



# Representing Families of Children with Diabetes Facing Child Abuse and Neglect Investigations

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A resource for attorneys to gain a basic understanding of child protective services agencies and their processes for conducting investigations including a discussion of strategies and case law to consider when child abuse and neglect reports are made in bad faith.

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## **Contents**

I.	Introduction.....	1
II.	Basic Information on Diabetes.....	2
III.	The Role of Child Protective Services .....	4
A.	The CPS Process and Investigation .....	4
1.	Determining the validity of a report made to CPS.....	4
2.	Timeframe for completing the investigation.....	5
3.	Powers granted to CPS investigators .....	6
4.	Evidentiary standard for CPS investigations.....	8
5.	Appealing a CPS finding of substantiation .....	9
IV.	The Legal Definition and Interpretation of What Constitutes Abuse and Neglect .....	10
A.	Medical Neglect .....	11
B.	Educational Neglect .....	13
V.	Considerations when a Report to CPS is made in Bad Faith .....	14
A.	Retention and Access to CPS records .....	14
B.	Reports to CPS made in Retaliation for Asserting Rights .....	14
1.	Diabetes as a protected disability under federal law .....	14
2.	Anti-retaliation provisions under Section 504 and the ADA .....	15
3.	Establishing a prima facie case of retaliation.....	16
VI.	Conclusion .....	20

## **I. Introduction**

Parents and guardians of children with diabetes strive to keep life as normal as possible for their children. They have to work closely with their children's school and doctor in order to ensure that they are properly cared for while they are at school and so that transition from home to school goes as smoothly as possible. While diabetes care can be relatively simple for the well-trained individual, not everything can go smoothly all of the time. How diabetes will impact a particular child cannot be predicted or generalized. In addition, there are outside environmental, social and psychological circumstances that can have an impact on the overall wellbeing of children with diabetes.

Diabetes is a chronic medical condition for which there must be constant monitoring and around-the-clock care. Students with diabetes can have more medically necessary absences due to illness or medical appointments than students without diabetes. They also may need additional diabetes care support or accommodations which can feel burdensome to some school administrators. Ideally, school administrators will be well educated about diabetes and will work with the parents or guardians of students with diabetes to minimize class absences while ensuring the student's diabetes is well managed. In reality, misconceptions about diabetes can often lead to tensions and misunderstandings that can culminate in well-meaning, but unfounded, accusations of child abuse and neglect or in malicious reports of abuse and neglect.<sup>1</sup>

A primary reason why a report of suspected child abuse and neglect is made for a child with diabetes is due to suspected unattended health care problems or medical needs. 16% of all child abuse and neglect reports in the U.S. are made by educators.<sup>2</sup> Making sure that school staff is educated about diabetes and maintaining good communication between the school and the child's parent or guardian is the best way to prevent unfounded accusations of child abuse and neglect.

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<sup>1</sup> Common misconceptions about diabetes include, but are not limited to: 1) children with diabetes cannot eat sugary snacks; 2) it is the parent's fault that the child's blood sugar is "out of control;" or 3) attendance problems are not really related to diabetes but rather the parent is allowing the child to miss school. Misconceptions are addressed further throughout the rest of this paper.

<sup>2</sup> Inst. of Med. & Nat'l Research Council, *New Directions in Child Abuse and Neglect Research*, 45 (Anne C. Petersen et al. eds., 2014).

When a child abuse and neglect investigation is initiated for a child with diabetes, it's important that the attorney representing or advising the family involved understand that defending these types of cases requires three critical components: 1) a general knowledge of the medical condition of diabetes; 2) knowledge of the particular student's medical history and unique diabetes needs (gathered from the family and child's health care provider); and 3) knowledge of the state's child abuse and neglect laws as well as federal anti-discrimination protections that may apply.

This paper is designed to provide general information about diabetes, child welfare laws and procedures, and available legal protections in the context of federal anti-discrimination laws that prohibit retaliation. This paper focuses on child abuse and neglect referrals made by educators or school officials. However, most principles referenced here also apply to reports of child abuse and neglect from other sources. It is important to note that this paper is not intended to be used for the purpose of interfering with the work that child protective agencies do in protecting children who are actually experiencing medical neglect.

## **II. Basic Information on Diabetes**

Diabetes is a serious chronic medical condition in which the body does not make insulin or does not correctly use insulin. Insulin is a necessary hormone that helps turn the food we consume into energy for the body. When insulin is not produced or not used effectively by the body, the results are high levels of glucose (or sugar) in the blood. This happens because the glucose cannot get into the cells that need it and, instead, it builds up in the bloodstream.<sup>3</sup>

Diabetes is classified into different types. The most common forms are type 1 and type 2 diabetes. In type 1 diabetes, the body's immune system mistakenly destroys the insulin-producing cells of the pancreas. As a result, the body produces very little or no insulin at all. In type 2 diabetes, the body does not respond properly to insulin (insulin resistance) or the body

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<sup>3</sup> Kate Ruder, *American Diabetes Association Complete Guide to Diabetes*, 7-21 (Abe Ogden ed., 5th ed. 2011).

does not produce enough insulin.<sup>4</sup> The majority of youth with diabetes, have type 1 diabetes. However, the prevalence of youth with type 2 diabetes has gone up in recent years.<sup>5</sup>

Diabetes can lead to both short-term and long-term complications. Short-term problems can include high (hyperglycemia) or low (hypoglycemia) blood glucose levels that significantly affect the person's ability to concentrate and learn, and can cause serious immediate consequences such as brain damage or death if not treated. In addition, diabetes can cause serious complications that develop over time (such as vision problems and kidney disease), but people with diabetes can take steps to control the disease and lower the risk of complications.<sup>6</sup>

Children with diabetes can face daily struggles related to diabetes which can lead to false CPS reports. The following are some examples of these daily struggles:<sup>7</sup>

- Bruising at the site where insulin is injected or blood glucose is tested
- Frequent absences from school [to treat diabetes or attend doctor appointments]
- Sudden weight loss due to diabetes
- Difficulty concentrating, drowsiness or other symptoms of low or high blood sugar
- High or low blood sugar levels due to hormones or other factors such as other illnesses
- Taking extra insulin so the child can enjoy sweets or other foods like other children

To learn more about diabetes and diabetes care, see the following resources:

- [Diabetes Care in the School Setting: A Position Statement of the American Diabetes Association](#)
- [National Institute of Diabetes and Digestive and Kidney Diseases, \*Helping the Student with Diabetes Succeed: A Guide for School Personnel\*](#)
- [Every Day Life](#) (American Diabetes Association's resources to help families navigate life after their child is diagnosed with diabetes)

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<sup>4</sup> See *id.* at 25-36.

<sup>5</sup> For more information on diabetes statistics see, Centers for Disease Control and Prevention, National Diabetes Statistics Report: Estimates of Diabetes and Its Burden in the United States (2014), available at <http://www.cdc.gov/diabetes/pubs/statsreport14/national-diabetes-report-web.pdf>

<sup>6</sup> James A. Rapp et al., *Legal Rights of Students with Diabetes* (3rd ed. 2015), <http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/education-materials/legal-rights-of-students-with-diabetes/legal-rights-of-students-with-diabetes.pdf>.

<sup>7</sup> *Child Protective Services*, Am. Diabetes Ass'n, <http://www.diabetes.org/living-with-diabetes/parents-and-kids/diabetes-care-at-school/special-considerations/child-protective-services.html> (last visited Oct. 5, 2016).

### **III. The Role of Child Protective Services**

Child Protective Services (CPS) is a general term that refers to the state agency charged with protecting the children of that state from abuse and neglect in accordance with that state's child welfare laws and regulations. Each state has its own CPS agency and may have a different name for its agency (e.g. Child and Family Services, Department of Family Services, etc.). Most CPS agencies are responsible for receiving and investigating reports that a child is at risk for abuse or neglect, and providing services to prevent further abuse. Once a CPS referral is made and an investigation is started, the stakes are very high for families of children with diabetes enthralled in a CPS investigation.

A CPS referral is only the first step in the process of protecting children. Eventually, a CPS report can lead to, without limitation:

- Removal of the child from the home;
- The requirement for completion of a service plan before reunification is allowed;
- Inclusion of the alleged perpetrator in a state registry or database if a finding of child abuse and neglect is made;<sup>8</sup>
- Termination of parental rights after a petition is filed in state court; and
- Referral to law enforcement agencies for criminal prosecution.

#### **A. The CPS Process and Investigation**

##### **1. Determining the validity of a report made to CPS**

Some states will have established by statute the threshold criteria for determining which reports of abuse and neglect will be investigated by CPS and which will not. This is a different standard than that used to determine whether a report is substantiated or unsubstantiated,<sup>9</sup> which also varies by state. For example, in Virginia, only “*valid*”

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<sup>8</sup> Michigan, for example, has a mandatory Child Abuse and Neglect Central Registry where perpetrators' names are listed in cases that CPS categorizes as Level I or Level II (Category II involves cases in which the department determines that there is a preponderance of evidence of child abuse or neglect and the risk assessment indicates a high or intensive risk. Category I cases are those in which the department determines that there is a preponderance of evidence of child abuse or neglect and a court petition is needed and/or required.) *Children's Protective Services Investigation Process*, Mich. Dep't of Health and Human Services, [http://www.michigan.gov/mdhhs/0,5885,7-339-73971\\_7119\\_50648\\_7194-159484--00.html](http://www.michigan.gov/mdhhs/0,5885,7-339-73971_7119_50648_7194-159484--00.html) (last visited Oct. 5, 2016).

<sup>9</sup> The terms “substantiated” and “unsubstantiated” refer to the final CPS disposition at the end of its investigation (i.e., the report is substantiated or unsubstantiated). It establishes whether child abuse and neglect has occurred. Substantiation may also be referred to as founded, indicated or confirmed. U.S. Dep't of Health & Human Services,

reports are investigated. A valid report in Virginia requires that the following elements be present: 1) the alleged victim is under the age of eighteen; 2) the alleged abuser is the alleged victim child's parent or other caretaker; 3) the local department receiving the complaint or report has jurisdiction; and 4) the circumstances described allege suspected child abuse or neglect. Va. Code Ann. § 63.2-1508 (2016). In other states, the CPS agency establishes screening policies for CPS workers to be able to decide which reports should be screened in or out.

A good starting point to determine your state's process is the Child Welfare Information Gateway. This is a service of the U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. This Gateway compiles all state publications (guides and manuals) related to child protection that states make available to professionals and families. The State Guides and Manuals search is available at this link <https://www.childwelfare.gov/topics/systemwide/sgm/>.

## **2. Timeframe for completing the investigation**

CPS agencies are usually required to complete the investigation and make a determination of whether the report is substantiated or unsubstantiated within a specific timeframe. The consequences of failing to complete an investigation within the statutory timeframe vary from state to state. Attorneys should familiarize themselves with the required procedures that CPS must follow and gather any evidence of failure to comply with those procedures. This evidence could be relevant on appeal or might be worth citing to when making the argument that a complaint should be dismissed. There could also be more complex arguments under the state's Administrative Procedure Act that might be worth exploring in instances where there might be agency action in excess of statutory authority.

By way of illustration, in Virginia, a CPS investigation must be completed within 45-60 days from the date of the report and that timeframe can be extended to 90 days when the investigation is being conducted in cooperation with law enforcement. Va. Code Ann. § 63.2-1505(B)(5) (2016). In Virginia, a failure to comply with the statutory timeframe by

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Admin. for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, *Child maltreatment 2014*, 17 (2016), <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment>

the CPS agency is only helpful on appeal if the appellant can show some harm or prejudice. The Court of Appeals of Virginia found that,

“[w]hen considering whether a local department of social services loses jurisdiction to make a determination of abuse by not making such a determination within 45 days of receiving a referral, as required by Va. Code Ann. § 63.2-1505(B)(5), it has been held that the word "shall" is procedural, not jurisdictional. Because the time limitation is procedural, a party contesting a determination must show some harm or prejudice caused by a failure to file a written justification to extend the time for filing before a trial court may reverse the determination.”

*Travis v. Va. Dep't of Soc. Servs.*, 2013 Va. App. LEXIS 261 (Va. Ct. App. Sept. 24, 2013).

### **3. Powers granted to CPS investigators**

CPS investigators are granted wide discretion to conduct interviews, survey and even photograph the alleged victim's living conditions, question alleged victims without the presence of the parent or caregiver, arrange for a medical evaluation of the alleged victim (without needing parental/caregiver consent) and petition a court of law for various orders as needed.

CPS investigations, however, still must be conducted within the confines of the Fourth Amendment. Parents/caregivers may refuse to allow CPS to interview their children and they may also refuse to allow CPS to enter their home. Absent exigent circumstances, CPS will then have to petition a court of law for an order to gain access to the child and/or the home. Also, depending on the state, the parent or caregiver may have the right to record any communications between the parent or guardian and CPS. For example, Virginia allows electronic recording of communications between CPS and parents as long as all parties are aware of the recording. Va. Code Ann. § 63.2-1516 (2016). Not all states allow this type of recording. Before advising parents or caregivers to engage in this action, attorneys need to carefully review the state rules regarding recording of communications between parents or caregivers and CPS.

***a) Criminal prosecution***

Certain types of suspected abuse or neglect may require a report to law enforcement or referral to a prosecuting attorney such as when the alleged victim of child abuse and neglect dies or suffers a serious injury. In fact, in many states, CPS and law enforcement officials conduct joint investigations.<sup>10</sup> In New York, for example, the statute makes it clear that a child abuse and neglect case can be transferred by the family court, upon a hearing, to an appropriate criminal court or the family court may refer the case to the appropriate district attorney if the court “concludes that the processes of the family court are inappropriate or insufficient.” N.Y. Family Court Act § 1014 (Consol. 2016).

When there is evidence of certain criminal acts, CPS agencies may also be required to petition a court for removal of the child from the home. It is usually at the point when a dependency petition is filed in court that the parent or guardian will have a right to a court appointed attorney, but the family can always retain an attorney at any point of the investigation.

The National District Attorneys Association’s National Center for Prosecution of Child Abuse publishes a compilation of all criminal statutes listed by state that apply in instances of alleged child abuse and neglect. The most recent compilation titled, “Criminal Child Neglect and Abandonment” is available at the following link under the “Child Neglect” section:

[http://www.ndaajustice.org/ncpca\\_state\\_statutes.html](http://www.ndaajustice.org/ncpca_state_statutes.html). For a compilation of state statutes that allow for the termination of parental rights due to child neglect, click on the document titled, “Child Neglect and Termination of Parental Rights.”

***b) Emergency Protective Custody***

It is important to know that in cases deemed to be an emergency, CPS may have authority to take protective custody of a child by requesting an ex parte order from a judge. In Pennsylvania for example, where medical or protective custody

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<sup>10</sup> Inst. of Med. & Nat’l Research Council, *supra*, at 58.

is necessary, the CPS investigator can take custody of a child by seeking “judicial authorization based on the merits of the situation.” 23 Pa. Cons. Stat. § 6315(a)(5) (2016). The Pennsylvania Office of Children in Families in the Court has interpreted this statute to mean that a verbal authorization from a judge over the phone meets the requirements of the statute. According to their website, “[i]n cases where medical or police protective custody is necessary, the procedure used in many counties is for the caseworker or supervisor with the agency to telephone a judge to request a verbal order. A police officer at the scene may also request confirmation over the phone as to the verbal order.”<sup>11</sup> In addition, the state law can ultimately mandate that CPS initiate a request to terminate parental rights.

#### **4. Evidentiary standard for CPS investigations**

The evidentiary standard for a CPS finding that an allegation is substantiated varies by state. According to the Administration for Children and Families, substantiation is found when the answer is “yes” to two important questions:

1. “Is the harm to the child severe enough to constitute child maltreatment?”<sup>12</sup> This part of substantiation can include both current harm and the risk of harm in the future.
2. Is there sufficient evidence to support the designation of the case as one of child maltreatment?”<sup>13</sup>

The majority of states require a preponderance of the evidence to substantiate an allegation of child abuse or neglect. Only Kansas places a higher evidentiary burden on these investigations requiring clear and convincing evidence. Arizona is the only state that requires probable cause and six states (HI, LA, MA, OR, UT, VT) use the reasonable person standard.<sup>14</sup> According to research findings, the level of evidence required

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<sup>11</sup> *Court Processes*, Office of Children in Families in the Court, <http://www.ocfcpacourts.us/system-professionals/child-dependency-system/court-processes> (last visited January 18, 2017).

<sup>12</sup> The term “child maltreatment” is a general term that is meant to encompass all forms of child abuse. Alexander Butchart and Alison Phinney Harvey, *Preventing Child Maltreatment: a guide to taking action and generating evidence*, World Health Organization and International Society for Prevention of Child Abuse and Neglect, 9 (2006).

<sup>13</sup> Office of Planning, Research and Evaluation, Admin. for Children and Families, U.S. Dep’t of Health & Human Services, *National Survey of Child and Adolescent Well-Being Research Brief No. 6: How Do Caseworker Judgments Predict Substantiation of Child Maltreatment?*, 1 (2007).

<sup>14</sup> See *Child maltreatment 2014*, *supra*, at 110.

correlates with the numbers of findings of substantiation. In 2007, the states with the least strict evidentiary standard found the most cases of substantiation while the states with the strictest evidence requirements reported the fewest cases of substantiation.<sup>15</sup>

In practice there are many factors that have been found to increase the likelihood of substantiation. For example, incident severity, history of prior referrals, caregiver denies there is a problem, and where the referral came from a professional such as police officer or school administrator. On the other hand, factors that are associated with an increased likelihood of unsubstantiation are: no history of prior referrals, acknowledgement of problem, use of community resources, and non-professional referral source.<sup>16</sup>

The type of evidence that may be relied upon in order to make a finding of substantiation is sometimes limited as well. In New Jersey, for example, in a fact-finding hearing CPS must prove abuse or neglect by a preponderance of the evidence and requires that only "competent, material and relevant evidence" may be admitted. N.J. Stat. Ann. § 9:6-8.46 (2016). Evidence that is not competent, material or relevant must be challenged at the first instance or risk losing the opportunity to raise it as a basis of error on appeal. *See*, N.J. Div. of Child Prot. & Permanency v. C.M., 2015 N.J. Super. Unpub. LEXIS 549, at \*8-9 (App.Div. Mar. 13, 2015).

### **5. Appealing a CPS finding of substantiation**

All states should have a mechanism for parents or caregivers who disagree with an official finding of abuse or neglect to appeal that finding. Usually, the party can petition for administrative review. There should also be a right to judicial review of any adverse administrative finding. In Connecticut for example, there is a two-step appeal process for substantiated claims of child abuse and neglect. Conn. Gen. Stat. § 17a-101k (2016). During this appeals process, the individual is also provided access to all documents relevant to the substantiation finding that are in the possession of CPS. *Id.* at § 101k(c)(1).

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<sup>15</sup> Inst. of Med. & Nat'l Research Council, *supra*, at 371.

<sup>16</sup> Child Welfare Info. Gateway, *Decision-Making in Unsubstantiated Child Protective Services Cases: Synthesis of Recent Research*, 4 (2003).

Refer back to your state rules to determine the applicable deadlines and required procedures for the appeal process, including which steps may be optional and which may be required in order to exhaust all administrative remedies before going to court.

#### **IV. The Legal Definition and Interpretation of What Constitutes Abuse and Neglect**

Each state has its own definition of child abuse and neglect. However, the Child Abuse Prevention and Treatment Act (CAPTA) provided minimum standards for what constitutes child abuse and neglect which states used to craft their own statutory definitions. This was mostly due to the fact that CAPTA provided, and still does provide, federal funding for states in support of prevention, assessment, investigation, prosecution, and treatment activities. These funds were only available to states that complied with certain requirements established by CAPTA which included having a state law that includes the minimum standards set by CAPTA in its statutory definition of child abuse and neglect.<sup>17</sup> As a result of CAPTA, most states define child abuse and neglect to include at least “any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation” or “an act or failure to act which presents an imminent risk of serious harm.”<sup>18</sup>

Most states recognize four major types of maltreatment: neglect, physical abuse, psychological maltreatment, and sexual abuse. This paper is focused only on *neglect*, which can include *educational neglect* (recognized in 25 states,<sup>19</sup> the District of Columbia, the U.S. Virgin Islands and American Samoa) or *medical neglect* (recognized in 14 states<sup>20</sup>), and sometimes physical abuse as well.<sup>21</sup> Physical abuse is included here because there are some states that define *physical abuse* to include physical injury or the threat of substantial risk of harm.<sup>22</sup>

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<sup>17</sup> Child Welfare Info. Gateway, *About CAPTA: A Legislative History* (2011).

<sup>18</sup> Child Welfare Info. Gateway, *Definitions of Child Abuse and Neglect: State Statutes* (2016), available at <https://www.childwelfare.gov/pubPDFs/define.pdf#page=2&view=Types%20of%20abuse>.

<sup>19</sup> Some form of *educational neglect* is recognized in: Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, and Wyoming.

<sup>20</sup> Some form of *medical neglect* is recognized in: Arkansas, Florida, Indiana, Iowa, Kansas, Minnesota, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Tennessee, Texas, and West Virginia.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Inst. of Med. & Nat'l Research Council, *supra*, at 364.

## **A. Medical Neglect**

What is considered medical neglect varies from state to state and changes depending on the age and developmental stage of the child. CAPTA also does not provide a definition for medical neglect. CAPTA simply requires that states include, in their state plans, an assurance that the state has in place procedures for responding to the reporting of medical neglect. 42 U.S.C. § 5106a(b)(2)(C) (2016). Specifically, it requires that all states give authority to CPS agencies to “pursue any legal remedies, including the authority to initiate legal proceedings in a court of competent jurisdiction, to provide medical care or treatment for a child when such care or treatment is necessary to prevent or remedy serious harm to the child . . .” *Id.* at § 5106i(b).

Medical neglect can encompass the denial of needed health care or delay in seeking care. It can also include the failure to provide medical care, as recommended by a doctor, for a medical condition. In Texas, for example, medical neglect is defined as “failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child.” Tex. Fam. Code § 261.001(4)(A)(b) (2016). According to the Child Welfare Information Gateway, Florida, Michigan, Minnesota, Missouri, Ohio, Oklahoma, and Pennsylvania are the only states that require mandated reporters to report instances when a child is not receiving medical care.”<sup>23</sup>

One case out of California can shed some light on how a referral to CPS for medical neglect of a child with diabetes makes its way through the system.<sup>24</sup> This case involved a referral to CPS alleging that an 8 year old named Vanessa was not receiving her medication for diabetes, was not eating properly, always had head lice, and was always absent from school. The first referral to CPS resulted in the family receiving some services and agreeing to take some corrective actions. The case was closed by CPS within two months of receiving the referral. *V. v. Esther O.*, 2005 Cal. App. Unpub. LEXIS 3327, at \*4-5 (Cal. App. 5th Dist. Apr. 14, 2005).

A few months later, a second referral was made alleging the parent was not sending Vanessa’s diabetes supplies to school, the child was dirty and again had head lice. This second referral was deemed substantiated. During the investigation CPS discovered that the parent was

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<sup>23</sup> Child Welfare Info. Gateway, *Definitions of Child Abuse and Neglect: State Statutes*, 4 (2016).

<sup>24</sup> This is an unpublished opinion from the California Court of Appeal, Fifth District. The facts of this case are cited here only for illustrative purposes.

overwhelmed, suffered from depression and failed to realize the seriousness of the child's health condition. Another telling fact was that Vanessa had missed 81 out of 105 days of school that school year. *Id.* at \*6. This second referral resulted in CPS removing the child from the home and placing her in foster care. The report by CPS found that the parent failed to monitor the child's blood glucose levels, failed to make sure she received a proper diet and failed to properly administer insulin. *Id.* at \*7. A case plan was put in place for eventual reunification as long as there was compliance. Vanessa spent six months in foster care before she was returned to her parents and the family spent another 10 months being monitored by CPS before the case was closed. *Id.* at \*7-9.

A third referral was made a short time later alleging that the parent continued to send the child to school without breakfast and without her insulin and that she continued to have high blood sugar levels. The allegations were again substantiated and a case plan was put in place. Vanessa was again being sent to school without her carbohydrate snack. *Id.* at \*9. During a home visit, a social worker noted that there were several candy bars and junk foods present which were harmful to Vanessa and that two bottles of insulin were kept at room temperature instead of in the refrigerator. *Id.* at \*10. During another home visit, the child was found visibly ill and was removed from the home. The court adjudged the child a dependent child due to the parent's medical and hygienic neglect. She remained in foster care for a year and then was returned to her parents again under a family maintenance plan. *Id.* at \*10-11. Two months later, a petition was filed again by CPS to adjudge Vanessa a dependent child due to the parent's failure to comply with the family plan. *Id.* at \*13. The court found the allegations to be true and adjudged the child a dependent again setting a hearing for a future date for the matter of establishing a legal guardianship for the child's foster parents. *Id.* at \*30.

In the case above there were serious issues with the parents' ability to care for their child. However, there could be instances where a CPS investigation is initiated based on unfounded and misinformed accusations. Distinguishing those facts will be very important and it is crucial to do so at the earliest possible stage in order to avoid a drawn out child welfare process such as the one Vanessa suffered through.

It is also important to study your state's definition of neglect in order to assess whether a CPS agency may have in place standards to make medical neglect findings that overstep the statutory

definition or are wrongly applied in investigations involving alleged medical neglect of a child with diabetes. Again, diabetes is an often misunderstood medical condition and investigators who are entirely ignorant about diabetes may not be employing the correct medical standards. The Child Welfare Information Gateway is a helpful tool to find your state's statutory definition of neglect. The Gateway compiles all state laws in one place. This information can be searched at this link <https://www.childwelfare.gov/topics/systemwide/laws-policies/state/?CWIGFunctionsaction=statestatutes:main>

## **B. Educational Neglect**

Educational neglect refers to parents or caregivers who are suspected of permitting habitual absenteeism from school. It can also involve failure to enroll or register a child for school.<sup>25</sup> According to the Child Welfare Information Gateway, approximately 25 states, the District of Columbia, American Samoa, Puerto Rico, and the Virgin Islands recognize educational neglect or failure to educate in their neglect statutes.<sup>26</sup> In the diabetes context, suspected educational neglect is often the initial red flag that can lead a school to make a report to CPS.

Families of children with diabetes often face tremendous challenges with maintaining optimal blood glucose control. There are many factors that can influence a child's diabetes control. For example, when children reach puberty, diabetes management and blood glucose controls become more difficult.<sup>27</sup> Parents or caregivers, together with their physician, may be doing all they can to help the child maintain blood glucose levels within their optimal range. However, for some children, diabetes results in chronic absenteeism or tardiness due to low or high blood sugar levels.<sup>28</sup>

A child missing school due to problems with diabetes management might have nothing to do with educational neglect as defined under the law, yet school officials may suspect otherwise and

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<sup>25</sup> U.S. Dep't of Health & Human Services, Admin. for Children and Families, Admin. on Children, Youth and Families, Children's Bureau, Child Neglect: A Guide for Prevention, Assessment and Intervention 14 (2006) .

<sup>26</sup> The states that define "failure to educate" as neglect include Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Kentucky, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota, Utah, West Virginia, and Wyoming. Child Welfare Info. Gateway, Definitions of Child Abuse and Neglect 2 (2014).

<sup>27</sup> For a comprehensive view of major developmental issues and their effect on diabetes in children and adolescents see, Jane L. Chiang et al., Type 1 Diabetes Through the Life Span: A Position Statement of the American Diabetes Association 2037 (2014).

<sup>28</sup> To learn more about attendance accommodations for students with diabetes, see the American Diabetes Association's Fact Sheet – Diabetes and School Attendance, available at <http://www.diabetes.org/living-with-diabetes/parents-and-kids/diabetes-care-at-school/special-considerations/attendance.html>

feel they are obligated to make a report to CPS. Mandatory reporters can face criminal and civil liability for failing to report suspected child abuse and neglect. Of the total 1,293,359 reports of child abuse and neglect received by CPS agencies in the country in 2014, 17.7% were made by education personnel while 9.2% were made by medical personnel.<sup>29</sup>

## **V. Considerations when a Report to CPS is made in Bad Faith**

Most states grant immunity to people who, in good faith, make a report of suspected child abuse and neglect. However, reports made with malicious intent or in bad faith do not qualify for immunity.

### **A. Retention and Access to CPS records**

If CPS determines a report is unfounded, records of the investigation are usually kept only for a limited amount of time. It's important to be aware of the retention policies in your state in the event the family wants to pursue legal options against the person or entity that submitted the bad faith report. Access to the CPS file may be essential in bringing those claims. There may be a mechanism to request retention of unfounded case files for a longer period of time. For example, in Virginia, the statute requires the local department to “retain such records for an additional period of up to two years if requested in writing by the person who is the subject of such complaint or report.” Va. Code Ann. § 63.2-1514(B) (2016).

Virginia also provides that any person who is the subject of an unfounded report can petition the court for the release to such person of the records of the investigation or family assessment. The court may release those records if it finds there is a reasonable question of fact as to whether the report or complaint was made in bad faith and the disclosure of the identity of the person who made the report would not be likely to endanger the life or safety of that person. *Id.* at § 63.2-1514(D).

### **B. Reports to CPS made in Retaliation for Asserting Rights**

#### **1. Diabetes as a protected disability under federal law**

Students with diabetes are protected against discrimination under several federal laws including both the Americans with Disabilities Act (ADA) and Section 504 of the

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<sup>29</sup> See Child maltreatment 2014, *supra*, at 13.

Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (2016), (Section 504). The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) amended the ADA by, among other things, amplifying the non-exhaustive list of activities that are considered “major life activities.” It states that “major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A) (2016). The ADAAA also amended “major life activities” to include “the operation of a major bodily function, including but not limited to, functions of the . . . endocrine” system. *Id.* at § 12102(2)(B). The ADAAA also included an amendment to the Rehabilitation Act of 1973 that affects the meaning of disability in Section 504. Under Section 504 regulations, diabetes meets the legal definition of a disability as a “physical . . . impairment that substantially limits one or more major life activities.” 34 C.F.R. § 104.3(j) (2016). The definition of physical impairment includes any condition affecting the endocrine system. *Id.* at § 104.3(j)(2)(i). Because diabetes always affects the endocrine system, this broader interpretation of what constitutes a qualifying disability made it so that it is virtually impossible to deny that diabetes meets the definition under the law.

## **2. Anti-retaliation provisions under Section 504 and the ADA**

Section 504 and the ADA give certain rights to students with diabetes and place certain obligations on public schools and also on private schools that receive any form of federal funding, even if indirectly. Religious schools that do not receive any federal funds are not covered by either law.<sup>30</sup> When a student’s parent or caregiver asserts those rights or makes a complaint challenging potential violations of those rights, they are protected against retaliation. Courts have established that the standard for retaliation claims under The Rehabilitation Act and the ADA is the same. *See, Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2010); *Mershon v. St. Louis Univ.*, 442

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<sup>30</sup> “The provisions of this subchapter shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship.” 42 U.S.C. § 12187 (2016).

F.3d 1069, 1074 (8th Cir. 2006); *A.C. v. Shelby County Bd. of Educ.*, 711 F.3d 687, 697 (6th Cir. 2013); and *S.B. v. Bd. of Educ.*, 819 F.3d 69, 78 (4th Cir. 2016).

Section 504 regulations incorporate by reference the anti-retaliation provisions of the federal regulations implementing Title VI of the Civil Rights Act of 1964 (Title VI). 34 C.F.R. § 104.61 (2016). The anti-retaliation provisions under Title VI state that “no recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.” *Id.* at § 100.7(e).

Title II of the Americans with Disabilities Act also prohibits “discrimination against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.” 42 U.S.C. § 12203(a) (2016). Title II also prohibits interference, coercion or intimidation of any individual “in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act.” *Id.* § 12203(b).

### **3. Establishing a prima facie case of retaliation**

To bring a successful retaliation claim under Section 504 or the ADA a parent or caregiver must prove that, (i) he or she “engaged in a protected activity; (ii) the alleged retaliator knew that plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action. *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 148-149 (2d Cir. 2002). Once these elements are met, the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) is applied and the consideration turns to whether the school can offer a legitimate, non-discriminatory, reason for taking the adverse action. If so, the burden shifts back to the

plaintiff to demonstrate that the reason provided is pretextual. *DiCarlo v. Potter*, 358 F.3d 408, 414-415 (6th Cir. 2004).

In general, there have not been many reported cases under Section 504 and the ADA involving claims that *schools or school districts* retaliated against students with disabilities by making false CPS reports. There are far fewer cases involving students with diabetes. What we do have, however, shows that bringing a successful claim is an uphill battle and, more often than not, sufficient evidence to prove the third and fourth elements or to survive the burden-shifting test is scant. *See, Pape v. Bd. of Educ.*, 2013 U.S. Dist. LEXIS 106471, at \*49-50 (S.D.N.Y. July 28, 2013) (granting the school district's motion for summary judgment of plaintiffs' retaliation claims on the basis that they presented no evidence "other than their own conclusions or speculative beliefs" that an adverse action was taken against them by the school); and *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 686-687 (E.D.N.Y. 2012) (granting the school district's motion for summary judgment because plaintiffs did not present any evidence to demonstrate why the school's actions could constitute an adverse action). However, a few Circuit Court level cases have denied defendant's motions for summary judgment and allowed retaliation cases to move forward as discussed in more detail below.

The Weixel case referenced above is instructive. It involved a 12 year old student who became chronically ill with numerous conditions and unable to attend school. The plaintiffs (her parents) alleged that they stayed in contact with the school while the child was out sick and that despite this, the school principal threatened to file negligence charges with CPS if the student was not returned to school. The facts state that doctor's notes were provided to excuse the student's absences and yet the school principal followed through with her threats and made the report to CPS for educational neglect. *Id.* at 142-143.

The District Court dismissed the Weixels' retaliation claims finding that plaintiffs failed to sufficiently allege a retaliation claim. The Second Circuit reversed, finding that the District Court's "brief analysis ignores the strong inference of retaliation raised by several of plaintiffs' allegations." *Id.* at 148. The Circuit Court stated plaintiffs sufficiently alleged they were seeking accommodations for the child's disabilities, the

school was aware of these attempts, and, most importantly, that the amended complaint was “replete with allegations of retaliatory conduct.” *Id.* at 149. The allegations included, “threatening (and instituting) child welfare investigations in response to plaintiffs' medically excused absences from school; (2) threatening to file child abuse charges in response to Ms. Weixel's efforts to obtain home schooling for [her child]; (3) refusing to promote [the child] to the eighth grade; and (4) refusing to academically evaluate and place [the child] according to her abilities, allegedly in retaliation for plaintiffs' attempts to obtain reasonable accommodation of [her] disability.” *Id.*

In a similar case that involved a child with diabetes, the Sixth Circuit reversed and remanded the lower court’s grant of summary judgment for the defendant school. In *A.C. v. Shelby County Bd. of Educ.*, 711 F.3d 687 (6th Cir. 2013), the parents of a student with diabetes engaged in protected activity by requesting on different occasions that the school provide certain Section 504 accommodations related to diabetes care for their child. Allegedly in response, the school principal made reports to the state CPS agency claiming that the parents were medically abusing the child. CPS investigated the reports and found that the medical maltreatment allegation was unfounded. *Id.* at 695. The Circuit Court concluded that a reasonable jury could find that the school’s claims of having legitimate, non-discriminatory concerns for the child’s health were pretextual and “were actually motivated by the school’s well-established displeasure with [the child’s parents] and their accommodations requests.” *Id.* at 705.

There are several important takeaways from the Shelby case:

1. **The importance of the medical history.** The Circuit Court spends a substantial amount of time in its opinion going through the child’s diabetes regimen and treatment methods. Even confirming that for all of the “careful carbohydrate counting and state-of-the-art monitoring,” it was “common and essentially unavoidable” that the student’s blood glucose levels would be high in the morning and dramatically lower by late morning. *Id.* at 690-691.
2. **Lack of education about diabetes can lead to inaccurate conclusions of medical abuse.** In this case, a teacher who had not been trained about type 1 diabetes concluded that the child’s parents were “committing medical abuse by

failing to feed her appropriately” because the teacher saw the child with candy and cookies. *Id.* at 692. School officials also recommended a referral to CPS based on “erratic” fluctuations in the child’s blood glucose levels. *Id.* at 694.

3. **Very little evidence is required for CPS to decide that a report is valid and merits opening an investigation.** In this case, the principal called CPS and reported that the child was being sent to school “with cookies, Kool-Aid, and candy, which makes her sugar shoot up to a very high level.” *Id.* She also reported that she had documentation that the child’s diabetes was not being monitored at home. A claim that was never substantiated by any evidence on the record and that the principal later admitted was untrue. *Id.* at 700.
4. **The state’s mandatory reporting statutes may erroneously be used by courts when analyzing whether plaintiffs sufficiently made out a prima facie case for retaliation.** In this case, the District Court looked to the Tennessee state law that requires school officials to immediately report cases of suspected child abuse and neglect and which includes a statutory presumption that all reports are made in good faith. The District Court then held that plaintiff could overcome the statutory presumption only by proving that the school acted in bad faith by “clear and convincing evidence.” *Id.* at 695. However, under federal law the evidentiary standard to prove that the legitimate reasons offered by defendants are in fact a pretext for discrimination has been held to be the preponderance standard. The Circuit Court did not resolve this issue. However, in dicta, the Court questioned the District Court’s incorporation of the state evidentiary standard “without any explanation of why enforcing that standard over the much-lower federal preponderance standard is permissible.” *Id.* at 706-707.

To gauge the difficulty in bringing these cases, contrast the facts in Weixel and Shelby with numerous other situations where there are no direct threats made, no firm denial of accommodations or refusals, and no tangible way to show a causal connection between the protected activity and the adverse action because, often, the only clear adverse action is an anonymous CPS referral. A search of all resolutions published by the U.S. Department of Education Office of Civil Rights (OCR) since October 2013 involving claims of retaliation based on CPS referrals, yielded five investigations where no

retaliation was found,<sup>31</sup> two investigations where the CPS retaliation claims were resolved by agreement before any official OCR finding was made,<sup>32</sup> and zero resolutions with an actual finding of retaliation based on a CPS referral. It is important to note that many OCR investigations settle through resolution agreements before a finding of discrimination can be made. OCR resolutions are available at the following link, <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html>

## **VI. Conclusion**

Families of children with diabetes can encounter many hurdles along the way when facing a possibly well-intentioned but potentially unfounded CPS investigation and also when asserting their rights under the laws that protect their children against discrimination. As noted above, there are a number of factors that influence what the outcome of a CPS investigation will be and the impact it can have on a child with diabetes. All stakeholders, including families of children with diabetes, health care providers, school officials, attorneys, judges and CPS agencies, should have an interest in avoiding unfounded child abuse and neglect reports so that the focus can remain on the cases most likely to be substantiated.

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<sup>31</sup> Gilroy Unified School Dist., OCR case # 09-15-1279 (CA 2015) (OCR found that the CPS reports made by the school were not connected to the parent's advocacy. There was no evidence of animosity between the school and the parent, the school employees who made the CPR reports were conflicted about doing so and, without deciding whether proximity is enough to raise the inference of a causal connection, OCR found that the school's concerns about the health of the child were legitimate and non-discriminatory); Houston Independent School Dist., OCR case # 06-14-1208 (TX 2014) (The only evidence provided by the parent in support of the retaliation claim was the fact that two attorneys for the school attended a hearing for a court case that the parent filed against CPS to compel disclosure of CPS files. OCR learned these attorneys were there for other reasons. OCR's investigation did not discover any evidence that the school made reports to CPS about the parent. OCR closed this issue finding that no adverse action was established); Skaneateles Central School Dist., OCR Case # 02-13-1290 (NY 2013) (OCR found school did not retaliate against parent because the school was simply following state law and district policies which require a report to CPS whenever a student has accumulated more than 20 unexcused absences. OCR did not find any evidence that the school ever deviated from this policy for other students); Poughkeepsie City School District OCR Case # 02-13-1201 (NY 2013) (OCR found that school's report to CPS for educational neglect was consistent with the District's policy and practice of filing reports whenever a student is not enrolled in an appropriate educational program and not receiving an appropriate special education because of the parent's unwillingness to participate in the program's intake process. OCR also found that the District filed reports of educational neglect with CPS for similarly situated students whose parents had not engaged in protected activity. OCR found there was insufficient evidence to establish retaliation); and Responsive Education Solutions OCR Case # 06-15-1203 (TX 2015) (OCR found that the second element of a prima facie retaliation claim was not met because Responsive Education Solutions was not aware of the parent's protected activity prior to the alleged adverse action.)

<sup>32</sup> Riverside Unified School Dist. OCR case # 09-15-1233 (CA 2015) and Austin Independent School Dist. OCR Case # 06-14-1390 (TX 2014).

Families of children with diabetes should document all communications with school officials about their children's condition and their efforts to ensure that school staff members are well educated about diabetes. It generally is not the responsibility of the family to educate school staff. However, being actively involved in requesting and ensuring that training is done can help stave off misunderstandings about diabetes that could result in unfounded CPS reports. Health care providers should support these families in their efforts to get adequate diabetes care at school and to educate school staff members about diabetes. School officials should make every effort to educate staff not only about diabetes but also about their obligations under the law and the prohibition against retaliation. Finally, attorneys, for whom this paper is primarily intended, need to perform their due diligence in understanding diabetes. They should also take precautions to preserve the evidence and the record, challenge any CPS agency action that oversteps its statutory authority and be sure to follow the state procedures for appealing CPS findings of substantiation.

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Disclaimer: While the American Diabetes Association attempts to ensure that all legal information is accurate and current, the general legal information contained in this resource is not a substitute for individualized legal advice, particularly in relation to information related to state or local laws or regulations. The law may change or have additional exceptions or interpretations. The American Diabetes Association, its attorneys and Legal Advocates do not represent you. For detailed legal advice or representation, contact a locally licensed attorney.

Further, because child welfare laws vary state by state, it is not possible for the American Diabetes Association's Legal Advocacy Division to provide one-on-one assistance to attorneys handling these types of cases in state courts. However, we may be able to offer assistance to attorneys handling diabetes discrimination cases which sometimes involve retaliation claims as covered in detail above. For instance, the Association may be able to help develop arguments and legal strategies, assist with finding medical experts, and, in certain cases, may file amicus briefs. In addition, the Association provides extensive resources on diabetes-related discrimination litigation on its website at <http://www.diabetes.org/attorneymaterials>. This site includes case lists, articles and papers like this one discussing relevant legal issues, and pleadings and other materials from key cases that have addressed these issues. Lawyers with questions about a specific case are encouraged to contact our legal advocacy staff by emailing [AskAda@diabetes.org](mailto:AskAda@diabetes.org).