

“My personal introduction to the Dalai Lama was by way of television-in a hotel room. I was in Washington, D.C., preparing for a conference on children and the media and was looking for a certain news program when I happened on His Holiness saying, ‘Someone else’s action should not determine your response,’ I was so intrigued. I wrote down those words, turned off the television and thought about nothing else the whole evening...It sounds so simple, doesn’t it? And yet what if someone else’s action should be shouting angry words at us or hitting us with a rotten tomato? That doesn’t affect what we do in response? Not if our compassion is genuine. Not if our love is the kind the Dalai Lama advocates.”
-Life’s Journeys according to Fred Rogers

LEARNING GOALS: as a result of reading this chapter, you will be better prepared to:

1. Maintain perspective while in the midst of potential legal challenges;
2. Know your rights and responsibilities when asked to provide a reference for a former employee;
3. Ask appropriate interview questions for all applicants, including applicants with “known” handicaps;
4. Prevent disputes at the end of the day about who has the right to take the child home, especially if the parent appears impaired by alcohol or a custody issue flares up.

LAWSUITS ARE POWERFUL. One lawsuit has the potential to put a childcare center out of business. One accusation, even a false one, of wrongdoing can cause parents to withdraw their children. Nurturing communities carefully created together over the years can be destroyed by one action. Directors in the field report they fear being sued. Our legal system guarantees the presumption of innocence until guilt is proven. Public opinion is often quicker to proclaim guilt, even before the evidence is in.

One Massachusetts director mourned, when her teacher was accused of child molestation: “My worst fear has come true.” Her center survived and still thrives by continuously holding open forums for parents and staff to discuss their concerns. In the end, the charges were dropped. Nonetheless, the center initially lost families as soon as the accusation was uttered. Everyone, from children to teachers, parents and administrators, felt anxious about the potential lawsuit.

PREVENTION IS THE BEST MEDICINE. Fortunately, administrators can take steps to prevent problems from exploding into disasters. The more preventative measures we take, the more confident we become. We can protect our program, and the children and families in our care, by planning in advance. Some problems, of course, cannot be

prevented. Even for those crises, we can prepare by having in place and practicing model crisis procedures.

EMOTIONAL INTELLIGENCE AND PREVENTION: Did you know moods are “catching”? Have you even entered a room of dour, unsmiling people and felt your spirit dragged down by their prevailing blue mood? Scientific research has recently documented that we can “catch” moods from others nearby. The molecules in our bodies tend to “harmonize”, or line up with, the molecules in the people around us. If the majority of people around are in a blue mood, their bodily states will influence our mood.

The emotionally intelligent manager, fortified by this information, has a greater resilience to maintain perspective in the midst of threatening situations. Rather than being “brought down” by others’ negativity, hostility or fears, the manager with EQ can make choices. She can choose to keep her “eyes on the prize” of quality care for children and families, or she can allow herself to be toppled by the prevailing mood. As Mr. Rogers reminds us: “Someone else’s action does not have to determine my response.”

WHEN CAN WE BENEFIT FROM PREVENTATIVE POLICIES & PRACTICES?

The question to ask, before getting “hooked” by fear of a lawsuit, is “What choices do I have, above and beyond my immediate reaction?” Stepping back from a potentially overwhelming threat, frees us to use our emotional intelligence. We will see we have options that free us from doing or saying something in the instant we may later regret. Let’s look at some policies we can institute that afford us choices and a longer-range perspective.

Here are 3 common issues directors face:

1. **GIVING REFERENCES FOR FORMER EMPLOYEES**
2. **USING APPROPRIATE JOB INTERVIEW QUESTIONS**
3. **END OF THE DAY DISRUPTIONS:** Parents under the influence, and/or in custody disputes.

By instituting preventative measures, administrators can nip potential problems in the bud. Each problem, if not handled preventatively, could mushroom into a lawsuit. When planned for in advance, the problem loses its power to alarm, and perhaps, overwhelm the director and the program.

GIVING REFERENCES FOR FORMER EMPLOYEES:

Consider what you would do in the situation below. Next, think of policies you could put into place that might prevent problems from arising.

Evangeline, a director from across town calls you with this request: “Jennie, who says she worked for you, is applying to be my new lead toddler teacher. Jennie says you will give

her a wonderful reference. What did you think of Jennie’s performance?” What would you say to Evangeline if:

- 1) You were grateful Jennie quit because you were about to fire her for continually arriving late?
- 2) Jennie’s classroom skills were adequate; however, her gossiping and negativity troubled other teachers?
- 3) Jennie was one of your best toddler teachers. You believe Jennie is ready to become a lead teacher. However, you do not have a position available?
- 4) Something bothered you about Jennie that you couldn’t quite identify. Frankly, you were relieved when she left suddenly?

Directors often wish they could tell the whole truth about their experience with a past employee. Employees who perform well deserve glowing references. Directors want to warn prospective employers against hiring poor performers. Our sense of fairness tells us we should be able to share accurate, documented information. After all, if Jennie presents a danger to children, aren’t we obligated to warn future employers? Sometimes the law and common sense do not align, as we would like.

Legally, your answer to Evangeline’s question would be the same, regardless of which scenario (1,2, 3 or 4 above) were true. Most centers are instructed by their attorneys to abide by the following written policy:

Our organization’s policy on responding to requests for references on current or former employees, is to provide only the following information:

1. *Confirm or deny the applicant’s employment.* For example: “Yes, Ms. Jennie Wrightson worked for our organization,” or, “No, our organization has not employed Ms. Wrightson.”
2. *State the dates of that person’s employment.* For example, “Ms. Wrightson was employed by our organization from March 15, 2005 to January 10, 2006.”

This policy precludes sharing any information on Jennie’s performance. Jennie’s potential employer, Evangeline, has learned little to help her make an important hiring decision. On the other hand, Jennie has been protected. No negative information about her has been released. How does this policy serve the interests of children and families?

What additional policy would allow directors to share accurate information, when called for a reference? Consider the policy to the right, to be signed by new and current employees.

If Jennie had signed this statement, Jennie would have

Reference Consent Form

*I, _____, an
employee of _____,
agree to hold harmless
_____ for the
reference that
organization may give me,
on my employment with
the organization.*

consented to your sharing accurate information on her performance. This consent form would free you to answer Evangeline’s questions such as: “Would you re-hire Jennie? Do you have any reservations about Jennie’s performance? What skills did you observe in Jennie that would indicate her ability to be lead toddler teacher?”

You are bound to convey information in an accurate, unbiased manner, which honors the employee’s confidentiality. In this case, ethical and legal standards will align. As long as you share accurate information, you will not be committing slander. *Slander is saying something false that would cause the person’s reputation in the community to be damaged.* If you shared false information about a former employee, you could be sued for damages. Telling the truth is the best defense to a charge of slander.

Instituting this consent form with your staff wards off the problem of not being able to share accurate information on a former employee. By taking this preventative step, you have raised the ability of the profession to ensure that competent people are hired.

ASKING APPROPRIATE INTERVIEW QUESTIONS, ESPECIALLY WHEN UNANTICIPATED ISSUES ARISE DURING THE INTERVIEW

EQUAL EMPLOYMENT LAW requires us to treat each applicant for a position fairly, regardless of race, religion, age, gender, or (in most cases), national origin. In interviewing possible employees, we are required to give each person equal opportunity to respond to the same questions. If Germaine is asked: “Can you describe a time when you faced a discipline challenge in the classroom, and how you handled that challenge?”, all other applicants for that position should be given the same opportunity to answer that question. If an interviewer were to use different questions for different applicants, she could be accused of favoring one applicant over another. This is why many directors choose to have a written set of interview questions and scenarios that is consistent for each applicant. Consider what you would do in this situation:

Jason’s written application for pre-school teacher indicates he can perform the job functions. His associate’s degree in early childhood education is from a nearby community college. In his cover letter, Jason notes his military service in the Middle East strengthened his desire to work with young children. When Jason arrives for the interview with a smile, he shrugs off his coat. Jason’s right arm appears to have been amputated. The interviewing team becomes anxious about what they can ask Jason about this visible handicap. What could you do in advance to help all parties to the interview feel welcome and prepared?

ESSENTIAL FUNCTIONS OF THE JOB. When we interview applicants to fill a position, we seek the person who is best qualified, from those who can “perform the essential functions of the job. The Childcare law Center’s booklet, “Employing people with disabilities”, defines *essential functions* as: “*the tasks and duties that describe the job, but only those that are essential to the performance of the job*”. For example, for an infant teacher to be able to diaper a child, he must be able to lift at least 20 pounds. In the event of a fire or similar crisis, teachers must be able to assist in evacuating the building

while immediately responding to an emergency situation. Infants must be taken to a designated safe place. Both being able to diaper a child and assist in an emergency situation are essential functions of the job.

Essential functions of the job should be stated in terms of the tasks the employee will complete, rather than as a physical attribute. This allows applicants like Jason to demonstrate their own way of accomplishing the task. Jason's way may not be like anyone else's. *Physical and mental attributes, and skills based on them (like lifting, driving, and reading) should be avoided to the greatest extent possible in the list of essential functions of the job. If a physical attribute seems unavoidable to perform the job, accompany that attribute with a description of the task or goal intended to be accomplished*", advises the Childcare Law Center. For example, if the ability to lift 20 pounds seems unavoidable as an essential function of the job, say that the goal is to be able to lift an infant for diapering.

THE AMERICANS WITH DISABILITIES ACT (ADA). The ADA supports employers' efforts to find the person best qualified for the job. The ADA also ensures that applicants, who are "handicapped", or otherwise able, have equal access to employment and to maintaining their employment. The ADA does not require employers to favor a handicapped applicant over other equally qualified applicants. The ADA does require employers to make "*reasonable accommodations*" to allow qualified applicants to perform the job.

HANDICAP & REASONABLE ACCOMMODATIONS. According to the ADA, a *handicap "restricts an essential life activity"*. Essential life activities include breathing, sitting, standing, walking, seeing, hearing. Employers are required to make accommodations that will allow a person with a handicap, *who is otherwise qualified*, to perform the duties of the job.

Consider applicant Selena, who is diabetic, and otherwise qualified to be a teacher's aide. To perform her job, Selena says she needs to test her blood sugar level at predictable intervals during the day. She also needs to ingest or inject insulin as needed. Selena's employer must make reasonable accommodations to allow Selena to test and maintain her blood sugar levels. Making sure Selena has a safe storage location for her testing equipment and insulin, as well as adequate time to test and maintain her blood sugar, are both reasonable accommodations her employer can make.

Administrators often worry about whether their budgets will cover the cost of making accommodations. Interestingly, federal statistics show that the average per reasonable accommodation is \$240.

These reasonable accommodations need only be taken if Selena *is otherwise qualified for the job*. If Selena lacks the required coursework or experience working with children, Selena is not otherwise qualified for the job. She cannot be considered for the position until she meets the essential requirements listed in the job description. This is why job descriptions must be written with care.

UNDUE HARDSHIP. The ADA envisions a workplace where every qualified person, regardless of handicap, is given equal opportunity to find employment and to continue that employment productively. In some cases, the accommodations required for a potential employee with a handicap are too costly for the program to bear. The ADA does not require an organization to endure an undue hardship for the sake of one employee.

In other cases, an applicant, even with the necessary accommodations, might still pose a *DIRECT THREAT* to herself or others. An employee with chronic progressive multiple sclerosis who cannot hold a child without the strong possibility of dropping him poses a direct threat to her own and others' safety.

In either of these cases, *UNDUE HARDSHIP* or *DIRECT THREAT*, the ADA does not require employers to hire or retain the employee. In those cases, the wellbeing of the program outweighs the individual's needs.

To prevent difficulties like this arising, focus on two preventative measures. First, write the job description as a list of essential tasks to be performed. Avoid listing physical attributes. "Must be able to diaper a child" can replace "must be able to lift 20 pounds." An alternate approach is to link the physical attribute directly to the task to be accomplished: "Must be able to lift at least 20 pounds to be able to diaper a child."

Second, invite the applicant to demonstrate how s/he would accomplish those tasks. Consistency is important. If everyone interviewed is asked to demonstrate diapering a child, Jason will not be singled out. Jason may well demonstrate his own way to safely and effectively diaper a child. If so, everyone has benefited by the interviewing process. If Jason names the accommodations he requires to be able to perform this task, the interviews can explore in greater detail what those accommodations might involve. However, if Jason does not voluntarily request accommodations, the interviewers may not be the first to ask.

Appendix A contains a sample job description that focuses on tasks rather than attributes. By revising your job descriptions to focus on tasks, you can prevent difficult moments at job interviews. Restructure interviews from question and answer format to scenarios and demonstrations. In this way, applicants can share their own ways of meeting the essential functions of the job.

PREVENTING CUSTODY DISPUTES WHEN PARENTS PICK UP CHILDREN.

Sometimes divorce decrees are clear as March mud puddles. Courts may grant "joint custody", without clarifying the details. What happens if both parents arrive to pick up baby Jasmine on the same day and an argument ensues? When parents are not married, who has the right to create the "authorized list" for pick-up? Can one parent leave the other parent off the list? What if Timothy's mom changes her mind frequently about

whether Timothy's dad can pick Timothy up? The last thing anyone wants at departure time, is a disruption that leaves a child feeling unsafe and unsettled.

How might you prevent the following situation from arising?

Lupe Hernandez-Jones, listed only her brother and sister on the authorized list for pick up, when she enrolled her daughters, Rosa and Yvette. The girls are anxious to please, obedient, and seem fearful of changes. Lupe faithfully picks the girls up each day; her brother and sister have never appeared. At the end of their first year with you, Lupe comes to your office for a confidential meeting. She tearfully tells you that she and the girls escaped from the girls' abusive dad, Buster in Tampa. Lupe begs you to prevent Buster see the girls. Before you can respond, a respectful Buster, baseball cap in hand, appears at your door, requesting to see take his daughters out for ice cream.

Our job is not to decide who has the right to the child. Our task, instead, is to obtain complete information at enrollment to prevent these power struggles from occurring. At enrollment, if Lupe does not mention the children's father, what can you say? Lupe may tell you the father wants nothing to do with his children. She may say she does not know who the father is. Here is a policy for the parent handbook that clarifies enrollment practice. This policy can prevent custody ruptures later on:

BOTH PARENTS' RIGHT TO PICK UP THE CHILD

Under the laws of the state of _____, both parents may have the right to pick up their child, unless a court document restricts that right. The enrolling parent, who chooses not to include the other parent's name on the authorized list for pick-up, must file an official court document (e.g. current restraining order, sole custody decree, divorce decree stating sole custody). Absent that document, the center may release the child to either parent, provided that parent documents his paternity/her maternity of that child.

If at enrollment, Lupe supplies you with a restraining order against Buster, you are far more able to do your job. If Buster appears, you can advise him that the girls cannot be released to him, because of the restraining order against him. If Lupe cannot supply you with an appropriate document demonstrating her custody of the girls, Buster could claim Lupe kidnapped the girls from him.

To avoid the children and the program's getting caught in the middle, be preventative. Add the policy on "*Both parents right to pick up the child*" to your parent handbook. Enforce the policy at enrollment. This policy requires Lupe to provide a court document

(restraining order, sole custody decree or divorce decree). With documentation on file, staff are prepared for end-of-the-day custody issues.

Perhaps Lupe and Buster share custody of the Rosa and Yvette. However, their anger at each other makes it difficult to be clear on who will pick up the girls. Worse than that, the girls might be exposed to a fight between Lupe and Buster at the entrance of your center. To keep all children safe from harm, include this policy as an option for parents who share custody:

SHARED CUSTODY PARENTAL AGREEMENT

We, _____ & _____, parents of _____, agree that (parent 1) will pick up _____ on Mondays-Wednesdays); _____(parent 2) will pick up _____ on Thursdays and Fridays. If a parent attempts to pick up _____ on the other parent's day, that parent must document the consent of the other parent to the change in schedule. Should continuous changes occur, both parents will file a revised agreement with the program promptly.

By requiring parents at enrollment to complete these forms, the director has prevented headache and heartache for everyone, especially the children. Lupe and Buster are responsible for following their own written agreement. If one parent wants to change the agreement, s/he will have to communicate directly with the other parent, before any changes can be made.

PLANNING FOR THE UNPLANNED: PREVENTING CRISES FROM OVERWHELMING PEOPLE AND PROGRAM

We can't always prevent crises. We can, however, use our emotional intelligence to deal as effectively as possible with each crisis. Just knowing, as Fred Rogers did, that another person's action, no matter how frightening or threatening, does not have to determine our response, is deeply empowering.

USING "Code Blue" TO PREPARE STAFF FOR MANAGING CRISES. Margaret Leitch Copeland's "Code Blue!" walks us through a step-by-step process of preparing for the unseen. She advises us to:

1. Brainstorm with our staff, all the possible crises that can occur.
2. Utilize the assistance of crisis management experts in our communities to help us develop plans.
3. Post crisis plans and regularly practice carrying them out.
4. Establish a system of how to inform and communicate with parents.
5. Name a spokesperson for your organization, preferably not you, the director.
6. Anticipate and prepare information the media may need, and make sure the spokesperson has that information in writing.
7. Inform all others to refer questions to the spokesperson.

