

# Perils, Pitfalls and Protections in Child Abuse Pediatrics

AN OVERVIEW OF CHILD ABUSE PEDIATRICS FROM THE LEGAL PERSPECTIVE,  
AND THE CURRENT STATUS OF THE LAW IN NEW YORK STATE.

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## Disclosure

The speaker, Jason R. Corrado Sr., Esq., is an attorney representing clients who may be professionals in healthcare.

Jason is a partner with the law firm of Shaub, Ahmuty, Citrin & Spratt, LLP.

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## Learning Objectives:

- ▶ Discuss an overview of legal considerations for professionals in the field of child abuse pediatrics
- ▶ Review relevant statutes which govern the obligations of mandated reporters, focusing upon those in clinical practice
- ▶ Describe protections (both by statute and in clinical practice) that should be considered when assessing children, making reports, and making recommendations to ACS/CPS and the court system

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Perils and Pitfalls – an introduction:

- ▶ How cases are being presented to the Courts, and how clinicians are being implicated.
- ▶ Constitutional claims, arising through 42 U.S.C. § 1983
- ▶ Boot-strapping "garden variety" medical malpractice and other "state law" claims to allege Constitutional claims

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Keenan case

- EASTERN DISTRICT OF NEW YORK
- GENESIS OF CLAIMS – FACTS AND ALLEGATIONS
- LEGAL THEORIES
- DISCOVERY PHASE
- MOTION PRACTICE
- CURRENT STATUS OF THE ACTION
- 2<sup>ND</sup> CIRCUIT COURT OF APPEALS

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How clinicians can minimize legal risks

- Documentation
- Coordination
- Appropriate Consultations
- Reasonableness

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What are the legal considerations for professionals in the field of child abuse pediatrics?

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What are the relevant statutes in New York State?

The primary New York State Law is found in the State's Social Services, Title 6, Child Protective Services

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Social Services Law:

**§413(a)**

Makes physicians, nurses, social workers, etc., "mandated" reporters.

Required "to report or cause a report to be made . . . when they have reasonable cause to suspect that a child coming before them in their professional or official capacity is an abused or maltreated child . . ."

**§417(b)**

Taking a child into protective custody: Any physician that notifies the appropriate public authorities or the social child protective services to take custody of any child such physician is treating whether or not additional medical treatment is required, if such physician has reasonable cause to believe that the circumstances or condition of the child are such that continuing to be in the care of the person or persons having legal custody or guardianship, custody or other person responsible for the child's care presents an imminent danger to the child's life or health.

**§420**

Penalties for Failure to Report:

1. Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who willfully fails to do so shall be guilty of a class **A** misdemeanor.
2. Any person, official or institution required by this title to report a case of suspected child abuse or maltreatment who knowingly and willfully fails to do so shall be **civily liable** for the damages proximately caused by such failure.

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## SSL §419. Immunity from Liability

- Any person, official, or institution participating in **good faith** in . . . the making of a report, the taking of photographs, the removal or keeping of a child pursuant to this title, or the disclosure of child protective services information in compliance . . . this chapter **shall have immunity from any liability, civil or criminal**, that might otherwise result by reason of such actions.
- For the purpose of any proceeding, civil or criminal, the good faith of any such person, official, or institution . . . shall be presumed, provided such person, official or institution was acting in discharge of their duties and within the scope of their employment, and that such liability **did not result from the willful misconduct or gross negligence of such person, official or institution.**

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What are the obligations of a mandated reporter?

- ❖ OBLIGATIONS IN GENERAL
- ❖ OBLIGATIONS SUBSEQUENT TO REPORT
- ❖ OBLIGATIONS WITH ACS/CPS
- ❖ OBLIGATIONS WITH FAMILY OR CRIMINAL COURT PROCEEDINGS

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What are the legal protections?

- ▶ What protections are afforded under the law which should be considered when assessing children, making reports and continued cooperation with ACS/CPS?
- ▶ How much protection do the relevant statutes actually provide?
- ▶ SSL §419 – reasonableness and “good faith”

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How are plaintiffs and their attorneys making a Federal case out of medical care?

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### 42 U.S.C. §1983 Litigation

- Federal statute permitting private citizen to sue for violation of their Constitutional rights
- Typically, claims involve alleged violation of rights under the 4<sup>th</sup> Amendment (search and seizure) and the 14<sup>th</sup> Amendment (due process)
- Substantive due process claims
- Procedural due process claims

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### 42 U.S.C. §1983 Litigation

- ▶ Generally, the purpose of §1983 is to address Constitutional violations by the government, its agents and/or employees
- ▶ Provides for an action at law against a "person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and law."
- ▶ For a private citizen to be liable under §1983, the threshold question is whether the private citizen is a "State Actor."
- ▶ Three Primary Tests:
  - A. Joint action
  - B. Compulsion test
  - C. Public function test

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## 42 U.S.C. §1983 Litigation

### ► Joint Action Test:

Under the 'joint action' doctrine, a private actor can be found to act under color of state law for § 1983 purposes if the private party is a willful participant in joint action with the State or its agents.

The touchstone of joint action is often a 'plan, prearrangement, conspiracy, custom, or policy' shared by the private actor and the state agents.

Mere cooperation with a state official is insufficient to establish state action. Instead, a plaintiff must show that the private citizen and the state official shared a common unlawful goal.

Often pled as a conspiracy between the medical professionals and ACS/CPS.

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## 42 U.S.C. §1983 Litigation

### ► Public Function Test:

To satisfy the state action requirement under the 'public function' test, the private entity must 'perform a function that is traditionally the exclusive prerogative of the state.'

Under the public function test, state action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity."

As seen in [Kia P. v. McIntyre](#), 235 F.3d 749 (2<sup>nd</sup> Cir. 2000), where the conduct is "so intertwined" as to fairly attribute the private parties conduct to that of the state.

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## 42 U.S.C. §1983 Litigation

### ► State Compulsion Test

Under circumstances where a private entity acts pursuant to the "coercive power of the state," or is controlled by the state.

Occurs when the a private decision is undertaken through coercion by the state, or the state provided "significant encouragement, overt or covert, that the choice must be deemed to be that of the state."

NOT typically seen or argued in the area of pediatric child abuse cases.

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## Other Types of Claims:

In addition to Federal Constitutional claims, plaintiffs also typically allege:

- ▶ Malicious prosecution
- ▶ False imprisonment
- ▶ Medical malpractice
- ▶ Wrongful death

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## Qualified Immunity?

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## Qualified Immunity

- ▶ If the Court finds conduct sufficient to hold a private entity as a "state actor," the inquiry continues.
- ▶ Are the defendants entitled to immunity?
- ▶ Absolute immunity
- ▶ Federal qualified immunity
- ▶ State qualified immunity – pursuant to SSL §419

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## Qualified Immunity

The defense of qualified immunity is available as to §1983 claims involving a government actor performing a discretionary task if:

- a. the defendant's action did not violate clearly established law, or
- b. it was objectively reasonable for the defendant to believe that his action did not violate such law.

In the context of child abuse or neglect proceedings, the 2nd Circuit has applied a deferential standard, emphasizing that courts must apply the reasonable basis test to permit investigators considerable discretion in the abuse context.

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## Qualified Immunity

Social Services Law §419.

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## Clinical Considerations for Practitioners Given the Legal Paradigm

WHAT ARE THE CONCERNS AND PRACTICAL APPLICATIONS IN CLINICAL PRACTICE?

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## Clinical Considerations:

### What are some of the pitfalls and perils?

- Failure to adequately document
- Failure to adequately communicate with colleagues
- Failure to take an adequate history
- Forcing a diagnosis or conclusion
- Overzealous advocacy
- Failing to appreciate equivocal clinical or historical data

### What are some of the protections in clinical practice?

- Reasonable assessment
- Reasonable under the circumstances
- See what is present without overreach
- Order tests which are medically necessary or clinically relevant
- Coordination and documentation

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## Clinical Considerations:

When making a report to the Central Registry, be clinical in your approach.

The clinician's job is not as an investigator or prosecutor in the setting of Family Court or Criminal Court proceedings

Do NOT over-reach in assessment

Be mindful of drawing conclusions; be clinical in your approach

Findings are "consistent with" trauma, and non-accidental trauma cannot be excluded.

Beware of "diagnosing" or concluding "child abuse" or stating with certainty "non-accidental trauma" as the cause.

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## Practical Considerations: case specific issues and concerns

- o Family court proceedings and ACS ... how far do you go?
- o Do you need an attorney?
- o What happens if a claim is made, or you are sued?
- o What is the process (e.g. - motions, discovery, depositions, trial or settlement)
- o Medical malpractice: duty, breach, causation & damages (requires physical injury)
- o Intentional tort versus negligence, and employer liability

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## Conclusions:

- Be reasonable
- Don't over-reach ("consistent with . . .")
- Don't speculate – stick to the objective medical evidence
- When non-accidental trauma is considered, take an adequate history
- Speak with specialists in fields that are relevant to the particular inquiry

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## Issues for another day:

- ▶ If medical malpractice coverage is for negligence, and carriers and employers specifically exclude intentional torts, what happens if a clinician is found liable under §1983? Can the insurance carrier, or the employer, deny coverage?
- ▶ What about indemnification from the State or County, where there is the existence of a more "formal" arrangement, where "State Action" may be more credibly argued? What about the absence of a formal arrangement, but where "joint action" was found?

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