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MEMORANDUM

To: Interested Parties
From: New York Civil Liberties Union, Reproductive Rights Project
Re: OCFS guidelines re: reporting of consensual teen sexual activity
Date: March 12, 2009

On January 16, 2009, in response to a request from the NYCLU, the NYS Office of Children and Family Services ("OCFS") issued a letter setting forth important clarifications regarding the New York Statewide Central Register of Child Abuse and Maltreatment ("SCR") standards for intake reports related to allegations of child sexual abuse. This memorandum seeks to explain these clarifications and their relevance to providers who work with sexually active teens.

Specifically, the letter makes clear that a child abuse report is *not* required merely because a person under the age of seventeen has been sexually active with a non-parent or caregiver. Rather, absent other allegations of abuse or neglect, a report is only required if the parent or caregiver (a) was aware (or should reasonably have been aware) of the teen's sexual activity *and* (b) failed to respond appropriately under the circumstances. Otherwise, a minor's consensual sexual activity does not automatically give rise to reasonable suspicion of abuse or neglect and therefore does not trigger a reporting obligation.

BACKGROUND

OCFS has the complicated responsibility to navigate an area where reality, public policy, and the law do not easily align. First, the current reality is that over 46% of teens are sexually active. Second, as a result of this reality, New York's strong public policy reflects recognition of the importance, from a public health perspective, of providing teens with unimpeded access to confidential reproductive and sexual health care. Third, the law requires OCFS to investigate and adjudicate cases of possible child abuse and maltreatment – concepts defined by statute. These three areas are sometimes in tension and can result in confusion among many providers of services to young people.

The relevant portion of the child abuse law defines an abused or neglected child as one whose parent, guardian, custodian or other person legally responsible (hereinafter collectively referred to as "parent or caregiver") for the child *commits or allows to be committed* certain sex offenses against the child. According to the New York State Penal Law, a person under the age of seventeen is deemed legally incapable of consent, and therefore essentially all sexual activity involving a person under the age of seventeen (including teen consensual sexual activity) is a sex offense. Because the definition of child abuse or neglect is limited to acts by a parent or caregiver, a teenager's consensual sexual activity with a non-family member cannot in and of

itself lead to a charge of child abuse. However, parents or caregivers who "allow" a sexual offense to be committed against a child for whom they are legally responsible *may* be considered abusive or neglectful, depending on the circumstances and whether the caregiver responded appropriately to the situation.

Unfortunately, many health care and social service providers have interpreted these laws as requiring a report to the SCR of *any circumstance* where it becomes clear that a young person under the age of seventeen is engaging in sexual activity, such as when a teenager becomes pregnant; seeks or obtains birth control, abortion services, or STI testing or treatment. As outlined in previous NYCLU publications, this position is not supported by the law. (Please see our website at: http://www.nyclu.org/node/2294) Nonetheless, this misinterpretation has resulted in policies and practices which ultimately compromises the confidentiality of adolescents and deter them from obtaining necessary and critical preventative care and treatment. These policies and practices, adapted by providers who tend to err on the side of reporting when their legal obligations are unclear, end up contravening the public policy purpose behind laws protecting teens' confidential access to these services. The misinterpretation has also led to child abuse investigations against parents and caregivers who were trying to be supportive and responsible by becoming actively involved in supporting their teens' access to birth control, STI testing and treatment, and prenatal care. Accordingly, in an attempt to clarify the confusion, the NYCLU sought guidance from OCFS on its view of when a report of child abuse is appropriate.

OCFS RESPONSE

The OCFS letter provides two important clarifications regarding SCR practices related to the intake or registering of child abuse or neglect reports in which the sole basis for a child abuse report is sexual activity by a person under seventeen and person who is *not* a parent or caregiver.

First, there must be an inquiry as to whether the caller has reasonable cause to suspect that the parent or caregiver *was aware of or should have reasonably been aware of the sexual activity*. The language is clear that if there is *no* "reasonable cause to suspect that a parent was aware of sexual activity, or should reasonably have been aware of the activity," then *no report will be registered* by the SCR.

Second, the language makes clear that a child abuse report is not necessarily required even if the parent or caregiver was aware of the sexual activity, because knowledge of a teen's sexual activity does not in and of itself trigger a reporting obligation. Rather, the mandated reporter should conduct a more careful analysis to determine whether the parent or caregiver took steps in response that were appropriate under the circumstances.

EXAMPLE

Samia, who is fifteen, goes to an adolescent health care center in her neighborhood for confidential family planning services because she has started having consensual sex with her fifteen year old boyfriend. She is terrified of her parents finding out because of their strong religious beliefs regarding premarital sex. If Samia feared that her parents would be notified (and even possibly investigated) as a result of a child abuse report, it is much more likely that she would avoid seeking birth control – but it is almost certain that she would continue having sex.

As per the OCFS clarification, because there is no reasonable cause to suspect that Samia's parents were aware of her sexual activity, no report should be registered, and the services should remain completely confidential.

The letter provides two specific examples in which a parent or caregiver's awareness of their child's sexual activity would not necessarily require a report to the SCR. First, it specifies that the mere reoccurrence of the sexual activity "does not in and of itself" mean that a report is required, and emphasizes that if "the parent's response was appropriate under the circumstances, the failure of that response to prevent an additional occurrence of the sexual activity does not provide a reasonable cause to suspect child abuse or maltreatment."

EXAMPLE:

Sally discovers that her sixteen-year-old daughter, Emma, is engaging in sexual activity with her eighteen year old boyfriend. Rather than forbidding her daughter to continue the relationship, Sally attempts to control where and when Emma spends time with her boyfriend, limiting them to public spaces and attempting to ensure that they are supervised. Nonetheless Emma becomes pregnant, and decides to continue the pregnancy. Sally thinks it is important that her daughter get prenatal care, and accompanies Emma for prenatal visits and delivery.

If Emma's prenatal care providers believe that Sally's response and actions were appropriate under the circumstances, despite her knowing of Emma's sexual activity, no report to SCR is required. Similarly, if Sally thereafter supports her daughter in obtaining birth control, the provider should not be liable for failing to report to SCR if he/she believes that steps Sally took were appropriate under the circumstances.

Second, the letter makes clear that although a parent or caregiver who is supportive of or involved in a teen's accessing sexual or reproductive health care services is obviously aware of the teen's sexual activity, this alone does not give rise to reasonable cause to suspect child abuse, "because such support may very well have been appropriate under the circumstances."

Therefore, the language is clear that a mandated reporter *should not be liable* for a failure to make a report to the SCR *unless* they have reasonable cause to suspect that the parent or caregiver was aware or should have been aware of the sexual activity, *and, despite that, the parent or caregiver failed to take steps in response that were appropriate under the circumstances*. The mandated reporter must assess on a case-by-case basis whether the response was appropriate under the circumstances.

CONCLUSION

These clarifications should remove confusion and promote the important public policy goals of encouraging teens to feel safe in accessing confidential reproductive health care services, while at the same time fostering open family communication and support for sexually active teens. We are hopeful that health care and social service providers will reexamine their policies and practices to ensure compliance.

Please be in touch with Ami Sanghvi of the Reproductive Rights Project at (212) 607-3391 if you have any questions or concerns regarding this memorandum or to report any instances where you believe that child abuse reports are being filed inappropriately. For a more in depth analysis of the legal and public policy basis behind our requested clarification, as well as the response from OCFS please visit: http://www.nyclu.org/node/2294.