Reporting and Protecting Students from Child Abuse

By Charles J. Russo, J.D., Ed.D.

Education leaders should understand their responsibilities when it comes to reporting suspected child abuse.

A tragic reality of American life is that a significant number of children are abused and neglected, even killed, by the hands of their parents and caregivers. In fact, 2013 data from the Centers for Disease Control and Prevention reveal that 678,932 incidents of child abuse and neglect were reported to Child Protective Services (CPS) nationally, with about 27% of those cases involving youngsters under the age of three (CDC 2015).

Moreover, the CDC noted that the CPS data suggest that their reports may underestimate the occurrences of child abuse and neglect. That same report estimates that about 1,520 children died of abuse and neglect in the United States during 2013.

Because of their duty to safeguard vulnerable youngsters, all jurisdictions have enacted fairly stringent child abuse reporting and protection laws. Those laws have led to a growing body of litigation with the result that one dispute recently made its way to the Supreme Court.

In *Ohio v. Clark* (2015), the Supreme Court unanimously reversed an order of the Ohio Supreme Court that would have limited the use of a teacher's testimony in a case involving child abuse.

At issue was the admissibility of evidence from a teacher who testified that one of her three-year-old students told her he was injured by his mother's boyfriend while left in the man's care. The Court ruled that allowing the teacher to testify about the student's out-of-court-statements concerning the physical abuse he suffered did not violate the defendant's rights under the Sixth Amendment's confrontation clause "to be confronted with the witnesses against him," because her testimony served as a substitute for having the child appear. The boyfriend subsequently challenged his conviction on all but one of the multiple charges he faced and was sentenced to a lengthy prison term.

Against the backdrop of the need to protect children from abuse and neglect, the first substantive part of this column reviews the facts and the Supreme Court's holding in Clark. The second section offers recommendations for education leaders as they work to protect the children in their care from abuse.

Facts in *Ohio v. Clark*

The facts in *Clark* are as straightforward as they are egregious. The defendant sent his girlfriend from their residence in Cleveland, Ohio, to Washington, D.C., to work as a prostitute. During that time, the defendant remained at home caring for his girlfriend's two young children, a three-year-old son and an 18-month-old daughter.

When the boyfriend took the three-year-old to preschool and one of the child's teachers asked about his bloody eye, the boy initially responded that nothing had occurred. The boy later told his teacher that he hurt his eye when he fell. As the teacher and child moved into the brighter light of a classroom, she observed red whip-like marks on his body. In response to the teacher's inquiries, the three-year-old responded that his mother's boyfriend caused the injuries. After the child answered another one of the teacher's questions by describing the person who hit him as "big," she brought him to her supervisor who lifted the boy's shirt and discovered additional injuries. The teacher then called a child abuse hotline to alert officials about the suspected abuse.

On arriving at school, the boyfriend denied having injured the child. Later, in a footnote, the Supreme Court reported that the teachers and a social worker were reluctant to release the child to the boyfriend and

that after a brief "stare-down," he left quickly.

The next day, a social worker went to the residence to take the boy and his sister to a hospital. At the hospital, a doctor discovered that the boy "had a black eye, belt marks on his back and stomach, and bruises all over his body. [His sister] had two black eyes, a swollen hand, and a large burn on her cheek, and two pigtails had been ripped out at the roots of her hair" (*Clark* at 2178).

Judicial History

The boyfriend was indicted on five counts of felonious assault, four relating to the boy and one to his sister; one count of endangering children for each child; and one count of domestic violence for each child. At trial, the teacher testified about the boy's out-of-court statements because children under 10 are incompetent to do so under Ohio's evidentiary rules. However, another state evidentiary rule allows the admission of reliable evidence from a third party because the child's statements to his teacher had sufficient guarantees of trustworthiness.

After a trial court denied the boyfriend's attempt to suppress the teacher's testimony, he was convicted on all counts but for the assault related to the younger child. When the boyfriend challenged his 28-year prison sentence, an appellate court reversed in his favor. The court asserted that the teacher's testimony about what the child had told her violated the confrontation clause.

A divided Ohio Supreme Court, in a four-to-three judgment, affirmed that insofar as it viewed the teacher's statements as primarily being used to gather evidence as a state agent pursuant to a mandatory child abuse reporting law, her testimony was admissible. On further review, the Supreme Court unanimously reversed in favor of the state with concurring opinions authored by Justices Antonin Scalia and Clarence Thomas.

Majority Opinion

Writing for the Supreme Court, Justice Samuel Alito was joined by Chief Justice John Roberts and Justices Anthony Kennedy, Stephen Breyer, Sonia Sotomayor, and Elena Kagan. Alito began the Court's analysis by noting that 35 years earlier, in another dispute from Ohio, *Ohio v. Roberts* (1980), the justices interpreted the confrontation clause as allowing the use of out-of-court statements as long as they "bore 'adequate indicia of reliability' [by having] 'particularized guarantees of trustworthiness'" (*Clark* at 2179, citing Roberts at 66).

Alito quickly added that in *Crawford v. Washington* (2004), a suit about statements from nontestifying witnesses during police questioning were inadmissible at trial unless individuals were unavailable to testify in person. Even so, the Court acknowledged that it did not offer an exhaustive explanation of so-called testimonial evidence, something it attempted to do in later litigation reaching different outcomes.

Justice Alito indicated that the Supreme Court has since enunciated the "primary purpose" test. Under that test, a statement is not subject to the confrontation clause unless its primary purpose is testimonial. Yet Alito determined that the confrontation clause does not exclude all evidence satisfying that test because although it is necessary, it is not always a sufficient condition justifying the exclusion of out-of-court evidence.

Turning to the facts at hand, Justice Alito recognized that insofar as the disputed testimony involved preschool teachers, the key question before the Court was one that it had yet to address, namely, "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause" (*Clark* at 2181).

Conceding that some comments made to individuals other than law enforcement officers could raise issues about the confrontation clause, the Court was unwilling to adopt a categorical rule excluding such evidence. Even so, the Court reasoned that testimony from non-law-enforcement officials was less likely to be testimonial than if made to the police because of the different natures of their jobs. In this way, the Court was satisfied that insofar as what the three-year-old told his teacher lacked the primary purpose of creating evidence for a criminal prosecution, it did not violate the confrontation clause.

Addressing the nature of what the boy told his teacher, the Supreme Court was convinced that he spoke in the context of an emergency involving suspected child abuse that arose when educators feared for his safety on seeing the physical harm he had suffered at the hand of his caregiver. In light of educator concerns for the child's safety, the Court believed that educators acted to protect him rather than gather evidence for the state against the defendant, and that they did not inform him that his words were to be used in a criminal prosecution, something it suggested he would not have understood anyway.

On the basis of the child's age, the Supreme Court decided that what the three-year-old told his teacher was not testimonial in nature because preschool students are unlikely to understand the nature of the criminal justice system. Even the defense agreed that the child probably lacked such an understanding of the criminal justice system. The Court buttressed its position by explaining that as a matter of history and common law, the child's remarks to his teacher would not likely be treated as inadmissible.

The Supreme Court reiterated its refusal to treat all statements made to non-law-enforcement officials as beyond the reach of the

confrontation clause. Rather, the Court maintained that judges must evaluate remarks both in their context and in light of who is speaking. Consequently, the Court observed that statements made to officials such as teachers whose jobs do not principally involve investigating and prosecuting crimes are as less likely to be treated as testimonial than if they had been made to the police. In other words, the Court took the position that comments made to teachers are likely to be admissible in trials.

In the final section of its opinion, the Supreme Court rejected the defense's argument that teachers, as mandatory reporters of child abuse, were the functional equivalent of law enforcement officials. The Court treated that comparison as inapt because the primary concern of the teachers was to protect the child and remove him from a harmful situation, not gather evidence of a crime.

Over the past 25 years, all jurisdictions have enacted stringent child abuse and reporting laws that usually include a wide array of school personnel as mandatory reporters.

Rounding out its opinion, the Court rebuffed the defense's two final arguments. First, the justices rebutted the claim that admission of the teacher's testimony was fundamentally unfair because it was admissible under an exception to the hearsay rule that allows out-of-court statements to be entered into evidence if they are probative of a defendant's guilt.

Second, the justices gave no credence to the defense's position that the jury would have viewed the teacher's reporting of the student's comments as the functional equivalent of testimony. Instead, the Supreme Court emphasized that because the child's statements to the teacher were not intended as a substitute for having him appear in person, the educator's oral evidence should not have been excluded as testimonial.

Concurrences

Justice Scalia, joined by Justice Ruth Bader Ginsburg, agreed with the outcome but disagreed because he viewed the primary purpose test as the sole means of evaluating whether a person acted as a witness. He would have reinstated the conviction because the educators acted out of their desire not to return the child to a situation where he faced immanent harm.

Justice Thomas concurred because he agreed that teachers as mandatory reporters are not agents of the police. At the same time, he thought that the majority failed to offer clear guidance on the confrontation clause. Further, insofar as the child's answers to his teacher's questions "do not bear sufficient indicia of solemnity to qualify as testimonial" (*Clark* at 2186), he concluded that their admission did not involve the confrontation clause.

Recommendations for Practice

Over the past 25 years, all jurisdictions have enacted stringent child abuse and reporting laws that usually include a wide array of school personnel as mandatory reporters. For instance, those laws usually cover professionals, such as a "licensed school psychologist; . . . speech pathologist or audiologist; . . . administrator or employee of a child day-care center; administrator or employee of a residential camp or child day camp; administrator or employee of a certified child care agency or other public or private children services agency; school teacher; school employee; school authority; . . . superintendent or regional administrator employed by the department of youth services; superintendent, board member, or employee of a county board of developmental disabilities . . ." (Ohio Revised Code § 2151.421[A][1][b][2014]).

The presence of state laws regulating child abuse reporting does not absolve school boards of their duty to work with education personnel in implementing those provisions to keep the children in their care safe.

Typically, statutorily mandated reporters must make good-faith reports of suspected abuse directly to state-level agencies rather than through intermediaries in their school systems. Educators who fail to comply with state reporting laws face serious consequences, up to and including dismissal from their jobs. In one recent case, by way of illustration, an appellate court in Arkansas affirmed a teacher's conviction for first-degree failure to make a good-faith report of child maltreatment as a mandated reporter for not reporting sexual relations between another teacher and a high school student (*Griffin v. State of Arkansas* 2015).

The presence of state laws regulating child abuse reporting does not absolve school boards of their duty to work with education personnel in implementing those provisions to keep the children in their care safe. As such, education leaders may wish to keep the following suggestions in mind when discussing their roles in enforcing state child abuse and protection laws. To this end, district officials should take the following actions:

1. Provide mandatory annual professional development sessions for teachers and other staff members. Those sessions not only should update participants on the law in their jurisdictions but also should provide them with instruction and information about detecting indicators of possible child abuse, along with how to fulfill their duties as

statutorily mandated reporters. Such sessions should be delivered by professionals in such areas as medicine, psychology, and law to identify whether children have been abused and how to respond appropriately.

2. Give staff members hard copies of or provide links to all relevant state materials.

3. Consider revising their own child abuse and protection policies to clarify state requirements, while perhaps adding further protections for children. Local board policies should reiterate the need to report instances of suspected abuse promptly to the appropriate state agencies and to maintain confidentiality to protect all parties involved, including the accused. Policies should also encourage all faculty and staff members and students to cooperate in the event that state or other officials are in schools investigating possible abuse claims.

4. Include relevant Websites and phone numbers in teacher, staff, parent, and student handbooks, as well as other written materials, such as newsletters.

5. Schedule regular public information sessions about child abuse detection and reporting for parents and the general public in order to heighten awareness of this all-too-frequent crime in communities.

6. Post child abuse prevention and reporting materials on district Websites to make them readily available to all community members.

7. Offer confidential counseling to children who have been abused and, if appropriate, to their peers and other family members, including parents, to help overcome the emotional trauma they experienced.

8. Review policies annually to ensure that they are updated with ongoing developments in state statutes, regulations, and case law.

Conclusion

It is incumbent on education leaders to help enhance student achievement by working to eradicate child abuse in their schools and communities so that youngsters come to school ready to learn. To that end, if education leaders are up-to-date on the law and keep their teachers and other staff members well informed, perhaps they can help reduce, if not eliminate, child abuse.

References

CDC (Centers for Disease Control and Prevention). 2015. Child maltreatment prevention. www.cdc.gov/Violence Prevention/childmaltreatment/index.html .

Crawford v. Washington, 541 U.S. 36 (2004).

Griffin v. State of Arkansas, 454 S.W.3d 262 (Ark. Ct. App. 2015).

Ohio v. Clark, 135 S. Ct. 2173 (2015).

Ohio Revised Code § 2151.421(A)(1)(b) (2014).

Ohio v. Roberts, 448 U.S. 56 (1980).

U.S. Constitution, Amend. VI.

Charles J. Russo, J.D., Ed.D., content area leader for ASBO's Legal Aspects Committee, is Joseph Panzer Chair of Education in the School of Education and Health Sciences (SEHS), director of SEHS's Ph.D. program in educational leadership, and adjunct professor in the School of Law at the University of Dayton, Ohio. Email: crusso1@udayton.edu