational and psychological testing is to provide descriptive measures that are objective and interpretable in either comparative or absolute terms. The member must recognize the need to interpret the statements that follow as applying to the whole range of appraisal techniques including test and nontest data. Test results constitute only one of a variety of pertinent sources of information for personnel, guidance, and counseling decisions.

1. The member must provide specific orientation or information to the examinee(s) prior to and following the test administration so that the results of testing may be placed in proper perspective with other relevant factors. In so doing, the member must recognize the effects of socioeconomic, ethnic, and cultural factors on test scores. It is the member's professional responsibility to use additional unvalidated information carefully in modifying interpretation of the test results.

2. In selecting tests for use in a given situation or with a particular client, the member must consider carefully the specific validity, reliability, and appropriateness of the test(s). General validity, reliability, and related issues may be questioned legally as well as ethically when tests are used for vocational and educational selection, placement, or counseling.

3. When making any statements to the public about tests and testing, the member must give accurate information and avoid false claims or misconceptions. Special efforts are often required to avoid unwarranted connotations of such terms as IQ and grade equivalent scores.

4. Different tests demand different levels of competence for administration, scoring, and interpretation. Members must recognize the limits of their competence and perform only those functions for which they are prepared. In particular, members using computer-based test interpretations must be trained in the construct being measured and the specific instrument being used prior to using this type of computer application.

5. In situations where a computer is used for test administration and scoring, the member is responsible for ensuring that administration and

scoring programs function properly to provide clients with accurate test results.

6. Tests must be administered under the same conditions that were established in their standardization. When tests are not administered under standard conditions or when unusual behavior or irregularities occur during the testing session, those conditions must be noted and the results designated as invalid or of questionable validity. Unsupervised or inadequately supervised test-taking, such as the use of tests through the mails, is considered unethical. On the other hand, the use of instruments that are so designed or standardized to be self-administered and self-scored, such as interest inventories, is to be encouraged.

7. The meaningfulness of test results used in personnel, guidance, and counseling functions generally depends on the examinee's unfamiliarity with the specific items on the test. Any prior coaching or dissemination of the test materials can invalidate test results. Therefore, test security is one of the professional obligations of the member. Conditions that produce most favorable test results must be made known to the examinee.

8. The purpose of testing and the explicit use of the results must be made known to the examinee prior to testing. The counselor must ensure that instrument limitations are not exceeded and that periodic review and/or retesting are made to prevent client stereotyping.

9. The examinee's welfare and explicit prior understanding must be the criteria for determining the recipients of the test results. The member must see that specific interpretation accompanies any release of individual or

group test data. The interpretation of test data must be related to the examinee's particular concerns.

10. Members responsible for making decisions based on test results have an understanding of educational and psychological measurement, validation criteria, and test research.

11. The member must be cautious when interpreting the results of research instruments possessing insufficient technical data. The specific purposes for the use of such instruments must be stated explicitly to examinees.

12. The member must proceed with caution when attempting to evaluate and interpret the performance of minority group members or other persons who are not represented in the norm group on which the instrument was standardized.

13. When computer-based test interpretations are developed by the member to support the assessment process, the member must ensure that the validity of such interpretations is established prior to the commercial distribution of such a computer application.

14. The member recognizes that test results may become obsolete. The member will avoid and present the misuse of obsolete test results.

15. The member must guard against the appropriation, reproduction, or modification of published tests or parts thereof without acknowledgement and permission from the previous publisher.

16. Regarding the preparation, publication, and distribution of tests, reference should be made to:

- a. "Standards for Educational and Psychological Testing," revised edition, 1985, published by the American Psychological Association on behalf of itself, the American Educational Research Association and the National Council of Measurement in Education.
- b. "The Responsible Use of Tests: A Position Paper of AMEG, APGA, and NCME," *Measurement and Evaluation in Guidance*, 1972, 5, 385-388.
- c. "Responsibilities of Users of Standardized Tests," APGA, *Guidepost*, October 5, 1978, pp. 5-8.

#### **Section D: Research and Publication**

1. Guidelines on research with human subjects shall be adhered to, such as:
  - a. *Ethical Principles in the Conduct of Research with Human Participants*, Washington, D.C.: American Psychological Association, Inc., 1982.
  - b. Code of Federal Regulation, title 45, Subtitle A, Part 46, as currently issued.
  - c. *Ethical Principles of Psychologists*, American Psychological Association, Principle #9: Research with Human Participants.
  - d. Family Educational Rights and Privacy Act (the Buckley Amendment).
  - e. Current federal regulations and various state rights privacy acts.

2. In planning any research activity dealing with human subjects, the members must be aware of and responsive to all pertinent ethical principles and ensure that the research problem, design, and execution are in full compliance with them.

3. Responsibility for ethical research practice lies with the principal researcher, while others involved in the research activities share ethical obligation and full responsibility for their own actions.

4. In research with human subjects, researchers are responsible for the subjects' welfare throughout the experiment, and they must take all reasonable precautions to avoid causing injurious psychological, physical, or social effects on their subjects.

5. All research subjects must be informed of the purpose of the study except when withholding information or providing misinformation to them is essential to the investigation. In such research the member must be responsible for corrective action as soon as possible following completion of the research.

6. Participation in research must be voluntary. Involuntary participation is appropriate only when it can be demonstrated that participation will have no harmful effects on subjects and is essential to the investigation.

7. When reporting research results, explicit mention must be made of all variables and conditions known to the investigator that might affect the outcome of the investigation or the interpretation of the data.

8. The member must be responsible for conducting and reporting investigations in a manner that minimizes the possibility that results will be misleading.

9. The member has an obligation to make available sufficient original research data to qualified others who may wish to replicate the study.

10. When supplying data, aiding in the research of another person, reporting research results, or making original data available, due care must be taken to disguise the identity of the subjects in the absence of specific authorization from such subjects to do otherwise.

11. When conducting and reporting research, the member must be familiar with and give recognition to previous work on the topic, as well as to observe all copyright laws and follow the principles of giving full credit to all to whom credit is due.

12. The member must give due credit through joint authorship, acknowledgement, footnote statements, or other appropriate means to those who have contributed significantly to the research and/or publication, in accordance with such contributions.

13. The member must communicate to other members the results of any research judged to be of professional or scientific value. Results reflecting unfavorably on institutions, programs, services, or vested interests must not be withheld for such reasons.

14. If members agree to cooperate with another individual in research and/or publications, they incur an obligation to cooperate as promised in terms of punctuality of performance and with full regard to the completeness and accuracy of the information required.

15. Ethical practice requires that authors not submit the same manuscript or one essentially similar in content for simultaneous publication consideration by two or more journals. In addition, manuscripts published in whole or in substantial part in another journal or published work should not be submitted for publication without acknowledgement and permission from the previous publication.

### **Section E: Consulting**

Consultation refers to a voluntary relationship between a professional helper and help-needing individual, group, or social unit in which the consultant is providing help to the client(s) in defining and solving a work-related problem or potential problem with a client or client system.

1. The member acting as consultant must have a high degree of self-awareness of his/her own values, knowledge, skills, limitations, and needs in entering a helping relationship that involves human and/or organizational change and that the focus of the relationship be on the issues to be resolved and not on the person(s) presenting the problem.

2. There must be understanding and agreement between member and client for the problem definition, change of goals, and prediction of consequences of interventions selected.

3. The member must be reasonably certain that she/he or the organization represented has the necessary competencies and resources for giving the kind of help that is needed now or may be needed later and that appropriate referral resources are available to the consultant.

4. The consulting relationship must be one in which client adaptability and growth toward self-direction are encouraged and cultivated. The member must maintain this role consistently and not become a decision maker for the client or create a future dependency on the consultant.

5. When announcing consultant availability for services, the member conscientiously adheres to the Association's Ethical Standards.

6. The member must refuse a private fee or other remuneration for consultation with persons who are entitled to these services through the member's employing institution or agency. The policies of a particular agency may make explicit provisions for private practice with agency clients by members of its staff. In such instances, the clients must be apprised of other options open to them should they seek private counseling services.

#### **Section F: Private Practice**

1. The member should assist the profession by facilitating the availability of counseling services in private as well as public settings.

2. In advertising services as a private practitioner, the member must advertise the services in a manner that accurately informs the public of professional services, expertise, and techniques of counseling available. A member who assumes an executive leadership role in the organization shall not permit his/her name to be used in professional notices during periods when he/she is not actively engaged in the private practice of counseling.

3. The member may list the following: highest relevant degree, type and level of certification and/or license, address, telephone number, office hours, type and/or description of services, and other relevant information.

Such information must not contain false, inaccurate, misleading, partial, out-of-context, or deceptive material or statements.

4. Members do not present their affiliation with any organization in such a way that would imply inaccurate sponsorship or certification by that organization.

5. Members may join in partnership/corporation with other members and/or other professionals provided that each member of the partnership or corporation makes clear the separate specialties by name in compliance with the regulations of the locality.

6. A member has an obligation to withdraw from a counseling relationship if it is believed that employment will result in violation of the Ethical Standards. If the mental or physical condition of the member renders it difficult to carry out an effective professional relationship or if the member is discharged by the client because the counseling relationship is no longer productive for the client, then the member is obligated to terminate the counseling relationship.

7. A member must adhere to the regulations for private practice of the locality where the services are offered.

8. It is unethical to use one's institutional affiliation to recruit clients for one's private practice.

### **Section G: Personnel Administration**

It is recognized that most members are employed in public or quasi-public institutions. The functioning of a member within an institution must contribute to the goals of the institution and vice versa if either is to

accomplish their respective goals or objectives. It is therefore essential that the member and the institution function in ways to: (a) make the institutional goals specific; and public; (b) make the member's contribution to institutional goals specific; and (c) foster mutual accountability for goal achievement.

To accomplish these objectives, it is recognized that the member and the employer must share responsibilities in the formulation and implementation of personnel policies.

1. Members must define and describe the parameters and levels of their professional competency.
2. Members must establish interpersonal relations and working agreements with supervisors and subordinates regarding counseling or clinical relationships, confidentiality, distinction between public and private material, maintenance and dissemination of recorded information, work load, and accountability. Working agreements in each instance must be specified and made known to those concerned.
3. Members must alert their employers to conditions that may be potentially disruptive or damaging.
4. Members must inform employers of conditions that may limit their effectiveness.
5. Members must submit regularly to professional review and evaluation.
6. Members must be responsible for in-service development of self and/or staff.
7. Members must inform their staff of goals and programs.

8. Members must provide personnel practices that guarantee and enhance the rights and welfare of each recipient of their service.

9. Members must select competent persons and assign responsibilities compatible with their skills and experiences.

10. The member, at the onset of a counseling relationship, will inform the client of the member's intended use of supervisors regarding the disclosure of information concerning this case. The member will clearly inform the client of the limits of confidentiality in the relationship.

11. Members, as either employers or employees, do not engage in or condone practices that are inhumane, illegal, or unjustifiable (such as considerations based on sex, handicap, age, race) in hiring, promotion, or training.

#### **Section H: Preparation Standards**

Members who are responsible for training others must be guided by the preparation standards of the Association and relevant Division(s). The member who functions in the capacity of trainer assumes unique ethical responsibilities that frequently go beyond that of the member who does not function in a training capacity. These ethical responsibilities are outlined as follows:

1. Members must orient students to program expectations, basic skills development, and employment prospects prior to admission to the program.

2. Members in charge of learning experiences must establish programs that integrate academic study and supervised practice.

3. Members must establish a program directed toward developing students' skills, knowledge, and self-understanding, stated whenever possible in competency or performance terms.

4. Members must identify the levels of competencies of their students in compliance with relevant Division standards. These competencies must accommodate the para professional as well as the professional.

5. Members, through continual student evaluation and appraisal, must be aware of the personal limitations of the learner that might impede future performance. The instructor must not only assist the learner in securing remedial assistance but also screen from the program those individuals who are unable to provide competent services.

6. Members must provide a program that includes training in research commensurate with levels of role functioning. Paraprofessional and technician-level personnel must be trained as consumers of research. In addition, personnel must learn how to evaluate their own and their program's effectiveness. Graduate training, especially at the doctoral level, would include preparation for original research by the member.

7. Members must make students aware of the ethical responsibilities and standards of the profession.

8. Preparatory programs must encourage students to value the ideals of service to individuals and to society. In this regard, direct financial remuneration or lack thereof must not be allowed to overshadow professional and humanitarian needs.

9. Members responsible for educational programs must be skilled as teachers and practitioners.

10. Members must present thoroughly varied theoretical positions so that students may make comparisons and have the opportunity to select a position.

11. Members must develop clear policies within their educational institutions regarding field placement and the roles of the student and the instructor in such placement.

12. Members must ensure that forms of learning focusing on self-understanding or growth are voluntary, or if required as part of the educational program, are made known to prospective students prior to entering the program. When the educational program offers a growth experience with an emphasis on self-disclosure or other relatively intimate or personal involvement, the member must have no administrative supervisory, or evaluating authority regarding the participant.

13. The member will at all times provide students with clear and equally acceptable alternatives for self-understanding or growth experiences. The member will assure students that they have a right to accept these alternatives without prejudice or penalty.

14. Members must conduct an educational program in keeping with the current relevant guidelines of the Association.

As Revised by AACD Governing Council, March 1988

## APPENDIX B

AMERICAN SCHOOL COUNSELOR ASSOCIATION  
CODE OF ETHICS

1. Responsibilities of the school counselor stem from these basic premises and basic tenets in the counseling process.
  - A. Each person has the right to dignity as a human being
    1. without regard to race, sex, religion, color, socio-economic status.
    2. without regard to the nature and results of behavior, beliefs and inherent characteristics.
  - B. Each person has the right to individual self-development.
  - C. Each person has the right to self-direction and responsibility for making decisions.
  - D. The school counselor equipped with professional competency, an understanding of the behavioral sciences and philosophical orientation to school and community, performs a unique, distinctive and highly specialized service within the context of the education purpose and structure of the school system. Performance of this rests upon acquired techniques and informed judgment which is an integral part of counseling. Punitive action is not a part of the counseling process. The school counselors shall use these skills in endeavoring constantly to insure that the counselee has the afore-mentioned rights and a reasonable amount of the counselor's time.

E. The ethical conduct of the school counselors will be consistent with the state regulations.

F. The school counselor may share information gained in the counseling process for essential consultation with those appropriate persons specifically concerned with the counselee. Confidential information may be released only with consent of the individual except when requested by court order.

I. Principle responsibilities of the school counselor to PUPILS

A. The school counselor

1. has a principle obligation and loyalty to respect each person as a unique individual and to encourage that which permits individual growth and development.

2. must not impose consciously his attitudes and values on the counselee though he is not obligated to keep his attitudes and values from being known.

3. should respect at all times the confidence of the counselee; should the counselee's condition be such as to endanger the health, welfare, and/or safety of self or others, the counselor is expected to report this fact to an appropriate responsible person.

4. shall be knowledgeable about the strengths and limitations of tests; will share and interpret test information with the counselee in an accurate, objective and understandable manner to assist the counselee in self-evaluation.

5. shall assist the counselee in understanding the counseling process in order to insure that the persons counseled will understand how information obtained in conferences with the counselor may be used.

## II. Principle responsibilities of the school counselor to PARENTS

### A. The school counselor

1. shall work with parents so as to enhance the development of counselee.

2. shall treat information received from the parents of a counselee in a confidential manner.

3. shall share, communicate and interpret pertinent data, and counselee's academic progress with his parents.

4. shall share information about the counselee only with those persons properly authorized to receive this information.

## III. Principle responsibilities of the school counselor to FACULTY, ADMINISTRATION AND COLLEAGUES

### A. The school counselor

1. shall use discretion, within legal limits and requirements of the state in releasing personal information about a counselee to maintain the confidences of the counselee.

2. shall contribute pertinent data to cumulative records and make it accessible to professional staff (except personal factors and problems which are highly confidential in nature.)

3. shall cooperate with colleagues by making available as soon as possible requested reports which are accurate, objective, meaningful and concise.

4. shall cooperate with other pupil personnel workers by sharing information and/or obtaining recommendations which would benefit the counselee.

5. may share confidential information when working with the same counselee, with the counselee's knowledge and permission.

6. must maintain confidentiality even though others may have the same knowledge.

7. shall maintain high professional integrity regarding fellow workers when assisting in problem areas related to actions, attitudes and competencies of faculty or colleagues.

#### IV. Principle responsibilities of the school counselor to SCHOOL AND COMMUNITY

##### A. The school counselor

1. shall support and protect the educational program against any infringement which indicates that it is not to the best interest of the counselee or program.

2. must assume responsibility in delineating his role and function, in developing educational procedure and program, and in assisting administration to assess accountability.

3. shall recommend to the administration any curricular changes necessary in meeting valid educational needs in the community.

4. shall work cooperatively with agencies, organizations, and individuals in school and community which are interested in welfare of youth.

5. shall, with appropriate release, supply accurate information according to his professional judgment to community agencies, places of employment and institutions of higher learning.

6. should be knowledgeable on policies, laws and regulations as they relate to the community, and use educational facilities accordingly.

7. shall maintain open communication lines in all areas pertinent to the best interest of counselees.

8. shall not accept remuneration beyond contractual salary for counseling any pupil within the school district. The counselors shall not promote or direct counselees into counseling or educational programs which would result in remuneration to the counselor.

9. shall delineate in advance his responsibilities in case of any confrontation and have an agreement which is supported by the administration and the bargaining agency.

V. Principle responsibilities of the school counselor to SELF

A. The school counselor

1. should continue to grow professionally by
  - a. attending professional meetings
  - b. actively participating in professional organizations
  - c. being involved in research

d. keeping abreast of changes and new trends in the profession and showing a willingness to accept those which have proved to be effective.

2. should be aware of and function within the boundaries of his professional competency.

3. should see that his role is defined in mutual agreement among the employer, students to be served, and the counselor. Furthermore, this role should be continuously clarified to students, staff, parents and community.

#### VI. Principle responsibilities of the school counselor to the PROFESSION

##### A. The school counselor

1. should be cognizant of the developments in his profession and be an active contributing participant in his professional association—local, state, and national.

2. shall conduct himself in a responsible manner and participate in development policies concerning guidance.

3. should do research which will contribute to professional and personal growth as well as determine professional effectiveness.

4. shall under no circumstances undertake any group encounter or sensitivity sessions, unless he has sufficient professional training.

5. shall, in addition to being aware of unprofessional practices, also be accountable for taking appropriate action to eliminate these practices.

Accepted by the ASCA Governing Board in October, 1972.

## APPENDIX C

NORTH CAROLINA GENERAL STATUTES  
RELATING TO STUDENT RECORDS**G.S. 115C-3. Access to information and public records.**

Except as otherwise provided in this Chapter, access to information gathered and public records made pursuant to the provisions of this Chapter must be in conformity with the requirements of Chapter 132 of the General Statutes.

**G.S. 115C-114. Records; privacy and expunction.**

(a) No local educational agency may release to any persons other than the eligible student, his parents or guardian or any surrogate parent any records, data or information on any child with special needs except (i) as permitted by the prior written consent of the student, his parents or guardian or surrogate parent, (ii) as required or permitted by federal law, (iii) school officials within the local education agency who have legitimate educational interest, (iv) school officials of other local educational agencies in which the student intends to enroll, or (v) certain authorized representatives of the State and Federal government who are determining eligibility of the child for aid, as provided under Public Law 93-380 or other federal law.

(b) The eligible student, his parents or guardian or surrogate parent shall have the right to read, inspect and copy all and any records, data and information maintained by a local education agency with respect to the student, and, upon their request, shall be entitled to have those records, data

and information fully explained, and interpreted and analyzed for them by the staff of the agency. The parent or guardian or surrogate parent may demand that his request must be honored within not more than 45 days after it is made.

(c) The student, his parents or guardian or surrogate parent shall have the right to add to the records, data and information written explanations or clarifications thereof, and to cause the expunction of incorrect, outdated, misleading or irrelevant entries. If a local educational agency refuses to expunge incorrect, outdated, misleading or irrelevant entries after having been asked to do so by the parent, such person may obtain a due process hearing, under G. S. 115C-116, on the agency's refusal, and must request the hearing within 30 days after the agency's refusal.

**G.S. 115C-182. Public records exception.**

Any written material containing the identifiable scores of individual students on any test taken pursuant to the provisions of this Article shall not be considered a public record within the meaning of G. S. 132-1 and shall not be disseminated or otherwise made available to the public by any member of the State Board of Education, any employee of the State Board of Education, the Superintendent of Public Instruction, any employee of the Department of Public Instruction, any member of a local board of education, any employee of a local board of education, or any other person, except as permitted under the provisions of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g.

**G.S. 115C-402. Student records; maintenance; contents; confidentiality.**

The official record of each student enrolled in North Carolina public schools shall be permanently maintained in the files of the appropriate school after the student graduates, or should have graduated, from high school unless the local board determines that such files may be filed in the central office or other location designated by the local board for that purpose.

The official record shall contain, as a minimum, adequate identification data including date of birth, attendance data, grading and promotion data, and such other factual information as may be deemed appropriate by the local board of education having jurisdiction over the school wherein the record is maintained.

The official record of each student is not a public record as the term "public record" is defined by G. S. 132-1. The official record shall be subject to inspection and examination as authorized by G. S. 132-6.

**G.S. 115C-317. Penalty for making false reports or records.**

Any school employee of the public schools other than a superintendent, principal, or teacher, who knowingly and willfully makes or procures another to make any false report or records, requisitions, or payrolls, respecting daily attendance of pupils in the public schools, payroll data sheets, or other reports required to be made to any board or officer in the performance of his duties, shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court and the certificate of such person to teach in the public schools of North Carolina shall be revoked by the Superintendent of Public Instruction.