



ROPE & GRAY LLP

LEGAL DEVELOPMENT ADVISORY

DATE: October 6, 2005
TO: Steve Clem
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SUBJECT: *Sexual Encounters Between Students*¹

This Legal Development Advisory provides guidance to private schools on the implications of students' engaging in sexual relations. It discusses both the potential ramifications for the students themselves under the Massachusetts Statutory Rape Law, Mass. Gen. Laws Ch. 265, § 23² and other criminal statutes, and the reporting duties that may apply to schools that learn of sexual encounters between their under-age students.

1. *What is statutory rape?*

Statutory rape occurs if a person has sexual intercourse or "unnatural" sexual intercourse with a child, whether male or female, who is under 16. Unlike ordinary rape where the victim must not have consented to intercourse, in statutory rape the minor's consent to the sexual act is irrelevant. This is why 16 is often termed the "age of consent."

2. *What constitutes "sexual intercourse" for the purposes of statutory rape?*

Statutory rape encompasses either "sexual intercourse or unnatural sexual intercourse." This has been found by the courts to include vaginal and anal penetration (whether penile, lingual, digital or by some other means), fellatio and cunnilingus. It includes both heterosexual and same-sex acts.

¹ The information provided in this advisory is for general, educational purposes. It is not intended to be, and should not be viewed as, legal advice with respect to any particular situation, as to which schools should instead consult with their legal counsel.

² A copy of this statute can be found on the last page of this document.

3. *Can a female student commit statutory rape?*

Yes. The only requirement is that she have sexual intercourse with a person under the age of 16.

4. *What if both parties engaging in intercourse are under 16?*

Technically both parties are committing statutory rape against one another. Typically, however, the District Attorney will exercise prosecutorial discretion and proceed against only one party, or neither, depending on the circumstances.

5. *Is there any lower age cut-off for convictions for statutory rape?*

No. Massachusetts has specifically rejected the common law presumption that children under the age of 14 are incapable of committing rape. Children as young as 12 have successfully been indicted for statutory rape.

6. *When will a District Attorney choose to prosecute for statutory rape?*

Although consent is not a defense to statutory rape, an Assistant District Attorney in one of the state's most prominent offices for the prosecution of sex crimes has indicated that the District Attorney would likely still consider whether intercourse was consensual or whether there was any element of coercion in determining whether to prosecute. A wide age gap between students and the incidence of alcohol might be regarded as vitiating consent, making prosecution more probable. However, simply because students are the same age and unintoxicated would not necessarily mean that intercourse would be regarded as consensual and that prosecution would not result. In the view of the Assistant District Attorney with whom we recently consulted, the gender of the participants would not influence the likelihood of prosecution one way or the other. In all cases, the analysis of whether to prosecute would be made on an individualized basis.

Schools and students should not assume that, because they believe intercourse was consensual, the District Attorney's office would take the same view. Moreover, different District Attorneys take different approaches, so there can be no guarantee that the issue of consent will be considered at all.

7. *Could a student be prosecuted for other offenses in addition to statutory rape?*

Yes, although this will very much depend on the circumstances. Possible additional offenses could include forcible rape of a child (M.G.L.c.265 § 22A), assault with intent to rape a child (M.G.L.c.265 § 24B), unnatural and lascivious act with a child (M.G.L.c.272 § 35A) or indecent assault and battery, among others.

8. *Would a young defendant be treated more leniently by the courts than one 18 or over?*

Not necessarily. The District Attorney has prosecutorial discretion to proceed against juveniles as if they were adults if certain criteria are met:

- the individual must be between the ages of 14 and 17;
- have committed acts that would be punishable by commitment to state prison if committed by adults; and
- either:
 - previously been committed to the Department of Youth Services; or
 - have committed offenses which involve the infliction or threat of serious bodily harm. See M.G.L. c. 119 §54.

The commission of “sexual intercourse or unnatural sexual intercourse” will not per se constitute “infliction or threat of serious bodily harm.” It is the conduct constituting the offense itself that is important. Factors such as the juvenile’s position of authority, age difference between the juvenile and the victim, and the vulnerability of the victim will be considered in determining whether sexual conduct meets this standard.

If the District Attorney decides to proceed against a student under 18 as an adult, the student will be indicted as a “youthful offender.” A child under 14, however, must be dealt with as a delinquent and not as a youthful offender.

9. *What are the implications of a student’s being indicted as a “youthful offender” rather than as a “delinquent”?*

Once a juvenile is treated as a youthful offender, he or she is no longer given the protections and privileges afforded to delinquent children. See *Doe v. Attorney Gen. (No. 1)*, 425 Mass. 210, 212-213 n.8 (1997). This means that the student would be unable to apply to have his or her court record sealed, would be unable to apply for special alternatives in lieu of confinement and, perhaps most significantly, could be confined to state prison (rather than a facility reserved for children).

10. *What are the potential penalties for statutory rape?*

Statutory rape carries with it a maximum penalty of life imprisonment for a first offense.

11. *If a student under the age of 18 is convicted of statutory rape, would he or she be required to register in accordance with the sex offender registry legislation?*

Yes. While delinquents and youthful offenders convicted of some crimes may apply to court to avoid the registration requirements, this avenue is not available where the individual has been convicted of a sex offense involving a child (as is the case with statutory rape). However, if the Sex Offender Registry Board determines that the risk of reoffense is low and the degree of dangerousness posed to public safety is such that the public safety interest is not served by public availability, it will designate the student a Level 1 offender. This means that, while the individual will still have to register with the Board and keep this information updated for a minimum of 10 years, information will not be made generally available to the public. See M.G.L.c. 6 §178C-P.

12. *Is a school obliged to report activity that it believes may amount to statutory rape?*

Teachers, school administrators, guidance counselors and any persons paid to care for or work with a child in a facility, among others, must make certain mandatory reports to the Department of Social Services under M.G.L. c. 119 § 51A. Such reports are required where:

- the teacher, administrator or other mandated reporter in his professional capacity has reasonable cause to believe that
- a child under the age of 18
- is suffering physical or emotional injury
- resulting from abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare
- including sexual abuse.

Since statutory rape would amount to sexual abuse, it is the view of at least one Assistant District Attorney active in prosecutions in this field, that all cases of statutory rape, even between consenting minors, must be reported to the DSS. This is so whether or not such statutory rape took place in circumstances in which the District Attorney might decide to prosecute, and whether or not the DSS would "screen the case out" because of the absence of a custodial or caretaker relationship. Moreover, schools should be aware that statutory rape by its very nature may be viewed as causing emotional injury, since a "presentation of facts which create a suspicion of child abuse" has been found sufficient to trigger the reporting requirement under §51A. See *Care & Protection of Robert*, 408 Mass. 52, 63 (1990).

If a teacher, school administrator or other mandated reporter becomes aware of circumstances in which reporting is required, the school must:

- immediately report orally the circumstances to the Department of Social Services; and
- make a written report within 48 hours after such oral communication.

These reports must contain:

- the names and addresses of the child and his parents or other person responsible for his care;
- the child's sex;
- the nature and extent of the child's injuries, abuse, maltreatment, or neglect, including any evidence of prior injuries, abuse, maltreatment, or neglect;
- the circumstances under which the person required to report first became aware of the child's injuries, abuse, maltreatment or neglect;
- whatever action, if any, was taken to treat, shelter, or otherwise assist the child;
- the name of the person or persons making such report;
- any other information which the person reporting believes might be helpful in establishing the cause of the injuries;
- the identity of the person or persons responsible for the injuries; and
- such other information required by the Department.

13. *What action will the Department of Social Services take?*

In most cases, reports of sexual encounters between students will likely be screened out because the Department will not regard these as implicating abuse or neglect by a "caretaker." Where a report is "screened out" over the phone in response to the school's initial oral report, the school should, as a matter of caution, send a letter confirming to the DSS intake worker the fact that a report was made and was screened out, and should retain a copy of this letter in its files. If the Department determines that there is

reasonable cause to believe that a child has been abused or neglected, it will conduct an investigation to assess whether services need to be provided. In certain extreme cases, the Department is required to refer the matter directly to the District Attorney. Even if all that is involved is consensual sex between students below the age of consent, the DSS may nonetheless investigate whether the school, in its custodial role, has taken appropriate steps to monitor students and to deal with known sexual activity by under-age participants.

14. *What are the penalties for failure to report?*

Under M.G.L. c.119 §51A, failure to report is punishable by a fine of up to \$1,000. Separately, and again depending on the circumstances, school personnel might be charged under M.G.L. c. 265 § 13L, which in broad terms prohibits the reckless disregard of circumstances that place a child at risk for serious physical injury or sexual abuse where there is a duty to act. This statute provides for criminal sanction of up to 2½ years' imprisonment.

GENERAL LAWS OF MASSACHUSETTS
PART IV. CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES
TITLE I. CRIMES AND PUNISHMENTS
CHAPTER 265. CRIMES AGAINST THE PERSON

Chapter 265: Section 23 Rape and abuse of child

Section 23. Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in a jail or house of correction, and for the second or subsequent offense by imprisonment in the state prison for life or for any term of years, but not less than five years; provided, however, that a prosecution commenced under the provisions of this section shall not be placed on file or continued without a finding.