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March 15, 2008

Commissioner Brenda Harvey
Department of Health and Human Services
221 State Street
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Dear Commissioner Harvey:

By letter dated November 1, 2007, you have requested an opinion concerning the interpretation of 22 M.R.S.A. § 4011-A, referred to generally (and herein) as the mandatory reporting law. Specifically, you ask whether the obligation imposed by that statute to report abuse and neglect to the Department of Health and Human Services ("Department") should be read "to include all defined crimes of sexual act or contact involving children under age 14, so as to require the Department both to report such cases to the District Attorneys and to require the Department to accept such cases for our own child welfare investigations?"[1]

SUMMARY OF CONCLUSIONS

This is a complex issue, but also a narrow and specific one. The effective operation of the mandatory reporting law and the prosecution of sex crimes perpetrated against children are critical tools for the protection of children. The mandatory reporting law clearly requires the reporting to the Department of "abuse and neglect," which is defined to mean "a threat to a child's health or welfare by physical, mental or emotional injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these…by a person responsible for the child." 22 M.R.S.A. § 4002(1). The mandatory reporting law also requires mandatory reporters to report to the appropriate district attorney instances of abuse and neglect, as defined above, when committed by a person who is not responsible for a child; the district attorney has discretion to prosecute in appropriate cases. The behaviors that must be reported under this statute include conduct that may also constitute a crime under the Maine Criminal Code and which may be a juvenile crime under the Maine Juvenile Code.[2]

[1] Attorney General G. Steven Rowe did not participate in the preparation of this opinion.

[2] In this opinion, references to "a crime" or to "crimes" should be read to include juvenile crimes.

We have found no Maine case addressing the question that you have posed. The courts in other jurisdictions that have ruled on this issue have carefully limited the scope of their opinions to very precise parameters. We adopt this same approach, in order to avoid an overbroad interpretation of our conclusions that might operate to undermine the proper reporting of child abuse and neglect to the Department and to the district attorneys. As a result, references to sexual conduct by minors in this opinion mean activities where: 1) no coercion or violence was involved; 2) no mental disability or other appreciable power differential existed between partners; and 3) the parties are both minors who are at least twelve and the age difference between them is less than three years.[3] It is also important to note that we are addressing the question of whether the mandatory reporting law requires a report to be made, as distinguished from whether it permits one. The law encourages reporting by providing that a mandated reporter is immune from liability for making a report in good faith. 22 M.R.S.A. § 4014.

The narrow legal question we address in this opinion is whether a mandated reporter is required to report sexual conduct by a minor that may constitute a crime involving a sexual act or contact even where the mandated reporter does not know or have reason to suspect that the conduct presents a threat to a child's health or welfare. Critical to our analysis is the fact that a knowing failure to comply with the mandatory reporting law is subject to prosecution for a civil violation. 22 M.R.S.A. § 4009. Because the mandatory reporting law does not clearly put reporters on notice that they must report to the district attorney actions by a person not responsible for a child solely because those actions may constitute a crime, we do not believe it likely that a court would reach the conclusion that failure to make such a report *under these narrow circumstances* constitutes a knowing failure and therefore a civil violation.[4]

The mandatory reporting law is ambiguous in its application to this specific issue. However, we believe that a court construing its language would conclude that a mandated reporter is not legally required to make a report unless the reporter has reasonable cause to suspect a threat to a child's health or welfare. In many cases, sexual conduct by minors may satisfy this standard, and reports should be made in those situations. A report to the Department may also be appropriate in these cases if the reporter has reasonable cause to suspect that a person responsible for the child has failed to protect the child from abuse and neglect. However, if a mandated reporter reasonably concludes, based on the totality of the circumstances and exercising the reporter's professional expertise where applicable, that sexual conduct between minors does not threaten the health or welfare of the children involved, we do not believe that a court would conclude that a report is legally required.

This question is not addressed in the Department's rules or policies, or in the explanatory materials it provides concerning the mandatory reporting law. Based on our discussions with your staff and our review of your statutes, rules and policies, we have not found any guidance on the Department's view of same or near age sexual activities by minors. It is our opinion, in responding to your second question, that whether the Department opens an investigation in any given matter is within the Department's enforcement discretion. Since we have concluded that

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[3] This is the formulation used by the federal district court in *Aid For Women v. Foulston*, 427 F.Supp.2d 1093 (D. Kan. 2006), with some minor clarifications.

[4] We emphasize that this opinion does not affect criminal prosecutions.

there is no clear requirement that all behaviors that may constitute crimes fall within the abuse and neglect definition under the Act, we do not believe that you are compelled to open an investigation solely because such behaviors may be crimes. As with any other report, the Department must use its judgment to determine whether a child has been or is likely to be abused or neglected.

The Department may wish to clarify its rules and policies on mandatory reports to address how same or near age sexual activities will be addressed in its enforcement of the child protection laws. In addition, the Legislature may wish to consider clarifying the mandatory reporting law on the issue of the reporting of activities that may constitute crimes. Legal issues discussed in the analysis that follows may be relevant to a statutory clarification, such as the interface of the mandatory reporting law with existing statutes providing minors with certain rights to reproductive health services without parental notification. There are, of course, a number of policy issues that are relevant to this question, as to which we express no opinion herein.

Before beginning our legal analysis of the questions you have asked, we set out the relevant child protection and criminal law provisions that inform our discussion.

BACKGROUND

I. The Mandatory Reporting Law

Your questions focus on the provisions that require reporting of suspected cases of child abuse and neglect. Title 22, M.R.S.A., § 4011-A(1) requires twenty-nine specific categories of adult individuals to "immediately report or cause a report to be made to the department when the person knows or has reasonable cause to suspect that a child has been or is likely to be abused or neglected...."

Persons required to report (collectively referred to as "mandated reporters") include (among others) the following when acting in a professional capacity: a variety of health care providers (physicians, nurses, dentists, mental health professionals, etc.), school personnel (teachers, guidance counselors, school officials), law enforcement personnel, and clergy. Department employees who are social workers are mandated reporters. 22 M.R.S.A. § 4011-A(15). Persons with full, intermittent or occasional responsibility for the care or custody of a child, and persons who serve in an administrative capacity or position of trust in a church or religious institution, are also mandated reporters. 22 M.R.S.A. § 4011-A(1)(B)&(C).

Mandated reporters are also required to report to the district attorney's office, as follows:

> 2. Required report to district attorney. When, while acting in a professional capacity, any person required to report under this section knows or has reasonable cause to suspect that a child has been abused or neglected by a person not responsible for the child, the person immediately shall report or cause a report to be made to the appropriate district attorney's office.

22 MRSA § 4011-A(2).

There are two differences between these two reporting requirements: 1) Reports to the district attorneys are required only where the abuse or neglect is perpetrated by a person not responsible for the child; and 2) reports to the district attorneys are required only where a mandated reporter knows or has reason to suspect that a child has been abused or neglected, while reports to the Department are required when there is reasonable cause to suspect that a child has been or is likely to be abused or neglected. A knowing failure to make a report required under either provision is a civil violation for which a forfeiture of not more than $500 may be adjudged under the general penalty provision of the Act. 22 M.R.S.A. §4009.

II. Criminal Sex Offenses.

Before looking at the question of whether all criminal sexual offenses are required to be reported, we offer the following information about the relevant criminal statutes to provide context. The term "abuse and neglect" as used in the mandatory reporting law is defined to include "a threat to a child's health or welfare by...sexual abuse and exploitation...." 22 M.R.S.A. § 4002(1). "Sexual abuse and exploitation" could potentially include all the crimes in Chapters 11 (Sexual Assaults) and 12 (Sexual Exploitation of Minors) of the Maine Criminal Code, Title 17-A. Certain other Criminal Code sections could also fall within these general terms, such as § 556 (incest), § 852(1)(B) (aggravated promotion of prostitution) and § 855 (patronizing prostitution of a minor).

If the person engaging in the proscribed conduct is also a minor, certain of these crimes either have no application or only limited application because the age of the actor is made an element of the crime. In some instances the actor must be an adult. *See e.g.*, § 254 (sexual abuse of minors), § 256 (visual sexual aggression against a child), § 258 (sexual misconduct with a child under 14), and § 556 (incest) as examples where the actor must be an adult. In other instances the minor must be of a certain age. *See* § 255-A(1)(E)-(F-1) (certain unlawful sexual contact crimes; actor must be at least 3 years older than child under 14 in the case of (E) & (F) or under 12 in the case of (E-1) and (F-1)); § 259 (solicitation of a child by computer to commit a prohibited act; actor must be at least 16 or 3 years older than expressed age of the other person); § 260(1)(C) (certain unlawful sexual touching crimes; actor must be at least 5 years older than child under 14) as examples where a crime has only limited application.

By limiting the offense to situations where the actor is a specified number of years older than the minor other person, these statutes avoid criminalizing certain sexual behaviors between age or near age mates. For a few crimes, the age of the actor is not so limited. *See*, e.g., § 253(1)(B) & (C) (certain gross sexual assault crimes); §§ 282-284 (sexual exploitation of a minor, dissemination of sexually explicit material, and possession of sexually explicit material); and § 855 (patronizing prostitution of a minor).

In those situations where the age of the actor is not an element of the crime or the age element of the actor is satisfied, the minor actor is not automatically subject to prosecution under the Criminal Code. Under 17-A M.R.S.A. § 10-A(1), these minor actors are subject to

adjudication under the Maine Juvenile Code. *See* 15 M.R.S.A. § 3103(1)(A). Only if bound over pursuant to 15 M.R.S.A. § 3101(4) is a juvenile subject to being prosecuted as an adult for these crimes. *See* 17-A M.R.S.A. § 10-A(1).

Your letter makes specific reference to the crime of gross sexual assault. The governing statute makes criminal a number of behaviors involving a "sexual act."[5] Relevant to this inquiry is the prohibition against engaging in a sexual act with another person, not the actor's spouse, who has not in fact attained the age of 14 years. 17-A M.R.S.A. § 253(1)(B). Maine's Law Court has held that it is not a defense to gross sexual assault that the defendant was under the age of 14. *State v. Edward C.*, 531 A.2d 672 (Me. 1987); *State v. Danny A.*, 536 A.2d 1136, 1136 (Me. 1988).

DISCUSSION

I. The Language of the Mandatory Reporting Law

Our legal analysis begins with the language of the mandatory reporting statute, and the definition of the term "abuse and neglect" as incorporated into that statute. In determining the meaning of a statute, a court must look first to its plain language. *Connolly v. Connolly*, 2006 ME 17, ¶ 6, 892 A.2d 465. A court examines the plain meaning of the language in the statute, seeking to give effect to legislative intent. *Guardianship of Zachary Z.*, 677 A.2d 550, 552 (Me. 1996). "Unless the statute reveals a contrary intent, the words 'must be given their plain, common and ordinary meaning.'" *State v. Edward C.*, 531 A.2d at 673.

A. "Abuse and neglect." Key to determining when a report is required to either the Department or the district attorney is an understanding of what constitutes "abuse or neglect." The phrase "abuse or neglect" is not defined in the reporting statute itself. However, it is defined for purposes of the Child and Family Services and Child Protection Act, 22 M.R.S.A. §§ 4001-4099-C ("the Act"), of which the mandatory reporting law is a part.

> "Abuse or neglect" means a threat to a child's health or welfare by physical, mental or emotional injury or impairment, sexual abuse or exploitation, deprivation of essential needs or lack of protection from these or failure to ensure compliance with school attendance requirements under Title 20-A, section 3272, subsection 2, paragraph B or section 5051-A, subsection 1, paragraph C, by a person responsible for the child.

22 M.R.S.A. § 4002(1).

[5] "Sexual act" is defined to include: "any act between 2 persons involving direct physical contact between the genitals of one and the mouth or anus of the other, or direct physical contact between the genitals of one and the genitals of the other." 17-A M.R.S.A. § 251(1)(C)(1). There are a number of other specific acts that are addressed in the gross sexual assault statute, but these are the ones that are relevant to your inquiry.

The definition of abuse and neglect in § 4002(1) is expressly made applicable to actions of "a person responsible for the child."[6] This raises a question as to how this definition informs the determination of which cases are required to be reported to the district attorneys under subsection 2 of the mandatory reporting law, which is limited to actions of any person *not* responsible for the child. The introductory language of § 4002 (the definitions section for the Act as a whole) states that its definitions apply to terms "[a]s used in this chapter, unless the context indicates otherwise...." Certainly the express terms of subsection 2, "by a person not responsible for the child," supersede that part of the abuse and neglect definition that specifies actions by persons *who are* responsible for a child.[7] However, the remainder of the definition is not inconsistent with the requirements of subsection 2, nor does subsection 2 contain any language specifying different criteria for those situations that must be reported to the district attorney.[8]

The definition of abuse and neglect focuses on "a threat to a child's health or welfare" from one or more of the harms listed, including sexual abuse or exploitation. In the vast majority of cases, conduct that falls within the definition of a crime that can be characterized as sexual abuse or exploitation where the victim is a child will also be a threat to a child's health or welfare, and there will be no ambiguity concerning the need to report. A more difficult interpretive issue arises, however, if the reporter is aware of conduct that falls within the scope of a crime but does not give the reporter reason to suspect that there is a threat to the health or welfare of a child.

Under one possible interpretation of the mandatory reporting law, if the reporter becomes aware of conduct by a person not responsible for a child that fits the definition of a crime, that conduct should be reported to the appropriate district attorney solely because it is a crime. A district attorney's office has authority to prosecute crimes and juvenile offenses, as well as certain specific types of civil violations. 30-A M.R.S.A. §§ 282 & 283. It might therefore be inferred from the fact that some reports are directed to the district attorneys, that what is to be reported is behavior that the reporter has reason to suspect is abuse or neglect that is a crime. If one accepts the inference that the nature of mandated reports to district attorneys is determined by the primary function of those offices, *i.e.*, the prosecution of crimes, there is still a significant ambiguity in the reporting requirement: whether behavior that might constitute a crime is sufficient to trigger the requirement, or whether the behavior that constitutes the crime must also

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[6] This phrase is defined in 22 M.R.S.A. § 4002(9) as follows: "'Person responsible for the child' means a person with responsibility for a child's health or welfare, whether in the child's home or another home or a facility which, as part of its function, provides for care of the child. It includes the child's custodian."

[7] The phrase "by a person responsible for the child" became part of the definition of "abuse and neglect" when the child protection laws were recodified in 1979. P.L. 1979, c. 733, § 18. The mandatory reporting law enacted at that time (22 M.R.S.A. § 4011) required reports to be made only to the Department and not to the district attorneys. The Department's duties and powers under the Act, then as now, are focused on children and the adults that are responsible for them, and the § 4002(1) definition of abuse and neglect applies to the entire Act. Under these circumstances, it is logical that abuse and neglect was defined with reference to "a person responsible for the child."

[8] This conclusion is consistent with advice provided by this Office in the past; *see, e.g.*, April 20, 1999 letter from Christopher Leighton, then Chief of the Office's Health & Human Services Division, to Mr. Bob Rowe, Executive Director of New Beginnings.

constitute a threat to a child's health and welfare. Under this reading of the mandatory reporting law, the required threat to the health or welfare of a child is either irrelevant or presumed from the fact that the behavior in question is a crime.

If the law is read to limit reporting to the district attorneys to possible crimes, the only part of the definition of "abuse and neglect" that is given effect is the phrase "sexual abuse and exploitation." While a bright line may be convenient, this interpretation of the mandatory reporting law is inconsistent with the general rules of statutory construction, both by reading words (*e.g.*, "constituting a crime") into and reading other words (*e.g.*, "threat to health and welfare") out of the language enacted by the Legislature. Moreover, such an interpretation results in different definitions of abuse and neglect for reports to the district attorneys and those made to the Department, in the absence of any language in the definition of abuse and neglect signaling the difference. Depending on such an inference as the basis for compelling a report, when failure to make the report is a civil violation subject to penalty, does not give clear guidance to mandated reporters of the scope of their duty.

Moreover, a significant practical problem results if mandatory reporters are required to infer an obligation to report sexual conduct that may constitute a crime. With the exception of law enforcement officials, mandatory reporters are generally not going to be lawyers or trained in the criminal law. These lay persons are unlikely to be familiar with the many sex crimes in Maine law (described above in Background, Section II). Under a more workable interpretation of the reporting to district attorneys, if reports are based on a threat to a child's health and welfare, the district attorneys can review them for possible crimes, whether sex crimes or other criminal offenses.

Maine's mandatory reporting law does not define reportable events with reference to provisions in the Maine Criminal Code. Neither does the definition of "abuse and neglect," which is central to the interpretation of the mandatory reporting statute, contain such a reference. There is, therefore, no clear notice to reporters that they are expected to report crimes, and which ones. Several state statutes do expressly define reportable behaviors to include those that constitute crimes. Examples are: North Dakota, N.D. Cent. Code §§ 50-25.1-02 & 50-25.1-03 (2007); Wyoming, Wyo. Stat. Ann. §§ 14-3-202(a)(ii) & 14-3-205 (2007); and California and Kansas, whose statutes are cited in the cases discussed below.

We have found no Maine case addressing the interpretation of the mandatory reporting law or its application to underage sexual activities. However, in *Aid For Women v. Foulston*, 427 F.Supp.2d 1093 (D. Kan. 2006), a federal district court concluded that the Kansas mandated reporting statute should not be read to require the reporting of behaviors that may constitute crimes in the absence of possible harm to the children involved. The Kansas mandatory reporting statute in effect at that time, Kan.Stat.Ann. ("K.S.A.") § 38-1522, contained language parallel to that of Maine's statute and required reporting whenever (*inter alia*) the reporter had "reason to suspect that a child has been injured as a result of...sexual abuse." K.S.A. § 38-1522(a). However, Kansas law further defined "sexual abuse" as "any act committed with a child which is described in article 35, chapter 21 of the Kansas Statutes Annotated." K.S.A. §

38-1502(c).[9] Chapter 21 contains the Kansas penal code, which criminalizes a range of sexual activities with children under the age of 16 years. "Based on the very language of the provisions, sexual activity of minors younger than sixteen is illegal, regardless of whether the activity is voluntary or the sexual activity involves an age-mate." *Aid for Women* at 1098.

The Kansas Attorney General issued an opinion that concluded that the state mandated reporting statute required the reporting of all incidents of sexual activity involving persons younger than 16 years old, including consensual sexual activity between near-age partners.[10] The U.S. District Court for Kansas found, after a testimonial trial, that the mandated reporting statute did not make all underage sexual activity inherently injurious and required healthcare professionals and others who had an obligation to report, to report only if they had reason to suspect injury that resulted from illegal sexual activity.

> If "injury" is the equivalent of "sexual abuse" as the Attorney General contends, then the requirement of an 'injury' in the reporting statute is rendered meaningless. The statutory language does not require reporting of all illegal sexual activity of minors; it requires reporting of such sexual activity if there is "reason to suspect injury." Therefore, the statute requires reporting of illegal sexual activity that causes *injury*, not all illegal sexual activity.

Id. at 1102 (citations omitted).

In 2002 the Connecticut Attorney General issued an opinion in which he reached a similar result. 2002 Conn. AG Lexis 33. Conn. Gen. Stats. § 17a-101a provides: "Any reporter . . .who in the ordinary course of such person's employment or profession has reasonable cause to suspect or believe that any child under the age of eighteen years...has been abused or neglected, as defined in section 46b-120(4), . . .shall report or cause a report to be made...." *Id.* at 5-6. Conn. Gen. Stats. §46b-120 defines abuse as: "in a condition which is the result of maltreatment such as, but not limited to. . . sexual molestation or exploitation." *Id.* at 7. The Attorney General noted that the statute did not further define "sexual molestation or exploitation." *Id.* at 8. The Attorney General further noted that neither the mandatory reporting law nor the definition of abuse and neglect makes reference to Conn. Gen. Stats. §53a-71, which establishes the crime commonly refered to as statutory rape.

> Had the legislature intended the definition of "abused" for purposes of the reporting statute to include the definition of statutory rape under the criminal statutes, it could have said so explicitly. Indeed, it would have been expected to say so specifically, as a matter of statutory construction.

Id. at 8-9.

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[9] The Kansas mandatory reporting law was amended effective January 1, 2007. The definition of "sexual abuse" under the current statute, K.S.A. § 38-2202(cc), no longer contains a reference to Kansas criminal statutes.

[10] The court's opinion in this case uses the phrase "consensual underage sexual activity" to mean 1) no coercion was involved, 2) no appreciable power differential existed between partners, and 3) the age difference between partners is no more than three years. The court used "underage" to mean that neither person involved is younger than 12 and at least one is under 16. *Id.* at 1096, fn. 2.

The Connecticut Department of Children and Families had adopted a policy providing that a mandated reporter was obligated to report any sexual relations involving a minor under the age of 13, and sexual relations between a minor under the age of 16 and a person over the age of 21, regardless of whether any other facts were known to the mandated reporter. On the other hand, a mandated reporter was not automatically required to report consensual sexual relations between two minors 13 years of age or older and within 2 years of age of each other unless the reporter had other facts to provide reasonable cause to suspect that child abuse or neglect had occurred. In concluding that the Department's interpretation was reasonable, the Attorney General stated:

> [B]ecause of the possible variations in situations involving sexual relations between a minor 13 years or over and under 16 years with a partner under 21 years who is more than two years older than the minor, § 17a-101a does not impose a per se or automatic obligation on mandated reporters to report such behavior in every situation, but rather requires a report whenever the mandated reporter has a reasonable suspicion, based on his or her professional judgment and all the information available to him, including the ages of the parties involved, that a child has been abused or neglected.

Id. at 4.

The California Court of Appeals in *Planned Parenthood Affiliates of California v. Van De Kamp, Attorney General*, 181 Cal.App.3d 245, 226 Cal. Rptr. 361 (1986), held that implementation of the Attorney General's opinion that required the reporting of all sexual activity of minors under 14 years of age would have resulted in the reporting of voluntary behavior, a result both inconsistent with the intent of the Legislature and in violation of the California Constitution's privacy guarantees. The California mandatory reporting law construed by the court is similar to Maine's in that it requires specified professionals to report when he or she knows or reasonably suspects that a child has been the victim of child abuse, including sexual abuse. Unlike Maine's statute, but like that of Kansas, sexual abuse is defined to include sexual crimes under California's penal code. Cal. Code § 11165(b)(1).[11]

The court held:

> We must decide whether the law requires a professional, who has no knowledge or suspicion of actual abuse, to nevertheless report a minor as a child abuse victim solely because the minor is under the age of 14 and has indicated that he or she engages in voluntary, consensual, sexual activity with another minor of similar age. We hold the reporting law imposes no such requirement."

Id. at 363.

[11] The definition of "sexual abuse" in the current California mandatory reporting law has been amended but continues to include a list of sex crimes. Cal. Code § 11165.1(a) (2007).

The California Attorney General had interpreted the reporting statute in response to a request from the Los Angeles District Attorney as to whether a medical or nonmedical practitioner was required to make a child abuse report "when a child receives medical attention for a sexually transmitted disease, for birth control, for pregnancy or for abortion...The essence of the inquiry was whether these indicia of sexual *activity* necessitated a report on the grounds of sexual *abuse*." *Id.* at 366. The Attorney General concluded that with respect to minors over 14 years of age, the mere fact of sexual activity did not necessitate a child abuse report; a report would be required only if additional facts pointed to sexual abuse. For a child under the age of 14, the Attorney General concluded that "indicia of past or present sexual activity ipso facto render the minor a child abuse victim." *Id.* at 367.

The court noted that the opinion of the Attorney General with respect to minors under 14 years of age was based on the inclusion of California's statutory rape law in the definition of sexual abuse. On this point, the court held:

> [The reporting] provisions contemplate criminal acts of child abuse causing trauma to the victim; they do not contemplate the voluntary sexual associations between young children under the age of 14 who are not victims of a child abuser and are not the subjects of sexual victimizations. Certainly if the Legislature was of the view that any sexual conduct on the part of a minor under 14 was "sexual abuse" it would have so indicated in clear terms.

Id. at 371. The court limited its holding to voluntary conduct between minors who are both under 14 years of age. *Id.* at 377, fn.14.

The California Court of Appeals also found the Attorney General's interpretation of the mandated reporting law violated a minor's right to sexual privacy guaranteed by the California Constitution. In this respect, the court based its decision on U.S. Supreme Court decisions on the constitutional right to privacy and noted that "the Attorney General fails to meet his burden of showing a significant state interest, much less a compelling one, for reporting voluntary sexual behavior as child abuse." *Id.* at 380.

Maine's mandatory reporting law is not identical to that of Kansas, Connecticut or California, and California is different for the additional reason that its state constitution has an express privacy provision. These statutes share a similar structure, however, in that they require reporting of harm, injury, or the risk of such, and sexual abuse or exploitation are listed as examples of the means by which such harm or injury may occur. In the case of both Kansas and California, sexual abuse is statutorily defined to include criminal sexual offenses, yet both courts concluded that the state legislatures did not intend that such criminal offenses were required to be reported unless there was also an indication of harm or injury. The same conclusion was reached by the Connecticut Attorney General's opinion, where state law, like that of Maine, did not expressly incorporate sexual offenses into the mandatory reporting law. We have found no case holding to the contrary.

B. "Reasonable cause to suspect." Under the terms of § 4011-A(1)&(2), the obligation to report arises when a mandated reporter "knows or has reasonable cause to suspect"

that a child has been or (under subsection 1) is likely to be abused or neglected. This "reasonable cause" standard is not further defined in the law, and we have found no case construing it in the context of the issue we address in this opinion. However, this same language in the Wisconsin mandatory reporting law was upheld when challenged for vagueness, and its meaning discussed as follows:

> [The statute]'s use of the phrase "reasonable cause to suspect" fairly notifies a person of ordinary intelligence that if there is a reasonable basis to suspect that child abuse has occurred, that person must make a report to the appropriate agency. Whether a person possesses a reasonable suspicion that child abuse has occurred is not subject to misunderstanding. This requirement examines the totality of the facts and circumstances actually known to, and as viewed from the standpoint of, that person...Thus, the test becomes whether a prudent person would have had reasonable cause to suspect child abuse if presented with the same totality of circumstances as that acquired and viewed by the defendant. Under this statute, conviction is only permitted when, under the totality of the circumstances presented to the defendant, a prudent person would have had reasonable cause to suspect child abuse.
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> ....
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> The phrase "reasonable cause to suspect" is a readily ascertainable and understandable standard that involves a belief, based on evidence but short of proof, that an ordinary person would reach as to the existence of child abuse.

State v. Hurd, 400 N.W.2d 42, 45-46 (Wis. Ct. App. 1986) (citations omitted), cited with approval in *State v. Denis L.R.*, 699 N.W. 2d 154, 164 (Wis. 2005).

This language in Maine's mandatory reporting law reflects the relevance of all the circumstances in making the judgment of whether abuse or neglect has occurred or is likely to occur. Licensed health care professionals who must report may also be required by their licensing authorities to utilize their expertise and apply standards of care within their respective professions in making this judgment. For these reasons, the most logical interpretation of "reason to suspect" yields a flexible standard that takes into account the totality of the circumstances, including the expertise of the observer. The California Court of Appeals in the *Planned Parenthood* case discussed above found that the obligation to report rested in part on the exercise of the professional judgment.

> A fundamental part of the reporting law is to allow the trained professional to determine an abusive from a nonabusive situation. Instead of a blanket reporting requirement of all activity of those under a certain age, the professional can make a judgment whether a minor is having voluntary relations or is being sexually abused.

226 Cal.Rptr. at 375.

Similarly, the court in *Aid for Women* also concluded that the language "reason to suspect a child has been injured" by sexual abuse vests mandatory reporters, such as health care providers, with discretion to determine both suspected sexual abuse and resulting injury.

> The core of the reporting statute –providing for the detection and protection of children suffering from incest or abusive sexual activity –is unaffected by this opinion. Such acts were and will remain subject to mandatory reporting. But the statute was not intended to cover consensual sexual activity between age-mates that do not result in injury. Injunctive relief barring the Attorney General from instituting a *per se* rule that all illegal sexual activity involving a minor is injurious advances the public interest in protecting children by allowing reporting, administrative investigation and law enforcement efforts to be concentrated on the legislature's real target—true sexual abuse.

427 F. Supp. at 1113-1114.

We think it likely that a court would find that this conclusion is equally applicable to Maine's mandatory reporting law. Like the Kansas federal district court, we believe that the heart of the mandatory reporting law is unaffected by the issue addressed by this opinion, but that the law is not clearly intended to cover sexual conduct that does not result in a threat to a child's health or welfare.

C. Legislative History of the Mandatory Reporting Law.

Given the ambiguity in the mandatory reporting law with respect to the reporting of crimes, we have examined the legislative history of that law and of the definition of "abuse and neglect" that is central to its interpretation. While the mandatory reporting law has undergone a number of amendments and been rewritten, we have found no indication of how the Legislature intended the statute to be applied to the question you have raised, but offer this brief summary of our findings.

This first mandatory reporting statute, enacted in 1965, provided in pertinent part:

> Any physician, including any licensed doctor of medicine, licensed osteopathic physician, intern or resident, licensed chiropractor having reasonable cause to believe that a child under 16 years of age brought to him or coming before him for examination, care and treatment has had physical injury or injuries inflicted upon him other than by accidental means by a parent or caretaker, shall report or cause reports to be made to the State Department of Health and Welfare, Division of Child Welfare and to the county attorney in the county where the child was examined...

P.L. 1965, c. 68, § 3852.

The 1965 law was repealed and replaced in its entirety by P.L. 1975, c. 167, which was enacted as emergency legislation in order to make the State of Maine eligible for continuing receipt of federal child protection funds.[12] The 1975 law contained this reporting requirement:

> When any [mandated reporter] knows or has reasonable cause to suspect that a child has been subjected to abuse or neglect or observes the child being subjected to conditions or circumstances which would reasonably result in abuse, when such individual is acting in his professional capacity, he shall immediately report or cause a report to be made to the department...

P.L. 1975, c. 167. The change from "reasonable cause to believe" in the 1965 law to "reasonable cause to suspect" in the 1975 law was controversial, and resulted in debate on the House floor. Legis. Record B526-B530 (1975). The provision for reports to be made to the district attorneys was dropped in the 1975 law. However, we can find no indication in the legislative history of the 1975 law that sheds any light on why this was so; it is conceivable that this omission was the inadvertent result of hewing closely to the controlling federal law requirements upon which continued funding was dependent.

The mandatory reporting law was again repealed and replaced in the 1979 recodification of the child protection laws, again without any requirement of reporting to the district attorneys. P.L. 1979, c. 733, § 18. It was not until 1985 that reports to the district attorneys were again required by the mandatory reporting law, when language was added to what was then 22 M.R.S.A. § 4011 that is substantially the same as what now appears in § 4011-A(2). P.L. 1985, c. 795, §19.

II. The Mandatory Reporting Law in Context of the Child Protection Act and Other Related Laws

As we have discussed in Section I, we do not believe that a court would likely construe the language of the mandatory reporting law as requiring the reporting of sexual behaviors between minors based on the fact that the behaviors may constitute a criminal offense, unless the reporter also concludes that the behavior presents a threat of harm to the physical or mental health of a child. Because the language of the statute does not expressly address the reporting of criminal sexual offenses, we have also looked at it in the context of the Act as a whole, and certain related laws.

As the Law Court has stated:

> Where, as here, the statute has failed to define a crucial term or phrase, our analysis must attempt to find a meaning consistent with the overall statutory context, as well as reflect the subject matter of the statute, its purpose, the

[12] The 1975 law also included provisions requiring the court to appoint a guardian ad litem for the child, authorizing examination of the child or a parent by a physician or psychiatrist, and establishing the confidentiality of child protection records.

> occasion and necessity of the law and the consequences of a particular interpretation.

State v. Philbrick, 402 A.2d 59, 62 (Me. 1979)(citations omitted).

A. The Child and Family Services and Child Protection Act ("the Act").

As we have noted, the definition of "abuse and neglect" in § 4002(1) applies to the entire Act, not just the mandatory reporting requirement. The Act has several broad purposes. As your letter notes, it authorizes the Department to protect and assist abused and neglected children, those at substantial risk of abuse and neglect, and their families. 22 M.R.S.A. § 4003(1). The Act contains a number of specific provisions governing the activities that the Department undertakes in its efforts to meet these broad purposes. These cover matters such as investigations of possible abuse and neglect, court proceedings to meet the needs of children in jeopardy including issuance of child protection orders, care of children in custody, and rehabilitative and reunification services for families. To a substantial degree, the provision of child and family services is based on a court's determination of "jeopardy." "Jeopardy to the health or welfare of a child" is defined to mean "serious abuse or neglect", as evidenced by "serious harm," which is in turn defined to include "sexual abuse." 22 M.R.S.A. § 4002(6), (10), and (10)(C). The court's determination that a child is in circumstances of jeopardy is the prerequisite to its issuance of a "jeopardy order" and a decision on appropriate disposition (services to be provided to the child and family, foster care, etc.). 22 M.R.S.A. § 4035(3). Jeopardy is not defined with reference to specified sexual crimes.

The legislature has specifically referenced sexual crimes in several parts of the Child Protection Act, as well as in the related statute governing parental rights and responsibilities (19-A M.R.S.A. § 1653). Both have provisions pertaining to awarding custody or contact rights to a person convicted of a "child-related sexual offense." 19-A M.R.S.A. § 1653(6-A), (6-B) and 22 M.R.S.A. § 4035(2-A), 4005-E(3). A "child related-sexual offense" is defined for purposes of these statutes to include the following crimes in Title 17-A, if committed when the victim was under 18 years of age: sexual exploitation of a minor, § 282; gross sexual assault, § 253; sexual abuse of a minor, § 254; unlawful sexual contact, § 255-A; visual sexual aggression against a child, § 256; sexual misconduct with a child under 14, § 258; and solicitation of a child under 14 years of age, § 259.

The definition of "aggravating factor" also includes references to a number of sex crimes. Under 22 M.R.S.A. § 4052(2-A), the Department is directed to file a termination petition within 60 days of a court order that includes a finding of an aggravating factor and an order to cease reunification. Aggravating factor is defined to include circumstances where the parent has subjected any child for whom the parent was responsible to, *inter alia*, rape, gross sexual misconduct, gross sexual assault, sexual abuse, incest, aggravated assault, kidnapping, promotion of prostitution, abandonment, torture, chronic abuse or any other treatment that is heinous or abhorrent to society. It also includes situations where a parent has been convicted of murder, manslaughter, felony murder, soliciting murder or manslaughter, or felony assault that results in injury if the victim was a child for whom the parent was responsible or a member of a household lived in or frequented by the parent. 22 M.R.S.A. § 4002(1-B).

The fact that the Legislature made specific references to various crimes in several parts of the Act weighs against any suggestion that criminal offenses should be read into the mandatory reporting law by inference.

B. Controlling Federal Law: CAPTA. The definition of "abuse and neglect" includes "a threat to a child's health or welfare by...sexual abuse or exploitation," but as we have noted, the terms "sexual abuse" and "exploitation" are not themselves defined in the Act. There is, however, a definition of sexual abuse in the Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5107 ("CAPTA"). The terms of CAPTA are relevant to the interpretation of the Child Protection Act, because a number of the provisions in Maine's law are required under CAPTA as conditions of receiving the federal funding upon which the Department's programs are dependent. [13] Indeed, Maine's Law Court has relied on the requirements of CAPTA in construing the confidentiality provisions of the Act. *In Re Bailey M.*, 2002 ME 12, ¶ 17.

The CAPTA definition of child abuse and neglect includes "sexual abuse or exploitation." 42 U.S.C. § 5106g(2).[14] CAPTA regulations define "sexual abuse" as follows:

> The term sexual abuse includes the following activities *under circumstances which indicate that the child's health or welfare is harmed or threatened with harm*: The employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or having a child assist any other person to engage in, any sexually explicit conduct (or any simulation of such conduct) for the purpose of producing any visual depiction of such conduct; or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children. With respect to the definition of sexual abuse, the term "child" or "children" means any individual who has not attained the age of eighteen.

45 C.F.R. § 1340.2(d)(1) (emphasis added).

This definition supports a reading of Maine's mandatory reporting law in which the threat of harm to a child is the focus.

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[13] CAPTA authorizes grants to states for child abuse, neglect, prevention and treatment programs and for programs relating to investigation and prosecution of child abuse and neglect cases. 42 U.S.C. § 5106a(a). In order to be eligible to receive a prevention and treatment program grant, a state is required to submit a plan. 42 U.S.C. 5106a(b). The state plan must include an outline of the activities that the state intends to carry out as well as an assurance that state law or a statewide program provides for the reporting of child abuse and neglect. 42 U.S.C. § 5106a(b)(2)(A)(i). The State of Maine is the recipient of a CAPTA grant and must thus adhere to CAPTA and the accompanying federal regulations. CAPTA regulations provide that, in order, for a state to receive federal funding, the state statutory definitions of terms relating to child abuse and neglect must be the "same in substance" as the definitions provided in federal law. 45 C.F.R. §1340.14(b).

[14] "The term 'child abuse and neglect' means, at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm." 42 U.S.C. §5106g(2).

C. The Department's Child and Family Services Manual. The Child and Family Services Manual, which contains the Department's policies in the area of child protection, contains some provisions that define abuse and neglect for purposes of determining when jeopardy exists. The Department is required to "put in writing all policies that direct or guide procedural and substantive decision making by caseworkers, supervisors and other department personnel concerning child protective cases." 22 M.R.S.A. § 4010-B(1). In a section headed, "Comments on interrelationships of definitions," this explanation of jeopardy appears:

> c. *"Jeopardy to health or welfare"* is that category of abuse or neglect which constitutes a threat of physical or mental injury or impairment or of sexual abuse or exploitation. A child must be adjudicated by the court to be in jeopardy before the court will issue a protection order regarding the child.
>
> 1) Jeopardy is evidenced by any of the following conditions of abuse and/or neglect when allowed to occur or caused by a person responsible for the child:
>
> a) Serious physical injury or impairment - injury to specific bones or organs, impairment of specific physical functioning, impairment of physical health.
>
> b) Serious mental injury or impairment - neurosis, psychosis, adjustment reaction dysfunction, impairment of normal mental development, as evidenced by severe anxiety, depression or withdrawal, untoward aggressive behavior, developmental delay or similar serious dysfunctional behavior.
>
> c) Sexual abuse or exploitation - subjection by any person under 18 years of age to any of the acts treated as sexual offenses under the Criminal Code. (See Section IV, Addendum A)

Child and Family Services Manual, Section IV.A.2.a. Department staff has not been able to provide a copy of Addendum A, so we do not know what guidance that might provide.

This is the clearest statement we have found that directly defines abuse and neglect as including criminal sexual offenses. It is important to note that the Manual is intended to provide guidance with respect to the Department's handling of child protection cases, which involve parents or other persons responsible for a child. Further, while the policies in the Manual are guidance to Department employees responsible for enforcing the Act that are required by statute to be made available to the public, they are not rules.

As we have noted above, we can find no instance in which the Department has discussed the question that we address in this opinion, whether in rule, the Manual or other informational material on mandatory reporting responsibilities. The Department may wish to clarify the Manual in this regard.

D. Statutes Granting Minors Authority to Obtain Reproductive Medical Services Without Parental Consent. The Maine Legislature has enacted a number of statutes that give minors the ability to obtain reproductive health services without parental consent in certain instances. These include:

1. A minor may consent to medical, mental, dental, and other health counseling and services if the minor is or has (a) been living apart from parents or legal guardians for at least 60 days and is independent of parental support; (b) been married, (c) been a member of the U.S. Armed Forces; or (d) been emancipated by court order. 22 M.R.S.A. § 1503;

2. A minor may consent to treatment at a hospital for sexually transmitted diseases, alcohol or drug abuse, or collection of evidence of sexual assault. 22 M.R.S.A. §1823;

3. A minor may consent to an abortion a) when the attending physician has secured the minor's informed written consent and has determined her to be mentally and physically competent to provide informed consent; or b) the minor has received certain statutorily required information and counseling and has provided her informed written consent. 22 M.R.S.A. § 1597-A;

4. A minor may consent to treatment from an osteopathic or allopathic physician for a sexually transmitted disease or for alcohol or substance abuse. 32 M.R.S.A. §§ 2595 & 3292; and

5. A minor may consent to health services associated with a sexual assault forensic examination to collect evidence of an alleged sexual assault. 22 M.R.S.A. § 1507.

The right to confidentiality of health information is closely aligned with the right to consent to treatment. A minor controls access to medical records related to treatment to which the minor consented. "If a minor has consented to health care in accordance with the laws of this State, authorization to disclose health care information . . . must be given by the minor unless otherwise provided by law." 22 M.R.S.A. § 1711-C(12).

The existence of medical emancipation and attendant confidentiality statutes was cited as a factor in two of the authorities cited above in our discussion of the proper construction of the mandatory reporting law. The California Court of Appeals in the *Planned Parenthood* case, *supra*, pointed out that the Attorney General's interpretation of that state's mandatory reporting law as requiring the reporting of sexual crimes regardless of harm to the child could not be harmonized with the Legislature's comprehensive scheme to medically emancipate minors by enabling them to consent to reproductive health care without the involvement of a parent.

> If a minor seeking care under the medical emancipation statutes is actually abused, the matter must be reported. But by requiring blanket reporting of voluntary sexual activity solely on the basis of age, the Attorney General has taken a position inconsistent with the Legislature's judgment that minors under 14 are entitled to confidential reproductive health care.

226 Cal.Rptr. at 373-374.

Similarly, in the Connecticut Attorney General's opinion, the Attorney General concluded that automatic reporting of underage sexual activity would conflict with statutory confidentiality requirements for minors 13 years of age or older consenting to the treatment of venereal disease.

> Thus, the legislature has envisioned certain instances when physicians and other mandated reporters will become aware of sexual activity involving minors thirteen years of age and older but determined that countervailing concerns of confidentiality, and the public policy interest in encouraging such minors to seek medical treatment, justify an exception to the mandated reporting requirement.

2002 Conn. AG LEXIS 33, at 10-11.

An interpretation of the mandatory reporting law that requires reports to the district attorneys of minors engaging in sexual conduct, including intercourse, with age mates or near age mates appears to be inconsistent with legislative intent in giving these minors the right to obtain health services with respect to that same behavior, and to keep that treatment confidential. While this factor is not dispositive of your question, it would certainly be relevant to the consideration of clarifying legislation.

The right of minors to confidentiality in their medical treatment information has a constitutional dimension as well as a statutory basis. The Kansas federal district court in *Aid for Women, supra,* concluded that informational privacy rights of minors would be violated by an interpretation of that state's mandated reporting law that compelled the reporting of sexual conduct by minors that may be illegal but where there is no reason to suspect injury. 427 F.Supp. at 1106. We are aware of no clear precedent from the U.S. Supreme Court on the scope of a minor's right to informational privacy, and there is some disagreement among the federal courts of appeal. *See, e.g.,* discussion in *Planned Parenthood of Indiana v. Carter,* 854 N.E. 2d 853, 2006 Ind. App. LEXIS 1947. This is another area that would be relevant to legislative clarification of the mandatory reporting law, should that be considered.

III. The Department's Decision to Open an Investigation.

Finally, you have also asked whether you are required to open a child protection investigation in the event that you receive a report that indicates that a minor may be engaging in sexual conduct with a same or similar age partner that falls within the definition of a crime but as to which there is no indication that the health or welfare of a minor is threatened. As Commissioner, you have the primary jurisdiction to interpret the statutes you administer. *York Mut. Ins. Co. v. Superintendent of Ins.*, 485 A.2d 239 (Me. 1984). Additionally, you have the responsibility for enforcing the child protection laws within the Department's budget for this program, requiring the allocation of these resources in the manner you find most effective.

For these reasons, we believe that reports of underage sexual conduct that may be crimes should be treated the same as any other report in deciding whether to open an investigation. For

example, investigation of such a report may be appropriate to determine whether a parent is protecting a child from abuse. However, we do not believe that a court would conclude that you are not automatically required to open an investigation in these matters solely because the conduct may constitute a crime.

Sincerely,

Linda M. Pistner
Chief Deputy Attorney General