



## THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

### CEPI Education Law Newsletter

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

NOVEMBER 2014: Vol. 13-3

#### REPORTING SUSPECTED CHILD ABUSE: POLICY IMPLICATIONS

##### Overview

In recent months several stories involving incidents of domestic violence and child abuse have gained national attention in the popular media. As someone who has spent more than five decades working with school administrators, teachers, parents, and students, I remain shocked at some of the horrific situations covered in the news media—especially those where the suspected child abuse involves an infant or toddler and was administered by a parent (including foster parent), family member, or legal guardian. Ironically, these are the same people who should be providing children with a safe, loving, and nurturing home environment.

Because the definition may vary from state to state, for purposes of this commentary the following generic definition of “child abuse” is used: “An intentional or neglectful physical or emotional injury imposed on a child, including sexual molestation.” BLACK’S (7<sup>th</sup> ed. 1999) Also, in this commentary the term “child” refers to an individual who is “less than eighteen years old.”

*Reporting Suspected Child Abuse.* A recent national survey tells us that in our nation: (1) a report of child abuse is filed every ten seconds, (2) more than 4 children die every day as a result of child abuse—most of whom are children under four years old, and (3) “child abuse occurs at every socio economic level, across ethnic and cultural lines, within all religions, and at all levels of education.” (“Child Maltreatment 2012,” Department of Health and Human Services, 2012)

*State Law and Child Abuse.* While many incidents of child abuse often go unreported it is, as a general rule, the legal obligation of a host of professionals, many of whom work in public school systems, to immediately report “suspected child abuse” to the proper authorities. To discover and read one’s legal obligations concerning matters of reporting suspected child abuse the reader first must reference the statutes of the state where his or her professional work is carried out. While each situation is different, one common thread can be observed in many of the reported cases. Even where a state statute defines the term, “child abuse,” (see, e.g., VA. CODE, 16.1-228, *Definitions*) the term is somewhat subjective in nature. What does or does not move “suspected

child abuse” to “established child abuse” is a matter subsequently determined on a case-by-case basis by the facts found and a preponderance of evidence produced.

Over the past five decades, as someone who has served as a teacher in New York State and, more recently here in Virginia as a certified mediator, I have been and remain obligated by state law, along with a long list of other professionals, to immediately report suspected child abuse to the proper authorities. My legal obligation encompasses situations that have come to my attention in the course of carrying out my official duties. See “Complaints,” VA. CODE, 63.2-1509. Moreover, I also know that Virginia law: (1) mandates that within 72 hours of the first suspicion of child abuse or neglect I must report my suspicion or be fined. (VA. CODE, 63.2-1509, 14D), and (2) while carrying out my legal obligation to report I am immunized from any civil or criminal liability, or administrative penalty or sanction. (VA. CODE, 63.2-1509, 14C).

*Classroom Teachers, School Social Workers, Nurses, and Other Obligated School Staff.* While the purpose of mandatory reporting is to protect a child’s best interests, a set of *confounding variables* sometime add confusion to state mandated reporting obligations. These variables involve the policies and accepted practices of the school system in which a person works. Phrased as questions these are:

- To whom do I, the legally obligated teacher or other staff member, immediately report my suspicion?
- Do I immediately file a report with my department head or the school principal? Or, do I go outside the school system and file a direct report with the local department or agency of the county or city where the child resides? Or, because child abuse is against the law, what about a police report?
- What if police officers come into my school and quiz me about a parent of one of my students and suspected child abuse?
- What about the rights and protections (legal and constitutional) of the parent(s), family member(s), or guardian(s) implicated in my report? What about the rights and protections of the psychological and educational wellbeing of the child or children involved?
- Will I the reporter, or the child involved, later be called into court where my report and testimony will be entered as evidence by lawyers?
- Can I lose my job for violating school board policies?

Thus, it is wise for classroom teachers and others obligated by state law to report suspected child abuse to know local school system school policies, procedures, and expectations, and certainly to seek the advice of an attorney when and where appropriate.

Recently I came across an Ohio case where the Supreme Court of Ohio was faced with the following question involving the “Confrontation Clause” of the Sixth Amendment: “whether the trial court violated Darius Clark’s constitutional right to confront the witnesses against him when it admitted a hearsay statement that three-and-a-half-year-old L.P. made to his preschool teacher, Debra Jones, in response to questions about injuries and marks on his face observed upon his arrival at a preschool day care?” A corollary question asks: were the statements “testimonial in nature because there was no ongoing emergency and the primary purpose of the questioning was

to establish or prove past events potentially relevant to a later prosecution for child abuse.” The United States Supreme Court recently *granted cert.*, at 20145 LEXIS 4914 (2014). While the case turns on a Sixth Amendment issue, I nonetheless selected the case for discussion because of its potential policy implications for local school systems.

### **State of Ohio v. Clark (Ohio, 2013)**

*Facts.* Darius Clark (hereafter referred to as D.C.) lived with his girlfriend T.T, her three-year-old son L.P., and their two-year-old daughter A.T. On March 17, 2010, D.C. dropped off L.P. at the William Patrick Day Head Start Center, in Cleveland. While in the Center’s lunchroom one of L.P.’s preschool teachers R.W. observed that L.P.’s left eye appeared bloodshot and blood stained. She asked him, “What happened?” L.P. first said nothing but then replied, “I fell.” R.W. then asked, “How did you fall and hurt your face?” He answered, “I fell down.” Subsequently, in brighter light R.W. looked again and saw “[r]ed marks, like whip marks of some sort.” In shock, R.W. got the attention of Debra Jones (D.J., the class Lead Teacher).

After seeing L.P.’s eye D.J. decided to have her supervisor, Ms. Cooper look at L.P. Prior to seeing Ms. Cooper, D.J. asked L.P., “who did this? What happened to you?” D.J. described L.P. as kind of bewildered and uncertain. But L.P. said “Dee.” Because L.P. had only attended the school for a short time and because she could not be sure that L.P. understood her questions, D.J. escorted L.P. to the office where Ms. Cooper looked at L.P.’s injuries. Ms. Cooper then decided that the first person to observe L.P.’s injuries should call 696-KIDS and make a suspected child abuse report. R.W. made the call.

The next day, in response to the report, the County Department of Child and Family Services (CDCFS) sent a social worker to the school to question L.P. D.C. arrived at the school while the social worker was questioning L.P. He denied responsibility for the injuries and left with L.P. The next day a social worker located T.T’s children at the home of D.C.’s mother and took them to the hospital where a physician determined that L.P. had bruising in various stages of development and abrasions consistent with having been struck by a linear object. The physician also said that A.T. (the two-year-old daughter) had bruising, a swollen hand, and a pattern of sores at her hairline. The physician suspected child abuse and estimated that the injuries occurred between February 28 and March 18, 2010.

A grand jury indicted D.C. on one count of felonious assault relating to L.P., four counts of felonious assault relating to A.T., two counts of endangering children, and two counts of domestic violence. The trial court declared L.P. incompetent to testify but denied Clark’s motion *in limine* to exclude L.P.’s out-of-court identification statements. Seven witnesses (*e.g.*, social worker, intake social worker, police detective, maternal grandmother) testified regarding statements made by L.P. (a three-and-a-half year old) six months earlier. The jury found Clark guilty of all charges, except for one count relating to A.T., and the court sentenced him to an aggregated 28-year prison term. D.C. appealed claiming that the trial court violated his right to confrontation by allowing witnesses to testify about statements L.P. made to his preschool teachers. The court of appeals held that the trial court abused its discretion because the statements of witnesses were testimonial and their admission violated the Confrontation Clause of the Sixth Amendment. *State of Ohio v. Clark* (Ohio App. 2011) The appellate court remanded the matter for a new trial and the State appealed the matter to the Supreme Court of Ohio.

*Ohio Supreme Court Rationale and Decision.* The Court begins its rationale by making it clear that in the State of Ohio a statutory duty is imposed on all school officers and employees, including administrators and employees of child day-care-centers, to report actual or suspected child abuse or neglect, “because they are among the ‘most likely and qualified persons to encounter and identify abused and neglected children’ and have ‘the necessary training and skill to detect the symptoms of child abuse.’”

Reporting child abuse, said the Court, is a “means of protecting Children.” For, example, the information gathered can be used by child-protection agencies to separate children from a dangerous situation. However, while questioning a child about suspected injury is consistent with a duty to report, the Confrontation Clause analysis requires that the “primary purpose” of the questioning be ascertained. In the Clark case “the circumstances objectively indicate that the primary purpose of the questions asked L.P. was not to deal with an existing emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. “L.P.’s teachers did not treat the situation as involving any ongoing medical emergency.” Thus “[w]hen teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator, any statements obtained are testimonial for purposes of the Confrontation Clause.” The Ohio Supreme Court then launches into an extensive case law documented discussion of the Sixth Amendment which provides in relevant part: “In all criminal prosecution, the accused shall enjoy the right...to be confronted with the witnesses against him....” Also, the Court offers a detailed discussion and clarification of the meaning of the phrase “on-going emergency.”

Applying the primary-purpose analysis to the facts in the Clark case the Ohio Supreme Court concluded that “when questioning a child about suspected abuse in furtherance of a statutory duty, a teacher acts in a dual capacity as both an instructor and as an agent of the state for law-enforcement purposes.” And, because no emergency existed they sought facts concerning past criminal activity to identify the “person responsible,” the person who had “perpetrated the abuse,” “L.P.’s statements identifying Clark as responsible for his injuries are therefore testimonial and should have been excluded from evidence pursuant to the Confrontation Clause.”

*Decision.* The judgment of the Court of Appeals is affirmed. It should be noted that three Justices were in concurrence.

*Dissent.* A dissenting opinion was written by Justice O’Connor (two other Justices join in the dissenting opinion). In Justice O’Connor’s view the “majority decision creates confusion in our case law...and threatens the safety of our children. Not surprisingly, it is also wrong as a matter of federal constitutional law.” First, “a teacher is not an agent of law enforcement for the purpose of determining whether a statement is testimonial under the Confrontation Clause merely because that teacher has a statutory duty to report child abuse.” Moreover, “[on] the record before us, there is no basis from which to conclude that an injured child’s teachers acted on behalf of law enforcement.” They questioned L.P. to “protect him” and “to maintain a secure and orderly classroom in which learning could take place. No objective witness could reasonably believe that the interviews served a prosecutorial purpose rather than a protective one.” L.P.’s statements to his teachers are “non-testimonial and thus are not excluded by the Confrontation Clause.”

Following from his extensive and detailed analysis of the facts, the right to confrontation generally, the duty of teachers to report suspected child abuse, and a detailed analysis of the case law explaining the term “testimonial,” Justice O’Connor concludes with the following statements: “For all these reasons, I would hold that a teacher asking a child questions about an injury is not an agent of law enforcement for the purposes of determining whether a statement is testimonial and thus excluded by the Confrontation Clause merely because the teacher has a legal duty to report child abuse pursuant to State statute.” The majority “fails to account for a teacher’s duty to protect her students and to maintain a secure and orderly classroom where learning can take place.”

## **Policy Implications**

In my view, while State of Ohio v. Clark (2013) is more legal-technical in nature (*i.e.*, testimony, purpose of interrogation, evidence gathered, confrontation of witnesses, *et.al.*) and is not purely a public school law case, the Court majority’s rationale balanced with the points raised in dissent nonetheless present the reader with potential implications for local school system policies dealing with child abuse reporting. Briefly summarized below are implications gleaned from my analysis of the reasoning presented by the Court:

School Board policy must make it clear that:

- It is the Board’s intent and it is the obligation of staff members covered under state law to implement and enforce all statutes requiring the immediate reporting of suspected child abuse and neglect to the proper authorities and to cooperate with local authorities to determine appropriate next steps.
- The purpose of implementing and enforcing the legal obligation of child abuse reporting is to protect the best interests of the child or children involved, respect parent and family privacy, and to provide a safe, secure, orderly, and healthy learning environment for all children enrolled in the schools of the school district.
- Where situations of suspected child abuse or neglect have come to the attention of a school system employee an initial report shall be made to that employee’s immediate superior.
- All employees obligated to immediately report suspected child abuse or neglect are acting as employees of the school system and, as such, are expected to make their report by following and adhering to internal school system reporting procedures as specified in the school system *Employee Personnel Manual*.
- Confidentiality of all names of persons and other information gathered shall be followed at all stages of the reporting procedure.

**Final Note:** It is not for me to say what the United States Supreme Court will say in The State of Ohio v. Clark (2013) and I shall not attempt to make a prediction. However, while I respect and value the constitutional right of an accused individual to confront the witnesses against him or her, I also do not want to open the way to exposing vulnerable children to the pressures and disconcerting nature of offering direct testimony in an adult courtroom. Nor do I wish to see road blocks placed in the path of administrators, teachers, social workers, psychologists, and other staff,

who are not police officers, to find help for a student in their school—a child they believe in good faith may be suffering as a victim of abuse or neglect. I believe that the Court will find a way to enhance efforts to increase reporting and to drastically reduce what has become a national problem.

**Resources Cited**

BLACK'S LAW DICTIONARY (7<sup>th</sup> ed. 1999)

*Child Maltreatment 2012*, Department of Health and Human Services (2012)

State of Ohio v. Clark, 2011 Ohio App. LEXIS 5457 (Ohio Ct. App. Cuyahoga County, 2011)

State of Ohio v. Clark, 999 N.E.2d 592 (Ohio, 2013); *reconsideration denied*, State v. Clark, 999 N.E.2d 698 (Ohio, 2013), *cert. granted*, Ohio v. Clark, 2014 U.S. LEXIS 4914 (2014)

U.S. CONST. amend VI, rat. Fed. (1791)

VA CODE, 16.1-228, 63.2-1509, and 63.2-1509 14 (C) and (D)

*Richard S. Vacca*

Senior Fellow CEPI

**Note:** The views expressed in this commentary are those of the author.