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CHILD CARE LAW PROJECT

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**Special Needs Care for Child  
Care Providers**

January 2004

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## **INTRODUCTION**

In 1990, Congress passed the Americans with Disabilities Act (ADA). This Act is designed to make services of all types, including child care programs, accessible to people with disabilities. The ADA prohibits child care providers and centers, regardless of size, from automatically denying a child admission or continued care based solely on her disability. The ADA requires child care providers to evaluate each child's needs and conditions on an *individual basis*. Once admitted, a child is entitled to equal, non-segregated participation in the program, to the extent appropriate to the child's needs.

This booklet will review Title III of the ADA as it applies to child care providers. First, the ADA will be generally explained. Second, we will review who is protected under the ADA. Third, the responsibilities of child care providers in deciding to admit and accommodate children with disabilities in their program will be reviewed. Fourth, other anti-discrimination laws, including those specific to California, will be highlighted. Finally, anti-discrimination law as it applies to employment situations will be briefly explored. A list of resources is included at the end of the booklet.

## **Organization of the ADA**

The ADA is divided into several sections, called Titles. Each title addresses different areas where discrimination is prohibited. Specifically, the law prohibits discrimination in employment (Title I), state and local government services (Title II), public accommodations (Title III), public transportation (Title IIIB), and telecommunications (Title IV).

## Goal of the ADA

The overall goal of the ADA is assure the *integration* of person's with disabilities in all places that are accessible to the public. The ADA requires that you make *reasonable accommodations* for individuals with disabilities to the extent possible based on the abilities of *each individual*.

This goal rests on three primary principles. These principles are:

- ✓ Individuality -- considering the abilities and needs of *each individual*
- ✓ Reasonableness -- considering the *reasonableness* in modifying the program to the individual
- ✓ Integration -- the importance of *integrating* the individual with others in the program

## The ADA as it Applies to Family Child Care Providers/Centers

Titles I, II, and III apply to child care centers. Each is briefly described. However, Title III will be the primary focus of this publication.

### **Title I**

Title I is about preventing employment discrimination against people with disabilities. Title I applies if you employ 15 or more persons. This is discussed in the section of this booklet on federal law that affects child care providers with employees.

### **Title II**

Title II applies to child care services provided by government agencies (e.g., Head Start, summer programs, and extended school day programs). If your child care center is part of a government agency, you must comply with Title II of the ADA.

## **Title III**

Title III applies to non-government child care. This Title applies to any businesses and nonprofit providers that are “public accommodations.” Public accommodations means private persons or businesses that own, lease, lease to, or operate facilities (e.g., restaurants, stores, theaters, private schools, homeless shelters, zoos). Family child care homes, child care centers, nursery schools, preschools, and Head Start programs run by non-public agencies are public accommodations. It is not necessary to receive public funding in order to be a public accommodation.

### **Can a program be exempt from Title III?**

Title III does not apply to activities *controlled* by religious entities. Therefore, a child care provider is exempt from Title III *only if* it is actually run by a religious entity, such as a church, mosque, or synagogue.

This exception **does not** apply to private child care centers that are *operating* in a religious setting. If your program leases space from a religious organization, but the program is not *controlled or operated* by the religious organization, Title III applies to your program. That is, if a private child care program is operated out of a church, pays rent to the church, and has no other connection to the church, the program has to comply with Title III, while the church does not.

## **DEFINING WHO IS PROTECTED UNDER THE ADA**

### **Why is it Important to Define a Child with a Disability?**

Determining whether a child meets the ADA’s definition of a disability is the first step in knowing whether you must comply with the ADA. If a child meets the definition of having a disability, the

child is protected under the ADA, and the child care provider must comply with the law. If the child does not fit within the ADA's definition of disability, then the ADA is not applicable.

### **Defining Disability under the ADA**

The ADA does not specifically list covered impairments. Rather, the ADA defines an individual with a disability if she fits within any one of the following four categories:

1. People who **have a physical or mental impairment that substantially limits** one or more of their major life activities.

**What is a “major life activity”?** – Functions such as grooming, walking, seeing, hearing, speaking, breathing, learning, working, sitting, standing, thinking, interacting, etc.

**What is a “substantial limitation” of a major life activity?** – A substantial limitation **prevents or significantly restricts** a disabled person from performing an activity that a person without the disability can do.

Some **factors** used to decide what a significant restriction is, includes:

- Nature and severity of the impairment
- Expected duration of the impairment
- Permanency or long-term impact of the impairment

Example: A child with severe visual impairment, diabetes, cerebral palsy, learning disability, or severe behavioral problem would fall under this definition, and thus would be protected under the ADA.

**Note:** California’s definition of a disability is “a physical or mental impairment that limits a major life activity.” California’s definition is broader because it does not include the word “substantial.” This means that a child that might not be protected under the ADA may be protected in California. This is further discussed in the section of this booklet which discusses California law.

2. People who **have a history or record of an impairment** – in other words, people who have a history of or have been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

Example: A child who had Hodgkin’s disease (cancer) in the past, but is now in remission, is protected under the ADA.

3. People who **are regarded or perceived by others as having such impairment**. This phrase refers to:
  - a. People who have an impairment that does *not* substantially limit a major life activity, but are treated as if their impairment does;
  - b. People who have an impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment;
  - c. People who have no impairment, but are treated as if they do.

Example. A healthy child that does not suffer any physical or mental impairment, but is treated as disabled or been discriminated against because of severe scarring from burns, is protected under the ADA.

4. The ADA also protects **people associated with people with disabilities**. If a person does not have a physical or mental impairment that substantially limits a major life activity, but is *related to or associates with* someone who does, the person without the disability is protected.

Example: A healthy child whose family member has HIV or scoliosis is protected under the ADA even though she is not the person with the disability.

### **Does any disability fall under the ADA?**

If the disability can be defined based on one of the above categories, it falls under the ADA. The kind of disability a child may have can vary greatly – from simple allergies, developmental disorders, diabetes, cerebral palsy, to even a terminal illness. Each of these may be considered a disability under the ADA definition. A disabled child can also be one who has an emotional or mental illness. Even a child with a severe behavioral problem will probably fall under the ADA.

### **Is HIV considered a disability under the ADA?**

Yes. The U.S. Supreme Court held that HIV infection—from the moment of infection—is a significant impairment for ADA purposes. (*Bragdon v. Abbott*, 118 S.Ct. 2196, 1998)

## **ADMITTING A CHILD WITH A DISABILITY INTO YOUR PROGRAM**

### **Creating Equal Opportunities for Children with Disabilities**

The ADA requires that child care providers, regardless of size, not discriminate against any child with disabilities because of their

disability. This means that child care providers must make reasonable accommodations to provide children with disabilities *equal opportunities* to participate in their program.

### **What does the ADA require of a provider?**

It is your responsibility as a child care provider to make a *good faith* effort to include children with special needs in your program. As a rule, in order to provide equal opportunities, child care programs must provide the following accommodations. Unless an exception is met (discussed on in this section How do I decide whether a child with a disability belongs in my program ? is on page 10), a child care provider:

- Must make *reasonable modifications* to policies, practices, and procedures to integrate children with disabilities into their program *unless* doing so would constitute a *fundamental alteration*.
  - ⇒ Policies or practices that discriminate must be eliminated. For example, a policy refusing to enroll children with disabilities is prohibited. Similarly, a broad policy refusing to enroll children who have not been toilet trained would be prohibited. This is because it would tend to screen out children with disabilities.
  - ⇒ Reasonable modifications must be made in order to accommodate the child with a disability. Examples might include providing alternative foods for children with certain food allergies; making a schedule change for a child who takes medication and must nap in the morning; or using simple language and repetition to ensure understanding by a child with a developmental disability.

- Must provide appropriate auxiliary aids and services needed for *effective communication* with children with disabilities *unless* doing so would constitute an *undue burden*.
  - ⇒ Child care programs are required to provide special equipment and services to ensure effective communication for those with disabilities. Examples of auxiliary aids and services might include purchasing large print books, learning some sign language or hiring an interpreter, putting a Braille label on the cubby of a child who is blind.
  
- Must generally make facilities accessible to persons with disabilities.
  - **For an existing child care program**, architectural barriers that prevent access to services must be removed *if* removal is *readily achievable*.
    - ⇒ ***Readily achievable*** means removing the barriers can be easily accomplished and done without much difficulty or expense. Examples of removing architectural barriers include widening doorways, installing ramps, rearranging furniture.
    - ⇒ When barrier removal is **not** readily achievable, programs must make the services available through ***alternative methods***, *if* the alternative methods are themselves *readily achievable*. For example, if access through the front door of a family child care home would be very costly, but access through a side door could be accomplished with little expense, this alternative must be taken.

- **New facilities** and any altered portions of existing facilities must be *fully accessible*.
  - ⇒ ***Fully accessible*** means compliant with the Americans with Disabilities Act Accessibility Guidelines (ADAAG). Compliance guidelines can be found at <http://www.usdoj.gov/crt/ada/stdspdf.htm>. Guidelines specific to children’s environments and outdoor play areas have been developed, but not formally adopted (as of Nov. 20, 2003; <http://www.access-board.gov/adaag/html/intro.htm>). However, it is recommended that these guidelines be used when building new facilities for children.
- **NOTE: Renovations to existing facilities** - Child care programs undergoing renovation in existing buildings must ensure that the altered portion is *fully accessible* and usable by individuals with disabilities. This is to be done to the maximum extent feasible. The rules governing renovations are complex. It is advisable to seek additional information and advice before making any renovations.

### **Determining if a child with a disability must be accommodated**

You must objectively evaluate a child’s needs on an ***individual basis***. You cannot just assume that a child’s needs are too severe, or use stereotypes in evaluating the child’s needs. Instead, you should learn about the child’s needs by talking with her parents, and other persons that know the child (e.g., teacher, health care worker).

Once you have an objective evaluation of the child’s needs, you can determine if you can meet her needs without fundamentally altering your program.

### **How do I decide whether a child with a disability belongs in my**

## **program?**

While all attempts must be made to include children with disabilities, there are circumstances when providing appropriate care for a particular child would be too big of a burden or cost to your program. In such circumstances, a provider would not be required under the ADA to care for the child.

Four factors should be considered in deciding whether a provider is not required to care for a child with a disability. Each factor will be reviewed.

1. The steps necessary to accommodate the child's needs are **unduly burdensome, and** there are no reasonable alternatives.

**What is an undue burden?** – The ADA defines it as a **significant difficulty or expense**. Whether something is an undue burden or not depends on the unique circumstances of each program. The factors to be considered include:

- The nature and cost of the proposed accommodation
- The overall financial resources of your program
- The number of employees in your program
- Legitimate safety requirements at your site
- Whether reasonable alternatives exist, which do not impose an undue burden

Example: What if a child care provider needs to hire medical personnel in order to accommodate a child who needs special medical attention? If the provider does not already offer this kind of service, and the cost to do so would be significant, a provider would not be required to accommodate the child. However, if this service is offered as part of the program, the provider cannot charge an additional fee to enrolled families with special needs children.

Example: If a child has a visual impairment a large center may be required to provide books in Braille or audio recorded books for the child so that she can fully and equally participate in the program. Even a small family day care would be required to furnish these items because it would probably not be considered an undue burden.

Example: It would probably be an undue burden on a family day care provider to provide a full-time interpreter to accommodate a hearing impaired child, while a large child care center may be able to accommodate this need.

2. If integrating the child into the program requires changes in policies, practices, or procedures that would **fundamentally alter** the nature of the program or facility, **and** there are no reasonable alternatives.

**What is a fundamental alteration?** This means that a high degree of change in the nature of the existing program is necessary in order to accommodate the child with a disability. This is a *very* limited exception to the requirement that providers make reasonable accommodations. It requires much more than discomfort or inconvenience for the staff, administrators, or other parents.

Example. A child may need one-to-one care, but your program is designed for group care. If you do not have the resources to hire an assistant, this may qualify as a fundamental alteration. However, you must first explore other alternatives before denying admission. For example, are there alternative funding sources to pay for an aide? If so, this is a reasonable alternative and you cannot deny the child.

On the other hand, does the child need only occasional one-on-one care? In this case, because most children need some individualized attention, if the child can be integrated without fundamentally altering the program, the child cannot be excluded for this reason.

3. A particular child's condition poses a **direct threat to the health or safety** of the disabled child or of any other children or staff, **and** there is no reasonable way of eliminating the threat through changes in policies, practices, procedures, equipment, or services.

**What is a direct threat?** A direct threat is a substantial risk of harm to the health and safety of others. *It must be documented by objective professional evidence.* If you believe that a child's disability poses a direct threat to others, you will have to establish a solid basis for that belief before you make the decision to exclude the child from your program. Your decision must be based on current medical information, or on *the best available objective evidence*, not on generalizations or stereotypes.

**What factors can I consider in assessing a direct threat?**

- The nature of the child's condition that poses a risk to others
- The probably duration of the condition that poses a risk
- The severity of the risk
- The probability of actual harm to others by the child's condition
- If the risk can be eliminated by modifying any policy, practice or procedure so as not to fundamentally later the nature of the program

### **What if the threat is a short-term medical illness?**

Children with transient short-term illnesses, such as the flu or measles, are protected under the ADA. If a medical illness is highly contagious, and the probability of harm to others is high; and there is no way of eliminating the risk, then the ADA would not require the provider/center to accept this child.

4. Accommodating the child's needs requires **architectural changes that are not readily achievable**, and there are no reasonable alternatives available.

The ADA does not require that child care providers make changes that would require a significant expense or difficulty, as this could be an undue burden. Whether something is expensive or difficult depends on the size and budget of the child care program. Thus, what may be readily achievable for a large child care center may not be readily achievable for a small family day care provider. With each child that applies to your program, you must determine what options exist and whether they are readily achievable. You must also consider reasonable alternatives.

Example. If the cost to widen doors and install a ramp would be an undue burden for a child with a wheelchair, first consider reasonable alternatives. Perhaps the parents are willing to purchase a smaller wheelchair that would fit through the existing door, and you can add a ramp for a reasonable cost.

### **Reasonable alternatives**

The key to all the exceptions is making an individualized assessment to determine if the needs of the child would fundamentally alter the program or create an undue burden. It is also imperative to consider what reasonable alternatives might be available before denying admission to a child under one of these exceptions.

## SPECIAL TOPICS

### Behavioral Disorders/Problems

#### **Can behavioral disorders or problems be direct threats?**

This is a difficult assessment to make. Unlike infectious diseases, it is not always clear whether a child's behavioral characteristics will pose a direct threat.

Remember that when it comes to determinations of direct threat, you are required to assess the degree of risk posed by the child's condition based on objective medical information whenever possible you should avoid basing a decision on your best guess. If you feel that the child's behavior may pose a risk, it is very important to approach the parent of the child early on about having the child's condition assessed professionally.

If a child with a behavioral disorder is not under a doctor's care, it may be very difficult for you to measure accurately and objectively whether the child's conduct poses a direct threat. You may want to inform a parent of the importance of a medical/professional evaluation in helping you determine the amount of added supervision or other special care the child may need in order to eliminate the direct threat. You may also want to explain that the lack of an evaluation may make it difficult for you to objectively assess if you are reasonably able to meet the child's needs.

#### **How should I discuss behavioral problems with parents?**

In cases involving behavioral disorders, you should encourage the parents to seek professional advice on how best to meet the needs of the child.

Parents are under no legal obligation to seek professional advice, but many parents may be willing, if they understand that it will help you

to better care for their child. If the parents agree to seek professional help, be sure to get their consent for you to speak with the health care professional. This will assist you in making a judgment about your program's ability to accommodate their child. If you still believe that you cannot provide adequate supervision, document all efforts to accommodate the family before denying admission.

**Once in the program, what if behavioral problems arise that the parents do not acknowledge?**

If you have admitted the child and the parent refuses to have the child assessed, try to work with the parent to help them overcome their fears. Document all attempts to work with the parents, as well as the parents' refusal to consent to having their child evaluated.

There are things you can do to help protect yourself. You can invite the parents to observe the child's behavior in your program, document all of your related observations, and review them with the parent, provide the parent with a list of specialists in the area, and follow up with the parents in writing. If the parents still refuse to comply, your records will protect you from legal liability.

**Can I expel a child with bad behavior such as biting or hitting?**

The ADA does not require you to keep a child that poses a direct threat to the health and safety of others in your program. However, you should first try to work with the parents to see if you can make any reasonable accommodations. If you have made reasonable efforts, and the child continues to bite or hit the other children or staff, she may be expelled even if she has a qualifying disability.

**Fees Charged for Special Needs**

**Can I bill the parents for the costs incurred in accommodating their child?**

**No.** You may not directly pass the cost of accommodating a child with a disability to the parent(s) of that child. You may, however, uniformly increase fees across all the children in your program.

### **An exception to direct billing**

One exception may allow you to pass on the added cost of accommodating a child with a disability to the parents. If the accommodation is a professional service (e.g., occupational therapy, physical therapy, speech therapy) that is billed independently of child care, **and** if providing that service is above and beyond your legal responsibilities under the ADA, then the cost for the professional service can be charged to the parent. If the child can reasonably obtain the service outside of child care, but for convenience sake, the parent prefers that the child receive the service while the child is in child care, you will not be responsible for supplying or paying for the service.

### **What if the Parent volunteers to pay?**

On occasion, a parent of a child with a disability may volunteer to cover the cost of an accommodation for her child. If this occurs, you should inform the parent that she is under **no** legal obligation to cover the cost of accommodating the child. You should assess, independent of the parent's offer to pay, whether your program is *reasonably able* to accommodate the child. If it is, you are under a *legal obligation to cover the cost* of the accommodation regardless of the parent's offer. We suggest you explain this to the parent, and offer to pay for the accommodation, and be clear the parent is under no obligation to pay.

If, however, after a genuine assessment of the circumstance, you determine that the proposed accommodation would impose an *undue burden* on your program, the parent may wish to pay for the accommodation as a *last resort*, rather than having the child denied admission to your program. Remember though, the parent is never under an obligation to cover the cost. You should *never* request that the parents pay or share in the cost of the accommodation. Upon the rare occasion that the parent independently offers to pay for the accommodation when your program is genuinely unable to accommodate the child, you may accept the offer.

**Note: Should you accept the offer, do so knowing that it is a *legally risky* arrangement for you. You should carefully document your process of assessing an undue burden, and of informing the parent of her right not to cover the cost.** Never suggest or request this arrangement, and avoid all appearances of having suggested or requested the arrangement. If, at a later point in time, the parent changes her mind, the parent is still under no legal obligation to continue to cover the cost. At that time, you will have to reassess whether your program is able to cover the cost without it being an undue burden.

### **Transportation is Covered by the ADA**

If transportation is offered as a child care service, it must be offered for children with special needs. The same rules for removing barriers exist in the transportation of children. That is, you must remove barriers if it is readily achievable. For example, a reasonable accommodation may include lifting a child in or out of a vehicle and storing a wheelchair in the trunk.

In general, larger programs using vehicles that can transport more than 16 people, and which transport the children on a fixed route, must have an accessible vehicle that includes permanent equipment, such as a hydraulic lift.

### **Special Equipment/Toys**

If special equipment, services or toys are necessary to ensure that a child with special needs is not excluded or segregated, then providing them will be required under the ADA.

The types of auxiliary aids and services required depend on the needs of the individual child. For example, for the hearing impaired you may need to bring in an interpreter, provide phones that are compatible with hearing aids or provide a closed caption decoder. When deciding whether or not to purchase special equipment, check out the cost and availability to determine if it would be an undue burden to provide it.

## **Rent: If Child Care is Provided in a Rented Home or Facility**

If you rent, then both you and your landlord are responsible for complying with the ADA. It is recommended that you and your landlord enter into an agreement defining each of your responsibilities. This agreement should be in writing.

Generally, the landlord will be responsible for removing architectural barriers in common areas, while the renter will most likely be responsible for removing architectural barriers inside the facility/home.

*Always* get your landlord's permission before making any architectural changes.

## **Record Keeping**

### **Absences**

Children with disabilities may have more absences than other children. Therefore, you should define in advance payment requirements for absences. To avoid discrimination, do this for *every* child in your program. Since frequent absences without pay may be unduly burdensome, you should have a uniform policy that requires payment for days any child misses, regardless of the reason. Once admitted, non-payment for any reason can be grounds for termination.

### **Health status**

You should keep all information about the child's health including any special needs, medication, specialized procedures, and the name and number of the child's physician. Be sure to maintain confidentiality of this information.

### **Document challenges to accommodation after admission**

You should document any difficulty you may experience in providing for the child. In the event that it becomes unduly burdensome to continue accommodating the child, it will be important to have a history of documentation of the challenges.

## **Non-Discrimination Policy**

As discussed in the introduction, written policies against admitting children with disabilities are prohibited. Having such a policy will not excuse you from complying with the ADA. If your child care program has such a policy, you should remove it immediately. If you have such a policy, and are ever sued for refusing to admit a child with a disability into your program, the policy will show that the discrimination was illegal. In this case, it would not matter if you had a legitimate reason to deny the child admission.

If your child care program is incorporated, it may be a good idea for you to set out an explicit non-discrimination policy in your articles of incorporation. A sample non-discrimination policy is included in Appendix A.

### **Can I establish any admission criteria involving health concerns?**

Yes, as long as the requirements are imposed on all children. In addition, it must allow an exception to accommodate children with disabilities. For instance, you can require immunization for all children in your program as long as you do not preclude a child not immunized because of a medical reason. You cannot condition an immunization requirement on whether or not a child has a disability.

## **Tax Benefits**

The Internal Revenue Service (IRS) provides a tax benefits to assist businesses in complying with the ADA. Section 44 of the code allows a tax credit for small businesses, and section 190 allows for a tax deduction for all businesses.

### **Tax Credit**

A tax credit is available to small businesses. A small business is one that has \$1,000,000 or less in total revenues (for the previous tax year) *or* 30 or fewer full-time employees. This credit can cover 50% of the eligible access expenditures in a year up to \$10,250. The maximum credit a business can get is \$5,000. The tax credit can be used to offset the costs of complying with the ADA. The credit is available for expenses such as undertaking barrier removal, alterations to improve accessibility, providing sign language interpreters, and for purchasing certain adaptive equipment.

### **Tax Deduction**

A tax deduction is available to all businesses. The maximum deduction is \$15,000 per year. The tax deduction can be claimed for expenses incurred in barrier removal and alterations.

Be sure to speak with your accountant regarding tax credit and tax deduction provisions.

## **OTHER ANTI-DISCRIMINATION LAWS**

### **Federal Law**

#### **Rehabilitation Act of 1973, *Section 504*.**

Section 504 of the Rehabilitation Act of 1973 is another federal civil rights law protecting people with disabilities from discrimination. Section 504 applies only to public accommodations that receive federal funds. It does *not* have an exemption for religious organizations. Thus, any child care program receiving federal dollars may not discriminate because of disability. If a religious organization runs a child care program, and receives federal funding, it must accommodate children with disabilities.

## California Law

California offers protections similar to federal laws, but in some instances, California law provides more protections than federal law. Where California law is more protective, you must comply with California law, even if it would not be required under the ADA.

### **Unruh Civil Rights Act**

The Unruh Act, California's broadest civil rights law, provides that all persons within the state are free and equal, and regardless of their disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments, including public accommodations, or every kind whatsoever. (Cal. Civ. Code § 51) The Act affects these areas:

- It establishes a uniform definition of disability for many of California's civil rights statutes. The definition of a disability in California is "a physical or mental impairment that limits a major life activity." This definition applies for a child being admitted to child care and an employee seeking employment.
- It says that you cannot consider mitigating factors when determining if a mental or physical condition is a disability. Mitigating factors are things such as medications, assistive devices, and reasonable accommodations. For instance, if a person is hearing impaired, her needs should be evaluated without consideration of any corrective devices that she uses. If the mitigating factor *itself* limits an individual's ability to participate in major life activities, then it can be considered.

# **THE INCLUSION OF EMPLOYEES WITH SPECIAL NEEDS**

This section briefly describes different federal and state laws that affect child care providers that have employees.

## **Federal Law**

### **Title I of the ADA**

Title I prohibits employers from denying employment based solely on a disability. The ADA defines employers as those with 15 or more employees. Thus, if you have 15 or more employees, you are required to evaluate the needs and conditions of each applicant and employee on an *individual basis*.

**NOTE:** The rules in California are different. See page XX.

### **Title VII of Civil Rights Act of 1964**

Prohibits an employer from discriminating against an employee or applicant based on race, color, sex, national origin and/or religion with respect to hiring, firing, training and all terms, conditions or privileges of employment.

*\* Applies to employers with 15 or more employees.*

### **Pregnancy Disability Act (PDA)**

Prohibits employers from discriminating against an employee or applicant because she is pregnant.

*\* Applies to employers with 15 or more employees.*

### **Age Discrimination in Employment Act (ADEA)**

Prohibits an employer from discriminating against an employee or applicant who is 40 years of age or older with respect to hiring and firing, training, and all terms, conditions and privileges of employment.

*\* Applies to employers of 20 or more employees.*

## **Immigration Reform and Control Act (IRCA)**

Prohibits discrimination against applicants based upon national origin or protected status as US citizen or alien lawfully admitted for temporary or permanent employment.

*\* Applies to employers who have 3 or more employees.*

## **California Law**

### **California Fair Employment & Housing Act (FEHA)**

FEHA prohibits employers from discrimination in hiring based on race, color, national origin, ancestry, sex, physical or mental disability, age, religion, pregnancy or childbirth, medical condition or marital status.

*\* Applies to employers who have 5 or more employees or those who have only 1 employee if there is a discriminatory harassment claim involved.*

FEHA provides protections in the area of disabilities independent from, and oftentimes greater, than do those in the ADA. Two specific protections are applicable to child care providers/centers.

- FEHA employs a broader definition of disability than the ADA. The ADA definition of a disability requires a "substantial limitation of a major life activity." FEHA's definition of a disability requires only "a limitation of a major life activity." The actual language of FEHA states that: "This distinction is intended to result in broader coverage under the law of this State than under the federal law." (CA Gov. Code § 12926.1)
- FEHA applies to employers with *5 or more employees* while Title I of the ADA applies to employers with *15 or more employees*.

## **How would an employee sue their employer under FEHA?**

Before an employee can file a lawsuit against an employer under FEHA, she must first exhaust *administrative remedies* by filing a complaint with the California Department of Fair Employment and Housing (DFEH) or the Equal Employment Opportunity Commission (EEOC). FEHA created the DFEH to receive FEHA complaints from people with discrimination claims and to investigate them. The EEOC was established under Title VII of the Civil Rights Act of 1964. It is charged with enforcing Title I of the ADA.

### Process under the DFEH

Once an employee files a complaint, DFEH interviews the employee. The DFEH will then conduct an investigation. The employer will be notified within 45 days, and is required to answer the complaint. If the investigation reveals no violation of the law, the case will be closed.

If the investigation shows a violation of the law, the DFEH gives the employer the opportunity to voluntarily resolve it. It is possible for a no-fault resolution to be negotiated at any time during the process. The next stage, if necessary, is formal conciliation conferences. Here the DFEH supports the violation and explores options to resolve the complaint. If this fails, the administrator for DFEH may recommend litigation.

The litigation results in an "accusation" against the employer. This will result in a public administrative hearing before a DFEH Commission. In certain circumstances, the employer may choose to move the hearing to civil court.

If DFEH decides not to file a lawsuit on behalf of the employee, or fails to do so within 150 days after the employee filed the complaint, DFEH will issue a "right to sue" letter. The "right to sue" letter allows an employee to sue the employer in Superior or Municipal Court.

The employee does not have to wait for DFEH to issue the “right to sue” letter, she can simply request the letter, and DFEH will issue it and close their files. If this happens, the DFEH no longer participates in the investigation or resolution of the matter. With the "right to sue" letter, only the employee can file a lawsuit, and she must do so within one (1) year of the date of the "right to sue" letter.

### **Unruh Civil Rights Act**

This law also applies in the area of employment. It details the extent to which employers may make medical inquiries or require medical examinations of their applicants and employees. The Act also mandates that employers must respond promptly to employees or applicants who request accommodations for their known disabilities.

### **What do these requirements mean for me as an employer?**

If an employee with a known disability requests accommodation you must engage in a timely, good faith, interactive process to provide effective, reasonable accommodations if there are any, otherwise you will be liable.

Because of these requirements, you should make sure you follow certain steps to protect yourself from liability:

- **Document when you became aware of an employee’s disability.** An employer can be held liable if she knows about an employee’s disability, and did not provide timely, reasonable accommodations.
- **Document when an employee asks for accommodations.** If an employee requests accommodation, the employer should note when it was. An employer’s obligation to provide accommodation is contingent on knowing about the disability.
- **Document all conversations about providing accommodations.** The burden is on the employer to show that she engaged in a timely, interactive process. These records will be useful in supporting your process.

- **Document all efforts to provide accommodations.** Employers should do their best to provide accommodations to employees with a known disability. Since you must provide *reasonable* accommodations, it is best to show all efforts to do so, even if there are none available.
- **Make a good faith attempt to provide reasonable accommodations.** Employers must discuss accommodations in good faith. The burden is on the employer to prove that she cannot provide reasonable accommodations. If an employer offers accommodations but the employee/applicant refuses them, the employer should explore other reasonable accommodations using her best efforts to try to accommodate the employee.

### What are some examples of possible accommodations?

Job restructuring, part-time work, modified work, modified scheduling, reassignment or transfer, leave of absence, modification of equipment or devices, elimination of non-essential job functions or duties, retraining.

- **If the employer cannot provide the requested accommodations, document the reasons why.** This is to show good faith, timeliness, and interaction. If accommodations cannot be made, the employer will have to prove that what was requested equaled an **undue burden** (practically, economically, financially infeasible).
- **Consult legal counsel:** It is a good idea for employers when they are dealing with disability issues and reasonable accommodations of employees to consult with an attorney.

## **RESOURCES**

### **Local Resources**

Protection & Advocacy Inc.  
3580 Wilshire Blvd., Suite 902  
Los Angeles, CA 90010-1025  
(213) 427-8747  
[www.pai-ca.org](http://www.pai-ca.org)

Western Law Center for Disability Rights  
Learning Rights Project  
Janeen Steel, Director  
919 S. Albany Street  
Los Angeles, CA 90015  
(213) 736-8366

The Jeffrey Foundation  
5470 W. Washington Blvd.  
Los Angeles, CA 90016  
(323) 965-7536  
[www.thejeffreystation.org](http://www.thejeffreystation.org)

The Center for the Improvement of Child Caring  
11331 Ventura Blvd., Suite 103  
Studio City, CA 91604-3147  
(818) 980-0903/(800) 325-CICC  
Fax: (818) 753-1054  
[www.ciccparenting.org](http://www.ciccparenting.org)

They have a checklist called the “Discovery Tool” which explores 6 basic areas of child development (physical development/motor skills, cognitive skills, language, sensory skills, social and emotional development, daily living skills). The tool allows parents to see whether their child’s skills are similar to other children of the same age). Can use the tool online, order the book or take it over the phone.

Child Care Law Center  
221 Pine Street, 3<sup>rd</sup> Floor  
San Francisco, CA 94104  
(415) 394-7144  
Fax: (415) 394-7140  
info@childcarelaw.org

### **General Information on the ADA**

Office on the Americans with Disabilities Act, Civil Rights Division  
U.S. Dept. of Justice  
P.O. Box 66118  
Washington, D.C. 20035-6118

National ADA informational hotline: (202) 514-0301

United States, Department of Justice  
ADA information line: (800) 514-0301  
[www.usdoj.gov/crt/ada/adahom1.htm](http://www.usdoj.gov/crt/ada/adahom1.htm)

Electronic Bulletin Board: (202) 514-6193 (by computer modem)

Regional Disability and Business Technical Assistance Centers:  
(800) 949-4232

The Access Board offers technical assistance on the ADA  
accessibility guidelines:  
(800) 872-2253

ARC  
(800) 433-5355, (800) 855-1155

- Publishes *All Kids Count: Child Care and the ADA* that addresses providers' obligations under the ADA

Eastern Washington University  
(509) 623-4246

- Produces videotapes on ADA and child care. Can purchase by calling.

National Association for the Education of Young Children  
1509 16th St. N.W.  
Washington, D.C. 20036  
(800) 424-2460  
(202) 232-8777

### **Information on Special Education**

Los Angeles County Office of Education  
Special Education  
Interim Director: Kim Hopko  
9300 Imperial Highway  
Downey, CA 90242  
(562) 803-8307

Los Angeles Unified School District  
Special Education  
Infant and Preschool Education  
Whit Hayslip  
333 S. Beaudry Avenue  
Los Angeles, CA 90017  
(213) 241-4713

Kayne Eras Center (Education Resource & Services Center, Inc.)  
Barbara Cull  
(310) 737-9393  
[www.erascenter.com](http://www.erascenter.com)

### **Information on Architectural Barrier Removal**

Public Access Section  
Civil Rights Division  
U.S. DOJ  
P.O. Box 66738  
Washington, D.C. 20035-6738  
(800) 514-0301

Architectural and Transportation Barriers Compliance Board

(Access Board)  
1331 F. St. N.W., S-1000  
Washington D.C. 20004-1111  
(800) USA-ABLE Voice

### **Information on Employment Issues**

Equal Employment Opportunity Commission (EEOC)  
(800) 669-4000

Dept. of Fair Employment and Housing (DFEH)  
(800) 884-1684

### **Information on Disability and Abuse related issues**

Disability, Abuse and Personal Rights Project, Spectrum Institute  
P.O. Box 65756  
Los Angeles, CA 90065  
(310) 391-2420 ext. 333

- Organizes an annual conference on abuse and disabled persons; conducts research; produces reports on abuse and disability; provides training and produces training materials for both abuse response service providers and disability related service providers. Provides advocacy services for persons w/disabilities related to civil rights and abuse related issues.

National Center for Child Abuse and Neglect (NCCAN)  
P.O. Box 1182  
Washington, D.C. 20013  
(800) 394-3366

National Coalition on Abuse and Disability  
P.O. Box "T"  
Culver City, CA 90230-0090  
(310) 391-2420

- Provides a quarterly newsletter

## **APPENDIX A**

### **EQUAL EMPLOYMENT OPPORTUNITY**

The Company seeks, as employees, men and women who can work harmoniously with others and efficiently perform their assigned tasks. Accordingly, equal employment opportunity will be afforded to all applicants and employees. The Company will strive to ensure that employees comply with both the letter and the spirit of federal, state, and local laws and regulations in providing equal employment opportunity with regard to race, color, sex, age, sexual orientation, religion, creed, national origin, ancestry, citizenship, age, veteran or marital status, disability, or any other protected characteristic. The Company also will comply with all applicable laws regarding reasonable accommodation for disabled employees and strive to provide an environment that is free of unlawful harassment of any kind. This policy governs all aspects of employment, compensation, promotion, assignment, discharge, and other terms and conditions of employment.

## **CHILD CARE LAW PROJECT**

Public Counsel provides representation for low-income child care providers with a variety of licensing, zoning, child abuse reporting, and other concerns. The project developed out of the profound need to support affordable, quality child care for children of poor working parents and to help combat the phenomenon of latchkey children.

*This pamphlet is one of a series prepared by Public Counsel's Child Care Law Project to provide the Los Angeles County child care community with general information on a variety of legal issues.*