

How to Minimize Group Home Liability

by Cameron R. Getto & Daniel Pollack

The headlines tell the story:

*Pasadena youth group home sued for teen's alleged abuse*¹

*Family sues Carrick youth home over son's injuries*²

*Foster mom sues group home operator over alleged sex abuse*³

*Lawsuit against children's group home describes sex crimes*⁴

Attorneys who represent group homes face many challenging situations. For attorneys who represent children or families in litigation against group homes, many issues may arise. When defending a group home in litigation, the practitioner must be aware not only of the common law negligence issues that arise, but also the statutory and regulatory framework governing routine issues.

Lawyers who periodically advise group homes or serve as corporate counsel must have a keen understanding of the unique issues that may arise by and between employees, managers, executives, directors, health care practitioners, contractors, regulators, law enforcement and public and private funding sources.

Group home operators are involved in different legal relationships that make them vulnerable to litigation. Long ago, when group homes were seen as charitable, they could avoid liability to some extent. They could avoid vicarious liability for the negligent acts of social workers, psychologists, psychiatrists, educators, and others affiliated with them by arguing that such caregivers were technically independent contractors.

Today, group homes are no longer immune from general liability, nor are they viewed as facilities in which independent practitioners come and go. In many cases, group homes advertise themselves as comprehensive settings and secure clients through sophisticat-

ed marketing. Therefore, many believe they should be held accountable for serious infractions that occur within their domains.

Types of Liability

Liability ordinarily arises from two types of failures that can occur in a group home: neglect and abuse.⁵

- *Neglect* tends to result from unintentional wrongdoing, such as errors, omissions and oversights.⁶ For example, a group home may be responsible for neglect when a non-ambulatory resident is placed in a chair out of doors initially to enjoy the day, but who suffers a serious sunburn when allowed to remain in the sun for too long. Neglect can also include denial of care or delayed care. Another example: a resident may suffer a fall, and an unskilled or improperly trained worker may conclude the fall was minor only to later discover a serious injury resulted.⁷ Neglect can also involve failing to protect a resident from self-injury or injury by another resident.
- *Abuse* tends to occur less often and ordinarily involves some degree of intent.⁸ For example, sexual contact with a minor in a group home setting is strictly forbidden, and any such contact constitutes abuse.⁹ Despite these prohibitions, sexual misconduct continues to occur in some group homes.¹⁰ When a child has a

mental condition or disability that makes interaction challenging, frustrated and poorly trained workers may react or attempt to control behavior with abuse.¹¹ Any time a group home worker engages in physical management of a resident, an abuse charge may result.

- A corporation can be both directly or vicariously liable for injuries arising from abuse and/or neglect.

Direct corporate liability

Direct corporate liability arises from the failure of the corporation through its executives, managers or governing body, to observe statutes, regulations, industry standards, and norms. For instance, the corporation might negligently hire an individual who is unqualified to provide direct care, and/or subsequently fail to provide adequate training. Or, a corporation may inadequately monitor a home or the workers at the home who provide direct care. When a failure occurs that is directly attributed to something the corporation negligently did or did not do, direct corporate liability will result.

Vicarious liability

Vicarious liability refers to holding one party liable for the acts of another based solely on the legal relationship between the two. This type of liability is loosely based on principles of agency where the principal is held accountable for the actions of the agent, even though the principal did not necessarily authorize or direct the agent.

There are three general areas of vicarious liability:

- *Respondeat superior*¹² liability arises from a direct employer/employee relationship.
- *Apparent authority*¹³ (sometimes

referred to as ostensible agency or agency by estoppel) results when a third party reasonably infers the agent was authorized to act on behalf of the principal.

- *Implied authority*¹⁴ occurs when conduct by the principal grants authority to the agent even though there is no agreement or other express authority of the agent to act. This can occur when the agent acts on behalf of the principal, and the principal fails to object.

Nondelegable duty

Although each state has its own regulatory scheme that applies to group homes, the principles underlying statutory regulation are similar regardless of the jurisdiction. Some jurisdictions require an administrator or caregiver with particular qualifications to serve as the single point of contact and responsibility for operating the home.¹⁵ Others impose regulations listing what a group home must provide.¹⁶ Thus, while the day-to-day tasks associated with operating the home are often delegated to employees, the duties and responsibilities of complying with state law are often prescribed by statute and nondelegable. Although an administrator need not be present at the home all the time, responsibility will always remain with the administrator or licensee for compliance with all licensing regulations, unusual incident reporting, recipient rights reporting,¹⁷ and quality assurance.

Advice for Attorneys

Ensure good corporate governance

The first line of defense against being sued is for an attorney to ensure a group home's board of directors and its administrators adhere to sound corporate structures and policies of governance. In today's demanding regulatory environment, the board and its administrators must be sure to nail down the basics. This means being familiar with and knowing how to apply the group home industry's

"standards of care." One example: properly documenting all actions enacted at board meetings.¹⁸ This helps provide evidence that directors have exercised their fiduciary duties.

Another example is establishing an active safety committee or quality assurance committee. This can help a group home defend against certain negligence allegations. If the committee was aware of and considered a safety issue and concluded there was no hazard, this may be evidence

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showing due diligence. In some jurisdictions, quality assurance committees or activities are privileged,¹⁹ shielding a committee's good-faith attempt to investigate and remediate a specific problem. This privilege allows an investigation to proceed with candor and diligence without concern that the data or results of the investigation will be used against the company in court.

Know what kind of insurance is needed

It is imperative that administrators, be they public, private, for-profit, or nonprofit, understand the difference between different types of insurance. Most group homes, as well as the companies that operate them, will require comprehensive commercial liability insurance with numerous added provisions and services. If the company employs or contracts with health care professionals (nurses, doctors, social workers, physical therapists, occupational therapists, nutritionists, etc.), professional liability insurance may be required. If the home has a means of transporting residents, or even if workers take residents to and from appointments or local restaurants and stores, commercial auto liability coverage may be needed.

Insurance for the governing board is a distinct and separate type of

liability insurance that most companies elect to purchase. This allows board members peace of mind knowing that if they are sued as a consequence of their governance activities, their private assets will not be jeopardized. There are numerous specialty insurers and agents that offer comprehensive plans tailored to group homes and other human services corporations. It is important to consult a qualified insurance professional before finalizing insurance decisions.

Understand the scope of agreements with funding sources

Corporate leadership must understand the scope of the insurance and liability obligations they may be required to accept when contracting with agencies that pay for services they provide in their homes. Many agencies, both public and private, that fund the services provided in group homes require the home to defend and accept responsibility for lawsuits from that care. Thus, when faced with a lawsuit, it is not unusual for a funding agency to tender the defense and request the group home indemnify it for any verdict or settlement. If a tender is unreasonably rejected, the group home could potentially be shouldered with the burden of covering both the liability and the defense of the agency.

Many agreements between agencies and group homes require the group home to designate its funding agency as an additional insured or additional named insured, which can confer the benefit of a defense and indemnity on the agency as an insured under the applicable policy.

Evaluate client satisfaction with the group home

When an injury occurs in a group

home, some families or clients feel compelled to sue, not because of the injury that was sustained, but because of how the home's employees handled the situation. If the overall communication between the home and family has been ineffective or inadequate, this leaves a prospective plaintiff feeling that the home is unsympathetic. Overall client satisfaction, especially regarding communication, and regardless of the home's effectiveness as a treatment milieu, may help lower the risk of being sued.

Conclusion

Managing a group home that cares for children involves many complexities at every stage. From governance to administrative compliance, from licensing to direct care, every activity is carefully calculated to ensure children receive the best care in the safest environment. Liability occurs when this focus is lost. A clear understanding of the bases for liability is important to delivering optimum care in the group home setting.

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Endnotes

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3. Smith, Mitch. "Foster Mom Sues Group Home Operator Over Alleged Sex Abuse." *Chicago Tribune*, June 17, 2014. Available at: <http://www.chicagotribune.com/suburbs/schaumburg-hoffman-estates/chi-foster-mom-sues-group-home-operator-over-alleged-sex-abuse-20140616-story.html>

4. Roxas, Gabriel. "Lawsuit against Children's Group Home Describes Sex Crimes." News10ABC, May 14, 2014. Available at: <http://www.news10.net/story/news/local/sacramento/2014/05/17/group-home-lawsuit/9199267/>

5. See, e.g., MCL 330.1722 (Michigan); Fla. Stat. § 415.102(16).

6. See, e.g., California Welfare and Institutions Code Section 15610.57.

7. Kevin Allenspach, (June 30, 2015). "State Agency Substantiates Neglect at Local Care Home." *SC Times*, available at: <http://www.sctimes.com/story/news/local/2015/06/29/state-agency-substantiates-neglect-local-care-home/29484251/>

8. See, e.g., California Penal Code Section 11164-11174.3 et seq.; Fla. Stat. § 827.03.

9. In New York, for example, a caregiver abuses a child when he or she "commits or allows to be committed a sexual offense against the minor." N.Y. Soc. Serv. Law section 412(1) (McKinney 2006); Fam. Cut. Act section 1012(e).

10. Sausser, Lauren. "Abuse Allegations Haunt Lucrative Group Homes." *The Post and Courier*, July 23, 2015. Available at <http://www.postandcourier.com/article/20150723/PC16/150709450>.

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12. "Respondeat superior" is Latin for "Let the master answer." See, e.g., <http://dictionary.law.com/Default.aspx?selected=1827>.

13. See, e.g., Wex Legal Dictionary, Legal Information Institute at Cornell University Law School, https://www.law.cornell.edu/wex/apparent_authority.

14. Ibid.

15. See, e.g., Michigan Licensing Rules for Family and Group Child Care Homes R 400.1901(f) & (r).

16. Ohio Admin. Code 5101:2-9-02 et seq.

17. In some states, recipient rights or similar patient advocacy organizations are created or authorized by statute. They most often investigate allegations of neglect and abuse, suggest administrative penalties, and sometimes advise providers how to remediate violations. See, e.g., MCL 330.1755 et seq.; Ca. W&I Code, Section 5370.2

18. See, e.g., Wis. Stat. § 181.1601(1).

19. See, e.g., State of Missouri ex rel. Boone Retirement Center, Inc. v. Hamilton, 946 S.W.2d 740, 743 (Mo. 1997) (upholding federal nursing home quality assurance privilege); see also R.S.A. 151:13-a, R.S.A. 151:D:2, R.S.A. 151-A:16, R.S.A. 151:13-b, R.S.A. 135-C:63-a (New Hampshire state laws creating privileges for hospitals, ambulatory care clinics, nursing homes, home health care providers and community mental health centers).

(In re Hicks/Brown, cont'd from p. 83)

types or assumptions or an unwillingness to make the required effort to accommodate the parent's needs.

In this case, the agency did not fulfill its responsibilities and the trial court failed to recognize that failing. The mother's case plan did not match her abilities. She would likely never be able to read and comprehend the contents of a GED exam, hold down a job, or live independently. A service plan that ignored these realities was simply unreasonable and not individually tailored to her needs. The court acknowledged the mother might be unable to overcome the conditions that brought her children into care. However, reunification services were inadequate. As a result, the court vacated the termination order and remanded the case for reconsideration after the mother was provided necessary individualized services.