



Working with Youth: Liability and Risk Management

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FOR NEW YORK

Connecting Lawyers, Nonprofits, and Communities



Disclaimer

Today's presentation is informational only and is not intended to constitute legal advice. Consult with counsel for legal advice pertinent to your organization, especially as it relates to law outside of New York.



Today's Goals

- Understand liability issues and when your organization might be liable for injury
- Understand ways to minimize your organization's exposure to legal risk



When might an organization be held liable for injury?



Organizational liability

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*: org operates in a location where the floor is not well maintained. Over time, a large crack develops in the floor and the org (who is responsible for maintenance) does not fix it or attempt to make it safe. A child trips on the crack and falls, fracturing her ankle.
- *Release of child*: org has child whose mother typically picks her up. One day, the father arrives and says he is there to pick up the child. He is not on the approved list, but because he is the father, a staff member releases child to him.



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

- A org breaches its duty to adequately screen an applicant, especially before giving that applicant access to minors (does not use reasonable care in selecting employees)
- Three step test:
 1. Was/is the employee unfit for employment?
 2. Did the employer 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

An org hires a bus driver to take students on a field trip. On the way, the driver gets into an accident and the students 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 students 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
- Federal and NYS law protects volunteers, but not the program, from liability resulting from volunteer service (unless gross negligence, willful, criminal or reckless misconduct)



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
- NY State also prohibits discrimination of sexual orientation, gender identity and marital status
- usually arises in the employment context
- can arise in provision of services to students



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



Discrimination and Harassment

What can you do to limit liability for discrimination and harassment?

- Have a comprehensive written policy
 - Include anti-harassment policies in employee handbook or code of conduct
- Make sure staff is trained on what's in the policy



Discrimination and Harassment

Anti-harassment policy

- Names of people who can be contacted with complaints
- Address potentially harassing conduct, even if no complaint filed
- Formal procedure for investigating complaints
- Retaliatory acts will not be tolerated
- Address appropriate discipline or punishment
- Conduct training for staff



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
- Information about alleged harasser should be kept confidential as long as possible
- Anonymity
 - a complainant may remain anonymous, but program needs to explain the effect on investigations



Protecting the Organization: What can we do to limit liability?



What can organizations do to limit liability?

Organizations have a number of options to reduce risk:

- Incorporation/corporate structure
- Corporate policies and procedures
- Indemnification
- Waivers and releases
- Parental consents
- Insurance



What can organizations do to limit liability?

Waivers, releases or parental consents

- Activity/participation waivers
- Field trip consent/waiver
- Photo release



Waivers, releases or parental consents

Activity/participation waivers

- A general waiver provided to all participants in your programming
- May be included as part of a parent information packet
- Can also have a waiver for volunteers

A note on enforceability:

- Waivers/releases may have limited enforceability
- BUT can serve as a deterrent to litigation, help evidence that parents were informed



Waivers, releases or parental consents

FIELD TRIP RELEASE

I, _____, the parent or guardian of _____
(hereinafter "Child") give permission for Child to attend a field trip under the
supervision of _____ (hereinafter "the Program").

I hereby release the Program from any and all claims which I or Child may have against
the Program arising from, resulting from or in connection with said field trip, including
but without limitation, any claims, demands or causes of action for injuries to Child,
including but not limited to injuries resulting from the negligence of the Program. This
agreement is signed for the purpose of fully and completely releasing, discharging, and
indemnifying the Program from all liability as herein described.

Signed:



Waivers, releases or parental consents

FIELD TRIP RELEASE

I, _____, the parent or guardian of _____
(hereinafter "Child") give permission for Child to attend a field trip to _____
on _____ at _____, under the supervision of _____
_____ (hereinafter "the Program"). The field trip may entail the activities set forth on
the Field Trip Information Sheet (attached).

I hereby acknowledge receipt of the Field Trip Information Sheet. I have read and
understand the activities in which my Child will be participating and I hereby consent
to my Child's participation in the field trip.

I hereby release the Program from any and all claims which I or Child may have against the Program arising from, resulting from or in connection with said field trip, including but without limitation, any claims, demands or causes of action for injuries to Child, including but not limited to injuries resulting from the negligence of the Program. This agreement is signed for the purpose of fully and completely releasing, discharging, and indemnifying the Program from all liability as herein described.



Waivers, releases or parental consents

Field trip or activity waivers

- Tailor to the field trip or activity
 - When and where will field trip be? Examples include political events and rallies, company events etc.
- What kind of activities might there be?
 - Specify potentially hazardous activities (karate, horseback riding, archery)
- Who will be supervising?
 - Specify how many adults should be present or a minimum number of supervisors that should be assigned to any specific threshold number of children
- Liability forms for transportation
- Policies for lodging accommodations of minors



Waivers, releases or parental consents

PHOTO RELEASE FOR CHILDREN

In exchange for the opportunity for my child(ren) to participate in a _____ program, event or activity, I irrevocably authorize _____ and its affiliates, licensees, assignees, and successors to photograph my child(ren) and to use such photographs in its promotional materials in its brochures, advertisements, newspapers, and web sites.

In addition, I voluntarily waive any right, cause of action or demand of any kind whatsoever resulting from my child's photograph from which any liability may or could accrue to _____.

PARENT OR LEGAL GUARDIAN

Signature: _____

Date: _____

Printed: _____



Waivers, releases or parental consents

PHOTO AND VIDEO RELEASE FOR CHILDREN

In exchange for the opportunity for my child(ren) to participate in a _____ program, event or activity, I irrevocably authorize _____ and its affiliates, licensees, assignees, and successors to take photographs or video my child(ren) and to use such photographs or video in its promotional materials, including in its brochures, advertisements, newspapers, ~~and~~ web sites, electronic, visual or social media.

In addition, I voluntarily waive any right, cause of action or demand of any kind whatsoever resulting from my child's photograph or video from which any liability may or could accrue to _____.

I also understand that _____ will not give me or my child(ren) any compensation for using my child(ren)'s photograph or interview in its promotional materials. Thus, by signing this document, I waive any rights to any compensation now or in the future.

PARENT OR LEGAL GUARDIAN

Signature: _____
Printed: _____

Date: _____



Waivers, releases or parental consents

Photo or video release

- Photo, video, interview, voice
- Include all uses
- No compensation will be given
- Permission to use the name of the child



Waivers, releases or parental consents

Parent/guardian communication!

- keep parents/guardians informed
 - informed consent
- have signatures with acknowledgment



Waivers, releases or parental consents

What if you can't get parents/guardians involved?

- understand you're taking on risk
- make sure staff understands



What can you do to limit liability?

Other forms and policies

- Health forms and policies
 - Allergies, medication
 - COVID policies, sick policies
- Attendance records
- Arrival/dismissal procedures
 - authorized pick-up persons
- Incident report
 - Liability forms for behavior while on the premises, especially as they relate to damages to workplace property or physical injury



What can you do to limit liability?

Internal policies and procedures

- Policies for drop off/pick up
- Authorization specifying who can pick up children
 - also keep track of anyone who does NOT have permission to pick up children
 - what procedures should staff follow if someone arrives who is on the do not pick up list?
- Policies for childcare on premises
 - babysitting during events
 - accommodations for parents



What can you do to limit liability?

Codes of Conduct

- For volunteers and staff
 - agreement to follow laws and regulations
 - agreement to behave professionally
 - specific responsibilities
 - limitations on relationships between staff and youth
 - provisions on confidentiality
 - prohibition on drug/alcohol use
 - anti-discrimination and harassment



What can you do to limit liability?

Codes of Conduct

- For students
 - abide by rules of program
 - explain how misconduct will be handled
 - anti-harassment
 - bullying/ cyberbullying



What can you do to limit liability?

- **Reporting child abuse**
 - Important for programs to maintain a written policy that outlines the procedures for handling cases of suspected child abuse
 - Protects the children
 - Give guidance to employees
 - Enables program to hold employees accountable for improper behavior
- **Mandated reporters**
 - Many states have laws that require people in certain professions to report suspected incidents of child abuse or maltreatment
 - Who is a mandated reporter?
 - look at your state's requirements. In New York, it includes licensed after school program workers and other child care workers.
 - <http://www.nysmandatedreporter.org/MandatedReporters.aspx>



What can you do to limit liability?

Insurance

- A way to transfer *economic* risk in the event of an accident
- 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?



Other considerations



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

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



Online programming

Security and privacy

- Make sure you're using a secure platform
 - enable or utilize all appropriate security options (e.g., locking classrooms, using security codes)
- Read the user agreement
 - major platforms will have information about their security features and compliance with relevant privacy laws
- Inform parents about the security measures you're taking and whether/how you will be collecting or using any data



Online programming

Adult supervision

- Even online, still need adult supervision
- Follow your typical practices as closely as possible
- Use breakout rooms
- Pay special attention whenever any sensitive information may be discussed



Online programming


Recording an online session

- NY is a one – party consent state, meaning you can record so long as you have consent of one party
- But you should notify students and parents if you plan to record
- If to be made available to anyone outside of those participating in the session, *should* have consent – this can be added to your media release



Data Privacy

- **COPPA (“Children’s Online Privacy Protection Act”)**
 - Applies to the collection of personal information of youth under the age of 13
 - Not-for-profits generally exempt but best practice is to comply with privacy laws (provide notice and obtain parental consent)
 - <https://www.ftc.gov/tips-advice/business-center/guidance/complying-coppa-frequently-asked-questions>
 - <https://www.ftc.gov/tips-advice/business-center/guidance/childrens-online-privacy-protection-rule-six-step-compliance>
- **Other privacy considerations**
 - If an organization is a vendor of or getting personal information from NY schools there likely are additional contractual and other limitations placed on them from the schools. The Family Educational Rights and Privacy Act (“**FERPA**”), state and city education privacy laws may be relevant.

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- Lawyers Alliance offers webinars throughout the year on exempt organization regulations (e.g., board responsibilities, fundraising, etc.) for nonprofits, including those working with youth
 - We also release Legal Alerts on nonprofit regulations that are applicable to any nonprofit organization, including those that work with youth

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