PENNSYLVANIA PSYCHOLOGICAL ASSOCIATION

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Judith Pachter Schulder
State Board of Psychology
One Penn Center
2601 North Third Street
Harrisburg, PA 17110

Dear Ms. Schulder:

Thank you for giving us an opportunity to comment on the proposed regulations 16A-6318. We are writing on behalf of the Pennsylvania Psychological Association.

We oppose the adoption of the proposed regulations of the State Board of Psychology as published in the August 18th issue of the *Pennsylvania Bulletin*. We believe that these proposed regulations violate existing state and federal law, harm the public, and are often ambiguous and lack clarity. Furthermore, the Board is adding requirements in its commentary (outside of the purview of IRRC to approve or disapprove) that should be placed in the regulations themselves in order for them to convey their intent accurately.

In detailing our concerns we will focus first on the most salient problem that occurs in proposed regulations §41.61 (e) (situations where a psychologist determines that a patient presents an immediate threat of harm to an identifiable third person). Then we will discuss other issues.

Duty to Warn or Protect

The relevant section of the proposed regulations of the State Board of Psychology is copied below:

"(e) *Protecting confidentiality of clients/patients.*

(1) A psychologist shall keep confidential information as defined in §41.1 (relating to definitions) about a client/patient confidential and assure that employees keep this information confidential except as provided in paragraph (2).

(2) A psychologist may make the following disclosures without the client/patient's written consent:

(i) When the client/patient communicates to the psychologist a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable party and when the psychologist determines that the client/patient represents serious danger of violence:

(A) The psychologist shall warn identified or readily identifiable threatened third parties of the danger.

(B) The psychologist may discuss these threats with other psychologists and seek assistance to protect against the danger.

(C) The psychologist may communicate the threats and seek assistance to prevent the client/patient from harming himself or others. . ."

We believe that the regulations proposed in §41.61 (e) are vague, violate existing state and federal law, unnecessarily threaten public safety, and require substantial policy decisions that should be left to the State Legislature. Each of these issues will be considered separately.

Vagueness

In Subsection (e) (2) (i) (C) the proposed regulations state that "the psychologist may communicate the threats and seek assistance to prevent the client/patient from harming himself or others." This sentence is unclear as it never specifies to whom the psychologist can communicate this information, except to the persons specifically identified (the intended victim or another psychologist for purposes of seeking consultation). Consequently we do not know for certain who should receive this additional information. Presumably the communication is restricted to the persons specifically enumerated in the proposed regulations.

The commentary states that "proposed subsection (e) (2) (A) (i) requires psychologists to warn the threatened third party" (p. 5358). However, there is no subsection (e) (2) (A) (i). On first glance one would think that this was a minor notation error of no consequence. However, the commentary later states that "Proposed subsection (e) (2) (A) (ii) – (iv) addresses additional persons to whom psychologists may disclose and discuss the threats to seek their assistance to protect against dangers and to prevent their clients/patients from harming themselves" (p. 5358). However, we can find no subsection (e) (2) (A) (ii) – (iv) in the proposed regulations. It raises the possibility that the Board was envisioning a broader range of persons who might be notified. However, we cannot comment on possible provisions that are not published and must restrict ourselves to what is published in the *Pennsylvania Bulletin.*

Violation of Existing Law

The State Board of Psychology does not have the authority to usurp federal and state law. The proposed regulations of the State Board of Psychology contradict the Family Education Rights and Privacy Act (FERPA; the federal law governing confidentiality in schools), the School Code of Pennsylvania, federal and state drug and alcohol law, and the regulations to Pennsylvania's Mental Health Procedures Act.

Family Education Rights and Privacy Act (FERPA)

According to FERPA, confidential information may be released if a mental health professional believes, based on the totality of circumstances, that there is "a threat to the health or safety of a student or other individuals" (§99.36 (c)) and the disclosure can be made to "any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals" (§99.36 (c)).

FERPA is contradicted by the proposed regulation of the State Board of Psychology that restricts warning to situations where the patient communicates a threat (not in situations where the psychologist learns of the threat through other means or discerns a threat by looking at the totality of information provided). FERPA is also contradicted by the proposed regulation of the State Board of Psychology that restricts the psychologist only to warning the identified or identifiable victim, whereas FERPA permits disclosures to any person who can help diffuse the danger. A copy of the relevant portions from FERPA is included in the Appendix.

Pennsylvania School Code

Furthermore, according to the School Code in Pennsylvania, "information received in confidence from a student may be revealed to the student's parents or guardians, the principal or other appropriate authority when the health, welfare or safety of the student or other persons is clearly in jeopardy" (22 PA Code §12.12).

The School Code is contradicted by the proposed regulation of the State Board of Psychology that restricts exceptions to confidentiality when there is an identified or identifiable victim (student) in contrast to the Pennsylvania School Code which does not have that restriction. The School Code is also contradicted by the proposed regulation of the State Board of Psychology that restricts the psychologist to warning the identified or identifiable victim, whereas the School Code permits disclosures to a wider range of persons. A copy of the relevant portions of the School Code is included in the Appendix.

State and Federal Drug and Alcohol Laws

According to both state and federal law, psychologists and other health care professionals working in qualified drug and alcohol treatment facilities are not permitted to disclose confidential patient information, even in a duty to warn situation, without a court order (this is

covered in the Licensing Alert from the Pennsylvania Department of Health in September 1999, citing 42 CFR Part 2, Subgroup B §2.20; see response to question 9).

These drug and alcohol laws are contradicted by the proposed rule of the State Board of Psychology that would require warning identified or identifiable victims without a court order. A copy of the relevant portion from the Licensing Alert from the Pennsylvania Department of Health is included in the Appendix.

Pennsylvania's Mental Health Procedures Act

Finally, the regulations from Pennsylvania's Mental Health Procedures Act (MHPA) permit disclosures "to prevent serious risk of bodily harm or death" (55 PA Code §5100.32 (a) (9)). The MHPA is contradicted by the proposed regulations of the State Board of psychology in that the MHPA does not restrict the responses of the psychologist only to warning the intended victim. A copy of the relevant portion of these regulations is included in the Appendix. These different standards are summarized in the table below.

	Who is endangered	**Who may be notified?**	**Threshold for determining danger**
FERPA	"a student or other individuals"	"to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals"	Looking at the "totality of circumstances"
PA School Code	Student or other persons	Parents/guardians, principals, or "other appropriate authority"	Not specified
Drug and Alcohol Laws	n.a.	No one without a court order	n.a.
Mental Health Procedures Act	Not specified	Not specified	Not specified
Current State Board of Psychology regulations	Identifiable or readily identifiable victim or "group of people" or "society"	"appropriate professional workers or public authorities" or "readily identifiable victim or group of people"	Client makes threat and psychologist determines threat is imminent and credible
Proposed State Board of Psychology regulations	Identifiable or readily identifiable victim	"intended victim"	Client makes threat and psychologist determines threat is imminent and credible

Threat to Public Safety

In addition to contradicting state and federal law, we believe that the proposed regulations would jeopardize public safety. On July 20, 2012, in Aurora Colorado, a man with a serious mental illness shot and killed several persons in a movie theater. News reports indicated that he was seeing a psychiatrist who had issued warnings about his potential for danger, although many details have been embargoed by the judge. Nonetheless, these and other cases highlight the importance of developing regulations that protect the public. The proposal of the State Board of Psychology would erode the protections currently in place. Below we give specific information as to why the proposed regulations of the State Board of Psychology would jeopardize public safety.

First, the proposed regulations would permit exceptions to confidentiality only if there is an identified victim (or readily identifiable victim). This narrow standard is in contrast with the current regulations that also permit exceptions to confidentiality when there is a danger to "an individual or to society" (49 PA Code, §41.61 (5) (b) (1)). It seems desirable to keep this option available. Consider this example:

> *A patient who was an air traffic controller had a serious depression and the psychologist did not believe that he could fulfill his job obligations adequately and believed that the patient's non-performance could lead to the death of dozens or hundreds of individuals. The patient lacked insight into the problem and was refusing to take a medical leave. Under current regulations, which permitted disclosures when society is in imminent danger, the psychologist told the patient either to get a medical leave or his condition would be reported to his employer.* [This is a real case.][1]

In addition, the wording proposed by the State Board of Psychology says that a duty arises if the patient communicates a threat. This is in contrast to the current regulations that permit a break in confidentiality if the psychologist determines that there is a threat to a third party or society, thus allowing the possibility that psychologists can use other sources of data to determine if a danger exists (e.g., in marital therapy the wife makes a credible report that her husband, also a patient, intends to inflict serious physical harm on an identifiable party).

Furthermore, the wording proposed by the State Board of Psychology would permit the psychologist to attempt to diffuse the violence only by warning the intended victim. This is in contrast with the current regulations that would permit a wider range of interventions than simply warning the intended victim (which paradoxically may actually increase the risk of danger in some situations). It should be kept in mind that often the psychologist cannot reach the intended victim(s). A study of psychiatric residents implementing a duty to warn found that "in almost half of the cases, the resident was unable to contact the intended victim" (Binder & McNiel, 1996, p. 1212). Other options include an involuntary psychiatric hospitalization. "Regardless of

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[1] In these and other case examples, identifying information has been deleted and certain details have been modified to ensure the anonymity of the situation. Nonetheless, the essential ethical conflicts have been represented accurately.

what legal protective duties are in effect, as a rule, the most prudent and preventative measure to handle a patient who is seriously mentally ill, and as a result is dangerous to others, is hospitalization" (Felthous & Kachigian, 2001, p. 370). Consider this example:

> *A psychologist had a patient with serious paranoid schizophrenia who threatened to harm a third party. A hospitalization was arranged and the hospital was notified of the threat to the third party. After a week in the hospital and the administration of anti-psychotic medication, the homicidal urges diminished very substantially.* [This is a real case.]

As we describe in more detail below in the section entitled "Policy Decision That Requires Legislative Review," the proposed regulations would not permit psychologists to notify authorities necessary to institute an involuntary psychiatric hospitalization.

In addition, any regulation needs to reflect the fact that warnings to the intended victim are not always effective. Often warned victims deny that the patient presents any threat. "The second most common reaction [of the intended victim] was denial that the patient would ever hurt them" (Binder & McNiel, 1996, p. 1212). Furthermore, in some cases warning the intended victim may increase likelihood of danger and precipitate violence that the psychologists want to prevent (see case example below). Psychologists need to have more options available, such as the option of notifying the police or other persons capable of diffusing the danger.

> A *patient who was hospitalized following a gang fight expressed the intention to harm the parties who injured him. In the opinion of the psychologist, notifying the threatened third parties (members of the rival gang) would only precipitate more violence as these gang members would most likely take preemptive action against the patient.* [This is a real case.]

Furthermore, McNiel, Binder, and Fulton (1998) found that about half of the intended victims were family members or paramours, suggesting that the best responses, in some situations, must be linked to programs and procedures designed to prevent intimate person violence (domestic abuse).

Another consideration is that when children are threatened, it may be more appropriate to notify parents, police, or other adults, rather than the child.

> *A high school student made a serious threat to kill a teacher and several students who were in his school. Notification was made to the school principal, instead of trying to reach the teacher and each student separately.* [This is a real case.]

In cases where a parent makes a serious threat to injure a child, the current regulations can be interpreted to allow the psychologist to notify Children and Youth, thus preventing child abuse. Although the proposed regulations would also permit such disclosures to children and youth authorities (see (e) (2) (ii) (B)), it would also require the psychologist to notify the intended victim who is a child, which is an absurd requirement, given that the victim may even

be an infant, or even if the child were older, would typically lack the options available to avoid or prevent the violence.

Also, the proposed regulations would permit psychologists to consult only with other psychologists when faced with a patient who presents an immediate danger of harm to third parties. We believe this should be broadened so that psychologists can consult a wider range of individuals, including psychiatrists, other health professionals, or any individual with the capacity to diffuse the danger.

We note that the State Board claims that its proposed regulations are based on the Supreme Court decision, *Emerich* (720 A. 2nd 1032 (PA, 1998)). However, a reading of *Emerich* shows that the Board selectively ignores very important qualifications that the Supreme Court put on its own opinion.

In *Emerich*, the Pennsylvania Supreme Court addressed whether a therapist who had warned an intended victim had discharged his duty. The Supreme ruled that this particular therapist had discharged his duty by warning "under facts of the case" (p. 1032). It was not discussing whether future therapists in future situations could discharge their duty by ways other than warning the intended victim ("because of the facts before us, and in light of our limited grant, we are not required to address the related issue of whether this duty to warn may be discharged by notifying relatives of the victim, other individuals close to the victim, or the police" footnote 8, p. 1040).

Emerich recognized that the duty to warn is a subset of the duty to protect and the court wrote that it was not addressing the broader issue of whether there is a duty to protect. Again, the actual case stated that

> it is critical to note that the *Tarasoff* court found a duty to *protect* a third party from a patient. We believe, and the court in *Tarasoff* made clear, that a duty to warn is subsumed in this broader concept of a duty to protect. Indeed, a warning was one alternative offered by the court in *Tarasoff* to discharge the duty to protect . . . . However, consistent with our limited grant, we will only address the issue of protection in the context of a duty to warn the intended victim of danger. We leave for another day the related issue of whether some broader duty to protect should be recognized in this Commonwealth (footnote 5, p. 1037).[2]

Nowhere in its opinion did the Court criticize or attempt to negate the numerous state and federal laws that give mental health professionals a wider range of options when attempting to diffuse dangerous situations.

A copy of the relevant portions from *Emerich* decision is included in the Appendix.

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[2] *Tarasoff* refers to a 1976 California case that first articulated a duty to protect when a patient presents an immediate danger to an identifiable third party.

In addition, and this is a very important issue, there are many times that it is imperative to break confidentiality in order to ensure the safety of a person at risk to die from suicide. However, the proposed regulations do not address this issue (since the only option would be to notify the intended victim, which, in the case of threatened suicide, would be meaningless). We believe that public safety requires us to have the option of breaking confidentiality to protect the life of a patient at risk to die from suicide. We note that the Board commentary states that "proposed subsection (e) (A) (ii) – (iv) addresses additional persons to whom psychologists may disclose and discuss the threats to seek their assistance to protect against dangers and to prevent their clients/patients from harming themselves" (p. 5358). However, as we have noted above, we can find no such subsection in the proposed regulations. Perhaps the Board had intended to deal with this issue but a section was inadvertently deleted. We do not know and must restrict ourselves to what was actually published in the *Pennsylvania Bulletin.*

According to the proposed regulations, psychologists must follow the standards of the American Psychological Association (APA) except that these regulations would supersede any standard of APA in case of a conflict. However, the APA Ethics Code defers to state law concerning the release of information without patient consent. According to Standard 4.05 (b) of APA's Ethics Code, "psychologists [may] disclose confidential information without the consent of the individual only as mandated by law or permitted by law for a valid purpose such as to . . . protect the client/patient, psychologist, or others from harm." Because the APA Ethics Code defers to state law on this issue and because the State Board of Psychology does not identify an exception to confidentiality to prevent a suicide, our conclusion is that the State Board of Psychology would not permit psychologists to break confidentiality even to save the life of a patient. Depriving psychologists of the opportunity to intervene in the life of a patient at risk to die from suicide would be likely to result in many avoidable deaths every year.

A survey of Pennsylvania psychologists in 2003 showed that 56% of psychologists had a patient threaten suicide in the last year and 14% had at least one patient die from suicide in the last year (see Table below; Knapp & Keller, 2003). We do not know how many of the threats were prevented or the attempts thwarted because psychologists had the option of breaking confidentiality in situations where the danger of suicide was imminent. Nonetheless, we believe that public safety demands that psychologists continue to have a wide range of options in attempting to protect human life.

Number of times	**Patient Threatened Suicide**	**Patient Attempted Suicide**	**Patient Died from Suicide**
Once	18	16	10
Twice	13	8	2
Three or more	25	8	2
Total	56	32	14

The commentary of the Board states that "Proposed subsection (e) addresses confidentiality issues and is generally consistent with Principle 4 of the APA Code and Section

III (F) of the ASPPB Model Code" (p. 5357).[3] We disagree very strongly with this assertion. For example, as applied to the duty to warn or protect, the ASPPB Code of Conduct states

> The psychologist may disclose confidential information without the informed written consent of the client when the psychologist judges that disclosure is necessary to protect against a clear and substantive risk of imminent serious harm being inflicted by the client on the client or another person. In such case, the psychologist shall limit disclosure of the otherwise confidential information to only those persons and only that content which would be consistent with the standards of the profession in addressing such problems. . . III (F) (2)

So far from being consistent with the ASPPB Code of Conduct, the proposed regulations are quite different from them. The ASPPB Code of Conduct actually agrees with our analysis in all crucial points. That is, there should be an option of breaking confidentiality in the case of a person at risk to die from suicide; the warning of the intended victim is one (not the only) option to diffuse the danger; information may be disclosed to persons other than the intended victim if necessary to diffuse the danger; and the standard for determining when confidentiality should be broken rests with the judgment of the psychologist.

Policy Decision That Requires Legislative Review

The proposed regulations would not permit psychologists to notify government authorities to secure an involuntary psychiatric hospitalization. This system of involuntary psychiatric hospitalizations has been largely successful in both protecting the public and securing treatment for those afflicted with serious mental illnesses. We can find no justification for restricting psychologists from disclosing information necessary to use this option to protect the public. Such a radical departure from established practice should, in our opinion, require legislative review.

Summary of Issues Surrounding Duty to Warn or Protect

We are fortunate that in Pennsylvania we have not yet had a major tragedy such as has occurred in Aurora, Colorado, Virginia Tech, or other locations across the country. No doubt this is due, in part, to random luck. However, Pennsylvania also has a set of laws that permit flexibility on the part of psychologists to respond appropriately when they become aware of the possibility of such dangers. In addition to the legal conflicts created by the regulations proposed by the State Board of Psychology, good public policy requires that regulations continue to allow psychologists to fulfill their obligations to protect the public.

Furthermore, we believe that it is crucial that the regulations permit psychologists to disclose confidential information if necessary to protect the life of a person at risk to die from suicide.

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[3] ASPPB stands for the Association of State and Provincial Psychology Boards. It is the international association (United States and Canada) of psychology licensing boards that has developed its own code of conduct.

Finally, we note, contrary to the statements of the Board, its position deviates substantially from that of ASPPB.

Other Issues

We found numerous other situations where the Board's proposed regulations exceeded the statutory authority of the Board, violated existing state or federal laws, harmed the public interest or safety, engendered unreasonable costs to business, the Commonwealth and its subdivisions, or were ambiguous or unreasonable. Each of these will be reviewed in sequence as they appear in the proposed regulations. Some of these are minor wording issues that could be clarified very easily; others are substantive issues that could have a significant impact on the citizens of the Commonwealth.

In addition, in several places the Board attempts to add requirements through its commentary that are not found in the proposed regulations themselves. Often the commentary contradicts the plain and ordinary meaning of the proposed regulations themselves. We believe that any statements in the commentary that change the literal meaning of the proposed regulations should be put directly in the regulations themselves so that they can be subject to scrutiny by IRRC and the respective committees of the General Assembly.

Section §41.1 (Definitions) Approved Treatment Provider

The current regulations define an approved treatment provider as "a licensed physician or psychologist with verified training and experience in the diagnosis and treatment of addiction." However, many impaired professionals do not have addictions, but other mental disorders. We believe that public welfare will be enhanced if psychologists concerned about becoming impaired would be able to seek treatment from psychologists or physicians who treat mental health disorders as well.

The Board notes that this definition tracks the standards of the Professional Health Monitoring Board. However, our understanding is that the large majority of the impaired professionals from the other health professions have problems with the abuse of prescription medications (including poly substance abuse) and that they would likely seek treatment from drug and alcohol treatment providers. But psychologists do not have the legal right to prescribe medications, have a much lower rate of poly substance abuse, and would be less likely to seek treatment from a drug and alcohol provider.

§41.1 Definitions, Client/Patient

The commentary of the Board states that proposed subparagraph (iii) refers to state law that "specifically requires that conversations between the psychologist and the minor/legally incapacitated adult remain confidential, such as 23 Pa C. S. §6383 (b) (2)" (p. 5356). However, the section referenced only clarifies that the regulations of the Child Protective Services Law take precedence over those of licensing boards. Its relationship to patient confidentiality is

unclear. A copy of 23 Pa C. S. §6383 (b) (2) is enclosed in the Appendix. It is possible that the Board was referring to Confidential communications to psychiatrists or licensed psychologists, 42 Pa. C. S. §5944.

Furthermore, the Minors Consent to Treatment Law (Act 147 of 2003) specifies the conditions of confidentiality for minors (aged 14 or older) receiving mental health treatment. However, it is not clear to us that the communications between a legally incapacitated adult and a psychologist can be kept from the guardian of the legally incapacitated adult. We have not had enough time to review this legal issue in detail. However, the general rule is that the ability to consent to treatment implies the ability to control the release of information.

Section §41.1 Definitions. Confidential Information

This appears to be a minor referencing error. This section requires psychologists to keep information confidential except with the written consent of the client/patient "or as permitted under an exception in §41.61 (d) (relating to Code of Ethics)." However, we notice that exceptions to confidentiality are found in §41.61 (e) *Protecting confidentiality of clients/patients* and also §41.61 (k) *Reporting suspected violations*.

Section §41.1. Definitions. Multiple Relationship

Multiple relationships are defined to mean a secondary relationship or promise of a secondary relationship with "a client/patient or immediate family member of a client/patient. . . (§41.1)." The Board appears to be limiting its ability to protect the public by adopting such a narrow definition of a multiple relationship. We note that the APA Ethics Code also notes that a multiple relationship can also exist if the psychologist is in another role with a person "closely associated with or related to" the patient (Standard 3.05 (a)). Also the ASPPB Code of Conduct adopts broader language than what is found in the Board's proposed regulations as it refers to "a relevant person associated with or related to the client" (Section III (B) (2)).

Furthermore, the definition fails to account for the fact that psychologists may have harmful multiple relationships with supervisees (for example, dating a supervisee who depends on the psychologist for a letter of reference in order to become licensed). It might also be possible to have harmful or exploitative multiple relationships with students or research participants.

Section §41.57 Professional Records

The proposed regulations would change the requirement for keeping the records of children for 2 years after they turn 18 (or 5 years since the last patient contact). Anecdotal reports suggest patients almost never request their records after 5 years. Given these facts, we would like to know the rationale of the Board for this proposed change.

However, a more substantive problem occurs in that in two places in the commentaries on these proposed regulations the Board states that psychologists are required to keep certain

information in the records, although these requirements do not appear in the proposed regulations themselves. For example, the Board states that psychologists are required to evaluate the potential for harm when entering into a potentially harmful multiple relationship with a patient and "this evaluation should be documented in the psychologist's records as part of §41.57 (a)" (p. 5357). If the Board wants this to be part of the professional practice of psychology, it needs to indicate such in the regulations themselves; not in the commentary. Section §41.57 contains no requirement that psychologists have to document potential harm from multiple relationships.

Second, the Board correctly notes that HIPAA permits psychologists to withhold assessment results from patients in limited circumstances such as when there is a potential for harm. In its commentary the Board also notes that "When the information is withheld, it should be documented in the client/patient's record under §41.57 (b)" (p. 5359). Again, if the Board wants this to be part of the professional practice of psychology, it needs to indicate such in the regulations themselves. Section §41.57 contains no requirement that psychologists have to document why they withheld assessment results from patients.

Section (b) Competence

The proposed regulations state that "A psychologist shall limit the psychologist's practice and supervision to the areas in which the psychologist is competent by virtue of education, training and experience." This contrasts with Standard 2.01 (d) of the APA Ethics Codes which states "when psychologists are asked to provide services to individuals for whom appropriate mental health services are not available and for which psychologists have not obtained the competence necessary, psychologists with closely related prior training or experience may provide such services in order to ensure that services are not denied if they make a reasonable effort to obtain the competence required by using relevant research, training, consultation, or study." Also Standard 2.02 of the APA Ethics Code states that "In emergencies, when psychologists provide services to individuals for whom other mental health services are not available and for which psychologists have not obtained the necessary training, psychologists may provide such services in order to ensure that services are not denied. The services are discontinued as soon as the emergency has ended or appropriate services are available."

These proposed regulations include no exception for competence for underserved areas or emergencies, as found in the APA Ethics Code. It seems in order to ensure public safety it would be necessary to make limited exceptions for emergencies and for the treatment of persons in under-served areas of the state.

Furthermore, we note that the commentary of the Board is misleading. The commentary of the Board states that this language tracks the language currently found in Principle 2 (a) of the State Board of Psychology's Code of Conduct.[4] However, a careful reading shows that this

[4] Here and in many other places in the commentary the Board claims it is tracking the provisions of the APA Ethics Code or current Board regulations. These claims are often

is not the case. Principle 2 (a) of the current Code of Conduct states that "Psychologists . . . provide only services and use only techniques for which they are qualified by education and training, consistent with the American Psychological Association's *General Guidelines for Providers of Psychological Services.*" These Guidelines do provide exceptions for usual levels of competence for psychologists in unusual situations. For example, it states "Before offering professional services beyond the range of their experience and usual practice (e.g., providing services to culturally/linguistically diverse populations), psychologists strive to obtain pertinent knowledge through such means as education, training, reading, and appropriate professional consultation" (American Psychological Association, 1987, p. 715). A copy of the relevant portion of the *General Guidelines for Providers of Psychological Services* is enclosed in the Appendix.

Subsection (b) (5) Giving Opinions on Persons Not Seen

The commentary of the State Board of Psychology appears to contradict the wording of the proposed regulations. For example, in §41.61 (b) (5), the proposed regulations read that "A psychologist may not render a formal opinion about a person without direct professional contact with or a review of records of the person." However, the commentary states that this standard does not apply to supervisory relationships or to peer review committees. The problem is that psychologists would be held to the regulations, not the commentary. Furthermore, from an educational perspective psychologists will be reading the only the regulations (not the commentary) while studying for the PPLE (the PA Psychology and Law Examination, which all applicants for the psychology license must take as a condition of becoming licensed as a psychologist in Pennsylvania). In other words, future applicants will be required to study the regulations, but there is no requirement that they also study the very important caveats to the regulations that the Board wants to place in its commentary. Therefore these important qualifications in the commentary need to be included in the regulations themselves.

Subsection (b) (6) Making Treatment Arrangements

The Board is proposing that psychologists make treatment arrangements in the event of their absences. We have no problem with this proposed regulation. However, we note that the commentary of the Board references Standard 2.01 (c) of the Ethics Code, which deals with standards of conduct in new areas of practice. This leads us to question whether this was a simple error on the part of the Board or whether the Board had other intentions in mind for this particular provision.

Subsections (c) (2) and (c) (3) Exploitation

In (c) (2) the Board defines exploitation as constituting three types of conduct. We ask if the Board should identify these as only examples misconduct. Furthermore, in its commentary the Board states that section (c) (3) "tracks the prohibition against engaging in multiple relationships that are exploitative in the current Principle 6 (b) of the Code, Principles 2.01 (c)

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misleading as the proposed regulations frequently differ in meaningful ways from the APA Ethics Code or current Board regulations.

and 3.12 of the APA Code and Section III (B) (2) (a) of the ASPPB Model Code" (p. 5357). However, Standard 2.01 (c) of the Ethics Code refers to the use of new treatment techniques, and Standard 3.12 deals with provisions when services are being interrupted.

Subsection (c) (5) Termination

The proposed regulations read that "Terminating the professional relationship does not obviate an exploitation." We ask the Board to consider if this is always the case.

Subsection (c) (6) Clashes with Organizational Interests

Second, in (c) (6) the Board describes the obligations of a psychologist when the interests of an organization conflict with the interests of a client. We ask if this is adequate to ensure ethical conduct. Instead we ask the Board to consider if it would be preferable for the regulations to state the issue in terms of violating the ethics code, not only in terms of conflicting with the interests of the client. For example, an agency may demand that the psychologist fraudulently submit insurance claims, which is an action that the client does not perceive as against their interests. We ask the Board to consider if the ethics code should require psychologists to resist those unethical actions as well, even if they did not conflict with the interests of a client.

Also, we question whether it is always necessary to inform the clients of potential conflicts of interests. If the issue can be resolved without informing the client, we question if it is always necessary to inform them. Standard 1.03 of the APA Ethics Code, dealing with organizational conflicts, does not always require notifying consumers.

Subsection (d) (1) Informed of Purpose of Evaluation

Subsection d (1) states that "A psychologist shall keep the client/patient informed of the purpose and nature of any evaluation, treatment or other procedure . . ." [except for legal cases]. However, according to one of the learned texts in psychology ethics, assessments could also include "teaching evaluations in academic institutions or consumer satisfaction questionnaires in hospitals and social service agencies" (Fisher, 2003, p. 190). Of course, this restriction could also apply to any consumer satisfaction survey or institution or even routine educational tests. Furthermore, it would also include the EPPP (the Examination for the Professional Practice of Psychology, which is the test on the general knowledge of psychology that all applicants for licensing as a psychologist in Pennsylvania must pass in order to receive a license) or the PPLE. That is, according to its own regulations, it is conceivable that any psychologist involved in the development of any of the licensing examinations by the Bureau of Professional and Occupational Affairs would need to ensure that every applicant went through the appropriate informed consent process.

Because of these problems, we believe that the State Board of Psychology should include the exemptions found within the APA Ethics Code for testing, such as when "testing is mandated by law or government regulations; (2) informed consent is implied because testing is

conducted as a routine educational, institutional, or organizational activity (e.g., when participants voluntarily agree to assessment when applying for a job); or (3) one purpose of the testing is to evaluate decisional capacity" (Standard 9.03 (a)).

Although the wording of the subsection deals with informing patients of the purpose and nature of an evaluation, the commentary of the Board claims that the regulations also state that

> an additional element added to proposed subsection (d) (1) is the recognition that generally psychologists are required to provide clients/patients with accurate and understandable accounts of their conditions. However, there are circumstances when the information would be injurious to the client/patient or when other statutes or common law, including HIPAA, 23 Pa. C. S. §6383 (b) (2) and therapeutic privilege would permit psychologists to withhold information until the client/patient is psychologically ready to accept the information. (p. 5357)

However, we do not see any language in the proposed regulations permitting the exceptions stated in the commentary. Also, the commentary on the Board's proposed regulations references an exception to giving patients accurate accounts of their condition and cites 23 Pa. C. S. §6383 (b) (2) and "therapeutic privilege." We do not understand the relationship of the above mentioned statute to withholding information, not do we understand what the Board means by "therapeutic privilege." Section 23 Pa. C. S. §6383 (b) (2) is enclosed in the Appendix.

Subsection (d) (2) Making a Referral

This subsection reads that "if a psychologist is unable to be objective, the psychologist shall make a referral." We ask if the words "if necessary" or "if clinically indicated" should be added. Otherwise psychologists would be required to make a referral even if it were not indicated. We note that a psychologist following the proposed wording in (d) (2) would be in violation of the proposed wording in (l) (1)- (4), which does not list the inability to be objective as a reason for making a referral.

Subsection (d) (4) Competency to Consent

The Board notes that subsection (d) (4) incorporates Principle 3.10 of the APA Ethics Code requiring that psychologists get consent before starting treatment. However, the Board fails to note the exception in 9.01 of the APA Ethics Code, which notes informed consent for an assessment is not necessarily required if the purpose of the assessment is to determine the decisional capacity of the individual. Since the line between when an assessment ends and treatment begins may be blurred, we suspect that sometimes it is not possible to determine the decisional capacity of an individual until after services have already begun. We urge the Board to reconsider this subsection.

Subsection (d) (5) Clarifying Confidentiality

The proposed regulations state that "A psychologist shall, at the beginning of the professional relationship, clarify the scope of the relationship and the limits of confidentiality to the client/patient." The Board commentary refers to subsection (d) (4), but it appears that it means to reference (d) (5).

A problem arises in that the Board's commentary includes exceptions to (d) (5) that do not appear in the regulations themselves. The Board's commentary states that it has chosen not to require the disclosure at the first session, gives some examples of where this would not have to occur, and even states that the delay make take several sessions. The Board's commentary is reasonable. For example, HIPAA permits health professionals to delay giving the patient a Privacy Notice under some circumstances, such as a health emergency. But the proposed regulations themselves do not include these exceptions. We believe that the Board should clarify its meaning directly in the regulations.

Section (e) Confidentiality

Our concerns with the duty to warn or protect were covered previously. However, there is a technical point that was not previously addressed. In (e) (1), the proposed regulations make reference to exceptions provided in paragraph 2. However, we note that paragraph 3 also contains another exception.

Subsection (e) (3) Release of Information Forms

The Board specifies that a release "specifically identifies the person or persons to whom the information may be released" (e) (3). However, often patients legitimately request that information be sent to an agency, hospital, or other institution. We believe it would create an unreasonable delay in patient care for the patient to have to identify a specific individual every time they want to release of information.

Subsection (e) (7) Deceased Clients/Patients

The proposed wording is that "A psychologist shall keep the client/patient information confidential even after the professional relationship terminates or the client/patient dies except in response to a court order or a release signed by the client/patient." The definition of client/patient does not address the issue of executors of a person's estate, which is relevant to the release of records following the death of a patient. The Board commentary states that the release may not be done by the executor of the deceased patient's estate. However, the regulations do not say this. Again, we believe that the Board should clarify its meaning directly in the regulations.

The position of the Board differs from that of other licensing boards in Pennsylvania. As a result psychologists are often challenged by attorneys to present justification for withholding the records of deceased patients even when the written authorization of the executor of the estate is provided. Any regulation needs to address this issue explicitly.

Subsection (e) (4) Prohibitions against Future Disclosure of Confidential Information

Subsection (e) (4) requires psychologists to take reasonable steps to ensure that persons who receive confidential information understand prohibitions against further disclosure. We question the wisdom of this section as the prohibitions against further disclosure can be quite complex, depending on the applicable mandated reporting law or legal status of the recipient. For example, if the information were released to a psychologist, then that a psychologist would have restrictions placed on redisclosing consistent with the regulations here and other applicable state and federal laws. However, if the information were released to an attorney, it appears beyond the purview of the Board to require psychologists to understand the rules of re-disclosure for attorneys. Perhaps the Board is trying to say that the receipt of this information does not, in and of itself, constitute permission for the information to be redisclosed. If this is the intent it would be clearer if it were stated directly.

Subsection (e) (5) Disclosing Patient Information

This subsection states that "when case reports or other confidential information is used in situations other than the treatment of a specific client/patient, a psychologist shall exercise reasonable care to insure that identifiable information is appropriately disguised." Although it appears that it was meant to deal with disclosing information in didactic settings or consultations, the literal wording would prohibit a psychologist from sending a report with identifying information if the report was done for evaluation purposes only and not for treatment.

Subsection (g) (2) Excessive Fees Prohibited

This subsection states that "a psychologist may not exploit a client/patient or responsible payor by charging fees that are excessive. . ." There are two problems with this subsection. First, the Board never defines excessive fees. More importantly, however, the legislature has not granted the Board the authority to set fees. Therefore we believe that this subsection exceeds the authority of the Board to promulgate regulations.

Subsection (g) (2) Prohibitions against Exploitative Bartering

Subsection (g) (2) prohibits psychologists from entering into an exploitative bartering relationship. However, previously the Board noted in (c) (2) that exploitation occurs when there is a multiple relationship, the judgment of the psychologist is not objective, or a behavior has the potential to harm a client. Since the payment of any fee or the bartering of any kind harms the client in the sense of costing the client goods or money, this would appear to prohibit any bartering. This needs to be clarified. One solution may be to eliminate the restrictions on the word "exploitation" as found earlier in the proposed regulations.

Section (h) Assessment

This is a minor referencing correction and not a substantive comment. The Board commentary states that "Principle 8 (d) of the Code and Section III (I) (2) of the ASPPB Model Code, requires psychologists to include the results of the assessment as well as available norms, deficiencies and reservations or qualifications which affect the validity or reliability of the results except where the law permits the information to be withheld" (p. 5359). However, the proper reference is Section III (I) (3) of the ASPPB Code of Conduct.

Subsection (h) (3) Explain Assessment Results

This subsection reads that "a psychologist shall explain assessment results and the limitations of the assessment to the client/patient, except when information may be withheld by law in a manner that the information can be understood by the client/patient."There is a substantive issue in that some patients without legal guardians may, because of intellectual or emotional limitations, be incapable of understanding the information presented.

Also, once again the commentary includes information on exceptions, as mandated by HIPAA that is not included in the proposed regulations. Furthermore, this subsection appears to prohibit psychologists, clients (such as prospective employees) and employers from voluntarily entering into confidential agreements when doing employee evaluations or lethal weapons evaluations.

We ask if this change has the potential to impact business and government employers. It is our understanding that many small and large businesses rely on psychologists to conduct pre-employment screening or screening for prospective employees. The current regulations are silent on the issue of whether the psychologist has to show the examination results to the examinee. In actual practice, some businesses allow psychologists to share reports with the examinees, some do not. In either case, the businesses retain control over that decision. We note that the relevant portion of the ASPPB Model Code is misquoted in this commentary. It should be Section III (I) (2).

Finally, we note that the commentary states that "psychologists may not disclose specific questions asked on standardized tests" (p. 5359). Our assumption is that this sentence needs to be read in light of the previous discussion prohibiting psychologists from "reproducing or describing assessments as part of lectures, presentations or popular publications in ways that might invalidate them" (p. 5359). If that is what the Board means, then we have no objection to what is written.

However, we want to ensure that the Board did not mean for the sentence prohibiting disclosure of specific test items to stand alone. It is common practice for psychologists to share an item or two with a parent or test-taker as part of the process of explaining test results. For example, *in Newport-Mesa Unified School District v. State of California* (371 F. Supp. 2d 1170), the Court ruled that the school district could be required to give parents copies of their test protocols, but the court noted that the school district could attempt alternative safeguards of

the tests before turning them over to parents. Although not stated explicitly in the decision, one of those alternatives could be allowing parents to read selective items in a subscale in order to educate them on the general nature of the domains being assessed. A copy of the relevant portion of *Newport-Mesa* case is included in the Appendix. Furthermore we note that a prominent test manufacturer has recommended the option of having parents look at selected test items if necessary to learn about the general nature of the test. We include a copy of that comment in the Appendix.

Section (i) Violations of the Law

The Board claims that subsection (i) "lists seven categories of violations involving psychology authorized under section 8 of the act. . ." (p. 5359). To a large extent this is true as most of the violations listed in the proposed regulations are also listed in the Act or regulations. However, there is an important error in the list. The Professional Psychologists Practice Act specifically forbids "intentionally submitting to any third party payor a claim for a service or treatment which was not actually provided" (63 P. S. §1218 (a) (14)). However, the proposed regulations prohibit misrepresentation in "billing a client/patient or third party payor." The distinction between misrepresentation and intentional misrepresentation is crucial. There is probably no psychologist, or no health care professional, who delivers a large amount of health care service who has not made a billing error at sometime in their careers. Even those who pursue health care fraud most ardently acknowledge this distinction. Furthermore, the state legislature clearly added the word "intentionally" in the law and the State Board does not have the authority to undercut legislative intent through regulations. A copy of the relevant portion of the Professional Psychologists Practice Act is found in the Appendix.

Section (j) Unauthorized Practice

The Board claims that section (j) tracks current Principle 2 (b) of its current ethics code. Although there is much similarity between the two versions they are not identical. The current code states that "psychologists who know firsthand of these activities [practicing psychology without a license] attempt to rectify the situation. When a situation cannot be dealt with informally, it is called to the attention of the Board" (Principle 2 (b)). This omission needs to be addressed.

Subsection (l) (ii) (2) Prohibition against Abandonment

Subsection (l) (ii) (2) permits psychologists to terminate with patients as long as they do not abandon the patient. We think that the word "abandonment" should be defined. For example, the APA Ethics Code explicitly permits psychologists to terminate with patients who assault them or threaten them physically. We would want to know if the Board would consider such terminations as abandonment.

Subsection (k) (l) (v) Required Reporting of Child Abuse

Subsection (k) (l) (v) is confusing. It appears in a portion of the regulations on reporting violations by psychologists, so a logical interpretation is that it is requiring psychologists to report other psychologists who violate the Child Protective Services Law and abuse children. However, the commentary states that this proposed subsection only requires psychologists to abide by the Child Protective Services Law (a requirement that is already covered in (e) (ii) (B)). We need to know if this subsection does anything more than repeat the necessity to report child abuse.

Related to the point above, the commentary is also confusing because it says that the reporting requirement does not require the psychologist to have the consent to release the name of patients if a psychologist is "causing harm to a client/patient" (k) (1) (i). The commentary then states that this is "set forth in *Emerich*" (p. 5359). Since *Emerich* deals with a client/patient who is threatening to kill an identifiable third party and since this appears in the section dealing with violations by psychologists, our reading is that the Board is proposing that psychologists are obligated to release the name of psychologists who are presenting an imminent danger of inflicting serious bodily harm on a patient. Although this scenario is possible, we have never heard of it occurring and believe it would be covered by (e) *protecting confidentiality of clients/patients*.

Section (l) *Referrals*

This section requires psychologists to make referrals in situations where the patient has a problem that exceeds the scope of competence of the psychologist. As we noted earlier, we believe that the public is better served if psychologists are permitted to respond to emergencies, even if the patient presents with a problem outside of their ordinary scope of competence, or to provide services to patients in underserved areas.

§41.62. Compliance with APA standards and guidelines

This section states that "a psychologist shall adhere to American Psychological Association (APA) Standards and Guidelines, except as provided in subsections (b) and (c)." On its face this would seem rather straightforward, but there are several problems with this. First, we do not know if the State Board is referring to the APA standards and guidelines that exist now (that they presumably agree with) or future ones that APA may develop. For example, the current regulations of the State Board of Psychology make reference to adhering to the *General Guidelines for Psychological Providers,* a document developed by APA. However, these guidelines were repealed by APA; thus we do not know if they are currently in effect or not.

Second, the commentary refers to APA guidelines and standards regarding employee/employer relationships, teacher-student issues, and working relationships, or supervision of others, etc. However, we are not aware of any APA guidelines specifically dealing with those issues. We are aware of APA guidelines dealing with custody matters, child

protection matters, multicultural competence, etc., but none with the topics referenced by the Board in its commentary. Consequently, we are uncertain as to what the Board is requiring.

Electronic Transfer of Information

We believe that there is a need for guidance on the standards for electronic health care records and we request that the State Board of Psychology consider regulations dealing with this issue.

Summary

We believe that these proposed regulations should be rejected because they contradict existing state and federal law, exceed the statutory authority granted to the State Board of Psychology, jeopardize public safety, engender unwarranted costs to the consumer and the public, are ambiguous (lack clarity or are internally contradictory), and are unreasonable.

Each of these areas of concern will be reiterated below.

Exceeding statutory authority: (g) (2) granting the Board the authority to punish psychologists who have "excessive fees."

Violating existing state or federal law: (e) failure to conform to state and federal laws concerning duty to warn or protect; (d) (5) failure to accommodate HIPAA requirements when clarifying confidentiality at the start of a relationship; (h) (3) failure to reference HIPAA exceptions to explaining assessment results; (i) misrepresenting the manner in which the Professional Psychologists Practice Act addresses misrepresentation of billing information.

Harming public interest or safety: (b) (1), psychologists are restricted in providing services in emergencies or services to patients in underserved areas where no other treatment options are available; (d) (5) requiring psychologists to review limits of confidentiality at the start of treatment, even if there is an emergency; (e) failing to conform to state and federal laws concerning duty to warn or protect; failing to allow psychologists to have the option of breaking confidentiality to protect an individual at risk to die from suicide; prohibiting psychologists from sharing information necessary to institute an involuntary psychiatric hospitalization; (l) requiring psychologists to refer all patients outside of their scope of competence, even in an emergency; (j) removing the requirement for psychologists to report the unauthorized practice of psychology.

Decisions that should require legislative input: (e) regulations that would prohibit psychologists from implementing involuntary psychiatric hospitalizations when indicated.

Putting directives into the commentary that should be placed within the regulations themselves: §41.57 (Records) requiring psychologists to note potentially harmful multiple relationships in records; requiring psychologists to document circumstances in which psychologists withhold assessment results from patients for fear of harming them or others; (d)

(5) requiring psychologists to review limits of confidentiality at the start of treatment, even if there is an emergency; (e)(7) commenting on the status of the executors of the estate of deceased persons in the commentary, but not in the regulations themselves; (h) (3) requiring psychologists to document exceptions to explaining assessment results to patients.

Engendering costs to business, the Commonwealth, or its political subdivisions: §41.1 definition of client/patient; (d) (1) requiring informed consent even for consumer satisfaction surveys, and (h) (3) prohibiting employers (including municipal governments) and employees from voluntarily entering into agreements where testing results are not made known to the testee.

Ambiguity or lack of clarity: (b) (5) rendering opinions on persons not seen; (d) (1) referencing "therapeutic privilege" in the commentary without defining what it means; (d) (5) clarifying confidentiality at the start of a relationship; (e) making references in the commentary to sections in the regulations that do not exist; (e) (7) clarifying whether an executor can or cannot waive confidentiality for a deceased patient; (e) (4) clarifying what is meant by further disclosure of health records; (e) (5) clarifying the use of information for didactic purposes; (g) (2) failing to clarify what is meant by exploitative bartering; (k) (l) (i) and (k) (l) (4); clarifying intent of the board regarding reporting suspected violations by psychologists; §41.62, clarifying obligation to follow APA Standards and Guidelines.

Reasonableness: §41.1 (definition of approved treatment provider); §41.1 (definition of multiple relationship; (c) (2) limiting definition of exploitation; (c) (5) on ending exploitation by termination of relationship; (c) (6) conflicts between employers and interests of clients; and (d) (1) (and (h) (3) prohibiting employers (including municipal governments) and employees from voluntarily entering into agreements where testing results are not made known to the testee; (e) (2) (B) prohibiting patients from releasing information to institutions or agencies.

Thank you for your consideration of our perspectives.

Sincerely yours,

Samuel Knapp, Ed.D., ABPP
Director of Professional Affairs

Rachael Baturin, MPH, J. D.
Professional Affairs Associate

cc: Mr. Scott Schalles, Independent Regulatory Review Commission (IRRC)

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APPENDIX

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Title 34: Education

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PART 99—FAMILY EDUCATIONAL RIGHTS AND PRIVACY

Section Contents

(B) That the purpose for which the personally identifiable information from education records is disclosed to the authorized representative is to carry out an audit or evaluation of Federal- or State-supported education programs, or to enforce or to comply with Federal legal requirements that relate to those programs; and

(C) A description of the activity with sufficient specificity to make clear that the work falls within the exception of §99.31(a)(3), including a description of how the personally identifiable information from education records will be used;

(iii) Require the authorized representative to destroy personally identifiable information from education records when the information is no longer needed for the purpose specified;

(iv) Specify the time period in which the information must be destroyed; and

(v) Establish policies and procedures, consistent with the Act and other Federal and State confidentiality and privacy provisions, to protect personally identifiable information from education records from further disclosure (except back to the disclosing entity) and unauthorized use, including limiting use of personally identifiable information from education records to only authorized representatives with legitimate interests in the audit or evaluation of a Federal- or State-supported education program or for compliance or enforcement of Federal legal requirements related to these programs.

(b) Information that is collected under paragraph (a) of this section must—

(1) Be protected in a manner that does not permit personal identification of individuals by anyone other than the State or local educational authority or agency headed by an official listed in §99.31(a)(3) and their authorized representatives, except that the State or local educational authority or agency headed by an official listed in §99.31(a)(3) may make further disclosures of personally identifiable information from education records on behalf of the educational agency or institution in accordance with the requirements of §99.33(b); and

(2) Be destroyed when no longer needed for the purposes listed in paragraph (a) of this section.

(c) Paragraph (b) of this section does not apply if:

(1) The parent or eligible student has given written consent for the disclosure under §99.30; or

(2) The collection of personally identifiable information is specifically authorized by Federal law.

(Authority: 20 U.S.C. 1232g(b)(1)(C), (b)(3), and (b)(5))

[53 FR 11943, Apr. 11, 1988, as amended at 73 FR 74854, Dec. 9, 2008; 76 FR 75642, Dec. 2, 2011]

§ 99.36 What conditions apply to disclosure of information in health and safety emergencies?

top

(a) An educational agency or institution may disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

(b) Nothing in this Act or this part shall prevent an educational agency or institution from—

(1) Including in the education records of a student appropriate information concerning disciplinary action taken against the student for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community;

(2) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials within the agency or institution who the agency or institution has determined have legitimate educational interests in the behavior of the student; or

(3) Disclosing appropriate information maintained under paragraph (b)(1) of this section to teachers and school officials in other schools who have been determined to have legitimate educational interests in the behavior of the student.

(c) In making a determination under paragraph (a) of this section, an educational agency or institution may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

(Authority: 20 U.S.C. 1232g (b)(1)(I) and (h))

[53 FR 11943, Apr. 11, 1988; 53 FR 19368, May 27, 1988, as amended at 61 FR 59297, Nov. 21, 1996; 73 FR 74854, Dec. 9, 2008]

§ 99.37 What conditions apply to disclosing directory information?

top

(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of:

(1) The types of personally identifiable information that the agency or institution has designated as directory information;

(2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and

(3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information.

(b) An educational agency or institution may disclose directory information about former students without complying with the notice and opt out conditions in paragraph (a) of this section. However, the agency or institution must continue to honor any valid request to opt out of the disclosure of directory information made while a student was in attendance unless the student rescinds the opt out request.

(c) A parent or eligible student may not use the right under paragraph (a)(2) of this section to opt out of directory information disclosures to—

(1) Prevent an educational agency or institution from disclosing or requiring a student to disclose the student's name, identifier, or institutional email address in a class in which the student is enrolled; or

(2) Prevent an educational agency or institution from requiring a student to wear, to display publicly, or to disclose a student ID card or badge that exhibits information that may be designated as directory information under §99.3 and that has been properly designated by the educational agency or institution as directory information in the public notice provided under paragraph (a)(1) of this section.

(d) In its public notice to parents and eligible students in attendance at the agency or institution that is described in paragraph (a) of this section, an educational agency or institution may specify that disclosure of directory information will be limited to specific parties, for specific purposes, or both. When an educational agency or institution specifies that disclosure of directory information will be limited to specific parties, for specific purposes, or both, the educational agency or institution must limit its directory information disclosures to those specified in its public notice that is described in paragraph (a) of this section.

(e) An educational agency or institution may not disclose or confirm directory information without meeting the written consent requirements in §99.30 if a student's social security number or other non-directory information is used alone or combined with other data elements to identify or help identify the

(c) Students may be required to wear certain types of clothing while participating in physical education classes, shops, extracurricular activities or other situations when special attire may be required to insure the health or safety of the student.

(d) Students have the responsibility to keep themselves, their clothes and their hair clean. School officials may impose limitations on student participation in the regular instructional program when there is evidence that the lack of cleanliness constitutes a health hazard.

Authority

The provisions of this § 12.11 amended under section 2603-B of the Public School Code of 1949 (24 P. S. § 26-2603-B).

Source

The provisions of this § 12.11 amended February 17, 1984, effective February 18, 1984, 14 Pa.B. 520; amended December 2, 2005, effective December 3, 2005, 35 Pa.B. 6510, 6658. Immediately preceding text appears at serial page (288181).

§ 12.12. Confidential communications.

(a) Use of a student's confidential communications to school personnel in legal proceedings is governed by statutes and regulations appropriate to the proceeding. See, for example, 42 Pa.C.S. § 5945 (relating to confidential communications to school personnel).

(b) Information received in confidence from a student may be revealed to the student's parents or guardians, the principal or other appropriate authority when the health, welfare or safety of the student or other persons is clearly in jeopardy.

Authority

The provisions of this § 12.12 amended under section 2603-B of the Public School Code of 1949 (24 P. S. § 26-2603-B).

Source

The provisions of this § 12.12 amended February 17, 1984, effective February 18, 1984, 14 Pa.B. 520; amended December 2, 2005, effective December 3, 2005, 35 Pa.B. 6510, 6658. Immediately preceding text appears at serial pages (288181) to (288182).

Notes of Decisions

Confidential Communication

Conversations between an assistant principal and a student are not privileged and confidential under 22 Pa. Code § 12.12 (a) unless acting in the role of guidance counselor. *In re McClellan*, 475 A.2d 867 (Pa. Cmwlth. 1984).

DEPARTMENT OF HEALTH
... in pursuit of good health

LICENSING ALERT

Lori Gerhard
Acting Deputy Secretary
For Quality Assurance

September 1999

Division of Drug and Alcohol Program Licensure
Licensing Alert #1-99

CONFIDENTIALITY

The Division of Drug and Alcohol Program Licensure and the Bureau of Drug and Alcohol Programs regularly receive questions and requests for clarification on the confidentiality regulations. It is recognized that drug and alcohol confidentiality and the relevant state and federal regulations are complex. For these reasons, we have compiled the enclosed list of commonly asked questions about confidentiality and their respective responses.

If you have questions, please contact

Carol Bashore
Arvida Wanner
Division of Drug and Alcohol Program Licensure
(717) 783-8675

8. **Our greatest concern is that Confidentiality Regulations would make it impossible to bill insurance companies. The information that some managed care forms require to authorize service is in violation of these standards. At this time, our only options are to be in non-compliance or to go out of business.**

RESPONSE: In July 1997, the Department issued a letter from Deputy Secretary Molly Raphael to all managed care organizations regarding confidentiality regulations. Copies of the Federal and State Regulations were enclosed with the letter. Payors at times will request information beyond that which is legally permitted. It is our experience that when so notified and sent only the allowable information, the insurers abide by the regulations. However, since the release of additional information is prohibited by law, payment by insurers cannot be contingent upon receipt of any additional information. Providers cannot be forced to violate the law in order to receive payment. Facilities, nevertheless, must be proactive in this effort.

9. **Is there a legal duty to warn requirement for drug and alcohol facilities in Pennsylvania?**

Currently, there is no legal duty to warn. The Department has reviewed the Pennsylvania Supreme Court ruling on Emerich V. Philadelphia Center for Human Development, Inc., et. al. (November 25, 1998). This ruling does not change the way duty to warn activities must be carried out in drug and alcohol treatment centers in Pennsylvania. This is due to the Federal regulations at 42 CFR Part 2, Subparts A through E. The regulations at 42 CFR Part 2, Subpart B, §2.20, Relationship to State laws, states the following:

> The statutes authorizing these regulations (42 U.S.C. 290ee-3 and 42 U.S.C. 290dd-3) do not preempt the field of law which they cover to the exclusion of all State laws in that field. If a disclosure permitted under these regulations is prohibited under State law, neither these regulations nor the authorizing statutes may be construed to authorize any violation of that State law. However, no State law may either authorize or compel any disclosure prohibited by these regulations.

If the Federal regulations do not allow for a release of information, no state law can subsequently authorize that release. The Pennsylvania Supreme Court ruling on Emerich V. Philadelphia Center for Human Development, Inc., et. al. (November 25, 1998), may now be state law, but it cannot authorize a release prohibited by the Federal regulations.

The Federal regulations do not ignore "Duty to Warn/Protect" situations and provide for those situations in at least two ways. The first method is described at 42 CFR Part 2, Subpart B, §2.12(c)(5) and (c)(6) where there are contingencies for reporting *CRIMES ON PROGRAM PREMISES OR AGAINST PROGRAM PERSONNEL* and for *REPORTS OF SUSPECTED CHILD ABUSE AND NEGLECT,* without obtaining the client's consent. When this does occur, the Commonwealth's requirements at 28 Pa. Code §709.28(e)(1) and (e)(2) relating to documenting the disclosure in the client's record and informing the client that the information was disclosed must be followed in detail. The second method relating to "Duty to Warn/Protect" is described in detail at 42 CFR Part 2, Subpart E, §2.63(a)(1)

CONFIDENTIAL COMMUNICATIONS and §2.64(a) **PROCEDURES AND CRITERIA FOR ORDERS AUTHORIZING DISCLOSURES FOR NONCRIMINAL PURPOSES.** These regulations describe the method for filing a "John Doe" Application for a court order that would authorize the release of information without the client's consent. These are the same procedures that providers in Ohio, in California and in any other state or territory of the United States are required to follow in order to be in compliance with Federal regulation.

Providers operating in the Commonwealth of Pennsylvania who wish to include duty to warn policy and procedure in their operations manuals, must write a policy and procedure that does not conflict with the regulations indicated above. Duty to warn activities may and in many cases probably should take place, however, they must be conducted in accordance with the appropriate law and regulation.

10. **How do the regulations apply to electronic transmittal of client identifying information?**

The confidentiality regulations protect the transmittal of all client identifying information regardless of whether the information is written or verbal.

ions); 55 Pa. Code § 5221.52 (relating to notice of confidentiality and nondiscrimination); and 55 Pa. Code § 5320.26 (relating to confidentiality).

§ 5100.32. Nonconsensual release of information.

(a) Records concerning persons receiving or having received treatment shall be kept confidential and shall not be released nor their content disclosed without the consent of a person given under § 5100.34 (relating to consensual release to third parties), except that relevant portions or summaries may be released or copied as follows:

(1) To those actively engaged in treating the individual, or to persons at other facilities, including professional treatment staff of State Correctional Institutions and county prisons, when the person is being referred to that facility and a summary or portion of the record is necessary to provide for continuity of proper care and treatment.

(2) To third party payors, both those operated and financed in whole or in part by any governmental agency and their agents or intermediaries, or those who are identified as payor or copayor for services and who require information to verify that services were actually provided. Information to be released without consent or court order under this subsection is limited to the staff names, the dates, types and costs of therapies or services, and a short description of the general purpose of each treatment session or service.

(3) To reviewers and inspectors, including the Joint Commission on the Accreditation of Hospitals (JCAH) and Commonwealth licensure or certification, when necessary to obtain certification as an eligible provider of services.

(4) To those participating in PSRO or Utilization Reviews.

(5) To the administrator, under his duties under applicable statutes and regulations.

(6) To a court or mental health review officer, in the course of legal proceedings authorized by the act or this chapter.

(7) In response to a court order, when production of the documents is ordered by a court under § 5100.35(b) (relating to release to courts).

(8) To appropriate Departmental personnel § 5100.38 (relating to child or patient abuse).

(9) In response to an emergency medical situation when release of information is necessary to prevent serious risk of bodily harm or death. Only specific information pertinent to the relief of the emergency may be released on a nonconsensual basis.

(10) To parents or guardians and others when necessary to obtain consent to medical treatment.

(11) To attorneys assigned to represent the subject of a commitment hearing.

(b) Current patients or clients or the parents of patients under the age of shall be notified of the specific conditions under which information may released without their consent.

(c) Information made available under this section shall be limited to tl information relevant and necessary to the purpose for which the information sought. The information may not, without the patient's consent, be released additional persons or entities, or used for additional purposes. Requests for inf mation and the action taken should be recorded in the patient's records.

Notes of Decisions

Duty to Report

Mental healthcare workers do not have an affirmative duty to investigate and report possible cri involving their patients. *Hennessy v. Santiago*, 708 A.2d 1269 (Pa. Super. 1998).

Release of Information in Response to Medical Emergency

Regulations which provide for the nonconsensual release of confidential information when rel is necessary to prevent harm or death in response to medical emergency may include situat wherein a psychiatric patient's threats to harm a third party are disclosed. *Ms. B. v. Montgor County Emergency Service*, 799 F.Supp. 534 (E.D. Pa. 1992), affirmed, 989 F.2d 488 (3d Cir. 1993); cert. denied, 510 U. S. 860, 126 L. Ed. 2d 133, 114 S. Ct. 174 (1993).

Cross References

This section cited in 55 Pa. Code § 3800.20 (relating to confidentiality of records); 55 Pa. (§ 5100.4 (relating to scope); 55 Pa. Code § 5100.31 (relating to scope and policy); 55 Pa. (§ 5100.34 (relating to consensual release to third parties); 55 Pa. Code § 5100.90a (relating to mental hospital admission of involuntarily committed individuals—statement of policy); 55 Pa. (§ 5200.41 (relating to records); 55 Pa. Code § 5200.47 (relating to other applicable regulations Pa. Code § 5210.26 (relating to records); 55 Pa. Code § 5210.56 (relating to other applicable re tions); 55 Pa. Code § 5221.52 (relating to notice of confidentiality and nondiscrimination); an Pa. Code § 5320.26 (relating to confidentiality).

§ 5100.33. Patient's access to records and control over release of reco

(a) When a client/patient, 14 years of age or older, understands the natur documents to be released and the purpose of releasing them, he shall co release of his records. For a client who lacks this understanding, any person sen by the patient may exercise this right if found by the director to be actir the patient's best interest. In the event that the client/patient is deceased, co over release of records may be exercised by the client's/patient's chosen ex tor, administrator or other personal representative of his estate, or, if there i chosen personal representative, by a person otherwise empowered by court c to exercise control over the records. In the event that the client/patient is less 14 years of age or has been adjudicated legally incompetent, control over rel of the client's/patient's records may be exercised by a parent or guardian o client/patient respectively.

(b) The term "access" when used in this section refers to physical exan tion of the record, but does not include nor imply physical possession o records themselves or a copy thereof except as provided in this chapter.

Honeywell, Inc., 95 B.R. 768 (D.Colo.1989) (recoupment is an equitable doctrine, which one might expect to be broad; however, it should be narrowly construed.) Thus, the Superior Court's application of this doctrine to equitable distribution proceedings, which arose after the bankruptcy proceedings were finalized, was an improper attempt to frustrate the discharge in bankruptcy. See *In re Edwards*, 91 B.R. 95, 96 (Bankr.C.D.Cal. 1988) (the bankruptcy court refused to permit the state court to circumvent the effects of husband's bankruptcy discharge by ordering husband to pay as support to wife debts that were previously discharged; courts cannot find a way to make a discharged debt in effect nondischargeable).

Based on the foregoing, I would reverse the Superior Court's decision and order.

CASTILLE, J., joins this concurring opinion.

Ronald B. EMERICH, Administrator of the Estate of Teresa M. Hausler, Appellant,

v.

PHILADELPHIA CENTER FOR HUMAN DEVELOPMENT, INC. and Albert Einstein Medical Center, Appellees.

Ronald B. EMERICH, Administrator of the Estate of Teresa M. Hausler, Appellant,

v.

PHILADELPHIA CENTER FOR HUMAN DEVELOPMENT, INC., Albert Einstein Healthcare Foundation, Albert Einstein Medical Center, Harvey Friedrich, ACSW, Anthony J. Scuderi, M. Div., Cac and Hacan Ulus, Administratrix of the Estate of Ahmet Ulus, M.D., Appellees.

Supreme Court of Pennsylvania.

Argued Dec. 11, 1996.

Decided Nov. 25, 1998.

Administratrix of estate of victim who was murdered by mental patient brought negligence action against mental health treatment center and mental health professionals that treated patient. The Court of Common Pleas, Philadelphia County, Civil Division, Nos. 9305–3216 and 9306–3480, Joseph D. O'Keefe, J., granted judgment on the pleadings in favor of defendants. Administratrix appealed. The Superior Court, Nos. 0884PHL95, 0885PHL95, and 0886PHL95, affirmed. Allocatur was granted. The Supreme Court, Nos. 52–54 Eastern District Appeal Docket 1996, Cappy, J., held that: (1) mental health professional has duty to warn third party of patient's threat to harm third party where specific and immediate threat of serious bodily injury has been conveyed by the patient to the professional regarding a specifically identified or readily identifiable victim; (2) mental health professional had duty to warn victim under facts of case; and (3) professional's statement to victim that she should not go to patient's apartment satisfied that duty.

Affirmed.

Flaherty, J., concurred and filed opinion.

Zappala, J., concurred and filed opinion in which Castille, J., joined.

Nigro and Newman, JJ., concurred and dissented and filed opinions.

1. Appeal and Error ⇐863

The standard of review of an appellate court in passing on a challenge to the sustaining of a judgment on the pleadings is limited; a judgment on the pleadings will be granted where, on the facts averred, the law says with certainty that no recovery is possible.

2. Pleading ⇐343

Principles applicable to a judgment on the pleadings are the same as the principles applicable to a preliminary objection in the nature of a demurrer.

3. Negligence ⇐2

Under common law, as a general rule, there is no duty to control the conduct of a third party to protect another from harm; however, a judicial exception to the general rule has been recognized where a defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct, which gives to the intended victim a right to protection.

4. Mental Health ⇐414(2)

Mental health professional's duty to warn third party whom the therapist knows to be threatened by his patient is subsumed in the broader concept of a duty to protect.

5. Mental Health ⇐414(2)

Mental health professional has a duty to warn a third party of potential harm by his patient, where a specific and immediate threat of serious bodily injury has been conveyed by the patient to the professional regarding a specifically identified or readily identifiable victim.

6. Mental Health ⇐414(2)

Where mental health professional has duty to warn third party of potential harm by his patient, the warning to the intended victim should be the least expansive based upon the circumstances.

7. Mental Health ⇐414(2)

Difficulty in predicting violent conduct, alone, did not preclude court from recognizing a duty on the part of a mental health professional to warn a third party of a patient's threats of harm.

8. Mental Health ⇐414(2)

While psychiatrist or psychologist-patient privilege did not explicitly recognize an exception to the prohibition against the disclosure of confidential information for situations involving immediate harm to member of the public, the regulations promulgated by the state board of psychology recognized such an exception, and, therefore, the privilege did not preclude court from recognizing a duty on the part of a mental health professional to warn a third party of a patient's threats of harm. 42 Pa.C.S.A. § 5944; 49 Pa. Code § 41.61.

9. Mental Health ⇐414(2)

Although Mental Health Procedures Act (MHPA) did not specifically allow disclosure of privileged communications where threat of serious harm to third party is at issue, MHPA's implementing regulations provided for nonconsensual release of confidential records in such a situation, and, therefore, MHPA did not preclude court from recognizing a duty on the part of a mental health professional to warn a third party of a patient's threats of harm. 50 P.S. § 7111; 55 Pa. Code § 5100.32(a)(9).

10. Mental Health ⇐414(2)

Mental health professional had duty to warn patient's former girlfriend of potential harm by patient, where patient stated during course of treatment that he was going to kill girlfriend if she went to his apartment to remove her clothes and professional knew of patient's history of violence.

11. Mental Health ⇐414(2)

Where mental health patient told mental health professional that he would kill his former girlfriend if she when to his apartment to remove her clothes, patient's subsequent assurances that he would not harm her did not preclude a finding that the mental health professional had a duty to warn the girlfriend of the threat.

12. Negligence ⇐136(14)

While the existence of a duty is a question of law, whether there has been a neglect of such duty is generally for the jury.

13. Negligence ⇐136(14)

The issue of whether an act or a failure to act constitutes negligence may be removed from consideration by a jury and decided as a matter of law when the case is free from doubt and there is no possibility that a reasonable jury could find negligence.

14. Mental Health ⇐414(2)

A mental health care professional's warning to third party of potential harm by patient must be reasonable under the particular circumstances.

decisions from other jurisdictions, as well as by analogous decisions by this court and lower court case law in this Commonwealth, we determine that a mental health care professional, under certain limited circumstances, owes a duty to warn a third party of threats of harm against that third party. Nevertheless, we find that in this case, judgment on the pleadings was proper, and thus, we affirm the decision of the learned Superior Court, albeit, for different reasons.

[3] Under common law, as a general rule, there is no duty to control the conduct of a third party to protect another from harm. However, a judicial exception to the general rule has been recognized where a defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct, which gives to the intended victim a right to protection. *See*, Restatement (Second) of Torts §315 (1965). Appellant argues that this exception, and thus, a duty, should be recognized in Pennsylvania.

Our analysis must begin with the California Supreme Court's landmark decision in *Tarasoff v. Regents of Univ. of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976) which was the first case to find that a mental health professional may have a duty to protect others from possible harm by their patients. In *Tarasoff*, a lawsuit was filed against, among others, psychotherapists employed by the Regents of the University of California to recover for the death of the plaintiffs' daughter, Tatiana Tarasoff, who was killed by a psychiatric outpatient.

Two months prior to the killing, the patient had expressly informed his therapist that he was going to kill an unnamed girl (who was readily identifiable as the plaintiffs' daughter) when she returned home from spending the summer in Brazil. The therapist, with the concurrence of two colleagues, decided to commit the patient for observation. The campus police detained the patient at the oral and written request of the therapist, but released him after satisfying themselves that he was rational and exacting his promise to stay away from Ms. Tarasoff. The therapist's superior directed that no further action be taken to confine or otherwise restrain the patient. No one warned either Ms. Tarasoff or her parents of the patient's dangerousness.

After the patient murdered Ms. Tarasoff, her parents filed suit alleging, among other things, that the therapists involved had failed either to warn them of the threat to their daughter or to confine the patient.

The California Supreme Court, while recognizing the general rule that a person owes no duty to control the conduct of another, determined that there is an exception to this general rule where the defendant stands in a special relationship to either the person whose conduct needs to be controlled or in a relationship to the foreseeable victim of that conduct, citing Restatement (Second) of Torts §315–320. Applying that exception, the court found that the special relationship between the defendant therapists and the patient could support affirmative duties for the benefit of third persons. *Tarasoff* 17 Cal.3d at 436, 131 Cal.Rptr. at 23, 551 P.2d at 343.[4]

The court made an analogy to cases which have imposed a duty upon physicians to diagnose and warn about a patient's contagious disease and concluded that "'by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient.'" *Id.*, 17 Cal.3d at 437, 131 Cal.Rptr. at 24, 551 P.2d at 344, quoting Fleming & Maximov, *The Patient and His Victim: The Therapist's Dilemma*, 62 Cal. L.Rev. 1025, 1030 (1974).

The court also considered various public policy interests determining that the public interest in safety from violent assault outweighed countervailing interests of the confidentiality of patient therapist communications and the difficulty in predicting dangerousness. *Id.*, 17 Cal.3d at 437–43, 131 Cal.Rptr. at 24–28, 551 P.2d at 344–48.

[4] The California Supreme Court ultimately held:

> When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.

17 Cal.3d at 431, 131 Cal.Rptr. at 20, 551 P.2d at 340.[5]

Following *Tarasoff*, the vast majority of courts that have considered the issue have concluded that the relationship between a mental health care professional and his patient constitutes a special relationship which imposes upon the professional an affirmative duty to protect a third party against harm. Thus, the concept of a duty to protect by warning, albeit limited in certain circumstances, has met with virtually universal approval. *See e.g., Naidu v. Laird*, 539 A.2d 1064 (Del.1988); *Bardoni v. Kim*, 161 Mich. App. 169, 390 N.W.2d 218 (1986); *Bradley v. Ray*, 904 S.W.2d 302 (Mo.Ct.App.1995); *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (D.Neb.1980); *McIntosh v. Milano*, 168 N.J.Super. 466, 403 A.2d 500 (1979); *Leedy v. Hartnett*, 510 F.Supp. 1125 (M.D.Pa.1981); *Peck v. Counseling Service of Addison Co., Inc.*, 146 Vt. 61, 499 A.2d 422 (Vt.1985); *Petersen v. Washington*, 100 Wash.2d 421, 671 P.2d 230 (1983); *Schuster v. Altenberg*, 144 Wis.2d 223, 424 N.W.2d 159 (1988). *Accord, Hamman v. County of Maricopa*, 161 Ariz. 58, 775 P.2d 1122 (1989); *Bradley Center, Inc. v. Wessner*, 161 Ga.App. 576, 287 S.E.2d 716, *aff'd*, 250 Ga. 199, 296 S.E.2d 693 (1982); *Perreira v. State*, 768 P.2d 1198 (Colo.1989); *Littleton v. Good Samaritan Hospital and Health Center*, 39 Ohio St.3d 86, 529 N.E.2d 449 (1988); *Limon v. Gonzaba*, 940 S.W.2d 236 (Tex.App.—San Antonio 1997). *But see, Boynton v. Burglass*, 590 So.2d 446 (Fla.Dist.Ct.App.1991).

[5] We believe that the *Tarasoff* decision and its progeny are consistent with, and supported by, Pennsylvania case law and properly recognize that pursuant to the special relationship between a mental health professional and his patient, the mental health professional has a duty to warn a third party of potential harm by his patient.

This court has not previously had the occasion to address whether a mental health professional has a common law duty to warn a third party of a patient's threat of harm. However, decisions by this court in analogous situations, certain lower court decisions dealing with this issue, and public policy support the recognition of a duty to warn.

The finding of a duty to protect by warning another of future harm by a patient is consistent with this court's prior case law regarding liability of a mental health professional to a third party for the negligent discharge of a patient under the Mental

4. The court relied solely upon section 315 for its "determination that a duty to protect should be imposed when the nature of the relationship deserves recognition as a special relationship. However, comment c to §315 states that special relationships between the actor and one whom the Restatement refers to as a "third person" requiring the actor to control "the third person's" conduct are described in §§316–19.

Although not specifically addressed by the court in *Tarasoff*, section 319, entitled "Duty to Those in Charge of Person Having Dangerous Propensities," notes a duty to control a third person who the actor knows or should know is likely to cause bodily harm to others if not controlled. "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." Restatement (Second) of Torts §319. Other courts which have adopted a *Tarasoff* type duty have analyzed the issue under either section 315 or 319.

5. It is critical to note that the *Tarasoff* court found a duty to *protect* a third party from a patient. We believe, and the court in *Tarasoff* made clear, that a duty to warn is subsumed in this broader concept of a duty to protect. Indeed, a warning was one alternative offered by the court in *Tarasoff* to discharge the duty to protect. "The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus, it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances." *Tarasoff*, 17 Cal.3d at 431, 131 Cal.Rptr. at 20, 551 P.2d at 340.

However, consistent with our limited grant, we will only address the issue of protection in the context of a duty to warn the intended victim of danger. We leave for another day the related issue of whether some broader duty to protect should be recognized in this Commonwealth.

gered party or those who can reasonably be expected to notify him, we see no sufficient societal interest that would protect and justify concealment. The containment of such a risk lies in the public interest.

Tarasoff, 17 Cal.3d at 442, 131 Cal.Rptr. at 27–28, 551 P.2d at 347–48.

After consideration of the above, we find that the special relationship between a mental health professional and his patient may, in certain circumstances, give rise to an affirmative duty to warn for the benefit of an intended victim. We find, in accord with *Tarasoff*, that a mental health professional who determines, or under the standards of the mental health profession, should have determined, that his patient presents a serious danger of violence to another, bears a duty to exercise reasonable care to protect by warning the intended victim against such danger.[8]

Mindful that the treatment of mental illness is not an exact science, we emphasize that we hold a mental health professional only to the standard of care of his profession, which takes into account the uncertainty of such treatment. Thus, we will not require a mental health professional to be liable for a patient's violent behavior because he fails to predict such behavior accurately.

[6] Moreover, recognizing the importance of the therapist-patient relationship, the warning to the intended victim should be the least expansive based upon the circumstances.

As stated by the court in *Tarasoff*,

> We realize that the open and confidential character of psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the person threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.

Tarasoff, 17 Cal.3d at 441, 131 Cal.Rptr. at 27, 551 P.2d at 347.

Having determined that a mental health professional has a duty to protect by warning a third party of potential harm, we must further consider under what circumstances such a duty arises. We are extremely sensitive to the conundrum a mental health care professional faces regarding the competing concerns of productive therapy, confidentiality and other aspects of the patient's well being, as well as an interest in public safety. In light of these valid concerns and the fact that the duty being recognized is an exception to the general rule that there is no duty to warn those endangered by another, we find that the circumstances in which a duty to warn a third party arises are extremely limited.

First, the predicate for a duty to warn is the existence of a specific and immediate threat of serious bodily injury that has been communicated to the professional. We believe that in light of the relationship between a mental health professional and patient, a relationship in which often vague and imprecise threats are made by an agitated patient as a routine part of the relationship, that only in those situations in which a specific and immediate threat is communicated can a duty to warn be recognized.

Moreover, the duty to warn will only arise where the threat is made against a specifically identified or readily identifiable victim. Strong reasons support the determination that the duty to warn must have some limits. We are cognizant of the fact that the nature of therapy encourages patients to profess threats of violence, few of which are acted upon. Public disclosure of every generalized threat would vitiate the therapist's efforts to build a trusting relationship necessary for progress. *Tarasoff*; *Thompson v. County of Alameda*, 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980)(limiting *Tarasoff* to specifically foreseeable and identifiable victims). Moreover, as a practical matter, a mental health care professional would have great difficulty in warning the public at large of a threat against an unidentified person. Even if possible, warnings to the general public would "produce a cacophony of warnings that by reason of their sheer volume would add little to the effective protection of the public." *Thompson*, 27 Cal.3d at 754–55, 167 Cal.Rptr. at 81, 614 P.2d at 735.

This limitation, in the mental health arena, is consistent with treatment of this consideration by the Pennsylvania decisions in *Dunkle* and *Leonard* and a number of other courts. *See e.g., Brady v. Hopper*, 570 F.Supp. 1333 (D.Colo.1983), *aff'd* 751 F.2d 329 (10th Cir.1984); *Fraser v. United States*, 236 Conn. 625, 674 A.2d 811 (1996); *Davis v. Yong–Oh Lhini*, 124 Mich.App. 291, 335 N.W.2d 481 (1983); *Cairl v. Minnesota*, 323 N.W.2d 20 (Minn.1982); *Leedy v. Hartnett*, 510 F.Supp. 1125 (M.D.Pa.1981). However, a few courts have held the duty is owed to all foreseeable victims. *Hamman v. County of Maricopa*, 161 Ariz. 58, 775 P.2d 1122 (1989); *Lipari v. Sears, Roebuck & Co.*, 497 F.Supp. 185 (D.Neb.1980); *McIntosh v. Milano*, 168 N.J.Super. 466, 403 A.2d 500 (1979); *Petersen v. Washington*, 100 Wash.2d 421, 671 P.2d 230 (1983); *Schuster v. Altenberg*, 144 Wis.2d 223, 424 N.W.2d 159 (1988).

Thus, drawing on the wisdom of prior analysis, and common sense, we believe that a duty to warn arises only where a specific and immediate threat of serious bodily injury has been conveyed by the patient to the professional regarding a specifically identified or readily identifiable victim.

[7] Appellees offer two primary arguments as to why this court should not recognize any duty to warn a third party of a patient's threats of harm. First, Appellees argue that a duty to warn should not be imposed on a mental health professional because such a professional is no better able than anyone else to predict violent behavior. Appellees offer various studies in support of its argument that purport to prove that dangerousness cannot be predicted.

While this court is cognizant of the difficulties predicting whether a patient may truly pose a danger to others, this argument rings hollow for a number of reasons. First, as noted above, the legislature has determined, and this court has already found, that liability may attach for negligently discharging a dangerous patient. *Goryeb*. Subsumed in finding such liability is a failure to recognize that the patient was dangerous.

Related thereto, determinations of "dangerousness" consistent with the MHPA must be undertaken by mental health professionals every day to involuntarily commit a patient. Specifically, the MHPA in its procedures for involuntary mental health treatment mandates a determination of whether an individual poses a clear and present danger of harm to others or to himself. 50 P.S. §7301. Obviously, some understanding and prediction of dangerousness is required in making this determination. To find that a determination of dangerousness is so uncertain to be no better than a coin toss, and thus, preclude liability, would raise "serious questions ... as to the entire present basis for commitment procedures." *McIntosh*, 168 N.J.Super. at 495, 403 A.2d at 514.

Moreover, we are unpersuaded that difficulty in predicting violent conduct alone should justify barring recovery in all situations. The standard of care for mental health professionals adequately takes into account the difficult nature of the problem facing them. *Tarasoff*, 17 Cal.3d at 436–37, 551 P.2d at 344–45, 131 Cal.Rptr. at 24–25; *Lipari*, 497 F.Supp. 185, 192 (D.Neb.1980); *McIntosh*, 168 N.J.Super. at 481–82, 403 A.2d at 507–08; *Peck*, 146 Vt. 61, 499 A.2d 422, 425 (Vt.1985).

Finally, while there may not be one hundred percent accuracy in predictions of dangerousness, a therapist "does have a basis for giving an opinion and a prognosis based on the history of the patient and the course of treatment." *McIntosh*, 168 N.J.Super. at 482, 403 A.2d at 508. We take note that

8. Again, because of the facts before us, and in light of our limited grant, we are not required to address the related issue of whether this duty to warn may be discharged by notifying relatives of the victim, other individuals close to the victim, or the police. Also, we do not address the similar issue of whether a broader duty to protect exists, other than in the context of a duty to warn, and what actions would discharge any such duty if it did exist.

as the Public Welfare Code, and applicable department regulations. The burden of proof in the hearing shall be on the county agency. The department shall assist the county agency as necessary.

(e) Order.--The department is authorized and empowered to make any appropriate order regarding records to make them accurate or consistent with the requirements of this chapter.

(f) Other appeals.--Action by a custodial parent or person who has primary responsibility for the welfare of a child under this section does not preclude his right to exercise other appeals available through department regulations or the courts. (Dec. 16, 1994, P.L.1292, No.151, eff. July 1, 1997)

1994 Amendment. Act 151 added section 6376.

§ 6377. Caseloads.

The department by regulation shall set forth staff-to-family ratios for general protective services. (Dec. 16, 1994, P.L.1292, No.151, eff. July 1, 1997)

1994 Amendment. Act 151 added section 6377.

§ 6378. Purchase of services.

Except for the receipt and assessment of reports alleging a need for protective services, the county agency may purchase and utilize the services of any appropriate public or private agency. The department shall promulgate regulations establishing standards and qualifications of persons or agencies providing services for a county agency. The department may, by regulation, provide for the establishment of regional facilities or a regional coordination of licensed professional service providers to provide county agencies with access to licensed physicians and psychologists, as required by this section. (Dec. 16, 1994, P.L.1292, No.151, eff. July 1, 1997)

1994 Amendment. Act 151 added section 6378.

SUBCHAPTER E
MISCELLANEOUS PROVISIONS

Sec.

§ 6381. Evidence in court proceedings.

(a) General rule.--In addition to the rules of evidence provided under 42 Pa.C.S. Ch. 63 (relating to juvenile matters), the rules of evidence in this section shall govern in child abuse proceedings in court or in any department administrative hearing pursuant to section 6341 (relating to amendment or expunction of information).

(b) Reports of unavailable persons.--Whenever a person required to report under this chapter is unavailable due to death or removal from the jurisdiction of the court, the written report of that person shall be admissible in evidence in any proceedings arising out of child abuse other than proceedings under Title 18 (relating to crimes and offenses). Any hearsay contained in the reports shall be given such weight, if any,

as the court determines to be appropriate under all of the circumstances. However, any hearsay contained in a written report shall not of itself be sufficient to support an adjudication based on abuse.

(c) Privileged communications.--Except for privileged communications between a lawyer and a client and between a minister and a penitent, a privilege of confidential communication between husband and wife or between any professional person, including, but not limited to, physicians, psychologists, counselors, employees of hospitals, clinics, day-care centers and schools and their patients or clients, shall not constitute grounds for excluding evidence at any proceeding regarding child abuse or the cause of child abuse.

(d) Prima facie evidence of abuse.--Evidence that a child has suffered child abuse of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the welfare of the child shall be prima facie evidence of child abuse by the parent or other person responsible for the welfare of the child.

(Dec. 16, 1994, P.L.1292, No.151, eff. July 1, 1995)

1994 Amendment. Act 151 amended subsecs. (a) and (d).

§ 6382. Guardian ad litem for child in court proceedings (Repealed).

2000 Repeal Note. Section 6382 was repealed May 10, 2000, P.L.74, No.18, effective in 60 days.

§ 6383. Education and training.

(a) Duties of department and county agencies.--The department and each county agency, both jointly and individually, shall conduct a continuing publicity and education program for the citizens of this Commonwealth aimed at the prevention of child abuse and child neglect, including the prevention of newborn abandonment, the identification of abused and neglected children and the provision of necessary ameliorative services to abused and neglected children and their families. The department and each county agency shall conduct an ongoing training and education program for local staff, persons required to make reports and other appropriate persons in order to familiarize those persons with the reporting and investigative procedures for cases of suspected child abuse and the rehabilitative services that are available to children and families. In addition, the department shall, by regulation, establish a program of training and certification for persons classified as protective services workers. The regulations shall provide for the grandfathering of all current permanent protective services workers as certified protective services workers. Upon request by the county agency and approval of the department, the agency may conduct the training of the county's protective services workers.

(a.1) Study by department.--The department shall conduct a study to determine the extent of the reporting of suspected child abuse in this Commonwealth where the reports upon investigation are determined to be unfounded and to be knowingly false and maliciously reported or it is believed that a minor was persuaded to make or substantiate a false and malicious report. The department shall submit the report to the Governor, General Assembly and Attorney General no later than June 1, 1996. The report shall include the department's findings and recommendations on how to reduce the incidence of knowingly false and malicious reporting.

(b) Duties of Department of State.--

(1) The Department of State shall make training and educational programs and materials available for all professional licensing boards whose licensees are charged with responsibilities for reporting child abuse under this chapter with a program of distributing educational materials to all licensees.

(2) Each licensing board with jurisdiction over professional licensees identified as mandated reporters under this chapter shall promulgate regulations within one year of the effective date of this subsection on the responsibilities of mandated reporters. These regulations shall clarify that the provisions of this chapter take precedence over any professional standard that might otherwise apply in order to protect children from abuse.

(Dec. 16, 1994, P.L.1292, No.151; Dec. 9, 2002, P.L.1549, No.201, eff. 60 days)

2002 Amendment. Act 201 amended subsec. (a).

Cross References. Section 6383 is referred to in section 6509 of this title.

§ 6384. Legislative oversight.

A committee of the Senate designated by the President pro tempore of the Senate and a committee of the House of Representatives designated by the Speaker of the House of Representatives, either jointly or separately, shall review the manner in which this chapter has been administered at the State and local level for the following purposes:

(1) Providing information that will aid the General Assembly in its oversight responsibilities.

(2) Enabling the General Assembly to determine whether the programs and services mandated by this chapter are effectively meeting the goals of this chapter.

(3) Assisting the General Assembly in measuring the costs and benefits of this program and the effects and side-effects of mandated program services.

(4) Permitting the General Assembly to determine whether the confidentiality of records mandated by this chapter is being maintained at the State and local level.

(5) Providing information that will permit State and local program administrators to be held accountable for the administration of the programs mandated by this chapter.

Cross References. Section 6384 is referred to in section 6340 of this title.

§ 6385. Reimbursement to county agencies.

The department shall certify in accordance with the needs-based budgeting provisions of Article VII of the act of June 13, 1967 (P.L.31, No.21), known as the Public Welfare Code, a level of funds sufficient to meet the cost of services required by the provisions of this chapter which are reasonable and allowable as defined in Article VII.

(Dec. 16, 1994, P.L.1292, No.151, eff. July 1, 1995)

1994 Amendment. Act 151 added section 6385.

§ 6386. Mandatory reporting of infants born and identified as being affected by illegal substance abuse.

Health care providers who are involved in the delivery or care of an infant who is born and identified as being affected by illegal substance abuse or as having withdrawal symptoms resulting from prenatal drug exposure shall immediately cause a report to be made to the appropriate county agency. The county

General Guidelines for Providers of Psychological Services

Board of Professional Affairs, Committee on Professional Standards

Preamble

A set of practices and implicitly recognized principles of conduct evolves over the history of every profession. Such principles guide the relationships of the members of the profession to their users, to each other, and to the community of which both professionals and users are members. Making such guiding principles and practices explicit is a sign of the profession's maturity and serves the best interests of the profession, its users, and the community at large.

Because psychology is a continually evolving science and profession, guidelines for practice are living documents that require periodic review and revision. The *General Guidelines for Providers of Psychological Services*[1,2] represents an important milestone in the evolutionary development of professional psychology.

These General Guidelines are a set of aspirational statements for psychologists that encourage continual improvement in the quality of practice and service. Some of these General Guidelines have been derived from specific APA Ethical Principles (APA, 1981a).[3] Providers of psychological services have the same responsibility to uphold these specific General Guidelines as they would the corresponding Ethical Principles. The language of the other General Guidelines must at all times be interpreted in light of their aspirational intent.

These General Guidelines are general in nature and, as such, are intended for use by all providers of psychological services; they are supplemented by the *Specialty Guidelines for the Delivery of Services by Clinical (Counseling, Industrial/Organizational, and School) Psychologists* (APA, 1981b).

Introduction

This version of the *General Guidelines* is the second revision of the principles originally adopted by the American Psychological Association on September 4, 1974, and first revised in 1977.[4] The *General Guidelines* are intended to improve the quality, effectiveness, and accessibility of psychological services.

Since 1970, the American Psychological Association has worked to develop and codify a uniform set of guidelines for psychological practice that would serve the respective needs of users, providers, third-party purchasers, and other sanctioners of psychological services. In addition, the APA has established a Committee on Professional Standards, which is charged with keeping the General Guidelines responsive to the needs of these groups and with upgrading and extending them as the profession and science of psychology continue to develop knowledge, improved methods, and additional modes of psychological service. These General Guidelines have been established by organized psychology as a means of self-regulation in the public interest.

When providing any of the covered psychological service functions at any time and in any setting, whether public or private, profit or nonprofit, any persons representing themselves as psychologists are expected, where feasible, to observe these General Guidelines of practice to promote the best interests and welfare of the users of such services. Functions and activities related to the teaching of psychology, the writing or editing of scholarly or scientific manuscripts, and the conduct of scientific research do not fall within the purview of the present *General Guidelines*.[5]

Underlying Principles

Six basic principles have guided the development of these General Guidelines:

1. These General Guidelines apply to psychological service functions offered by psychologists, regardless of their specialty, of the setting, or of the form of remuneration given to them. Professional psychology has a uniform set of guidelines just as it has a common code of ethics (APA, 1981a). These General Guidelines apply equally to individual practitioners and to those who work in a group practice, an institutional agency, or another organizational setting.
2. Guidelines describe levels of quality for covered psychological services that providers strive to attain, regardless of the nature of the users, purchasers, or sanctioners of such covered services.
3. Those people who provide psychological services

These General Guidelines were revised by the Committee on Professional Standards (COPS) in consultation with the Board of Professional Affairs (BPA) and providers of psychological services from throughout the American Psychological Association (APA). The assistance of APA staff is gratefully acknowledged. The names of members and staff who supported this effort are included in Footnote 4. This document was approved by the APA Council of Representatives in February 1987.

Comments or questions on these General Guidelines should be addressed to the Committee on Professional Standards, American Psychological Association, 1200 Seventeenth Street, NW, Washington, DC 20036.

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...ipation as voting and as office-holding members, ... the governance staff as well as on executive, planning, and evaluation boards and committees.

1.5 All providers of psychological services attempt to maintain and apply current knowledge of scientific and professional developments that are directly related to the services they render. This includes knowledge relating to special populations (such as ethnic or other minorities) that may compose a part of their practice. (See Ethical Principles 2, 2c, and 2d.)

ILLUSTRATIVE STATEMENT: Methods through which knowledge of scientific and professional developments may be gained include, but are not limited to, continuing education, attendance at workshops, participation in staff development programs, formal and informal on-the-job training, and reading scientific and professional publications. All providers have access to reference material related to the provision of psychological services. All providers are prepared to show evidence periodically that they are staying abreast of and utilizing current knowledge and practices.

1.6 Professional psychologists limit their practice, including supervision, to their demonstrated areas of professional competence. Special proficiency supervision of psychologists may be provided by professionals from other disciplines whose competence in the given area has been demonstrated by previous education, training, and experience. (See Ethical Principles 2 and 2d.)

ILLUSTRATIVE STATEMENT: Psychological services are offered in accordance with the providers' areas of competence as defined by verifiable education, training, and experience. Before offering professional services beyond the range of their experience and usual practice (e.g., providing services to culturally/linguistically diverse populations), psychologists strive to obtain pertinent knowledge through such means as education, training, reading, and appropriate professional consultation.

1.7 Psychologists who change or add a specialty meet the same requirements with respect to subject matter and professional skills that apply to doctoral education, training, and experience in the new specialty.[19]

ILLUSTRATIVE STATEMENT: Retraining psychologists to qualify them for a change in specialty must be under the auspices of a program in a regionally accredited university or professional school that offers the doctoral degree in that specialty. Such education and training are individualized, due credit being given for relevant coursework or requirements that have previously been satisfied. Merely taking an internship or acquiring experience in a practicum setting or in an employment setting is not considered adequate preparation for becoming a clinical, counseling, industrial/organizational, or school psychologist. Fulfillment of such an individualized training program is attested to by official certification by the supervising department or professional school indicating the successful completion of educational preparation in the particular specialty. Specific requirements for retraining in each of the recognized specialties are detailed in the *Specialty Guidelines for the Delivery of Services* (APA, 1981b).

1.8 Psychologists are encouraged to develop and/or apply and evaluate innovative theories and procedures, to provide appropriate theoretical or empirical support for their innovations, and to disseminate their results to others. (See Ethical Principles 2 and 2c.)

ILLUSTRATIVE STATEMENT: A profession rooted in a science continually explores, studies, conducts, and evaluates applications of theories and procedures with a view toward developing, verifying, and documenting new and improved ways of serving users.

General Guideline 2: Programs

2.1 Composition and organization of a psychological service unit

2.1.1 The composition and programs of a psychological service unit strive to be responsive to the needs of the people and settings served.

ILLUSTRATIVE STATEMENT: A psychological service unit is structured to facilitate effective and economical delivery of services. For example, a psychological service unit serving a predominantly low-income or ethnic minority group has a staffing pattern and service program adapted to the linguistic, experiential, attitudinal, and financial characteristics of the user population.

2.1.2 A psychological service unit strives to include sufficient numbers of professional psychologists and support personnel to achieve its goals, objectives, and purposes.

ILLUSTRATIVE STATEMENT: The workload, diversity of the psychological services required, and the specific goals and objectives of the setting determine the numbers and qualifications of professional psychologists and support personnel in the psychological service unit. Where shortages in personnel exist, so that psychological services cannot be rendered in a professional manner, the director of the psychological service unit initiates action to modify appropriately the specific goals, objectives, and timetables of the service. If necessary, the director appropriately modifies the scope or workload of the unit to maintain the quality of the services and, at the same time, makes continued efforts to devise alternative systems for delivery of services.

2.2 Policies

2.2.1 A written description of roles, objectives, and scope of services is developed by multi-provider psychological service units as well as by psychological service units that are a component of an organization, unless the unit has a specific alternative approach. The written description or alternative ap-

371 F.Supp.2d 1170
United States District Court,
C.D. California,
Southern Division.

NEWPORT-MESA UNIFIED SCHOOL DISTRICT, Plaintiff,
v.
STATE OF CALIFORNIA DEPARTMENT OF EDUCATION et al., Defendants.

No. SACV 04-512-GLT (ES). May 24, 2005.

Synopsis

Background: California school district that was found by state Department of Education to be out of compliance with California Education Code section for failing to provide parent of special education student with requested copy of copyrighted achievement test protocol and was ordered to revise its policies and procedures on student record requests brought action requesting declaration of its rights under copyright law and injunction to prevent Department from enforcing its compliance report. At court's invitation, test publishers intervened to assert copyright interest. Parties cross-moved for summary judgment.

Holdings: The District Court, Taylor, J., held that:
1 school district had standing to assert its own interest in avoiding civil liability for copyright infringement;
2 state statute requiring copies of test protocols to be provided to parents of special education students fell within acceptable "fair use" under federal copyright law, which did not preempt the state statute; and
3 in order to minimize risk of improper use, district could choose to use appropriate safeguards, such as requiring review by parents of original test protocols before obtaining copy, written request for copy, nondisclosure or confidentiality agreement, or other reasonable measures.

Plaintiffs' motion denied; defendants' motion granted.

West Headnotes (16)

1 **Declaratory Judgment**
Nature and Elements in General
Declaratory Judgment
Adverse Interests or Contentions
Copyrights

To have standing to bring declaratory relief action, plaintiff must show under all the circumstances of the case, there is a substantial controversy between parties having adverse legal interests, and the controversy is of sufficient immediacy and reality to warrant declaratory relief; for copyright matters, this requirement is satisfied if plaintiff has a real and reasonable apprehension it will be subject to liability if it continues to engage in allegedly infringing conduct. 28 U.S.C.A. § 2201(a).

2 **Declaratory Judgment**
Schools and School Districts
Declaratory Judgment
Copyrights

California school district had standing to seek declaration of its rights under copyright law and to assert its own interest in avoiding civil liability for copyright infringement with regard to request under state school records statute that it furnish copyrighted achievement test protocol to parent of special education student; threat to district of future injury was both real and immediate, as if Department of Education enforced its compliance report then district would have to give copy of test protocol to requesting parent or lose state funding, but if district distributed test protocol it risked being copyright infringer liable for actual or statutory damages to copyright owners, who had intervened in action and thereby shown their willingness to litigate to protect their interests. 17 U.S.C.A. §§ 501, 504; 28 U.S.C.A. § 2201(a); West's Ann.Cal.Educ.Code § 56504.

3 **Records**
Access to Records or Files in General

Achievement test protocols sought by parent of special education student were "school records" within meaning of California statute giving parents the right to inspect and reproduce all of child's school records; after students wrote answers on test protocols, they were identifiable

a viewer to see a work "he had been invited to witness in its entirety free of charge"), *with Pataki*, 889 F.Supp. at 571 (comparing *Sony* to a case in which the test publishers "have done everything they can to ensure that the test-taking public not gain access to ... copyrighted materials").

6. *Conclusion*

15 16 The Court concludes a school giving parents of special education students copies of their children's test protocols when requested under California Education Code section 56504 is a fair use under 17 U.S.C. § 107. In order to minimize the risk of improper use, the District may choose to use appropriate safeguards, such as requiring a review by parents of the original test protocols before obtaining a copy, a written request for a copy, a nondisclosure or confidentiality agreement, or other reasonable measures.

The more appropriate outcome of this case is apparent to all. In order to avoid a "fair use" analysis whenever a district releases documents, and to protect California's school districts from fear of violating federal law, the California legislature should update section 56504 with appropriate standards to protect legitimate copyright concerns, while affording the important disclosure protections for parents of special education students the legislature intended. This should not be a difficult task.

III. *DISPOSITION*

Plaintiff's and Plaintiffs-Interveners' motion for summary judgment is DENIED. Defendants' motion for summary judgment is GRANTED.

Parallel Citations

199 Ed. Law Rep. 184

PROFESSIONAL PSYCHOLOGIST PRACTICE ACT

Section 8. Refusal, Suspension or Revocation of License.

(a) The board may refuse to issue a license or may suspend, revoke, limit or restrict a license or reprimand a licensee for any of the following reasons:

(1) Failing to demonstrate the qualifications or standards for a license contained in this act or regulations of the board.

(2) Making misleading, deceptive, untrue or fraudulent representations in the practice of psychology.

(3) Practicing fraud or deceit in obtaining a license to practice psychology.

(4) Displaying gross incompetence, negligence or misconduct in carrying on the practice of psychology.

(5) Submitting a false or deceptive biennial registration to the board.

(6) Being convicted of a felony in any state or Federal court or being convicted of the equivalent of a felony in any foreign country, or being convicted of a misdemeanor in the practice of psychology. As used in this clause the term "convicted" includes a finding or verdict of guilt, an admission of guilt or a plea of *nolo contendere* or receiving probation without verdict, disposition in lieu of trial or an Accelerated Rehabilitative Disposition in the disposition of felony charges.

(7) Having a license to practice psychology suspended, revoked or refused or receiving other disciplinary action by the proper psychology licensing authority of another state, territory or country.

(8) Being unable to practice psychology with reasonable skill and safety by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals or any other type of material, or as a result of any mental or physical condition. In enforcing this clause, the board shall, upon probable cause, have authority to compel a psychologist to submit to a mental or physical examination by a physician or a psychologist approved by the board. Failure of a psychologist to submit to such examination when directed by the board, unless such failure is due to circumstances beyond his or her control, shall constitute an admission of the allegations against him or her, consequent upon which a default and final order may be entered without the taking of testimony or presentation of evidence. A psychologist affected under this clause shall at reasonable intervals, as determined by

the board, be afforded an opportunity to demonstrate that he or she can resume a competent practice of psychology with reasonable skill and safety.

(9) Violating a lawful regulation promulgated by the board, including, but not limited to, ethical regulations, or violating a lawful order of the board previously entered in a disciplinary proceeding.

(10) Knowingly aiding, assisting, procuring or advising any unlicensed person to practice psychology, contrary to this act or regulations of the board.

(11) Committing immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing psychological practice. Actual injury to a client need not be established.

(12) Soliciting any engagement to perform professional services by any direct, in-person or uninvited soliciting through the use of coercion, duress, compulsion, intimidation, threats, overreaching or harassing conduct.

(13) Failing to perform any statutory obligation placed upon a licensed psychologist.

(14) Intentionally submitting to any third-party payor a claim for a service or treatment which was not actually provided to a client.

(15) Failing to maintain professional records in accordance with regulations prescribed by the board.

(b) When the board finds that the license or application for license of any person may be refused, revoked, restricted or suspended under the terms of subsection (a), the board may:

(1) Deny the application for a license.

(2) Administer a public reprimand.

(3) Revoke, suspend, limit or otherwise restrict a license as determined by the board.

(4) Require a licensee to submit to the care, counseling or treatment of a physician or a psychologist designated by the board.

(5) Suspend enforcement of its findings thereof and place a licensee on probation with the right to vacate the probationary order for noncompliance.

(6) Restore a suspended license to practice psychology and impose any disciplinary or corrective measure which it might original-

PEARSON ALWAYS LEARNING
ASSESSMENT & INFORMATION

Legal Policies

Effective: January 1, 2006

IMPORTANT NOTE:
These Legal Policies were written to apply to the following: the assessment products and services listed on this website (Site), with the exception of Pearson Inform™, Pearson Benchmark™, PASeries®, GMADE™, GRADE™ and Write to Learn™, which may be subject to similar, but not necessarily identical policies. For additional information concerning Pearson Inform™, Pearson Benchmark™, PASeries®, GMADE™, GRADE™ or Write to Learn™, go to www.pearsonschool.com or contact us.

These Legal Policies are subject to change from time to time by updated postings, and changes will be effective upon posting of an update.

HIPAA POSITION STATEMENT

Please see the Important Note at the top of these Legal Policies concerning applicability.

Many of our customers have inquired regarding Pearson's position on whether test record forms must be disclosed to patients in order to comply with the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA). The HIPAA Privacy Rule provides that individuals have a qualified right of access to individually identifiable health information maintained by health care providers covered by HIPAA. The widespread dissemination of record forms (which may disclose test questions and answers) would violate restrictions on providers' use of Pearson's materials and would render test instruments invalid and therefore useless to the clinical community and to the public at large. In order to obtain clarification regarding this matter, an opinion was requested from the U.S. Department of Health and Human Services (HHS), which is responsible for HIPAA. Richard Campanelli, the Director of the Office for Civil Rights at HHS, responded to this request as follows:

"[A]ny requirement for disclosure of protected health information pursuant to the Privacy Rule is subject to Section 1172(e) of HIPAA, 'Protection of Trade Secrets.' As such, we confirm that it would not be a violation of the Privacy Rule for a covered entity to refrain from providing access to an individual's protected health information, to the extent that doing so would result in a disclosure of trade secrets."

Accordingly, we continue to advise our customers that the test instruments covered by these Legal Policies are trade secrets and their usefulness and value would be compromised if they were generally available to the public. This position has been consistently taken in correspondence, court cases, news articles and on the website for these assessments for many years. This position is consistent with the longstanding practice of requiring that all purchasers have the appropriate qualifications to administer and interpret the instruments being purchased and that such purchasers agree to maintain the confidentiality of the instruments.

Given the above-quoted support from HHS, Pearson reiterates that customers may not disseminate copies of test record forms or protocols to persons who erroneously claim that they are entitled to copies under HIPAA. As the HHS has now confirmed, HIPAA does not require any person to disclose any trade secret materials, and all restrictions on the dissemination of test record forms and protocols remain in effect.

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POLICIES FOR RELEASE/PHOTOCOPYING/VIDEOTAPING OF TEST MATERIALS

This page addresses proper security measures with respect to the copying, release, videotaping, and/or audiotaping of psychological tests for adults and children that are published by Pearson and covered by these Legal Policies. Categories include trade secrets, copyright, FERPA, second opinions, ethical issues, nonstandard conditions, and litigation. Please see the Important Note at the top of these Legal Policies concerning applicability.

Pearson asserts that strong measures are necessary to protect the validity of valuable testing instruments. Pearson believes that any copying of its tests constitutes copyright infringement. Furthermore, disclosure of the tests threatens the ongoing validity of the test results, and therefore, the commercial value of the test.

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Trade Secrets

Pearson considers its secured tests to be trade secrets. The test questions and answers, manuals and other materials divulging test questions or answers constitute highly confidential, proprietary testing information which Pearson takes every precaution to protect from disclosure beyond what is absolutely necessary for the purpose of administering the test. Initially, the materials are treated confidentially by Pearson (including its employees, agents and consultants) throughout the development process. For example, employees working with test materials must sign a confidentiality agreement, and consultants working in development and examiners administering pilot and standardization editions must sign agreements containing confidentiality obligations.

Pearson continues to guard the secrecy of its test materials once they become finished products. They are sold only to qualified individuals who are bound by the ethical standards of their profession to protect the integrity of the materials by maintaining the confidentiality of the questions and answers. Pearson has a Qualifications Department for such purpose.. The Registration Form that all purchasers must complete and submit to Pearson before purchasing contains a statement signed by the purchaser indicating that the purchaser is so qualified, and that all ethical rules will be observed by the purchaser.

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Copyright/Fair Use

It is the position of Pearson that any copying of the tests or audio- or videotaping during test administration constitutes an infringement of the copyright and other proprietary rights in the above-referenced protocols. Such copying does not, in our view, fall under the "fair use" exception of the copyright law. Section 107 of the copyright law states four factors as being among those which should be considered in determining whether unauthorized copying of copyrighted material is a "fair use." These factors are:

(1) the nature of the use (e.g. commercial vs. non-profit educational use);
(2) the nature of the copyrighted work (e.g. special consideration such as security issues);
(3) the amount of the copyrighted work which is used; and
(4) the effect of the use in a potential market for the copyrighted work.

Although the disclosure of copies of test materials might, in certain cases, fall on the "fair use" side of point (1), it almost certainly falls on the "non-fair use" side of the other three, particularly points (2) and (4).

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FERPA

Even in a school setting, release of copies of test questions or protocols in any form is not required under federal law. The applicable U.S. statute is the Family Education Rights and Privacy Act (FERPA). This establishes the right of parents "to inspect and review the education records of their children" (20 U.S.C. § 1232G(a)(1)(A)). It requires schools to establish procedures that will enable parents to review their children's records within a reasonable time after a request is made. The regulations implementing this section define "the right to inspect and review education records" as including:

"(1) the right to a response from the [school] to reasonable requests for explanations and interpretations of the records; and

(2) the right to obtain copies of the records from the [school] where failure of the [school] to provide the copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records" (34 C.F.R. § 99.11(b)).

The import of this section is that only where failure to provide copies would deny the exercise of this right will schools be obliged to provide copies. In all other cases, inspection alone would presumably suffice. If a parent requests an inspection of a child's record, once the school agrees to review the content of the child's test record with the parent, it is most unlikely that a court would find that exercise of the right to review educational records had been denied.

Pearson encourages professionals to review test results with parents, including, if the psychologist deems appropriate, review of responses to individual items. This may involve showing a test protocol or answer contained in test booklets to

parents in order to facilitate discussion. However, we strongly oppose the release of copies of protocols for the reasons noted above. The tests are extremely valuable instruments, which are widely used throughout the world. Impairment of their security could threaten the validity of the tests and, therefore, their value as a measurement tool.

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Second Opinion

We recognize that in some cases, parents may wish to consult a second professional regarding a child's test scores. In these situations, we have no objection to a copy of the completed test protocol being sent to another professional for the purposes of review; however, the materials should pass directly from professional to professional and not through the hands of the parents or their attorney.

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Ethical Issues

The original dissemination of these test materials is carefully restricted to individuals with a professional background in psychology, and only individuals with appropriate training in psychological assessment should interpret the tests. Under the *Standards for Educational and Psychological Testing* (American Psychological Association), psychologists have an ethical duty to protect the integrity of secure tests by maintaining the confidentiality of the questions and answers to the tests and by releasing such tests only to professionals who have the same duty.

The confidentiality of test questions and answers is paramount to maintaining the integrity of the tests and the validity of test results. Unlike many other types of tests, the *Wechsler* tests (and many of our other tests) do not consist of a large collection of test items that are rotated. Rather, these tests have one expensive and highly researched version that should remain intact for 10 to 15 years. Millions of dollars have been spent on the research and "norming" (compiling of statistical data regarding results) of the tests. Any leakage of test items severely compromises the value of the tests.

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Non-Standard Conditions

It is our opinion that the presence of a third party (audio- or videotaping or other non-standard condition) may not result in a statistically accurate or psychometrically sound scaled score. As you may know, norms for standardized tests are developed under strict conditions. If such conditions are not met, the scaled scores obtained by application of the test norms are not statistically defensible. Although it is the position of Pearson that the validity of any scaled score which results from a non-standard administration is suspect, it is the responsibility of the individual psychologist administering the test to determine whether testing under non-standard conditions serves any other purpose.

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Litigation

Pearson does not wish to impede the progress of legal proceedings; however, we are equally unwilling to jeopardize the security and integrity of our test instruments by consenting to the release of copyrighted and confidential material to those not professionally qualified to obtain them. Should litigation in which a psychologist is involved reach the stage where a court considers ordering the release of proprietary test materials to non-professionals such as counsel, we request that the court issue a protective order prohibiting parties from making copies of the materials; requiring that the materials be returned to the professional at the conclusion of the proceedings; and requiring that the materials not be publicly available as part of the record of the case, whether this is done by sealing part of the record or by not including the materials in the record at all.

In addition, testimony regarding the items, particularly that which makes clear the content of the items, should be sealed and again not be included in the record. Pleadings and other documents filed by the parties should not, unless absolutely necessary, make specific reference to the content of or responses to any item, and any portion of any document that does so should be sealed. Finally, we ask that the judge's opinion, including both findings of fact and conclusions of law, not include descriptions or quotations of the items or responses. We think this is the minimum requirement to protect our copyright and other proprietary rights in the test, as well as the security and integrity of the test.

Please feel free to use this policy statement along with the company's name in your materials. We very much appreciate your concerns with regard to this issue. If you have other questions, please contact Pearson at 800-228-0752 and ask for the Legal Department.

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