Child Abuse Report Required or Permitted?

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In the February 2008 Avoiding Liability Bulletin, I asked a series of questions regarding a particular child abuse reporting issue. In the article – "Think About This - Child Abuse?" – the following scenarios were described:

… A parent smokes marijuana (one time) in front of her 17-year old daughter and tells her therapist about this. Is a child abuse report required? Is a child abuse report permitted?

… A parent snorts a line of cocaine (one time) in front of her 17-year old daughter and tells her therapist about this. Is a child abuse report required? Is a child abuse report permitted?

… What if the child in the questions above is an 11-year old daughter? Do any of your answers change?

I invited e-mail comments and requested that they be sent to CPH and Associates for forwarding to me. I stated that I would report on the nature and extent of the responses and viewpoints expressed. This is done below. Additionally, I offer my viewpoint on these scenarios and the questions asked regarding child abuse reporting.

Each state has its own law on the reporting of child abuse, and while these laws have many similarities, there are differences – and the differences matter. They matter because reporting or failing to report has significant consequences, both for the patient and for the therapist or counselor. The following discussion of the questions and answers should be viewed as educational material (and something to consider) rather than advice on any particular reporting issue – since state laws vary, sometimes in fine nuance affecting reporting questions and decisions.

It is possible that some state(s) may have enacted, or may soon enact, a specific statute that directly addresses one or more of the situations described above. An attempt to do that recently occurred in California, but the bill did not become law. It would have seemingly made cocaine use in front of a child reportable as child abuse, but not reportable if marijuana was used. Thus, it would be important to ascertain whether your state law contains a specific provision that directly addresses drug use in front of a child as reportable child abuse or an otherwise reportable event.

When a difficult reporting question arises, it is usually quite useful to call child protective services (or another agency that receives reports) and ask them what they think about the need to report in a particular circumstance. In fact, one of the email respondents to these hypothetical questions mentioned this important advice. It is also important for practitioners to document their records as to the call and the advice or opinion given. If the person at child protective services says that the situation is reportable, it would be wise to ask that person to specify the section of the reporting law

that he or she is relying on to conclude that a report is required. The same approach can be taken with advice not to report. In other words, it is a good idea, in my view, to press for a rationale and to document it in the records.

Using drugs in front of a child would not typically fall under the categories of either physical abuse or sexual abuse. Most, if not all, states have some kind of a child endangerment statute. In one state, for example, the statute describes a situation in which any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation in which his or her person or health is endangered. In my view, the one time use of marijuana or cocaine in front of the daughter, regardless of the age of the daughter, does not endanger the daughter's health or person. The fact of the one time use and the disclosure of that fact in therapy help to persuade me that the mother's acts were not willful (perhaps they were negligent or thoughtless) and that she is not a child abuser.

Some states may have laws that permit, but do not require, a child abuse report for what may be called or referred to as "emotional abuse." One state's definition of this term previously included situations where the health practitioner reasonably suspected that mental suffering had been inflicted upon the child or that his or her emotional well-being was endangered in any other way. Even under that broad provision, it would be my view that a report should not be made. Since reporting is not mandated, I would opt for confidentiality and continued treatment.

It is also arguable that a report is not permitted, and if one were to make a report, it could be argued that the report constituted a breach of confidentiality. The one time use of a drug in front of a child would not, in my view, result in an endangerment to the child's emotional well-being, especially if the mother is apparently dealing with her behavior in therapy. Interestingly, the broad definition of "emotional abuse" in that state has since been amended. The law now requires that the health practitioner have a reasonable suspicion that the child is suffering serious emotional damage or is at a substantial risk of suffering serious emotional damage. Even in such circumstance, a report is permitted or authorized – but not required - in that particular state.

Typically included in the definition of child abuse is neglect, which generally requires that a child abuse report be made. Neglect is sometimes subdivided into "severe neglect" and "general neglect." Without exploring the definition of "severe neglect," it is safe to say that the situations described above are not likely to fall within the definition of "severe neglect." "General neglect" may be defined as the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care or supervision. It also might typically require, in order for a report to be mandated, the existence of a situation indicating harm or threatened harm to the child's health or welfare. Once again, the one time use of the drug and the disclosure to the therapist would argue, in my view, against reporting. In my view, there was no failure to provide adequate supervision and there was no threat of harm to the child's health or welfare. Inadequate supervision might typically be evidenced by repeated falls down stairs, repeated ingestion of

harmful substances, the child being left alone in the home, or the child being cared for by another child rather than the parent.

Thus, it is my view that the answer to all of the above questions posed is “no.” Even if one were to argue that one or more of the situations described were permissible to report, the facts of the case, in my view, call for the therapist to respect the patient’s expectation of confidentiality. The real danger for therapists and counselors occurs when they fail to make a report that is later determined to have been required. Those who fail to make permissible reports, however, should be protected were there to be future, unanticipated harm to the child. And finally, let me remind the readers that each state law and state practice may treat this subject matter differently. Our discussion of this subject matter is not intended as legal advice, but rather to alert you to the issue so that you can pursue the matter further should you need or desire to do so.

Several of the e-mail responses, although a bit off-point, generally related to drug use by parents and were nevertheless interesting and appreciated. Thanks. None of the six responses attempted to answer all of the questions asked. One respondent (the same one referred to earlier in this article) offered that in these kind of situations, there is a need to assess the level of drug use and its effects on the child, the need to determine if the one-time drug use occurred in a car, and suggested more caution and more care in the assessment of endangerment or risk to the eleven-year old. Good thoughts, because if the facts change substantially, so too might the responses!

Author:
Richard Leslie