

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.

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.