



# CHILD CARE LAW CENTER

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## Questions & Answers about the Americans with Disabilities Act: A Quick Reference for Child Care Providers Updated October 2012

### 1. What is the ADA?

The Americans with Disabilities Act (ADA) is a federal civil rights law that Congress passed in 1990.<sup>i</sup> Among other things, the ADA prohibits discrimination by child care centers and family child care providers against individuals with disabilities.<sup>ii</sup> The ADA Amendments Act of 2008 revised the ADA's definition of disability to broaden the reach of the law's protections.<sup>iii</sup> It reinforced the ADA's focus on whether discrimination has occurred, rather than on whether the person claiming discrimination has a disability.

The ADA allows states to provide greater protection for people with disabilities.<sup>iv</sup> In California, additional state laws protect people with disabilities. These laws include the Unruh Civil Rights Act, which guarantees full and equal privileges and services in all business establishments of every kind whatsoever.<sup>v</sup> They also include the California Disabled Persons Act, which states that people with disabilities or medical conditions have the same right as the general public to the full and free use of public places.<sup>vi</sup> A child care provider that violates the ADA also violates the Unruh Civil Rights Act and California Disabled Persons Act.<sup>vii</sup>

### 2. Who is protected by the ADA?

Three groups of people receive protection under the ADA. They are:

- People with a **physical or mental impairment** that **substantially limits** one or more **major life activities**;
- People with a **record (history)** of a physical or mental impairment that substantially limits one or more major life activities;
- People who are **regarded as** having a physical or mental impairment that substantially limits one or more major life activities.<sup>viii</sup>

### 3. What constitutes a physical or mental impairment?

The term is defined in the Code of Federal Regulations and includes many conditions.

- Physiological conditions, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine
- Intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities

- Contagious and noncontagious conditions such as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, intellectual disability, emotional illness, specific learning disabilities, HIV/AIDS, tuberculosis, drug addiction, and alcoholism.<sup>ix</sup>

Even if a condition is episodic or in remission, it is a disability if it would substantially limit a major life activity when it is active.<sup>x</sup> Similarly, the condition is a disability if it would substantially limit a major life activity without any mitigating measures, even if mitigating measures such as medication, equipment, or accommodations (with the exception of ordinary eyeglasses or contact lenses) ameliorate the condition's effects.<sup>xi</sup>

#### **4. What is a major life activity?**

The very broad list of major life activities includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working,” as well as the operation of a major bodily function, including but not limited to, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>xii</sup>

#### **5. Do child care providers have to comply with the ADA?**

**Yes.** The Title III of the ADA applies to all places of public accommodation, and almost all child care providers are places of public accommodation.<sup>xiii</sup>

#### **6. What is a public accommodation?**

The ADA provides a list of specific places that are considered public accommodations including “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education” and “day care center(s).”<sup>xiv</sup> These private entities are considered places of public accommodation because they hold themselves out to the public as a business. A child care provider, whether operating out of a center or a family child care home, is a place of public accommodation.

#### **7. My program operates as license-exempt. Am I still required to comply with the requirements of the ADA?**

**Yes.** State law determines what programs are required to be licensed and what programs can operate as license-exempt. The ADA is a federal law and is not affected by state licensing law. Therefore, license-exempt programs are required to comply with the ADA if they are places of public accommodations, and almost all child care providers are public accommodations.

#### **8. My program is run by a religious entity. Am I still a “public accommodation” that must comply with the ADA?**

No. Title III of the ADA contains an exemption for religious entities, and by extension for the child care programs they run.<sup>xv</sup> Merely operating in a religious building does not meet the ADA exemption.

Other disability laws may apply to child care providers run by religious entities. There is no religious exemption under the Section 504 or the Rehabilitation Act of 1973. Section 504 applies to any program that receives federal funds, and prohibits discrimination on the basis of disability under standards that are nearly the same as those used in the ADA.<sup>xvi</sup> A child care program run by a religious entity may also be covered under California's Unruh Civil Rights Act and Disabled Persons Act, if it sells its basic child care activities or services to nonmembers and nonbelievers, and attendees are not required to adhere to the religious entity's beliefs or values.<sup>xvii</sup>

### **9. What does the ADA require of providers?**

The ADA prohibits providers from excluding people because of their disabilities. It prohibits admissions policies that screen out or tend to screen out persons with disabilities.<sup>xviii</sup> A provider has to make a case-by-case assessment of what a child with a disability requires to be integrated into the provider's program. Once the provider knows what is needed, the provider must assess whether accommodations can be made to include the person.<sup>xix</sup> A provider does not have to make an accommodation if the child qualifies as a person with a disability only under the "regarded as" standard described in Question 2 above.<sup>xx</sup>

### **10. What types of accommodations does the ADA require?**

The ADA sets out three primary types of accommodations:

- Changes in policies, practices, or procedures;<sup>xxi</sup>
- Provision of auxiliary aids and services to ensure effective communication;<sup>xxii</sup> and
- Removal of physical barriers in existing program facilities.<sup>xxiii</sup>

### **11. How does a program determine the reasonableness of a requested modification?**

In practical terms, what is reasonable will vary. The accommodations must be based on individualized assessments of the child's needs and the program's ability to make the necessary modifications. Generally, the three most important variables are (1) the needs of a person with a disability, (2) the accommodations requested, and (3) the resources available to the program. A family child care home that has fewer resources and a smaller staff may not be required to make the same accommodation required of a larger center.

The ADA requires child care programs to make accommodations in the areas described in Question 10 unless:

- In cases of changes in policies, practices or procedures, the accommodation would **fundamentally alter the nature of the program or services offered**,<sup>xxiv</sup>
- In the case of auxiliary aids and services, the accommodation **would fundamentally alter the nature of the program or pose an undue burden** (i.e., pose a significant difficulty or expense);<sup>xxv</sup>
- In the case of the removal of physical or structural communication barriers, the accommodation is **not readily achievable**.<sup>xxvi</sup> If removal of such a barrier is not

readily achievable, the ADA requires providers to make services available through alternative methods if such methods are readily achievable.<sup>xxvii</sup>

Child care providers should begin the process of identifying reasonable modifications by talking with the parent(s) or legal guardian about the child's needs and the accommodations sought. If the child has an individualized family services plan (IFSP) or an individualized education plan (IEP) to meet his or her educational needs as required under the Individuals with Disabilities Education Act, the provider can look to the IEP for information about what services and accommodations a school is providing to help the child attain his or her educational goals. An IFSP or IEP is only one tool for determining accommodations, and not the definitive answer as to what is reasonable. If an informal resolution between the parents and provider were not possible, a court would ultimately decide what is reasonable.

### **12. Who within a particular program makes accommodation decisions?**

It depends on the particular program. In a private child care program, the center director or family child care provider would most likely make these decisions. For a program that is run in conjunction with a school or on a school site, the answer is more complicated. A private program that is simply renting space from a school will likely have the autonomy to make decisions regarding admissions policies, program modifications and auxiliary aids and services, but will have to consult with the school or school district about facility modifications. If the program is run by the school, then the person in charge of that school (usually a principal or superintendent) would make the accommodations decisions for the program.

It is important to note that a parent or guardian can always disagree with a program's accommodations decisions. Ultimately, a court of law would make a final determination about what is reasonable in a particular situation.

### **13. What do I do when another parent makes inquiries about a child with disabilities?**

Information about a child's disability is confidential and should not be shared with others unless you have consent from the parents of the child with the disability. If you have a respectful relationship with the parents, you may be able to have a conversation with them about how they would like to see you handle inquiries about their child's disability from the parents and the children. Some parents will prefer that information about their child's disability continue to be kept confidential while others may welcome the opportunity to share with other families the nature of their child's disability. If a family chooses to share information about their child and his or her disability, it can provide valuable learning opportunities for all the children in the program.

Once again, one of the best ways to respond to other families is outside of the context of a particular child by providing general information about what quality care is all about. High quality programs will provide opportunities for parent education, which should include discussions of the benefits to all children of inclusive child care.

**14. Are there a certain number of children I may care for if I care for a child with special needs?**

There is no particular number of children you may care for when you care for children with special needs, as each child with special needs is different, and there are no required staffing ratios. The provider must evaluate his/her own program, keeping in mind the special needs of each child before determining how many children with special needs the program can accommodate.

Federal law requires Head Start providers, to ensure that, at a minimum, at least 10% of the children served are children with disabilities.<sup>xxviii</sup>

**15. Can I charge more for a child with special needs because they require more individualized attention? If I cannot, how will I survive financially?**

Programs may not charge more for a child with a disability to cover the costs of measures required to provide the child with nondiscriminatory treatment.<sup>xxix</sup> Programs may raise their fees to all families, use tax credits or deductions available from the IRS if they are for-profit programs which pay taxes, or seek resources from outside their programs.

Programs may charge parents for the cost of providing additional, non-child care services, such as physical therapy, occupational therapy and the like (if they are not already paid for by IDEA Part C funds or the local school district). Keep in mind that in many instances, the reasonable accommodations which are necessary are not very costly, and in some cases, such as improving staffing ratios, could benefit all the children in care. Please see our Publication, entitled “Questions and Answers about the IDEA & Child Care in California” for more information on how to apply for special education services for your child.

**16. When I care for a child with special needs who receives a subsidy, may I receive any additional money?**

Yes, there are special needs rates and additional funding that may be obtained when caring for “children with exceptional needs” and “severely disabled children.” These terms are defined in the Education Code. To qualify as a child with exceptional needs, a child must be eligible for early intervention services or for educational services.<sup>xxx</sup> A “severely disabled child” is a child “who require[s] intensive instruction and training in [a] program serving pupils with an enumerated profound disability.”<sup>xxxi</sup> However, the additional money cannot be charged to the parents, but must be billed to the funding entity. The adjustment rate for children with exceptional needs is 1.2 times the standard reimbursement rate and 1.5 times for severely disabled children.<sup>xxxii</sup>

**17. I understand that programs may not discriminate, but in addition I want to be clear that my program welcomes children with disabilities. How do I say that in my brochure?**

Your materials may include language that states that your “program is fully accessible” or that your teachers “have experience in caring for children with disabilities.” This goes

beyond what is required by law, but is helpful to make your facility visible as one that promotes inclusion.

**18. How can I care for children with disabilities if I am not trained or if I work on my own?**

Many of the accommodations children need are not complicated and can be learned easily. If you work on your own, necessary accommodations can often be made without additional staffing. In other instances, where training is helpful or necessary, it may be available from the parent, early intervention or special education specialists, health professionals, disability organizations, local resource and referral agencies, or community colleges. An important first step is to identify community resources that can assist with inclusion.

**19. May I automatically decline to serve a child with disabilities and simply refer them on to another provider who I think is better able to serve them?**

**No.** A parent may prefer your care and if it is possible for you to make the accommodations necessary to serve that child, without imposing a fundamental alteration or undue burden on your program, the child may not be turned away and referred to another program. If a program can document that it undertook an individualized assessment of the situation and found that it could not accommodate the child, the program may then offer suggestions for other potential care.

**20. Shouldn't providers get to choose who they enroll since it is their business?**

By deciding to become professional caregivers, providers become responsible for complying with many types of laws. Like licensing laws, civil rights laws such as the ADA, the Unruh Civil Rights Act, and the California Disabled Persons Act, are a cost of doing business. Civil rights laws protect children, by protecting them and their families from discrimination. Their protections benefit all of us, as any of us could become a person with a disability at any time, and any of us could become the family member or loved one of a person with a disability.

**21. If a parent of a child with a disability has conflicts with the provider or the parent fails to comply with rules applied to all families, can the family be terminated from the program?**

Yes, if it can be documented that the reasons for termination have to do with failure to comply with rules or standards that are uniformly applied to all families, not relevant to any potential required accommodations, and are not used as pretexts for discrimination.

**22. Can I be sued by other parents for taking a child with disabilities?**

While it is impossible to guarantee a provider will not be sued, it is extremely unlikely that a parent who sues you only because you are caring for a child with disabilities would be successful. The provider has an obligation to comply with the ADA and it is unlikely that a provider's lawful compliance would open the provider up to civil liability. One way for a

high quality program to respond to the concerns of all parents in the program is to provide opportunities for parent education about the benefits of inclusive child care for both typically developing children as well as those with disabilities.

### **23. What can individuals do if they feel they have been discriminated against?**

Individuals may file a complaint with the Department of Justice (DOJ) in Washington, D.C. about a potential ADA violation. Written complaints should include the full name, address and telephone number of the person filing the complaint, the name of the person discriminated against, the name of the program which engaged in the discrimination, a description of the discrimination, the date or dates on which it occurred, the name(s) of those individuals discriminating, any other information that you believe is necessary to support your complaint, and copies of any relevant documents (originals should be kept in a safe place). This should be sent to:

U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Civil Rights Division  
Disability Rights – NYAVE  
Washington, DC 20530

There is no deadline for filing a complaint under the ADA but it is recommended that complaints be filed promptly. Typically, the older a case becomes, the more difficult it is to come up with reliable proof and witnesses. Additionally, there is an increased chance the case may be dismissed for failure to pursue it.

The DOJ will investigate the complaint. DOJ attempts to resolve most complaints through informal or formal settlement agreements, but may file lawsuits in federal court to enforce the ADA. Courts may order compensatory damages and back pay to remedy discrimination if the DOJ prevails. Under title III, the Department of Justice may also obtain civil penalties of up to \$55,000 for the first violation and \$110,000 for any subsequent violation.

A California parent who believes that his or her child is currently being excluded on the basis of disability can also contact Disability Rights California (DRC), at (800) 776-5746. DRC is the state protection and advocacy organization for people with disabilities.

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#### **Endnotes**

These endnotes provide legal citations for the information above. To look up the laws that apply to you, visit your local law library. If you are having trouble understanding these citations, please speak with a reference librarian in your local law library. Do not hesitate to look up the law and know your rights.

<sup>i</sup> Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (2009)

<sup>ii</sup> 42 U.S.C. §§ 12181 (7)(K)(day care centers and other social service center establishments are public accommodations) and 12182 (a) (it is illegal for public accommodations to discriminate against individuals on the basis of disability).

<sup>iii</sup> Americans with Disabilities Amendments Act of 2008 (P.L. 110-325), 42 U.S.C. §§ 12101 (findings and purposes of ADA Amendments Act of 2008) and 12101 (definition of disability).

<sup>iv</sup> 28 C.F.R. § 12201(b).

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- <sup>v</sup> Cal.Civ. Code § 51(b).
- <sup>vi</sup> Cal. Civ. Code § 54(a).
- <sup>vii</sup> Cal. Civ. Code §§51(f)(a violation of the ADA is a violation of the Unruh Civil Rights Act) and 54(c)(a violation of the ADA is a violation of the California Disabled Persons Act).
- <sup>viii</sup> 42 U.S.C. § 12102(1).
- <sup>ix</sup> 28 CFR § 35.104(1).
- <sup>x</sup> 42 U.S.C. § 12102(4)(D).
- <sup>xi</sup> 42 U.S.C. § 12102(4)(E).
- <sup>xii</sup> 42 U.S.C. § 12102(2).
- <sup>xiii</sup> See supra note 2.
- <sup>xiv</sup> 42 U.S.C. § 12181(J) and (K).
- <sup>xv</sup> 42 U.S.C. § 12187 (“The provisions of this subchapter shall not apply to . . . religious organizations or entities controlled by religious organizations....”).
- <sup>xvi</sup> 29 U.S.C. § 794, *et seq.*
- <sup>xvii</sup> See Stevens v. Optimum Health Institute--San Diego, 810 F.Supp.2d 1074, 1088-1090 (S.D. Cal. 2011)(religious organization which operated holistic health program was a “business establishment” pursuant to California's Unruh Civil Rights Act and a “public accommodation” pursuant to California's Disabled Persons Act for purposes of suit by blind woman who claimed she was denied access because of her disability), citing Warfield v. Peninsula Golf & Country Club, 10 Cal. 4th 594 (1995).
- <sup>xviii</sup> 42 U.S.C. § 12182(b)(2)(A)(i) (2006); 28 C.F.R. § 36.302 (2006).
- <sup>xix</sup> 42 U.S.C. § 12182 (2006); 28 C.F.R. § 35.130(b)(7) (2008).
- <sup>xx</sup> 42 U.S.C. § 12201(1)(h) (2009).
- <sup>xxi</sup> 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302.
- <sup>xxii</sup> 42 U.S.C. § 12182(b)(2)(A)(iii); 28 C.F.R. § 36.303.
- <sup>xxiii</sup> 42 U.S.C. § 12182(b)(2)(A)(iv); 28 C.F.R. § 36.304.
- <sup>xxiv</sup> 42 U.S.C. § 12182(b)(2)(A)(i)(ii); 28 C.F.R. § 36.30; 42 U.S.C. § 12134; 28 C.F.R. § 35.130(b)(7)(8).
- <sup>xxv</sup> 42 U.S.C. § 12182(b)(2)(A)(iii); 42 U.S.C. § 12134; 28 C.F.R. § 35.130(f). U.S. Dep’t of Justice, Title II Highlights(2002) available at <http://www.usdoj.gov/crt/ada/t2hlt95.htm>. U.S. Dep’t of Justice, Title III Highlights available at <http://www.ada.gov/t3hiltght.htm>.
- <sup>xxvi</sup> 42 U.S.C. § 12182(b)(2)(A)(iv).
- <sup>xxvii</sup> 42 U.S.C. § 12182(b)(2)(A)(v).
- <sup>xxviii</sup> 42 U.S.C. § 9835(d)(1).
- <sup>xxix</sup> 28 C.F.R. § 36.301(c).
- <sup>xxx</sup> Cal Educ. Code § 8208(l).
- <sup>xxxi</sup> Cal. Educ. Code § 8208(y). A profound disability includes “autism, blindness, deafness, severe orthopedic impairments, serious emotional disturbances, or severe mental retardation.”
- <sup>xxxii</sup> Cal. Educ. Code § 8265.5(b)(4)-(5).