STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY • GOVERNOR EDMUND G. BROWN JR.

BOARD OF PSYCHOLOGY – Administration
1625 N. Market Blvd., N-215, Sacramento, CA 95834
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MEMORANDUM

DATE	April 16, 2015
TO	Policy and Advocacy Committee Members
FROM	Jonathan Burke Administrative Services Coordinator
SUBJECT	**California Child Abuse and Neglect Reporting Act (CANRA) and Mandated Reporting - Penal Code Sections 261.5, 288, and 11165.1**

Background:

At our February, 2014 Meeting, the Board moved to ask for an opinion from the Attorney General (AG) clearly stating whether oral copulation and sodomy between minors of like age is reportable. It was our hope that Senator Steinberg would seek an opinion on behalf our licensees and the Board. However, staff learned in December 2014 that the request for an opinion was never forwarded to the AG.

On February 25, 2015, Assemblymember Garcia (D - AD 58) forward the Board's request for an official opinion to the AG. The opinion will also address issues regarding mandated reporting raised by the passage of AB 1775 Child Abuse and Neglect Reporting Act: sexual abuse (Melendez, Chapter 264, Statutes of 2014).

The questions laid out in the request to the AG are;

1. The Child Abuse and Neglect Reporting Act (CANRA; Pen. Code, sec. 11164 et seq.) requires "mandated reporters" to report instances of child sexual abuse, assault, and exploitation to specified law enforcement and/or child protection agencies. Does this requirement include the mandatory reporting of voluntary acts of sexual intercourse, oral copulation, or sodomy between minors of a like age?

2. Under CANRA is the activity of mobile device "sexting," between minors of a like age, a form of reportable sexual exploitation?

3. Does CANRA require a mandated reporter to relay third-party reports of downloading, streaming, or otherwise accessing child pornography through electronic or digital media?

Action Requested:

There is no action requested at this time.

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Assembly
California Legislature

CRISTINA GARCIA
ASSEMBLYMEMBER, FIFTY-EIGHTH DISTRICT

COMMITTEES
CO-CHAIR: ETHICS
HUMAN SERVICES
JUDICIARY
NATURAL RESOURCES
UTILITIES AND COMMERCE

February 25, 2015

Susan Duncan Lee
Supervising Deputy Attorney General
Office of the Attorney General
Opinion Unit, Dept. of Justice
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

RE: Attorney General Opinion – Child Abuse and Neglect Reporting Act ("CANRA")

Dear Ms. Duncan Lee:

Please consider this letter an official request to obtain a formal opinion regarding the mandated reporting requirements under the Child Abuse and Neglect Reporting Act ("CANRA").

The specific legal questions to resolve are: What instances of non-abusive sexual conduct involving minors must a mandatory reporter report to child protective agencies under CANRA? Does CANRA require a distinction be made in reporting sexual conduct depending upon the nature of the conduct suspected? Additionally, given the latest changes to Penal Code Section 11165.1(c)(3), is sexting a mandated report, and must mandated reporters report third party reports of such acts as downloading or streaming child pornography.

It is my hope that this opinion will clarify the duties of mandated reporters as to the state of the reporting requirements outlined in CANRA.

Sincerely,

CRISTINA GARCIA
Assemblymember, California State Legislature

cc: Board of Psychology

Printed on Recycled Paper

Enclosure(s):

(i) Board of Psychology Opinion Request Letter
(ii) BBS Legal Opinion

Continuing Education Resources and Guidelines that provide contradictory information for Mandated Reporters, or refer to the confusion surrounding this issue.

(iii) County of Santa Clara information sheet for mandated reporters. Comments on "hopelessly blurred" situation.

(iv) CAMFT Guide for Mandating Reporting that references the BBS opinion

(v) Legal article arguing that oral copulation and sodomy are always mandated reports if they involve a minor

(vi) Guide for Psychologists published by Girls Incorporated of Alameda County that states that oral copulation and sodomy are mandated reporting.

(vii) Child Abuse Council of Santa Clara County reporting guidelines that indicate that oral copulation and sodomy are mandated reporting.

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BOARD OF PSYCHOLOGY – EXECUTIVE OFFICE
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February 13, 2015

The Honorable Cristina Garcia,
California State Assembly
State Capitol, Room 2013
Sacramento, CA 95814

RE: Attorney General Opinion – Child Abuse and Neglect Reporting Act ("CANRA")

Dear Assemblymember Garcia:

The Board of Psychology (Board) seeks your assistance in obtaining clarification from the Attorney General's Office on the mandated reporting requirements under the Child Abuse and Neglect Reporting Act ("CANRA").

CANRA, Penal Code section 11164 et seq., requires certain enumerated mandated reporters, including psychologists and registered psychological assistants, to report to appropriate authorities suspected child abuse or neglect. "Child abuse" includes sexual abuse as defined in Penal Code section 11165.1, and includes certain acts of sodomy (Penal Code section 286) and oral copulation (Penal Code section 288a), and certain lewd and lascivious acts (Penal Code section 288). Since 1986, the law has been clear that reporters are not required to report consensual sexual intercourse between minors under age 14 as sexual abuse under Penal Code section 288 in the absence of any other signs of abuse. (See *Planned Parenthood Affiliates of California et al., v. John K. Van de Kamp* (1986) 181 Cal.App.3d 245.) Historically, however, the Board of Psychology, as well as several other healing arts boards, has acknowledged different reporting requirements for acts of sodomy and oral copulation between minors than for other sexual acts, like sexual intercourse, that has been discussed and outlined in secondary source materials for psychologists to assist psychologists' compliance with the law. Specifically, according to these long-standing sources, practitioners do not have to report their knowledge of non-abusive consensual sexual conduct between minors of a like age to authorities except in instances when acts of sodomy or oral copulation have occurred.

On April 11, 2013, the Board of Behavioral Sciences (BBS) received a legal opinion from its counsel that found that a reasonable reading of CANRA does not require the reporting of any consensual sexual activity between minors, and that no amendments to CANRA were necessary to clarify that interpretation. Counsel concluded, "It is not

necessary to amend the statute to remove sodomy and oral copulation, as these acts are not treated differently from other acts outlined in the code." (The opinion has been made public by the Board of Behavioral Sciences, and is attached for your reference.)

While the Board generally agrees with the conclusion of the BBS legal opinion, a significant shift in the interpretation of CANRA after nearly 30 years of a different standard without a change in the statute is cause for confusion for the Board's licensees. The state professional association for psychologists, noting that the BBS opinion described a duty different from what has been described by educators for psychologists, raised the question with the Board as to what standard would the Board be relying upon in reviewing cases where CANRA was relevant. In addition to a long history of psychologists learning a standard for reporting sexual activity between minors of a like age that differentiates between the type of sex act (i.e., sodomy and oral copulation are reportable; intercourse is not), the Board is aware that violations of CANRA are enforced as misdemeanors. Issuing an opinion as the interpretation of a penal statute that may not be accurate carries criminal implications for its licensees even if the Board does not pursue an administrative action because of a different interpretation of the standard. Therefore, the Board is seeking an opinion from the Attorney General's Office on behalf of its licensees to clarify what CANRA requires them to report.

The Board is seeking your help in obtaining an Attorney General's Opinion on this matter because its impact will affect numerous healing arts licensing boards, including the Medical Board of California, BBS, and Board of Registered Nursing.

The specific legal questions to resolve are: What instances of non-abusive sexual conduct involving minors must a mandatory reporter report to child protective agencies under CANRA? Does CANRA require a distinction be made in reporting sexual conduct depending upon the nature of the conduct suspected?

It is the Board's hope that this opinion will clarify how healing arts boards properly educate their licensees as to the state of the law, and discipline their licensees for violations of the reporting requirements outlined in CANRA.

The Board appreciates any assistance your office can provide. If your office has any questions or concerns regarding this request, please feel free to have them contact me at (916) 574-7113.

Sincerely,

ANTONETTE SORRICK
Executive Officer, Board of Psychology

cc: Members, Board of Psychology
Kim Madsen, Executive Officer, Board of Behavioral Sciences

Attachment(s) or Enclosure(s):

(i) BBS Legal Opinion

Continuing Education Resources and Guidelines that provide contradictory information for Mandated Reporters, or refer to the confusion surrounding this issue.

(ii) County of Santa Clara information sheet for mandated reporters. Comments on "hopelessly blurred" situation.

(iii) CAMFT Guide for Mandating Reporting that references the BBS opinion

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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

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MANDATED REPORTERS: WHEN MUST YOU REPORT *CONSENSUAL* SEXUAL ACTIVITY INVOLVING MINORS?

The question of whether the Child Abuse and Neglect Reporting Act (CANRA) (Penal Code §§ 11165 - 11174) requires designated professionals to report consensual sexual activity involving minors remains a "hopelessly blurred" area of the law. On the one hand, *Planned Parenthood v. Van de Kamp* (1986) 181 Cal.App.3d 245 holds that laws which require the reporting of voluntary, nonabusive sexual behavior between minors of a similar age violate a minor's right to sexual privacy. On the other hand, *People v. Stockton Pregnancy Control Medical Clinic, Inc.* (1988) 203 Cal.App.3d 225, as well as legislative changes in 1997, affirm that certain types of sexual conduct involving minors still must be reported even if consensual. (See AB 327, Stats. 1997, c. 83.) The following guidelines are designed to synthesize conflicting legal authority and provide mandated reporters with reasonable guidance.

☞**Both children are under age 14? No report is required** unless there is disparate age, intimidation, coercion, exploitation or bribery.

☞**One child is under age 14, the other child is age 14 - 17? Yes, a report is required.** Penal Code sections 11165.1(a) and 288(a) afford special protection to children under age 14.

☞**Both children are ages 14 - 17? No report is required,** unless the sexual activity involves incest (see Penal Code § 285, Family Code 2200) or there is evidence of abuse or an exploitative relationship.

☞**The child is age 14 - 17, the other person 18 or older? No report is required,** unless the sexual activity involves one of the following: 1. Incest (see Penal Code § 285, Family Code 2200); 2. Unlawful Sexual Intercourse (also known as "Statutory Rape") involving a person over age 21 with a child age 14 or 15 (see Penal Code § 261.5(d)); and 3. Lewd and Lascivious Acts involving a child age 14 or 15 and a person who is at least ten years older than the child (see Penal Code § 288(c)(1)).

While consensual sexual intercourse between a child (a person under age 18) and an adult (a person age 18 or older) is still a crime and thus subject to prosecution, California law only requires that it be reported if the child is under age 16 and the adult is over age 21. (See Penal Code § 261.5(a).)

Note: Sodomy (Penal Code § 286); Oral Copulation (Penal Code § 288a) and Penetration by Foreign Object (Penal Code § 289) (which includes a penetration by a finger) are still listed as reportable offenses under Penal Code § 11165.1, but recent cases such as *People v. Hofsheier* (2006) 37 Cal. 4th 1185 and *Lawrence v. Texas* (2003) 539 U.S. 558 cast doubt on the constitutionality of treating these types of consensual sexual activity different from sexual intercourse.

[Prepared by L. Michael Clark, Senior Lead Deputy County Counsel, Santa Clara County / Revised December 2006]

Reporting Consensual Activity Between Minors:

The Confusion Unraveled

CATHERINE ATKINS, STAFF ATTORNEY
(Revised May 2013)

Time and time again, there seems to be much confusion with regard to whether an MFT must, or is even permitted to, report consensual sexual activity involving minors. The information below applies only to consensual sexual activity-not incest, date rape or any situation in which the minor did not fully consent to the sexual activity. Involuntary sexual activity involving minors, and incest involving a minor (even when voluntary), is always a mandatory report.

Below is a chart which identifies the various ages of children and consensual sexual activity at issue[1]:

"Child" refers to the person that the mandated child abuse reporter is involved with.	**Definitions and Comments**	**Mandatory Report**	**Not Mandatory Report**
A. Child younger than 14 years old			
1. Partner is younger than 14 years old and of similar chronological or maturational age. Sexual behavior is voluntary & consensual. There are no indications of intimidation, coercion, bribery or other indications of an exploitive relationship.	See, *Planned Parenthood Affiliates of California v. John K. Van De Kamp* (1986) 181 Cal. App. 3d 245 (1986); See also, *In re Jerry M.* 59 Cal. App. 4th 289.		X
2. Partner is younger than 14 years old, but there is disparity in chronological or maturational age or indications of intimidation, coercion or bribery or other indications of an exploitive relationship.		X	

Child refers to the person from the mandated child abuse reporter is involved with	Definitions and Comments	Mandatory Report	Not Mandatory Report
3. Partner is 14 years or older.		X	
4. Lewd & Lascivious acts committed by a partner of any age.	The perpetrator has the intent of "Arousing, appealing to or gratifying the lust, passions, or sexual desires of the perpetrator or the child". This behavior is generally of an exploitative nature; for instance, 'flashing' a minor- exposing one's genitals to a minor.	X	
5. Partner is alleged spouse and over 14 years of age.	The appropriate authority will determine the legality of the marriage.	X	

B. Child 14 or 15 years old

1. Partner is less than 14		X	
2. Unlawful Sexual Intercourse with a partner older than 14 and less than 21 years of age & there is no indication of abuse or evidence of an exploitive relationship.			X
3. Unlawful Sexual Intercourse with a partner older than 21 years of age.		X	

"Child" refers to the person that the mandated child abuse reporter is involved with:	Definitions and Comments	Mandatory Report	Not Mandatory Report
4. Lewd & Lascivious acts committed by a partner more than 10 years older than the child.	The perpetrator has the intent of "Arousing, appealing to or gratifying the lust, passions, or gratifying the lust, passions, or sexual desires of the perpetrator or the child". This behavior is generally of an exploitative nature; for instance, 'flashing' a minor- exposing one's genitals to a minor.	X	
5. Partner is alleged spouse and over 21 years of age.	The appropriate authority will determine the legality of the marriage.	X	

C. Child 16 or 17 years old

1. Partner is less than 14		X	
2. Unlawful Sexual Intercourse with a partner older than 14 & there is no indication of an exploitive relationship.			X
3. Unlawful Sexual Intercourse with a partner older than 14 & there is evidence of an exploitive relationship.		X	
4. Partner is alleged spouse and there is evidence of an exploitive relationship.	The appropriate authority will determine the legality of the marriage.	X	

D. Oral Copulation and Sodomy of Child under the age of 18

Historically most county agencies and professional associations stated that under Penal Code section 11165.1, all sodomy, oral copulation, penetration of a genital or anal opening by a foreign object, even if consensual, with a partner of any age, was a mandatory report.

However, on April 11, 2013, the Board of Behavioral Sciences (BBS) released an evaluation of the Child Abuse and Neglect Reporting Act (CANRA), specifically answering the question: "Did Penal Code 11165.1 require practitioners to report all conduct by minors that fall under the definition of sodomy and oral copulation?"

Counsel to the BBS stated, in summary, that court interpretations throughout the years confirmed that minors can lawfully engage in consensual sex with other minors *of like age*, without the necessity of a mandatory report. Counsel further stated that while the cases cited in her analysis did not directly discuss oral copulation and sodomy between minors, the same reasoning applied and as such, practitioners were not required to report all conduct by minors that fell under the definition of sodomy and oral copulation.

So what does this mean? When a provider learns of consensual, non-abusive sexual activity between two minors, the provider would:

1. Utilize the chart above to determine if the ages are "of like ages."
2. If there is a mandatory report, based on the ages above, for intercourse, certainly there would be a mandatory report for oral copulation or sodomy.
3. However, if there is no mandatory report, based on the ages above, according to the BBS, there would be no mandatory report necessary in the case of oral copulation or sodomy either.
4. Forced, coerced, and/or non-consensual sexual activity is always a mandatory report.

NOTE: It is important to note that the recent BBS evaluation is the BBS' interpretation of law. While the BBS evaluation would be a good evidentiary resource in defense of a provider who is challenged in court for not making a mandatory report for consensual oral copulation or sodomy, the laws regarding mandatory reporting have not changed. Since state law regarding reporting of consensual oral copulation and sodomy has not changed and this exact issue has not been examined by the courts, the conservative approach, in order to gain immunity from suit under CANRA, would be to continue to report those types of consensual acts between minors.

This information is intended to provide guidelines for addressing difficult legal dilemmas. It is not intended to address every situation that could potentially arise, nor is it intended to be a substitute for independent legal advice or consultation. When using such information as a guide, be aware that laws, regulations and technical standards change over time, and thus one should verify and update any references or information contained herein.

References

1 This chart was adapted from the Child Abuse Council of Santa Clara County found at www.cacscc.org.

Catherine L. Atkins, JD, is a Staff Attorney and the Deputy Executive Director at CAMFT. Cathy is available to answer members' questions regarding legal, ethical, and licensure issues.

Reporting Consensual Sexual Activity Involving Minors

(November/December 1999
Updated 2002)

By Bonnie R. Benitez, Attorney
Previously employed with CAMFT

There seems to be much confusion with regard to whether an MFT must or is even permitted to report consensual sexual activity involving minors. The information below applies only to consensual sexual activity-not incest, date rape or any situation in which the minor did not fully consent to the sexual activity.

The general rule is that consensual sexual activity is NOT reportable. Listed below are the three main exceptions to this general rule:

(1) Sexual intercourse between a minor under 16 (15 and younger) and an adult 21 and over.

(2) Lewd or lascivious conduct where the minor is 14 or 15 years old and the adult at least 10 years older than the minor. 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.

(3) Any consensual sexual contact between minors where one is over 14 years of age and one is under 14 years of age, which may apply to lewd touching if done with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the person involved or the child.

It is clear from these exceptions that a minor who is 16 or 17 years old can engage in any sexual activity (including intercourse) with anyone of any age with the exception of another minor who is under 14. While such sexual activity may be criminal (statutory rape if the minor is having intercourse with a sexual partner 18 or older), it is not reportable under the Child Abuse and Neglect Reporting Act and should therefore remain confidential.

Other sexual activity, which is not reportable, includes voluntary sexual conduct between children who are both under the age of 14 years and who are of similar age, maturity, and sophistication.

Some sexual conduct, while consensual, may be reportable due to the nature of the conduct. Penal Code section 11165.1 includes oral copulation and anal sex (sodomy) in the definition of sexual assault, without making allowances for the ages of the persons involved in the conduct. As a result, two 16-year-olds could engage in consensual sexual intercourse, and it would not be reportable as child abuse. However, oral sex between the same 16-year-olds would call for a report. As mandated reports, therapists are not investigators of child abuse. Therefore, a therapist need not inquire into the type of sexual activity a minor is having. However, if certain kinds of sexual conduct are brought to the attention of the mandated report, he or she would be required to make a report.

Because of the significant penalties and ramifications of not making a report, and because of the protections given to mandated reporters who do report their reasonable suspicions of child abuse, therapists will probably opt to make reports in cloudy situations. It is important for all mandated reporters to read and become familiar with the Child Abuse and Neglect Reporting Act (California Penal Code Sections 11164-11174.3).

This information is intended to provide guidelines for addressing difficult legal dilemmas. It is not intended to address every situation that could potentially arise, nor is it intended to be a substitute for independent legal advice or consultation. When using such information as a guide, be aware that laws, regulations and technical standards change over time, and thus one should verify and update any references or information contained herein.

Following are a few situations to contemplate with regard to minors and consensual sexual activity. Unless otherwise specified, each example is assumed to be consensual. Read the example and apply the rules listed above.

1. A 14-year-old girl discloses to you that she is engaging in sexual intercourse with her 20-year-old boyfriend.
2. A 17-year-old boy discloses to you that he is engaging in sexual intercourse with his 30-year-old neighbor.
3. A 23-year-old woman discloses to you that she is engaging in sexual intercourse with a 16-year-old friend of her younger brother.
4. A 13-year-old girl discloses to you that she is engaging in sexual activity, but not intercourse, with her 16-year-old boyfriend.
5. A 16-year-old girl discloses to you that she recently had intercourse with a former boyfriend who is 22 years old. She also indicates that she has not been sexually active with anyone else, and while she did not want to have sex with the former boyfriend she had been drinking and did not "fight him off."
6. A 10-year-old boy discloses to you that he and a friend who is 12 engaged in some sexual touching. The 10 year old also discloses that he initiated the sexual activity.
7. A 10-year-old boy discloses to you that he and a friend who is 12 engaged in some sexual touching. The 10 year old also discloses that the friend initiated the sexual activity.
8. A 27-year-old patient discloses to you that he had sex with a younger girl a few years ago. The girl is now 18.
9. A 15-year-old boy discloses to you that he has been engaging in sexual intercourse with a woman who is 22. The boy also discloses that he originally initiated the sexual activity and continues to pursue the woman.
10. A 14-year-old girl discloses to you that she has been engaging in sexual activity with her 15-year-old best friend, who is also a girl.
11. A 17-year-old discloses to you that he has been having anal intercourse with his 18-year-old girlfriend.
12. A 16-year-old discloses to you that she has been engaging in oral sex with her 16-year-old boyfriend.

Answers:

1. Not reportable. Does not fall under any of the exceptions.
2. Not reportable. Does not fall under any of the exceptions.
3. Not reportable. Does not fall under any of the exceptions.
4. Likely reportable. See exception (3); it is important to consider all of the facts and circumstances presented to determine whether the activity falls within the exception.
5. May be reportable. There is a question here as to whether the intercourse was consensual. If the minor indicates that the intercourse was consensual, the activity would not be reportable because she is 16 and the activity does not fall under any of the exceptions. If the minor indicates that the intercourse was not consensual, the activity would be reportable as sexual assault.
6. May be reportable. Consider the relative ages of the participants as well as their level of maturity. Here, the participants are of reasonably similar age, the activity was consensual and may be considered experimental activity. It is important to consider all of the facts and circumstances presented.
7. May be reportable. Consider the relative ages of the participants as well as their level of maturity. Here, the participants are of reasonably similar age, the activity was consensual and may be considered experimental activity. It is important to consider all of the facts and circumstances presented.
8. Not reportable. The girl is no longer a minor. Therapists do not report adults who were abused as children.
9. Mandated report, falls under exception (1).

10. Not reportable. Does not fall under any of the exceptions. However, it is important to consider all of the facts and circumstances presented.
11. Mandated report. Anal intercourse (sodomy) involving a minor of any age is reportable (see Penal Code section 11165.1(a)), regardless of the genders of the persons involved.
12. Mandated report. Oral copulation involving any a minor of any age is reportable.

This article was published in the November/December 1999 issue of The California Therapist and has been updated for 2002. The information contained in this article is intended to provide guidelines for addressing difficult legal dilemmas. It is not intended to address every situation that could potentially arise, nor is it intended to be a substitute for independent legal advice or consultation. When using such information as a guide, be aware that laws, regulations and technical standards change over time, and thus one should verify and update any references or information contained herein.

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Mandated Reporting of Suspected Child Abuse

Michael Donner, Ph.D. and the 2004 Expertise Series Task Force

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California law and the American Psychological Association Ethical Principles Of Psychologists and Code of Conduct (2002) require psychologists to protect confidentiality. It is a violation of law, and unprofessional conduct, to disclose confidential information received in psychotherapy unless permitted to do so by law. The Child Abuse and Neglect Reporting Act (CANRA) is a law which mandates or permits certain disclosures in specific situations.

Psychologists must keep in mind that CANRA defines most, if not all, of the terms that apply to the mandate or permission to report. Some behaviors that psychologists may consider abusive will not be defined as such in CANRA. Psychologists must be aware of CANRA's definitions, and apply those definitions to reporting situations. (Penal Code Section 11164-11174.4)

CANRA makes an important distinction between mandated reporting and permissible reporting. Failure to make a mandated report is illegal, subject to discipline by the Board of Psychology, and may lead to civil suit. Permissible reports are left to the psychologist's discretion and psychologists are legally permitted to go against the wishes of the child or parent in making them.

Psychologists who make mandatory or permissible reports may be sued but are immune from civil liability if they follow the law. The immunity applies to the decision-making leading to a report as well as to the report itself. However, the immunity may not apply to post-reporting actions that are outside the scope of the mandated report, such as, taking on an investigative role.

Civil immunity does not prevent the Board of Psychology from taking disciplinary action where a psychologist has made a frivolous report or has made a report for an improper purpose. To impose discipline, the Board of Psychology would need to establish that the psychologist engaged in an extreme departure from the standard of care, not just a mistake or error of judgment.

MANDATED REPORTING

When psychologists acting in their professional capacity have knowledge or a reasonable suspicion that a child has been the victim of abuse or neglect *as defined by CANRA*, an oral and a written report must be completed.

Reports should be made as soon as reasonably possible by telephone. A report may be directed to a Police Department, Sheriff's Department, or Children's Protective Services, which are typically a part of the County Welfare Offices. A written report (a form for which can be provided by any of the above) must be submitted within 36 hours (PC 11166 [a]). If the suspected abuse occurred outside of California, the psychologist still must report in California because psychologists may not have immunity for reports made to officials outside of California.

DEFINITIONS

"Reasonable Suspicion"—This means that the edu-cation and training of psychologists in child abuse and neglect would lead a reasonable psychologist to suspect abuse. There must be some *objective* basis for suspecting abuse. A hunch, intuition or impression does not constitute an objective basis.

"A child has been the victim"—(1) The victim must still be a child, not an adult who was victimized as a child. (2) The abuse must have already occurred. A concern that abuse COULD occur is not reportable.

BEHAVIOR THAT MUST BE REPORTED

1. Sexual Abuse—Any form of non-consensual sexual activity between an adult and a child, i.e., someone 18 or over with someone under 18. Sexual activity includes any sexual or sexualized behavior that is intended to arouse the sexual desire of either the adult or the child, or sexually exploit the child. This includes intercourse, oral and anal sex, and a wide range of behaviors such as kissing, touching, fondling or groping (even through clothing), or showing of pornography (Penal Code Section 11165.1). A coerced agreement to perform sexual acts is not consent.

2. Reportable Consensual Sexual Activity - The rules involving CONSENSUAL activity are complicated and not necessarily intu- itive. These should be read carefully and referred to as the situation requires. See table for further clarification.

a. Any consensual sexual activity between minors where one is 15 years old or over and the other is 13 or younger. This requirement includes the entire range of sexual activities, and probably includes behaviors that are normative and even age appropriate. However the CANRA mandates a report.

b. Any sexual activity between a child 14 or 15 years old and an adult at least 10 years older.

c. Sexual intercourse between a child 15 or younger and someone 21 or over. "Sexual intercourse" is genital intercourse between a male and a female.

d. Anal or oral sex when either partner is a minor 14 or older is a mandated report, even when the partner is also a minor, and even when intercourse would be permissible. For reasons not specified in CANRA, oral and anal sex are treated differently than intercourse.

e. SPECIAL NOTE - Voluntary sexual activity of any sort between children who are both under the age of 14 years and who are of similar age, maturity, and sophistication is not a mandated report.[1] This means that younger children can engage in voluntary sexual activity that would mandate a report if one of the minors were 14 or older.

3. Physical Abuse—Any *injury* caused *deliberately*. An accident is not abuse. An injury is defined in CANRA as a traumatic condition. This means serious harm, including cuts, burns, severe bruises, broken bones, welts or scars.[2]

a. Willful harming or injuring of a child or the endangering of the person or health of a child—This means behaviors in which the probability of serious flagrant disregard for the health and safety of children, or which result in significant psychological trauma. For example, a nine year old child was beaten with a wooden dowel so severely she was still bruised and swollen days later.[3]

b. Unlawful corporal punishment—Cruel or inhuman behavior that causes an injury. Beatings that leftscars from belt buckles, black eyes, dragging a child by the hair, are all examples of unlawful corporal punishment. Physical discipline of a child, such as slapping, spanking or grabbing to correct or punish breaches of rules, have been found to be acceptable as long as it is not excessive as described above. (In re Jose M.(1988), People v Checketts (1999) People v. Smith (2002) , Cal.App.4th)

4. Neglect—Neglect means risking, causing or permitting the health of a child to be seriously endangered by intentionally failing to provide adequate food, clothing, shelter or medical care. The emphasis in this section is on the severity of the neglect, behaviors that could cause great bodily harm. The courts have defined "intentionally" to mean "know or should know of the severity of the risk."(People v Sargent, 2002, Section 11165.2.[a],11165.3)

WHAT IS NOT A MANDATED REPORT OF PHYSICAL ABUSE?

An accidental injury.

When an ADULT victim reports abuse that occurred to them when they were a child. Corporal punishment that did not cause a physically Traumatic condition and was not excessive. Parents may use "instruments." Thus, for example, leaving a red mark by hitting a child with a belt does not, in itself, constitute abuse, under a conservative interpretation of the law.

A positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis or reporting child abuse or neglect. (11165.13 [a])

A child receiving treatment by spiritual means as long as the health of the child is not seriously endangered. (11165.2.[b])

A mutual fight between minors.

PERMISSIBLE REPORTING

A psychologist is PERMITTED but not mandated to make a report only if he or she suspects that a child is suffering serious emotional damage or is at a substantial risk of suffering serious emotional damage in the future (Penal Code Section 11166.05). Examples of evidence of serious emotional damage would include severe anxiety, depression, withdrawal, or agressive behavior. Psychologists should note the use of the word SEVERE symptoms, even for PERMISSIBLE reporting. Psychologists who make PERMISSIBLE reports have the same protections as when making MANDATED reports, but those who decide to maintain patient confidentiality by not reporting are also fully in compliance with the law.

Mandated Reporting continued on next page

[1] Planned Parenthood v. Van de Kamp

[2] In re Edward C. 1981, In re Jose M, 1988, People v Whitehurst 1992.

[3] People v. Jaramillo (1979), Cline v. Superior Court (1982), People v. Valdez (2002)

REPORTING IN AGENCY OR INSTITUTIONAL SETTINGS

A supervisor or employer may not prevent, or retaliate against, a subordinate from making a report. (PC Sec. 11166 [g]1)

A supervisor or employer may not require a subordinate to tell them if you made a report. (PC Sec. 11166 [g]2)

Only one member of a treatment team is required to make a report (PC Sec. 11166[f]), although all members may if they wish.

SPECIAL NOTE:

Psychologists must not provide the written child abuse reports to anyone other than the agencies previously described, even if the record has been subpoenaed. To do so is a misdemeanor. (PC 11167.5)

Disclaimers:

This document is educational in nature and is not intended to replace the advice of an attorney. In addition, although the information in this document was accurate at the time of publication, psychologists using this information should bear in mind that laws and regulations change over time and that the interpretation of laws and regulations by courts and the Board of Psychology may change from time to time.

The Board of Psychology (Board) is committed to including guest articles in the BOP Update. *The Board of Psychology takes no responsibility for the accuracy or veracity of any comments or statements contained in a guest article, and the Board remains neutral on any position statements made in a guest article.*

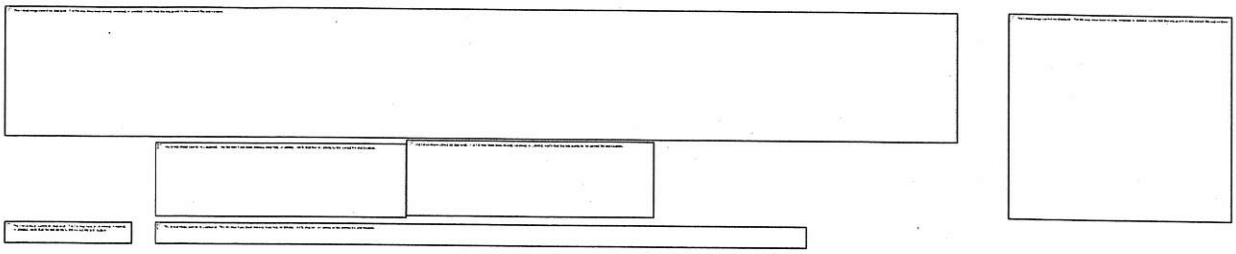
This table indicates specific acts that must be reported, even if the act is consensual. Identify the cell at the intersection of the ages of the parties involved. Forced or coerced behavior is not consensual. Any behavior deemed abusive by the therapist is a mandatory report.

Age	13	14	15	16	17
13	No mandated report for any consensual activity	Anal or Oral Sex Mandated*	Any Sexual Activity-Mandated Report	Any Sexual Activity-Mandated Report	Any Sexual Activity-Mandated Report
14	Anal or Oral Sex Mandated Report*	Anal or Oral Sex Mandated Report	Anal Or Oral Sex Mandated Report	Anal or Oral Sex Mandated Report	Anal or Oral Sex Mandated Report
15	Any sexual behavior mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
16	Any sexual behavior mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
17	Any sexual behavior mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
18	Any sexual behavior mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
19	Any sexual behavior mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
20	Any sexual behavior mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
21	Any sexual behavior mandated report	Anal, oral and intercourse-mandated report	Anal, oral and intercourse-mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
22	Any sexual behavior mandated report	Anal, oral and intercourse-mandated report	Anal, oral and intercourse-mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
23	Any sexual behavior mandated report	Anal, oral and intercourse-mandated report	Anal, oral and intercourse-mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
24	Any sexual behavior mandated report	Any sexual activity-mandated report	Anal, oral and intercourse-mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report
25	Any sexual behavior mandated report	Any sexual activity-mandated report	Any sexual activity-mandated report	Anal or oral sex mandated report	Anal or oral sex mandated report

* Although there is some disagreement, our interpretation is that some consensual sexual activity between a 14 year old child and a child under 14 does not mandate a report.

Sexual Activity: Sexual activity includes any behavior intended to arouse the adult or child or sexually exploit the child. This can include intercourse, oral and anal sex, and a wide range of behaviors such as kissing, touching, fondling, groping, or showing of pornography.

Sexual Intercourse: Genital intercourse between a male and a female.



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Child Abuse Reporting Guidelines for Sexual Activity Between and with Minors

Santa Clara County Child Abuse Council

This is a guide for mandated reporters and the information contained in this document is designed to assist those mandated by California Child Abuse Reporting Laws to determine their reporting responsibilities. It is not intended to be and should not be considered legal advice. In the event there are questions regarding reporting responsibilities in a specific case, the advice of legal counsel should be sought. This guide incorporates changes in the Child Abuse Reporting Law, effective January, 1998. For more detailed information refer to Penal Code Section 11164 & 11165.1 et al.

I. INVOLUNTARY SEXUAL ACTIVITY is always reportable.

II. INCEST, even if voluntary is always reportable. Incest is a marriage or act of intercourse between parents and children; ancestors and descendants of every degree; brothers and sisters of half and whole blood and uncles and nieces or aunts and nephews. (Family Code, § 2200.)

III. VOLUNTARY SEXUAL ACTIVITY may or may not be reportable. Even if the behavior is voluntary, there are circumstances where the behavior is abusive, either by Penal Code definition or because of an exploitive relationship and this behavior must be reported. Review **either** section A, B or C **and** section D. In addition, if there is reasonable suspicion of sexual abuse prior to the consensual activity, the abuse must be reported.

"Child" refers to the person that the mandated child abuse reporter is involved with.	**Definitions and Comments**	**Mandatory Report**	**Not Mandatory Report**
A. Child younger than 14 years old			
1. Partner is younger than 14 years old and of similar chronological or maturational age. Sexual behavior is voluntary &	See, *Planned Parenthood Affiliates of California v. John K. Van De Kamp* (1986) 181 Cal. App. 3d 245		X

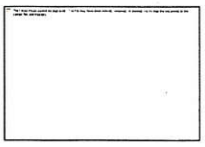
consensual. There are no indications of intimidation, coercion, bribery or other indications of an exploitive relationship.	(1986) & *In re Jerry M.* 59 Cal. App. 4th 289		
2. Partner is younger than 14 years old, but there is disparity in chronological or maturational age or indications of intimidation, coercion or bribery or other indications of an exploitive relationship.		X	
3. Partner is 14 years or older.		X	
4. Lewd & Lascivious acts committed by a partner of any age.	The perpetrator has the intent of "Arousing, appealing to or gratifying the lust, passions, or sexual desires of the perpetrator or the child".?	X	
5. Partner is alleged spouse and over 14 years of age.	The appropriate authority will determine the legality of the marriage.	X	
B. Child 14 or 15 years old			
1. Partner is less than 14		X	
2. Unlawful Sexual Intercourse with a partner older than 14 and less than 21 years of age & there is no indication of abuse or evidence of an exploitive relationship.			X
3. Unlawful Sexual Intercourse with a partner older than 21 years of age.		X	
4. Lewd & Lascivious acts	The perpetrator has the	X	

committed by a partner more than 10 years older than the child.	intent of "Arousing, appealing to or gratifying the lust, passions, or gratifying the lust, passions, or sexual desires of the perpetrator or the child".		
5. Partner is alleged spouse and over 21 years of age.	The appropriate authority will determine the legality of the marriage.	X	
C. Child 16 or 17 years old			
1. Partner is less than 14		X	
2. Unlawful Sexual Intercourse with a partner older than 14 & there is no indication of an exploitive relationship.			X
3. Unlawful Sexual Intercourse with a partner older than 14 & there is evidence of an exploitive relationship.		X	
4. Partner is alleged spouse and there is evidence of an exploitive relationship.	The appropriate authority will determine the legality of the marriage.	X	
D. Child under the age of 18			
1. Sodomy, oral copulation, penetration of a genital or anal opening by a foreign object, even if consensual, with a partner of any age.		X	

Mandated reports of sexual activity must be reported to either The Department of Family & Children's Services (DFCS) or to the appropriate police jurisdiction. This information will then be cross-reported to the other agency. Reporting does not necessarily mean that a civil or criminal proceeding will be initiated against the suspected abuser.

Failure to report known or reasonable suspicion of child abuse, including sexual abuse, is a misdemeanor. Mandated reporters are provided immunity from civil or criminal liability as a result of making a mandated report of child abuse.

Child Abuse Council, Interagency Collaboration Committee (3/12/98). Reviewed February 2008..
Adapted from Orange County Reporting Guidelines



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