



## Commentary

## Mandatory reporting for child protection in health settings and the rights of parents with disabilities



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## ABSTRACT

This commentary considers the intersection of mandatory reporting in health settings and the public child protection system's treatment of parents with disabilities. Its impetus is the August 2015 technical assistance document issued jointly by the U.S. departments of Justice (DOJ) and Health and Human Services (HHS) that affirms the applicability of the ADA and Section 504 to child protection system (CPS) processes. The DOJ/HHS document speaks to actions of state child protection agencies and courts, without addressing the first step, mandatory reporting. Nonetheless, there are implications for how mandated reporters understand child risk in the presence of disability, and health settings are one venue where mandated reports initiate. This commentary seeks to provide medical professionals with greater understanding of the CPS process and its intersection with disability rights. It concludes that mandatory reporter training must include ADA principles for addressing disability so parents are not unnecessarily reported for investigation.

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This commentary focuses on the challenges of mandatory reporting of child abuse and neglect in health settings when the parents are persons with disabilities. Its impetus is the August 2015 technical assistance document issued jointly by the U.S. Departments of Justice (DOJ) and Health and Human Services (HHS) which affirms the applicability of the ADA and Section 504 to child welfare system processes.<sup>1</sup> While the guidance is not aimed at mandatory reporters, it carries implications for how mandated reporters consider child risk in the presence of disability. The goal of this commentary is a greater understanding for medical professionals of the child protection process and its intersection with disability rights. The two cases below illustrate how medical settings' mandated reporting obligation is part of the child welfare-disability rights nexus.

Four hours after Erika Johnson, 24, gave birth at a hospital in Kansas City, Missouri in May 2010, she and the baby's father were being questioned by a child protective services worker. A nurse had called the public child welfare agency, concerned for the baby's welfare, because the parents were both legally blind. Erika left the hospital without her daughter, who was put into foster care. There

were no allegations of abuse or neglect, but presumption of risk because the parents were blind.<sup>2</sup> Missouri began the process to determine if the child should remain in protective custody, but withdrew its petition 57 days later. Although returned, baby and parents were deprived of the bonding that occurs during the first two months of life.<sup>2</sup>

Ms. Gordon, a 19 year old woman with a developmental disability who lives with her parents, gave birth in November 2012. Ms. Gordon's mother had quit her job to provide full-time support to the new mother and baby. Two days after the baby's birth, the Massachusetts Department of Children and Families (DCF) received a report from the hospital alleging neglect because of some difficulty with holding and feeding. Following an emergency review, the agency removed the child from Ms. Gordon's custody.<sup>3</sup> DCF did not offer the assistance, training, and support services it usually offers to parents to enable safe parenting and reunification. Instead, it concluded that because of her disability, Ms. Gordon could not become a fit parent, and the goal for the baby was adoption and termination of parental rights. In January 2015 the U.S. Department of Justice determined Ms. Gordon had been treated discriminatorily because DCF failed to offer her the support offered other parents, and failed to reasonably modify its policies, practices, and procedures to accommodate her disability. Two years after her daughter's birth, DCF was directed to provide Ms. Gordon with appropriate services to support the goal of reunification.<sup>3</sup>

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These are not the only instances in which parents with disabilities have been reported to the child welfare system on the logic that the parent's disability posed a risk to the child.<sup>4</sup> The outcome in many instances was the permanent termination of parental rights.<sup>5</sup> Studies have found that parents with disabilities are at a greater risk than other parents of having their children removed to out-of-home care or parental rights terminated.<sup>6</sup> A 2012 report by the National Council on Disability provides a substantive review of the problems parents with disabilities experience in relation to public policies for child welfare.<sup>4</sup> The problems arise from: (1) the inclusion of disability in many state child welfare laws as a “risk factor” for child abuse or neglect, or a characteristic that can be used in judging parental fitness; (2) the prevailing assumptions, attitudes, and stereotypes about the abilities of parents with disabilities held by mandatory reporters, child welfare caseworkers, and judges; and (3) the perspective taken by courts that the ADA and Section 504 are not applicable to processes in public child welfare or custody decisions.

Because the August 2015 DOJ/HHS document affirms the applicability of the ADA and 504, efforts to ensure accommodation and non-discrimination in the application of child protection criteria may now occur.<sup>1</sup> However, risk remains as long as those who launch an investigation through a report of potential abuse or neglect continue to do so with the parent's disability as the primary indicator. Medical settings, especially maternity units, are venues where mandatory reporters may base reports on presumed future harm due to parental disability.

### **Child protection systems and their approaches to parents with disabilities**

The 1974 Child Abuse Prevention and Treatment Act (CAPTA, PL 93-247) and its subsequent amendments is the basis of the federal/state system of child protection. It operates with funding, requirements, and standards from the federal government, and matching state funding, additional state laws, and state agencies for implementation of child protection services (CPS).<sup>7</sup> The basic activities of state child welfare agencies include (1) receiving and investigating reports of children who may have been abused or neglected, or who are at risk of it, and determining whether they are substantiated; (2) working with families to enable child safety and reunification where a child has temporarily been removed from the home; (3) determining whether to recommend termination of parental rights to assure the safety of a child, (4) operating a system of out-of-home care for children removed from parents; and (5) facilitating the identification of adoptive homes and adoption of children taken permanently from their biological parents.<sup>8</sup> In FFY2014 approximately 3.6 million reports of possible abuse were received by state agencies, of which 61% (2.2 million reports) were screened in for a disposition. Of those, approximately 20% were substantiated.<sup>9</sup>

Each state has persons who are by law “mandated” to report any suspected abuse or neglect of a child they encounter in the course of their activities. Typically on the list of mandated reporters are doctors, nurses, school personnel, social workers, other counseling professionals, child care workers, and law enforcement officers.<sup>10</sup> The identification of the “battered child syndrome” grew out of the medical care profession and mandatory reporting evolved from this beginning.<sup>11,12</sup> In every state, members of the medical profession are included in the list of mandated reporters, but considerable variation exists across states, with some extending the mandate to many occupations or all citizens.<sup>13</sup> All states require reports for reasonable suspicion of present or past child abuse or neglect.<sup>14</sup> With small differences in exact wording, nine states have added language to their reporting requirements for observation of

conditions or circumstances that would “reasonably result” or “likely to result” in child abuse or neglect.<sup>14</sup> Other states imply a forward look, not in the reporting standard, but with definitions of child abuse or neglect that speak of risk of serious future harm. In 2014, 62.7% of reports were called in by mandated professionals; medical personnel accounted for 9.2% of all reports.<sup>9</sup>

Mandated child abuse reporting is not without critique.<sup>13,15</sup> Researchers have documented reporter variation in the threshold of “reasonable suspicion;” reporters' sense of inadequate guidance and training for identification of abuse and neglect; and state variation regarding types of reportable harms and time frames.<sup>13,15–17</sup> Mandated reporting laws aim to encourage reporting by providing immunity to persons reporting in good faith, and penalties for the failure to report.<sup>11,13</sup> Noting that approximately 80% of reports are not substantiated, critics point out the potential harm experienced by a large number of children and families associated with the investigation procedures.<sup>11,18,19</sup>

A report of suspected abuse or neglect to a state agency starts a process of investigation. A child viewed in immediate risk may be removed from a parent's custody while the investigation is conducted. If currently the parent is not able to safely parent the child, the child may be put into out-of-home care. If the state agency decides that a parent will never be able to safely raise the child, it seeks court action to formally terminate parental rights; the child is “freed” for adoption. The preferred outcome is to return children to the custody of their parents once there is no threat to child safety. State CPS agencies provide services and parent training to modify parenting behaviors to enable the return of children to the custody of their parents.<sup>8</sup>

The CPS system may differentially respond to parents with disabilities at several points. The first point is upon receipt of a report when the investigating caseworker must determine whether the child's risk is such that she must immediately be removed from her parent's care. In the above cases, the decision was to immediately take custody of the children. There was no strong evidence of previous or current abuse or neglect, but the action suggests the caseworker judged that the parent's disability put the child at serious risk of harm. The second point comes with the investigation. If child abuse or neglect is not substantiated, the child immediately returns to parents. Reports from parents with disabilities who have had encounters with CPS suggest that their cases remain open longer. During this time the child continues in out-of-home care.<sup>4</sup> The third point occurs when the goal for the child is recommended. Research suggests that parents with disabilities often are not offered the option of reunification following compliance with requirements, while parents without disabilities are often provided this option.<sup>4,5</sup> Where parents with disabilities are referred for parent training or services, disability accommodations may not be provided to ensure that the parents can participate and benefit from the activity.<sup>4,20</sup> State child welfare agencies appear to more quickly initiate the process of termination of parental rights when the parents are people with disabilities based on the logic that because the disability will not change, the risk to the child cannot be altered by the usual services or training provided other parents.<sup>5,6</sup>

Assumptions about the unfitness of parents with disabilities extends to court actions where caseworker recommendations carry weight, even if the parents are present and have legal representation.<sup>6,20</sup> Compounding this dynamic, many states' statutory language includes parental disability as a factor that can be used in the decision to terminate parental rights if viewed as compromising the parent's ability to care for a child.<sup>21</sup> Inclusion of disability as a basis for assessment of parental fitness may cause the focus of the proceeding to shift from examination of parental behavior to the parent's diagnosis and condition. Lightfoot, Hill, and LaLiberte

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