

Legal Issues in Child Maltreatment



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KEYWORDS

• Legal issues • Child maltreatment • Medicolegal issues • Expert witness

KEY POINTS

- Discuss the legal duty to report suspicion of child maltreatment.
- Understand processes and duties associated with giving effective and ethical expert witness testimony.
- Obtain appropriate, informed consent for child maltreatment medical evaluations.
- Explore current issues of civil liability exposure related to reporting and evaluating suspected child maltreatment.

INTRODUCTION

Patient advocacy is an integral part of pediatric practice. Few patients require that advocacy as urgently as the child who has been abused or neglected. The pediatrician's opportunity to serve the child, whom other protectors may have failed, necessitates interactions with law enforcement, child protection agencies and the courts: entities unfamiliar to many pediatricians. In this article, four legal issues are discussed that arise when pediatricians report or evaluate children suspected of being abused or neglected: a physician's duty as a mandated reporter; a physician's responsibilities when called to court as an expert witness; informed consent for maltreatment-specific evaluations; and liability confronting providers involved in child maltreatment.

MANDATED REPORTING

For most pediatricians, the first and most frequent interaction with the child protection system is as a mandated reporter. Federal law requires states to have mandated reporting laws regarding child maltreatment.¹ Pursuant to this law, states must require

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“mandatory reporting by individuals required to report,” and establish a system to respond to such reports. “Individuals required to report” is not defined by federal law, and significant variation exists among the states.² Separate, and subtly different, mandated reporting laws exist in all states and territories of the United States.³ Additionally, a federal statute extends this duty to professionals on federal land or in federal facilities where state law does not apply.

Most states require a report when a mandated reporter, in their professional capacity, “reasonably suspects” or has “reason to believe” that a child has been abused or neglected. Other states enumerate specific professions as mandated reporters but also require all adults to report suspected maltreatment. New Jersey and Wyoming simply require all adults to report without mention of professions. As recent high-profile cases have reminded us,⁴⁻⁶ many adults fail to report suspicion or even knowledge of child maltreatment.

What constitutes “reasonable suspicion” or a “reasonable cause to believe” is an issue that has perplexed and frustrated physicians for decades. Recent studies have shown that one of the reasons for underreporting child abuse is a misinterpretation of the level of certainty needed before reporting. In CARES (Child Abuse Reporting Experience Study),⁷ physicians did not report 27% of the injuries that they determined to be likely or very likely caused by child abuse. Levi and Brown⁸ reported that 15% of the physicians whom they studied required 75% or more probability of abuse before they would report. Multiple studies have confirmed that physicians have varying interpretations of what constitutes reasonable suspicion.

The most helpful judicial clarification of “reasonable suspicion” comes not from child abuse reporting cases but from a search and seizure case under the 4th Amendment. The US Supreme Court stated in *Illinois v Wardlow* that “a reasonable, articulable suspicion” equates to something “more than an inchoate and unparticularized suspicion or ‘hunch’.”⁹ Thus, in maltreatment cases, a “reasonable suspicion” is some objective, articulable fact that would lead a reasonable person to suspect that abuse or neglect might have occurred. However, *practitioners should understand that the threshold for reporting maltreatment does not require incontrovertible certainty*. A mandated reporter must report a reasonable suspicion even when the provider cannot prove, or doubts, that abuse or neglect has occurred.

Another reason why pediatricians fail to report is that they do not trust the child protection system to help the patient or family. In a physician focus group study that examined physician perceptions of child maltreatment reporting systems,¹⁰ participants opined that they could help the family without involving child protection authorities. This approach is legally risky. Other reasons that physicians have indicated for not reporting include fear of testifying, increased time demands for these types of cases, and reluctance to get entangled in the legal system.

The Health Insurance Portability and Accountability Act (HIPAA) is, incorrectly, an oft-perceived impediment to reporting abuse and neglect. HIPAA specifically permits disclosures to “a public health authority or other appropriate government authority authorized by law to receive reports of child abuse or neglect.”¹¹ Similarly, most states explicitly exempt mandated reporting of child maltreatment from the physician-patient privilege of confidentiality. Thus, the pediatrician may disclose protected health information to an appropriate investigative agency without parental notification or consent. When the physician is not the reporter of suspected abuse or neglect, the physician may still disclose Protected Health Information to the Child Protection Services or law enforcement when certain conditions are met (eg, when permitted by state law, when deemed necessary to prevent serious harm to a child, and when limited to only information related to the abuse or neglect).

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