

## LATIN LEGAL DOCTRINES AND THE RISK OF LITIGATION

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Community Providers serving individuals with development disabilities are vulnerable to lawsuits brought by current and former service recipients. Three reasons for this vulnerability are the legislated public policy of the State of New Jersey, and the legal doctrines of “*in loco parentis*” and “*respondeat superior*.” Familiarity with the concepts will assist agencies to appreciate the threat of litigation and take preemptive precautions to reduce the occurrence of incidents of neglect and abuse, which are among the most common allegations in claims brought on behalf of service recipients.

On the public policy front, the enactment of the Developmentally Disability Rights Act (“DDRA”), N.J.S.A. 30:6D-1-12, by New Jersey’s Legislature grew out of recognition of the State’s policy of protecting the developmentally disabled from abuse or mistreatment. The State’s legislators recognized that persons with developmental disabilities are especially vulnerable, and are without the knowledge, ability, or resources to protect or vindicate their civil rights. The repercussion of the DDRA’s laudable objective of protecting the rights of the developmentally disabled is that agencies are susceptible to litigation when a violation of a right, or an incident of abuse or neglect, occurs in its facility.

In addition to the State’s explicit public policy of protecting developmentally disabled citizens, Community Providers are also vulnerable to lawsuits because the agencies are recognized as institutions with *in loco parentis* responsibilities. *In loco parentis* is the legal doctrine referring to an individual who assumes the function or responsibility of a parent. Historically, the most common usage of *in loco parentis* was in circumstances where a person acted as a temporary guardian or caregiver of a child. In institutional settings, *in loco parentis* was applied teachers and students, and schools could be found liable based on negligence principles. Over time, more institutions and facilities came to be viewed as fulfilling caregiving responsibilities. Facilities caring for the developmentally disabled are viewed as having the status of *in loco parentis*. A significant reason why Community Providers are viewed as *in loco parentis* institutions is the dependency of the service recipients on the caregiver, Direct Support Professionals (DSP) to supervise and protect from harm. From a liability defense perspective designation as an *in locos parentis* institution will mean that the agency will be subject to traditional liability principles.

Another legal concept, with roots in the Common Law, impacting Community Providers is the doctrine of *respondeat superior*. The doctrine of *respondeat superior*, translated as "let the superior make answer," originated from the concept "one who would manage his or her affairs through others is obligated to third persons damaged by such others acting in the course of their employment." Under this concept, Community Providers are subject to liability for the neglectful or abusive actions of their caregiver employees. The concept of *respondeat superior* focuses on the relationship between the employee's job responsibilities and his or her alleged tortious conduct. These principles have long been part of New Jersey law. Therefore, if an agency employee acts negligently, or even inflicts intentional harm while in the scope of his or her duties, the employer agency will be held liable as a matter of law for the conduct of the employee.

It is important for Community Providers to be aware that measures taken by the agency to guard against intentional or negligent harm by employees - careful review of an applicant's educational and employment history, a thorough background check, probing interviews, meticulous training and exemplary supervision – although vital to the prevention incidents of neglect and abuse, will not offer a complete defense to liability once the harm has already taken place. Notwithstanding, there are rare instances in which the law will not hold provider agencies civilly liable for certain employee conduct, such as when the conduct is "outside the scope of employment." The type of conduct meeting this exception is reserved for egregious criminal acts perpetrated against service recipients. One example discussed by the case law, which met the exception, was where a DSP deliberately scalded a service recipient without provocation.

DSPs are the agency employees with the most sustained contact with service recipients and, therefore, present the greatest risk of litigation. Consequently, it is important for Community Providers to be aware of the legal principles which are likely to result in the agency being held liable for the actions of its employees.

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