



# NYCLU

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*Reproductive Rights Project*

## **CHILD ABUSE REPORTING AND TEEN SEXUAL ACTIVITY: CLARIFYING SOME COMMON MISUNDERSTANDINGS**

(Updated March 2009)

New York laws about “statutory rape” and child abuse reporting are confusing. This list of frequently asked questions (FAQ) describes when to make a report to the Statewide Central Register of Child Abuse and Maltreatment (the reporting hotline for child abuse and neglect) based on a minor’s sexual activity.

This FAQ explains that according to New York courts and guidance from the Office of Child & Family Services (“OCFS”), **parental knowledge of a minor’s voluntary sexual activity does not necessarily give rise to reasonable suspicion of abuse or neglect and should not be reported to the Statewide Central Register, absent other indications of abuse or neglect.**

This memorandum is not intended to provide individualized legal advice. A mandated reporter or young person who faces a specific legal problem should consult with an attorney.

### **1. What is reportable as child abuse?**

New York’s child abuse reporting law mandates certain professionals to file a report when they either have reasonable cause to suspect or become aware of abuse or maltreatment (neglect) committed by a “parent, guardian, custodian or other person legally responsible” (hereinafter referred to as “parent or caregiver”) for a child’s care.<sup>1</sup> Abuse or maltreatment means that the parent or caregiver directly harms the child or acts in a way that allows the child to be physically or emotionally harmed or sexually abused.<sup>2</sup>

Under New York law, a child abuse report is only required if the abuse is committed by a parent or caregiver, because they are the only ones that can be “the subject of a report.”<sup>3</sup> Therefore, the Statewide Central Register should only commence an investigation in a case involving suspected child abuse or maltreatment against a parent or caregiver, and not in a case involving a person who is clearly not considered a person legally responsible for the child’s care,<sup>4</sup> even if that person harmed a child.<sup>5</sup>

Harms committed by strangers or peers are therefore not mandated reports, unless a parent has allowed a third party to harm the child. The word “allow” means that a child’s parent or caregiver knew or “should have known about” abuse to the child by a third party and “did nothing to prevent or stop it.”<sup>6</sup> To determine whether abuse or neglect has occurred, New York courts require a showing that a parent or guardian failed to exercise a minimum degree of care and therefore generally consider “whether a reasonable and prudent parent would have so acted (or failed to act) under [the] circumstances” that existed at the time.<sup>7</sup>

## 2. Who must report cases of child abuse?

Mandatory reporters are health and educational professionals who are legally required to report suspected cases of child abuse or neglect to the Statewide Central Register when they have a reasonable suspicion that a child whom they see in their professional capacity is an abused or neglected child.<sup>8</sup>

Mandatory reporters are:

- ✓ physicians (including residents and interns), physician assistants, and registered nurses;
- ✓ mental health professionals (including social workers, psychologists, substance abuse counselors, alcoholism counselors, and licensed creative arts therapists);
- ✓ other health professionals (including dentists and dental hygienists, podiatrists, emergency medical technicians, osteopaths, optometrists, chiropractors and Christian Science practitioners);
- ✓ hospital personnel involved in patient admissions, examinations, care or treatment;
- ✓ school officials (including teachers, coaches, guidance counselors and principals);
- ✓ social services workers;
- ✓ employees or volunteers in certain residential care facilities;
- ✓ child care and foster care workers; and
- ✓ law enforcement officials (including police officers, peace officers, district attorneys, assistant district attorneys and investigators employed by the district attorney's office).<sup>9</sup>

*Note:* A provision added in 2007 now requires the mandated reporter to personally report suspected child abuse to the Statewide Central Register and inform the director of his or her agency or institution. This is a change from previous law, which called for a medical staff member to first report to a designated agent for the agency or institution, who then was responsible for making the report.<sup>10</sup>

## 3. When must a mandatory reporter make a child abuse report?

Mandatory reporters must report a *reasonable suspicion* of child abuse or neglect immediately to the Statewide Central Register.<sup>11</sup> A reasonable suspicion must be based upon “articulable facts which, when examined objectively, would lead others to the same conclusion” that a child whom they see in their professional capacity has been abused or neglected.<sup>12</sup> Therefore, a proper report is based upon a reasonable suspicion that a parent or caregiver harmed – or allowed a third party to harm – the child.

Social service workers who are either employed by or have contracts with local social service districts are under an additional obligation to report child abuse or maltreatment if a third party comes to them in their official capacity and provides the social worker with information that, if true, would render a child abused or maltreated.<sup>13</sup>

## 4. Should a mandatory reporter file a child abuse report if he or she learns that a minor is engaged in a sexual relationship with a parent, guardian or person legally responsible—even if the minor says that it is consensual?

**Yes.** A minor engaging in a sexual relationship with a parent, guardian or person legally responsible for their care—even if the minor considers the relationship consensual—is a proper basis for a child abuse report.<sup>14</sup>

5. **Can a child abuse or neglect report be made against the parent or caregiver solely on the grounds that a teen in their care is sexually active?**

**No**, absent other allegations of abuse or neglect, a minor is not an abused or neglected child merely because she or he is sexually active.<sup>15</sup> **Without other evidence of abuse, mandatory reporters should not report sexually active or pregnant minors to the Statewide Central Register.**

**Situation #1: The parent is unaware of his or her child's sexual activity.**

Generally, there is no abuse or neglect if a parent or guardian is unaware of a teen's sexual activity. In *Matter of Toni D*, the court concluded that a parent must know that his or her teen is engaging in sexual activity in order to consider a charge of child abuse or neglect.<sup>16</sup> In that case, an appellate court affirmed the lower court's dismissal of charges against the parents of a 13-year-old girl whose boyfriend was 23, because no evidence had been presented to suggest the parents knew of the sexual relationship.

Additionally, recent guidance from OCFS further affirms that "no report will be registered by the Statewide Central Register where the caller fails to provide a reasonable cause to suspect that a parent was aware of sexual activity or should have reasonably been aware of the activity, absent other indications of child abuse or maltreatment."<sup>17</sup>

**Situation #2: The parent or caregiver is aware of his or her teen's sexual activity.**

The phrasing of the child abuse reporting law has confused some mandatory reporters about their duty to file a report in cases where the parent is aware of a minor's voluntary sexual activity. Under the child abuse reporting law, caregivers who allow a sexual offense to be committed against a child may be considered abusive or neglectful. New York Penal Law broadly prohibits sexual activity with a minor under the age of seventeen, commonly known as "statutory rape," even when the activity is voluntary and even when the minor engages in sexual activity with a peer who is also under 17, because a person under 17 is deemed incapable of consent as a matter of law.<sup>18</sup>

Recent guidance from OCFS makes clear that a mandated reporter should make a case by case determination that considers not only the parent's awareness but also whether the parent or caregiver's response was appropriate under the circumstances. OCFS further clarifies two points: (a) the mere reoccurrence of the sexual activity "does not in and of itself," mean that the parent's response is inappropriate or that a report is required and (b) a parent's support of or involvement in the teen's accessing sexual or reproductive health care services may be a reasonable response, and therefore does not by itself give to a reasonable suspicion of child abuse or neglect.

New York courts that have considered the question of whether a parent's knowledge of a teen's sexual activity constitutes child abuse have found that **it is not child abuse for a parent to know that a minor child is sexually active if they have responded appropriately under the circumstances.**<sup>19</sup>

For example, in *In re Leslie C.*, a mother was charged with abuse and neglect because her daughter was sexually active with, and became pregnant at the age of 14 by, a 20-year-old boyfriend. The court dismissed the charges and concluded that Leslie's sexual activity and pregnancy did not

support a child abuse finding against her mother. The court found that while statutory rape laws serve a strong social policy purpose, child abuse liability cannot reasonably be extended to the parents of all sexually active minors.<sup>20</sup> The court extensively discussed the policy reasons against imposing particular moral or religious values under the pretext of child protection, and the practical problems involved in convicting thousands of parents—including responsible and involved parents—of child abuse because of their children’s sexual activity.<sup>21</sup> The court concluded that any abuse or neglect charges should be “limited to those parents who fail to intervene in *forced* sexual relationships of which they have personal knowledge.”<sup>22</sup>

In summary, parents of sexually active or pregnant minors should not automatically be reported for suspected child abuse or neglect, even if they know of such activity.

**6. Should a mandatory reporter file a child abuse report against the parents of a sexually active minor solely on the basis of the child’s sexual activity with an older partner?**

**No.** In order to report a possible case of child abuse or neglect, a mandatory reporter must have a reasonable suspicion that such abuse or neglect is occurring.<sup>23</sup> Because courts have found that failure to prevent a child’s voluntary sexual activity does not constitute abuse under New York law, this situation in and of itself cannot give rise to a reasonable suspicion of child abuse.

While the age of the minor may be taken into account in determining whether sex was voluntary, a conclusion should not be based solely upon the age difference between the partners. In *Leslie C.*, the court concluded that the six-year age difference between the 14-year-old minor and her 20-year-old partner did not itself warrant finding the parents guilty of child abuse. The court left open the question of “whether, on different facts, an abuse finding should be made.”<sup>24</sup> A court might reach a different finding in a case involving, for example, a 12-year-old in a sexual relationship with a 25-year-old, despite claims that it was voluntary and consensual.

Therefore, health care, educational and other facilities should not impose policies requiring blanket reporting of all sexually active or pregnant teens to the Statewide Central Register because a determination of reasonable suspicion of child abuse should be made on a case by case basis depending on the specific circumstances of a situation.

**7. How does a health provider’s duty of confidentiality affect the reporting obligation?**

Most health care providers are prohibited from disclosing information about a patient learned in their professional capacity without the patient’s permission, unless otherwise required by law.<sup>25</sup> Providers who disclose such information without patient authorization or other legal permission commit professional misconduct and can be sued, fined, and have their licenses revoked.<sup>26</sup> However, as discussed above, one of the legal exceptions to this duty of confidentiality is the requirement to report information to the Statewide Central Register when that information is the basis for a reasonable suspicion of child abuse or neglect.

As described above, New York courts have held that most cases of voluntary teen sexual activity do not give rise to reasonable suspicion of child abuse or neglect. When a health provider does not have a reasonable suspicion of child abuse or neglect, there is no legal basis to breach a patient’s confidentiality to file a report. A health care provider or other professional with

confidentiality obligations who makes a child abuse report without reasonable suspicion of abuse or neglect commits professional misconduct. This can subject such providers to professional sanctions for breaching patient confidentiality, in addition to potential liability for committing the crime of false reporting (see Question # 9, below).

**8. Should a mandatory reporter report teen sexual activity to law enforcement or the police as statutory rape without the patient's permission?**

**No.** Even though the minor may be the victim of a statutory sex offense, **there is no blanket requirement that all crimes be reported to the police.**<sup>27</sup> Furthermore, a health care provider who reports a minor's sexual activity to the police without the patient's permission (or the parent's permission if the minor is unable to consent to the health service) has breached patient confidentiality, committed professional misconduct and made herself vulnerable to lawsuit by her patient and to professional licensing sanctions. Hospital policies that mandate or permit reporting of "statutory rape" to the police (or to child protective services without further evidence of abuse) also make the hospital vulnerable to a lawsuit.

**9. Can a mandatory reporter be sued or charged with a crime for making or failing to make a child abuse report?**

**Maybe.**

**Situation #1: Penalties for mandatory reporters who make good faith, false or negligent reports.**

A mandatory reporter who makes a child abuse report in good faith cannot be sued by a parent for injury to his or her reputation.<sup>28</sup> Good faith is presumed unless a mandatory reporter acts with willful misconduct (makes a report knowing that it is false) or gross negligence (makes a report without exercising even slight care or diligence to determine its validity).<sup>29</sup>

Although good faith mandatory reporters cannot be sued, it is unclear whether a good faith mandatory reporter who incorrectly reports suspected abuse can be charged with a *crime* for making a false report. New York Social Services Law immunizes good faith mandatory reporters from being charged with a crime.<sup>30</sup> However, a conflicting New York Penal Law makes it a misdemeanor if a person makes a false report of "an alleged occurrence or condition of child abuse or maltreatment which did not in fact occur or exist" to the Statewide Central Register either directly or indirectly.<sup>31</sup> While this statute seems to state that it can be a misdemeanor to file a false report regardless of situations where the suspicion of abuse was reasonable and the report was made in good faith, no court has addressed this contradiction and it appears that the law was not originally intended to apply to mandated reporters.<sup>32</sup> Therefore, it is unlikely that a good faith mandatory reporter would be prosecuted, even if the report turned out to be unfounded. A cautious mandatory reporter may wish to consult an attorney before making a report.

**Situation #2: The mandatory reporter fails to make a report.**

On the other hand, a mandatory reporter who suspects abuse or neglect and deliberately *fails* to report it may be guilty of a class A misdemeanor and can be sued for damages resulting from the failure to report (for example, the continued abuse of the child).<sup>33</sup>

<sup>1</sup> N.Y. SOC. SERV. LAW § 413 (McKinney 2006). “Persons legally responsible” for a child’s care include a child’s guardian, custodian (any person regularly found in the child’s household) or other person responsible for the child’s care at the relevant time. FAM. CT. ACT § 1012(g) (McKinney 2006). *See also Matter of Case*, 120 Misc. 2d 100, 102 (Oneida Co. 1983) (finding a 19 year old brother with whom minor lived with was not a person legal responsible for her within the meaning of the statute noting that “the mere fact that two persons are residing in the same household at the relevant time does not create a presumption that the older is exercising any type of parental control over the younger”).

<sup>2</sup> A caregiver commits *child abuse* if he or she: (1) inflicts or allows the infliction of a non-accidental, physical injury that causes substantial risk of serious physical or emotional harm; **or** (2) creates or allows the creation of substantial risk of non-accidental physical injury that is likely to cause serious physical or emotional harm; **or** (3) commits or allows to be committed a sexual offense against the minor. N.Y. SOC. SERV. LAW § 412(1) (McKinney 2006); FAM. CT. ACT § 1012(e). A caregiver is guilty of *child neglect* when he or she fails to exercise substantial care, and thus causes or creates a substantial risk of physical harm to the child or causes a substantial reduction in the child’s psychological or intellectual functioning. N.Y. SOC. SERV. LAW § 412(2); FAM. CT. ACT §§ 1012(f), (g).

<sup>3</sup> N.Y. SOC. SERV. LAW § 412(4) (McKinney 2008). *See In re Catherine G.*, 3 N.Y.3d 175 (2004) (dismissing claim for failure to report abuse of child by 14-year-old boy because boy was not a parent, caregiver, or person legally responsible for the child’s welfare and therefore could not be the subject of the report pursuant to the law); *see also Page v. Monroe*, 488 F. Supp. 2d 219, 221 (N.D.N.Y. 2007) (finding that a report against a half-brother was not legally justified as a report of child abuse or maltreatment because the half brother “could not be the subject of a report”) *affirmed in part, reversed in part* by 300 Fed. Appx. 71 (2d Cir. 2008) (affirming the holding that there was no showing of a statutory duty to report under the mandatory reporter law but reversing the grant of summary judgment for the medical malpractice claim because there existed genuine issues of material fact as to whether the pediatrician otherwise breached her duty of care).

<sup>4</sup> Teachers and other school employees are not considered persons “legally responsible” under New York child abuse laws. However, abuse committed by a school employee against a student in a school setting is governed by another set of laws. School employees must report any allegations of such abuse to school authorities, but *not* to the Central Register. N.Y. EDUC. LAW, Art. 23-B (McKinney 2006).

<sup>5</sup> *See supra* n.3.

<sup>6</sup> *In re Katherine C.*, 122 Misc. 2d 276, 278-279 (N.Y. Fam. Ct. Richmond Co. 1984) (finding a mother guilty of neglect because she should have known that her daughter was being sexually abused by the stepfather and failed to act to protect her). *See also* Besharov, Practice Commentaries, McKinney’s Cons. Laws of N.Y., Book 29A, Family Ct. Act § 1012 at 314 (1999) (“Allowing a child to be abused includes taking no appropriate protective (or preventive) action after being warned of the danger to a child”).

<sup>7</sup> *See Katherine C.*, 122 Misc.2d at 278. *See also, Page*, 488 F. Supp. 2d at 221 (finding no statutory duty to report an instance of abuse against a child committed by someone who could not be the subject of a report when there is no showing that the mother was incapable or unwilling to protect the child from further potential abuse); *In re Katrina W.*, 171 A.D.2d 250 (2d Dept. 1991) (finding that daughter was an abused child because her mother was unwilling or unable to protect her from being sexually abused by her older brother).

<sup>8</sup> N.Y. SOC. SERV. LAW § 413(1) (McKinney 2006).

<sup>9</sup> *Id.*

<sup>10</sup> N.Y. SOC. SERV. LAW § 413(1)(a) (McKinney 2008).

<sup>11</sup> N.Y. SOC. SERV. LAW §§ 413(1); 415 (McKinney 2008).

<sup>12</sup> *Vacchio v. St. Paul’s United Methodist Nursery Sch.*, NYLJ, July 21, 1995, p. 32, col. 2 (Sup. Ct. Nassau Co.) (Alpert, J.), citing *People v. Brooks*, 88 A.D.2d 451, 454 (2d Dept. 1982).

<sup>13</sup> N.Y. SOC. SERV. LAW § 413(1)(b) (McKinney 2008). “Social service worker” is defined by OCFS as professional or paraprofessional staff either employed by, or who have contracts with, local social service districts to provide services to children and/or families. New York Office of Children and Family Services, Administrative Directive, 07-OCFS-ADM-15 (Dec. 13, 2007). The information that is provided to the social service worker should be accepted at face value, and should be reported to the State Central Register so long as it would constitute child abuse assuming it were true. *Id.*

<sup>14</sup> *See supra* n.2.

<sup>15</sup> For example, in *In re Philip M.*, a state appellate court affirmed a lower court’s decision noting that a 15-year-old with a sexually transmitted infection could not be presumed to be the victim of child abuse because the minor’s age indicated

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that he could have been engaged in “consensual sexual activity.” 589 N.Y.S.2d 31, 32 (1st Dept. 1992) *aff’d on other grounds*, 82 N.Y.2d 238 (1993)

<sup>16</sup> *In re Toni D.*, 179 A.D.2d 910 (3d Dept. 1992).

<sup>17</sup> Letter from Charles Carson, Assistant Deputy Counsel, NYS Office of Children & Family Services to Galen Sherwin, Director, NYCLU Reproductive Rights Project, dated January 16, 2009, available at <http://www.nyclu.org/node/2294>.

<sup>18</sup> Article 130 of the New York Penal law identifies sexual offenses including sexual misconduct, rape, sodomy, and sexual abuse. The categories of offenses are based on the ages of the participants and the type of sexual activity involved. Because New York law provides that persons 16 years old and younger generally do not have the capacity to consent to sexual activity, anyone under the age of seventeen who engages in vaginal, anal or oral sex is the victim of at least the misdemeanor crime of sexual misconduct, and may be the victim of a felony sexual crime depending on the age of his or her partner. N.Y. PENAL LAW § 130.00 (McKinney 2006). However, it is important to remember that this penal law scheme does not automatically implicate mandatory reporting obligations. Courts have found that a statutory sex offense based on a minor’s voluntary activity does not in and of itself constitute abuse or neglect by the parent or caregiver. *See* cases cited *infra* note 20.

<sup>19</sup> *Comm’r of Social Serv. ex rel Leslie C.*, 161 Misc. 2d 600, 609-610 (Kings Co. 1994); *Page*, 488 F.Supp.2d at 221 (finding that in order to establish that a parent ‘allowed’ abuse to occur to their child, the appropriate standard is to determine if “the parent or guardian failed to exercise a minimum degree of care, such as failing to take any appropriate action to protect their child” and noting that “if the parent is responding appropriately and acting to prevent harm to their child, then there is no grounds for a report and no justification for state involvement”).

<sup>20</sup> *Leslie C.*, 161 Misc. 2d at 608.

<sup>21</sup> *Id.* at 607-608.

<sup>22</sup> *Id.* at 610 n.15 (emphasis added).

<sup>23</sup> N.Y. SOC. SERV. LAW § 413(1) (McKinney 2006).

<sup>24</sup> *Id.* at 610.

<sup>25</sup> Professionals who are licensed or certified by the State, including nurses, doctors, physician assistants, nurse practitioners, pharmacists, social workers and psychologists, are bound by confidentiality obligations. 8 N.Y.C.R.R. § 29.2 (2006). *See also* N.Y. C.P.L.R. §§ 4504 (privileging doctor-patient communications); 4507 (psychologist) 4508 (social worker); 4510 (rape crisis counselor).

<sup>26</sup> Revealing personal information obtained in a professional capacity without the prior consent of the patient constitutes professional misconduct and is punishable by fine, reprimand or license revocation. 8 N.Y.C.R.R. § 29.1 (2006); N.Y. EDUC. LAW §§ 6509(9), 6511 (McKinney 2006). Providers who breach confidentiality without patient authorization may be sued by their patients for resulting damages. *See, e.g., MacDonald v. Clinger*, 84 A.D.2d 482 (4th Dept. 1982).

<sup>27</sup> There are a few narrow exceptions where a report may be required. For example, New York law mandates that hospital workers report to the police injuries involving firearm discharge or life-threatening stab wounds. N.Y. PENAL LAW § 265.25 (McKinney 2008).

<sup>28</sup> N.Y. SOC. SERV. LAW § 419 (McKinney 2008) (immunizing good faith mandatory reporters from civil liability).

<sup>29</sup> *Id.*; *Gentile v. Garden City Alarm Co., Inc.*, 147 A.D.2d 124 (2d Dept. 1989). Courts have also defined “gross negligence” as involving egregious conduct. *Gandiano v. Sobol*, 171 A.D.2d 965 (3d Dept. 1991); *Spero v. Board of Regents of University of State*, 158 A.D.2d 763 (3d Dept. 1990). For example, in *Vacchio*, the court held that a teacher was not necessarily immune from liability because her immediate reporting of a student’s black eye without first inquiring as to the cause of the black eye could support a finding of gross negligence, and thus was made without “reasonable suspicion” that child abuse had occurred. However, “reasonable suspicion” is a far lower standard than certainty. In *Kimberly S.M. v. Bradford Cent. Sch.*, 226 A.D.2d 85 (4th Dept. 1996), a sixth-grade student told her teacher (a mandatory reporter) that an uncle sexually abused her while she was living with him during school vacations over the course of two years. On the mistaken theory that the uncle was not reportable as a “person legally responsible” for the child, the teacher did not report the allegation, and the student continued to spend her school vacations at her uncle’s house. The appellate court ruled that the teacher could be held liable for failure to report because the uncle was indeed a reportable custodian or person legally responsible for the child’s care—as a person in whose care the child had been entrusted—during the child’s extended visits with him because it was clearly unreasonable for the teacher to fail to report the uncle given the facts she knew, as such facts created a “reasonable suspicion” that child abuse had occurred. Therefore, mandatory reporters should report reasonable suspicions of child abuse, even if they are uncertain whether or not the situation fits

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the legal definition thereof. Of course, if a mandatory reporter is certain that the situation does *not* fit the legal definition of child abuse, a report would not be in good faith and could be considered willful misconduct, thereby not immunizing the mandatory reporter from criminal and civil liability.

<sup>30</sup> N.Y. SOC. SERV. LAW § 419 (McKinney 2008).

<sup>31</sup> N.Y. PENAL LAW § 240.50(4) (McKinney 2009). Paragraph (a) of the law covers individuals who make false reports directly to Statewide Central Register. Recent legislation added paragraph (b) to the section to cover the individual who makes a false report indirectly by giving the false report to someone they know is obligated to make the report to the statewide central register and with the intent that the report reach there. L. 2008, c. 400 § 1, eff. Feb. 1, 2009.

<sup>32</sup> When the provision was initially passed, the accompanying legislative memorandum indicated that the purpose of the law was to address the problem of individuals misusing the hotline by making “child abuse reports for harassment purposes, especially during the course of matrimonial proceedings and child custody disputes.” *See* Donnino, Practice Commentaries, McKinney’s Cons. Law of N.Y., Book 39, Penal Law § 240.50, at 169.

<sup>33</sup> N.Y. SOC. SERV. LAW § 420 (McKinney 2008). *See Bowes v. Noone*, 748 N.Y.S.2d 440, 444 (4th Dept. 2002) (finding no grounds for civil liability when the failure to report was not willful even where there was reasonable cause to suspect child abuse); *Page*, 488 F.Supp.2d at 219 (noting that a showing of a reasonable cause to suspect child abuse is insufficient as a matter of law to establish civil liability if the evidence does not support a finding that the failure to report was knowing and willful).