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OPINION	:	No. 08-509
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THE HONORABLE MARK WYLAND, MEMBER OF THE STATE SENATE, has requested an opinion on the following questions:

1. Under Education Code section 49602(c), is a school counselor required to disclose pregnancy-related or abortion-related personal information received from an unemancipated student age 12 or older to the student's parents or school principal when the counselor has reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the student's health, safety, or welfare? And, to the extent that the statute allows disclosure of a student's pregnancy-related or abortion-related information to be made under any circumstances, is it invalid on its face as violating the student's constitutional right to privacy?

2. When a school counselor fails to disclose pregnancy- or abortion-related personal information to the parents or school principal of an unemancipated student age 12 or older and the minor thereafter suffers harm that could have been averted by the

disclosure of that information, may the counselor or his or her employing school or school district be held civilly liable under the doctrine of negligence per se for a violation of Education Code section 49602(c)?

CONCLUSIONS

1. Education Code section 49602(c) permits, but does not by its terms require, a school counselor to disclose personal information (including pregnancy-related or abortion-related information) received from an unemancipated student age 12 or older to the student's parents or school principal when the counselor has reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the student's health, safety, or welfare. The statute does not, on its face, violate a student's constitutional right of privacy.

2. Because Education Code section 49602(c) does not by its terms compel disclosure, it may not form the basis of civil liability against a school counselor or his or her employing school or school district under the doctrine of negligence per se where the school counselor fails to disclose pregnancy-related or abortion-related personal information to the parents or school principal of an unemancipated student age 12 or older and the minor thereafter suffers harm that could have been averted by the disclosure of that information.

ANALYSIS

In 1997, the California Supreme Court recognized that minors, as well as adults, have a privacy interest under the California Constitution in medical decisions relating to their pregnancies and struck down a law that would have required all minors to obtain their parents' consent (or a court order) for an abortion.[1] Further, California statutes generally consider a minor's pregnancy-related or abortion-related personal information to be private and confidential to the minor herself, and protect that information from unwarranted disclosure. For example, while a minor's parents or guardians are generally entrusted with the authority to make medical decisions on the minor's behalf,[2] the state's medical emancipation statutes authorize a pregnant minor of any age to give legal

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[1] *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 348-359 (1997); *see* Cal. Const. art. 1, § 1; Fam. Code § 6925(b)(2); Health & Saf. Code § 123450.

[2] *Am. Acad. of Pediatrics*, 16 Cal. 4th at 315, 335-336.

consent, without parental notification or authorization, for the full range of medical care related to her pregnancy that an adult may receive.[3] In addition, under the Confidentiality of Medical Information Act, a minor has the same right as an adult to have her pregnancy-related medical information kept confidential. With some exceptions, health care providers may not disclose such information without the minor's consent, even where the minor's parents or guardians request or demand it.[4]

In view of these laws, we have previously concluded that school districts may not require parental consent before a minor student is released from school to receive "confidential medical services," including pregnancy-related or abortion-related care, and that a school district may not adopt a policy of notifying a minor's parents when she leaves school to receive such services.[5] Such policies, we concluded, would undermine the minor's right to have her information kept confidential.[6] In this opinion, we return to the school setting to consider related questions.

School counselors provide "educational counseling" for pupils on a variety of matters, including academics, career and vocational planning, and personal and social issues.[7] To do so, they must possess a "valid credential with a specialization in pupil personnel services[.]"[8] A pupil personnel services credential may be obtained in the categories of "school counseling," "school social work," "school psychology," and "child welfare and attendance," each of which includes a combination of skills involving students' academic and personal welfare.[9] Some counselors are also licensed in

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[3] *Id.* at 318-320; *see* Fam. Code § 6925(a) (prevention or treatment of pregnancy); former Civ. Code § 34.5.

[4] Civ. Code § 56.11(c)(2); *see also* Health & Saf. Code § 123115(a) (providing that only the minor, not the minor's legal representative, may access medical records documenting treatment to which the minor may lawfully consent); *Planned Parenthood Affiliates of Cal. v. Van de Kamp*, 181 Cal. App. 3d 245, 270 (1981) ("only the minor may consent to disclosure of records of treatment to which the minor consented").

[5] 87 Ops.Cal.Atty.Gen. 168, 173-175 (2004).

[6] *Id.* Because we concluded that such a policy would be improper under a statutory analysis, we found it unnecessary to reach the issue whether such a policy might also violate a minor student's privacy rights under the state Constitution. *Id.* at 175 n. 6.

[7] Educ. Code § 49600(b).

[8] *Id.* at § 49600(a).

[9] *See* Cal. Code Regs. tit. 5, § 80049.1(a). Although a school district may utilize

professions that fall into the category of "psychotherapist" for purposes of the evidentiary psychotherapist-patient privilege[10] and/or "provider of health care" for purposes of the Confidentiality of Medical Information Act.[11]

On occasion, a school counselor may learn from a minor student during counseling that she is or might be pregnant, that she has had or is considering having an abortion, or similar information. The questions presented for our review concern those situations in which a school counselor who receives such information becomes concerned about the well-being of the student, such as when the student reveals that she plans to self-abort her pregnancy or to seek an abortion from an unlicensed provider, or that she is refusing to get medical treatment for serious complications of her pregnancy.

Specifically, we are told that certain provisions of Education Code section 49602[12] have left school counselors who confront these types of situations uncertain of what they are required or permitted to do, or are prohibited from doing, regarding pregnancy-related or abortion-related personal information that they have received from a student. While the statute generally requires school counselors to keep a student's personal information confidential, subdivision (c) of the statute contains an exception for "[r]eporting information to the principal or parents of the pupil when the counselor has reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the health, safety or welfare of the pupil [or other specified individuals]."

We are told that some counselors feel that the statute places them in a dilemma when it comes to the question whether to disclose a student's pregnancy-related or abortion-related personal information in the sorts of hypothetical situations described above. Does the statute require or merely permit them to disclose this type of information? While the statute requires a counselor to balance a student's health, safety, and welfare against the student's constitutionally protected right to privacy, it provides scant guidance for doing so. Nor does the statute clearly indicate what the consequences

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"community-based service providers, including volunteers, individuals completing counseling-related internship programs, and state licensed individuals and agencies to assist in providing pupil personnel services," a pupil services credential holder must supervise those individuals and agencies in their school-based activities. *Id.* at § 80049.1(c).

[10] Evid. Code §§ 1010, 1010.5.

[11] Civ. Code §§ 56.05(j), 56.10, 56.11.

[12] Further references to the Education Code are by section number only.

to a counselor may be for failing to strike that balance correctly. To address these concerns, we examine the scope of the statutory confidentiality exception set forth in section 49602(c).

1. Permissible, or Mandated, Disclosure?

We are first asked to consider whether and under what circumstances a school counselor is required or permitted to disclose confidential pregnancy-related or abortion-related information received from an unemancipated student age 12 or older[13] to the minor's parents or principal. Further, we are asked whether the possibility of such disclosures renders the statute invalid on its face as violating the minor student's constitutional right to privacy. We start by examining whether section 49602(c) either requires or permits a school counselor to disclose what would otherwise be deemed confidential personal information imparted by a student in a counseling session. We focus next on additional concerns raised when the information is *pregnancy-related* or *abortion-related.* Finally, we address the constitutional privacy implications of the statute.

In relevant part, section 49602 provides:

> Any information of a personal nature disclosed by a pupil 12 years of age or older in the process of receiving counseling from a school counselor as specified in section 49600 is confidential . . . . The information shall not be revealed, released, discussed, or referred to, except as follows:
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> . . .
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> (c) Reporting information to the principal or parents of the pupil when the school counselor has reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the health, safety or welfare of the pupil or the following other persons living in the school community: administrators, teachers, school staff, parents, pupils, and other school community members.
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> . . .

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[13] As they have been put to us, the questions posit a hypothetical "unemancipated student age 12 or older." For the sake of brevity, we use the terms "student" or "pupil" as shorthand for an unemancipated student age 12 or older. In any event, our conclusions do not turn on a student's age or emancipation status.

> Notwithstanding the provisions of this section, a school counselor shall not disclose information deemed to be confidential pursuant to this section to the parents of the pupil when the school counselor has reasonable cause to believe that the disclosure would result in clear and present danger to the health, safety or welfare of the pupil.
>
> Notwithstanding the provisions of this section, a school counselor shall disclose information deemed to be confidential pursuant to this section to law enforcement agencies when ordered to do so by order of a court of law, to aid in the investigation of a crime, or when ordered to testify in any administrative or judicial proceeding.
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> . . .
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> No person required by this section to keep information discussed during counseling confidential shall incur any civil or criminal liability as a result of keeping that information confidential.

To sum up, section 49602 states that—subject to specified exceptions—a student's personal information "*shall not* be revealed, released, discussed, or referred to[.]"[14] When used in statutes and regulations, the word "shall" is commonly understood to be a mandatory command,[15] which in this case prohibits the act of disclosing a student's information. Subdivision (c) sets forth an exception for those situations in which the school counselor reasonably believes that disclosure is "necessary to avert a clear and present danger to the health, safety or welfare of the pupil or [other specified persons]." In contrast to the statute's general command of confidentiality, however, subdivision (c) does not state that a counselor "shall" report personal information in order to avert a clear and present danger, nor does it use any other explicitly mandatory language.

It might be argued that section subdivision (c) should be read to *impliedly* create a mandate to disclose confidential information in the circumstances described. But to do so "would violate the cardinal rule that a statute 'is to be interpreted by the language in

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[14] Emphasis added.

[15] *See People v. Heisler*, 192 Cal. App. 3d 504, 506-507 (1987); 92 Ops.Cal.Atty.Gen. 30, 32 (2009).

which it is written,'" and we are "'no more at liberty to add provisions to what is therein declared in definite language than . . . to disregard any of its express provisions.' [Citation.]"[16]

Moreover, there is no indication that the Legislature intended to treat subdivision (c) differently from subdivisions (a), (b), (d), or (e) of this same statute, and it seems clear that the statute cannot reasonably be read to mandate disclosure of confidential information in the circumstances described in those subdivisions. Subdivision (a) exempts from the prohibition against disclosure "[d]iscussion with psychotherapists . . . other health care providers, or the school nurse, for the sole purpose of referring the pupil for treatment."[17] It would not be reasonable to read this as impliedly creating a *mandate* to disclose in these circumstances. Subdivision (b) exempts "[r]eporting of child abuse or neglect *as required by Article 2.5 (commencing with Section 11165) of Chapter 2 of Title 1 of Part 4 of the Penal Code.*"[18] The italicized language would be redundant if section 49602 were to be read implicitly to create a mandate whenever disclosure of confidential information is exempted from the ban against disclosure. Finally, subdivision (d) exempts "[r]eporting information to the principal, other persons inside the school, as necessary, the parents of the pupil, and other persons outside the school when the pupil indicates that a crime, . . . , will be or has been committed," and subdivision (e) exempts "[r]eporting information to one or more persons specified in a written waiver . . . read and signed by the pupil . . . ." Both provisions are worded in a manner that indicates the counselor has discretion over when and to whom to report the described information.

In clear contrast to these apparently discretionary provisions, it is evident that the Legislature knows how to mandate disclosure of otherwise confidential information when it wants to do so. Section 49602 does expressly mandate disclosure in specified circumstances by stating that, notwithstanding the statute's general rule of confidentiality, a "school counselor *shall* disclose" personal information "to law enforcement agencies when ordered to do so by order of a court of law, to aid in the investigation of a crime, or when ordered to testify in any administrative or judicial proceeding."[19] And still another

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[16] *Wells Fargo Bank v. Super. Ct.*, 53 Cal. 3d 1082, 1097 (1991); *see also Cal. Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 633 (1997) (statute may not be read "so as to make it conform to a presumed intention which is not expressed").

[17] Educ. Code § 49602(a).

[18] *Id.* at § 49602(b) (emphasis added).

[19] Emphasis added.

provision of section 49602 (which we view as an exception to the listed exceptions permitting disclosure) expressly prohibits disclosure to parents—that is, the school counselor "*shall not*" disclose a student's confidential information to the student's parents—when the counselor has "reasonable cause to believe that the disclosure [to the parents] would result in clear and present danger to the health, safety or welfare of the pupil."[20]

"When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning."[21] Because the Legislature has used mandatory language in certain of the statute's provisions, but not in subdivision (c), we decline to read into subdivision (c) a mandatory requirement to disclose personal information. Therefore, we conclude that section 49602(c) permits, but does not require, a school counselor to disclose a student's personal information to the student's parents or school principal when the counselor has reasonable cause to believe that disclosure is necessary to prevent a clear and present danger to the student's health, safety, or welfare. So, for example, a counselor who reasonably believes that a student intends to harm herself is permitted to inform the school principal of the danger. Likewise, the counselor is permitted to inform the student's parents of the danger—except, of course, in circumstances where the counselor reasonably believes that disclosing the information to the student's parents would itself endanger the student.

Having determined that a school counselor is generally permitted to disclose a student's confidential information (at least to the school principal) in order to avert a specific, evident danger to a student, we next examine the additional considerations that are raised by a specific type of personal information: that is, *pregnancy-related* or *abortion-related* information. This kind of information is considered particularly

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[20] Thus, under this latter provision, even if a given set of circumstances would otherwise permit disclosure to a student's parents under subdivision (c)—for example, where the counselor believed it necessary to prevent the student from harming another student (or teacher or other member of the school community)—the option of disclosure *to the student's parents* is not available where the counselor reasonably believes it will result in harm to the student. Under the described circumstances, however, the counselor would be permitted to disclose the information to the student's school principal.

[21] *Cornette v. Dept. of Transp.*, 26 Cal. 4th 63, 73 (2001); *see also People v. Duran*, 94 Cal. App. 4th 932, 941 (2001) ("We presume a different legislative intent, not an oversight, from the fact that words used in [one provision] are missing [from another].").

sensitive, and has been the subject of close legal scrutiny. As a result, both judicial decisions and legislative actions have clearly established that a minor's pregnancy- or abortion-related information is protected under the privacy clause of the state Constitution (as well as under state statutes). This constitutional right to privacy may be infringed only when necessary to serve a *compelling state interest.*[22]

The question, therefore, is whether a school counselor's disclosure of a student's pregnancy- or abortion-related information would serve a compelling state interest. This question need not detain us long, because the state has a compelling state interest in protecting the health and safety of minors,[23] and the statute's own terms only permit disclosure when reasonably believed *necessary* to further that interest—i.e., "to avert a clear and present danger to the health, safety or welfare of the pupil." Put another way, we believe that the constitutional standard will be met whenever a school counselor reasonably believes that disclosure of pregnancy- or abortion-related information to a student's parents, guardians, or principal[24] is necessary to avert a clear and present danger to the student's[25] health or safety.[26]

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[22] *See Am. Acad. of Pediatrics*, 16 Cal. 4th at 341 (constitutional right of privacy in minor's pregnancy-related information and autonomy may be infringed only when necessary to serve compelling state interest).

[23] *See id.* at 341, 348 (state's interest in preserving health of minors is compelling).

[24] Again, however, disclosure to the student's parents would *not* be permitted in circumstances where the parents themselves are reasonably perceived as posing the danger.

[25] Questions involving other dangers, such as dangers to "other persons living in the school community" (§ 49602(c)), are beyond the scope of this opinion.

[26] Although we conclude that section 49602(c) permits the disclosure of otherwise confidential information in the described circumstances, we caution that it is an exception to a general statute that in most cases requires counselors to keep students' personal information confidential. Statutory exceptions to general rules are to be narrowly construed. *See City of National City v. Fritz*, 33 Cal. 2d 635, 636 (1949) (exceptions to statute's general rule are narrowly construed); *People v. Melton*, 206 Cal. App. 3d 580, 592-593 (1988) (same). This means, among other things, that a perceived "danger" to a student's "health, safety or welfare" should not be interpreted too loosely. While it would be unwise for us to speculate on the various forms that such dangers might take, an individual's or a community's moral, ethical, or religious values should not be considered in determining whether there is a clear and present danger to the health and safety of the student. For example, we believe that section 49602(c) would *not* permit a counselor to

Returning to our interpretation of the statute itself, a recognized principle is that "every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect."[27] In our view, the disclosures permitted under section 49602(c) are consistent with those permitted under other statutes involving related issues. One such statute is the psychotherapist-patient evidentiary privilege, which is codified at Evidence Code section 1024, and states:

> There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger.[28]

Moreover, to the extent that the student's pregnancy- or abortion-related personal information is deemed "medical information" under the Confidentiality of Medical Information Act,[29] that act also permits such information to be disclosed "when specifically authorized by law, . . . "[30] as well as

> . . . consistent with applicable law and standards of ethical conduct, by a psychotherapist, as defined in Section 1010 of the Evidence Code,[31] if the psychotherapist, in good faith, believes the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims, and the disclosure is made to a

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reveal a student's pregnancy-related or abortion-related personal information based solely on the counselor's personal views on the subjects of teen pregnancy or abortion, or on the counselor's or community's subjective belief that this is the type of information that every parent should know.

[27] *Moore v. Panish*, 32 Cal. 3d 535, 541 (1982); *see also Mejia v. Reed*, 31 Cal. 4th 657, 663 (2003).

[28] *Id.*

[29] We need not and do not decide whether the fact of a student's pregnancy and her expressed *refusal* to seek appropriate medical care would necessarily qualify as "medical information" under the Confidentiality of Medical Information Act.

[30] Civ. Code § 56.10(c)(14).

[31] This section defines "psychotherapist" to include licensed school psychologists and educational psychologists.

person or persons reasonably able to prevent or lessen the threat, including the target of the threat.[32]

As mentioned previously, some school counselors hold professional credentials that require them to adhere to specific confidentiality rules such as these. Of course, each situation must be evaluated based on its particular facts. But we note that a theme emerges from examining section 49602(c) in conjunction with these other statutes: disclosure of protected information is generally permitted where the disclosure is reasonably believed to be necessary to avert a sufficiently serious danger to the well-being of the patient or a third party. And this is so regardless of whether the person being counseled is a child or an adult. For these reasons, we believe that our construction of section 49602(c) is harmonious with other statutes that cover similar subjects.[33] And, following another relevant canon of statutory construction, we believe that our construction arrives at a workable and "commonsense meaning" for section 49602(c).[34] To read it as *requiring* school counselors to disclose confidential information in every case of perceived danger to a student would seriously undermine counselors' ability to exercise their best judgment under the most difficult circumstances.

Finally, even though we construe section 49602(c) as permitting, rather than requiring, school counselors to disclose confidential information when disclosure is necessary to avert a danger to the student, we acknowledge the argument that a law permitting *any* disclosure of pregnancy-related information is unconstitutional on its face as violating a student's constitutional right to privacy.[35] After careful consideration,

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[32] Civ. Code § 56.10(c)(19).

[33] *See People v. Frawley*, 82 Cal. App. 4th 784, 789-790 (2000); *Franchise Tax Bd. v. Super. Ct.*, 63 Cal. App. 4th 794, 799 (1998). The fact that the relevant statutes can be harmonized in this way differentiates the section 49602(c) procedures from the school policies that we found unacceptable in our earlier opinion as undermining the confidentiality provisions of the medical emancipation statutes. Those policies generally *required* that a student's parents be notified of and consent to a student's excusal from school to access pregnancy-related or abortion-related medical services. *See* 87 Ops.Cal.Atty.Gen. at 173-175.

[34] *See Dyna-Med, Inc. v. Fair Empl. & Hous. Commn.*, 43 Cal. 3d 1379, 1392 (1987). ("Statutes are to be given a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent 'and which, when applied, will result in wise policy rather than mischief or absurdity.' [Citation]".)

[35] *See generally Am. Acad. of Pediatrics*, 16 Cal. 4th at 348-359 (striking down statute requiring minors to obtain parents' consent for abortion).

however, we disagree. We believe that allowing disclosure of pregnancy-related information under these narrowly limited circumstances does not vitiate the privacy of such information in the broad run of cases.

As the Supreme Court has recognized, a determination of facial unconstitutionality must be supported by more than the suggestion that "in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute."[36] Rather, it must be shown that "the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions."[37] "Whenever possible, statutes are construed to avoid unconstitutionality."[38] Comparing section 49602(c) to the parental-consent-for-abortion law invalidated in *American Academy of Pediatrics* illustrates this point.

There, the Supreme Court found that the challenged statute directly intruded upon a privacy interest—the minor's right to make decisions concerning her pregnancy—that was fundamental to her personal autonomy.[39] Therefore, the Court subjected the statute to a "compelling interest" test, meaning that, to be upheld against a constitutional challenge, the law must be shown to further a "compelling state interest which justifies [the intrusion] and which cannot be served by alternative means less intrusive on fundamental rights."[40] In applying this test, the Court found that the state has a compelling interest in protecting the health of minors.[41] The Court found, however, that the parental-consent statute was not necessary to serve that interest (and in a significant portion of cases may actually impede it).[42] Also undercutting the statute's purported necessity were "the numerous, analogous California statutory provisions authorizing a

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[36] *P. Legal Found. v. Brown*, 29 Cal. 3d 168, 180 (1981); *see Am. Acad. of Pediatrics*, 16 Cal. 4th at 347 ("[A] law may not be held unconstitutional on its face simply because those challenging the law may be able to hypothesize some instances in which application of the law might be unconstitutional.").

[37] *Id.* at 181; *see Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995); *Arcadia Unified Sch. Dist. v. State Dept. of Educ.*, 2 Cal. 4th 251, 267 (1992).

[38] *S. P. Pipe Lines, Inc. v. Bd. of Supervisors*, 9 Cal. App. 4th 451, 460 (1992).

[39] *Am. Acad. of Pediatrics*, 16 Cal. 4th at 340-346.

[40] *Id.* at 341 (quoting *White v. Davis*, 13 Cal. 3d 757, 772 (1975)).

[41] *Id.* at 341; *see id.* at 348 (state's interest in protecting health of minors is "extremely important and vital").

[42] *Id.* at 353-358.

minor, without parental consent, to make medical and other significant decisions with regard to her own and her child's health and future."[43]

As for section 49602(c), the privacy interests at stake are similar to those at stake in the case of the parental-consent statute, and include the student's interest in keeping this sensitive information confidential, as well as her interest in making health-related decisions concerning her pregnancy.[44] But the disclosures permitted under section 49602(c) are substantially less intrusive than the parental-consent laws, which would have required all pregnant minors to obtain their parents' consent (or, failing that, a court order) to obtain an abortion. Disclosures under section 49602(c) would not erect any legal barrier to a student's receiving pregnancy-related health care, including abortion. And the opportunities for disclosure under section 49602(c) are also far more limited, arising—as we have already observed, *supra*—only when disclosure is *necessary* to avert a clear and present danger to the student's health, safety, or welfare, an interest which the Supreme Court in *American Academy of Pediatrics* found "compelling." As we construe it, then, section 49602(c) strikes a reasonable, and constitutional, balance between a student's privacy rights and a compelling state interest.[45]

Therefore, we conclude that the terms of section 49602(c) permit, but do not require, a school counselor to disclose personal information received from an unemancipated student age 12 or older to the student's parents or school principal when the counselor reasonably forms the belief that disclosure is necessary to avert a clear and present danger to the student's health, safety, or welfare. Whether *pregnancy-related* or *abortion-related* personal information may be properly disclosed under this statute would depend on whether the school counselor reasonably believes that disclosing this specific information, to the specific persons listed in the statute, is necessary to avert the perceived clear and present danger. Construed in this narrow manner, the statute does not, on its face, violate a minor's constitutional right to privacy.

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[43] *Id.* at 356.

[44] "Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ('informational privacy'); and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ('autonomy privacy')." *Hill v. Natl. Collegiate Athletic Assn.*, 7 Cal. 4th 1, 35 (1994).

[45] The reasonableness of any given *application* of section 49602(c) is beyond the scope of this opinion, and would depend on all the circumstances presented by the particular situation.

2. Failure to Disclose Is Not Negligence Per Se.

The second question presented to us is whether a school counselor (or his or her employing school or school district) may be held civilly liable, under the doctrine of negligence per se, for *failing* to disclose pregnancy- or abortion-related information to a pupil's parents, guardians, or principal if the minor later suffers harm that could have been averted by disclosure. We conclude that counselors and their employers may not be held so liable.[46]

As a preliminary matter, we must determine whether public school counselors' decisions to disclose or withhold a student's personal information under section 49602(c) are immune from civil liability under the California Tort Claims Act,[47] which governs the tort liability of public officers and employees and the agencies that employ them. While the Tort Claims Act provides immunity for a public employee's "discretionary" acts,[48] as well as the employing agency in those situations where the employee is immune,[49] it does not immunize "all acts requiring a public employee to choose among alternatives,"[50] or what are sometimes referred to as "operational" judgments.[51] Instead, immunity is reserved for those basic "quasi-legislative" policy decisions that have been expressly committed to coordinate branches of government.[52]

It has been specifically held that psychologists employed by the government are *not* immune from liability under the Tort Claims Act for their failure to warn a third party

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[46] A corollary of our determination that disclosure of otherwise confidential information is permitted (but not mandated) under section 49602(c) is that this same provision *does not require confidentiality* under the described circumstances. For this reason, the statute's general provision—which states that "[n]o person *required* by this section to keep information discussed during counseling confidential shall incur any civil or criminal liability as a result of keeping that information confidential"—is not determinative of the question posed here.

[47] Govt. Code §§ 810-998.3.

[48] Govt. Code § 820.2(a).

[49] Govt. Code § 815.2(a).

[50] *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995).

[51] *See Barner v. Leeds*, 24 Cal. 4th 676, 684-685 (2000).

[52] *Caldwell*, 10 Cal. 4th at 981.

of a risk of harm posed by a patient.[53] While the "decision whether to disclose such a risk of danger may require the exercise of considerable judgment skills, [it] does not rise to the level of a basic policy decision for which the statute provides immunity."[54] For purposes of determining whether governmental immunity applies, we see little difference between the psychologist's decision to warn (or not warn) a patient's potential third-party victim and the school counselor's decision to make (or not make) disclosures permitted by section 49602(c). Therefore, we believe that a school counselor's decision whether to disclose under section 49602(c) is not covered by the immunity provisions of the Tort Claims Act.

Putting issues of immunity aside, we may now reach the question presented, namely, whether civil liability against a school counselor and his or her employer may be premised upon section 49602(c) itself, under a theory of negligence per se. "To establish liability in negligence, it is a fundamental principle of tort law that there must be a legal duty owed to the person injured and a breach of that duty which is the proximate cause of the resulting injury. [Citation.]"[55] The doctrine of negligence per se is codified at Evidence Code section 669, and creates a presumption of negligence where a defendant:

> (1) . . . violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.[56]

In our view, a claim of negligence per se predicated on section 49602(c) would fail. As discussed at length in our response to the first question, we believe that section 49602(c) permits a school counselor to reveal confidential information under certain circumstances, but it does not require him or her to do so. Permissive action implies permissive inaction, which defeats any notion of a mandatory duty to act. Since the

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[53] *Tarasoff v. Regents of U. of Cal.*, 17 Cal. 3d 425, 446 (1976); *see also Ewing v. Goldstein*, 120 Cal. App. 4th 807, 814-816 (2004); Civ. Code § 43.92.

[54] *Tarasoff*, 17 Cal. 3d at 446; *see Barner*, 24 Cal. 4th at 686.

[55] *Jacoves v. United Merchandising Corp.*, 9 Cal. App. 4th 88, 114 (1992)

[56] *Johnson v. Honeywell Intern. Inc.*, 179 Cal. App. 4th 549, 555 (2009).

statute imposes no duty upon a counselor to disclose, there is no duty to violate[57] by not disclosing.[58] Thus we conclude that, because of its permissive nature, section 49602(c) cannot itself form the basis of civil liability against a school counselor under the doctrine of negligence per se.[59]

Turning now to the potential vicarious liability of the counselor's employing school or school district, we observe that "[a] public entity is liable for injury proximately caused by an act or omission of an employee . . . within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee[,]"[60] and that, as a general matter under the theory of respondeat superior, all public *and* private employers are vicariously liable for the tortious acts of their employees during the course and scope of their employment.[61] In other words, for purposes of ascertaining liability, the employing school or school district "stands in the [counselor's] shoes,"[62] "irrespective of proof of the employer's fault."[63] Since our conclusion is that civil liability may *not* be premised against the school counselor under a theory of negligence per se, it follows that civil liability may not be imposed vicariously against his or her employer under such a theory, either.

In response to the second question, then, we conclude that because section 49602(c) is a permissive statute, it may not form the basis of civil liability against a school counselor or his or her employing school or school district under the doctrine of negligence per se where the school counselor fails to disclose pregnancy-related or

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[57] *See* Evid. Code § 669(a)(1).

[58] For the same reason, we believe that section 49602(c) imposes no affirmative duty on the counselor's employing school district. Thus, liability may not be premised on the Tort Claims Act provision stating that a public entity may be liable for a person's injuries where an enactment has imposed, *upon the entity*, a mandatory duty to protect against particular kinds of injuries, and the public entity's failure to discharge the duty proximately causes a person to suffer that kind of injury. *See* Govt. Code § 815.6.

[59] Questions as to whether a counselor or the counselor's employer might be civilly liable under some other theory are beyond the scope of this opinion.

[60] Govt. Code § 815.2(a); *see Lisa M. v. Henry Mayo Newhall Mem. Hosp.*, 12 Cal. 4th 291, 296 (1995); *Sullivan v. Co. of Los Angeles*, 12 Cal. 3d 710, 717 (1974).

[61] *Lobo v. Tamco*, 182 Cal. App. 4th 297, 301 (2010).

[62] *See*, *e.g.*, *Miller v. Stouffer*, 9 Cal. App. 4th 70, 84 (1992).

[63] *Perez v. Van Gronigen & Sons, Inc.*, 41 Cal. 3d 962, 967 (1986).

abortion-related personal information to the parents or school principal of an unemancipated student age 12 or older and the minor thereafter suffers harm that could have been averted by the disclosure of that information.

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