



June 4, 2020

VIA EMAIL & U.S. MAIL

Rebekkah Shaw
Executive Secretary
State Records Committee
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Re: June 11, 2020, State Records Committee Hearing on James McConkie's Appeal from the Denial of His Request for Student Counseling and Related Records – University of Utah Written Statement

Dear Ms. Shaw:

This is the written statement of the University of Utah (“University”) in support of its denial of the request submitted by James McConkie for records related to mental health counseling for a deceased student. Please provide this to members of the State Records Committee (the “Committee”) for their consideration in advance of the hearing on this matter.

Statement of Facts, Reasons, and Legal Authority in Support of Denial

Utah’s Mental Health Professional Practices Act (the “Act”) provides that a “mental health therapist under this chapter may not disclose any confidential communication with a client or patient without the express consent of: (a) the client or patient; (b) the parent or legal guardian of a *minor* client or patient; or (c) the authorized agent of a client or patient.” Utah Code Ann. § 58-60-114(1). The Act contains certain limited exceptions for disclosure. Those exceptions do not include disclosure as a result of the patient’s death or disclosure to the parent of an adult child. The Act includes an exception permitting disclosure “made under a generally recognized professional or ethical standard that authorizes or requires the disclosure.” *Id.* at § 58-60-114(2)(c). Therefore, Utah law requires that the Committee look to the relevant professional or ethical standards to determine whether disclosure of any counseling records that might exist would be appropriate in this case.

In addition to the Act, the Government Records Access and Management Act, Utah Code sections 63G-2-101 to -901 (“GRAMA”) provides protection for counseling records. Under

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GRAMA, records related to a student's mental health counseling are "private" records. *See* Utah Code § 63G-2-302(1)(b). GRAMA states that private records include "records containing data on individuals describing medical history, diagnosis, condition, treatment, evaluation, or similar medical data." *Id.* § 63G-2-302(1)(b).

Records related to a student's mental health counseling are also subject to classification as "controlled" records under GRAMA. *See* Utah Code § 63G-2-304. "A record is controlled if: (1) the record contains medical, psychiatric, or psychological data about an individual; (2) the governmental entity reasonably believes that: ... (b) releasing the information would constitute a violation of normal professional practice and medical ethics; and (3) the governmental entity has properly classified the record." *Id.* § 63G-2-304. University of Utah retention schedule Series 09539, enclosed, states that the primary records designation for "Student counseling records" is "controlled." Controlled records may only be disclosed to certain health care providers, insurance providers, and public health oversight agencies, with permission from the subject of the record; and such entities are restricted from disclosing the records further, even to the subject of the record. *See id.* § 63G-2-202(2); *see also* Charles Watkins v. Utah Dept. of Corrections, Utah State Records Comm. Case # 99-02 (March 18, 1999) (order upholding the Dept. of Corrections' decision to withhold mental health records from the subject of the record).

Under the Act and GRAMA, the private counseling records of a student should not be disclosed to anyone contrary to the ethical rules of the counseling and psychotherapy profession. In this case, the relevant rules include the NASW Code of Ethics, the APA Code of Ethics, and the ACA Code of Ethics.

The NASW Code of Ethics, <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English>, provides in section 1.07(w) that the privacy of deceased clients should be protected, stating that "[s]ocial workers should protect the confidentiality of deceased clients consistent with the preceding standards." The preceding standards state that social workers may "disclose confidential information when appropriate with valid consent from a client or a person legally authorized to consent on behalf of a client." NASW Code of Ethics at 1.07(b).

The American Psychological Association Ethical Principles of Psychologists and Code of Conduct, <https://www.apa.org/ethics/code/>, in section 4.05(b) provides that confidential information should not be disclosed without the consent of the client, with rare exceptions, none of which are present here.

4.05 Disclosures

(a) Psychologists may disclose confidential information with the appropriate consent of the organizational client, the individual client/patient, or another legally authorized person on behalf of the client/patient unless prohibited by law.

(b) Psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose such as to (1) provide needed professional services; (2) obtain appropriate professional consultations; (3) protect the client/patient, psychologist, or others from harm; or (4) obtain payment for services from a client/patient, in which instance disclosure is limited to the minimum that is necessary to achieve the purpose. (See also Standard 6.04e, Fees and Financial Arrangements.)

As explained in the literature on ethics in counseling and psychotherapy, “the professional’s ethical obligation to confidentiality extends past death as codified in the 2005 version of the ACA (American Counseling Association) Code of Ethics (Section B.1.n). In other words, the death of a client does not release a provider from his or her obligation to maintain confidentiality.” See Welfel, E.R. (2010). *Ethics in counseling and psychotherapy: Standards, research, & emerging issues*. p 108, Brooks/Cole; Belmont, CA. Section B.3.f. of the current version of the ACA Code of Ethics provides that “[c]ounselors protect the confidentiality of deceased clients, consistent with legal requirements and the documented preferences of the client.” See <https://www.counseling.org/resources/aca-code-of-ethics.pdf>. “Current advice recommends declining to release confidential records even to legal representatives in situations in which the professional has a reasonable basis upon which to believe that release would be inconsistent with the deceased client’s wishes or not in his or her best interest (Werth, Burke, & Bardash, 2002).” Werth, J.L., Burke, C., & Bardash, R. J. (2002) Confidentiality in end-of-life and after-death situations, *Ethics Behavior*, 12, 205 – 22). See Welfel, E.R. (2010). *Ethics in counseling and psychotherapy: Standards, research, & emerging issues*. p 109, Brooks/Cole; Belmont, CA.

Mr. McConkie argues that the preceding standards allow, and that state law requires, health care providers at the University Counseling Center or at the Psychology & Wellness service provided by Athletics to provide student counseling records to the personal representative of a student’s estate, in this case the student’s mother. The University respectfully disagrees. Absent direct student consent or a court order, the University has not released student counseling records and has no intention of doing so in the future. The University is not aware of any evidence that the student whose records are sought in this request, during her lifetime, consented to the disclosure of any student counseling records to her parents, or to anyone else. The University is also not aware of any evidence that the student authorized her parents as agents to permit disclosure of any student counseling records. This student was a 21 year-old adult at the time of her death, with the capacity and authority to make her own health care decisions.

The ruling in this GRAMA appeal is important to the privacy of this student to the extent that she may have availed herself of the mental health counseling services. However, a decision that a student’s counseling records could be disclosed to his or her parents or to anyone else would have far reaching consequences for university counseling centers and the students who seek out counseling services. Besides being the requirement of the law, a prohibition on disclosure in this case is the only sensible outcome.

Some students seek university counseling to discuss test anxiety or challenges adapting to college life. Other students may wish to discuss relationship issues, substance abuse, or challenges coping with tragedy. Students often raise sensitive issues relating to parents, siblings, or friends. University providers of counseling to adult students respect the privacy and the autonomy of such students to make their own health care decisions and to control the release of information only to persons the students designate.

The disclosure of student counseling records by University student counseling professionals, even in the face of that student's tragic death, to persons not authorized by that adult student, not only undermines the autonomy of that student, but may deter other students from seeking counseling for highly sensitive personal issues that they may not want to share with their parents or other family members, even after death.

Consistent with the governing law and ethical rules, the University has determined that, to the extent any records responsive to Mr. McConkie's request exist, such records are prohibited from disclosure by the Act; by GRAMA, which classifies such records as "private" and "controlled"; and by the professional and ethical standards that govern the practitioners in the Counseling Center and in the Psychology & Wellness service provided by Athletics. This also means that the only individuals on campus who would have access to any such records are mental health counselors. Such records would not have been disclosed to anyone else at the University, including attorneys and administrators, without prior written student consent.

Furthermore, with respect to Mr. McConkie's request for an "accounting of disclosures," there is no legal requirement or professional ethical expectation for the University Counseling Center or the Psychology & Wellness service provided by Athletics to create or maintain an accounting of disclosures. An accounting of disclosures is a term of art under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 CFR §164.5280, which does not apply to the University Counseling Center or to the Psychology & Wellness service provided by Athletics. HIPAA does not apply to health care providers who do not transmit health information in electronic form in connection with a HIPAA-covered transaction. 45 CFR §160.103 (see definition of "covered entity" and "transaction").

Generally speaking, HIPAA was designed to apply to health care providers who submit electronic insurance claims. Neither the University Counseling Center nor the Psychology & Wellness service provided by Athletics submit electronic insurance claims or other transactions that would make these University units subject to HIPAA. Moreover, if the creation or disclosure of such a record were governed by HIPAA, disclosure of that record containing protected health information would not be subject to GRAMA. *See* Utah Code Ann. § 63G-2-107(1) (stating that GRAMA does not apply to a record containing protected health information that is governed by HIPAA). To the extent any record exists that may be considered an "accounting of disclosures" outside the scope of HIPAA, such a record is classified as "private" and "controlled" under GRAMA, as described above.

Conclusion

For the reasons summarized above, the University respectfully requests that the Committee uphold the University's denial of Mr. McConkie's request.

Sincerely,

Phyllis J. Vetter
General Counsel
University of Utah

cc: James W. McConkie II
Gregory C. Thompson, Appeals Officer, University of Utah
Lauren Weitzman, Director for Social Services, University Counseling Center
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