OPINION NO. 2000-014

Syllabus:

If the state plan developed and administered by the Rehabilitation Services Commission pursuant to the federal Rehabilitation Act of 1973 is to remain in compliance with federal requirements, then the Commission must amend 5 Ohio Admin. Code 3304-2-63(C)(1) to provide that a client may designate any person to receive on the client's behalf information that may be harmful to the client, and to require that, where a court has appointed a representative for the client, the information be released to the representative. Such amendment is not barred by R.C. 1347.08(C)(1).

To: Robert L. Rabe, Ohio Rehabilitation Services Commission, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, February 16, 2000

You have requested an opinion whether 5 Ohio Admin. Code 3304-2-63(C)(1), which addresses the release of client information kept by the Rehabilitation Services Commission (RSC), and R.C. 1347.08, as it relates to such release, are superseded by 34 C.F.R. § 361.38 (1999).

In order to respond to your question, it is helpful to first examine the federal law under which 34 C.F.R. § 361.38 was adopted. The Rehabilitation Act of 1973, 29 U.S.C.S. §§ 701-796l (Supp. 1999), as amended, was enacted to empower persons with disabilities to maximize employment opportunities and achieve economic self-sufficiency, and to assist States in operating programs of vocational rehabilitation services for persons with disabilities. 29 U.S.C.S. §§ 701, 720. *See also* 34 C.F.R. § 361.1 (1999). In order to be eligible to participate in programs under the Act, a State must submit to the federal Commissioner of the Rehabilitation Services Administration[1] a plan for vocational rehabilitation services that meets the requirements of federal law. 29 U.S.C.S. § 721(a)(1)(A). *See also* 34 C.F.R. §§ 361.2, 361.10. Once the state plan is approved by the Commissioner, federal money is appropriated to the State to assist it in providing vocational rehabilitation services specified under the plan. 29 U.S.C.S. § 720(b); 34 C.F.R. § 361.3. The Rehabilitation Services Commission is the sole state agency designated to administer the plan under the Act. R.C. 3304.16(D). *See* 29 U.S.C.S. § 721(a)(2).

Federal regulations mandate that the state plan "assure that the State agency ... will adopt and implement policies and procedures to safeguard the confidentiality of all personal information" of the agency's clients. 34 C.F.R. § 361.38(a)(1). *See* 1984 Op. Att'y Gen. No. 84-084 at 2-287 ("34 C.F.R. § 361.2 provides that, to be eligible for federal grants under Title I of that Act, a state must submit an approvable state plan. 34 C.F.R. § 361.49 [now § 361.38][2] sets forth standards of confidentiality which such a plan must satisfy") (footnote added). *See generally* 29 U.S.C.S. § 721(a)(6); 34 C.F.R. § 361.12. Although client information must, as a general matter, be kept confidential, the plan must provide that the state agency shall make all information in a client's record accessible to the client, upon the client's

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[1]The Rehabilitation Services Administration is established in the Office of the Secretary of Education and is headed by a Commissioner. 29 U.S.C.S. § 702.

[2]34 C.F.R. Part 361.49 was amended and renumbered 361.38 in 1997. *See* 60 Fed. Reg. 64486 (1995), 62 Fed. Reg. 6308 and 6351 (1997).

written request. 34 C.F.R. § 361.38(c)(1).[3] In response to these federal mandates, RSC promulgated 5 Ohio Admin. Code 3304-2-63. *See* rule 3304-2-63(J) ("[t]his rule is designed to implement federal regulations, 34 CFR, Parts 361.49 [now 361.38] and 363.6"). *See also* R.C. 3304.16(K)(3) (empowering the Commission to "adopt plans and methods of administration found necessary by the federal government for the efficient operation of any joint arrangements or the efficient application of any federal statutes"); R.C. 3304.16(K)(5) (authorizing the Commission to comply "with any requirements necessary to obtain federal funds in the maximum amount and most advantageous proportion possible").

Although 34 C.F.R. § 361.38 provides generally for the release of information about a client directly to the client, it makes special provision for the release of medical, psychological, or other information that may be harmful to the client. Rule 3304-2-63 also addresses this eventuality, although in a manner that is not entirely consistent with the federal regulation. It is the relationship between the two regulations as they address the exception for harmful information that is the subject of your opinion request.[4]

As first promulgated, 34 C.F.R. § 361.49 (now § 361.38) read as follows:

> (c) Release to involved individuals. (1) When requested in writing by the involved individual or his or her representative, the State unit must make all information in the case record accessible to the individual or release it to him or her or a representative in a timely manner. *Medical, psychological, or other information which the State unit believes may be harmful to the individual may not be released directly to the individual but must be provided through his or her representative, a physician or a licensed or certified psychologist*; (Emphasis added.)

See 1984 Op. Att'y Gen. No. 84-084 at 2-288.

In conformity with this regulation, RSC included in division (B) of rule 3304-2-63 a requirement that RSC release to a client information in the client's case record within fifteen days of request, providing in division (C)(1), however, that "[a]ny medical, psychological, or other information, determined by an RSC medical or psychological consultant to have a potentially adverse effect on the client, shall be released only to a physician or psychologist who is designated in writing by the client."

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[3]Client records held by the Rehabilitation Services Commission (RSC) under the state vocational rehabilitation program are not public records. R.C. 3304.21; 1984 Op. Att'y Gen. No. 84-084; 1976 Op. Att'y Gen. No. 76-049. *See* R.C. 149.43.

[4] The state regulation speaks in terms of information that is determined to have "a potentially adverse effect on the client," while the federal regulation addresses information that "may be harmful to the individual." It is assumed for purposes of this opinion that these phrases are synonymous.

Although rule 3304-2-63(C)(1) was consistent with federal regulations when it was first promulgated, the Secretary of Education amended the exception for release of harmful information in 1997,[5] so that 34 C.F.R. § 361.38(c)(2) now reads[6]:

> Medical, psychological, or other information that the State unit determines may be harmful to the individual may not be released directly to the individual, but must be provided to the individual *through a third party chosen by the individual, which may include, among others, an advocate, a family member, or a qualified medical or mental health professional, unless a representative has been appointed by a court to represent the individual, in which case the information must be released to the court-appointed representative.* (Emphasis added.)

Thus, federal law now entitles a client to designate, in effect, any person to receive on the client's behalf potentially harmful information [7], while state regulation restricts a client to designating either a physician or psychologist. Although rule 3304-2-63(C)(1) was consistent at the time it was promulgated with the federal regulation on the disclosure of harmful information, it has, with the amendment of 34 C.F.R. § 361.38, ceased to provide clients with those rights federal law requires the plan to provide.

You have stated that RSC has not followed 34 C.F.R. § 361.38 nor amended its own rule to conform to the federal regulation because of the language of R.C. 1347.08(C)(1). R.C. Chapter 1347 governs generally the maintenance of personal information systems by governmental agencies. Individuals who are the subject of information maintained by a public agency are entitled under R.C. Chapter 1347 to inspect that information. R.C. 1347.08(A)(2). However, R.C. 1347.08(C)(1) provides the following exception:

> A state or local agency, upon request, shall disclose medical, psychiatric, or psychological information to a person who is the subject of the information or to the person's legal guardian, unless a physician, psychiatrist, or psychologist determines for the agency that the disclosure of the information is likely to have an adverse effect on the person, in which case the information shall be released to a physician, psychiatrist, or psychologist who is designated by the person or by the person's legal guardian.

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[5]In the Notice of Proposed Rule-Making issued prior to the amendment of the section governing the release of harmful information, the Secretary called for "public comment on whether the provisions of this section are unduly burdensome or inconsistent with State laws governing the protection, use, or release of personal information." 60 Fed. Reg. 64486 (1995). No responses are reported as being received.

[6]You have questioned in your letter of request whether there is a statutory basis for the adoption of 34 C.F.R. § 361.38(c)(2). The statutes cited as the basis for promulgation of 34 C.F.R. §361.38 include 29 U.S.C.S. § 721(a)(6)(A) which states that, "[t]he State plan shall provide for such methods of administration as are found by the Commissioner [of the Rehabilitation Services Administration] to be necessary for the proper and efficient administration of the plan."

[7]Although a client is, as a general matter, entitled under 34 C.F.R. § 361.38(c)(2) to designate any person to receive on the client's behalf potentially harmful information, the regulation does provide that, if a representative has been appointed by a court to represent the client, then the information must be released to the representative. *See* 62 Fed. Reg. 6323 (1997).

Thus, rule 3304-2-63(C)(1), as it now reads, is consistent with R.C. 1347.08(C)(1). This does not mean, however, that RSC is barred by R.C. 1347.08(C)(1) from amending its rule to comply with federal law. Not only has RSC been statutorily empowered to carry out the federal Rehabilitation Act of 1973, under which 34 C.F.R. § 361.38 was promulgated, R.C. 3304.16(D), it has also been specifically empowered to "adopt plans and methods of administration found necessary by the federal government for the efficient operation of any joint arrangements or the efficient application of any federal statutes," R.C. 3304.16(K)(3), and to comply "with any requirements necessary to obtain federal funds in the maximum amount and most advantageous proportion possible," R.C. 3304.16(K)(5). These statutory powers constitute sufficient authority for RSC to promulgate a rule, in conformance with federal law, which varies from the general provisions of R.C. 1347.08. *See* 1981 Op. Att'y Gen. No. 81-074 at 2-296 ("an administrator's statutory determinations may properly be dependent on considerations of federal funding"). *See also Warm v. City of Cincinnati*, 57 Ohio App. 43, 51, 11 N.E.2d 281, 284 (Hamilton County 1937) (holding that the State, which contracted to receive and use a grant of federal funds with which to eliminate a grade crossing subject to certain conditions, should "[i]n good conscience ... perform its part of the bargain" which is that wages and hours on the project be controlled by the President and the work be inspected by federal officers).

Therefore, R.C. 1347.08 does not preclude RSC from amending rule 3304-2-63(C)(1) to enable a client to choose any person, not only a physician or psychologist, to receive information that may be harmful to the client, in compliance with 34 C.F.R. § 361.38(c)(2).

In adopting 34 C.F.R. § 361.38, the Secretary of Education specifically made clear that, "the individual's right under paragraph (c)(2) of this section to choose the person to whom harmful information is released supersedes any conflicting State confidentiality policy developed under paragraph (a)(1) that designates a specific individual to receive harmful information (e.g., medical professional)." 62 Fed. Reg. 6323 (1997). Indeed, as it now reads, rule 3304-2-63 is internally inconsistent since division (J) of the rule states that the rule is "designed to implement federal regulations," including what is now 34 C.F.R. Part 361. *See* 1981 Op. Att'y Gen. No. 81-074 (a metropolitan housing authority may, in order to qualify for federal funds, enter into a loan agreement with the federal government agreeing to retain a definition that coincides with the definition established by a federal agency, even though the federal agency's definition may change during the life of the loan). RSC's inaction is also inconsistent with the Commission's duties under R.C. 3304.16(K)(3) and (5) to "adopt plans and methods of administration found necessary by the federal government for the efficient operation of any joint arrangements or the efficient application of any federal statutes," and to comply "with any requirements necessary to obtain federal funds in the maximum amount and most advantageous proportion possible."

It is, therefore, my opinion, and you are advised that if the state plan developed and administered by the Rehabilitation Services Commission pursuant to the federal Rehabilitation Act of 1973 is to remain in compliance with federal requirements, then the Commission must amend 5 Ohio Admin. Code 3304-2-63(C)(1) to provide that a client may designate any person to receive on the client's behalf information that may be harmful to the client, and to require that, where a court has appointed a representative for the client, the information be released to the representative. Such amendment is not barred by R.C. 1347.08(C)(1).