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Michigan Coalition to End Domestic & Sexual Violence

Sexual Assault Medical Forensic Exam (SAFE) Policy Considerations & Recommendations for Sensitive Populations

Introduction

Several of MCEDSV's member programs offer sexual assault forensic exam ("SAFE") services. A SAFE has two primary purposes: (1) ensure the health of the survivor by addressing any medical needs connected with the assault, and (2) collect physical evidence from the survivor's body that could potentially be used to assist with proving that contact occurred and/or the identity of the assailant. Member programs who administer SAFEs provide an important alternative for survivors to have the SAFE without going to a hospital where staff who perform the SAFE may not be specifically trained in that protocol.

Michigan law does not provide explicit requirements governing how programs should handle complex issues of consent or assent involving survivors who are incapacitated, minors, or under guardianship. The policy recommendations below are intended to provide survivor-centered guidance regarding the power to provide consent or assent to performing the SAFE itself as well as the release of the evidence kit associated with the exam to law enforcement. These policy recommendations are only intended to guide efforts of SAFE programs housed within domestic or sexual assault service providers and should not be considered legal advice. These recommendations are intended to inform individualized policies that each agency should adopt and have approved by the agency's board of director, agency counsel, and any health care facility or hospital with which the agency is connected.

Terminology:

1. When the word "minor" is used in this document, it refers to an individual who is not emancipated by court order or by law. It should be noted that a person under the age of 18 who is validly married is emancipated by operation of law. To the greatest extent possible, programs should strive to honor the self-determination and expressed interests of minor survivors.

2. The term "guardianship" refers generally here to encompass both limited and general guardianships. Programs would benefit from carefully reading and understanding the scope of any particular guardianship to better understand the role a particular guardian plays in the survivor's life and the power the guardian possesses. Programs should recall that individuals with disabilities and older adults who may be subject to a guardianship are still capable of consenting to and enjoying sexual contact. Programs should continue to communicate with individuals subject to guardianship in a manner that honors their personhood.

General Policy Considerations:

1. In all circumstances, the wishes of the person who was assaulted ("the survivor") should be prioritized and honored to the greatest extent possible. Education regarding the importance of survivor self-determination should be incorporated into programs' dialogue with support persons and survivors alike.

2. Regardless of age or capacity, no survivor should be restrained in order to perform an examination. **Staff should not touch the survivor without informed consent or assent**.[1]

3. If the survivor is accompanied by another individual, program staff should continue to communicate directly with the survivor. Staff should ensure that the survivor has an opportunity to speak with staff outside of the presence of the accompanying individual regardless of the age or perceived capacity of the survivor without appearing dismissive of the accompanying individual. When the accompanying individual is in the presence of the survivor, staff should be aware of signs indicating the survivor is or is not comfortable with that individual, but should listen to the survivor's expressed wishes about whether the individual is someone whom the survivor trusts. Where it is clear the support person is trusted by the survivor,

[1] See U.S. Dep't Justice, *National Protocol for Sexual Assault Forensic Examinations* (2013) available at https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf. As used here, "assent" is the expressed willingness to participate in an activity (e.g., examination). For children who are too young to give informed consent to care, but old enough to understand and agree to participate, the child's "informed assent" should be sought. See also, U.S. Dep't Justice, *National Protocol for Sexual Assault Forensic Examinations, Pediatric* (2016), available at: https://cdn.ymaws.com/www.safeta.org/resource/resmgr/protocol_documents/national_pediatric_protocol_.pdf.

staff should make every effort to treat the support person with courtesy and offer supportive services as appropriate.

4. At all times, the program should adhere to applicable mandatory reporting laws. It is critical that programs carefully review and train staff on mandatory reporting issues. Please consult the MCEDSV's Confidentiality Manual for further information about reporting processes. Another helpful resource is MDHHS's Mandated Reporters Manual. One specific inquiry that programs should ensure they are considering is whether the perpetrator is in a caregiving relationship with the survivor, which is a determinative part of the reporting analysis.

5. At all times, program staff should adhere to applicable medical, nursing, or social work ethical standards.

Policy Recommendations Regarding Unconscious Survivors

1. Exam facilities should have policies in place to address consent for treatment in cases in which patients are unconscious, intoxicated, or under the influence of alcohol or drugs, and are temporarily unable to give consent. There is no governing consensus regarding the proper approach to unconscious survivors. In such cases, programs may choose between a few of the different policy approaches listed below. Given the lack of legal and ethical clarity, programs are strongly encouraged to have written policies approved by necessary stakeholders (e.g., agency board of directors, agency legal counsel, and any applicable health care governing entity). Such policies should provide flexibility so that staff may adapt to changing circumstances. Having clear policies will allow staff to make these difficult determinations with confidence so that they can focus on treating the survivor.

2. In an effort to center survivor self-determination, MCEDSV suggests that programs seriously consider adopting a policy that they will not perform examinations on unconscious survivors during periods of unconsciousness, regardless of circumstances, due to survivors' inability to provide informed consent.[2]

3. In all circumstances, MCEDSV strongly recommends that, if a survivor appears likely to regain consciousness within an appropriate time frame for evidence collection, the agency will wait to perform any examination. However, in the event that a survivor is unlikely to regain consciousness in time for proper evidence collection, agencies may consider one of two alternative approaches:

    a. A policy may allow program staff to seek consent to perform the exam from a proxy, such as a non-offending parent, guardian, spouse, or person with medical power of attorney. After obtaining such consent, the exam may be performed in the least invasive manner possible. The program will want to consider a separate policy regarding whether an exam obtained pursuant to this subsection should be released to law enforcement with only the proxy's consent.
    b. The program may work with legal counsel to obtain a court opinion sanctioning performance of the exam. The program will want to consider a separate policy regarding whether an exam obtained pursuant to this subsection should be released to law enforcement with only the proxy's consent.

[2] Importantly, the majority of survivors who are unconscious for a prolonged period will require care that is not available in domestic and sexual violence agencies.

4. MCEDSV strongly recommends policies that honor survivor autonomy to the greatest extent possible when addressing the conditions under which a completed exam should be released to law enforcement when a survivor is unconscious.

Policy Recommendations Regarding Minors and Survivors with Guardians

1. Exam facilities should have policies in place to address consent for minor survivors and survivors with guardians. Programs are strongly encouraged to have written policies approved by necessary stakeholders (e.g., agency board of directors, agency legal counsel, and any applicable health care governing entity). Such policies should provide flexibility so that staff may adapt to changing circumstances. Having clear policies will allow staff to make these difficult determinations with confidence so that they can focus on treating the survivor.

2. If a minor survivor presents with an individual who states they are the survivor's parent, staff should generally accept that this individual is the survivor's parent without any further proof of relationship. Staff should also provide the survivor an opportunity to speak with staff out of the presence of that individual. This individual time is a critical opportunity to give the survivor a healthcare consultation and information, regardless of whether an exam goes forward.

3. Programs may wish to adopt a policy conveying to parent or guardian that staff will not discuss the exam with the survivor's parent or guardian without the survivor's consent. Any such policy should be clearly explained to the survivor and any parent or guardian.

4. Staff should be particularly cognizant of circumstances when a parent or guardian is requesting that a minor receive an exam if the survivor has not alleged nonconsensual sexual contact. Programs should ensure it is clearly communicated that staff will not perform the exam if the survivor does not believe that the contact was nonconsensual. Programs should also consider an explicit policy that staff will not perform virginity checks.

5. Where a survivor presents with an individual who states they are the survivor's guardian, staff should observe to note whether the survivor appears generally to be comfortable with the individual. Staff should ask the individual if they can provide documentation in support of the guardianship. If the individual does not have guardianship documentation, but the survivor appears comfortable with the individual, staff may ask the individual to sign documentation attesting that they are, indeed, the survivor's guardian.

6. If, while out of the presence of the parent or guardian, the survivor requests that the parent or guardian accompany them during the exam, staff should honor that request.

7. Staff should take time to speak with the parent or guardian in the presence of the survivor to explain the program's mission and procedures regarding survivor autonomy and consent, emphasizing that the survivor's empowerment and self-determination is critically important to the short and long-term health and well-being of the survivor.

8. If a minor survivor or trusted person accompanying the survivor makes a representation that a parent or guardian was involved in the alleged assault, then the program may adopt a policy allowing staff, based on their professional assessment and with the consent of the survivor, may proceed with the SAFE without consent of the parent or guardian. The program should document these extenuating circumstances and the reasons why this decision was made.[3] At a minimum, emergency or life-saving treatment as well as services to diagnose and treat sexually transmitted diseases should be provided upon a minor survivor's consent or assent without further inquiry.

9. Before performing the SAFE, program staff should disclose to minor survivors that the evidence collected during the SAFE may be released to law enforcement in accordance with the wishes of their parent or guardian, or in order to comply with legal orders related to mandatory reporting laws. The survivor should be given an opportunity to discuss this with staff outside of the presence of a parent or guardian. The survivor should be made aware that once the SAFE is performed, they may not retain control over whether the evidence kit is given to law enforcement, as that decision may be made by a parent or guardian as discussed below.

10. In circumstances where a parent or guardian whom the program believes is non-offending (i.e., not alleged to be the perpetrator of the sexual assault) do not agree with a minor survivor about whether the evidence kit should be released to law enforcement, programs may want to consider the following possible policies:

    a. For children under 13 years old, a non-offending parent/guardian may generally make the decision about law enforcement conveyance, particularly if there are no other red flags or warning signs (i.e., child is generally demonstrating that they are comfortable with the parent or

[3] It should be noted that a circumstance described here would give rise to an analysis of mandatory reporting obligations to Child Protective Services.

guardian). A child should consulted and involved in the decision to the greatest extent possible.

b. For survivors who are over 13 and under 18 years old, releasing the evidence kit to law enforcement based on a parent or guardian's desires should only occur after careful discussion with the parent or guardian. However, the non-offending parent or guardian of a minor has the authority to decide whether to release the evidence kit to law enforcement.

c. If a minor survivor and their guardian do not agree about whether to release an exam to law enforcement, then staff should request that the guardian produce documentation supporting the guardianship if it has not already been produced.

11. If an adult survivor is accompanied by a person purporting to be the survivor's guardian and the survivor does not consent to the exam, the exam should not be conducted.[4]

12. If an adult survivor is accompanied by a person representing to be the survivor's guardian and the survivor and guardian do not agree about whether to release the exam to law enforcement, then programs may wish to adopt a policy directing staff to request the documentation supporting the guardianship. If it is not clear after an initial reading of the guardianship whether the guardian has authority to consent to releasing the evidence kit on behalf of the survivor, then the program should require that the guardian must seek the opinion of the judge who issued the guardianship as to whether the guardian may provide consent before releasing the evidence kit.

13. For all of the determinations and judgment calls discussed above, program staff should retain careful documentation about the observations that led them to their final decisions, including guidance from medical providers or outside ethics agencies. However, such documentation should be kept separate from the SAFE record itself and also separate from any file kept about the survivor in the program's records. Programs may consider retaining a separate file pertaining to all such decisions specifically for this purpose. For further guidance on recordkeeping,

[4] See, e.g., U.S. Dep't Justice, National Protocol for Sexual Assault Forensic Examinations (2013). Several programs have experienced both adolescent and adult survivors appearing to consent to the exam while accompanied by their parent or guardian and then asking that the exam not be conducted. Programs should not misrepresent to a parent or guardian that an exam was performed when it was not, but it may not be appropriate for program staff to affirmatively tell a parent or guardian that the exam was not performed. Programs should consult their professional licensure ethics resources for further guidance on these circumstances.

please refer to the Coalition's Confidentiality Policy Considerations and Recommendations and seek technical assistance from the Coalition.

Please note that other instances, such as survivors who present with interpreters or service providers for persons with disabilities, require careful consideration that is outside the scope of this document in its current form. The Coalition would encourage members to reach out for guidance when they have concerns about these difficult issues.

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