

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

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OPINION	:	No. 83-911
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of	:	<u>JUNE 1, 1984</u>
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THE HONORABLE ROBERT H. PHILIBOSIAN, DISTRICT ATTORNEY, COUNTY OF LOS ANGELES, has requested an opinion on the following question:

Is a medical practitioner or a nonmedical practitioner, as defined in the Child Abuse Reporting Law, required by that law to make a report to a child protective agency when a child receives medical attention for a sexually transmitted disease, for birth control, for pregnancy or for abortion?

CONCLUSION

The obligation of a medical practitioner or a nonmedical practitioner, as defined in the Child Abuse Reporting Law, to make a report to a child protective agency arises when such person in his or her professional capacity has knowledge of or observes a child who he or she knows or reasonably suspects has been the victim of child abuse. A

report is required when a child under age 14 receives medical attention for a sexually transmitted disease, for pregnancy or for abortion. A report is required when a child age 14 or older receives such attention if additional facts point to child abuse.

## ANALYSIS

We are asked whether a medical practitioner or a nonmedical practitioner, as defined in the Child Abuse Reporting Law (Pen. Code, §§ 11165-11174), is required under that law to make a report to a child protective agency when a child receives medical attention for a sexually transmitted disease, for birth control, for pregnancy or for abortion.

A medical practitioner is "a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code." (Pen. Code, § 11165, subd. (i).) The latter category covers a variety of healing arts professionals including optometrists and pharmacists. A nonmedical practitioner is "a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; a paramedic; a marriage, family, or child counselor; or a religious practitioner who diagnoses, examines, or treats children." (Pen. Code, § 11165, subd. (j).) Persons in these categories (and in the other categories listed in section 11165) who in their professional capacities or within the scopes of their employments have knowledge of or observe a child who they know or reasonably suspect has been the victim of child abuse must report the known or suspected instance to a child protective agency. (Pen. Code, § 11166, subd. (a).) A child protective agency is "a police or sheriff's department, a county probation department, or a county welfare department." (Pen. Code, § 11165, subd. (k).)

Child abuse has several definitions in the reporting law. Child abuse is a "physical injury which is inflicted by other than accidental means on a child by another person"; child abuse is a "sexual assault of a child or any act or omission proscribed by [Penal Code] Section 273a (willful cruelty and unjustifiable punishment of a child) or [Penal Code] Section 273d (corporal punishment or injury)"; child abuse is "neglect of a child or abuse in out-of-home care, as defined in this article." (Pen. Code, § 11165, subd. (g).) A report of child abuse may be made when "mental suffering has been inflicted on a child or his or her emotional well-being is endangered." (Pen. Code, § 11166, subd. (b).)

Sexual assault is further defined as follows (Pen. Code, § 11165, subd. (b)):

"'Sexual assault' means conduct in violation of the following sections of the Penal Code: Sections 261 (rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivisions (a) and (b) of Section 288 (lewd or lascivious

acts upon a child under 14 years of age), and Sections 288a (oral copulation), 289 (penetration of a genital or anal opening by a foreign object), and 647a (child molestation)."

Neglect has several definitions in the reporting law (Pen. Code, § 11165, subd. (c)):

"'Neglect' means the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare. The term includes both acts and omissions on the part of the responsible person.

"(1) 'Severe neglect' means the negligent failure of a person having the care or custody of a child to protect the child from severe malnutrition or medically diagnosed nonorganic failure to thrive. 'Severe neglect' also means those situations of neglect where any person having the care or custody of a child willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered, as proscribed by subdivision (d), including the intentional failure to provide adequate food, clothing, or shelter.

"(2) 'General neglect' means the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, or supervision where no physical injury to the child has occurred.

"For the purposes of this chapter, a child receiving treatment by spiritual means as provided in Section 16508 of the Welfare and Institutions Code or not receiving specified medical treatment for religious reasons, shall not for that reason alone be considered a neglected child."

Abuse in out-of-home care is also described in the reporting law (Pen. Code, § 1165, subd. (f)):

"'Abuse in out-of-home care' means situations of physical injury on a child which is inflicted by other than accidental means, or of sexual assault or neglect or the willful cruelty or unjustifiable punishment of a child, as defined in this article, where the person responsible for the child's welfare is a foster parent or the administrator or an employee of a public or private residential home, school, or other institution or agency."

Willful cruelty and unjustifiable punishment of a child are defined in Penal Code section 273a (see also Pen. Code, § 11165, subd. (d)):

"(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison for 2, 3 or 4 years.

"(2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor."

Corporal punishment or injury is defined in Penal Code section 273d (see also Pen. Code, § 11165, subd. (e)):

"Any person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for 2, 3 or 4 years, or in the county jail for not more than one year."

For purposes of the reporting law, reasonable suspicion means "that it is objectively reasonable for a person to entertain such a suspicion, based on facts that cause a reasonable person in like position, drawing when appropriate on his or her training and experience, to suspect child abuse." (Pen. Code, § 11166, subd. (a).)

A child is a person under age 18. (Pen. Code, § 11165, subd. (a).) We observe that a child who has attained the age of 12 years and who in the opinion of the attending professional person is mature enough to participate intelligently in mental health treatment and counseling may consent without parental approval to such therapy in a child abuse situation. (Civ. Code, § 25.9.) Moreover, a minor may similarly consent to the furnishing of hospital, medical and surgical care related to the prevention or treatment of pregnancy. (Civ. Code, § 34.5.) A minor 15 years of age or older who is living separate

and apart from his parents and managing his own financial affairs may give independent consent to hospital care, X-ray examination, anesthetic, and medical, surgical and dental diagnosis rendered by a physician or dentist. (Civ. Code, § 34.6.) A minor 12 years of age or older who comes in contact with any infectious, contagious, communicable or sexually transmitted disease may likewise give consent to the furnishing of hospital, medical and surgical care related to the diagnosis or treatment of such disease. (Civ. Code, § 34.7.) Similar forms of medical emancipation are afforded to children 12 years of age or older who have been raped, to children who have been sexually assaulted and to children 12 years of age or older who have drug or alcohol related problems. (Civ. Code, §§ 34.8-34.10.)

It is not possible to list the myriad situations which would give rise to an obligation to report child abuse when a child receives medical attention. Each case presents its unique facts since the children, the circumstances and the backgrounds will invariably be distinct. Nevertheless, medical and healing arts professionals by reason of their training and experience are expected to identify actual and suspected child abuse. The obligation to report is incurred when they provide services in their professional capacities or within the scopes of their employments.

Facts before the practitioner may indicate that the child receiving medical attention has suffered a nonaccidental physical injury, has been neglected, has been subjected to cruel and unjustifiable punishment or has been mentally mistreated. The focus of this opinion, however, is on child abuse in the form of a sexual assault. When the practitioner determines or reasonably suspects that the child has unwillingly engaged in sexual intercourse, has had sexual intercourse with a family member or has otherwise been the victim of one or more of the sexual assault crimes included in subdivision (b) of Penal Code section 11165, reporting such to a child protective agency is a manifest duty.

However, the question we address is whether a reasonable suspicion arises whenever a child obtains medical attention for a sexually transmitted disease, for birth control, for pregnancy or for abortion. The question assumes that the child, at the outset or during the course of an ensuing examination or treatment, does not disclose the circumstances which led to the request, e.g., that he or she was raped or molested. In our view, the duty to report in such cases depends upon the age of the child.

#### A. CHILDREN UNDER FOURTEEN YEARS OF AGE

Children under the age of 14 years cannot consent legally to any lewd or lascivious acts upon their persons, including sexual intercourse. Penal Code section 288 provides:

"(a) Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or such child, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six, or eight years.

"(b) Any person who commits an act described in subdivision (a) by use of force, violence, duress, menace, or threat of great bodily harm, shall be guilty of a felony and shall be imprisoned in the state prison for a term of three, six or eight years.

"(c) In any arrest or prosecution under this section the peace officer, the district attorney, and the court shall consider the needs of the child victim and shall do whatever is necessary and constitutionally permissible to prevent psycho- logical harm to the child victim."

The willing participation of the child in the act or acts is not a defense to this offense. (*People v. Dontanville* (1970) 10 Cal.App.3d 783, 796.)

When a medical or nonmedical practitioner encounters a child under age 14 needing medical attention for a sexually transmitted disease that knowledge or observation alone triggers an obligation to make a report to a child protective agency. The fact that the child requires medical help for the condition raises a reasonable suspicion that some other person has engaged in lewd or lascivious acts with the child. In *State v. Efird* (N.C. 1983) 309 S.E.2d 228, 230 the young child contracted such a disease and a child abuse report was deemed justified:

"There was unequivocal evidence that the seven year old in this case has been sexually abused, which would invoke applicability of these [reporting] statutes."

The same reasonable suspicion would be aroused if the child under age 14 were pregnant or the child asked for an abortion.

As we have seen, the law allows a child of any age to obtain his or her own medical care related to a prevention of pregnancy. (Civ. Code, § 34.5.) A request for birth

control assistance,<sup>1</sup> by itself, does not create a reasonable suspicion of prior sexual contact which would give rise to a duty to report child abuse under the reporting law. Such a request does provide an inference that there may be planned future sexual contact but the reporting law does not require the reporting of suspected future events.

We recognize that there may be a situation when the disease was not sexually transmitted or when the child's concern about disease, birth control, pregnancy or abortion was the result of ignorance, misunderstanding or confusion. In such circumstances the professional consultation or examination will ordinarily eliminate child abuse as a suspected cause.

#### B. CHILDREN FOURTEEN YEARS OF AGE OR OLDER

If a medical or nonmedical practitioner has knowledge of or observes that a child age 14 or older is afflicted with a sexually transmitted disease, is there a duty to report this information? In our view this information must be reported when the practitioner has additional facts raising a reasonable suspicion that the child received the disease through a sexual assault as defined in the reporting law.

If the disease were transmitted sexually (the question apparently assumes such is the case) there may be facts before the practitioner that the child was a victim of one of the sexual assault crimes listed in the reporting law<sup>2</sup> and from these facts a reasonable suspicion of child abuse is drawn. However, we do not believe the existence of a sexually transmitted disease in the child age 14 or older by itself is a sufficient fact suggesting a sexual assault.

We are asked our view on the situation where a child age 14 or older asks for medical attention relating to birth control. Without more, we do not believe that a request for birth control assistance in these circumstances raises a reasonable suspicion of child abuse. Certainly, by itself, such request does not indicate a sexual assault such as rape or incest.

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<sup>1</sup> By birth control assistance we do not mean mere information on the subject. The question assumes that the child is seeking an appropriate medical procedure, such as birth control pills, to prevent pregnancy.

<sup>2</sup> The reporting law does not include the crime of unlawful sexual intercourse (Pen. Code, § 261.5) among the sexual assault crimes. This crime prohibits sexual intercourse with a female under age 18 who is not the wife of the perpetrator regardless of the female's consent to the act. The facts, then, must indicate rape, incest, sodomy, oral copulation, penetration by foreign object or molestation. (Pen. Code, § 11165, subd. (b).)

In any event, a request for such medical attention is unlikely to be made in a vacuum. The professional will usually have a medical history or other information available to him or her to evaluate the request and to determine whether some type of child abuse has occurred.

Is there an obligation on the part of the practitioner to make a child abuse report when confronted with a child age 14 or older who is pregnant? Again, the answer will depend upon the facts of each case. Clearly the possibility of rape, incest, or molestation cannot be ruled out. We believe that in such a situation the practitioner's consultation or examination will either remove a reasonable suspicion of sexual assault or will produce a reasonable suspicion thereof.<sup>3</sup>

In the case of a mentally or physically impaired child or of a retarded child the fact that the child is pregnant raises a reasonable suspicion of child abuse. A reasonable person, using objective standards, would infer that such child has been sexually abused by some person.

The situation of a child seeking an abortion is not substantially different from the situation of the pregnant child. When the child is immature or mentally deficient there is a reasonable suspicion that the child is a victim of child abuse. When the child is mature there may be additional facts disclosed in the course of rendering the medical service which either raise or eliminate a reasonable suspicion of sexual assault.

## CONCLUSION

The obligation of a medical practitioner or a nonmedical practitioner, as defined in the Child Abuse Reporting Law, to make a report to a child protective agency arises when such person in his or her professional capacity has knowledge of or observes a child who he or she knows or reasonably suspects has been the victim of child abuse. A report is required when a child under age 14 receives medical attention for a sexually transmitted disease, for pregnancy or for abortion. A report is required when a child age 14 or older receives such attention if additional facts point to child abuse.

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<sup>3</sup> We observe that applicants for a physician's certificate, a school nurse's certificate or a public health nurse's certificate must have received training in child abuse detection. (Bus. & Prof. Code, §§ 2089 and 2091; Ed. Code, § 44877; Health & Saf. Code, § 605.)