

Mandated Reporter Commission

November 10, 2020

Penalties and Protections

The penalties working group, made up of a minority of Commission members, met two times to discuss the penalties section of the 51A statute. The following recommendations are based on the brainstorming of that working group.

Failure to Report:

MGL c. 119 §51A(c) in relevant part:

“Notwithstanding subsection (g) [no mandated reporter shall be liable in any civil or criminal action if the report was made in good faith, not frivolous, and the reporter did not cause the abuse or neglect], whoever violates this section shall be punished by a fine of not more than \$1,000...”

“Any mandated reporter who has knowledge of child abuse or neglect that resulted in serious bodily injury to or death of a child and willfully fails to report such abuse or neglect shall be punished by a fine of up to \$5,000 or imprisonment in the house of correction for not more than 2 ½ years or by both such fine and imprisonment; and, upon a guilty finding or a continuance without a finding, the court shall notify any appropriate professional licensing authority of the mandated reporter’s violation of this paragraph.”

MGL c. 119 §51A(e) “A mandated reporter who has reasonable cause to believe that a child has died as a result of any of the conditions listed in subsection (a) shall report the death to the district attorney for the county in which the death occurred and the [OCME] as required by...Any person who fails to file a report under this subsection shall be punished by a fine of not more than \$1,000.”

The monetary/imprisonment penalties for failing to report child abuse and neglect are not often pursued or imposed. As most of the professions and roles of mandated reporters listed in the current statute and in this Commission’s recommended statutory language are professions and roles that are licensed, one possible penalty for failure to report is a licensing penalty or revocation. A license penalty is more likely to be pursued and imposed and may create a greater disincentive for failure to report than a monetary fine.

A monetary/imprisonment penalty should still be available in the statute for non-licensed mandated reporters and for egregious cases of failing to report (including possible patterns of behavior over time).

The monetary penalty of \$1,000 may be insignificant for certain mandated reporters depending on income level and are certainly insignificant for institutions who may have a profit-motive and reputational motive for failing to report. The monetary penalty should be increased in order to provide a true disincentive; the penalty should reflect a range of possible monetary amounts to permit prosecutorial discretion in sentencing in relation to level of culpability and ability to pay.

Further, if possible, any failure to file that can be attributed to an institution/business/organization, should have a greater monetary penalty.

It would be possible also that the Commission could recommend either in its report, or in statutory language, that licensing agencies include the possibility of a public reprimand for failure to file attributed to an institution/business/organization or if a pattern of failure to file has been substantiated.

In some instances, law enforcement or investigation agencies delay the filing of a 51A report during an active investigation to avoid tainting that investigation or alerting subjects of that investigation to the investigation's existence. The safety of children requires effective law enforcement as well as effective DCF investigation and the interplay between the two agencies can be complex. This complexity should be accommodated when possible but should not discourage or exempt reporting by law enforcement.

Recommendations for possible drafting based on working group brainstorming:

MGL c. 119 §51A(c) in relevant part:

Notwithstanding subsection (g) [no mandated reporter shall be liable in any civil or criminal action if the report was made in good faith, not frivolous, and the reporter did not cause the abuse or neglect], whoever violates this section shall be punished by a fine of not ~~more~~ **less than \$1,000 and not more than \$10,000. Notwithstanding subsection (g), any company, corporation, business, or partnership, shall be punished by a punitive fine if an individual's violation of this section can be established to have been acting under the authority of, or on behalf of, the company, corporation, business, or partnership.**

...

Any mandated reporter who has knowledge of child abuse or neglect that resulted in serious bodily injury to or death of a child and willfully fails to report such abuse or neglect shall be punished by a fine of ~~up to~~ **not less than \$5,000 and not more than \$50,000** or imprisonment in the house of correction for not more than 2 ½ years or by both such fine and imprisonment; and, upon a guilty finding or a continuance without a finding, the court shall notify any appropriate professional licensing authority of the mandated reporter's violation of this paragraph.

Upon the determination of any law enforcement entity, state investigatory agency, or licensing body, that a mandated reporter violated this section, that entity, agency, or body shall notify the appropriate professional licensing authority of the violation. Upon written request, the Department shall provide any professional licensing authority with redacted records which protect the confidentiality of any person other than the mandated reporter to the extent that those records substantiate a violation of this section. Any and all hearings or other disciplinary procedures by a licensing authority regarding this section shall be closed to the general public

and all Department records obtained for these purposes shall be confidential and exempt from disclosure under chapter 66A and chapter 66 and clause twenty-sixth of section 7 of chapter 4.

MGL c. 119 §51A(e) “A mandated reporter who has reasonable cause to believe that a child has died as a result of any of the conditions listed in subsection (a) shall report the death to the district attorney for the county in which the death occurred and the [OCME] as required by [Duty to report deaths; failure to report]...Any person who fails to file a report under this subsection shall be punished by a fine of not ~~more~~ less than \$1,000 and not more than \$10,000.”

Suggested Report Recommendations:

- All licensing authorities adopt procedures for administrative processes to review, sanction, and/or revoke professional licenses for mandated reporters who fail to report
 - Licensing authorities should consider a public penalty for institutions who could be considered by the licensing agency to be culpable or encouraging of a failure to report
- The report should note that there are instances when law enforcement delays reporting in order to protect the efficacy of an ongoing criminal investigation. In this scenario DCF would expect that reports will be made immediately after the danger of impacting the criminal investigation has passed. DCF will most likely not consider these scenarios to be a failure to report.

51A does not provide for a private right of action against mandatory reporters who fail to report.¹

At least one state includes a “continuing offense” provision to delay the running of a statute of limitations if the MR intentionally conceals his/her failure to report.

Delaware provides a civil remedy for failure to report for up to \$10,000 for the first violation and up to \$50,000 for a subsequent violation as well as the award of attorney’s fees and costs.

Minnesota increases the liability when the failure to report includes two or more children not related to the perpetrator who have been subject to child abuse and neglect within 10 years of each other.

New York directs the child protective office to refer cases of false reporting to law enforcement or the district attorney.

Knowingly and willfully failing to report for at least six months (“prolonged knowledge”) is a felony in Oklahoma.

Virginia identifies failure to report rape/sodomy/sexual penetration as resulting in a higher penalty than failing to report all other forms of child abuse and neglect.

¹ Doe v. D’Agostino, 367 F.Supp.2d 157 (D. Mass. 2005).

In In re Grand Jury Investigation, a private school's internal investigation documents fell under the crime-fraud exception to attorney-client privilege and were ordered to be released to a grand jury investigating school personnel failure to report child abuse and neglect under 51A; evidence showed that school used attorney-client privilege to obscure their knowledge and responsibility to report.² Section 51A can also put other legal obligations of mandated reporters into context in regards to their heightened responsibility to be aware of child abuse and neglect.³

False or “Frivolous” Reporting:

Massachusetts appears to be the only state using the term “frivolous;” most states are using phrases such as “knowingly false,” “malicious,” “willful,” “intentional,” “reckless reporting,” “lacking a factual foundation,” and “bad faith.” However, there is no indication that the term “frivolous” is ineffective or requires alteration.

There is an abundance of false reporting in divorce and custody cases but it is unlikely that those cases would be prosecuted. It is more likely that those cases will be filtered out as screen-outs at the intake phase.

MGL c. 119 §51A(c) in relevant part:

“... Whoever knowingly and willfully files a frivolous report of child abuse or neglect under this section shall be punished by: (i) a fine of not more than ~~\$2,000~~ **\$10,000** for the first offense; (ii) imprisonment in a house of correction for not more than 6 months and a fine of not more than ~~\$2,000~~ **\$10,000** for the second offense; and (iii) imprisonment in a house of correction for not more than 2 1/2 years and a fine of not more than ~~\$2,000~~ **\$10,000** for the third and subsequent offenses.”

MGL c. 119 §51A(g):

“No mandated reporter shall be liable in any civil or criminal action for filing a report under this section or for contacting local law enforcement authorities or the child advocate, if the report or contact was made in good faith, was not frivolous, and the reporter did not cause the abuse or neglect. No other person filing a report under this section shall be liable in any civil or criminal action by reason of the report if it was made in good faith and if that person did not perpetrate or inflict the reported abuse or cause the reported neglect. Any person filing a report under this section may be liable in a civil or criminal action if the department or a district attorney determines that the person filing the report may have perpetrated or inflicted the abuse or caused the neglect.”

² In re Grand Jury Investigation, 772 N.E.2d 9, 167 (2002).

³ See for example, Doe V. Bradshaw, 203 F.Supp.3d 168, 180 (D. Mass. 2016), indicating that a claim of deliberate indifference to a violation of a student's bodily integrity can be seen through the context of reporting requirements under 51A: “Plaintiff's cause of action does not turn on whether Bradshaw violated her obligations as a mandatory reporter. Rather, the statutory scheme, of which she was or should have been aware, provides the context in which her response to the risk of a constitutional violation must be understood. Her increased obligation to act, and decreased discretion merely to investigate abuse internally, could be seen to transmute an inadequate response to Weixler's inappropriate behavior into a deliberate choice not to act.”

Some states identify a false report as a classification of misdemeanor; several states identify false reporting as a form of “disorderly conduct.” Connecticut requires that false reports be referred to the Chief State’s Attorney for criminal investigation. South Carolina permits the Department to file a civil action to recover the costs of the investigation of a false report and attorney’s fees. Oklahoma specifically addresses false reporting with the intention to influence a custody/child support decision and provides for a harsher penalty in such cases.

- Should licensing boards be notified of false reporters or habitual false reporters?

Employer Retaliation:

Currently the law only prohibits employer retaliation against mandated reporters for reporting in good faith. Massachusetts is unique in this regard, the majority of states do not limit the protection solely to mandated reporters. As the 51A law relates solely to mandated reporters, the protection solely for mandated reporters is narrowly tailored. However, if the Commission agrees that there is a value to encouraging any person to report child abuse and neglect, then employer retaliation could be prohibited for any person making a good faith report.

The statute does not specify how a claim is brought; lack of specificity may cause underreporting of retaliation or may inhibit an employee from making a report based on a lack of trust that the statute provides sufficient safeguards. Other states have been more specific in regards to the cause of action, for example some states clarify that employer retaliation is a misdemeanor, or a civil action that can be brought by the Attorney General, or a civil action including compensatory and punitive damages. The working group felt that ideally there would be a body, similar to the Massachusetts Commission Against Discrimination (MCAD), where charges of retaliation could be filed, an investigation would be completed, there would be a finding of probable cause, and a hearing process which could provide various relief including reinstatement to an employment position, back pay, and damages.

MGL c. 119 §51A(h)

“No employer shall discharge, discriminate or retaliate against a mandated reporter who, in good faith, files a report under this section, testifies or is about to testify in any proceeding involving child abuse or neglect. Any employer who discharges, discriminates or retaliates against that mandated reporter shall be liable to the mandated reporter for treble damages, costs and attorney’s fees.”

MGL c. 119 §51A(h)

“No employer shall discharge, discriminate or retaliate against **any person** ~~mandated reporter~~ who, in good faith, files a report under this section, testifies or is about to testify in any proceeding involving child abuse or neglect. Any employer who discharges, discriminates or retaliates against that mandated reporter shall be liable to the mandated reporter for treble damages, costs and attorney’s fees.”

MGL c. 119 §51B(o):

“No employer shall discharge, discriminate or retaliate against a mandated reporter who, in good faith, provides such information, testifies or is about to testify in any proceeding involving child abuse or neglect unless such person perpetrated or inflicted such abuse or neglect. Any employer who discharges, discriminates or retaliates against such a person shall be liable to such person for treble damages, costs and attorney's fees.”

MGL c. 119 §51B(o):

“No employer shall discharge, discriminate or retaliate against **any person** ~~mandated reporter~~ who, in good faith, provides such information, testifies or is about to testify in any proceeding involving child abuse or neglect unless such person perpetrated or inflicted such abuse or neglect. Any employer who discharges, discriminates or retaliates against such a person shall be liable to such person for treble damages, costs and attorney's fees.”

At least one state includes a prohibition on the employer interfering with the making of the report, “interfering” would likely include intimidation tactics. The working group determined that intimidation would be extremely difficult, if not impossible to prove or charge.

In Asia v. Res-Care Inc., a cause of action for employer retaliation against a teacher for filing a 51A report and indicating her intention to report suspected child abuse and neglect to the police, survived a summary judgement motion on the grounds (in part) that the reporter did not need to meet a burden of “reasonable cause” to believe the student was at risk, the 51A report only needed to be made in “good faith.”⁴

- Is the statute too vague to be effective as a deterrent and a remedy?
- What elements should be included?
- Is the statute too narrowly tailored by protecting only mandated reporters from retaliation?
- Some states specify whether “good faith” reporting is a rebuttable presumption, should the statute include such a presumption?

Immunity:

MGL c. 119 §51A(g):

“No mandated reporter shall be liable in any civil or criminal action for filing a report under this section or for contacting local law enforcement authorities or the child advocate, if the report or contact was made in good faith, was not frivolous, and the reporter did not cause the abuse or neglect. No other person filing a report under this section shall be liable in any civil or criminal action by reason of the report if it was made in good faith and if that person did not

⁴ Asia v. Res-Care Inc., 59 F.Supp.3d 260 (D. Mass. 2014).

perpetrate or inflict the reported abuse or cause the reported neglect. Any person filing a report under this section may be liable in a civil or criminal action if the department or a district attorney determines that the person filing the report may have perpetrated or inflicted the abuse or caused the neglect.”

Massachusetts, along with the majority of states, provides criminal and civil immunity for reports by mandated reporters of child abuse and neglect made in good faith, that were not “frivolous,” and so long as the reporter themselves did not cause the abuse and/or neglect. The statute also protects other reporters so long as the report was made in “good faith” and the reporter did not perpetrate or inflict the abuse or neglect. The drafting appears to account for situations where a non-mandated reporter, perhaps with limited detailed knowledge, makes a “frivolous” report in good faith.

Similarly, M.G.L. c. 119 § 51B provides civil and criminal immunity for any person providing information during the investigation of child abuse and neglect.

MGL c. 119 §51B(k)(4) in relevant part regarding referrals to the DA:

“No person providing notification or information to a district attorney or local law enforcement authorities under this section shall be liable in any civil or criminal action by reason of such action.”

MGL c. 119 §51B(n):

“No person required to provide such information under this section or permitted to disclose information under section 5A of chapter 119A shall be liable in any civil or criminal action for providing such information.”

Many states use the catch-all phrase “cooperation” to extend civil and criminal immunity to the investigation, possible court proceedings, and case monitoring, though several states clarify that there is no immunity for malicious false statements and perjury. Michigan specifically notes that immunity is not available for negligent acts that cause injury or death, or for physician malpractice. Some states indicate that there is a rebuttable presumption of a reporter operating in good faith. Some states also clarify that there is civil and criminal immunity for medical professionals ordering tests so long as those tests don’t deviate from the accepted standard of care.

- Are there any additional situations, such as a delayed report, where civil and/or criminal immunity should not apply?
- Is the statute clear enough to encourage reporting?

Other: Some state statutes have penalties for violations of the confidentiality of reports and investigations. While Massachusetts does not specifically identify any penalties for a violation of confidentiality, Massachusetts does have a catch-all provision stating that any violation of 51A shall be punished by a fine of up to \$1,000.

- Should there be an exception for volunteers?
 - Should this be left to prosecutorial discretion?

- What concerns are there for the possible immigration consequences for failure to report or frivolous reporting?
 - Should this be left to prosecutorial discretion?
- MR training should specifically include information about protection from civil suit for filing (but no protection from civil suit for failure to file)