

Minor Consent, Confidentiality, and Reporting Child Sexual Abuse: A Guide for Title X Family Planning Providers in New Mexico

*Rebecca Gudeman, J.D., M.P.A.
National Center for Youth Law
Teen Health Rights Initiative*

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National Center for Youth Law

405 14th St., Suite 1500

Oakland, CA 94612

www.youthlaw.org

www.teenhealthrights.org

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LSUHSC School of Nursing

Title X Family Planning Regional Training Center

1900 Gravier St.

New Orleans, LA 70112

<http://nursing.lsuhs.edu/familyplanning>

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I. MINOR CONSENT

What is the age of majority?

A minor legally becomes an adult at 18 years of age. N.M. STAT. ANN. § 28-6-1.

What is the age of consent for sexual activity?

While no statute specifically establishes an age of consent, there can be criminal penalties for certain consensual sexual activity with a minor who is under 18 years of age. *See, e.g.* N.M. STAT. ANN. § 30-9-13(D)(2) (prohibiting “sexual contact” with a minor under 18 years of age when the perpetrator is a school employee, at least four years older than the minor, and not the spouse of the minor).

Who generally consents for health care for minors?

Generally, a parent or guardian must consent for health care on behalf of a minor; however, there are exceptions.

What exceptions allow minors or others to consent for minors’ health care?

◆ MINOR CONSENT BASED ON STATUS

➤ Emancipated Minor

An emancipated minor shall be considered as being at or over the age of majority for the purpose of consenting to medical, dental or psychiatric care without parental consent, knowledge or liability. N.M. STAT. ANN. § 32A-21-5.

An emancipated minor is any person 16 years of age or older who:

- A. has entered into a valid marriage, whether or not the marriage was terminated by dissolution;
- B. is on active duty with any of the armed forces of the United States of America; or
- C. has received a declaration of emancipation by a court.¹

N.M. STAT. ANN. § 32A-21-3.

¹ N.M. STAT. ANN. § 32A-21-4(Any person sixteen years of age or older may be declared an emancipated minor by the court if he is willingly living separate and apart from his parents, guardian or custodian, is managing his own financial affairs and the court finds it in the minor's best interest.).

➤ **Married or Divorced Minor**

Notwithstanding any other provision of the law, and without limiting cases in which consent may otherwise be obtained or is not required, any minor who has contracted a lawful marriage may give consent to the furnishing of hospital, medical and surgical care for him or herself. Subsequent judgment of annulment of the marriage or judgment of divorce shall not deprive the minor of his adult status once attained. N.M. STAT. ANN. § 24-10-1.

◆ **MINOR CONSENT BASED ON SERVICES SOUGHT**

➤ **Abortion**

While New Mexico passed a statute that would have required parental consent for a minor to receive an abortion, the New Mexico Attorney General declared the parental consent requirement unconstitutional. The parental consent requirement is not enforceable. N.M. Op. A.G. No. 90-19 (Oct. 3, 1990)(reviewing N.M. STAT. ANN. §§ 30-5-3 and 30-5-1).

➤ **Emergency**

In cases of emergency in which a minor is in need of immediate hospitalization, medical attention or surgery and the parents of the minor cannot be located for the purpose of consenting thereto, after reasonable efforts have been made under the circumstances, consent for the emergency attention may be given by any person standing *in loco parentis* to the minor. N.M. STAT. ANN. §24-10-2.

➤ **Family Planning (Title X Funded)**

Federal regulations establish special access rules for family planning services funded through Title X. Providers delivering services funded in full or in part with Title X monies must comply with the federal regulations.

Federal law requires that Title X funded services be available to all adolescents, regardless of their age, without the need for parental consent. 42 C.F.R. 59.5(a)(4). This regulation supersedes any state law to the contrary. *Planned Parenthood Assoc. of Utah v. Matheson*, 582 F. Supp. 1001, 1006 (D. Utah 1983); *see 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).

Thus, minors of any age may consent to family planning services when those services are funded in full or in part by Title X monies. For family planning services not funded by Title X, state consent law applies.²

➤ **Family Planning (Non-Title X funded)**

New Mexico law allows minors of any age to consent to family planning services.³ Neither the government nor any health facility may impose standards or requirements that limit access based on age. N.M. STAT. ANN. § 24-8-5.

➤ **HIV and AIDS**

To the extent that HIV/AIDS services are funded in full or in part by Title X, minors of any age may consent. *See supra* "Title X funded Family Planning."

In other cases, state law applies. New Mexico law provides that a minor, regardless of age, may consent to testing for HIV. N.M. STAT. ANN. § 24-2B-3.

➤ **Pregnancy**

A minor, regardless of age, may consent to an examination and diagnosis by a licensed physician for pregnancy. N.M. STAT. ANN. § 24-1-13.

➤ **Prenatal and Postnatal Care**

A female minor of any age may consent to prenatal, delivery and postnatal care by a licensed health care provider. N.M. STAT. ANN. § 24-1-13.1.

➤ **Sexually Transmitted Diseases**

² Please note, however, that services funded by other federal programs, such as Medicaid, may operate under separate confidentiality and consent rules. In addition, constitutional law may provide a separate basis for providers to treat minors confidentially. Providers in non-Title X funded programs should consult with their own legal counsel for further information.

³ N.M. Stat. Ann. § 24-8-2("Family planning services" includes contraceptive procedures and services (diagnosis, treatment, supplies and follow-up), social services, educational and informational services. "Contraceptive procedures" means any medically accepted procedure to prevent pregnancy.)

To the extent that STD services are funded in full or in part by Title X, minors of any age may consent. *See supra* “Title X Family Planning.”

In other cases, state law applies. New Mexico law permits a minor, regardless of age, to consent for examination and treatment by a licensed physician for any sexually transmitted disease. N.M. STAT. ANN. § 24-1-9.

➤ **Psychotherapy and Counseling**

A minor of any age may consent to individual psychotherapy, group psychotherapy, guidance, counseling or other forms of verbal therapy if they do not include any aversive stimuli or substantial deprivations. N.M. STAT. ANN. § 32A-6-14(A).

➤ **Psychotropic Medications and Interventions involving Aversive Stimuli**

If the minor is 14 years of age or older, psychotropic medications or interventions involving aversive stimuli or substantial deprivation can be administered with the informed consent of the child if the child is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent. N.M. STAT. ANN. §§ 32A-6-14(C), (E)⁴.

⁴ If the consent of the child is not obtained, or if the mental health or developmental disabilities professional or physician who is proposing this or any other course of treatment or any other interested person believes that the child is incapable of informed consent, and the treatment provider or another interested person believes that the administration of the drug or program is necessary to protect the child from serious harm, any interested party may request that the children's court attorney petition the court for appointment of a treatment guardian to make a substitute decision for the child. N.M. STAT. ANN. § 32A-6-14. If a licensed physician believes that the administration of psychotropic medication is necessary to protect the child from serious harm that could occur while the provisions of this section are being satisfied, the licensed physician may administer the medication on an emergency basis. When medication is administered to a child on an emergency basis, the treating physician shall prepare and place in the child's medical records a report explaining the nature of the emergency and the reason that no treatment less drastic than administration of psychotropic medication without proper consent would have protected the child from serious harm. When medication is administered to a child on an emergency basis, the child's parent, guardian or legal custodian and the child's attorney or guardian ad litem shall be notified by the residential treatment or habilitation program. N.M. STAT. ANN. § 32A-6-14(I).

If the minor is under 14, psychotropic medications or interventions involving aversive stimuli or substantial deprivation require the informed consent of both the child and the child's parent, guardian or legal custodian. N.M. STAT. ANN. § 32A-6-14(D).

➤ **Psychosurgery or Convulsive Treatment**

New Mexico law does not authorize a minor or the parent of a minor to consent to any intervention that involves psychosurgery or convulsive treatment. These interventions require a court finding that such treatment is necessary to prevent serious harm to the minor. Consent by the minor or the minor's parent is invalid without a court finding of necessity. N.M. STAT. ANN. § 32A-6-14(B).

II. CONFIDENTIALITY

Who controls access to medical information?

Federal HIPAA regulations provide individuals with the right to control certain disclosures of medical information and to obtain access to such information. 45 C.F.R. §§ 164.502(a); 164.524. Under HIPAA, when a parent consents for an unemancipated minor's health care, that parent generally has a right to control access to the minor's medical information. This means that providers generally may not use or disclose the minor's health information without the parent's consent. It also means that parents generally have the right to inspect their children's records. 45 C.F.R. §§ 164.502(g)(1), (g)(3), (a)(1)(i), (a)(2)(i).

When a minor consents 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 controls his or her own medical records if consent for medical care was provided by a court, or other person on the minor's behalf, as permitted by state law.) A parent's right to inspect records in this situation will depend on state law. 45 C.F.R. § 164.502(g)(3)(ii).

New Mexico law states that, in general, all health information that relates to and identifies specific individuals as patients is strictly confidential and cannot be released, except in limited circumstances. N.M. STAT. ANN. § 14-6-1. It does not directly address the issue of parent access.

The confidentiality of certain types of records is additionally protected. For example, counselors and “therapist practitioners” are specifically barred from disclosing any professional records without written consent.⁵ N.M. STAT. ANN. § 61-9A-27. And records relating to mental health, developmental disabilities, and sexually transmitted diseases, including HIV/AIDS, are specially protected. N.M. STAT. ANN. §§ 43-1-19; 24-1-9.4; 24-2B-6. The confidentiality of records held by an HMO is specially protected,⁶ as is the confidentiality of the records of insurers.⁷ State law also provides patients a right of access to certain records. For example, mental health and disability clients have a right to access their records in most cases. N.M. STAT. ANN. § 43-1-19(D).

State law and HIPAA establish certain general rules about access to medical information; however, there are exceptions to both the federal and state laws that change access rights in some instances.

What exceptions impact *parent* access to medical information about minors?

► When access to records of mental health or developmental disabilities services will have a detrimental effect

While a client has a right of access to confidential information, nothing shall prohibit the denial of access to such records when a physician or other mental health or developmental disabilities professional believes and notes in the client's medical records that such disclosure would not be in the best interests of the client. In any such case, the client has the right to petition the court for an order

⁵ There are a few exceptions. For example, the therapist may reveal information without client consent when: (1) such communication reveals the contemplation of a crime or act harmful to the person's self or others; (2) the information acquired indicates the person was the victim or subject of a crime required to be reported by law; or (3) the person, family or legal guardian waives the privilege by bringing charges against a counselor and therapist practitioner as defined in the Counseling and Therapy Practice Act.

⁶N.M. STAT. ANN. § 59A-46-27(“Any data or information pertaining to the diagnosis, treatment or health of any enrollee or applicant obtained from such person or from any provider by any health maintenance organization shall be held in confidence and shall not be disclosed” without authorization, except in limited circumstances.)

⁷ N.M. Admin. Code tit. 13, Part 3 (persons and agencies required to be licensed under the New Mexico Insurance Code shall not disclose nonpublic personal health information about a consumer or customer unless an authorization is obtained, but for a few exceptions. Compliance with HIPAA satisfies these rules.)

granting such access. N.M. STAT. ANN. § 43-1-19(D).

➤ **Risk of domestic violence/abuse/neglect**

The Federal HIPAA regulations provide an exception to the parent’s federal right to control disclosure and access to medical records in situations where:

1. the provider has a reasonable belief that the minor has been or may be subject to domestic violence, abuse or neglect by the parent, OR giving the parent the right to access to the minor’s medical information 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 provide the parent with access to the minor’s medical information. 45 § C.F.R. 164.502 (g)(5).

➤ **Emancipated Minor**

An emancipated minor shall be considered as being over the age of majority for the purpose of consenting to medical, dental or psychiatric care without parental consent, knowledge or liability. N.M. STAT. ANN. § 32A-21-5.

➤ **Drug and Alcohol Abuse Treatment**

Federal regulations establish special protections for substance abuse treatment records. Providers that meet certain criteria must follow the federal rule. (For criteria, see footnote three below.)⁸

⁸ Federal confidentiality law applies to any individual, program, or facility that meets the following two criteria:

1. The individual, program, or facility is federally assisted. (Federally assisted means authorized, certified, licensed or funded in whole or in part by any department of the federal government. Examples include programs that are: tax exempt; receiving tax-deductible donations; receiving any federal operating funds; or registered with Medicare.) 42 C.F.R. § 2.12;

And:

2. The individual or program:
 - 1) Is an individual or program that holds itself out as providing alcohol or drug abuse diagnosis, treatment, or referral; OR
 - 2) Is a staff member at a general medical facility whose primary function is, and who is identified as, a provider of alcohol or drug abuse diagnosis, treatment or referral; OR
 - 3) Is a unit at a general medical facility that holds itself out as providing alcohol or drug abuse diagnosis, treatment or referral. 42 C.F.R. § 2.11; 42 C.F.R. § 2.12.

For those providers who must comply with federal rules, the federal regulations prohibit disclosing any information without receiving both the parent's and the minor's written consent. 42 C.F.R. § 2.14. In addition, a minor's *application* for treatment can only be shared with the minor's parents if (1) the minor has provided written consent, or (2) the individual provider or the program's director (if it is a program) determines the following three conditions are met: (i) that the minor's situation poses a substantial threat to the life or physical well-being of the minor or another; (ii) that this threat may be reduced by communicating relevant facts to the minor's parents; and (iii) that the minor lacks the capacity because of extreme youth or a mental or physical condition to make a rational decision on whether to disclose to his or her parents. 42 C.F.R. § 2.14.

➤ **Family Planning (Title X funded)**

Federal regulations establish special confidentiality protections for family planning information gathered during a Title X funded service. Providers delivering services funded in full or in part with Title X monies must comply with the federal regulations.

For agencies delivering services funded in full or in part by Title X, federal law mandates 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.

Thus, if a minor receives Title X funded services, the records cannot be disclosed to parents without obtaining the minor’s documented consent.

➤ **Pregnancy**

For agencies delivering services funded in full or in part by Title X, federal law mandates 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.

➤ **Prenatal and Postnatal Care**

For agencies delivering services funded in full or in part by Title X, federal law mandates 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.

➤ **Sexually Transmitted Diseases, including HIV and AIDS**

For agencies delivering services funded in full or in part by Title X, federal law mandates 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.

In addition, state law mandates that in all cases “no positive test result for a sexually transmitted disease shall be revealed to the person upon whom the test was performed without the person administering the test or the health facility at which the test was performed providing or referring that person for individual counseling about:

- A. the meaning of the test results;
- B. the possible need for additional testing;
- C. the availability of appropriate health care services, including mental health care, social and support services; and
- D. the benefits of locating and counseling any individual by whom the infected person may have been exposed to the sexually transmitted disease and any individual whom the infected person may have exposed to the sexually transmitted disease.”

N.M. STAT. ANN. § 24-1-93.

➤ **Psychotherapy and Counseling, Psychotropic Medications and Interventions involving Aversive Stimuli, Psychosurgery or Convulsive Treatment**

Confidential information about mental health and developmental disabilities services cannot be disclosed or transmitted without the authorization⁹ of the child except in a few circumstances. Confidential information is information from which a person well acquainted with the child might recognize the child as the described person or any code, number or other means that could be used to match the child with confidential information regarding him. N.M. STAT. ANN. § 32A-6-15(A).¹⁰

If the minor is incapable of giving consent for release

If the minor is 14 years of age or older and does not have a treatment guardian appointed by a court, the person seeking the authorization shall petition the court for the appointment of a treatment guardian to make a decision for the child.

If the minor is less than 14 years old, the child's parent, guardian or legal custodian is authorized to consent to disclosure on behalf of the child. N.M. STAT. ANN. § 32A-6-15(B).

⁹ No authorization given for the transmission or disclosure of confidential information shall be effective unless it: (1) is in writing and signed; and (2) contains a statement of the child's right to examine and copy the information to be disclosed, the name or title of the proposed recipient of the information and a description of the use that may be made of the information. N.M. STAT. ANN. § 32A-6-25(D).

¹⁰ Authorization from the child shall not be required for the disclosure or transmission of confidential information in the following circumstances:

(1) when the request is from a mental health or developmental disability professional or from an employee or trainee working with mentally disordered or developmentally disabled persons, to the extent their practice, employment or training on behalf of the child requires that they have access to the information; (2) when the disclosure is necessary to protect against a clear and substantial risk of imminent serious physical injury or death inflicted by the child on himself or another; (3) when the disclosure of the information to the parent, guardian or legal custodian is essential for the treatment of the child; (4) when the disclosure of the information is to the primary caregiver of the child and the disclosure is only of information necessary for the continuity of the child's treatment in the judgment of the treating clinician who discloses the information; (5) when the disclosure is to an insurer contractually obligated to pay part or all of the expenses relating to the treatment of the child at the residential facility. The information disclosed shall be limited to data identifying the child, facility and treating or supervising physician and the dates and duration of the residential treatment. It shall not be a defense to an insurer's obligation to pay that the information relating to the residential treatment of the child, apart from information disclosed pursuant to this section, has not been disclosed to the insurer; or (6) when the disclosure is to a protection and advocacy representative. N.M. STAT. ANN. § 32A-6-15(C).

In addition, minors have a right of access to confidential mental health or dev. disability information about themselves and have the right to make copies of any information and submit clarifying or correcting statements and other documentation of reasonable length for inclusion with the confidential information. However, the provider has the right to deny access to the records when the physician or other mental health or developmental disabilities professional believes and notes in the child's medical records that the disclosure would not be in the best interests of the child. In all cases, the child has the right to petition the court for an order granting access. N.M. STAT. ANN. § 32A-6-15(E).

In what situations might I be allowed or required to give others access to a minor's medical information?

State and federal confidentiality laws contain many exceptions that allow or require providers to share medical information, whether or not they have parental or minor authorization. Examples include:

➤ **Reporting Certain Sexually Transmitted Diseases and Conditions to Health Authority**

Providers administering a test for sexually transmitted diseases may disclose the identity of patients to the department of health and the centers for disease control and prevention of the United States public health service in accordance with reporting requirements for a diagnosed case of a sexually transmitted disease. N.M. STAT. ANN. § 24-1-9.4.

➤ **Sharing Mental Health Records For Treatment Purposes**

“Authorization from the client shall not be required for the disclosure or transmission of confidential information when the request is from a mental health or developmental disability professional or from an employee or trainee working with mentally disordered or developmentally disabled persons, to the extent their practice, employment or training on behalf of the client requires that they have access to such information.” N.M. STAT. ANN. §43-1-19 (B)(1).

➤ **Reporting Child Abuse**

Mandated reporters of child abuse must report child abuse. N.M. STAT. ANN. § 32A-4-3(A).

A counselor or therapist practitioner must disclose information acquired from a minor who has consulted him in his professional capacity if the information indicates that the minor was a victim of child abuse. N.M. STAT. ANN. § 61-9A-27(B)(3).

Can individuals be held liable for revealing confidential information outside the exceptions listed in federal or state law?

Providers can only share information without 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. For example, any person revealing STD records without authorization may be found criminally and civilly liable. N.M. STAT. ANN. § 24-1-21. In addition, the federal Department of Health and Human Services has authority to enforce HIPAA confidentiality regulations and to impose sanctions on providers who breach those rules. *See* 42 U.S.C. 1320d-6; 45 C.F.R. § 160, Subpart C.

Beyond criminal and civil sanction, professionals who violate confidentiality also put their medical license at risk.

III. CHILD ABUSE REPORTING REQUIREMENTS

A. Am I a Mandated Reporter?

Who is a mandated reporter?

All individuals are mandated to report child abuse. In addition, the law specifically defines the following as mandated reporters:

- (1) licensed physicians;
- (2) residents or interns examining, attending or treating a child;
- (3) law enforcement officers;
- (4) judges presiding during a proceeding;
- (5) registered nurses;
- (6) visiting nurses;
- (7) schoolteachers;
- (8) school officials;
- (9) social workers acting in an official capacity and
- (10) members of the clergy who have information that is not privileged as a matter of law.

N.M. STAT. ANN. § 32A-4-3(A).

B. When is a Mandated Reporter Required to Submit a Report?

When must I report abuse?

The Abuse and Neglect Act requires *anyone* “who knows or has a reasonable suspicion that a child is an abused or a neglected child” to make a report. N.M. STAT. ANN. § 32A-4-3 (A).

What if I am not sure that abuse has occurred?

Confirmation of abuse is not required. Reporters must report whenever they have “reasonable suspicion” that abuse has occurred.

C. Is This a Type of Activity That Must be Reported?

The Abuse and Neglect Act requires reporting “abused” and “neglected” children. The Act defines “abused child” as a child:

- (1) who has suffered or who is at risk of suffering serious harm because of the action or inaction of the child's parent, guardian or custodian¹¹;
- (2) who has suffered physical abuse, emotional abuse or psychological abuse inflicted or caused by the child's parent, guardian or custodian;
- (3) who has suffered sexual abuse or sexual exploitation inflicted by the child's parent, guardian or custodian;
- (4) whose parent, guardian or custodian has knowingly, intentionally or negligently placed the child in a situation that may endanger the child's life or health; or
- (5) whose parent, guardian or custodian has knowingly or intentionally tortured, cruelly confined or cruelly punished the child.

N.M. STAT. ANN. § 32A-4-2(B).

The Act defines “neglected child” as a child:

- (1) who has been abandoned¹² by the child's parent, guardian or custodian
- (2) who is without proper parental care and control or subsistence, education, medical or other care or control necessary for the child's well-being because of the faults or habits of the child's parent, guardian or custodian or the failure or refusal of the parent, guardian or custodian, when able to do so, to provide them;
- (3) who has been physically or sexually abused, when the child's parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm;
- (4) whose parent, guardian or custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization or physical or mental disorder or incapacity; or

¹¹ N.M. STAT. ANN. § 32A-1-4(E) (“Custodian” means an adult with whom the child lives who is not a parent or guardian of the child.).

¹² N.M. STAT. ANN. § 32A-4-2(A) (Abandonment includes instances where the parent, without justifiable cause: 1) left the child without provision for the child's identification for a period of fourteen days; or 2) left the child with others, including the other parent or an agency, without proper support and without communication for a period of a. 3 months, if the child was under six years of age at the time of commencement of the three-month period or six months, if the child was over six years of age at the time of commencement of the six-month period.).

(5) who has been placed for care or adoption in violation of the law.

N.M. STAT. ANN. § 32A-4-2(E).

D. What Sexual Activity Must be Reported?

What sexual activity triggers a child abuse or neglect report?

The Abuse and Neglect Act requires reports when sexual activity is evidence of “abuse” or “neglect.”

➤ Activity that triggers abuse report

Mandated reporters must make a report of ABUSE when sexual abuse¹³ or sexual exploitation¹⁴ has been inflicted on a child by the child's parent, guardian or custodian¹⁵. N.M. Stat. Ann. § 32A-4-2(B)(3). Specifically, a report is mandated when the following three criteria are met:

1. The activity involves a minor;
2. The perpetrator is:
 - A parent;
 - A guardian; or
 - An adult with whom the child lives who is not a parent or guardian of the child; and
3. Any of the following occurred:
 - Sexual penetration¹⁶ or contact¹⁷ (including acts by force or coercion)¹⁸;

¹³ N.M. STAT. ANN. § 32A-4-2(G)(“Sexual abuse includes, but is not limited to criminal sexual contact incest or criminal sexual penetration, as those acts are defined by state law”).

¹⁴ N.M. STAT. ANN. § 32A-4-2(H)(“Sexual exploitation includes but is not limited to: allowing, permitting or encouraging a child to engage in prostitution; allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or filming or depicting a child for obscene or pornographic commercial purposes, as those acts are defined by state law.”).

¹⁵ N.M. STAT. ANN. § 32A-1-4(E)(“Custodian” means an adult with whom the child lives who is not a parent or guardian of the child.)

¹⁶ N.M. STAT. ANN. § 30-9-11(Penetration includes causing “a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.”)

¹⁷ N.M. STAT. ANN. § 30-9-13(“Touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts. For the purposes of this section, ‘intimate parts’ means the primary genital area, groin, buttocks, anus or breast.”).

- Incest;¹⁹ or
- Sexual exploitation, which includes: allowing, permitting or encouraging a child to engage in prostitution; allowing, permitting, encouraging or engaging a child in obscene or pornographic photographing; or filming or depicting a child for obscene or pornographic commercial purposes.

N.M. STAT. ANN. §§ 32A-4-2(B); 32A-1-4(E); 30-9-11; 30-9-13; 32A-4-2(G&H).

➤ **Activity that triggers neglect report**

Mandated reporters must make a report of child NEGLECT when a child has been sexually abused and the child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm. N.M. STAT. ANN. § 32A-4-2(E)(3). Specifically, neglect reports are mandated when the following three criteria are met:

1. The activity involves a minor;
2. The child’s parent, guardian or custodian knew or should have known of the abuse and failed to take reasonable steps to protect the child from further harm; and
3. Any of the following occurred:
 - Nonconsensual sexual penetration²⁰ or contact²¹;
 - Penetration or contact with person in a position of authority²² when the person uses this authority to coerce the child to submit;²³

¹⁸See N.M. STAT. ANN. §§ 30-9-11(A,C&D); 30-9-13((A,B&C)(Coercion includes acts by a person in a position of authority when the person uses this authority to coerce the child to submit.)

¹⁹ N.M. STAT. ANN. § 30-10-3 (Incest consists of knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews.)

²⁰ N.M. STAT. ANN. § 30-9-11(Penetration includes causing “a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.”)

²¹ N.M. STAT. ANN. § 30-9-13(“Touching of or applying force to the intimate parts of a minor or the unlawful and intentional causing of a minor to touch one’s intimate parts. For the purposes of this section, ‘intimate parts’ means the primary genital area, groin, buttocks, anus or breast.”).

²² N.M. STAT. ANN. § 30-9-10(E)(“position of authority” means that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child.”).

²³ See N.M. STAT. ANN. §§ 30-9-11(A,C&D); 30-9-13((A,B&C)(Coercion includes acts by a person in a position of authority when the person uses this authority to coerce the child to submit.).

- Incest;²⁴
- Consensual sexual penetration or touching of a minor less than 13 years old by any partner;²⁵
- Consensual sexual touching of student by a “school employee or volunteer”²⁶ and:
 - Minor is 13 or 14 years old and partner is 18 or older;
 - Minor is 15 years old and partner is 19 or older;
 - Minor is 16 years old and partner is 20 or older; or
 - Minor is 17 years old, partner is 21 years old or older.
- Consensual sexual penetration by anyone, not the spouse of the minor, and:
 - Minor is 13 or 14 years old and partner is 18 or older;
 - Minor is 15 years old and partner is 19 or older;
 - Minor is 16 years old and partner is 20 or older; or
 - Minor is 17 years old, partner is 21 or older and is a school employee.

N.M. STAT. ANN. §§ 32A-4-2(B); 32A-1-4(E); 30-9-11; 30-9-13; 32A-4-2(G&H).

For the purposes of reporting ‘neglect,’ how do I know when a “parent, guardian or custodian knew or should have known of abuse” or when he or she has “failed to take reasonable steps to protect the child from further harm?”

New Mexico law does not define these terms. For additional guidance, providers should speak to their own legal counsel or risk management department for advice and assistance in developing a reporting policy.

What sexual activity with a minor should not be reported?

Both state and federal law protect the confidentiality of information received in the course of providing care. If a child abuse or neglect report is not required by state law, any information a provider learns about a minor’s sexual activity while

²⁴ Incest consists of knowingly intermarrying or having sexual intercourse with persons within the following degrees of consanguinity: parents and children including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews. N.M. STAT. ANN. § 30-10-3.

²⁵ N.M. STAT. ANN. §§ 30-9-11; 30-9-13(B)(1)&(C)(1).

²⁶ N.M. STAT. ANN. § 30-9-13(D)(2)(For this purpose, the term school employee includes “licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer.”)

providing health care to the minor is protected by confidentiality rules, and mandated reporters cannot share it with the Department of Children, Youth and Families or law enforcement without the minor's consent. Mandated reporters bound by confidentiality laws may not report consensual activity unless one of the following conditions is true:

- (1) The minor's partner is a parent, guardian or caretaker; or
- (2) The minor's parent, guardian or custodian knew or should have known certain sexual activity was occurring and failed to take reasonable steps to protect the minor from further harm.

These conditions greatly limit what can be reported. In fact, in many cases, mandated reporters may not even use the Abuse and Neglect Act to report assaults by a stranger. This does not mean the assaults can never be reported. Rather, providers simply may need to obtain patient consent first in some cases. Certainly, providers also may encourage their clients to report these assaults as well. Providers should consult with their legal or risk management department for advice on counseling patients to report such crimes.

Do I have to report every criminal act of my client?

No. Both state and federal law protect the confidentiality of information received in the course of providing medical care. This information cannot be shared with the authorities unless a specific statutory requirement obligates that sharing. The Abuse and Neglect Act requires mandated reporters to share information about child abuse. It does not require mandated reporters to report information about any other crimes. No state or federal law requires medical practitioners to report every criminal act of their patients.

E. How Does Reporting Work?

To whom should reports be made?

Reports of suspected child abuse or neglect should be made to any one of the following:

- (1) a local law enforcement agency;
- (2) the Department of Children, Youth and Families (the department); or

(3) a tribal law enforcement or social services agency for any Indian child residing in Indian country.

N.M. STAT. ANN. § 32A-4-3 (A).

How do I make a report?

Reports must be made immediately to one of the listed agencies, but state law does not restrict how those reports are made. (However, there is a statewide central intake line to facilitate reporting.)

What information do I include in my report?

Law enforcement and the department are required to create a written report based on the information they are provided by a mandated reporter. Their written report must include (and, therefore, they are likely to ask mandated reporters for) the following:

- the names and addresses of the child and the child's parents, guardian or custodian,
- the child's age,
- the nature and extent of the child's injuries, including any evidence of previous injuries, and
- other information that the maker of the report believes might be helpful in establishing the cause of the injuries and the identity of the person responsible for the injuries.

N.M. STAT. ANN. § 32A-4-3(B).

F. What are the Consequences of My Reporting Decision?

What will these agencies do after I make my report?

The agency that receives a child abuse or neglect report must take immediate steps to ensure prompt investigation of the report. Both law enforcement and the

department are required to cross-report to each other any abuse or neglect reports they receive. N.M. STAT. ANN. § 32A-4-3(B),(C).

The department then must conduct an investigation of each abuse or neglect report to determine the best interests of the child with regard to any action to be taken. During the investigation, the department may refer the matter to another appropriate agency. The investigation must be completed within a reasonable period of time from the date the report was made. After completion of the investigation, the department must make recommendations about appropriate action. N.M. STAT. ANN. § 32A-4-4.

Will my identity and my report be confidential?

The name and information regarding the person making a report shall not be disclosed absent the consent of the informant or a court order. N.M. STAT. ANN. § 32A-4-4(A).

In addition, all records or information concerning a party to a neglect or abuse proceeding are confidential and only may be disclosed in limited contexts. N.M. STAT. ANN. § 32A-4-33(A). For the most part, the law only allows these reports to be shared with other agencies involved in investigating, prosecuting, or tracking child abuse, or treating the child victim. N.M. STAT. ANN. § 32A-4-33(B). Persons who intentionally and unlawfully release any information or records closed to the public pursuant to the Abuse and Neglect Act are guilty of a petty misdemeanor. N.M. STAT. ANN. § 32A-4-33(B).

Can individuals be held liable for making reports?

It depends. While there is no guarantee that a mandated reporter will never be sued for making a report, reporters who report in good faith are protected from civil and criminal liability by law. However, a reporter can be held liable for filing a false report if the reporter acted in bad faith or with malicious purpose. (Reporters are presumed by law to act in good faith.) N.M. STAT. ANN. § 32A-4-5(B).

Can individuals be held liable for not making reports?

Yes. A person who violates the reporting requirements established in the Abuse and Neglect Act is guilty of a misdemeanor. N.M. STAT. ANN. § 32A-4-3(F).

G. Do Medical Records Remain Confidential in Cases of Alleged Abuse?

When must confidential medical information be shared with CPS or the police?

A law enforcement agency or the department shall have access to any of the records pertaining to a child abuse or neglect case maintained by mandated reporters, except as otherwise provided in the Abuse and Neglect Act. N.M. STAT. ANN. § 32A-4-3(E).

Do the medical records I provide CPS or the police remain confidential?

For the most part, yes. The records you provide become part of the child abuse or neglect report and file. Under state law, all records or information concerning a party to a neglect or abuse proceeding are confidential and only may be disclosed in limited contexts. N.M. STAT. ANN. § 32A-4-33(A). For the most part, the law only allows these reports to be shared with other agencies involved in investigating, prosecuting, or tracking child abuse, or treating the child victim. N.M. STAT. ANN. § 32A-4-33(B). Persons who intentionally and unlawfully releases any information or records closed to the public pursuant to the Abuse and Neglect Act are guilty of a petty misdemeanor. N.M. STAT. ANN. § 32A-4-33(B).

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

While both federal and state law allow providers to release health information in some circumstances 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.

H. What are the Potential Criminal Charges Arising Out of Abuse Reports?

Will the police be informed of any child abuse reports I make?

Yes. The Department is mandated to cross-report child abuse or neglect to the law enforcement agency having jurisdiction over the case. N.M. STAT. ANN. § 32A-4-4(B).

In addition to being used as indicators of abuse or neglect for child welfare purposes, will sexual activity uncovered during an abuse/neglect investigation be prosecuted?

Perhaps. The police and prosecutor will decide how best to investigate and possibly prosecute criminal incidents. Some counties may have policies that outline the types of cases they are most likely to prosecute. Because the prosecutor has some discretion, if you have questions about how such charges are handled in your jurisdiction, it is helpful to speak to your local welfare, police and prosecutor's office about local practice.