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OPINION	:	No. 83-812
of	:	JUNE 1, 1984
JOHN K. VAN DE KAMP Attorney General	:	
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CHAUNCEY L. VEATCH III, DIRECTOR, DEPARTMENT OF ALCOHOL AND DRUG ABUSE PROGRAMS, has requested an opinion on the following question:

Are providers of services under federally funded state alcohol or drug abuse programs prohibited by federal laws and regulations from reporting child abuse information pursuant to the California Child Abuse Reporting Law?

CONCLUSION

Providers of services under federally funded state alcohol or drug abuse programs are prohibited by federal laws and regulations, except upon the conditions and specifications therein expressly provided, from reporting child abuse information pursuant to the California Child Abuse Reporting Law.

ANALYSIS

Generally, under the Child Abuse Reporting Law (Pen. Code, §§ 11165-11174) certain persons are required to make a report to a child protective agency if, in their professional capacities or within the scope of their employments, they have knowledge of or observe a child whom they know or reasonably suspect is a victim of child abuse. (Pen. Code, § 11166(a).) These persons belong to defined categories identified as child care custodians, medical practitioners, nonmedical practitioners, child protective agency employees and commercial film and photographic print processors. (Pen. Code, §§ 11165(h), 11165(i), 11165(j) and 11165(k); see also 65 Ops.Cal.Atty.Gen. 345 (1982).) Specifically, Penal Code section 11166 provides in part:

> "(a) Except as provided in subdivision (b), any child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. For the purposes of this article, 'reasonable suspicion' means that it is objectively reasonable for a person to entertain such 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 abuse.
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> "(b) Any child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who has knowledge of or who reasonably suspects that mental suffering has been inflicted on a child or his or her emotional well-being is endangered in any other way, may report such known or suspected instance of child abuse to a child protective agency."

Penal Code section 11167 provides in part:

> "(a) *A* telephone *report of a known or suspected instance of child abuse shall include* the name of the person making the report, the name of the child, the present location of the child, the nature and extent of the injury, and *any other information*, *including information that led such person to suspect child abuse*, requested by the child protective agency.

"(b) Information relevant to the incident of child abuse may also be given to an investigator from a child protective agency who is investigating the known or suspected case of child abuse.

"(c) The identity of all persons who report under this article shall be confidential and disclosed only between child protective agencies, or to counsel representing a child protective agency, or to the district attorney in a criminal prosecution or in an action initiated under Section 602 of the Welfare and Institutions Code arising from alleged child abuse, or to counsel appointed pursuant to Section 318 of the Welfare and Institutions Code, or to the county counsel or district attorney in an action initiated under Section 232 of the Civil Code or Section 300 of the Welfare and Institutions Code, or when those persons waive confidentiality, or by court order." (Emphases added.)

The State Department of Alcohol and Drug Programs has been established to apply for and administer federal funds for alcohol and drug programs in California. (Health and Saf. Code, § 11750 et seq.) Federal statutory provisions pertaining to the confidentiality of information acquired in the course of a state alcohol abuse program supported by federal formula or project grants are contained in title 42 United States Code section 290 dd-3 (formerly tit. 42 U.S.C. § 4582)[1]:

"(a) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to alcoholism or alcohol abuse education, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

"(b)(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

[1] See the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act Amendments of 1974. (Pub.L. 93-282, 88 Stat. 131.)

"(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

"(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

"(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

"(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

"(c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

"(d) The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.

"(e) The prohibitions of this section do not apply to any interchange of records—

"(1) within the Armed Forces or within those components of the Veterans' Administration furnishing health care to veterans, or

"(2) between such components and the Armed Forces.

"(f) Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500

in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

"(g) Except as provided in subsection (h) of this section, the Secretary shall prescribe regulations to carry out the purposes of this section. These regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection (b)(2)(C) of this section, as in the judgment of the Secretary are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

". . . . . ."

Federal provisions pertaining to the confidentiality of information acquired in the course of a federally supported state drug abuse program are contained in title 42 United States Code section 290ee-3 (formerly tit. 42 U.S.C. § 1175)[2], and are substantially identical to the above provisions.

Regulations promulgated to implement title 42 United States Code sections 290dd-3 and 290ee-3 are found in title 42 Code of Federal Regulations, part 2. No present regulation specifically addresses the subject of reporting child abuse.[3] However, the regulations expressly provide that no state law "may either authorize or compel any disclosure prohibited by this part." (42 C.F.R. § 2.23.)

The federal regulations prohibit the communication of patient identifying information defined to mean the name, address, social security number or similar information by which the identity of a patient can be determined with reasonable accuracy and speed either directly or by reference to other publicly available information. (42 C.F.R., § 2.11(j).)[4] The term "records" within the meaning of the confidentiality provisions

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[2] See the Drug Abuse Office and Treatment Act of 1972. (Pub.L. 92-255, 86 Stat. 65; amended Pub.L. 93-283, 88 Stat. 137.)

[3] Substantial changes in these regulations are proposed, including the incorporation of specific provisions relating to child abuse reporting. (See Fed. Reg., vol. 48, No. 166, pt. 6, p. 38767, Aug. 25, 1983.)

[4] The following types of communications do not constitute unauthorized disclosures (42 C.F.R., § 2.11(p)):

"(1) Communications of information within a program between or among personnel having a need for such information in connection with their duties.

set forth above includes "*any information*, *whether recorded or not*, relating to a patient, received or acquired in connection with the performance of any alcohol abuse or drug abuse prevention function, whether such receipt or acquisition is by a program, a qualified service organization, or any other person." (42 C.F.R. § 2.11(o); emphasis added.)

The present inquiry is whether providers of services under federally funded state alcohol or drug abuse programs are prohibited by federal law and regulations from reporting child abuse information pursuant to the California Child Abuse Reporting Law. The inquiry arises by virtue of the perceived inconsistency[5] of the state and federal statutes

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"(2) Communications between a program and a qualified service organization of information needed by the organization to perform its services to the program.

"(3) Communications of information which includes neither patient identifying information nor identifying numbers assigned by the program to patients."

A qualified service organization, as identified in (2) above, provides certain services to an alcohol or drug abuse program such as data processing, dosage preparation, laboratory analysis, or legal, medical, accounting or other professional services. (42 C.F.R., § 2.11(m).)

[5] It has not escaped attention that the Department of Alcohol and Drug Abuse Programs is expressly authorized to apply for federal funds. In this regard, Health and Safety Code section 11775 provides in part:

"(a) Each year the department shall apply for federal funds from the National Institute on Alcohol and Alcoholism and may expend such funds only upon appropriation or approval by the Legislature pursuant to the provisions of the Budget Act.

"(b) Whenever the National Institute on Alcohol Abuse and Alcoholism, as created pursuant to Public Law 91-616 of 1970, conditions its allocation of funds to the department in a manner which would conflict with any provisions of this part, the department shall specifically describe such conflict in order to assist the Legislature in deciding upon whether to appropriate or approve expenditure of such funds." (Fn. omitted.)

Further, section 11777 of said code provides:

"The Legislature, subject to the Governor's approval, has the sole authority under Section 12 of Article IV of the California Constitution to appropriate any funds, including federal funds, to the department pursuant to the Budget Act. Each year the Legislature shall review the Governor's proposed budget for the department and periodically shall conduct hearings and undertake other activities to oversee the department's implementation of the provisions of this division."

Thus, it may be suggested that the Legislature has not only authorized such application without regard to federal limitations and conditions, but by its reserved power of specific appropriation and approval pursuant to the Budget Act, a state statute, has effectively consented to such federal constraints. That the Legislature, at the time of any such approval, is aware of pertinent federal law is not within the realm of dispute. While it may be argued that such legislative action itself

in the limited context of federally supported state alcohol and drug abuse programs. The sole issue, then, is whether the state or federal statute prevails. Obviously, there are profound policy considerations on both sides of the issue. It is not within our province, however, to exercise our own judgments or notions respecting legislative policy, wisdom, or expediency.

In a recent opinion we were asked whether a federal statute, which placed certain limitations upon the right to a state to permit disclosure of information concerning applicants and recipients of public assistance under a state administered, federally assisted program, barred the Auditor General from access, pursuant to a state statute, to such information. We stated in part:

> "To the extent that state statutes permit greater access than allowed under federal law, they are invalid. Having elected to participate in the federal social welfare program, a state must comply with the mandatory requirements established by the Social Security Act and implemented by regulations promulgated by the Department of Health, Education and Welfare. (*Burnham* v. *Woods* (1977) 70 Cal.App.3d 667, 673; *Garcia* v. *Swoap* (1976) 63 Cal.App.3d 903, 909; *In re Jeannie Q.* (1973) 32 Cal.App.3d 288, 297-298; *X* v. *McCorkle* (1970) 333 F.Supp. 1109, 1114, affd. 404 U.S. 23.) The courts have held invalid state regulations inconsistent with congressional policy regarding AFDC recipients. (Cf. *King* v. *Smith*, *supra*, 392 U.S. 309; *Rosado* v. *Wyman* (1970) 397 U.S. 397; *Van Lare* v. *Hurley* (1975) 421 U.S. 338; *Lewis* v. *Martin* (1970) 397 U.S. 552; *Townsend* v. *Swank* (1971) 404 U.S. 282.)"

(62 Ops.Cal.Atty.Gen. 494, 503 (1979).) Similarly, to the extent that the California Child Abuse Reporting Law permits or requires greater access to information than allowed under the confidentiality provisions of federal statutes pertaining to federally assisted state alcohol and drug abuse programs, it is invalid.

It has been suggested, on the other hand, that the California Child Abuse Reporting Law is itself mandated by another federal law. Upon this basis it is contended that the state is required by one federal statute to violate another. If so, we would be presented with a conflict of federal laws. In this regard, we are confronted with the federal Child Abuse Prevention and Treatment Act of 1974[6] and its implementing regulations. (42

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supersedes any other conflicting state law, we proceed upon the *assumed premise*, in light of the conclusion reached, that the state and federal laws are in conflict.

[6] (Pub.L. 93-247;, 88 Stat. 5; amended Pub.L. 93-644, 88 Stat. 2310 (1975); amended Pub.L. 95-266, 92 Stat. 206 (1978); amended Pub.L. 96-88, 93 Stat. 695 (1979).)

U.S.C. §§ 5101-5115; 45 C.F.R. § 1340.1 et seq.) This act established the National Center on Child Abuse and Neglect (NCCAN). (42 U.S.C. § 5101.) NCCAN may make grants for the following purposes (42 U.S.C. § 5103):

> "(1) for training programs for professional and paraprofessional personnel in the fields of medicine, law, education, social work, and other relevant fields who are engaged in, or intend to work in, the field of the prevention, identification, and treatment of child abuse and neglect; and training programs for children, and for persons responsible for the welfare of children, in methods of protecting children from chid (sic) abuse and neglect;
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> "(2) for the establishment and maintenance of centers, serving defined geographic areas, staffed by multidisciplinary teams of personnel trained in the prevention, identification, and treatment of child abuse and neglect cases, to provide a broad range of services related to child abuse and neglect, including direct support and supervision of satellite centers and attention homes, as well as providing advice and consultation to individuals, agencies, and organizations which request such services;
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> "(3) for furnishing services of teams of professional and paraprofessional personnel who are trained in the prevention, identification, and treatment of child abuse and neglect cases, on a consulting basis to small communities where such services are not available; and
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> "(4) for such other innovative programs and projects, including programs and projects for parent self-help, and for prevention and treatment of drug-related child abuse and neglect, that show promise of successfully preventing or treating cases of child abuse and neglect as the Secretary may approve."

In order for a state to qualify for such a grant it must (42 U.S.C. § 5103(2)):

> "(A) have in effect a State child abuse and neglect law which shall include provisions for immunity for persons reporting instances of child abuse and neglect from prosecution, under any State or local law, arising out of such reporting:
> "(B) provide for the reporting of known and suspected instances of child abuse and neglect:
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> "(C) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly

to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child, as well a (sic) that of any other child under the same care who may be in danger of abuse or neglect:

"(D) demonstrate that there are in effect throughout the State, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such administrative procedures, such personnel trained in child abuse and neglect prevention and treatment, such training procedures, such institutional and other facilities (public and private), and such related multidisciplinary programs and services as may be necessary or appropriate to assure that the State will deal effectively with child abuse and neglect cases in the State;

"(E) provide for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians;

"(F) provide for the cooperation of law enforcement officials, courts or competent jurisdiction, and appropriate State agencies providing human services;

"(G) provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings:

"(H) provide that the aggregate of support for programs or projects related to child abuse and neglect assisted by State funds shall not be reduced below the level provided during fiscal year 1973, and set forth policies and procedures designated to assure that Federal funds made available under this subchapter for any fiscal year will be so used as to supplement and, to the extent practicable, increase the level of State funds which would, in the absence of Federal funds, be available for such programs and projects;

"(I) provide for dissemination of information to the general public with respect to the problem of child abuse and neglect and the facilities and prevention and treatment methods available to combat instances of child abuse and neglect; and

"(J) to the extent feasible, insure that parental organizations combating child abuse and neglect receive preferential treatment." (See also 45 C.F.R. § 1340.)

Thus, the federal child abuse law requires a state to "provide for the reporting of known and suspected instances of child abuse and neglect." (42 U.S.C. § 5103(2)(B).) Does this general grant condition compel a state to disregard the express, unequivocal, and specific prohibitions of the federal alcohol and drug abuse statutes? Neither upon the enactment of the federal child abuse law in 1974 nor in the course of its various amendments (fn. 6, *ante*) has the Congress made any attempt to supersede expressly or by necessary implication the confidentiality provisions of the federal alcohol and drug abuse law. Nor at any time since such enactment or in the course of the various amendments of the federal alcohol and drug abuse law (fn. 2, *ante*) has the Congress attempted to amend or modify expressly or otherwise the unequivocal terms thereof pertaining to confidentiality of information.

Perhaps of greater significance, however, is the fact that the Congress *has considered and expressly provided* for the disclosure of information under the federal alcohol and drug abuse law *subject to specific limitations*. Thus, information may be disclosed *if authorized by an appropriate court order* upon a showing of good cause. (42 U.S.C. § 290dd-3(b)(2)(C), *supra*.) In assessing good cause, the court is required to balance the public interest and need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. (*Id.*) In this regard the regulations provide (42 C.F.R. § 2.65):

> "(c) *Criteria*. A court may authorize disclosure of records pertaining to a patient for the purpose of conducting an investigation of or a prosecution for a crime of which the patient is suspected only if the court finds that all of the following criteria are met:
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> "(1) The crime was extremely serious, such as one involving kidnapping, homicide, assault with a deadly weapon, armed robbery, rape or other acts causing or directly threatening loss of life or serious bodily injury, or was believed to have been committed on the premises of the program or against personnel of the program.
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> "(2) There is a reasonable likelihood that the records in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution.
>
> "(3) There is no other practicable way of obtaining the information or evidence.
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> "(4) The actual or potential injury to the physician-patient relationship in the program affected and in other programs similarly situated, and the

> actual or potential harm to the ability of such programs to attract and retain patients, is outweighed by the public interest in authorizing the disclosure sought."

Thus, it has been said that where a statute prescribes the only mode by which a power may be exercised, the mode is the measure of the power. (*Reams* v. *Cooley* (1915) 171 Cal. 150, 154; 64 Ops.Cal.Atty.Gen. 803, 808 (1981).)

Accordingly, we view the federal alcohol and drug abuse law as a limited exception to the general grant condition of the federal child abuse law. In this regard, we find nothing intrinsically absurd or inherently inconsistent in the interaction of the respective federal policies and objectives. The Congress may well have perceived that the confidentiality provision of its alcohol and drug abuse program would serve inevitably the best interest of the patient and of society as well as the child through the treatment of the underlying causes of abusive behavior. It is apparent, after all, that in the absence of such a reasonable expectation of confidence and of the consequent reluctance to pursue a beneficial course, neither the patient nor the child might find a resolution of *their* problem. It has been observed, in any event, that governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometimes effectuate and other times not thwart other valid statutory governmental policies. (*Zabel* v. *Tabb* (1970) 430 F.2d 199, 209; 64 Ops.Cal.Atty.Gen. 425, 430 (1981).)

In this fashion, the statutes are readily harmonized.

> "In the absence of a showing to the contrary, all laws are presumed to be consistent with each other. Where it is possible to do so, it is the duty of the courts, in the construction of statutes, to harmonize and reconcile laws, and to adopt the construction of a statutory provision which harmonizes and reconciles it with other statutory provisions . . . ."

(73 Am.Jur.2d, § 254, fns. omitted.) It is concluded that providers of services under federally funded state alcohol or drug abuse programs are prohibited by federal law and regulations from reporting child abuse information pursuant to the California Child Abuse Reporting Law.

With respect to this conclusion, however, it must be emphasized that the prohibition is not absolute. In the summary of proposed revisions of federal regulations under the alcohol and drug abuse statutes (fn. 3, *ante*), and in the specific context of child abuse reporting, it is said:

> "The authorizing statutes do not categorically except disclosures in connection with the reporting of child abuse and neglect from the restrictions on the disclosure and use of alcohol and drug abuse patient records. Thus, the Department cannot by regulation abrogate the statutory restrictions where a disclosure is made in connection with the reporting of child abuse or neglect. However, *it is the policy of the Department to encourage providers of alcohol and drug abuse services to report instances of child abuse and neglect where this can be done in conformity with the statutory confidentiality protections*." (Emphasis added.)

For example, disclosure may be made, as previously discussed, pursuant to the order of a court (cf. *In the Matter of Baby X* (Mich. App. 1980) 293 N.W.2d 736, 741: ". . . any conflict between federal and state law can be avoided by filing a John or Jane Doe petition with the disclosure of any names and confidential information to follow the issuance of a court order upon 'good cause'"), or where the identity of the patient is not disclosed (cf. 42 C.F.R., § 2.11(p)(3), fn. 4, *ante*; and cf. *State* v. *Andring* (Minn. 1984) 342 N.W.2d 128, 132-133)[7], upon the prior written consent of the patient (42 U.S.C. § 290dd-3(b)(1)), or pursuant to a bona fide medical emergency (42 U.S.C. § 290dd-3(b)(2)(A)). In no event, however, except pursuant to a court order, may such disclosure be made to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient. (42 U.S.C. § 290dd-3(c).)

This issue is not free from some doubt. The Supreme Court of Minnesota in *State* v. *Andring* (Minn. 1984) 342 N.W.2d 128, 131-132 held that the confidentiality of patient records in a federally funded state alcohol program did *not* preclude the use of such records in child abuse proceedings under a Minnesota child abuse reporting law. The court stated at page 132:

> "Congress recognized the strong local interest in preventing child abuse and consequently enacted legislation which, while mandating a minimally acceptable child abuse reporting and investigation system, left as much flexibility on the state level as possible. 45 C.F.R. § 1340.1-1 (1982). Whenever Congress acts in areas traditionally reserved to the states (as are both alcohol treatment and child abuse prevention), it is more difficult to find broad preemption. Tribe, *American Constitutional Law*, § 6.25, pg. 385 (1978). Not only was Congress aware that it was acting within areas traditionally left to the states, it also recognized that the states were the best level at which to deal with child abuse prevention. Given its awareness of

[7] The cited case held that the confidentiality provisions of the federal alcohol treatment act did not preclude the use of patient records in child abuse proceedings *to the extent required by the state statute*.

> the situation Congress could not have intended to preempt the very state statutes that it had itself mandated. We hold that the confidentiality of patient records provision of the alcohol treatment act does not preclude the use of patient records in child abuse proceedings to the extent required by Minn.Stats. § 626.556."

However, given no clear federal mandate to except child abuse reporting from the confidentiality requirements for federally funded state alcohol and drug abuse programs it must be concluded that the federal restrictions and conditions still obtain.

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