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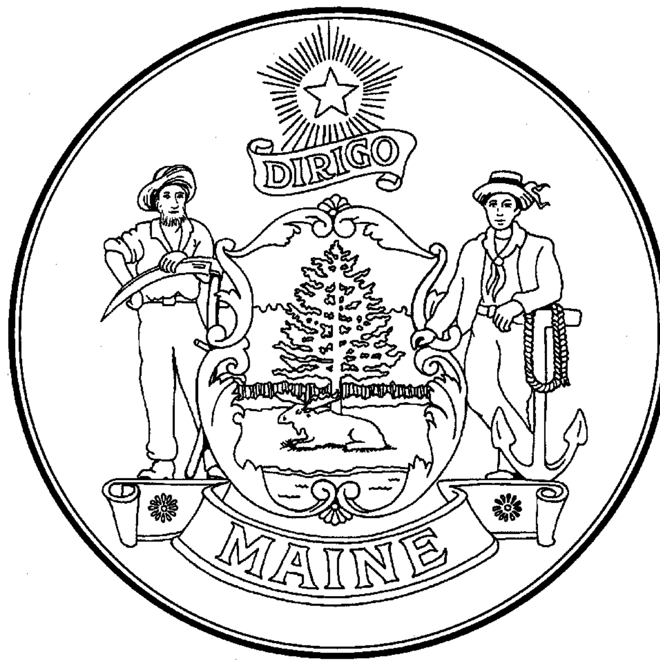



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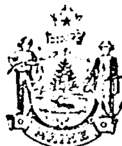
Welfare Records, Confidentiality
22 MRSA 3853
22 MRSA 3062

JOSEPH E. BRENNAN
ATTORNEY GENERAL



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STATE OF MAINE

DEPARTMENT OF THE ATTORNEY GENERAL

AUGUSTA, MAINE 04333

December 1, 1978

To: C. Owen Pollard, Director, Bureau of Rehabilitation

From: Thomas E. Geyer, Assistant Attorney General

Subject: Confidentiality

FACTS:

A client of the Bureau of Rehabilitation, during the course of an interview with his counselor, an employee of the Bureau, revealed an incident of alleged sexual abuse occurring in his home, more specifically, that the client had an ongoing, incestuous relationship with his younger, teenage sister.

QUESTION:

Must a counselor of the Bureau of Rehabilitation report a suspected case of child abuse or neglect, pursuant to 22 M.R.S.A. §3853, when the counselor obtained the information while performing Bureau functions with a client?

ANSWER:

Yes. A counselor of the Bureau of Rehabilitation must report a suspected case of child abuse or neglect, pursuant to 22 M.R.S.A. §3853, when the counselor obtained the information while performing Bureau functions with a client.

REASONS:

The statute which regulates the use of records of the Bureau of Rehabilitation is 22 M.R.S.A. §3062 which reads as follows:

> It shall be unlawful, except for purposes directly connected with the administration of the rehabilitation program and in accordance with its rules and regulations, for any person or individuals to solicit, disclose, receive or make use of, or authorize, knowingly permit, participate in or acquiesce in the use of any list of, or names of, or any information con-

> cerning individuals applying for or receiving rehabilitation, directly or indirectly derived from the records, papers, files or communications of the State or subdivisions thereof, or acquired in the course of the performance of official duties. Any person who violates any provision of this section shall be punished by a fine of not less than $50 nor more than $300, or by imprisonment for not more than 60 days, or by both.

The statute which mandates that certain professional persons report suspected cases of child abuse or neglect is 22 M.R.S.A. §3853 which reads in pertinent part as follows:

> When any medical physician, resident, intern, medical examiner, dentist, osteopathic physician, chiropractor, podiatrist, registered or licensed practical nurse, Christian Science practitioner, teacher, school official, social worker, homemaker, home health aide, medical or social service worker for families and children, psychologist, child care personnel, mental health professional or law enforcement official knows or has reasonable cause to suspect that a child has been subjected to abuse or neglect or observes the child being subjected to conditions or circumstances which would reasonably result in abuse or neglect, when such individual is acting in his professional capacity, he shall immediately report or cause a report to be made to the department... This subsection does not require any person to report when the factual basis for knowing or suspecting child abuse or neglect came from treatment of the individual for suspected child abuse or neglect, the treatment was sought by the individual for a problem relating to child abuse or neglect, and, in the opinion of the person required to report, the child's life or health is not immediately threatened.

It is clear that there is a conflict between 22 M.R.S.A. §3062 and §3853, the former imposing strict requirements of confidentiality on the counselor regarding client information, and the latter requiring the counselor to disclose certain information relevant to a suspected case of child abuse or neglect. In order to resolve this conflict, two issues must be examined: (1) legislative intent and (2) public policy.

1. Legislative Intent. Pursuant to 45 CFR §1361.47, the State of Maine enacted 22 M.R.S.A. §3062, the statute relating to confidentiality of Bureau records. This statute was enacted before the mandatory reporting law, 22 M.R.S.A. §3853, which was passed by the legislature in order to comply with 45 CFR 1340.3-4. It must be

presumed that when the legislature enacted section 3853, it was cognizant that section 3062 was still in effect. Yet, the language of section 3853 is quite clear that the counselor is mandated to report a suspected case of child abuse or neglect when he acquires information concerning the matter while "...acting in his professional capacity..." Therefore, the only logical conclusion is that the legislature intended section 3853 to take precedence over section 3062, i.e., in so far as the child abuse and neglect laws are concerned, section 3062 was impliedly repealed. Such a conclusion is supported in case law by State v. Taplin, 1968, Me., 247 A.2d 919, wherein the Court at 922 addressed the issue of implied repeal as follows:

> ...implied repeals do exist and must be given effect based as they are on the rationale that "the legislature cannot be supposed to have intended that there should be two distinct enactments embracing the same subject matter in force at the same time, and that the new statute, being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law." Knight v. Aroostook Railroad, 67 Me. 291,293. Nevertheless, implied repeals, provided no contrary legislative intent appears, will be restricted in scope to the extent of the inconsistency or conflict. State v. Bryce, 1968, Me., 243 A.2d 726.

Additional evidence that the legislature intended that section 3853 take precedence over section 3062 is found in two other statutes which were enacted after section 3062, 22 M.R.S.A. §3856-A and 22 M.R.S.A. §3856. Section 3856-A abrogates the privileged quality of communications "...between any professional person and his patient or his client..." Section 3856,provides civil and criminal immunity from prosecution for persons who in good faith make reports to the department pursuant to section 3853. It is important to note that the "immunity" section, like most of the state child abuse and neglect laws, was enacted by the legislature in order to comply with a federal regulation, 45 CFR §1340.3-3(d)(1). This regulation states in part that, "The State must have in effect a child abuse and neglect law which includes provisions for immunity for all persons reporting [emphasis added], whether mandated by law or not, instances of known or reasonably suspected child abuse and neglect, from civil or criminal prosectuion under any State or local law, arising out of such reporting." Because of the legislatively granted immunity, the penalty provisions of section 3062 would not apply to the counselor who disclosed client information relative to a child abuse case. In fact, to go one step further, if the counselor failed to comply with the mandatory reporting law, he would be subject to the penalty provisions of 22 M.R.S.A. §3857, i.e., a fine not to exceed $500.00.

2. Public Policy. There are unquestionably valid public policy reasons for insuring that a client's relationship with the Bureau, and any conversations he may have in connection therewith, be held in confidence. The client has a reasonable right to privacy, and within limits, is entitled to assurance that that right shall be honored. However, if the counselor, during the course of his activities with the client, obtains information relative to a case of suspected child abuse or neglect, where the life or safety of a child may be in serious jeopardy, public policy demands that the health and safety of the child override the client's right to privacy. The counselor must refer the matter to the child protective services unit of the Department of Human Services.

Support for this public policy can be found by reference, again, to legislative intent. For example, an analogous set of facts to those listed herein would be an instance whereby the counselor obtained information from a client that a serious crime was about to take place. To argue that the counselor would be bound by the constraints of section 3062, and could not divulge such information to the proper authorities in order to prevent the crime, is clearly unreasonable. Neither Congress nor the State Legislature could have conceivably intended such an absurd result from a strict interpretation of the confidentiality provisions. In discussing the question of strict, statutory interpretation, the Court in Ballard v. Edgar, 1970, Me., 268 A2d 884, 885 stated that:

> The guiding principle was stated in Emple Knitting Mills v. Bangor (supra) in these terms:
>
> > "A construction should be avoided which leads to a result clearly not within the contemplation of the legislature or which leads to a result which is absurd, even though the strict letter of the law may have to be disregarded. Inhabitants of Town of Ashland v. Wright, 139 Me. 283, 29 A.2d 747."
>
> When "words are free from doubt," they are the "final expression of the legislative intent." They are not free from doubt when they lead to "absurd or wholly impracticable consequences." State of Maine v. United States (1943) 1 Cir., 134 F.2d 574.

For further authority concerning the foregoing rule of statutory interpretation see: Cornwall Industries, Inc., v. Maine Department of Manpower Affairs, Employment Security Commission, 1976, Me., 351 A.2d 546 and In Re Belgrade Shores, Inc., 1976, Me., 359 A.2d 59.

Finally, in the event that a counselor does make a report to child protective services, pursuant to 22 M.R.S.A. §3853, he should provide only that information which is absolutely necessary in order for the social worker to carry out an effective investigation of the

referral. In all probability, there will be a considerable amount of material in the client's file which must still remain confidential.

TEG:mm

# Department of Human Services

Bureau of Rehabilitation Office

Date April 11, 1978

To David Smith, Commissioner ATTN: Thomas Geyer, Ass't. Attorney General

From C. Owen Pollard, Director, Bureau of Rehabilitation Owen Pollard

Subject Confidentiality - RE: Child Abuse

Recently, you rendered an oral opinion to one of our counselors, John Antonik, concerning the confidentiality of a child client of Vocational Rehabilitation who has been subjected to alleged abuse.

We would like to distribute and share your opinion with our entire staff. In order to do this, we would like to have your opinion in writing.

Your earliest response to this request will be greatly appreciated.

/llm
cc: T. Longfellow
R. Hanson
J. Powell

# Department of Health and Welfare

BIDDEFORD SCHOOL DEPT. Office

Date March 29, 1978

To Judy Powell - Augusta

From John C. Antonik

Subject Confidentiality - Ref. Child Abuse

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Judy, an incident involving confidentiality came up in regards to a case of mine which should be shared with other V.R. counselors.

Question - If a client reveals to you information in regard to child abuse, physical or sexual, is the counselor bound under confidentiality not to report it to appropriate agency? If counselor reports incident without client's consent, has he violated confidentiality?

Answer - In discussing case with Attorney General Tom Geyer, Augusta, he states that counselor on being aware of child abuse must report it to proper authorities with or without client's consent. If child protection agency becomes aware that a counselor had knowledge of child abuse and did not report it, counselor is subject to a fine and cannot claim coverage under confidentiality.

JCA

JCA/bap
cc: Owen Pollard
Harlow C