

# KNOW THE LAW ABOUT THE AMERICANS WITH DISABILITIES ACT

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## 1. What is the Americans with Disabilities Act?

The Americans with Disabilities Act (“ADA”) is a federal civil rights law that Congress passed in 1990 and amended in 2008.<sup>1</sup> Specifically, the ADA says that child care centers, preschools and family child care providers cannot discriminate against individuals with disabilities.<sup>2</sup> The ADA Amendments Act of 2008 revised the ADA’s definition of a disability to cover more people and situations.<sup>3</sup> It expanded the legal definition of who is considered disabled while reinforcing the ADA’s focus on whether discrimination has occurred.

## 2. Does California state law also protect people with disabilities?

The ADA sets a federal minimum standard for disability protection and allows states to provide **greater or equal** protections to people with disabilities.<sup>4</sup> As such, California has its own laws that protect more people with disabilities than the ADA does. One of these laws is the Unruh Civil Rights Act, which guarantees full and equal privileges and services “in all business establishments of every kind whatsoever.”<sup>5</sup> Another is the California Disabled Persons Act, which states that people with disabilities or medical conditions have the same right as the

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<sup>1</sup> Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* (2009).

<sup>2</sup> 42 U.S.C. §§ 12181(7)(K) (2009) (day care centers and other social service center establishments are public accommodations), 12182(a) (it is illegal for public accommodations to discriminate against individuals on the basis of disability).

<sup>3</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325; 42 U.S.C. §§ 12101 (2009) (findings and purposes of ADA Amendments Act of 2008), 12102 (2009) (definition of disability).

<sup>4</sup> 42 U.S.C. § 12201(b) (2009).

<sup>5</sup> Unruh Civil Rights Act, Cal. Civ. Code § 51(b) (2016). The term “business establishments” in California’s Unruh Civil Rights Act must properly be interpreted in the broadest sense reasonably possible. [Stevens v. Optimum Health Institute, 810 F. Supp. 2d 1074](#), 1084 (S.D. Cal. 2011) (quotation omitted).

general public to the “full and free use” of public places.<sup>6</sup> A child care provider that violates the ADA also violates the Unruh Civil Rights Act and California Disabled Persons Act.<sup>7</sup>

### 3. Who is protected against discrimination by the ADA?

The ADA protects people who have a physical or mental impairment that substantially limits one or more of their major life activities. Each of these terms is more fully described below.

Three groups of people receive protection under the ADA:

- 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 and
- People who are **regarded as** having a physical or mental impairment that substantially limits one or more major life activities.<sup>8</sup>

### 4. What does the ADA mean by a “physical or mental impairment”?

A **physical** impairment includes many conditions, such as:

- Physiological conditions, cosmetic disfigurement or anatomical loss affecting one or more body systems. Examples of body systems include: neurological, musculoskeletal (system of muscles and bones), special sense organs, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine.

A **mental** impairment is a mental or psychological illness or disorder. Examples of mental impairments include:

- Intellectual disabilities, organic brain syndrome, emotional or mental illness and specific learning disabilities.

Other specific impairments listed in federal regulations are: certain contagious and noncontagious diseases; conditions such as orthopedic, visual, speech and hearing impairments; cerebral palsy; epilepsy; muscular dystrophy; multiple sclerosis; cancer; heart

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<sup>6</sup> Under California’s Disabled Persons Act, “Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians’ offices, public facilities, and other public places.” Cal. Civ. Code § 54(a) (2001).

<sup>7</sup> Cal. Civ. Code §§ 51(f) (2016) (a violation of the ADA is a violation of the Unruh Civil Rights Act), 54(c) (2001) (a violation of the ADA is a violation of the California Disabled Persons Act).

<sup>8</sup> 42 U.S.C. § 12102(1) (2009); 28 C.F.R. § 36.105(a)(1) (2016). See also 28 C.F.R. pt. 36, App. C (2011).

disease; diabetes; intellectual disabilities; emotional illness; dyslexia; specific learning disabilities; HIV/AIDS; tuberculosis; drug addiction and alcoholism.<sup>9</sup>

Whether a condition constitutes a disability does not depend on the name of the condition or diagnosis. Instead, whether a condition is a disability depends on the effect the impairment has on the person's life activities.<sup>10</sup> Even if a condition comes and goes or is in remission, it is a disability if it would substantially limit a major life activity when it is active.<sup>11</sup> Similarly, the condition is a disability if it **would substantially limit** a major life activity if it was not treated, even if treatment (i.e. medication, equipment or accommodations except for ordinary eyeglasses or contact lenses) would make the condition's effects less severe.<sup>12</sup>

## 5. What is a "major life activity"?

To be disabled, a person's mental or physical impairment must substantially limit a major life activity. The list of major life activities is broad and includes any activity central to daily living. 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 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>13</sup> The ability of children living with disabilities to engage in major life activities is measured in comparison to children living without disabilities in their peer age group.<sup>14</sup>

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

**Yes.** Title III of the ADA applies to all places of public accommodation, and almost all child care settings are places of public accommodation.<sup>15</sup> Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), came before the ADA and prohibits discrimination against people with disabilities by programs receiving federal financial assistance.<sup>16</sup> Title II of the ADA expanded Section 504 to include state and local activities, regardless of whether they receive federal financial assistance, thus covering public school preschools and district-run child care centers and before/afterschool programs.<sup>17</sup>

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9 28 C.F.R. § 36.105(b)(1) (2016).

10 29 C.F.R. Part 1630, App. § 1630.2(j).

11 42 U.S.C. § 12102(4)(D) (2009).

12 *Id.* § 12102(4)(E).

13 *Id.* § 12102(2)(A)-(B).

14 SSA Listing of Child Impairments: <https://www.ssa.gov/disability/professionals/bluebook/ChildhoodListings.htm>; see also, *A Guide For Physicians and Other Health Care Professionals*, Social Security Administration, <https://www.ssa.gov/disability/professionals/childhoodssi-pub048.htm> (last visited Nov. 22, 2021).

15 See *supra* note 2.

16 The Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.* (2016).

17 42 U.S.C. § 12131.

## 7. What is a “public accommodation”?

The ADA lists specific places as places of “public accommodation,” including “a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education” and “day care center(s).”<sup>18</sup> These private entities are considered places of public accommodation because they hold themselves out to the public as businesses. A child care provider, whether operating out of a center or a family child care home, is a place of public accommodation.

## 8. If a child care provider operates a license-exempt program, do they still have to comply with the ADA?

**Yes.** **State law** determines what programs have to be licensed and what programs can operate as license-exempt. The ADA is a **federal law**, so state licensing law does not affect it. Therefore, license-exempt programs must comply with the ADA if they are places of public accommodations, and almost all child care providers run programs that are places of public accommodation.

## 9. If a child care program is run by a religious entity, is it a place of “public accommodation” that must comply with the ADA?

**No.** Title III of the ADA contains an exemption for religious entities, such as churches, mosques and synagogues. Child care programs **run** by religious organizations or entities are exempt.<sup>19</sup> However, merely operating in a religious building does not exempt a child care program from the ADA.

Other disability laws may apply to child care providers run by religious entities. Section 504 of the Rehabilitation Act of 1973 has no religious exemption; it applies to any program that receives federal funds. Section 504 prohibits discrimination on the basis of disability under nearly the same standards as those in the ADA.<sup>20</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>21</sup>

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18 42 U.S.C. § 12181(7)(J-K) (2009).

19 *Id.* § 12187 (“The provisions of this subchapter shall not apply to ... religious organizations or entities controlled by religious organizations....”).

20 *Supra* note 15.

21 See Stevens v. Optimum Health Institute, 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)).

## 10. What are child care providers' obligations under the ADA?

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>22</sup> A provider has to assess on a case-by-case basis what accommodation a child with a disability needs to be integrated into the provider's program. Once the provider knows what is needed, the provider must assess whether reasonable accommodations can be made to include the child. The U.S. Department of Justice, Civil Rights Division's *Commonly Asked Questions about Child Care Centers and the Americans with Disabilities Act*, gives examples of reasonable accommodations of specific disabilities.<sup>23</sup>

A provider does not have to make an accommodation if the child is a person with a disability **only** under the "regarded as" standard described in Question 3 above.<sup>24</sup> However, the provider still may not exclude or treat differently a child "regarded as" having a disability.

## 11. What types of accommodations does the ADA require?

The ADA sets out three primary types of accommodations:

- Changes in policies, practices, or procedures;<sup>25</sup>
- Provision of auxiliary aids and services to ensure effective communication<sup>26</sup> and
- Removal of physical barriers in existing program facilities.<sup>27</sup>

## 12. What makes a requested modification "reasonable"?

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

The ADA requires child care programs to make accommodations in the areas described in Question 11 **unless**:

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<sup>22</sup> 42 U.S.C. § 12182(b)(2)(A)(i) (2006); 28 C.F.R. § 36.302 (2006).

<sup>23</sup> 42 U.S.C. § 12182 (2006); 28 C.F.R. § 35.130(b)(7) (2008); see also *Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act*, U.S. Dep't of Justice, Civil Rights Division, <https://www.ada.gov/childdqanda.htm> (last visited Nov. 22, 2021).

<sup>24</sup> 42 U.S.C. § 12201(h) (2009).

<sup>25</sup> *Id.* § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302 (2016).

<sup>26</sup> 42 U.S.C. § 12182(b)(2)(A)(iii) (2009); 28 C.F.R. § 36.303 (2017).

<sup>27</sup> 42 U.S.C. § 12182(b)(2)(A)(iv) (2009); 28 C.F.R. § 36.304 (2012).

- In cases of changes in policies, practices or procedures, the accommodation **would fundamentally alter the nature of the program or services offered**;<sup>28</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>29</sup>
- In the case of the removal of physical or structural communication barriers, the accommodation is **not readily achievable**, meaning implementing it would be difficult or expensive.<sup>30</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>31</sup>

Child care providers should begin the process of identifying reasonable accommodations by talking with the parent(s) or legal guardian(s) 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”) under the Individuals with Disabilities Education Act, the provider can look to the IFSP or 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 the parents/guardians and provider cannot agree, a court might ultimately have to decide.

### 13. Who within a particular program makes accommodation decisions?

It depends on the 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 under the direction of a school district or on a school site, the answer is more complicated. A private program that simply rents space from a school will likely have the autonomy to decide on 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 the school (usually a principal or superintendent) or the school’s disability services would make accommodations decisions for the program.

It is important to note that a parent or guardian can always disagree with a program’s accommodations decision. Ultimately, a court or administrative agency<sup>32</sup> would determine what is reasonable in a particular situation.

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<sup>28</sup> *Supra* note 25.

<sup>29</sup> *Supra* note 26.

<sup>30</sup> *Supra* note 27.

<sup>31</sup> 42 U.S.C. § 12182(b)(2)(A)(v) (2009).

<sup>32</sup> Complaints of violations of the ADA may be brought to the Dep’t. of Justice (see Question 24). Complaints under the Unruh Civil Rights Act or the CA Disabled Persons Act may be brought to the CA Department of Fair Employment and Housing.

#### 14. What does a child care provider do when another parent asks 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 parent(s) or legal guardian(s) of the child with the disability. If you have a respectful relationship with the parent(s) or guardian(s), you may be able to talk with them about how they would like you to handle such inquiries from other parents and children. Some families will want to keep information about their child's disability 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 the information, it can be a valuable learning opportunity for all children in the program.

One of the best ways to respond to questions from other families is not to focus on the particular child but rather to offer general information about quality care. High-quality programs will offer parent education, which should include discussions of how inclusive care benefits all children.

#### 15. Is there a certain number of children a child care provider may care for if they already care for a child with special needs?

**No.** Each child with special needs is different, and there are no required staffing ratios specific to caring for children with special needs. The provider must evaluate his/her own program, keeping in mind the special needs of each child, when determining how many children with special needs the program can accommodate.

Federal law requires Head Start providers to ensure that at least 10% of the children they serve are children with disabilities.<sup>33</sup> In California State Preschools, once all income-eligible families are enrolled, higher-income families whose children have exceptional needs may attend for free.<sup>34</sup>

#### 16. Can a child care program charge more for a child with special needs because the child requires more individualized attention? If it cannot, how will the program 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>35</sup> Programs may raise their fees to all families, use tax credits or deductions available from the IRS if they are for-profit programs that pay taxes or seek resources from outside their programs.

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<sup>33</sup> 42 U.S.C. § 9835(d)(1) (2007).

<sup>34</sup> School Finance: Education Omnibus Trailer Bill, A.B. 99, 2017-18 Reg. Sess., § 7 (Cal. 2017) (amending Cal. Educ. Code § 8235(d)).

<sup>35</sup> 28 C.F.R. § 36.301(c).

Programs may charge parents for the cost of additional, non-child care services, such as physical or occupational therapy, if the services are not already paid for by Individuals with Disabilities Education Act (“IDEA”) Part C funds or the local school district. Keep in mind that often, the necessary reasonable accommodations are not very costly, and some accommodations (such as improving staffing ratios) could benefit all the children in care.<sup>36</sup>

### 17. When child care programs care for a child with special needs who receives a subsidy, may the program receive any additional money?

**Yes**, child care providers who care for “children with exceptional needs” and “severely disabled” children are entitled to a special needs rate that increases their reimbursement. These terms are defined in the California Education Code. A child “with exceptional needs” must be eligible for early intervention services or educational services.<sup>37</sup> A child “with severe disabilities” is one who requires intensive instruction and training in a program serving pupils with one of the listed “profound disabilities.”<sup>38</sup> However, the additional money cannot be charged to the parents but must be billed to the funding entity. The reimbursement rate for children with exceptional needs is multiplied by 1.54 and the adjustment factor for severely disabled children is 1.93.<sup>39</sup>

### 18. If a child care program wants to clearly state that it welcomes children with disabilities, how does it say this in its brochure?

A child care program’s materials may state that its “program is fully accessible” or that its teachers “have experience in caring for children with disabilities.” This goes beyond what is required by law but is helpful in making the child care facility visible as one that promotes inclusion.

### 19. How can child care providers care for children with disabilities if they are not trained or if they work on their own?

Many of the accommodations children need are not complicated and can be learned easily. If a provider works on their own, they can often make necessary accommodations without additional staffing.

In other instances, necessary or helpful training may be available from the parent/guardian, early intervention or special education specialists, health professionals, disability organizations,

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<sup>36</sup> See, [Early Start](#) home page for more information on how to apply for early intervention and special education services for your child in California.

<sup>37</sup> [Cal Educ. Code § 8205\(h\)](#)

<sup>38</sup> A profound disability includes “autism, blindness, deafness, severe orthopedic impairments, serious emotional disturbances, or severe intellectual disabilities.” *Id.* § 8205(s).

<sup>39</sup> Cal. Educ. Code § 8265.5(c)(3-4)).



local resource and referral agencies or community colleges. An important first step is to identify community resources that can assist with inclusion. For example, a child may need to have medication administered in order to attend the child care program. This need is generally not an acceptable reason to exclude a child from your program.

**For more information on this topic**, see the Child Care Law Center's [Know the Law About Giving Medications to Children in Licensed Child Care in California](http://childcarelaw.org/wp-content/uploads/2017/09/Know-the-Law-About-Giving-Medications-to-Children-in-Licensed-Child-Care-in-California.pdf).<sup>40</sup>

20. May a child care provider automatically decline to serve a child with disabilities and simply refer the child to another provider who they think is better able to serve them?

**No.** A parent may prefer the provider's care. If it is possible for a provider to make the accommodations the child needs without imposing a fundamental alteration or undue burden on their program, they may not turn the child away through referral to another program. If the provider can document that they individually assessed the situation and found that they could not accommodate the child, they may then suggest other potential providers.

21. Shouldn't providers get to choose whom to enroll in their own program?

By deciding to become professional caregivers, providers become responsible for complying with many types of laws. In operating their business, just as providers are subject to licensing laws, providers are subject to civil rights laws, such as the ADA, the Unruh Civil Rights Act and the California Disabled Persons Act. Civil rights laws benefit children by protecting them and their families from discrimination. These protections benefit all of us, as any of us or our family members could become disabled at any time.

22. 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, are not relevant to any potential required accommodations, and are not a pretext for discrimination.

23. Can other parents sue a child care program for taking a child with disabilities?

While it is impossible to guarantee that a provider or program will not be sued, it is extremely unlikely that a parent who sues a provider or program only because they care for a child with disabilities would be successful. A provider is obligated to comply with the ADA and that compliance is unlikely to make the provider subject to civil liability. One way for a high quality

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<sup>40</sup> Child Care Law Center, *Know the Law About Giving Medications to Children in Licensed Child Care in California* (2017) <http://childcarelaw.org/wp-content/uploads/2017/09/Know-the-Law-About-Giving-Medications-to-Children-in-Licensed-Child-Care-in-California.pdf>.

program to respond to parents' concerns is to educate them about the benefits of inclusive child care, for both typically developing children and those with disabilities.

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

Individuals may file a complaint with the Department of Justice (DOJ) 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 that engaged in the discrimination, a description of the discrimination, the date or dates on which it occurred, the name(s) of individuals who engaged in discrimination, any other information necessary to support the complaint, and copies of any relevant documents (originals should be kept in a safe place). Complaints may be submitted:

- Online via the DOJ complaint webpage [here](#); or
- By [mail](#), here:

U.S. Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
4CON, 9<sup>th</sup> Floor  
Washington, DC 20530

There is no deadline for filing a complaint under the ADA, but it is better to file complaints 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. The DOJ tries to resolve most complaints through informal or formal settlement agreements, but it may file lawsuits in federal court to enforce the ADA. A court may order money damages as a remedy for discrimination if the DOJ prevails. Under Title III, the DOJ 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 being excluded from child care on the basis of a disability can also contact Disability Rights California (DRC), the state protection and advocacy organization for people with disabilities, at (800) 776-5746.



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