

Opening Your Doors to Visitors

A Discussion about Program Liability

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Editor's Note: The information in this article is intended as general practical advice based upon legal considerations. It is NOT intended as legal advice. Applicable laws vary from state to state. Consult with a lawyer for your specific legal needs. For more information, go to ChildCareCompliance.com and register free of charge. Register now and you will be alerted when the updated childcare law information is posted and webinars are scheduled. All references to NAEYC Code of Ethics were based upon the most recent 2011 version available on line at naeyc.org.

The typical child care facility or preschool will have between 50 and 100 enrolled children so, counting children, parents dropping off and picking up, teachers and staff, there could be as many as 300 expected visitors on any given day. All of those visitors are (or should be) accounted for with picture identifications in the facility's records. But what about irregular visitors for irregular purposes? This article discusses legal issues relating to volunteers, irregular visitors, and employee interactions with non-employees.



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Sonia and Barbara operate a full-time preschool in rural Great Falls. A painted sign hangs above the main entrance to the school on Main Street. There is another entrance off the alley behind the school, but that entrance is only used by employees and is usually kept locked.

As the usual need arose, Sonia called Village Supply to place a bulk order for napkins, paper towels, plastic eating utensils, trash bags, and the like. Mike, the owner, always delivered in person, greeting all with smiles as he carted the goods to the school's storage room. But on this particular occasion Mike had the flu so he sent one of his stock boys, Sam, to make the delivery. Sam had never been to the school and after passing the Main Street entrance he turned down the alley behind the school, figuring that, like most businesses, there would be a delivery entrance in back. Sam parked by the alley entrance, loaded the supplies on a cart, and proceeded through the unlocked rear door. Unfamiliar with the layout, Sam wandered down an empty hallway and then, hearing noise coming from behind an old wooden door, he tried the door. The door, it turns out, was to an unmarked restroom that was occupied by Jenny, a preschooler in the program. Both Sam and Jenny jumped in surprise. Jenny cried out. Sam backed away. Jenny's teacher ran to her side and from Jenny's crying assumed that Sam had tried to harm her.

An honest and unfortunate mistake, and if Jenny's family presses a claim against Sam, the truth or falsity of whatever allegation ensues will be decided in the courts. But other than the obvious fix that the rear entrance should have been locked, what security measures could have been employed to prevent this occurrence?

It is most common and highly recommended that, with security concerns for children a must, the facility should have only one entrance through which all visitors are funneled and that entrance should be staffed by a receptionist at all times. By this simple measure all visitors will be greeted, noted, and directed to the appropriate place within the facility.

Although it may be impractical to maintain identification records for irregular visitors, a receptionist with immediate access to a photocopy machine could request and copy a photo ID from the irregular visitor so as to have a complete record of all persons accessing the facility. Paramount to a locked and monitored facility is maintaining constant visual supervision of all children at all times.

Alfred Smithers, 65, has been employed at Whiz Kidz for more than 20 years. He maintains the air conditioning and heating units, does all the custodial duties, fixes whatever is broken, and when not engaged in some task, he hangs out in his workshop behind a door marked, "Custodian. Private."

With a little extra money in their budget, Barbara and Sonia have lately begun ordering floral arrays to spruce up the facility. The flowers are delivered from Sadie's Florist by Sadie, the attractive young proprietor trying to make a go in her new business. Though she was not even half his age, Alfred had designs on Sadie from the first time he saw her. Then, on one of her deliveries, Alfred was showing Sadie where to place some flowers and cornered her, making the offhand comment, "How would you like to take up with an old coot like me?" Sadie laughed off the comment, but Alfred let her know he was serious. The incident made Sadie quite uncomfortable. Sadie has now filed a sexual harassment claim against Alfred and the school.

Sexual harassment is generally defined as verbal or physical harassment that is sexual in nature and includes unwelcome sexual advances and requests for sexual favors. Although laws proscribing sexual harassment generally do not prohibit simple teasing, offhand remarks or isolated incidents that are not serious, when incidents are frequent it can

lead to a finding that there is a hostile or offensive work environment, and this can result in employer liability.

The hallmark of sexual harassment and how we usually think about it is that one employee makes another employee uncomfortable through actions or words, but such claims are not limited to employee versus employee. In our example we have an employee harassing a visitor, and sexual harassment law covers such situations.

There is currently much legal debate and conflicting court decisions regarding whether an employer is strictly liable for the harassing actions of an employee, i.e., employer liability attaches by the mere act of having employed the harasser, or whether the employer is liable only where they knew or should have known about what was occurring. In the former case, Whiz Kidz would be liable for Alfred's actions; in the latter, a court would look at all of the surrounding circumstances and history to determine whether Alfred's employer should have known that he had a propensity for such conduct.

Insurance companies will not issue policies covering employees unless the employer has an Employee Handbook, and one of the handbook requirements is a section dealing with sexual harassment — what it is, what is prohibited, how to make a confidential complaint, and how such complaints are resolved. Assuming Barbara and Sonia have complied with the handbook requirements, Alfred was surely on notice that his conduct was unbecoming. Perhaps, as Sadie apparently perceived it, the first incident with Alfred could be considered somewhat innocent, but most would agree that the second incident was inexcusable.

The legal point to be gained from this example is that sexual harassment is

not limited to situations involving two employees.

Every weekday for over 10 years Randy, the owner of Randy's Dairy, has delivered milk, orange juice, apple juice, and bottled water to the Whiz Kidz. Barbara and Sonia recently hired a front desk receptionist named Julie, and Randy was smitten with her from the moment he first passed her post. Each morning Julie greeted Randy with a smile and Randy was encouraged. Randy finally worked up his nerve, stole a secret moment, and asked Julie if she would join him for coffee after work. With a flirtatious smile and an enticing bent of her head Julie said, "Today, I think not." Randy asked, "How about tomorrow or any other day?" and Julie answered, "Let me think on it."

A weekend passed and on Monday morning Randy said, "Well, what do you think?"

"I think I'll pass," Julie responded.

"Why?"

"I don't think I have to explain myself to you," Julie said.

Angry and frustrated, Randy said, "Well, I think you do, so let's have it."

Sonia saved the day by emerging from her office, which caused Randy to make a hasty retreat. But, of course, Julie, fearing another confrontation with Randy, dreaded Tuesday morning and failed to show for work, instead consulting with a lawyer and a sexual harassment claim was in the works.

It is quite obvious that although not an employee of Whiz Kidz, Randy's unwanted advances and demanding nature had created a hostile work environment for Julie. Perhaps Julie could have availed herself of the

remedies available in the Employee Handbook by complaining to her employers who then would have been forced to take action, most likely terminating use of Randy's services. Since Randy was not employed by Whiz Kidz, even in jurisdictions where employer strict liability adheres, the school would not be strictly liable for Randy's actions. Rather, liability would rest on whether the administrators of Whiz Kidz who contracted for Randy's services knew or should have known about his propensity for such conduct.

The legal point of this example is not whether liability will attach in this case; the point, as an adjunct to the previous example, is that sexual harassment is not limited to employee against employee. Here we have a regular visitor whose harassing conduct may expose the school to liability.

One of Great Falls' favorite sons was Arturo, a graduate of Whiz Kidz, who went to the big city and made a name for himself by serial appearances on "Dancing with the Stars." Arturo returned to Great Falls, visited his preschool alma mater, and suggested to Barbara and Sonia that he would be willing to spend a couple of hours each week teaching dance to the children. The thought of enrollment increases, driven by the offering of a dance enrichment program taught by a celebrity, overwhelmed Barbara and Sonia and they readily agreed.

Since Arturo was a volunteer, a known celebrity, and would not be an employee of the school, Barbara and Sonia did not think to vet his background as they would have done with anyone applying for employment. The school rolled out an advertising campaign, the anticipated swell in enrollment materialized, and the new program was the talk of the town.

Not long after it was discovered that while in the big city, Arturo had been convicted of misdemeanor lewd conduct with a minor. Arturo had avoided jail time by paying a handsome settlement to his victim and performing many hours of community service. Regardless of the actual facts of his offense, with knowledge of that conviction Whiz Kidz never would have allowed him near the children.

Arturo was not an irregular visitor but an anticipated regular presence, and it was imperative that Barbara and Sonia vet him like they would any employee. It would certainly be a devastating embarrassment should the community learn of Arturo's peccadillo through a media report or a parent making a casual Google inquiry. Beyond the embarrassment, it is likely some parents would choose to sue the school for involving their children in a program taught by a person with an unsavory background.

The lesson here is that, while the school can't always know the background and propensities of irregular visitors, regular visitors must be thoroughly vetted.

Visitors potentially pose many problems some of which, as we have seen, are unexpected and often unavoidable.

The best practice for any school is to know as much about visitors as you can. Put simply, the best practices for the above scenarios would include: 1) conduct background checks on all employees, volunteer and regular visitors; 2) update a well-drafted employee handbook; 3) conduct routine safety inspections of your facility with particular emphasis on the entrance, exits, and remote areas; and 4) review supervision policies, procedures and practices for maintaining visual contact of children at all times.

