

OPINION NO. 75-047

Syllabus:

1. In the case of a licensed psychologist or a licensed school psychologist employed by a public school system, the requirements of the licensing laws applicable to school psychologists (R.C. Chapter 4732), do not conflict with the regulations applicable to certificated school personnel but, rather, supplement them in that each governs a distinct, although related, aspect of the school psychologist's practice.
2. The records of a school psychologist whether licensed under Chapter 4732 or certificated pursuant to R.C. 3319.22 do not constitute public records within the purview of R.C. 149.43. However, authorized board of education personnel do have access to the reports and recommendations of the certificated school psychologist.
3. In the case of a licensed and certificated school psychologist, his client is the student not the employing educational

system, although it is the parents or legal guardians of the student who control and who may waive the privilege provided for in R.C. 4732.19 until the student attains 18 years of age.

To: David D. Blyth, Ph.D., Pres., Board of Psychology, Columbus, Ohio
By: William J. Brown, Attorney General, July 7, 1975

I have before me your request for my opinion which reads as follows:

"The Board of Psychology is hereby requesting an Attorney General's opinion regarding Section 4732.19, Ohio Revised Code, relative to the confidential relations between a licensed psychologist or school psychologist and his client.

"In the case of a certified, licensed school psychologist employed in the schools, would the requirements of the licensing law take precedence over regulations and policies applicable to certified school personnel? Does the work of the school psychologist as a public employee result in his producing public records which are, therefore, open to the scrutiny of any authorized person regardless of whether or not the psychologist who developed those records is a licensed psychologist?

"In the case of a certified, licensed school psychologist employed by a public school system, who is the psychologist's client, the school system, the child, or the child's parents or guardians? If the answer to this question is the child's parents, then it would be important to know at what age and under what conditions the child becomes responsible for himself."

At the outset it is important to point out that distinctions have been drawn between a "licensed psychologist," a "licensed school psychologist" and a "certificated school psychologist"--all of whom may also be classified as a "school psychologist." R.C. 4732.01 provides in pertinent part:

"As used in sections 4732.01 to 4732.25 of the Revised Code:

". . . .

"(D) 'School psychologist' means any person who holds himself out to the public by any title or description of services incorporating the words 'school psychologist' or 'school psychology,' or who holds himself out to be trained, experienced, or an expert in the practice of school psychology.

"(F) 'Licensed psychologist' means an individual holding a current, valid license to practice psychology issued under section 4732.12 or 4732.15 of the Revised Code.

"(G) 'Licensed school psychologist' means an indi-

vidual holding a current, valid license to practice school psychology issued under section 4732.12 or 4732.15 of the Revised Code.

"(H) 'Certificated school psychologist' means an individual holding a current, valid school psychologist certificate issued under division (K) of section 3319.22 of the Revised Code."

It is also important to note that a "certificated school psychologist" is specifically exempted from the licensing requirements of Chapter 4732 by R.C. 4732.22, although when a "licensed psychologist" or a "licensed school psychologist" is employed by an educational system he must also be a "certificated school psychologist" pursuant to R.C. 3319.22(K).

In discussions had with your office subsequent to your request you stated the concern to be that where a licensed psychologist or a licensed school psychologist is employed by a board of education, he may be required by his employer to report information gathered from individual students which he would otherwise not release because of the privilege against disclosure of confidential communications provided for in R.C. 4732.19. On the other hand, this office has had discussions with the Department of Education concerning this same topic, inasmuch as the Director of the Department of Education has also requested my opinion as to the scope and applicability of R.C. 4732.19 to "certificated school psychologists." The concern expressed by the Department of Education is that if licensed psychologists or licensed school psychologists are employed, the employing educational systems may be hampered in obtaining information needed for course development and for placement of individuals in specialized classes.

These concerns are generated because the privilege against disclosure of confidential communications, provided for in R.C. 4732.19, only applies to "licensed psychologists" and "licensed school psychologists." R.C. 4732.19 reads as follows:

"The confidential relations and communications between a licensed psychologist or licensed school psychologist and client are placed upon the same basis as those between physician and patient under division (A) of section 2317.02 and section 2317.021 [2317.02.1] of the Revised Code. Nothing in this chapter shall be construed to require any such privileged communication to be disclosed."

It is axiomatic that the intention of the legislature in enacting a statute must be determined primarily from the language of the statute itself, without deleting employed terms, or inserting that which has not been written. State, ex rel. Shaffer v. Defenbacher, 148 Ohio St. 465 (1947); State, ex rel. Mooney v. Ferguson, 142 Ohio St. 279 (1943). It is also a maxim of statutory construction that expressio unius est exclusio alterius (the mention of one thing implies the exclusion of all others). In the case of R.C. 4732.19 both a "licensed psychologist" and a "licensed school psychologist" are listed, but a "certificated school psychologist" is not. Accordingly, the privilege provided for in R.C. 4732.19 is not operative with respect to communications had with a "certificated school psychologist" unless also licensed. The scope of the following discussion concerning the privilege is therefore limited to its applicability with respect to only a "licensed psychologist" and a "licensed school psychologist."

The issue then concerns the extent of possible conflict between the responsibilities and obligations of a "licensed psychologist" or a "licensed school psychologist" to an employing educational system, and his responsibilities and obligations under R.C. 4732.19 to individual student-clients.

The primary responsibility and function of a school psychologist is to act as a consultant to the administrative staff and faculty in problems relating to special education, curriculum, and instruction, so as to enable the proper school authorities to assign particular students to those classes or courses of study which will ensure that each student attains his optimum level of achievement. This is evident from a review of both R.C. 4732.01(E), which defines the "practice of school psychology," and the regulations promulgated by the Superintendent of Public Instruction, which delineate the scope of the school psychologist's responsibility to his employing educational system.

R.C. 4732.01(E) provides as follows:

"(E) 'Practice of school psychology' means rendering or offering to render to individuals, groups, organizations, or the public any of the following services:

"(1) Evaluation, diagnosis, or test interpretation limited to assessment of intellectual ability, learning patterns, achievement, motivation, or personality factors directly related to learning problems in an educational setting;

"(2) Counseling services for children or adults for amelioration or prevention of educationally related learning problems;

"(3) Educational or vocational consultation or direct educational services. This does not include industrial consultation or counseling services to clients undergoing vocational rehabilitation."

The regulations of the Superintendent published January 1, 1972 provide at page 3, section 2A:

"The primary responsibility of the school psychologist is to assist the school in improving the achievement and adjustment of pupils.

"The primary function of the school psychologist shall be the intensive, individual psychological study of pupils referred to him because of learning and/or adjustment problems. He uses the resulting information and understanding about pupils in consultation and in follow-up services with pupils, parents, teachers, and professional workers in the school and in the community.

"As a result of such study and because of his special training, he functions as:

"1. A consultant to supervisors and administrators in problems relating to special education, curriculum and instruction, group testing, counseling and guidance, pupil personnel policies, and other matters

relating to the adjustment of the individual child in the school setting.

"2: A resource person to the school staff and community in developing better understanding and application of the principles of child development, learning, mental health, and the implication of individual differences."

The licensing laws, on the other hand, address themselves to the psychologist's responsibilities and obligations to his clients, as evidenced in R.C. 4732.17 which specifically provides that the willful, unauthorized communication of information received in professional confidence is grounds for harsh disciplinary action including suspension or revocation of license. R.C. 4732.17(E).

It is apparent from this disciplinary provision that confidentiality is recognized as an important tool in assisting a school psychologist in an aspect of his practice which is distinct from that of reporting conclusions and making recommendations to the employing educational system. The confidentiality of communications enables a school psychologist to counsel and assist individual students, as clients, when they have educational, personal, social and related problems. This function of the school psychologist would be greatly impaired, if not totally destroyed, if a student was prevented from revealing his innermost thoughts and feelings to the school psychologist for fear of the psychologist divulging such information to unauthorized persons.

Based upon the foregoing comparison of the licensing laws on the one hand and the policies and regulations applicable to "certificated school psychologists" on the other, it is apparent that the conflict between them which is assumed by your first question does not exist. They apply to different functional areas of the individual who is practicing school psychology. Accordingly, it would be inappropriate to categorize either the laws, or the policies and regulations, as taking precedence over the other. In any case where a dispute nevertheless arises due to the insistence of an employing educational system upon release of confidential information, the statutorily based privilege against disclosure would clearly control, such a request being beyond the scope of policies and regulations applicable to certificated school psychologists.

Turning now to your next question, you ask whether or not the work of the school psychologist as a public employee results in his producing public records which are, therefore, open to the scrutiny of any authorized person, regardless of whether the psychologist who developed those records is licensed pursuant to Chapter 4732 or is certificated pursuant to R.C. 3319.22.

R.C. 149.43, which defines what is a public record, reads as follows:

"As used in this section, 'public record' means any record required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except records pertaining to physical or psychiatric examinations, adoption, probation, and parole proceedings, and records the release of which is prohibited by state or federal law.

"All public records shall be open at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time."

(Emphasis added.)

Under Ohio law, school authorities are required to maintain many kinds of records. See R.C. 3319.32, 3321.12, 3317.021. However, I know of no statutory or regulatory requirement that mandates the keeping of records relative to consultations between a school psychologist and his student-client. Such being the case, the records and evaluations of the school psychologist do not constitute "public records" within the purview of R.C. 149.43, and are not open for public inspection. Moreover, it appears that the exception of records pertaining to psychiatric examinations contained in R.C. 149.43 would except consultations between students and school psychologists. Although there are distinctions between psychiatric and psychological examinations, the similarities between the two would seem to warrant the equation of the two in order to comply with the spirit of the exception.

Further, R.C. 149.43 expressly sets forth an exception from public records for "records the release of which are prohibited by state law." Inasmuch as R.C. 4732.19 prohibits disclosure of confidential communications, it is a state law which may be construed as prohibiting the release of records developed by a licensed psychologist or a licensed school psychologist, thereby bringing their records within this exception.

Finally, if the records resulting from consultation are to be "public records", then the protection afforded by R.C. 4732.19 is illusory and in effect non-existent. Principles of statutory construction do not allow the negation of one statute by another in such a manner. In order that the privilege statute have any effect, the records cannot be considered "public records."

Your last question which focuses on waiver of the privilege asks, in the case of a certificated and licensed school psychologist, who is the psychologist's client, the school system, the child, or the child's parents or guardians. It is my opinion that the psychologist's client is the student because he is the one the privilege is intended to protect. It is the student who "owns" the privilege. See Timken Roller Bearing Co. v. United States, 38 F.R.D. 57 (D.C. Ohio, 1964); State v. Osborne, 25 Ohio L. Abs. 543 (1937); 55 O. Jur. 2d Witnesses §251 at 670-71. However, the student's parent or legal guardian may waive this privilege and require disclosure by a school psychologist because the rights which pertain to the person of a minor are confided to his parents or legal guardian. Corey v. Bolton, 63 N.Y. Supp. 915 (1900). Therefore, for all practical purposes, the parent or legal guardian controls the privilege and may waive it until the student reaches the age of majority (18 years of age), whereupon the student becomes responsible for himself and consequently may either exercise or waive the privilege in his own right.

Based upon the foregoing, it is my opinion and you are so advised that:

1. In the case of a licensed psychologist or a licensed school psychologist employed by a public school system, the requirements of the licensing laws applicable to school psychologists (R.C. Chapter 4732), do not conflict with the regulations applicable to certificated school personnel but, rather, supplement them in that

each governs a distinct, although related, aspect of the school psychologist's practice.

2. The records of a school psychologist whether licensed under Chapter 4732 or certificated pursuant to R.C. 3319.22 do not constitute public records within the purview of R.C. 149.43. However, authorized board of education personnel do have access to the reports and recommendations of the certificated school psychologist.

3. In the case of a licensed and certificated school psychologist, his client is the student not the employing educational system, although it is the parents or legal guardians of the student who control and who may waive the privilege provided for in R.C. 4732.19 until the student attains 18 years of age.