

LEGAL NOTES

LONG & DiPIETRO, LLP
ATTORNEYS AT LAW
175 Derby Street, Unit 17
Hingham, MA 02043
www.long-law.com

NEW AMENDMENTS TO CHILD ABUSE REPORTING REQUIREMENTS UNDER M.G.L. CHAPTER 119, SECTION 51A

School employees are often required to judge whether a student has been the victim of child abuse. As mandated reporters within the meaning of Chapter 119, Section 51A, educators must be familiar with applicable standards. The new law, c176 of the Acts of 2008, signed by the Governor on July 8, 2008, substantially revised Child Abuse reporting and administrative procedures for DSS.

For schools, the new law requires training for all mandated reporters and increases fines for failure to file abuse reports to \$5,000.00, and fines for filing frivolous reports to \$2,000.00. A complete text of the law, based on House bill #4905, is 45 single spaced pages. A copy may be downloaded from <http://www.mass.gov.legis/laws/seslaw08/s1080176htm>.

Please note Chapter 176 contains an emergency pre-amble, making it effective immediately.

A. MANDATED REPORTING PROCEDURE

Chapter 119 sec. 51A contains a lengthy list of "mandated reporters," who tend to be professionals or staff people whose primary functions include educating, caretaking or providing medical or psychological services for children. Public and private school teachers, administrators, counselors, day care workers or other school "staff" are mandated reporters. As amended in July 2008, the statute provides that any mandated reporter:

who, in his professional capacity has reasonable cause to believe that a child is suffering physical or emotional injury resulting from: (i) abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare, including sexual abuse; (ii) neglect, including malnutrition, or (iii) physical dependence upon an addictive drug at birth shall immediately communicate with the Department orally and, within 48 hours, shall file a written report with the Department detailing [the abuse]...

handicapping condition. This definition is *not* dependent upon location
(i.e., neglect can occur while the child is in an out-of-home or in-home setting.)

Emotional Injury means an impairment to or disorder of the intellectual or psychological capacity of a child as evidenced by observable and substantial reduction in the child's ability to function within a normal range of performance and behavior.

Physical Injury means: (a) death; or (b) fracture of a bone, a subdural hematoma, burns, impairment of any organ, and any other such nontrivial injury; or (c) soft tissue swelling or skin bruising depending upon such factors as the child's age, circumstances under which the injury occurred, and the number and location of bruises; or (d) addiction to drug at birth; or (e) failure to thrive.

It is not clear at this time whether or when these regulations will be amended as a result of c.176.

C. REASONABLE CAUSE STANDARDS

The Legislature and the Courts have not provided us with a detailed definition of the "reasonable cause to believe" standard as to whether a child is suffering from child abuse or neglect. A decision rendered in May of 2002 suggests that reasonable cause is established when facts, knowledge or observation tend to support, or are consistent with, the allegations. See Covell v. DSS, 768 N.E. 2d. 564, 567 (2002).

The following cases, decided under the law in effect before July 2008 may be helpful to those who are mandated reporters under Section 51A in determining whether the facts demonstrate reasonable cause. Mandated reporters should take care to note that "abuse" is not limited to physical injury.

- In Cobble v. Commissioner of Department of Social Services, 430 Mass. 385 (1999), a father appealed a DSS decision to support a report of abuse, based on allegations that the father had spanked his nine-year old son with a belt. The Supreme Judicial court held that the evidence did not support a finding of abuse or substantial risk of abuse.

In this case, a school teacher had reported possible abuse and neglect to the DSS. The father admitted striking the child on the buttocks with a belt on five or six occasions in a seven month period. He denied being a "spontaneous spanker," and stated that he only spanked the boy as punishment for misbehavior at school. The belt made a "solid smack" and left temporary red marks on the boy's buttocks, which would fade after about ten minutes. The spanking was not done in anger, would never escalate, and it was administered in a controlled manner. After the spanking, the father would hug the boy and tell him that he loved him. On the basis of this evidence, the court concluded that these facts could not support a report of abuse. There was no conclusive

incident from a pattern, the trivial from the serious.

The court characterized the school defendants as overly hesitant, and said that persons with reporting obligations ought to more faithfully make reports than the school personnel did here. Reports to the Department of Social Services should be made immediately "when there is as solid ground to think there has been child abuse as there was in this case."

- The Appeals Court in Arnone v. Comm. of DSS, 43 Mass. App. Ct. 33 (1997) reversed a finding of abuse. In that case, a 4 year old boy alleged that his penis had been mutilated by a teacher.

The DSS interviewer interviewed the child. The child was examined by a physician. The physician found no marks on his penis, no evidence of sexual abuse and no evidence of urinary tract infection. The court noted there was some evidence that the teacher "sometimes spoke harshly to children at the daycare center, and she had once been reprimanded for treating children too roughly, in the physical sense, when they disobeyed her." In this case, the court was confounded by the multiple levels of hearsay involved. The student had related stories of mutilation to his mother, a teacher and an interviewer who in turn related the stories to the DSS investigator. The court observed that, based on the physical examination, the boy's story relative to the sexual mutilation was completely untrue and that "the incident had not occurred as reported by the child."

In this kind of case, said the Court as a DSS determination implies some form of criminal conduct and results in mandated reports to the Office of Children and a teacher's employer, the court determined that substantial evidence "needs to rest on something more solid than exclusively hearsay - and particularly hearsay statements of very young children, which have been recognized as requiring independent corroborative evidence." Id. at 37. The court concluded by reversing the Superior Court judgment that upheld the DSS substantiation of the abuse report.

Hearsay evidence is extremely problematic. Generally excluded from court proceedings unless specifically accepted by the rules of evidence, hearsay is admissible in administrative proceedings. As a result, while no right to confront an accuser exists in DSS abuse hearings, be aware that hearsay can be admitted if reliable. There are discussions in which DSS findings of abuse were reversed, as the hearsay offered was determined insufficient to meet the "substantial evidence" standard required.

D. CONCLUSION

While the new law was primarily directed at DSS procedures, increased fines for failing to report will be imposed. The message from the legislature is clear: When in doubt, file.