

Are You Involved in a Risky Business?

Liability and Insurance Grab Bag

by Abby J. Cohen

Is child care a risky business? The stock response is, of course, compared to what? It isn't like operating a mine or a petrochemical plant. Even industries which might appear less risky than child care might still be more risky than child care simply because they involve a lot of driving — which turns out to be one of the most common sources of injuries for which claims are brought generally.

No one agency keeps aggregate data on all incidents or claims against child care centers nationwide, so it is impossible to gauge exactly how risky a business child care is. But — when one considers the heightened vulnerability of children to injury and illness; the large number of children in centers; the extensive number of hours they are present in child care; the length of time a child can potentially bring an action against a program; and the preciousness of children to their families — it is remarkable just how few claims are brought that we do know or hear about. Even fewer of those claims are ultimately successful.

What are the most common claims that are brought against child care programs?

There is very little published information about which **claims** are most common in child care. However, we do know that many of the claims brought against child care programs are ultimately about the inadequacy of supervision. This is true whether the claim is about a fall from play equipment, one child hurting another, an injury from a toy, or abuse by a staff member. Each of these situations might have been avoided by a properly supervised child, even when there are other

factors contributing to the injury. In one study examining injuries among preschoolers enrolled in child care centers, the authors stated that three of four injuries were considered preventable by training and/or education or by injury reduction strategies. That is why the selection, training, and supervision of staff is so vitally important for the well-being of the children and your program.

What are the areas in which centers are most vulnerable?

It is surprising given the large number of children in child care how little hard data there is on injuries to them when in care.



Abby J. Cohen, JD, is a consumer of child care and a child care law and policy consultant in Oakland, California. Formerly the managing attorney of the Child Care Law Center, she currently works for the National Child Care Information Center as a regional technical assistance specialist for Region IX. Additionally, she provides consultation services to child care providers, child care support organizations, foundations, and public officials. Her primary objective in working with child care programs is to make the law more understandable so as to avoid legal problems.

However, the studies which do exist point most convincingly to injuries on playgrounds, particularly falls. Consequently, impact absorbing playground surfacing becomes one of the most significant means of prevention.

Another study found that 53% of the injuries involved some type of consumer product; the leading type of consumer product which produced injuries was playground equipment. Additionally, the injuries produced when playground equipment was involved were of a relatively serious nature. In addition to having proper cushioning, programs also need to check equipment on a daily basis, instruct children about proper usage, and always adequately supervise.

Under what, if any, circumstances are individual staff held responsible for claims brought against a center?

Generally, under the legal theory of *respondeat superior*, which means “let the master answer,” it is the employer who is responsible for the acts of employees, provided these acts occurred in the scope of the employment. Therefore, it is only when an individual staff member causes harm acting outside his/her legitimate scope of authority that he or she may be individually liable.

Is there any point in getting accident insurance if the parents in my program already have health insurance which would cover their children's injuries?

Yes, it is generally a good idea to obtain accident insurance even if your parents already have health insurance. Accident insurance is never a substitute for liability insurance; but given its relatively minimal cost as compared with liability insurance, it accomplishes two things. First, it promotes good

will between a program and parents, demonstrating that even accidents are a concern of the program. If there is an accident, it means that the accident coverage will pay for stitches or setting a broken bone, and the parents will not usually have to use their own insurance which might require a deductible or a co-pay. Additionally, sometimes if there is insurance for an accident, parents may be less inclined to bring a lawsuit claiming that the cause was negligence (even when it wasn't), rather than an accident, if they know the medical bills will be covered.

I've heard it is really difficult to obtain liability insurance for child care centers. Is this true?

Times are generally good for child care centers in the market for insurance these days. By contrast to what the situation was a decade ago, some might even say things are looking great. The availability and cost of insurance tends to operate in a cycle, and we're in the better part of the cycle right now. However, even with good times, there are things to watch out for. There is increased competition; but this isn't always to or for the buyer's benefit. To distinguish themselves in a buyer's market, some companies will:

- add coverages — but these may be unnecessary or costly relative to what is offered.
- promise more than the written policy seems to indicate, so never trust a verbal assurance — if it isn't in the policy, get it in writing!
- offer cheaper rates but not use admitted carriers which may result in your inability to collect should the carrier go bankrupt or close up shop. So while insurance is more readily available, it still is important to read the fine print. The buyer should always beware!

Are there any new and emerging issues for child care programs?

Recently, **transportation** issues have undergone some changes at the federal level. The National Highway Traffic Safety Administration (NHTSA), which enforces the law requiring vehicle dealers to sell buses that seat 11 or more passengers to schools for the transport of children, has changed its interpretation of the law so that centers which may have purchased vans in the past would now be required to purchase buses. The NHTSA has determined that buses are much safer than vans. For a more detailed discussion of this issue, see the Fall 1998 issue of the NCCA's *National Focus* newsletter.

But keep in mind that the transportation of children is not just a *federal* area of concern. Child care programs which transport children should always check their *state* laws, too, to determine how their states regulate the transportation of children, and whether there are special rules which apply when a certain number of children are transported and/or they are transported to and from school. One may not assume that using appropriate child passenger safety restraints and carrying vehicle insurance are all that is needed. In some instances, child care programs need to use true school buses, have special signage, have special safety equipment, and so on.

An emerging issue involves the enactment of “Megan's Laws.” These laws require law enforcement agencies to provide **notification about the presence of sex offenders in a neighborhood**. In many states, laws require specific notification to schools and child care centers. This had led to dilemmas for child care programs about how to handle such notifications as well as concerns

about the accuracy of the information, which in some cases has been proven incorrect. A measure of the difficulties and legal exposure resulting from these laws is evidenced by California's recent enactment of amendments to its original law. These amendments do two things:

- authorize child care facilities which receive information to disclose that information in the manner and to the extent authorized by the law enforcement entity; and
- immunize child care facilities and their employees who, in good faith, disseminate information about these sex offenders.

As more children with specialized health needs are integrated into child care, programs also face a potential increase in liability exposure for the **performance of certain specialized health procedures** which, in some cases, may be required by the Americans with Disabilities Act (ADA). A recent lawsuit against a center for their unwillingness to allow an asthmatic child to use an inhaler underscored this issue. (The case was settled in favor of the child after intervention by the U.S. Department of Justice.) To minimize this exposure, it is critically important that responsible staff are adequately trained in the procedure in question. This training should be provided by a health professional (as opposed to a parent) and documented.

While it may be the case that a parent is perfectly competent to train others about the procedure, this may not always be the case. By having a health professional provide the training, staff will learn the procedure from the official source (who carries malpractice insurance!) and have an opportunity to ask questions which the parent may not be equipped to answer.

In a recent study of parents trained on the use of the Epi-Pen (a pre-measured injection device used in emergencies for children with severe, life threatening allergies) by health professionals, 75% of the parents surveyed indicated that when an allergist prescribed the Epi-Pen, they were not given a demonstration of its use. When other physicians prescribed the device, an incredible 92.3% of the parents were not given a demonstration of its use! The survey demonstrated in a very stark way the inadequacy of training that parents receive. (For more detail about this survey, see the *Journal of Allergy and Clinical Immunology*, 1998,102: 525-6.)

Consequently, child care staff should not rely on parents for health procedure training. This may result in some ruffled feathers on the part of parents, particularly those who may genuinely know more about the procedure than the health care trainer, but programs need to underscore a child care program's heightened liability exposure for reliance on parent training. This absolutely should not preclude staff from having essential discussions with parents *about* the procedures so that parents' unique knowledge and understanding of their children can be gleaned and utilized by the child care program when performing these procedures on the children.

Centers should also ensure that they have the consent of the parent/guardian to perform the procedure, the name and phone number of the physician to call in an emergency, information on how to evaluate the well-being of the child, and that they know how to handle emergencies.