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## LEGAL ISSUES FOR FAMILY CHILD CARE PROVIDERS: CARING FOR MILDLY ILL AND INJURED CHILDREN

**By the Staff of Child Care Law Center**

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# LEGAL ISSUES FOR FAMILY CHILD CARE PROVIDERS: CARING FOR MILDLY ILL AND INJURED CHILDREN

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## INTRODUCTION

Most children suffer some knocks, falls, aches, and illnesses before they reach adulthood. Some are unfortunate enough to experience serious illnesses and/or accidents. Child care providers should be prepared to respond appropriately when a child is sick or injured, to work closely with the parent(s), and to administer or obtain medical care when necessary. This article discusses a family child care provider's legal duties in administering medication to children, preparing for accidents, and obtaining medical treatment when a child is injured.

- ✓ *The legal principles apply generally to all states. When appropriate, this article will highlight California-specific law with a check mark and italics, as exemplified by this insert.*

## MAY FAMILY CHILD CARE PROVIDERS CARE FOR MILDLY ILL CHILDREN?

This question really involves two different situations: (1) when a sick child is brought to your child care program, and (2) when a child becomes sick during the program day. Both situations require you to assess the child's condition and respond appropriately.

(1) When a sick child is brought to the program: State laws dictate whether you may care for mildly ill children. The rules may differ from state to state, and may be different for child care centers than for family child care homes.

- ✓ *For example, California law requires center providers to examine children briefly before admitting them on any given day, and to refuse to admit a child who is obviously feverish or vomiting.<sup>1</sup> On the other hand, California law allows family child care providers to care for children with minor contagious illnesses, such as the flu.<sup>2</sup>*
- ✓ *For further information on California's licensing requirements, see the Child Care Law Center's ("CCLC") publication entitled *Licensing Regulations and Appeal Rights for Family Child Care Providers*.*

The question of whether you *may* care for a child with a mild illness is different from the question of whether you *must* do so. Most health professionals and child care experts recommend that mildly ill children be cared for at home rather than in a group child care setting, both for the comfort of the child and the health of the provider and the other children.<sup>3</sup>

If you decide that you do not want to admit mildly ill children, it is a good idea to clarify this in your contract, fee agreement, or policies. Inserting a provision that you will not accept children with mild illnesses until the children are feeling better or the danger of contagion has passed will inform parents about the rule before the situation arises. You can specifically list some of the illnesses that will trigger a child's temporary exclusion from the program, such as the chicken pox, the flu, pink eye, or a cold, but the agreement should clarify that these are just examples. For more information on family child care contracts, see CCLC's publication entitled *Child Care Contracts: Information for Providers*.

(2) When a child becomes sick while in child care: Both center providers and family child care providers are responsible for the health and well-being of children in their care, and must therefore obtain appropriate medical attention for a child who becomes ill or suffers an injury in the course of that care.<sup>4</sup> This can range from providing a separate room where the child can lie down, to administering medication, to the more serious situation where the child must be taken to a physician. Again, state laws will determine your specific obligations. For example, in California:

- ✓ *Family child care providers **must** separate a sick child from the other children and must try to determine if the child has a contagious disease.*<sup>5</sup>
- ✓ *Family child care providers must get training in preventive health practices, including pediatric CPR (cardiopulmonary resuscitation), pediatric first aid, and the recognition and management of infectious diseases.*<sup>6</sup>
- ✓ *And – on a related topic -- family child care providers must verify that a child has had specific immunizations and tuberculosis testing before the child can be accepted into the program.*<sup>7</sup>
- ✓ *Family child care providers need not report specific infectious illnesses to their county public health departments, although it can be a good idea to do so.*<sup>8</sup> *Child care centers*<sup>9</sup> *and health care providers*<sup>10</sup> *must report information about certain listed illnesses. Most of the listed illnesses are rare and unusual, but some – like E-coli infection and foodborne illness – could occur in family child care.*

## **ARE THERE DIFFERENT RULES FOR CHILDREN WITH DISABILITIES?**

Yes. You may not refuse to care for a child because the child has a disability as defined by the Americans with Disabilities Act (the "ADA"). The ADA defines disability as a physical or mental impairment that substantially limits the child in a "major life activity," such as performing manual tasks, walking, seeing, hearing, speaking, breathing, or learning. Asthma, cerebral palsy, diabetes, and autism are examples of disabilities. Some chronic infectious diseases, such as HIV or Hepatitis C, may be considered disabilities, since they are long-term and recurrent (as opposed to short-term and acute). Including provisions in your contract or fee agreement stating that you will not care for children with disabilities is illegal.<sup>11</sup>

The ADA requires you to evaluate – on an *individual basis* – whether you can care for children who have chronic infectious diseases or other disabilities covered by the ADA. You must take into consideration the child's particular needs, the particular risks the child's condition poses, and whether there is a reasonable way to eliminate the risk through changes in policies, practices, and procedures without excluding the child. You must base this assessment on objective information obtained from a public health agency or other reputable medical source.<sup>12</sup>

In short, while you may refuse to care for a child who is sick with a mild illness, you may not refuse to care for a child simply because the child has a disability. For more information about the ADA, see CCLC's publication entitled, *Caring for Children with Special Needs*.

## **IS THERE ANYONE WHO CAN HELP PROVIDERS DECIDE WHETHER TO TAKE CARE OF MILDLY ILL CHILDREN?**

Some Resource and Referral Agencies can provide information about accepted health and safety standards for sick and injured children. You may also contact:

- The California Child Care Healthline (1-800-333-3212).
- The American Academy of Pediatrics (AAP) (1-800-433-9016), which publishes the *Healthy Child Care America Newsletter* and other helpful materials.<sup>13</sup>
- The National Resource Center for Health and Safety in Child Care (1-800-598-KIDS), which publishes *Caring for Our Children* and other helpful materials.<sup>14</sup>

## **WHAT SHOULD A PROVIDER DO IF A CHILD BECOMES ILL WHILE**

## IN CHILD CARE?

- First handle any serious emergency by obtaining appropriate medical care and contacting the parents immediately. For example, you may have to administer CPR, call 911 or poison control, or administer immediate first aid, and then call the parents so that they can make further medical decisions. In treating a serious illness or injury, it is always best to err on the side of caution and request medical assistance.
- If the illness does not pose an immediate medical emergency, you can contact the parents and ask them to pick up their child. If the parents are unavailable, contact other persons on the child's emergency contact list to arrange for alternate care until you can reach the parents.
- Licensing rules often require that mildly ill children be separated from other children and made comfortable until they are picked up.<sup>15</sup> Note, however, that such a rule applies only to children with mild illnesses, such as a cold, the flu or chicken pox. Do not separate or isolate a child because the child has a disability.
- You may want to have a rule that you will not administer medication -- whether over-the-counter or prescription drugs or home remedies -- without express parental permission. This issue is discussed in more detail below.
- When the parent of a child who has become ill arrives, ask for the parent's cooperation to determine whether the illness is contagious and whether the child should be kept out of the program until the risk of infection is over. If the illness is contagious, notify the parents of other children in the program so that they can watch for symptoms in their own children and seek appropriate treatment.
- Check with your licensing agency for rules on posting notices about exposure to infectious illness. You can also contact the local public health department for further information regarding exposure to contagious illnesses. The local Resource and Referral Agency and the California Child Care Healthline (1-800-333-3212) may also have information.

## WHAT SHOULD A PROVIDER DO IF A CHILD IS SERIOUSLY INJURED

## WHILE IN CHILD CARE?

Most children will experience some scrapes and bruises while in child care. Occasionally, however, a child may be seriously injured. Be prepared to take a number of steps in the event of a serious injury like a broken bone, serious cut, head injury or burn.

1. Make emergency plans *before* a child is injured. For example:
  - Maintain current first aid and CPR certifications;
  - Keep a well stocked first aid kit with you at all times, including on field trips;
  - Keep current authorizations for medical treatment for all children in your care with you at all times;
  - Keep the telephone numbers of parents and other emergency contacts with you at all times;
  - Plan how you will transport injured children to the hospital;
  - Arrange for back up providers to watch the other children in the event of an emergency;
2. If the injury is serious, or you do not feel that you can safely transport the child to the hospital, call 911 immediately.
3. Immediately after rendering first aid, call the child's parents or other persons on the emergency contact list.
4. Consult with the parent about who will transport the child to the hospital. You may have to arrange for another person to care for the remaining children if you need to transport the child to the hospital.
5. Even if you and the parent determine that the child does not need to go to the hospital immediately, you may still require the parents to pick up the child so that they can observe the child's condition and make any further medical decisions.
  - ✓ *California law also requires that the following events be reported to Licensing by fax or telephone call during business hours before the next working day:*
    - *a death of any child from any cause,*
    - *any injury to any child that requires medical treatment,*
    - *any suspected physical, sexual, or emotional abuse of any child, or*
      - *Note that as mandated reporters, family child care providers are also required to report this*

- information to local Law Enforcement or the local Child Protective Services agency.*
- *any act of violence occurring while children are in care. Examples include:*
    - *any physical altercation between adults or teenagers.*
    - *altercations between children that result in an injury.*
  - *any time any child in care is missing for any reason without the knowledge, permission, or supervision of the licensee.*
    - *any child in care who wanders away from the home, is lost during an outing, or does not return from school all must be reported.*
  - *any unusual incident that threatens the physical or emotional health or safety of any child. Examples include:*
    - *explosions, fires, epidemics, poisoning, or.*
    - *other catastrophes such as flooding or car accidents that occur while children are in care.*

*In these situations, a written report must follow within 7 days.<sup>16</sup>*

## **WHAT FORMS DOES A PROVIDER NEED IN ORDER TO OBTAIN EMERGENCY MEDICAL CARE FOR A CHILD?**

In most states, parental authorization is necessary for you to obtain emergency medical care for a child.

- ✓ *California's licensing regulations require family child care providers to have written authorization to consent to medical treatment from the parent(s) of every child in their care.<sup>17</sup>*

It is a good idea to keep the signed authorization forms in your possession at all times when the children are in care, so that the forms are easily accessible if an accident occurs. If you take the children away from the family child care home, always take copies of the authorization forms, insurance information, and the parents' and physicians' names, addresses, and phone numbers.

## **DOES THE AUTHORIZATION FORM GUARANTEE THAT A PROVIDER**

## **CAN GET MEDICAL TREATMENT FOR AN INJURED CHILD?**

Unfortunately, it does not. Most hospitals will treat a child if you have a signed and dated authorization form, and all must provide treatment if the child's condition is life-threatening.<sup>18</sup> However, to treat less serious injuries, some hospitals require more than your authorization form. Some will treat children only when the parent has already filled out a form at the particular hospital. Others require telephone confirmation from the parent prior to treatment. Still others will require insurance information. If possible, plan to take injured children to a hospital that the parent has designated and find out before any emergency arises what that hospital will require.

Physicians and hospitals will often supply their own authorization form for the parents to complete. That does not prevent you from asking the parent to sign one that you have prepared so that it can be included in the child's records at the doctor's office and designated hospital.

If you have to take a child to the doctor or hospital you will probably be asked about a child's allergies or other medical conditions. Answer such questions but otherwise maintain the confidentiality of a child's medical information. A recent federal law – the Health Insurance Portability and Accountability Act (“HIPAA”) – imposes explicit obligations on hospitals, doctors, employers, and insurance companies to protect the privacy of such information.<sup>19</sup> While you as a family child care provider are technically not subject to HIPAA requirements, other laws and common sense dictate that all medical information be kept confidential unless there is a compelling need to disclose it, such as seeking emergency medical attention.

- ✓ *In California, the confidentiality of medical information is protected by state law<sup>20</sup> as well as by the state constitutional right to privacy.<sup>21</sup>*

## **WHAT SHOULD A PROVIDER DO IF A CHILD IS INJURED BUT THE INJURY IS NOT SERIOUS?**

Always inform the parent of an injury, no matter how minor it seems. For example, if a child bumps her head on a swing during the day and seems fine, it's still best to mention the bump to the parent at the time the child is picked up. This will help the parents diagnose harmful effects that may not appear immediately after an injury. It will also increase the parent's trust in you when you disclose every major occurrence in the child care home.

## **SHOULD A PROVIDER TAKE EXTRA PRECAUTIONS ON FIELD**

## TRIPS?

If you include field trips in your program you should:

- Explain this to parents at the time of initial enrollment and include the information in the contract or fee agreement, and
- Require each parent to sign a general field trip permission form that contains medical information about his or her child and authorizes you to seek emergency care for that child.

For regular or frequent field trips, such as daily visits to the neighborhood park, take along each child's general field trip permission form, every time. For special field trips, obtain a permission form from each child's parent for that particular trip, and take it along. For more information about insurance, see CCLC's publication on *Legal Issues for Family Child Care Providers in California: Liability and Insurance*.

## MAY PROVIDERS GIVE PRESCRIPTION OR NON-PRESCRIPTION MEDICATION TO THE CHILDREN IN THEIR CARE?

State law determines whether and how you may administer prescription and non-prescription medications. The regulations in many states are silent on family child care providers' role in administering medication. This means that you may make your own choice about whether to administer medications or not. If you agree to give medication to children, always obtain authorization to do so from the parents, as further described below. Check with your licensing representative for up-to-date information on permitted services and medications.

Note, however, that if administering medications is a reasonable accommodation for a child with a disability, the ADA may require you to alter a "no-medications" policy in order to include that child in your program.<sup>22</sup>

Each state may have special rules regarding particular health care services or medications. For example:

- ✓ *In California, family child care providers who follow certain rules may administer or assist with the following:*
  - *inhaled medication, such as asthma medications administered through inhalers or nebulizers,<sup>23</sup>*
  - *blood glucose tests for children with diabetes,<sup>24</sup>*
  - *feeding children through gastrostomy tubes,<sup>25</sup>*
  - *administration of the EpiPen Jr. (see CCLC's publication on Licensing).*

- ✓ *California's rules and conditions for administering "inhaled medication" are excellent guidelines for administering **any** medications in family child care. That is:*
  - *The parent or guardian must give written authorization and instruct the provider how to administer the medication to the child;*
  - *The provider must follow specific written instructions from the child's doctor, which must include dosage, explanation of side effects and responses to them, storage requirements, and the doctor's address and phone number;*
  - *The doctor's instructions must be updated annually;*
  - *The provider must record each time the medication is administered, and must give the parent a daily copy of the record;*
  - *The provider must be trained on the use and maintenance of nebulizer and inhaler equipment.<sup>26</sup>*

## **WHAT AUTHORIZATIONS SHOULD A PROVIDER GET BEFORE GIVING CHILDREN MEDICATIONS?**

It is a good idea to obtain written permission, signed and dated by the parent, before giving any prescription medication, non-prescription medication, or traditional or herbal remedy to a child. Written permission will help avoid any confusion about what the parent asked you to do. To help you understand, remember, and follow the exact instructions of the parent and/or the doctor, the permission form should include:

- The date;
- The name of the medication;
- The dosage;
- That their child's physician has approved the dosage of any prescription medication;
- The times and dates it is to be given;
- The period of time over which the medication is to be given;
- The prescribing physician's name and phone number; and
- Any additional relevant information about possible side effects, e.g., the necessity to give the medication with food, storage instructions, or other important handling instructions.

You can simply ask the parents to write a note with this information, or they can

use a form that they create themselves.

## **WHAT PRECAUTIONS SHOULD THE PROVIDER TAKE WHEN HANDLING MEDICATIONS?**

When administering medications to children in your care, observe the following guidelines:

- Plainly label the medication container with the child's name.
- Give the medication only in the specified dosage and at the times indicated.
- Store the medication as directed – often in the refrigerator – and out of reach of all the children.
- Tell the parent at the end of each day exactly what medication was given to the child, how much, and when.
- Return the medication to the parent:
  - When the child no longer needs it;
  - If the family withdraws from the program; or
  - When the medication's expiration date is reached.

If you cannot reach the parent, throw away the medication in a location that is inaccessible to the children in the program.

## **CAN FAMILY CHILD CARE PROVIDERS PROTECT THEMSELVES AGAINST LIABILITY FOR INJURY TO CHILDREN IN THEIR CARE?**

There is no foolproof way to prevent a claim or lawsuit if a child is injured while in family child care, but you should follow these common-sense guidelines:

- Maintain a safe program and comply with applicable laws and regulations.
- Buy adequate insurance to cover liability in the event of a claim or a lawsuit. For more information about insurance, *see CCLC's publication on Legal Issues for Family Child Care Providers in California: Liability and Insurance*
- Keep notes – written on the day of each occurrence, if possible – of:
  - All injuries that occur while children are in the provider's care;
  - All medications or medical care that children receive while in care; and
  - A parent's refusal of permission for suggested medical treatment while his or her child is under the provider's care.

- ✓ *California law requires that any injury or act of violence to a child that occurred or is believed to have occurred in the provider's care must be reported to the parent(s) or guardian as soon as possible.<sup>27</sup>*

## **ARE THERE ANY ADDITIONAL RESOURCES FOR PROVIDERS?**

The following organizations have useful and relevant publications that are available on their websites or by calling a toll-free number:

- The American Academy of Pediatrics (AAP),  
<http://www.aap.org/advocacy/hcca> or 1-888-227-5409.
- The National Resource Center for Health and Safety in Child Care,  
<http://nrc.uchsc.edu> or 1-800-598-5437.
- The National Child Care Information Center,  
<http://nccic.org/hcca/nl/jan99/emergenc.html> or 1-800-616-2242.
- The National Center for Injury Prevention and Control,  
<http://www.cdc.gov/ncipc/ncipchm.htm> or 1-770-488-1506.
- The California Child Care Healthline,  
[www.ucsfchildcarehealth.org](http://www.ucsfchildcarehealth.org) or 1-800-333-3212.
- The Centers for Disease Control and Prevention,  
<http://www.cdc.gov> or 1-800-311-3435.

## **ENDNOTES**

<sup>1</sup> 22 CAL. CODE REGS. § 101226.1 (2002). A parent dropping off a child at a center must wait until a staff member has looked at and accepted the child for that day. Providers must give particular attention to children who have recently been absent because of illness or who have recently been exposed to a contagious disease.

<sup>2</sup> 22 CAL. CODE REGS. § 102417(e) (2002).

<sup>3</sup> Donna Rafanello, "Controlling the Spread of Infectious Disease in Child Care Programs," *Health Child Care America Newsletter*, (American Academy of Pediatrics 2001), available by calling 888-227-5409 or at <<http://www.healthychildcare.org/pdf/InfectDisease.pdf>>.

<sup>4</sup> This legal duty comes from the common law of torts as well as licensing regulations governing family child care in each state. See 6 Witkin, Summary 9<sup>th</sup> (1990) Torts, §732, p. 60. See also CAL. HEALTH & SAFETY CODE §1597.30 (West 2002).

<sup>5</sup> 22 CAL. CODE REGS. § 102417(e) (2002).

<sup>6</sup> CAL. HEALTH & SAFETY CODE §1596.866 (West 2002).

<sup>7</sup> 17 CAL. CODE REGS. §§ 6000-6015, and 22 CAL. CODE REGS § 102418 (2002).

<sup>8</sup> 17 CAL. CODE REGS. §§ 2500 (b) and (j)(1) (2002).

<sup>9</sup> 22 CAL. CODE REGS. §101212(d)(1)(E) (2002).

<sup>10</sup> 17 CAL. CODE REGS. §2500(a)(14) (2002).

<sup>11</sup> 42 U.S.C. § 12182 *et. seq.* (2000).

<sup>12</sup> 28 C.F.R. § 36.208 (2000).

<sup>13</sup> These are also available at <http://www.healthychildcare.org/newsletter.cfm>.

<sup>14</sup> These are also available at <http://nrc.uchsc.edu/>.

<sup>15</sup> 22 CAL. CODE REGS. § 102417(e) (2002).

<sup>16</sup> California Department of Social Services, Community Care Licensing Program. July 11, 2003 Letter from Melissa Miller on Reporting Requirements for Family Child Care Home Licensees. For more information, contact your regional licensing office, which you can locate at <http://ccld.ca.gov/> or by calling (916) 229-4500. See also, CAL. HEALTH & SAFETY CODE §1597.467(b) (West 2003).

<sup>17</sup> 22 CAL. CODE REGS. § 102417 (g)(7)(2002).

<sup>18</sup> See American Medical Association (AMA) Guidelines on *Emergency Care: Responsibilities and Alternatives*, <<http://www.ama-assn.org/ama/pub/category/2663.html>>

<sup>19</sup> 42 U.S.C.A. 1320, *et seq.* (2003) See regulations at 45 C.F.R.160 and 164 (2003).

<sup>20</sup> CAL. CIV.CODE §56 (2003). See 2 Witkin, Cal. Evid. 4th (2000) Witnesses, § 518, p. 823.

<sup>21</sup> 2 Witkin, Cal. Evid. 4th (2000) Witnesses, § 519, p. 825.

<sup>22</sup> 28 C.F.R. § 36.302 (2000).

<sup>23</sup> CAL. HEALTH & SAFETY CODE § 1596.798 (2003).

<sup>24</sup> CAL. HEALTH & SAFETY CODE § 1596.797 (2003).

<sup>25</sup> Letter from Carol Jacobi, Chief of Policy Development Bureau, California Department of Social Services, Community Care Licensing Division to All Regional Managers (September 14, 2000) (on file with Child Care Law Center).

<sup>26</sup> CAL. HEALTH & SAFETY CODE §1596.798 (2003).

<sup>27</sup> CAL. HEALTH & SAFETY CODE §1597.467(a) (2003).