

# Reporting Out-of-Home Maltreatment: Penalties and Protections

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*Amendments to many child abuse laws mandate the reporting by staff members of suspected abuse or neglect in out-of-home settings. Legal protections, as well as potential liabilities for those filing or failing to file such complaints are discussed.*

Although easily exaggerated and sensationalized the maltreatment of children in out-of-home care is a serious problem.<sup>1</sup> Rindfleisch and Rabb, for example, used nationwide data to estimate conservatively that "residential complaint rates may be twice as large as intrafamilial rates."<sup>2</sup>

In recent years, child abuse reporting laws have been amended to require the reporting of suspected abuse and neglect in out-of-home settings. This article briefly sketches the penalties and protections provided when a staff member reports, or fails to report, such cases.

## **Mandatory Reporting**

Since 1964, all states have enacted laws that require the reporting of suspected child abuse and neglect. Originally, these laws were directed solely at physicians, who were required to report "serious physical injuries" or "non-accidental injuries" inflicted by parents. Over the years, however, reporting laws have been progressively expanded.

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The newest round of child abuse laws have broadened the concept of child maltreatment to include the maltreatment of children in residential institutions and day care centers. A California statute is an early example of such concern:

The Legislature finds and declares all of the following: (a) An alarming number of incidents of child abuse have occurred in state-licensed child care facilities. (b) The State has the responsibility to ensure that children are cared for in a healthy environment. (c) Early detection and prevention of child abuse is vital to solving this problem. (d) Prevention of child abuse is facilitated by the prompt and full communication between government agencies of information about suspected incidents of child abuse. (e) The Community Care Licensing Division of the State Department of Social Services shall be responsible for combatting child abuse in day care facilities. The department shall develop programs and cooperate with parents, children, community groups, and local and State law enforcement to prevent and detect child abuse.<sup>3</sup>

Thus, in 1984, the federal Child Abuse Prevention and Treatment Act was amended to require states to provide for the reporting of maltreatment by "a person (including any employee of a residential facility or any staff person providing out-of-home care) who is responsible for the child's welfare."<sup>4</sup> Now, about 46 states require reports of the maltreatment of children in foster care and residential institutions, and a growing number are requiring reports of maltreatment in day care settings.<sup>5</sup>

In addition, such matters as day care licensing, criminal records checks, and other pre-employment screening of child care providers have become the responsibility of child protective agencies. At least seven states have enacted provisions permitting access to otherwise confidential government held records to determine whether child care employees, volunteers, or others in contact with children have criminal records or have been reported for suspected child maltreatment.<sup>6</sup> In some states, records checks for day care employees have been made mandatory.<sup>7</sup> Investigating reports of suspected out-of-home maltreatment raises special problems. No agency should be allowed to investigate itself. An outside, disinterested agency must perform the investigation and it must have sufficient authority to take meaningful corrective action.<sup>8</sup> Thus, federal regulations specifically require that when "a report of known or suspected child abuse or neglect involves the acts or omissions of the agency, institution or facility to which the report would ordinarily be made, a different properly constituted authority must receive and investigate the report and take appropriate protective and corrective action."<sup>9</sup> Largely as the result of this requirement, at least 40 states now have a special procedure

which ensures that no agency will police itself in the investigation of reports of institutional maltreatment. About 26 states have enacted specific statutes on the subject.<sup>10</sup> For example, Michigan law provides:

If there is reasonable cause to suspect that a child in the care of or under the control of a public or private agency, institution, or facility is an abused or neglected child, the agency, institution, or facility, shall be investigated by an agency administratively independent of the agency, institution, or facility being investigated.<sup>11</sup>

### **Criminal and Civil Liability**

Although the ultimate success of a reporting system must depend upon the willing cooperation of professionals and the public, reporting laws need enforceable provisions for those who refuse to accept their moral obligation to protect endangered children. Thus, the reporting laws of 44 states contain specific criminal penalty clauses for the failure to report.<sup>12</sup> In the rest of the states, a general statutory provision may establish criminal liability.<sup>13</sup> The criminal penalty is usually of misdemeanor level, with the potential fine ranging from \$100 up to \$1,000 and/or imprisonment from five days up to one year.

The failure to report suspected out-of-home maltreatment has resulted in a number of criminal prosecutions. For example, the head of an institution can be criminally liable for the failure to respond to information suggesting that a staff member maltreated a child. Thus, in one case, a school principal was fined \$200 (the maximum penalty) for failing to report the claims of two sets of parents that a teacher was sexually assaulting their third-grade daughters.<sup>14</sup>

Eight states have specific statutory provisions establishing civil liability for the failure to report. However, no specific legislation is needed to create civil liability for violating a reporting law. In fact, there are circumstances that can create civil liability even if the reporting law does not require the particular professional to report. Although there are only a handful of reported cases on the subject, none denies the cause of action, and the facility with which such claims are settled (even in states without specific legislation) reflects the strong consensus among practicing lawyers and insurance companies that such liability exists. One California case, in which the police, two hospitals, and individual doctors repeatedly failed to report a child with severe injuries indicative of abuse, was settled for \$600,000.<sup>15</sup>

The failure to report out-of-home maltreatment has resulted in a number of civil actions seeking money damages from workers, their supervisors, and

their agencies. In *Borgenson v. Minnesota*<sup>16</sup> the state, the county, state and county licensing officials, the group home, and staff members of the group home were alleged to have failed to report (and respond to) information that juveniles in a locked residential facility were maltreated. (It was claimed that the juveniles were physically abused, given tranquilizing drugs improperly, and placed in isolation without proper safeguards being taken.)

Similarly, there have been suits against child welfare workers and their agencies when they failed to report the maltreatment of foster children. For example, in *Bartels v. County of Westchester*, a foster child less than three years old was severely scalded when, it was alleged, the foster parent carelessly bathed her. The child "sustained extensive second- and third-degree burns, caused permanent scarring to 40 percent of her body, webbing of the fingers of the right hand, and a deformity known as 'clam toe.'" <sup>17</sup> The court explained how the agency and individual workers could be held liable for the child's burns:

If, as has been asserted, the [county child welfare agency] knew of the incompetence of the foster parents or the indifferent discharge by them of their duties, [it] might be held liable for an ensuing injury to the child, dependent on the evidence at trial.<sup>18</sup>

Adequate supervision also requires that the agency be aware of and responsive to reports or other indications of possible maltreatment in the foster home. The most widely known case on the subject is *Doe v. New York City Department of Social Services*. In 1964, when Anna Doe was two years old, she and her sister were placed in a foster home. Two more girls were placed in the same home in 1965. According to the court,

the record discloses a pattern of persistent cruelty to Anna at the hands of her foster father. Anna and her foster sisters testified that starting when she was about ten years of age, she was regularly and frequently beaten and sexually abused by Senerchia [the foster father]. Plaintiff testified that he beat her with his hands and belt all over her body, threw her down the stairs, and on one occasion lacerated her with a hunting knife, that he confined her to her room for days at a time, and ultimately forced her to have intercourse and oral sexual relations with him.<sup>19</sup>

A \$225,000 jury verdict against the agency was sustained on the ground that the agency had inadequately monitored her 13-year foster placement. Most telling was the agency's failure to act on information strongly suggesting that Anna was being abused—which was both bad practice and a violation of state law.

The unreported maltreatment of children in day care settings has also resulted in civil lawsuits. *Brasel v. Children's Services Division* was a wrongful death action brought by the parents of 18-month-old Desha, who died in a day care center certified by the Oregon Children's Services Division. The parents alleged that the division was negligent in "(1) failing to properly investigate the day care facility in which their daughter was injured before issuing a certificate of approval for its operations . . . ; (2) failing to investigate an incident of child abuse alleged to have occurred at the facility before plaintiffs placed their daughter there; (3) failing to halt operation of the center following the incident; (4) failing to inform plaintiffs of a previous incident; and (5) allowing them to rely upon representations that the day care facility was a safe and secure place for their child when defendant knew that it was not."<sup>20</sup> The Oregon Supreme Court dismissed the parents' last claim on the ground that the state law that prohibited public access to reports and records of child abuse also applied to prospective users of a day care center. Thus, under state law, the agency was "not authorized to advise the parents" of the previous reports of child abuse at the center.<sup>21</sup> However, the court allowed the parents' other claims to go to trial.

#### **Adverse Employment Actions**

Employees of public and private agencies sometimes are discharged or suffer other adverse employment actions for failing to report suspected child maltreatment. Assuming that they had knowledge of sufficient information to make a report, and of the obligation to report, such penalties may be justified.

Greater concern arises when the adverse employment action is taken because the worker did make a report. If the report turns out to have been unfounded, and if it appears that the report was made maliciously or recklessly, a penalty, again, may be justified. But, too often, it appears that such actions are taken inappropriately.

The allegations in one case suggest how this can happen. A social worker in a private clinic was told by the father that he had hit his child with a belt. The worker informed the father that she would have to file a suspected child abuse report. The father happened to be vice president of a company that had a \$1 million contract with the clinic to provide counseling for company employees; in fact, he was in charge of writing the contract. According to the worker, the father convinced the clinic director to tell the worker not to file a report. The worker insisted on filing the report—and was fired.<sup>22</sup> This case resulted in passage of Minnesota's antiretaliation law.

Of course, all states have laws that provide immunity from liability for reporting in good faith, even if the report is determined to be unfounded.<sup>23</sup> But some parents seek retaliation against the person who made the report by complaining to the agency. Sometimes, the agency improperly gives in to parental pressure, but even when the agency does not do so, the procedure it follows in responding to the complaint can unnecessarily punish the reporter. In one case, for example, a parent filed a formal complaint with the state licensing agency, claiming that a visiting nurse had wrongfully reported. Although the parent made no substantial allegations of the nurse's bad faith, the agency took eight months to determine the complaint. Those eight months of uncertainty and stress—and the cost of defending the claim—were not lost on other professionals licensed to practice in the state.

By far the greatest danger of wrongful retaliation arises when employees report the maltreatment of children by their own agencies. One social worker's description of what happened to her when she tried to protect a child in her care speaks for itself:

I was fired from my position as the only social worker at [a center for the treatment of cerebral palsy] because I was advocating for a child who attended the center. The child, an eleven year old who was fully ambulatory, was tied into a wheelchair from 9 to 3 each day for the past three years in order to prevent his acting out self abusive behavior. A helmet was placed on his head and tied to the back of the wheelchair and his upper arms were tied behind him. No motion was possible. In addition, he was heavily sedated. On the basis of my previous, extensive work with handicapped children, examination of the reports in the child's file and discussions with my colleagues at the agency, I believed that the child had, in addition, been misdiagnosed as severely retarded and was in the wrong program at the Center. After trying, without success, for four months to convince the Center administration, the psychologist and the doctors to untie the boy, to reevaluate him and to plan a proper educational program for him, I contacted the Chairman of the Board of Trustees of our agency and asked him to intervene. Three weeks after contacting him, the child's situation was unchanged and I then notified [the state agency that had placed the child and the state agency responsible for investigating reports of child abuse].

I did not seek support from the child's parents because staff members had reported that the child was tied and kept in a closet at home. I had met the mother and believed that she could not, at that time, be helpful to the child.

I then gave information to the [state agency] and was immediately

suspended from my job. I received my salary for 55 days and was then fired, with a dismissal letter containing false statements that will totally damage my professional reputation as a social worker. I asked for an evaluation of my work at the agency the day I was fired and was refused. I also utilized all of the ten Personnel Policies, but my efforts were ignored.

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I was fired for properly doing my job as a social worker and advocating for a client and for my commitment to NASW Code of Ethics.<sup>24</sup>

The social worker accepted a \$5,000 payment in settlement of her lawsuit after she realized that the legal costs for pursuing her claim might be higher than any additional payment she might receive. She also wanted to put a very unpleasant incident behind her.

In 1981, administrative disciplinary proceedings were initiated against Irwin Levin, a New York City worker, who released case records to the press. He claimed that he wanted to prove that many child abuse deaths "stemmed from . . . staff incompetence and irresponsibility in handling clients."<sup>25</sup> Unfortunately, in doing so, he apparently released client-identifying information. The agency first sought to fire Levin. In a compromise agreement, he agreed to a demotion and reduction in salary. It took three years, a harshly critical report from the agency's own inspector general, and personal intervention by the mayor before Levin was vindicated—and reinstated with back pay.

There is no way of knowing how often this kind of retaliation occurs; it rarely comes to public attention.<sup>26</sup> But enough cases have become known so that four states—Colorado, Pennsylvania, Tennessee, and Wisconsin<sup>27</sup>—have now passed specific legislation to protect employees who report in good faith from what the Tennessee statute calls "a detrimental change in employment status."<sup>28</sup> Pennsylvania's law gives the employee an express cause of action against the agency:

Any person who . . . is required to report . . . and who, in good faith, makes or causes said report to be made and who, as a result thereof, is discharged from his employment or in any manner discriminated against with respect to compensation, hire, tenure, terms, conditions or privileges of employment, may file a cause of action in the court of common pleas of the county in which the alleged unlawful discharge or discrimination occurred for appropriate relief. If the court finds that the individual is a person who, under this section, is required to report or cause a report of suspected child

abuse to be made, that he, in good faith, made or caused to be made a report . . . and that as a result thereof he was discharged or discriminated against with respect to . . . employment, it may issue an order granting appropriate relief, including but not limited to reinstatement with back pay.<sup>29</sup>

Even in the absence of this kind of specific legislation, the basic employment law of many states would protect employees who report in good faith.<sup>30</sup>

The ability of the law to protect the reporter suffers from one major limitation. To be protected, the employee must establish a connection between the report and the adverse employment action. This can be difficult. Often, there is a history of poor relations and conflict between the employee and the agency's administrators, and the adverse action is claimed to be based on this history, or the action is attributed to legitimate administrative or budgetary needs of the agency. The connection, thus, comes down to a question of proof, which the employee frequently cannot produce.

To meet this often insurmountable problem, Minnesota's employee protection statute creates a "rebuttable presumption that any adverse action within 90 days of a report is retaliatory." It goes on to define an "adverse action" to include, but not be limited to: "(1) discharge, suspension, termination, or transfer from the facility, institution, school or agency; (2) discharge from or termination of employment; (3) demotion or reduction in remuneration for services; or (4) restriction or prohibition of access to the facility, institution, school, agency, or persons affiliated with it."<sup>31</sup> Antiretaliation laws provide important protection for agency workers seeking to report the maltreatment of children in out-of-home care. All states should enact such legislation.

### Conclusion

This article has sought to describe the growing liability for the failure to report suspected child maltreatment faced by the staff of residential, foster care and day care agencies. In doing so, it may have alarmed the reader. Unfortunately, there is reason for concern. Although the mandate to report may seem straightforward, definitional vagueness and evidential ambiguities combine to make the decision to report (or not report) a difficult and often stressful one. These problems, present for all forms of child abuse reporting, are heightened because of the complications created by institutional settings, the special problems (and needs) of the children involved, and the need to maintain agency control as well as accountability.<sup>32</sup>

But the reader should not be overly alarmed. Prosecutions for failing to

report are still rare; successful ones are rarer still. Moreover, state immunity laws—bolstered by the antiretaliation legislation described above—can provide major protection. They should be enacted in all states. ♦

### Notes

1. See, e.g., U.S. National Center on Child Abuse and Neglect. *Preventing Child Abuse and Neglect: A Guide For Staff In Residential Institutions* (1980); *Child Abuse and Neglect in Residential Institutions: Selected Readings on Prevention, Investigation and Correction*. Washington, DC, 1978.
2. Rindfleisch, N. and Rabb, J. "How Much Of A Problem Is Resident Mistreatment In Child Welfare Institutions?" *Child Abuse and Neglect* 8,1 (1984): 33-40.
3. Cal. Health and Safety Code § 1527.5 (West Supp. 1985).
4. Pub. L. 98-457, Oct. 9, 1984 (42 U.S.C. 5101, § 3(1)).
5. See U.S. National Center of Child Abuse and Neglect. *State Child Abuse and Neglect Laws: A Comparative Analysis 1984*, pp. 64-67 (DHHS undated). In 1984, eight states were said to have legislation on the subject. In 1985, the number was 15.
6. *Id.*
7. See, e.g., Ga. Code Ann. § 49-5-70 (Code of 1981, Supp. 1984).
8. In those states in which the child protective agency is administratively linked to day care or residential institutions, an investigation by the child protective agency, like one by the institution itself, might be perceived as something less than independent and objective. To provide assurance that the investigation will be thorough and fair, and that it also will appear to be fair, it is essential that an administratively separate agency conduct it.
9. 45 Code of Federal Regulations § 1340.14(e) (January 26, 1983).
10. U.S. National Center on Child Abuse and Neglect. *Trends In Child Abuse and Neglect Laws*, p. 24 (1981).
11. Mich. Comp. Laws Ann. § 722.628(4) (Supp. 1977).
12. In 1984, the states without specific penalty clauses were reported to be: Idaho, Illinois, Maryland, Mississippi, North Carolina, and Wyoming. U.S. National Center on Child Abuse and Neglect, *supra* n.5, at p. 18, table C.
13. For example, the failure to report may be misprision of a felony. *Cf. Pope v. State*, 38 Md. App. 520, 382 A. 2d 880 (1978); *modified*, 284 Md. 309, 396 A. 2d 1054 (1979), dismissed because the state's child abuse law did not apply and because it was not a crime to fail to report a felony in Maryland.
14. "Principal Fined for Failure to Report Abuse Suspicion." *Denver Post* (March 10, 1982): A-1, col. 1; "PTA Backs Fine in Failure to Report Alleged Abuse." *Denver Post* (March 11, 1982): A-1, col. 1.
15. See generally Besharov, D. *The Vulnerable Social Worker: Liability for Serving Children and Families*. Silver Spring, MD: National Association of Social Workers, 1985, chap 2.
16. *Borgerson v. Minnesota*, Nos. 3-78-228, 4-81-14, slip opinion, (U.S.D. Ct. of Minn., 3d Div., June 12, 1981). This case is cited as an example of the claims that can be made. Minnesota does not have a civil liability statute.

17. *Bartels v. County of Westchester*, 72 A.D.2d 517, 429 N.Y.S.2d 906, 908 (2nd Dept. 1980).
18. *Id.* at p. 909.
19. *Doe v. New York City Department of Social Services*, 649 F.2d 134, 137 (2nd Cir. 1981) and 709 F.2d 782 (2nd Cir. 1983), *cert. denied*, 464 U.S. 864 (1983).
20. *Brasel v. Children's Services Division*, 56 Or. App. 559, 642 P.2d 696, 697 (1982).
21. *Id.* at p. 700.
22. Confidential material on file with author.
23. See Besharov, *supra* n.15, at p. 38-42.
24. Confidential material on file with author.
25. Quoted in "Legal Defense Fund Aids in Test Case in Confidentiality." *NASW News* 27 (June 1982): 22.
26. See, for example, "Virginia, Massachusetts Agencies Draw Sanctions," *NASW News* 28 (October 1983): 18. See generally, Rindfleisch, N. and Rabb, J. "How Much of a Problem Is Resident Mistreatment in Child Welfare Institutions?" *Child Abuse and Neglect* 8, 1 (1984): 33.
27. U.S. National Center on Child Abuse and Neglect, *supra* n.5, at p. 26.
28. Tenn. Code Ann. § 37-1210 (Michie Supp. 1983).
29. Pa. Stat. Ann. tit. 11, § 2202(d) (Purdon Supp. 1984).
30. See generally H. Perritt, *Employee Dismissal Law and Practice*, New York: Wiley Law Publications, 1984; D. Cathcart and S. Kruse, "The New American Law of Wrongful Termination." *International Business Lawyer* (February 1984): 73; Moore, T. "Individual Rights of Employees Within the Corporation." *The Corporation Law Review* 6 (Winter 1983): 39.
31. Minn. Stat. Ann. § 26.556(4a)(c) (West Supp. 1984).
32. See generally Rindfleisch, N. and Rabb, J. "Dilemmas in Planning for the Protection of Children and Youths in Residential Facilities." *Child Welfare* LXIII, 3 (May-June 1984): 205-215.

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