

# Counselling Support in Schools – Te Kura Rautau

## Centennial Park School from Nov 2021- 2023

### Consent, Privacy and Confidentiality

#### -Additional Information-

Counselling is a health service. The provision of health services, and the collection, use and disclosure of health information is governed by:

- the Health Act 1956
- Code of Health and Disability Services Consumers Rights (1996), and
- the Health Information Privacy Code 2020 (a Code under the Privacy Act 2020).

The following section provides information on consent for the provision of counselling services, and explains legal obligations relating to collection, use and disclosure of health information.

#### **Consent**

Consent is a fundamental concept in the provision of health services. The law relating to the ability of children and young people to consent to a health service is complex and requires careful navigation.

The best interests of the child or young person should be at the forefront of your decision-making. Any decision regarding consent should enhance, not inhibit, a child or young person's opportunity to get the health care best suited to their particular circumstance.<sup>1</sup>

Under the Code of Health and Disability Services Consumers Rights (the Code) a health service can only be provided to a person with their informed consent.<sup>2</sup> The Code avoids setting an age when a child or young person can validly give consent to receive health services. Under the Code, the relevant question is whether a child or young person's level of maturity and understanding (competency) enables them to consent to a particular health service or medical treatment. Their age will be a relevant, but not determinative, consideration in making this assessment. The nature of the proposed health service is also a consideration. A counsellor must assess each child or young person's competency to give informed consent before they can provide counselling services to that child or young person.

#### **16 years and over**

As a general rule, a young person aged 16 years and over can consent to receive counselling services.<sup>3</sup> To ensure their consent is informed, a counsellor is required to provide the young person with information about the service, which is suitable for the young person's age and presented in a manner that they will understand. Before working with young people aged 16 years and over, a counsellor

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<sup>1</sup> Care of Children Act 204, s36(1)(b) and Code of Health and Disability Consumers' Rights, right 7(4)(a). Note the terms 'child' and 'young person' generally refer to persons aged under 18 years. See Care of Children Act 2004, s8 and Oranga Tamariki Act 1989, s2(1).

<sup>2</sup> Code of Health and Disability Services Consumers Rights, rights 7(1) and 7(7). See also New Zealand Bill of Rights Act 1990, s10.

<sup>3</sup> Care of Children Act 2004, s36(1)(b).

must still consider the competency of each young person, and ensure they fully understand what they are consenting to.

### **Under 16 years**

Children and young people under the age of 16 still have the right to make their own decisions about their health, including whether they wish to receive counselling services. However, a counsellor will need to determine whether the child or young person is competent to give informed consent to receive counselling services.<sup>4</sup> If the counsellor considers a child or young person under the age of 16 has sufficient understanding to form a balanced judgment about the proposed treatment then, if the child or young person consents, counselling can be provided without the need to obtain parental consent.

### **Parental consent**

Where a counsellor determines that a child or young person of any age does not have sufficient competency to provide consent, consent must be sought from the child's parent or guardian before any counselling service can commence.<sup>5</sup> Parents / guardians will need to be given information about the proposed service to inform their consent.

Where a child or young person does not have sufficient competency to consent themselves, but their parent or guardian has provided consent, the counsellor is still required to provide the child or young person with information that enables them to understand the service they will receive.

### **Privacy and confidentiality**

Counsellors must meet their professional and legal obligations to protect students' privacy and the confidentiality of their personal information. Privacy is the legal framework created by the Privacy Act 2020 (e.g. requiring agencies to be open about their purpose for using and disclosing information, keep information safe and give access to the person concerned on request). Confidentiality is the obligation of confidence between a client and their counsellor, requiring the counsellor to keep the information secret unless necessary to keep someone safe.

The Health Information Privacy Code 2020 (HIPC), issued under the Privacy Act, governs the collection, use and disclosure of health information. Health information is information about an identifiable individual that is:

- about their health
- about any disabilities they have or had
- about any health services they have received, or
- collected before, in the course of, or incidental to the provision of health services (including counselling).

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<sup>4</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and Another* [1986] 1 AC 112 (HL) (*Gillick*). *Gillick* was recognised in New Zealand in *Re J (an Infant): B v Director-General of Social Welfare* [1996] 2 NZLR 134, *Hawthorne v Cox* [2008] 1 NZLR 409, and *Re SPO* (FAM-2004-085-1046) Family Court, Wellington, 3 November 2005.

<sup>5</sup> Care of Children Act 2004, s36(3)(a).

## **Rules about collecting health information<sup>6</sup>**

Counsellors should collect health information directly from the student concerned, not from other people, unless certain exceptions apply. Information must be collected in a way that is fair and does not intrude unreasonably on the student's personal affairs. For example, counselling services should be offered in an environment where other people cannot overhear the counsellor or the student.

When collecting information from a student, a counsellor must take steps to ensure that the student is aware of:

- the fact the information is being collected
- the purpose for which the information is being collected
- who the information may be shared with
- whether it is voluntary or mandatory for them to provide the information, and any consequences if they do not provide the information, and
- their rights to access and correct any health information held about them (outlined below).

## **Rules about using health information<sup>7</sup>**

A counsellor can only use a student's health information for the purpose(s) that it was collected. This means in most cases health information collected by a counsellor may only be used for the purposes of providing counselling services.

There are some exemptions to this general rule, which allow counsellors to use health information they have collected for another purpose, such as where they have obtained consent from the student (or their parents/whānau where appropriate) to use the health information for another purpose. Any secondary use of a student's health information must still be lawful and connected to the functions and activities of the counsellor.

## **Rules about confidentiality and disclosing health information to others**

Counsellors have professional ethical obligations to treat all health information about students as confidential and sensitive.<sup>8</sup> It is important that a student feels their personal information will be kept safe, secure, and private.

### *Health Information Privacy Code 2020*

Rule 11 of the HIPC allows counsellors to disclose a student's health information with their consent, or without their consent in limited circumstances.<sup>9</sup> These circumstances relevantly include when:

- disclosure is to the student concerned, or their representative where the student is unable to exercise their rights<sup>10</sup>
- disclosure is directly related to the purpose(s) for which the information was collected
- the information will be used in a form in which the student is not identified, including for statistical and research purposes, or
- disclosure is necessary to:

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<sup>6</sup> See HIPC 2020, cl 5, rules 1 – 4.

<sup>7</sup> HIPC 2020, cl 5, rule 10.

<sup>8</sup> See New Zealand Association of Counsellors (NZAC) Code of Ethics, cl 6.

<sup>9</sup> See also Health Act 1956, s22C(1) and (3).

<sup>10</sup> Note the parent / guardian of a child under the age of 16 is considered to be their representative under the HIPC, cl 3 (discussed further below).

- prevent or lessen a serious threat to the life or health of the student concerned or another individual, or
- avoid prejudice to the prevention, detection, investigation, prosecution and punishment of offences.

### *Oranga Tamariki Act 1989*

The Oranga Tamariki Act allows anyone to disclose information about a child or young person where they have genuine concerns for their wellbeing or safety. If a counsellor believes that a child or young person has been, or is likely to be, harmed, ill-treated, abused (whether physically, emotionally, or sexually), neglected, or deprived, they can make a report of concern to Oranga Tamariki or the Police.<sup>11</sup>

On request from Oranga Tamariki, a care and protection co-ordinator, or the Police, a counsellor must supply information they hold about the safety or well-being of a child or young person, if that information is required to determine whether the child is in need of care or protection or is needed for proceedings under the Act (including family group conferences).<sup>12</sup>

The Oranga Tamariki Act also enables agencies, including schools and counsellors, that hold information about children or young persons to use or disclose that information with other child welfare protection agencies and independent persons for specified purposes including:

- preventing or reducing the risk of harm, ill-treatment, abuse, neglect, or deprivation, or
- making or contributing to a risk or needs assessment.<sup>13</sup>

Counsellors do not need a student's consent to share information under the Oranga Tamariki Act. They should, however, talk to the child or young person and their parents/whānau (where appropriate and safe to do so) and seek their views before sharing information.<sup>14</sup>

### **Keeping health information safe<sup>15</sup>**

Counsellors should ensure information collected about a student for the purposes of providing counselling services, including case notes, is kept secure and protected against loss and unauthorised access, use, modification, or disclosure.

Access to a student's personal information should be restricted to individuals who are working directly with the student and have a valid professional reason to access that information. Access should be considered on a case-by-case basis.

When there is a lawful reason to share information about the student (as outlined above), counsellors must ensure that the method they use to share the information is secure. When disposing of a student's health information they must do so in a manner that preserves the student's privacy.

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<sup>11</sup> Oranga Tamariki Act 1989, s15.

<sup>12</sup> Oranga Tamariki Act 1989, s66. See also Health Act 1956, s22C(1)(a) and (2)(c).

<sup>13</sup> Oranga Tamariki Act 1989, s66C.

<sup>14</sup> See Oranga Tamariki Act 1989, ss8 and 11.

<sup>15</sup> HIPC 2020, cl 5, rule 5.

## Right to access health information

Individuals, including children and young people, have a right to access to their health information.<sup>16</sup> This includes health information collected and held by counsellors. If a student requests access to their health information, the counsellor should provide it to them, unless:<sup>17</sup>

- the counsellor has a lawful excuse for not disclosing the information, or
- refusal is authorised under the HIPC 2020, including where:<sup>18</sup>
  - disclosure would be likely to prejudice the health of the student, or
  - disclosure would be contrary to the best interests of a student under the age of 16.

When responding to access requests, counsellors must inform the student of their right to request correction of health information held about them (as outlined below).

### *Access requests made by parents / whānau*

Parents and whānau can request access to health information that a counsellor holds about their child. However, they do not have an automatic right to access this information. In responding to access requests from parents and whānau, counsellors must consider a student's capacity to give or refuse consent to disclosure of their health information.

Parents or guardians of students aged under 16 years may request access to their child's health information as their personal representative. A counsellor should provide this information to a student's personal representative, unless:<sup>19</sup>

- disclosure would be contrary to the student's interests
- the counsellor has reasonable grounds to believe the student would not want the information disclosed to their representative, or
- refusal is authorised under the HIPC (as outlined above).<sup>20</sup>

Where a student is aged over 16 years, their parents / guardians are not their personal representatives but may still request access to their health information. Counsellors can only provide health information to parents and whānau with the consent of a student aged over 16 years, or where limited exemptions apply.<sup>21</sup>

## Rights to correct health information<sup>22</sup>

Students are entitled to request correction of health information held about them. A counsellor must take reasonable steps to ensure the health information they hold about students is accurate, up to date, complete and not misleading.

When a student requests correction of their health information correction, a counsellor must either:

- amend their records, or

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<sup>16</sup> Health Act 1956, s22F(1); HIPC 2020, cl 5, rule 6.

<sup>17</sup> Health Act 1956, s22F(2).

<sup>18</sup> HIPC, cl 5, rule 6(3); Privacy Act 2020, ss49(1)(b)-(c). See also Privacy Act 2020, Part 4, ss50 – 53.

<sup>19</sup> Health Act 1956, ss22B and 22F(1) – (2); HIPC 2020, cls 3(1) and 6, rule 11(5).

<sup>20</sup> See Privacy Act 2020, ss49 – 53.

<sup>21</sup> HIPC 2020, cl 5, rule 11(1) – (2).

<sup>22</sup> HIPC 2020, cl 5, rule 7.

- if the counsellor is not willing to correct the information, attach a statement reflecting the student's correction request to their records.

If inaccurate health information was shared before it was corrected, counsellors should, where practical, inform those who had access to the information about the correction.

### **Alignment with NZAC Code of Ethics/He Pikorua Practice Framework**

Many of the legislative requirements and obligations relating to consent, privacy and confidentiality are reflected in the NZAC Code of Ethics and the principles underpinning the He Pikorua Practice Framework. For example:

- Obligations around informed consent and confidentiality set out in the NZAC Code of Ethics reflect the legal requirements in the Code of Health and Disability Services Consumers Rights and the HIPC respectively.<sup>23</sup>
- The He Pikorua principle of taking a mokopuna and whānau-centred approach is reflected in the legal requirement to ensure children and young people (and their parents and whānau where appropriate) are provided with the necessary age-appropriate information to make an informed decision about services that may impact them.

When we get consent, privacy or confidentiality wrong we can damage the strong relationships He Pikorua is designed to foster, negatively impact outcomes for our learners, and undermine the trust that is the foundation of the relationship between a counsellor, a student and their whānau.

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<sup>23</sup>

See NZAC Code of Ethics, cls 5.5 and 6.