

An Analysis of Assembly Bill 327:
New California Child Abuse
Reporting Requirements
for Family Planning Providers

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An Analysis of Assembly Bill 327: New California Child Abuse Reporting Requirements for Family Planning Providers

Introduction

As of January 1, 1998, mandated child abuse reporters in California have expanded reporting responsibilities. Certain age differences between minors and their adult sexual partners now trigger a mandatory report. This is true even when the sexual activity is voluntary and consensual.

The National Center for Youth Law has prepared this memorandum for the California Family Health Council to answer some frequently-asked questions about the new law. This memorandum is informational only – IT IS NOT LEGAL ADVICE. Anyone who has legal questions about reporting responsibilities in a particular case, about clinic policies and procedures, or about any other legal issue, should consult a lawyer. This memorandum first explains the changes to the law, and then discusses some practical issues in child abuse reporting for health care providers.

How has the child abuse reporting law changed?

During 1997, the California Legislature passed Assembly Bill 327 (AB 327), which added the new reporting requirements. Governor Wilson signed AB 327 on July 21, 1997, and the new law went into effect on January 1, 1998.

Sexual assault is one element of child abuse that must be reported under the child abuse reporting law.¹ AB 327 adds two additional crimes to the definition of “sexual assault.” The relevant portion of the definition of sexual assault as amended by AB 327 currently reads as follows (with the new language in italics):

“Sexual assault” means conduct in violation of one or more of the following sections: Section 261 (rape), *subdivision (d) of Section 261.5 (statutory rape)*, 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b), *or paragraph (1) of subdivision (c) of Section 288 (lewd and lascivious acts upon a child)*, 288a (oral copulation), 289 (penetration of a genital or anal opening by a foreign object), or 647.6 (child molestation).²

How does AB 327 change providers’ reporting responsibilities?

¹California Penal Code §§ 11165.1, 11165.6.

²California Penal Code § 11165.1(a).

Mandated reporters now must report two new categories of sexual activity as child abuse. As a result of the AB 327 changes, some cases of *statutory rape* and some instances of *lewd and lascivious acts upon a child* must now be reported.

What is statutory rape?

Statutory rape is addressed in California Penal Code Section 261.5. This section does not actually use the phrase “statutory rape,” but refers instead to “unlawful sexual intercourse.” Penal Code Section 261.5(a) defines “unlawful sexual intercourse” as sexual intercourse with a minor under age 18 who is not the spouse of the perpetrator. Until 1993, the minor was defined as female; since then the statute has been amended to be gender-neutral.

Does the new law require reporting of statutory rape?

Yes, but only in some cases. The new law requires reporting of unlawful sexual intercourse (statutory rape) between a minor who is under age 16 and an adult who is over age 21. “Over age 21” is not defined in the law, but, when interpreted consistently with other California laws appears to mean “21 years old or older.” Thus,

C if one partner is under age 16 and has engaged in sexual intercourse with a partner age 21 or older, a report is required.

Is all statutory rape reportable?

No. California Penal Code Section 261.5(d) sets heightened criminal penalties for statutory rape *when the minor is under age 16 and the perpetrator is over the age of 21*. Only these instances of statutory rape are mandatorily reportable. Although all instances of unlawful sexual intercourse (statutory rape) are illegal, the reporting law *does not* mandate reporting in all cases. Reports may be required in other cases of statutory rape if they give rise to a reasonable suspicion that abuse has occurred, as discussed below.

What are lewd and lascivious acts?

California Penal Code Section 288(a) says that:

Any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body . . . of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony . . .”

Generally, charges brought under this section have involved severely exploitative behavior. This definition of “lewd and lascivious acts” is incorporated by reference in Penal Code Section 288(c)(1), which addresses lewd and lascivious acts upon minors ages 14 and 15, and is the Section newly included in the reporting requirements under AB 327.

Does the new law require reporting of lewd and lascivious acts?

Yes, in some cases. AB 327 requires reporting of lewd and lascivious acts when such acts are performed upon a child of 14 or 15 years when the defendant is at least 10 years older than the child.³ Thus,

C if one partner is age 14 or 15 and is sexually active with a partner at least ten years older, a report is required.

Are all cases of lewd and lascivious acts upon a minor reportable?

No. The child abuse reporting law explicitly requires reporting two specific categories of lewd and lascivious acts.

For minors who are age 14 or older, only those acts involving a minor who is age 14 or 15 and an adult who are at least 10 years older are required to be reported.⁴ This requirement was added by AB 327, as described above.

For minors who are under age 14, only those acts between a partner under the age of 14 and a partner age 14 or older must be reported.⁶ This reporting requirement is not new. Prior to the passage of AB 327, the child abuse reporting law required reporting of acts included under Penal Code Section 288(a) under certain circumstances, i.e. some instances of sexual activity involving minors under the age of 14. These reporting requirements are still in effect.

³California Penal Code §§ 288(c)(1), 11165.1.

⁴California Penal Code §§ 288(c)(1), 11165.1.

⁶California Penal Code §§ 288(a), 11165.1.

The scope of this reporting obligation has been delineated in a 1984 Attorney General's opinion and two subsequent court decisions interpreting that opinion.⁷ As a result, the following general rules apply:

- C if both sexual partners are under age 14, a report is *not* required unless additional facts (beyond the sexual activity itself) give rise to a reasonable suspicion of abuse;**
- C if both sexual partners are age 14 or older, a report is *not* required unless additional facts (beyond the sexual activity itself) give rise to a reasonable suspicion of abuse; and**
- C if one partner is under age 14 and one partner is age 14 or older, a report is required.**

Apart from the age-based requirements, what other sexual activity triggers a duty to report?

The age-based reporting requirements discussed above are not the only triggers for mandatory reports. Under the Child Abuse and Neglect Reporting Act,⁸ health practitioners and other mandated reporters, working in their professional capacity or within the scope of their employment, must report cases in which they know or reasonably suspect that a minor has been the victim of child abuse.⁹

What is reasonable suspicion of abuse?

“Reasonable suspicion” of abuse is defined as a situation in which “it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child

⁷*Planned Parenthood Affiliates of California v. Van de Kamp*, 226 Cal. Rptr. 361 (1986); *People v. Stockton Pregnancy Control Medical Clinic*, 249 Cal. Rptr. 762 (1988); 67 Ops. Atty. Gen. 235, 6-1-84.

⁸California Penal Code § 11164 *et seq.*

⁹California Penal Code § 11166.

abuse.”¹⁰ A 1987 amendment to the law states that the pregnancy of a minor does not “in and of itself, constitute a basis of reasonable suspicion of sexual abuse.”¹¹

How do these requirements apply in the family planning setting?

Apart from the age-based requirements that operate to require a report whenever a specific set of circumstances arises, family planning providers must make judgments about whether their minor patients’ sexual activity requires a child abuse report. In circumstances other than the age-based situations discussed above, for a report to be mandatory, *additional facts, beyond the sexual activity itself*, must give rise to a reasonable suspicion of child abuse. For example, sexual activity between a 16-year-old and a 22-year-old would not be mandatorily reportable based on age alone, but if the health provider suspected coercion or assault, a report would be required.

Does the fact of pregnancy or a diagnosis of STD mandate a child abuse report?

Not necessarily. According to a California appellate court opinion, when both sexual partners are under age 14 *and the sexual contact was voluntary and consensual*, no child abuse report is required, even if the minor receives medical attention for sexually transmitted diseases or pregnancy, including abortion.¹² The Attorney General has made the same determination for minors age 14 or older.¹³ Nevertheless, professionals are required to report when minor patients seek treatment for STDs or pregnancy and additional facts, beyond the pregnancy or diagnosis of STD, give rise to reasonable suspicion of abuse.

When does an age difference between sexual partners require a child abuse report?

In two situations. First, as discussed above, when the child abuse reporting law explicitly makes an age difference between partners the basis for a child abuse report, a report is mandatory.

Second, when the age difference, in combination with other facts, leads a provider to have a reasonable suspicion of abuse, a report is also required. Current practice in these situations varies considerably among providers, clinics, and geographic areas. In situations not covered by an explicit age-based requirement in the reporting law, a provider must exercise professional

¹⁰California Penal Code § 11166(a).

¹¹California Penal Code § 11166(a).

¹²*Planned Parenthood Affiliates of California v. Van de Kamp*, 226 Cal. Rptr. 361 (1986).

¹³67 Ops.Atty.Gen. 235, 6-1-84, at 240.

judgment in resolving the question of whether a particular age difference between partners indicates abuse. In general, the younger the minor and the older the partner, the more carefully providers should scrutinize the situation to determine whether a reasonable suspicion of abuse is warranted.

What consensual sexual activity does *not* require a report?

Even after the passage of AB 327, there are still a number of situations in which child abuse reports are not required:

- C when both minors are under 14 and of similar age, no report is required unless additional facts (beyond the sexual activity itself) give rise to a reasonable suspicion of abuse;**
- C when both minors are 14 or older and of similar age, no report is required unless additional facts (beyond the sexual activity itself) give rise to a reasonable suspicion of abuse;**
- C when one partner is a minor age 14 or 15 and the other partner is under age 21, no report is required unless additional facts (beyond the sexual activity itself) give rise to a reasonable suspicion of abuse; and**
- C when one partner is a minor 16 or over and the other partner is an adult of any age, no report is required unless additional facts (beyond the sexual activity itself) give rise to a reasonable suspicion of abuse.**

Appendix A includes a chart presenting some of the situations involving a difference in age between partners and indicating whether or not a report is generally required.

What are “similar ages”?

California courts have used the concept of “similar age” to describe minors who may engage in voluntary sexual activity without triggering a mandatory report.¹⁴ The precise definition of minors “of similar ages” is not included in either statutory or case law. “Similar ages” is best considered as one of the factors bearing on whether a situation *not otherwise mandatorily reportable* is child abuse or not.

¹⁴*People v. Stockton Pregnancy Control Medical Clinic*, 249 Cal. Rptr. 762 (1988) at 765.

Do family planning providers have a legal duty to ascertain the ages of their patients' sexual partners?

No. The new law does not impose any additional duty on health practitioners to screen their patients using any particular criteria, nor to ask about the ages of minor patients' sexual partners. In general, the reporting requirements rely on health care providers to use their discretion to assess which situations are reportable and which are not. In the *Stockton* case, the court explained that "nothing in the [Child Abuse Reporting] Act requires . . . health care practitioners to obtain information they would not ordinarily obtain in the course of providing care or treatment."¹⁵ The court emphasized that the duty to report is based on information obtained in the ordinary course of care. Whether or not this information leads to a reasonable suspicion of abuse will depend on the provider's training and experience.

An individual health care provider's professional judgment determines his or her practice in eliciting information, including the ages of a patient's sexual partners, that is relevant to child abuse reporting issues. In addition, practice may be directed by the policies and protocols of the particular family planning clinic or other site in which the provider works. Health care providers are encouraged to consult with their own clinics and institutions, including legal counsel for those institutions, in determining the scope of questions to ask.

Is information in the medical chart confidential?

There are a number of legal protections for the confidentiality of medical information. In California, the sources of these protections include, among others, the constitutional right of privacy, the Confidentiality of Medical Information Act, the Patient Access to Health Records Act, the physician and psychotherapist patient privileges, professional licensing laws, and professional codes of ethics. These protections extend to the medical records of minors as well as adults. In addition, generally when a minor has the right to consent to health care services, such as family planning, she also has the right to control disclosure of medical records related to that care.¹⁶

However, protection for the confidentiality of medical information is never absolute. Numerous situations arise in which confidentiality may be overridden or disclosure may be required. For example, disclosure of medical records can be compelled by a board, commission, or

¹⁵*People v. Stockton Pregnancy Control Medical Clinic*, 249 Cal. Rptr. 762 (1988) at 769.

¹⁶*See, e.g.*, California Civil Code § 56.10, 56.11, 56.12; California Health and Safety Code §§ 1795, 1795.12.

administrative agency pursuant to its lawful authority, or pursuant to court order or subpoena.¹⁷ Moreover, disclosure of some confidential medical information is likely to be required in the course of a child abuse investigation. The court in *Stockton* held that to the extent that the reporting requirements of California Penal Code Section 11166 conflict with provisions about the confidentiality of medical information (under Civil Code Section 56.11), the reporting requirements of the Penal Code prevail.¹⁸

Is information in provider notes confidential?

Information contained in the written notes of health care providers that are maintained apart from a patient's formal medical record may also be subject to disclosure requirements. The scope of mandatory disclosure of such information may vary from case to case and is not explicitly addressed in many of the controlling legal provisions. However, the possibility always exists that circumstances may arise in which the disclosure of information contained in a provider's notes would be compelled.

How should a subpoena or other legal request for confidential information be handled?

A subpoena or request for disclosure will not necessarily withstand a legal challenge. Moreover, even when the authorities have a right to some information, they may be seeking more than they are entitled to obtain. When disclosure of confidential and sensitive information is sought, health care providers are encouraged to seek legal counsel *before* disclosing the information.

What should family planning providers tell their patients about the reporting requirements?

Recent studies have confirmed what family planning providers have long known: confidentiality is an important issue for adolescents seeking health care services, particularly family planning and other sensitive services.¹⁹ Many providers of health care to adolescents have worked to educate themselves and their patients about the right to confidential care. Furthermore, some young people choose certain clinics or providers specifically because they expect greater confidentiality protection at those sites.

¹⁷California Civil Code § 56.10.

¹⁸*People v. Stockton Pregnancy Control Medical Clinic*, 249 Cal. Rptr. 762 (1988) at 768.

¹⁹*See, e.g., Carol A. Ford et al., "Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care: A Randomized Controlled Trial," 278 JAMA 1029 (1997).*

Thus, telling adolescent patients about the *limits* of confidentiality is a difficult issue for providers. Many providers do not offer this information. In one recent study, 64% of the California physicians who conveyed information about confidentiality to their adolescent patients assured them that the confidentiality was unconditional (“all discussions with me are confidential”).²⁰

No assurance of confidentiality can be absolute. Moreover, since passage of AB 327, the limits of confidentiality for adolescents seeking family planning services, or other services related to sexual activity, have increased.

While there is no stated legal requirement to discuss with patients the requirements of the child abuse reporting law, ethical standards do require that patients be told the limits of confidentiality before they disclose sensitive information. The American Academy of Family Physicians, American College of Obstetricians and Gynecologists, American Academy of Pediatrics, and American Medical Association all have issued policy recommendations on this point.²¹ Some providers have found that giving this information both in writing (for example, on a self-administered health history form) and verbally is successful.

How does reporting really work?

The child abuse reporting law outlines, in general terms, the requirements and procedures for making abuse reports. The actual handling of abuse reports varies significantly from county to county, and even between local county offices. Family planning providers should consult with their local child welfare agencies (often referred to as child protective services or CPS) and police departments for more information on the handling of child abuse reports, and especially newly-mandated reports under AB 327.

Who is a mandated reporter?

The named categories of mandated reporters in the Child Abuse and Neglect Reporting Act are: child care custodian, health practitioner, employee of a child protective agency, child visitation monitor, firefighter, animal control officer, humane society officer, and commercial film and photographic print processor. Clergy members serving in any of these roles are also mandated

²⁰Carol A. Ford and Susan G. Millstein, “Delivery of Confidentiality Assurances to Adolescents by Primary Care Physicians,” 151 *Arch Pediatr Adolesc Med* 505 (1997).

²¹Janet E. Gans, *Policy Compendium on Confidential Health Services to Adolescents*, Chicago: American Medical Association (1993).

reporters; clergy members receiving penitential communications are exempt from reporting information received through such communications.²²

Within the category of health practitioners, the law names the following subcategories of providers: physicians and surgeons; psychiatrists; psychologists; dentists; residents; interns; podiatrists; chiropractors; licensed nurses; dental hygienists; optometrists; any other person licensed under Division II (commencing with section 500) of the Business and Professions Code; marriage, family, and child counselors; emergency medical technicians and paramedics; registered psychological assistants; marriage, family, and child counselor trainees; unlicensed marriage, family, and child counselor interns; state or county public health employees who treat minors for venereal disease or any other conditions; and coroners, medical examiners, or any other persons who perform autopsies.²³

Who is a non-mandated reporter?

The law does not require, but does allow, people who are not mandated reporters to make child abuse reports.²⁴ Similarly, the law allows mandated reporters who have acquired knowledge or suspicion of child abuse *outside* the scope of their employment or when they are not acting in their professional capacity to make reports.

Within a team or a single clinic or site, who should report?

The duty to report is individual. This means that supervisors and administrators cannot stop a provider from reporting or sanction him or her for doing so. An employer also cannot relieve a mandated reporter from the duty to report abuse that he or she knows, or reasonably suspects, has occurred.²⁵

Where people work in a team, the law does not require every person with knowledge or suspicion of a single incident of abuse to make the same report. If two or more mandated reporters jointly have knowledge or reasonable suspicion of the same instance of child abuse, one person may be

²²California Penal Code § 11166.

²³California Penal Code § 11165.8.

²⁴California Penal Code § 11166(f).

²⁵California Penal Code § 11166(h).

designated to make the report. However, any member of the group who knows that the person designated to report has failed to do so must make the report instead.²⁶

How and to whom should reports be made?

The law requires that reports of known or suspected child abuse be made to a “child protective agency immediately or as soon as practically possible by telephone,” with a written report to follow “within 36 hours of receiving the information concerning the incident.”²⁷ “Child protective agency” is defined as a police or sheriff’s department, a county probation department, or a county welfare department.²⁸ County welfare departments are often referred to as “child protective services” or “CPS.”

The child abuse report must include the following information:

- C the name of the child;
- C the present location of the child;
- C the nature and extent of the injury;
- C the name of the person making the report; and
- C any other information, including the information that led the person to suspect abuse, requested by the child protective agency.²⁹

Child abuse reporting forms are available from child protective agencies.

Is the identity of individuals making child abuse reports confidential?

Yes. The identity of the reporter is confidential, and should only be disclosed between child protective agencies or in certain other limited circumstances.³⁰ Non-mandated reporters are not required to include their names in the child abuse report.³¹

²⁶California Penal Code § 11166(g).

²⁷California Penal Code § 11166(a).

²⁸California Penal Code § 11165.9.

²⁹California Penal Code § 11167(a).

³⁰California Penal Code § 11167(d).

³¹California Penal Code § 11167(e).

Can individuals be held liable for making child abuse reports?

Generally, no. The law is weighted heavily toward identifying possible child abuse. Therefore, it is not a crime to make a report of child abuse in good faith. While there is no guarantee that a mandated reporter will never be sued for making a child abuse report, mandated reporters are protected from civil and criminal liability for required reports.³² Non-mandated reporters are also protected from civil and criminal liability for a report unless it can be proved that they knew the report was false or it was made with reckless disregard of the truth or falsity of the report.³³

Can individuals be held liable for *not* making child abuse reports?

Yes. Mandated reporters who fail to make required reports may incur criminal or civil liability, or both. The child abuse reporting law explicitly includes criminal penalties for mandated reporters who knowingly fail to report child abuse. Failure to report is a misdemeanor, subject to 6 months in county jail, a fine of up to \$1,000, or both.³⁴ In addition, a mandated reporter who fails to report may face civil liability.³⁵

What happens when a child abuse report is made?

It depends. The response to reports of child abuse varies greatly by location. The law says that, after receiving a report of child abuse, a county welfare or probation department must immediately make a cross-report to the law enforcement agency having jurisdiction over the case. Similarly, law enforcement agencies must cross-report to the county welfare department and to the district attorney's office.³⁶

The risks and benefits of reporting to the welfare department (CPS) or the police also vary by location, as do these agencies' responses. In some places, providers feel that CPS rarely follows up on *any* abuse reports regarding adolescents, especially if they are related to consensual sexual activity. In other communities, CPS and law enforcement agencies are aggressive in pursuing these investigations. It is important that providers understand the philosophies and practices of

³²California Penal Code § 11172(a).

³³California Penal Code § 11172(a).

³⁴California Penal Code § 11172(e).

³⁵*Landeros v. Flood* (1976) 17 Cal. 3d 399.

³⁶California Penal Code § 11166(i).

their local agencies. Providers are encouraged to consult with their local CPS agencies, police departments, and district attorney's offices.

Does the reporting of voluntary sexual activity based only on age differences of participants lead to criminal prosecution of the perpetrator?

Possibly. As stated above, law enforcement agencies receiving child abuse reports are mandated to cross-report all cases to the district attorney's office, where a decision is made regarding prosecution of the case. In 1995, California established the Statutory Rape Vertical Prosecution Program, which provides financial support to enable counties to assign a single prosecutor and investigator to follow these cases from beginning to end. As a result, prosecution of statutory rape cases has increased significantly across the state.

There is significant variation between counties as to which statutory rape cases are prosecuted. Again, providers are encouraged to familiarize themselves with local policies and practices and to consult with their district attorney's office regarding this issue.

Appendix A: Child Sexual Assault Reporting Requirements

Activity	Report Required?	Source
<p>Minor under age 14: Consensual sexual activity with minor partner under age 14 and of similar age, and additional facts do not suggest abuse.</p> <p>This includes minors under age 14 who seek medical treatment for STDs, pregnancy, or abortion, where practitioners believe these conditions are the result of consensual sexual activity, and additional facts do not suggest abuse.</p>	NO	<p style="text-align: center;"><i>Planned Parenthood Affiliates of CA v. Van de Kamp</i></p> <p style="text-align: center;"><i>People v. Stockton Pregnancy Control Medical Clinic</i></p> <p style="text-align: center;">67 Ops.Atty.Gen. 235, 6-1-84</p>
<p>Minor under age 14: Consensual sexual activity with partner age 14 or over, and additional facts do not suggest abuse.</p>	YES	<p style="text-align: center;">Cal. Penal Code § 288(a) Cal. Penal Code § 11165.1(a) <i>In re Paul C.</i></p>
<p>Minor age 14 or 15: Consensual sexual activity with partner at least 10 years older, and additional facts do not suggest abuse.</p>	YES	<p style="text-align: center;">Cal. Penal Code § 288(a) Cal. Penal Code § 11165.1(a)</p>
<p>Minor age 14 or over: Consensual sexual activity with minor partner age 14 or over and of similar age, and additional facts do not suggest abuse.</p>	NO	<p style="text-align: center;">Imputed from lack of requirement for younger minors, legislative silence on the issue, and holding in <i>People v. Stockton</i></p>
<p>Minor under age 16: Consensual sexual intercourse (statutory rape) with partner age 21 or older, and additional facts do not suggest abuse.</p>	YES	<p style="text-align: center;">Cal. Penal Code § 261.5(d) Cal. Penal Code § 11165.1(a)</p>
<p>Minors age 14 or over but younger than age 16: Consensual sexual activity with person under 21, and additional facts do not suggest abuse.</p>	NO	<p style="text-align: center;">Not specifically mandated by new reporting law</p>
<p>Minor age 16 or over: Consensual sexual activity with adult of any age, and additional facts do not suggest abuse.</p>	NO	<p style="text-align: center;">Not specifically mandated by new reporting law</p>
<p>Other situations where provider knows or has a reasonable suspicion that there has been sexual assault, as defined in the statute.</p>	YES	<p style="text-align: center;">Cal. Penal Code § 11165.1(a)</p>