

N.D.A.G. Letter to Sanstead (Nov. 4, 1991)

November 4, 1991

Honorable Wayne G. Sanstead
Superintendent of Public Instruction
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Dr. Sanstead:

Thank you for your letter of October 23, 1991, in which you request a clarification of the privilege of confidentiality covering communications with elementary or secondary school guidance counselors pursuant to North Dakota Century Code (N.D.C.C.) § 31-01-06.1. Your request was prompted by statements allegedly made in February of 1991 by Burleigh County State's Attorney Pat Burke that this privilege did not exist and that charges may be filed against counselors who fail to disclose the confidential information in a court of law. My staff discussed this matter with Ms. Burke. She indicated that her comments were limited to the situation in which a guidance counselor is required to file a child abuse report pursuant to N.D.C.C. § 50-25.1-03. In light of this information, my response will focus on the interaction between the privilege accorded to guidance counselors and the mandatory reporting of suspected child abuse or neglect.

North Dakota Rule of Evidence 501 states

[e]xcept as otherwise provided by constitution or statute or by these or other rules promulgated by the supreme court of this state, no person has a privilege to (1) refuse to be a witness; (2) refuse to disclose any matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

N.D.R. Evid. Rule 501. Pursuant to this rule, only those communications which are accorded a privilege by either constitution, statute, or rule will be recognized by the courts.

N.D.C.C. § 31-01-06.1 accords authorized elementary or secondary school counselors in North Dakota absolute immunity from disclosing "any privileged or confidential communication" made to the counselor during a counseling interview. This immunity is absolute unless otherwise modified by constitution, statute, or rule.

In 1975 the North Dakota Legislative Assembly enacted N.D.C.C. § 50-25.1-03 which requires professionals, including school counselors, who have knowledge of or reasonable cause to suspect that a child is being abused or neglected to report the abuse or neglect to the Department of Human Services. The requirement to report the suspected abuse or neglect is mandatory, not discretionary. N.D.C.C. § 50-25.1-10 abrogates the privilege accorded to school counselors under N.D.C.C. § 31-01-06.1 only to the extent of

requiring them to report suspected child abuse or neglect. In The Interest of R.D.S., 259 N.W.2d 636, 639 (N.D. 1977). N.D.C.C. § 50-25.1-09 accords a school counselor immunity from civil or criminal prosecution for making the child abuse report, assisting in an investigation, furnishing information to an investigator, or providing any protective services to the abused or neglected child.

Reading N.D.C.C. § 31-01-06.1 and chapter 50-25.1 together leads to the conclusion that elementary and secondary school counselors in North Dakota may refuse to divulge communications with their clients which occurred during a counseling session for any purposes other than the mandatory child abuse or neglect reports. The privilege is not available to prevent the school counselor from making the child abuse or neglect reports. For example, if a child confides to a school counselor that he has stolen something and the child is eventually charged with stealing that particular item, the school counselor cannot be compelled to testify that the child told him that he had stolen the item. On the other hand, a school counselor is required to report suspected child abuse or neglect and can be compelled to testify regarding the communications with the child relating to the suspected child abuse or neglect.

Because the child abuse report is mandatory, a school counselor who willfully fails to report the suspected child abuse or neglect is subject to prosecution for a class B misdemeanor. N.D.C.C. § 50-25.1-13. However, if the school counselor in good faith files the report and testifies at a trial, the counselor has immunity for any civil or criminal liability that may arise from compliance with the statute in filing the report or testifying. N.D.C.C. § 50-25.1-09.

I hope that this further clarifies the issue. If you have further questions, please do not hesitate to contact my office.

Sincerely,

Nicholas J. Spaeth

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