VICTIM RIGHTS LAW CENTER

What to Know About Protecting Minors' Privacy Rights

Protecting the privacy of child and teen survivors of sexual assault, dating and domestic violence, and stalking (called "minors" in this document[1]) can be challenging for victim services providers. For many minors, privacy is their priority. Fear that information about the survivor, or the abuse itself, may be disclosed to anyone outside your agency can cause a survivor to refuse to speak with you or to not seek services in the first place. While minors do not enjoy the exact same privacy rights as adults, they do still have rights.

This assessment tool discusses challenges minor survivors face with privacy, and how advocates can address these issues honestly, while still promoting survivor agency and ensuring informed consent. It is meant to help you and your victim services organization[2] determine your readiness to provide confidential services for survivors who are minors and it is designed as a companion tool to "Working with Minors: A Privacy and Confidentiality Worksheet." The answers to the "Implementation Questions" asked throughout this assessment may be recorded on the Worksheet.

Who Has Legal Authority to Make Decisions?

Figuring out who is legally in control of the decision-making can take some effort, but it is important. When you are serving minors, you need to know how parents' and guardians' legal authority to make certain decisions will affect decisions such as who can agree to receive (or refuse to receive) services, who can sign away rights and who can affirmatively assert them, who controls the flow of information, and much more.

To determine whether a minor can legally consent to services, and what a guardian or parent's role may be with respect to those services, start here.

- **What does the law say?** Does your jurisdiction have a statute, regulation, or case law that addresses the age a minor can legally consent to your specific services or has legal capacity generally? If not, do other statutes or legal guidance support a minor's right to access comparable services that could be interpreted to app to the services you provide?
- **Is the minor emancipated?** Some jurisdictions allow a minor to legally separate from their parent or guardian, and to be treated as an adult under the law for many purposes. In some states, specific statutes set out the emancipation process. In others, emancipation is determined by the courts on a case-by-case basis, weighing several factors—for instance, whether the minor is living on their own or is financially self-sufficient. For most purposes an emancipated minor will be treated as an adult under the law and can enter into binding contracts and make binding decisions about their health, education, and welfare—including for advocacy and legal services. It's not always clear, though, if emancipation removes a minor from being a "child" under child abuse reporting law.

[1] The use of the term "minor" is being used for the specific legal meaning of survivors under the age of 18. When working with and serving minors yourself, it is generally preferable to use a less clinical or distancing term.

[2] For purposes of this toolkit, we assume that your organization receives federal, state, territorial, or tribal funding that triggers the privacy obligations set forth in the Violence Against Women Act (VAWA) and/or the Victims of Crime Act (VOCA). Most of the obligations discussed in this document apply to organizations funded by the Family Violence Prevention and Services Act (FVPSA), too.

- **Implementation Questions:** Does your organization ask minors about emancipation? Are staff informed about how serving an emancipated minor impacts consent, and confidentiality rights, including mandatory reporting? Are there any differences in your jurisdiction between providing services to an emancipated minor and an adult?

- **Are there other legal frameworks that would allow you to provide services directly to a minor without parent/guardian involvement?** In some jurisdictions, even if there is not a statute authorizing a minor to consent to certain services, the law may allow a provider to assist a minor without parental involvement under a theory known as the "mature minor doctrine." Please contact the Victim Rights Law Center for more information about this doctrine.

If you are working with a minor survivor and the parent or guardian has legal decision-making authority over the minor, start here.

- **Who can legally consent to services?** Who has legal decision making-authority for a minor will depend on the law in your jurisdiction and can be informed by individual court cases.
    - **Implementation Questions:** Do you have a procedure in place to assess whether the parent or guardian has this decision-making authority? If parental consent is required, does your jurisdiction require the consent of both parents, or just one parent or guardian? What happens if the state is in the role of guardian (for instance, if you are seeking to represent a sexual assault survivor who is in foster care or in juvenile detention)?
- **Does the survivor want their parent or guardian present?** For some survivors, having the parent or guardian present can be reassuring and helpful. For others, especially when talking about intimate sexual details, or alcohol or substance use, having a parent or guardian present may be the last thing a minor wants. Even if you speak with the survivor privately, knowing that the parent or guardian may be able to access their information later may inhibit the survivor's desire or ability to speak freely.
    - **Implementation Questions:** What is your policy about allowing the parent or guardian to be in the room during consultations? If your jurisdiction has a victim-advocate privilege, does having the parent or guardian in the room impact this or any other privilege (and does the survivor's age or emotional state, for example, make a difference in determining whether there is a waiver)? Does your jurisdiction have a parent and child privilege? Do you discuss waiver of privilege with clients? With their parents or guardians?
- **How can you limit access?** If the minor wants to limit the information accessible to their parent or guardian, the parent or guardian may be willing to agree to this. The agreement can be useful for setting ground rules for services and expectations, but it is not necessarily legally binding. If the parents or guardians change their mind, they may still be able to access the minor's records if the law allows them to do so.
    - **Implementation Question:** What do you do if the parent or guardian will not agree with what the minor wants?

Who Gets What Information and When?

Who Controls the Minor's Information and Records? Most minors have less control over their personal information and records than an adult—particularly if they are unemancipated, or too young to consent to services. Here are some things to consider.

- **When does a minor have a right to keep information confidential?** As a general rule, a minor has a right to keep information confidential if they have the legal right to consent to the service. Therefore, you must know whether and when a minor may consent to the services you, and other professionals, provide. Become familiar with the law in your jurisdiction.
- **May a minor sign a release of information to give access to their records?** To serve a minor effectively, you may need to access or share documents or information outside of your organization, so you will need to determine who may sign the release of information. Your jurisdiction may have laws that address who may sign a release. VAWA-funded organizations need an informed, written release to share personally identifiable information (unless release is required by a statutory or court mandate). VAWA specifies who may provide this consent for minors as follows:
    - If a minor is permitted by law to receive services without the parent's or guardian's consent, the minor may consent to release information. A parent or guardian's consent is not required. In the case of an unemancipated minor who is not legally permitted to consent to services, the release must be signed by the minor and a parent or guardian.
    - If a minor is incapable of knowingly consenting, the parent or guardian may provide consent. If a parent or guardian consents for a minor, the VAWA-funded program should attempt to notify the minor as appropriate.
    - Consent for release of information may not be given by a minor's abuser.
    - Consent for release of information may not be given by the abuser of the other parent of a minor.
- **Can the survivor provide a valid release of information or otherwise authorize access?** Sometimes the law on minors' authority to allow access to personally identifiable information will be unclear. Look at what your law says about comparable information or services. Seeking legal advice from a coalition or local attorney familiar with minors' legal rights might help.
    - **Implementation Question:** If a minor may not authorize the release on their own, what is your policy on how and whether to access them? See also above regarding parental access to the survivor's records and confidentiality.

What about mandatory reporting?

The analysis below can help you understand your mandatory reporting obligations and is useful to incorporate with your work with all survivors because of the likelihood of contact with minors—directly or indirectly. Refer also to the Mandatory Child Abuse Reporting flowchart.

Are you a mandatory reporter? Look at your law to determine if you, or others in your organization, must report child abuse. Pay attention to the specifics of your abuse reporting law. For instance, does the law only apply when you are working in your professional capacity or is the duty 24/7? Who else in your agency, coordinated community response, or referral network is, or is not, a mandatory reporter? Do you

have a policy in place to keep track of new employees and volunteers who are mandatory reporters as well as changes in reporter status?

Implementation Questions:

- **Is this survivor a minor whose abuse must be reported?** How is "child" defined in your mandatory reporting law? What if the minor is emancipated? Married? Pregnant? A parent? In the military?
- **Has the survivor experienced the sort of abuse or injury that requires a report?** How does your law define "abuse?" What level or type of harm meets the definition of abuse or injury that requires a report? Does the abuse the minor experienced meet the definition?
- **Are you exempt from reporting child abuse in certain cases?** Sometimes a disclosure that would otherwise fall under mandatory reporting laws is nonetheless protected from disclosure. For instance, disclosure may not be required if the disclosure is protected by a legal privilege.
- **Who is the best person or agency to receive the report?** If your law allows you to choose who to make a report to—for instance, the police or the Department of Human Services—would your client prefer you call one over the other? Learn how the different options may impact minors so you can help them decide to whom to make a report.
- **What exactly must you report?** Often laws will state what must be reported when a disclosure is required. Do not share more information than is legally required without the survivor's consent.
- **What do you tell the minor about your reporting obligations, and when?** Tell the minor and, when appropriate, their parent or guardian, as soon as possible about your mandatory reporting obligations. Include what information must be reported. While this may limit disclosure by some survivors—particularly teens—the survivor needs to know this at the outset to make informed decisions. Survivor-centered and trauma-informed services require us to be led by the survivor's wishes. Even if you do have to make a mandatory report, keep in mind that not everything a survivor tells you must be disclosed. Closely examine the laws in your jurisdiction before making any disclosures to ensure you're only releasing the information you're required to release.

How Can You Help Keep Survivor Information Safe?

Should the survivor become involved in legal proceedings, parties may seek information from your client files. Consider:

- **What is your organization's response to subpoenas?** Make sure that everyone in your organization knows what to do when a subpoena comes in the door. Who at your organization is designated to receive subpoenas? What happens when they are out of the office when a subpoena arrives? The designated person will need to determine if the subpoena is valid and lawful, and if it was properly served. Someone will need to ask the minor (and/or, in some cases, their parent or guardian) how they want you to respond. If the subpoena seeks privileged information and the survivor does not want to waive the privilege, do not turn the documents over to the court or party without consulting an attorney and moving to quash the subpoena. If privileged records were requested, it can be very important to contest the subpoena even if you do not have any records or never provided services to the named survivor. (If you only contest subpoenas when you served the survivor and/or have relevant documents you may inadvertently be providing information to the other party.) If you receive VAWA, VOCA, or, in most cases, FVPSA funding, you

may not disclose individual client information without the informed, written, reasonably-time limited consent of the minor or the minor's parent or guardian, unless you are required to release the information subject to a statutory or court mandate. Even if the information must be released under a legally-issued subpoena, VAWA, VOCA, and FVPSA require you to make reasonable attempts to provide notice to the survivor and take steps necessary to protect their privacy and the safety of those affected by the disclosure.

    - **Implementation Questions:** Does your organization have a policy in place about what to do if served with a subpoena? Has your organization taken steps to make sure that all employees know what to do if a subpoena is received?

- **How does your organization maintain files?** How you maintain your records will make a difference in what information actually gets turned over. Your agency should have a policy about what information goes and does not go into client files. For example, keep separate parent and child files, so disclosing information in a child's file does not require disclosing information in a parent's file. Practice minimal record keeping. Rather than writing down every detail of the case, document the action that the advocate did—for instance, "met with client for one hour to safety plan" or "discussed history of abuse and coping mechanisms."
    - **Implementation Questions:** Does your organization have a clear policy on record keeping? How is that policy communicated to employees and volunteers, including new hires?

What Are Your Confidentiality Obligations if You Are Working with Schools? Your organization may be asked to come to schools to discuss abuse prevention or promote healthy relationships. Confidentiality issues may arise from this work because prevention educators are speaking to a room full of minors. Here are some things to consider.

- **Hold firm with your reporting obligations.** Schools may ask you to report child or other abuse as if you're an employee of the school. Under VAWA, the only exceptions to signed releases are statutory or court mandates. An inter-agency agreement is not a statutory or court mandate.
- **Discuss students' privacy with school officials in advance.** Plan to avoid inadvertently triggering a mandatory report. For example, instead of taking individual questions, invite students to write anonymous questions and turn them in to a "Question Box." If possible, bring along an advocate who can provide confidential support. Ask any teachers who are mandatory reporters to step out of the room during a presentation. If adults who are mandatory reporters remain, explain what mandatory reporting obligations adults in the room may have at the start of a presentation.
- **Provide confidential options for minors.** We want minors to weigh their options and decide how they want to respond to violence to the extent possible given their age. Be sure you know about confidential referrals in the school (if any exist) and in the broader community, and how to access confidential hotlines. This is especially important if you are a mandatory reporter of child abuse. Your warning about being a mandatory reporter may scare students off; it's important that you share the available confidential resources to make sure that minors have someone to talk to on their own terms. [See our Toolkit script for how you might have this conversation with students at the start of a presentation.]
- **Know your policies before a student needs help.** Students often approach advocates for help after a child-focused presentation. However, even informal communications can trigger mandatory reporting. As always, be clear and direct with the students from the start about your role and your reporting requirements. Be specific, so the students can decide how much to tell you.

Other Things to Consider. While minors do not have the same privacy rights as adults, in some situations minors may have stronger privacy protections. For example, if a criminal case goes to trial, the survivor can often receive more protection than an adult survivor might—using pseudonyms, sealing court documents, confidentiality orders, and closing the courtroom. Please contact the Victim Rights Law Center or an attorney in your jurisdiction for more information.

Please also consider that policies are only useful when they are shared within your organization, and employees and volunteers are properly trained. Ask yourself: How can we make sure that all employees and volunteers are well-trained on our policies, including our policies about minor-survivors' privacy rights?

Note that while this toolkit covers several important privacy issues to consider when working with a minor survivor, there are dozens more issues that can come up in the course of serving minors, such as common law duties to warn and protect survivors, dealing with minors in detention, special considerations when working with immigrant populations, and others. For help on these, or other issues, please contact the Victim Rights Law Center's privacy technical assistance team: PrivacyTA@victimrights.org.

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