

Politicizing Statutory Rape Reporting Requirements: A Mounting Campaign?

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State laws requiring the reporting of sexual intercourse involving an underage minor—often referred to as “statutory rape”—are intended to safeguard adolescents from sexual coercion and exploitation, particularly by older partners. This body of law is complex and sometimes unclear, and therefore can be difficult for law enforcement agents, school officials, reproductive health care providers and other adults who frequently interact with adolescents to navigate.

Beyond the legal complexity and ambiguity, statutory rape reporting requirements can present a challenge for those who recognize the value in both assuring that minors have access to confidential health care and protecting adolescents from sexual exploitation. This is particularly true for reproductive health care providers, who usually are obliged to report suspected cases of sexual abuse—and often are uniquely positioned to detect it. At the same time, they are ethically, and sometimes legally, required to honor a patient’s privacy rights.

Statutory rape reporting requirements have recently received heightened attention at both the federal and state levels. Within the past year, the U.S. Department of Health and Human Services (DHHS) both sponsored a national conference on the sexual exploitation of teenagers that featured this topic and released an inspector general report addressing the issue. Moreover, intense legal battles are being fought in two states, Kansas and Indiana, in which the attorneys general are seeking the

medical records of minor patients of family planning and abortion clinics—purportedly to determine whether the clinics are complying with the states’ statutory rape reporting requirements. These attorneys general have taken such an aggressive stance on the issue that their efforts reasonably could be seen as being aimed not just at protecting minors from harm but also at intentionally undermining their access to sexual health services—and at intimidating the professionals who provide these services.

Statutory Rape 101

Every state criminalizes sex with a minor under a certain age. The laws vary considerably from state to state, based on the age of the “victim,” the age difference between “victim” and “perpetrator” and the nature of the act.

A separate body of laws, which also vary widely by state, identifies those individuals who are required to report child abuse, including child sexual abuse—a term which often, but not always, includes statutory rape. Typically, these “mandatory reporters” are adults who interact regularly with adolescents, such as teachers, social workers and medical professionals (“Statutory Rape Reporting and Family Planning Programs: Moving Beyond Conflict,” *TGR*, June 2004, page 10).

The complexity and, sometimes, lack of clarity of these two areas of law can make understanding what constitutes statutory rape, as well as who should report it and under what cir-

cumstances, difficult. On top of this, the potential for these laws to be misused for political ends is of particular concern for reproductive health care providers—both those who are currently being investigated in two states for allegedly failing to report statutory rape, and others around the country who fear similar attacks on their integrity and professionalism.

Kansas Takes the Lead

In Kansas, Attorney General Phill Kline’s (R) aggressive campaign to use statutory rape reporting requirements to target abortion providers has come in the form of two distinct but seemingly related efforts that date back more than two years. In June 2003, Kline wrote an opinion letter that would have required abortion providers to report to state authorities every minor under 16 who seeks an abortion. In the letter, Kline reasoned that sex that is illegal under state law—sex with someone under the age of 16—is inherently injurious and, therefore, evidence of such injury, namely pregnancy, must be reported as suspected child abuse. Kline’s letter acknowledged that “although this opinion is limited to the question posed [about abortion providers], the consequences of [his] conclusion reach further.” Indeed, Kline listed several other situations “that might trigger a mandated reporter’s obligation, because sexual activity of a minor becomes known, includ[ing] a teenage girl or boy who seeks medical attention for a sexually transmitted disease, a teenage girl who seeks medical attention for a pregnancy, or a teenage girl seeking birth control who discloses she has already been sexually active.”

Kline’s opinion represented a dramatic departure from a long-standing interpretation of Kansas law. That law mandates that specific individuals—including medical professionals—report to authorities when they suspect that a minor under 16

has been *injured* as a result of any physical, emotional, mental or sexual abuse. A 1992 opinion letter by former Kansas Attorney General Robert Stephan (R) asserted that, for mandatory reporting purposes, “whether a particular minor in a particular case has been injured as a result of sexual intercourse and a resulting pregnancy must be determined on a case-by-case basis.”

In July 2004, a U.S. district court temporarily enjoined Kline’s opinion. In a lawsuit, *Aid for Women v. Foulston*, brought by the Center for Reproductive Rights on behalf of various health care professionals and their minor clients in the state, the court found that his opinion violates minors’ “right to informational privacy concerning personal sexual matters that might be revealed through mandatory reporting.”

During that same year, subpoenas were issued in an investigation conducted by Kline for the medical records of nearly 90 women from two abortion clinics in the state, which he asserts are necessary to discover whether providers are complying with the state’s reporting requirement, as well as its law restricting postviability abortions. The demand for the records is pending before the Kansas Supreme Court, which has temporarily barred Kline from obtaining the records until it makes a final determination.

Indiana Follows Suit

Meanwhile, a similar situation is unfolding in Indiana. In March, investigators from the Indiana Medicaid Fraud Control Unit (IMFCU), which is within the office of Attorney General Steve Carter (R), entered three separate Planned Parenthood clinics and demanded the medical records of nearly a dozen Planned Parenthood patients. Later, the IMFCU demanded that 19 other facilities turn over the medical records of over 70 additional low-

income patients, who were 12 and 13 at the time they received care. The clinics denied the IMFCU access to the majority of the files, claiming that disclosure of the information would violate the privacy interests of their patients.

Like Kline, Carter and the IMFCU’s stated intent is to discover whether providers are complying with the state’s child abuse reporting requirement, which requires any individual who has reason to believe that a child is the victim of abuse to file a report with local law enforcement or child protective services. Under Indiana law, a minor under age 14 who has engaged in sexual activity, regardless of the age of the partner, is considered a victim of child abuse.

In most cases, federal health privacy law protects the confidentiality of personal medical information, but Carter and the IMFCU are investigating the records of Medicaid patients only and therefore have authority, under federal Medicaid law, to review complaints of abuse or neglect of Medicaid patients at the hands of providers. Carter’s assertion is that, by not reporting sexual abuse, providers are themselves guilty of neglecting their patients.

In March, Planned Parenthood of Indiana filed a lawsuit to block Carter and the IMFCU from seizing the records. In June, Superior Court Judge Kenneth Johnson denied Planned Parenthood’s request for a preliminary injunction, which would have prevented Carter and the IMFCU from accessing the records while the court considered the merits of the case. In his opinion, Johnson wrote, “the great public interest in the reporting, investigation and prosecution of child abuse trumps even the patient’s interest in privileged communication with her physician because, in the end, both the patient and the state are benefited by the disclosure.” Later that same month, the Indiana Court of

Appeals issued a temporary stay—thereby keeping Carter and the IMFCU from accessing the records—pending Planned Parenthood’s appeal of Johnson’s denial of its request for a preliminary injunction.

A Campaign in the Making?

Counterbalancing these investigations is a recent federal report indicating that federally funded family planning clinics are complying with state statutory rape reporting requirements. In April, DHHS’s Office of the Inspector General released its evaluation of the Title X family planning program; clinics that receive program funding are required by law to both provide confidential services to teens and comply with state reporting requirements. The evaluation was issued in response to a 2003 request from conservative members of Congress, who expressed concern that Title X-funded organizations “may not be fully complying with State laws requiring the reporting of potential sexual abuse, including statutory rape.”

In fact, the inspector general’s evaluation reflects quite favorably on the Office of Population Affairs (OPA), which runs the Title X program, for its efforts to inform and periodically remind Title X grantees of their responsibilities regarding state child abuse and sexual abuse reporting requirements. The evaluation notes that OPA includes state reporting requirements within its reviews and site visits of the program’s 86 grantees (which support 4,600 family planning clinics nationwide), and that all grantees were deemed to be complying with state law during the prior year. The evaluation also cites extensive training within the program to ensure that clinicians are conversant with state law in this area and trained to both recognize signs of sexual coercion and sexual violence and follow appropriate procedures when such cases arise. Finally, it notes that patient chart

reviews, conducted as part of OPA regional consultants' routine site visits, revealed documented cases of sexual abuse that were appropriately reported pursuant to state law.

Notwithstanding this favorable assessment, Title X opponents in Congress are seeking to use the investigations in Kansas and Indiana to undermine the program. Observing that attorneys general in "several States are requesting records to determine any role family planning providers may have had in failing to report criminal activity such as statutory rape," report language accompanying the FY 2006 appropriations bill passed by the House in June directs OPA to remind Title X grantees of their obligation to report statutory rape. It further directs the secretary of DHHS to conduct an audit of a sample of Title X recipients to determine compliance with state laws, although that is already routinely done by the federal agency's regional consultants.

Reproductive health advocates also point to other signs that a broad campaign may be underway to use state reporting requirements for political ends. In March, as a featured speaker at a national conference on "The Sexual Exploitation of Teens" sponsored by DHHS, Kline largely abandoned his prepared presentation on Internet predators in order to speak about his efforts in Kansas. During that speech, Kline went so far as to suggest that the Center for Reproductive Rights' 2004 lawsuit challenging his opinion letter was an example of "predator[-] inspired judicial assaults on age of consent laws, as well as mandatory reporting laws." He also denounced, and, more importantly, mischaracterized, the judge's decision in that case as advancing the "frightening argument" that "our constitution gives a child such a privacy right that we cannot take action to remove that child from a predatory situation." It is noteworthy that Kline co-chairs a

working group on sexually violent predators for the National Association of Attorneys General. Even more ominous, Randall Terry, founder of Operation Rescue and a staunch opponent of abortion and family planning, is spearheading a nationwide campaign to enlist other attorneys general to mount similar investigations in their own states.

Beyond Legal Considerations

In the near term, it is up to the courts in Kansas and Indiana to decide, based on those states' laws, whether protections of minors' confidentiality rights or the ability of state officials to cast a wide net in order to enforce statutory rape reporting requirements will prevail. Meanwhile, reproductive health providers across the nation grapple every day with the questions of what constitutes harm to young adolescents and how best to prevent it—especially where it involves very young adolescents who are particularly vulnerable to exploitation. While providers are acutely aware of the need and importance of protecting minors from harm in the form of sexual exploitation, they are also concerned that wholesale reporting of large numbers of sexually active teenagers will deter young people from seeking care, itself doing more harm than good. They point to a large and established body of related research, including a 2004 study by Guttmacher Institute researchers published in the *Journal of the American Medical Association*, that suggests that a significant proportion of teenagers would stop seeking services from a family planning clinic, but continue to have sex, if their parents were notified when they sought birth control. They argue that routine reporting of teen sexual activity to state authorities would have similar consequences.

Fortunately, a 2004 position paper, issued by the major medical professional organizations serving children and adolescents, expresses this ethi-

cal complexity and offers guidance to the field. The statement, written jointly by the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists and the Society for Adolescent Medicine and published in the *Journal of Adolescent Health*, clearly articulates that not all adolescent sexual activity should be considered child abuse and asserts that adolescents who are sexually active need to receive appropriate health care and counseling, on a confidential basis if necessary. It also insists that providers know their state laws and report cases of abuse to the proper authorities. But, perhaps most importantly, it recognizes health care professionals' unique ability to identify and report abuse based on careful clinical assessments and open communication with patients. It asserts that laws should support and affirm providers in their position to exercise appropriate clinical judgment.

Overly broad statutory rape reporting requirements that deny reproductive health providers such professional discretion tip the balance between the need to maintain patient confidentiality and reporting adolescent sexual activity too far in one direction. The same is true for investigations by overzealous prosecutors who are conducting what some have characterized as "fishing expeditions"—investigations that appear to be designed, at least in part, to deter adolescents from seeking reproductive health services and to intimidate providers from offering care. Reproductive health providers, for their part, must continue to be sensitive to their dual legal and ethical responsibilities to report statutory rape and to provide confidential services to adolescents, and, when necessary, to negotiate the conflict presented by these two potentially competing responsibilities. At the same time, they will need to keep a watchful eye on the growing politicization of this issue in the months ahead. ☉