

The ADA and IDEA Basics: Inclusion of Children With Disabilities

by Mona Motwani

The Americans with Disabilities Act (ADA) is a federal civil rights law that was passed in 1990 with the aim of securing equal rights for persons with disabilities in the employment, housing, government, transportation, and public accommodations contexts. The ADA was passed in an effort to provide equal opportunities to people with disabilities.

The ADA applies to almost all child care settings. Even before describing *how* this law applies to child care, it is important to understand *why* inclusion of children with disabilities in the child care setting is important. Child care settings are like a microcosm of society; therefore, integrating typically developing children with children with

disabilities at a young age benefits all children and promotes tolerance and diversity.

Definition of disability

Under the ADA, a child with a disability is one who has a physical or mental impairment that substantially limits the child's ability to care for herself or himself, perform manual tasks, or engage in any other "major life activity," such as walking, seeing, hearing, speaking, breathing, or learning, in an age-appropriate manner. However, a child that has a diagnosis of a condition is not automatically covered by the ADA — each child requires an individualized assessment to determine if he/she is substantially impaired in one or more major life activities. For example, any of the following children *might* be considered a child with a disability under the ADA: a child with cerebral palsy, autism, a learning disorder, severe food allergies, diabetes, or an emotional or mental illness. It is important to remember that each child is unique, and determining whether a child with a disability is covered by the ADA is based on an individualized assessment of that child.

The ADA protects these four categories of people from discrimination on the basis of disability:

- 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);
- People with a **history of** a physical or mental impairment which **substantially limits** one or more major life activities (this may include, for example, a child with a history of seizures);
- People who are **regarded as** having a physical or mental impairment which **substantially limits** one or more major life activities (this may include, for example, a child who a provider thinks has a disability because of certain behavior but who does not actually have a disability); and/or
- People/entities **associated with people** who have a physical or mental impairment which **substantially limits** one or more major life activities (this may include, for example, a child in care who has an HIV-positive sibling). Note that the person/entity does not have to be related to the person with the disability.

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inclusion of children with disabilities in the child care system. Mona is a 2005 graduate of University of California Hastings College of Law, where she focused on civil rights and public interest law and was a

member of the Hastings International and Comparative Law Review. Her past work experience during law school includes working on voting rights at the ACLU of Northern California, working on asylum cases for victims of gender persecution, and working on human rights litigation at the United Nations and in San Francisco.

Child care providers and the law

The ADA applies to all places of public accommodation, and in most cases, child care providers' places 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. However, religiously affiliated child care facilities that are considered public accommodations are exempt from the requirements of the ADA.ⁱ

The ADA requires that providers not discriminate against people simply because they have disabilities. Instead, providers are to make a case-by-case assessment of what the child 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.

Much discussion among providers and others in the early childhood community centers on the following question: What is a reasonable accommodation? The ADA sets out four primary types of accommodations:

- Admissions policies that do not screen out or tend to screen out persons with disabilities;ⁱⁱ
- Changes in policies, practices, or procedures;ⁱⁱⁱ
- Provision of auxiliary aids and services to ensure effective communication; and^{iv}
- Removal of physical barriers in existing program facilities.^v

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

- In the case of admissions policies, the policy is **necessary for safe operation of the program** (note that this is

almost never the case in child care settings);^{vi}

- In the case of changes in policies, practices, or procedures, the accommodation would **fundamentally alter the nature of the program**;^{vii}
- 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);^{viii} or
- In the case of the removal of barriers in an existing program, the accommodations would require **much difficulty or expense**.^{ix}

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 an individualized assessment of the child's needs and the program's ability to accommodate always need to occur to determine what is reasonable.

The most important thing is to undertake a process of dialogue with the

parents to determine what accommodations are necessary and whether they are reasonable to the program. It should be the goal of both the parents and the provider to reach an informal resolution whenever possible.

Examples of reasonable modifications might include, but are not limited to, the following: rescheduling the snack time of a child with diabetes, assisting with a child's leg brace, allowing a child's one-on-one aide or physical therapist on the child care site, and providing visual cues of transitions (e.g., large colored cards placed on stairs to facilitate movement).

Caring for children with special needs — financial considerations

A common inquiry is whether a provider can charge more for children with special needs because they require more individualized attention. Providers cannot charge families of children with disabilities more than families of typically developing children. However, when an accommodation is above and beyond a reasonable accommodation, a provider may impose an additional fee, but a legal

The ADA prohibits **unnecessary** inquiries about a child's disability. **Questions to help assess individual children — these are questions providers might ask the parents of all children:**

- What type of care are parents expecting?
- What does the child like or enjoy (use your list of daily activities)?
- Favorite toys, games, activities?
- How do parents adapt activities or equipment at home? Any special considerations, accommodations, or assistance used at home?
- What skills has the child mastered?
- What are the toileting skills of the child?

NOTE: These are questions you might ask all children. These questions cannot be used to screen out a child.

consultation should be made with someone knowledgeable with the ADA laws. 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, 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. 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.

There is a tax credit available for those who incur expenses in order to comply with the ADA. The Disabled Access Tax Credit is a federal tax credit for the purchase of equipment and/or auxiliary aids in which the primary purpose is to provide equal access to a business's goods and services. An eligible small business^X may elect a nonrefundable tax credit equal to half of the expenditures for eligible accommodations that are above \$250. For instance, if a child care home or center incurs cost in order to accommodate a child with a disability, these expenses can receive a tax credit for up to half the amount spent above \$250. The maximum credit a business can elect for any tax year is \$5,000 for eligible expenditures of \$10,250 or more. More information on the Disabled Access Tax Credit is available at www.ada.gov/taxpack.htm.

Certain states have special needs rates or differential rates for subsidized care. This means that providers may secure additional funding when caring for children in subsidized care with special needs. The definitions of "children with special needs" are interpreted differently from state to state. *This special needs rate is not billed to the parents* but to the subsidy agency. Some states that have

special needs rates are: California, Vermont, Nebraska, New York, and Pennsylvania. Contact your subsidy agency for more information.

When care can be refused

Situations where care for a child can be refused on the basis of disability are 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.

For instance, take the example of a child with a disability who exhibits hitting behavior in care. The provider should not immediately expel the child because he or she exhibited this behavior, but should look at the nature, duration, and severity of the risk as well as the probability that the potential injury will actually occur.

It is also important to see if the provider can mitigate the behavior with reasonable measures. Often, children with special needs who exhibit hitting behavior may have a hard time communicating by other means and are using this as a communication tool. If the provider works with a parent to address the underlying communication issue, the hitting behavior itself might diminish. Again, the best course of action for providers is to undertake a dialogue with the parents when a child care situation becomes difficult.

Confidentiality and the ADA

Information about a child's disability is confidential and should not be shared with others unless the provider has consent from the parents of the child with the disability. Providers may be able to have a conversation with them about how they would like to see the provider 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 center.

One of the best ways to respond to families who inquire about another child's disability is by giving them 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.

IDEA

The Individuals with Disabilities Education Act (IDEA) guarantees children with disabilities the same access to education as children who do not have disabilities.^{Xi} The IDEA is an entitlement law that provides early intervention and special education services to children, ages 0 - 21, who qualify for them.

IDEA's services may be provided through visits to the child care or preschool setting by teachers, developmental specialists, and therapists. These early intervention personnel can work with the child care staff to systematically embed the individualized goals for children into the curriculum activities and classroom routines.

The school or early intervention personnel consult and partner with the child care staff in order to enhance the participation of children in common preschool activities, and may present ways in which activities or environments may be adapted to promote the child's participation and learning.

Who is eligible for IDEA's early intervention services?

Eligible children are those children who are 0 - 36 months old who reside in the state and who:

- Have a developmental delay in one or more areas of development OR
- Have a diagnosed physical or mental condition which has a high probability of resulting in developmental delay

Some states have opted for a third eligibility category allowed by federal law:

- Are at risk of having substantial delays if early intervention services are not provided

Early Intervention services are services designed to meet the developmental needs of an eligible child and the needs of the family related to enhancing the child's development. Related services, for example, can include audiological services, family training, counseling and home visits, and respite services.

Who is eligible for IDEA's special education and related services?

School-age and preschool children (ages 3 - 21 or children who will turn 3 during the school year) are eligible who have:

- 1) mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities, and
- 2) who, by reason thereof, need special education and related services.^{xii}

Families and children can receive any service that is necessary to help a child benefit from her special education

program.^{xiii} All services under the IDEA for children 3 - 21 are free^{xiv} and based on each child's educational need,^{xv} not on her disability.^{xvi} Special education means specially designed instruction, such as adapting the content or delivery of classroom instruction, at no cost to the parents, to meet the unique needs of a child with a disability.^{xvii} Related services are transportation and developmental, corrective, and other supportive services that help a child with a disability benefit from special education. Related services, for example, can include speech-language pathology services, psychological services, occupational and physical therapy, school health services, and parent counseling and training.^{xviii}

Reauthorized IDEA – 2004 regulations relevant to child care

The IDEA was reauthorized in 2004, and a new set of regulations have been promulgated and are effective as of October 2006. **These key changes affect child care:**

- The final regulations now include a provision requiring that all children with disabilities receive the appropriate supplementary aids and services needed to participate in nonacademic settings, such as extracurricular activities, meals, and recess periods.^{xix}
- The final regulations now include Tourette syndrome in the definition of "other health impairments," which is a category that defines children eligible for special education and related services under Part B.^{xx}
- In the case of a child who previously received early intervention services under Part C of the IDEA and has an IEP meeting, the IEP notice must include a statement that the parent may request a representative from Part C to be invited to the initial IEP

meeting. This is done to assist with the smooth transition of services.^{xxi}

- The new regulations clarify that the public agency will provide a copy of the evaluation report and documentation of determination of eligibility to the parent at no cost.^{xxii}
- The public agency providing services to a child transitioning from Part C (early intervention services) to Part B (special education services) is not required to provide the Part C services that the child *had* been receiving. When the family of this child disagrees with the child's proposed IEP and the family has lodged a complaint against a public agency (often the school district), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

Inclusive child care projects

Inclusive child care projects are great resources for providers and families. These projects are efforts to support parents and providers so that they can provide quality, inclusive child care for children who have special needs. These projects are often funded by private donors, non-profit organizations, and state and local government funds. Two model child care inclusion projects include the **Child Care Inclusion Challenge Project (CCICP)** in San Francisco, California and **Project Jericho** in Albuquerque, New Mexico.

CCICP is a collaborative project between four county organizations whose mission is to make quality inclusive child care the norm in San Francisco, so that each child will have the opportunity to realize his or her full potential. The project team members meet on a weekly basis, and contact each other more frequently, to discuss cases and legal issues that arise in these settings. The project provides on-site

consultation, technical assistance, and training on topics related to working with children with disabilities.

Project Jericho works with the staff of local Early Care and Education Centers to train and model best practice for the inclusion of infants and children to age five years who have a developmental delay or who are at risk for a delay. Project Jericho works with families and the personnel of care centers for children who have special needs, strengthens the community's understanding of children and the family's individual needs, and assists with on going support and training to child care providers, to assure that every child is able to grow, learn, and play equally regardless of abilities or disabilities.

Child Care Inclusion Challenge Project (CCICP), San Francisco, CA. More information available at: www.supportforfamilies.org/inclusionproject/index.html, (415) 343-3334, or info@inclusionproject.org

Project Jericho, Alta Mira Specialized Family Services, Inc. Albuquerque, NM. More information available at: www.altamiranm.org/program.html, (505) 262-0801, or jdebonis@altamiranm.org.

Including children with special needs strengthens child care programs by offering a model of acceptance, integration, and equality for children. Children with disabilities as well as those who are typically developing both reap benefits from this type of care. Early intervention and special education in child care settings and the classroom are critical to children's development.

End notes

¹Note, 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.

ⁱⁱ28 C.F.R. § 36.301 (2006).

ⁱⁱⁱ28 C.F.R. § 36.302 (2006).

^{iv}28 C.F.R. § 36.303 (2006).

^v28 C.F.R. § 36.304 (2006).

^{vi}28 C.F.R. § 36.301 (2006).

^{vii}28 C.F.R. § 36.302 (2006).

^{viii}28 C.F.R. § 36.303 (2006).

^{ix}28 C.F.R. § 36.304 (2006).

^x **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.

^{xi}20 U.S.C. § 1400 *et. seq.*

^{xii}20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.7(a)(1) (further specifying eligibility criteria for special education including multiple handicapped).

^{xiii}34 C.F.R. § 300.24(a).

^{xiv}20 U.S.C. § 1401(8)(A).

^{xv}34 C.F.R. Part 300, App. A.

^{xvi}34 C.F.R. § 300.300(a)(3)(ii).

^{xvii}34 C.F.R. § 300.26; 34 C.F.R. 300.26(b)(3).

^{xviii}34 C.F.R. § 300.24.

^{xix}34 C.F.R. §300.117 Nonacademic settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the

services and activities set forth in §300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings. (Authority: 20 U.S.C. 1412(a)(5)).

^{xx}34 C.F.R. §300.8(c)(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and (ii) adversely affects a child's educational performance.

Resources

Child Care Law Center, San Francisco, California. Call (415) 394-7144 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 12 p.m. to 3 p.m. (PST)
- Publish many useful publications. Visit our web site 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 web site:

www.usdoj.gov/disabilities.htm.

“Commonly Asked Questions About Child Care and the ADA” at:

www.usdoj.gov/crt/ada/childq%26a.htm.

Contact your local family resource center. Internet search keywords: family resource center (insert type of disability).