



Operating an Afterschool Program: Part I Liability and Regulatory Issues

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Overview

- **General principles of liability**
- **Employment law “trouble spots”**
- Key areas of NYS **school-age child care** laws & regulations
- Provide tools to proactively address legal risks



General Principles of Liability



Question: Under what circumstances does an afterschool program face potential liability for an injury to a child?

1. Intentional action

- examples: abuse, molestation of child
- this is the most publicized and most feared, but **not** the most common form of liability

2. Negligence

- unintentional injury caused by unreasonable action or inaction
- most common form of liability



Negligence

Negligence: Negligence has four elements:

- **Duty:** did the program owe a legal duty of care towards the person claiming to be injured?
- **Breach:** did the program breach its duty (*i.e.* failed to exercise “duty of care” or “prudent parent” standard)?
- **Causation:** did the program’s breach of duty cause the injury (proximate cause/foreseeability)?
- **Damages:** did the injured person suffer damages as the result of the injury?



Negligence

Examples of negligence:

- *Slip and fall*: Child slips because floor was in disrepair or the program failed to maintain the premises in a safe condition
- *Release of child*: Program releases child to an adult not on approved list



Per se negligence

- *Violation of statute or regulation* (per se negligence):
 - Is the injured person within the class of persons the statute/regulation is designed to protect?
 - Was the statute or regulation violated?
 - Did the violation cause the injury?



Per se negligence case example

A licensed after school program has 22 10-year old children with one adult supervising. Per regulations, the maximum permissible ratio of 10-year old children to adults is 15 to 1. During the program, a child runs out of the room and down a staircase where she trips on a step and breaks her arm.

- A court might find that the injury related to violation of statute because it is more difficult for the adult to maintain discipline in a crowded classroom.
- Plaintiff is more likely to have a successful claim than if the class size were appropriate (even if other factors are at issue, like child had been warned repeatedly not to run down steps, child was old enough to know, etc.)



Negligent hiring

Negligent hiring

- An organization breaches its duty to adequately screen an applicant before giving that applicant access to children (does not use reasonable care in selecting employees)
- Three step test:
 1. Was/is the employee unfit for employment?
 2. Did the employer must have actual or constructive knowledge of the employee's unfitness?
 3. Was the employer's hiring of the unfit employee the cause of the third party's injury?
- An organization is responsible for **any damages caused** by an employee negligently hired



Negligent hiring case example

A nonprofit hires a bus driver to take children in its after school program on a field trip. On the way, the driver gets into an accident and children are injured as a result. After the accident, it was discovered that the driver had a record of unsafe driving.

- Did the organization have a policy to check the motor vehicle records of anyone it hires to drive?
- If so, did it check the records?
- If the nonprofit had no policy or did not follow its policy, a court could find that it had not exercised reasonable care in hiring the driver; the employer put the driver in a position where the participating children could be injured



Negligent hiring

What can programs do to reduce liability for negligent hiring?

- At a minimum, require written job applications, review employment history and request references
- Check references. Obtain a consent and release from prospective employee to check references and conduct background check
- Check criminal history, only AFTER a conditional offer of employment has been made (Fair Chance Act)



Negligent Hiring

Application to volunteers

Negligent “hiring” or “supervision” can also apply to volunteers’ actions

- Programs should screen volunteers and train volunteers in how to handle emergency situations
- Avoid leaving volunteers alone with children; licensed programs must ensure that children are supervised by a staff member *at all times*
- Confirm that your insurance policy covers claims based on negligence of volunteers



Discrimination and Harassment

Discrimination

- treating individuals differently or denying individuals the ability to participate in or benefit from a program or activity based on race, age, color, national origin, religion, sex, or disability
- usually arises in the employment context
 - Title VII
- can arise in provision of services to students
 - organizations that receive federal financial assistance may be subject to additional federal laws (such as Title IX) that prohibit discrimination



Discrimination and Harassment

Harassment includes:

- Employee on student harassment
- Student on student harassment (peer harassment or bullying)
- Third party (such as volunteers, visiting teachers, speakers, visiting teams, independent contractors, etc.) on student harassment
- Employee on employee harassment
- Student on employee harassment



Discrimination and Harassment

Anti-harassment policy

- Names of people who can be contacted with complaints
- Formal procedure for investigating complaints
 - carried out by more than one staff member
 - interview anyone with relevant information and keep precise record
 - determine if similar complaints have been made
 - summarize and keep record of all documents, reports, investigations, interviews and meetings
- Conduct training for staff
- Address potentially harassing conduct, even if no complaint filed
- Report any child abuse or maltreatment immediately to the Statewide Central Registry of Child Abuse and Molestation (SCRCAM) and law enforcement
- Address appropriate discipline or punishment



Discrimination and Harassment

Privacy Interests


- programs should keep all materials related to investigations confidential
- certain laws also require parent permission before disseminating certain student information
- if a complainant wants to remain anonymous, program needs to explain the effect on investigations
- information about alleged harasser should be kept confidential as long as possible



Discrimination and Harassment

Dignity for All Students Act

- DASA took effect in 2012
- establishes policies and procedures to keep school environments “free of harassment and discrimination”
- applies to activities that occur “on school property”
- obligates schools and districts to create anti-discrimination and anti-harassment policies
- provides civil liability protection for good faith reporters, and prohibits retaliation




Other measures that may limit liability of afterschool programs (licensed or unlicensed)

Waivers, releases or parental consents

- Field trip or activity waivers
- Waivers/releases have limited enforceability
- BUT can serve as a deterrent to litigation, help evidence that parents were informed
- Photo or video release for any public use (social media)

Other forms and information


- Child health form
- Medication release
- Authorization specifying who can pick up children



Other measures that may limit liability of afterschool programs (licensed or unlicensed)

Insurance

- Carefully consider the scope of activities covered by the policy and locations
- Most policies will not cover claims based on child abuse, maltreatment or harassment; a separate endorsement (abuse and molestation coverage) may be required
- Make sure policy covers defense of claims (including ultimately meritless claims)
- Should program be added to a third party's policy (landlord/school)? Should others be added to yours?
- Check insurance of third-party contractors



Other measures that may limit liability of afterschool programs (licensed or unlicensed)

Insurance – what do to in the event of an accident/injury?

- minimize loss – administer first aid, remove defective item
- provide notice to insurance provider in EXACT FORMAT they require
- obtain a “take over” letter from your insurance provider
- complete incident forms
- make copy of applicable insurance policy
- notify the police or other regulatory agency
- cooperate with insurance adjuster or attorney
- be diligent and responsive in claims process
- evaluate events leading up to the incident and ways of preventing future occurrences
- review insurance coverage annually



Employment Law Issues



Employee vs. Independent Contractor

- Important distinction for withholding and tax purposes, and for determining eligibility for benefits
 - If an employee, employer must withhold income tax, withhold and pay social security and Medicare taxes, and pay unemployment tax on wages, and issue a W-2
 - If an independent contractor, employer does not need to withhold or pay taxes on payments, and only issues a 1099 to contractors who receive more than \$600 in a calendar year



Employee vs. Independent Contractor

Key question: does the individual have the **right to control** the means and methods of accomplishing the work?

- If so, likely an independent contractor
- BUT IRS has a 20-factor test
- Does **not** depend on the number of hours worked
- If you rely on a person to work with your students on a regular basis, that person is almost certainly NOT an independent contractor
- Important to get this right: misclassification may lead to significant penalties



Employee vs. Independent Contractor

Penalties for misclassification

- employers could owe money for back taxes that were not paid or withheld
- 100% penalty (the “Responsible Person”) rule – IRS may sanction a 100% penalty on certain persons responsible for **willful** failure to withhold or pay certain tax liabilities
- employers could be subject to fines for failure to properly pay wages, especially if overtime is involved
- penalties can arise under benefit plans, unemployment insurance or worker’s compensation - could trigger investigation of entire workforce



Exempt vs. Non-Exempt

Federal Fair Labor Standards Act (FLSA)

- establishes minimum wage, overtime, record-keeping and child labor standards that apply to all employees **unless they are exempt**
- **non-exempt** employees must be paid federal minimum wage and must be paid overtime: one-and-a-half times their hourly rate for any hours worked over 40 each week



Exempt vs. Non-Exempt

Who's exempt?

- To be exempt, an employee must earn a salary of at least \$455/week or \$23,660/year
- Primary exemptions: executive, administrative and professional positions
- Salaried workers can be either exempt or non-exempt, depending on how much independent discretion and judgment they use in their job



Exempt vs. Non-Exempt

Other considerations

- Keep in mind **NYS minimum wage law** (whose effective date depends on employer's size)
- NYS Labor Law requires employers to provide **written notice** of pay rate, eligibility for overtime and if eligible, the overtime rate and scheduled pay day
- Discuss any uncertainties about classification with an attorney



Volunteer vs. Employee

- A volunteer is someone who “performs hours of service for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered”
- But NY Department of Labor has additional standards* volunteers may not:
 1. Replace or augment paid staff to do the work of paid staff
 2. Do anything but tasks traditionally reserved for volunteers
 3. Be required to work certain hours
 4. Be required to perform duties involuntarily
 5. Be under any contract to hire
 - by any other person or business
 - express or implied
 6. Be paid for their services (except reimbursement for expenses)

*<https://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf>



Regulation of School-Age Child Care Programs



Regulation of school-age child care (SACC) programs

What is a SACC program?

- Defined as a program that provides care:
 - on a regular basis to
 - an enrolled group of
 - 7+ school-age children
 - that are younger than 13
 - during the school year, before/after school hours, during lunch hours, school holidays and other periods when school is not in session,
 - is located at a non-residence, and
 - operates for more than one purpose.
- If you qualify, you must register



Regulation of school-age child care (SACC) programs

What is NOT a SACC program?

- Programs organized solely for “religious education, sports, classes, lessons or recreation” are NOT SACC programs
- Accordingly, single-purpose programs (e.g., weekly chess instruction) are generally exempt from regulations
- BUT the definition is murky; if your program engages in more than one of the listed activities, should register



Regulation of school-age child care (SACC) programs

Registering as a SACC provider

- Applicant must first complete an online child day care pre-application orientation session
- After the orientation, request an application
- Must submit all documentation and clearances, including fingerprinting and background checks within 90 days
- <https://www1.nyc.gov/nycbusiness/description/school-age-child-care-registration>



Regulation of school-age child care (SACC) programs

Registering as a SACC provider

- Initial license is for two year period
- Must renew at least 60 days before expiration
- Upon renewal, effective for four years



Key features of NYS regulation of SACC programs

- Facility and other safety requirements
- Transportation requirements
- Program requirements
- Employee qualifications



Key features of state regulation of SACC programs

Staff Training

- Each director and staff working an average of 20 hours or more per week must complete 30 hours of training every two years. 15 of these hours must be completed within the first six months of employment.
- Staff working 20 hours or less per week complete a shorter amount (pro-rated) of training.
- Each director, teacher or teaching assistant (including substitutes) and volunteer with regular contact with children must take an online (5 hour) Foundations in Health and Safety course within three months of hire.
- Programs must have at least one staff trained in both CPR and first aid.



Key features of state regulation of SACC programs

Supervision of Children

- Children must be supervised at all times
- Only directors, group teachers or assistant teachers may supervise children independently; must be at least 18
- Parents must be notified of long-term teacher absences
- Supervision ratios:
 - up to 9 years old, 1:10
 - 10-12 years old: 1:15
- Children may only be released to parents or designated person
- Must have visitor control procedures in place



Key features of state regulation of SACC programs

- **Provision of Medication to Children**
 - No one is required to administer medication, except to the extent that such medication, treatment or remedy is required under the **provisions of the ADA**, which requires accommodation of disabled children (including those with asthma, diabetes, ADHD and HIV/AIDS)
 - If program opts to administer medications, designated staff must receive OCFS administered/ approved training
 - Every licensed program must have a **written health care plan** indicating the categories of children it will serve; if plan covers administration of medications, it must be reviewed and approved by a health care consultant (MD, PA, RN or NP)



Key features of state regulation of SACC programs

- **Employee Background Checks and Fingerprinting**
 - Employment history
 - At least 3 references
 - Medical statement (no communicable diseases, recent TB shot)
 - Relevant education background
 - OCFS criminal background check/fingerprinting for prospective employees and volunteers
 - OCFS safety assessment
 - Notification of OCFS determination: employer may be directed to deny application on the basis of criminal record
 - Must check whether any prospective employee, volunteer or anyone else with “regular and substantial contact” with children is the subject of an indicated report with **SCRCAM**



Key features of state regulation of SACC programs

- **Reporting of Child Abuse and Maltreatment**

- Employees of regulated SACC providers **must** report suspected incidents of child abuse or maltreatment
 - Threshold for reporting = reasonable cause to believe
 - Must *personally* report to SCRCAM within 48 hours and notify supervisor
 - Mandatory reporter is generally immune from civil/criminal prosecution based on presumption of good faith
- When a child care provider fails to report a reasonable suspicion of abuse, criminal and civil suits may be instituted against the provider
- Important for programs to maintain written policies and procedures for handling cases of suspected child abuse
 - Give guidance to employees, enable center to hold employees accountable for improper behavior and reduce likelihood of criminal liability



- Lawyers Alliance offers several workshops throughout the year on exempt organization regulations (e.g., board responsibilities, fundraising, etc.) that also apply to afterschool programs as nonprofits
- We also release Legal Alerts on nonprofit regulations that are applicable to any nonprofit organization, including afterschool programs

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