

Summer 8-1-2015

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Seletha R. Butler

Valerie Njiiri

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### Recommended Citation

Seletha R. Butler and Valerie Njiiri, *Higher Education Governance: Proposals for Model Child Protection Governance Policy*, 2015 BYU Educ. & L.J. 367 (2015).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2015/iss2/2>

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# HIGHER EDUCATION GOVERNANCE: PROPOSALS FOR MODEL CHILD PROTECTION GOVERNANCE POLICY

*Seletha R. Butler\* and Valerie Njiiri†*

## I. INTRODUCTION

This article considers existing child maltreatment reporting laws and professional codes of conduct applicable to higher education institutions and affiliated persons. Chaos continues to exist around child maltreatment reporting, in part from no clarity or consistency among related laws and policies. Thus, minors within the higher education system experience harm. To better protect such minors and shield the system and its other stakeholders from damage, we propose provisions for a model child protection governance policy. This article focuses on four-year higher education institutions. However, its content may apply to community colleges and other educational institutions. We call the policy incorporating the proposed provisions in whole or part “the Policy.” We desire that the Policy over time will operate to improve higher education governance and eradicate reporting confusion with respect to institutions’ child maltreatment reporting regimes. Of course, we acknowledge law and policy limitations. No law or policy can eliminate all instances of child maltreatment affiliated with higher education institutions, and a one-size-fits-all regime is not realistic in varying platforms of higher education institutions. However, goals of the Policy are to bring some parity to the process of child maltreatment reporting while protecting minors, education institutions, and their stakeholders.

Given recent scandals involving higher education institutions, this article is important. It addresses the grave issue around child protection for minors affiliated with higher education institutions, and the resulting consequences to the higher education institution in events of such child

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\*Assistant Professor, Georgia Institute of Technology. Fellow, Women and Public Policy Program, John F. Kennedy School of Government, Harvard University. Network Fellow, Edmond J. Safra Center for Ethics at Harvard University. J.D., Harvard Law School; M.B.A., Georgia Institute of Technology.

†Valerie Njiiri, Case Advocacy Supervisor, Voices for Children. J.D., Walter F. George School of Law, Mercer University; M.S.W., Washington University in St. Louis.

protection breaches.

Following the introduction, we give a brief history of existing child maltreatment reporting laws, then discuss details about mandatory reporting laws. Considering the need for reform and greater focus on protecting minors in higher educational affiliated platforms, we propose the framework and certain content for the Policy. Also, because a policy needs teeth, we include provisions on internal institutional punishment for violators before concluding this article.

## II. EXISTING CHILD MALTREATMENT REPORTING LAWS

An old world problem, child maltreatment, made significant advancement over the last fifty plus years.<sup>1</sup> Since the early 1960s, U.S. jurisdictions have passed laws requiring certain professionals to make mandated reports of child maltreatment. Presently, these laws vary among jurisdictions, including who constitutes a designated reporter and types of child maltreatment requiring reporting.<sup>2</sup>

Professional reporting obligations commenced with physicians who were required to report only serious physical injuries and non-accidental injuries.<sup>3</sup> The categories of a mandated reporter and the conditions requiring reporting expanded.<sup>4</sup> Most jurisdictions today require mandated reporters to report all forms of child maltreatment—sexual abuse and exploitation, physical abuse and neglect, and emotional maltreatment—and a number of jurisdictions designate all persons as mandated reporters with a larger amount of movement in this expansive mandated reporter requirement following the recent sexual abuse scandals in higher

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<sup>1</sup> Douglas J. Besharov, Marcia Robinson Lowry, Leroy H. Pelton & Michael W. Weber, *How We Can Better Protect Children from Abuse and Neglect*, 8 THE FUTURE OF CHILDREN 120, 120 (Spring 1998).

<sup>2</sup> Douglas J. Besharov & Lisa A. Laumann, *Child Abuse Reporting: The Need to Shift Priorities from More Reports to Better Reports*, THE BROOKINGS INSTITUTION 257–58 (1996); see also Debra Schilling Wolfe, *Revisiting Child Abuse Reporting Laws*, SOCIAL WORK TODAY (Mar. 19, 2012), [www.socialworktoday.com/archive/031912p14.shtml](http://www.socialworktoday.com/archive/031912p14.shtml) (last visited June 11, 2012) (The state laws, at a minimum, provide the state's position on what constitutes child maltreatment and who is a mandated reporter. There are advantages and disadvantages to states having different law content. This Article does not address the advantages and disadvantages, which could be a future research project).

<sup>3</sup> *Id.* at 258. See also Douglas J. Besharov, *Responding to Child Sexual Abuse: The Need for a Balanced Approach*, 4 SEXUAL ABUSE OF CHILDREN 135, 137 (1994).

<sup>4</sup> Besharov & Laumann, *Child Abuse Reporting*, *supra* note 2, at 257–58. See also Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 137–38; John E. Kesner, *Child Protection in the United States: An Examination of Mandated Reporting of Child Maltreatment*, 1 CHILD IND RES 397, 397–98 (2008) (describing and comparing the reporting practices of four mandated reporting groups in the U.S.—legal/law enforcement, medical, education, and social service/mental health personnel—over a three year period to assess the type of child maltreatment reported and the rate of substantiation by child protective services).

education.<sup>5</sup> In addition to mandatory reporting obligations, many states have provisions that allow and encourage permissible reporting, including providing indemnity from criminal and civil liability for those reporting in good faith.<sup>6</sup> Good faith references that no malicious intent exists.<sup>7</sup> Some states have a presumption of good faith, making it attractive for persons to report with a reduced fear of prosecution.<sup>8</sup>

Historically, prosecution of and convictions for child maltreatment reporting failures were rare.<sup>9</sup> Mandated reporters with some knowledge about the child maltreatment beyond reasonable suspicion were the most often held accountable.<sup>10</sup> Thus, the case being evaluated focused on when the law required mandated reporting.<sup>11</sup> However, we caution that such rare prosecution tendency may turn with the numerous recent child abuse scandals in higher education and other trust organizations where institutional parties allegedly failed to properly report the child maltreatment. Modern reaction and intolerance for child maltreatment reporting failures may drive such reaction.

### A. Legal Mandate

#### 1. Maltreatment meaning

In this article, child maltreatment means all forms of child abuse, including sexual abuse and exploitation, physical abuse and neglect, and emotional maltreatment. However, we focus on child sexual and physical abuse, not addressing other forms of child maltreatment.

Each U.S. jurisdiction's law governs the meaning of child

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<sup>5</sup> Besharov & Laumann, *Child Abuse Reporting*, *supra* note 2, at 257–58. *See also* Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 137–38.

<sup>6</sup> Besharov & Laumann, *Child Abuse Reporting*, *supra* note 2, at 258. *See also* Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 145.

<sup>7</sup> Benjamin H. Levi & Greg Loeben, *Index of Suspicion: Feeling Not Believing*, 25 THEOR. MED. 277, 282 (2004) (describing significant problems arising from a lack of clarity for child maltreatment reporting requirements, including the meaning of reasonable suspicion, discussing the nature and scope of the vagueness, and recommending a practical solution to the problem); SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW, & POLICY 20 (2<sup>nd</sup> ed. 1999) (“It is extremely rare for mandated reporters to file reports that are deemed harassing and without just cause”).

<sup>8</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 145 (as part of Besharov’s push to curtail the number of unsubstantiated reports and overcrowding of the child protective services system, he advocates that states limit liability for reporting failure to “knowing” and “willful” failures, which he points out a few states have instituted. We however do not support such a reporting concept as they anticipate such reporting liability limitation will lead to missed reporting and the subsequent endangerment of children which could have been avoided).

<sup>9</sup> Douglas J. Besharov, *Reporting Out-of-Home Maltreatment: Penalties and Protections*, 66 CHILD WELFARE 399, 406–07 (1987).

<sup>10</sup> KALICHMAN, *supra* note 7, at 33.

<sup>11</sup> *Id.*

maltreatment. In our investigation, many laws define “child” as persons under the age of eighteen.<sup>12</sup> There is ambiguity and inconsistency regarding the meaning of child maltreatment. Some laws contain a broad definition and other laws contain a narrow definition, causing problems both for the mandated reporters<sup>13</sup> and other parties involved in child maltreatment matters.<sup>14</sup> The Child Abuse Prevention and Treatment Act (“CAPTA”) “sets minimum definitional standards for the states receiving federal funds, but the details of defining maltreatment fall to the states, and specific definitions vary considerably.”<sup>15</sup> CAPTA arguably contains a narrow or broad definition of child maltreatment.<sup>16</sup> A broad definition of child maltreatment increases reports that do not have sufficient evidence to establish child maltreatment.<sup>17</sup> Narrow definitions reduce false reports, but false negatives likely result because of missed abuse cases.<sup>18</sup> Under CAPTA, child maltreatment means “the physical and mental injury, sexual abuse, neglected treatment or maltreatment of a child under age 18 by a person who is responsible for the child’s welfare under circumstances which indicate the child’s health and welfare is harmed and threatened.”<sup>19</sup> English indicates that the CAPTA definition allows for only the child’s parents and caregivers to be possible offenders, which is a narrow definition.<sup>20</sup> We disagree with such a limited application of potential child maltreatment offenders. The meaning of child maltreatment with respect to potential offenders should include persons in addition to parents and caregivers. We argue for a broader CAPTA child maltreatment definition interpretation.

## 2. *Mandated and permissible reporter*

No state law uniformity exists on the mandatory reporters and the thresholds triggering a reporting obligation. In most jurisdictions,

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<sup>12</sup> ALA. CODE § 26-14-1, 23 PA. CONS. STAT. § 6303 (1994), CONN. GEN. STAT. § 17a-93 (provides that “child” means any person under the age of eighteen, unless another age is indicated, except the age is under twenty-one with respect to children attending full-time secondary educational institutions, technical schools or state-accredited job training programs), MD. CODE ANN. [Md. Family Law] § 5-701 (2012).

<sup>13</sup> KALICHMAN, *supra* note 7, at 21, 26.

<sup>14</sup> KALICHMAN, *supra* note 7, at 21.

<sup>15</sup> Diana J. English, *The Extent and Consequences of Child Maltreatment*, 8 PROTECTING CHILDREN FROM ABUSE AND NEGLECT 39, 40 (1998) (examining the definition of child abuse and neglect and the related controversies).

<sup>16</sup> *Id.*

<sup>17</sup> KALICHMAN, *supra* note 7, at 21.

<sup>18</sup> *Id.*

<sup>19</sup> *quoted in* English, *supra* note 15, at 40.

<sup>20</sup> *Id.* Historically, child maltreatment by parents and other adults in a caretaking position fell under both the child welfare system and criminal justice system to the extent the perpetrator’s actions were criminal activity. Wolfe, *supra* note 2.

mandated reporters generally include persons commonly in contact with children because they are most likely to observe signs or hear about child maltreatment and make the report.<sup>21</sup> Historically, primary and secondary teachers and administrators were mandated reporters, but university professionals were in a grey area. Such greyness likely will change under many jurisdictions' laws. If not, institutions of higher education should be addressing such in its policies on reporting child maltreatment. Also, some jurisdictions required a person with direct knowledge of the child maltreatment to report up within the organization with the higher authority having to report the situation.<sup>22</sup>

A trigger point for reporting child maltreatment is problematic because it may cause the potential reporter to make subjective determinations in the report. Even after amendments, states provide minimum clarity on what the direct trigger is for reporting. In the U.S., these differ with jurisdictions: "In [twenty-two] states some variant of *belief* characterizes the statutory wording, while some variant of *suspicion* is used in [twenty-eight] states."<sup>23</sup> Levi and Portwood explain that such variability in the threshold standard is problematic because belief and suspicion are conceptually and practically different.<sup>24</sup> Belief represents the truth of a matter and suspicion deals with the possibility of occurrence of a matter.<sup>25</sup> Variation between suspicion and belief leads to substantially different reporting levels.<sup>26</sup>

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<sup>21</sup> Gail L. Zellman, *Linking Schools and Social Services: The Case of Child Abuse Reporting*, THE RAND CORPORATION, reprinted in 12 EDUC. EVALUATION & POL'Y ANALYSIS 41, 1–2 (1990).

<sup>22</sup> *Id.*

<sup>23</sup> Benjamin H. Levi & Sharon G. Portwood, *Reasonable Suspicion of Child Abuse: Finding a Common Language*, 39 J. L. MED & ETHICS 62, 64 (2011).

<sup>24</sup> *Id.* at 63–64. Kalichman's work further explains that state laws following the original statutory provision for child maltreatment reporting do not require knowledge or certainty for reporting, with such statutory provisions using terms such as "reason to believe" or "having a reasonable cause to suspect" as describing the reporting threshold. KALICHMAN, *supra* note 7, at 26. However, other states include a subjective suspicion threshold indicating that reporting should occur when "based upon the facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training and experience, to suspect abuse." *Id.* The reasonable suspicion standard may imply that the mandated reporter must engage in "a thoughtful, discretionary process when reporting" *Id.* at 27. Kalichman did acknowledge that he did not identify empirical evidence showing a difference in reporting where the threshold is "suspicion of abuse" versus "reasonable suspicion of abuse." *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Levi & Portwood, *supra* note 23, at 66. Levi and Portwood reference numerical thresholds such as a percentage probability (i.e. >25%), but they note the need for empirical research and a cost benefit analysis prior to any established numerical threshold being adopted: "[E]mpirical research into the costs and benefits of various cutoff points . . . is essential. The impact of specific thresholds on rates of overall reporting, false positive reports, and false negatives . . . must all be examined. Only with actual data on the relative costs of adopting various standards can we conduct the complex social calculus for determining how much we, as society, are willing to invest to protect children from abuse, and how much and what kinds of harm we are willing to tolerate. Set the bar

Reasonable suspicion has a greater problem as a reporting trigger. It is subjective—subject to a reporter’s interpretation of what a reasonable person would do regarding reporting.<sup>27</sup> Despite the concern with reasonable suspicion as a trigger for reporting, most state laws indicate that “[t]he duty to report does not require the professional to ‘know’ that abuse or neglect occurred. All that is required is information that raises a reasonable suspicion of maltreatment. A mandated reporter who postpones reporting until all doubt is eliminated *probably* violates the reporting law.”<sup>28</sup> This article does not analyze this reporting threshold debate, but we include this information about the controversy. It adds background to understanding problems faced by reporters in fulfilling reporting obligations.

Such information also ties to understanding the debate regarding a more or less expansive definition for the mandated reporter. Many policymakers, child advocates and experts argue that more reports of suspected child maltreatment are not the solution to the continued incidents of child maltreatment.<sup>29</sup> Opponents of the more expansive definition of mandated reporter assert that it clogs the child welfare system, ultimately causing workers to be inundated with unsubstantiated claims and thus leading to actual child maltreatment incidents being missed or overlooked in the mass volume.<sup>30</sup> Supporters of a more expansive definition of mandated reporter argue that unfounded child maltreatment reports resulting from over-reporting is merely a byproduct of protecting endangered children.<sup>31</sup>

Changes are continuing to occur at the state and federal level regarding the class of mandated reporters. Currently, pending CAPTA legislation exists requiring all U.S. states to amend their laws within two years to include all adults as mandated reporters and provide child maltreatment training.<sup>32</sup> This proposed federal legislation ties states’ receipt of federal CAPTA funds to taking such action.<sup>33</sup> Experts are

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too low, investigating *any* suspicion, and the costs (financial, personal, etc.) become prohibitive. Set mandatory reporting thresholds too high, and we risk overlooking instances of abuse, stranding tens of thousands of children in harm’s way. Hence, some balancing is necessary to identify an appropriate threshold, as is research to understand the implications of various thresholds.” *Id.* at 66.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 21.

<sup>29</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 120.

<sup>30</sup> *Id.* In 1975, thirty-five percent of all reported child maltreatment claims were found inappropriate compared to sixty-five percent in 1995. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Wolfe, *supra* note 2.

<sup>33</sup> *Id.*

studying the effects of such all-encompassing mandated reporter law.<sup>34</sup>

Some jurisdictions require immediate reporting by oral report with a subsequent written report.<sup>35</sup> Initially, under child maltreatment reporting laws, child maltreatment reports went to the applicable jurisdictional police department, but in response to society's growing therapeutic response to child maltreatment, reporting shifted to the applicable jurisdiction's specialized child reporting agency.<sup>36</sup> Thus, currently, some state laws require that child maltreatment reports go to the applicable jurisdiction's specialized child protection agency, and others provide a reporting choice—either to a specialized child protection agency or the police; and in the case of emergencies, to the police.<sup>37</sup>

Finally, permissible reporting is where the state statutory law encourages but does not have a requirement for certain parties to report child maltreatment. All states allow any citizen to make good faith reports of child maltreatment with state legal protection agencies.<sup>38</sup>

When child maltreatment or suspected child maltreatment goes unreported or improperly reported, existing and potential educational stakeholders including the victims go without protection. Such lack of reporting may lead to liability, losses, or reputational damage: directly, to the institution and connected individuals, and indirectly, to institutional stakeholders. These potentially harmed stakeholders are parents who entrust their minors to the institution and its appropriate operation, taxpayers whose funds are used for the operation of the institution, and peers whose safety is being disrupted with such unreported child maltreatment, to name a few. Thus, it is important to address child maltreatment reporting in some consistent manner.

### 3. Penalties

This section provides a brief overview of potential penalties faced by non-reporting mandated reporters. Penalties vary based on jurisdiction as well as the higher education institution in which applicable policies apply. Violators and affiliated entities may be subject to both criminal

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<sup>34</sup> *Id.* Many U.S. jurisdictions have a short statute of limitations for bringing such criminal and civil claims. *Id.* Thus, some U.S. state legislators engaged experts to examine revamping the statute of limitations around child maltreatment reporting. *Id.*

<sup>35</sup> Pennsylvania requires that mandated reporters report immediately by telephone with a written report due within forty-eight hours after making the oral report. 23 PA. CONS. STAT. § 6313 (1994).

<sup>36</sup> DOUGLAS J. BESHAROV, *RECOGNIZING CHILD ABUSE: A GUIDE FOR THE CONCERNED* 171 (1990).

<sup>37</sup> *Id.* at 171.

<sup>38</sup> *Id.* at 9, 25.



and civil penalties and sanctions.<sup>39</sup> The penalties and sanctions are issued by professional standards boards for mandatory reporting law violations and vary by jurisdiction and legal challenge.<sup>40</sup> Such penalties have evolved over time in regard to initiation, success, and extent.<sup>41</sup> Although not historically the case, recently, criminal prosecutions have become increasingly prevalent for a mandated reporter failing to meet his or her reporting obligation.<sup>42</sup> The criminal liability for mandated reporters failing to report suspected child maltreatment typically is a misdemeanor, which carries a fine and jail term.<sup>43</sup>

Depending on the specificity of the applicable statute, civil liability may exist for failure to report and may not only capture the actual non-reporting individual(s), but also connected organizations and related supervisors or other management.<sup>44</sup> However, there needs to be no legislation specifically creating civil liability as the “failure to comply with a statutory mandate ‘in itself’ establishes the negligence.”<sup>45</sup> Statutes of limitations often bar victims and the state prosecution from pursuing action, criminal and civil, against violators of mandatory reporting statutes, which most recently has drawn mass criticism in blocking the ability of the victims to seek retribution against non-reporting mandated reporters.<sup>46</sup>

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<sup>39</sup> *Id.* at 37. In almost all states, mandated reporters are subject to criminal penalties for failing to report suspected child maltreatment or whichever standard constitutes the mandated reporting obligation. Prior to the 2012 child maltreatment reporting law reform, some reporting law research references that the then reporting violation penalties added “teeth” to the legislation. However, given the most recent line of high profile child maltreatment cases for which reporting failed to occur, a good argument exists that such penalties did not serve their purpose of insuring reporting. For updated state statutes on child reporting laws, see *Child Welfare Information Gateway*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, [https://www.childwelfare.gov/systemwide/laws\\_policies/state/index.cfm](https://www.childwelfare.gov/systemwide/laws_policies/state/index.cfm).

<sup>40</sup> Besharov & Laumann, *Child Abuse Reporting*, *supra* note 2, at 258; *see also* Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 145; Besharov, *Reporting Out-of-Home Maltreatment*, *supra* note 9, at 401.

<sup>41</sup> *Id.*

<sup>42</sup> BESHAROV, *RECOGNIZING CHILD ABUSE*, *supra* note 36, at 37–38. Historically, criminal prosecutions for non-reporting were uncommon because of three main reasons: (1) problems of proof of the potential child maltreatment existed which could be connected to the targeted individual failing to report; (2) sentiment existed that criminal sanctions were inappropriate because there is no criminal culpability; and (3) because the non-reporter’s cooperation was needed to prove the case against the child maltreatment offender, the non-reporter was not pursued. *Id.* at 37.

<sup>43</sup> KALICHMAN, *supra* note 7, at 67.

<sup>44</sup> BESHAROV, *RECOGNIZING CHILD ABUSE*, *supra* note 36, at 39.

<sup>45</sup> *Id.* at 40.

<sup>46</sup> *Id.* at 44. Besharov explains an example of such a statute of limitation bar: “[A]n action must be filed within three to five years of when the harm was done. In all but a few states, however, the statute of limitations usually does not take effect against minor plaintiffs until they reach age eighteen. Thus, the failure to report the suspected maltreatment of an infant may result in a lawsuit up to twenty-one years later. Of course, an action may be initiated on behalf of a child while he or she is still a minor if it is brought by a legal representative or a duly appointed guardian.” *Id.* at 44–45..

Moreover, potential professional liability for failure to report also varies from profession to profession and often requires a professional relationship between the maltreated child and the mandated reporter who failed to report, whether at all or within the requirement time frame and reporting manner.<sup>47</sup> When deciding to report or not, fear of criminal and civil penalties and professional standards for board discipline are a low concern.<sup>48</sup> Despite legal protections for good-faith reporting, many mandated reporters fear being sued for libel, slander, defamation, invasion of privacy, or breach of confidentiality.<sup>49</sup> In response to such concerns, all states have enacted laws specifically protecting the reporting person, including granting the person civil and criminal liability immunity where the report is made without malice.<sup>50</sup>

#### 4. Duties to protect and warn

Mandatory child maltreatment reporting laws stem from two professional duties—the duty to protect and the duty to warn.<sup>51</sup> The duty to protect addresses a particular professional’s duty to protect those that he or she serves, including vulnerable persons from the harm of others.<sup>52</sup> The duty to warn involves a broader context. It involves shielding the public, victims, and potential victims from a potential perpetrator by notifying a protective agency or authority regarding the circumstance at issue.<sup>53</sup>

Finally, a mandated reporter’s legal obligations can cause an ethical dilemma. Conflicts may exist between protecting the child victim, other potential victims, and the public, while also meeting the individual’s professional obligations, such as confidentiality.<sup>54</sup> Kalichman points out that an ethical dilemma in a certain professional’s mandatory reporting

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<sup>47</sup> *Id.* at 43. Outside the scope of this Article is a discussion regarding potential liability and penalties on the higher education institutions and the professionals from accrediting and governing authorities such as the Southern Association of Colleges and Schools Commission on Colleges, Middle States Commission on Higher Education, New England Association of Schools and Colleges Commission on Institutions of Higher Education, U.S. Department of Education, and National Collegiate Athletic Association, to name a few.

<sup>48</sup> KALICHMAN, *supra* note 7, at 67.

<sup>49</sup> BESHAROV, RECOGNIZING CHILD ABUSE, *supra* note 36, at 46.

<sup>50</sup> *Id.* Even though immunity fails to block the initiation of a lawsuit for damages for wrongful reporting, such suit is difficult to succeed for good faith reporting. *Id.* at 47. Such a lawsuit is likely dismissed for insufficient proof of the reporter’s bad faith. *Id.*

<sup>51</sup> KALICHMAN, *supra* note 7, at 46.

<sup>52</sup> *Id.* at 43–45.

<sup>53</sup> KALICHMAN, *supra* note 7, at 43–46 (liability for breaching the duty to warn exists where Party A fails to warn third parties of a clearly recognized danger posed by Party B for which Party A has knowledge of the danger Party B presents).

<sup>54</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 120.

obligations is “a legal obligation with ethical implications. . . .”<sup>55</sup> This article omits any discussion of the legal and ethical clash for professionals when faced with mandatory reporting obligations and promises of ethics and codes of conduct within their profession.

### *B. Purpose and Mission*

The implementation of and continuous enhancements to the child maltreatment reporting laws result in many children being protected from further harm caused by child maltreatment.<sup>56</sup> In 2010, 676,569 unique cases of child maltreatment were reported with all fifty states plus the District of Columbia reporting.<sup>57</sup> Even with the positive increased protection, one must remember that many instances of child maltreatment go unreported.

Experts provide many reasons for mandatory reporting laws related to child maltreatment. First, child maltreatment reporting laws exist to provide a voice and power to children who lack the ability to protect themselves. Unlike some adult abuse victims, children often lack the physical and mental capability to protect themselves from maltreatment, including reporting to authorities or generally an adult that they have been victimized.<sup>58</sup> Many children are young and fearful to seek

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<sup>55</sup> KALICHMAN, *supra* note 7, at 46. Kalichman explains the difference between confidentiality and privileged communication: “Confidentiality is . . . ‘the general standard of professional conduct that obliges a professional not to discuss information about a client with anyone’. [It] is an ethical concept and should not be confused with privileged communication, a legal concept that refers to ‘the quality of certain specific types of relationships that prevent information, acquired from such relationships, from being disclosed in court or other legal proceedings.’” *Id.* at 47. Kalichman further discusses the multi-tiered complexity in professionals meeting legal and ethical obligations in connection with mandatory reporting obligations and the need for further research: “Conflicts among reporting reasonable child abuse, protecting children, maintaining confidentiality, protecting the integrity of professional services, and acting within professional roles are complex. A closer examination of professionals’ decision-making processes concerning reporting may, therefore, be of use in understanding these conflicts.” *Id.* at 63.

<sup>56</sup> John E. Kesner, *Self-Reports of Child Maltreatment in the U.S.: A Key Social Indicator*, 83 SOC INDIC RES 117, 118 (2006) (describing an analysis of reports to child protective services by the victims of child maltreatment over a three year period).

<sup>57</sup> Child Maltreatment 2010, CHILDREN’S BUREAU: AN OFFICE OF THE ADMINISTRATION FOR CHILDREN AND FAMILIES,, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment> (last visited July 31, 2013); Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 121 (unique count of child victims counts a child only once, regardless of how often the child is reported as a victim during the reporting year).

<sup>58</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 137, 143. In Kesner’s research, child protective services substantiated only thirty-eight percent of child self-reports compared to a fifty-seven percent substantiation rate for adult professional reports. Kesner, *supra* note 56, at 122. We do not take a position on this substantiation discrepancy, but are noting the difference to exemplify the point that children often feel powerless which may lead to few child victim self-reports and services as a purpose of mandatory reporting laws. Additionally, it buttresses the concept that the child protection governance policy should contain elements encouraging child victim self-reports and protecting them when such reports are made.

protection, thus they rely on adults for protection.<sup>59</sup> Also, they may be unable to directly report the maltreatment to the institution designated to receive the report for a number of reasons, including a lack of ability to contact a child protection services agency.<sup>60</sup>

Additionally, emotional factors play large roles in children not making direct reports to authorities about their maltreatment: “Fear of embarrassment, retaliation by the perpetrator or others, revictimization, being stigmatized, or simply not being believed . . . may be an insurmountable barrier to children self-reporting maltreatment.”<sup>61</sup> Secondly, mandatory reporting represents the seriousness of curtailing child maltreatment by “reinforc[ing] the moral responsibility of community members to report suspected child abuse and neglect . . . and overcome[ing] the reluctance of some professionals to become involved in suspected cases of child abuse by imposing a public duty to do so.”<sup>62</sup> Finally, mandatory reporting is the means enabling governmental authorities to investigate allegations of child maltreatment.<sup>63</sup>

### C. History and Reform

In 1963, California was the first jurisdiction in the U.S. to adopt mandatory child maltreatment reporting laws, which were limited, applying to physicians for restricted types of injuries.<sup>64</sup> In 1974, federal law addressed child maltreatment with the passage of CAPTA and with its subsequent amendments.<sup>65</sup>

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<sup>59</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 137; *see also* Ben Mathews et al., *Teachers Reporting Suspected Child Sexual Abuse: Results of a Three-State Study*, 32 UNIV OF NSWLJ 772, 775–76 (2009) (examining teachers’ knowledge of their child maltreatment reporting duties, revealing information about their past reporting practices, and providing insight into future reporting practices and legal compliance).

<sup>60</sup> Kesner, *supra* note 56, at 118.

<sup>61</sup> Kesner, *supra* note 56, at 118. Kesner notes that sometimes child self-reporting exists, and based on his study, child victim self-reports from sexual abuse were five out of six in terms of the percentage of child self-report, with physical abuse being the most reported and medical neglect the least reported. *Id.* at 118, 121; *See also* Mathews, *supra* note 59, at 775–76.

<sup>62</sup> Daryl Higgins et al., *Mandatory Reporting of Child Abuse and Neglect*, NATIONAL CHILD PROTECTION CLEARINGHOUSE (August 2010), [www.aifs.gov.au/nch/pubs/sheets/rs3/rs3.pdf](http://www.aifs.gov.au/nch/pubs/sheets/rs3/rs3.pdf).

<sup>63</sup> Wolfe, *supra* note 2. U.S. jurisdictions have their individual child protection services systems, and some jurisdictions segment the state system into local components. *Id.*

<sup>64</sup> John E. Kesner, *Child Protection in the United States: An Examination of Mandated Reporting of Child Maltreatment*, 1 CHILD IND. RES. 397, 397 (2008) (describing and comparing the reporting practices of four mandated reporting groups in the U.S.—legal/law enforcement, medical, education, and social service/mental health personnel—over a three year period to assess the type of child maltreatment reported and the rate of substantiation by child protective services).

<sup>65</sup> *Id.* CAPTA, in general, requires U.S. states to enact child maltreatment reporting legislation, but Congress in CAPTA failed to define mandated reporters. Marsha B. Liss, *Child Abuse: Is There a Mandate for Researchers to Report?*, 4 ETHICS BEHAV 133, 133 (1994) (reviewing the types of state child maltreatment statutes, outlining the categories of mandated reporters, and developing a model of how researchers can determine if they are mandated reporters).

Evidence exists that one in three professionals fails to report child maltreatment.<sup>66</sup> A number of reasons exist to explain professionals, including mandated reporters, failings to report child maltreatment. First, a lack of knowledge contributes to reporting failure, with such parties being unaware of the harm to the child.<sup>67</sup> Second, in many instances, mandatory reporting laws provide limited guidance on who must report, what types of situations to report, when to report reportable incidents, and the reporting structure or process.<sup>68</sup> Thirdly, legislation provisions and definitions are vague or overbroad and not uniform among the states, prohibiting the potential reporter from being able to decipher reporting obligations.<sup>69</sup> Finally, fear of being sued for libel, slander, defamation, invasion of privacy, or breach of confidentiality stops some from reporting. Rarely does a situation exist where a party fails to report for a lack of care about the victim of child maltreatment.<sup>70</sup>

Some experts, prior to 2012 and continuing, argue that child maltreatment laws are vague and overly broad.<sup>71</sup> Experts are pushing for legislative reform of child maltreatment laws to provide clear guidelines about what conditions require reporting child maltreatment.<sup>72</sup> Unclear laws cause inconsistent application across reporters reporting under the same law.<sup>73</sup> Some experts rationalize that such ambiguity in the laws may

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Another federal law relevant to this article is The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, known as the Clery Act. Congress passed the Clery Act in 1990, which requires all colleges and universities participating in any federal aid program to keep and disclose criminal activity on or near the campus, and the U.S. Department of Education monitors compliance with and imposes violating penalties to the Clery Act. 20 U.S.C. § 1092(f). This article does not contain detailed discussion and analysis of the Clery Act but references it because a question of Clery Act compliance exists in child maltreatment involving higher education institutions.

<sup>66</sup> KALICHMAN, *supra* note 7, at 4.

<sup>67</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 120.

<sup>68</sup> Gail L. Zellman, *Report Decision-Making Patterns Among Mandated Child Abuse Reporters*, THE RAND CORPORATION (Sept. 1990), <http://www.rand.org/content/dam/rand/pubs/notes/2009/N3225.pdf> (reprinted in 14 CHILD ABUSE AND NEGLECT 325 (1990)). Considering all U.S. jurisdictions, nearly forty different professionals comprise the mandated reporter block. KALICHMAN, *supra* note 7, at 19.

<sup>69</sup> Zellman, *supra* note 68, at 1.

<sup>70</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 121.

<sup>71</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 142; *see also* Levi & Loeben, *supra* note 7, at 277.

<sup>72</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 142.

<sup>73</sup> Levi & Loeben, *supra* note 7, at 279. Although this article does not address the topic, Levi and Loeben discuss in their article the problems with reasonable suspicion as a benchmark for determining mandatory reporting obligation and how such causes evaluation and determination issues for the reporter and due process problems for the accused. These authors note that reasonable suspicion should be a feeling rather than a belief and argue for a clear trigger for when mandated reporters are obligated to report child maltreatment—a feeling that a child has been abused looking at the likelihood of such abuse having occurred. *Id.* at 284–95.

be attributed to many reasons, including: the perceived harm resulting from reporting; variation in what constitutes or should constitute abuse depending on culture and community norms; the large pool of mandated reporters making consistent law interpretations difficult; and barriers existing to proper training of the numerous categories of mandated reporters.<sup>74</sup>

While efforts have been made to reform child maltreatment laws, progress has been slow and minimal. An expert described the reform resistance as “bureaucratic inertia; the difficult, time-consuming process of changing long-established practices; the cost of reform; the lack of administrative continuity; and the absence of political will to spend money on a constituency of children who are often exploited to win votes but who cannot vote themselves.”<sup>75</sup> Despite the pros and cons of mandatory reporting laws’ reform, many experts agree that most of the reports made about child maltreatment would not exist, without such mandatory reporting laws and the complimentary media awareness initiatives.<sup>76</sup> Thus, any change in the child maltreatment laws will require advocacy and legislative initiatives at a minimum.<sup>77</sup> However, despite all of the prior and recent reform efforts around reporting obligations of child maltreatment, it is critical to remember that reporting is only one of many components to protecting victims of child maltreatment.

### III. PROPOSALS FOR A POLICY

Often taken for granted is the idea that minors on or in the care of adults in any institutional platform, particularly higher education institutions, will be protected and free from intentional harm. The public, now more than a few years ago, knows this sense of security can be a fallacy and is advocating for better mechanisms for protecting higher education stakeholders, particularly the innocent youth, from predators. For years, reform regarding child maltreatment has occurred and there have been continuous calls for more progressive reform, especially following major scandals, including the recent issues at various higher

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<sup>74</sup> *Id.* at 279–80.

<sup>75</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 124. In her description of the reform problem, Lowry further exemplifies the problem saying that “in the absence of focused and sustained pressure, too many government child welfare systems have responded to the crisis of the day—or the decade—with the eager acceptance of single, simple operating principles as a substitute for what any system truly needs: adequate management, a competent workforce, sufficient resources, and the capacity for professional decision making.” *Id.*

<sup>76</sup> Besharov & Laumann, *Child Abuse Reporting*, *supra* note 2, at 258.

<sup>77</sup> KALICHMAN, *supra* note 7, at 184.

education institutions.<sup>78</sup> Thus, a charge for improved child maltreatment protection exists, and governments and higher education institutions are responding with studies, evaluations, and reform of laws and policies that try to protect minors under the supervision of higher education institutional establishments and affiliates. Given the importance that laws, regulations, and policies serve in higher education institutions in protecting the innocent, we address higher education policy reform.

In the area of child protection in higher education, law, policy, and ethics intersect to a large extent. Although this article focuses on the law and policy aspect of child protection in higher education, we reference the ethical intersection.<sup>79</sup>

This section addresses our policy reform. It is a national framework for child protection governance in higher education and should encourage and assist higher education management in developing, implementing, and applying a method for curtailing and addressing child maltreatment issues in its environment. Governing the well-being of children is complex and should involve “levels of understanding that cannot be gleaned from books alone.”<sup>80</sup> Management and decision-making require a blending of theory and practice in order to best accomplish the needed results for keeping minors protected. Thus, we propose a Policy as a first step for higher education management to blend theory and practice in accomplishing the goal of child protection as well as other stakeholder fortification.

Appropriate reporting of child maltreatment requires a good understanding of the laws, regulations, and policies relating to the reporting criteria. Thus, higher education institutions have adopted and should continue to advance policies around child maltreatment reporting. Also, to comply with certain state laws, some higher education institutions must adopt and include certain provisions in their child maltreatment reporting policies, as some states require certain institutions to have specific provisions within child maltreatment reporting policies.<sup>81</sup>

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<sup>78</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 120.

<sup>79</sup> We acknowledge a potential research project that will address ethical issues around child maltreatment reporting in higher education. Also, with no diminution of its importance, this article does not address the connection among the legal and ethical duties of higher education governing bodies, its board members, management, and the implementation and enforcement of organizational compliance systems.

<sup>80</sup> Frank P. Cervone & Linda M. Mauro, *Ethics, Cultures, and Professions in the Representation of Children*, 64 *FORDHAM L. REV.* 1975, 1987 (1996). With respect to child advocacy relationships, the authors state that “[p]rofessionals need to respect each other and work together to arrive at meaningful decisions.” *Id.*

<sup>81</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 144.

Affected parties must understand that child maltreatment is not the responsibility of only one sector of society. Parties also should recognize that they must collaborate with multiple platforms, strategies, and processes to maximize child protection.<sup>82</sup> Platforms in which minors receive services often involve the interaction of multiple disciplines, with cooperation and effective communication being critical.<sup>83</sup> For example, in a higher education matter, the multi-function areas may include compliance or legal, athletics, student services, administration, institution protective services, or social services. Thus, if there is a potential issue with respect to child maltreatment, different departments must collaborate. Society in totality must communicate appropriately and work together effectively to minimize the problem of child maltreatment, the cure of which involves more than just formality structures.<sup>84</sup> However, the Policy is not a complete cure to stop all perpetrators and child maltreatment.

When making policy, it is important for policy makers to be realistic about the organization's ability to effectively implement and administer a policy. Thus, organizational resources should be important considerations when developing the Policy.<sup>85</sup> Government reporting laws supersede institution policies; thus, the Policy should include or reference all applicable legal mandates.<sup>86</sup> More specifically, the Policy should contain the following components: (1) "clearly state legal requirements for reporting, as well as the penalties and protections established in the law";<sup>87</sup> (2) "describe where and how to report";<sup>88</sup> and (3) if any and in compliance with law, "delineate the duties and responsibilities of different types of staff members[.]" indicating who should do what.<sup>89</sup>

In addition to the above-mentioned basic and universal elements for the Policy, the other proposed components for a Policy are: whistleblower protections, strategic risk management, code of conduct—ethics and professional responsibility, communication—awareness campaign, training, and enforcement.

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<sup>82</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 130–32.

<sup>83</sup> Cervone, *supra* note 80, at 1975–76, 1987.

<sup>84</sup> Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, *supra* note 1, at 132.

<sup>85</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 144; *see also* BESHAROV, *RECOGNIZING CHILD ABUSE*, *supra* note 36, at 194.

<sup>86</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 144; *see also* KALICHMAN, *supra* note 7, at 122.

<sup>87</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 144.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*



### A. *Whistleblower*

We recommend that the Policy provide mandatory and permissible reporters protection and incentives for abiding by the law, and where no legal mandate exists, for being ethical by reporting suspected child maltreatment. The incentive system, along with its other elements, is the whistleblower component of the Policy. It must be robust and specific to encourage and enable good faith and effective reporting of child maltreatment related to the higher education institution.<sup>90</sup> Below are reasons for adopting a robust whistleblower policy with respect to corporations. These reasons are conceptually translatable to higher education organizations.

- Where legally permissible, encouraging internal reporting rather than external disclosure to obtain bounties;
- Providing the governing board with important risk management information essential to fulfilling its fiduciary obligations;<sup>91</sup>
- Enabling the organization to handle issues and mitigate risk prior to harm or additional harm to victims and the organization occurring; and
- Protecting the organization and the stakeholders by disseminating high-level organizational risk exposure information to the governing board especially independent members.<sup>92</sup>

Although other options exist, we recommend five components for the Policy's whistleblower component—an anti-retaliation provision, reporting incentive, report up and report out, acknowledged support from the top of the institution, and independent outside auditor.<sup>93</sup>

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<sup>90</sup> FREDERICK D. LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES, AND PROTECTION STRATEGIES 103 (2012).

<sup>91</sup> This article does not address the fiduciary obligations of the management and governing board of higher educational institutions and certain other components of such institutions such as relations of athletic foundations. Such discussions require in-depth analysis and thus a separate project.

<sup>92</sup> LIPMAN, *supra* note 90, at 79, 84, 103. Examples of organizational and stakeholder protection reasons are: "1. To protect the organization from criminal indictment, conviction, and fines and from related civil liability. 2. To protect the shareholders or other equity holders of the organization from loss of value of their equity interests. 3. To protect the board of directors and officers from civil liability. 4. To protect the chief executive officer . . . from both criminal and civil liability. 5. To protect the business reputation of both the directors and the CEO." *Id.* at 79.

<sup>93</sup> Internal corporate whistleblowers often fail to come forward and damage their career without guaranteed anonymity, meaningful remuneration, and independence in the investigation. *Id.* at 2.

### 1. *Anti-retaliation*

Fear of retaliation is a key reason internal mandated reporters fail to report child maltreatment.<sup>94</sup> As part of the state's child maltreatment reporting laws, some states include an anti-retaliation provision protecting personnel that report child maltreatment.<sup>95</sup> We, along with some experts, advocate for all U.S. jurisdictions to include an anti-retaliation provision in their child maltreatment reporting legislation that protects the good faith reporter.<sup>96</sup> However, such universal anti-retaliation protection in the child maltreatment laws is likely a long-term goal (if not impossible given the independence of the states). Thus, because many internal reporters fear retaliation for reporting and no state law uniformity exists, the Policy should contain a strong provision prohibiting reprisals against parties, specifically internal personnel, for reporting suspected child maltreatment. Also, the anti-retaliation provision must address the harmed person's burden of proving a nexus between its action and the negative employment consequence. We propose following certain employment law anti-retaliation protections by making it a rebuttable presumption that any adverse action to the reporter within ninety calendar days of the report is deemed retaliatory action.<sup>97</sup>

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<sup>94</sup> See Mathews, *supra* note 59, at 800. See also KALICHMAN, *supra* note 7, at 127.

<sup>95</sup> Besharov, *supra* note 9, at 405–06.

<sup>96</sup> Besharov, *Reporting Out-of-Home Maltreatment*, *supra* note 9, at 406. Besharov discusses that an anti-retaliation provision in state child maltreatment reporting laws is important given the difficulty to succeed in a retaliation claim under basic employment law. The reason is because many of these laws require an established connection between the reporting of child maltreatment and the adverse employment action, which often is difficult to accomplish. The defense often stands behind the argument that the dismissal or reassignment resulted from budgetary constraints or historical poor performance of the reporter. *Id.* Besharov references the Minnesota anti-retaliation provision as a sample of such anti-retaliation provision, which he describes as creating the following:

[a] rebuttable presumption that any adverse action within 90 days of a report is retaliatory. . . .  
 [A]n "adverse action" . . . include[s], 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.

*Id.* Section 6311(d) of the Pennsylvania Code also contains an anti-retaliation provision which provides in part,

Any person . . . required to report or cause a report of suspected child abuse to be made and . . . in good faith, makes or causes the report to be made and, as a result thereof, is discharged from his employment or in any other manner is discriminated against with respect to compensation, hire, tenure, terms, conditions or privileges of employment, may commence an action in the court . . . of the county in which the alleged unlawful discharge or discrimination occurred for appropriate relief. If the court finds [such activity] . . . , it may issue an order granting appropriate relief, including, but not limited to, reinstatement with back pay. 23 PA. CONS. STAT. § 6311(d) (1994).

<sup>97</sup> BESHAROV, RECOGNIZING CHILD ABUSE, *supra* note 36, at 52.

## 2. Reporting incentive

Compensation is not uncommon in whistleblowing. Pursuant to the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd Frank”), the Securities and Exchange Commission (“SEC”) promulgated rules providing whistleblowers a reward for disclosing certain activities to the SEC.<sup>98</sup> These SEC whistleblowers may receive a reward between ten and thirty percent of the collected monetary sanctions imposed in covered judicial or administrative or related actions.<sup>99</sup> “Most potential internal whistleblowers, including executive-level ones, will not jeopardize their careers without an absolute guarantee of anonymity, a meaningful reward, and an independent investigation of their allegations.”<sup>100</sup> In line with the federal government’s SEC whistleblower platform, the child protection governance policy’s whistleblower component should provide some form of incentive to encourage early and good faith reporting of child maltreatment with respect to the higher education institution.

A monetary reward likely is not practical for a higher educational institution currently operating on tight budgets. Also, unlike the SEC reward structure, based on the authors’ information and investigation, there are no collective fees for whistleblowing regarding child maltreatment. We thus propose that the incentive be a minimum of five and a maximum of ten personal days awarded to the reporter. To receive the incentive the following are required: (1) the reporter must make a good faith child maltreatment report that leads to the arrest and conviction of a perpetrator of child maltreatment; and (2) the child victim involved in the child maltreatment report must be under, in or connected to the care of the higher education institution. We will call such a whistleblower the “Child Protection Whistleblower.” A human resources department representative would be involved with the risk management committee or department referenced in the Policy. Therefore, the institution’s human resource department working with the risk management committee or department can implement such a reward to the Child Protection Whistleblower. The Policy would need to specify the details of the whistleblowing reward, including who qualifies for the

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<sup>98</sup> Frederick D. Lipman, *Whistleblower Awards for Independent Auditors*, ASSOCIATION OF AUDIT COMMITTEE MEMBERS, INC. (2012).

<sup>99</sup> Lipman, *supra* note 98; *see also*, LIPMAN, *supra* note 90, at 12. “Under Dodd-Frank, whistleblowers who provide ‘original information’ . . . leading to a successful enforcement action by a judicial or administrative body under the securities and commodities laws receive not less than 10 percent or more than 30 percent of the total recovery ‘ordered to be paid’ if it is greater than \$1 million, including penalties, disgorgement, and interest.” *Id.* at 13.

<sup>100</sup> LIPMAN, *supra* note 90, at 2.

reward, who is a disqualified individual, and qualification and earned award details, to name a few. Incentives are important because:

[a]lthough some employees are driven by their moral compass to do the right thing and do not need rewards, the number of employees who are Mother Teresa is very limited. Given the real possibility that persons disclosing wrongful activity may be terminated, or at least potentially socially ostracized, employees have no reason to assume those risks without a meaningful incentive.<sup>101</sup>

### 3. Report up and report out

Just as with some traced issues of the corporate scandals of the early 2000s and the more recent implosion of financial services companies, governing boards of some higher education institutions recently involved in institutional scandal, whether child sexual abuse or hazing, lacked adequate information to perform their oversight responsibilities. Therefore, a vigorous structure for institutional personnel to report suspected child maltreatment inside and outside of the organization may help eliminate some of the information asymmetry resulting in recent corporate and higher education problems.

The up and out reporting structure is that the Child Protection Whistleblower must report the suspected child maltreatment matter externally and internally. The external reporting requirement is to report to the state's applicable child protection services agency. The Child Protection Whistleblower's internal reporting requirement is to report directly to his or her direct supervisor or to the head of risk management or the general counsel's office at the institution. If the Child Protection Whistleblower is concerned about conflicts of interests or sees no protective progress from the initial internal reporting, he or she may go directly to the governing board chair, its audit committee chair, or the governing board chair's designee.<sup>102</sup> Some goals of up and out reporting are to protect children by encouraging reporting, getting the report to the right parties with the best timing, and to protect the institution and its

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<sup>101</sup> Frederick D. Lipman, *From Enron to Lehman Brothers: Lessons for Boards from Recent Corporate Governance Failures*, 1 THE CONFERENCE BOARD 4 (March 2012), available at <http://www.conference-board.org/publications/publicationdetail.cfm?publicationid=2157> (last visited July 18, 2012).

<sup>102</sup> "Conscientious directors and CEOs who value their business reputation should insist on an effective whistleblower system, administered by independent counsel or another independent party (an ombudsman) who reports directly to the independent directors. In an effective whistleblower system, the internal auditor or director of corporate compliance reports directly to the independent directors and becomes the eyes and ears of those directors within the organization." LIPMAN, *supra* note 90, at 4. Whistleblower anonymity encourages disclosure of wrongdoings and internal rather than external reporting where law or policy does not require external reporting. *Id.* at 72-74.

other stakeholders by stopping management's hold on important governance information. The proposed reporting structure does not seek to build tension between management, employees and governing boards.

#### 4. *Leadership support*

With any successful culture change or leadership program, top management must support the effort. Thus, the institution's management must be visible in acknowledging and supporting all aspects of the Policy. Additionally, the institution's management must be directly involved in compliance with the law and engaging in ethical behavior. Generally, management can accomplish such tasks with training, policies, and controls, and more specifically, by building a culture of integrity capital:<sup>103</sup>

Integrity capital is embedded in the culture . . . and it helps shape employee behavior . . . . It is driven by five key factors: Management takes action when it becomes aware of misconduct. Employees are comfortable speaking up about misconduct and don't fear retaliation. Senior leaders and managers treat employees with respect. Managers hold employees accountable. High levels of trust exist among colleagues.<sup>104</sup>

#### 5. *Outside auditor*

Finally, there should be a mechanism for engaging an external auditor who is independent from management and skilled in forensic investigations of higher education institutional governance, including compliance and strategic risk management—preventable, strategy, and external—and child protection.<sup>105</sup> The stories of higher education institutions involved in child maltreatment matters demonstrate the need for such external auditor to investigate certain Child Protection Whistleblower matters. At some of these educational institutions, several executive members allegedly failed to report the allegations of child maltreatment to the governing board and the state child protection services agency.<sup>106</sup> Several reasons may exist for reporting failure, but such non-reporting later resulted in an external investigation and

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<sup>103</sup> Dan Currell & Tracy Davis Bradley, *Greased Palms, Giant Headaches*, 90 HARV. BUS. REV. 21, 22 (2012).

<sup>104</sup> *Id.* Further, Currell and Bradley's research shows that "organizations must insist on a swift response to complaints, unbiased investigations, and 'public hangings' of offenders, and they should praise employees who have the courage to call out wrongdoing. These actions are critical to employees' perceptions of organizational justice . . ." *Id.* at 23.

<sup>105</sup> Lipman, *supra* note 101.

<sup>106</sup> Wolfe, *supra* note 2

uncovering of the events and actions surrounding the devastating incidents of child maltreatment involving each institution.<sup>107</sup> Arguments exist that executives are or should be required to make maltreatment reports to the state's child protection agency.<sup>108</sup>

When such management initially received the reports, could engaging an external independent auditor to investigate the allegations have prevented some of the harm and fallout stemming from the child maltreatment incidents? In support of the independent external auditor, we point out the Enron situation where an inside versus an independent audit of activities yielded tremendously different results. Enron's in-house legal department and outside law firm both investigated the complaint made by whistleblower, Sherron Watkins, about wrongdoing at Enron.<sup>109</sup> Both of their investigations found no support for Ms. Watkins' allegations.<sup>110</sup> However, after Enron went into bankruptcy, an independent board found evidence to support the Watkins' allegations regarding wrongdoing at Enron.<sup>111</sup>

Despite the support for a whistleblower component in the Policy, there are a number of drawbacks to whistleblowing, particularly with respect to internal whistleblowers. Some drawbacks include financial disincentives, physical emotional and other psychological deterrents, and potential liability under contractual and fiduciary obligations.<sup>112</sup> Nevertheless, we believe the benefits from a whistleblower component in the model policy outweigh the potential drawbacks.

### *B. Strategic Risk Management*

Effective oversight must exist in application and implementation of the Policy. Child protection is an acute risk management issue.<sup>113</sup> It requires a process and personnel to effectively manage such risk and protect the potentially harmed individual and all other stakeholders.

Higher education institutions should consider developing a risk management component to its Policy. It should include dictates regarding personnel for groups (especially affiliated camps) involving minors; use of higher education facilities; and other compliance and risk management facets. A goal of this component of the Policy is to shield minors, the

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Lipman, *supra* note 101.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> LIPMAN, *supra* note 90, at 60.

<sup>113</sup> MARSH RISK CONSULTING, *The Best Practices for Managing Minors on Campus*, 1 (June 2009).

institution, and its stakeholders from harm (physical, emotional, economic, and reputational, as applicable) by planning for, monitoring, and controlling preventable, external, and strategic risks.

Any group involved in governing or managing minors on campus should be diverse.<sup>114</sup> Such group members should be professionals with varied backgrounds. Ideally, such comprehensive staffing would consist of a staff diverse enough so that all minors in the group are comfortable approaching a staffer with issues and concerns. Additionally, the comprehensive staffing group should contain at least one professional thoroughly trained in mandatory reporting of child maltreatment, such as a child social services or law enforcement individual. However, where the higher education institution does not have direct determination on the composition of such group's personnel, the higher education institution must require that the personnel meet certain minimum standards in place by the higher education institution for its own personnel coming into contact with minors. The higher education institution also must demand a certification and complete indemnification from the group that all personnel have been prescreened and meet minimum standards established by the higher education institution.

Further, the higher education institution needs to be cautious about and use high discretion in allowing outside organizations to conduct camps and other events on and in the campus facilities. The following are suggested things the higher education institution can engage in for its pre-approval diligence:

- Conduct careful screening of the organization;
- Receive required documentation about the organization's personnel;
- Enter into tightly drafted liability and indemnification documentation with the organization releasing the higher education institution and its officers, governing boards, and personnel from any and all liability; and
- Provide detailed rules and regulations for operating on the higher education institution's campus.

If the institution grants permission to outside groups for use of campus facilities, it should ensure that the rules and regulations require that minimum opportunities exist for one-on-one contact between an adult and child in non-public spaces.

If the applicable rules and regulations, or an equivalent, do not currently exist, higher education institutions should establish a risk

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<sup>114</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 144.

management committee, which should be within the institution's legal department. This committee head, if possible given budgetary considerations, should be an independent attorney<sup>115</sup> and report directly to the institution's governing board to avoid any conflicts of interest in reporting to the institution's management or any retaliation for reporting misdeeds involving or affecting such management parties. Among other things, the risk management committee should: develop or be involved in developing the policies and procedures involving minors enrolled in or on the institution's campus or under the care of the institution, which includes off-campus trips and overnight and dressing accommodations; maintain and monitor the programs and activities involving minors on the campus of or affiliated with the institution; and in conjunction with human resources, be involved in or advised of the screening process for personnel, volunteers and other affiliates of the higher education institution and the training of all such persons regarding the institution's child protection governance policy.<sup>116</sup> Also, because liability insurance policies may contain exclusion for intentional or reckless acts, the Policy is important. This article, however, does not include a discussion on insurance policies and intentional or reckless act exclusion provisions.

### *C. Code of Conduct – Ethics and Professional Responsibility*

Certain professional groups, such as attorneys, doctors, and certain educators, have governing codes addressing ethical and professional responsibilities. Such codes of conduct may or may not require mandated reporting of child maltreatment by the applicable professionals. However, in some circumstances, the codes of conduct may require the professional to report child maltreatment even though there is no legal obligation to report. In addition, the professional code of conduct and the applicable state's legislation could negatively conflict where the professional is required by law, but prohibited by code of conduct, to report child maltreatment. Moreover, in some instances, the professional responsibility code requires the professional to hold confidential certain activity such as attorney-client confidentiality obligations, which the legislation does not acknowledge and except from mandated reporting status. Because of this potential conflict, the Policy must provide direction on how to address such conflicts, including with the professional governing body.

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<sup>115</sup> LIPMAN, *supra* note 90, at 115. Independent counsel brings the benefit of the attorney/client privilege to the organizational matters, protecting certain company compiled information from discovery in litigation. *Id.*

<sup>116</sup> MARSH RISK CONSULTING, *supra* note 113, at 3–5.



Despite the higher education professional's reporting obligation, we argue that the professional also has an ethical obligation to report such child maltreatment to the proper authorities

#### *D. Communication – Awareness Campaign*

Communication is essential for an effective Policy. Despite the concreteness and precision of a policy, it is ineffective without proper communication to, and knowledge and understanding by the institution's personnel. The two communication objectives are: effectively communicate and disseminate the Policy, and avoid Policy information asymmetry.<sup>117</sup> In order to continuously reach and reiterate the importance of meeting mandated reporting obligations or engaging in the permissible reporting aspects, Policy communication should exist in multiple forms.<sup>118</sup> The communication also must be supported and, in some instances, led by leadership to show the Policy's importance to the institution's top officials.<sup>119</sup> Suggestions on proper communication and dissemination include: (1) distribute the policy to all institution personnel in multiple and convenient formats especially by electronic access with a stationary web posting of the updated policy and periodic web blast to the personnel; (2) post physical copies of the current policy in conspicuous locations, such as faculty and staff lounges and cafeterias; (3) distribute periodic electronic reminders for personnel to review the policy even outside of the formal review and certification periods; and (4) discuss and reinforce the importance of the policy at staff meetings.<sup>120</sup> Because a policy is ineffective if awareness is absent, the institution should use multiple and continuous sources to communicate the Policy to its personnel,<sup>121</sup> and management must establish and ensure a tone at the top message about the importance of the Policy.

#### *E. Training*

As with any policy initiative requiring implementation and application to a group or situation, the legislation, regulations, and policies regarding child maltreatment in higher education require adequate training in order to prepare the higher education personnel to meet their obligations. As indicated in the Mathews study, a major challenge to the studied teachers meeting their reporting duties was that

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<sup>117</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 144–45.

<sup>118</sup> See Mathews, *supra* note 59, at 801.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 802.

<sup>121</sup> *Id.* at 802–03.

such parties lacked familiarity with their legislative duty of reporting child maltreatment.<sup>122</sup> Mathews and his co-authors provide evidence of the benefits of training to arm mandated reporters with skills to make appropriate reports and provide evidence of the benefits of training.<sup>123</sup> The study's results explain that the mandated reporters' training must include an explanation of the content of the actual legislation and situational training.<sup>124</sup> Additionally, it is important to explain in the training and its materials any differences between the law and the institutional policy, to the extent that such exists. The applicable personnel must know about the policy's existence and its content because both enable the personnel to facilitate and comply with the policy.<sup>125</sup> Mere knowledge stops short of the personnel's ability to comply.

First, we recommend new hire training on the Policy during new personnel orientation. All personnel should engage in annual online review of the Policy accompanied by a brief knowledge test for annual certification. Experts often indicate that high quality representation of children comes from requiring certification of all persons working with children.<sup>126</sup> Some research shows that higher education policy on child maltreatment reporting should contain a provision requiring the mandated reporters to acknowledge completion of such training and certify that they understand the institution's mandatory reporting requirements.<sup>127</sup> Higher education institution personnel must have a current, accurate, and full knowledge and understanding of their mandatory reporting obligations and any permissible reporting options under applicable laws. Thus, since laws change regarding child maltreatment reporting, the Policy must contain a process for updating and informing institution personnel of the applicable modifications to child maltreatment reporting laws.<sup>128</sup> Also, given staff turnover and the need to refresh and update the skills of the personnel, there needs to be continuous training focusing on the Policy's content.<sup>129</sup>

Second, to the extent feasible, a portion of the new hire training should include a discussion group among the institution's training

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<sup>122</sup> *Id.* at 799–800.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 799–801, 805, 807. For teachers familiar with child maltreatment reporting legislation, reporting was high, with eighty percent of fifty-eight polled teachers indicating they would have reported if armed with legislation and policy details, and thus, the study's authors recommended detailed rather than broad content training about reporting obligations. *Id.*

<sup>125</sup> Mathews, *supra* note 59, at 803.

<sup>126</sup> Cervone, *supra* note 80, at 1989–90.

<sup>127</sup> Besharov, *Responding to Child Sexual Abuse*, *supra* note 3, at 143.

<sup>128</sup> KALICHMAN, *supra* note 7, at 171.

<sup>129</sup> Douglas Besharov, Fixing Child Protection 1, 2 (Jan. 1, 1998) (unpublished comment) (on file with the Philanthropy Roundtable).

personnel, the new hires, and applicable local child protection agency staff (i.e. the agency designated to receive the higher education institution's reports) in order to foster communication and relationships prior to reporting incidents.

Third, with respect to training coverage and application, the training should cover the specifics in the Policy and be participant centered so as to engage the audience in the training activities. Participant-centered learning could include a hypothetical scenario followed by questions such as:

- Does the Policy require you to report the incident?
- Would you report the incident?
- If you would report the incident, to whom would you make the report?
- If you would not report the incident, why not, and how would you justify such non-reporting if questioned by authorities for failure to report?

In sum, training should be pre-service and in-service and cover knowledge of the Policy and its specific content with repetition and periodic training by persons skilled and knowledgeable about the subject matter all with leadership's support to foster a culture of child security and thus stakeholder protection.

### F. Enforcement

To foster compliance, the Policy should contain a strong enforcement and disciplinary structure with a due process mechanism. Policies and procedures do not act as their own enforcer like market-based decisions.<sup>130</sup> Thus, policymakers must give proper and balanced direction on rule enforcement and watch over such enforcement,<sup>131</sup> with the penalties for violating policy being sufficient to deter violations. To ensure an effective incentive for compliance, outside of ethical and moral beliefs, the bite must sufficiently match the Policy's bark.<sup>132</sup> The

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<sup>130</sup> GEORGE A. AKERLOF & ROBERT J. SHILLER, *ANIMAL SPIRITS: HOW HUMAN PSYCHOLOGY DRIVES THE ECONOMY, AND WHY IT MATTERS FOR GLOBAL CAPITALISM* xi (2009) (draws on behavioral economics and describes the operation of the economy based on people operating as humans with "human *animal spirits*").

<sup>131</sup> *Id.* at xiii, xxiii–iv. ("There have to be rules and there has to be a referee who enforces them—and a good and conscientious referee at that. Otherwise, there will be random cheating that destroys the sense of the game, and dangerous and aggressive play, so that many people will get hurt and the game will cease to reward good play. . . . The proper role of [governance], like the proper role of the advice-book parent, is to set the stage. The stage should give full reign to the creativity of capitalism. But it should also countervail the excesses that occur because of our animal spirits").

<sup>132</sup> BESHAROV, *RECOGNIZING CHILD ABUSE*, *supra* note 36, at 37.

penalties must be substantial enough to prevent a “No” reporting decision after a cost-benefit analysis involving disclosure. However, the enforcement direction needs to balance the ability to meet the needs of compliance with the ability for the institution to creatively operate while fulfilling its strategies, goals, and missions. No institution will thrive with its hands completely tied. Institutions need the ability to make informed, risk evaluated, and measured decisions on implementation and enforcement of policies and procedures.

In sum, we advocate for a vibrant and evolving yet adaptable Policy that not only requires, but also encourages and insists on compliance with all related laws, regulations, and policies. The Policy must have punishment provisions and enforcement teeth.

#### IV. CONCLUSION

Clear and consistent child maltreatment laws and the Policy are critical to saving our children and preserving the financial, security, and image of our higher educational system. It also is imperative for higher education personnel to understand their legal powers and obligations to protect maltreated children.<sup>133</sup> Many persons in higher education interact with children in a variety of platforms, including on-campus youth summer camps and academic enrolled students meeting the statutory definition of minor. Also, higher education personnel must remember that child maltreatment is not isolated to one population segment because “all racial, religious, social, and economic groups are its victims.”<sup>134</sup>

Leadership at higher education institutions must examine more deeply its existing policies regarding child maltreatment reporting, and consider the implementation of all or many of the these proposals for the Policy. Such leadership, in addition to protecting innocent children, has to make sure that it is insulating its establishment from the ramifications of child maltreatment scandals.

Child maltreatment is not only the child’s and his or her family’s problem, but it is a social problem of extreme magnitude because it devastates the infrastructure for our future leaders—the maltreated children. Moreover, child maltreatment liability and scandals at higher education institutions deplete institution funds, including endowments, and reduce student enrollment at the affected institution. Child maltreatment also rocks the security of higher education institutions in piercing the protective fabric historically bestowed upon such

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<sup>133</sup> BESHAROV, RECOGNIZING CHILD ABUSE, *supra* note 36, at 192.

<sup>134</sup> Douglas J. Besharov, *Building a Community Response to Child Abuse and Maltreatment*, 4 CHILDREN TODAY 2, 2 (1975) (reprinted in U.S. Department of Health, Education, and Welfare).

organizations. Society pays a high cost for such social problems, especially given that the public tax base in many instances funds or supplements aspects of higher education. Also, because U.S. laws have yet to catch up with child maltreatment activities or potential ones, societal resources are spent addressing laws and policies to protect child maltreatment victims in retrospect.<sup>135</sup>

We advocate for higher education institutions to consider the recommendations in this article. Children, higher education institutions, and its other stakeholders all deserve to be protected from the acts of persons bent on ultimately destroying innocent individuals and an institution's reputation of honor, respect, and trust. We must remember that child protection is our problem, and protection sometimes requires reform with new options.

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<sup>135</sup> See Besharov, *supra* note 3 at 142