Child Abuse Reporting Issues

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CHILD ABUSE REPORTING ISSUES

One area of practice that can create a dilemma for practitioners is when a minor patient informs the treating practitioner that she is pregnant. With such information, the practitioner must determine whether or not a child abuse report is required, and if not, what further duty, if any, does the practitioner have with respect to the requirement to report the suspicion or reasonable suspicion of child abuse (whatever the specific standard for reporting is in your state of practice). The specifics of individual state laws vary in fine nuance, so practitioners must be familiar with the child abuse reporting laws in their respective states. While California law is described below, readers should know how the child abuse reporting law and other legal authority in their state may differ with this information.

In California, the child abuse reporting law provides that the pregnancy of a minor, in and of itself, does not constitute a basis for a reasonable suspicion of sexual abuse. The phrase "in and of itself" suggests that there may be other information developed or discovered that will result in a reasonable suspicion of sexual abuse, thus requiring that a child abuse report be made. California law does not require mandated reporters to investigate whether child abuse has actually occurred – investigation is clearly the job of the authorities to whom reports of reasonable suspicion of child abuse are made. On the other hand, it is expected that the treating practitioner will not close his or her eyes to the possibility of child abuse (e.g., sexual assault, rape), but will explore the issue during the course of treatment. Does the child abuse reporting law in your state of practice address the issue of a minor's pregnancy and how that is to be treated or is the law silent on that issue? Is there a duty to investigate?

The patient may be reluctant to share information for a number of reasons. A 16 year old patient may simply explain that there was consensual sexual intercourse with another like aged minor, but may in reality be misrepresenting the facts because of her fear that a child abuse report will be made and lives will be affected in a major way with substantial negative consequences. Some practitioners may take the view that they are not going to press or challenge the patient, and may be of the belief that a child abuse report would be clinically counterproductive – even if it is ultimately suspected or determined that sexual abuse was involved. A question that is raised in this kind of scenario is whether the practitioner is under a duty to explore the possibility of abuse during the course of treatment and if so, to what degree. While there may be no duty to investigate (practitioners should know whether and how this principle is recognized in their respective states of practice), there is a duty to render competent care. Where the line is drawn varies based upon the totality of the facts and circumstances involved.

Suppose there is a subsequent sexual assault that comes to light and a report is then made (perhaps by

someone other than the practitioner). Suppose further that during the investigation, the authorities become aware of facts that lead them to believe that the practitioner intentionally did not properly explore the possibility that the pregnancy was not the result of consensual sex with a like-aged minor. Perhaps the investigation determines that the sexual activity was with a twenty-three year old man and that some force or coercion was used. The focus may then turn to the practitioner's actions or intentional avoidance of the reporting duty. In California, consensual sexual intercourse between a minor who is sixteen or older with someone who is over twenty-one, while a crime, is not reportable child abuse for the mandated reporter. Many law enforcement authorities are unaware of this critical distinction. Consensual sexual intercourse between someone who is over twenty-one and someone who is under sixteen years of age does require that a child abuse report be made.

In California, if there is consensual sexual activity between two like-aged minors of the same sex that involves acts of sodomy, oral copulation, or sexual penetration with a foreign object, existing law requires that a child abuse report be made. This has been the case for many years. Legislation is now pending that would change this reporting requirement by providing that "sexual assault," for the purposes of the Child Abuse and Neglect Reporting Act, does not include voluntary conduct for sodomy, oral copulation, or sexual penetration with a foreign object, if there are no indicators of abuse, unless the conduct is between a person twenty-one years of age or older and a minor who is under sixteen years of age. Note the phrase "if there are no indicators of abuse." Is the treating practitioner under a duty to investigate, or is the practitioner simply expected to look for indicators of abuse during the course of treatment?

The author of the bill asserts that the current law is, among other things, discriminatory against LGBT teens because such consensual activity will always be reported, while consensual sexual intercourse would not be reported. The author of the bill points out that "even if the two minors were seventeen years of age, one teenager would have to be reported as a sex offender and one as a victim." The California Psychological Association explains that "for years, professionals in the field have felt that the current statute discriminates against LGBT youths, and could put practitioners at risk of professional and legal discipline for not reporting what they did not deem to be child abuse." The California Department of Consumer Affairs (DCA) had issued a legal opinion (around 2013) concluding that oral and anal copulation between two like aged minors does not have to be reported if the professional deems it is not abuse. This DCA legal opinion appears to conflict with the existing statute, and professionals fear that attorneys or enforcement authorities will argue that such a failure to report constitutes a violation of the child abuse reporting statute – which is a crime.

The enforcement authorities would argue that is not up to the professionals to simply deem some conduct not to constitute child abuse when the conduct is reportable under the statute – regardless of the opinion from the Department of Consumer Affairs. Practitioners who fail to report can be charged criminally, they can face enforcement proceedings leading to revocation or suspension of the license, and they can be vulnerable to a civil lawsuit for damages flowing from the failure to make a required report. I have spoken with many therapists who decided in a variety of circumstances to substitute their judgment on reporting issues rather than follow the dictates of the law. Such conduct, while arguably

clinically or morally justified under some circumstances, exposes the practitioner to significant liability should such conduct become known.