



Questions & Answers about the Americans with Disabilities Act in Child Care ~ Arkansas ~

1. What is the ADA?

The Americans with Disabilities Act (ADA) is a federal civil rights law which was passed in 1990.¹ Among other things, the ADA prohibits discrimination by child care centers and family child care providers against individuals with disabilities. The ADA applies to all 50 states. States may provide greater protection for people with disabilities than what is guaranteed by the ADA.²

2. Who is protected by the ADA?

Four groups receive protection under the ADA. They are:

- (1) People with a **physical or mental impairment** which **substantially limits** one or more major life activities (when determining whether one has a substantial limitation, one takes into account any corrective measures they use, such as medication);
- (2) People with a **history of** a physical or mental impairment which substantially limits one or more major life activities;
- (3) People who are **regarded as** having a physical or mental impairment which substantially limits one or more major life activities; and
- (4) People/entities **associated with people** who have a physical or mental impairment which substantially limits one or more major life activities. Note that the person/entity does not have to be related to the person with the disability.

3. Do child care providers have to comply with the ADA?

Yes. The ADA applies to all places of public accommodation under Title III.³ In most cases, child care providers are places of public accommodation. However, religious entities are exempt from the ADA.⁴

Child care facilities run by state and local government agencies, such as Head Start or a public school day care program, are also subject to the ADA under Title II.⁵

Note, the ADA also protects employees from discrimination in many child care settings, but that portion of the ADA will not be discussed here.

4. Do tribes have to comply with the ADA?

Tribal governments are not exempt from Title III of the ADA, which applies to public accommodations. However, the law applies differently to tribes than it does to non-tribal entities. Specifically, a private party may not sue a tribal entity for a violation of the ADA.⁶ Only the Attorney General, at his or her discretion, can bring such a lawsuit against a tribe. See Endnote 5 for detailed legal discussion.

However, because the Attorney General can bring a lawsuit against a tribe, it is necessary for tribal child care centers and homes to comply with the ADA in this context. Again, inclusion of children with disabilities benefits all children in any kind of child care center or home.

5. What makes a child care provider a “place of public accommodation?”

A child care provider, whether a family child care home or center, is a place of public accommodation because it holds itself out to the public as a business.

6. What does the ADA require of providers?

The ADA requires that providers not discriminate against persons simply because they have disabilities. Instead, they are 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 to allow this to happen.

7. Who determines if the accommodation is reasonable?

The ADA sets out four primary types of accommodations

- Admissions policies that do not screen out or tend to screen out persons with disabilities;⁷
- Changes in policies, practices, or procedures;⁸
- Provision of auxiliary aids and services to ensure effective communication; and⁹
- Removal of physical barriers in existing program facilities.¹⁰

Child care providers **must** make these accommodations **unless**:

- In the case of changes in policies, practices or procedures, the accommodation would **fundamentally alter the nature of the program**;¹¹
- 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);¹² or

- In the case of the removal of barriers in an existing program, the accommodations would require **much difficulty or expense**.¹³

What is “reasonable” will vary, depending on the accommodations requested and the resources available to the program. Generally speaking, less will be required of a family child care home which typically has fewer resources and staff than a center, but individualized assessments of the child’s needs and the program’s ability to accommodate always need to occur to determine what is reasonable.

It is critically important to undertake a process of dialogue with the parents to determine what accommodations are necessary and whether they are reasonable for the program to make. If there is disagreement, it should be the goal of both the parents and the provider to reach an informal resolution whenever possible.

Ultimately, if the parent and the provider cannot agree, it is a court that determines if the accommodation requested is reasonable.

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

These situations will be very limited. They include situations in which a child poses a direct threat—a substantial risk of harm to others (which must be documented by objective professional evidence) or where the accommodations needed would not be reasonable for the program to provide (see question above for the standards used to determine if an accommodation is reasonable).¹⁴

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

Not successfully. In fact, the law is to the contrary. Anyone who would interfere with a program’s rightful compliance with the law (for

example, enrolling a child with disabilities) can be sued for violating the ADA. A high quality program should provide opportunities for parent education about the benefits for typically developing children and those with disabilities to be together in child care.

10. 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. 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 program.

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 child care.

11. Are there a certain number of children I may care for if I care for a child with a disability?

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

special needs of each child before making the determination of how many children with special needs their program can accommodate.

12. Are there any minimum enrollment requirements in caring for children with disabilities in Head Start Programs?

Yes, in all Head Start programs, it is required, at a minimum, that 10% of the children served are children with disabilities.¹⁵

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

Generally, some more individualized attention may be needed for children with disabilities. Attention can still be a reasonable accommodation, and therefore a provider may not charge more for it.

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,¹⁶ 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 the services are not already covered by IDEA Part C funds, the local school district, or some other resource). 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. Please see our Publication, entitled "Questions and Answers about the IDEA & Child Care in Arkansas" for more information on how parents can apply for early intervention and special education services for their child.

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 to both ensure that the accommodation is in fact "above and beyond" a reasonable accommodation as well as to ensure that there is sufficient documentation of agreement on this point.

14. 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 welcomes children with disabilities" or that your teachers "have experience in caring for children with special needs." This goes beyond what is required by law, but is helpful to make your facility visible as one that promotes inclusion.

15. 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 easily learned. If a provider works on their 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, Resource and Referral Agencies, or community colleges. The important thing is to identify community resources that can assist with inclusion.

16. 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 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 care.

17. 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 Arkansas Civil Rights Act, 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 Arkansas Civil Rights Act.

18. 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. So 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, would cause her ADA claim to fail.¹⁷

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

(1) File a complaint with the **Department of Justice**, the federal agency that enforces the ADA.

Individuals who feel they have been discriminated against may file a written complaint with the United States 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 Title III 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 available at: <http://www.ada.gov/t3compfm.htm>.

(2) File a lawsuit under the Arkansas Civil Rights Act.

Unfortunately, Arkansas does not have a state enforcement mechanism for the Arkansas Civil Rights Act. This means there is no state agency to which a victim of discrimination under this Act can complain.

Therefore, in order to remedy a violation of this law, a person would have to hire a private attorney to bring a lawsuit. You can find an attorney by contacting the Arkansas Bar Association at 501-375-4606 or by visiting www.arkansasfindalawyer.com. Attorneys at legal services may be able to help you for little or no cost if you qualify; contact Center for Arkansas Legal Services at 1-800-950-5817 or Legal Aid of Arkansas at 1-800-234-3544. A person may simultaneously file a complaint regarding the ADA with the Department of Justice and file a lawsuit under the Arkansas Civil Rights Act

Useful Resources

- **Child Care Law Center**, San Francisco, CA. Call (415) 394-7144 or visit www.childcarelaw.org if you would like information about child care issues. We are a national and California child care support center for legal services programs. We also provide counsel and advice over the telephone. The following are some of our legal services:
 - Answer legal questions regarding child care legal issues during our telephone intake hours: Monday, Tuesday and Thursday from 12p.m. to 3p.m. (Pacific standard time)
 - Publish many useful publications. Visit our website at www.childcarelaw.org.
 - Conduct trainings for parents, teachers, community agencies, and others regarding legal issues affecting child care.
 - Occasionally we provide legal representation in impact cases.
- ◆ **Department of Justice Hotline** (between 11 a.m. and 5 p.m. EST weekdays) at (800) 514-0301 or (800) 514-0383 (TDD). DOJ Disability website: <http://www.usdoj.gov/disabilities.htm>. “Commonly Asked Questions About Child Care and the ADA” at: <http://www.usdoj.gov/crt/ada/childq%26a.htm>.
- ◆ **National Dissemination Center for Children with Disabilities**, <http://www.nichcy.org/stateshe/ar.htm>. This site has a large collection of Arkansas state resources, including parent organizations, disability organizations, and state agencies.
- ◆ **Arkansas Disability Rights Center**, at (800) 482-1174 V/TTY \ (501) 296-1775 V/TTY, or visit: www.arkdisabilityrights.org/pair.html. This is the Protection and Advocacy Center for people with disabilities in Arkansas.
- ◆ **Arkansas Department of Human Services, Division of Child Care and Early Childhood Education (DCCECE)** at 501-682-4891 (Subsidy Agency – Voucher Program), 501-682-8590 (Licensing Agency), or 800-445-3316, or visit: <http://www.arkansas.gov/childcare>. This is the **Licensing** as well as the **Subsidy Agency** for child care providers in Arkansas.
- ◆ **State Resource and Referral Contact:** Arkansas Division of Children & Early Childhood Education, 501-682-4893.
- ◆ **Arkansas Support Network** at 800-748-9768 or 479-273-0338, or visit www.supports.org. Arkansas Support Network provides a flexible and individualized system of supports which regards the family unit, not just the child with a disability, as the focus. They provide assistance and supports which enable children, even those with very severe disabilities and health care needs, to live in their homes and participate in the life of their community. They are also a collaborative partner in the Arkansas Parent Training and Information Network (PTI).
- ◆ **Arkansas Advocates for Children and Families**, (501) 371-9678 or www.aradvocates.org. This is a non-profit, non-partisan, child advocacy organization that advocates, researches, and dialogues children’s issues through lobbying, analyzing public issues, and making legislation more digestible. They do not serve individual members of the public.
- ◆ **Arkansas First Connections Program**, at (501) 682-8650, (800) 643-8258, or visit: <http://www.arkansas.gov/dhhs/ddds/FirstConn/What%20Is%20First%20Connections.html>. This is the Arkansas Infant and Toddler Program that provides Early Intervention Services to children ages 0 – 3 under Part C of the IDEA. Parents can contact them for a free assessment of their child if they feel the child may need early intervention services.

- ◆ **Arkansas Department of Special Education**, at (501) 682-4221, or visit <http://arksped.k12.ar.us/default.html> or email spedsupport@arkedu.k12.ar.us. Please contact this department if you are interested in learning more about special education services for a child age 3 or older. **Parent Support Website**, complete with listing of parental rights in special education and connection to services: <http://arksped.k12.ar.us/sections/dss.html>. **Arkansas Special Education Resource Center (ASERC)**, especially for parents with children in special education. Contact ASERC at 1-800-482-8437.
- ◆ **Arkansas Head Start**, 1-866-371-0740 or visit <http://www.arheadstart.org/>. Head Start is a nationwide, federally funded, program designed to foster healthy development of young children from low-income families.
- ◆ **Arkansas Better Chance Preschool (ABC) Program** can be contacted by calling 501-682-9699 or by visiting <http://www.state.ar.us/childcare/abcprogramstaff.htm>.
- ◆ **Boundless Playgrounds**, (860) 243-5854, www.boundlessplaygrounds.org. This nonprofit helps communities develop playgrounds that are accessible to children with disabilities.
- ◆ **Lekotek's AblePlay Website**, <http://www.ableplay.org/>. This one-of-a-kind website provides information and ratings of toys and products for children with special needs.
- ◆ **United States Access Board**, (800) 872-2253 or (800) 993-2822 (TTY), www.access-board.gov/. **This is an** independent Federal agency devoted to physical accessibility for people with disabilities and helping with accessible design.
- ◆ **National Early Childhood Technical Assistance Center (NECTAC)**, (919) 962-2001 OR (919) 843-3269 (TDD), <http://www.nectac.org/>. NECTAC provides technical assistance on numerous topics relating to early childhood, including inclusion, early intervention, quality assurance, and much more.
- ◆ **National Early Childhood Consortia for Indian Children with Special Needs (NECCICSN)**, (520) 871-7865, paulas@dns.nncs.ihs.gov. NECCICSN provides technical assistance and promotes information-sharing among tribes and other government agencies that work with children with special needs.
- ◆ **For an expansive list of Parent Training and Information Centers and Community Groups**, which provide training and information to parents of infants, toddlers, school-aged children, and young adults with disabilities and the professionals who work with their families in your state, visit www.yellowpagesforkids.com/help/ar.htm or call the **Technical Assistance Alliance for Parent Centers (the Alliance)** at (612) 827-2966 to reach the parent center in your state.

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 The Americans with Disabilities Act can be cited as 42 U.S.C. §§ 12201 et. seq.

² 28 Code of Federal Regulations § 12101(b).

³ 42 U.S.C. § 12181 et. seq.; Title III of the ADA covers public accommodations, commercial facilities, and private entities that offer certain examinations and courses related to educational and occupational certification. "Places of public accommodation include over five million private establishments, such as restaurants, hotels, theaters, convention centers, retail stores, shopping centers, dry cleaners, laundromats, pharmacies, doctors' offices, hospitals, museums, libraries, parks, zoos, amusement parks, private schools, day care centers, health spas, and bowling alleys." See U.S. Department of Justice, Civil Rights Division, Disability Rights Section, "Title III Highlights," available at: <http://www.ada.gov/t3highlight.htm>.

⁴ 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.

⁵ 42 U.S.C. § 12131 et. seq.

⁶ Tribes are not exempt from Title III of the ADA; however no private right of action can be brought against a tribal entity that violates the ADA. See Florida Paraplegic Association, Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126 (1999). Only the Attorney General can bring such an action for violation of the ADA. Tribes are not amenable to private suit, because Congress did not unequivocally express intent to abrogate their tribal sovereign immunity. Id. Note, however, that tribes have been held to be exempt from Title I of the ADA, dealing with employment. See Pena v. Miccosukee Service Plaza, 2000 WL 1721806 (S.D. Fla.) (2000).

⁷ Id.; 28 C.F.R. § 36.302 (2006).

⁸ Id.; 28 C.F.R. § 36.302 (2006).

⁹ Id.; 28 C.F.R. § 36.303 (2006).

¹⁰ Id.; 28 C.F.R. § 36.304 (2006).

¹¹ 28 C.F.R. § 36.302 (2006).

¹² 28 C.F.R. § 36.303 (2006).

¹³ 28 C.F.R. § 36.304 (2006). See "Licensing Fact Sheet: Arkansas" for additional requirements imposed by Licensing.

¹⁴ See Burriola v. Greater Toledo YMCA, 133 F.Supp.2d 1034 (2001), which required an after-school child care program to readmit an autistic child who they terminated from care because the child demonstrated physically aggressive behavior. Because the child care director never attempted to implement reasonable modifications, which were suggested by a specialist, the judge found that the provider had not fulfilled his obligations under the ADA.

¹⁵ Head Start Performance Standards 1308.5, available at: <http://www.acf.hhs.gov/programs/hsb/performance/index.htm/>

¹⁶ The "**Disabled Access Tax Credit**" (Title 26, Internal Revenue Code, Section 44), is a tax credit for access expenditures that are incurred in order to comply with the ADA. This enables an eligible small business to elect a nonrefundable tax credit equal to half of the expenditures for eligible accommodations that are above \$250. The maximum credit a business can elect for any tax year is \$5,000 for eligible expenditures of \$10,250 or more. **Eligible small businesses:** are defined as any person (the term includes corporations) whose gross receipts for the preceding tax year did not exceed \$1 million, or whose full-time employees number fewer than 30. An employee is considered full-time if he or she works at least 30 hours a week for 20 or more calendar weeks in the tax year. **Eligible access expenditures:** specifically include amounts paid or incurred to acquire equipment or devices for people with disabilities. The credit is available every year and may be used for a variety of costs such as: Sign language interpreters for children who have hearing impairments; Purchase of adaptive equipment or the modification of equipment; Production of print materials in alternate formats (e.g., Braille, CD, audio tape, large print); and Removal of barriers, in buildings and transportation, that prevents a business from being accessible to, or usable by, people with disabilities. More information available at: <http://www.ada.gov/taxpack.htm>.

¹⁷ See Beale v. Aardvark Day Care Center, 2000 WL 33119418 (E.D. Pa.) (2000).