

# Improving Child Care Licensing Background Checks: The Legal Perspective

Looking for an excellent child care facility? You're in good company. According to one child care industry organization, there are now more than 11 million children under the age of five who are in some form of child care.<sup>1</sup> Some states allow child care to be unregulated if the number of children being cared for is minimal. More than that number, the state requires licensure. The purpose of licensing child care facilities is to monitor, regulate, enforce, and improve the quality of child care. An excellent resource to consult is the *National Database of Child Care Licensing Regulations*, "a repository of state and territory licensing regulations and agency contact information. It is organized by state and allows users to access child care licensing regulations that apply to child care centers, family child care homes, school-age programs, and infant care programs, and other specialized programs."<sup>2</sup>

When we entrust our child to a child care provider, we want only the highest level care and supervision to ensure their safety. We ask for suggestions from our friends and neighbors. We research whether the facility is licensed. We find out if it has a history of complaints. However glowing the reviews, injuries at child care centers are common. Usually they occur by accident. Kids are kids. Sometimes they happen because there was negligence on the part of the child care staff. And sometimes, the licensor, the department of human services, may have been negligent in licensing or overseeing the facility.



Common injuries to a child at a child care center may include:

- Physical, sexual, or verbal abuse
- Falls or drops
- Choking on food
- Choking on or swallowing small objects
- Drowning or other water-related injuries
- Allowing unauthorized personnel to gain access to the facility or child
- Allowing a child to wander away from a facility
- Dangerous or unapproved sleeping conditions
- Improper administration of medication
- Inadequate supervision
- Failing to tend to a sick child in a timely way

Legal complications often arise because injured children, especially

very young ones, don't have the ability to speak for themselves about how an injury occurred. The child care staff may not be forthcoming in admitting the real source or cause of a child's injury. This makes winning a case against the facility, its workers, or the department very difficult.

The Child Care and Development Block Grant (CCDBG) Act of 2014 seeks to make child care safer by ensuring that individuals working with or in proximity to children have not committed violent crimes, child abuse, or sexual offenses. Toward that effort, federal and state laws require a background check for anyone working or regularly volunteering in a licensed child care facility. This includes, depending upon the exact license, a fingerprint-based and name-based

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choice of underprescribing for chronic pain patients or risk coming under government scrutiny. The immediacy has reached such a swift crescendo that a local news story purporting that casual skin contact with Fentanyl can be life threatening was picked up by major news carriers and taken national. Massachusetts became the first state to ban the presentation of the drug as evidence in the courtroom for fear that it could endanger those proximate to it.

James Madison argued 230 years ago in the *Federalist Papers* that the only way to control factions is either to curtail liberty or design a system of counterweights to reflexive action in the face of popular passions. Thus was formed one of the guiding principles of the U.S. Constitution and our republican form of government. Its inefficiencies and resistance to radical changes are intentional. Amendments are not meant to be adopted or modified in a sudden, reactive manner.

From day one, reform was always meant to go slower than the speed of temporal opinion or news cycles. Why? To ensure stability and because such change is less prone to design flaws, lasts longer, and is a more accurate reflection of the will of the people. Which puts social advocacy in a terrible difficulty. In this age of hyperkinetic news cycles, is it possible to act in a timely and thoughtful manner? Or is the pressure of losing attention to the next big story too great to ignore?

According to a Nielsen Company audience report, in the first quarter of 2016, Americans consumed an average of 10 hours and 39 minutes of media per day. A growing portion of that screen time was spent on social media sites. Not surprisingly, news cycles, propelled by the speed of the Internet, are shorter, congested, and increasingly shallow. The notion of *Washington Post* editor Ben Bradlee anguishing Hamlet-like over having sufficient verification to break the

Watergate story seems as antiquated as, well, Hamlet.

“Move fast and break things” may be fine as Facebook’s motto, but given the exponentially increasing speed of events and the media that report them, there is compelling evidence to suggest that social advocacy—long-term, sensible social advocacy—cannot keep pace with the news cycle. And, given the high probability of miscues in the rush to solutions, there is equally compelling evidence that suggests we should not be trying to. As Shakespeare said, “Wisely, and slow. They stumble that run fast.” 📖

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check through the FBI, a search of the state criminal registry and sex offender registry, the National Crime Information Center’s National Sex Offender Registry, and the state’s child abuse and neglect registry. Many states require checking these registries for only a set number of years in the past. Increasing the look-back period indefinitely is one improvement that has been suggested by many attorneys and child care advocates. Another change, perhaps surprising to some, is that minor household members between age 10 and 17 may be required to submit to a background check if day care is provided in their home.

Lashonda Council Rogers, a Georgia day care abuse attorney, advises that states implement mandatory drug screenings for day care workers and those who regularly volunteer in child care facilities. “For the past few

years, I have noticed an increased number of day care injuries due to day care workers being under the influence of drugs while working with children. With the rise of the opioid epidemic, the “face” of drug abuse has changed and children are unintentionally being left in harm’s way. For instance, statistics show that one in four people who receives prescription opioids long-term for pain struggles with addiction. Since some opioids are legally prescribed by a physician, it is not uncommon in my practice to encounter a day care employee with an opioid addiction who does not have a criminal record. Therefore, a standard background check is not sufficient to ward against this problem. Unfortunately, even with the implementation of mandatory drug screenings for day care workers, some opioid use may still be undetectable.”

A cursory background check of prospective employees and volunteers may appease the licensor or provide a veneer of diligence should something go wrong. In contrast, a rigorous background check will return real value for a child care facility. Not only will it benefit the children, it will also help reduce employee turnover and absenteeism, reduce theft and fraud, and help to avoid unnecessary legal costs. 📖

### Reference Notes

1. <http://usa.childcareaware.org/advocacy-public-policy/resources/research/costofcare/>
2. <https://childcareta.acf.hhs.gov/licensing>

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