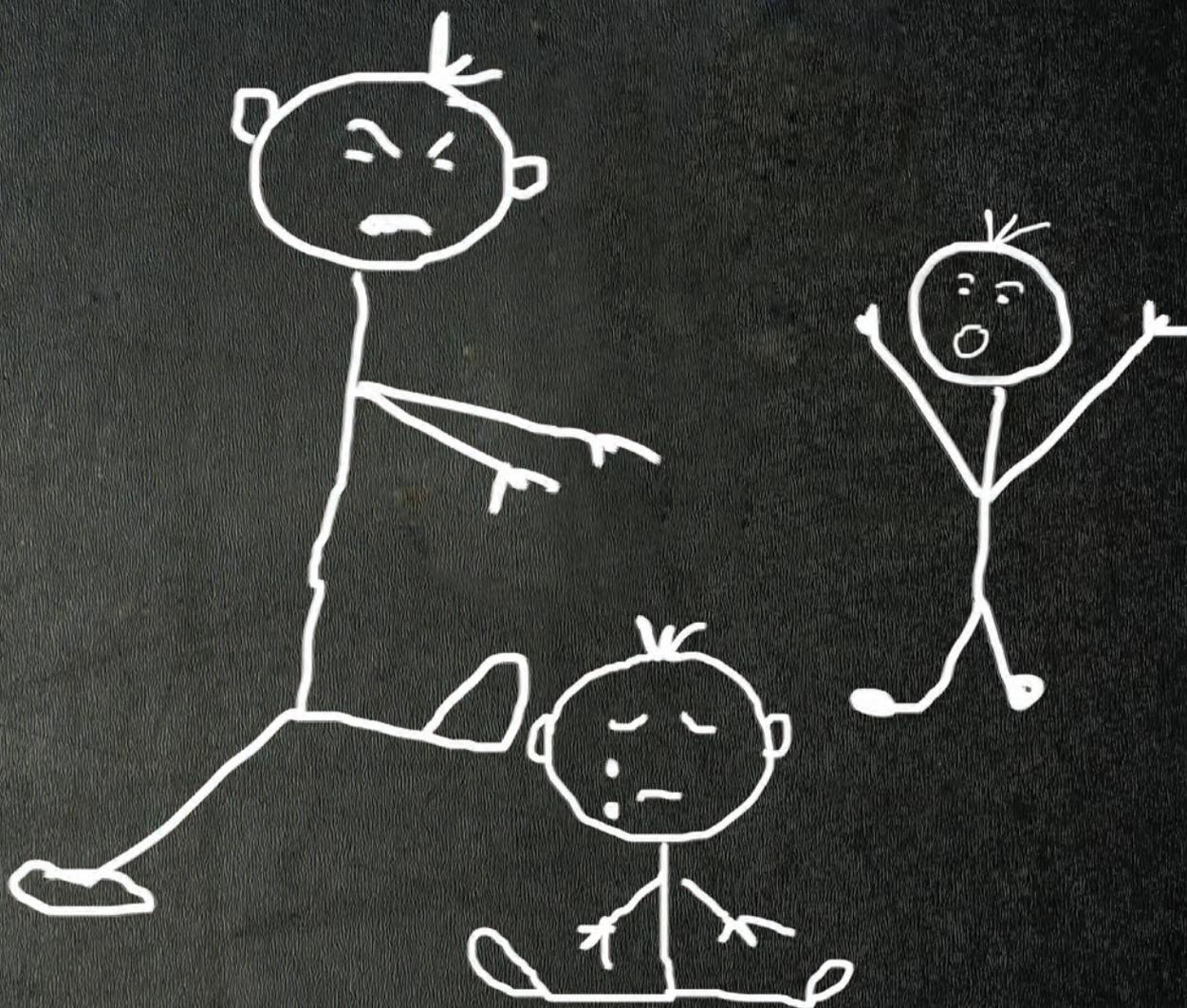


Child Protective Services Law

Implications for Behavioral Health Organizations

by Paul F. Laughlin and William Banton Jr.



In 2013, the Pennsylvania General Assembly amended and expanded the Child Protective Services Act relative to child abuse reporting to allow indicated reports to be filed as against unidentified perpetrators. The purpose of this amendment was no doubt to promote the safety of children. However, the General Assembly did not similarly expand the appellate procedures for “persons” deemed indicated perpetrators to include the employer organizations of unidentified perpetrators. As a result, the amendments to the Child Protective Services Act have created a situation in which organizations may experience the significant adverse impact of indicated abuse reports against unknown individual employees without an opportunity for appellate scrutiny or to demonstrate that such reports are erroneous.

Given the important mission of organizations delivering behavioral health care to children with significant and diverse behavioral problems and the need for accuracy in cases involving alleged abuse, the General Assembly should consider expanding the rules regarding appellate review to include affected organizations.

BACKGROUND

The need for quality behavioral health care for children is as critical now as it has ever been. According to data maintained by the Centers for Disease Control and Prevention (CDC), approximately 9.4% of children between the ages of 2 and 17 are affected by Attention Deficit Hyperactivity Disorder (ADHD), more than 1% are afflicted with anxiety and approximately 3.2% suffer from depression.

The frequency of significant behavioral diagnoses also has been on the rise. For instance, according to the CDC data, 1 in 54 children were affected by autism as of 2016, whereas only 1 in 150 were diagnosed with autism in 1992.

While the numbers of children affected by behavioral health disorders is substantial and, evidently, has increased over the years, the challenges facing organizations providing behavioral health care has not changed. The very nature of behavioral health disorders often renders such patients very difficult to manage as the disorders often involve self-harm, as well as violent outbursts and control issues.

Another problem facing children at alarming rates is the prevalence of mistreatment and/or child abuse. According to CDC publications, as of 2012 there were approximately 3.4 million Child Protective Services referrals in the United States. An estimated 9.2 children per 1,000 were victims of maltreatment, of which a full





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18% constituted physical abuse and an additional 9% were subjected to sexual abuse. Unfortunately, despite increasing awareness of the prevalence of child abuse and efforts to curb it, these rates have not declined appreciably.

In Pennsylvania, the Child Protective Services Act, 23 Pa. C.S. §6301, et seq., was enacted in order to address problems related to child abuse and specifically to encourage more complete reporting of abuse, to protect children from future abuse and, in general, to ensure the well-being of children. 23 Pa. C.S. §6302.

In 2013, a series of amendments to the Child Protective Services Law were enacted that changed not only the definition of child abuse itself, but also the manner in which it could be adjudicated. Prior to this



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2013 amendment, child abuse could include “any recent act or failure to act” leading to injury. The 2013 amendment, however, placed a higher culpability threshold on acts in order to be deemed child abuse. Specifically, rather than defining abuse as including an act or failure to act, the 2013 amendment required that an injury was caused “intentionally, knowingly, or recklessly” in order to be deemed child abuse. 23 Pa. C.S. §6303(b)(1). By definition, an intentional act is when it is the actor’s conscious objective to engage in the conduct or cause the result (23 Pa. C.S. §6303, citing 18 Pa. C.S. §302); an action occurs “knowingly” if the actor is aware it is practically certain that conduct will cause the result; and “recklessly” involves an actor consciously disregarding a substantial and unjustifiable risk that the injury would occur. *See Id.* As such, the 2013 amend-

ments had the effect of increasing the level of culpability suggesting that an “indicated” instance of child abuse involves more than mere passive omissions or negligence but rather involves acts that are intentional, knowing or reckless.

In addition to these amendments, the General Assembly expanded the options for an indicated report of child abuse to permit an indicated report of child abuse to list the perpetrator as “unknown” if substantial evidence of abuse by a perpetrator exists but the department or county agency is unable to identify the specific perpetrator. *See* 23 Pa. C.S. §6303.

However, the appellate provisions were not modified in 2013. With regard to appellate review of indicated child abuse reports, pursuant to 23 Pa. C.S. §6341(a)(2), any

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Communities require both access to quality behavioral health services for children and an effective process through which child abuse can be investigated, reported and, where possible, prevented.

“person named as a perpetrator” in an indicated report of child abuse may, within 90 days of being notified of the status of the report, request an administrative review or appeal and request a hearing before the secretary to amend or expunge an indicated report on the grounds that it is inaccurate or being maintained in a manner inconsistent with the Child Protective Services Law.

IMPACT ON BEHAVIORAL HEALTH ORGANIZATIONS

Behavioral health organizations are not immune to the problem of child neglect and abuse; wherever there are children, instances of abuse can unfortunately occur. However, given the challenges particular to the behavioral health milieu, there may be instances where reported injuries occur that at first glance may appear to be consistent with abuse but, in reality, are the result of accident, self-injurious behavior on the part of the subject child or related to comorbid conditions. As such, there have been instances in which conduct initially reported as abuse has, upon closer review and appellate scrutiny, been shown to be unrelated to any neglect, mistreatment or abuse.

The impact of an indicated abuse report on behavioral health organizations can be substantial. As a threshold, it is important to note that indicated reports of abuse are made part of licensing inspection summaries and are published online by the Department of Human Services and thus available for review by the public at large. Given the ease with which digital research may be conducted, it is common for parents, guardians and others seeking information and/or guidance in making decisions about behavioral health options to look first to the internet for information guiding health care selections. Accordingly, any incorrect or untruthful information published online has significant potential to negatively impact the reputation of organizations and influence the decisions of potential consumers. Incorrect and adverse information about otherwise high-quality facilities could dissuade consumers from seeking services. The presence of such information could adversely impact not only the facilities, but also the children who might otherwise receive significant benefits from their services. In addition, behavioral health organizations are licensed facilities within the commonwealth and depend upon such status for access to payment and insurance. Incorrect information and, in particular, reports of abuse



that put their reputation at risk could lead to erroneous conclusions by regulatory and licensing agencies and insurers, to their detriment.

Such repercussions also implicate constitutionally protected interests, including for instance, property and reputational interests that are not to be abridged without due process. For instance, behavioral health organizations have a constitutionally protected interest in government-issued licenses that could be adversely affected by a finding that child abuse is “indicated” by an unknown perpetrator at one of their facilities. See *Young J. Lee, Inc. v. Commonwealth, Department of Revenue, Bureau of State Lotteries*, 474 A.2d 266, 270 (Pa. 1983). (“Government licenses generally constitute a form of property insofar as they are an entitlement to engage in a valuable activity” creating a “right or entitlement which triggers procedural rights under the due process clause of the 14th Amendment.”) Moreover, the Pennsylvania Constitution itself, including sections 1 and 11 of Article I, provides a fundamental right to reputation, whereby “reputational harm alone is an affront to one’s constitutional rights.” See *In Re Fortieth Statewide Investigating Grand Jury, Nos. of Pennsylvania 2*, 571, 2018 Pa. D&C LEXIS 69 (C.P.

Allegheny Cty. June 5, 2018) (*quoting DC v. Department of Human Services*, 150 A.3d 558, 566 (Pa. Cmwlth. 2016)).

The adverse effect of indicated reports can be even more problematic when they are reported online and involve an unidentified perpetrator at a behavioral health facility. In situations involving an identified perpetrator, organizations, which are required to submit “corrective plans” to regulatory authorities, can take swift and decisive action, including but not limited to retraining staff, terminating an employee who is an indicated abuser or who failed to follow protocols, and even reviewing and revising policies and procedures. However, the suggestion that there is an unknown perpetrator renders it difficult if not impossible for the behavioral health organization to create meaningful “corrective plans,” much less take the type of swift and decisive steps that would demonstrate that the danger of repeat events has been removed or mitigated. For this reason, in the context of an unidentified perpetrator, it is all the more important to insure that the indicated report itself is correct. The unfortunate reality is that investigations of child abuse, particularly where no actual perpetrator is identified, are often undertaken by understaffed and overworked

county children and youth agencies, with or without the assistance of local police investigators. These investigators themselves may lack access to sophisticated resources and experts often required to properly evaluate complex medical issues, especially in the context of specialized behavioral health care situations. Accordingly, an extra level of scrutiny and access to appellate review is all the more important.

Prior to the 2013 amendments to the Child Protective Services Law when reports of abuse had to be directed to specific persons, there was always an avenue for appellate scrutiny, certainly by the individuals themselves or on their behalf with the support of the organizations by which they were employed. Now that the amendments permit indicated reports to be filed as against unnamed, unidentified perpetrators, the ability of an organization to challenge indicated reports of child abuse alleged to have occurred within their organization is unclear.

APPELLATE JURISPRUDENCE

The concerns identified above do not appear to have been addressed by the appellate courts in the commonwealth. However, there has been at least one



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instance in which an administrative appeal by a behavioral health organization of an indicated report of abuse by an unidentified perpetrator within its facility was dismissed based upon lack of jurisdiction. Although the identity of the participants is confidential, the administrative law judge in the case specifically held that “23 Pa. C.S. §6341(a)(2) clearly and explicitly states in order to be able to file an appeal, the appellant must be a person and the appellant must be named as a perpetrator of the abuse,” and further, that “only a person who is named as a perpetrator of child abuse has the right to a hearing.” If this decision is followed, it will undoubtedly have an adverse impact upon affected behavioral health organizations’ constitutional rights to property and reputation and, ultimately,

could unjustifiably impair the delivery of important services to children.

PROPOSED COURSE OF ACTION

Given the unfortunate prevalence of both behavioral health issues involving children and child mistreatment and abuse, it is obvious that our communities require both access to quality behavioral health services for children and an effective process through which child abuse can be investigated, reported and, where possible, prevented. However, these mutually important interests are not equally advanced by a system that permits the erroneous reporting of child abuse to adversely impact behavioral health organizations without affording them an opportunity to demonstrate that such reports are unfounded. The interests of quality behavioral health services and prevention of child abuse can only be advanced by ensuring the accuracy of investigations and indicated reports of child abuse. These important interests and the search for the truth can only be furthered by providing an opportunity for appellate scrutiny of investigations and indicated reports of child abuse involving organizations. Simply stated, our system of justice is not served by creating a mechanism by which investigative authorities are permitted to reach conclusions that impact organizations without affording them the right to appellate review. Not only does such a system allow for errors and incorrect conclusions, but it also potentially promotes and encourages investigative agencies to take shortcuts by choosing to simply label conduct as indicated abuse by unidentified perpetrators rather than taking the necessary steps to fully investigate a claim. Perhaps even more concerning is the potential that the ability to render indicated child abuse reports without the remedy of appellate review could itself become subject to abuse by members of agencies who may have ulterior motives.

The 2013 expansion of the Child Protective Services Act to include unidentified

perpetrators without similarly expanding organizations' appellate rights was likely an oversight by well-intentioned legislators who failed to fully consider the potential ramifications on quality behavioral health organizations. Indeed, the legislative history certainly does not suggest that consideration was given to the appellate process, much less that equivalent modifications were considered and actually rejected.

The General Assembly therefore is encouraged to review the Child Protective Services Law and consider explicitly expanding the appellate procedures to insure that not only persons, but also organizations potentially affected by indicated abuse reports, particularly involving unidentified perpetrators, may pursue an appeal and thereby subject such reports to an additional layer of scrutiny. The search for the truth is always a worthy endeavor. 



Laughlin

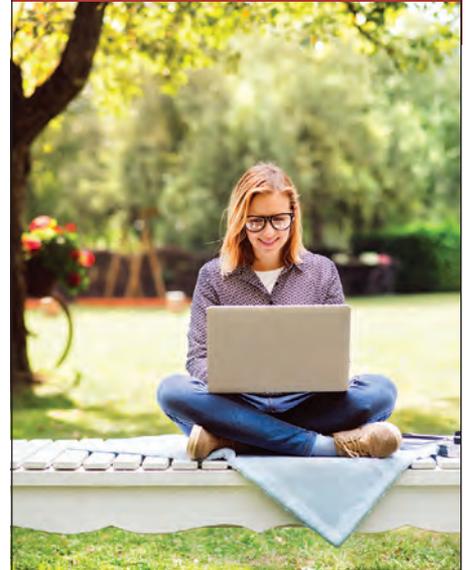


Banton

Paul F. Laughlin and William Banton Jr. co-chair the Behavioral Health Risk and Liability Practice Group at Marshall Dennehey Warner Coleman & Goggin. Health care liability attorney Donna Modestine and appellate attorney Audrey Copeland also contributed to this article. The authors may be reached at pflaughlin@mdwvcg.com or wlbanton@mdwvcg.com.

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