



*Texas Community Building with Attorney Resources*

Building Blocks of Community Development:

# Legal Issues Affecting Start-Up Nonprofit Child-Care Centers



## Introduction

Accessible and affordable high quality child-care is a cornerstone of community economic development. It is of critical importance to low-income families nationwide and to the 41% of Texas families who struggle to make ends meet. In Texas, half of all mothers with children under age five are employed outside the home. [Olivia Golden, Pam Winston, Greg Acs and Ajay Chaudry, *Framework for a New Safety Net for Low-Income Working Families* (Urban Institute, June 2007), p24. Kathleen Snyder and Gina Adams, *State Child-care Profile for Children with Employed Mothers: Texas* (Urban Institute, February, 2001), p. 2]

Without low-cost high-quality, reliable child-care many parents will be unable to maintain employment or keep their children safe. Quality child-care also provides children with critical early educational opportunities. These educational opportunities include increased social and emotional development, pre-literacy activities, and an increased level of self-confidence. A RAND Corporation study, demonstrated that children who participated in a quality child-care program had a more successful elementary school experience than those who did not. [Karoly, L.A., Greenwood, P.W., Everingham, S., Hoube, J., Kilburn, M.R., Rydell, C.P., Sander, M., & Chiesa, J. (1998). *Investing in Our Children: What We Know and Don't Know About the Costs and Benefits of Early Childhood Interventions*. 182 pp. Santa Monica, CA: RAND Distribution Services.] Furthermore, studies have shown that every dollar invested in high quality child-care results in seven dollars in savings for the community in later education costs such as special tutoring, welfare dependency, and the juvenile justice system. (<http://www.ncchild.org>)

Quality licensed child-care can cost at least \$800 a month in some urban Texas communities. In 2002, over 40,000 children were waiting for some type of child-care from the Texas Workforce Commission. Without major subsidies, most low-income families, especially those with multiple children, are unable to afford child-care for their children. (<http://www.cppp.org>)

The role of community organizations is critical to providing affordable quality child-care. Nonprofit organizations have an opportunity to fill the shortage of such child-care slots. Community and faith-based nonprofits are experts at working with residents, government officials, and employers to build creative solutions to local problems. Existing nonprofits also have relationships with low-income parents who need these services. As a nonprofit, an organization may have access to tax advantages and subsidies to reduce costs.

There are many types of child-care operations. The most common options include relative care, home care, and center-based care. 'Centers' are defined by the Department of Family and Protective Services (DFPS) as providing care for seven or more children for less than 24 hours per day. This manual will address the requirements of center-based child-care.

Child-care centers may be organized as for profit or nonprofit businesses. This guide will focus on nonprofit child-care businesses. Due to the risk and liability issues inherent in operating a child-care center, most experts recommend forming a corporation to allow for the best management of the business risks.

An existing nonprofit may elect to start a child-care center under the umbrella of their current program or may choose to start a new 501(c)(3) nonprofit. The decision to start a child-care center should be thought through carefully, especially how the project will sustain its funding.

Starting a successful child-care program takes a great deal of planning, as well as interaction with local employers and members of your community. As you will see, there are numerous laws that govern the formation and day-to-day operations of nonprofit child-care centers. It is critical that both board members and executive directors become familiar with these laws and ensure that the nonprofit is in compliance with them. Failure to comply with laws and regulations can result in administrative actions, civil and criminal penalties, and a possible loss of the center's operating license.

Texas C-BAR has created this guide to provide an overview of the critical legal issues that affect nonprofit child-care centers, including Texas and federal laws governing the formation and operation of nonprofit child-care centers. This guide should be helpful for both existing 501(c)(3) nonprofits and organizations that are evaluating whether and how to form a nonprofit child-care center. This guide does not provide a list of every law or the law's applicability to particular fact situations. It also does not include a comprehensive discussion of regulations promulgated by the DFPS. Moreover, laws governing nonprofits and interpretation of these laws by the courts are constantly changing. As a result, while every effort has been made to make these materials as accurate as possible, these materials are not to be used as a substitute for the advice of an attorney. Persons reviewing this guide should not act upon the information without seeking professional legal counsel.

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We would appreciate your comments on issues that are unclear, suggested additions, and any other recommended changes. Please contact us with your feedback at [info@texasbar.org](mailto:info@texasbar.org), or 512-374-2710.

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## Table of Contents

<b>Licensing and Regulation for a New Child-Care Center.....</b>	<b>4</b>
<b>Forming a Nonprofit Tax-Exempt Child-Care Corporation in Texas .....</b>	<b>7</b>
<b>Financing for Nonprofit Child-Care Centers .....</b>	<b>15</b>
<b>A Child-Care Center’s Physical Space .....</b>	<b>25</b>
<b>Operating a Child-Care Center: Keeping the Organization Legal and the Children Safe .....</b>	<b>37</b>
<b>Parent – Provider Relations .....</b>	<b>50</b>
<b>Employment Issues for Nonprofit Child-Care Centers.....</b>	<b>56</b>

# Licensing and Regulation for a New Child-Care Center

## Overview

Under Texas law, a “licensed child-care center” is facility that provides care for seven or more children younger than 14 years old for less than 24 hours per day at a location other than the permit holder’s home.” An organization interested in setting up a child-care center should review both the requirements for establishing a new child-care center and the ongoing compliance and liability issues involved in operating a child-care business before making the final decision to establish a child-care center. Child-care centers are highly regulated businesses that must comply with local, state, and federal laws administered by the following agencies:

- The Texas Department of Family and Protective Services (DFPS) is the agency responsible for licensing and monitoring child-care businesses, including centers. The Child-Care Licensing Division of the DFPS grants permits to child-care operators in Texas.
- Local government planning and permit offices regulate land use, health and safety compliance, and permitting (including that for food services) practices of businesses located within their jurisdiction.
- Local fire departments are responsible for ensuring that businesses follow local codes and regulations through review of evacuation plans and through annual inspections.
- The Texas Attorney General has enforcement authority of the business entities formed under Texas law.
- The Texas Secretary of State oversees the creation and compliance of business entities under Texas law.
- The Comptroller of the State of Texas monitors the compliance of Texas businesses with various provisions of the Texas Tax Code.
- The Internal Revenue Service is responsible for granting recognition of exemption from federal taxes to nonprofit organizations and responsible for ongoing monitoring of those organizations.

## Application Process

The process of becoming a licensed Texas child-care center (“center”) involves many steps. The process is outlined in information packets available from local child-care licensing offices. To locate the nearest office, visit:

**[http://www.dfps.state.tx.us/Child\\_Care/Local\\_Child\\_Care\\_Licensing\\_Offices/default.asp](http://www.dfps.state.tx.us/Child_Care/Local_Child_Care_Licensing_Offices/default.asp)**.

The information packet will include application forms and information regarding resources that help applicants meet the licensing requirements. DPFS will arrange a pre-application meeting prior to accepting an application submission. The information gathering phase is also the time to identify and

contact the relevant local government offices that will regulate zoning, safety, and food service permits for the center. In order to submit a successful application, a center will need a business plan and a facility plan. Statewide and local networks of child-care providers are good resources for creating the various plans needed to start and operate a child-care business.

A completed application for licensing will contain several items including the following:

- A completed Child Day Care Application Form, Form 2910.
- A completed floor plan of the building and surrounding space to be used, including dimensions of the indoor and outdoor space.
- A completed Request for Criminal History and Central Registry Check form on all applicable persons, that must be submitted online (enter the names of all applicants and employees as known). A center may submit a written request (Form 2971) with the consent of the Licensing Office. See the Employment Section for more information.
- A completed Personal History Statement, Form 2982, for all persons designated as director or co-director.
- Proof of Liability Insurance. Liability insurance coverage for injury to a child that occurs while the child is in the center's care or on the premises of the operation is required in the amount of at least \$300,000 for each occurrence of negligence. If the center does not obtain liability insurance, submit a written explanation of why the insurance coverage is not provided along with a sample letter or pamphlet to inform parents that the center does not provide the coverage. DFPS may not agree with the explanation and may instruct the center to obtain the insurance before issuing a permit.
- A completed Plan of Operation, Form 2948. The Plan of Operation must show how the operation will comply with the law and appropriate minimum standard rules.
- A completed Child-Care Fee Schedule form, Form 2988 and fee. Generally, submit a \$35 application fee and a \$35 initial permit fee.

Submitted applications will be reviewed within 21 days. DFPS will notify the center in writing that the application is either:

- Complete and accepted for processing; or
- Incomplete or the materials submitted do not show compliance with relevant law or minimum standard rules.

The notification letter will explain necessary corrections. The center will have three opportunities to resubmit the materials. If the application is returned as incomplete three times within one year, the application will not be accepted and the center may not apply again for one year from the date that the last incomplete application was returned.

## Post-Application

If the application is accepted, before issuing the center an initial or non-expiring permit, licensing staff will conduct an inspection to ensure the center and its operations comply with applicable law and minimum standard rules. The inspection, which is usually announced ahead of time, consists of a review of all submitted documentation, checking other required materials, and inspection of the operation to make sure all appropriate standards are met. It must meet all standards except for those for which waivers and variances have been granted. If licensing staff observe deficiencies with the law or minimum standard rules, they will inform the center about them and set due dates by which the center must make corrections. DFPS will then issue a permit to the center if the operation complies with the law and applicable minimum standard rules. They will deny a permit if the operation does not comply with the law and minimum standard rules. They will issue or deny the permit no later than 60 days after they have accepted the application.

In most cases, DFPS will grant the center an initial permit if it meets the requirements. An initial permit allows the center to operate pending the issuance of a non-expiring permit and is valid for six months from the date it is issued. DFPS may renew an initial permit for up to an additional six months for a maximum of one year. The initial permit expires when the center is issued a non-expiring permit. During the six-month initial period, the child-care operation must show that it can meet standards on a continuing basis in order to qualify for a non-expiring permit. Licensing staff will conduct at least three inspections to evaluate the center's compliance with minimum standard rules. Licensing staff will provide technical assistance as needed. After each inspection, licensing staff will discuss their findings with the center and provide notice in writing of any deficiencies.

If the operation continues to meet minimum standards throughout the initial period, the center will be issued a non-expiring permit, valid until relinquished or revoked for good cause; no new application is necessary. However, the center must pay the non-expiring licensing fee, renewable annually.

After receiving the center's non-expiring permit, licensing staff will periodically inspect the licensed operation to make sure it continues to meet minimum standards. By law, DFPS must make at least one unannounced inspection every year.

## Forming a Nonprofit Tax-Exempt Child-Care Corporation in Texas

Some existing nonprofits may find that developing a child-care center within their existing structure may cut down on overhead expenses, streamline operations, maintain existing community relationships, and capitalize on the organization's strong reputation in the area. However the desire to separate the liability risk of a child-care business from other organizational programs, to operate the child-care program under a distinct mission, to recruit a separate board, and to seek funding sources dedicated to child-care funding may prompt a nonprofit to create a new entity to operate the child-care center.

### Steps to Creating a New Nonprofit

The necessary steps to forming a tax-exempt nonprofit corporation in Texas are:

- Choose a management structure and form an initial board of directors
- Check availability of name with the Secretary of State
- Prepare the Certificate of Formation
- Prepare bylaws
- File the Certificate of Formation
- Hold initial meeting of directors
- Apply for a Federal Employer Identification Number ("EIN")
- Apply for Recognition of Exemption from federal taxes
- Apply for Franchise (Margin) Tax exemption from the Texas Comptroller (by filing form AP 204)
- Apply for a Sales Tax exemption from the Texas Comptroller

For more detailed information on this process, see Texas C-BAR's publication, *How to Form a Nonprofit Tax-Exempt Corporation in Texas*. Key issues affecting child-care centers in the formation process are discussed below.

### Benefits and Limitations of a Nonprofit Corporation

One of the primary benefits of forming a nonprofit corporation is that the corporation's members and directors are generally shielded from personal liability (unless the member or director acts in bad faith, without utilizing ordinary care, and in a manner the director cannot reasonably believe is in the best interest of the corporation). It is also advantageous for a nonprofit to incorporate so that it can receive government community development loans and grants, which often require the organization to have a nonprofit objective.

## Definition of a Nonprofit Tax-Exempt Corporation

A Texas nonprofit tax-exempt public charity is a corporation that is organized under the laws of the state of Texas and has been recognized as tax-exempt by the Internal Revenue Service under Section 501(c)(3) of the Internal Revenue Code. To obtain nonprofit tax-exempt status, an organization must take action at both the state and federal level. Although the two processes are separate, federal tax-exempt law is key to many nonprofit corporation statutes and must be taken into account from the start of the formation process.

### Texas Law

The Texas Business Organization Code § 22.001(5) defines a nonprofit corporation as one in which “no part of the income or profit of which is distributable to its members, directors or officers.” A nonprofit corporation may be organized for any lawful purpose that is not expressly excluded by the Business Organization Code. Texas Business Organization Code § 22.051. A nonprofit corporation must have a formal, centralized management structure and can be managed by a board of directors, members, or a combination of the two.

### Federal Law

In order to qualify for tax-exempt status under Section 501(c)(3) of the tax code as a charitable organization, “a non-profit organization must be *organized* and *operated* exclusively for one or more *exempt purposes*:

**Organized:** A 501(c)(3) organization must be organized as a corporation, trust or unincorporated association. An organization’s organizing documents (certificate of formation, trust documents, articles of association) must: limit its purpose to those described in section 501(c)(3) of the Internal Revenue Code; not expressly permit activities that do not further its exempt purposes, i.e., unrelated activities; and permanently dedicate its assets to exempt purposes.

**Operated:** Because a substantial portion of an organization’s activities must further its exempt purpose(s), certain other activities are prohibited or restricted including, but not limited to, the following activities. A 501(c)(3) organization:

- must refrain from participating in the political campaigns of candidates for local, state or federal office;
- must restrict its lobbying activities to an insubstantial part of its total activities;
- must ensure that its earnings do not inure to the benefit of any private shareholder or individual;
- must not operate for the benefit of private interests such as those of its founder, the founder’s family, its shareholders or persons controlled by such interests;

- must not operate for the primary purpose of conducting a trade or business that is not related to its exempt purpose; and
- may not have purposes or activities that are illegal or violate fundamental public policy.

**Exempt Purpose:** To be tax exempt, a child-care center must have one or more exempt purposes, stated in its organizing document. Section 501(c)(3) of the Internal Revenue Code includes the following exempt purposes: charitable, educational, religious, scientific, literary, fostering national or international sports competition, preventing cruelty to children or animals, and testing for public safety. Most child-care centers qualify with either a charitable or an educational purpose.

**Charitable Purposes:** To meet the IRS requirements, the center's purpose must state that the nonprofit will be beneficial to society, and the center must serve an open class of people, not a limited number of group members or a group of specific individuals. The beneficiary class needs to be open and unspecified, but does not have to be large. A center established to serve the families in a specific neighborhood would qualify as a charitable organization, as long as it serves all the families in the neighborhood.

For example, the El Almanecer Day Care in Starr County, Texas adopted the following exempt purpose to demonstrate that it is organized to provide a community benefit. (Note: the nonprofit also included an educational purpose.)

To improve the human and social conditions of colonia residents in Starr County. Specifically, the organization will focus on the development and implementation of educational programs that enhance human capital for youth and their families, cultural activities that promote community participation, environmental awareness programs, and other activities that promote familial and communal cohesiveness and awareness.

**Educational Purposes:** To qualify with an educational purpose, a child-care center must demonstrate the "instruction or training of individuals for the purpose of improving or developing their capabilities, or the instruction of the public on subjects useful to individuals and beneficial to the community." The IRS allows a curriculum to present particular viewpoints if there ". . . is sufficiently full and fair exposition of pertinent facts to permit an individual or the public to form an independent opinion or conclusion." However, mere presentation of unsupported opinion is not considered educational.

Under Section 501(k), the IRS recognizes the operation of a nonprofit child-care business as a nonprofit with an exempt purpose. To qualify, the center must demonstrate that it will provide care for children away from their homes so that substantially all the care provided by the organization is for the purposes of enabling individuals to be gainfully employed and the services being provided are available to the general public.

**Public Charity:** The IRS divides all 501(c)(3) charitable tax-exempt organizations into one of two groups: public charities and private foundations. The difference between the two categories is the source of their funding. Private foundations generally receive their funding from one or a few individuals. Public charities generally receive their funding from a broader base of public support, including individuals, the government, or other publicly supported organizations. Different rules apply to each category, the principal purpose of which is to ensure that private foundations are not using their funds primarily to benefit their few donors because in that case, the organization would not be considered a charity. Operational, distribution, and reporting requirements for private foundations differ from those of public charities and are more tedious. The key to being classified as a private charity is in the classification of the support that a nonprofit receives.

Child-care centers trying to qualify as public charities may structure their support under either Section 170(b)(1)(A) or Section 509(a)(2). The types of income that qualify as public support vary in ways that are significant for a child-care center.

**Section 170(b)(1)(A):** A center that qualifies under Section 170(b)(1)(A) is an organization that receives one third of its support, directly or indirectly, from the general public or government grants. The organization may count the following types of income as public support:

- donations from individuals, corporations, foundations, (the funding provided by each individual and each entity is capped at 2% of the center's total income when determining public support);
- government grants that are used to provide a benefit to a community. The grant may not be payment for services under a contract outsourcing work that the government entity is obligated to provide.

Note: Income from fees, even though it may be classified as related income, is not classified as public support.

Section 170(b)(1)(A) public charities may qualify as such using one of two tests: the one-third test or the facts and circumstances test. The one-third public support test is a strict mechanical formula. The annual 990 will automatically apply this test. An organization that does not meet this test may still qualify under the facts and circumstances test. To qualify, a center's income must show at least 10% public support. The center must then demonstrate that its operations meet the definition of a public charity through submission of minutes, descriptions of activities, and other documentation that the IRS may require.

**Section 509(a)(2):** A center that qualifies under Section 509(a)(2) may count as a public charity if, in addition to the sources listed above, it receives income from membership fees or from services related to the center's exempt purpose, in this case fees charged for center services. Income from individual services is capped at the greater amount of \$5,000 or 1% of the organization's budget. As many nonprofit child-care centers are finding it increasingly difficult to rely solely on subsidies to provide care, choosing to qualify under this section, which would allow the operation of a sliding fee scale program, may prove more sustainable in the long-term.

Section 509(a)(2) public charities may qualify as such using one of two tests: the one-third test or the “not more than one-third” test. Again, the one-third test is a mechanical formula. The “not more than one third” test limits gross investment income or the income from unrelated business activity to no more than one third” of the organization’s support.

## **Organizational Issues**

### ***Choosing a Management Structure***

A nonprofit corporation may be managed by a board of directors, members, or a combination of the two.

**Board of Directors:** Nonprofits managed by a board of directors establish an initial board of directors at formation. The board of directors manages the organization, establishes policies, and makes decisions such as amendments of bylaws, mergers, or dissolutions. The initial board replaces itself in the future through the policies outlined in the organization’s bylaws. This type of board is called a self-perpetuating board.

**Member Management:** Under this structure, the members of an organization manage the organization through decisions such as amendments of bylaws, mergers, and dissolutions. Nonprofits managed by members have a board of directors that is periodically elected by the nonprofit’s members. Criteria for membership are outlined in bylaws. Member-managed nonprofits must still have a board of directors. Cooperative child-care centers organized by parents may incorporate a membership management structure to allow each family an equal voice in the center’s operation.

**Combination Management:** Under this structure, nonprofits distribute the management between the members and the board of directors in any way that makes sense for the organization. For example, a center might have a strong committee structure that incorporates parents and other members of the corporation.

Membership organizations allow greater accountability to a particular community of stakeholders. However, member organizations require extensive record-keeping and a management of a larger group of decision-makers that may make it more difficult for the nonprofit to function efficiently. Most nonprofit child-care centers are organized as non-membership organizations.

## **Bylaws**

The bylaws contain the rules governing the internal structure and internal management of the corporation. The initial board of directors of the nonprofit corporation should prepare and adopt bylaws for the corporation simultaneous with the preparation of the certificate of formation or soon thereafter. State law requires certain bylaw provisions, but most provisions are optional. The law often provides gap filler provisions that will apply by default when the bylaws are silent on particular issues. When the bylaws are not silent, the bylaw provisions apply, so long as they are not illegal and do not conflict with the certificate of formation or state law.

## **Initial Meeting**

After the organization receives the file-stamped copy of the Certificate of Formation, it must hold an initial meeting at which it will transact key business to complete the formation process. The organization meeting must be called by the incorporator or a majority of the directors. At least three days' notice must be provided to the directors named in the certificate, stating the time and place of the meeting.

## **Applying for Recognition of Exemption from Texas Franchise (Margin) Tax**

Obtaining tax-exempt status from the IRS is an important step, but not the only step that you will need in order to secure tax-exempt status for your organization. Nonprofit corporations are subject to the Texas franchise (margin) tax unless an exemption from the Texas Comptroller is obtained. Corporations which have already received their 501(c)(3) tax exempt status from the IRS should file Form AP-204 with the Comptroller at 111 E. 17<sup>th</sup> Street, Austin, Texas 78774, requesting a franchise (margin) tax exemption and enclosing a copy of their 501(c)(3) determination letter from the IRS. For a copy of Form AP-204, go to <http://www.window.state.tx.us/taxinfo/taxforms/ap-204.pdf>.

If a corporation has not yet received their exemption from the IRS, a 90-day provisional state franchise (margin) tax exemption may be granted. A copy of the corporation's application for federal tax exemption and a copy of the notice of receipt of application from the IRS should be sent to the Texas Comptroller's office along with a letter requesting the temporary tax exemption. Once the Texas Comptroller has granted your organization tax-exempt status, your organization will be exempt from Texas sales and margin taxes. Your organization may also qualify for exemptions from property taxes, but you will need to contact your local property tax authority to determine available exemptions and the exemption procedures.

### ***Ongoing Requirements after Obtaining Tax Exemption***

Once the organization has received tax exempt status, it will be required to file certain annual forms with the IRS, the Texas Comptroller, the Secretary of State, and, potentially, local tax authorities. Discuss these requirements with legal and tax advisors. For more information, see Texas C-BAR's publication, *Nonprofit Legal Toolkit*.

There are strict record-keeping obligations that a nonprofit must comply with under Texas law. It must keep correct and complete books and records of the corporation's accounts and minutes of all proceedings of the board, committees with board authority, and members. The corporation must also keep a record of the names and addresses of the members entitled to vote at its registered office.

There are special record-keeping obligations for corporations that raise more than \$10,000 a year. The board must prepare or approve an annual report of the corporation's financial activity, which must be made available to the public for inspection and copying during normal business hours. The report must conform to the accounting standards of the American Institute of Certified Public Accountants. Corporations with members must hold an annual meeting for the members once a year. Notice of the meetings must be delivered between 10 and 60 days before the meeting, in person, by fax, or by mail. The bylaws may provide that no notice is required, but the bylaws must then provide the time and place of the meeting. If the corporation has more than 1,000 members, it may give notice by publication in a newspaper in the community, if the bylaws so provide.

The bylaws must specify whether notice is required for regular meetings, and if so, the type of notice. A quorum for business by the board is a majority of the number of directors set in the bylaws, but the bylaws can set a different number for a quorum, as long as the number is not less than three directors. Directors must always act in good faith and in a manner the director reasonably believes to be in the best interest of the corporation. A director must disclose any conflicts he or she has in transactions before the board, and he or she must abstain from voting on any transaction in which he or she has a conflict of interest. Certain government programs may still bar approval of the transaction when there is a conflict of interest.

Beginning in 2008, organizations with income under \$25,000 per year must file Form 990-N. An organization that obtains over \$25,000 a year must file IRS Form 990 within 4 ½ months following the close of the organization's fiscal year. Additionally, organizations having annual gross incomes of \$1,000 or more from unrelated business activities must file IRS Form 990-T and pay taxes on the unrelated business income.

Nonprofit directors are charged with managing the affairs of the corporation with good faith and in the best interest of the organization. Board members must attend meetings, understand the program and financial operations of the nonprofit, and act as good stewards of the nonprofit business. In return for good practices, the board member will be shielded from liability. As with other corporation

volunteers, a written description of time requirements, responsibilities, required skills or education, and the training the center will provide for each position will set a strong foundation for best practices.

### ***Monitoring of Tax-Exempt Organizations***

The Board of Directors is legally responsible for the activities of the organization, including guarding it against fraud and corruption. Private watchdog groups, such as the National Charities Information Bureau and the American Institute of Philanthropy, monitor the behavior of nonprofits in order to ensure that money is being spent appropriately and effectively. The state, through the Attorney General's Office, is responsible for investigating fraud and abuse claims. The IRS monitors nonprofits, ensuring that they are satisfying the requirements for being tax-exempt. The IRS can also individually sanction officials who abuse their positions within the nonprofit organization. Individual donors and members can regulate the organization by withholding financial support as well. Increased media coverage has also held nonprofits accountable to their true purposes. It is a good idea to contact a lawyer who can help you avoid unnecessary mistakes which might jeopardize the center's ability to incorporate or gain tax-exempt status. A lawyer can also offer advice on certain corporate responsibilities, such as withholding and paying Social Security tax as well as any other wage withholding taxes for employees. Such taxes generally apply regardless of your tax-exempt status.

### ***Qualifications for Board of Directors***

A committed board of directors with an appropriate mix of skills to oversee a child-care center is key to a successful and sustainable nonprofit child-care organization. Skills and expertise that a child-care center might consider when choosing board members include: knowledge of early childhood education, a good financial background, strong organizational and communication skills, fundraising experience, experience with child-care centers as a parent, or a strong commitment to the program. Texas law requires only three directors, but successful nonprofit organizations typically exceed the minimum requirements, often electing between five and nineteen directors. In addition, a child-care center must adhere to the state and federal governance requirements that apply to all nonprofit tax-exempt organizations. A center should make sure that board members understand their legal obligations, including reviewing and understanding an organization's financial status and financial statements.

Nonprofit child-care centers may invite parents to serve on the board of directors, and in fact may be required to do so by some funding sources. However, a parent should not receive any personal gain, such as free tuition, from their service on the board. A center seeking federal funds will have to conduct criminal background checks of potential directors. Convictions that will affect a candidacy are: a felony or misdemeanor classified as an offense against the person or family, or as public indecency; or a felony violation of any statute intended to control the possession or distribution of a substance included in the Texas Controlled Substances Act.

## Financing for Nonprofit Child-Care Centers

Child-care experts commonly agree that centers with fewer than 70-100 children are rarely economically viable as stand-alone operations. Child-care management is complex, particularly in low-income communities where parents may need to participate in an array of government subsidy programs in order to afford the care. It is difficult to provide sufficient management functions and break even without income from at least 70-100 children.

Listed below are some common funding sources and restrictions.

### Fee Funding Sources

#### ***Fee Structures and Policies***

The fees charged by a child-care center serve as the core of the funding for the program. Fees are typically determined by establishing the cost of care and choosing a fee structure based on the community rates and the type of program the center will run. The cost of care per child is reached by totaling the annual cost of the child-care program and dividing the cost by the number of children served. Child-care centers use three basic types of fee systems: flat fees, sliding-fee scales, and scholarships.

***Flat fees:*** centers charge families an equal amount of money for child-care. This system is easy to implement and maintain. The flat fee system can be adapted to allow for different flat fees for different ages of children, based on the greater cost of serving some ages than others.

***Sliding-Scales Fees:*** Centers charge families different amounts based on their ability to pay. This fee structure can make child-care more affordable for lower-income families. Some sliding fee scales place the cost of care at the mid-point of the scale and subsidizes families at the low end of the scale by charging families at the higher end more than the actual cost of care. Some sliding fee scales place the actual cost of care at the upper end of the scale, so that no family pays more than the actual cost of care. Reduced fees are subsidized by outside contributions. Programs employing a sliding fee scale must verify family income, such as requiring families to provide pay stubs, tax or child support statements. Year-to-year income projections can be challenging with this method.

A nonprofit child-care center should use a sliding-scale fee cautiously so as not to threaten its ability to obtain or maintain tax-exempt status. The nonprofit must be able to show that it remains a public charity and must therefore limit the number of higher fee children in the center. A nonprofit child-

care center that is primarily an educational program such as Montessori schools or Head Start programs may avoid this issue by qualifying as an educational institution where the custodial nature of their services would be considered “incidental” to the educational nature of the program rather than as a charitable one.

**Scholarships:** Centers provide scholarships to some or all of the children attending the center. The scholarship method can be utilized with both the flat fee scale and the sliding fee scale. The costs of providing care are subsidized by outside contributions and/or government contracts. Child-care subsidies available in Texas have dwindled over the past decade and many 100% subsidized child-care centers merged with other programs to avoid closing.

In order to qualify for and maintain tax-exempt status, a nonprofit child-care center will need to subsidize the fees for the low-income children enrolled in the program.

### **Additional Fee Policies**

- Tuition prior to service: Many programs charge fees prior to service on a weekly, biweekly, or monthly basis. Some programs also require a refundable deposit at the time of enrollment.
- Registration fees: Many programs charge a fee to process the family’s initial paperwork.
- Discounts for siblings: Most programs offer a discount for the second or third child from a single family the program.
- Absence fees: Many programs offer a specific number of no-charge days or weeks which families can use during a one-year period. Otherwise, the family is expected to pay the full tuition amount charged by the program.
- Special classes: Some centers generate additional fees by offering special skills classes such as swimming, gymnastics, or dance or offering special programs such as 4-H or scouts.
- Drop-in fees: Some programs generate extra fees by accepting children on a drop-in basis. The hourly fee is usually higher than the regular rate.

### **Other Funding Sources**

Funding for child-care centers may come from government subsidy programs, individual donations, fundraising activities, religious organizations, foundations, corporations, or government agencies. This section outlines the many streams of monies that might be available for a center. Keep in mind, however, that some programs (particularly foundations) will only fund a specific project of the center; most foundations will not fund the general operating budget.

## ***Child-Care Subsidy Assistance Payments***

Child-care subsidy assistance payments may be paid directly to the center or may be paid to the family.

## **Texas Funding**

Other than subsidies for some special needs populations, Texas has moved away from direct contracts with child-care centers to portable subsidies or vouchers which are given directly to parents through local Workforce Development Boards (see above for information on how to contact the local board). However, some cities and counties use Community Development Block Grant Funding (CDBG) or Child-Care Development Block Grant Funding (CCDF) to reserve a number of slots for families who qualify for vouchers, but who don't receive them due to lack of state funding.

Another form of funding is through the Texas Prekindergarten Program. Prekindergarten programs can be operated only by school districts and within school facilities, but subcontracting is permitted and coordination with other early childhood programs such as Head Start is encouraged. Prekindergarten programs must meet at least three hours a day for the full school year and be taught by a certified teacher. For more information, contact school districts in your area.

## **Federal Direct Subsidies to Centers**

***Head Start:*** Head Start and Early Head Start are federally funded programs for children aged zero to five in families with incomes at or below the poverty level. Funds are available to support center-based child-care, although only a limited number of programs can be funded within a given area. Organizations that receive Head Start funds are required to follow the Head Start performance standards and to provide an array of comprehensive services, which include child development, early education, social, health, and nutrition services. For more information, see <http://www.acf.dhhs.gov/programs/hsb>.

***Child and Adult Care Food Program (CACFP):*** This USDA program provides funds for meals and snacks for children in child-care centers up to age 12. Reimbursements vary based on the incomes of families served by the early childhood program. In center-based care, reimbursement is based on the number of families that are eligible for free and reduced-price meals. For more information go to <http://www.fns.usda.gov/cnd/care/cacfp/cacphome.htm>.

***Office of Apprenticeship Training, Employer and Labor Services (ATELS):*** This Department of Labor Program awards grants to states. In the past, Texas has sometimes awarded funds to child-care programs to sponsor apprentices. For more information, go to [http://www.doleta.gov/atels\\_bat/](http://www.doleta.gov/atels_bat/).

***Carol M. White Physical Education Program:*** This Department of Education (DOE) program provides grants to initiate, expand, and improve physical education programs, including after-school programs, for students in kindergarten through 12<sup>th</sup> grade in order to make progress toward meeting state standards for physical education. For more information, visit <http://www.ed.gov/programs/whitephysed/index.html>.

***Community Technology Centers Program:*** The purpose of this DOE program is to create and expand community technology. They fund centers that will provide disadvantaged residents of economically distressed urban and rural communities with access to information technology and related training. The focus of the program is to use technology-related instruction to improve the academic achievement of students in secondary schools. For more information, visit <http://www.ed.gov/programs/comtechcenters/index.html>.

***Cultural Partnerships for At-Risk Children and Youth:*** This Department of Education program makes demonstration grants to eligible entities for the development of school-community partnership programs designed to improve the educational performance and future educational potential of at-risk children by providing comprehensive, coordinated, educational and arts programs and services. Funds are distributed directly to local education agencies (LEAs.) For more information on the program, visit <http://www.ed.gov/programs/artscp/index.html>.

***Drug-Free Communities Support Program:*** This program supports community coalitions in their efforts to address and reduce substance abuse among youth. DFCSP grants will be available to eligible coalitions in amounts of up to \$100,000 for a 12-month period. The coalition must have representation from the targeted community and include at least one member/representative from each of the following 12 sectors: youth; parents; businesses; media; schools; youth-serving organizations; law enforcement agencies; religious or fraternal organizations; civic and volunteer groups; healthcare professionals; and state, local, and/or tribal governmental agencies with expertise in the field of substance abuse. For more information, visit <http://www.ondcp.gov/dfc/>.

***Early Reading First:*** This program, part of the President's "Good Start, Grow Smart" initiative, is a DOE program designed to transform existing early education programs into centers of excellence that provide high-quality, early education to young children, especially those from low-income families. The overall purpose of the Early Reading First Program is to prepare young children to enter kindergarten with the necessary language, cognitive, and early reading skills to prevent reading difficulties and ensure school success. For more information, visit <http://www.ed.gov/programs/earlyreading/index.html>.

***Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP):*** The GEAR UP program is a discretionary grant program run by the DOE and designed to increase the number of low-income students who are prepared to enter and succeed in postsecondary education. GEAR UP provides six-year grants to states and partnerships to offer services at high-poverty middle and high schools. GEAR UP grantees serve a cohort of students beginning no later than the seventh grade and follow the cohort through high school. GEAR UP funds are also used to provide college scholarships to low-income students. After-school programs will need to collaborate with other entities to apply for this grant. For more information, visit <http://www.ed.gov/programs/gearup/index.html>.

***Mentoring Grants:*** This DOE program aims to improve the academic achievement of children with greatest need by assisting them in receiving support and guidance from a mentor. “Children with greatest need” is defined as children at risk of educational failure, dropping out, or involvement in criminal or delinquent activities, and who lack positive role models. Supported activities will work to improve interpersonal relationships between targeted children and their peers, teachers, other adults, and family members. Additionally, funded programs will work to reduce juvenile delinquency, involvement in gangs, and the dropout rate of at-risk children. For more information, visit <http://www.ed.gov/programs/dvmentoring/index.html>.

***Parental Information and Resource Centers:*** The PIRC program provides resources that grantees can use in pursuit of the objectives of the No Child Left Behind Act. In particular, this program provides an opportunity for grantees to focus on assisting the parents of children who attend schools identified for improvement, corrective action, or restructuring under Title I, Part A of the Elementary and Secondary Education Act (ESEA). For more information, visit <http://www.ed.gov/programs/pirc/index.html>.

***Partnerships in Character Education:*** This DOE program provides funding for character education programs. A nonprofit child-care center will need to partner with a local education agency (LEA) in order to apply. For more information, visit <http://www.ed.gov/programs/charactered/index.html>.

***Talent Search Program:*** The Talent Search program identifies and assists individuals from disadvantaged backgrounds who have the potential to succeed in higher education. The program provides academic, career, and financial counseling to its participants, encourages them to graduate from high school, and assists them in continuing on to the postsecondary school of their choice. Talent Search also serves high school dropouts by encouraging them to reenter the educational system and complete their education. The goal of Talent Search is to increase the number of youth from disadvantaged backgrounds who complete high school and enroll in postsecondary education institutions. Students must be between the ages of 11 and 27 and have completed the fifth grade. In any given project, two-thirds of the participants must be low-income students who are potential first-generation college students. For more information, visit <http://www.ed.gov/programs/triotalent/index.html>.

Direct, low-interest government loans, and loan guarantee programs can also be a source of funds. USDA/Rural Development provides both direct and guaranteed low-interest loans to construct, improve, or expand space, and buy equipment and furniture for child-care projects in rural areas (populations under 50,000). Both nonprofit and for-profit organizations are eligible to apply. Transportation assistance funding from the U.S. Department of Transportation may be available if a project involves families who formerly received public assistance. Your area SBDC may also be able to provide you with information about low-interest loans.

Government grant availability changes on a regular basis. Agency goals that are low priorities one year may suddenly become the highest priority the following year. Check with local government agency representatives to find out when funding decisions are made, and ask how to have input on the process.

### **AmeriCorps VISTA**

AmeriCorps VISTA can provide an organization with high-quality volunteers whose living expenses, healthcare, and other benefits are covered by AmeriCorps. For more information, see <http://www.americorps.org>.

### **Other Funding**

#### **Tax Benefits for Compliance with the ADA**

The Internal Revenue Service (IRS) provides a tax benefits to assist businesses in complying with the Americans with Disabilities Act of 1990 (ADA). A child-care center must comply with the ADA. This means that the center's physical spaces must be accessible to disabled persons. Section 44 of the Internal Revenue Code allows a tax credit for small businesses. A small business is one that has \$1,000,000 or less in total revenues (for the previous tax year) *or* 30 or fewer full-time employees. This credit can cover 50% of the eligible access expenditures in a year up to \$10,250. The maximum credit a business can get is \$5,000. The tax credit can be used to offset the costs of complying with the ADA. The credit is available for expenses such as undertaking barrier removal, alterations to improve accessibility, providing sign language interpreters, and for purchasing certain adaptive equipment. Section 190 allows for a tax deduction for all businesses. The maximum deduction is \$15,000 per year. The tax deduction can be claimed for expenses incurred in barrier removal and alterations. Be sure to speak with your accountant regarding tax credit and tax deduction provisions.

## Employer Funding

Some employers offer assistance with the cost of child-care either by reimbursing employees for a portion of their child-care costs or by subsidizing specific child-care programs, usually located at the workplace. Employers in Texas can receive tax credit for expenditures on child-care.

## Foundation and Private Funding

### Overview

According to *Financing Child-care in the United States*, contributions from the private sector play a minor part in child-care financing for ongoing operation child-care centers, representing less than one percent of total annual expenditures for child-care and early education. Nevertheless, this support can be significant for some programs. Individual donations can be large or small and usually succeed because of person-to-person contact. This technique works best if you can present a specific need and dollar amount to support that need, such as \$20 for an art easel or \$3,000 for a new piece of playground equipment.

### Donated Goods and Services

Nonprofits are eligible to receive donated goods because they are tax deductible for donors. In some smaller communities, child-care facilities have been constructed almost entirely through in-kind contributions. Local residents contribute land and building materials, design services, and labor. While this level of in-kind contribution may not be feasible in your community, consider potential contributions of goods and services. However, as community based organizations experienced in housing development already know, donated materials and services are not always an advantage, particularly when they require major adaptations of plans and schedules to accommodate the contributor. Nonprofits should check all donated equipment and toys to ensure they have not been recalled due to safety hazards.

## Community and Religious Organizations

Community or religious organizations can be an important source of funds, space, and in-kind contributions. Sponsorships of individual child-care programs are quite common. Money can be collected for scholarships, or for ongoing operations. A church donating one-fourth of its loose change in the collection plate each Sunday could generate thousands of dollars for a child-care program that it sponsors. Other private sector organizations, such as community foundations and local philanthropic foundations, also contribute to child-care, most notably through scholarship programs, although sometimes they donate cash or material resources. Some of the scholarship programs are portable, allowing the family to choose the child-care provider. Other programs require eligible parents to use specific child-care providers.

## Foundations

Foundations rarely provide regular ongoing operational funds but may be willing to contribute to start-up costs or to a specific project. In general, contacting small local community or family foundations will be the most successful. *The Foundation Directory* located in the reference section of many public libraries is a good source for locating foundations.

## Corporate Sector

Businesses frequently contribute to worthwhile community causes. Larger corporations may even have a staff person assigned to review requests. They may also have formal procedures and guidelines for you to follow in applying for funds. Smaller corporations are often less formal, but it is a good idea to approach them with a written proposal, as well. Think win-win. Be prepared to show the corporation how they could gain from giving to your cause, through publicity, tax deduction, or shared services.

## Nonprofit Lenders

Nonprofit lenders may provide loans at a low rate.

## Common Funding Restrictions

If nonprofits accept government funding, they will have to agree to any restrictions that come with the funds. The most common restrictions include certification as a drug-free work place, background checks, disclosure of lobbying activities, and following federal bidding procedures. Other federal grants will require using a federal wage scale. Foundations and corporations will also have restrictions on their funding. It is very important to read and understand the grant agreement before signing.

## Funding for Facility Construction and Program Start-up or Expansion

### Federal Government Funding

***Community Development Block Grant Program (CDBG):*** This Department of Housing and Urban Development program offers grants to qualified cities/counties and all states. The funds can be used to construct child-care facilities in low-income areas. Some jurisdictions have elected to set up a loan program (section 108) with the funding. For more information on how to obtain this grant or loan money, contact your city or county officials. If they cannot answer your question, contact your local HUD field offices. The field offices in Texas can be located through the national HUD website at: <http://www.hud.gov/local/index.cfm?state=tx&topic=offices>.

The United States Department of Agriculture has two child-care funding programs for rural areas, currently 20,000 people or fewer.

***Community Facilities Grant Program:*** Funds from this program can be used for construction of the child-care center or equipment required for a facility's operation. The amount of the grant can be no more than 75% of the project's costs. Priority is given to grant applicants who serve small communities (5,000 or less) or who serve low-income communities.

***Community Facilities Loan Program:*** This program is similar to the grant program except the monies must be paid back to USDA. The rates are determined by the median household income that the center serves, and those serving very low-income families receive the best rates. The maximum loan term is the lesser of forty years or the useful life of the center.

More information about both these programs can be found at <http://www.rurdev.usda.gov/rhs/cf/cp.htm> or by contacting your local USDA rural development office. A list of rural development offices in Texas can be found at <http://www.rurdev.usda.gov/tx/lolist.htm>.

***Small Business Administration:*** This micro loan program provides short-term loans of up to \$35,000 to small businesses and not-for-profit child-care centers for working capital or the purchase of inventory, supplies, furniture, fixtures, machinery and/or equipment. Additional information is available at <http://www.sba.gov/services/financialassistance/index.html>.

## State and Local Government Funding

Most state funding is available through Local Workforce Development Boards. These 28 local boards manage the Child-Care Development Block Grant Funding (CCDF) and coordinate other funding/resources. To find the board in your area, see <http://www.twc.state.tx.us/dirs/wdbs/wdbcontacts.html>.

You may also be able to obtain a low-interest loan, of \$10,000 to \$250,000, from the state through the Texas Linked Deposit Program. You can apply at almost any bank in the state, who will then submit an application to the state. Loans will be subject to the lender's normal credit evaluation. Proceeds can be used for working capital, or the purchase, construction, or lease of capital assets, which include land, buildings, and equipment. Loans to start-up businesses are permissible, subject to lender's normal credit evaluation. For more information on the Linked Deposit Program, visit [http://www.governor.state.tx.us/divisions/ecodev/ed\\_bank/linked\\_deposit/](http://www.governor.state.tx.us/divisions/ecodev/ed_bank/linked_deposit/).

## Local School Districts

Some local school districts provide free facilities or grant subsidies to nonprofit child-care organizations that provide children before- and after-school care in school buildings.

### ***Private Funding***

Nonprofit lenders can often provide grants and low-interest loans for development costs. For instance, the Greater Houston LISC (Local Initiatives Support Corporation) provides funding for community development projects in the Houston area. For more information on Houston LISC, visit <http://www.lisc.org/houston/index.shtml>.

Some foundations also specialize in start-up projects. For instance, the Coastal Bend Community Foundation provides seed money for projects in Aransas, Bee, Jim Wells, Kleberg, Nueces, Refugio and San Patricio counties. For more information, visit <http://www.cbcbfoundation.org>.

## A Child-Care Center's Physical Space

The facility that will house a center is one of the most critical components in a successful program. The correct design and location of a child-care facility can promote safety, increase effectiveness, and enhance the quality of child-care and the success of the center's programs. A nonprofit seeking to establish a new child-care center has three options when it comes to selecting a space for the center: using an existing space that conforms to minimum standards, modifying an existing space, or building a completely new space. The option that a nonprofit chooses will be subject to several factors outlined below, including the minimum requirements that the state of Texas requires licensed child-care centers to meet. This chapter will begin by discussing the factors to be considered in site selection as well as the minimum requirements for the physical facilities of a child-care center and other legal issues that affect the location of a center. The chapter will then cover legal issues involved in leasing or purchasing a child-care center space.

### Site Selection Factors

#### *Safety and Security*

The safety and security of the center's children, parents, and employees is an important factor in the selection of the location for the center. A sex-offender search should be conducted to be sure that no offenders are located within 1000 feet of the center. The center should also make sure to ask for notification if a sex offender seeks to be located within 1000 feet of the center so they can register a protest.

The traffic patterns at the location should also be taken into consideration. The center will need to be sure that there is adequate safe parking for parents dropping off and picking up children. In addition, if the center does not have enough adequate adjacent outdoor play space, additional space that can be safely reached through traffic will have to be found. This is discussed further below.

A circular driveway will allow parents peace of mind when unloading their children and picking them up, while providing easy access to the building itself. This provision also will increase safety to the children by forcing the building to be further back from the road. Fencing the property is also important.

## ***Market Feasibility***

An organization should conduct a feasibility study of any location selected for the center. The center should be located in an area within easy transportation distance for parents in the target neighborhoods or businesses. It is best if it is an easy to find location, with good access and visibility.

## ***Texas Minimum Space Requirements for a Licensed Child-Care Center***

In Texas, licensed child-care centers must meet indoor and outdoor space requirements established by the DFPS to ensure that child-care centers provide a safe and adequate care space for the children in their charge. Local health and safety ordinances may have additional requirements.

### **Indoor Space Requirements**

DFPS's indoor space requirements cover, among other things, the amount of space required per child, the location of the caregiving area, the amount of storage space per child, and the number of sinks and toilets provided per child. In addition, DFPS requires that children younger than 18 months of age be cared for in an area separate from children older than 18 months of age. A child-care center building must also at least two exits to the outside that are located in distant parts of the building.

### **Outdoor Space Requirements**

DFPS's outdoor space requirements cover the amount and location of outdoor activity space per child, the size of the fencing required, exits from the space, and who may share activity space.

### **ADA Requirements**

Child-care centers built or renovated after January 26, 1993 must comply with Title III of the American Disabilities Act (ADA). The ADA requires that all newly-constructed facilities be fully accessible to individuals with disabilities. Existing facilities must be modified to be fully accessible only if the modifications are readily achievable. The only general exception to these requirements is for child-care centers run by religious entities; child-care centers merely housed by a religious organization are not exempt. Organizations seeking to evaluate an existing facility or to build or renovate a facility should contact an architect for assistance. For more information on a center's disability policy please see the Operating Section.

### ***Ineligible Neighbors***

A child-care center may not be located near certain types of businesses, including adult-oriented businesses or those that sell firearms.

## ***Zoning and Land Use Issues***

A center's ability to use an existing building for a child-care business or to build a new facility on an undeveloped piece of land depends on the allowable uses of the land on which the building is or will be located. Land use is governed by zoning ordinances, deed restrictions, and other land transfer documents or restrictions created by homeowners associations and recorded in the county land records.

### **Zoning Ordinances**

Texas law allows cities and some counties to regulate the use of land within their jurisdictions. Cities typically divide the land in their jurisdiction into districts that are classified as residential, commercial (sometimes further divided into office and retail), and industrial zones. Zoning ordinances are laws that restrict the use of land in each zone. Typically, the zoning regulations are consistent within each district but may differ between districts. Most Texas cities and some counties have enacted a master plan and appropriate zoning ordinances. Zoning regulations cover among other things: how land may be used, the height of buildings, how far buildings must be set back on each lot, the density of the building allowed on each lot, the ratio of built space to natural space, and the signage allowed on the land.

For each zone, a city may determine whether a type of use is permitted, conditionally permitted, or prohibited. A permitted use indicates that use can be exercised by right in that zone. A conditionally permitted use is one that is allowed only with prior approval from the city. To grant a conditional permit, a city has the right to impose additional conditions on the use of the land. A prohibited use is one that is not allowed under any circumstance.

A growing number of cities are imposing additional restrictions on land that has been zoned. For example, the City of Austin has several districts in which a neighborhood overlay (created by a neighborhood planning committee) cuts across several zones and imposes restrictions designed to create uniformity to community sections.

Child-care centers are typically considered commercial enterprises and therefore are permitted to be located only on property that is zoned for such purposes. Zoning issues arise when a child-care center classified as a commercial use seeks to locate in a district that is zoned as residential.

### **Conditional Use Permit**

In some jurisdictions, child-care centers are allowed to operate as conditionally permitted uses in areas zoned as residential. If a center wants to locate in an area in which child-care is a conditionally permitted use, the center should apply for a permit. The application process will typically involve the notification of the owners of the surrounding property and may or may not involve a hearing. In addition, a jurisdiction may charge a fee if the conditional use permit is granted.

## Variance

If child-care is not classified as a conditionally permitted use, a center may seek a variance. A variance is a waiver from a zoning provision. Variances may be granted when a zoning restriction causes *unnecessary hardship* to the business. The application process will typically involve the notification of the owners of the surrounding property and will likely involve a hearing. Zoning jurisdictions typically charge fees for the application process. In addition, a jurisdiction may charge a fee if the variance is granted.

Applications for conditional use permits and variances are filed with the city or county office that oversees development. Conditional use permits and variances are reviewed by the zoning or planning commission or other government body making land use decisions. Appeals from the decision of the administrative body are made to the city or county government. Applications for conditional use permits or variances will typically require the following information: exterior and interior site and building plans, maps of the neighborhood, a traffic analysis, letters from the affected neighborhood or homeowners associations, a recommendation from a city or county staff person, and additional information about the business to be located at the site.

The zoning jurisdiction will notify surrounding property owners, neighborhood associations, and other stakeholders of the application and, if appropriate, will set the application for a hearing, at which the surrounding property owners may voice their concerns and protests. The center will have a chance to respond at the hearing. Child-care centers have typically raised concerns regarding traffic congestion, lack of parking, large signage, noise, and the general concern that a commercial use will attract additional business uses that will lower the property value of the surrounding neighborhood.

Some best practices are:

- Don't sign an earnest money contract without a requirement that appropriate zoning be obtained.
- Review the zoning maps or neighborhood plans that apply to the specific property or area in which the child-care center is interested.
- If child-care is not a permitted use, contact the city or county development office to discuss the possibility of locating a child-care business in the zone.
- Identify and contact the affected stakeholders, including the surrounding property owners and tenants to discuss the merits of locating an affordable child-care center in the location.
- Take note of any concerns raised and incorporate those concerns into a development plan.
- Allow the stakeholders to review the development plan.
- If the use is ultimately allowed, be vigilant about maintaining good relations with the neighbors.

## Deed Restrictions and Other Restrictions in Land Transfer Documents

Some Texas jurisdictions, such as Houston, have not implemented a master plan and have no zoning. Instead land use planning is covered by deed restrictions and homeowners associations. In certain circumstances, a center may seek to obtain a text amendment, which is a legislative change in the zoning of an area.

## Environmental Issues

Because a child-care center will serve children under the age of 18, environmental considerations must be investigated and addressed. Environmental concerns may occur in the building, in the playground equipment or in the land itself.

**Lead paint:** Existing buildings may be contaminated with lead. Lead is particularly poisonous to children. The most common form of lead is in paint. Lead paint is present in many buildings built before 1978, especially those built before 1960. Lead paint can be found on any painted surface, but it is most often found on windows, trim, doors, columns, porches, and outside walls. Lead paint is believed to pose the greatest risk to children between six months and six years of age. Children of this age are at the greatest risk for lead based poisoning because they are most likely to come into contact with paint chips and paint dust on floors and windowsills. Existing buildings must undergo a lead paint test conducted by a certified lead paint evaluation professional before a child-care center will be licensed. In some circumstances, the lead paint must be removed before a jurisdiction will issue a certificate of occupancy. This process is known as lead paint abatement and must be performed by a certified lead paint specialist. For more information about lead based paint see <http://www.cpsc.gov/cpscpub/pubs/lead/6007.html> or <http://www.hud.gov/offices/lead/>.

**Asbestos:** Existing buildings built before the mid-1980's may have asbestos issues. Asbestos is a now banned in insulation and siding material because it has been shown to cause lung cancer. Asbestos may be contained or removed.

**Radon or carbon monoxide poisoning:** Both radon and carbon monoxide are especially dangerous for children. Carbon monoxide is a poison that results from incomplete oxidation of carbon in combustion processes like un-vented heaters, leaking chimneys and furnaces, wood stoves, and gas pipes. The Texas Human Resources Code requires child-care centers to have carbon monoxide alarms. Radon is a naturally occurring gas that comes from various rocks and soils and can cause lung cancer. Most child-care centers take precautions against radon gas. A center can buy a radon kit from many department stores and should test for radon every three months. More information about radon and carbon monoxide poisoning can be found at <http://www.state.in.us/idem/kids/5star/resources.html>.

**Poisons in playground equipment:** Most playground equipment manufactured in the United States is treated with chromated copper arsenate (CCA), a type of arsenic. Some research has shown that repeated exposure to CCA is associated with a higher risk of cancer especially in children. Currently, neither the Environmental Protection Agency (EPA) nor the DFPS ban the use of CCA. Some local jurisdictions, however, have banned the use of CCA treated wood in playground equipment. Whether or not a local jurisdiction allows CCA treated materials, the best risk management practice is to consider purchasing playground equipment treated with arsenic-free preservatives or using materials that don't contain arsenic, such as metal, plastic, and naturally rot-resistant wood. This will eliminate the possibility of a lawsuit against the center for use of potentially poisonous equipment. For the EPA's position on CCA in playground equipment, see <http://www.epa.gov/pesticides/factsheets/health.fs.htm>.

## Site Control Issues

### *Buying vs. Leasing*

A nonprofit may or may not have a choice regarding whether to lease or buy an existing building or to build a new facility. Many nonprofits establishing new child-care programs choose to lease space for the initial program period. Leasing a space is often a less expensive and more flexible option than either purchasing an existing space or constructing a new one. A lease requires less financial investment and spans a finite term; thus it often allows a child-care program to try out different spaces and locations without serious commitment. This feature is often attractive to child-care programs in their initial stages. Some of the drawbacks to leasing include complications with renovations to meet child-care licensing and fire safety requirements. For example, requirements for running water may preclude the use of some buildings. Landlords may ask for a long-term lease to help cover those costs. Alternatively, landlords may ask programs to pay for renovation costs up front, thereby increasing the value of the building and raising the potential for increased rental fees later on. Churches, schools, and nonprofit organizations may provide space at little or no cost. Other related costs, such as custodial service or utilities, may be minimal.

New centers may have the option of buying a space or building a new facility. In addition to building equity through the ownership of an asset, owning a space gives the nonprofit more control over design or remodeling decisions. Sometimes owning a building can be less expensive than renting or leasing when renovations improve the energy efficiency of a building and loan payments are lower than rent. However, buying or building a facility is a complex undertaking and requires management by persons experienced in real estate and construction. The drawbacks include a large initial monetary investment, which frequently requires a nonprofit to borrow money.

Whether a nonprofit chooses to lease or purchase, the corporation should conduct extensive research into the property. This process is called due diligence and consists of researching the property's ownership, encumbrances, zoning, easements, and suitability for use as a child-care center.

## **Corporate Authority**

Texas law requires the board of directors to document authorization for the purchase of property through a corporate resolution. The contract should be signed by the person(s) authorized to sign in the nonprofit's bylaws.

## **Leasing a Facility**

Nonprofit child-care programs that choose to lease space should work with an attorney to conduct a thorough investigation of the space to determine whether the location meets the minimum facility requirements, whether child-care is a permitted use of the land, and whether any environmental conditions exist that may prohibit the operation of a child-care business at the desired site. If the nonprofit determines that the site is suitable, it should negotiate a leasing arrangement and make sure that all agreements are incorporated as provisions into a signed written lease agreement.

## **Lease**

A lease is a written summary of the agreement between a landlord and tenant. The lease transfers the right of possession of a property from a landlord to a tenant. The tenant may use the leased property in any lawful or reasonable manner, subject to any provisions within the lease itself.

## **Lease Provisions**

Many landlords use leases that are mass-produced documents or standard forms. These form documents often contain provisions that favor landlords over tenants. Therefore, it is very important to read and understand all the provisions of the lease. The time to negotiate any changes to provisions is before signing the document.

Provisions that are normally incorporated into a lease govern:

- the property to be leased, both indoor and outdoor;
- the duration of the lease;
- the commencement date of the lease;
- the rental payment date;
- landlord responsibilities;
- tenant responsibilities;
- services to be provided by the landlord (i.e. repairs, maintenance, operating expenses — in many commercial leases, landlords are responsible for outside and structural repairs while tenants are responsible for interior repairs — some which include plumbing and heating/cooling);
- landlord's right to enter;
- modifications to be made to the property prior to the commencement date of the lease;
- permitted uses of the building; (The lease should clearly permit the operation of child-care

center but should be broad enough to allow a nonprofit to assign the lease or sublease the property if the site is not workable for the child-care center.)

- permitted modifications to the building; (Leases often provide landlords absolute discretion over alterations to their premises. However, a child-care center may stipulate in the lease that the use of discretion be reasonable. A center that plans to make alterations to a building may also want to stipulate that the landlord respond to alteration requests within a specified time period and provide reasons for any denial of a request.)
- permitted signage;
- who will pay, and in what proportion, for expenses (utilities, telephone, computer, internet, insurance, taxes, cleaning, garbage, security, etc.);
- hours of use of common space;
- right to assign the lease;
- right to sublease;
- right to renew or extend the lease; and
- lease termination. (It is in the tenant's favor to have as many termination rights as possible. The most frequent events that trigger tenant's termination rights include casualty/condemnation, inhabitability of the premises, and landlord's breach of obligations under the lease. Given the nature of the nonprofit sector, in addition to requesting these common termination rights, a nonprofit center may also want to request that its termination rights be triggered by a loss or decrease in funding. Since a landlord's only other option than granting termination in the face of decrease in funding would be to face a defaulting, judgment-proof tenant, a landlord will often grant this termination right. A child-care center might specifically seek termination rights if it fails to obtain or loses a license from DFPS.)

### ***Liability Provisions***

Because caring for children brings a high amount of liability, a landlord may seek specific indemnification language and specific levels of insurance from the nonprofit. The nonprofit should consider the possibility of adding the landlord as an additional insured to the center's liability policy.

### ***Subordination of the Lease Clause***

An unconditional subordination provision is standard in leases and provides that a lease is subordinate to any mortgages then or thereafter attached to the property. This type of provision allows a mortgage lender to foreclose and eject a tenant from a property regardless of whether the tenant is in default. A center may protect itself from this by negotiating that as long as the center abides by the lease terms, the center cannot be evicted from the space even if the building ownership is transferred. This protection measure is appropriate for a short-term lease, i.e. less than 5 years; however, if the lease is long term, a center should simply negotiate a long advance notice period.

## ***Signing the Lease***

The center should make sure that the person, partnership or corporation named as landlord is the owner of the property. The center should ask to see a deed or title insurance policy to verify that the named landlord really owns the building. If the building is owned by an individual, that person or an authorized person should sign the lease. If the building is owned by a business entity, the center should make sure that the person signing the lease has the authority to sign for the entity.

If a rental agent will be negotiating the lease and signing it on behalf of the owner, the center should ask for written confirmation from the owner that the agent has the authority to sign the lease.

For its own part, the center should make sure that the person signing the lease on their behalf is given authority to do so in the bylaws. The center should also be sure to enact the appropriate board resolution authorizing the lease of real property.

## **Buying a Facility**

Nonprofits opting to purchase or build a new facility should work with an attorney experienced in real estate transactions. Real estate transactions vary from deal to deal. The discussion below is intended to introduce some of the basic steps. If the center chooses to purchase space, each potential property should be researched to determine the appropriateness of the space for the intended use.

### **Title**

In order to secure ownership of a property, a buyer should ensure that the seller has clear title. Clear title means that no other person or entity can claim a right of ownership or financial interest in the property. Without clear title, the property can not easily be sold and most lenders will not make loans to purchase or renovate the property. Ownership of property can be determined by a search of the deed records in the county where the site is located. A child-care center's best bet is to work with a title company to conduct a title search and issue a title policy to protect the nonprofit's ownership.

If a site for purchase is selected, the nonprofit should follow established land purchase methods to ensure that the ownership of the property is secure.

A contract for the purchase of real property or a purchase contract is an agreement to purchase named real property within a specified period at an agreed-upon purchase price. Most purchase contracts will include the following terms:

- A clear description of the real property to be purchased;
- The earnest money deposit;

- The purchase price and how it will be paid;
- The closing date and any agreements regarding extensions of time;
- Any existing leases or contracts affecting the contract;
- The seller's obligation to disclose condition of property and any/all defects;
- The buyer's rights upon post-escrow discovery of defects;
- A right to assign contract to another party;
- Any existing easements encumbering the property;
- The closing costs and who will pay them;
- Prorated taxes, insurance, rents, etc; and
- The broker's fees if any and who will pay the fee.

The following types of contracts are variations on the standard purchase contract that provide flexibility to the buyer and so may be good choices for a center.

**Option Contract:** This type of contract gives the buyer the right to purchase a property for a set period of time at an agreed upon extra amount, called the option fee or option price. If the option is not exercised, the option price set in the contract is usually lost. If the option is exercised, the option price may or may not be applied to the purchase price. The buyer may choose not to exercise the option for any reason. Option contracts may be extended according to the agreement of the buyer and the seller. Option contracts allow a buyer to secure a property while the nonprofit secures financing, obtains required permits or waivers, resolves title problems, and conducts other purchase business. A center may record an Option Contract to protect the center's rights during the option period.

**Conditional Purchase Contract:** This type of purchase contract makes the purchase subject to contingencies that are specified in the contract. The buyer must purchase the property unless the specified contingencies prevent the completion of the purchase. A conditional contract typically includes a nonrefundable deposit that the nonprofit will forfeit if it is not able to purchase the property. When the purchase is prevented by a contingency, it may be possible for the nonprofit to renegotiate the forfeiture of the deposit. Failure of the center to obtain licensing or to obtain the needed zoning waivers may be named as one of the contingencies in the contract.

## Title Insurance

Purchasing title insurance is important to a child-care center for several reasons. First, title insurance will protect a center from issues affecting the title of the property that might not appear in any public records. Second, title insurance is often required to obtain financing on a property — most financial lenders will require a mortgage title insurance policy before lending money for the purchase or improvement of a piece of property. Finally, without title insurance and the protection of a title search, a center could be accountable for prior liens, judgments and back taxes, even without knowledge of their existence.

There are two types of title insurance: a mortgage policy that protects the lender, and an owner's

policy that protects the owner. Owner's title insurance protects the owner against financial loss if problems develop regarding the right to ownership in property. Title insurance does not guarantee that the owner will continue to have the right to possess or use the property, but it does guarantee that a title company will defend the owner from any lawsuits by other persons claiming an interest in the property and reimburse the owner for any financial loss incurred as a result of any claims covered by the title policy.

## Facility Development

A center faced with a need to engage in facility development, either to renovate an existing facility or to construct a new one, should engage appropriate professionals to provide technical assistance, including architects, engineers, contractors, and construction managers. Nonprofits will need to engage in complex project management when building or improving a facility. Necessary project components include financial feasibility and appropriate design. Some of the most common issues during facility construction are discussed below.

***Contractor Qualifications:*** Whether a nonprofit is building a new facility or modifies an existing one, the choice of a competent builder is critical. It is important to work with contractors qualified in particular areas of construction. In Texas, only specialty contractors, including HVAC, fire sprinkler systems, plumbing, and electrical specialists, need to be licensed. To obtain these licenses contractors must pass one or more exams and meet certain requirements. Ideally, the contractor would be familiar with child-care center state and local design regulations. In addition, some funders might have additional qualifications.

***Bidding Process:*** A nonprofit may be required to engage in a competitive bidding process by funding sources. In the competitive bidding process the plan is drawn up by an architect and bids are solicited from multiple contractors. Nonprofits may also have the option of bidding out the contract through a guaranteed maximum price. This allows the nonprofit to choose a contractor prior to settling on a design and seek the contractor's input into the design process. A nonprofit should be sure to enlist an architect or design professional to assist with preparation of a bid or request for qualifications.

**Construction Contract:** The construction contract should contain:

- a timeline for the project;
- whether or not a performance bond will be secured;
- a list of materials that will be used;
- identification of subcontractors;
- a maximum price of the work;
- any penalties that will be incurred for finishing late (liquidated damages clause);
- who is responsible for obtaining insurance coverage, criminal background checks, and the necessary construction permits; and
- a clearly specified statement that modifications to the contract must be made in writing.

**Davis-Bacon Act:** Nonprofits should be mindful of the Davis-Bacon Act. This Act requires contractors to use the prevailing wage rates (determined by the U.S. Department of Labor) for all Federal construction/rehabilitation projects in excess of \$2,000. Most centers' construction/rehabilitation will not be directly covered by the Act, but might be covered by a related act, especially the Housing and Community Development Act of 1974. A center should check with a federal funding grant or loan officer to determine if the Davis-Bacon Act applies.

**Mechanic's Lien Documents:** A contractor secures the promise of payment upon the completion of work through a mechanic's lien contract, a mechanic's lien note, and a deed of trust. The mechanic's lien contract will typically include a description of the real property to be improved, the work to be completed, dates for completion of the work, liquidated damages, and the contractor's and owner's obligations and rights. The mechanic's lien note functions as a promissory note that is secured by the deed of trust.

The mechanic's lien documents are recorded against the property itself. Failure to pay a contractor for work performed may result in a lien being placed against the property. Property cannot be sold and often cannot be refinanced when a mechanic's lien is placed against the property.

**Required Permits and Approvals:** Several public approvals are needed before a center can begin operations. These approvals might include utility, building safety, fire code approval, and a retail food and beverage permit. Operating permits are discussed in greater detail in the Operations Section. Properties within earthquake, flood, and coastal zones might require additional approvals. Center staff should set up a calendar for obtaining the needed approvals, and research what standards the site will need to meet to obtain the approval.

## Operating a Child-Care Center: Keeping the Organization Legal and the Children Safe

Once the nonprofit child-care center is up and running, the primary mission of the board and staff will insure the safety of the children by keeping the organization operating within the boundaries of the law. The following legal issues and suggested policies and procedures will help a nonprofit child-care center achieve that goal.

### Potential Areas of Liability for Child-Care Centers

The board and staff of a child-care center must be prepared to identify and evaluate its potential risks and to plan ahead to minimize liability by taking the appropriate precautions and protecting the facility and operations with adequate levels of insurance. This section will discuss the areas of operation that pose the greatest risk of liability for a nonprofit child-care center.

### Identifying and Evaluating a Child-Care Center's Risks

Types of risks faced by a child-care center may include:

- loss or damage of property by fire, water, or accident;
- fraud or embezzlement;
- lawsuits by clients or employees for negligence;
- lawsuits by employees arising from employment practices;
- lawsuits arising from an automobile accident;
- injury to an employee or volunteer;
- illness spread by a child;
- injury to a child or a child's parent;
- theft or vandalism of property;
- failure of a contractor to pay its subcontractors or for materials; and
- loss of information from computer breakdown.

### Negligence

Negligent injury to an enrolled child is one of the most common and serious risks faced by child-care centers. Child-care staff have a duty to act with reasonable care towards the children under their supervision. When a child-care staff member fails to act with reasonable care, the staff member is said to have acted *negligently*. A center may be sued for its staff's negligence that results in the injury of a child. If a center is found liable for the injury, it may be responsible for reimbursing medical expenses associated with the injury, as well as damages for physical and mental suffering. In order to protect

itself from shouldering heavy financial liabilities such as these, child-care centers should take steps to manage their risk by maintaining a safe environment, following all licensing requirements, and purchasing liability insurance. A center may be held liable for the acts of its employees both because the employees act as agents for the center and because the center did not exercise proper caution when hiring its employees.

## Types of Negligence

Some of the most common forms of negligence faced by child-care centers are:

- Failing to maintain the center's premises and the equipment in safe operating condition;
- Violating a law or regulation that governs child-care centers;
- Failing to provide proper supervision or any supervision at all, including failing to follow state regulations regarding supervision and child/staff ratios;
- Failing to implement a policy regarding the daily attendance of children who exhibit signs of a communicable illness, thereby exposing the other children to illness (please note that children who have HIV/AIDS are not classified as having a communicable illness);
- Administering prescription medicine without a doctor's consent or direction or administering over the counter medicine without exercising the proper caution; and
- Failing to provide proper care to an injured child.

## Taking Adequate Precautions

A center should review all areas of operation and ensure adequate safety measures, following the law in each relevant area.

## Employing Waivers

A center should employ waivers, in the form of written consent, for the following activities and situations: field trips, photo images of the children, outdoor recreation activities, and when administering medication. Liability waivers alone may not protect a nonprofit in court, and they will certainly not apply in all situations. Insurance can provide the center additional protection in these situations.

**Hiring Licensed and Qualified Personnel:** Please see the Employment Section for more information.

## Major Types of Insurance Coverage

Licensed child-care centers in Texas must maintain liability insurance that provides coverage of at least \$300,000 for each occurrence of negligence. The insurance must cover any injury that occurs to a child while on the license holder's premises or under the license holder's care. Proof of the required insurance must be filed with the DFPS. If a center is uninsured, whether due to expiration of the policy, financial constraints, or lack of availability, the center must make written notification to both the DFPS and the parents of the children under its care. The failure of a center to maintain the required level of coverage does not indemnify it for damages due to its negligence and is grounds for the suspension or revocation its license. **Please note however that any nonprofit must maintain liability insurance coverage of at least \$1,000,000.00 for bodily injury to be protected under Texas laws that cap the amount of money a person can recover for injuries resulting from an organization's employees or volunteers.** See Tex. Civ. Prac. Rem. Code Ann. § 84.006 and 84.007.

**Commercial General Liability Insurance:** Liability insurance will pay for a center's legal defense in the event of a lawsuit and any settlement or judgment, up to the limits of the policy, in the event the center is found to be liable in the suit. The insurance generally covers negligent acts committed by the organization, employees, or volunteers (including board members) that cause members of the public to incur bodily injury, property damage, or medical expenses. Certain types of exclusions are very common in the child-care areas and should be noted by the board. Exclusions are items that are not covered by the insurance policy. The most common exclusion is for child abuse or molestation; other exclusions include: injuries away from the center; kidnapping; damages resulting from food products; injuries while swimming; and damages resulting from pollution.

**Personal Injury:** In comparison to a general liability policy that covers claims regarding bodily injury or property damage, a personal injury policy covers claims regarding injury resulting from libel and slander. This coverage may be important if a center or its staff becomes involved in a child custody or child abuse case and thus becomes subject to libel and slander from the opposing party in the case.

**Product Liability:** This type of insurance covers claims against a center that relate to the food it serves or products it might purchase for use by the children in its care.

**Automobile Insurance:** Drivers in Texas must show proof of liability insurance at a minimum of \$20,000 per injured person and \$15,000 for property damage. If the center has a 15-passenger van, the driver of the van must be qualified to do so. The driver of a 15-passenger van should have training in driving both a fully loaded and unloaded 15-passenger van. Getting insurance coverage for this type of vehicle could prove difficult, as many insurance companies no longer provide coverage because of high rollover rates. For all types of vehicles, the center should have bodily injury, property damage, and uninsured motorist protection.

- **Business Automobile Insurance:** Similar to commercial general liability, this type of insurance is used when coverage is needed by an incorporated entity for ownership, operation, maintenance, and general use of vehicles owned by the center.

- **Hired and Nonowned Automobile Coverage:** The “hired” automobile endorsement to an auto policy covers bodily injury and property damage resulting from accidents that occur when the center rents or leases a car. The “non-owned” automobile policy protects the center for damages caused by volunteers driving their own vehicles on business for the center. This is very important coverage for nonprofits that utilize volunteers to transport children.

**Property Insurance:** This insurance covers damages to property owned by a center after construction has been completed and is based on the type of occupancy. Covered losses include fire, hail, or vandalism. However, property insurance may limit or exclude coverage for items such as mold testing or remediation and loss or damage to electronic data and associated equipment.

**Workers’ Compensation:** This form of insurance protects the center and provides benefits to paid workers for job-related injuries and illnesses. Maintaining this insurance limits the amount of money that is paid to an employee for any injuries. Organizations that do not provide workers’ compensation insurance have no liability limit if an employee is injured on the job.

**Fidelity Bond:** A bond protects the center if employees embezzle or steal assets from the center. The bonding company will replace the missing funds and then try to collect from the employee. Depending on the amount of funds handled, a center should consider conditioning employment in a position of financial responsibility upon the ability to obtain a bond.

**Director’s and Officer’s Insurance (D&O):** Similar to commercial general liability, this insurance covers the costs of defense and damages for wrongful acts and omissions committed by directors, employees, and volunteers. A center should ask for two different coverages:

- **Full Entity Coverage:** Reimburses the nonprofit for amounts paid to indemnify its directors and covers claims against the center; and
- **Directors and Officers Coverage:** A nonprofit corporation is a legal entity independent from its members, board, employees or volunteers. Individuals acting in their appropriate role within a corporation are protected from personal liability for the corporation’s breach of contract or tortious acts or omissions. However, individuals may still be liable for their own acts. D&O insurance protects the directors and officers for losses for which they are not indemnified. D&O policies are often “claims made” policies, which means that coverage is provided for claims made within the policy period rather than when the act occurred. If the nonprofit discontinues a policy, a director could be uninsured for acts that occurred during the director’s term of office, if the claim is made after the policy is discontinued. It should be noted that D&O policies typically do not provide for the payment of legal expenses until after a final determination of liability. Further, the insurance company has no duty to defend a lawsuit, only to reimburse legal expenses. Lawyer board members who act as counsel to the nonprofit should examine whether the D&O policy applies to them. Specifically, the board

member should determine whether legal malpractice policies exclude claims that arise if the attorney is acting as a director of a nonprofit. Other exclusions in D&O policies may include: libel or slander actions, fines and penalties, fair employment claims, and punitive damages.

***Employment Practice Liability (EPL):*** EPL protects nonprofits, directors, and employees. It covers employment discrimination claims, suits of wrongdoing in employment hiring and firing, and other employment practices. Since employment claims are the most common types of insurance claims against nonprofits, it is important to obtain EPL coverage. One of the main values of this coverage is that it covers litigation expenses. A center should buy a D&O policy that includes EPL.

***Errors and Omissions:*** This type of policy protects the center and its officers, directors, and employees against claims charging a violation of the professional standard of conduct associated with child-care providers.

***Medical or Accident Insurance:*** An accident insurance policy generally covers medical expenses from covered accidents occurring at the center or on a field trip. An advantage to the center is that it allows medical bills to be paid immediately. Some insurance companies will offer a discount on general liability policies if this type of insurance is purchased.

***Surety and Performance Bonds:*** These bonds protect the center from acts or omissions of others. For example, surety and performance bonds can be issued to guarantee a contractor will conduct activities in accordance with all laws and ordinances or will complete a project in a timely and workmanlike manner. This type of insurance could be useful if a center is planning on constructing a new facility or entering into several subcontracting agreements.

***Special Event Insurance:*** Special event insurance is specifically designed to cover the additional risks incurred in certain type of activities that are out of the ordinary for a center or that may be part of a short-term activity, including one-day events. An example of this is an on-site fair for children and families that might include a moonscape or other activities that bring a higher risk of physical injury. If a center is unable to purchase a rider to its general liability policy, it should consider purchasing this extra protection.

***Loss of Business Income:*** Insurance provides important protection for organizations who depend, in part or in whole, on fees for services or contract reimbursements for their cash flow. Many organizations will experience a cash flow problem while waiting for insurance or grant money following a disaster. The easiest way to protect your organization against this problem is to plan ahead for it, usually by purchasing insurance. Many nonprofits do not purchase *Loss of Business Income* insurance because they think that since they do not make a profit they do not need the coverage. Because there are so many choices available, with this insurance, a center's director should discuss the options with an insurance professional, so as to choose the coverage that fits the center's needs best.

***Specialty Insurance Lines:*** This insurance provides coverage for special events. Certain types of activities, such as working with animals, may not be covered by general liability insurance and, therefore, require a specialty line of coverage. Two common Specialty Insurance Lines are:

- **Owners and Contractors Protective Liability Policy:** Covers the owner or general contractor handling a construction project.
- **Builder's Risk Insurance:** Covers losses to property while property is being built, e.g., hail, vandalism, etc.

***Umbrella Policy:*** This type of policy is an option for directors to gain additional personal coverage. An umbrella policy may be purchased to provide coverage in excess of the individual director's homeowner's and automobile policies. A commercial umbrella policy might also be useful for the center. The majority of insurance companies do not generally provide insurance to child-care centers. For a list of companies that do provide liability insurance nation-wide to child-care centers, see <http://www.nccic.org/poptopics/liability.html>.

## **Health Issues**

A center's best practice for avoiding liability relating to health issues is to follow appropriate regulations established by federal, state, and local entities and to implement universally accepted health practices. A child-care center must submit to an annual sanitation inspection. This inspection, along with proper hand-washing and keeping a clean disinfected center (part of the universal precautions), are the main ways to ensure the health of children in a center. Beyond these measures, child-care centers may take other measures to protect the health of the children under their care. For instance, most child-care centers implement health policies, such as immunization requirements and procedures on handling sick children. The center should also have available for review a medical release form signed by the current legal guardian and each child's immunization record, health statement, and results of a TB test, if required by the local government entity. Because of privacy concerns, these health records should be kept separate from other types of records and only those employees with a reason to know the information should have access to these records.

## **Immunization**

Both the Texas Department of State Health Services and the DFPS mandate that children should have had the proper immunizations before enrolling in a child-care center. The departments require that each child at an appropriate age have a test for tuberculosis and be immunized against diphtheria, tetanus, poliomyelitis, mumps, rubella, rubeola, invasive pneumococcal disease, hepatitis A and any other communicable diseases as recommended by the Texas Department of State Health Services.

Immunization must be effective upon the first date of entry into the center. However, a child may be provisionally admitted if immunizations have begun and are to be completed as soon as possible. A child may also be admitted without the proper immunizations if he or she has either an affidavit signed by a licensed physician stating that the immunization would harm the child or a member of the child's household, or a notarized affidavit signed by a legal guardian claiming a conscientious objection including religious beliefs. The affidavit claiming a conscientious objection must be submitted on an official Texas Department of State Health Services form.

Please see the discussion of immunizations for children with HIV/AIDS below.

## ***Illness***

Parents may drop off an ill child or a child will become ill while within a center's care. The center should provide training to caregivers on how to spot common childhood illnesses. Caregivers should know which illnesses are contagious before and after symptoms appear. The center should then follow its policy for exclusion of sick children. In order to prevent problems in deciding whether to exclude a child, the center should maintain a written program policy on inclusion/exclusion of children.

If a child falls ill, in addition to excluding the child, the center must notify the Texas Department of State Health Services. The most common diseases that the center must report to the Texas Department of State Health Services include campylobacteriosis, chickenpox, hepatitis, measles, meningitis, mumps, rubella shigellosis, salmonellosis, and tuberculosis. Failure to report these diseases is a Class B misdemeanor under the Texas Health and Safety Code §81.049. Note that HIV/AIDS is not classified as a contagious disease and centers are not required to report on these cases. Children and employees with HIV/AIDS are particularly vulnerable to contagious diseases. Because a center may or may not know that children or employees have HIV/AIDS, implementation of the Universal Precautions is key to the protection of clients and employees, and therefore the protection of the center from liability.

## **Safety Issues**

The DFPS requires licensed centers to maintain the premises in a manner that is safe, sanitary, and will allow the center to handle emergencies. These requirements outline the standards for protections such as emergency lighting, fire extinguishers, smoke detectors, carbon monoxide detectors, and heating devices. To avoid liability, a center should maintain its equipment in good working order and should test the equipment regularly. The center will be subject to annual fire and gas inspections. It is the center's responsibility to make sure that the inspections are conducted. Failure to do so may lead to liability for the center if a child is harmed by a fire or gas leak.

## Protective Orders

A center must be aware of protective orders that affect children in the center's care. See the discussion in the Parent-Provider Section for more information.

## Disaster Preparedness

A center should take steps to make sure that in the event of a disaster, children and employees will be safe and business losses will be mitigated. The DFPS requires an approved evacuation plan as part of the licensing process. Center staff and the parents of children cared for at the center should be familiar with the plan and children should be drilled in the plan's particulars.

## Transportation

Transporting children poses considerable potential liability for a center. To minimize the risks, a Center should take the following precautions:

- Hire qualified drivers as required by the DFPS (see discussion in the Employment Law Section.)
- Follow supervision guidelines established by DFPS to make sure that children being transported are adequately supervised.
- Make sure that vehicles are well-maintained in safe and operable condition.
- Train staff and drivers in the proper procedures to follow when emergencies occur during transportation.

The DFPS provides extensive regulations regarding the transportation of children, including where children can sit in a vehicle and the equipment that must be maintained in the vehicle. The center should follow these regulations and make any failure to follow them by staff subject to disciplinary measures.

## Hiring a Van Driver

If the program includes school-age children, you may want to consider hiring a professional van driver who can pick children up after school from one or more schools and bring them to the center. If so, you will want to make sure to specify the following in his or her employment contract:

- Who is responsible for regularly checking his or her license and driving record?
- Who pays the insurance on the van?
- Does he or she get paid weekly or bi-weekly?
- What happens if school is canceled due to weather?
- Does he or she have to pick up the children if school is not let out at the ordinary time?
- Is the compensation dependent on the number of children he or she brings to your program?
- Who is responsible for handling complaints by a child or parent?

## Food Services

Food services are an important part of a center's activities. The meals and snacks provided by a center serving low-income children provides an important source of nutrition for the children. The center must obtain a permit from the Texas Department of Health (nonprofit centers are granted fee waivers). The center must follow regulations set by the DFPS. In addition, if the center receives reimbursement through the Child and Adult Care Food Program, the center must follow regulations set by the Texas Department of State Health Services. For more information, see [http://www.frac.org/html/federal\\_food\\_programs/programs/cacfp.html](http://www.frac.org/html/federal_food_programs/programs/cacfp.html).

## Children with Special Needs

### *The Americans with Disabilities Act*

All child-care centers, with of exception of those run by religious entities, must comply with Title III of the Americans with Disabilities Act. (Child-care centers that are part of government programs such as HeadStart are also subject to Title II.) The ADA is a federal law that forbids discrimination against individuals with disabilities. The aim of the Act in the child-care arena is to ensure children with disabilities receive equal opportunity to participate in child-care programs. This is accomplished by integrating children with disabilities into accommodations accessible to the public.

The ADA requires that a center consider each child with a disability on an individual basis when deciding whether or not the program has the resources to reasonably accommodate that child. To further this aim the Act requires centers to:

- include children with disabilities unless their inclusion would pose a *direct threat* to the health and safety of others or force a *fundamental alteration* of the program;
- make *reasonable modifications* to their policies and practices in order to accommodate children or guardians with disabilities unless it would require a *fundamental alteration* to the program;
- provide appropriate auxiliary aids and services to ensure effective communicate with children or guardians with disabilities unless it would pose an *undue burden*; and
- make their new facilities *fully accessible* to persons with disabilities and existing facilities must be made accessible if modification is *readily achievable*.

### **ADA Coverage**

The Americans with Disabilities Act (ADA) covers physical or mental impairments that substantially limit one or more major life activities. For instance, individuals with cerebral palsy, tuberculosis, HIV/AIDS, and autism are covered, as well as those suffering from mental retardation, attention deficit disorder and other learning disabilities. Also covered more generally are individuals with a history of an impairment, individuals perceived by others as having an impairment, and individuals associated with people with disabilities. Thus, a child with a disabled guardian would be covered. The ADA does not consider chicken pox, flu, cold, or broken bones disabilities.

HIV/AIDS is classified as a disability and persons with HIV/AIDS are considered disabled from the moment of infection.

### ***Required Inclusion***

A center may not exclude a child with disabilities from its program unless inclusion would pose a direct threat to the health and safety of the other children or would fundamentally alter the program itself. A center may not simply assume that a disabled child cannot be integrated into its program; it must make an individualized assessment of each child to determine whether the program can accommodate his or her needs. If a center determines that it cannot include a child in its program due to disability, the burden of proof is on the center to prove serving the disabled child would require a fundamental change in the program. In fact, centers funded through state or local government contracts must put in writing why the modification of its program to include a particular disabled child is a fundamental alteration. A center may require children to submit to a medical exam before entering into the program, but the exam must be required of all applicants and cannot be used for discriminatory purposes.

Once it is determined that serving a disabled child will not pose a threat to others or require a fundamental alteration to the program, a center must make a good faith effort to provide the child services in the most integrated setting appropriate. A center cannot segregate children with disabilities into a separate program. Even if a child needs some one-on-one services, the child has a right to be integrated into group activities the rest of a time. Additionally, the center generally must place disabled children in their age-appropriate classroom. For instance, a center may not place a developmentally delayed child in the infant or toddler room without his or her parents' permission.

### ***Cost of Inclusion***

An insurance company may charge higher rates to centers serving disabled children. However, a center may not exclude a disabled child due to an increase in insurance rates or transfer costs of the increase to the guardians of the disabled child. Any increase in cost must be treated as overhead and spread among the children. Additionally, a center cannot transfer costs of performing *reasonable* accommodations required by the ADA to the guardians of the disabled child. For instance, while a center may be able to charge parents for special medications and modified food, it cannot charge for the cost of providing *reasonable* services, such as performing blood glucose tests or diapering older children with disabilities if the center diapers younger children. See the Funding Section for more information regarding tax credits that a center may apply to the cost of making reasonable accommodations.

## Rehabilitation Act of 1973, Section 504

Children with disabilities are also protected by Section 504 of the Rehabilitation Act of 1973, a federal civil rights law that protects people with disabilities from discrimination. Section 504 applies only to public accommodations that receive federal funds. The law does *not* have an exemption for religious organizations. Thus, any child-care program receiving federal dollars may not discriminate because of disability. If a religious organization runs a child-care program, and receives federal funding, it must accommodate children with disabilities.

## AIDS

A center may face caring for children with HIV/AIDS or hiring employees with HIV/AIDS. It is against the law to discriminate against people who have HIV/AIDS or are associated with people who have HIV/AIDS. HIV/AIDS is not classified as a communicable disease and children with HIV/AIDS should be treated accordingly.

## Testing

A center may not require either employees or enrolled children or candidates for either to be tested for HIV/AIDS. Testing for HIV/AIDS is severely restricted and must be documented by informed written consent.

## Confidentiality

Federal and state law protect the confidentiality of persons living with HIV/AIDS. A center cannot require that it be informed of either a child's or an employee's status. Under Texas regulations, only physicians and other health professionals must report confirmed diagnoses of *AIDS* (not simply HIV infection) to the Texas Department of Health Services and the local health authority. This requirement does not apply to child-care providers or teachers.

The Texas Health and Safety Code protects the privacy of people with HIV infection, including AIDS, by strictly regulating the circumstances under which the knowledge of a person's HIV-positive status can be shared with other people. Texas law provides that HIV test results can be released only after the test subject (or parent or guardian, as required by law) signs a separate written authorization for each person to be told. (The exceptions to this rule apply only to physicians and surgeons and will not be reviewed here.)

Under Texas law, you may not disclose, release, transfer, disseminate, or otherwise communicate all or any part of any record regarding an individual's HIV test results, orally, in writing, or by electronic means to any person or entity.

Parents of children enrolled in a center MAY NOT be given confidential medical information pertaining to other children. Parents wanting such information should be reminded that this policy also protects their own privacy, since the center would similarly not reveal confidential information about their children.

Texas law further protects the privacy rights of individuals with HIV infection, including AIDS, by prohibiting any person from being *compelled* to disclose any characteristics that would identify any individual who has taken an HIV test in any type of legal proceeding. Providers who receive subpoenas requesting either testimony or documents that may reveal a child or parent's HIV status should consult an attorney immediately.

## Center Policies

A center's policies should address the following issues:

- Admission guidelines—factors to consider regarding the ability to provide appropriate care to an infected child;
- Immunization;
- Exposure to Infection;
- Universal Blood Precautions;
- Housekeeping Procedures; and
- Children with HIV/AIDS.

The laws protecting children with HIV/AIDS requires that affected children be exempted from some of the regulations that apply to other children in the center's care including the following:

- Medical records: parents of children with HIV/AIDS are not required to disclose their child's condition to a child-care center, therefore, a center is not held responsible for maintaining this information.
- Immunizations: although by law, centers must require that a child enrolled in the center be current with their immunizations, children with HIV/AIDS are exempted from this requirement because they frequently cannot tolerate the immunizations. A center should have on file a written order of exclusion from the child's doctor. A center can also look into the alternative immunization recommendations for children with HIV/AIDS that have been developed by the CDC. For more information, call 1-800-342-2437.

Best practices to address the issue of HIV/AIDS for centers:

- Provide health-related HIV/AIDS education.
- Be familiar and train staff on the laws regarding HIV testing, confidentiality and disclosure, and discrimination. Review and revise policies as appropriate to ensure that everyone at the center follows the confidentiality provisions (Many centers make breach of these provisions an action that is subject to the employee's immediate termination.)

- Include children with HIV/AIDS in regular activities unless doing so would increase the risk of injury to the child or other children.
- For children (and employees) identified to the center as having HIV/AIDS, maintain the files in a separate locked personnel file, and limit the persons who are authorized to access the information.
- Adopt the universal precautions to minimize the transmission of diseases. The Universal Precautions are available at the center for Disease Control website at [http://www.cdc.gov/ncidod/dhqp/bp\\_universal\\_precautions.html](http://www.cdc.gov/ncidod/dhqp/bp_universal_precautions.html).

## Parent – Provider Relations

The relationship between the center and the parents of the children within the center's care is the cornerstone of a sustainable program.

### Parent-Provider Contracts

A clear well-written admission agreement serves as a written contract between the center and the parents (or other legal custodians) of the children enrolled in the center. Written contracts serve as the basis for establishing communication between a center and parents, outlining the rights and responsibilities of each party. In addition, contracts serve as the written basis for collecting payments from parents. At a minimum, the agreement should address the following issues:

- Parties to the agreement;
- Specific beginning and ending dates;
- Fees, rates, deposits and refunds;
- Responsibilities of parents;
- Specific services;
- Medical considerations;
- Reasons for termination and basic notices before termination;
- Debt collection;
- Grievance;
- Dispute resolution;
- Children with special needs; and
- Signatures of all parties involved.

Contract agreements between providers and parents help eliminate miscommunication and unnecessary liability for the center. A contract agreement should outline a center's policies and practices so that a parent clearly understands the program in which he or she is enrolling a child. At a minimum the agreement should include:

- services provided;
- optional services;
- payment rates and methods;
- emergency contact information of the guardian;
- who is authorized to pick up the child;
- termination procedures;
- a schedule of the center's hours; and
- rules for modifying any provision of the agreement, particularly the payment rate.

Other important features to address in the contract include:

- whether there will be late fees for late payments or late pickups;
- whether there will be extra charges for meals, diapers, and other supplies;

- rules relating to dispensation of medication and emergency treatment in case of injury; and
- whether parents will be charged for days the center is closed due to weather or when their children are either sick or on vacation.

Often local licensing agencies have sample contracts that can help centers craft an appropriate contract. In developing a contract, a center should consider having the contract published in another language if a large number of the parents are non-English readers. The center should keep the original copy of the agreement on file and provide a copy to the parent or guardian.

## **Brochures and Handbooks**

In addition to a written contract, some centers choose to provide parents with a brochure or handbook. A handbook has the advantage in that it allows centers to explain their policies and procedures in more detail than in a contract and gives parents the opportunity to take material home to review at their leisure. Further, a handbook demonstrates to parents that a center knows and cares about children.

A handbook should reiterate all the items in the contract and express a center's general views on child-care. It should outline a center's policy on medical emergencies, late fees, sick children, administering medicine, and discipline. A handbook could also highlight the planned activities for children in the center and the training of the child-care staff.

## **Addressing Parent-Provider Challenges**

### ***Payment***

The enrollment contract should include a written policy about how to handle bad checks. The policy should state if the parents will be given an opportunity (i.e. a set number of days) to make up the difference or if all bad checks will immediately be turned over to the County Attorney's office. The policy should be posted in the area where parents customarily make payments. Texas law allows child-care providers to charge a reasonable fee to bad check writers. Usually, a fee between \$25 and \$75 is considered reasonable. The enrollment contract should also state that children will not be allowed to attend the center if an account is past due (usually by 7-14 days).

A center can take some precautions that help avoid problems collecting payments, including:

- Require payment in advance for the payment period specified in the contract.
- Do not take in children whose parents have not paid in advance, unless the child is part of a program that provides subsidies at specified times.
- Ask for a deposit from new participating families to cover a sufficient period to make up for checks that may bounce.
- Include a bounced check provision in the contract, stipulating fees for returned checks and a requirement of alternate payment methods after the first bounced check.

- Have parents acknowledge a debt in writing if a child is allowed to attend the program while the payment has not yet been made.
- Keep accurate and consistent records of attendance, payment, and method of payment.

## **Debt Collection**

Failure to make payments that are owed or failure to replace a bounced check within 30 days create collectible debts that entitle a center to remedies. A center should implement sound debt collection practices from the start. A center's first step is usually to send a demand letter to put the parents on notice that a debt is owed and that the center is prepared to collect that debt. A preventative measure is to only accept money orders.

## ***Parental Rights to the Child and Child Custody***

A center must make sure that the person(s) enrolling the child has the legal right to make decisions regarding the child's life. At first contact, the center should determine who has the legal right to the child. The Texas Family Code is a complex area of the law and a center is advised to contact an attorney when questions arise regarding the custody of children. In Texas, there are two general categories of persons authorized to make decisions for a child: biological parents and person(s) named as managing conservators in an agreed order or court order following a custody case.

Biological parents are presumed to be the persons named as mother and father on a child's birth certificate. The center should request a copy of the child's birth certificate during the enrollment process. Without a court order limiting the rights of either or both parents, both parents named in the birth certificate are presumed to have the right to make all decisions regarding the child's life and to have physical custody of the child. Both parents should sign the center's admissions agreement. If the birth certificate does not name a father, the center may accept the mother's statement naming a biological father (absent a court order). If a child's biological parents are informally separated (and have no court order regarding managing rights for the child), both parents should sign an enrollment agreement that names persons authorized to pick up the child. If the biological father is not part of the enrollment process and is not listed as a person authorized for pickup by the mother, the center is still required to allow the father access to the child. The center may also be required to release the child to the father, especially if the father is accompanied by a police officer.

## **Conservatorship**

A Conservatorship is a legal appointment of an adult(s), other than the biological parents or the Texas DFPS to make decisions regarding the child's life and to have physical custody of the child. Conservators are typically appointed as a result of a custody dispute between the child's biological parents, an adoption, or the removal of child by DFPS.

Under Texas law, the Managing Conservator has the legal authority to manage the child's well being. Normally it is also the managing conservator that has physical custody of the child and hence has the authority to arrange for the child's pick-up from care. In Texas, the court will often award parents joint managing conservatorship, giving the parents equal rights (outlined in the order) to make decisions regarding the child's life. The Order will typically specifically detail days and times of possession for each parent. The managing conservator has the authority to authorize other persons to pick up the child.

Under Texas law, the Possessory Conservator has the legal right to have physical custody of the child under the terms outlined in the Order of Conservatorship. If one parent is appointed as sole conservator, the other parent is typically appointed as a Possessory Conservator. In this situation, the center may only release the child to the possessory conservator on the days/times outlined in the Order. The center should look at the Order to determine who has the legal right to pick up the child and on what days each parent has this right. The possessory conservator has the right to authorize other persons to pick up the child on the days/times of the possessory conservator.

The rights of any of the person listed above may be altered by a restraining order issued by a court that prohibits a person from coming to the child-care facility. Such an order may be issued in situations involving domestic violence. The admission agreement should require that the center be notified if such an order is issued. In addition, the center's update forms should inquire about such orders. Note, however, that if the restraining order does not list the facility and the center has no reason to suspect child abuse, the person named in the restraining order can visit the child at the center.

As can be seen from the discussion above, this area of law is very complicated. A center should determine whether there is a court order governing management of the child early in the enrollment process. If an Order is in place, a center must follow the Order specifically unless presented with an agreement signed by the persons determined in the Order to have managing rights for the child.

## **Release**

Centers must be very careful when releasing children, as this is an area of potential liability. Releasing the child to an unauthorized person may lead to the center bearing responsibility for any harm that come to a child subsequent to the release. The best way to determine who has the legal right to pick up the child is to ask for a certified copy of the most recent court order or agreement between the parents concerning custody. If both parents are on the enrollment agreement and the center has no copy of a conflicting court order/agreement, then the center may release the child to the parent that shows up first. If other individuals are authorized to pick up the child from care this should also be on file at the center. If the center has a copy of a protective or restraining order against a parent, and this parent arrives to pick up the child, then the center should notify law enforcement and not let the child leave. The center should also have a process to ensure that the child's information gets updated on a timely basis. The contract with parents should state that the parents have a duty to inform the center if custody information changes. The person authorized for release may be a minor; however, in that case, the center may want to have the parents sign a separate release and may want to set a minimum age for release.

A best practice is to require the signature of all persons with the legal rights to the child.

A center may refuse to release to an authorized person under the following circumstances:

- Suspicion of child abuse: A center may refuse to release.
- Suspicion of domestic violence: A center may not refuse to release unless there is a suspicion of harm to the child.
- Intoxication: A center may refuse to release if harm to the child seems likely.
- Lack of a car seat: A center may not refuse to release
- Failure to Pick Up: If a child is not picked up, a center may, after calling all authorized persons and waiting a reasonable time, release the child into the custody of the police. Center personnel are not authorized to take the child to their homes.

## Immigrant Children

A center is not required to inquire into the immigrant status of children or their parents. Center staff are also not required to report families suspected of uncertain immigration status. However it is a best practice to have on file the names of alternate persons to whom the children in the center's care may be released in addition to the parents for all children enrolled in the center.

## Child Abuse and Neglect

Child abuse is mental, emotional, physical, or sexual injury to a child or failure to prevent such injury to a child. Neglect includes (1) failure to provide a child with food, clothing, shelter and/or medical care; and/or (2) leaving a child in a situation where the child is at risk of harm.

Texas law states that anyone having cause to believe that a child's physical or mental health or welfare has been or may be affected by abuse or neglect *must* report the case to a state or local law enforcement agency or the DFPS. The DFPS has a 24-hour family violence hotline, 1-800-252-5400.

### **Common Signs of Abuse are:**

- Frequent injuries such as bruises, cuts, or burns especially when the child cannot adequately explain the cause;
- Burns or bruises in an unusual pattern;
- Fear of going home or seeing a parent;
- Sexually suggestive or promiscuous behavior; or
- Lack of reaction to pain.

**Common Signs of Neglect are:**

- Obvious malnutrition;
- Begs for or steals food;
- Habitually dressed in the same clothes for multiple days;
- Frequently absent or late; or
- Dirty hair and clothing.

Reports should be made as soon as possible but no later than 48 hours before bruises and marks start to fade. It is important for the investigators to be able to see the physical signs. When the center makes a report it should be specific, telling exactly what happened and when. Center staff should be sure to record all injuries or incidents observed, including dates and times of day, and to keep this information secured. Center staff should give the agency person any information about the relationship between the child and the suspected abuser. The following information must be provided in the report:

- Name, age, and address of the child;
- Brief description of the child;
- Current injuries, medical problems, or behavioral problems; and
- Parents names and names of siblings in the home.

The report is confidential and is not subject to public release under the Open Records Act. The law provides for immunity from civil or criminal liability for innocent persons who report even unfounded suspicions, as long as the report is made in good faith. The report maker's identity is kept confidential. If center staff have reason to suspect child abuse, but are not positive, they should make the report. If any doubts persist about whether or not it is abuse, call the hotline. They can provide advise on whether the signs indicate abuse.

Under the Texas Family Code, Chapter 261, failure of a caregiver to report suspected child abuse or neglect is a misdemeanor punishable by imprisonment of up to 180 days and a fine of up to \$2000. Centers should have a **written** process that caregivers follow to report abuse, keeping in mind that reporting the suspected child abuse to the center's director does not satisfy the caregiver's responsibly under the law.

For more information about the signs of child abuse and neglect see:

**<http://www.oag.state.tx.us/victims/childabuse.shtml>**.

## Employment Issues for Nonprofit Child-Care Centers

Hiring experienced, qualified, and dedicated employees is the key to operating a safe and successful child-care business. Nonprofit child-care centers must follow specific state laws relating to child-care workers, as well as general state and federal laws when hiring and managing employees and volunteers. This chapter will outline the minimum requirements that a center must meet in addition to summarizing some of the most common employment issues faced by Texas businesses and providing a brief introduction to federal and state laws that govern the employee-employer relationship. For a more detailed explanation of employment issues for nonprofits, see Texas C-BAR's Employment Law manual.

To qualify under the State of Texas licensing requirements, a center must ensure that employees meet the requirements outlined below.

**Director:** The center director is the key staff person. The director is the adult designated to have the daily, on-site responsibility for the operation of the center, including maintaining compliance with standards and licensing laws. To obtain and maintain licensing, a center must hire a director who meets DFPS requirements. The director must be approved by the DFPS. In addition, under a new law (effective date), failure to maintain a qualified director may subject a center to misdemeanor penalties.

**Caregivers and Other Employees:** Anyone who works for the center or who is regularly present while children are in care, including employees, independent contractors, or volunteers must meet certain minimum qualifications. The list of qualifications may be found at:

[http://www.dfps.state.tx.us/Documents/Child\\_Care/Child\\_Care\\_Standards\\_and\\_Regulations/final746.pdf](http://www.dfps.state.tx.us/Documents/Child_Care/Child_Care_Standards_and_Regulations/final746.pdf).

### Background Checks

Background checks are required to determine whether a person's presence at a child-care operation violates statutory law, administrative rules, or minimum standard rules; or presents a risk to the health and safety of children in care. A center must request background checks for each person 14 years or older, other than clients of the operation, who will regularly or frequently be present at the center while children are in care, including :

- Employees and applicants hired that will provide direct care or have direct access to a child in care;
- Any persons, including volunteers, who are counted in the child/caregiver ratio;
- Any persons, including professionals, under contract with the center who have unsupervised contact with children in care on a regular or frequent basis;
- The directors, owners, operators, or administrators of the operation; and
- Applicants for a child-care administrator's license.

Background checks must be completed 1) at the initial licensing of all intended employees, contractors, and volunteers, 2) at the initial hiring or contracting of additional persons, and 3) every 24 months for persons continuing with the center.

Background checks consist of searches of different databases. There are three types of background checks:

- (1) Criminal history checks conducted by the Department of Public Safety for crimes committed in the state of Texas;
- (2) Criminal history checks conducted by the Federal Bureau of Investigation for crimes committed anywhere in the United States; and
- (3) Central registry checks conducted by DFPS. The Central Registry is a database of people who have been found by Child Protective Services, Adult Protective Services, or Licensing to have abused or neglected a child.

### ***Requesting a Background Check***

In order to request a background check, a center must submit the required information online or through a written form (if approved by the Licensing Office). More information is available at [http://www.dfps.state.tx.us/Child\\_Care/About\\_Child\\_Care\\_Licensing/](http://www.dfps.state.tx.us/Child_Care/About_Child_Care_Licensing/).

Pursuant to Senate Bill 758, passed by the 80<sup>th</sup> Texas Legislature and effective September 1, 2007, all persons on whom a request for a background check is submitted, must also pass an FBI fingerprint check. See [http://www.dfps.state.tx.us/About/News/2007/2007-06-29\\_fingerprint.asp](http://www.dfps.state.tx.us/About/News/2007/2007-06-29_fingerprint.asp) for more information. The fingerprint check must be initiated within two days of the submission of the background check request. The cost of the fingerprint check is \$48.95 and may be paid by either the person or the center. The fingerprint check will be required on all new employees, volunteers, and contractors, and on all continuing employees at their 24 month background check update.

Background checks must be submitted within two business days after a new person is hired or is present in the center with children. A center may temporarily rely on passage of the name-based portion of the background check if the full results are not returned within two working days, the center faces staff shortages, and the new person is needed to complete child-caregiver ratios.

### ***Results of a Background Check***

Title 40 of the Texas Administrative Code lists the following as possibly precluding a person from being present in a child-care center:

- (a) A misdemeanor or felony under Title 5 (Offenses Against the Person), Title 6 (Offenses Against the Family), Chapter 29 (Robbery) of Title 7, Chapter 43 (Public Indecency) or §42.072 (Stalking) of Title 9, §15.031 (Criminal Solicitation of a Minor) of Title 4, §38.17 (Failure to Stop or Report Aggravated Sexual Assault of Child) of Title 8 of the Texas Penal

- Code (TPC), or any like offense under the law of another state or federal law;
- (b) A misdemeanor or felony under the Texas Controlled Substances Act, §46.13 (Making a Firearm Accessible to a Child) or Chapter 49 (Intoxication and Alcoholic Beverage Offenses) of Title 10 of the Texas Penal Code, or any like offense under the law of another state or federal law that the person committed within the past ten years;
  - (c) Any other felony under the Texas Penal Code or any like offense under the law of another state or federal law that the person committed within the past ten years; and
  - (d) Deferred adjudications covering an offense listed in subsections (a)-(c) of this section, if the person has not completed the probation successfully.

In addition, the following may also preclude a person from being present in a child-care center:

- Any sustained finding of child abuse or neglect, including sexual abuse, physical abuse, emotional abuse, physical neglect, neglectful supervision, or medical neglect.
- Any central registry finding of child abuse or neglect (whether sustained or not), where Licensing has determined the presence of the person in a child-care operation poses an immediate threat or danger to the health and safety of children.

Licensing will provide the center with the results of the background check and a determination of whether the person:

- is permanently barred and must not be present at an operation while children are in care;
- is temporarily barred and may not be present at an operation while children are in care pending the outcome of the administrative review and due process hearing; or
- must not be present at a child-care operation while children are in care, unless a risk evaluation is approved.

If the person with the criminal conviction or central registry finding believes the information is incorrect, the center must still take the action called for in the letter. However, the center may also take steps to talk to the licensing staff to verify the results. Complete information regarding background checks including implementing the results of background checks is available at [http://www.dfps.state.tx.us/Child\\_Care/About\\_Child\\_Care\\_Licensing/](http://www.dfps.state.tx.us/Child_Care/About_Child_Care_Licensing/).

## Health Requirements

### **Exams**

Potential caregivers are not required by law to submit to a health exam during the employment process. A center may require potential caregivers to submit to a medical exam, but the exam must be required for all entering employees of the same position. The information must be kept confidential and cannot be used to discriminate against a potential candidate.

## ***Immunization Policy***

A center may want to consider requiring care givers to maintain immunizations against the communicable diseases common in children.

## **Personnel Records**

The DFPS requires that child-care centers keep records on each person regularly present at the child-care center (volunteers and employees). These records include documents indicating the start and end dates of employment, documentation of the employee's qualifications, a notarized licensing affidavit for applicants of employment, and a record of the employee's training hours. Records must be kept at the center or in a central administrative location for at least three months after an employee's last day on the job, except the annual training records which must be kept both for the current and previous year. However, due to the recent HIPPA legislation, all health care information including should be kept in a separate file. The center should make sure to limit access to personnel records.

## **Independent Contractors vs. Employees**

An independent contractor is a person who conducts work for the center but is not an employee of the center. DFPS regulations apply to all individuals regularly in contact with the children whether an employee or independent contractor. Other state and federal labor laws apply only to employees. It is important for a center to classify workers correctly.

There is no one test to determine whether a worker is an employee or an independent contractor. Generally an independent contractor controls the details of his/her work, provides the necessary tools, and operates in a business that is distinct from the employer's business.

New businesses often work through independent contractors because doing so minimizes the reporting requirement for the employer. In addition, a center may also find it helpful to classify special area instructors, such as Spanish, computer, or ballet teachers, and other workers such as van drivers and janitors, who work only weekly or bi-weekly, as independent contractors under written contracts. Employers are required to report all wages and pay all taxes properly for their employees. Failure to properly classify a worker may result in severe consequences for the employer including back taxes, interest, penalties, overtime, and compensation for other job benefits. A center director who is unsure whether a worker should be classified as an independent contractor or an employee should seek legal counsel.

## Federal and State Nondiscrimination Laws

Texas is an at-will employment state, but many different local, state and federal laws prohibit discrimination in employment based on race, color, religion, gender, national origin, age, and disability, and sexual orientation. Employers can be held liable for discrimination by supervisors, co-employees, agents of the employer, volunteers and, in some circumstances, non-employees such as clients or customers.

## ADA Compliance

An individual with a disability under the ADA is a person who has:

- a physical or mental impairment that substantially limits one or more major life activities,
- a record of such an impairment, or
- is perceived as having such an impairment.

Reasonable accommodation means making a change in the work environment or in the way a job is performed in order to enable a qualified person with a disability to enjoy equal employment opportunities. There are basically four kinds of accommodations an employer can provide: changes to a job application process; changes to the work environment, or to the way a job is usually performed; changes to the content of a job, i.e., removing non-essential job functions; and changes that enable an employee with a disability to enjoy equal benefits and privileges of employment (such as access to training).

## Paying Employees

Texas law has several specific mandates governing when and how employees must be paid. Employers can be sanctioned with both criminal and civil penalties for violating the payday laws. As a result, employers need to be extremely careful in this area of the law.

Laws regarding the payment of employees include:

- Time for Payment of Employees: how often to pay exempt and non-exempt employees, when paychecks must be ready, and notices that must be posted.
- Delivery of Payment to Employees: where and to whom to deliver payment to employees.
- Last Paycheck: how and when to pay employees who are fired or who resign.
- Employment Taxes: A nonprofit employer is responsible for federal income tax, social security, and Medicare taxes which must be deducted from employee wages and sent to the IRS. Nonprofit directors are jointly and severally liable for a failure to pay such taxes..
- Unemployment Compensation: Employees who are terminated from nonprofits with more than four employees may be eligible for unemployment compensation. Employees who leave their jobs due to disaster or domestic violence may also be eligible for compensation.

- **Deductions:** Deductions are allowed in only very limited circumstances and employers must be careful to get proper authorization from the employee in writing before making an employee-authorized payroll deduction. Unauthorized deductions cause many problems for employers. Legal deductions include the following: a court order, such as court-ordered child support payments; IRS withholding; and authorization in writing by the employee, and then only for a lawful purpose such as deductions for charities or medical expenses. Deductions for health insurance for dependants of employees subject to court order under Family Code § 154.186 are mandatory.

## The 40-Hour Work Week

The Fair Labor Standards Act (FLSA) is the federal law that governs wages and hours. It requires employers, including non-profit organizations, to pay employees a minimum wage and overtime pay for all hours worked in excess of 40 hours in a workweek, unless the employee is an exempt employee. The workweek is defined as seven consecutive 24-hour periods starting on any day and hour designated by the employer. Center administrators should note that employees who work a 7:30 a.m. to 6:00 p.m. shift five times a week will work more than 40 hours per week.

Once the workweek is established, it may not be changed to avoid complying with federal wage and hour laws. Hours worked includes all time spent in physical or mental exertion for the benefit of the employer and also all on-duty time required or controlled by the employer, even if no work is required. Employers are generally required to pay non-exempt employees one and a half times their hourly pay for their overtime hours.

Exempt employees need not be paid overtime for hours worked over 40. To be considered an “exempt employee”, an employee must meet both a “duties test” and a “salary (or fee) basis test.” To satisfy the duties test, the employee’s duties must fall into one of the following categories: executive; administrator; professional; or outside sales employee. Simply paying an employee a salary and assigning an employee an exempt-sounding job title does not make them exempt. The determination of whether an employee is exempt or nonexempt is complex and fact specific. A center should consult an attorney for assistance in making the determination.

## Penalties for Violations of the Fair Labor Standards Act

The Department of Labor enforces the FLSA and may recover back wages for employees who have been underpaid in violation of the law. Violations may result in civil or criminal action.

## Best Practices Tips

Have an accurate and detailed job description to determine whether an employee is exempt from overtime pay. Have clear policies and procedures for deductions from the pay of exempt employees.

## Suggested Handbook Provisions

Have an accurate and detailed job description to determine whether an employee is exempt from overtime pay. Have clear policies and procedures for deductions from pay of exempt employees. Establish clear standards for hiring and termination employees. Implement an employee handbook with the following provisions:

- Employment Terminable At-Will;
- Statement of Right to Revise Policy;
- Equal Opportunity Statements and Prohibition Against Discrimination;
- Payroll Practices/Policies;
- Full Time and Part Time Work;
- Leaves of Absence;
- Workplace Safety Policies;
- Obligation to Report Child Abuse;
- Policy Prohibiting Sexual Harassment and Harassment Based on Race, Color, Religion, or National Origin;
- Disciplinary Policies; and
- Acknowledgment of Receipt of Handbook and Obligation to Read and Adhere to Policies.

For more information, see Texas C-BAR's *Employment Law Issues: A Guide for Nonprofit in Texas*, available at [http://www.texasbar.org/legal\\_library/pubs/employment\\_law.php](http://www.texasbar.org/legal_library/pubs/employment_law.php).