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Mike Moore
Beadle County State's Attorney
450 3rd St. SW Ste. 108
Huron, SD 57350

Official Opinion No. 21-01

Re: Anonymity of Sexual Assault Victims and Mandatory Reporting

Dear State's Attorney Moore,

In your capacity as Beadle County State's Attorney you have requested an official opinion from the Attorney General's Office on the following question:

QUESTION:

Can a sixteen-or-seventeen-year-old victim of sexual assault who undergoes a sexual assault examination remain anonymous under the provisions of SDCL ch. 23-5C, taking into account the mandatory reporting requirements of SDCL 26-8A-3?

ANSWER:

No, a sixteen-or-seventeen-year-old sexual assault victim cannot remain anonymous. The health care professionals that treat or examine child-victims must report suspected child abuse, including sexual abuse, to law enforcement; the state's attorney; or the Department of Social Services, regardless of the child-victim's age and the perpetrator's relationship to the child-victim.

FACTS:

SDCL 23-5C-2 gives victims of sexual assault the option of reporting the sexual assault to the appropriate law enforcement entity. The statute also establishes that a health care facility may not require the reporting of the sexual assault to law enforcement in order for the victim to receive an examination or treatment for the sexual assault. SDCL 22-22-26.3 grants minor victims – age sixteen or older – the capacity to consent to a forensic medical examination due to an alleged sexual assault or sexual offense. SDCL 26-8A-3, however, mandates that a medical professional who reasonably suspects that a minor has been abused or neglected must report that information to the appropriate law enforcement entity. Abuse and neglect of a child is defined by SDCL 26-8A-2 to include sexual abuse, sexual molestation, or sexual exploitation of a minor; a child whose environment is injurious to their welfare; or a child that is threatened with substantial harm. You have become aware that certain health care systems in the state have advised their medical professional staff that a sixteen or seventeen-year-old who is the victim of sexual assault at the hands of their boyfriend or girlfriend may remain anonymous from law enforcement when receiving treatment for the sexual assault.

IN RE QUESTION:

Because the question deals with the interplay between various statutes, the principals of statutory construction must be applied.

In reviewing a statute, “the language expressed in the statute is the paramount consideration.” *Olson v. Butte County Commission*, 2019 S.D. 13, ¶ 5, 925 N.W.2d 463, 464 (quoting *Goetz v. State*, 2001 S.D. 138, ¶ 5, 636 N.W.2d 675, 681).

When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court’s only function is to declare the meaning of the statute as clearly expressed. When we must, however, resort to statutory construction, the intent of the legislature is derived from the plain, ordinary and popular meaning of the statutory language.

In re Wintersteen Revocable Trust Agreement, 2018 S.D. 12, ¶ 12, 907 N.W.2d 785, 789 (citations omitted). The intent of a statute “must be determined from the statute as a whole, as well as enactments relating to the same subject.” *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 807 (citations omitted).

SDCL 23-5C-2 provides, in pertinent part:

A health care facility examining or treating a victim of rape or sexual assault shall give the victim, or a victim or witness assistant, the option of reporting the rape or sexual assault to an appropriate law enforcement agency. A health care facility may not require the victim to report the rape or sexual assault in order to receive an examination or treatment for the rape or sexual assault.

The plain language of the statute places solely in the victim's hands the option of reporting a sexual assault to law enforcement. Because of this, the question arises when, if at all, health care professionals are mandated to report a sexual assault regardless of the victim's wishes?

South Dakota's mandatory reporting statute requires most medical and mental health practitioners to report to law enforcement if the practitioner has "reasonable cause" to suspect that a child has been "abused or neglected." SDCL 26-8A-3. The statute reads:

Any physician, dentist, doctor of osteopathy, chiropractor, optometrist, emergency medical technician, paramedic, mental health professional or counselor, podiatrist, psychologist, religious healing practitioner, social worker, hospital intern or resident, parole or court services office, law enforcement officer, teacher, school counselor, school official, nurse, licensed or registered child welfare provider, employee or volunteer of a domestic abuse shelter, employee or volunteer of a child advocacy organization or child welfare service provider, chemical dependency counselor, coroner, or any safety-sensitive position as defined in [SDCL] 3-6C-1, who has reasonable cause to suspect that a child under the age of eighteen has been abused or neglected as defined in [SDCL] 26-8A-2 shall report that information in accordance with [SDCL] 26-8A-6, 26-8A-7, and 26-8A-8. Any person who intentionally fails to make the required report is guilty of a Class 1 misdemeanor. Any person who knows or has reason to suspect that a child has been abused or neglected as defined in [SDCL] 26-8A-2 may report that information as provided in [SDCL] 26-8A-8.

Id.

The statute clearly defines a child as "any person under the age of eighteen[.]" *Id.* See also SDCL 26-1-1. There is no distinction drawn – or exception made – in the mandatory reporting statutes for children aged sixteen or seventeen years old. A practitioner covered by the statute is obligated to report the suspected abuse and neglect of a child under eighteen years of age.

An "abused or neglected child" has been defined by SDCL 26-8A-2, and (pertinent to your inquiry) includes a child:

- (3) Whose environment is injurious to the child's welfare; ...
- (6) Who is threatened with substantial harm; and ...
- (8) Who is subject to sexual abuse, sexual molestation, or sexual exploitation as defined in [SDCL] 22-22-24.3, by the child's parent, guardian, custodian, or any other person responsible for the child's care[.]

SDCL 26-8A-2(8) defines a child abused and neglected if that child is "subject to sexual abuse, sexual molestation, or sexual exploitation as defined in [SDCL] 22-22-24.3, by the child's parent, guardian, custodian, or any other person responsible for the child's care." Your request for this opinion is based upon the factual situation where a child is sexually assaulted by their boyfriend or girlfriend. In that factual situation, the child would not be deemed abused and neglected under SDCL 26-8A-2(8).

An "environment ... injurious to [a] child's welfare," as referenced in SDCL 26-8A-2(3), has not been defined by statute. When otherwise undefined by the Legislature, I must give the words used in the statute their plain meaning and effect. *State v. Bowers*, 2018 S.D. 50, ¶ 16, 915 N.W.2d at 166; SDCL 2-14-1. "Environment" is commonly understood to mean "the circumstances, objects, or conditions by which one is surrounded[.]" *Environment*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014). "Injurious" means "inflicting or tending to inflict injury[.]" *Injurious*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014).

Likewise, "threatened with substantial harm," as referenced in SDCL 26-8A-2(6), has also not been defined by the Legislature. "Threat" is defined as "an indication of something impending." *Threat*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014) "Threaten," means "to announce as intended or possible[.]" *Threaten*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014). "Substantial" is universally recognized as meaning "considerable in quantity; significantly great[.]" *Substantial*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014). "Harm" means "physical or mental damage[.]" *Harm*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014).

The South Dakota Supreme Court has recognized that sexual assaults on children have tragic consequences, including negatively affecting a child's mental health and mental well-being. *See State v. Buchhold*, 2007 S.D. 15, ¶ 40, 727 N.W.2d 816, 826 (concluding intentional and repeated sexual abuse of a child over a period of years may likely result in "irreparable emotional harm to [the child]."); *State v. McKinney*, 2005 S.D. 73, ¶ 13, 699 N.W.2d 471, 477 (recognizing a child-victim of sexual assault may "suffer lifetime consequences" because of the sexual abuse); *See also Owens v. State*, 724 A.2d 43, 53 (Md. Ct. App. 1999)(recognizing the mental and emotional impact sexual abuse can

have on children, throughout their life, "including chronic depression and anxiety, isolation and poor social adjustment, substance abuse, suicidal behavior, and involvement in physically or sexually abusive relationships as either aggressor or victim. . . ." (quoting *Doe v. Poritz*, 662 A.2d 367, 375 (N.J. 1995)).

After consideration of the plain and ordinary meanings of the statutory terms used in SDCL 26-8A-2(3) and (6), I conclude that the sexual assault of a child exposes the child to a threat of substantial harm and places the child in an environment injurious to the child's welfare. This is true whether the assault is perpetrated by the child's parent or guardian or by the child's boyfriend or girlfriend. The sexual assault creates conditions for the child that inflict injury or harm to the child's physical and mental wellbeing. As such, it is my opinion that a child who suffers a sexual assault at the hands of their boyfriend or girlfriend is an abused or neglected child. Under SDCL 26-8A-3, a mandatory reporter must report this information to the appropriate person(s).

Considering the conclusion reached above, the question then becomes what effect the anonymity portion of SDCL 23-5C-3 has on a mandatory reporter's duty to report rape or sexual abuse of a child. Stated alternatively, does SDCL 23-5C-3 relieve a mandatory reporter of his or her duty to report the sexual assault of a child victim if that victim wishes to remain anonymous? I conclude that SDCL 23-5C-2 does not relieve a mandatory reporter of his or her duty under SDCL 26-8A-3.

The provisions of SDCL 23-5C-3 appear to conflict with the mandatory reporting requirements of SDCL 26-8A-3. In such a case, the statutes must be interpreted in a manner that gives effect to both provisions to the extent possible. See *Matter of Certain Territorial Elec. Boundaries v. Northwestern Public Service Company*, 281 N.W.2d 72, 76 (S.D. 1979) (recognizing a "duty to reconcile any such apparent contradiction and to give effect, if possible, to all of the provisions under consideration, construing them together to make them harmonious and workable." (citing *North Central Investment Co. v. Vander Vorste*, 135 N.W.2d 23 (S.D. 1965))). While SDCL 23-5C-2 and SDCL 26-8A-3 appear to contradict each other, they can co-exist in a way that gives effect to both statutes and carries out their legislative purposes.

In passing SDCL 23-5C-2, the Legislature secured for victims of sexual assault the ability to receive a sexual assault examination (and other potential life-saving medical care) without requiring these victims to engage with law enforcement or participate in the criminal justice process.

The Legislature explicitly articulated the purpose of its child abuse and neglect statutes: "It is the purpose of this chapter [(SDCL ch. 26-8A)]. . . to establish an

effective state and local system for protection of children from abuse and neglect." SDCL 26-8A-1.

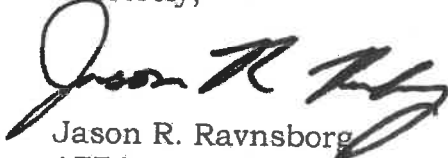
The statutes can be harmonized to conclude that a victim of sexual assault may choose not to report a rape or sexual assault to law enforcement under SDCL 23-5C-2. But, even if this is the case, the health care facility's mandatory reporters must report the rape or sexual assault of a child victim to the appropriate persons as required by SDCL 26-8A-3. Interpreting the statutes in this manner gives effect to the purposes of both statutes.

Further, a determination that SDCL 23-5C-2 extinguishes a mandatory reporter's duty to report reasonably suspected abuse and neglect, even if the child, or their parents, wishes to not report the crime to law enforcement, would directly contravene the purpose and intent of the mandatory reporting statutes, and render the language used in SDCL 26-8A-3 mere surplusage as it pertains to child sexual assault victims. Such a conclusion cannot be reached - "[t]he [L]egislature does not intend to insert surplusage into its enactments." *Steinberg v. South Dakota Dep't of Military and Veterans Affairs*, 2000 S.D. 36, ¶ 12, 607 N.W.2d 596, 601 (quoting *National Farmers v. Universal*, 534 N.W.2d 63, 65 (S.D. 1995)).

CONCLUSION

I conclude that SDCL 23-5C-2 does not relieve a health care facility's professional medical staff of their mandatory responsibility to report reasonably suspected child sexual abuse - including sexual assault of a victim by their boyfriend or girlfriend. While the child victim may not wish to report the sexual assault to law enforcement, and the medical staff cannot force the victim to make such a report, I believe the medical staff must report the sexual assault consistent with the mandatory reporting requirements of SDCL 26-8A-3. The Legislature has mandated such reports by medical and mental health professionals to protect the children of South Dakota.

Sincerely,



Jason R. Ravensborg
ATTORNEY GENERAL

JRR/MWT/SRB/lde