

When Teens Disclose Dating Violence to Health Care Providers:

A Guide to Confidentiality and Reporting Laws in Michigan

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The National Center for Youth Law is a national, non-profit organization that uses the law to improve the lives of poor children. NCYL works to ensure that low-income children have the resources, support and opportunities they need for a healthy and productive future. Much of NCYL's work is focused on poor children who are additionally challenged by abuse and neglect, disability or other disadvantage. NCYL's **Teen Health Rights Initiative** provides information and resources to providers of adolescent health services.

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The Family Violence Prevention Fund works to prevent violence within the home, and in the community, to help those whose lives are devastated by violence because everyone has the right to live free of violence. For more than three decades, the Family Violence Prevention Fund has worked to end violence against women and children around the world. Instrumental in developing the landmark Violence Against Women Act passed by Congress in 1994, the FVPF has continued to break new ground by reaching new audiences including men and youth, promoting leadership within communities to ensure that violence prevention efforts become self-sustaining, and transforming the way health care providers, police, judges, employers and others address violence.

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Disclaimer: This manual provides information. It does not constitute legal advice or representation. For legal advice, readers should consult their own counsel. This manual presents the state of the law as of July 2010. While we have attempted to assure the information included is accurate as of this date, laws do change, and we cannot guarantee the accuracy of the contents after publication.

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I. INTRODUCTION and OVERVIEW

The Family Violence Prevention Fund's (FVPF) *Project Connect: A Coordinated Public Health Initiative to Prevent Violence against Women* is designed to improve the health and safety of women and children. Project Connect seeks to better integrate screening and response by public health programs to dating violence², including dating violence against adolescents. Adolescents face high rates of domestic and sexual violence as well as related poor health outcomes including substance abuse, mental health issues, unplanned pregnancies and sexually transmitted infections.

Each Project Connect site has a Leadership Team that will develop and implement a comprehensive action plan to improve the public health response to domestic and sexual violence. As part of this plan, the site's Leadership Team may develop model guidelines to educate health care providers about how to screen for and best respond to abuse of patients.

In developing model response guidelines for adolescent health settings, the Team will have to make recommendations regarding the confidentiality and reporting of teen dating violence disclosures. The Team may need to make recommendations regarding when a health care provider should report this information to law enforcement or child abuse authorities, or should share information with parents or referral agencies. In developing such recommendations, the Team must consider multiple factors, including but not limited to, ethical, clinical, public health, and safety concerns. The Team also must be familiar with the requirements of confidentiality and reporting law.

This publication is intended as a legal reference for use by members of the Leadership Team in their discussions of adolescent confidentiality and reporting. The document provides an overview of the pertinent federal and state confidentiality and reporting laws that apply when adolescents disclose dating violence in a medical setting. It explains the parameters of the law, highlighting what the law mandates in terms of confidentiality and reporting; what the law leaves to the discretion of providers; and where the Team may need to seek further clarification regarding the law.

² For definitions of "dating violence," "adolescent" and other terms used in this publication, please see the "Glossary of Terms" at the end of this document.

The document is intended solely to inform development of a comprehensive best practice model for adolescent settings. It is just one of several resources the Leadership Team should reference in developing a model response. The document does not address other factors, such as ethical or safety considerations, that should also be taken into account in developing this model response nor does it address the confidentiality and reporting laws that may apply in other settings or with other patient populations, such as vulnerable adults. For this reason, the document should not be used as a best practice or provider guide or in development of policies or recommendations for other settings.

Section II of the document reviews relevant federal and state medical confidentiality law. Section III reviews other pertinent confidentiality law. Sections IV and V review Michigan's child abuse reporting and domestic violence reporting laws and address when health care providers must report teen dating violence to the authorities. Section VI addresses discretionary sharing of information, and answers several frequently asked questions, including whether providers may share teen dating violence disclosures with parents, whether providers may report violence to the authorities even if they are not mandated to do so, and whether health care providers may share information with referral agencies and partners in a multi-disciplinary collaborative. The final section of this document is a glossary of terms.

II. MEDICAL CONFIDENTIALITY: HIPAA and Michigan Law

What information obtained by health care providers from their patients must be kept private?

The federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule protects the privacy of health information. 45 C.F.R. Parts 160 and 164.

While Michigan does not have a statute that generally protects the confidentiality of medical information, Michigan does have statutes that protect the confidentiality of specific records. For example, the confidentiality of mental health and drug treatment records are specially protected. *See* Michigan Compiled Laws³ §§ 330.1748, 333.6111. As well, records held by certain agencies are protected. For example, health care facilities and HMO's are required to keep medical records confidential. M.C.L. § 333.20201; Michigan Admin. Code Rule

³ Hereinafter M.C.L.

325.6810. In addition, physician-patient privilege limits the ability of health care providers to disclose information as evidence in legal proceedings. M.C.L. §§ 600.2157, 333.17078.

Health care providers must follow both the federal HIPAA Privacy Rule and state law. In general, if the federal and state laws conflict, and the state law provides greater confidentiality protection than HIPAA, providers must follow state law. When HIPAA provides greater protection, providers must follow HIPAA.⁴

What kinds of health care providers must abide by HIPAA?

All health care providers who transmit health information in electronic form, health plans and health care clearinghouses must abide by the HIPAA Privacy Rule.⁵ “Health care providers” in this context mean individual providers such as physicians, clinical social workers and other medical and mental health practitioners, as well as hospitals, clinics and other organizations that provide, bill for, or are paid for health care.⁶

Is information about dating violence or sexual coercion, obtained by a health care provider in the course of providing health care to a teen, considered protected health information?

Yes. HIPAA limits disclosure of what it calls “protected health information” (PHI).⁷ The HIPAA Privacy Rule defines protected health information to include “individually identifiable health information”⁸ in all forms. This includes oral communications as well as written or electronically transmitted information, created or received by a health care provider; that relate to the past, present or future physical or mental health or condition of an individual; and either identify the individual or can be used to identify the individual patient.

If a teen discloses information regarding dating violence or reproductive coercion⁹ during provision of health or mental health care, that is information in possession of a health care provider that relates to personal history and to the

⁴ 45 C.F.R. § 160.203.

⁵ 45 C.F.R. § 160.103 (defining “covered entity”).

⁶ 45 C.F.R. § 160.103 (defining “health care provider”).

⁷ 45 C.F.R. § 160.103 (defining “protected health information” and “health information”).

⁸ 45 C.F.R. § 160.103 (defining “individually identifiable health information”).

⁹ For definitions of “dating violence” and “reproductive coercion”, see “glossary of terms” at end of this document.

past, present or future physical or mental health or condition of the individual. Therefore it is protected by HIPAA. The teen does not have to be seeking medical care in response to the dating violence or reproductive coercion for the information she shares to be protected.

Can “protected health information” ever be released?

Protected health information generally must be kept confidential, but can be disclosed by a health care provider if the provider either has a signed authorization allowing for the disclosure, or a specific exception in federal or state law allows or requires the disclosure. *See* 45 C.F.R. § 164.502

Who may sign an authorization to release protected health information?

It often depends upon who consented for the underlying health care.

Under HIPAA, a parent or guardian usually must sign the authorization to release information when the parent or guardian consented for the unemancipated minor’s health care. 45 C.F.R. §§ 164.502(a)(1)(i); (a)(2)(i); (g)(1); (g)(3).

Conversely, when the minor consented for his or her own care under state law, the HIPAA regulations allow the minor to control disclosure of the related records. 45 C.F.R. §§ 164.502(a)(1)(i)&(iv);(a)(2)(i);(g)(1); (g)(3)(i). The minor also may sign the authorization in a few other situations, for example, if a court consented for the minor’s medical care pursuant to state law. When a minor has a right to sign authorizations under HIPAA, the parent’s right to access or inspect the underlying health information is determined by state law.

Thus, when a parent consents for her unemancipated teen to receive a sports physical, the parent must sign any authorization to release information related to that visit. By contrast, when a teen consents to outpatient mental health services on his own behalf as authorized by state law,¹⁰ the teen must sign any authorization to release related medical information. Whether the parents have a right to access that mental health information depends on state law.¹¹

¹⁰ M.C.L. § 330.1707. For more information on Michigan minor consent laws and what state law says regarding a parent’s right to access minor consent records, *see* Gudeman, *Minor Consent, Confidentiality, and Reporting Child Sexual Abuse: A Guide for Title X Family Planning Providers in Michigan* (2007), available at: www.teenhealthlaw.org.

¹¹ *See id.*

Other laws and regulations contain different rules regarding who must sign an authorization to release records and these rules may apply depending on the type of service provided or the funding source for the service. For example, if the records relate to services funded under the federal Title X family planning program, Title X regulations dictate that the minor sign any authorization to release her own medical information. In section III, this document reviews a few of the laws with different authorization rules, including the Title X regulations. The Project Connect Leadership Team should consider whether to include any guidance in its recommendations regarding who may authorize the release of health information about adolescent patients. This guidance might include providing sample authorization forms or recommending that health care providers review their authorization forms and signing protocols with legal counsel to be sure the forms and protocols comply with all applicable laws related to adolescent confidentiality.

What does an authorization to release health information need to look like?

HIPAA requires that a written authorization to release health information contain certain elements in order to be valid. These elements include: a description of the health information to be used or released; the purpose for the disclosure; an expiration date for the release; the name or description of the person or class of persons authorized to release information; and the name or description of the person or class of persons authorized to receive information. HIPAA also requires that authorizations include several notice statements, such as notice that the individual has a right to refuse to sign the authorization.¹² It also says that release forms cannot be combined with certain other forms. 45 C.F.R. § 164.508(b)(3),(c).

An authorization is not valid under HIPAA if it does not contain all the required elements and notice statements. Other confidentiality statutes, such as the Violence Against Women Act (VAWA) and federal drug treatment regulations, require that an authorization contain additional or different elements and notice statements to be valid. The authorization requirements under VAWA are discussed in Section III of this document. The Project Connect Leadership Team should consider including guidance regarding authorizations and signing protocols in their best practice recommendations.

¹² Among others, the authorization also must include notice that the individual has a right to revoke the authorization. See HIPAA for the complete list of required statements, 45 C.F.R. § 164.508(c).

What exceptions allow or require a health care provider to disclose health information without an authorization?

Generally, information protected by HIPAA and state law can only be disclosed by a health care provider if the provider has a signed authorization to release records; however, a number of exceptions in HIPAA and state law allow or require a provider to release information without an authorization in certain situations. For example, under HIPAA, health care providers may share health and mental health information with other health care providers for treatment and referral purposes without need of a signed release. 45 C.F.R. § 164.506. Other HIPAA exceptions allow health care providers to release information to comply with mandatory state reporting laws, in emergencies, and for billing, payment, and research purposes without need of an authorization. 45 C.F.R. § 164.512. There are additional exceptions as well.

Several Michigan laws compel disclosure of protected health information in order to protect the public health. Important examples are laws that require certain individuals to report vulnerable adult abuse, child abuse and certain violence. In sections IV and V, this document provides more detail about the latter two laws and the reporting they require.

Can health care providers be held liable for revealing confidential information outside the exceptions listed in HIPAA or state law?

Providers can only share information without client authorization if an exception in state or federal law specifically allows the release. If no exception applies that would allow a provider to share information, providers who reveal confidential information may be held liable. *See* 42 U.S.C. § 1320d-6; 45 C.F.R. § 160, Subpart C.

Beyond criminal sanction, professionals who violate confidentiality also may put their professional licenses at risk. For example, the Department may investigate and discipline health professionals for “a betrayal of a professional confidence.” M.C.L. § 333.16221(e)(ii).

III. ADDITIONAL CONFIDENTIALITY LAWS: Laws that limit disclosure of specialized information or information obtained in certain settings

What is the federal Title X family planning program and what are Title X family planning settings?

“The Title X Family Planning program was enacted in 1970 as Title X of the Public Health Service Act. Title X is the only federal grant program dedicated solely to providing individuals with comprehensive family planning and related preventive health services. The Title X program is designed to provide access to contraceptive services, supplies and information to all who want and need them. In approximately 75% of U.S. counties, there is at least one clinic that receives Title X funds and provides services as required under the Title X statute.”¹³

The Michigan Department of Community Health’s Family Planning Program receives Title X funding and distributes it to over 37 agencies across the state. For a list of those agencies and more detail about Title X funded services, see the Department of Community Health Family Planning Program website at http://www.michigan.gov/mdch/0,1607,7-132-2942_4911_4912_6216---,00.html

Are there any special confidentiality protections for services funded through the federal Title X program?

Yes. Federal Title X regulations establish special confidentiality protections for information gathered during a Title X funded service that apply in addition to or in lieu of HIPAA and other federal and state medical confidentiality law.

For agencies delivering services funded in full or in part by Title X, federal regulations mandate that “[a]ll information as to personal facts and circumstances obtained by the project staff about individuals receiving services must be held confidential and must not be disclosed without the individual’s documented consent, except as may be necessary to provide services to the patient or as required by law, with appropriate safeguards for confidentiality.” 42 C.F.R. § 59.11. This regulation supersedes any state law to the contrary.¹⁴

The Title X regulations require that providers comply with any applicable

¹³ Excerpted from the U.S. Department of Health and Human Services, Office of Population Affairs website. For more information, see <http://www.hhs.gov/opa/familyplanning/index.html>

¹⁴ See *Planned Parenthood Assoc. of Utah v. Matheson*, 582 F. Supp. 1001, 1006 (D. Utah 1983); see also *Does 1-4 v. Utah Dept. of Health*, 776 F.2d 253 (10th Cir. 1985); *Doe v. Pickett*, 480 F. Supp. 1218, 1220-1221 (D.W.Va. 1979).

mandated abuse reporting law. However, the regulations allow adolescents to prohibit their Title X providers from disclosing information in many other contexts. The regulations also require that Title X service providers implement appropriate safeguards for confidentiality. Thus, for example, even when a Title X provider must make a child abuse report to the Department of Human Services pursuant to state law, the provider cannot inform parents of the report without the minor's authorization.

Title X grantees who fail to comply with federal Title X regulations risk loss of Title X funding.

Are there any special confidentiality protections for information obtained during the provision of mental health care or drug treatment?

Yes. Federal regulations establish special protections for substance abuse treatment records. These regulations apply in addition to or in lieu of HIPAA and other federal and state medical confidentiality law. The regulations supersede any state law to the contrary. The federal regulations greatly limit access to the records they protect. Providers that meet certain criteria must follow the federal drug treatment regulations. *See* 42 C.F.R. §§ 2.11, 2.12. In addition, state law specially protects the confidentiality of mental health and drug treatment records. *See* M.C.L. §§ 330.1748; 333.6111. Among other things, these regulations may impact parent access as well as who must sign an authorization to release information. For this reason, mental health and substance abuse providers may need confidentiality policies that are different from those used by other health care providers.

If Project Connect will be working with providers of mental health and substance abuse services, the Leadership Team should seek additional information about the confidentiality and reporting obligations under mental health and substance abuse treatment law, and consider how the differences may impact any guidance and recommendations being created by the Team.

Are there any special confidentiality regulations that apply when services are provided by school employees?

Yes. The federal Family Educational Rights and Privacy Act (FERPA) protects the privacy of education records. Health care service records are subject to FERPA if the underlying services were provided by employees of schools or other agencies that receive funding from the federal Department of Education (which includes

most public schools and school districts).¹⁵ HIPAA explicitly states that its rules *do not apply* to health information held in an education record subject to FERPA.¹⁶ In other words, if FERPA applies, HIPAA does not. For this reason, the records of a school nurse or school counselor are subject to FERPA, not HIPAA.

In many ways, FERPA and HIPAA are similar. Both protect the privacy of personal information. Both require a signed authorization before records can be released. Both allow or require sharing of information with certain individuals and agencies even without a signed release in some situations, such as to report child abuse. However, there are important differences between the two laws as well. For example, FERPA only applies to written records. HIPAA applies to both oral and written information. A parent's right to access records about a minor is different under HIPAA and FERPA; and when a provider can release information pursuant to court order is different.

While HIPAA does not apply to medical records that are subject to FERPA, state medical confidentiality law still may apply to these records. In some cases, the requirements of FERPA and state law regarding who may access medical information in an education file, such as a school nurse's file, may conflict. If Project Connect will be working with school health staff, the Leadership Team should consider whether it is necessary to seek legal advice about possible conflicts between FERPA and state law and consider how this counsel may impact confidentiality recommendations being created by the Team.

If Project Connect agencies or individuals will be working in school settings, the Leadership Team also should consider whether to seek further information or legal counsel about which records and agencies are subject to FERPA. In some cases, FERPA may apply to the records of an outside health agency when that agency provides health services on a school campus, even though the agency normally operates under HIPAA. Whether HIPAA or FERPA applies to those records depends on the relationship between the provider and the educational institution.

¹⁵ 34 C.F.R. § 99.1(a) ("Except as otherwise noted in § 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if— (1) The educational institution provides educational services or instruction, or both, to students; or (2) The educational agency is authorized to direct and control public elementary or secondary, or postsecondary educational institutions.").

¹⁶ 45 C.F.R. § 160.103 ("Protected Health Information...Protected health information excludes individually identifiable health information in: (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. §1232g;").

Failure to comply with FERPA regulations may result in enforcement actions by the Secretary of Education, including withholding of federal education funding. 34 C.F.R. § 99.67. More information about FERPA and HIPAA in the school health setting is available from the U.S. Department of Health and Human Services website at:

<http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hipaaferpajointguide.pdf>.

Are there any special confidentiality regulations for services provided by grantees of the federal Violence Against Women Act (VAWA) or the Family Violence Prevention Services Act (FVPSA)?

Yes. Federal law establishes special confidentiality protections for information gathered by programs that receive funding under VAWA or FVPSA (as grantees or subgrantees).

VAWA generally protects the confidentiality of persons receiving services from VAWA or FVPSA funded programs and prohibits these programs from disclosing “any personally identifying information or individual information collected in connection with services requested, utilized, or denied through grantees’ and subgrantees’ programs.”¹⁷

Individual information protected by VAWA can only be released outside the program if: (1) the program has a signed consent; (2) the release is compelled by statutory mandate; or (3) the release is compelled by a court order.¹⁸

A signed consent is valid under VAWA if it is “informed, written, [and] reasonably time-limited....”¹⁹ Emancipated minors may sign their own authorizations to release information.²⁰ Authorizations to release information about unemancipated minor clients must be signed by both the minor and her parent or guardian, unless: (1) the adult is the minor’s abuser;²¹ (2) the adult is the abuser of the minor’s other parent;²² or (3) the minor is receiving medical services that, by state law, she is allowed to receive with her own consent alone.²³

¹⁷ 42 U.S.C. § 13925(b)(2)(B)(i).

¹⁸ 42 U.S.C. § 13925(b)(2)(B)&(C).

¹⁹ 42 U.S.C. § 13925(b)(2)(B)(ii).

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Julie Field, National Network to End Domestic Violence, *FAQ’s on Survivor Confidentiality Releases* 8 (2008) [hereinafter *FAQ’s on Survivor Confidentiality Releases*].

While VAWA requires that programs comply with mandated abuse reporting laws and court orders that compel disclosure, it also requires that grantees and subgrantees “make reasonable attempts to provide notice to victims” when they will be making an abuse report or responding to an order, and requires the programs to “take steps necessary to protect the privacy and safety of the persons affected by the release of the information.”²⁴ The Project Connect Leadership Team should consider whether it would be helpful to include any guidance regarding VAWA in its best practice policies and guidelines for health care providers, such as developing authorization forms and reporting policies that comply with both HIPAA and VAWA. Several organizations have issued guidance on VAWA and how to implement the VAWA confidentiality provisions, including the federal Office on Violence against Women and the Michigan Domestic Violence Prevention Treatment Board (MDVPTB).²⁵ For example, MDVPTB has issued quality assurance standards that include standards related to consent forms and consent policy.²⁶

Failure to follow VAWA confidentiality regulations puts receipt of federal VAWA funds at risk.

IV. REQUIRED DISCLOSURES: Mandated Child Abuse Reporting in Michigan

As outlined in sections II and III, the confidentiality of information gathered during provision of health services is typically protected by federal and state law. Health care providers are generally not permitted to disclose protected health information unless they have a written authorization to disclose or an exception in federal or state law allows or requires the disclosure. Child abuse reporting is one example of an exception in state law that requires disclosure of otherwise protected information. As health care providers incorporate screening for dating violence and reproductive coercion into their health practice, they may have questions about whether dating violence information must or should be reported as child abuse. This section of the document reviews the application of child abuse reporting law in Michigan in this context. The Leadership Team should consider developing materials that explain when child abuse reports are clearly required under state law, when they are not, when providers have

²⁴ 42 U.S.C. § 13925(b)(2)(C).

²⁵ See also *FAQ's on Survivor Confidentiality Releases*, *supra* note 23; National Network to End Domestic Violence, *An Update on the Violence Against Women Act (VAWA) & Confidentiality 2* (2006) [hereinafter *Update on VAWA*].

²⁶ MDVPTB's Quality Assurance Standards available at http://www.michigan.gov/dhs/0,1607,7-124-5460_7261_7274---,00.html

discretion about whether to report, and when there may be differences of opinion regarding how to interpret child abuse reporting law. Where there may be differences of opinion, the Leadership Team should consider whether it would be helpful to work toward some consensus on these issues.

Who is a mandated reporter of child abuse?

The following persons are “mandated reporters” of child abuse in Michigan:

- a physician,
- dentist,
- physician's assistant,
- registered dental hygienist,
- medical examiner,
- nurse,
- person licensed to provide emergency medical care,
- audiologist,
- psychologist,
- marriage and family therapist,
- licensed professional counselor,
- social worker,
- licensed master’s social worker,
- licensed bachelor’s social worker,
- registered social service technician,
- social service technician,
- a person employed in a professional capacity in any office of the friend of the court,
- school administrator,
- school counselor or teacher,
- law enforcement officer,
- member of the clergy,
- regulated child care provider, and
- Any employee of an organization or entity that, as a result of federal funding statutes, regulations, or contracts, would be prohibited from reporting in the absence of a state mandate or court order.

M.C.L. § 722.623(1)(a),(c).

Mandated reporters also include a Michigan Department of Human Services employee who is one of the following:

- Eligibility specialist.
- Family independence manager
- Family independence specialist.
- Social services specialist
- Social work specialist

- Social work specialist manager
 - Welfare services specialist.
- M.C.L. § 722.623(1)(b).

When is the obligation to report child abuse triggered under Michigan law?

A mandated reporter must report when he or she has “reasonable cause to suspect child abuse or neglect.” M.C.L. § 722.623(1)(a).

Does child abuse reporting law require mandated reporters to file a child abuse report against a dating partner for abuse of a teen?

No, except in a very few circumstances. Under Michigan law, child abuse is an act committed by a parent, guardian, teacher, clergy member or someone responsible for the child’s health or welfare. *See* M.C.L. § 722.622(f).²⁷ There are very few circumstances in which the dating partner of a teen will be someone responsible for the child’s health or welfare as that is defined by Michigan law.

A person responsible for the child’s health or welfare is defined as any of the following:

- a parent²⁸
- a legal guardian²⁹
- a teacher³⁰
- a teacher’s aide³¹
- a member of the clergy³²
- a person 18 years of age or older who resides for any length of time in the same home in which the child resides³³
- a person 18 years of age or older and who, regardless of the person’s domicile, meets all of the following criteria in relation to a child:
 - i. Has substantial and regular contact with the child.

²⁷ “‘Child abuse’ means harm or threatened harm to a child’s health or welfare that occurs through nonaccidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, a legal guardian, or any other person responsible for the child’s health or welfare or by a teacher, a teacher’s aide, or a member of the clergy.” M.C.L. § 722.622(f).

²⁸ M.C.L. § 722.622(f).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ M.C.L. § 722.622(u).

- ii. Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare; and
 - iii. Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree;³⁴ or
- an owner, operator, volunteer, or employee of one or more of the following:
 - i. A licensed or registered child care organization; or
 - ii. A licensed or unlicensed adult foster care family home or adult foster care small group home.³⁵

If a teen is dating someone in any of the above categories of persons and reports dating violence, then a child abuse report may be necessary, as described below.

What physical acts against a teen by a dating partner qualify as reportable child abuse?

Michigan law requires a mandated reporter to report as child abuse “nonaccidental physical or mental injury...or maltreatment... *by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy.*” M.C.L. §§ 722.623(1)(a), 722.622(f)(emphasis added).

Michigan law does not define the terms “nonaccidental physical or mental injury” or “maltreatment” for this purpose.³⁶

Because the law does not establish an explicit definition, reporting obligations may be interpreted and applied differently by different mandated reporters in the context of dating violence, and in practice, what the Department of Human Services and law enforcement do when reports are filed in cases involving physical acts between dating minors may differ from one agency to another. The Leadership Team may wish to seek some consensus and develop recommendations regarding when physical acts against a minor by a dating partner trigger a child abuse report.

³⁴ M.C.L. § 722.622(t).

³⁵ M.C.L. § 722.622(u).

³⁶ The Department of Human Services provides definitions in their Children Protective Services Manual; however, the manual emphasizes that these are not legal definitions. Instead, they are intended to assist workers once reports have been made to the Department. Thus, while the manual definitions do not have the force of law, they do suggest how the Department of Human Services will interpret the terms once a report is received. See DHS Children Protective Services Manual, www.mfia.state.mi.us/olmweb/ex/PSM/711-5.pdf

Should the Team choose to address and seek consensus on this issue, the Team should consider consulting legal counsel and involving other stakeholders in the consensus discussion, including but not limited to representatives from pediatric and adolescent health, public health, and domestic violence and sexual assault agencies, as well as the Department of Human Services, and relevant law enforcement agencies across the state.

What sexual acts by a dating partner qualify as reportable child abuse?

Michigan law requires a mandated reporter to report as child abuse “harm or threatened harm to a child's health or welfare that occurs through sexual abuse [or] sexual exploitation...*by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or a member of the clergy.*” M.C.L. §§ 722.623(1)(a), 722.622(f)(emphasis added).

Michigan defines sexual abuse as “engaging in sexual contact³⁷ or sexual penetration³⁸...with a child.” M.C.L. § 722.622(w). Sexual exploitation is defined as “allowing, permitting, or encouraging a child to engage in prostitution, or allowing, permitting, encouraging, or engaging in the photographing, filming, or depiction of a child engaged in a listed sexual act³⁹....” *Id.* at (x).

Thus, a report is necessary if a teen is dating one of the above individuals and the dating partner subjects the teen to sexual contact, sexual penetration or sexual exploitation. Further, Michigan law states that “for purposes of this act, the pregnancy of a child less than 12 years of age or the presence of a venereal disease in a child who is over 1 month of age but less than 12 years of age is reasonable cause to suspect child abuse and neglect have occurred.” M.C.L. § 722.623(8).

The Leadership Team may wish to develop some consensus recommendations regarding when sexual acts between a minor and a dating partner must be reported as child abuse. Should the Team choose to address and seek consensus

³⁷ M.C.L. § 750.520a(q) (“‘Sexual contact’ includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) Revenge. (ii) To inflict humiliation. (iii) Out of anger.”).

³⁸ *Id.* at (r) (“‘Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.”).

³⁹ M.C.L. § 750.145c(h) (“‘Listed sexual act’ means sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity.”).

on this issue, the Team should consider consulting legal counsel and involving other stakeholders in the consensus discussion.

What else may need to be reported if a teen discloses dating violence?

Abuse by a dating partner may not require a child abuse report against the dating partner; however, it may raise the possibility of a mandated neglect report against the teen's parent or another person responsible for the teen. Neglect under the child abuse reporting law includes "harm or threatened harm to a child's health or welfare" by "[p]lacing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk." M.C.L. § 722.622.⁴⁰

The Leadership Team may wish to develop some consensus recommendations regarding when dating violence may require a neglect report against a teen's caregivers. In considering whether neglect reports ever may be necessary or advisable in this context, the Team should consider consulting legal counsel and involving other stakeholders in the consensus discussion.

If my program is subject to VAWA confidentiality regulations, does this change my reporting obligation in any way?

VAWA requires that programs comply with mandated abuse reporting laws and court orders that compel disclosure; however, it also requires that grantees and subgrantees "make reasonable attempts to provide notice to victims" that reports are being made and also requires that grantees "take steps necessary to protect the privacy and safety of the persons affected by the release of the information."⁴¹ Providers with VAWA funding should seek advice from their own legal counsel on how to implement these provisions. The MDVPTB has issued best practice

⁴⁰ M.C.L. § 722.622(j) ("Child neglect" means harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following: (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care, (ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.").

⁴¹ 42 U.S.C. § 13925(b)(2)(C).

guidance on reporting child abuse.⁴² In addition, several other organizations have issued related guidance.⁴³

What if child abuse reporting law does not require an abuse report regarding physical or sexual acts against a teen, but a health care provider wishes to report the acts to the authorities?

The reporting statute obligates a health care provider to disclose information to the Department of Human Services and/or law enforcement when the health care provider knows or reasonably believes a child has been or will be subject to abuse. M.C.L. § 722.623(1)(a). Child abuse reporting statutes are designed to encourage reporting when a provider is not sure whether or not to report. In Michigan, a mandated reporter who makes a report in good faith is protected from liability. M.C.L. § 722.625.

However, a health care provider cannot simply report every adolescent patient to the authorities. The mandated reporter must use good faith in deciding when the reporting duty is triggered. *See Id.* Providers who violate confidentiality law may be held liable. If providers are subject to VAWA, Title X or certain other confidentiality laws, the law imposes additional obligations on providers not to make disclosures that are not explicitly required. The Leadership Team should consider whether to provide some guidance regarding mandated and permissive reporting.

What if someone other than a health care provider wants to report physical or sexual acts against a teen to the child abuse authorities?

Many individuals in addition to health care providers may obtain information about a situation involving dating violence. Examples include domestic violence and sexual assault advocates, lawyers, teachers and parents. Some of these individuals are mandated reporters of child abuse. Others are not. Some may be required to abide by confidentiality laws. Others may not.

If an individual obtains information about dating violence and is not a mandated reporter, the person must consider whether any confidentiality laws or

⁴² Debi Cain, Director, Michigan Domestic Violence Prevention & Treatment Board, Michigan Department of Human Services, Grantee Guidance - *Statutory changes mandated reporters of suspected child abuse or neglect*, October 20, 2008.

⁴³ *FAQ's on Survivor Confidentiality Releases*, *supra* note 23; *See also* Julie Kunce Field, Deb Goelman, Barbara Hart, Rebekah Lee, Sandra Murphy, Kim Tolhurst, and Roberta Valente, *Confidentiality, An Advocate's Guide*. Available at: http://www.bwjp.org/files/bwjp/articles/Confidentiality_Advocates_Guide.pdf.

obligations limit disclosure of the information, such as VAWA, federal substance abuse treatment regulations, or professional or ethical standards. If the person is bound by confidentiality law, is not a mandated reporter, and no exception in confidentiality law allows disclosures for permissive abuse reporting, then the individual cannot report without first obtaining an authorization to release information from the patient or other person authorized to sign an authorization. On the other hand, if the person is not bound by a confidentiality rule that would limit disclosure of the information, then that person has discretion to decide whether or not to make a report or share the information with others, considering best practices, safety and other relevant concerns. State law allows any person to make a child abuse report if that person has reasonable cause to suspect child abuse or neglect. M.C.L. § 722.624. In developing its recommendations, the Leadership Team should consider the question of information obtained by individuals who are not health care providers, and the possible confidentiality and reporting ramifications.

Do I have to report if my adult client reveals she was abused as a minor or once abused a child who is now an adult?

The Michigan Child Protection Law does not impose a duty to report child abuse when an adult discloses that he or she was abused as a child or when an adult discloses having abused a child, who is now an adult, unless there is reasonable cause to suspect that there is a current threat of harm to a child. Mich. Op. Atty. Gen. 1997, No. 6934.

Will the police be informed of child abuse reports?

They may. The Michigan Department of Human Services is required to involve law enforcement officials in an investigation within 24 hours after becoming aware that one or more of the following conditions exist:

- (a) Abuse or neglect is the suspected cause of a child's death;
- (b) The child is the victim of suspected sexual abuse or sexual exploitation;
- (c) Abuse or neglect resulting in severe physical injury to the child requires medical treatment or hospitalization;
- (d) Law enforcement intervention is necessary for the protection of the child, a department employee, or another person involved in the investigation; or
- (e) The alleged perpetrator of the child's injury is not a person responsible for the child's health or welfare.

M.C.L. §§ 722.628(1); 722.623(6).

DHS also must involve law enforcement if the alleged perpetrator is someone other than “a person responsible for the child's health or welfare.” M.C.L. § 722.623(6). In other cases, DHS has the discretion to share the report with the prosecuting attorney and the probate court of the county in which the abused child resides. *Id.* at (5).

Where may I obtain more information about child abuse reporting in Michigan?

For more information regarding reporting, including when reports must be submitted, what information they must include, and what happens with reports, the Department of Human Services has issued a publication entitled “Mandated Reporter’s Resource Guide.”⁴⁴ In addition, the publication *Minor Consent, Confidentiality and Reporting Child Sexual Abuse: A Guide for Title X Family Planning Providers in Michigan* provides more information.

V. REQUIRED DISCLOSURES: Mandated Reporting of Dating Violence under Michigan law

What reporting does section 750.411 require?

Michigan state law section 750.411 contains reporting requirements for hospitals, pharmacies and certain health professionals when they have in their care people suffering from injuries inflicted by means of violence. If this reporting requirement is triggered, the individual must report, even if the information is otherwise protected by medical confidentiality law.

Specifically, in hospital and pharmacy settings, the individuals described below must make a report when “1 or more persons come or are brought suffering from a wound or other injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence.” M.C.L. § 750.411.

In addition, in any setting, “[a] physician or surgeon who has under his or her charge or care a person suffering from a wound or injury inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence” must report. M.C.L. § 750.411(2).

⁴⁴ DHS Pub-112, available at http://www.michigan.gov/dhs/0,1607,7-124-5458_7699---,00.html

Who must report under section 750.411?

The following persons must report:

- A person, firm, or corporation conducting a hospital or pharmacy in this state⁴⁵
- The person managing or in charge of a hospital or pharmacy⁴⁶
- The person in charge of a ward or part of a hospital⁴⁷
- A physician or surgeon *who has under his or her charge or care* a person suffering from a wound or injury inflicted in the manner described in this section.

M.C.L. § 750.411(1),(2).

When is the obligation to report triggered for physicians and surgeons?

The reporting requirement is triggered only when all of the following are satisfied:

- The physician or surgeon
- Has under his or her care
- A person suffering from a physical wound or injury
- And that wound or injury was inflicted by means of a knife, gun, pistol, or other deadly weapon, or by other means of violence.

What abuse or conditions do not require a report under section 750.411?

A reporter under section 750.411 is not required to report in any of the following situations:

- when a patient does not have a physical wound or injury;
- when a patient had a wound or injury but is not currently suffering from one;
- when a patient has an injury but the injury is not the result of a knife, gun, pistol, other deadly weapon or other means of violence; or
- when a patient has an injury but the patient is not under the physician's charge or care.

See M.C.L. § 750.411.

⁴⁵ M.C.L. § 750.411(1).

⁴⁶ *Id.*

⁴⁷ *Id.*

Does section 750.411 require reporting of acts against minors? Does it require reporting of acts perpetrated by juveniles?

It appears so. The law does not exempt anyone from reporting based on age. Therefore, the law applies even where the patient and/or perpetrator is less than 18 years old.

The Leadership Team may wish to seek some consensus and develop recommendations regarding which acts by a minor against a teen dating partner must be reported under section 750.411. Should the Team choose to address this issue, the Team should consider consulting legal counsel and involving other stakeholders in the consensus discussion.

What information must the report include?

“The report shall state the name and residence of the [injured] person, if known, his or her whereabouts, and the cause, character, and extent of the injuries and may state the identification of the perpetrator, if known.” M.C.L. § 750.411(1).

To whom are reports made?

The report must be made “both by telephone and in writing, to the chief of police or other head of the police force of the village or city in which the hospital or pharmacy is located, or to the county sheriff if the hospital or pharmacy is located outside the incorporated limits of a village or city.” M.C.L. § 750.411(1).

VII. DISCRETIONARY DISCLOSURES: Disclosing and exchanging information in other situations

May health care providers legally disclose protected information, such as information about dating violence, to the parents of a teen survivor – even if she objects?

Sometimes. It depends when and how the provider obtained the information. The law prohibits a provider from revealing health information to parents when that information was disclosed by a teen during provision of certain health care services. For example, providers delivering services funded in full or in part with Title X monies cannot disclose Title X records or information to parents

without the minor's documented authorization. Similarly, parents do not have a right to access any information obtained during provision of most minor consent services.⁴⁸ See M.C.L. § 333.26263(n). Thus, for example, a provider cannot disclose suspected dating violence to parents without the teen's authorization if the teen discussed the violence during minor consent outpatient mental health services.⁴⁹

When a parent or guardian's consent is necessary for a minor's care, though, the parent or guardian generally has a right to obtain information about the minor's treatment. In these situations, the provider legally can share with parents, even if the adolescent patient has not authorized the disclosure. Thus, for example, a provider legally can disclose suspected dating violence to parents if an unemancipated teen tells her provider that she is being abused by a dating partner during provision of a parent consent sports physical. (*But see* the following question regarding discretion to keep information confidential.)

In a few situations in which a minor consents to his or her own care, the law grants health care providers the discretion to determine whether disclosure to parents is appropriate. For example, if a teen consents to her own treatment for a sexually transmitted disease pursuant to state law, the provider has some discretion to inform the parent. The law says: "For medical reasons a treating physician, and on the advice and direction of the treating physician, a physician, a member of the medical staff of a hospital or clinic, or other health professional, may, but is not obligated to, inform the spouse, parent, guardian, or person in loco parentis as to the treatment given or needed. The information may be given to or withheld from these persons without consent of the minor and notwithstanding the express refusal of the minor to the providing of the information." M.C.L. § 333.5127.

The Leadership Team should consider whether to provide guidance regarding when parental notification about dating violence is prohibited and when it is permitted. The Team also should consider whether to make recommendations to help providers determine when a discretionary notification to parents may be advisable. This deliberation should take into account ethical and professional standards, safety concerns, and best practice recommendations from experts, among other factors.

⁴⁸ In some cases, the provider may have discretion to decide whether or not to disclose minor consent related information to parents. See Gudeman, *Minor Consent, Confidentiality and Child Abuse Reporting for Title X Providers: Michigan Law* for more information about the state's minor consent laws.

⁴⁹ M.C.L. § 330.1707

May health care providers refuse to disclose protected information, such as information about dating violence, to a teen's parent?

Yes, in most cases. In some situations, the health care providers are required to refuse to disclose. For example, if a teen receives Title X funded services, the provider cannot disclose any related information to parents without first obtaining authorization from the teen. In other cases, even where a parent normally would have a right to review a teen patient's record, Michigan law states that a health care provider may refuse a parent's request to access a minor's medical records "if the health care provider or health facility determines that disclosure of the requested medical record is likely to have an adverse effect on the patient." M.C.L. § 333.26265(2)(e).

HIPAA also contains a similar exception. Under federal HIPAA regulations, providers may refuse to provide parents access to a minor's medical records if:

1. The providers have a "reasonable belief" that:
 - a) The minor has been or may be subjected to domestic violence, abuse or neglect by the parent, guardian or other giving consent; or
 - b) Treating such person as the personal representative could endanger the minor; And:
2. The provider, in the exercise of professional judgment, decides that it is not in the best interest of the minor to give the parent, guardian or other such access.

45 C.F.R. § 164.502(g)(5).

Thus, providers have some discretion to decide whether or not to disclose information to parents. The Leadership Team should consider whether to make recommendations regarding when parental notification is, and is not, in the best interests of a teen. This deliberation should take into account multiple factors in addition to the law, including but not limited to ethical and professional standards, safety concerns, and best practice recommendations from experts.

How should a subpoena or other legal request for confidential information be handled?

While both federal and state law allow providers to release information when subpoenaed, there are procedural and substantive standards that must be met before a subpoena is valid. Many subpoenas will not withstand legal challenge.

For this reason, when presented with a subpoena, it is always advisable to seek legal counsel before releasing any information.

If my agency wants to be able to share information with collaborating agencies, what paperwork or protocols does my agency need?

Most confidentiality laws, including HIPAA, VAWA, and FERPA, allow providers and programs to disclose information to other agencies pursuant to a written authorization. In addition, most of these laws allow for certain disclosures without an authorization in specific circumstances. For example, HIPAA allows providers to share information with other medical and mental health providers for treatment purposes without need of an authorization. If Project Connect will be encouraging multi-agency collaboration, the Leadership Team should consider whether it would be helpful to provide guidance regarding authorization forms and relevant confidentiality policies. The Team and its members may wish to seek legal advice from their own counsel. Some guidance is available on best practices in multi-agency collaboration with agencies subject to VAWA.⁵⁰ This guidance does not directly address health care confidentiality law.

⁵⁰ The National Network to End Domestic Violence (NNEDV) - *Template Memorandum of Understanding: Partnership Agreement for Community Collaborations*; Julie Kunce Field, Esq., Consultant to NNEDV and Center for Survivor Agency and Justice (CSAJ), Training Materials, *Victim Confidentiality and Privacy: The Challenges of Collaboration*.

GLOSSARY OF TERMS:

Adolescent: For the purposes of this document, the term “adolescent” is used interchangeably with the term “minor”.

Dating Violence: The Family Violence Prevention Fund defines dating violence as follows: “Dating violence is a type of intimate partner violence. It occurs between two people in a close relationship. The nature of dating violence can be physical, emotional, or sexual.” For more information about teen dating violence, see the Family Violence Prevention Fund website, http://www.endabuse.org/content/action_center/detail/754

Domestic Violence: “The term ‘domestic violence’ includes felony or misdemeanor crimes of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.”

Leadership Team: The Project Connect Leadership Team is tasked with developing a state action plan for Project Connect. Membership is defined by the Project Connect proposal from the site but should include “the State or regional domestic and sexual violence coalition and a public health leader, including partners from community-based health and violence prevention groups as well as key public health groups such as regional and State women’s health and adolescent health coordinators.”

Minor: A minor is a person under age 18. The age of majority in Michigan is eighteen years. M.C.L. §§ 722.1; 722.52.

Public Health Programs: “For the purposes of this initiative, public health programs include State, local, territorial or tribal department of health programs focused on improving maternal, child and adolescent health including: family planning, perinatal health programs, home visitation programs, STI/HIV programs, adolescent health programs and other related public health programs such as injury prevention.”

Reproductive Coercion: “includes intentionally exposing a partner to sexually transmitted infections (STIs); attempting to impregnate a woman against her will; intentionally interfering with a partner’s birth control, or threatening or acting violent if she does not comply with the perpetrator’s wishes regarding contraception or the decision whether to terminate or continue a pregnancy.”

Unless otherwise noted, all definitions are from the FVPF’s Request for Proposals for Project Connect funding.