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DEPARTMENT OF CONSUMER AFFAIRS

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BOARD OF PSYCHOLOGY
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MEMORANDUM

DATE	October 8, 2013
TO	Board of Psychology Members
FROM	Linda Kassis Linda Kassis Administrative Services Coordinator
SUBJECT	**Agenda Item 7c – Contemporary and Emerging Issues Committee**

Child Abuse and Neglect Reporting Act (CANRA) and Mandated Reporting – Penal Code Sections 261.5, 288, and 11165.1. The CANRA specifies types of sexual contact that must be reported as child abuse to law enforcement by mandated reporters.

Background

Thomas O'Connor, Interim Executive Officer was contacted by Charles Faltz, Ph.D., Director, Professional Affairs, California Psychological Association, regarding an opinion rendered to the Board of Behavioral Sciences (BBS) regarding whether the Child Abuse and Neglect Reporting Act (CANRA) should be amended to ensure that practitioners do not have to report certain homosexual activities.

Attached is a legal opinion prepared for the BBS by Dianne R. Dobbs, Senior Staff Counsel, Department of Consumer Affairs (DCA), Legal Affairs. In its legal opinion, DCA found that CANRA does not require a mandated reporter to report incidents of consensual sex between minors of a similar age for any actions described in PC Section 11165.1, unless there is reasonable suspicion of force, exploitation, or other abuse. DCA also found the following, based on past court cases:

- Courts have found that the legislative intent of the reporting law is to leave the distinction between abusive and non-abusive sexual relations to the judgment of professionals who deal with children.
- Review of other legal cases has found that the law does not require reporting of consensual sexual activities between similarly-aged minors for any sexual acts unless there is evidence of abuse.

Attachments:
DCA Legal Opinion dated April 11, 2013
Penal Code Sections 261.5, 288, and 11165.1

Action Requested:
No action requested

Subject: FW: DCA Legal Opinion on mandated reporting
Attachments: DCA (2013) CANRA memo.pdf

-----Original Message-----
From: Charles Faltz. Ph.D. [mailto:cpadpa@pacbell.net]
Sent: Monday, September 30, 2013 6:09 PM
To: O'connor, Thomas@DCA
Cc: Jo Linder-Crow; Amanda Levy
Subject: DCA Legal Opinion on mandated reporting

Hi Tom- Questions have arisen about the effect of the DCA legal opinion (attached) on the mandate to report child sexual abuse.

The opinion describes a duty that is different than what has been typically described as the standard in law for reporting in continuing educational programs presented to psychologists. Accordingly, to prevent any confusion about the interpretation of the statutory standard for reporting, we would appreciate it if you could advise us if the BOP will be relying on the DCA opinion in reviewing cases that come before it where this law is relevant.

Any clarification would be most appreciated. Thanks very much. Chuck

Charles A. Faltz, Ph.D.
Director of Professional Affairs
California Psychological Association

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MEMORANDUM

DATE	April 11, 2013
TO	Kim Madsen Members of the Board of Behavioral Sciences
FROM	DIANNE R. DOBBS Senior Staff Counsel, Legal Affairs
SUBJECT	**Evaluation of CANRA Reform Proposal Related to Reporting of Consensual Sex Between Minors**

Following presentation by Benjamin E. Caldwell, PsyD of a proposal to amend portions of the Child Abuse and Neglect Reporting Act ("CANRA") at the board meeting on February 28, 2013, the board requested a legal opinion on the proposal. The proposal seeks to amend CANRA to remove sodomy and oral copulation from the definition of sexual abuse, assault or exploitation. The purpose of the modification is to address concerns of mandated reporting in situations of consensual acts falling within these definitions when the actors are minors of like age under the law and the actions do not otherwise suggest other indications of abuse or neglect.

QUESTIONS PRESENTED

1. As written does Penal Code section 11165.1 require practitioners to report all conduct by minors that fall under the definition of sodomy and oral copulation?

2. Does the legal interpretation of CANRA warrant support of the proposed amendments?

SHORT ANSWERS

1. No. Court interpretation of CANRA dating back to 1986, and followed as recently as 2005 confirms that minors under and over age 14 can lawfully engage in consensual sexual activities with minors of a like age, and that not all sexual conduct involving a minor necessarily constitutes a violation of the law. That as such, a mandated reporter is required to report only those conditions and situations where the reporter has reason to know or suspects resulted from sexual conduct between the minor and an older adolescent or an adult and those contacts which resulted from undue influence, cohesion, use of force or other indicators of abuse.

2. No. Because practitioners are not required to report any non-abusive consensual sexual activities between minors of like age, amendment of the law is not necessary and should not be supported.

STATEMENT OF FACTS/BACKGROUND

1. Benjamin Caldwell PhyD, ("Dr. Caldwell") Legislative and Advocacy Committee Chair of the American Association of Marriage and Family Therapy – California Division seeks to amend CANRA and is seeking the support of the Board of Behavioral Sciences ("Board").

2. Dr. Caldwell claims that CANRA's inclusion of sodomy and oral copulation in the definition of sexual assault found in Penal Code section 11165.1[1] requires mandated reporters to report all homosexual activities meeting these definitions whether or not the acts are consensual and not otherwise suggestive of abuse.

3. The Senior Legislative Assistant of Assembly member Tom Ammiano believes that Dr. Caldwell and others are misinterpreting CANRA.

ANALYSIS

CANRA does not require a mandated reporter to report incidents of consensual sex between minors of similar age, as provided in section 261.5, absent reasonable suspicion of force, exploitation or other indications of abuse. The California Court of Appeal decided this issue in its 1988 ruling in *Planned Parenthood v. Van De Kamp. Planned Parenthood v. Van De Kamp (1988) 181 Cal.App.3e 245.* In that case, Planned Parenthood sought to enjoin implementation of CANRA following an opinion of the Attorney General which provided that the inclusion of section 288 in the definition of sexual assault found in section 11165.1 (a) meant that all sexual activities between and with minors under age 14 was reportable. *67 Ops.Cal. Atty.Gen. 235 (1984).*

In nullifying the AG's opinion, the court explored the legislative history and intent of CANRA and held that the legislative intent of the reporting law was to leave the distinction between abusive and non-abusive sexual relations to the judgment of those professionals who deal with children and who are by virtue of their training and experience particularly well suited to such judgment. The court reasoned that while the voluntary sexual conduct among minors under the age of 14 may be ill advised, it is not encompassed by section 288, and that the inclusion of that section in the reporting law does not mandate reporting of such activities. Id at 276.

[1] All further citations are to the Penal Code unless otherwise specified.

After the court's ruling in *Planned Parenthood*, the Legislature amended CANRA and did nothing to nullify or change the effect of the court's decision. As such, the Legislature is deemed to have approved the interpretation because where a statute has been construed by judicial decision and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approved of it. See *People v. Stockton (1988) 203 Cal.App.3d 225, citing Wilkoff v. Superior Ct.*

Following *Planned Parenthood* several other Court of Appeal cases adopted the reasoning of the court including *People v. Stockton* later in 1988, and most recently with *People v. Davis* in 2005. All these cases discuss the CANRA reporting requirements in the context of section 288 which relates to lewd and lascivious conduct with minors under 14. Though none of the cases discuss any of the other acts which also constitute sexual assault under section 11165.1(a), the same reasoning applies to those acts in that absent other indications of abuse, the law does not require the reporting of consensual sexual activities between minors of similar age for any of these acts. This interpretation is consistent with the well settled legal principle that statutes are to be construed with reference to the entire system of law of which they are a part, including the various codes, and harmonized wherever possible to achieve a reasonable result. *Cossack v. City of Los Angeles (1974) 11 Cal.3d 726, 732.*

Dr. Caldwell claims that section 11165.1(a) requires mandated reporters to report all minors engaged in sodomy and oral copulation even where the conduct is consensual and is devoid of evidence of abuse is not supported by the law. All conduct enumerated in section 11165.1(a) must be treated the same for purposes of reporting. To interpret the law otherwise would be against the intent of the legislature to leave the distinction between abusive and non-abusive sexual relations to the judgment of the professionals. An interpretation that would require the reporting of all sodomy and oral copulation without reasonable suspicion of abuse would lead to an absurd result. The court in *Planned Parenthood* said it best when it stated, "...statutes must be construed in a reasonable and commonsense manner consistent with their apparent purpose and the legislative intent underlying them, practical rather than technical, and promoting a wise policy rather than mischief or absurdity. Even a statute's literal terms will not be given effect if to do so would yield an unreasonable or mischievous result." *Planned Parenthood at 245.* Therefore, sexual conduct of minors that meet the definition of sodomy and oral copulation must be treated as all other sexual conduct noted in section 11165.1(a) and is only reported if the acts are nonconsensual, abusive or involves minors of disparate ages, conduct between minors and adults, and situations where there is reasonable suspicion of undue influence, coercion, force or other indicators of abuse.

Section 11165.1(b) further outlines limited examples of conduct which qualifies as sexual assault. There is also no evidence that any of the examples in that section would lead to a discriminatory result to justify removal of sodomy or oral copulation from subsection (a).

CONCLUSION

It is our opinion that CANRA does not require mandated reporters to report consensual sex between minors of like age for any of the actions noted in section 11165.1 unless the practitioner reasonably suspects that the conduct resulted from force, undue influence, coercion, or other indicators of abuse. Accordingly, it is not necessary to amend the statute to remove sodomy and oral copulation, as those acts are not treated differently from other acts outlined in the code.

DOREATHEA JOHNSON
Deputy Director, Legal Affairs

Dianne R Dobbs

By: DIANNE R. DOBBS
Senior Staff Counsel
Legal Affairs

Penal Code Section 11165.1.
As used in this article, "sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(a) "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 or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration), or 647.6 (child molestation).

(b) Conduct described as "sexual assault" includes, but is not limited to, all of the following:

(1) Any penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.

(2) Any sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

(3) Any intrusion by one person into the genitals or anal opening of another person, including the use of any object for this purpose, except that, it does not include acts performed for a valid medical purpose.

(4) The intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs, and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

(5) The intentional masturbation of the perpetrator's genitals in the presence of a child.

(c) "Sexual exploitation" refers to any of the following:

(1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of minor to perform obscene acts).

(2) Any person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or any person responsible for a child's welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct, or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, "person responsible for a child's welfare" means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home, residential school, or other residential institution.

(3) Any person who depicts a child in, or who knowingly develops, duplicates, prints, or exchanges, any film, photograph, video tape, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.

(Amended by Stats. 2000, Ch. 287, Sec. 21. Effective January 1, 2001.)

Penal Code Section 261.5.
(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.

(b) Any person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) Any person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) Any person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.

(e) (1) Notwithstanding any other provision of this section, an adult who engages in an act of sexual intercourse with a minor in violation of this section may be liable for civil penalties in the following amounts:

(A) An adult who engages in an act of unlawful sexual intercourse with a minor less than two years younger than the adult is liable for a civil penalty not to exceed two thousand dollars ($2,000).

(B) An adult who engages in an act of unlawful sexual intercourse with a minor at least two years younger than the adult is liable for a civil penalty not to exceed five thousand dollars ($5,000).

(C) An adult who engages in an act of unlawful sexual intercourse with a minor at least three years younger than the adult is liable for a civil penalty not to exceed ten thousand dollars ($10,000).

(D) An adult over the age of 21 years who engages in an act of unlawful sexual intercourse with a minor under 16 years of age is liable for a civil penalty not to exceed twenty-five thousand dollars ($25,000).

(2) The district attorney may bring actions to recover civil penalties pursuant to this subdivision. From the amounts collected for each case, an amount equal to the costs of pursuing the action shall be deposited with the treasurer of the county in which the judgment was entered, and the remainder shall be deposited in the Underage Pregnancy Prevention Fund, which is hereby created in the State Treasury. Amounts deposited in the Underage Pregnancy Prevention Fund may be used only for the purpose of preventing underage pregnancy upon appropriation by the Legislature.

(3) In addition to any punishment imposed under this section, the judge may assess a fine not to exceed seventy dollars ($70) against any person who violates this section with the proceeds of this fine to be used in accordance with Section 1463.23. The court shall, however, take into consideration the defendant's ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

(Amended by Stats. 2011, Ch. 15, Sec. 302. Effective April 4, 2011. Operative October 1, 2011, by Sec. 636 of Ch. 15, as amended by Stats. 2011, Ch. 39, Sec. 68.)

Penal Code Section 288.

(a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, 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 and shall be punished by imprisonment in the state prison for three, six, or eight years.

(b) (1) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.

(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent person by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, with the intent described in subdivision (a), is guilty of a felony and shall be punished by imprisonment in the state prison for 5, 8, or 10 years.

(c) (1) Any person who commits an act described in subdivision (a) with the intent described in that subdivision, and the victim is a child of 14 or 15 years, and that person is at least 10 years older than the child, is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year. In determining whether the person is at least 10 years older than the child, the difference in age shall be measured from the birth date of the person to the birth date of the child.

(2) Any person who is a caretaker and commits an act described in subdivision (a) upon a dependent person, with the intent described in subdivision (a), is guilty of a public offense and shall be punished by imprisonment in the state prison for one, two, or three years, or by imprisonment in a county jail for not more than one year.

(d) In any arrest or prosecution under this section or Section 288.5, the peace officer, district attorney, and the court shall consider the needs of the child victim or dependent person and shall do whatever is necessary, within existing budgetary resources, and constitutionally permissible to prevent psychological harm to the child victim or to prevent psychological harm to the dependent person victim resulting from participation in the court process.

(e) Upon the conviction of any person for a violation of subdivision (a) or (b), the court may, in addition to any other penalty or fine imposed, order the defendant to pay an additional fine not to exceed ten thousand dollars ($10,000). In setting the amount of the fine, the court shall consider any relevant factors, including, but not limited to, the seriousness and gravity of the offense, the circumstances of its commission, whether the defendant derived any economic gain as a result of the crime, and the extent to which the victim suffered economic losses as a result of the crime. Every fine imposed and collected under this section shall be deposited in the Victim-Witness Assistance Fund to be available for appropriation to fund child sexual exploitation and child sexual abuse victim counseling centers and prevention programs pursuant to Section 13837.

If the court orders a fine imposed pursuant to this subdivision, the actual administrative cost of collecting that fine, not to exceed 2 percent of the total amount paid, may be paid into the general fund of the county treasury for the use and benefit of the county.

(f) For purposes of paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c), the following definitions apply:

(1) "Caretaker" means an owner, operator, administrator, employee, independent contractor, agent, or volunteer of any of the following public or private facilities when the facilities provide care for elder or dependent persons:

(A) Twenty-four hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(B) Clinics.

(C) Home health agencies.

(D) Adult day health care centers.

(E) Secondary schools that serve dependent persons and postsecondary educational institutions that serve dependent persons or elders.

(F) Sheltered workshops.

(G) Camps.

(H) Community care facilities, as defined by Section 1402 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code.

(I) Respite care facilities.

(J) Foster homes.

(K) Regional centers for persons with developmental disabilities.

(L) A home health agency licensed in accordance with Chapter 8 (commencing with Section 1725) of Division 2 of the Health and Safety Code.

(M) An agency that supplies in-home supportive services.

(N) Board and care facilities.

(O) Any other protective or public assistance agency that provides health services or social services to elder or dependent persons, including, but not limited to, in-home supportive services, as defined in Section 14005.14 of the Welfare and Institutions Code.

(P) Private residences.

(2) "Board and care facilities" means licensed or unlicensed facilities that provide assistance with one or more of the following activities:

(A) Bathing.

(B) Dressing.

(C) Grooming.

(D) Medication storage.

(E) Medical dispensation.

(F) Money management.

(3) "Dependent person" means any person who has a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have significantly diminished because of age. "Dependent person" includes any person who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(g) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) apply to the owners, operators, administrators, employees, independent contractors, agents, or volunteers working at these public or private facilities and only to the extent that the individuals personally commit, conspire, aid, abet, or facilitate any act prohibited by paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c).

(h) Paragraph (2) of subdivision (b) and paragraph (2) of subdivision (c) do not apply to a caretaker who is a spouse of, or who is in an equivalent domestic relationship with, the dependent person under care.

(i) (1) Any person convicted of a violation of subdivision (a) shall be imprisoned in the state prison for life with the possibility of parole if the defendant personally inflicted bodily harm upon the victim.

(2) The penalty provided in this subdivision shall only apply if the fact that the defendant personally inflicted bodily harm upon the victim is pled and proved.

(3) As used in this subdivision, "bodily harm" means any substantial physical injury resulting from the use of force that is more than the force necessary to commit the offense.

(Amended by Stats. 2010, Ch. 219, Sec. 7. Effective September 9, 2010.)