

# I'm from the Government— and I'm Here to Help You

## Case C

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Jay Carlos had been thinking that everything was going just a tad too well to last. For the first time in a long time, there were no fires to put out. After five business start-ups and 20 years as an entrepreneur, he knew that crisis management is the rule rather than the exception in small business. His premonition was realized when the phone rang and Kris, the Program Services Director for his chain of homes for the mentally retarded said "An OSHA<sup>1</sup> inspector named Olive Stone just walked in the door and wants to review our blood-borne pathogen policy and employee hepatitis vaccination procedure. What should I do?"

## Case Outline

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## C-1 Industry and Company Background

It was in the mid-1970's that the national attitude toward the mentally retarded started changing. Prior to that time, most mentally retarded adults were cared for either in their parents' or another relative's home, or were placed in large state hospitals along with the mentally ill. As parents aged or relatives were unavailable, most retarded eventually wound up residing in the large state institutions. "Treatment" consisted largely of chemical restraints (drugs) to inhibit aggression, and confinement to protect the public from their occasionally erratic and antisocial behavior.

Gradually, however, a more enlightened attitude toward the mentally retarded developed. Social service professionals recognized that the mentally retarded were capable of living fuller lives, that most of their socially maladaptive behaviors derived from emotional immaturity and arrested developmental processes, and that a more normalized living environment not based on a medical model could be a less expensive alternative to hospital care.

An industry was created as the market responded to state governments' calls to contract with non-profit or profit-making private institutions willing to provide specialized behavioral treatment in a more normalized home environment for the retarded. As with most industries, market niches and specializations developed. Some homes specialized in the profoundly retarded, those with the lowest level of mental abilities and in need of the greatest degree of physical care. Others specialized in the severely, moderately, or only mildly retarded. Some homes were owned and operated by large, nation-wide corporations, usually chains of nursing homes that had decided to enter the new market; others were developed by church-affiliated or philanthropic non-profit foundations, and still others were small businesses developed by psychologists or other entrepreneurs who saw an opportunity for profitable investment.

East Hampshire Homes was one of the latter. Jay Carlos and his wife Leigh were a businessman/entrepreneur and registered nurse, respectively, in Concord, New Hampshire, when a local delegation of parents and relatives of institutionalized mentally retarded adults approached them. It was they (the relatives) who proposed to the Carloses that they build a home for the mentally retarded as a business venture, with the hope that the result would be a facility available to their institutionalized sons and daughters.

Jay and Leigh Carlos knew little about the mentally retarded, but were always interested in investment opportunities. After six months of study, they decided the potential return was worth the risk. Two years, \$250,000 in investment capital, and numerous regulatory and legal hurdles later, they opened their first home. Fifteen years later, they were operating a small two-home chain with a total of 23 beds, over 100 employees, and an adult day-care program for their residents. In addition, the site was already acquired for the next eight-bed home, and ground would soon be broken on an expanded day-care center.

## C-2 Blood-Borne Pathogens and Hepatitis B<sup>2</sup>

Leigh Carlos, RN, MSN, FNP<sup>3</sup>, as head of East Hampshire's medical services, was responsible for company compliance with federal, state, and local health and safety regulations. As such, she had carefully considered the risks associated with blood-borne pathogens in general and with hepatitis B in particular.

East Hampshire's homes were not "skilled nursing" facilities. That is, while they employed nurses (mostly Licensed Practical Nurses) and oversaw the medical and physical well-being of their residents, they did not provide round-the-clock, skilled nursing care. Unlike a hospital or nursing home, injections were unusual and staff contact with blood or other bodily fluids was rare.

Risk of exposure to blood-borne pathogens such as hepatitis B was, Leigh felt, far less than in an acute-care or nursing facility. It was, however, higher than in other work environments. East Hampshire Homes had developed, over the years, into an organization that specialized in mild-to-moderate mentally retarded residents with severe behavioral dysfunctions. Many of its residents exhibited violent behavior patterns, which were controlled with a combination of medications and behavioral programming directed by company psychologists. When residents did become physically aggressive they had to be physically restrained, and in some instances staff were in danger of resident biting or scratching behavior that could result in exposure to the hepatitis pathogen.

Leigh took the risk of such exposure seriously. As the organization's population of residents with such behavioral disorders grew, she addressed the question of staff risk in a businesslike manner. First, she carefully investigated Federal occupational safety regulations to determine what the company's obligations were. Then, within the scope of those regulations, she developed what she thought was a cost-effective compliance policy to provide for an adequately safe environment for her employees.

The OSHA (Occupational Safety and Health Act) regulations appeared to provide her with a significant amount of discretion. From 29 CFR 1910.1030(a):

For Ambulatory Residential Facilities: It is the employer's responsibility to determine which job classifications involve occupational exposure. The employer is only required to make the vaccine available and provide the other protections . . . to those employees having occupational exposure. Occupational exposure is defined as reasonably anticipating exposure to blood or other potentially infectious materials as the result of performing one's job duties.

Leigh believed that her employees were significantly less at risk than those of acute care facilities. In addition to the lack of skilled nursing services, the East Hampshire client population was a relatively stable one. Of the 23 beds, only one or two typically turned over to a new resident each year. Staff turnover rates, on the other hand, were typical of the industry at 35–40% per year. Leigh therefore reasoned that the way to control exposure to the pathogen was by immunizing all of the residents and requiring that all potential new residents be tested for hepatitis B before being admitted to any East Hampshire facility. A positive test result would preclude admission. If no residents brought the pathogen with them, there would be no possibility of staff exposure from that source.

Of course, some risk of exposure from other staff members still existed, but Leigh reasoned that this risk was no greater than that faced in the normal course of employment in our society. The risk was the same as for an employee at the grocery store, the bank, or any other place of work. This normal risk, she felt, did not call for any special action by East Hampshire beyond the vaccination of residents.

### C-3 Jay's Story

"Kris, I'm not sure what we should do here. We don't have an employee vaccination program, and our understanding has been that we don't need one. I think we need some quick legal advice. You say the OSHA inspector named Olive Stone is in the office now? OK. Keep her waiting there . . . tell her the home office is consulting on our response and we'll be right back to you. I'm calling our attorney right now. Offer her coffee and be polite."

Jay immediately called his attorney, Fred Fleagle. Fred had been the Carloses' business attorney for four years, since leaving office as the state Attorney General and running a losing race as the Republican candidate for U.S. Senator. He was very politi-

cally connected in the state and had excellent contacts with his former colleagues in the state bureaucracy, an important consideration, the Carloses felt, in an industry as heavily regulated by state and Federal agencies as theirs.

Fred's response to the situation was immediate: "Don't let her inspect without a search warrant," he said. "Understand that you're not trying to be difficult or contrary, but without a search warrant you have no ability to limit the scope of her inspection and you have no idea what she is looking for. Politely ask her to return another day with a search warrant so that we have a legal trail to follow if we object to her findings and want to appeal."

Jay said he would do that, and Fred emphasized remaining polite and cooperative but firm about the need for a warrant. Jay then suggested that he might himself call the person in the state department office who oversaw financial and contractual relationships between the state Department of Health and Welfare and homes for the mentally retarded. "After all, they may have some guidance for us here. If OSHA is going to require hepatitis vaccinations for all employees of homes like ours, that will cost the state millions of dollars. Their own legal department might want to become involved." Fred thought that was a good idea.

Jay called Kris, the Program Director, back and gave him instructions for the OSHA inspector. He emphasized being polite but firm. Then he called the head of the state agency overseeing group homes for the mentally retarded, Mr. B. Yuri Kratt. Jay had known Yuri and worked with him for over 10 years now, ever since Yuri had been promoted into the job, and their relationship was a good one as Jay had worked hard to develop positive working relationships with key state department representatives. Yuri listened to Jay's story and immediately agreed that the implications of OSHA requiring employee hepatitis vaccinations were substantial for the state's budget, as such a cost would form part of the underlying cost structure of the industry which, eventually, the taxpayers of New Hampshire paid for. He said he would call their own legal department and see if they had any advice and would like to intervene in East Hampshire's defense.

## C-4 One Hour Later

Jay felt he had now done what he could do for the short term and that the situation, while not a pleasant one, was at least under control. He had never before had any contact with OSHA inspectors, but his general impression from media reports and business colleagues was not a positive one.<sup>4</sup> He had heard many horror stories about the agency overstepping its authority. But he had no personal experience with such actions, and was inclined to believe that, since East Hampshire had carefully followed the regulations and procedures required on this matter, they would be okay. He did take the time to pull a file folder with his notes from several years earlier when he and Leigh had considered the matter and implemented the screening policy. What he found reassured him that they were in compliance. His attorney's advice had been followed, and his contacts in the state department were thinking of providing assistance.

The phone rang. "Jay, Yuri here. I have some bad news for you. I want you to listen carefully to what I'm saying. And then I want you to make another phone call. First, our legal department will not help you. They say flatly that they will not under any circumstances tangle with OSHA. We're staying out of it. Period. And that's from the top—Legal made a quick call to the Director and he says the same. Don't touch OSHA."

"Second, I want you to call Warren Belle at New Horizon Homes over in Manchester. You know Warren. He has a story to tell you. I can't tell it—but he can. Just call him."



## C-5 Warren's Story

Jay put the phone down with some concern. Yuri hadn't sounded the same during the second phone call. He was clearly speaking between the lines, and what he seemed to be saying was that the state bureaucrats themselves were afraid of OSHA. Warren Belle at New Horizon Homes was an East Hampshire competitor, but competition in this industry was often on friendly terms. Jay had known Warren for several years. He made the call.

Warren was in the office and took the call, listening to Jay recount the morning's events. When he heard the word OSHA he stopped him. "Jay—I've got only one thing to say, and I suggest you listen to it. Do whatever they ask you to do. Do it now. Do it exactly the way they ask you to do it. Do it no matter what it costs. Don't fight. And don't listen to your lawyer.

"Jay," said Warren, "OSHA came by here two months ago. We had exactly the same policy in effect that you do now. We did exactly what you have done and called our attorney, and he gave the exact same advice to require a warrant. The OSHA inspector came back the next day with a warrant and six of his buddies. They started at one end of our building and went to the other, and within a few hours we had accumulated \$13,500 in fines. One of the fines was for \$2,500 because we had not posted a detailed list of the chemical ingredients in the Dawn Dishwashing Soap in the kitchen. Then the inspector said 'Are you ready to do what we want, or do we have to come back tomorrow to accumulate another \$13,000 in fines?' We wound up doing what they wanted, which was to implement a vaccination program, and we still had to pay the \$13,500 in fines."

"But Warren," said Jay, "the regulations are clear. We're an exception and don't have to have the vaccination program if our people aren't at risk. You know that a hepatitis B vaccination series costs \$180 per person. Taking into account staff turnover, such a program would cost us almost \$30,000 per year."

"Jay, do you know how OSHA gets its budget?" asked Warren. "Were you aware that they have almost no budget other than what they collect from fines?<sup>5</sup> Do you know they get to retain the fines they collect to finance their own operations? Do you know that there is no statutory limit to the amount of the fine they can levy for even the smallest offense?<sup>6</sup> Do you know that there is no appeal outside the agency other than a full-blown and expensive court case?<sup>7</sup> Do what they say. Do it now. Don't mess around with these guys. They're like a goon squad. You don't fight—you just hand over your wallet and hope they don't beat you up."

Jay hung up the phone with a different perspective.

## C-6 Fred's Advice

Jay knew he had another call to make immediately. He picked up the phone and dialed Fred Fleagle's number again. Fred took the call right away, and Jay told him Warren's story.

"Well, Jay," said Fred, "I have to admit that I've heard some nasty stories about OSHA. But after you called this morning I rechecked the regulations on this thing just to refresh my memory and to make sure your policy fits. It couldn't possibly be clearer. Your policy is directly in line with the regulations. Admittedly there is room for some interpretation of what constitutes an 'at risk' employee, but the regulation leaves that interpretation in the hands of the employer. I think you're absolutely in the right here and should stand up for your rights. If they come back with a warrant, let them in. If they wind up fining you or demanding that you implement a vaccination program, we'll just take them to Federal court. And we'll win."

"Yes. And tell me, Fred, how long will that take, and at \$150 per hour what will it cost me to win?"

"Well, Jay, it could take some years to come to an absolute conclusion. And I won't say it would be cheap. The government has access to plenty of staff lawyers of course and you can't get your costs back even when you prevail."

"That doesn't sound encouraging, Fred."

"Yeah, Jay, but damn it, this is the sort of thing that someone has to stand up to. It's the kind of big government bullying that I ran for the Senate to try to put an end to. You know, that's another option for us. I'm pretty politically connected in this state. We have a Republican Governor, one Republican Senator, and a Republican Statehouse. I could make a few phone calls—see if we can't get these OSHA guys to call off the dogs. Whattya want me to do?"

## Endnotes

1. OSHA (the Occupational Safety and Health Administration) was created as a Federal agency by the Occupational Safety and Health Act of 1970 (Public Law 91-596). The ambitious goals of the agency are "To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes." To these ends, the Agency has broad authority to institute, interpret, and enforce occupational health and safety regulations, including substantial power to levy and collect fines. The agency (as of 2001) employs over 2,100 inspectors, working out of over 200 local offices spread throughout the country, and conducts surprise visits to job sites (the OSHA Act provides for a \$1,000 fine for anyone revealing that an OSHA inspection is about to occur).
2. Health professionals may be aware that since this case occurred, the Federal government has moved to require widespread hepatitis B vaccination for both employers and students in public schools and universities. As of the incident recounted in this case, however, such was not the case.
3. MSN=Masters of Science in Nursing; FNP=Family Nurse Practitioner
4. Jay's impressions are not uncommon. OSHA itself recognizes its public image problem. The OSHA website (see <http://www.osha.gov>) states frankly (as of October, 2001) "in the public's view, OSHA has been driven too often by numbers and rules, not by smart enforcement and results. Business complains about overzealous enforcement and burdensome rules. Many people see OSHA as an agency so enmeshed in its own red tape that it has lost sight of its own mission. And too often, a "one-size-fits-all" regulatory approach has treated conscientious employers no differently from those who put workers needlessly at risk.
5. This comment by Warren is not strictly true. OSHA does have its own budget. Fines, however, are retained by the agency and add to their operational resources.
6. Warren's statement is not quite correct. The Occupational Safety and Health Act of 1970 (Public Law 91-596, 91st Congress, S.2193, December 29, 1970) states: "Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation." On November 5, 1990, Pub. L. 101-508 amended the Act by increasing the penalties for willful or repeated violations of the Act in section 17(a) from \$10,000 for each violation to "\$70,000 for each violation, but not less than \$5,000 for each willful violation," and increased the limitation on penalties in sections (b), (c), (d), and (i) from \$1000 to \$7000 for serious and other-than-serious violations, failure to correct violative conditions, and violations of the Act's posting requirements. For all practical purposes, however, short of a full-blown civil case against the government, the Agency determines what constitutes either a "serious" or a "willful" violation, and also determines what constitutes "each" violation (every day a condition exists could potentially be a new violation with additional maximum penalties).
7. The Occupational Safety and Health Act of 1970 states "Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 10 may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside."