

KNOW THE LAW FOR RESPONDING TO CHALLENGING BEHAVIORS

Legal Basics and Checklist

1. What Are Challenging Behaviors?

Challenging behaviors are any that impede or prevent a calm, healthy, and successful child care experience for children and providers. Challenging behaviors may directly affect the physical environment, schedule, and social dynamics of the classroom. Challenging behaviors can include hitting, pushing, or biting. Equally challenging may be behaviors that indirectly alter the functioning, flow, and quality of the child care day. Such behavior includes such as difficulty transitioning, staying with the group, self-regulating, moving on, or making a choice. Providers often have concerns about how to care for children with challenging behaviors safely, effectively, and legally. This handout is an introductory resource of information about a provider's legal responsibilities, to guide strategies to prevent, reduce, and eliminate challenging behaviors.

2. Using Resources To Develop Effective, Legal Responses To Challenging Behaviors

Children's behaviors are an extension of how they communicate. Responding well to the needs of a child with challenging behaviors means understanding what the child is communicating through the behavior, and what is being communicated to the child by the provider's response to the behavior. It is an ongoing process that requires patience, dedication, and creativity. Many families and children are engaged with a variety of caregivers and service providers, such as special education educators, afterschool providers, speech, physical, and occupational therapists, and medical or mental health professionals. A team of child care providers, family members, and service providers can support this process. Identifying why a child is exhibiting a particular behavior will prepare the team to develop strategies that match possible explanations. The course of the day may provide opportunities to respond to and support a child's behavioral needs through choice of play materials, physical arrangement of the space, manner of communication, and choice of how and when transitions occur for the child. Keeping track of resources drawn upon to develop interventions, and of how interventions are working to reduce or eliminate unwanted behaviors, will assist behavior modification efforts, and also help demonstrate efforts to meet legal requirements.

3. Laws That May Apply To Child Care Providers' Responses To Challenging Behaviors

A. Licensing Regulations

Community Care Licensing requires that child care centers “provide care and supervision as necessary to meet the children's needs.”¹ Community Care Licensing expects providers to meet the needs of all children in care, both those who demonstrate challenging behaviors and those who do not.

All licensed child care providers must comply with “personal rights” regulations, which prohibit providers from responding to challenging behaviors with certain interventions that include corporeal punishment, mental abuse, humiliation, or withholding sleep, food or toileting.² Licensing also prohibits use of restraint to control behavior.³ Providers should receive training on children’s personal rights so they have a clear understanding of which interventions are legal and which are not.

Regulations also require child care providers to inform Community Care Licensing within 24 hours, and file an unusual incident/injury report (LIC 624 or 624B) within seven days, if any unusual incident occurs that threatens the physical or emotional health or safety of any child, or any suspected physical or psychological abuse of any child occurs.⁴ They must also report such incidents or suspected abuse to the parent of the child who is allegedly threatened or abused.⁵ To protect the rights of children who are in danger of being hurt by another child’s actions, providers should have (1) a protocol in place for approaching challenging behaviors in a productive, appropriate manner, and (2) use that protocol to develop and implement a clear plan of action once they recognize a pattern of aggressive behavior.

B. Disability Rights Laws

The Americans with Disabilities Act (ADA) is a federal civil rights law, which makes it illegal for child care providers to discriminate against children with disabilities.⁶ If a child needs

¹ Cal. Code Regs. tit. 22, § 101229. *See also* Cal. Code Regs. tit. 22, § 102417(a)(care and supervision requirements for family child care homes).

² Cal. Code Regs. tit. 22, §101223(a)(3) (a child’s personal rights in child care center); Cal. Code Regs. tit. 22 § 102423(a)(4) (a child’s personal rights in family child care homes).

³ Cal. Code Regs. tit. 22, § 101223(a)(7).

⁴ Cal. Health and Safety Code §1597.467 (reporting requirements for family child care homes); Cal. Code Regs. tit. 22, § 101212(d)(1) (reporting requirements for child care centers).

⁵ Cal. Code Regs. tit. 22, § 101212(f).

⁶ Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq. (2009). 42 U.S.C. §§ 12181 (7)(K) and 12182 (a).



special assistance to conform to a provider’s appropriate behavior rules and discipline policies because of the child’s disabilities, that assistance is an “accommodation” under the ADA. The law requires providers to make a case-by-case assessment of what accommodations a child with disability-related challenging behaviors needs to be integrated into the child care program, and to make reasonable modifications to rules and policies necessary because of the child’s disability.⁷ Child care providers cannot apply rules and policies in a way that excludes a child because of disability-related challenging behaviors, either by keeping the child separate from other children, or by terminating the child from the program, unless the child’s equal participation (1) requires an accommodation that would pose a ‘fundamental alteration’ or ‘undue burden’ or to the program, or (2) poses a ‘direct threat’ to the health and safety of others.⁸

An ‘undue burden’ means a significant difficulty or expense.⁹ A ‘fundamental alteration’ is a change that is so significant that it changes the basic nature of the child care services offered. A ‘direct threat’ is a substantial risk of serious harm that cannot be eliminated or reduced to an acceptable level by reasonable modifications.¹⁰ Before asserting a direct threat to exclude a child, a child care center must make an individual assessment, based on reasonable judgment and looking at current medical evidence or the best available objective evidence, of (1) the nature, duration, and severity of the risk; (2) the probability that the potential injury will actually occur; and (3) whether reasonable modifications will mitigate or eliminate the risk.¹¹

Generally, in determining what the law requires, the most important factors are the needs of a child with a disability, the changes requested, and the resources available to the program. A large program run by a school district might be required to do more than a small family child care home with fewer resources and staff. Either way, a decision to enforce discipline or other program policies in a way that excludes a child because of disability related challenging behaviors can only be made following an individualized assessment of those needs and a determination that the accommodations required to include the child would pose an undue burden, fundamental alteration, or direct threat.

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

⁸ 42 U.S.C. §§ 12182(b)(2)(A)(ii), (b)(2)(A)(iii), and (b)(3).

⁹ 28 C.F.R. §§ 36.104 and 36.303(a).

¹⁰ 28 C.F.R. § 36.208(b).

¹¹ 28 C.F.R. § 36.208(b).



CHECKLIST:

10 WAYS TO PLAN AHEAD FOR RESPONDING TO CHALLENGING BEHAVIOR

- 1) Put any discipline, behavior, non-violence and other policies important to your program in writing, and provide to parents at enrollment, re-enrollment, and/or annually.
- 2) Maintain a system for investigating, when challenging behaviors occur, what the child is communicating through the behavior.
- 3) Maintain a system for identifying resources (e.g. school district or regional center contacts, clinical specialists, parent support groups) that can assist in responding to challenging behaviors
- 4) Maintain a system for tracking resources drawn upon in responding to behaviors
- 5) Maintain a system for tracking behavior interventions and outcomes
- 6) Obtain staff training in licensing laws including on personal rights and reporting responsibilities
- 7) Have a protocol for reporting any unusual incidents (who is responsible for reporting, standards for when to report)
- 8) Obtain staff training on disability law requirements
- 9) Maintain a system for individualized assessment of needs of children with disabilities
- 10) Maintain a system for parent communication and referral to supporting resources

This document is intended to provide general information about the topic covered. It is believed to be current and accurate as of November 2021, but the law changes often. This document does not render legal or other professional advice. If you need legal advice, you should seek the services of a competent attorney.

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