

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 722 (Ochoa Bogh)
Version: February 16, 2023
Hearing Date: April 25, 2023
Fiscal: Yes
Urgency: No
CK

SUBJECT

Daycare facilities: incidental medical services plans

DIGEST

This bill requires the California Department of Social Services (DSS) to create templates for certain plans required of childcare providers and allows for children with exceptional needs, as defined, to attend a child daycare or development program once a template incidental medical services plan is completed. The bill provides immunity to childcare providers in connection with administering medication, as specified.

EXECUTIVE SUMMARY

In order to provide childcare in this state, providers must comply with a host of laws and regulations and directives issued by DSS. Among these requirements are an obligation to create a plan of operation, laying out the details of the program and, where applicable, an incidental medical services plan, laying out the procedures for providing certain medical services, including administering medication to children.

Given the immense barriers faced by children with disabilities seeking quality childcare, this bill seeks to streamline certain licensing requirements by requiring DSS to create templates for plans of operation and incidental medical services plans, and to allow children with exceptional needs to begin attending childcare after submission of these templates but before approval by DSS. The bill also provides qualified immunity to providers in connection with the administration of medication to children pursuant to incidental medical services plans, except where such administration amounts to gross negligence or willful and malicious conduct.

This bill is co-sponsored by the Santa Clara County Office of Education and the Office of the Riverside County Superintendent of Schools. It is supported by the Santa Clara County School Boards Association. There is no known opposition. The bill passed out of the Senate Human Services Committee on a 4 to 0 vote.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the California Child Day Care Facilities Act with the purpose to streamline the administration of childcare licensing and thereby increase the efficiency and effectiveness of this system. (Health & Saf. Code § 1596.70 et seq.)
- 2) Defines “child day care facility” as a facility that provides nonmedical care to children under 18 years of age in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a 24-hour basis. Child day care facility includes day care centers, employer-sponsored child care centers, and family day care homes. (Health & Saf. Code § 1596.750.)
- 3) Requires each child care center licensee to have and keep on file a current written, definitive plan of operation. A copy of the plan shall be submitted to DSS with the license application. The plan and related materials shall contain specified elements, including program methods and goals; administrative organization; staffing plan, qualifications, and duties; sample menus; and a rate-setting policy. Any proposed changes in the plan of operation that affect services to children shall be subject to DSS approval prior to implementation and shall be reported as specified. The child care center shall operate in accordance with the terms specified in the plan of operation. (22 C.C.R. § 101173.)
- 4) Defines “children with exceptional needs” as either of the following:
 - a) children under three years of age who have been determined to be eligible for early intervention services, as provided. These children include an infant or toddler with a developmental delay or established risk condition, or who is at high risk of having a substantial developmental disability, as defined. These children shall have active individualized family service plans and shall be receiving early intervention services; or
 - b) children 3 to 21 years of age, inclusive, who have been determined to be eligible for special education and related services by an individualized education program team according to the special education requirements, as specified, and who meet certain eligibility criteria. These children shall have an active individualized education program and shall be receiving early intervention services or appropriate special education. (Educ. Code § 8205(h).)
- 5) Provides that every person is responsible, not only for the result of their willful acts, but also for an injury occasioned to another by the person’s want of ordinary care or skill in the management of their property or person, except so

far as the latter has, willfully or by want of ordinary care, brought the injury upon themselves. (Civ. Code § 1714(a).)

- 6) Provides that no person who, in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This applies only to medical, law enforcement, and emergency personnel, as specified. (Health & Saf. Code § 1799.102(a).)
- 7) Extends to all other persons not covered by the above who are rendering medical or nonmedical care or other assistance in such situations immunity from civil damages resulting from any act or omission other than acts or omissions constituting gross negligence or willful or wanton misconduct. (Health & Saf. Code § 1799.102(b).)

This bill:

- 1) Requires the State Department of Social Services (DSS), notwithstanding any other law, on or before January 1, 2025, to create template forms for plans of operations and incidental medical services plans.
- 2) Requires DSS, upon completion of the templates, to revise its regulations, notices, practices, and bulletins to eliminate any requirement that an incidental medical services plan or amended plan of operation be approved before a child with exceptional needs as defined is allowed to attend a child daycare or child development program.
- 3) Immunizes, notwithstanding any other law, a provider who completes and submits all sections of an incidental medical services plan template from being subject to professional review, liable in a civil action, or subject to criminal prosecution for the administration of a medication, unless administration of the medication constitutes gross negligence or willful or malicious conduct.

COMMENTS

1. Childcare licensing

Providers of child care must be licensed through DSS in order to lawfully operate in California. DSS has established thorough licensing requirements in Title 22 of the California Code of Regulations that govern everything from facilities to operations to staffing. Among these regulations is the requirement that providers have a Plan of Operation approved by the DSS Community Care Licensing Division (CCLD), which

includes information about staffing and administration, admissions and rate setting policies, building floorplans, schedules, menus, and transportation.

CCLD has issued guidance on the regulations and best practices for providing incidental medical services in child care centers and family child care homes:

As places of public accommodation, licensed child care facilities are subject to federal and state disability laws, including Title III of the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. 12181 et seq.), the California Unruh Civil Rights Act (Civil Code Sections 51 et seq.), and the California Disabled Persons Act (Civil Code Sections 54 et seq.). Child care facilities may be required to undertake an individualized assessment if the facility receives a request to provide Incidental Medical Services (IMS), the provision of necessary medication while a child is in care, as an accommodation to a child with a disability. Each child care licensee is responsible for determining their legal obligations under the ADA and California disability laws.

Child Care Center (CCC) and Family Child Care Home (FCCH) licensees are responsible for ensuring that each child's needs can be met at the time of admission and throughout a child's attendance at the facility. Children with disabilities or special health care needs may require medications while in care. Child care staff can learn to safely give medications to children, and these services are known as IMS. The provision of IMS helps to ensure that licensed child care settings provide an inclusive environment and appropriate services for all children.

Among the best practices laid out therein, CCLD encourages facilities to document to DSS that the facility is providing IMS through an IMS plan, and for certain facilities, to include such an IMS plan in the facility's plan of operation.

CCLD provides that facilities should get written authorization for administering IMS and a copy of the medical orders written by the child's doctor. CCLD indicates that each designated licensee and staff person must be trained in the manner identified by the child's physician, and at least one trained person must be present at all times. Facilities are also encouraged to adhere to standard precautions when administering IMS.

2. Reducing barriers for children with disabilities

According to the author:

Disproportionate access to early learning and childcare (ELC) programs limits social and emotional growth opportunities for children with disabilities and contributes to the K-12 academic achievement gap

between students with and without disabilities. The latest student assessment from the California Department of Education (CDE) revealed students with disabilities performed 97.3 and 130.8 points below the state standard in English language arts and math, respectively. SB 722 will eliminate state-imposed barriers to childcare for children with disabilities by requiring the Department of Social Services (DSS) to create templates for the documents required of ELC providers and allow children with disabilities to attend ELC programs while the Department reviews such documents.

Research shows that the United States has failed to adequately invest in child care, leading to a dearth of affordable, high quality childcare options. These issues are exacerbated for children with disabilities and medical needs.¹

This bill seeks to streamline licensing requirements by requiring DSS to create templates for plans of operation and incidental medical services plans. Upon completion of these templates, DSS is required to revise their regulations and practices to eliminate any requirement that an IMS plan or amended plan of operation be approved before a child with exceptional needs is allowed to attend a child daycare or development program.

This ensures that a child is not left without childcare while such plans are being reviewed by DSS as a matter of course. The Santa Clara County Office of Education, the sponsor of the bill, elaborates:

When families are able to secure ELC for a child with a disability, they must often resort to segregated providers that serve children with disabilities separate from children without disabilities. Although access to any early learning may be better than none, significant research demonstrates that inclusive early learning programs reduce the prevalence and severity of disabilities and increase the likelihood that a child with a disability will graduate with their peers. At just 37%, California's preschool inclusion rate is one of the lowest in the nation.

SB 722 would remove barriers for children with disabilities by ensuring that children who require an Incidental Medical Services Plan (IMSP) can attend childcare as soon as their provider completes an IMSP. This change would alter the current practice in which families wait months for approval before a child can access care. The bill would also require the Department to create IMSP and Plan of Operation templates, thereby

¹ Cristina Novoa, *The Child Care Crisis Disproportionately Affects Children With Disabilities* (Jan. 2020) Center for American Progress, <https://www.americanprogress.org/wp-content/uploads/sites/2/2020/08/Child-Care-for-Children-with-Disabilites2.pdf>.

easing the [uncertainty] and administrative burden for childcare providers who serve children with disabilities.

3. Immunity

Directly relevant to this Committee's jurisdiction, the bill immunizes a provider who completes and submits all sections of an IMS plan template from professional review or criminal and civil liability for the administration of a medication, unless administration of the medication constitutes gross negligence or willful or malicious conduct.

As a general rule, California law provides that persons are responsible, not only for the result of their willful acts, but also for an injury occasioned to another by their want of ordinary care or skill in the management of their property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon themselves. (Civ. Code § 1714(a).) Liability has the primary effect of ensuring that some measure of recourse exists for those persons injured by the negligent or willful acts of others; the risk of that liability has the primary effect of ensuring parties act reasonably to avoid harm to those to whom they owe a duty.

Conversely, immunity from liability disincentivizes careful planning and acting on the part of individuals and entities. When one enjoys immunity from civil liability, it is relieved of the responsibility to act with due regard and an appropriate level of care in the conduct of its activities. Immunity provisions are also disfavored because they, by their nature, preclude parties from recovering when they are injured, and force injured parties to absorb losses for which they are not responsible. Liability acts not only to allow a victim to be made whole, but to encourage appropriate compliance with legal requirements.

Although immunity provisions are rarely preferable, the Legislature has in limited scenarios approved measured immunity from liability (as opposed to blanket immunities) to promote other policy goals that could benefit the public. Immunities are generally afforded when needed to ensure the willingness of individuals to continue taking on certain roles that may involve some risk and to incentivize certain conduct, such as the provision of life-saving or other critical services. Examples include protections for use of CPR (Civ. Code § 1714.2); use of an automated external defibrillator (Civ. Code § 1714.21); use of opiate overdose treatment (Civ. Code § 1714.22); providing emergency care at the scene of an emergency (Health & Saf. Code §§ 1799.102, 1799.106); and performing emergency rescue services (Health & Saf. Code § 1799.107). However, as indicated above, rarely is immunity absolute, and these immunities generally do not cover grossly negligent conduct or intentional misconduct.

Unlike other conduct that is immunized under California law, this bill provides immunity for the provision of medical care even where there is not an emergency. While the bill does limit the immunity to protect only simple negligence, the potential

for serious health consequences were medication is negligently administered is clear. This concern is heightened where providers can begin to provide care for, and administer medication to, a child without the IMS plan being approved by DSS. The ultimate question is whether the policy goals served by encouraging more child care providers to administer medication without fear of liability justifies removing this source of liability and the incentives for careful conduct that come with it.

SUPPORT

Santa Clara County Office of Education (co-sponsor)
Office of The Riverside County Superintendent of Schools (co-sponsor)
California County Superintendents
Santa Clara County School Boards Association

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation:

AB 71 (Rodriguez, 2023) provides, in relevant part, that a local agency, entity of state or local government, or other public or private organization that sponsors, authorizes, supports, finances, or supervises the instruction of pupils in bleeding control shall not be liable for any civil damages alleged to result from the acts or omissions of an individual who received such instruction. In addition, a public employee who provides or facilitates the instruction of pupils in bleeding control pursuant to this section shall not be liable for any civil damages alleged to result from the acts or omissions of an individual who received such instruction. AB 71 is currently on the Assembly floor.

SB 868 (Wilk, 2023) requires local educational agencies to equip each classroom with a trauma kit and to offer training to employees on the use of such kits. Employees who render emergency care with such kits are granted qualified immunity from civil damages, as provided. SB 868 is currently in the Senate Appropriations Committee.

Prior Legislation:

AB 2042 (Villapudua, 2022) would have required CDSS to establish an anaphylactic policy that sets guidelines and procedures to be followed by child daycare personnel to prevent a child from suffering from anaphylaxis and to be used during a medical emergency by July 1, 2024. This bill was vetoed by the Governor Newsom, who stated in his veto message: "It is important for all children in a child care setting to be cared for by staff who are trained to assist with their unique needs, including being able to

recognize and respond to symptoms of anaphylaxis. While I appreciate the author's attention to this important matter, the bill before me creates a number of implementation concerns, including establishing multiple processes and expanding the memorandum of understanding (MOU) between the State and the [Child Care Providers United - California]."

PRIOR VOTES:

Senate Human Services Committee (Ayes 4, Noes 0)
