

## Understand limits to legal immunity in child abuse cases

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Pediatricians and pediatric subspecialists who report child abuse may assume that immunity provisions within state statutes protect them from lawsuits. However, parents are suing physicians under US Code 42§1983 for assisting state protective agencies with their investigations of child maltreatment allegations.

In post-Civil War torn 1871, violent acts against freed African-Americans were commonplace. To stem this violence, Congress passed the Anti-Ku Klux Klan Act of 1871 (also known as the Civil Rights Act of 1871), which afforded all American citizens a remunerative cause of action in federal court for violence perpetuated by KKK-type conspirators. Thus, the Civil Rights/Anti-KKK Act of 1871 became known as the “agent of peace” and was codified as US Code 42§1983.

The pertinent language of US Code 42§1983 states that a person “who, under color of any statute” causes any U.S. citizen to be deprived “of any rights, privileges or immunities secured by the Constitution” shall be liable to that party. More simply stated, a U.S. citizen has redress against another individual if: 1) that offender is a “state actor” (i.e., “acting under color of state law”), and 2) the offender’s action deprives the citizen of a “clearly established constitutional right” (such as the “right to privacy” under the 14th Amendment).

In recent decades, parents have used US Code 42§1983 to assert their right to violently discipline their children. These legal actions are referred to as “1983 suits.”

In *Backlund v. Barnhart* (9th Circuit, 1985), foster parents asserted that the Washington State Department of Social and Health Services interfered with their “right” to exercise their religious beliefs by spanking their foster child and sued under US Code 42§1983. The 9th Circuit, however, held that the foster parents failed to demonstrate a clearly established constitutional right.

A similar suit was filed in *Sweeney v. Ada County* (9th Circuit, 1997), where a parent asserted her right to strike her son with a belt on school grounds without law enforcement investigation of her conduct.

Currently, 1983 suits are being filed increasingly against pediatricians and pediatric subspecialists. Once an allegation of child abuse has been deemed unfounded by a state department or a court, caregivers are suing pediatricians (and investigative agents) for setting in motion a course of events that led to the deprivation of their constitutional rights (i.e., their “right to familial relations” under the 14th Amendment, right to privacy or their right to be free from unlawful search and seizure under the 4th Amendment, if the physician hospitalized the child during the initial social investigation).

In essence, pediatricians who are acting to protect children from violence are being sued pursuant to what historically has been known as an anti-violence statute.

Pediatricians may assume that immunity provisions within state child abuse reporting statutes protect them from such frivolous suits. However, it depends on the language of their state reporting statute, the extent of action taken by the pediatrician/pediatric subspecialist and the degree of uncertainty that remains about the abuse diagnosis.

Many state reporting statutes have vague or limited language about protected actions of mandatory reporters. In fact, then-U.S. Department of Health and Human Services Secretary Kathleen Sebelius submitted a report to Congress in 2013 outlining legal concerns with loopholes in the immunity provisions of

many state reporting statutes. She recommended that Congress broaden the immunity language in the Child Abuse Prevention and Treatment Act (CAPTA) to cover associated actions that go beyond the mere “making” of a report. Despite this recommendation, Congress did not alter the immunity language in the most recent CAPTA reauthorization bill, and these loopholes remain.

So what can pediatricians do to reduce their risk of being sued as they protect children from abuse and comply with state mandates to report abuse?

While 1983 suits are rare, pediatricians should recognize that we live in a litigious society and take the following steps to protect themselves:

- Be a steadfast advocate, at both federal and state levels, for legislative change to the immunity provision language of reporting statutes.
- Carefully review your state reporting statute. When reporting abuse, ensure your actions and documentation are in accordance with the statutory language (i.e., formal notification, documentation, provide records only within statutory framework, etc.).
- When issues/questions arise in suspected child maltreatment cases, in reporting abuse or in interactions with state protective agencies, it may be prudent to consult with a child abuse specialist, hospital counsel or both.
- Review your malpractice insurance policy and have a detailed discussion with hospital counsel or your insurance carrier about the scope of your activities that are covered, whether civil actions such 1983 suits are covered under the malpractice policy and the limitations of coverage.

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