

LIABILITY EXPOSURE AND CHILD CARE HEALTH CONSULTATION



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BACKGROUND

A new profession is emerging out of an identified need to link the public health and child care fields together. As of yet, there exists some movement, but no definitive consensus on the scope of this work or the standards of care that are expected of those who engage in the work. Indeed, the individuals who currently identify themselves as child care health consultants and who are developing the field will have a significant influence on the shape of liability exposure by creating the standards of care and expectations on the part of their consumer public (primarily child care programs and families).

There currently exists no statutory basis for the profession. Instead, there are pilot projects and funded positions. Within what is emerging there is wide variation in:

(1) who is engaging in this function (although the California Child Care Health Program strongly recommends that the individual be a registered nurse with a certificate in public health); (2) whom they are employed by (public or private agency); (3) the activities they perform; (4) and the procedures and systems they employ to do their jobs. All of these factors contribute to differences in potential liability exposure. After extensive review, it appears that at this time, no health consultant has been sued for her/his work in child care settings and there exists no judicial guidance directly on point. Instead one can only rely on what we know from general legal principles and rather imperfect analogous situations.

In the presence of this new profession and in the absence of definitive consensus and case law, the best we can do at this juncture is to describe the most significant methods available for minimizing liability exposure. In the longer term, the emerging field might explore several possibilities. One is to undertake a consideration of statutory immunity. Such laws can relieve liability in whole

or in part typically premised on the overriding need for the service and a concern about the financial and potentially chilling effect liability has on the service. However, any kind of statutory immunity probably would not even be an option to consider unless and until a statutory basis for the profession is enacted. And even then, depending on what activities the health consultant undertakes, such an approach would undoubtedly be difficult, because such laws are not generally favored, particularly if they are not accompanied by some sort of compensation fund. Nonetheless, they do exist. Another approach would be the development of a specific malpractice policy or rider to existing malpractice policies. The purpose here would be to address specifically the liability concerns of this new profession and/or address any identified gaps or inadequacies of current malpractice policies.

At this point, it is important to remember that providing health consultation is an important service. Fear of liability, particularly when there have been no known lawsuits, should not paralyze consultants from engaging in this work. If the steps described below are taken to minimize liability exposure, health consulting in child care should continue to grow and thrive.

METHODS FOR MINIMIZING LIABILITY EXPOSURE IN CALIFORNIA

Liability is very fact specific and involves the consideration of a multitude of factors. Consequently, the list below can only be a general guide to how one can minimize liability exposure. The focus of these methods is to minimize liability for lawsuits based on negligence, violations of confidentiality and failures to obtain consent. For specific guidance on how to minimize liability exposure in your *particular* program, consult with an attorney.

Establish job qualifications in terms of professional training and credentials that allow for confidence in expertise and judgment.

As initiatives develop to offer health consultation in child care settings of various types, designers of these programs must be certain that the professional qualifications required of consultants be appropriate for the job they are being asked to perform. While no one would expect a car mechanic to perform heart surgery, that is the easy case. Given the porous and shifting borders of various health/mental health professionals, the *professionalization* of certain formerly “lay” activities and the *de-professionalization* of formerly professional activities, the ability to make an appropriate determination of who should perform the health consulting task may be far more difficult. That of course, in turn, depends on what exactly the job involves (see below). Nonetheless, given the current contours of the work, (as developed by the Child Care Health Program— see job description, Attachment 1) designers would minimize liability exposure by requiring that, at a minimum, the health consultants be registered nurses, and preferably have training and/or credentials in public health and/or pediatrics and/or early childhood development.

Recognize that different standards of care are imposed on different health professionals.

Each health professional is held to a standard of care reasonable for that particular profession. The law recognizes a different duty of care depending on whether one is a registered nurse, vocational nurse, physician, physical therapist, dietician, psychologist or other health/allied health professional. Each health consultant undertaking the work should be knowledgeable about the standards of care they are expected to meet under current state law. When viewed by courts, “standard of care” tends to be a composite of what has been learned in formal training,

advisories or guidance emanating from the licensing board of that particular profession and continuing education required or offered to that particular discipline. Additionally, further guidance may be gleaned from court cases.

Recognize that the job responsibilities which might be required are on a continuum of potential liability exposure and therefore job responsibilities ought to be chosen with care and forethought.

Currently, health consultants undertake a wide variety of activities, from sending out information on infectious diseases, to training parents on car seat safety, to promoting adherence to licensing requirements and/or best practices, to doing individualized assessments of children’s development. Any activity carries with it the possibility of liability exposure, but there is general agreement that some activities are more likely to be the focus of lawsuits and some activities are more likely to actually result in liability. For example, activities that are more general to the program are less likely to be the source of liability exposure than child specific activities. (Keep in mind however, that even this statement is not absolute; it is quite possible that a general program activity could result in greater liability than a child specific activity.) Similarly, informational activities are less likely to be a source of liability exposure than activities of a diagnostic or clinical nature. This does not mean that activities with higher potential exposure cannot be done. It is to suggest, however, that one should make that determination with an awareness of the higher exposure one is taking on and with the realization that additional steps might be required to try to minimize the additional potential liability exposure one would be taking on.

Once chosen, job responsibilities should be as clear as possible with standardized methods developed for these responsibilities.

Job descriptions should be detailed and clear. Individual health consultants should have clear

guidance as to what activities they should and should not undertake. Within any particular activity undertaken, the scope of responsibility should also be clear. As new potential responsibilities emerge, consultants should exercise caution before jumping in. When appropriate, standardized methods and procedures for undertaking responsibilities should be developed, not only to ensure appropriate follow-up when necessary, but also to ensure that when there are multiple consultants, that there is a common approach and consistency in operations.

Perform only those job responsibilities permitted by one's scope of practice and for which one has the professional expertise.

Every health professional not only has professional training and a license to practice, but each profession operates under a statute, for example the California Nursing Practice Act (California Business and Professions Code Section 2700 and following) that outlines the "scope of practice." Accordingly, one may not go beyond what the state law permits.

These same statutes also describe those duties that may be delegated to others; importantly, even when such duties are delegated, the health professional remains accountable. Delegation will not likely be relevant in most situations involving child care health consulting because the role tends to be neither clinical nor supervisory in an ongoing way, as a nurse would be in a clinical setting, potentially supervising unlicensed assistive personnel. However, some of the considerations in determining whether to delegate are relevant when determining the appropriateness of training child care providers about how to perform certain procedures. The primary consideration is the health, safety and well being of the child. Determining whether such delegation/training should occur depends on making an assessment of a number of factors. These include the nature, frequency and complexity of the specific task; the education, training and skills of the caregiver being trained; the po-

tential harm that could occur if the procedure was done improperly and the availability of adequate supervision/consultation.

It is imperative that professionals be familiar with scope of practice laws and any interpretive guidance that is available from professional licensing boards. In the case of the Nursing Practice Act, the California Board of Registered Nursing has issued an advisory entitled "An Explanation of the Scope of RN Practice Including Standardized Procedures," as well as other advisories and publications of relevance. Additionally, one can look to Attorney General Opinions that have also concerned scope of practice and delegation issues.

Finally, when providing advice or direct services involving a specific child, it is critical to obtain consent (see below) as well as to coordinate with the child's treating health care professional to clarify roles and responsibilities.

Recognize and understand the variability in liability exposure as the result of who employs the health consultant.

Generally speaking, the health consultant employed by public entities, as an employee, will have several factors operating in his/her favor to minimize liability exposure which may not be as true of those employed by private programs, whether child care support organizations or child care providers. First, depending on the fact situation, there may be some limitations on the liability of the public entity and/or its employees. Secondly, if the public entity is the public health department, there may be greater opportunities for appropriate supervision and discussion of complicated and difficult issues that could benefit from collegial brainstorming on a routine basis. Finally, there may be greater access to legal counsel on an as needed basis. Depending on the situation, these factors may or may not be available to independent contractors who contract with local public health departments. To the extent that consultants locate at particular child

care sites, this may have the effect of increasing exposure as such consultants may be seen in a different light if communication about their roles is not clear, and they may in fact be more involved in the direct operations of programs.

Develop and disseminate clear brochures and agreements, where appropriate, which specifically outline the functions of the health consultant.

In large measure, liability depends on the expectations which have been created in those who come to depend on the services being offered, whether the program or the families. Being clear about what the health consultant does, and does not do, to any and all who will be affected by the services will help to ensure that expectations comport with reality. Exercise care when communicating with providers and families that the child care health consultant is not a guarantor or certifier of the health and safety of the facility but simply a promoter of improved health and safety. Making a misrepresentation, such as saying that the health consultant ensures safety could become a misrepresentation that is relied on, with resulting liability. Being clear about what child care health consultants do and do not do could help not only to protect against standard legal claims, but would also help minimize more atypical *claims such as those by third persons* (persons not typically considered when entering into the consulting arrangement— such as a child not attending the child care program claiming he/she was infected by a neighbor child who did attend a child care program, (with the infection resulting from poor infection control at the program) and *claims of any duty to protect against third parties* (such as a failure to notify and/or warn families of the potential presence of a violent sex offender).

Keep current with health and legal information.

In addition to keeping current with the laws related to scope of practice and delegation as mentioned above, health consultants should en-

sure that they keep up to date with the content of their work. This will require keeping up with literature, current recommendations from governmental and professional bodies, attending continuing education, communicating with others engaged in this work and the like. In effect, this is to ensure that one can maintain the appropriate standard of care.

Health consultants should also be familiar with certain legal information, ranging from the legal requirements of universal precautions (See e.g. 29 CFR Section 1910.1030) to issues of confidentiality and consent (see below) and any laws which may require reporting, such as child abuse laws (California Penal Code Section 11165 and following) or reportable disease laws (17 California Code of Regulations Section 2500). Because these laws set out specific requirements, they in effect spell out very clearly the proper standard of care. Failure to meet these requirements could result in what the law calls negligence *per se*— an automatic finding of negligence because of failure to comply with a law intended to prevent the harm that occurred.

Maintain good documentation.

It is always critically important to maintain good documentation to defend against successful lawsuits. There should be both documentation of systems and procedures at the operational level; documentation of service, including what services are provided; what, if any, follow up has been completed, signed consent forms, and so forth.

Documentation should be current, objective, and sufficient, the latter of course requiring judgment as to what is at stake. It is certainly to the advantage of health consultants who are registered nurses that they have training in documentation of this nature, in keeping logs and records. Records should be dated, include the names of any individuals provided service, reasons for consultation, advice given and actions taken.

Obtain consent from families and staff.

To the extent health consultants will be reviewing medical records kept by the child care program and engaging in assessments of individual children it is critically important that proper legal consents be obtained. Health consultants working with programs should require the programs they work with to inform staff and parents of the health consultant's presence and the nature of the work they will be undertaking. Health consultants must also work with programs to obtain legal consent from parents to review medical records and other confidential information held by the program (See 22 Cal. Code of Regulations Section 101221(c) concerning the confidentiality of information held by licensed child care programs). They will also need consent for requests for additional information/contact/records held by a physician or school district and/or for undertaking individualized assessments/screenings/observations/ diagnosis and treatment.

Maintain the confidentiality of health information.

Health consultants may be involved in both creating health/medical information and reviewing existing information. In both instances, consultants must recognize that such information is confidential. The California Confidentiality of Medical Information Act (CMIA) indicates that medical information should not be released without the express consent of the patient or his/her representative (parent/guardian). This should be in writing. Furthermore, the law requires health care providers who create, maintain, preserve, store, abandon or destroy medical records to do so in a manner that preserves the information's confidentiality.

Information about children held by child care providers, including, but not limited to their medical assessment, is also confidential under licensing requirements. (22 Cal Code of Regulations Section 101221(c)). Medical information maintained in personnel records must also be

kept confidential. Once the health consultant has gained access to confidential information, such information should not be shared with other parties not appearing on the initial consent unless an additional release is obtained.

Carefully consider the use of disclaimers/waivers.

California cases present a mixed picture of whether a waiver eliminating future liability would be upheld. On the one hand, the courts look with disfavor on waivers that concern the public interest, but at least one California case has ruled that a parent can sign a contract with a disclaimer on it on behalf of a child. Other states specifically have refused to allow a waiver by a parent to bar a child's cause of action.

A disclaimer that does not waive liability but simply indicates that information is general and not specific to a situation and that the particularized advice of health professional should be sought may have some value in minimizing liability exposure. However, the absence of judicial interpretation on this point precludes any guarantee of protection. Nonetheless, there appears to be little in the way of any downside for adding such disclaimers to written materials so that they are indeed recommended. However, and importantly, they should not create a sense of security so that appropriate precautions are not implemented.

Consider carrying malpractice insurance.

Health consultants employed by local public health departments are typically covered for any claims by the local government through self-insurance*. However, some consultants employed by public agencies also carry their own malpractice insurance, as do those working outside of government. Generally speaking, one's only certainty about whether one would be covered under a malpractice policy for activities undertaken as a consultant would be to write a letter outlining these responsibilities and request

confirmation that such activities are covered, an explanation of any restrictions, and a description of any additional coverage which might be necessary. Given the relatively inexpensive cost of malpractice insurance for registered nurses, such a policy would be a worthwhile investment. Ensure that the malpractice policy covers legal defense in addition to the cost of the claim. As increasing numbers of health consultants begin working in child care and the contours of such services becomes clearer, it may be necessary and/or advantageous for consultants as a group to approach malpractice insurance carriers to develop a specialized policy or rider.

CONCLUSION

An understanding and use of each of the methods described above may serve to minimize the liability of those deciding to undertake the important work of a child care health consultant. In addition to these methods, it is also important to realize that there exist certain statutory immunities for certain activities, and certain realities that may also limit exposure. For example, depending on the facts of the situation, it may be very hard to prove that the acts or omissions of the consultant were the legal cause of an injury or to demonstrate that the consultant owed any duty to the party injured, two of the essential

elements to a finding of negligence. These in themselves may be significant hurdles to overcome in trying to place liability on a child care health consultant.

It is always difficult to deal with the knowledge that while what has been described here may minimize liability there are no ironclad guarantees. Unless and until we have more experience with this work and the issues it raises we will have to live with a level of uncertainty. Nonetheless, the importance of this work suggest that it be supported to continue and that we share with each other our issues, concerns, experiences and learning as we move forward. Hopefully in this way we can fashion other methods or refine what has been described to better protect the child care health consultant in successfully engaging in his/her work.

It is also important to once again underscore that this paper is written not in response to a huge increase in lawsuits; indeed we are aware of none. While the purpose of the paper is to prevent problems in the future it may result in engendering a greater sense of risk than is warranted at this time. So the bottom line is to carefully review and implement methods for reducing liability exposure— but keep the possibility of liability exposure in perspective!

*In California, for example, there is statutory immunity for persons administering vaccines as required by law or as part of an outreach program Cal. Health & Safety Code Section 120455) as well as Good Samaritan provisions for rendering care in an emergency without compensation (Cal. Business & Professions Code Section 2727.5). However, importantly, this immunity is limited to persons rendering care outside both the place and course of that persons' employment.