



# CHILD CARE LAW CENTER

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## Know the Law About Disabilities and “Challenging Behaviors” in California Child Care Programs

Civil rights laws that protect people with disabilities—the [Americans with Disabilities Act](#) (ADA)<sup>1</sup> primary among them, but state and other federal laws as well—make it illegal for child care providers to discriminate against children who have disabilities. If a child, because of his or her disabilities, needs special assistance to conform to a provider’s appropriate behavior rules and discipline policies, the provider must offer that assistance as an “accommodation” under the ADA. Providers often have concerns about how to comply with this requirement and how to care for children with challenging behaviors safely, effectively, and legally.

### 1. What Are “Challenging Behaviors”?

As the term is used here, challenging behaviors are any that interfere with a calm, healthy, and successful child care experience for both children and providers. If a child hits, pushes, or bites, those behaviors may *directly* affect the physical environment, schedule, and social dynamics of the classroom. Other challenging behaviors may *indirectly* affect the functioning, flow, and quality of the child care day. Examples of behaviors that cause an indirect effect would be difficulty in transitioning, staying with the group, self-regulating, moving on, or making a choice.

### 2. What Do Challenging Behaviors Mean?

Children’s behaviors are a form of communication. To respond well to the needs of a child who exhibits challenging behaviors, a child care provider must understand what the child is communicating through the behavior. A provider must also understand what the provider’s response to the behavior communicates to the child.

Many families and children engage with numerous caregivers and service providers—e.g. special education and after school teachers; speech, physical, and occupational therapists; and medical or mental

health care providers. A child care provider is part of this team of professionals who support the child and family. The child care provider is in a good position to help identify why a child exhibits a particular behavior. The course of the child care day can be a chance to respond to and support a child’s behavioral needs through choice of play materials, physical arrangement of space, manner of communication, and choice of how and when transitions occur. Keeping track of different responses to challenging behaviors and how successfully the responses reduce or eliminate unwanted behaviors can be the entire team in designing behavior modification efforts. Keeping track of interventions and their impact will also help child care providers show their efforts to meet legal requirements.

### 3. How Do Disability Rights Laws Apply to Challenging Behaviors?

When a child with disability-related challenging behaviors seeks enrollment in a child care program, the child care provider must assess the child individually to decide what the child needs to be fully included in the program. Based on that individual assessment the provider must make reasonable modifications of program rules and policies.<sup>2</sup>

### 4. May a Child Care Program Ever Exclude a Child Whose Behavior Is Challenging?

As a rule, child care providers may not apply rules and policies in a way that excludes a child because of disability-related challenging behaviors. Child care providers may not separate the child from other children or terminate the child’s enrollment. A provider may exclude a child because of disability-related challenging behaviors *only if* the child’s participation:

- Requires an accommodation that would pose a “fundamental alteration” or “undue burden” to the program<sup>3</sup> *or*

- Poses a “direct threat” to the health and safety of others.<sup>4</sup>

A “fundamental alteration” is one so significant it would change the basic nature of the child care offered. An “undue burden” is one that would cause significant difficulty or require major expense.<sup>5</sup>

### 5. When Is Behavior a “Direct Threat” That Allows a Child to Be Excluded?

A “[direct threat](#)” is one that creates substantial risk of serious harm and that cannot be eliminated or reduced to an acceptable level by making reasonable modifications. A child care provider must carefully consider all the circumstances before excluding a child on the grounds that the child poses a “direct threat.” Specifically, the provider must use reasonable judgment and current medical evidence or the best available evidence, to individually assess:

- the nature, duration, and severity of the risk
- the probability that harm will actually occur, and
- whether reasonable modifications will mitigate or eliminate the risk.<sup>6</sup>

### 6. How Should a Child Care Provider Assess What the Law Requires?

The most important factors generally are the child’s needs, the changes requested, and the resources available to the program. Resources available are likely to vary with program size; for example, a large program run by a school district would likely have to do more to accommodate a child than would a small family child care home with fewer resources and staff. In either case, however, enforcing disciplinary or other policies in a way that excludes a child due to disability-related challenging behaviors is allowed *only* after an individualized assessment of the child’s needs and a

determination that the accommodations necessary to include the child would pose an undue burden, fundamental alteration, or direct threat.

### 7. How Do Licensing Regulations Apply in Cases of Challenging Behaviors?

Community Care Licensing requires child care centers to “provide care and supervision as necessary to meet the children’s needs.”<sup>7</sup> Licensing expects providers to meet the needs of all children in care—both those who demonstrate challenging behaviors and those who do not.

To protect the rights of children who are in danger of being hurt by another child, providers should have a system in place to respond appropriately to challenging behaviors and should use the system to develop and implement a clear plan of action once they recognize a pattern of aggressive behavior. (See checklist below.)

### 8. What Are “Personal Rights” Regulations?

All licensed California child care providers must abide by “[personal rights](#)” regulations. Under these regulations providers may not respond to challenging behaviors by, for example, using corporal punishment, mental abuse, humiliation, or restraints, or by withholding sleep, food, or toileting.<sup>8</sup> Child care providers should receive training on children’s personal rights so that they understand clearly which interventions are legal and which are not legal.

If an unusual incident occurs that threatens any child’s physical or emotional health or safety, or if any physical or psychological abuse of a child is suspected, the regulations require California child care providers to inform Community Care Licensing within 24 hours and to file an unusual incident/injury report within seven days.<sup>9</sup> Child care centers must also report such incidents or suspicions to the child’s parent.<sup>10</sup>

## Checklist - 10 Tips to Prepare for and Respond to Challenging Behaviors

Child care providers should have plans in place ahead of time about how they will respond, before a child with disability-related challenging behaviors seeks to participate in the program.

- Put any discipline, behavior, non-violence, and other important policies in writing. Give copies to parents at enrollment, re-enrollment, and/or annually.
  - When challenging behaviors occur, investigate what the child is communicating through the behavior. Maintain a system for conducting the investigation.
  - Identify resources that can help in responding to challenging behaviors. School districts, regional centers, clinical specialists, or parent support groups might be sources of help.
  - Maintain a system for tracking resources drawn upon in responding to challenging behaviors.
  - Record how the program responds to and intervenes in challenging behaviors and what the effect is of these responses and interventions. Have a system in place ahead of time for keeping these records.
  - Train staff members on licensing laws, including (in California) those covering children's personal rights and staff members' reporting responsibilities.
  - Have a protocol for reporting any unusual incidents to Community Care Licensing. Have a system in place ahead of time for making such reports, including who is responsible for reporting and standards for when to report.
  - Train staff on the requirements of disability laws and how these laws apply in child care programs.
  - Maintain and use a system to conduct individual assessments of the needs of children with disabilities.
  - Maintain and use a system to communicate with parents and, when appropriate, refer them to supportive resources.
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**This publication is intended to provide general information about the topic covered. It is made available with the understanding that the Child Care Law Center is not engaged in rendering legal or other professional advice. We believe it is current as of August 2013, but the law changes often. If you need legal advice, you should consult an attorney who can specifically advise or represent you.**

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### **About the Child Care Law Center**

The Child Care Law Center is nonprofit law firm. Our work focuses exclusively on child care-related legal and policy issues. Staff attorneys are experts in the laws that help low-income and vulnerable children get and keep good quality child care.

### **About San Francisco Inclusion Networks**

SF Inclusion Networks is a professional development program with the goal of building the capacity of staff in early care and education settings to provide high quality, evidence-based, developmentally appropriate inclusive practices. SF Inclusion Networks is a program of Support for Families of Children with Disabilities.

### **Endnotes**

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<sup>1</sup> [42 U.S.C. §§ 12201-12213.](#)

<sup>2</sup> [42 U.S.C. § 12182\(b\)\(2\)\(A\)\(ii\); 28 C.F.R. § 36.302.](#)

<sup>3</sup> [42 U.S.C. § 12182\(b\)\(2\)\(A\)\(ii\) & \(iii\).](#)

<sup>4</sup> [42 U.S.C. § 12182\(b\)\(3\).](#)

<sup>5</sup> [28 C.F.R. §§ 36.104 & 36.303\(a\).](#)

<sup>6</sup> [28 C.F.R. § 36.208\(b\).](#)

<sup>7</sup> [Cal. Code Regs. tit. 22 § 101229.](#)

<sup>8</sup> [Cal. Code Regs. tit. 22, § 101223\(a\)\(3\), \(a\)\(7\).](#)

<sup>9</sup> [Cal. Health & Safety Code § 1597.467](#) (family child care homes); [Cal. Code Regs. tit. 22, § 101212\(d\)\(1\)](#) (child care centers).

<sup>10</sup> [Cal. Code Regs. tit. 22, § 101212\(f\).](#)