



Out of School Programs and the Americans with Disabilities Act Updated March 2009

Out of school programs serve a diverse population of students in a variety of settings. Many programs operate on tight budgets and aim to serve all those who need out of school care. When a person with disability wishes to attend a program, what responsibilities does the provider have? This memo discusses the federal law that protects individuals with disabilities from discrimination.

1. What is the Americans with Disabilities Act?

The Americans with Disabilities Act (ADA) is a federal civil rights law which was passed in 1990. Among other things the ADA prohibits discrimination by both public entities such as school districts and places of public accommodation, including after school programs and family child care homes.¹

The ADA Amendments Act of 2008, which took effect January 1, 2009, strengthens protections for people with disabilities.² It reinforces the focus of the ADA on whether covered entities complied with the statute and not on simply whether a person has a disability.

States may provide greater protection for people with disabilities than what is guaranteed by the ADA.³ In California, the Unruh Civil Rights Act prohibits all business establishments, including after school providers, from discriminating on the basis of disability.⁴

2. Who is protected by the ADA?

Three groups receive protection under the ADA. They are:

- People with a **physical or mental impairment** which substantially limits one or more major life activities. Corrective measures such as medication or glasses are taken into account when determining whether a person has a substantial limitation;
- People with a **history of** physical or mental impairment which substantially limits one or more major life activities;
- People who are **regarded as** having a physical or mental impairment which substantially limits one or more major life activities.⁵

3. What constitutes a physical or mental impairment?

The term is defined in the federal code of regulations and includes many conditions and diseases. Physical impairment includes:

- Physiological disorders or conditions;
- Cosmetic disfigurement; OR

- Anatomical loss affecting one or more bodily systems.

Mental impairment includes:

Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The Federal Code of Regulations also contains a long list of contagious and noncontagious diseases and conditions including orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.⁶ Note, that an impairment that is “episodic or in remission is a disability if it would substantially limit a major life activity when active.”⁷

In the past, the mitigating effects of medications, equipment and other auxiliary aids were factored into the determination of whether or not someone qualified as having a disability. The ADA Amendments Act of 2008 changes that. With the exception of ordinary eyeglasses or contact lenses, efforts made by a person to lessen the severity of their disability should not be taken into account when determining whether a person has a disability.⁸ In other words, in determining whether someone is protected by the ADA, what matters is whether a person has a physical or mental impairment and not what that person does to mitigate the effects of that disability.

4. What is a major life activity?

The definition of a major life activity was clarified by the ADA Amendments Act of 2008. It 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 major bodily functions.⁹

5. Do out of school providers have to comply with the requirements of the ADA?

YES. The ADA applies to out of school providers. Programs run by school districts or schools are public entities regulated by Title II, while for-profit or non-profit private programs are places of public accommodations regulated by Title III. Religious entities, however, are exempt from the ADA.¹⁰

6. What is a public entity?

A public entity is (1) any state or local government; (2) any department, agency, special purpose district, or other instrumentality of a State or States or local government.¹¹ Out of school providers that are run by a school district or a local educational agency are most likely considered a public entity and are governed by Title II of the ADA.

7. 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).” These private entities are considered places of public accommodation because they hold themselves out to the public as a business.¹² An out of school provider, whether operating out of a center or a family child care home, is a place of public accommodation.

8. Why does it matter whether I am categorized as a public entity or a public accommodation?

The ADA is divided into three different sections, known as “titles.” As mentioned in question 6, public entities are covered by Title II and public accommodations are covered by Title III¹³. Although there are many similarities between Title II and Title III, there are places where they differ and those distinctions can be important for providers and parents. Therefore, we highlight differences between Title II and Title III.

9. 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 either public entities or public accommodations.

10. My program is run by a religious entity do I still have to comply with the ADA?

No. Title III of the ADA contains an exemption for religious organizations or entities controlled by religious organizations.¹⁴ Merely operating in a religious building does not meet the ADA exemption.

It is also important to note that California has a law, the Unruh Civil Rights Act, which is more expansive than the ADA and covers all business establishments. The Unruh Act contains no exemption for religious entities. An out of school provider that is run as a business establishment would be required to follow the Unruh Act, which requires the same individualized assessment and reasonable accommodations for people with disabilities.

11. What does the ADA require of providers?

The ADA prohibits providers from discriminating against persons simply because they have disabilities. Instead, providers have to make a case-by-case assessment of what the person with the disability requires to be fully integrated into the program. Once they know what is needed, they must assess whether reasonable accommodations can be made.¹⁵ A provider does not have to make a reasonable accommodation if a person qualifies as a person with a disability under the “regarded as” standard described in Question 2 above.¹⁶

12. What types of accommodations does the ADA require?

The ADA sets out four primary types of accommodations:

- Admissions policies that do not screen out or tend to screen out persons with disabilities¹⁷;
- Changes in policies, practices, or procedures¹⁸;
- Provision of auxiliary aids and services to ensure effective communication¹⁹; and
- Removal of physical barriers in existing program facilities.²⁰

13. How does a program determine reasonableness?

In practical terms, what is reasonable will vary. 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. Because family child care homes generally have fewer resources and a smaller staff than centers, they may be required to do less. The accommodations, however, must be based on individualized assessments of the child's needs and the program's ability to make the necessary modifications.

The ADA requires out of school programs to make accommodations in the areas described in Question 11 unless:

- In cases of changes in policies, practices or procedures under both **Title II and Title III**, the accommodation would **fundamentally alter the nature of the program or services offered**.²¹
- In the case of auxiliary aids and services under both **Title II and Title III**, the accommodation **would fundamentally alter the nature of the program or pose an undue burden** (i.e., pose a significant difficulty or expense)²²;
- In the case of the removal of physical barriers under **Title II**, the accommodation would **fundamentally alter the nature of the program or be an undue financial and administrative burden**. The ADA allows programs to provide services to individuals with disabilities through alternative methods if physical barriers are not removed²³;
- In the case of the removal of physical barriers under **Title III**, the accommodation is **not readily achievable**. The ADA allows programs to provide services to individuals with disabilities through alternative methods if physical barriers are not removed²⁴.

Child care providers should begin the process of identifying reasonable accommodations 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 also use that as a guide for determining reasonable accommodations, although these are only one tool and not the definitive answer to what is reasonable. An IEP can provide information about what services and accommodations a school is providing to help the child attain his or her educational goals. Both the parents and the provider should aim to reach an informal resolution whenever possible. If informal resolution is not possible, a court would ultimately decide what is reasonable.

14. Who within a particular program determines what is reasonable?

It depends on the particular program. In a private out of school program governed by Title III, the center director or family child care provider would most likely make this determination. 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 autonomy to determine what is reasonable with regard to 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 reasonableness determination for the program.

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

15. Are there situations in which care can be refused?

Yes, but these situations will be very limited. They include situations when:

- A child poses a **direct threat** to him or herself or the other children in the program. A direct threat means a substantial risk of harm which must be documented by objective professional evidence.²⁵
- The accommodations requested are **unreasonable** and the parent(s) and provider(s) are unable to work out a compromise.

16. Do programs have to comply with any other laws related to children with disabilities?

Yes. There are other laws, both state and federal, that protect people with disabilities from discrimination. The law most relevant to out of school providers is the California Unruh Civil Rights Act, which prohibits all business establishments, including out of school providers, from discriminating on the basis of disability. The Unruh Civil Rights Act goes further than the ADA in its protections for children with disabilities.²⁶

17. 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 other parents and the children. Some parents will prefer that information about their child's disability remain confidential while others may welcome the opportunity to share with other families the nature of their child's disability. When a family is open about a child's disability, not only does the child benefit, but there are also many benefits and advantages for the staff and children in the programs.

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

18. Does caring for children with disabilities affect my staff to child ratios? Is there a limit on the number of children with special needs I can care for?

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.

19. My out of school program has high child to staff ratios and I don't think my program is appropriate for a child with disabilities. Can I refuse to take a child on that basis?

No. This approach assumes that all children with special needs require a lower than usual child to staff ratio. Regardless of ratios, a program must make an individualized assessment of the child. The program can factor in the number of staff and the ratios when determining what is reasonable. It is important to remember that a parent may prefer your program for their child.

20. 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 the parents of children with disabilities more for providing reasonable accommodations. Programs are free to 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.

When an accommodation is above and beyond a reasonable accommodation, an additional fee may be imposed, but a legal consultation should be made beforehand with someone knowledgeable about ADA's requirements. This will both ensure that the accommodation is in fact "above and beyond" a reasonable accommodation and that there is sufficient documentation of agreement on this point.

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 the local school district). Keep in mind that in many instances, the reasonable accommodations which are necessary are not very costly and/or in the case of improving ratios, could benefit all the children in care.

21. When I care for a child with a disability 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.²⁷ In other words, the child must have an active IFSP or an IEP. A “severely disabled child” is a child “who require[s] intensive instruction and training in [a] program serving pupils with an enumerated profound disability.”²⁸ 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.²⁹

22. I understand that programs may not discriminate, but additionally 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.

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

Many of the accommodations that children need are not complicated and can be easily implemented. If a provider works on his or her own, the 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 or guardian, health professionals, disability organizations, local resource and referral agencies, or community colleges. The important thing is to identify community resources that can assist with inclusion.

24. May my program automatically decline to serve a child with a disability and simply refer them to another program or 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 reasonable accommodations necessary to serve that child, he or she 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 accommodating the child would not be reasonable, the program may then offer suggestions for other potential alternatives.

25. 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—tax laws, licensing laws—as well as civil rights laws, which in the case of ADA and the Unruh Civil Rights Law, protects people with disabilities from discrimination. It is worth remembering that any of us could become a person with a disability at any time, and we too may benefit from the protections of the ADA and the Unruh Civil Rights Act.

26. If a parent of a child with a disability has conflicts with the provider or if 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 an excuse for discrimination. For example, a recent case found that a mother's belligerence and total lack of cooperation, coupled with her failure to comply with rules imposed on everyone which had nothing to do with her child's disability, permitted a program to terminate her child.³⁰

27. Can I be sued by other parents for accepting a child with disabilities into my program?

While it is impossible to guarantee a provider will not be sued, it is extremely unlikely that a parent who sues 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 them up to civil liability. It is, however, advisable for a high quality program to provide opportunities for parent education about the benefits for typically developing children and those with disabilities to be together in child care.

28. What can individuals do if they feel they have been discriminated against?

Individuals who feel they have been discriminated against may file a complaint with the Department of Justice in Washington, D.C. about a potential Americans with Disabilities Act 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 once you decide to file. 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 your case may be dismissed for failure to pursue it.

The Department of Justice (DOJ) will investigate your complaint. DOJ attempts to resolve most complaints through informal or formal settlement agreements, but is authorized to file lawsuits. If the Attorney General brings a lawsuit, she may seek monetary damages as well as civil

penalties (\$50,000 for the first violation; \$100,000 for any subsequent violation). More information is available at: <http://www.ada.gov/t3compfm.htm>.

Endnotes

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

¹ 42 U.S.C. § 12101 et seq. (2006).

² Americans with Disabilities Amendments Act of 2008, 42 U.S.C. § 12101 et seq. (2009)

³ 28 Code of Federal Regulations § 12201(b).

⁴ California Civil Code § 51 (West 2006).

⁵ 28 C.F.R. § 36.104 (2008).

⁶ 28 CFR § 35.104(1)(i)(ii)(2008).

⁷ 42 U.S.C. § 12102(a)(4)(2009).

⁸ 42 U.S.C. § 12102(a)(4) (2009).

⁹ 42 U.S.C. § 12102(a)(2) (2009).

¹⁰ Note, however, if a religious entity is receiving any federal funds, it is prohibited from discriminating on the basis of disability under Section 504 of the Rehabilitation Act, as amended at 29 U.S.C. § 794.

¹¹ 28 C.F.R. § 35.104 (2008).

¹² 42 U.S.C. § 12181(J) and (K)(2006).

¹³ 42 U.S.C. § 12131 et seq. (2006); 42 U.S.C. § 12181 et seq. (2006).

¹⁴ 42 U.S.C. § 12187 (2005).

¹⁵ 42 U.S.C. § 12182 (2006); 28 C.F.R. § 35.130(b)(7) (2008).

¹⁶ 42 U.S.C. § 12201(1)(h) (2009).

¹⁷ 42 U.S.C. § 12182(b)(2)(A)(i) (2006); 28 C.F.R. § 36.302 (2006).

¹⁸ 42 U.S.C. § 12182(b)(2)(A)(ii) (2006); 28 C.F.R. § 36.302 (2006).

¹⁹ 42 U.S.C. § 12182(b)(2)(A)(iii) (2006); 28 C.F.R. § 36.303 (2006).

²⁰ 42 U.S.C. § 12182(b)(2)(A)(iv) (2006); 28 C.F.R. § 36.304 (2006).

²¹ 42 U.S.C. § 12182(b)(2)(A)(i)(ii) (2006); 28 C.F.R. § 36.30 (2006); 42 U.S.C. § 12134 (2006); 28 C.F.R. § 35.130(b)(7)(8)(2008)..

²² 42 U.S.C. § 12182(b)(2)(A)(iii) (2006); 42 U.S.C. § 12134 (2006); 28 C.F.R. § 35.130(f)(2008).. 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/t3hilght.htm>.

²³ 42 U.S.C. § 12134 (2006); 28 C.F.R. § 35.150 (2008); U.S. Dep't of Justice, Title II Highlights (2002) available at <http://www.usdoj.gov/crt/ada/t2hlt95.htm>.

²⁴ 42 U.S.C. § 12182(b)(2)(A)(iv) (2006); U.S. Dep't of Justice, Title III Highlights available at <http://www.ada.gov/t3hilght.htm>.

²⁵ 42 U.S.C. § 12182(b)(3)(2006).

²⁶ California Civil Code §51 et seq. (2007).

²⁷ Cal Educ. Code § 8208(l).

²⁸ Cal. Educ. Code § 8208(y). A profound disability includes “autism, blindness, deafness, severe orthopedic impairments, serious emotional disturbances, or severe mental retardation.”

²⁹ Cal. Educ. Code § 8265.5(b)(4)-(5).

³⁰ See *Beale v. Aardvark Day Care Center*, 2000 WL 33119418 (E.D. Pa.) (2000).