

§2A3.5

in, or causing sexual contact with, or by another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation in, or communicating unwillingness to engage in, the sexual act.

4. **Application of Subsection (b)(3).—**

(A) **Custody, Care, or Supervisory Control.**—Subsection (b)(3) is intended to have broad application and is to be applied whenever the victim is entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this enhancement, the court should look to the actual relationship that existed between the defendant and the victim and not simply to the legal status of the defendant-victim relationship.

(B) **Inapplicability of Chapter Three Adjustment.**—If the enhancement in subsection (b)(3) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

5. **Misrepresentation of a Participant's Identity.**—The enhancement in subsection (b)(4) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(4) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(4) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(4) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

6. **Application of Subsection (b)(5).**—Subsection (b)(5) provides an enhancement if a computer or an interactive computer service was used to persuade, induce, entice, or coerce a minor to engage in prohibited sexual conduct. Subsection (b)(5) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor.

Background: This section covers abusive sexual contact not amounting to criminal sexual abuse (criminal sexual abuse is covered under §§2A3.1–3.3). Alternative base offense levels are provided to take account of the different means used to commit the offense.

<i>Historical Note</i>	Effective November 1, 1987. Amended effective November 1, 1989 (amendment 95); November 1, 1991 (amendment 392); November 1, 1992 (amendment 444); November 1, 1995 (amendment 511); November 1, 2000 (amendment 592); November 1, 2001 (amendment 615); November 1, 2004 (amendment 664); November 1, 2007 (amendments 701 and 711).
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§2A3.5. Failure to Register as a Sex Offender

(a) **Base Offense Level (Apply the greatest):**

(1) **16**, if the defendant was required to register as a Tier III offender;