UNC
SCHOOL OF GOVERNMENT

2023 Parent Attorney Conference

Thursday, August 17, 2023

8:50 to 9:00	**Welcome** *Timothy Heinle, Teaching Assistant Professor* UNC School of Government, Chapel Hill, NC
9:00 to 10:15	**Case Law Update, Part 1** *Sara DePasquale, Associate Professor of Public Law and Government* UNC School of Government, Chapel Hill, NC
10:15 to 10:30	Break
10:30 to 12:15	**Parents or Juveniles with Disabilities** *Holly Stiles, Assist. Legal Director for Disability Rights N.C.* *Annick Lenoir-Peek, Deputy Parent Defender for Indigent Defense Services* *Timothy Heinle, Teaching Assistant Professor at UNC School of Gov't*
12:15 to 1:00	Lunch
1:00 to 2:15	**Case Law Update, Part II (with Practical Applications)** *Sara DePasquale, Associate Professor of Public Law and Government* *Timothy Heinle, Teaching Assistant Professor*
2:15 to 2:30	Break
2:30 to 3:30	**Self-Care in Trauma-Facing Work [Mental Health CLE]** *Dr. Victoria Reynolds, Ph.D.; Psychologist* Durham, NC
3:30 to 4:30	**Legislative and IDS Update** *Wendy Sotolongo, Parent Defender* Office of Indigent Defense Services, Durham, NC

This program offers 6.25 hours of CLE credit (inc. 1-hour mental health), pending Bar approval.

Child Welfare Case Summaries (August 16, 2022 – August 1, 2023)
By Sara DePasquale, UNC School of Government

Contents

ICWA

Constitutional; Placement Preferences; Active Efforts; Records; Equal Protection

Haaland v. Brackeen, 599 U.S. ___ (2023)

**You can also read U.S. Supreme Court Holds the Indian Child Welfare Act Is Constitutional post on the School's On the Civil Side Blog.*

Held: Affirmed in part, reversed in part, vacated and remanded in part (7-2 decision). All of petitioners' challenges are rejected.

(1) Congress has the power to enact ICWA

(2) ICWA does not violate the anticommandeering principle of the Tenth Amendment

(3) No party has standing to raise the equal protection claim and the nondelegation challenge regarding the placement preferences.

- Facts: The petitioners include both individuals and the states of Texas, Indiana, and Louisiana. The case arises from three child custody proceedings where an Indian child was involved; the child was placed in a non-Indian placement; and the child's tribe sought to enforce the placement preferences designated in ICWA. One of the petitioners was a couple who provided foster care to an Indian child and who wanted to adopt the child with the support of the child's parents and grandmother. The child's tribe opposed the adoption by the petitioners and sought to enforce the placement preferences for the child with a nonrelative tribal member. A second petitioner was the Indian child's biological mother and prospective non-Indian adoptive parents who were selected by the biological mother. Although both biological parents supported the adoption, the tribe intervened and sought to enforce the placement preferences of ICWA. The third petitioner fostered an Indian child and sought to adopt the child. The tribe intervened and because of the placement preferences of ICWA, the child was moved from the non-Indian placement and placed with their grandmother. During the pendency of this appeal, the first two petitioners were able to adopt the children. All the individual petitioners expressed an interest in fostering or adopting Indian children in the future. Several Indian tribes intervened.
- The constitutional challenges included (1) Congress lacked authority to enact ICWA, (2) numerous ICWA requirements violated the Tenth Amendment anticommandeering principle, (3) race classifications for placement preferences discriminated against non-Indian families who wanted to foster or adopt Indian children, and (4) placement preferences that can be altered by the tribes violated the nondelegation doctrine.
- Procedural History: A federal district court granted summary judgment for the petitioners. In an *en banc* decision, the Fifth Circuit affirmed in part and reversed in part. The Firth Circuit held ICWA does not exceed Congress's Power, the tribe's placement preferences do not violate the nondelegation doctrine, and some of the placement preferences satisfy equal protection guarantees. The Fifth Circuit evenly split on whether other placement preferences unconstitutionally discriminated on race and issues related to notice requirements, placement preferences, and some recordkeeping requirements, thus affirming the district court's ruling that

these provisions were unconstitutional. The Fifth Circuit held the active efforts requirements, expert witness requirements, and the recordkeeping requirements violated the Tenth Amendment anticommandeering principle. The U.S. Supreme Court granted cert. Louisiana and Indiana did not pursue the appeal before the U.S. Supreme Court.

- ICWA was enacted to address "an alarmingly high percentage of Indian families that are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies… [which] harmed not only Indian parents and children, but also Indian tribes." Sl.Op. 2. Because children are vital to the existence and integrity of Indian tribes, ICWA "aims to keep Indian children connected to Indian families." Sl.Op. 3.
- Congress has the power to enact ICWA. Precedent has established that Congress has "plenary and exclusive" power to legislate with respect to the Indian tribes. Sl.Op.10. This power is not "free-floating" or absolute but derives from the Constitution. *Id*. This power comes from (1) the Indian Commerce Clause (Art. I, sec. 8, cl. 3); (2) the Treaty Clause (Art. II, sec. 2, cl. 2), which authorizes the President to make treaties with the Advice and Consent of the Senate, and although treaties with Indian tribes ended in 1871, Congress may " 'legislate on problems of Indians' pursuant to pre-existing treaties" (Sl. Op. 11); (3) principles inherent in the structure of the Constitution to act on Indian affairs, described as "necessary concomitants of nationality" (*Id.*); and (4) "the trust relationship between the United States and the Indian people" (Sl.Op. 12). Congress has the power to legislate a wide range of areas with respect to Indians, which includes criminal law, domestic violence, employment, property tax, and trade.
    - State courts apply state law when hearing cases involving foster care and adoptions, but when the child is an Indian child, ICWA, a federal statute, applies. Although Congress generally lacks power over domestic relations, "the Constitution does not erect a firewall around family law." Sl.Op. 14. There is no family law carve out to Congress's power to enact legislation under Article I.
    - Despite petitioners' argument that the Indian Commerce Clause only applies to Indian tribes, precedent has established that "commerce with Indian tribes, means commerce with the individuals composing the tribes." Sl.Op. 15 (citation omitted). Arguing children are not commerce is a rhetorically powerful point but ignores precedent that the Indian Commerce Clause addresses trade as well as "Indian affairs." Sl.Op. 16.
    - Principles inherent in the structure of the Constitution are not limited to war and peace as precedent includes "examples like 'creating departments of Indian affairs, appointing Indian commissioners, and … 'securing and preserving the friendship of the Indian nations' ' – none of which are military actions." *Id*. (citation omitted).
    - ICWA was not enacted under the Treaty Clause power.
    - Petitioners ignore precedent and argue "as if the slate were clean[,but m]ore than two centuries in, it is anything but." Sl.Op. 17.
- ICWA does not violate the anticommandeering principle of the Tenth Amendment.
    - In an involuntary child custody proceeding [in NC, abuse, neglect, dependency or TPR], ICWA provides heightened protections to parents and tribes. Any party who seeks a foster care placement or TPR must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful." Sl.Op. 18-19 (quoting 25 U.S.C. 1912(d)). The active efforts requirement does not command the

state's legislative or executive authority to administer or enforce a federal regulatory program. The statutory requirement is not directed primarily or exclusively to the states but applies to "any party" initiating an involuntary proceeding, which includes private individuals and agencies along with government entities. "Legislation that applies 'evenhandedly' to state and private actors does not typically implicate the Tenth Amendment." Sl.Op. 20 (citation omitted). There is no evidence that states initiate the vast majority of involuntary proceedings. Texas law authorizes private parties to initiate a termination of parental rights. Although the state initiates child protection cases, active efforts applies to cases that do not involve abuse or neglect; for example, it applies to a private adoption where one parent does not consent. Further, the state is not the only entity that can protect a child; for example, a grandmother can seek guardianship of her grandchild when the parents are neglectful. The application of active efforts to private lawsuits is consistent with ICWA's findings about the role of public and private actors in unjustly separating Indian children from their families and tribes.

  - Similarly, the provisions of ICWA that address notice requirements to the tribes, expert witness requirements, and evidentiary standards apply to both private and state actors and do not pose an anticommandeering problem.
  - The placement preferences under 25 U.S.C. 1915, which are hierarchical, do not violate the anticommandeering principle of the Tenth Amendment because the preferences apply to private and public parties. Additionally, ICWA "does not require *anyone*, much less the States, to search for alternative placements" so the state is not commanded to do anything. Sl.Op. 23. State courts must apply the placement preferences, but under the Supremacy Clause of federal law over state law, Congress can require state courts to enforce federal law. As held in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), no preference applies if an alternative party who meets the preferred preference has not come forward. The tribe or party objecting to the placement has the burden of producing the preferred (higher-ranked) placement.
  - Two recordkeeping requirements do not violate the anticommandeering principle of the Tenth Amendment – "Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment." Sl.Op. 28. ICWA requires the state court to provide the Bureau of Indian Affairs with a copy of the final adoption order and other information to show the child's tribal affiliation and name, the names and addresses of the biological parents and adoptive parents, and the identity of any agency that has information about the adoptive placement. The application of active efforts to private lawsuits is consistent with ICWA's findings about the role of public and private actors in unjustly separating Indian children from their families and tribes. 25 U.S.C. 1951(a). ICWA also requires the state to maintain a record that documents the efforts that were made to comply with the placement preferences and to make the record available at any time to the Bureau of Indian Affairs or the tribe. 25 U.S.C. 1915(e).

- The individual petitioners and the State of Texas do not have standing to raise an equal protection challenge to the placement preferences or a nondelegation challenge to the tribe's ability to modify the placement preferences.

    - Petitioners must show they suffered an injury that will be redressed by the requested relief. The placement preferences are applied by state courts, and state agencies carry out the court-order placements. There are no state officials who implement ICWA that are parties to this lawsuit, so any order would not be binding on the state actors. The judgment remedies an injury and addressing this issue would not result in a remedy but instead would be nothing more than an opinion.
    - Texas has no equal protection rights and cannot bring an action against the federal government as *parens patriae* on behalf of its citizens. Texas has not been injured.
- Concurrence: Gorsuch, J. joined by Sotomayor, J. and Jackson, J. for Parts I and III
    - This concurrence provides historical context for ICWA and discusses the history of the removal of Indian children from their families and tribes and the existential threat to the tribes for almost 150 years. It discusses Indian boarding schools, which started in 1879 with one school in Pennsylvania and grew to 408 schools across the country, which had the goal of "the abolition of the old tribal relations." Concurrence 4. Children came to the schools through either abduction or coercing parents by withholding rations. Once at the schools, the children were stripped of their identity – they were given English names, had their hair cut and their traditional clothes confiscated, were prohibited from speaking their native language or engaging in their customary or religious practices, and were separated from other members of their own Tribe. Children who resisted or ran away were punished. Conditions generally involved sexual, physical, and emotional abuse; disease; malnourishment; overcrowding; and a lack of health care. The Tribes were charged with the cost of the schools, and the children were required to work on the grounds to subsidize the costs. Some children were "outed" to live with white families to work on household and farm chores. Boarding schools continued into the 1970s, although a transition away from boarding schools had been occurring. At the same time, there was an increased demand for Indian children by adoptive couples. In the 1960s and 1970s, approximately one quarter to one third of all Indian children were removed from their families and communities without justification and without due process. An estimated 90 percent or more of non-relative adoptions were by non-Indian couples. Compared to white children, Indian children experienced a higher rate of physical, sexual, and emotional abuse in their foster and adoptive homes. The result was long-lasting health and emotional damage. In 1978, Congress responded to this crisis by enacting ICWA. "[T]he law's operation is simple. It installs substantive and procedural guardrails against the unjustified termination of parental rights and removal of Indian children from tribal life." Concurrence 10. Still, " ' many [S]tates have struggled with 'effective implemenation'…. Others resist ICWA outright, as the present litigation by Texas attests." Concurrence 12.
    - The concurrence also discusses the competing claims of federal, state, and tribal authority. Tribes are independent sovereigns with exclusive power to manage their internal affairs. "[R]esponsibility for managing interactions with the Tribes rests exclusively with the federal government" and is not with the States. Concurrence 18. The Indian Commerce Clause gives Congress the " 'authority to regulate commerce with Native Americans' as individuals … [and] cover[s] 'something more' than just economic exchange." Concurrence 28, 29. But, there is no " 'authority to delegate to the national

government power to regulate the [T]ribes directly'" Concurrence at 31. The plenary power theory adopted by the courts has resulted in confusion in Indian-law jurisprudence and recently, the Court has started to correct its mistake of expanding the meaning of plenary from what was first employed. This opinion recognizes Congress's authority results from the Constitution and looks to the Indian Commerce Clause and acknowledges there are limits to what Congress can legislate with respect to Indian tribes. ICWA falls under Congress's constitutional authority and limits how non-Indians may interact with Indians. Through ICWA "Congress exercised its authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is keeping with the Constitution's original design." Concurrence 28.

- Concurrence: Kavanaugh, J.: Concur in full. Emphasizing the court did not address or decide the race-based equal protection issue because of the lack of standing so this serious issue is undecided.
- Dissent, Thomas, J.: Congress did not have authority to enact ICWA. The federal government's powers are limited by the Constitution, and all other powers, including family law, remain with the States. The Constitution does not give the federal government plenary power over Indian affairs. The Court refers to a plenary power Congress has over Indian tribes but it is not grounded in constitutional text and the majority continues to refer to this power without a constitutional basis. ICWA is unconstitutional and an intrusion on states' powers. The Indian Commerce Clause applies to commerce, which is economic activity, and does not involve children or child custody matters. ICWA is not based on a treaty; the Treaty Clause is inapplicable. The inherent foreign affairs power does not apply to domestic child custody proceedings of U.S. citizens who reside in the States. Instead, it applies to external affairs and relations, such as war, peace, and diplomacy. ICWA "regulates child custody proceedings, brought in state courts, for those who need never have set foot on Indian lands. It is not about tribal lands or tribal governments, commerce, treaties, or federal property." Dissent 39.
- Dissent, Alito, J.: Provisions of ICWA are contrary to the best interests of children and require courts to consider what Congress believes is in the tribe's best interests. Congress's authority over Indian affairs does not allow it to (1) promote the tribe's interests over a child's best interests and (2) force state judges to follow the tribe's priorities for placement. Governing family relations is reserved for the states and not the federal government, although this does not mean Congress can never address a family law matter. "ICWA violates the fundamental structure of our constitutional order." Dissent 4. ICWA requires a state to abandon its own judicial procedures and laws when addressing a child's welfare and apply a federal law that focuses on the tribes and not solely on the child's best interests. This overrides the state's authority and harms vulnerable children and their parents.

Active Efforts; Incarcerated Parent

In re N.D.M., ___ N.C. App. ___ (April 21, 2023)

Held: Reversed and remanded

- Facts: In 2018, the juvenile was adjudicated neglected and dependent. The court determined the child was an Indian child and ICWA applied. Father was incarcerated and had his paternity established. Father was ordered to comply with a case plan including a comprehensive clinical assessment, substance use assessment, drug screens, parenting classes, and obtaining a legal means of income, transportation, and stable housing. Father was ordered no visitation. In 2019, father was released from prison but had not entered into a case plan. In 2019, father was reincarcerated and had not engaged in any services. The court had found throughout the hearings that DSS provided active effects by communicating with the parents, establishing father's paternity, identifying services, and monitoring the parents' status. In 2020, DSS filed a TPR petition regarding father. Father's rights were terminated on all 5 grounds alleged after the court found father did not complete his services, did not enter a case plan, did not participate in services while incarcerated, did not engage with DSS, and did not establish or maintain a relationship with the child. The court also found DSS made active and reasonable efforts to reunify father and child. Father appeals.
- Whether DSS provided active efforts for reunification under ICWA is reviewed de novo. Findings that relate to active efforts are more appropriately labeled a conclusion of law that are reviewed de novo. The findings do not support the conclusion that active efforts were provided.
- ICWA requires the TPR petitioner to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." Sl.Op. at 7; 25 U.S.C. 1912(d). Active efforts must be provided to both the Indian and non-Indian parent. "Active efforts" is defined in 25 C.F.R. 23.2. Whether the active efforts are sufficient is determined on a case-by-case basis. Although incarceration "may have a direct bearing on what active remedial efforts are possible … neither incarceration nor doubtful prospects for rehabilitation will relieve the State of its duty under ICWA to make active remedial efforts." Sl.Op. at 10 (citation omitted). Active efforts are not passive, which is when the parent is expected to develop their own resources to work a plan. Instead, "active efforts involve assisting the parent through the steps of a case plan, including accessing needed services and resources." *Id.*
- Other than the DNA test for paternity, DSS did not make efforts to contact father in any way while he was incarcerated. Creating a case plan is passive. There is no evidence DSS did anything actively to help the father with the steps of the plan or with accessing or developing resources that were necessary to complete the plan. There is no evidence that DSS communicated with father or prison staff to determine what services were available in the prison that would help father satisfy the case plan. Although father was denied visitation, there was no evidence DSS helped facilitate communication by phone or letters between father and child. When father was not incarcerated, DSS made no efforts to locate or communicate with him. Father did not thwart DSS's efforts by showing he was unwilling to participate, as he signed and returned the paternity results from prison, attended almost every court date, requested current pictures of his child at

a permanency planning hearing, and wrote a letter to the court stating DSS had not provided the pictures.

- In looking at other state court opinions, some have looked to what efforts were provided to the other, non-incarcerated parent when determined if active efforts were provided to the family. Here, the efforts provided to mother were not active efforts designed to prevent the breakup of the family.

Abuse, Neglect, Dependency

Adjudication

Evidence: Hearsay; Child's Statements

In re A.J., ___ N.C. App. ___ (July 18, 2023)

Held: Reversed and Remanded

- Facts: DSS filed juvenile petitions alleging three juveniles (ages four, 13, and 15) were neglected, and the two older juveniles were also dependent based on three incidents reported to DSS. The two older juveniles had been voluntarily residing with their maternal great aunt, while the younger juvenile resided with the mother. One incident alleged an altercation between the mother and the 13-year old, where the child refused to exit the car; mother attempted to remove the child from the car by her leg; the child locked herself in the car; the mother broke the car window to unlock the car, slapped and hit the juvenile with a belt, and choked and threatened to kill the child. A second incident alleged the mother choked the 13-year old and threw her out of the car. The third incident alleged the mother locked the 13-year old out of the house following an argument about transferring the juvenile's school district; when a social worker arrived, law enforcement had handcuffed mother to calm her down, which was witnessed by the youngest juvenile who was visibly upset, while the juvenile sought safety at a neighbor's. At the adjudicatory hearing and over mother's objections, DSS presented testimony of two social workers who testified to statements purportedly made to them by the 13-year old, noticed by DSS as admissible under the residual hearsay exception Rule 803(24) but presented by DSS at hearing as admissible as a statement by a party opponent. The court allowed the child's statements as an admission of a party. The three juveniles were adjudicated neglected and the two older juveniles were also adjudicated dependent. All three juveniles were placed into DSS custody. Mother appeals.
- "The court reviews an adjudication 'to determine whether the trial court's findings of fact are supported by clear and convincing competent evidence and whether the court's findings, in turn, support its conclusions of law.' " Sl. Op. at 4. The reviewing court disregards findings which lack sufficient evidentiary support and examines whether the remaining findings support the court's conclusions.
- To admit hearsay under the residual exception, the trial court must conduct a six-part inquiry consisting of whether proper notice was sent; whether the hearsay statement is not covered elsewhere, possesses circumstantial guarantees of trustworthiness, is material, and is more probative then other evidence that can be procured by reasonable efforts; and whether the interests of justice will be served by its admission. The court must make findings reflecting its inquiry. Sl. Op. at 7. No findings were made at the hearing or in the order addressing this

required six-part inquiry, and therefore, the juvenile's statements were not properly admitted under the residual hearsay exception and should have been excluded upon mother's objection.

- A statement of a party opponent must be offered against the party and be the party's own statement. Rule 801(d). While parents are party opponents to the petitioner (DSS) in abuse, neglect, dependency actions, the juvenile is not a party to the case, and therefore, her statements do not fall under any of the Rule 801(d) exceptions for statements of a party opponent and were inadmissible.
    - *Author's Note*: The opinion does not address G.S. 7B-401.1(f) and 7B-601(a), which state a juvenile is a party to the action and does not discuss whether a juvenile is a party opponent to the petitioner (DSS) or any other party in the action.
- "We disregard the challenged findings, or portions thereof, which rely upon [the juvenile's] inadmissible hearsay statements or those which are otherwise unsupported." Sl. Op. at 9.
- As the majority of the evidence supporting the allegations in the petition were based upon the juvenile's statements, absent the inadmissible hearsay evidence from the social workers' testimony, the conclusions of neglect and dependency are unsupported by the remaining findings of fact. The erroneous admission of hearsay and other unsupported testimony prejudiced mother.

Abuse, Neglect: Hearsay; Findings; Inappropriate Discipline

In re A.J.L.H., ___ N.C. ___ (April 6, 2023)

Held: Reverse Court of Appeals (results in affirming adjudication orders); Remand to court of appeals for arguments on initial dispositional order

Dissent: Earls, J. joined by Morgan, J.

- Facts: This action involves three children, where the appellant is the stepfather to the two older children and the biological father of the youngest child. The children share the same mother. DSS filed a petition based on the repeated use of corporal punishment with a belt that caused bruising and marks on the oldest child, who was 9 years old, as well as a requirement to stand in the corner for hours at a time and to sleep on the floor. The parents did not believe their disciplinary methods were cruel or unusual. The petition alleged the oldest child was abused and neglected and the younger siblings were neglected. After hearing, the children were adjudicated and the parents were denied visitation. The parents appealed, challenging the adjudications and denial of visitation. The court of appeals vacated and remanded the adjudications of neglect for one juvenile based on the trial court's reliance on inadmissible hearsay evidence and reversed and ordered the trial court to dismiss the adjudications of the siblings because it was based solely on the adjudication of the older juvenile. The supreme court granted a petition for discretionary review.
- Hearsay evidence involved the oldest child's statements made to others. The ruling on an evidentiary issue by the trial court "will be presumed to be correct unless the complaining party can demonstrate that the particular ruling was in fact incorrect." Sl.Op. at 9 (citation omitted).
    - A hearsay exception includes statements made to show the action taken by the person to whom the statement was made. The child's statements met this exception to show why DSS became involved and were not admitted to prove the truth of the statement about the abuse. The court of appeals should not have assumed the ruling was erroneous.
- A reviewing court determines whether the conclusions are supported by the findings and whether the findings are supported by clear and convincing evidence. The reviewing court

disregards information in a finding that is not supported by the evidence and examines the remaining findings that are supported by clear and convincing evidence to determine whether those findings support the court's conclusions. A "reviewing court should not speculate about how 'heavily' the trial court might have relied on one finding as opposed to another." Sl. Op. at 10.
  - <u>The abuse adjudication is supported by findings of marks on the juvenile's back caused by a belt, a bruise on the child's neck area and were confirmed by the respondent's admissions of the frequent (vs. sparing) use of physical discipline, having the child stand in a corner for hours and sleep on the floor.</u> Based on the frequency, this is cruel or grossly inappropriate procedures or devices to modify behavior. It is also an injurious environment supporting the neglect adjudication.

- <u>An adjudication of neglect cannot be based solely on the adjudication of other juveniles.</u> Here, the younger siblings were neglected based on a risk of harm because the respondents were not willing to commit to stopping their use of discipline of the older juvenile or acknowledge that it was abuse. <u>The court's assessment of a substantial risk of harm is predictive in nature based on the historical facts of the case and does not require the court to wait for actual harm to occur to the child</u>.
- <u>Dissent in part:</u> The court of appeals was correct in determination the adjudication of the siblings as neglected was based solely on the adjudication of the older sibling. There was no other factors that showed a risk based on current circumstances to the juvenile.

Neglect: Ultimate facts; Risk of Harm Finding Not Required

In re G.C., ___ N.C. ___ (April 6, 2023)

Held: Reverse Court of Appeals (results in affirming trial court adjudication)

Dissent, Earls J. joined by Morgan, J.

- <u>Facts</u>: The juvenile was adjudicated neglected due to living in an injurious environment and not receiving proper care and supervision. Mother had a previous DSS case with her two older children who had been adjudicated abused, neglected, and dependent and had been in DSS custody since 2017. In 2019, mother was convicted of misdemeanor child abuse related to these 2 older children. Two other juveniles were born. In 2020, mother placed the youngest juvenile in a pack and play with blankets and bottles and found him unresponsive. He died and the autopsy report could not rule out death by asphyxiation. DSS filed a petition for the older sibling to the juvenile who died in part because the parents had been informed about proper sleeping arrangements for infants, which involved not having blankets in the crib. The court adjudicated the juvenile neglected and father appealed, arguing mother's prior conviction and previous DSS cases involving her older children do not support current or future neglect regarding this juvenile. The court of appeals vacated the adjudication of neglect and remanded because there was no finding of any physical, mental, or emotional impairment or substantial risk of such impairment to the juvenile. Based on a dissent, DSS appealed to the supreme court.
- <u>Under G.S. 7B-101(15), a neglected juvenile involves a parent who does not provide proper care, supervision, or discipline or creates an injurious environment to the juvenile's welfare. It is relevant if a juvenile lives in the home where another juvenile has died because of suspected abuse or neglect or another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.</u>
- In footnote 3, <u>prior caselaw misusing the term "ultimate fact" is overturned</u>. "[A]n ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning" and is not a conclusion of law or a mixed question of law and fact. Quoting *Woodard v. Mordecai*, 234 N.C.

463, 470, 472 (1951), "[t]here are two kinds of facts: ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts…". The court made ultimate findings that the juvenile does not receive proper care, supervision, or discipline from her parent and that she lived in an environment that was injurious to her welfare. The ultimate findings were supported by the evidentiary facts including that the juvenile lived in the same home as the mother, the mother's prior criminal conviction, the adjudication of the older siblings, and the circumstances of the death of the younger sibling.

- An adjudication of neglect cannot be based solely on the adjudication of other juveniles. Rather, "there must 'be some physical, mental, or emotional impairment of the juvenile or *a substantial risk of such impairment* as a consequence of the failure to provide 'proper care, supervision, or discipline.' ' *In re J.A.M*., 372 N.C. 1, 9 (2019)" (emphasis in original). Sl. Op. at 11. There is no requirement that the trial court make a specific finding of the substantial risk of an impairment based on statute or supreme court precedent. Any opinions by the court of appeals that require a finding of fact is overruled. (Fn 5). Here the adjudication was also based on current circumstances that created a risk to this juvenile.
- Dissent: The younger infant's cause of death was undetermined and also could be consistent with SIDS. This possibility is not addressed by the majority. The court of appeals correctly required the finding of harm or substantial risk of harm to the juvenile. The lack of requirement to require such a finding interferes with parents' constitutional rights.

Neglect

In re A.H., ___ N.C. App. ___ (July 5, 2023)

Held: Reversed

Dissent, Flood, J.

- Facts: A 9-year-old child was adjudicated neglected and dependent based on an incident occurring after being picked up by her Father from the bus stop after school. Upon engaging in a disagreement with her Father, where father said she was going to get a whooping, the child exited the truck before reaching their destination. The Father followed the child in his truck, but because of the neighborhood and hauling a trailer, could not keep up. Father pursued the child on foot until she reached a cross road and he turned back to return to the two other minor step-siblings remaining in the truck. Another driver saw the child run across a road, nearly being struck by a large truck, while also observing Father turning back and walking away. The driver followed the child who was visibly upset and claimed to be afraid of her Father and called the police. Following a DSS investigation spanning a couple of hours that same afternoon, DSS filed a petition alleging neglect and dependency. Father did not contact DSS between the time of the investigation and before the filing of the petition, though Father testified he later saw the child who he determined was safe upon observing her with a crowd. Within an hour of dropping the other two minors off with a relative, father contacted his wife who informed him that the child was in DSS custody. Father appeals the adjudication and subsequent disposition order placing the child with DSS, contending that the findings are unsupported by the evidence and/or inadequate to support the adjudication.
- "An adjudication order is reviewed 'to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by the findings of fact.' " Sl. Op. at 6. (citation omitted)

- Several findings determined to be unsupported by the evidence or improper are stricken. The child's statement that her Father thought she'd gotten run over and just walked back to his truck is conjecture and insufficient to support a proper finding of fact regarding Father's knowledge of the child being in danger. Findings restating the social worker's testimony without any evaluation of credibility are improper.
- The remaining findings are insufficient to support a legal conclusion of neglect. The child's actions of darting into the road, standing alone, do not constitute neglect, as the findings only show Father turned his back before the child crossed the road, not whether Father perceived a dangerous situation and was neglectful in failing to attend to it. Additionally, without the court making further findings supported by evidence introduced by DSS, Father's failure to return to the scene or contact DSS within the 24 hour period between the events and the filing of the petition, while also tending to the other two minors in his care, do not amount to neglect. "The absence of evidence is not evidence." Sl. Op. at 13 (citation omitted).
- Dissent: "Based on the totality of the evidence and the findings of fact… the trial court did not err by concluding [the child] was neglected when Respondent-Father left her in an 'environment injurious to her welfare' and that she was 'at risk of physical, mental, and emotional impairment.' " Dissent at 21 (citation omitted). Findings of Father walking away as the child entered the roadway, leaving her with strangers, and not inquiring as to her well-being was "treatment that fell 'below the normative standards imposed upon parents by our society.' " *Id*. (citation omitted).

In re A.J., ___ N.C. App. ___ (July 18, 2023)

Held: Reversed and Remanded

- Facts: DSS filed juvenile petitions alleging three juveniles (ages four, 13, and 15) were neglected, and the two older juveniles were also dependent based on three incidents reported to DSS. The two older juveniles had been voluntarily residing with their maternal great aunt, while the younger juvenile resided with the mother. One incident alleged an altercation between the mother and the 13-year old, where the child refused to exit the car; mother attempted to remove the child from the car by her leg; the child locked herself in the car; the mother broke the car window to unlock the car, slapped and hit the juvenile with a belt, and choked and threatened to kill the child. A second incident alleged the mother choked the 13-year old and threw her out of the car. The third incident alleged the mother locked the 13-year old out of the house following an argument about transferring the juvenile's school district; when a social worker arrived, law enforcement had handcuffed mother to calm her down, which was witnessed by the youngest juvenile who was visibly upset, while the juvenile sought safety at a neighbor's. At the adjudicatory hearing and over mother's objections, DSS presented testimony of two social workers who testified to statements purportedly made to them by the 13-year old, noticed by DSS as admissible under the residual hearsay exception Rule 803(24) but presented by DSS at hearing as admissible as a statement by a party opponent. The court allowed the child's statements as an admission of a party. The three juveniles were adjudicated neglected and the two older juveniles were also adjudicated dependent. All three juveniles were placed into DSS custody. Mother appeals.
- G.S. 7B-101(15) defines a neglected juvenile as one who does not receive proper care, supervision, or discipline or who lives in an injurious environment.

- Some of the findings of fact were supported by inadmissible hearsay evidence. Those findings are disregarded. There was no properly admitted evidence to support the alleged second incident of mother choking child.
- Evidence does support that an argument between mother and child occurred in the car (first incident) and the incident that occurred when mother informed the juvenile that she would be transferring schools (third incident) but does not support the full findings about each incident.
- Supported findings regarding the first and third incidents are insufficient to establish mother's improper care or supervision of her children.
    - "An argument between a parent and child or use of corporal punishment, with no evidence of any resulting marks, bruising, or other injury, does not constitute neglect." Sl. Op. at 11-12.
    - "The place of the family's residence and choice of their children's school is a parent's prerogative under parental care, custody, and control." Sl. Op. at 12. The court found the properly admitted evidence establishes that the 13-year-old has "a recalcitrant and undisciplined pattern of behavior," while mother testified she believed her actions relating to the car incident and school transfer were necessary due to the 13-year-old's aggressive behavior. Sl. Op. at 13.
    - "Where a child is residing in a voluntary kinship arrangement prior to any DSS involvement, and no evidence or adjudicatory findings support a conclusion the child has been subjected to harm in the parent's primary care, custody, and control, 'the findings and evidence do not support a conclusion' of the child 'living in an environment injurious to her welfare and not receiving proper care and supervision.' " Sl. Op. at 13 (citation omitted). With the 13-year-old juvenile living with relatives during all relevant periods and with mother's permission, the trial court erred in adjudicating the 13-year old as neglected.
- Under G.S. 7B-101(15), it is relevant whether a juvenile lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. The court made no evidentiary findings concerning the other older juvenile who did not live with her mother, and only one relevant finding concerning the youngest juvenile – her presence during the third incident. This single finding does not support the conclusion that the youngest juvenile was neglected. With the evidence failing to support the 13-year-old juvenile as neglected, the trial court "erred in, ipso facto" adjudicating the two siblings neglected juveniles.
- The findings describing the behaviors of mother and the youngest child during the adjudicatory hearing is irrelevant when determining the existence or nonexistence of the conditions alleged in the petition, which is the purpose of the adjudicatory hearing. *See* G.S. 7B-802.

In re K.J.M., ___ N.C. App. ___ (April 21, 2023)

Held: Affirmed

- Facts: A 6-year-old juvenile was adjudicated neglected. Mother was incarcerated. Father was deceased. Mother left the juvenile with her mother who placed the juvenile with a non-relative. That non-relative caretaker was arrested for possession of methamphetamine while the child was present. There was no one available to care for the juvenile. Although mother identified her brother and sister-in-law as an option, those relatives were not willing to care for the juvenile. The neglect adjudication was based on a lack of proper care, supervision, or discipline, and an injurious environment. Mother appealed after the initial dispositional order was entered challenging the adjudication order only.

- Mother successfully challenged some findings of fact as conclusions of law. Regardless of how they are labeled, the appellate court applies the proper standard of review, which for conclusions of law is a de novo review.
- G.S. 7B-101(15) defines neglect as a parent, guardian, custodian, or caretaker who does not provide proper care, supervision, or discipline to a juvenile or creates an injurious environment to the juvenile's welfare. Additionally, case law requires there must be a physical, emotional, or mental impairment or substantial risk of such impairment as a result. This requirement results from the State's "authority … to regulate the parent's constitutional right to rear their children, *Meyer v. Nebraska*, 262 U.S. 390 … (1923), only when 'it appears that parental decisions will jeopardize the health or safety of the child.' " Sl.Op. at 24 (citation omitted).
- The challenged finding that the juvenile was without a caretaker of any kind after the caretaker's arrest is supported by the evidence since neither parent was available, the grandmother had placed the child with the caretaker who was arrested, and the brother and sister-in-law were unavailable to provide care. The court logically reasoned there was no other available caretaker. Regardless of whether grandmother was appropriate, grandmother being available as a caretaker was not admitted in evidence. The evidence showed she had given her caretaker role to another person and mother did not identify grandmother as a potential resource when approached by DSS. Mother's argument on appeal that grandmother was appropriate and available was not argued before the trial court, and mother cannot swap horses on appeal having argued grandmother's actions led to the child's removal at the adjudication hearing.
- The findings were supported by clear and convincing evidence, which includes social worker testimony. The statements made by the caretaker, which were included in the allegations in the petition, were excluded as hearsay and were not considered by the court. The statement "the allegations in the Juvenile Petition have been proven by clear, cogent, and convincing evidence" do not mean the trial court concluded that all of the allegations were proved. That is a hypertechnical reading. Further the court's statement regarding clear, cogent, and convincing evidence complies with G.S. 7B-807, which requires the court recite the standard it relied upon for adjudication.
- The findings support the conclusion of a substantial risk of harm to the child. At six years old, the juvenile did not have caretaker which at the time of DSS intervention appeared to be indefinite. A child that age faces a substantial risk of harm or impairment when without a caretaker for an indefinite period of time. In In re D.C., 183 N.C. App. 344 (2007), a 16 month old was at substantial risk of harm when left alone for more than 30 minutes in a hotel room. This case is not distinguished from In re D.C. because of the difference in age or location. Here, the juvenile would have been "capable of exploring and encountering various hazards" when left alone for an indefinite period of time. Sl. Op. at 26. The court does not have to wait for actual harm to occur.

In re M.C., 2022-NCCOA-786, 881 S.E.2d 871

Held: Affirmed

- Facts: Infant was born prematurely and was admitted to the NICU. Parents have older children who have been adjudicated and removed from their care based in part on parenting that was impacted by parents' mental health issues. Parents were not regularly present with their child in the hospital. When they were there, hospital staff repeatedly instructed parents on formula preparation, feeding times, amount to feed infant, and diaper changing. Parents did not always perform these tasks and when they did, they were unable to do so sufficiently. When infant was medically ready for discharge, the parents had not completed discharge teaching that addressed caring for their child. DSS filed a petition. Child was adjudicated neglected, and parents appealed.

- Under G.S. 7B-101(15), neglect involves the lack of proper care, supervision, or discipline. There must be some physical, emotional, or mental impairment, or substantial risk of such impairment, to the juvenile as a result. The determinative factors are the status of the child and not the fault or culpability of a parent. It is not appropriate to enter separate adjudications of neglect based on the individual conduct of each parent.
- Prior involvement with DSS standing alone is insufficient to support an adjudication of neglect. The court must find other factors that suggest the neglect will be repeated. A newborn does not have to return home from the hospital for a neglect adjudication to occur.
- Challenged findings are supported by clear and convincing evidence: medical records and testimony. Father's failure to acknowledge the neglect adjudication of their older child shows risk of impairment to this child. Father's argument that the prior neglect adjudication is not relevant since most of the findings were about mother is rejected. A neglect adjudication is about the status of the child.
- The prior DSS case regarding the parents' older child was not the sole basis for the adjudication. Both parents had significant mental health issues that impacted their parenting of this child. The parents were unable to provide basic care (feeding, changing diapers) to their infant while he was in the NICU and the parents were receiving instructions from staff. Both parents failed to obtain the services required from the prior case (e.g., therapy). A substantial risk of harm to this juvenile existed.

In re G.W., 2022-NCCOA-784, 882 S.E.2d 81

Held: Affirmed

- Facts: DSS filed an abuse and neglect petition regarding the two older siblings involving improper care. During that case, G.W. was born. At the time of G.W.'s birth, mother tested positive for substances. Based on parents' behaviors at the hospital, the hospital refused to allow G.W. to be discharged. DSS filed a neglect petition based on an injurious environment. The neglect petition alleged parents' inappropriate behaviors in the hospital, substance use, and noncompliance with their case plan for the older siblings to receive mental health services, complete parenting classes, and repairs holes in the floors of the home. The two older siblings were adjudicated neglected by consent. An adjudicatory and dispositional hearing was held regarding G.W., who the court concluded was a neglected juvenile based on an injurious environment due to the conditions of the home and parents' failure to address the conditions that caused the two older siblings to be removed. Mother appeals the adjudication.
- Neglect requires a showing that the injurious environment has resulted in harm or a substantial risk of harm to the juvenile. A newborn who is in the hospital is properly determined to live in the home of their parents when determining whether there is a substantial risk of harm. Cases involving newborns requires the trial court to assess whether there is a substantial risk of future abuse or neglect based on the historical facts of the case and is predictive in nature.

- G.S. 7B-802 requires the court at adjudication to determine the existence or nonexistence of any of the allegations in the petition. Post-petition evidence is considered at disposition when the court addresses the best interests of the juvenile. However, there are exceptions when the evidence pertains to a "fixed and ongoing circumstance[s]", like paternity or mental illness and is not a "discrete event or one-time occurrence." Sl.Op. ¶ 23.
    - Mother's challenged findings of fact are supported by clear and convincing evidence. The parents' completion of parenting classes occurred after the petition was filed and is post-petition evidence of a discrete event or one-time occurrence and is not considered at adjudication. Post-petition drug screens are a discrete one-time occurrence and is not admissible at adjudication. Other findings related to post-petition evidence were appropriately considered at adjudication as they relate to "ongoing circumstances" that are relevant to the existence or nonexistence of the allegations in the petition. Parents' behavior during visitation related to the allegation about parent's inability to care for G.W. Testimony of recent observations of holes in the floors, which existed prior to G.W.'s birth, related to an ongoing circumstance of home safety. The failure to receive mental health services as required by the case plan for the 2 older siblings is relevant to the ongoing circumstance of the parents' mental illness and is relevant to the existence or nonexistence of the allegations in the petition.
- A substantial risk of harm is an ultimate finding of fact as it determines a mixed question of law or fact. The findings of fact based on clear and convincing evidence and unchallenged findings of fact support the ultimate finding that G.W. was at substantial risk of future harm.
- Author's Note: This opinion does not address the NC Supreme Court opinion stating post-petition evidence is inadmissible and relies on court of appeals precedent that carves out the exception of post-petition evidence of a fixed and ongoing circumstances. That exception was not addressed by the Supreme Court in *In re L.N.H.,* 382 N.C. 536 (2022).

Neglect; Dependency

In re D.S., 2022-NCCOA-674, 879 S.E.2d 335

Held: Reversed

- Facts: Infant was born and tested positive for THC and was also placed in NICU due to low blood sugar. Report to DSS was made and based on mother's prior history with DSS involving substance use and unstable housing, agreement was made where infant was discharged from hospital to father's home. Two weeks later, DSS and law enforcement did a courtesy check, where father was not present for approximately 5 minutes. When father arrived, social worker and law enforcement officer entered home with father and found infant sleeping in his room; no one else was present in the home. DSS filed a neglect and dependency petition. The juvenile was adjudicated neglected and dependent based on stipulations and father appealed.
- Under G.S. 7B-101(15), neglect involves the lack of proper care, supervision, or discipline and/or an environment that is injurious to the juvenile's welfare. There must be some physical, emotional, or mental impairment, or substantial risk of such impairment, to the juvenile as a result.
- Prior involvement with DSS standing alone is insufficient to support an adjudication of neglect. The court must find other factors that suggest the neglect will be repeated. In reviewing the conclusion of law (neglect) de novo, the unchallenged findings do not support the conclusion.

The stipulations do not address when and why mother had a past DSS history, other than general references to substance use and unstable housing, and do not address the presence of any factors that would suggest the neglect from mother's prior DSS case would be repeated. There were no findings addressing the relationship between THC and the infant's low blood sugar levels. The infant was placed with father, who had no prior DSS history. There is no findings or evidence of harm or substantial risk of harm to the juvenile.

- <u>There were no findings that leaving the child briefly unattended caused harm or a substantial risk of harm.</u> This case is distinguishable from *In re D.C.*, 183 N.C. App. 344 (2007), where the child was left alone in a motel room for 30 minutes and was in distress. Here, the infant was sleeping in his crib when left briefly alone and was in no apparent distress. There is no indication that the child was more at risk than what he would have been if his father were sleeping in another room.
- <u>The argument of DSS that the court should look to criminal statutes, specifically G.S. 14-318, for neglect and adopt a per se rule that a violation of the criminal statute is neglect is rejected</u>. Neglect is defined in the Juvenile Code, which has a purpose of preventing the unnecessary separation of juveniles from their parents. The Juvenile Code "is not intended to punish parents; it is intended to ensure the wellbeing of juveniles." Sl. Op. ¶25. "We see no reason to link two distinct Chapters of our General Statutes when our legislature intentionally drafted § 7B-101(15) without reference to Chapter 14 when it easily could have chosen to…." Sl. Op. ¶24. There were no findings that father's home was inappropriate.
- <u>Dependency under G.S. 7B-101(9)</u> requires findings that both parents lack the ability to provide care or supervision and lack an appropriate alternative child care arrangement. Although the findings show mother was incapable of providing proper care, mother had father as an appropriate alternative childcare arrangement. The minimal facts that the child was left alone for 5 minutes does not establish both parents were unable to provide proper care or supervision and lacked appropriate alternative childcare arrangements.

In re J.N.J., 2022-NCCOA-785, 881 S.E.2d 890

Held: Affirmed

Dissent, Murphy, J.

- <u>Facts:</u> At the time of the juvenile's birth, mother had two children who were in DSS custody, having been adjudicated neglected and dependent. The primary permanent plan for those juveniles was adoption based on mother's lack of compliance with her case plan. The juvenile in this action was born prematurely and was admitted to the NICU. He is a medically fragile child, requiring a breathing tube and ventilator, 24-hour-a-day supervision (so 2 full-time caretakers), and an environment free of smoke and smoke residue (home, car, personal contact). The homes of both mother and father smelled of smoke, and both parents admitted to being smokers. Father did not complete any medical training, and mother completed only some medical training. Neither parent provided names of two appropriate caregivers to care for the juvenile. When the juvenile was 6 months old and still in the NICU, DSS filed a petition alleging neglect based on lack of proper care and supervision and an injurious environment as well as dependency. After a 2-day hearing, the juvenile was adjudicated neglected and dependent and after the initial dispositional hearing, was placed in DSS custody. Mother appeals the adjudication and disposition.

- Although the findings in the court order mirror the allegations from the petition, the findings are supported by clear and convincing evidence. It is not per se reversible error for the findings to mirror the wording of a petition or pleading. The record of the hearing must demonstrate the trial court found the ultimate facts necessary to adjudicate the juvenile based on its process of logical reasoning and the evidentiary facts before it. At the hearing, there was social worker testimony, and one of the social worker corroborated many of the allegations in the petition. Additionally, the trial court's oral rendition demonstrated the court used a process of logical reasoning based on the evidence before it to fine the necessary ultimate facts to support the adjudication.
- Neglect involves a parent not providing proper care, supervision, or discipline and/or creating an environment that is injurious to the child's welfare. There must be physical, mental, or emotional impairment or substantial risk of such impairment. For newborns or a medically fragile infant, the court must assess whether there is a substantial risk of future abuse or neglect based on the historical facts of the case and is predictive in nature.
    - A prior adjudication of a sibling, standing alone, is insufficient. There must be additional factors that suggest the neglect will recur. Failing to correct the conditions resulting in the prior adjudication, including addressing domestic violence, may support a likelihood of future neglect. The court properly found the parents were unable to provide proper care and supervision. Mother appeared controlled by father. The smoking by both parents and smoke in their homes created an injurious environment that would result in a substantial risk of physical impairment to this medically fragile infant.
- Dependency requires a juvenile to be in need of assistance because the parents are unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement. The court found that each parent was unable to provide proper care and supervision. Although father proposed alternative child care arrangements, his relatives were not willing to provide care to the juvenile. Mother failed to specifically identify any alternative caregivers and suggestions of a friend or sister were rejected as proper placements for her other children who were in DSS custody. Neither her friend or sister could provide 2 full-time live-in caretakers the juvenile required for his medical needs. The adjudication of dependency was proper.
- Dissent: The court's order contained a significant portion of its findings from the allegations in the petition that were not based on evidence before the court and do not appear to reflect the trial court's process of logical reasoning. Looking to an oral rendition is unprecedented and is a departure from the ordinary appellate review process.

Dependency: Evidence

In re L.N.H., 382 N.C. 536 (2022)

Held: Reversed and Remanded Court of Appeals Decision

- Facts and Procedural History: DSS became involved when the 2-month-old infant was treated at a hospital for injuries resulting from mother punching infant in the chest, spraying green liquid on the infant, and burning her infant's feet with a lighter. The infant was left alone on the porch, and the neighbors took her to the hospital. Mother was charged with felony child abuse. DSS filed a petition alleging abuse, neglect, and dependency. The court held an adjudication, disposition, and permanency planning hearing on the same day. At the adjudication hearing, over objection, the social worker testified to the initial report, which was offered not for the truth but for why DSS became involved. The court also took judicial notice of medical records that had been admitted at a nonsecure custody hearing without objection. The juvenile was adjudicated abused, neglected, and dependent. The child was placed in DSS custody but that custody would be transferred to a willing relative once a relative complied with certain requirements. The court ordered the cessation of reunification efforts. Mother appealed. The Court of Appeals determined mother received ineffective assistance of counsel based on a lack of objection to hearsay and reversed the dependency adjudication because the trial court did not look at the circumstances that existed at the time of the adjudicatory hearing. DSS and mother both filed a petition for discretionary review, which were granted. This summary focuses on evidentiary issues.

- Failing to object at trial to the court taking judicial notice of underlying juvenile files waives appellate review. There was no objection made when the court took judicial notice of the medical records that had been previously admitted without objection in the hearing on continued nonsecure custody. Mother waived this review.
- Ineffective assistance of counsel places the burden on the party alleging it that the counsel's performance was deficient, the deficiency was so serious that the party was deprived of a fair hearing, and there is a reasonable probability that, but for the counsel's errors, there would have been a different result. This is a heavy burden as there is a strong presumption that the counsel's performance was within the range of reasonable professional assistance, and an attorney is given wide birth in strategy decisions. Mother's attorney objected to the social worker's testimony, which was overruled. Counsel gave an explanation for why he did not object to the admission of the medical records – that were already in evidence. Neither NC appellate court has directly addressed whether a trial court at adjudication can take judicial notice of evidence that was admitted at a nonsecure custody hearing. As a result, "we are unable to conduct that respondent-mother's counsel's conduct was 'unreasonable' given 'prevailing professional norms.' " Sl. Op. ¶ 22 (citation omitted). There was no ineffective assistance of counsel.
- G.S. 7B-802 states "the adjudicatory hearing shall be a judicial process designed to adjudicate the existence of nonexistence of any of the conditions alleged in a petition." The court's determination of abuse, neglect, or dependency is "fixed at the time of the filing of the petition. This inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party." The court of appeals' reversal of the dependency adjudication because father and relatives were placement alternatives does not apply the plain language of G.S. 7B-802. When the petition was filed, father's paternity was not established and his location was unknown, and relatives were not available placements because there were no completed home studies. The trial court's findings that when the petition was filed, mother did not provide alternative placements with family members who presented themselves to DSS and did not have information about father and how to contact him were correct. The adjudication of dependency was not error.

Dependency

In re A.H., ___ N.C. App. ___ (July 5, 2023)

Held: Reversed

Dissent, Flood, J.

- Facts: A 9-year-old child was adjudicated neglected and dependent based on incidents occurring after being picked up by her Father from the bus stop after school. Upon engaging in a disagreement with her Father, where father said she was going to get a whooping, the child exited the truck before reaching their destination. The Father followed the child in his truck, but because of the neighborhood and hauling a trailer, could not keep up and instead pursued the child on foot until he had to turn back and return to the two other minor step-siblings remaining in the truck. Another driver saw the child run across a road, nearly being struck by a large truck, while also observing Father turning back and walking away. The driver followed the child who was visibly upset and claimed to be afraid of her Father, called the police. Following a DSS investigation spanning a couple of hours the same afternoon, DSS filed a petition alleging dependency and neglect the following morning. Father did not contact DSS between the time of the investigation and before the filing of the petition, though Father testified he later saw the child and determined she was safe upon observing her with a crowd. Within an hour of dropping the other two minors with a relative, father contacted his wife who informed him that the child was in DSS custody. Father appeals from adjudication and the subsequent disposition order placing the child with DSS, contending that the findings are unsupported by the evidence and/or inadequate to support the adjudication.
- An adjudication of dependency requires the trial court to ' " address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." ' Sl. Op. at 13. (citation omitted).
- DSS failed to introduce evidence that the Father did not have alternative child care arrangements available. Findings as to both prongs are required. Sl. Op. at 13.
- Father not contacting DSS or providing DSS with alternative arrangements within the 24 hours, and Father's wife not offering to take the juvenile into her custody or sharing the Father's contact information with DSS, does not meet DSS's evidentiary burden of showing no such arrangements exist.
- Dissent: The trial court fulfilled its duty to "address the parent's ability to provide care and alternative childcare arrangements." Dissent at 21. Father left the scene, did not return or contact DSS, and left town; Father's wife was not willing to assist in finding care or offering Father's contact information. DSS could not have attempted to work a plan with Father under these circumstances or gain assistance from Father's wife. Findings are supported by clear and convincing evidence to support the child's adjudication as dependent.

In re A.J., ___ N.C. App. ___ (July 18, 2023)

Held: Reversed and Remanded

- Facts: DSS filed juvenile petitions alleging three juveniles (ages four, 13, and 15) were neglected, and the two older juveniles were also dependent based on three incidents reported to DSS. The two older juveniles had been voluntarily residing with their maternal great aunt, while the younger juvenile resided with the mother. One incident alleged an altercation between the mother and the 13-year old, where the child refused to exit the car; mother attempted to remove the child from the car by her leg; the child locked herself in the car; the mother broke the car window to unlock the car, slapped and hit the juvenile with a belt, and choked and threatened to kill the child. A second incident alleged the mother choked the 13-year old and threw her out of the car. The third incident alleged the mother locked the 13-year old out of the house following an argument about transferring the juvenile's school district; when a social worker arrived, law enforcement had handcuffed mother to calm her down, which was witnessed by the youngest juvenile who was visibly upset, while the juvenile sought safety at a neighbor's. At the adjudicatory hearing and over mother's objections, DSS presented testimony of two social workers who testified to statements purportedly made to them by the 13-year old, noticed by DSS as admissible under the residual hearsay exception Rule 803(24) but presented by DSS at hearing as admissible as a statement by a party opponent. The court allowed the child's statements as an admission of a party. The three juveniles were adjudicated neglected and the two older juveniles were also adjudicated dependent. All three juveniles were placed into DSS custody. Mother appeals.

- <u>In determining dependency, the trial court must address the parent's ability to provide care or supervision and the availability to the parent of alternative child care arrangements</u>. Failure to address both prongs will result in reversal of the court.
- <u>The findings do not support the conclusion of dependency. There were no evidentiary findings or conclusions regarding the mother's ability to care for or to supervise the two older juveniles</u>. The portion of the findings that were supported and described mother's arguments with the 13-year-old do not show mother's behavior as "wholly unable to parent." There was no contrary evidence to mother's testimony that she was willing and able to care for the two older juveniles and continue to parent the youngest juvenile. References to mother's mental state are not supported by findings. Evidence does not support a finding that mother's voluntary placement of the older juveniles with relatives was necessary or due to mother's unwillingness or inability to parent, but rather related to mother witnessing traumatic events and being hospitalized following a car accident.

Initial Disposition

Parent's Constitutional Rights

<u>In re K.C.</u>, ___ N.C. App. ___ (May 2, 2023); Writ of Supersedeas granted

Held: Vacated

There is a Dissent

- <u>Facts:</u> DSS filed a neglect petition based on circumstances related to mother's substance use, mental health, domestic violence, and housing issues. Parents and DSS agreed to a safety plan where the juvenile would reside with father, who was the non-removal parent. DSS did not seek nonsecure custody. After the juvenile was adjudicated neglected, the court held the initial dispositional hearing. The court ordered temporary custody to a parental aunt and uncle, which is the first time the court contemplated removing the juvenile from her father. The court determined father acted inconsistently with his parental rights. Father was ordered to comply with a case plan and received 3 hours a week of unsupervised visitation. Father appeals.
- <u>A determination that a parent acted inconsistently with their parental rights is a conclusion of law that is reviewed de novo</u>.
- <u>The findings</u> are that father temporarily had the juvenile stay with his sister and husband (aunt and uncle). In those 3 months, father visited with the child. The child returned to father's home, which is also the home of his mother and aunt who assisted with childcare. Father was arrested and DSS discovered father has an extensive criminal history. Some findings of fact addressed

socioeconomic factors, which are irrelevant to whether a parent has acted inconsistently with their parental rights and are not considered by the appellate court. They are relevant to a best interests determination. These findings include father living with his mother, moving frequently, the house was not clean, and a history of unstable employment.

- While the juvenile was in father's care for approximately 15 months, DSS did not seek nonsecure custody and reported that the child was doing well, father was meeting her needs, is utilizing family supports, and is providing a safe home. DSS recommended placement with the aunt and uncle.
- The temporary time the child lived with her aunt and uncle does not undermine father's constitutional protected status. Viewing father's conduct cumulatively, having support from family to care for the child, taking the child with him when he worked, having past criminal convictions, and have a domestic violence charged is not a forfeiture of father's constitutionally protected status. The petition does not contain any allegations that father neglected his child, was unfit, or acted inconsistently with his parental rights. Father's constitutional rights remain.
- Dissent: At initial disposition, the court does not need to address whether father acted inconsistently with his parental rights when awarding temporary custody. This conclusion is only required when permanent custody is being ordered. The standard of review should have been an abuse of discretion of the initial disposition and not a de novo review of a conclusion of law that was premature and unnecessary. The court did not abuse its discretion when awarding temporary custody to relatives based on the child's best interests.

In re J.N.J., 2022-NCCOA-785, 881 S.E.2d 890

Held: Affirmed

Dissent, Murphy, J.

- Facts: The juvenile in this action was born prematurely and was admitted to the NICU. He is a medically fragile child, requiring a breathing tube and ventilator, 24-hour-a-day supervision (so 2 full-time caretakers), and an environment free of smoke and smoke residue (home, car, personal contact). The homes of both mother and father smelled of smoke, and both parents admitted to being smokers. Father did not complete any medical training, and mother completed only some medical training. Neither parent provided names of two appropriate caregivers to care for the juvenile. When the juvenile was 6 months old and still in the NICU, DSS filed a petition alleging neglect based on lack of proper care and supervision and an injurious environment as well as dependency. After a 2-day hearing, the juvenile was adjudicated neglected and dependent and after the initial dispositional hearing, was placed in DSS custody. Mother appeals the adjudication and disposition.
- Mother argues the court erred by applying the best interests of the child test without first addressing whether mother was unfit or acted inconsistently with her parental rights and this issues is automatically preserved as a constitutional argument under App. Rule 10(a)(1). This argument was rejected by *In re J.N.*, 381 N.C. 131. Mother failed to raise this argument at the adjudicatory or dispositional hearing despite having an opportunity to do so. Her argument that she could provide a safe permanent home and wanted in-person visitation with her child was insufficient. She did not argue that leaving her child in DSS custody violated her constitutional rights. Mother waived this argument for appellate review.

Cease Reunification Efforts

In re L.N.H., 382 N.C. 536 (2022)

Held: Reversed and Remanded Court of Appeals decision

- Facts and Procedural History: DSS became involved when the 2-month-old infant was treated at a hospital for injuries resulting from mother punching infant in the chest, spraying green liquid on the infant, and burning her infant's feet with a lighter. The infant was left alone on the porch, and the neighbors took her to the hospital. Mother was charged with felony child abuse. DSS filed a petition alleging abuse, neglect, and dependency. The court held an adjudication, disposition, and permanency planning hearing on the same day. The court ordered the cessation of reunification efforts. The trial court found reunification efforts with mother would be clearly unsuccessful or inconsistent with the juvenile's health and safety and aggravating circumstances exist as mother's conduct cause serious injuries to the juvenile. Mother appealed. The Court of Appeals determined mother received ineffective assistance of counsel based on a lack of objection to hearsay and reversed the dependency adjudication because the trial court did not look at the circumstances that existed at the time of the adjudicatory hearing. DSS and mother both filed a petition for discretionary review, which were granted. This summary addresses the cessation of reunification efforts.
- When a court ceases reunification efforts at initial disposition, it must make written findings under G.S. 7B-901(c). The reference to "aggravating circumstances" invokes G.S. 7B-901(c) even when the statutory citation was not specifically cited. Referring to "aggravating circumstances" without an explanation of those circumstances is insufficient for a G.S. 7B-901(c) finding.
    - DSS's argument that the findings showing severe burns requiring hospitalization for 2 days and medical treatment for several weeks satisfied G.S. 7B-901(c)(1)f that the parent engaged in "any *other* act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse of neglect" is rejected. G.S. 7B-901(c)(1)f requires "*other*" conduct that is more than the facts the resulted in the adjudication of abuse or neglect. Because that evidence supported the adjudication, it does not support a determination of this statutory aggravating factor.
    - There is sufficient evidence to supporting a finding under G.S. 7B-901(c)(3)(iii) when a parent has committed a felony assault resulting in serous bodily injury to the child. The court could have made this finding based on the evidence in the record. This portion of the order ceasing reunification is vacated and remanded for the trial court to enter an appropriate finding about whether reasonable efforts should be ceased under G.S. 7B-901(c).

Cease Reunification Efforts; Visitation

In re M.S., ___ N.C. App. ___ (June 6, 2023)

Held: Affirmed in part, vacated in part, remanded

- Facts: DSS filed a neglect petition for the juveniles based on improper care and supervision and an injurious environment caused by domestic violence, substance use, amber alert notification, and prior TPR of children based on sexual abuse. Prior to the adjudication hearing, the parents agreed to case plans with DSS that included no contact between the parents, parenting classes, a comprehensive clinical assessment, for mother a domestic violence assessment and classes, and for father sex offender evaluation, drug screens, domestic violence batterer's assessment, housing, and an employment search. Mother had one supervised visit but that was ceased at the pre-adjudication hearing when the court found the children started to show sexualized behaviors and there was a prior TPR based on sexual abuse. The court held an adjudication hearing and adjudicated the children neglected. The court moved to the dispositional hearing. The children were ordered in DSS custody; reunification efforts with the parents were ceased based on prior TPR orders; no visitation was ordered; and a permanency planning hearing will be scheduled within 30 days. Both parents appeal.

- <u>The neglect adjudication is supported by the findings, which are supported by clear and convincing evidence</u> – specifically social worker and officer testimony of their personal observations of the parents. Although one finding did not include the specific date of a domestic violence incident, that omission is not prejudicial.
- <u>G.S. 7B-901(c)(2) authorizes the cessation of reunification efforts when there has been a court order involuntarily terminating the parental rights of the parent to another child.</u> The standard of review of an order ceasing reunification efforts under G.S. 7B-901(c) is reviewed for an abuse of discretion.
    - <u>The court ceased reunification efforts based on G.S. 7B-901(c)(2) and is not an abuse of discretion</u>. Certified copies of the TPR petitions and orders were admitted to evidence. The court also found that mother and father did not follow components of their case plan.
- <u>A visitation order is reviewed for an abuse of discretion</u>. Visitation is addressed by G.S. 7B-905.1 when the child is placed outside the home.
    - The court of appeals looked to G.S. 7B-906.1(d) and (e) and the criteria a court must consider and make written findings *at any permanency planning hearing* where the juvenile is not placed with a parent. The court did not make those findings. Remanded to make findings.
    - <u>Author's Note:</u> It is unclear to this author why the court looked to the statute governing review and/or permanency planning hearings. It is believed this is an order of initial disposition where the factors of G.S. 7B-901 apply.

Visitation

Role of Appellate Court

<u>In re A.J.L.H</u>., ___ N.C. ___ (April 6, 2023)

Held: Reverse Court of Appeals (results in affirming adjudication orders); Remand to court of appeals for arguments on initial dispositional order

Dissent/Concur in Part: Morgan, J. joined by Earls

- <u>Facts:</u> This action involves three children, where the appellant is the stepfather to the two older children and the biological father of the youngest child. The children share the same mother. DSS filed a petition based on the repeated use of corporal punishment with a belt that caused bruising and marks on the oldest child, who was 9 years old, as well as a requirement to stand in the corner for hours at a time and to sleep on the floor. The parents did not believe their disciplinary methods were cruel or unusual. The petition alleged the oldest child was abused and neglected and the younger siblings were neglected. After hearing, the children were adjudicated and the parents were denied visitation. The parents appealed, challenging the adjudications and denial of visitation. The court of appeals vacated and remanded the adjudications of neglect for one juvenile reversed, ordered the trial court to dismiss the adjudications of the siblings, and ordered at disposition, if the older juvenile was adjudicated to order general and increasing visitation with the mother. The supreme court granted a petition for discretionary review.

- "The instruction to the trial court [on disposition] is improper and beyond the role of an appellate court.… The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court" that is reviewed for an abuse of discretion. Sl.Op. at 17. When there is an abuse of discretion, the remedy is to vacate the disposition order and to "express no opinion as to the ultimate result of the best interests determination on remand, as that decision must be made by the trial court." Sl.Op. at 17.

No Visits: Parent's Constitutional Rights

In re A.J.L.H., ___ N.C. App. ___ (July 18, 2023)

Held: Vacated in Part and Remanded

- Facts and procedural history: Returned on remand from the supreme court, *see* 384 N.C. 45 (2023), this matter involves an appeal of the adjudication and visitation portion of the initial disposition order. All three children share the same mother. Respondent step-father is the biological father of the youngest child; the two older children have different biological fathers. DSS filed a petition based on the repeated use of corporal punishment with a belt that caused bruising and marks on the oldest child, who was 9 years old, as well as a requirement to stand in the corner for hours at a time and to sleep on the floor. The parents did not believe their disciplinary methods were cruel or unusual. After hearing, the oldest child was adjudicated abused and neglected and the younger siblings were adjudicated neglected. At initial disposition, the oldest child was placed with a relative and the younger siblings were placed in foster care. Only the biological father of one of the younger children was granted supervised visitation; respondent mother, and respondent (step)father, and the third biological father, were denied visitation, after a determination that visitation was not in the children's best interests while respondents were working on their case plans with DSS. The court also denied placement of the younger juveniles with respondent-father's relatives and denied requests to attend medical appointments. The court of appeals vacated and remanded the adjudication of neglect for the oldest juvenile, ordered the trial court to dismiss the adjudications of the siblings, and ordered on remand that if the older juvenile was adjudicated the trial court order general and increasing visitation with the mother. The supreme court reversed the court of appeals decision, thereby affirming the adjudication orders, and held the court of appeals instruction to the trial court regarding disposition improper. The supreme court returned the matter to the court of appeals to address the respondents' remaining arguments regarding the disposition order. Respondents argue the trial court abused its discretion when it prohibited any visitation between respondent parents and their children.
- "The assessment of the juvenile's best interests concerning visitation is left to the sound discretion of the trial court and 'appellate courts review the trial court's assessment of a juvenile's best interests solely for an abuse of discretion.' " Sl Op. at 7, citing *In re A.J.L.H.,* 384 N.C. at 57. "The standard of review that applies to an [assertion] of error challenging a dispositional finding is whether the finding is supported by competent evidence." Sl. Op. at 8.
- Visitation may be denied "when it is in the juvenile's best interest consistent with the juvenile's health and safety." Sl. Op. at 8 (citation omitted). Based on precedent, factors a court must consider is whether the parent has a long DSS history, if the reason for the child's removal is

related to previous issues that led to another child's removal, whether the parent failed to or minimally participated in the case plan, whether a parent failed to consistently attend visits, and whether a parent relinquished their rights.

- "After initially concluding a parent is either unfit or has acted inconsistent with his or her parental rights, 'even if the trial court determines that visitation would be inappropriate in a particular case. . . it must still address that issue in its dispositional order and either adopt a visitation plan or specifically determine that such a plan would be inappropriate in light of the specific facts under consideration.' " Sl. Op. at 8.
- The trial court failed to make specific determinations of the factors affecting visitation for "*each child with each parent*." Sl. Op. at 9 (emphasis in original). There were no findings or conclusions regarding unfitness or conduct inconsistent with their parental rights, which must occur when no visitation is ordered. The dispositional findings must be supported by clear and convincing evidence.
    - *Author's note:* This author believes the requirement that the dispositional findings be made by clear and convincing evidence relate to those that support a conclusion that parent is unfit or has acted inconsistently with their constitutionally protected rights.
- "Neither the record nor the order provides a finding or explanation for the objectively disparate treatment accorded to [one of the younger children]'s biological father and the other three parents involved in the matter, nor the denial of family or relative placement, and participation in the children's medical appointments." Sl. Op. at 11. These failures constitute an abuse of discretion.
- Court vacated the dispositional portions of the order and remanded to the trial court to make the "required findings of fact and conclusions of law concerning visitation, family placement, and parental involvement in medical treatment in the best interests of *each child for each respective parent of each child*." Sl. Op. at 11 (emphasis in original).

Electronic Only Visitation: Findings

In re K.B., ___ N.C. App. ___ (August 1, 2023)

Held: Affirmed in Part, Vacated in Part, and Remanded

Dissent in part, Stroud, J.

- Facts: This matter involves three juveniles adjudicated neglected and dependent. All three juveniles were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Following adjudication, the initial dispositional order set the primary plan as reunification and the secondary plan as custody with a court approved caretaker. The court continued to hold dispositional hearings and enter orders for the following three years, during which placement continued with their great aunt. During this time, the court ordered that the grandmother, a Georgia resident, be considered for placement and that an ICPC home study assessment be made by Georgia officials. A later ordered ceased reunification efforts and shifted the primary plan to guardianship with a secondary plan of adoption. After hearings over several months and prior to the completion of the grandmother's home study, the court granted guardianship of the children to the great aunt and granted mother, a Georgia resident, voluntary electronic visitation twice a week. The court noted the matter closed, relieved DSS and the GAL of further responsibilities, but retained jurisdiction. Mother appeals.
- Trial courts must "provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation." G.S. 7B-905.1(a).

- The court of appeals has held that ordering electronic-only visitation is equivalent to granting no visitation and therefore the court must make specific findings equivalent to the findings required in granting no visitation. Sl. Op. at 8-9 (citations omitted). The court "must make 'specific findings that' a parent 'forfeited her right to visitation or that visitation would be inappropriate under the circumstances.' " Sl. Op. at 10 (citation omitted).
- The findings regarding visitation are insufficient to meet the requirements for electronic-only visitation. Limited findings include the current visitation plan of weekly virtual visits and telephone calls, initiated by mother, are inconsistent and often during school hours and dinner time, and provide the date of the last in-person visit.
- Frequent in-person visitation may not be eliminated solely due to the distance between children placed in-state and an out-of-state parent.
- G.S. 7B-905.1(c) requires an order providing for visitation to "specify the minimum frequency and length of the visits and whether the visits shall be supervised." Noncompliance with the requirements of G.S. 7B-905.1 is referred to as "leaving the terms of visitation to the discretion of the custodians." Sl. Op. at 11, FN 2.
- The order providing for electronic-only visitation twice a week only meets the requirement of specifying the minimum frequency of the visits, while not addressing the length or supervision of the visits. Therefore, the order improperly delegates authority regarding visitation.

Permanency Planning

Withdrawal of Counsel; Eliminate Reunification

In re L.Z.S., 2022-NCSC-129, 881 S.E.2d 82

Held: Reversed and Remanded

Dissent: Berger, J., joined by Newby, J. and Barringer, J.

- Facts: The juvenile was adjudicated neglected. During the course of the case, father had been incarcerated and then was released. The court held multiple permanency planning hearings, where father was represented by a court-appointed attorney but did not appear. Upon release from prison, father's contact with DSS and his attorney was sporadic despite efforts by DSS to contact father. At the last permanency planning hearing where father was not present, his attorney filed a written motion to withdraw based on his lack of contact with father and father's failure to appear at hearing. The motion was granted, and the permanency planning hearing proceeded. The court ordered reunification with father was eliminated as a permanent plan. DSS later filed a TPR petition, where father was reappointed his attorney and appeared at the TPR hearing. The TPR was granted. Father appeals the order allowing his attorney to withdraw at the permanency planning hearing, the order eliminating reunification, and the TPR order.
- A parent who is indigent has a statutory right to counsel in cases of abuse, neglect, dependency and TPRs (unless a parent waives that right). G.S. 7B-602; -1101.1. A parent may forfeit his right to counsel only when there conduct has been egregious, dilatory, or abusive.
- An attorney may withdraw from representation when there is (1) justifiable cause, (2) reasonable notice to the client, and (3) the court's permission. *In re K.M.W.*, 376 N.C. 195 (2002) referring to Rule 16 of the General Rules of Practice. " '[T]his general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court,' so that '[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge

has no discretion [to allow withdrawal].' " Sl. Op. ¶ 11 (*In re K.M.W*. 376 N.C. at 209). Before an attorney can be allowed to withdraw on the day of trial, prior notice that is specific and reasonable must be given to the client.

- <u>The cases are fact specific but all of them show the court only has discretion to permit the withdrawal when the parent has had adequate notice of the attorneys' intent to seek permission from the court to withdraw</u>. Relying on *In re K.M.W.,* Father's conduct of not maintaining consistent communication with his attorney and DSS does not rise to a forfeiture of counsel. Like In re K.M.W., father was not noticed by his attorney that the attorney would seek to withdraw on the day of the permanency planning hearing, and the court did not make any further inquiry about the circumstances for the motion to withdraw. The withdrawal of the attorney without notice requires reversal. Distinguishing these facts from *In re T.A.M.,* 378 N.C. 64 (2021), withdrawal in that case was not error because the court on multiple occasions advised father of his responsibility to attend all court hearings and his failure to appear may result in his attorney asking for permission to withdraw and the court proceeding without father being represented. Additionally, on the day of the hearing where the attorney did withdraw, the attorney spoke with father and told him if he did not appear at the TPR hearing, she would need to withdraw and the hearing would proceed without him.
- <u>On remand</u>, if the court concludes reunification should be eliminated, the TPR will stand. If the court determines reunification was improperly eliminated, the TPR will be vacated without prejudice.
- <u>Dissent</u>: The order allowing the attorney's withdrawal and the order eliminating reunification should be affirmed. The father's failure to communicate, avoid receiving mail, and not attend numerous hearings should not be permitted to manipulate the courts to delay the hearing and is contrary to the overarching purpose of the Juvenile Code to find permanency for the juvenile at the earliest possible stage. The required findings of fact required by G.S. 7B-906.2(b) and (d) were supported by competent evidence and support the order eliminating reunification.

Eliminate Reunification; Reasonable Efforts

<u>In re J.M</u>., ___ N.C. ___ (June 16, 2023)

Held: Reversed court of appeals (thus affirming trial court elimination of reunification)

Concur in part; Dissent in part: Morgan, J.

Dissent: Earls, J.

- <u>Facts</u>: In 2019, the juvenile infant was adjudicated abused and neglected and the older sibling was adjudicated neglected. The circumstances resulted from life-threatening nonaccidental injuries to the infant who had rib fractures, brain bleeds, and retinal hemorrhages that were caused while in the sole care of her parents who closely supervised contact between the infant and their other children and others. The parents subsequently separated. Both were ordered to comply with case plans. At permanency planning hearings, the court acknowledged respondents' progress on their case plan, including completing services, but cautioned that their failure to explain the injuries was a barrier to reunification. Ultimately, the court eliminated reunification as a permanent plan despite the parents' progress and an increase in visitation because of their failure to acknowledge how the child was so severely injured. Mother also believed that she should share custody with the father and that she had no concerns about the children being alone with him now. The court found that reunification efforts would clearly be unsuccessful and inconsistent with the children's health and safety. Respondents' appealed. The court of appeals reversed the trial court's decision and held that a precondition to reunification of admitting fault without finding the parent's forfeited their constitutional rights to care, custody, and control of their children was unlawful. The court of appeals also found DSS did not make reasonable efforts because it did not interview the two oldest children (who were not subject to the action), which may have provided an explanation for the injuries. The supreme court granted a petition for discretionary review.

- <u>Standard of review</u> of a permanency planning order is whether there is competent evidence to support the findings and whether the findings support the conclusion of law. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the findings." Sl.Op. 10. The court may consider any evidence that is relevant, reliable, and necessary to determine the juvenile's needs and the appropriate disposition. The disposition is reviewed for an abuse of discretion. "In the rare instances when a reviewing court finds an abuse of . . . discretion, the proper remedy is to vacate and remand for the trial court to exercise its discretion. The reviewing court should not substitute its own discretion for that of the trial court." Sl.Op. 11 (citation omitted).
- <u>Reunification as a primary or secondary plan is not absolute</u> because the court may eliminate reunification as a permanent plan when it makes the required findings under G.S. 7B-906.2. <u>Those findings do not have to track the exact language of the statute</u> but the findings must show "that the trial court considered the evidence in light of whether reunification would be [clearly unsuccessful] or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." Sl.Op. 14-15 (citation omitted).
- <u>When reviewing whether DSS made reasonable efforts</u>, defined at G.S. 7B-101(18), the court of appeals was bound by precedent that required it to treat the findings of fact in the adjudication order, which was not appealed, as binding. <u>The appeal was of the permanency planning order and should not have been transformed to a collateral attack on the adjudication order</u>. The adjudication order found no one other than the parents could have inflicted the serious injuries on the juvenile.
- Similar to *In re D.W.P.*, 373 N.C. 327 (2020) (a TPR case), <u>the evidence supports the findings and conclusion that "the respondents' persistent unwillingness to acknowledge responsibility for [the infant's] life-threatening injuries would render further efforts at reunification clearly unsuccessful and 'inconsistent with the [juvenile's] health or safety</u>.' " Sl.Op. 26-27. Further, unlike a TPR order, a permanency planning order that eliminates reunification "does not foreclose the possibility that one or both respondents might one day regain custody" of their children. Sl.Op. 26. This opinion cautions the holding is based on the facts of the case and does not stand for the proposition that a parent's refusal to acknowledge responsibility for the abuse will always result in a conclusion that reunification efforts will be clearly unsuccessful or inconsistent with the child's health or safety.
- Parents were on notice that the court was considering eliminating reunification as a permanent plan and did not argue the proposed change eliminating reunification would be improper on <u>constitutional grounds. The issue was not preserved for appellate review</u>.
- <u>Concur in part; Dissent in part</u>:
  - Concur that court did not err in eliminating reunification for father, the failure to preserve for appeal, and the discussion on reasonable efforts.

  - Dissent as to eliminating reunification for mother. The court's findings of mother's lack of explanation for the injuries is insufficient to conclude reunification efforts would be clearly unsuccessful or inconsistent with the juvenile's health and safety. Mother took reasonable step to ensure the children's well-being, including separating from father, substantially complied with her case plan, acknowledged the child suffered nonaccidental harm although she did not know how, and engaged with all the required services. Mother's steps to correct the conditions distinguish these facts from *In re D.W.P.*
- Dissent: The findings are insufficient to support the conclusion that reunification efforts with mother would clearly be unsuccessful or inconsistent with the children's health and safety. Mother complied with her case plan, which included drug screens, substance use treatment, domestic violence and life skills classes, parenting skills, employment, and separated from father. The sole fact is the parents not explaining how the child was injured. This fact alone is insufficient. The parents maintained that they did not know how the child was injured. This is beyond their control. Unlike *In re D.W.P*., the parents did not provide absurd explanations for the child's injuries, and they did take remedial steps and demonstrated growth. These are relevant factors the court should have considered in applying a holistic approach. DSS could have provided more evidence about the cause of the child's injuries, like testimony from the older siblings.

Eliminate Reunification

In re T.D.N., 2022-NCCOA-787, 882 S.E.2d 116

Held: Vacate and Remand

Dissent in part, concur in part; Carpenter, J.

- Facts: In 2020, the juvenile was adjudicated neglected. Part of the basis for the adjudication was mother's mental instability. In 2021, the court eliminated reunification as a permanent plan for each parent because of their lack of progress on their case plans. The court made findings that reasonable efforts would be unsuccessful, futile, and inconsistent with the juvenile's health and safety. The court also found that legal custody of the child cannot be returned to the parents but may be possible within the next 6 months if the parents completed their case plan. Concurrent permanent plans of custody and guardianship were ordered. Mother appealed.
- Standard of review is whether competent evidence supports the findings and whether the findings support the conclusions of law.
- The court made the required finding under G.S. 7B-906.2(b) that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health and safety. However, the finding that reunification may be possible within 6 months is materially contradictory. Although an order may include both favorable and unfavorable findings where the court weighs all the findings and makes a conclusion of law based on the findings that are given the most weight, an order cannot be upheld when the findings are "antagonistic, inconsistent, or contradictory such that the reviewing court cannot 'safely and accurately decide the question.' " Sl.Op. ¶21 (citation omitted). The court also ordered mother to have a parental capacity evaluation, which is unnecessary if reunification is not a permanent plan. It is unclear if these inconsistencies were a minor mistake or inadvertence. Further, the court did not find the parental capacity evaluation was in the child's best interests.

- Dissent in part; concur in part: The two findings do not materially contradict one another and does not support vacating the order. One finding is unsupported by the evidence. The court erred in ordering mother to have a parental capacity evaluation without determining it was in the child's best interests.

In re M.T., 2022-NCCOA-593; 877 S.E.2d 732

Held: Affirmed

- Facts: In 2018, after a hearing and based on stipulations, two juveniles were adjudicated neglected, and the younger infant was also adjudicated abused and dependent. The circumstances involved lack of medical care and nonaccidental injury to the infant including skull and rib fractures in various stages of healing, retinol hemorrhages in both eyes, malnourishment, and other life-threatening conditions. At the time of adjudication and throughout the case, the cause of injuries were never explained; however, the juvenile was in the sole care of his parents at all times prior to the petition being filed. Different explanations for the injuries were provided at different times, including hospital caused, mother's stepfather, and a single drop of the infant by father. The court determined those explanations were not credible to account for the various injuries occurring at different times.

  At disposition, the children were placed in DSS custody, and parents were ordered to engage in a case plan. Mother's case plan included a parenting capacity evaluation, parenting classes with demonstration of skills learned at visits, and random drug screens. In the first year of the case, the parents were incarcerated due to charges stemming from the infant's abuse. Ultimately, father pled to a child abuse charge and mother's charges were dismissed. At the third permanency planning hearing, reunification was eliminated as a permanent plan.

  DSS filed a TPR, which was granted on the grounds of neglect and failure to make reasonable progress. At the dispositional portion of the TPR hearing, mother's expert witness on child welfare policy and practice was not permitted to testify as her testimony was determined to be irrelevant. An offer of proof through the expert report was provided that addressed her testimony regarding racial disparity in child welfare, domestic violence and child welfare, and the importance of avoiding family separation and foster care versus kinship placement.

  Mother appeals the permanency planning order eliminating reunification (which the court of appeals granted a petition for writ of certiorari to review) and the TPR order for both the grounds and the trial court's denial of her expert witness testifying at the dispositional stage. Several agencies filed amicus briefs to the court to address domestic violence in child welfare cases, race in child welfare cases, and wealth-based pretrial incarceration on families.
- **Eliminating Reunification:** The standard of review is whether the findings are based on credible evidence and support the conclusions and whether the court abused its discretion with the dispositional order. The court's sole consideration at disposition is the child's best interests.
  - Mother does not challenge any specific findings, so she has failed to preserve challenges to any findings. The court made the required findings to eliminate reunification under G.S. 7B-906.2(b) and (d). The court found that mother did participate in services required by her case plan, but the services did not address the reasons for the children coming into care, including the lack of an explanation for how the child was injured. The court's decision to eliminate reunification was reasoned. Although mother argues she completed her case plan, the court's findings explain why it did not give significant weight to the parental capacity evaluation; the evaluator did not address the court's concerns about an explanation for the child's injuries and failed to review the child's

medical records to learn what happened to the child. Although mother attended parenting classes, those classes focused on how to childproof a home and what to do when a child is sick or injured and did not address the reasons for the children's removal. The court's reasonable view of the evidence is binding, even when the evidence may support a contrary view. Further, "compliance with a case plan alone is not always sufficient to preserve parental rights" because parents must show changed behaviors and acknowledge and understand why the juvenile came into DSS custody. Sl. Op. ¶66.

- The court did not abuse its discretion in emphasizing the lack of an explanation for the child's injuries when determining to eliminate reunification as a permanent plan. This case is similar to *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010), in that the court found the juvenile's injuries were nonaccidental and indicated child abuse. Further, the adjudication order found the children were in the sole care of the parents during the time of the infant's nonaccidental injuries. "[T]he trial court could not 'conclusively determine' who caused all of [the juvenile's] conditions but could still permissibly determine both parents were responsible for [his] condition either directly or indirectly." *Id*.

Eliminate Reunification; Guardianship

In re N.T., ___ N.C. App. ___ (June 6, 2023)

Held: Affirmed

- Facts: The children were adjudicated neglected after the one month old was admitted to the hospital with an unexplained skull fracture resulting from non-accidental means, blunt force trauma, while in the sole care of the parents. The children were placed with the grandparents throughout the case. Mother's explanation for the injuries was trauma at birth. Father's explanation was an accidental car seat incident where the infant fell out of the car seat. Neither explanation was supported by the medical evidence. After determining the parents did not correct the conditions the led to the children's adjudication/removal from home, it entered a permanency planning order that eliminated reunification, concluded the parents were unfit/acted inconsistently with their parental rights, and awarded guardianship to the grandparents. Both parents appeal.
- A court considers an order that eliminates reunification for an abuse of discretion. The standard is the child's best interests.
  - The trial court made the required findings under G.S. 7B-906.2(b) and (d) that were based on competent evidence from social worker, GAL, respondent's and grandfather's testimony as well as reports from the DSS, GAL, mother, and each parent's therapist.
- The conclusion that the parents were unfit and acted inconsistently with their constitutional rights were supported by the findings, which were supported clear and convincing evidence. The findings included the cause and circumstances of the child's injuries remain unknown and unaddressed; neither parent thinks therapy is beneficial; neither parent's therapy focuses on the circumstances surrounding the infant's injuries, adequate steps to ensure the children's safety have not been made.
- The guardianship order was based on the children's best interests, which was not an abuse of discretion.

Eliminate Reunification; Achieve Permanent Plan; Verification by Custodian

In re K.P., 2022-NCSC-128, 881 S.E.2d 250

Held: reversed in part, remanded (Court of Appeals Opinion)

- Procedural History: District court entered a permanency planning order that achieved a permanent plan of custody, eliminated reunification as a permanent plan, and waived further hearings. Mother appealed, and the court of appeals vacated and remanded the order for insufficient findings to eliminate reunification, verify the guardians understanding of their appointment, and waive further hearings. There was a dissent, and an appeal was made by DSS to the NC Supreme Court.
- Facts: The juvenile was adjudicated neglected based on an injurious environment due to domestic violence and substance use. The child was ordered in DSS custody and placed with the Phillips (step-grandparents). The Phillips are the parents of mother's spouse, who the court determined was not the child's father and determined another man was the child's father. Mother was not making adequate progress on her case plan. At a permanency planning hearing, the Phillips expressed a desire to be the child's legal custodians and Mr. Phillips testified to such as well as his income. The court found the juvenile was doing well in the Phillips' home, the Phillips had the financial ability to care for the juvenile, and determined the child's best interests would be to award permanent custody to them. Permanent custody to the court approved caretakers, was one of the concurrent plans identified at the previous permanency planning hearing, was ordered and achieved. Reunification was effectively eliminated as a permanent plan. Mother appealed.
- G.S. 7B-906.2(b) unambiguously states "[r]eunification shall be a primary or secondary plan unless the court made written findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." Sl. Op. ¶ 18. 'Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (*e.g.* "or"), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them." *Id*. (citations omitted). "[T]he use of the disjunctive term "or" in N.C.G.S. § 7B-906.2(b) demonstrates that the satisfaction of any one of the three delineated circumstances which are identified in the statute, even to the exclusion of the remaining two circumstances, relieves the trial court of any further obligation to maintain reunification as a permanent plan." Sl. Op. ¶ 21.
- Agreeing with the dissent, the achievement of a permanent plan occurred, regardless of whether it was labeled as the primary permanent plan or a concurrent permanent plan. Also agreeing with the dissent, the findings are sufficient to support the conclusion to eliminate reunification and satisfy the statutory requirement of G.S. 7B-906.1(d)(1) and 7B-906.2(b) that reunification efforts would clearly be unsuccessful or inconsistent with the juvenile's health or safety.
- Agreeing with the dissent, the testimony of Mr. Phillips and the DSS social worker demonstrated the Phillips understood the legal significance of their appointment as custodians. Further G.S. 7B-906.1(j) establishes that the juvenile's stable placement for 6 consecutive months is evidence of adequate resources. Here, the juvenile resided with the Phillips for 7 consecutive months, and

Mr. Phillips gave uncontroverted testimony about their ability to support the juvenile. The court made the sufficient required verifications.

- The decision of the court of appeals regarding waiving further hearings is not before the supreme court and remains undisturbed. That holding was the court did not make all 5 findings required by G.S. 7B-906.1(n).

Guardianship: Verification; ICPC Home Study

In re K.B., ___ N.C. App. ___ (August 1, 2023)

Held: Affirmed in Part, Vacated in Part, and Remanded

Dissent in part, Stroud, J.

- Facts: This matter involves three juveniles adjudicated neglected and dependent. All three juveniles were placed with their great aunt, a North Carolina resident, within a week of the petition's filing. Following adjudication, the initial dispositional order set the primary plan as reunification and the secondary plan as custody with a court approved caretaker. The court continued to hold dispositional hearings and enter orders for the following three years, during which placement continued with their great aunt. During this time, the court ordered that the grandmother, a Georgia resident, be considered for placement and that an ICPC home study assessment be made by Georgia officials. A later ordered ceased reunification efforts and shifted the primary plan to guardianship with a secondary plan of adoption. After hearings over several months and prior to the completion of the grandmother's home study, the court granted guardianship of the children to the great aunt and granted mother, a Georgia resident, voluntary electronic visitation twice a week. The court noted the matter closed, relieved DSS and the GAL of further responsibilities, but retained jurisdiction. Mother appeals.
- Before awarding guardianship, the court must determine the proposed guardian understands the legal significance of the placement pursuant to G.S. 7B-600. Specific findings are not required, but the record must show "the trial court received and considered adequate evidence on this point." Sl. Op. at 3-4 (citation omitted).
- Evidence shows the trial court received adequate evidence of the guardian's understanding of the legal significance of the placement. The court received evidence including that the children had been living with the great aunt for three years during which time she provided care such as scheduling and taking them to medical appointments and meeting teachers, and the great aunt testified that she wanted and was willing to continue providing care, understood her obligations to comply with court orders involving the children, and acknowledged the greater control of a guardian.
- The trial court should consider the children's best interest when placing them in 'out-of-home' care, but "[p]lacement of a juvenile with a relative outside of this State *must* be in accordance with the Interstate Compact on the Placement of Children [ICPC]." G.S. 7B-903(a1).
- "Where the ICPC applies, 'a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study.' " Sl. Op. at 5 (citation omitted) (emphasis in original). However, "[t]here is no obligation under the ICPC that a home study by completed *to rule out* an out-of-state relative as a placement option." Sl. Op. at 5 (emphasis in original).
- No abuse of discretion to award guardianship to the great aunt, an in-state person, without the benefit of the completed previously ordered home-study of the grandmother, an out-of-state person. The order granting guardianship to the great aunt is based on the children's best

interests and is supported by findings and conclusions, most notably that the juveniles had lived with the great aunt for three years and had bonded with her. “[I]t is only when a trial court judge *actually places a child with an out-of-state person* that the trial court lacks discretion to make that placement without the benefit of a home study of *that person*, because such study is required under the ICPC.” Sl. Op. at 7 (emphasis in original).

- Stating in the decretal portion of the order that “the matter is closed and DSS and its counsel are released and relieved of further responsibilities regarding this matter,” but noting retention of jurisdiction, is not error. The clause is not read as preventing mother from filing motions in the future concerning her children, as her parental rights have not been terminated and she was granted visitation rights by the court. Sl. Op. at 7-8.
- Dissent: The majority improperly reviewed the issue concerning the home study requirement under the ICPC for “abuse of discretion rather than de novo,” as the issue addresses statutory compliance under G.S. 7B-903(a1). Dissent at 2 (citation omitted). Under the court’s prior caselaw, “the ICPC definitively applies to the situation here where there is a potential placement with an out-of-state relative, [g]randmother.” Dissent at 3-4. The court’s interpretation that the ICPC only applies when a child is actually placed with an out-of-state relative contradicts (1) the purpose the Juvenile Code in attaining permanency as soon as possible, and (2) the purpose of the ICPC to exchange information between states to ensure any outside placement is not contrary to the best interests of the juvenile. Whether the court must wait for a completed ICPC home study when considering a potential placement with an out-of-state relative is decided on a case-by-case basis. in this case, the court was required to wait for the home study evaluating the grandmother as a potential placement, who was identified within days of the filing of the petition as potential placement. The home study was ordered three times with only DSS at fault for not complying with the court’s orders, while mother and grandmother continued to assert the need for the study throughout the proceedings. It cannot be assumed that the placement decision would be the same if the home study were received, as without the home study, “it is impossible to be certain what we, the parties, or the trial court would learn about [g]randmother’s home or her capacity to care for more children.” Dissent at 9.

Order

Rule 60(a); Clerical Mistake

In re A.R.B., ___ N.C. App. ___ (June 6, 2023)

Held: Vacated and remanded

- Facts: Mother filed a petition to terminate father’s parental rights. After a hearing, the court granted the TPR. In its order, the court stated that there is clear and convincing evidence that the TPR is in the child’s best interests. Father appealed. Mother then filed a Rule 60(a) motion to address that the standard of clear and convincing evidence was applied to the grounds phase. The court determined it was good practice to grant the motion and clarify that it applied clear, cogent, and convincing evidence standard. An amended order was entered specifying that clear, cogent, and convincing evidence supporting the grounds. Father appealed the amended order.
- Rule 60(a) is used to correct clerical mistakes resulting from an oversight or omission. The mistakes may be corrected during the pendency of an appeal before the appeal is docketed in the appellate division.

- The court may correct clerical mistakes, not make substantive modifications. A clerical mistake is one "that does not alter the court's reasoning or determination in ruling on an order." Sl.Op. 8. If the court alters the effect of the order, it is an abuse of discretion.
- Case law has established that correcting a standard of proof is reversible error. In this case, the standard of proof was added. Past opinions have held that not announcing or writing the standard of proof of clear, cogent, and convincing evidence to the TPR grounds is reversible error. These opinion "speak directly to the importance of the trial memorializing its employment of the correct standard of proof during the proceedings in this context." Sl.Op. 10. The plain language of the statute refers to "clerical error," which "Black's Law Dictionary defines… as 'an error resulting from a minor mistake or inadvertence…' " Sl.Op. 11. The recording device malfunctioned so it is impossible to know if the court announced the proper standard it was applying. Based on a comparison of the original and amended orders, the addition of the clear, cogent, and convincing evidence standard to the grounds "alters the effect of the original order." Thus, the addition of the language was a substantive modification and, therefore, an abuse of discretion.

Termination of Parental Rights

Personal Jurisdiction

Service of Process; Summons Requirements

In re C.T.T., ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: Father filed a TPR petition against mother and a summons was issued on the same day. Four days later, provisional counsel was appointed to mother, such that the provisional counsel's name was not listed on the summons. Mother was personally served with the petition and summons, and one month later, mother's provisional counsel was served. Counsel raised a deficiency with the original summons, which was outdated. Father obtained permission from the court to reserve mother by publication as her whereabouts at that time were unknown. Mother's counsel filed a motion to dismiss arguing the notice by publication did not comply with G.S. 7B-1106 because information about filing an answer, the child's first name, and the name of provisional counsel were not included. The court concluded the original summons complied with the statute and the notice by publication was moot since mother had been previously served. The court denied the motion to dismiss. Mother was not present for the hearing, and the court released provisional counsel. The TPR was granted, and mother appeals.
- G.S. 7B-1106 requires a summons to be served with a TPR petition is filed. The statute also identifies what must be included in the summons. Personal jurisdiction is generally accomplished with the service of a summons.
- There is no statutory requirement that the attorney's name be listed on the summons, rather the statute requires the counsel be served with the petition and summons. Mother was personally served with a summons that complied with G.S. 7B-1106(b). Provisional counsel was served and appeared at the first pretrial conference. The statute also requires the parent is entitled to appointed counsel, that provisional counsel be appointed, and that the court reviews the right to provisional counsel at the first hearing after the respondent is served. This all occurred. The

court had personal jurisdiction over mother. Even though the notice by publication was defective, it was moot since the original summons was sufficient.

Waive Personal Jurisdiction; Ineffective Assistance of Counsel

In re M.L.C., ___ N.C. App. ___ (June 20, 2023)

Held: Affirmed

- Facts: The juvenile was adjudicated dependent. Later, DSS filed a TPR petition. No summons was issued, but a Notice of Motion seeking TPR and a Notice of the TPR hearing listing March 26-27, 2022 were served on mother by sheriff. On the 2nd noticed date, mother's attorney was present and advised the court that mother had appeared the day before (the first noticed hearing date) and was advised to return the next day. Mother was not present on the next day, and her attorney moved to continue the hearing. The court denied the continuance. No objection about service was made. The court held the TPR hearing and granted the TPR. Mother appealed. Mother raises lack of personal jurisdiction and ineffective assistance of counsel.
- Personal jurisdiction is obtained through service of process or by the party's voluntary appearance or consent. Under Civ. Pro. Rule 12(h)(1), when a party does not raise the defense of lack of personal jurisdiction by motion or in a responsive pleading, it is waived. "[S]ummons-related defects implicate personal jurisdiction." Sl.op.4 (citation omitted). "[A]ny form of general appearance 'waives all defects and irregularities in the process and gives the court jurisdiction of the answering party even though there may have been no service of summons." *Id.* (citations omitted). A court may obtain personal jurisdiction over a party even without a summons when that party consent or makes a general appearance, which can including appearing at the hearing without making an objection. "[L]itigants often choose to waive the defense of defective services when they had actual notice of the action and when the inevitable and immediate response of the opposing party will be to re-serve the process." Sl.Op.5 (citation omitted). Trial counsel appeared at the hearing and did not make an objection and at the hearing, he cross-examined the witness and elicited testimony that was beneficial to mother. This is more than a cursory appearance but was a general appearance that waived any objection to personal jurisdiction.
- In a TPR, court-appointed counsel must provide effective assistance. A successful ineffective assistance of counsel claim must show the counselor performance was deficient and that deficiency was so serious that it deprived the party of a fair hearing. To prove the deprivation of a fair hearing, the party must prove there is a reasonable probability that there would have been a different result but for the counsel's errors. Mother is unable to prove this standard and counsel's performance was not deficient.

Notice Pleading

In re A.H.D., ___ N.C. App. ___ (Feb. 7, 2023)

Held: Reversed and remanded

- Facts: Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father's nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.

- G.S. 7B-1104(6) requires a petition state "the [f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exists." Sl. Op. at 8. Allegations need not be exhaustive but they must put a party on notice of the acts or omissions that are at issue. Father was put on notice of the ground for willful failure to pay child support for one year immediately preceding the petition. Only 1 of the 11 grounds address the willful failure to pay child support pursuant to a court order. Failing to include the citation for the statutory ground is not inadequate when the language of the allegation puts the party on notice. Failing to allege there is a judicial decree or child support order does not render the petition insufficient, although including a child support order exists is the better practice. The allegations stated father "refused" to pay child support, and refused shows an active decision to not pay, which is a willful decision to not pay.

Release of Provisional Counsel

In re R.A.F., ___ N.C. ___ (April 28, 2023)

Held: Reverse court of appeals decision and remand to court of appeals

Dissent in part: Morgan, J., joined by Earls, J.

- Facts: Mother was served with a TPR petition and summons and was appointed provisional counsel. Her provisional counsel requested an extension of time to respond to the TPR petition, which was granted. Notice of hearing was served by petitioners on provisional counsel but not on mother. Mother did not appear at the TPR hearing. The court held a limited inquiry asking if the provisional counsel had contact with their client. Provisional counsel replied they spoke with mother initially after service and heard from her when she was in a treatment facility. Provisional counsel discovered mother graduated from the facility and had not heard from her. The court released provisional counsel and proceeded with the TPR hearing. The TPR was granted. Mother appealed. In a divided opinion, the court of appeals vacated and remanded for a new hearing based on fundamental fairness principles including whether mother had notice of the hearing. An appeal to the supreme court followed.
- G.S. 7B-1108.1 addresses the pretrial to a TPR and requires the court to consider the retention or release of provisional counsel and whether all summons, services of process and notice requirements have been met.
- G.S. 7B-1101.1 addresses the appointment of counsel for a respondent parent and states "at the first hearing after service upon respondent parent, the court shall dismiss the provisional counsel if the respondent parent does not appear at the hearing…." Sl.Op. at 8. The court of appeals determined this statute presumes the parent has notice of the hearing and there was no evidence mother knew about the hearing. This issue was not raised on appeal before the court of appeals, and the appellate court's role is to not create an appeal. The parent cannot now change their position and argue before the supreme court that she lacked notice.
- The court found and concluded mother was served and was appointed provisional counsel with return of service in the court file. Notice of the hearing was made. Mother did not

appear for the hearing. Service and notice requirements were met, and provisional counsel was released pursuant to statute. The court acted properly.

- Dissent in part: The record shows mother was not served with the notice of hearing and the court's inquiry to provisional counsel did not adequately focus on the issue of notice yet the court found all notice requirements were met. Fundamental fairness applies to TPRs.

In re C.T.T., ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: Father filed a TPR petition against mother and provisional counsel was appointed to mother. Mother was personally served with the petition and summons as was her provisional counsel. Mother's provisional counsel made arguments to dismiss based on insufficiency of process, which were denied. Mother was not present for the hearing, and the court released provisional counsel. The TPR was granted, and mother appeals. This summary addresses the release of provisional counsel.
- "The purpose of provisional counsel is to ensure a respondent parent's rights are adequately protected for termination proceedings." Sl.Op. at 10-11 (citation omitted). The court must determine whether provisional counsel should be retained or released when the parent fails to appear at the hearing.
- The court's release of provisional counsel was proper under G.S. 7B-1108.1 and -1101.1(a)(1). Mother was personally served. Mother was in communication with her provisional counsel. Counsel was aware that mother would not be attending the hearing. The court inquired of provisional counsel at the TPR hearing about their communication with mother and determined counsel made adequate efforts to inform mother of her rights.

Adjudication

Denial of TPR; Standard of Review

In re S.R., ___ N.C. ___ (April 28, 2023)

Held: Affirmed and Modified court of appeals decision (affirmed denial of TPR)

- Facts: This is a private TPR where mother petitioned to terminate father's parental rights on the grounds of neglect, failure to pay child support, and willful abandonment. Findings addressed mother's agenda of setting father up to not pay child support so that the ground to TPR was available. The TPR was denied on all three grounds. Petitioner appealed arguing that some findings were not supported by clear and convincing evidence and the conclusion that no grounds existed was not supported by the findings. The court of appeals affirmed. The supreme court granted a petition for discretionary review.
- The standard of review of a TPR adjudication is whether the findings of fact are supported by clear and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo. This is the proper standard of review for a denial of a TPR adjudication. To the extent the court of appeals opinion could be interpreted to apply an abuse of discretion standard, it is modified to identify the correct standard.
- The trial court considers the evidence, determines its credibility and weight, and finds the relevant facts.
- G.S. 7B-1111(a)(4) authorizes a TPR based on a parent's willful failure to pay child support for one year or more immediately preceding the TPR petition when a parent has been awarded custody of the child and a support order is in place. The TPR order does not include findings that

there was a child support order requiring father to pay child support but instead finds father paid child support until mother elected to no longer have an income garnishment for father's wages to pay child support. There was evidence to show there was a child support order but no finding. Mother has the burden of proof and father's failure to directly deny an allegation does not meet that burden. Further, there were no findings regarding whether father willfully failed to pay.

- The court made no findings to support neglect or willful abandonment. Mother's argument that father neglected the child because of his past behavior is not supported by the findings that father's prior suicidal threat was not threatening or combative toward mother or the unborn child. Regarding willful abandonment, the court found father made some efforts to have a relationship with his child that were hindered by mother.

Standard of Proof: Clear and Convincing Evidence

In re A.H.D., ___ N.C. App. ___ (Feb. 7, 2023)

Held: Reversed and remanded

- Facts: Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father's nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.
- G.S. 7B-1109(f) requires the adjudicatory findings be based on clear, cogent, and convincing evidence. This standard protects the parent's constitutional due process rights in a termination of parental rights action. The court must announce the standard or include the standard in the written order. The trial court did not do either requiring reversal. Remand is appropriate only if evidence is sufficient to support the statutory ground.

Findings of Fact

In re H.B., ___ N.C. ___ (April 28, 2023)

Held: Affirmed and Modified court of appeals decision (affirming TPR)

Dissent: Morgan, J. joined by Earls, J.

- Facts: In 2019, the juveniles were adjudicated neglected and dependent due to circumstances created by mother's substance use, mental health, housing, and lack of appropriate supervision. The juveniles were placed in DSS custody. In 2021, DSS filed a TPR petition to terminate mother's parental rights of H.B. The TPR was granted and mother appeals both the grounds and disposition. Regarding the adjudication, mother argues the court's reliance on an exhibit created by DSS as a timeline of mother's lack of progress to support the ground of failure to make reasonable progress to correct the conditions was error and the reference to the exhibit in the order was an insufficient finding of fact to support the conclusion that the ground existed. The court of appeals affirmed the TPR and there was a dissent. Mother appealed to the supreme court.
- The finding of fact states "the Court relies on and accepts into evidence the Timeline, marked DSS Exhibit' ", in making these findings and finds the said report to [be] both credible and

reliable." Sl.Op. at 5. There was no objection to the admission of the Timeline in evidence. The Timeline showed H.B. was in DSS custody for more than one year, mother continually missed her visits and failed to attend her substance use and mental health appointments. Because the order was found to be "both credible and reliable," the finding is more than a reference of evidence in the record but is an indication that the court determined this evidence was credible and is a proper evidentiary finding.

- The majority opinion states "We stress that our holding today is not an endorsement of this sort of fact finding." Sl. Op. at 9. The better practice is to have express, specific findings of the facts rather than recite or reference evidence that it finds to be credible. The court could have found the mother missed visits on specific dates as well as missed appointments for substance use and mental health treatment without an explanation for why she missed those visits.
- Dissent: The trial court did not find facts specially as required by Rule 52 of the Rules of Civil Procedure. The findings are insufficient to support the TPR grounds. The findings doe not state what happened in space and time. The majority has relaxed the standard for appellate review and augments the trial court's insufficient findings of fact. The order should be vacated and remanded for findings.

Appellate Review: Single Ground

In re E.Q.B., ___ N.C. App. ___ (August 1, 2023)

Held: Affirmed in Part, Vacated in Part

- This is an appeal of a private TPR, where father's rights were terminated on the grounds of abandonment, neglect by abandonment, and neglect. The court of appeals affirmed the ground of abandonment and discussed the jurisprudence regarding the affirmation of one ground is sufficient to support a TPR order.
- "An adjudication of any single ground for terminating a parent's rights under G.S. 7B-1111(a) will suffice to support a termination order," and the court need not review any of the remaining grounds challenged on appeal once the court has affirmed one particular ground for termination exists. Sl. Op. at 12 (citation omitted).
- "This opinion recognizes that the validity of additional grounds for termination may be relevant and impact a parent's ability to regain their parental rights in a reinstatement of parental rights action pursuant to G.S. 7B-1114 (effective October 1, 2011). In that action, the court must consider whether the parent seeking reinstatement has "remedied the conditions which led to the juvenile's removal and termination of the parent's rights." G.S. 7B-1114(g)(2).
- As we affirm the trial court's finding of abandonment in accordance with G.S. 7B-1111(a)(7), we need not review either of the remaining grounds for the purposes of the termination of parental rights," "as resolving these issues would have no practical effect on the case." Sl Op. at 12, 13. Further, father has not argued for reconsideration of the court's "single ground" jurisprudence.

Neglect: Likelihood of Future Neglect

In re A.W., ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: DSS filed a neglect petition based on domestic violence in the home. Despite having a DVPO, mother and father continued to have contact. DSS later filed a petition to terminate father's parental rights based on neglect, dependency, and a prior TPR and failure to establish a safe home. Father's rights were terminated, and he appeals.
- G.S. 7B-1111(a)(1) authorizes a TPR on the ground of neglect, which involves a parent not providing proper care, supervision, or discipline or creating an injurious environment to the child's welfare. When there has been a period of separation, there must be past neglect and likelihood of future neglect. The court looks at the likelihood of future neglect based on circumstances between the past neglect and the time of the TPR hearing.
- The findings supporting a high likelihood of future neglect are supported by the evidence, including testimony from a psychologist, DSS social worker, GAL, and the foster parent as well as father's psychological evaluations, letter to the court, and emails between him and the foster parent. Despite engaging in services, the findings show father continues to show angry outbursts and emotional dysregulation, use substances, and continue to have contact with mother despite a DVPO.

In re M.T., 2022-NCCOA-593; 877 S.E.2d 732

Held: Affirmed

- Facts: In 2018, after a hearing and based on stipulations, two juveniles were adjudicated neglected, and the younger infant was also adjudicated abused and dependent. The circumstances involved lack of medical care and nonaccidental injury to the infant including skull and rib fractures in various stages of healing, retinol hemorrhages in both eyes, malnourishment, and other life-threatening conditions. At the time of adjudication and throughout the case, the cause of injuries were never explained; however, the juvenile was in the sole care of his parents at all times prior to the petition being filed. Different explanations for the injuries were provided at different times, including hospital caused, mother's stepfather, and a single drop of the infant by father. The court determined those explanations were not credible to account for the various injuries occurring at different times.

  At disposition, the children were placed in DSS custody, and parents were ordered to engage in a case plan. Mother's case plan included a parenting capacity evaluation, parenting classes with demonstration of skills learned at visits, and random drug screens. In the first year of the case, the parents were incarcerated due to charges stemming from the infant's abuse. Ultimately, father pled to a child abuse charge and mother's charges were dismissed. At the third permanency planning hearing, reunification was eliminated as a permanent plan.

  DSS filed a TPR, which was granted on the grounds of neglect and failure to make reasonable progress. At the dispositional portion of the TPR hearing, mother's expert witness on child welfare policy and practice was not permitted to testify as her testimony was determined to be irrelevant. An offer of proof through the expert report was provided that addressed her testimony regarding racial disparity in child welfare, domestic violence and child welfare, and the importance of avoiding family separation and foster care versus kinship placement.

Mother appeals the permanency planning order eliminating reunification (which the court of appeals granted a petition for writ of certiorari to review) and the TPR order for both the grounds and the trial court's denial of her expert witness testifying at the dispositional stage. Several agencies filed amicus briefs to the court to address domestic violence in child welfare cases, race in child welfare cases, and wealth-based pretrial incarceration on families.

- **TPR: Likelihood of Future Neglect** as well as past neglect must be shown when there has been a long period of separation between the parent and juvenile. The court looks at the circumstances at the time of the TPR hearing.
  - "Here, as in most cases involving life-threatening non-accidental injuries to a baby, there is no direct evidence of exactly what happened. A baby cannot tell anyone what happened, and no one, other than someone who hurt the baby, saw what happened. Trial courts must often make these difficult and momentous decisions based upon circumstantial evidence and evaluation of credibility and weight of the evidence." Sl. Op. ¶ 1. The lack of mother's explanation for the juvenile's injuries is not an improper shifting of the burden of proof from the petitioner (DSS); instead, "it speaks to the likelihood of future neglect or abuse…. [and] also touches Mother's reasonable progress, or lack thereof…." Sl. Op. ¶ 82. This lack of explanation helped the court evaluate whether DSS met its burden to prove the alleged grounds. The court's determination that mother's testimony and father's email was not reasonable or medically defensible to explain the infant's injuries is a credibility determination that the trial court makes and is not disturbed on appeal. The court's findings about the lack of explanation support its determination of a likelihood of future neglect. Regarding the sibling, "the trial court could rely on the prior abuse and neglect of [the one juvenile] plus Mother's lack of explanation for [his] injuries and condition when he arrived at the hospital to determine [the sibling] was also a neglected juvenile because of the likelihood of future abuse or neglect." Sl.Op. ¶ 112. There were additional findings about concerns related to the sibling (refusing immunizations and medical treatment). The findings support the conclusion of neglect.
  - The services mother completed did not address the reason for the children's removal as the parental capacity evaluation did not look at the cause or extent of the child's injuries and the parenting classes did not address the conditions in the home at the time of removal. Mother was on notice of that the parental capacity evaluation and parenting classes were insufficient at a prior permanency planning hearing where reunification was eliminated as a permanent plan.
  - Although the NC Coalition Against Domestic Violence argued in its amicus brief that the trial court's focus on a lack of explanation requirement retraumatizes domestic violence survivor parents and children involved in the child welfare system, the appellate court focused on case law that "demonstrates why the lack of explanation can be so important." Sl. Op. ¶102. The trial court drew the same inference as other cases (*In re D.W.P.*, 373 N.C. 327 (2020)) that when a parent cannot explain how the children were harmed, there is a risk of future harm being caused in the same way. The court did not infer mother participated in or condoned the abuse but instead focused on mother's belief that father harmed the child was medically impossible to explain all the injuries. Further, the definition of neglect includes living in an injurious environment, which can include failing to protect the juvenile from harm. A TPR focuses on the safety and wellbeing of a child and is not meant to be punitive against the respondent parent.

Finally, unchallenged findings of fact show that domestic violence between the parents did not occur before the abuse, neglect, and dependency petition was filed. This case differs from those where domestic violence existed before the A/N/D petition is filed and is part of the basis for the children's removal.

- **Amicus to Grounds**:
    - The ACLU of North Carolina raised constitutional issues regarding due process on the ground of failing to make reasonable progress to correct the conditions leading to the child's removal, G.S. 7B-1111(a)(2). Constitutional issues not raised before the trial court are waived.
    - The NC Justice Center and Community Bail Fund of Durham argued "wealth-based pre-trial incarceration" related to mother's incarceration and impact it has on her ability to comply with her case plan, specifically visiting the children and demonstrating skills learned in parenting, contradicts mother's argument that she satisfied her case plan. Sl. Op. ¶ 121. Further, mother did not argue her incarceration impacted her ability to work her case plan. The court did order DSS to determine what, if any, service were available in the jail and mother was later released and visited with her son.

Neglect; Failure to Make Reasonable Progress

In re M.B., 2022-NCSC-96

Held: Vacated and Remanded

Dissent, Berger, J., joined by Newby, J.

- In 2019, the juveniles were adjudicated neglected based on circumstances created by mother's substance use, unsanitary home conditions, and improper supervision. Mother was ordered to comply with her case plan, which included a substance use assessment and follow up with recommendations including drug screening, parenting classes, obtaining and maintaining suitable housing, and maintaining employment. Mother was not following the case plan recommendations or regularly attending visits. The primary permanent plan was changed to adoption, and DSS filed a TPR motion in 2020. The motion alleged the grounds of neglect and failure to make reasonable progress. After the TPR was granted on both grounds, mother appealed.
- G.S. 7B-1111(a)(1) authorizes a TPR when a parent neglects their child, including failing to provide proper care, supervision, or discipline or creating an injurious living environment. When a parent and child have been separated for a long period of time there must be prior neglect and the likelihood of future neglect. The court looks to past and present factors, including changed circumstances and the parent's progress toward eliminating the conditions that caused the children's removal. "[T]he factors alone does not amount to making the determination itself" of a likelihood of future neglect. Sl.Op. ¶ 14. The court must "distinctly determine a parent's likelihood of neglecting a child in the future. *Id*. "Even when 'competent evidence in the record exists to support such a finding, . . . the absence of this necessary finding [still] requires reversal.' " *Id*.
    - Although the court found the relevant factors, the court did not make the ultimate determination by clear and convincing evidence of the likelihood of a repetition of neglect.
- G.S. 7B-1111(a)(2) authorizes a TPR when the parent has willfully left the juvenile in foster care for more than 12 months without making reasonable progress under the circumstances to

correct the conditions that led to the juvenile's removal. Willfulness of a parent's failure to make reasonable progress is when the parent has the ability to make the progress but is unwilling to make the effort to do so. There must be adequate findings that the parent acted willfully.
  - The order does not address whether mother acted willfully when leaving the children in foster care without making reasonable progress.
- Dissent: Unchallenged findings were sufficient to show neglect and failure to make reasonable progress. The majority places form over substance.

Failure to Make Reasonable Progress

In re K.M.C., ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: The juveniles were adjudicated neglected based on mother's substance use on three separate occasions, twice after being reunified with mother. Domestic violence between the parents also occurred. The case plan required mother to obtain comprehensive clinical assessments, complete recommendations, comply with drug screens, obtain and maintain a safe residence including informing the social worker of her physical address and phone number. Mother completed an assessment but provided inaccurate information. She did not complete any recommendations from that assessment, did not submit to drug screens and admitted to using substances, denied the social worker access to the home on numerous attempts, and has not maintained consistent contact with the social worker. The court granted the TPR and mother appeals.
- G.S. 7B-1111(a)(2) authorizes a TPR when the parent has willfully left the child in foster care for 12 months while failing to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. When looking at the parent's progress, the court looks at the facts and circumstance up to the time of the TPR hearing. A child is willfully left in foster care when a parent has the ability to make reasonable progress but is unwilling to make the effort. A prolonged inability to make progress is willful even when a parent has good intentions and makes some efforts.
- Mother made late efforts to obtain psychological and substance use evaluations, provided inaccurate information, failed to follow up with recommendations, refused the drug screens, and admitted to using substances. Mother willfully failed to make reasonable progress.
- Mother argues collateral estoppel should have prevented the court from looking at the prior orders in her two earlier cases of neglect. The social worker testified to those cases and the orders were admitted in evidence without objection. Mother did not preserve this issue for appeal.

In re D.C., ___ N.C. App. ___ (May 16, 2023)

Held: Affirmed

- Facts: The juveniles were adjudicated neglected. After parents' failed to make progress on their case plan, DSS filed a TPR petition. The petition was granted based on a preponderance of the evidence standard. The parents appealed. The supreme court reversed and remanded and issued a mandate that the trial court consider the record before it to determine whether DSS proved by clear, cogent, and convincing evidence that one or more the TPR grounds existed. On remand, the court heard arguments from counsel, reviewed the record, stated the earlier standard of proof was a clerical error, and entered a new order findings 2 grounds based on the clear, cogent, and convincing evidence standard. Mother appealed the grounds.

- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves a child in foster care for 12 months and fails to make reasonable progress under the circumstances to correct the conditions that led to the child's removal. Willfulness is when a parent has an ability to make progress but is unwilling to make the effort. When noncompliance with a court-ordered case plan is a factor, there must be a nexus between the components of the case plan and the conditions that led to the child's removal.
- Mother did not make reasonable progress despite having an ability to do so. Mother was ordered to participate in parenting classes for 12 hours and mother chose to attend a 4-hour online class. DSS notified mother this was insufficient. Mother was also ordered to engage in therapy yet reported she does not trust or need counseling and will not participate in it.

In re A.D., 2022-NCCOA-551

Held: Reversed

- Facts: In 2019, the juvenile was adjudicated neglected based on circumstances created by mother's substance use. In 2020, putative father was identified and paternity was established. Father agreed to a case plan with DSS. Father had transportation issues due to a lack of driver's license, some criminal involvement, but was working sporadically, seeking housing closer to his daughter but moved frequently, maintaining contact with DSS, and working within COVID-19 restrictions. In 2020, DSS filed a TPR petition after the primary permanent plan was changed to adoption. At the time of the TPR hearing, father had complied with much of his case plan, including obtaining subsidized housing, employment, completing parenting classes, completing a substance use assessment, seeking treatment for mental health and substance use, maintaining some contact with DSS, and attending the majority of his visits. The TPR was granted after the court determined father complied with the minimal requirements of his case plan. Father appealed.
- G.S. 7B-1111(a)(2) authorizes a TPR when a parent willfully leaves their child in foster care for more than 12 months without making reasonable progress under the circumstances to correct the conditions that led to the juvenile's removal. Willfulness may be found even when a parent makes some efforts to regain custody. Reasonable progress must be made regardless of whose fault it was that caused the child to be placed in foster care. Compliance with a case plan is relevant in determining whether a parent has made reasonable progress up to the time of the TPR hearing. "[A] parent's failure to fully satisfy all elements of the case plan goals is not the equivalent of a lack of reasonable progress." Sl.Op. ¶ 66.
- Challenged findings regarding father not seeking paternity or custody and not making progress with his case plan are unsupported. Other challenged findings are supported by the evidence. The court is not required to make findings on all the evidence presented.
- The findings do not support the conclusion that father failed to make reasonable progress to correct the conditions that led to the juvenile's removal. "While Father has not fully satisfied all elements of his case plan, he has not shown 'a prolonged inability to improve [his] situation,' which would warrant terminating his parental rights…" Sl.Op. ¶67.

Failure to Pay Reasonable Cost of Care

In re A.C., 2022-NCCOA-552

Held: Affirmed

- Facts: In 2019, the juveniles were adjudicated neglected. The court found that father failed to comply with his case plan. In 2020, father was incarcerated for different periods of time for probation violations. A TPR motion was also filed in 2020, which was granted. Father appeals.
- G.S. 7B-1111(a)(3) authorizes a TPR when a parent willfully fails to pay for a reasonable portion of the child's cost of care for the six months immediately preceding the filing of the TPR when the parent is financially and physically able to do so.
- The court had clear, cogent, and convincing evidence of father's employment and income during the relevant six month period from the testimony of the DSS employee that did not include the GAL report, which father challenges should not have been considered because it was not admitted or offered in evidence. The issue regarding the GAL report is not considered by the appellate court.
- Evidence shows father was employed at some point during the relevant statutory six month period when he was not incarcerated and that he paid nothing toward the cost of care. These findings are sufficient to address the statutory time period.
- Although the amount of the father's specific earnings during the relevant time period were not in evidence, the evidence showed he was earning some money through employment, he paid zero toward the cost of care. The finding he had the ability to pay something more than zero in that 6-month period is sufficient.

Failure to Pay Child Support

In re A.H.D., ___ N.C. App. ___ (Feb. 7, 2023)

Held: Reversed and remanded

- Facts: Mother filed TPR action against father alleging that for more than one year, father did not have contact with or visitation with the child and for more than one year, father has failed and refused to pay child support. A TPR hearing was held where mother and father testified. Mother testified to the existence of a child support order and father's nonpayment, except for some tax intercepts. The court granted the TPR under G.S. 7B-1111(a)(4). Father appeals, challenging the sufficiency of the petition, the failure of the court to find the TPR ground by clear and convincing evidence, and insufficient evidence of the ground.
- G.S. 7B-1111(a)(4) requires the court make two findings of fact: (1) an order or agreement requires the payment of child support and (2) the parent willfully failed to pay the child support as ordered or agreed to.
- Although a child support order was not entered in evidence, mother presented sufficient evidence of the existence of a child support order when she testified to its existence. Father also testified that there was a child support order that he was unable to pay.
- Willfulness involves doing something deliberately and purposefully. Because a child support order exists, mother was not required to prove father had an ability to pay. Father's testimony was that he was unable to pay the full amount although he had some income during the relevant time period indicating he has the ability to pay something. Mother testified father paid nothing.

Mother presented sufficient evidence that the trial court could have found father willfully failed to pay. This warrants a remand.

Dependency

In re A.W., ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: DSS filed a neglect petition based on domestic violence in the home. Despite having a DVPO, mother and father continued to have contact. DSS later filed a petition to terminate father's parental rights based on neglect, dependency, and a prior TPR and failure to establish a safe home. Father's rights were terminated, and he appeals.
- G.S. 7B-1111(a)(6) authorizes a TPR on the ground of dependency when a parent is incapable of providing proper care and supervision such that the child is dependent under G.S. 7B-101(9) and the incapability is likely to last for the foreseeable future. The incapability may result from substance use, mental illness, or other condition that renders the parent unable to parent the juvenile.
- The findings supporting father's incapability are supported by the evidence, including testimony from a psychologist, DSS social worker, GAL, and the foster parent as well as father's psychological evaluations, letter to the court, and emails between him and the foster parent. Despite engaging in services, the findings show father has borderline personality disorder and other mental illnesses, continues to show mania and emotional dysregulation, including suicide attempts via overdoses, and a lack of empathy, and use substances.

Abandonment

In re S.I.D.-M., ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

Dissent in part

- Facts: Mother filed TPR against father alleging abandonment, failure to pay child support, and dependency. Prior to the TPR, mother had a custody order granting her sole custody and a modified order that suspended father's visits until he "presents himself to the Court and show just cause as to why his visits should be reinstated." Sl.Op. at 2. The modification was based on father's mental health issues. The court denied the TPR on 2 of the grounds but granted it on the abandonment ground. Father appeals, challenging the evidence was insufficient to support the findings of fact and the findings do not support the conclusion.
- G.S. 7B-1111(a)(6) allows for a TPR when a parent has willfully abandoned their child for at least 6 consecutive months immediately preceding the filing of the TPR petition. Abandonment involves conduct that manifests a willful determination to forego all parental duties and relinquish all parental claims by withholding one's presence, love, care, opportunity to show filial affection, and fails to support the child. Willfulness requires purpose and deliberation.
- A trial court weighs the evidence and determines its credibility. The trial court's finding that an email was sent to mother by father's attorney before the TPR was filed was supported. Without the email, father's testimony, or a more equivocal answer from mother that the email was to resume visitation, the court was not obligated to address what the purpose of the email was. The evidence also supports the findings that father did not attempt to contact mother during the determinative 6-month period. Although father believed there was a no-contact order, it was based on his not reading the order suspending visitation, which set forth what father had to do

to obtain visits. The court inferred father was not motivated or interested enough in resuming visits. The findings support the conclusion of abandonment.
- Dissent in part: Mother did not meet her burden of proof for the abandonment ground and the findings are not supported by clear, cogent, and convincing evidence.

In re E.Q.B., ___ N.C. App. ___ (August 1, 2023)

Held: Affirmed in Part, Vacated in Part

- Facts: Father challenges adjudication order terminating his parental rights of three children and dispositional order prohibiting contact with the children. Mother and father were married with two children. The couple divorced during a period of father's incarceration and had a brief reconciliation following father's release, during which time mother became pregnant with their third child. The couple again separated during father's subsequent incarceration, during which their third child was born.After father's release, father briefly lived with mother and the children, during which time mother paid all expenses. The couple again separated in January 2020. Father began calling mother and threatening her and the children. Mother blocked father from contacting her by phone and changed her phone number. In March, April, and July 2020, father sent money and toys through a relative to send to the mother for the children, but since the couple's final separation, father did not attempt to communicate or otherwise offer support to the children. Father was again incarcerated from September through December 2020. In December, upon release, father moved to Arizona. In February 2021, mother obtained a temporary domestic violence protective order (DVPO) against father, which became a final order in April 2021. In March 2021, mother filed the petition to terminate father's parental rights. After hearing, the court issued the TPR order based on abandonment, neglect by abandonment, and neglect by failure to provide proper care. The court also ordered father to have no further communication or contact with the children. Father appeals.
- An adjudicatory order is reviewed to determine "whether the findings are supported by clear, cogent, and convincing evidence and the findings support the conclusions of law, with the trial court's conclusions of law being subject to de novo review." Sl. Op. at 6 (citations omitted).
- G.S. 7B-1111(a)(7) authorizes termination of a "party's parental rights when it finds that the parent 'has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion.' " Sl. Op. at 6. "To find abandonment, the trial court must find that the parent's conduct 'manifests a willful determination to forego all parental duties and relinquish all parental claims to the child[,]' but the relevant inquiry is limited to the statutory period of six months." Sl. Op. at 7 (citations omitted).
- Challenged findings regarding the parties' relationship and father's failure to provide care, financial support, a safe and loving home, and emotional support to the children are supported by clear, cogent, and convincing evidence. Mother testified as to the time periods of their relationship, her provisions of total financial support for the children, her provision of a home for the children since birth, the children's injuries when left alone with father in the past, and the older children's desire to stay away from their father.
- The findings support the court's conclusion of abandonment. "The obstruction of a parent's ability to contact the children is relevant to the court's consideration; however, the trial court must consider the parent's other actions and inactions in determining the impact of the obstruction on the parent's lack of contact." Sl. Op. at 1. Although mother obtained a temporary

DVPO that was in effect for one and a half months of the determinative six-month period, it did not prohibit contact with the children. Mother blocked father after repeated threatening phone calls. During the determinative statutory period from September to March, father was incarcerated from September to December, moved to another state following release without attempting to see the children, and, while calling mother repeatedly, did not contact his children. Father did not offer any excuse for not seeking custody or signing a voluntary support agreement when the court found he had the means, opportunity, and ability to do so. Father did not provide financial or emotional support for the children.

Prior TPR

In re A.W., ___ N.C. App. ___ (Mar. 21, 2023)

Held: Affirmed

- Facts: DSS filed a neglect petition based on domestic violence in the home. Despite having a DVPO, mother and father continued to have contact. DSS later filed a petition to terminate father's parental rights based on neglect, dependency, and a prior TPR and failure to establish a safe home. Father's rights were terminated, and he appeals.
- G.S. 7B-1111(a)(8) authorizes a TPR on the ground of a prior involuntary TPR and a lack of ability or willingness to establish a safe home. Safe home is a home where there is not a substantial risk of physical or emotional abuse or neglect to the juvenile. G.S. 7B-101(19).
- There is no dispute father's rights to another child were involuntarily terminated. The findings supporting father's inability or unwillingness to establish a safe home are supported by the evidence, including testimony from a psychologist, DSS social worker, GAL, and the foster parent as well as father's psychological evaluations, letter to the court, and emails between him and the foster parent. Despite engaging in services, the findings show father did not address the underlying issues for why the child came into care or his substance use, continues to show angry outbursts and emotional dysregulation, and continues to have contact with mother despite a DVPO.

Disposition

Expert Testimony

In re M.T., 2022-NCCOA-593; 877 S.E.2d 732

Held: Affirmed

- Facts: In 2018, after a hearing and based on stipulations, two juveniles were adjudicated neglected, and the younger infant was also adjudicated abused and dependent. The circumstances involved lack of medical care and nonaccidental injury to the infant including skull and rib fractures in various stages of healing, retinol hemorrhages in both eyes, malnourishment, and other life-threatening conditions. At the time of adjudication and throughout the case, the cause of injuries were never explained; however, the juvenile was in the sole care of his parents at all times prior to the petition being filed. Different explanations for the injuries were provided at different times, including hospital caused, mother's stepfather, and a single drop of the infant by father. The court determined those explanations were not credible to account for the various injuries occurring at different times.

At disposition, the children were placed in DSS custody, and parents were ordered to engage in a case plan. Mother's case plan included a parenting capacity evaluation, parenting classes with demonstration of skills learned at visits, and random drug screens. In the first year of the case, the parents were incarcerated due to charges stemming from the infant's abuse. Ultimately, father pled to a child abuse charge and mother's charges were dismissed. At the third permanency planning hearing, reunification was eliminated as a permanent plan.

DSS filed a TPR, which was granted on the grounds of neglect and failure to make reasonable progress. At the dispositional portion of the TPR hearing, mother's expert witness on child welfare policy and practice was not permitted to testify as her testimony was determined to be irrelevant. An offer of proof through the expert report was provided that addressed her testimony regarding racial disparity in child welfare, domestic violence and child welfare, and the importance of avoiding family separation and foster care versus kinship placement.

Mother appeals the permanency planning order eliminating reunification (which the court of appeals granted a petition for writ of certiorari to review) and the TPR order for both the grounds and the trial court's denial of her expert witness testifying at the dispositional stage. Several agencies filed amicus briefs to the court to address domestic violence in child welfare cases, race in child welfare cases, and wealth-based pretrial incarceration on families.

- **Disposition: Expert Testimony** by mother's witness was excluded after the court determine at voir dire that it was irrelevant. The expert was going to address mother's bond with the children and the importance of maintaining family relationships, especially for Black families. The standard of review of the court's dispositional order is reviewed for an abuse of discretion, and the admissibility of evidence at disposition is also reviewed for an abuse of discretion.
    - The court made a reasoned decision after finding the expert did not believe she had all the documents to review and that the expert had insufficient information about mother and the facts of the case. The expert was also unfamiliar with NC DHHS practices and did not have research from NC. "The trial court's responsibility was to find the facts based upon the evidence presented as to these specific child and parents and to determine the best interests of these specific children based upon those facts and the law." Sl. Op. ¶133.
    - Amicus NC NAACP and ACLU of NC argue the expert would have provided relevant evidence of race disproportionately in child welfare via data. These point are worthy of note and are addressed by G.S. 7B-1110(a) – the bond with the parent and any other relevant consideration. The General Assembly also identifies the purposes and policies of the child welfare system in NC through G.S. 7B-100, which involves balancing family autonomy and protecting children and providing a safe permanent home to children. These laws favor family placement over any other placement when a family placement is available and safe. Parents have constitutional rights to care, custody, and control of their children when they are not unfit or have not acted inconsistently with those rights. "Statistics or studies regarding outcomes for children in non-kinship homes or disproportionate impacts on 'marginalized racial groups' may be of great assistance to the policy-making branches of government when establishing the laws and procedures in child welfare cases generally, but may have no direct relevance to a particular child or family." Sl. Op. ¶ 135

Bond between parent and child

In re H.B., ___ N.C. ___ (April 28, 2023)

Held: Affirmed and Modified court of appeals decision (affirming TPR)

Dissent: Morgan, J. joined by Earls, J.

- Facts: In 2019, the juveniles were adjudicated neglected and dependent due to circumstances created by mother's substance use, mental health, housing, and lack of appropriate supervision. The juveniles were placed in DSS custody. In 2021, DSS filed a TPR petition to terminate mother's parental rights of H.B. The TPR was granted and mother appeals both the grounds and disposition. Regarding the disposition, mother argues the court's finding that there was no bond between her and her child is unsupported by the evidence. The court of appeals affirmed the TPR and there was a dissent. Mother appealed to the supreme court.
- The best interests determination at disposition is reviewed for an abuse of discretion. The court considers factors in G.S. 7B-1110(a).
- Any evidence that supports a finding, even when there is competing evidence, will uphold the finding as the appellate court does not reweigh the evidence. There was some evidence mother had no bond with her child given her failure to visit with her child.
- Dissent: There was no evidence that mother and child did not have a bond. The evidence showed the child recognized her mother as mother and was happy to see her when visits did occur.

In re B.M.S., ___ N.C. App. ___ (April 21, 2023)

Held: Affirmed

- Facts: The juvenile was adjudicated neglected based on circumstances related to mother's substance use. After mother did not make progress on her case plan, DSS filed a petition to terminate her parental rights. The TPR was granted on the grounds of neglect and failure to make reasonable progress, and the court determined it was in the child's best interests to terminate mother's parental rights. Mother appeals, challenging the best interests determination and arguing the findings of fact are not supported by competent evidence.
- The best interests determination is reviewed for an abuse of discretion. The findings are reviewed under a competent evidence standard.
- At disposition, the court may consider written reports and other evidence about the child's needs that is relevant, reliable, and necessary. The court may also incorporate findings made at adjudication. One challenged finding was not supported by the evidence. The evidence was mother did not have stable housing yet the testimony and DSS report shows mother resided with her mother for 3 years. Other challenged findings are supported by competent evidence including social worker testimony and unchallenged findings of adjudicatory facts that were incorporated in the dispositional order.
- The court must consider the factors in G.S. 7B-1110(a). The court made findings of fact about all of the factors. The trial court considered mother's bond with her child and the potential impact of severing that bond and the court determined the TPR was in the child's best interests. There is no abuse of discretion when the court weighed the various factors.

No Contact Order

In re E.Q.B., ___ N.C. App. ___ (August 1, 2023)

Held: Affirmed in Part, Vacated in Part

- Facts: Mother initiated a TPR against father, which was granted. Father appeals by challenging the adjudication order terminating his parental rights of three children and dispositional order prohibiting contact and communication with the children. Father had a long history of repeated incarcerations, made threatening phone calls to mother, and was subject to a DVPO prohibiting contact between himself and mother. This summary focuses on the dispositional argument that the court had no authority to prohibit contact and communication between father and the children in the dispositional portion of the TPR order.
- Although father argued the court issued a no-contact order when entering the dispositional order prohibiting contact and communication between father and the children, "[t]here is no indication in the Record that the trial court attempted to issue its no-contact order under Chapter 50B." Sl.Op. at 14.
- The court abused its discretion by restricting father's ability to contact the children. No provisions of G.S. Chapter 7B authorize a trial court to issue a no-contact order in a G.S. Chapter 7B case. The trial court lacked statutory authority to include the no-contact provision in its dispositional order, therefore the court must vacate that portion of the order.

Remand; Current Circumstances; Nunc Pro Tunc

In re K.J.E., ___ N.C. App. ____ (April 21, 2023)

Held: Vacated in part and Remanded (Adjudication Affirmed)

- Facts: Mother filed a TPR against father for willful abandonment, which was granted. Father appealed, and the supreme court vacated the adjudication portion and remanded based on insufficient findings for the adjudication. In 2022, on remand, the trial court entered its second order with additional adjudicatory findings and terminated parental rights. A GAL was reappointed to the juvenile but the court denied father's motion to receive new evidence. The court relied on the 2020 record and entered the 2022 order nunc pro tunc to 2020. Father appealed, challenging the disposition portion only.
- "The trial court was required on remand during the disposition stage … to determine the best interests of the child at or near the time of the 2022 hearing." Sl.Op. at 3. Although a trial court has broad discretion to decide whether to hear new evidence on remand, this discretion is not unlimited. It is not *per se* error for a best interests determination made on remade to be based on the record of the earlier hearing, when for example, no party attempts to offer new evidence. The court looks at evidence that is relevant, reliable, and necessary and has "wide discretion to determine whether 'to admit or deny evidence at the dispositional phase' ". Sl.Op. at 8 (citation omitted). The supreme court was silent on whether the court must hear new evidence on remand, giving the trial court discretion to make that decision. However, "a trial court *mus*t generally hear any evidence relevant to a best interest determination if the evidence is not cumulative." Sl.Op. at 6 (emphasis in original). Father was not permitted to make an offer of proof such that the appellate court cannot decide if refusing to allow the evidence father would have offered was an abuse of discretion. Not allowing father to make the offer of proof was error.

- A motion to continue the matter for 30 days so the GAL could perform her duties was denied. The court has discretion to deny a motion to continue but the "Supreme Court has suggested a trial court should not begin to make a determination before a GAL can perform her duties." Sl.Op. at 9. The court of appeals makes no determination whether the court abused its discretion.
- On this remand, the court must exercise discretion when determining whether it is then in the child's best interests to terminate his father's rights. "It would seem to be an abuse of discretion if the trial court, on remand from our opinion today, made a best-interest determination based on 2020 information where the court could access new information." Sl.Op. at 10. If the court does not take new evidence, it is encouraged to detailed findings as to why that evidence would not be relevant, reliable, or necessary. The court does have broad discretion to determine what evidence to hear in the disposition.
- Here the court entered the new order *nunc pro tunc* to the earlier order's date, which suggests the court believed it was not required to look at the best interests of the child at the time of the hearing on remand. A *nunc pro tunc* order cannot be used "to accomplish something which ought to have been done but was not done." Sl.Op. at 4 (citation omitted). The use of *nunc pro tunc* was improper as the court was not trying to correct findings it had made in 2020 but rather it added findings it failed to make at the earlier hearing.

Appeal

Writ of Certiorari

In re R.A.F., ___ N.C. ___ (April 28, 2023)

Held: Reverse court of appeals decision and remand to court of appeals

Dissent in part: Morgan, J., joined by Earls, J.

- Facts: This is an appeal of a TPR that involves the release of mother's provisional counsel. After the TPR was granted, mother, who was pro se, appealed to the supreme court rather than the court of appeals. One month before mother filed her appeal, the supreme court had jurisdiction to hear TPR appeals but the statute was amended to place appeals of TPRs to the court of appeals at the time of mother's appeal. The court of appeals and parties to the appeal received notice from and briefed the appeal in the court of appeals. The court of appeals issued a writ of certiorari pursuant to Appellate Rule 21(a)(1). There was a dissent that the Appellate Rules do not allow for the court of appeals to treat the filings as a petition for writ of certiorari.
- "By law, the Court of Appeals has *jurisdiction* to issue a writ of certiorari in any case in aid of its own jurisdiction. N.C.G.S. 7A-32(c)." (emphasis in original). Separately, Appellate Rule 21 gives litigants a procedure that requires a petition for writ of certiorari but that rule does not limit the court of appeals. There is no statute that limits the authority of the court of appeals to issue a writ in this TPR case. The court of appeals had proper appellate jurisdiction.

Mandate

In re D.C., ___ N.C. App. ___ (May 16, 2023)

Held: Affirmed

- Facts: The juveniles were adjudicated neglected. After parents' failed to make progress on their case plan, DSS filed a TPR petition. The petition was granted based on a preponderance of the evidence standard. The parents appealed. The supreme court reversed and remanded and issued a mandate that the trial court consider the record before it to determine whether DSS proved by clear, cogent, and convincing evidence that one or more the TPR grounds existed. On remand, the court heard arguments from counsel, reviewed the record, stated the earlier standard of proof was a clerical error, and entered a new order findings 2 grounds based on the clear, cogent, and convincing evidence standard. The parents appealed arguing the trial court did not comply with the mandate by not reconsidering the evidence and holding a new dispositional hearing.

- Whether a trial court complied with the appellate court's mandate is reviewed de novo. The trial court must strictly follow the mandate, and the plain language of the mandate is controlling.
- The plain language of the mandate was to review and reconsider the record before it and apply the clear, cogent, and convincing evidence standard when making its findings of fact. The trial court's order states it reviewed the record and evidence and arguments of counsel and applied the clear, cogent, and convincing evidence standard. Despite what father argues, the mandate did not include a requirement that the trial court hold a dispositional hearing. The court was not required to hear additional evidence or hold a new hearing. The court followed the mandate language to review and reconsider the record before it.

Remand: Fundamentally Fair Procedures

In re Z.J.W., ___ N.C. App. ___ (Feb. 7, 2023)

Held: Vacated and remanded

- Facts: In 2019, father's parental rights were terminated and father appealed. On appeal, the supreme court reversed in part, vacated in part, and remanded in part the TPR for an order that contained proper findings and conclusions of laws regarding the ground of neglect and likelihood of repetition of neglect and the whether the TPR was in the child's best interests. In 2021, on remand, the trial judge held an in-chambers meeting with the DSS attorney and the child's GAL. Neither father nor his attorney were provided notice of the meeting or participated in the meeting. There was no record of the meeting. A new TPR order was entered, and father appealed.
- Parents must be provided with fundamentally fair procedures, consistent with the Due Process Clause, when the State moves to destroy weakened familial bonds. Judicial Canon 3(A)(4) requires a judge "accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding." Sl.Op. at 5.
- The trial court acted under a misapprehension of law that father was no longer a party and not entitled to due process. Father was entitled to proper service of notice, notice, and an opportunity to be heard, just like he was afforded at the initial TPR proceeding. A remand is required as father was not given an opportunity to participate or be heard before the new TPR order was entered.

UCCJEA

Subject Matter Jurisdiction

In re M.B., ___ N.C. App. ___ (April 21, 2023)

Held: Vacated and remanded for lack of subject matter jurisdiction

- Facts: The juvenile was born in 2013 and lived with his mother in the Washington, D.C. area since his birth. In 2018, the Maryland court concluded he was a child in need of assistance and placed him in the custody of Maryland DSS. In 2020, the Maryland court reunified the juvenile with his mother and terminated the child in need of assistance action but stated the order remains in effect until the child is 18 unless modified by a court of competent jurisdiction. In October 2020, mother was arrested for DWI, drug possession, and child abuse in North Carolina. DSS filed a petition, and the juvenile was placed in the nonsecure custody of DSS. From October 15 – December 1, 2020, the juvenile was in foster care in NC; mother was staying at a hotel in NC. On December 1st, the juvenile was placed with relatives in NC and mother moved back to Washington, D.C. The juvenile was adjudicated, and dispositional hearings were held. The court found that mother's permanent address is in Washington, D.C. and ultimately placed the juvenile with a relative in Maryland where the juvenile would be closer to his permanent home. At a permanency planning hearing, the court entered two orders: the first giving guardianship to the relative and the second giving legal custody to the relative. Mother appeals raising subject matter under the UCCJEA.
- The standard of review of whether the NC court has jurisdiction under the UCCJEA is de novo. If the court lacks jurisdiction, "then the whole proceeding is null and void, i.e., as if it had never happened." Sl.Op. at 12 (citation omitted).
- Maryland was the home state based on the juvenile and mother residing in Maryland for at least six months before DSS in NC filed its petition. Further, the NC court orders make numerous references to Maryland as the juvenile's home. As the home state, Maryland had jurisdiction to make an initial custody determination. Maryland's custody order was an initial custody determination. G.S. 50A-201(a)(1).
- Maryland, as the home state, retained exclusive continuing jurisdiction, as the Maryland order stated it remains in effect until the child turns 18; the mother and child have a significant relationship with Maryland and substantial evidence is there; the mother resides in Maryland; and the child lived all but 9 months of his life in Maryland. G.S. 50A-202.
- NC exercised temporary emergency jurisdiction when the child was found here and was subjected to or threatened with mistreatment or abuse. G.S. 50A-204(a). When exercising temporary emergency jurisdiction, the court must determine whether a previous child custody determination has been made. If there was not a previous child custody determination, "temporary emergency jurisdiction 'becomes a final determination … and this State becomes the home state of the child.' " Sl.Op. at 15-16; G.S. 50A-204(b). If there was a previous child custody determination, the court must specify the duration of the jurisdiction in its order and communicate with the court of the home state. G.S. 50A-204(c)-(d). Because of the previous Maryland custody order, the temporary emergency jurisdiction did not "morph" into home state jurisdiction. The NC court had an affirmative duty to communicate with the Maryland court to resolve the emergency or determine the length of the temporary order.

Subject Matter Jurisdiction: From Temporary to Home State

This opinion is also summarized and discussed in the On the Civil Side blog post, UCCJEA: Transitioning from Temporary Emergency Jurisdiction to Home State Jurisdiction in A/N/D Cases

In re N.B. & N.W., ___ N.C. App. ___ (July 5, 2023)

Held: Affirmed

- Facts: Mother and four children lived in Washington State. This case involves two of the children who relocated to North Carolina. In October 2020, Mother separated from husband and began relocating with her children to North Carolina. Two of the children were picked up by an aunt and brought to NC later that month. In December, DSS received a report of sexual abuse by mother's husband of one of the children staying with the aunt. In January 2021, Mother travelled with one of the children involved in this case to Pennsylvania. DSS filed petitions regarding all four children in January 2021 (the petitions for two of the children who relocated to Pennsylvania were voluntarily dismissed). Mother returned to North Carolina with the other child who is the subject of this case and appeared before the court on February 4, 2021. The court exercised temporary emergency jurisdiction to enter nonsecure custody orders for the two children. In March, the court held the adjudication hearing, at which time the mother had relocated to Charlotte The court entered its adjudication and disposition order on July 6, 2022, after determining NC had home state jurisdiction and adjudicated one of the children as a neglected and dependent juvenile and the other as a neglected and abused juvenile, continued DSS custody, suspended Mother's visitation, and ceased reasonable efforts for reunification with Mother. Mother appeals and only challenges the court's subject matter jurisdiction over the proceedings under the UCCJEA.
- "Whether a court possesses subject matter jurisdiction is a question of law, which this Court reviews de novo on appeal." Sl. Op. at 5 (citation omitted).
- "The jurisdictional requirements of the UCCJEA must be satisfied for a court to have authority to adjudicate petitions filed pursuant to our Juvenile Code." Sl. Op. at 6.
- G.S. 50A-204 "provides that the courts of this State may exercise 'temporary emergency jurisdiction if the child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.' " Sl. Op. at 8-9 (citation omitted). It is uncontested that NC was not the home state of any of the children at the commencement of the proceedings as none of the children had resided in the State for six months, and that the trial court properly exercised temporary emergency jurisdiction at the initiation of the proceedings. The trial court had temporary emergency jurisdiction to enter the initial, temporary nonsecure custody orders.
- This State can become the home state of the child if a child-custody proceeding has not been or is not commenced in a court of a state having home state jurisdiction under N.C.G.S. §§ 50A-201 through 50A-203, whereby the child-custody determination made by the court in this State exercising temporary emergency jurisdiction can be declared the final determination if so provided. G.S. 50A-204(b). Applying *In re M.B.*, 179 N.C. App. 572 (2006), a case with nearly identical facts, the trial court properly declared that NC had obtained home-state jurisdiction under the UCCJEA after it initially exercised temporary emergency jurisdiction. At the time of the adjudication and disposition order, the children and Mother had lived in North Carolina for well

over six months and no other custody order existed in any other state with jurisdiction. NC acquired home state jurisdiction.

Adoption

Father's Consent

Providing Tangible Support

In re B.M.T., 2022-NCCOA-838, 882 S.E.2d 145

Held: Affirmed

- Facts: Petitioners for adoption appeal district court order concluding father's consent was required for the child's adoption based on his acknowledging paternity, communicating and visiting with mother while pregnant and child after birth, and providing tangible support to mother during pregnancy and after the child's birth. Mother and father continued in a relationship when mother was pregnant. Father provided mother with food and baby formula, clothing for herself and baby, cash (which was sometimes accepted and sometimes refused), transportation, housing, and personal items (e.g., car seat, diapers) during her pregnancy and after the child's birth. Without father's knowledge, mother executed a consent for adoption and placed child with petitioners and stated father's identity was unknown. Afterwards, mother and father signed a voluntary acknowledgement of paternity resulting in the child's amended birth certificate. Petitioners later filed a petition for adoption. Father was served with notice of the adoption petition and objected to the adoption. A hearing on whether father's consent was required was held by the district court, which found father's consent was required.
- Standard of review is whether there is competent evidence to support the findings and whether the findings support the conclusion. The trial court determines witness credibility and the weight of the evidence.
- G.S. 48-3-601 requires a man, before the adoption petition is filed, to acknowledge his paternity, provide reasonable and consistent payment for support including tangible means of support that is within his financial means, and visited or communicated with (or attempted to) mother during or after her pregnancy and the child after their birth. Petitioners concede father acknowledge paternity and communicated with mother.
- Respondent has the burden of showing (1) he provided payments for the support of mother, minor child, or both, (2) the payments were reasonable based on his financial means, and (3) the payments were consistently made. Attempts or offers of support are insufficient. NC Supreme Court holdings note the importance of a "payment record." The findings that father provided *tangible support* before the filing of the adoption petition are supported by competent evidence. Father had receipts, bank and credit card statements, and a pregnancy expense report he created. Father also set up his own home with a bed, toys, and clothing so that he could care for his child.

Civil Cases Related to Child Welfare

Child Custody and Admission of DSS Child Protective Records

Kozec, Jr. v. Murphy, 2022-NCCOA-902, 882 S.E.2d 425

Held: Vacated and Remanded

- Facts: Mother filed a motion to modify a permanent custody order seeking father's prohibition from having contact with the children. DSS child protective records were obtained and placed under a protective order allowing the parties' attorneys to review them after the court determined under G.S. 7B-302(a1) that the records were relevant and necessary to the trial and were unavailable from another source. At the hearing, father sought the admission of those records, which mother objected to. The court sustained her objection after determining live witness testimony was required to authenticate the DSS records. The court modified the custody order and father appealed, challenging the exclusion of the DSS records based on the court's misapprehension of law.
- Standard of review is whether the court abused its discretion when excluding the DSS records.
- The court misapprehended the law when determining DSS records must be authenticated by a live witness testimony, rather than determine whether the records qualify as public records under Rule 902(4) of the Rules of Evidence, which allows for certified copies of public records. Despite mother's argument that there was no authenticating affidavit to the CPS records, the authenticating affidavit is part of the record on appeal. The trial court did not consider the affidavit based on its misapprehension of the law that live witness testimony to authenticate the records was required. This misapprehension of law is an abuse of discretion requiring the order be vacated and remanded. On remand, the parties shall have an opportunity to present arguments on whether the DSS records fall under the hearsay exception from Rule 803(8) or whether they are public record that can be authenticated by affidavit under Rule 902(4).

UCCJEA: Transitioning from Temporary Emergency Jurisdiction to Home State Jurisdiction in A/N/D Cases

The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) governs a state's subject matter jurisdiction to hear child custody cases, including abuse, neglect, dependency (A/N/D), and termination of parent rights (TPR). *See* G.S. 50A-102(4); 50A-106. Without following the jurisdictional requirements of the UCCJEA, the court lacks subject matter jurisdiction. Any orders entered when a court lacks subject matter jurisdiction are void ab initio. In re T.R.P., 360 N.C. 588 (2006). I receive numerous inquiries about the UCCJEA in A/N/D cases. A common question involves North Carolina's use of temporary emergency jurisdiction and whether it ever becomes initial custody jurisdiction when North Carolina becomes the juvenile's "home state" after the A/N/D petition has been filed in district court. Earlier this month, the court of appeals answered this question when it published *In re N.B*., ___ N.C. App. ___ (July 5, 2023). This blog serves as a follow up to my previous blog post about temporary emergency jurisdiction under the UCCJEA.

Jurisdiction under the UCCJEA

The UCCJEA provides for four types of subject matter jurisdiction in child custody proceedings:

- initial custody determination (G.S. 50A-201),
- modification jurisdiction of a child custody order (G.S. 50A-203),
- temporary emergency jurisdiction (G.S. 50A-204), and
- exclusive, continuing jurisdiction (G.S. 50A-202).

In re N.B. addresses temporary emergency jurisdiction and its conversion to initial custody determination based upon North Carolina becoming the child's "home state."

"Home State" and How It Relates to Subject Matter Jurisdiction

A child's "home state" is the state where the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the infant's home state is the state in which the child lived from birth with a parent or person acting as a parent. G.S. 50A-102(7). The commencement of a child custody proceeding is when the initiating pleading is filed in court, which for child welfare cases is the A/N/D petition. G.S. 50A-102(5); 7B-405.

Initial custody determination exists when the state is the child's "home state" and there has never been a child custody proceeding or determination for the child. G.S. 50A-201(a)(1). *See* G.S. 50A-102(3) (definition of "child custody determination"; 50A-102(4) (definition of "child custody proceeding"). Additionally, if the child has left a state but that state was the child's home state within six months before a custody proceeding is initiated, that state has initial custody jurisdiction so long as a parent or person acting as a parent continues to live in that state. G.S. 50A-201(a)(1). If there is a prior custody order entered in another state, the state where the child now lives has jurisdiction to modify the other state's custody order if the conditions of G.S. 50A-203 are satisfied. One of the criteria for modification jurisdiction is whether the state where the child now lives is the child's "home state."

Some A/N/D cases involve situations where the child is determined by a county department of social services (DSS) to be abused, neglected, and/or dependent but the child has not lived in North Carolina for six months. What can a DSS and the North Carolina district court do when North Carolina does not have initial custody or modification jurisdiction under the UCCJEA?

Temporary Emergency Jurisdiction

The UCCJEA provides for temporary emergency jurisdiction when a state has neither initial custody nor modification jurisdiction when

- the child is present in the state and
- the child has been abandoned or it is necessary in an emergency to protect a child because the child, their sibling, or their parent is threatened with or subjected to mistreatment or abuse.

G.S. 50A-204(a).

Temporary emergency jurisdiction enables DSS to immediately file an A/N/D petition in district court for a juvenile who has been substantiated as abused, neglected, and/or dependent but who has not lived in North Carolina for the immediately preceding six months. Temporary emergency jurisdiction provides the North Carolina court with subject matter jurisdiction to enter a temporary order. In an A/N/D action, that temporary order is the nonsecure custody order. *See* G.S. 7B-503 through -507.

Depending on whether there has been or is a child custody proceeding or determination in another state, the North Carolina court may be required to communicate with the court of the other state to address subject matter jurisdiction. *See* G.S. 50A-204(d). While exercising temporary emergency jurisdiction, the North Carolina court may only enter temporary orders. *Id.* (See my earlier blog post). In some cases, temporary emergency jurisdiction may transition to initial custody jurisdiction based on a change in the child's home state.

In re N.B.: Temporary Emergency Jurisdiction Transitions to Home State Initial Custody Determination

The Facts: In 2020, the two children who were the subject of the A/N/D action resided with their mother and her husband in Washington state (Note, there are two other children who are not included in this opinion). In October, mother separated from her husband and started to relocate to North Carolina. Later in October, one child moved to North Carolina and stayed with her aunt. In January, another child moved in with other relatives in North Carolina. In December, the child who lived with her aunt disclosed that mother's husband had been sexually abusing her. A report to DSS was made and mother denied any allegations and refused to cooperate with DSS. In January, DSS filed a petition alleging abuse, neglect, and dependency for the child who disclosed the sexual abuse and neglect and dependency for the sibling. The district court entered nonsecure custody orders for the two children based upon temporary emergency jurisdiction. By March, mother had relocated to North Carolina and had housing here. An adjudication and disposition hearing was heard in March, and an order was entered in July. The order contained a conclusion that it initially exercised temporary emergency jurisdiction but North Carolina had obtained home state jurisdiction since mother and the two children had lived here for more than six months and there was no custody order from another state. Mother appealed arguing that North Carolina did not have subject matter jurisdiction under the UCCJEA.

The Issue

The issue on appeal was "whether (and under what conditions) temporary emergency jurisdiction under the UCCJEA may eventually ripen into home-state jurisdiction." Sl.Op. 6. The answer is yes when specific criteria are met.

The Analysis

It is undisputed that when DSS initiated the A/N/D case, North Carolina was neither child's "home state" and that the district court properly exercised temporary emergency jurisdiction at the commencement of the action. As a result, the district court had subject matter jurisdiction to enter the nonsecure custody orders. However, mother argued that the district court lacked subject matter jurisdiction to enter an adjudication order under temporary emergency jurisdiction based upon the passage of time – six months – which made North Carolina the children's home state. The court of appeals rejected mother's argument.

The court of appeals looked to three prior published opinions. Two of those opinions involved a TPR where at the commencement of the TPR, North Carolina was the home state. Prior to the initiation of the TPRs, DSS had custody of the respective children because of underlying A/N/D cases where DSS had been awarded custody. The A/N/D cases initially involved temporary emergency jurisdiction as neither child had resided in North Carolina for six months before the A/N/D actions were commenced. *See* In re N.T.U., 234 N.C. App. 722 (2014); In re E.X.J., 191 N.C. App. 34 (2008), *aff'd per curiam*, 363 N.C. 9 (2009). In both cases, no child custody proceedings had ever been initiated in another state. Because *In re N.B*. does not involve a TPR, the court of appeals also looked to In re M.B., 179 N.C. App. 572 (2006). Like *In re N.B.*, *In re M.B.* was an A/N/D case. In *In re M.B*., the district court initially exercised temporary emergency jurisdiction and adjudicated the juvenile neglected and placed the juvenile in DSS custody. The district court recognized that North Carolina had become the child's home state and ordered that its adjudication become a final order under G.S. 50A-204(d). While the appeal in *In re M.B.* was pending, there was confirmation that no child custody proceedings had been filed in another state. The court of appeals determined that the issue of temporary emergency jurisdiction was moot and never discussed G.S. 50A-204.

In *In re N.B*., the court of appeals examined G.S. 50A-204(b), which explicitly states:

if a child-custody proceeding has not been or is not commenced in a court of a state having jurisdiction under G.S. 50A-201 through 50A-203, a child-custody determination made under this section becomes a final determination if it so provides, and this State becomes the home state of the child.

The plain language of this statute "contemplates that a court exercising emergency jurisdiction may enter an initial child-custody determination, which 'includes a . . . temporary . . . order.' *Id*." Sl.Op. 9. Here, mother and both her children lived in North Carolina for more than 6 months and there was never a child custody order from or proceeding in another state such that North Carolina was home state when the adjudication and dispositional order were entered. As a result, at the time the adjudication and dispositional orders were entered, North Carolina's temporary emergency jurisdiction had transitioned to initial custody determination. In making its holding, the court of appeals recognized it was following the holding of two unpublished cases, *In re K.M*., 228 N.C. App. 281 (2013) (unpublished) and *In re L.C.D.*, 253 N.C. App. 840 (2017) (unpublished).

A Word of Caution

Subject matter jurisdiction can be raised at any time. *In re K.J.L.*, 363 N.C. 343 (2009). It is a conclusion of law with a de novo standard of review. *In re N.B*. Although North Carolina can become a child's home state, transitioning North Carolina's temporary emergency jurisdiction to initial custody jurisdiction, consider the following:

- There cannot have been a child custody determination made in another state.
- A child custody proceeding cannot have been or be commenced in another state. It is possible that a child custody proceeding is initiated in a child's home state after an A/N/D petition has been filed in North Carolina and before North Carolina obtains home state jurisdiction.

Be wary about having an adjudication hearing prior to North Carolina becoming the child's home state. In *In re N.B*., the court of appeals referred to the passage of time up to the entry of the adjudication and dispositional order (the hearing was conducted earlier, before North Carolina had home state jurisdiction). Since an adjudication is not a temporary order, to avoid any confusion and possible jurisdictional defects, it is prudent to wait to hold the adjudicatory hearing until North Carolina has become the child'

U.S. Supreme Court Holds the Indian Child Welfare Act Is Constitutional

The Indian Child Welfare Act (ICWA) was enacted by Congress in 1978 and applies to designated "child custody proceedings" that involve an "Indian child." An Indian child is a person who is under 18 years old and is either (1) a member of a federally recognized Indian tribe or (2) eligible for membership in a federally recognized Indian tribe and a biological child of a member of a federally recognized Indian tribe. 25 U.S.C. 1903(4). There are four types of child custody proceedings that are governed by ICWA: (1) foster care placements, (2) preadoptive placements, (3) termination of parental rights (TPR), and (4) adoptions.

The purpose of ICWA is to set minimal federal standards for four types of child custody proceedings that involve the removal and placement of Indian children. Through ICWA, Congress sought to address "an alarmingly high percentage of Indian families that are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. 1901(4). ICWA encompasses a national policy of protecting the best interests of Indian child and promoting the stability and security of Indian tribes and families. 25 U.S.C. 1902. ICWA has many provisions that apply to abuse, neglect, dependency; TPR; guardianship of minors; and adoptions of minors (including stepparent adoptions) when an Indian child is involved. (For more information about ICWA and its requirements, see Chapter 13, section 13.2 of the A/N/D-TPR Manual here.)

In 2019, ICWA was challenged as and held to be unconstitutional because it exceeded federal authority, infringed on state sovereignty, and discriminated on race. That federal district court opinion was appealed and ultimately heard by the U.S. Supreme Court. Last Thursday, in a 7-2 opinion, the U.S. Supreme Court rejected every challenge made by the petitioners in Haaland v. Brackeen, 599 U.S. ___ (2023) and held that ICWA is constitutional. This opinion has two concurrences and two dissents, all of which are discussed below.

The Petitioners

The petitioners include both individuals and the states of Texas, Indiana, and Louisiana. The case arises from three child custody proceedings where an Indian child was involved; the child was placed in a non-Indian placement; and the child's tribe sought to enforce the placement preferences designated in ICWA.

One of the petitioners was a couple who provided foster care to an Indian child and who wanted to adopt the child with the support of the child's parents and grandmother. The child's tribe opposed the adoption by the petitioners and sought to enforce the placement preferences for the child with a nonrelative tribal member. A second petitioner was the Indian child's biological mother and prospective non-Indian adoptive parents who were selected by the biological mother. Although both biological parents supported the adoption, the tribe intervened and sought to enforce the placement preferences of ICWA. The third petitioner fostered an Indian child and sought to adopt the child. The tribe intervened and because of the placement preferences of ICWA, the child was moved from the non-Indian placement and placed with their grandmother. During the pendency of this appeal, the first two petitioners were able to adopt the children. All the individual petitioners expressed an interest in fostering or adopting Indian children in the future.

The Constitutional Challenges

Petitioners argued ICWA was unconstitutional because (1) Congress lacked authority to enact ICWA, (2) numerous ICWA requirements violated the Tenth Amendment anticommandeering principle, (3) race classifications for placement preferences discriminated against non-Indian families who wanted to foster or adopt Indian children, and (4) placement preferences that can be altered by the tribes violated the nondelegation doctrine.

Procedural History

A Texas federal district court granted summary judgment for the petitioners on all of their claims. In an *en banc* decision, the Fifth Circuit affirmed in part and reversed in part. The Firth Circuit held ICWA does not exceed Congress's power, the tribe's placement preferences do not violate the nondelegation doctrine, and some of the placement preferences satisfy equal protection guarantees. The Fifth Circuit evenly split on whether other placement preferences unconstitutionally discriminated on race and on issues related to notice requirements, placement preferences, and some recordkeeping requirements. Because of the even split, the Fifth Circuit affirmed the district court's ruling that these provisions were unconstitutional. The Fifth Circuit held the active efforts requirements, expert witness requirements, and the recordkeeping requirements violated the Tenth Amendment anticommandeering principle. The U.S. Supreme Court granted certiorari. Louisiana and Indiana did not pursue the appeal before the U.S. Supreme Court.

The U.S. Supreme Court Decision: Haaland v. Brackeen, 599 U.S. ___ (2023)

Congress Has the Power to Enact ICWA

The majority opinion held that precedent has established that Congress has "plenary and exclusive" power to legislate with respect to Indian tribes. Op. 10. This plenary power comes from (1) the Indian Commerce Clause (U.S. Constitution, Art. I, sec. 8, cl. 3); (2) the Treaty Clause (U.S. Constitution, Art. II, sec. 2, cl. 2); (3) principles inherent in the structure of the Constitution to act on Indian affairs, described as "necessary concomitants of nationality" (Op. 11); and (4) "the trust relationship between the United States and the Indian people" (Op. 12). Congress has the power to legislate a wide range of areas with respect to Indians, including the areas of criminal law, domestic violence, employment, property tax, and trade.

The opinion focuses on Congress's plenary power over Indian affairs under Article I and the Indian Commerce Clause. In discussing Congress's power to enact legislation under Article I of the Constitution, the majority recognized that Congress generally lacks power over domestic relations and that state courts apply state law when hearing cases involving foster care and adoptions. ICWA, a federal statute, applies when the child is an Indian child. The majority held ICWA is permissible because "the Constitution does not erect a firewall around family law", and there is not a family law carve out to Congress's power to enact legislation under Article I. Op.14. In contrast, Justices Thomas and Alito in their dissents discuss how the federal government's powers are limited by the Constitution and that family law is under the authority of the states.

Regarding the Indian Commerce Clause, the majority and concurrence (Gorsuch, joined by Sotomayer and Jackson) rejected the petitioners' argument that the Indian Commerce Clause does not apply to Congress's power to enact ICWA. The opinion held that the Indian Commerce Clause does not apply only to Indian tribes. Precedent has established that "commerce with Indian tribes, means commerce with the individuals composing the tribes." Op. 15 (citation omitted). Although petitioners argued that children are not commerce, the majority noted that the argument is a rhetorically powerful point but ignores precedent that the Indian Commerce Clause addresses trade as well as "Indian affairs." Op. 16. The majority stated that the petitioners ignore precedent and argue "as if the slate were clean[,but m]ore than two centuries in, it is anything but." Op. 17. Agreeing with the majority, Justice Gorsuch stated that the Indian Commerce Clause gives Congress the " 'authority to regulate commerce with Native Americans' as individuals … [and] cover[s] 'something more' than just economic exchange." Gorsuch Concur 28, 29. As a result, the Indian Commerce Clause gives Congress the power to enact ICWA. In his dissent, Justice Thomas agreed with petitioners that the Indian Commerce Clause applies to commerce, which is economic activity, and does not involve children or child custody matters.

The majority opinion and the Gorsuch concurrence recognize that legal precedent about Congress's plenary power over Indian affairs is confusing as it has become broader over time. The status of the case law on plenary power was discussed by the majority, Justice's Gorsuch's concurrence, and Justice Thomas's dissent. The majority opinion holds that Congress's plenary power is not unbounded, free-floating, or absolute but derives from the Constitution. Justice Gorsuch explained that the Supreme Court has started to correct its mistake of expanding the meaning of plenary from what was first employed. The opinion recognizes that what Congress can legislate with respect to Indian tribes results from the Constitution and the Indian Commerce Clause and so Congress has limits. The concurrence also determined that ICWA falls under Congress's constitutional authority and limits how non-Indians may interact with Indians. Through the enactment of ICWA ,"Congress exercised its authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is keeping with the Constitution's original design." Gorsuch Concur 28.

The Two Dissents

In a dissent, Justice Thomas concludes that Congress did not have authority to enact ICWA. Justice Thomas was unable to find any constitutional basis for the federal government's plenary power over Indian affairs. The Indian Commerce Clause applies to economic activity and not children. ICWA is not based on a treaty. The inherent foreign affairs power does not apply to domestic child custody proceedings of U.S. citizens who reside in the States. Because there is no constitutional basis for ICWA, ICWA is unconstitutional. ICWA is an intrusion on states' powers as it "regulates child custody proceedings, brought in state courts, for those who need never have set foot on Indian lands. It is not about tribal lands or tribal governments, commerce, treaties, or federal property." Thomas Dissent 39.

Justice Alito also dissents. The basis for his dissent is that "ICWA violates the fundamental structure of our constitutional order." Alito Dissent 4. The provisions of ICWA are contrary to the best interests of children and require courts to consider what Congress believes is in the best interests of tribes. Congress's authority over Indian affairs does not allow it to (1) promote the tribe's interests over a child's best interests and (2) force state judges to follow the tribe's priorities for placement. States govern family relations. ICWA requires a state to abandon its own judicial procedures and laws when addressing a child's welfare and apply a federal law that focuses on the tribes and not solely on the child's best interests. This overrides the state's authority and harms vulnerable children and their parents.

ICWA Does Not Violate the Anticommandeering Principle of the Tenth Amendment

The petitioners argued that certain requirements of ICWA, including the provision of "active efforts," expert testimony, heightened evidentiary standards, notice requirements, and placement preferences, violate the anticommandeering principle of the Tenth Amendment. They argue these provisions that apply to involuntary child custody proceedings (which in NC are abuse, neglect, dependency, and TPR actions) command the states to administer or enforce a federal regulatory program.

The majority opinion recognizes that ICWA provides heightened protections to parents and tribes. For example, any party who seeks a foster care placement or TPR must "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have been unsuccessful." Op. 18-19 (quoting 25 U.S.C. 1912(d)). The opinion holds that the active efforts requirement does not command the state's legislative or executive authority to administer or enforce a federal regulatory program. The active efforts requirement is not directed primarily or exclusively to the states but applies to "any party" initiating an involuntary proceeding. "Any party" includes private individuals and agencies along with government entities. When legislation applies evenhandedly to state and private actors, the Tenth Amendment is not typically implicated. Despite an argument by petitioners, there is no evidence that states initiate the vast majority of involuntary proceedings. Additionally, Texas law authorizes private parties to initiate a TPR proceeding. Although the state initiates child protection cases, active efforts apply to cases that do not involve abuse or neglect.

For example, active efforts apply to a private adoption where one parent does not consent. The state is also not the only entity that can protect a child; for example, a grandmother can seek guardianship of her grandchild when the parents are neglectful. The majority noted that requiring active efforts in these private child custody proceedings is consistent with ICWA's findings about the role of public and private actors in unjustly separating Indian children from their families and tribes. The opinion also held that the provisions of ICWA that address notice requirements to the tribes, expert witness requirements, and evidentiary standards apply to both private and state actors and do not pose an anticommandeering problem.

Similarly, the placement preferences for the child under 25 U.S.C. 1915 do not violate the anticommandeering principle of the Tenth Amendment because the preferences apply to private and public parties. These preferences are hierarchical, starting with the child's extended family and then prioritizing Indian providers over non-Indian providers. However, ICWA "does not require *anyone*, much less the States, to search for alternative placements" so the state is not commanded to do anything. Op. 23 (emphasis in original). Although state courts must apply the placement preferences, Congress can require state courts to enforce federal law under the Supremacy Clause. The majority reiterated that as held in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), no preference applies if an alternative party who meets the preferred preference has not come forward. The tribe or party objecting to the placement has the burden of producing the preferred (meaning higher-ranked) placement.

Two challenged recordkeeping requirements do not violate the anticommandeering principle of the Tenth Amendment. The challenged provisions require (1) the state court to provide the Bureau of Indian Affairs with a copy of the final adoption order and other information to show the child's tribal affiliation and name, the names and addresses of the biological parents and adoptive parents, and the identity of any agency that has information about the adoptive placement (25 U.S.C. 1951(a)) and the state to maintain a record that documents the efforts that were made to comply with the placement preferences and to make the record available at any time to the Bureau of Indian Affairs or the tribe (25 U.S.C. 1915(e)). "Congress may impose ancillary recordkeeping requirements related to state-court proceedings without violating the Tenth Amendment." Op. 28.

Lack of Standing for Equal Protection and Nondelegation Challenges on Placement Preferences

The individual petitioners and the State of Texas do not have standing to raise an equal protection challenge to the placement preferences or a nondelegation challenge to the tribe's ability to modify the placement preferences. The equal protection challenge was based on the argument that the placement preferences discriminate on race.

For standing, petitioners must show they suffered an injury that will be redressed by the requested relief. The placement preferences are applied by state courts, and state agencies carry out the court-ordered placements. None of the parties to the lawsuit are state officials who implement ICWA. As a result, any order would not be binding on the state actors. Since a judgment remedies an injury, addressing this issue would not result in a remedy. Instead, the judgment would be nothing more than an opinion. Texas has no equal protection rights and cannot bring an action against the federal government as *parens patriae* on behalf of its citizens. Texas has not been injured.

In his concurrence, Justice Kavanaugh emphasizes that the court did not address or decide the race-based equal protection issue because of the lack of standing. He notes that this serious issue is undecided.

Concurrence Explains Historical Context for ICWA

Some may wonder why ICWA was and is necessary. In his concurrence, Justice Gorsuch discusses the almost 150-year history of the removal of Indian children from their families and tribes and the resulting existential threat to the tribes. Justice Gorsuch starts his discussion with the creation and widespread use of Indian boarding schools, which started in 1879 with one school in Pennsylvania and grew to 408 schools across the country. The goal of the boarding schools was "the abolition of the old tribal relations." Gorsuch Concur 4. Children came to the schools through either abduction or from coercing parents by withholding rations. Once at the schools, the children were stripped of their identity – they were given English names, had their hair cut and their traditional clothes confiscated, were prohibited from speaking their native language or engaging in their customary or religious practices, and were separated from other members of their own tribe. Children who resisted or ran away were punished. The conditions in the schools generally involved sexual, physical, and emotional abuse; disease; malnourishment; overcrowding; and no health care. Tribes were charged with the cost of the schools. Children at the boarding schools were required to work on the grounds to subsidize the costs. Some children were "outed" to live with white families to work on household and farm chores. Boarding schools continued into the 1970s, although a transition away from boarding schools had been occurring.

At the same time, there was an increased demand for Indian children by adoptive couples. In the 1960s and 1970s, approximately one quarter to one third of all Indian children were removed from their families and communities without justification and without due process. An estimated 90 percent or more of non-relative adoptions were by non-Indian couples. Compared to white children, Indian children experienced a higher rate of physical, sexual, and emotional abuse in their foster and adoptive homes. The result was long-lasting health and emotional damage.

In 1978, Congress responded to this crisis by enacting ICWA. Justice Gorsuch stated, "the law's operation is simple. It installs substantive and procedural guardrails against the unjustified termination of parental rights and removal of Indian children from tribal life." Gorsuch Concur 10. Still, " ' many [S]tates have struggled with 'effective implementation'…. Others resist ICWA outright, as the present litigation by Texas attests." Gorsuch Concur 12.

National Research Center for Parents with Disabilities
Parents Empowering Parents
Padres Empoderando a Padres

Representing Parents with Disabilities: 10 Tips for Attorneys[1]

As people with disabilities increasingly become active members of their communities, many are choosing to become parents. Unfortunately, however, parents with disabilities all too often encounter substantial discrimination, particularly within the child protection and family law systems. Attorneys have an important – and often, challenging – role they must play to ensure that parents with disabilities are treated fairly and given the opportunity to thrive. Below are 10 tips for attorneys to assist in making sure these families are afforded their rights.

1. **Screen every client for disability.** Longstanding research indicates that parents with disabilities face significant discrimination, particularly within the child protection system. In fact, research suggests that parents with intellectual disabilities have their children permanently removed by child welfare agencies at rates ranging from 30% to 80%.[2] Similarly, research indicates that parents with psychiatric disabilities face disproportionately high rates of removal, with estimates as high as 70% to 80%.[3] Parents with disabilities are also at increased risk of losing custody and visitation during

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[1] This tip sheet was originally published at http://www.robynpowell.com/representing-parents-with-disabilities-10-tips-for-attorneys/.

[2] Tim Booth, & Wendy Booth, Findings from a Court Study of Care Proceedings Involving Parents with Intellectual Disabilities, 1 J. POL'Y PRACT. INTELLECT. DISABILITY 179-81(2004); Tim Booth et al., Care Proceedings and Parents with Learning Difficulties: Comparative Prevalence and Outcomes in an English and Australian Court Sample, 10 CHILD FAM. SOC. WORK 353-60 (2005); Maurice Feldman et al., Effectiveness of Home-Based Early Intervention on the Language Development of Children of Mothers with Mental Retardation, 14 RES. DEV. DISABILITY 387-408 (1993); Robert L. Hayman, Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent, 103 HARV. L. REV. 1201 (1990); Gwynnth Llewellyn et al., Prevalence and Outcomes for Parents with Disabilities and their Children in an Australian Court Sample, 27 CHILD ABUSE NEGL. 235-51 (2003); David McConnell et al. Parental Cognitive Impairment and Child Maltreatment in Canada, 35 CHILD ABUSE NEGL. 621-32 (2011); Brigit Mirfin-Veitch et al., Supporting Parents with Intellectual Disabilities, 6 NEW ZEALAND J. DISABILITY STUD. 60-74 (1999).

[3] Loran B. Kundra & Leslie B. Alexander, Termination of Parental Rights Proceedings: Legal Considerations and Practical Strategies for Parents with Psychiatric Disabilities and the Practitioners Who Serve Them, 33 PSYCHIATRIC REHABILITATION J. 142, 143 (2009); see generally Jennifer Mathis, Keeping Families Together: Preserving the Rights of Parents with Psychiatric Disabilities, 46 CLEARINGHOUSE REV 517 (2013).

divorce proceedings.[4] Given the high incidence of parental disability in these matters, it stands to reason that many of your clients may have an underlying disability (and some might not know it). As such, it is critical to screen every client for disability. To do so, ask questions such as, "Have you ever received SSI or SSDI?" "Did you receive extra assistance when you were in school?" "Do you have any difficulty reading or doing math?" "Do you have trouble remembering things?" "Have you ever seen a therapist or taken medication for depression or anxiety?" "Do you have any problems walking or lifting heavy things?" As discussed below, identifying a client's disability early on is very important in ensuring that they are provided certain protections and rights.

2. **Connect the parent with appropriate disability services.** It is important that parents with disabilities are connected with the appropriate disability services. For instance, local centers for independent living can assist parents with housing, employment, transportation, personal assistant services, and obtaining financial or health benefits. If parents have intellectual or disability services, it is important to make sure they receive supports through their state's intellectual and developmental disability Most states also have services for people who are Deaf or Hard of hearing as well as for people who are blind or have low vision. In addition, many states provide mental health services as well as peer supports for people with psychiatric disabilities.

3. **Make sure the parent receives an accessible parenting assessment.** Parenting assessments are often the deciding factor in child welfare and family law proceedings. As such, it is vital that parents with disabilities be assessed be someone who is competent on how to evaluate people with disabilities. Be sure to inquire about the evaluator's specific experience assessing parents with disabilities, as well as their knowledge of the American Psychological Association's Guidelines for Assessment of and Intervention with Persons with Disabilities. Moreover, parenting assessments must be fully accessible, conducted in the natural environment (i.e., the parent's home), and not be based solely on diagnosis or IQ.

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[4] Robyn M. Powell, Can Parents Lose Custody Simply because they are Disabled? 31 GP SOLO 14 (2014), available at http://www.americanbar.org/publications/gp_solo/2014/march_april/can_parents_lose_custody_simply_because_they_are_disabled.html; Ella Callow et al., Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community, 17 TEX. J. C.L. & C.R. 9 (2011).

4. **Raise the ADA early and often!** It is incredibly important to raise the Americans with Disabilities Act (ADA) as soon as possible. Title of the ADA requires specific obligations of child welfare agencies, as well as dependency and juvenile courts.[5] Further, parenting evaluators have obligations pursuant to Title III of the ADA.[6] Attorneys must also be mindful of their legal obligations.

5. **Request reasonable accommodations and modifications.** Parents with disabilities have the right to receive reasonable accommodations and modifications pursuant to Titles II and III of the ADA as well as Section 504 of the Rehabilitation Act.[7] Requests for reasonable accommodations and modifications should be in writing and state that your client is a qualified individual with a disability who requires a reasonable accommodation or modification for that disability. There is no one-size-fits-all solution: reasonable accommodations and modifications must be individualized. The University of Minnesota has developed helpful guidance on examples of accommodations and modifications.

6. **Appeal and/or file ADA complaint in federal court.** Attorneys should consider appealing and/or filing an ADA complaint in federal court if: (1) the removal of the child was based solely on the parent's disability; (2) the court will not order accommodations of hearings, meetings, or services; or (3) a decision of the court to continue jurisdiction over the child is not reasonable based on witness and expert testimony and other evidence. Also, if the parent is denied a reasonable accommodation, be prepared to appeal (where such process exists) or to file a complaint with the departmental, state, or federal agency empowered to investigate discrimination by the court or child welfare agency (see #7).

7. **File complaint with the Department of Justice (DOJ) and Department of Health and Human Services (HHS).** Attorneys can assist their clients with filing complaints with both DOJ and HHS. DOJ has jurisdiction over both Titles II and III of the ADA and HHS has jurisdiction in child welfare matters pursuant to Title II of the ADA and the

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[5] See 28 CFR 35 http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm.
[6] See 28 CFR 36 http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm.
[7] See U.S. Department of Justice and U.S. Department of Health and Human Services. (2015). Protecting the Rights of Parents and Prospective Parents with Disabilities, available at http://www.ada.gov/doj_hhs_ta/ child_welfare_ta.pdf/.

Rehabilitation Act. In January 2015, both agencies jointly investigated the "Sara Gordon" case.

8. **Know your client's disability.** As obvious as this may seem, it is imperative to truly understand your client's disability and how to affects your client. This means reading medical records, school records, conducting research, and most importantly, talking to your client! Each person is different and each disability is different.

9. **Focus on your client's strengths and abilities.** Remember, to focus on your client's strengths and abilities. During these proceedings, everyone else is going to be focused on what your client cannot do. Your job, as their advocate, is to demonstrate what they can do!

10. **Partner with disability rights attorneys.** Parent attorneys are not expected to know everything about disability law, just as disability rights attorneys cannot possibly know everything about dependency and family law. As such, it is hugely important for these two bars to work together. Each state has a "Protection and Advocacy" organization with attorneys who specialize in disability law, and I urge parent attorneys to cultivate relationships with these important groups!

For far too long, **parents with disabilities have struggled to maintain custody of their children due to ignorance about their disability.** This must end!

NORTH CAROLINA
___________ COUNTY

IN THE GENERAL COURT OF JUSTICE
JUVENILE COURT DIVISION
FILE NUMBER:

IN THE MATTER OF:

MOTION TO AMEND THE CASE PLAN FOR A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT AND THE JUVENILE CODE

COMES NOW Respondent [Mother/Father], [NAME OF CLIENT], by and through their attorney, [COUNSEL'S NAME], files Respondent [Mother/Father]'s Motion To Amend The Case Plan For A Reasonable Accommodation Under the Americans With Disabilities Act and the Juvenile Code. As grounds, Respondent asserts as follows:

SUMMARY OF THE ARGUMENT

[PARENT] is disabled and lives in a rural area. Currently, they cannot travel to where they need to participate in services as their case plan requires. The Department of Social Services ("the Department") has an ongoing duty to provide reasonable efforts to disabled parents such as [PARENT]. [PARENT] requests this Court amend their case plan and provide reasonable accommodations as required per the Americans with Disabilities Act ("ADA") and the Juvenile Code.

FACTS [ADAPT TO YOUR SCENARIO]

1. [PARENT] has a physical impairment that substantially limits a major life activity and qualifies as a disability under the ADA. Specifically, [PARENT] has been living with a mobility impairment. They cannot use their right arm due to a car accident. The Department is aware of [PARENT]'s disability, as evidenced by their physical appearance. [PARENT] also has mental health impairments. They are diagnosed with anxiety, trauma, PTSD, bipolar disorder, and social anxiety.

2. This case was filed on [DATE], for allegations of [USE YOUR FACTS: For example, substance abuse]. [PARENT] lives in [TOWN], North Carolina. Transportation is an ongoing issue for this family due to the distance.

3. [PARENT]'s ability to travel is substantially limited. Their physical impairment prevents them from driving to appointments. Instead, they have to rely on [RELATIVES/FRIENDS NAMES] for transportation to visit their child and provide unannounced drug screens.

4. [PARENT] has missed several drug screens. [PARENT] failed to comply with drug screens because there is no public transportation where they live. They rely upon others to give them rides to [NAME OF LAB]. [LAB] is ____ miles from where they live.

5. Since [PARENT] is a qualified person with a disability, they request that this Court amend the case plan and add reasonable accommodations to the case plan. It is unrealistic for [PARENT] to provide drug screens when they cannot drive themselves.

LEGAL AUTHORITY

6. A parent's right to direct and participate in the upbringing of their child is "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This due-process-based right "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

7. The North Carolina Court of Appeals noted in an abuse, neglect, or dependency case that the "two principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity." *In re A.P.*, 281 N.C. App. 347, 354 (2022) (quoting *In re Hicks*, 315 Mich. App. 251, 267 (2016), *aff'd in part, vacated in part, In re Hicks/Brown*, 500 Mich. 79 (2017)). The time to

raise the request for ADA accommodations is "when the court adopts a service plan." *In re A.P.*, 281 N.C. App. 347, 358 (2022).

8. Instead, due process in dependency and neglect proceedings dictates that parents named in the petition be provided an opportunity to become rehabilitated through participation in a case plan. N.C.G.S. 7B-100(4), -900, 904(c). Furthermore, this Court has the authority to modify a parent's case plan after its entry if the circumstances warrant it. N.C.G.S. 7B-904(d1)(3)(2023); *In re B.O.A.*, 372 N.C. 372, 379 (2019).

9. The ADA was enacted to ensure that individuals with disabilities did not continue to face discrimination by society based on their disability. Specifically, the ADA's non-discrimination mandate states, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA further defines those who fall within the purview of its anti-discrimination protections. "The term 'disability' means, with respect to an individual (A) A physical or mental impairment that substantially limits one or more major life activities of such individual; (B) A record of such an impairment; or (C) Being regarded as having such an impairment." 42 U.S.C. §12102(1).

10. Following amendments in 2008, the ADA is now clear that its protections are to be broadly applied. "The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S. C. §12102(4)(A). The regulations implementing the ADA further buttress this idea of broad applicability:

> The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Act's purpose of reinstating a broad scope of protection under the

> ADA, the definition of 'disability' in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of "disability." The question of whether an individual meets the definition of 'disability' under this part should not demand extensive analysis. 28 C.F.R §35.101(b).

11. Additionally, the Department and this Court are covered entities under the ADA. 42 U.S.C. §12131(1)(A),(B). As such, both the Department and this Court must afford individuals with disabilities the anti-discrimination protections of the ADA. 42 U.S.C. § 12132.

12. [PARENT] points out that ADA compliance ties in with the Department's funding for reasonable efforts. Under 29 U.S.C. § 794(a), (this statute is commonly known as 504), "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." The ADA, 504, and the Lucas Act also require the Department to ensure its contractors comply with these laws when administering services on the Department's behalf. *See* 28 C.F.R. § 35.130(b)(1), 45 C.F.R. § 84.4(b)(1) (definitions of disability extending to "contractual, licensing, or other arrangements" of covered entities); 28 C.F.R. § 35.130(b)(1)(v), 45 C.F.R. § 84.4(b)(1)(v) (prohibiting providing significant assistance to the entity that discriminates based on disability); 28 C.F.R. § 35.130(b)(3), 45 C.F.R. § 84.4(b)(4) (prohibiting utilizing, directly or through contractors, discriminatory methods of administration).

13. The Department receives federal funding by promising the federal government to provide services to parents like [PARENT]. Under 42 U.S.C. § 671(a), for DSS to be

eligible for payments from the federal government, the Department "shall have a plan approved by the Secretary which provides that:

> (A) in determining reasonable efforts to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern;
>
> (B) except as provided in subparagraph (D), reasonable efforts shall be made to preserve and reunify families—
>
> > (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and
> >
> > (ii) to make it possible for a child to safely return to the child's home;

14. Under 45 CFR § 1356.21, the title IV-E agency (the Department) must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from their home, as long as the child's safety is assured; to effect the safe reunification of the child and family (if a temporary out-of-home placement is necessary to ensure the immediate safety of the child), and to make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible. The regulations further state a Court must determine if the Department demonstrated reasonable efforts. *See* 45 CFR § 1356.21(b)(1(i) (reasonable efforts must be made within 60 days of a removal), 45 CFR § 1355.34(b)(2)(whether funding is available if the Department is in substantial conformity with title IV-B and title IV-E plans).

15. The Department and courts "must make changes in policies, practices, and procedures to accommodate the individual needs of a qualified person with a disability." U.S. Dept. of Justice, Civil Rights Division, Disability Rights Section. U.S. Dept. of Health and Human Services, Office for Civil Rights, Administration for Children and Families. Protecting the Rights of Parents and Prospective Parents with Disabilities:

Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Washington, D.C. found at http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf (last accessed August 14, 2023), p. 10-11, hereinafter "Technical Assistance." See also 28 C.F.R. § 35.130(b)(7)(i).

16. The Department is further required to document its efforts in a case plan. 42 U.S.C. § 675(1). These efforts include what services the Department has made for the family and how to prevent out-of-home placement of the child. 42 U.S.C. § 675a. Under North Carolina law, the Court has held that when children are removed from the home, the state must make reasonable efforts to reunify the children with their parents to provide due process to families. *In re S.D.*, 276 N.C. App. 309, 319, 321-22 (2021). The Juvenile Code defines reasonable efforts as "The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time… N.C.G.S. 7B-101(18)(2023). The General Assembly further declared that North Carolina is committed "To provide standards … for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. 7B-100(4)(2023).

ARGUMENT [Example using Transportation and Drug Tests]

17. [PARENT] asserts that the ADA applies to this proceeding and requests this Court amend their case plan to meet their disability and comply with the reasonable efforts standard. *See* 42 U.S.C. §12102(1), 42 U.S.C. § 671(a). [PARENT] will need assistance from the Department for traveling to provide random drug tests. They cannot drive, and they cannot always rely upon others to transport them to appointments. [PARENT]'s accommodations are for the Department to pay for

transportation service (Uber/Lyft/taxi), so [PARENT] can be drug tested three times a week. [PARENT] understands a set drug testing schedule is not random, but providing three drug tests a week will demonstrate ongoing sobriety to the Court and the Department. Another possible accommodation is the utilization of sweat patches instead of urine tests.[1]

18. The Department will argue that it is too costly to pay for three rides a week for [PARENT] to attend drug tests. They will further assert that sweat patches are not reliable. [PARENT] disagrees with these positions. Rural parents with disabilities like [PARENT] are entitled to ADA protections, and [PARENT]'s geographic location does not relieve the Department of reasonable efforts. Federal law is clear; if the Department desires to receive federal funds, the Department must show how they are providing reasonable efforts at each hearing and how their actions are living up to standards of diligence and care under the Juvenile Code. [PARENT] cannot make it to their drug tests because they lack proper transportation. Sweat patches are a viable option if the Department does not want to pay for [PARENT]'s transportation.

ARGUMENT [Example using Mental Health and Drug Tests]

19. [PARENT] has been diagnosed with post-traumatic stress disorder ("PTSD"), Major Depressive Disorder, and Generalized Anxiety Disorder, and ADHD/ADD. [PARENT] requires accommodations and modifications to policies, practices and procedures to comply with her treatment plan.

20. [PARENT] also suffers from arthritis and migraines which can often cause her debilitating pain.

21. [PARENT] is substantially impaired in several major life activities, including, but not limited to: regulating anxiety when her past trauma is triggered, sleeping due to both insomnia and narcolepsy, regulating pain, and interacting with people when she is put in a situation where she feels threatened.

22. [PARENT] is prescribed Adderall by a physician for her ADHD/ADD. ** utilizes CBD to help manage pain, anxiety, and sleep.

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[1] https://www.alcopro.com/product/sweat-patch-drug-test-system/

23. [PARENT] is a qualified individual with a disability because she is a party to this action, and a parent of a child who is a party to this action. She meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by or contracted by the Department of Social Services.
24. To have full and equal benefit of the services, programs, or activities of the Department of Human Services, [PARENT] requires several accommodations and modifications.

25. [PARENT]'s treatment plan should be amended to read as follows:

"[PARENT] will provide drug testing that is free of illicit drugs and alcohol, except for prescription medication (amphetamines)."

"[PARENT] is permitted to use CBD products. [PARENT] will provide a copy of your prescriptions and a letter from your treating physician regarding CBD to the caseworker."

"[PARENT] will keep their CBD products in a locked and secure location that cannot be accessed by their children. [PARENT] will not store any supplies or equipment necessary for CBD use within reach of the children. [PARENT] will allow the caseworker to observe the locked location(s) during any home visit."

CONCLUSION

[PARENT] requests this Court amend their case plan and adopt their suggested accommodations. The ADA and the Juvenile Code mandate that the Department delivers reasonable efforts for disabled parents based upon realistic case plans that consider the parent's disability. This current case plan does not live up to the statutory standards. Instead, the case plan sets [PARENT] up to fail. They are unable to demonstrate ongoing sobriety because they lack the resources to complete services [CHANGE TO REFLECT SITUATION\] Adopting [PARENT]'s accommodations would help render [PARENT] a fit parent.

WHEREFORE, Respondent Mother/Father, respectfully requests this Court amend their case plan according to the American's With Disabilities Act and the Juvenile Code.

This the ___ day of ____________, ______.

____
Attorney
Attorney for Respondent Father/Mother
Address
City, State, Zip
Phone No.
State Bar #

Certificate of Delivery

I do hereby certify that a true and correct copy of the **RESPONDENT MOTHER/FATHER'S MOTION TO AMEND THE TREATMENT PLAN FOR REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT AND THE JUVENILE CODE** was served by e-mail a true copy of the same to the person(s) named below on this _______day of ____________, 20____, duly addressed as follows:

____
Attorney

click here and enter today's date

Enter name of attorney
state/local government agency
mailing address

SUBJECT: ADA Title II Accessibility/Request for Accommodation

Dear enter name of attorney for agency:

I write concerning the accessibility of enter government service, program, or activity.

My client, enter client name, is a person with a disability, in that enter diagnosis or how their life is affected by their disability . It has been my experience that name service/program, activity is not accessible because state reasons .

Title II of the Americans with Disabilities Act (ADA) prohibits discrimination by state or local governments on the basis of disability. Under Title II of the ADA, a state or local government must ensure accessibility of all services, programs, and activities by [select all that apply]:

☐ Eliminating any eligibility criteria for participation in programs, activities, and services that screen out or tend to screen out persons with disabilities, unless it can establish that the requirements are necessary for the provision of the service, program, or activity;

☐ Reasonably modifying its policies, practices, or procedures to avoid discrimination; and/or

☐ Ensuring that individuals with disabilities are not excluded from services, programs, and activities because existing buildings are inaccessible.

To ensure accessibility of the above service/program/activity, we respectfully request that you [select all that apply]:

☐ Eliminate the eligibility criteria specified below;

☐ Reasonably modify the policy, practice, or procedure specified below; or

☐ Alter the existing facility specified below, construct additional facilities, relocate the service/program/activity to an accessible facility, or provide the service/program/activity at an alternate accessible site.

Specifically, we request the following: list your requests here.

Please reply to my request in writing within ten (10) business days. If you have any questions about my request, please do not hesitate to contact me at Enter your phone number or email address.

Sincerely,

____
Attorney name
Attorney address
Attorney phone number

cc: Enter other attorneys/parties names here.

APA GUIDELINES
for Assessment and Intervention with Persons with Disabilities

APA TASK FORCE ON GUIDELINES FOR ASSESSMENT AND INTERVENTION WITH PERSONS WITH DISABILITIES

APPROVED BY APA COUNCIL OF REPRESENTATIVES
FEBRUARY 2022

AMERICAN
PSYCHOLOGICAL
ASSOCIATION

This document will expire as APA policy in 10 years (2032). Correspondence regarding the *Guidelines for Assessment and Intervention with Persons with Disabilities* should be addressed to the American Psychological Association, 750 First Street, NE, Washington, 20002-4242.

Suggested Citation
American Psychological Association, APA Task Force on Guidelines for Assessment and Intervention with Persons with Disabilities. (2022). *Guidelines for Assessment and Intervention with Persons with Disabilities*. Retrieved from https://www.apa.org/about/policy/guidelines-assessment-intervention-disabilities.pdf

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ASSOCIATION

APA GUIDELINES
for Assessment and Intervention with Persons with Disabilities

APA TASK FORCE ON GUIDELINES FOR ASSESSMENT AND INTERVENTION WITH PERSONS WITH DISABILITIES

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APA Task Force on Guidelines for Assessment and Intervention with Persons with Disabilities

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INTRODUCTION

Over 41 million noninstitutionalized Americans are currently living with a disability (American Community Survey, U.S. Census Bureau, 2019). Individuals with disabilities and their advocates have worked for decades to eliminate attitudinal and physical barriers, to be fully included in all aspects of society, and to secure the freedom to choose their own futures (Jaeger & Bowman, 2005; Kerkhoff & Hanson, 2015; Krahn, et al., 2015; Priestley, 2001; Switzer, 2008). For a historical summary of events and legislative advancements and setbacks for people with disabilities, the reader is referred to two timelines (PAEC, 2018; National Consortium on Leadership and Disability for Youth, 2007). Advocacy efforts facilitated the passage of the Americans with Disabilities Act (ADA) of 1990 and more recently the ADA Amendments Act of 2008 (ADAAA) that broadened the definitions of "disability," "substantially limits," and "major life activities." Nonetheless, many people with disabilities continue to encounter both blatant and subtle discrimination in employment, housing, education, recreation, child-rearing, and health care, including mental health services (Banks & Kaschak, 2003; Basnett, 2001; Kirschbaum & Olkin, 2002; Krahn, et al., 2015; National Council on Disability, 2012; Raphael, 2006; Schriner, 2001; Smart, 2001; Stapleton et al., 2004; Waldrop & Stern, 2003; Woodcock, Rohan, & Campbell, 2007).

Although many persons with disabilities experience discrimination, each individual responds differently to those experiences. Moreover, each person assigns a unique meaning to disability, depending on the nature of impairment, the quality of social support, and life demands (Olkin, 2012; Olkin & Taliaferro, 2005; Vash & Crewe, 2004). People with disabilities, like all people, have influences in their lives that contribute to their development and experiences, such as their culture, religion, family of origin, community, education, socio-cultural context, employment, friends, significant others, and co-workers. They are also affected by system-wide factors, such as governmental policies, available programs, and associated funding. Such common influences shape a person's individual disability experience. Above and beyond their *disability* experiences, disabled individuals have their own *life* experiences and, like everyone else, their own personal characteristics, histories, intersecting identities, and life contexts that affect their psychological needs. To work effectively with people who have disabilities, psychologists should strive to become familiar with how disability and related factors influence their clients' psychological well-being and functioning. For example, the disability experience may be influenced by functional capacities, energy levels, pain, age of onset, manner of onset (e.g., military trauma), and whether the disability is static, episodic, or progressive. It is also influenced by one's experience of community. Disabled individuals who have limited contact with other people who have disabilities in their families, at school or work may experience feeling different from others or even ostracized. Individuals with invisible disabilities (e.g., learning disabilities, mental illness, brain injury, chronic pain) may have difficulty convincing others they even have a disability (Smart, 2001; Taylor & Epstein, 1999). Becoming familiar with the experience of living with a disability increases empathy and understanding, and thus enhances assessments and interventions. It is important for psychologists to become aware of how their own attitudes, reactions, conceptions of disability, and possible biases affect their professional relationships with clients who have disabilities. Psychologists can also benefit from learning the best "barrier-free" psychological practices in working with clients with disabilities, including providing reasonable accommodations and appropriately integrating disability-related issues into assessment and intervention.

Unfortunately, while psychologists receive extensive training in how to approach mental health issues, they rarely receive adequate education or training in disability issues (Gibson, 2009; Olkin & Pledger, 2003; Strike, Skovholt, & Hummel, 2004). Few graduate psychology training programs offer disability coursework (Olkin & Pledger, 2003; Weiss, 2010). Limited training and experience may leave many psychologists unprepared to provide professionally and ethically sound services to clients with disabilities. Further, many psychologists seek to develop disability competence after they have completed formal training.

The goal of these *Guidelines for Assessment and Intervention with Persons with Disabilities* is to help psychologists, psychology students, and psychology training programs conceptualize, design, and implement effective, fair, and ethical psychological assessments and interventions with persons with disabilities. The *Guidelines* provide suggestions on ways psychologists may make their practices more accessible and disability sensitive, and how they may enhance their working relationships with clients with disabilities. The *Guidelines* include information on how disability-related factors and sociocultural experiences of disability can impact assessment and intervention. Resources and suggestions are provided throughout the *Guidelines* to facilitate education, training, and experience with disability constructs important for effective psychology practice.

It is hoped that the *Guidelines* increase discussion, training, and awareness about disability across the profession and with other health professionals. It is also hoped that psychology training programs will use these guidelines to consider specific curricular revisions and program modifications that ensure disability issues are addressed and all training opportunities are accessible.

Such interest may additionally contribute to needed research on disability-related issues in assessment (e.g., test construction, norms, use of accommodations) and interventions (e.g., empirically informed activities and programs) as well as enhanced, culturally appropriate communication and decision-making with clients and health care teams.

The *Guidelines* are based on core values in the *Ethical Principles of Psychologists and Code of Conduct* (American Psychological Association, 2017; Smart, 2001). The core values include respect for human dignity and recognition that individuals with disabilities have the right to self-determination, participation in society, and equitable access to the benefits of psychological services. Psychologists recognize their role in facilitating an individual's health and well-being. Additionally, the core values include recognition that people with disabilities are diverse and have unique individual characteristics (like all people), and that disability is not solely a biological characteristic; it is also characterized by the individual's interaction with the physical, psychological, socioeconomic, and political environment. For example, the intersectionality of poverty, disabilities, and multiple minoritized identities (e.g., gender, race, and ethnicity) is well documented (McAlpine & Alang, 2021) and is included in the discussion on intersectional identities in Guideline 7.

Disability is a broad concept that encompasses a wide range of functional limitations and barriers to participation in community life (World Health Organization, 2001). Psychologists are recognized for having a firm grasp on impairments that arise from issues of emotional disturbance and mental health disability. Accordingly, although the APA *Guidelines* apply to persons with all types of disabilities, including mental health issues, disability issues arising from impairments less known to many psychologists, such as mobility, sensory, communication, and neurological impairments, are emphasized. The *Guidelines* also emphasize environmental factors that may influence the experience of disability and that potentially limit assessment validity. Suggestions are included for accommodations that may mitigate these factors.

An extensive literature search was conducted of psychological, medical, rehabilitation, vocational, and educational databases, searching in the areas of disability models, professional relationship and communication issues, attitudes and biases, intersectionality, assessment and intervention across the developmental trajectory, and regulatory and legal resources. The literature reviews were broad in scope, covering both quantitative and qualitative traditions tied to various specialty areas in disability research (e.g., clinical rehabilitation, neuropsychology, rehabilitation psychology, disability studies, education, vocational rehabilitation, forensics). The identified literature represents theoretical, professional, and clinical literature focusing on specific disabilities as well as disability more broadly conceptualized. Along with the original Guidelines, this literature serves as a basis for the guidance offered in this document.

Guidelines are not standards. Standards are generally mandatory and may have an enforcement mechanism. Guidelines are intended to be aspirational and facilitate the profession's continued systematic development and to ensure that psychologists maintain a high level of professional practice. Guidelines are not exhaustive and do not apply to every professional and clinical situation. They are not definitive and do not take precedence over a psychologist's well-informed judgment. Applicable federal and state statutes also supersede these *Guidelines*.

The *Guidelines* are primarily intended for psychologists and psychology trainees who work in various settings with clients with disabilities. Setting examples include hospitals, rehabilitation and community service settings; outpatient practice; educational, religious, and correctional facilities; employment settings; and business settings addressing legal, insurance, and/or compensation issues. The *Guidelines* are designed to facilitate a psychologist's work with clients who have disabilities, not to restrict or exclude any psychologist from serving clients with disabilities or to require specialized certification for this work. The *Guidelines* also recognize that psychologists who specialize in working with clients with disabilities may seek more extensive disability training consistent with specialized practice. Many avenues exist for psychologists and their students to gain expertise and/or training to facilitate ethical, competent work with individuals who have disabilities. The *Guidelines* are not meant to be prescriptive, but instead offer recommendations on areas of knowledge and clinical skills considered applicable to this work.

Guidelines for Assessment and Intervention with Persons with Disabilities

DISABILITY AWARENESS, TRAINING, ACCESSIBILITY, AND DIVERSITY

GUIDELINE 1

Psychologists strive to learn about various disability paradigms and models and their implications for service provision.

Disability as a construct is variously defined based on one's individual beliefs and sociocultural frame of reference. Therefore, the conceptualization of disability and its definition are impacted by legislative and regulatory environments (i.e., public or private entities receiving federal funds). For example, the Social Security Administration's definition of disability is connected to whether or not services and/or funds can be provided to an individual. Further, an individual's adoption of a certain theoretical model of disability may shape the professional's viewpoint or biases about disability. In alignment with Principle D, Justice, of the APA's Ethical Principles (APA, 2017), practitioners should strive to have broad awareness of social and public policy that affects many aspects of psychological services and health care delivery for people with disabilities (Saleh, Bruyère, & Golden, 2019). For example, legal definitions of disability determine who may be eligible for specific services and benefits, and accompanying regulations specify the parameters of providing those goods and services.

Perhaps the most well-known legal example is the Americans with Disabilities Act (ADA) Amendments Act of 2008 (ADA). The ADA defines disability as a "physical or mental impairment that substantially limits a major life activity, or a record of such an impairment, or being regarded as having such impairment" because of an actual or perceived physical or mental impairment (29 CFR Sec. 1630.2). This holds even with the use of equipment designed to mitigate the disability. For example, a person with a hearing impairment that interferes with social interactions would be considered as having a disability even if the use of an augmentative communication device significantly improves the person's ability to engage in conversation. This definition of disability is inclusive of individuals who may have episodic disabilities or chronic illnesses as long as there is a record of such impairment or they are regarded as having such impairment that affects one or more major life activities. Further detail is provided in Guideline 4.

Views on the nature of disability have evolved over time as reflected in the evolution of different theoretical models that define disability. Although current models emphasize an ecological perspective, clients and therapists may hold contrasting beliefs about disability that are influenced by religious, cultural, and medical beliefs. Importantly, psychologists' awareness of these beliefs and how they may affect their clients will facilitate improved clinical processes and outcomes (Altman, 2001; Olkin & Pledger, 2003; Schultz, et al., 2007; Smart & Smart, 2007). Similarly, psychologists, clients, and families may embrace different disability models resulting in specific beliefs and behaviors that may or may not align. It is important for psychologists to understand the potential influence of their own paradigms as well as their clients' in establishing and maintaining a therapeutic relationship and weighing clinical decisions. Several models of disability provided in the literature that have different therapeutic implications are described below.

The *moral model* views disability as an embodiment of evil, a punishment for a family member's or ancestor's transgression, a divine gift, fate, or a test of faith and opportunity to overcome a challenge (Groce, 2005; Mackelprang & Salsgiver, 2016; Olkin, 2012). Without realizing it, psychologists and their clients may be affected by these historical constructs in a way that influences their relationship. For example, a therapist may not understand a client who, based on the *moral model*, feels challenged by fate, and a client, in turn, may feel pressured by a therapist to change circumstances the client believes are dictated by fate.

The scientific models of disability reflect medical, social construction, and functional traditions of conceptualizing disability (Altman, 2001; Chan et al., 2009; Smart & Smart, 2007). The *biomedical model* views disability as a medical problem that deviates from the norm (Gill, et al., 2003). Dokumaci (2019) describes the *medical model* as a linear sequence, that is, pathology to disease to disability. The model emphasizes finding a cure and relieving or eliminating symptoms caused by impairment. The focus is on the person's deficits and elimination of the pathology or restoration of functional capacity. Based on this model, significant treatment advances have been made, particularly in symptom mitigation. On the other hand, its emphasis on cure or amelioration of symptoms may be negatively internalized by some individuals with disabilities to mean something is wrong with themselves, resulting in less effective coping. While many traditional psychological therapies (e.g., behavioral, cognitive-behavioral, and psychodynamic) are grounded in this model to target symptom removal or adjustment to disability, it is important to consider contemporary applications of these interventions in individualized ways that support the specific client and their needs.

Given the *medical model*'s focus on disability and chronic disease and its management, a primary weakness of the model is its omission of social determinants of health. Although psychologists extending the *medical model* may incorporate assessments of function and encourage active patient participation, particularly in treatment decisions, the model still operates based on individual problems that need to be addressed. In this model, assessments are manifestations or indirect expressions of the disabling process itself (i.e., symptom checklists, functional limitations based on injury or chronic disease) (Dokumaci, 2019).

Many disability advocates argue that the *medical model* devalues individuals as "patients." The *medical model* has also been challenged by research demonstrating that physical benefit does not always correlate with the individual's subjective expression of or satisfaction with health. Some rehabilitation research also reflects that with this model participants are defined in terms of their diagnostic groups or, as Elliott and Brenner (2019) describe, their relationship to the medical or rehabilitation setting. These authors argue that a wider lens is needed that incorporates a public health perspective involving the individual and environment. This broadening lens to the person–environment dynamic serves as a clinical underpinning of the *social model* of disability.

In the *social model*, individual impairment no longer defines disability. Rather, disability is a social construct in which the environment, broadly defined as physical and structural barriers as well as societal attitudes, beliefs, and values, either supports or limits one's participation in society and, thus, the experience of disability. The *social model* illuminates how environments may impede or facilitate individual functioning by erecting or removing barriers to full participation (Linton, 1998) while emphasizing social and functional accommodations. Solutions to barriers include using universal design to create accessibility for everyone, encouraging individuals with disabilities to make their own decisions, educating the public about disability issues and attitudes, and enforcing laws to ensure equal access and protection (Olkin, 2012; Smart, 2001). In this model, a psychologist may facilitate a client's positive disability identity and self-advocacy skills, and/or consult with others to ensure that the client has opportunities for participation, a voice in decision-making, and adequate accommodations.

The *functional model* of disability (sometimes referred to as the *rehabilitation model*) is pragmatic and cross-diagnostic. It conceptualizes disability as a social consequence of functional capacities and limitations (Chan et al., 2009; Nagi, 1965; Smart, 2001). The model assumes that the relationship between functioning and disability is best understood in the context of social and occupational demands. For example, a finger amputation may lead to a disability in a violinist but not in a business executive. In this model, psychologists facilitate the client's functional improvement and the development of adaptive strategies that compensate for limitations, given life's demands and supports. According to this model, the person with a disability is perceived to need services from a rehabilitation professional who can provide training, therapy, counseling, or other services to address the deficiencies caused by the disability. Historically, this model gained acceptance after World War II when many veterans with war-related injuries needed compensatory strategies or equipment to enter the civilian workforce. The current vocational rehabilitation system is designed based on this model.

Internationally, the *human rights model* of disability serves as the basis for the United Nations' Convention on the Rights of Persons with Disabilities (UNCRPD). This model views persons with disabilities as rights holders and posits that social structures and policies restricting or ignoring the rights of people with disabilities often lead to discrimination and exclusion. The United States is a signatory to the UNCRPD, but has yet to ratify it (Kanter, 2019). The UNCRPD highlights the importance of effective participation and inclusion in society and advocates for the autonomy and dignity of disabled people. This model is centered on the voice of the disabled and the belief that individuals, such as clinicians, cannot use disability or diagnosis to deny or restrict human rights.

The World Health Organization's *International Classification of Functioning, Disability, and Health* (ICF) *model* of disability integrates the medical, social, and functional dimensions and provides a positive, enablement-focused rather than disability-oriented framework. The ICF includes assessment of functional domains such as body function and structure, activity and participation, and personal and environmental factors such as access to transportation. In the ICF, impairment is not viewed as a problem but is conceptualized as a difference or change in bodily function or structure; functional limitations become disabling in the interactive context of broader physical, social, and attitudinal factors that restrict participation (Chan et al., 2009; Peterson, 2005; Schultz et al., 2007; WHO, 2001). Psychologists in various specialty areas are translating this model for psychological research and practice (Bruyère & Peterson, 2005; Bruyère, et al., 2005; Reed, et al., 2005). They emphasize the importance of using measures of constructs mapped by the ICF and recommend linking the ICF-postulated assessment model to individual and social interventions (Chan et al., 2009). The International Classification of Health Interventions (ICHI) is currently being developed by the World Health Organization to provide a common tool for reporting and analyzing health interventions for statistical purposes (WHO, 2020). For more information about the ICF, readers are referred to the following resource: who.int/standards/classifications/international-classification-of-functioning-disability-and-health.

The *diversity model* of disability (Andrews, 2020; Mackelprang & Salsgiver, 2016) recognizes the inaccessible and often oppressive environments that surround people with impairments. It differs from the social and ICF models in that it situates disability as a unique cultural group because of the experience of impairment, regardless of the individual's environment. This perspective advances the social model in that it recognizes the unique human variations that people with disabilities hold both in their bodies and, subsequently, as part of their identities. The *diversity model* celebrates the experience of disability. In this way, disability is not viewed from a deficit-based perspective; rather, it is viewed as an aspect of uniqueness that contributes to society's overall richness (Connor, 2012; Connor & Gabel, 2010; Erevelles,1996). The *diversity model* expands on the enablement concept and embraces disability identity, which has been described as "a sense of self that includes one's disability and feelings of connection to, or solidarity with, the disability community" (Dunn & Burcaw, 2013, p. 148).

There is growing literature that discusses social and psychosocial identity development for individuals with disabilities (Forber-Pratt & Zape, 2017), as well as the concept of disability identity and disability identity development from an empirical rather than a theoretical viewpoint (Bogart, 2015; Dunn, 2015; Dunn, 2016; Forber-Pratt, Lyew, et al., 2017; Forber-Pratt, et al., 2020). Common themes have emerged that are important considerations for clinical practice, such as the individual's identification as someone with a disability based on personal and social constructs, the importance/perception of self-worth, and the individual's sense of belonging and connectedness with others with disabilities. In addition, the formation and evolution of one's disability identity is viewed as a developmental process. Therefore, the resources needed to maximize engagement change at different time-points. From this frame of reference, psychological service provision considers both (1) the meaning of disability as a personal construct (i.e., within the person's own self-identification), which can intersect with the experience of external factors such as institutional barriers and discrimination, and (2) the timing and readiness of the individual for social connectedness with others with disabilities. Mona, Hayward, and Cameron (2019) specifically mention the use of cognitive behavioral therapy to challenge internalized stigma created by pervasive negative social messages, with the goal being enhanced self-esteem.

Disability identity as a construct is also embedded in the disability culture movement, consistent with a positive affirmation model. That is, disability is not something that needs to be cured, changed, conquered, or "normalized." Disability is incorporated as one facet of a multifaceted human being. In general, the disability identity construct within the disability culture movement reflects positive self-affirmation and pride, and an identification and connection to disability communities as well as advocacy for disability rights. Individuals with disabilities have also called for embracing the actual word "disability" as many within the disability community proudly claim this as an integral part of their identity (Andrews, 2020).

The psychologist's roles in this model focus on facilitating adaptation through encouraging self-exploration, constructive feedback, and the development of social networks. Strategies for demonstrating allyship to and with clients with disabilities require intentional attention, engagement, and openness to consider clients simultaneously as individuals and as members of a powerful, diverse community with a unique identity experience. Disability allyship involves critical self-reflection, potential attitudinal shifts, and social action. Forber-Pratt, Mueller, and Andrews (2019) provide recommendations for engaging in disability identity discussions as well as allyship development for both nondisabled and disabled psychologists.

GUIDELINE 2

Psychologists examine their beliefs and emotional reactions toward various disabilities, determine how these might influence their work, and strive to change ableist practices.

For decades "the attitudes, actions, and decisions of the clinicians working within a health care system have [had] an important impact on disabled people" (Basnett, p. 5, 2001; Olkin, 1999a). Principle D, Justice, of the APA Ethical Principles (2017) advises psychologists to understand their biases and limits of competence through the exploration of feelings and beliefs. In relation to disability, empirical research demonstrates that many misassumptions based on ableist perspectives are made about disabled individuals. For example:

- Disabled people need help even when they do not explicitly ask for it (Dunn, 2019).
- Disabled individuals are asexual or impotent (Azzopardi & Callus, 2015; Lindemann, 2010).
- All disabled people desire improvements in functional abilities or to be "cured" (Hahn & Belt, 2004).
- Disabled people have a lower quality of life than those without disabilities (Iezzoni, et al., 2021).

Ableism is a form of control used either implicitly or explicitly by nondisabled individuals and systems that results in the marginalization of disabled individuals. These negative stereotypes and assumptions experienced by disabled individuals are influenced by embedded structural biases. Negative types of impacts of ableist assumptions are reflected in both historical legal cases and legalized medical procedures (e.g., forced sterilization) as well as in contemporary decisions (e.g., health care plan exclusions; pandemic-related health care rationing) devaluing the lives of people with developmental or acquired impairments (Andrews, et al., 2021; Disability Justice, 2015; Tilley, et al., 2012). The result of acting on implicit biases may lead to microaggressions. Microaggressions are verbal, behavioral, or environmental slights that are the result of an individual's biases. The term was originally developed to describe insults non-Black Americans used toward Black people, and in 2010 this was expanded to include insults toward any marginalized group, including people with disabilities (Sue, 2010).

Conversely, significant positive social change, albeit evolving, has occurred, including successes like the passage of the ADA, the Olmstead Act of 1999 (prohibiting as discriminatory unjustified institutionalization), and the contributions of the Independent Living Movement, borne out of affirmation and advocacy. Understanding this history and ongoing contemporary issues, such as the fight for inclusion in health care plan coverage, access to care (Banks, et al., 2015), and emergency evacuation plans (Taylor, 2018), are critical to recognizing that beliefs and reactions toward people with disabilities are highly consequential. Despite significant progress, lack of understanding, stereotypes, misassumptions regarding quality of life, implicit and explicit bias, and discrimination against people with disabilities persist (Andrews, 2020; Dovidio, Pagotto, & Hebl, 2011; Iezzoni et al., 2021; VanPuymbrouck et al., 2020; White, Jackson, & Gordon, 2006;).

1. One important factor impacting the perception of disability is the health care provider's experience or lack thereof working with individuals with disabilities. A meta-analysis of the relationship between "intergroup contact" and prejudice demonstrated an inverse relationship in which higher levels of contact with people with disabilities correspond with lower levels of prejudice (samples not specific to psychologists) (Pettigrew & Tropp, 2006). Research has also demonstrated that psychologists' and other health professionals' disability-related experience (not just years of experience) correlates with self-reported disability competence and that professional experience with people with disabilities is reported to be an important

factor in successful service provision. This same research found that professionals with less disability-related experience report larger gaps in disability knowledge and skills (Leigh, et al., 2004; Strike et al., 2004). Lack of experience among health care providers may shape implicit bias and lead to erroneous assumptions that are not only counterproductive to the therapeutic relationship, but may result in poor or inadequate decision-making (Basnett, 2001). Erroneous and outdated beliefs about disability may contribute to advice given by professionals that is not rooted in science and has the potential to harm, such as when hearing parents are discouraged from exposing a Deaf child to sign language (Humphries, et al., 2012).

2. A psychologist may misattribute a psychological characteristic to having a disability, such as assuming that a person's shyness is attributable to having a limb loss without considering other explanations. As Banks et al. (2015) describe in working with women with disabilities, "biased reactions can affect providers' ability to listen; understand; and provide empathic, respectful care" (p. 166).
3. The field of psychology has a small minority of graduate students and psychologists with disabilities themselves, leaving individuals with disabilities overwhelmingly without access to providers who share the lived experience of disability. The best available estimates indicate that approximately 3% of psychology graduate students and 2% of faculty in APA-accredited programs report having a disability (Andrews & Lund, 2015).
4. Research suggests psychologists tend to believe problems experienced by clients with intellectual disabilities are attributable to their disability as opposed to psychological conditions, such as depression (Mason & Scior, 2004). This misperception is an example of *diagnostic overshadowing*, that is, over-emphasizing or mistakenly focusing on a client's disability while ignoring other important aspects of one's life, such as life events, capabilities and strengths, and other issues related to the client's presenting concerns (Jopp & Keys, 2001; Kemp & Mallinckrodt, 1996; Mason, 2007; White et al., 1995).
5. Conversely, psychologists may under-emphasize disability-related concerns, or even assume clients use their disabilities as an excuse to avoid specific actions. Psychologists may also experience countertransference based on their vulnerabilities or discomfort with specific physical characteristics, such as scarring, burns, or communication challenges (Artman & Daniels, 2010). Consistent with the APA Ethics Code (Ethical Standard 2.06 Personal Problems and Conflicts), psychologists need to address countertransference issues.
6. Psychologists may assume that people with cognitive impairments or intellectual disabilities are unable to speak on their own behalf; therefore, they are incapable of exercising control over their own lives and are incompetent to make their own treatment-related decisions. Positive assumptions of decision-making capacity are a key factor in affecting supported decision-making (Shogren et al., 2006).
7. Lack of familiarity with disability may influence how a psychologist perceives and responds to the client's emotional expression. Because individuals with disabilities may experience lack of accommodations, personal slights, insensitive behavior, and discrimination, they may express feelings of sadness, anger, and frustration about their disability experiences. A psychologist may perceive such expressions as a sign that the client has not adjusted to their disability rather than as an emotional response to painful experiences (Olkin, 1999a; Vash & Crewe, 2004).

Two recommended actions psychologists may take to address biases, faulty assumptions, and negative emotional reactions are (1) self-examination and (2) increasing cultural understanding, including learning about disability-related issues (Banks et al., 2015; Blotzer & Ruth, 1995; Olkin, 2012; Vash & Crewe, 2004; Wilson, 2003). Evaluating and confronting one's biases and the social constructions from which some of these have taken shape is not easy, but the following are practical suggestions related to disability cultural competence in which psychologists may engage.

1. Acknowledge that beliefs, attitudes, and values may be held that differ from the client and may have the potential to be deleterious to rapport building, clinical decision-making, and delivery of clinical services.
2. Examine preconceptions, beliefs, and emotional reactions toward persons with disabilities. Become aware of any implicit biases that contribute to negative views of people with disabilities that may also be compounded by intersections (e.g., Black and disabled; Rynders, 2019; refer to Intersectional Identities - Guideline 7).
3. Consider ableist views that might underpin attitudes and reactions. As Banks et al. (2015) note in working with women with disabilities (WWD), "Self-awareness of one's attitudes is central to working with WWD. People bring a mixture of personal beliefs, attitudes, and/or fears to the idea of the disability experience. Thinking about and working with WWD may threaten concepts a psychologist has held about who she is. Concepts of strength and deficits, independence and dependence, and other attitudinal beliefs need to be explored" (p. 173).
4. The development of attitudes is typically an insidious process. It will take concerted effort and patience to transform one's belief system in a culturally competent manner, of which self-awareness is the first step. Andrews (2020) offers a brief exploration of stigma as well as common myths and stereotypes that are sometimes held by those without disabilities that may serve as a springboard for self-reflection.
5. Consider how disability-related and other life experiences, separately or together, may be related to the client's current psychological issues. Evaluate different intersections of identity with the experience of disability. Dunn and Burcaw (2013) suggest psychologists can challenge unconscious stereotypes and biases through carefully listening to individuals' narratives, with attention paid to psychosocial influences on identity.
6. Assess the client's strengths and weaknesses and incorporate them into interventions. Dunn and Elliott (2005)

suggest that psychologists be aware of the coping versus succumbing frameworks proposed by Wright (1983) and emphasize the client's realistic possibilities rather than limitations in social, vocational, and educational endeavors.

7. Act as an ally to the disability community. Acts of allyship might include taking action to ask the owner to move their vehicle blocking an accessible parking space at the psychologist's practice location, making sure the psychologist's practice's website is Section 508 compliant (e.g., screen reader accessibility, notes about accessible parking and paths of travel, alternative formats of intake forms, etc.) (Forber-Pratt et al., 2019), and working to remove barriers within the broader health care system in which the psychologist practices.
8. Integrate disability-related case material and topics into professional discussions, study groups, courses, and seminars.
9. Contact professionals in the community who can provide consultation and/or supervision; encourage self-reflection and exploration; challenge or provide feedback on beliefs, perceptions, and stereotypes; and provide practical resource information. Professional peers may be an invaluable resource in this exploratory process.
10. Become familiar with disability resources in the community and explore opportunities to strengthen engagement (Forber-Pratt et al., 2019). Resources include local Centers for Independent Living, state assistive technology projects, and advocacy groups.
11. Refer to the current APA Ethics Code (2017) that addresses unfair discrimination, competence, and bases for scientific and professional judgments in Standards 3.01, 2.01, and 2.04, respectively.

GUIDELINE 3

Psychologists strive to increase their knowledge and skills about working with individuals with disabilities through training, supervision, education, and expert consultation.

Competence to practice is based on a fundamental set of knowledge, skills, and behaviors psychologists demonstrate that facilitate the health and well-being of individuals and groups served. The APA Ethics Code (2017), Standard 2.0, has concretized the importance of maintaining education and training to ensure competent practice. Given the prevalence of catastrophic injury, developmental, and chronic health issues, most psychologists can expect to serve individuals with disabilities, necessitating continuing education and training that may be in relatively unique or less familiar professional development areas. Consider the following non-exhaustive list of examples:

1. Understanding the direct effects of injury or illness and anticipated progression may affect decision-making related to rehabilitation, recovery of function, and community integration, such as anticipated educational and employment needs.
2. A psychologist's competence in disability may affect the fairness and validity of assessments and interventions. Understanding how to appropriately modify assessment tools and procedures and interpret results on non-standardized and standardized tests (e.g., tests that include questions on physical symptoms) may prevent an underestimation of skills. Similarly, being aware of the effects of medications and endurance on cognitive, emotional, and physical presentation may facilitate appropriate interpretation of behavior at both specific time points and over time.
3. A person's resilience is affected by several inter-related factors potentially impacting the disability experience, such as level of cognitive function, energy and endurance, pain, and self-esteem. Understanding the concept of resilience and the importance of assessing resilience in individuals served may impact the creation of appropriate interventions, and hence, overall adjustment over time.
4. As discussed in Guideline 2, it is important to be aware of and manage personal biases and reactions related to disability to build an appropriate therapeutic relationship. This also includes an exploration of cultural differences between psychologist and client. Similarly, whether one explores an individual's experience of marginalization may influence actions recommended. However, it is equally important to remember that disability may or may not be part of the reason an individual is seeking psychological services. Therefore, one must strive to guard against making this assumption or engaging in the spread effect in which disability becomes a primary focus of issues that may be only minimally related to disability.
5. Working with people with disabilities is generally a team-based endeavor. Those historically working in an individual practice setting may need continuing education related to team roles and dynamics within and across professions, such as understanding multiple relationships, setting appropriate team boundaries, addressing team conflict, and supporting team cohesion.
6. Many individuals who have disabilities have formal or informal caregiver supports. Understanding the relevance of these relationships is important because caregiver stress may directly impact how well both the person with a disability and the caregiver(s) adapt over time. For example, psychologists may need to address causal attributions of injury (e.g., blame vs. coincidence) that facilitate or create barriers to healthy relationships. They may also need to address how the personal care assistant and client maintain an equitable relationship. Psychologists may also share relevant resources to promote and support caregiver mental health.
7. There are numerous assistive technology, social, and recreational resources that facilitate community participation for individuals with disabilities (refer to Guideline 11 regarding technology and

the Resource Guide at the end of this document). Being aware of these resources is an important step in translating the individuals' and families' needs and interests into concrete opportunities and actions, particularly related to social and other community engagement.

8. Psychologists are encouraged to learn how to evaluate their own space, communications, and practices to reduce access and performance barriers.
9. To ensure appropriate financial coverage for services needed, psychologists may benefit from learning about different funding possibilities, including billing codes.
10. Many psychologists will first work with individuals with disabilities in either a health care or school setting. Hanson and Kerkhoff (2012) offer a detailed discussion of competence to practice in health care, including achieving baseline competence and developing team-building skills. The reader is also referred to the APA *Guidelines for Psychological Practice in Health Care Delivery Systems* (2013) for a discussion of integrating psychological services in the health care environment.
11. Those serving children will likely have to advocate for appropriate services within the school system, which includes at its most basic level understanding 504 plans and Individualized Education Programs (refer to Guideline 8).

Given professional advances in working with people with disabilities, even highly trained and experienced professionals may need continuing education in areas such as assessment, accommodations, use of technology, therapeutic techniques, and federal and local laws and policies governing disability issues. For example, one might need to understand the difference between a service animal and an emotional support animal before deciding whether to write a support letter for one or the other. Another less frequently occurring, but important, area is preparing court testimony, such as a deposition related to the cause and evolving impact of injury for someone sustaining a traumatic brain or spinal cord injury as the result of a car accident. The competencies defined by the specialties of rehabilitation psychology, clinical neuropsychology, geropsychology, school psychology, and forensic psychology can serve as general guides in identifying potential areas for education and training for those working with individuals with acquired disability. However, there are many resources available to help guide the psychologist's professional development. Continuing education may include Division/State Association workshops; academic disability studies; rehabilitation, educational, and clinical neuropsychology courses and certificate programs; re-specialization programs; post-doctoral fellowships, self-study, and disability-related coursework; work with a mentor; and/or seeking supervision. APA has also published several guidelines and book series relevant to disability education and training. (Examples include *Guidelines for the Evaluation of Dementia and Age-Related Cognitive Aging*, APA Task Force for the Evaluation of Dementia and Age-Related Cognitive Change, 2021; *Guidelines for Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists*, 2003; and *APA Handbook of Ethics in Psychology*, Volumes 1 & 2, 2012). Professional journals and organizations publish a wide range of research and practice literature relevant to working with people with disabilities. The following is a non-exhaustive list of suggested national organizations that are specific to disability issues that psychologists may wish to consult to increase knowledge and skills. An extended list of other organizations, many specific to disability subgroups, is provided in the Resource Guide.

- Administration for Community Living: acl.gov
- American Association with People with Disabilities: aapd.com
- Americans with Disabilities Act National Network: adata.org
- Job Accommodation Network: askjan.org
- National Alliance on Mental Illness: nami.org
- National Council on Independent Living: ncil.org
- National Disability Rights Network: ndrn.org
- National Institutes of Health: nih.gov

Finally, a powerful resource for education and training is consultation. Consultation may be especially beneficial when psychologists face challenging or ambiguous ethical situations (e.g., beneficence vs. respect for autonomy reflected in conflicts among family, team, and individual; variable cognition; discharge setting safety; justice reflected in limited resource allocation based on personnel and time available, organizational policy, etc.). In addition to state and national boards, there is a broad network of potential colleagues to assist with specific questions and training needs related to working with individuals and groups of individuals with disabilities. Although one's colleagues are not necessarily within one's own practice or organization, the rise of ZOOM and other networking programs have provided an avenue to more readily reach organizations and individuals needed. In addition to the Committee on Disability Issues in Psychology (CDIP) and the APA Ethics Office, State Psychological Associations commonly offer CE opportunities. They may also sometimes assist with interpretation of state law applicable to psychological practice within a specific state. Another excellent resource are APA divisions. Many colleagues will quickly address specific questions through their listservs. Psychologists who are not members may consider reaching out to a divisional officer listed on the division-specific APA website.

GUIDELINE 4

Psychologists strive to learn about federal and state laws that support and protect the rights of people with disabilities.

The goal of laws that protect the rights of individuals with disabilities is to ensure their freedom to participate fully in all aspects of society (Pullin, 2002). Three primary federal laws affect individuals with disabilities: the Rehabilitation Act of 1973 (Sections 503, 504, and 508); the Americans with Disabilities Act (ADA) of 1990 plus the Americans with Disabilities Amendments Act of 2008 (ADAAA); and the Individuals with Disabilities Education Act (IDEA) (1997).

Sections 503, 504, and 508 of the Rehabilitation Act prohibit disability-based discrimination by federally funded institutions. This law has increasingly been used in schools to provide services for children who do not qualify under IDEA. Section 503 of the Rehabilitation Act prohibits discrimination against individuals with disabilities in employment and requires employers with federal contracts or subcontracts that exceed $10,000 to take affirmative action to hire, retain, and promote qualified individuals with disabilities. Section 504 of the Rehabilitation Act prohibits discrimination against individuals with disabilities in any federal program or activity. Section 508 requires that electronic and information technology used by the Federal government be accessible to people with disabilities. Sections 503, 504, and 508 do not apply to non-federally funded institutions and do not provide administrative procedures for acquiring accommodations or the due process available under IDEA (Rae et al., 2001).

The ADA and the ADA Amendments Act (ADAAA) of 2008 provide comprehensive civil rights protection to individuals with disabilities. Title I prohibits discrimination in employment based on a disability for qualified individuals who, with or without a reasonable accommodation, can perform the essential functions of a job. Employers are required to provide reasonable accommodations to afford applicants and employees equitable access to the application, retention, and advancement parts of the employment process (USEEOC, 2002). Accommodations are routinely provided to the general workforce, and 95% of workplace accommodation requests come from employees other than those with disabilities, so provisions of accommodations should not pose an undue burden to employers (Von Schrader et al., 2014). For more information about providing accommodations for people with different disabilities at the workplace, refer to the following resource: the Job Accommodation Network at https://askjan.org/.

In 2008, the ADAAA made important changes to the definition of disability, thereby making it easier for an individual seeking protection under the ADA to establish a disability (29 CFR Section 1630.2). Specifically, under the ADAAA, the definition of "major life activities" was expanded to include "major bodily functions." Major life activities include, but are 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" (42 U.S.C. Section 12102(2)(a)). Major bodily functions include, but are not limited to, "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions" (42 U.S.C. Section 12102(2)(b)). Therefore, individuals with many more types of disabilities—including those with chronic illnesses such as Crohn's disease, for example—are now legally protected by federal law. For a more complete understanding of the 2008 amendments to the ADA, refer to the following government resource: dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments.

ADA's Title II prohibits "the exclusion of a qualified individual with a disability, by reason of such disability, from participating in or securing the benefits of services, programs, or activities of a public entity" (42 U.S.C § 12131 et seq.). This title includes all aspects of school programs, facilities, and services.

Title III of the ADA promotes accessibility for "places of public accommodations" (42 U.S.C § 12181- 12189 et seq.), including all private health care providers (42 U.S.C. § 12181(7)(F). The Americans with Disabilities Act Accessibility Guidelines (U.S. Access Board, 2004) specify the standards such entities must meet. The relevant provisions are found in Title III of the ADA and its implementing regulations—refer to Americans with Disabilities Act tit. 3, 42 U.S.C. §§ 12181-12189 (2020); 28 C.F.R. §§ 36.10136.607 (2016). The number of employees associated with the health care provider, its size or status as a non-profit, and the nature of the care or treatment are irrelevant; these factors do not affect the provider's obligation to follow Title III of the ADA.

Title IV covers telephone and television access for people with hearing and speech disabilities. It requires telecommunication companies to provide interstate and intrastate relay service 24 hours a day, 7 days a week, to individuals who use telecommunication devices (47 U.S.C. § 201 et seq.). Title V includes miscellaneous provisions, such as the recovery of legal fees for successful proceedings under the ADA. It also prohibits coercing, threatening, or retaliating against people with disabilities or those attempting to aid people with disabilities in asserting their rights under the ADA (42 U.S.C 12201 et seq.).

The Individuals with Disabilities Education Act (IDEA) enacted in 1975 (Public Law 94-142), and amended in 1997 and 2004, mandates that each student suspected of having a disability be assessed in all relevant areas, which may include health, vision, hearing, social, emotional, general intelligence, academic status, adaptive behavior, communication, and motor skills. The IDEA is primarily focused on public schools (not private schools); it also applies to charter and magnet schools (refer to https://understood.org/articles/en/individuals-with-disabilities-education-act-idea-what-you-need-to-know). If a student is determined to be eligible for special education services, a team identifies the student's strengths and needs, writes an individualized education program (IEP), develops specially designed instruction, and establishes benchmarks to measure the student's academic and behavioral progress (National Council on Disability, 1996). Decisions on educational modifications and accommodations are based on specific educational needs and performance on multiple measures, including formal and informal testing.

Broad federal legislation designed to protect the civil rights of people with disabilities has been complemented by federal laws designed to offer protections and create opportunities in more specific areas, such as the Voting Accessibility for the Elderly and Handicapped Act of 1984 (Public Law 98-435) and the Ticket to Work and Work Incentives Authorization Act of 1999 (Public Law 106-170). The Workforce Innovation and Opportunity Act (WIOA) (Public Law 113-128, U.S. Dept. Of Labor) that was enacted in 2014 was designed to help individuals access employment, education, training, and support services to succeed in the labor market and to match employers with the skilled workers they need to compete in the global economy. Specifically, Section 188 of the WIOA prohibits discrimination against all individuals in the U.S. based on race, color, religion, sex, national origin, age, disability, political affiliation or belief, and against beneficiaries based on either citizenship/status as a lawfully admitted immigrant authorized to work in the U.S. or by participation in any WIOA Title I financially assisted program or activity. It is important for psychologists to be aware that eligibility for different services by foreign nationals varies, depending on the nature of the service and the related regulatory environment. For example, if employed on a work visa, individuals are protected by the ADA employment provisions. Psychologists are encouraged to consult legal counsel for questions regarding ADA protections and service eligibility.

In addition to federal law, state laws directly affect the rights and protections of persons with disabilities. State law determines the priority for guardianship for individuals with compromised capacity as well as defines the parameters of abuse. Psychologists working with people with disabilities need to be familiar with their specific state's laws related to disability as well as those of other states in which they might provide telehealth services. State laws may provide more protection than federal laws for citizens with disabilities, but never less protection.

There are several resources available to learn about disability rights and legal support services. Two of these resources are *A Guide to Disability Rights Laws* (https://ada.gov/cguide.htm) and *Your Legal Disability Rights* (https://usa.gov/disability-rights). Each state also has a disability rights legal center that provides free legal assistance to people with disabilities who believe their civil rights have been violated or who need assistance with accommodations (https://usa.gov/disability-rights).

Federal laws are enforced by the Department of Justice, which relies on the reports and complaints of individuals with disabilities in order to act. Psychologists may need to consider the intersection of law and policy, as well as the fact that at times policies regarding service access (e.g., disability) may be incompatible with other service access policies (e.g., aging). Psychologists are encouraged to consult with attorneys and access other legal resources and training to assist with understanding the application of legal mandates to their clients' circumstances and potential roles in advocacy.

GUIDELINE 5

Psychologists strive to provide barrier-free physical and communication environments in which clients with disabilities access psychological services.

Despite the fact that businesses serving the public are required to comply with Title III of the ADA, people with disabilities continue to face both attitudinal and physical barriers that limit access to health care services (Iezzoni, et al., 2021; Lagu, et al., 2013; Mudrick, et al., 2012). The 2019 APA Resolution on Support of Universal Design and Accessibility in Education, Training and Practice (https://apa.org/about/policy/resolution-support-universal-design-accessibility-education.pdf) was based to a significant degree on recognition that (1) these pervasive barriers limiting access to education, assessment, and clinical services contribute to health disparities; (2) efforts to date to address inaccessibility have fallen short; and (3) the application of universal design principles can increase access to products and services that address psychological and other health areas for individuals with diverse needs. Consistent with both the position of APA and the legal requirements of the ADA, psychologists should strive to ensure their practice locations and environments facilitate access for all clients. This includes understanding how therapeutic environments and processes potentially affect therapeutic engagement and working with clients to provide hospitable, accessible environments for both psychological assessment and intervention (Banks & Kaschak, 2003). Several areas are highlighted below to encourage barrier-free physical and communication access, two universal design components referred to in the APA resolution.

PHYSICAL ENVIRONMENTS

Access to physical environments encompasses a broad range of transportation and exterior and interior building and office features, such as those described below.

- Transportation: Clients with disabilities may need accessible transportation services to and from the psychologist's office. An office location with nearby accessible public transportation can enhance service access. However, public transportation may entail effort, time, cost, and navigation of high traffic volume in urban areas. It is therefore helpful for the psychologist to be aware of other accessible transportation options, such as wheelchair-accessible van services and community-based programs that provide transportation services for individuals with physical, emotional, and/or behavioral needs. In addition, transportation resources and associated time to and from the psychologist's office may impact the set-up of the therapy schedule. If clients experience limited endurance, poorly controlled pain, or other disability-related factors affected by travel, a full-length therapy session may prove too exhausting. A mix of in-person and telehealth sessions that remove travel barriers may help clients maintain stamina for individual sessions.

- Building Access: Psychologists using home or office space for in-person appointments are advised to consider multiple components of physical accessibility. Examples include designated parking; pathways to buildings with curb cuts; external and internal doorways wide enough for wheelchair access; doors with automatic openers or easily manipulated handles; use of signage and information posted on websites to help navigate the office space; accessible bathrooms; clearly located ramps and elevators; and barrier-free access to safety exits (McClain, 2000; O'Halloran, Hickson, & Worrall, 2008; U.S. Access Board, 2010). Psychologists are strongly encouraged to evaluate accessibility before renting office space.

- Physical Aspects of the Therapeutic Environment: In addition to general physical access, there are specific environmental factors that can affect level of comfort, engagement, and physical well-being of clients with disabilities during assessment and intervention.

Examples include room temperature for individuals who have difficulty with temperature regulation; lighting matched to the individual's needs (e.g., enhanced lighting for people who rely on vision for orientation or communication; lower lighting for individuals with light sensitivity); chair positioning for individuals with specific postural or skin pressure needs as well as for safety; device positioning while using assessment or treatment tools; removal of scents and odors such as from perfumes and food; and modifications to stimuli (e.g., creating a very quiet environment, reducing visual stimuli via minimizing number or size of objects on walls, desks, and floors). Changing the session structure may also need to be considered for individuals with reduced or variable attention span or ability to process content. Similar to reducing travel time, shorter, more frequent sessions or augmenting in-person sessions with telehealth check-ins may help the client meaningfully engage in assessment and intervention.

Although physical accessibility facilitates service delivery, some adaptations may take time and resources. As an alternative, a psychologist may opt to conduct sessions in a mutually convenient, private, accessible location, or refer the client to a psychologist with similar or greater qualifications whose workspace is more accessible. However, these should be considered last resorts only if physical modifications are cost prohibitive. Psychologists opting to use telehealth services as an alternative or complement to in-person appointments are also encouraged to examine their platforms and digital tools to ensure access for disabled individuals. Ensuring screen reader compatibility when sharing testing stimuli or providing access to closed captioning or Communication Access Realtime Translation (CART) services during the assessment process are two such examples. Communication issues are discussed in more detail below.

COMMUNICATION ENVIRONMENTS

Accessible communication involves the way in which one communicates and the environment in which communication occurs. Assuring appropriate communication reduces the risk of discrimination resulting from inadequate opportunities for clients with disabilities to be involved in their care. It is important to keep in mind that communication access is a two-way process. It is affected by both how clients communicate and the relevant adaptations psychologists and their staff make.

- Diversity in Communication: Clients with communication disabilities may use specific methods or technologies to engage in psychology's services. Clients with speech disabilities may communicate with alternative or augmentative communication such as speech boards, speech synthesizers, or computers. Clients who are Deaf or hard-of-hearing and/or have speech disabilities may call or be called via telephone, or use internet and/or video relay services. Communications' assistants involved in relay services cannot intentionally modify or disclose content, and minimum FCC telecommunications relay service standards require confidentiality (Federal Communications Commission, 2019). Some clients may prefer to use cell phone text messaging and secure electronic mail, or secure videophone or teletype equipment. Sign language interpreters or computers may also be engaged for interpersonal communication. When sign language interpreters are present, the psychologist needs to remember to focus their primary attention and eye contact on the client rather than on the interpreter.

- Communication Content and Processes: Although the psychologist may not manage the type of communication aids and strategies an individual uses during the session, the psychologist does manage content presentation and process variables affecting communication. Word choice, use of verbal and nonverbal messages, and how information is delivered and received may powerfully shape the therapeutic relationship and influence decision-making and outcomes. Accessible communication may be affected by the amount of time the psychologist allots for critical information to be addressed, the level and type of language used, the pace, the psychologist's attitudes, and the environment in which the communication is shared, such as the level of privacy achieved. Examples are provided below.

  - » Psychologists working with individuals with cognitive impairments or whose situations have overwhelmed their coping resources may need to adjust varied aspects of communication. The client may need some or all the following from the psychologist: use of concrete language without metaphor, shorter sentences, increased pausing, calm presentation, consistency in session structure, step-by-step instructions, modeling and repetition, cueing (visual, auditory, and/or kinesthetic) ahead of and/or after task initiation, and checks on therapeutic expectations and actions.

  - » A psychologist may also use cueing with someone with attentional issues, such as saying the name of the client, making eye contact, and then proceeding with calm verbal communication.

  - » A client with a language processing disability may need the psychologist to adjust their listening to the client's rate of speech, ensure clear wording, pause between sentences, and provide written or visual cueing.

  - » A client who uses a visual communication system, speech synthesizer, other specialized approaches, or a sign language interpreter (Olkin, 2012) may need the psychologist to pace questions and comments based on the rate at which the client communicates with the augmentative or other communication supports.

  - » A client with a visual disability may need specific descriptions to enhance awareness of the immediate environment or need documents in large print, as text files, or in Braille (Lighthouse International, 2006; Olkin, 2012).

  - » Clients with diverse linguistic, cognitive, and/or emotional needs may require simplified, easy-to-understand documents, such as office paperwork, and/or have access to aids such as pen and paper, and be given written or taped summaries of session components (Wehmeyer, Smith, & Palmer, 2004).

  - » It is also important to keep in mind that the consenting process for services may require adaptations to obtain valid consent, consistent with the APA Ethics Code Principles D, Justice, and E, Respect for People's Rights and Dignity and Standards 3.10, 9.03, and 10.01 (2017). These adaptations may include adjusting consent language, including both word type and level/complexity; modifying how the client accesses forms; and involving sign language interpreters and legal guardians (Fisher, 2003). Other detailed recommendations for modifications during intervention are provided by Turner and Bombardier (2019). Please refer to Guideline 14 for a detailed discussion of accommodations related to testing.

- Provider Characteristics: Finally, communication becomes more accessible when the psychologist creates a positive environment. In a small exploratory study focusing on communication with children who were disabled, rapport building, a family-centered approach, and use of communication aids were shown to facilitate communication (Sharkey, et al., 2016). Effective communication is supported by greater knowledge, constructive attitudes, and the overall communication skills of the provider. O'Halloran et al. (2008) found that, among other factors, providers' lack of knowledge about the disability or communication aids and negative attitudes toward people with various communication differences (Deaf, Blind, has aphasia) created significant communication barriers because clients did not feel listened to or able to ask questions. Facilitative strategies included being patient, kind, and restating questions or statements when the first attempt was unsuccessful as well as taking time to learn how specific communication devices work.

Although often unintentional, psychologists send a message regarding the status of individuals with disabilities when they do not invest in universal design that supports communication and physical access to their services. As the Office of Special Education and Rehabilitative Services noted in its 2016 call to action, the "inclusion of individuals with disabilities cannot be an afterthought." The examples provided above highlight a number of straightforward adaptations a psychologist may make to engage effectively and respectfully with disabled clients.

GUIDELINE 6

Psychologists strive to use appropriate language and respectful behavior toward individuals with disabilities.

As professional ethics and writing standards dictate, psychologists are expected to strive for "accurate, unbiased communication" (p. 131, Publication Manual of the American Psychological Association, 2020) and must "not knowingly engage in behavior that is harassing or demeaning" (APA Ethics Code, Standard 3.03, p. 6). One critical way to respect the dignity and worth of all people (Principle E of the APA's Ethical Principles, 2017) is to support the use of disability-friendly language. Language may reveal one's attitudes toward people with disabilities (Hauser, et al., 2000). Excessively positive language (e.g., "heroic," "despite his disability," or "overcoming disability") or excessively negative language (e.g., "afflicted with," "suffering from," "confined to wheelchair," or "wheelchair bound") is problematic because these terms reinforce stereotypes rather than focus on the individual (APA Publication Manual, 2020). Additionally, euphemisms (e.g., special needs, handicapable) are equally problematic as they diminish the disability itself and perpetuate the stereotype that disability should be avoided or not talked about (Andrews et al., 2019; APA Publication Manual, 2020). Such language may bias both diagnostic and intervention processes (Simeonsson & Scarborough, 2001).

The use of person-first language (putting the person first, as in person with disability) has been repeatedly endorsed to reduce stigma and bias (Dunn & Andrews, 2015). It literally means that the person comes before the disability. Person-first language is intended to avoid stereotypical or derogatory phrases that imply deficiency or inadequacy (Gill et al., 2003; Khubchandani, 2001; Olkin, 2002). Gernsbacher (2017) stated that person-first language was created as an equalizer intended for use in describing people with and without disabilities. However, the author argues this goal has not been achieved based on reviewing scholarly writing referencing people with disabilities.

Language is not a static concept. It evolves over time as cultural awareness and attitudes shift. This is certainly the case in the evolution of disability language use. Disabled psychologists highlighted the history and evolution of terminology advocating for the use of the word "disability" and promoting the use of identity-first language (Andrews et al., 2019). Consider the example of Rosa's Law when in 2010 the U.S. Congress replaced the term mental retardation with the term intellectual disability. Mental retardation was viewed as stigmatizing, reinforcing negative perceptions of people with intellectual disabilities.

There have been other shifts as well. Specific organizations (e.g., National Federation of the Blind) and many disability rights advocates have argued for the use of identity-first language (i.e., "disabled people") over person-first language. Rather than identity-first language implying something is wrong with the individual, it can be a source of pride; the individual may be empowered by defining their own identity (APA Publication Manual, 2020; Dunn & Andrews, 2015). In addition to identity-first language, some individuals with disabilities have used what traditionally would be viewed as negative terminology (e.g., crip) to refer to themselves or others within their disability subculture (insiders). Others have recently recommended the interchangeable use of person-first and identity-first language (e.g., Research and Training Center on Disability in Rural Communities—RTCDRC).

The shift in thinking about language use is reflected in changes within APA. Although the 6th edition of the Publication Manual of the American Psychological Association (2012) indicated person-first language was preferred, the 7th edition published in 2020 supports the interchangeable use of person-first and identity-first language, like the RTCDRC. Therefore, the following recommendations are offered to psychologists, which are also consistent with APA's Inclusive Language Guidelines (APA, 2021).

- Use the identity-first or person-first language preferred by the client (diabetic person <> person with diabetes; amputee <> person with amputation).
- If the client's wishes are unknown, directly ask the client what language they prefer.
- There are some 'insider terms' that can reflect disability identity or pride (e.g., crip, gimp, quad, para) when used within the disability community by a member of that community. Although psychologists are generally encouraged to align with the client's language, they are discouraged from using this insider terminology in their professional practice.
- Use person-first and identity-first language interchangeably in writing.

Even though one might assume that communication is mostly verbal, most communication is nonverbal (e.g., facial and body language, personal mannerisms, and style) (Burgoon, Guerrero, & Floyd, 2016). If the psychologist is unfamiliar with physical representations of specific disabilities, how a client speaks or moves may be misunderstood (Leigh & Brice, 2003; Wright, 1989). For example, limited movement involved in facial expression caused by facial paralysis may be misinterpreted as flat affect as well as lead to misdiagnosis of psychological issues (Bogart, Briegel, & Cole, 2014). Similarly, facial expressions may be involuntary or have multiple meanings, reflecting such issues as chronic pain, memory problems, or psychological issues. Sign language users convey nuances of meaning through facial expressions. Body language may also reflect disability-related needs, such as frequently changing position in a wheelchair to prevent pressure sores or adjusting position in response to lighting or temperature changes. Verbal and non-verbal messages may also conflict (Wright, 1987), and the psychologist may misinterpret the amount or type of presented emotion and undervalue a client's input.

Overall, the psychologist may facilitate clinical work in a respectful manner by first asking the client about communication preferences, such as asking the client if they would like assistance and requesting specific instructions on the type of assistance rather than assuming the client would accept such assistance. This is consistent with Principle E of the APA Ethics Code, Respect for People's Rights and Dignity. In addition, the psychologist needs to be an effective observer of the verbal and non-verbal information the client provides and be adaptive to this information. For example, in the facial paralysis example above, the psychologist should strive to integrate facial cues with emotional information reflected in other body movements, use of language, and voice cues to increase accuracy of diagnostic impressions (Bogart, Cole, & Briegel, 2014). Respectful behavior by the psychologist involves communication and use of language that are intentional and matched with the particular client's needs. The psychologist is encouraged to seek expert consultation for additional information on appropriate adaptations if needed. Such steps are advised to ensure accurate and respectful representation of the client in determining assessment outcomes and therapy procedures.

GUIDELINE 7

Psychologists strive to recognize the intersectional identities of persons with disabilities.

The term intersectionality means that multiple identities interact in complex ways in individuals' lives. Intersectionality is not the sum of multiple identities; it is the interaction of multiple identities and their relation to power embedded in societal systems of privilege and/or oppression (APA 2021; Crenshaw, 2017). Psychologists will interact with clients who have different kinds of disabilities, impairments, and ways of being represented in the disability community. Psychologists strive to understand their clients' intersections to serve them effectively.

Persons with disabilities hold intersectional identities based on social and cultural identities. APA's *Guidelines on Multicultural Education, Training, Research, Practice, and Organizational Change for Psychologists* (2003) and APA's *Handbook of Multicultural Psychology* Volumes 1 and 2 (Leong, et al., 2014) discuss working with clients from diverse cultural and social backgrounds. Psychologists are encouraged to read these as they pertain to the combined identities of their clients with disabilities while recognizing that clients are multidimensional, not simply the sum of these identities.

As noted in Guideline 2, the forces that structurally oppress persons with disabilities are called ableism. As researchers Nario-Redmond, Kemerling, and Silverman (2019) explain, individuals with disabilities experience ableism in many forms, from the seemingly benevolent to more ambivalent or mixed forms (e.g., paternalistic or condescending; jealous/envious) to the blatantly hostile. This may be further complicated when other marginalized identities and oppressive structures are also affecting the individual. Individuals who experience racism, ageism, homophobia, transphobia, religious persecution, or any combination thereof, in addition to ableism, may experience a compounded form of oppression not often considered in designing clinical tools, practices, and therapies. Disparities may result from a complex interaction of socioeconomic and demographic characteristics as well as the intersection of such compounded oppression. In discussing marginalization related to mental health in transgender individuals, Burnes and Chen (2012) point out "when one changes one's authentic self in order to conform to other's perceptions out of fear or stigmatization, distress can arise and negatively affect the individual's mental health" (p. 118).

To work effectively with clients with disabilities, psychologists strive to consider how a client's disability-related issues interact with other cultural and social identities and experiences as well as the potential combined effects of ableism and discrimination on the individual's psychological well-being. Intersectional identities may include race, ethnicity, gender, gender identity, immigration status, socioeconomic background, and other identities that an individual may have as a result of personal characteristics or the context in which they live. Some of these are described below, keeping in mind that these factors may intersect with each other as well as create complex relationships in understanding the individual's potential strengths and experience of disparities.

The American Community Survey data from 2019, which includes self-reported disability, found that within racial and ethnic groups, African Americans and Non-Hispanic Whites have some of the highest percentages of people with disabilities (each group at 14%) followed by Latinos (9%) and Asian Americans (7%) (U.S. Census Bureau, 2019). The percentage of American Indian and Alaska Natives with a disability is very small among the U.S. population at 0.02%. However, within the Alaska Native population, 17.2% have a disability, the highest percentage within racial groups. In 2021, the APA Council of Representatives passed the *Resolution on Harnessing Psychology to Combat Racism: Adopting a Uniform Definition and Understanding, the Role of Psychology and APA in Dismantling Systemic Racism Against People of Color in the U.S., and an Apology to People of Color for APA's Role in Promoting, Perpetuating, and Failing to Challenge Racism, Racial Discrimination, and Human Hierarchy in the U.S.*

Different cultural, religious, and underrepresented groups may attribute different causes and meanings to disability and emphasize different coping strategies. These, in turn, may influence the ways in which disabled persons seek out or respond to psychological services and/or assessment. Belgrave, Gary, and Johnson (2019) offer an excellent discussion of the intersections of culture, race, and disability with clear implications for psychological practice. Although they may not apply to every individual, attributions of blame for disability may be generally relevant in some cultures (e.g., traditional Korean-American culture) but not others (e.g., American Indian, which emphasizes harmony among mind, body, and spirit) (Belgrave et al.). Emphasis in beliefs may also impact coping strategies (e.g., religion among Blacks; family among Hispanics). Similarly, disability-related concepts such as independent living may vary or not apply to different groups (Bryan, 2007; Lomay & Hinkebein, 2006). Recent work has promoted the value of interdependence (Forber-Pratt, 2019; White, et al., 2010). Interdependence does not necessarily mean doing activities on one's own but, rather, having the personal agency and ability to manage one's own care and have one's voice heard during daily living activities to the best of one's ability. Given that 35% of non-institutionalized individuals with disabilities have some type of independent living difficulty (U.S. Census Bureau, 2019), the development of interdependence is a critical area of psychological intervention with particular clients.

One's family structure and culture represent social intersections that may directly affect one's experience of disability and, therefore, willingness or frame of reference to consider specific psychological services and recommendations that foster or deter interdependence. Psychologists working with people with disabilities are advised to explore who is and is not part of the common family structure and who might facilitate or support development of the client's interdependence. For example, does one's culture support participation from those external to this family structure or would reaching beyond the family nucleus be considered taboo (Olkin, 2017)?

Demonstrating a willingness to understand the impact of one's culture on health care values and beliefs may help the psychologist avoid clinical pitfalls and instead identify culturally sensitive approaches as these intersect with the client's identities and needs in support of constructive coping. Further, and sometimes related, having a disability and being an undocumented immigrant may create unique issues in understanding eligibility requirements, access to services, and legal rights (Blakenship & Madson, 2007). Additionally, clients living in multigenerational or mixed-status households may fear jeopardizing their family members' immigration status. For further information, psychologists are referred to the U.S. Immigration and Customs Enforcement (ICE) Family Residential Standard 4.8 entitled: Disability Identification, Assessment and Accommodation (ICE, 2020). It is also recommended that psychologists seek counsel specializing in immigration law and legislation. Even for visa holders or green card holders, navigating the complex systems to receive disability-related services or accommodations can be challenging.

Identification as female also intersects with disability in psychologically relevant ways. There are over 165 million women in the United States, approximately 12.8% of whom have a disability (U.S. Census Bureau, 2019). As the 2018 APA *Guidelines for Psychological Practice with Girls and Women* summarize, girls and women are more likely to face a broad range of stressors with psychological consequences, such as sexual abuse, intimate partner violence, employment discrimination, long-term caregiving expectations, and a barrage of social media images in which idealized physical appearance equates with self-worth. The 2018 *Guidelines* further note that transgender women are at significantly increased risk for suicide, women veterans are more likely to experience PTSD, and older women are more likely to live in poverty. On the positive side, women tend to have more supportive friendships and develop resilience that can help buffer the negative effects of stress. As stated in Guideline 1 from the 2018 APA *Guidelines*, "Psychologists recognize girls' and women's strengths and resilience and work to honor and cultivate these'" (p. 9). However, psychologists also need to strive to recognize the intersections of oppression as noted at the beginning of this section. As Guideline 3 of the 2018 *Guidelines on Girls and Women* states, "Psychologists strive to recognize, understand, and use information about structural discrimination and legacies of oppression that continue to impact the lives and psychological well-being of girls and women" (p. 11).

Women with disabilities report experiencing significant levels of depression and lower self-esteem than women without disabilities (Hughes, Nosek, & Robinson-Whelen, 2007; Niemeier, 2008; Nosek, Howland, et al., 2001), both of which are associated with social isolation, lower quality of intimate relationships, pain, and higher risk of abuse (Nosek et al., 2001). Additionally, women with disabilities face unique experiences and challenges related to dating and parenting (Andrews & Ayers, 2016), such as difficulties with communication about breastfeeding (Andrews et al., 2021). It is important to avoid pathologizing these experiences and to instead offer appropriate psychological services towards recognizing strengths, building resilience and self-esteem, and advocating for and using resources consistent with interdependence. (Refer to Banks et al., 2015 and

Kuemmel, Campbell, & Gray, 2019 for detailed discussions of different intersections for women with disabilities and recommendations for psychological practice.)

Men with disabilities, almost 20 million people or 12.6% of men in the United States (U.S. Census Bureau 2019), also experience important intersections affecting psychological needs. Individuals identifying as men may experience psychological distress from threats to sexual identity and masculinities and concerns about self-reliance, independence, and employment (Marini, 2001). How individuals identifying as men conceptualize their gender role has been shown to impact psychological health. Men who identify with traditional Asian values and masculine gender role expectations and men who embrace Latino gender expectations based on Machismo may experience more gender role conflict and psychological distress (Fu, Shen, & Marquez, 2014), which may be further complicated by traditional perceptions of disability. Nario-Redmond (2010) found that cultural stereotypes of both disabled men and women included dependence, incompetence, and being asexual. Shuttleworth, Wedgwood, and Wilson (2012) offer an ethnographic review of the evolution of thought on the intersection between the concept of masculinity and men with disabilities. They point out that early disability studies focused on the presumed non-synergistic relationship between masculinity and disability (masculine = power, strength; disability = dependency, weakness). Over time, however, this basic conceptualization of masculinity and disability has been replaced with a more complex view, consistent with contemporary representations of disability identity. That is, the experience of disability is multifaceted and layered, impacted by a variety of factors, in particular social structure and interaction. Shuttleworth et al. argue that masculinity is both "dynamic and a context-specific social structure." Rather than conceptualizing the intersection of masculinity and disability as generic, they suggest this intersection is also affected by type, severity, and visibility of disability. Although more research is needed to delineate the impact of these disability specific factors (Kavanagh et al., 2015; Shuttleworth et al.), their findings suggest that psychologists consider exploring nuances to the intersections described on men's psychological well-being. Listening carefully to the individual's descriptions of disability identity can help the psychologist identify important factors for further assessment (e.g., does a visible vs. less visible disability affect the client's perception and social experience of masculinity and sense of self?). Finally, the 2018 APA *Guidelines for Psychological Practice with Boys and Men* note that it is common to use the term masculinities instead of masculinity in recognition of the intersection of multiple identities constructed by social, cultural, and contextual norms. The complexity of disability identity parallels the complex nature of what it means to be masculine. While it may be useful for practitioners to explore whether their clients hold traditional stereotypes as part of their conceptualization of self-worth and meaning (able-bodied = masculine), it is also important to recognize that characterizing masculinity as a disabled person is complex, may include apparent contradictions based on cultural and social norms, and is affected by intersections that may shape and change their sense of self over time.

Gender has historically been represented as binary, which fails to recognize the lived experiences of transgender and nonbinary individuals. In the U.S., the limited research available has consistently shown a high prevalence of disability among transgender people. The National Center for Transgender Equality's 2015 U.S. Transgender Survey (James, et al., 2016) reported that 39% of the nearly 28,000 transgender respondents had one or more disabilities, as compared with 15% of the general population. Disabled adults who are transgender face significant stressors based on intertwined marginalized identities. Like individuals with disabilities, transgender individuals face discrimination and social stigma that negatively impact employment opportunities, availability and quality of health services, risk of bullying and abuse, mental health issues, and overall health outcomes (APA *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 2015; Conron, et al., 2012; Dinwoodie, Greenhill, & Cookson, 2020; Frederiksen-Goldsen, Kim, & Barkan, 2012.; Witten, 2014). Disabled transgender individuals often face homelessness and experience suicidal thoughts and being dismissed by others (Waldman, Perlman & Schwartz, 2018). Similarly, of the 27.1% of people who indicated they had a disability on the Transgender MetLife Survey, 62.1% stated they were under moderate to extreme financial strain (Witten, 2014). Regardless of current disability status, 59% of people surveyed indicated they were moderately to extremely concerned that they would be unable to function independently at some age due to financial insecurity. This overlaps with the fact that both disabled and transgender individuals are often under-employed, less physically active, and receive inadequate health services (Dispenza, Harper, & Harrigan, 2016). In the MetLife Survey, approximately one-third of those with disabilities reported living alone, which may increase concerns about financial stability over time, social isolation, and availability and cost of personal care assistance. Frederiksen-Goldsen et al. (2012) found that disability occurrence was mediated by positive social support and a sense of community belonging as measured by social network size. Similar work has also supported the importance of community among LGBT people with intellectual disabilities (Dinwoodie, et al., 2020). These findings re-emphasize the importance of psychological assessment of health-related financial stress, social support, and facilitation of social connectedness consistent with how clients define their identities. In addition, the research suggests that transgender individuals may hold negative or mixed perceptions of disability, perhaps internalized negative social constructions of disability and sexuality (Dinwoodie, et al., 2020). An affirmative approach to intervention by psychologists may help address these constructions (refer to "Intervention" in these *Guidelines,* particularly Guideline 20). Although survey responses were not categorized by transgender versus non-transgender status, one study's results suggested four components subjectively define health among LGBT individuals: physical wellness, emotional vitality, functionality (e.g., completing daily tasks, working), and social engagement (Dispenza, et al., 2016). The authors suggest that these dimensions offer practitioners a framework for integrating practice across identities for persons with disabilities by exploring barriers and means to strengthen the above relevant components for individual clients.

Gender expression and disability also intersect with sexual orientation, and far more research exists about disabled LGB populations than disabled transgender populations (Andrews & Forber-Pratt, in press). Research shows that the prevalence of disability is higher among lesbian, gay, and bisexual (LGB) adults compared with their heterosexual counterparts. Fredriksen-Goldsen and colleagues (2012) analyzed Washington State Behavioral Risk Factor Surveillance System data ($n = 82{,}531$) and found that approximately 36% of lesbians, 36% of bisexual women, and 25% of heterosexual women were disabled. Approximately 26% of gay men and 40% of bisexual men were disabled compared with 22% of heterosexual men; the likelihood of being disabled for gay and bisexual men was significantly higher than that for heterosexual men, even after controlling for age. Overall, among LGB adults, 36% of women and 30% of men reported being disabled. Additionally, disabled LGB adults were significantly younger than disabled heterosexual adults (Fredriksen-Goldsen, et al., 2012). For further reading, Santinele Martino (2017) outlines scholarship addressing disability and sexuality and calls for more intersectional research. From this work, Santinele Martino also highlights the few researchers who focus on the experiences of disabled asexual individuals (Cuthbert, 2015; Gupta, 2014; Kim, 2011; Lund & Johnson, 2015).

Sexual and gender minority subgroups report significant health concerns related to psychological status (e.g., substance use, mental health issues, including suicidal ideation and victimization; Conron, Mimiaga & Landers, 2010; Lick, Durso, & Johnson, 2013), and these sexual and gender minority subgroups may experience multiple forms of oppression when seeking psychological services. For an individual who identifies as both disabled and LGBTQ, the dual forces of ableism and heterosexism may exist that create challenges for healthy sexual and disability identity development (Lund, Forber-Pratt, & Andrews, 2021). In fact, these individuals may feel pressure to "pick one" aspect of their identity when receiving support (Lightfoot & Williams, 2009). In one study, the decision to disclose sexual orientation for lesbians receiving disability-related health services was impacted by how safe and welcoming they perceived the health care environment. Furthermore, for some women, the acceptance of their partner by the health care team influenced their perception of the health care received (Hunt, Milsom, & Matthews, 2009). In a review of the research literature addressing the intersection of intellectual disabilities and sexual orientation, Wilson et al. (2018) found that respondents risked rejection from each group (ableists and heterosexists), increasing safety concerns and highlighting the need for advocacy and targeted education and support. Children with disabilities must negotiate inter-related components of sexual identity development (e.g., sexual orientation, gender identity, gender expression) within social constructs. These social constructs impact varying levels of parental/familial, peer, and community (e.g., church, school, sports) support and acceptance of LGBTQ expressions. As such, the psychologist should strive to clearly understand these intersections as well as others (e.g., race, economic status). Readers are referred to two important resources in support of affirmative psychological practice: APA's *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People* (2015) and APA's *Guidelines for Psychological Practice with Sexual Minority Persons* (2021).

In addition to intrinsic characteristics, external factors, such as where one lives, may affect a client's experience of disability. Living in urban areas may present challenges that provide distinct vulnerabilities for people with disabilities. These may include added difficulties in navigating education, transportation, and health and human service systems, crowded public areas, and heightened risk of violence and crime. Rural Americans have more limited health care access due to workforce shortages, travel distances, and health care costs, which can directly affect disabled individuals, who are disproportionately represented in rural communities (17.1% of rural Americans report having a disability compared with 11.7% of those living in urban areas) (National Association of County & City Health Officials, 2018). Psychologists working in rural areas may serve clients in a wide variety of geographical settings, for which telehealth may provide an avenue to increase service access. Telehealth has been used to train caregivers, address mental health issues, and facilitate basic self-care management for people with disabilities (Christensen & Bezyak, 2020; Zhou & Paramanto, 2019). Limited research further suggests that people with disabilities underutilize telehealth services (e.g., only a small percentage of health care apps are disability focused). However, users view telehealth positively; it saves time and money and contributes to some functional improvement (Christensen & Bezyak). Psychologists' use of telehealth depends on a variety of factors, such as reliable, accessible, and secure technology; allowable interstate practice; specific state billing policies; and appropriate privacy protections (Alonso, et al., 2019; Khubchandani & Thew, 2016). APA's Joint Task Force for the Development of Telepsychology Guidelines for Psychologists (2013) provides helpful suggestions related to decision-making on whether to use telehealth services with disabled individuals. It is important to note, however, that the success of telehealth, including whether it removes health care barriers, has not been well researched (Christensen & Bezyak; Khubchandani & Thew, 2016).

Another significant intersection for people with disabilities is economic insufficiency, given disabled individuals are more likely to live in poverty (Lustig & Strauser, 2007). Twenty-six percent of working-age Americans with disabilities live below the poverty line, compared to 10% of those without disabilities. Poverty also intersects with race. The poverty rate for White Americans without a disability from 2021 U.S. Census data is 9%, while the poverty rate for White Americans with a disability is 24%, and for Black Americans with a disability, 36% (Erickson, 2021).

Disability and poverty are reciprocal—disability increases the risk of poverty, and poverty, associated with decreased access to health care, transportation, and assistive devices, increases the risk of disability. In addition to recognizing the relationship among poverty, disability, race, and psychological issues, psychologists should consider familiarizing themselves with local and regional resources, and partnering with other professionals with resource expertise to effectively assist their clients. Another important resource is the 2019 APA *Guidelines for Psychological Practice for People with Low-Income and Economic Marginalization.*

Across marginalized groups, several fundamental components are suggested for competent psychological practice. These include, but are not limited to, psychologists' consideration of multiple, intertwined intersections impacting well-being; recognition that the formation and evolution of identity may change as the client gains knowledge and resources and their experiences unfold in socioeconomic, cultural, and political contexts; and willingness to explore their own beliefs, biases, and embodiment of cultural stereotypes toward affirmative, respectful practice.

GUIDELINE 8

Psychologists strive to understand the different factors affecting the experience of disability at different developmental stages.

Individuals with disabilities face the same developmental tasks and milestones as everyone else, such as forming friendships with peers, pursuing an education, developing a cohesive identity, becoming sexual and establishing intimate relationships, getting a job, conceiving and raising children, and dealing with advancing age. For individuals with disabilities, the ability to achieve developmental goals often depends less on the nature of their disabilities than on their personal relationships with family, significant others and friends, and systemic interactions with their schools, employers, healthcare providers, and communities (Goodley & Lawthom, 2006; Olkin, 2012; Reeve, 2000; Woolfson, 2004). In this section of the *Guidelines*, four major developmental stages will be discussed: childhood, transitioning to adulthood, employment, and older adulthood.

There are over three million children and adolescents with disabilities in the U.S. (U.S. Census Bureau, 2019). When working with children and adolescents with disabilities, psychologists often take a systems approach, including family members, peers, schools, and others. Identification of a disability may occur at different points in development, including around birth. For example, the early identification of deafness has been a goal of the federally mandated Early Hearing Detection and Intervention (EHDI) systems, established in 1999, that operate in all states. Along with newborn screening programs comes the opportunity for psychologists to participate in early assessment and intervention. Psychologists may be called upon to provide an objective assessment of a child's functioning and to support eligibility determination for early intervention services. Psychologists doing this work require familiarity with state guidelines for eligibility and with measures appropriate for young children with various disabilities. Young children may receive supports via an Individualized Family Service Plan (IFSP) that documents and guides the early intervention process provided under Part C of IDEA. The services provided consider the family's resources and child's goals and are intended to support the child's smooth transition from IFSP services to other services under IDEA. Once entering school, many students with disabilities have assessments to develop Individualized Education Programs (IEPs) and participate in psychological, behavioral, and educational interventions. Additionally, some children may receive accommodations in school under Section 504 of the Rehabilitation Act of 1973. Other children with disabilities may not need any type of school-based accommodations (Forber-Pratt et al., 2020). Consequently, psychologists should attempt to understand the developmental needs of children and adolescents with disabilities and combine this understanding with adequate knowledge of how to conduct fair and valid assessments and interventions from developmental, systems, and functional perspectives. It is important to remember that states are required to ensure inclusion of students with disabilities in the educational process, including instruction and assessment. Significant guidance regarding expectations and reporting are provided by the U.S. Department of Education (2018). Psychologists are encouraged to work with school systems and participate on IEP teams to promote inclusion and full accessibility, and emphasize possibilities and opportunities for academic and social development (Olkin,1999a, b).

Like adults, children and adolescents with disabilities hold multiple intersectional identities. Though less is known empirically about these identities, some information is known about the influences of the school's social environment on psychological outcomes. King and colleagues (2018) found that disabled students (as defined by IDEA) and students identifying as LGBQ exhibit higher levels of suicidality and peer victimization, and less school connectedness in comparison with their peers. In fact, students with the highest levels of suicidal ideation were those who identified as disabled and LGBQ (King et al., 2018). Adolescents with disabilities face many challenges common to their typically developing peers (Maxey & Beckert, 2017), including how they develop into sexually expressive and fulfilled adults. Some adolescents with disabilities seem to be participating in sexual relationships without adequate knowledge and skills to help them stay healthy, safe, and satisfied (Murphy & Young, 2005). Support in this process can be a meaningful role for psychologists.

Adolescence is a time of great emotional and psychological change, emerging sexuality, and important life choices about post-secondary education and employment. For some adolescents, it is a time when they are grappling with how to form their disability identity and social relationships with peers with and without disabilities (Forber-Pratt et al., 2021). Like people with disabilities generally, adolescents with disabilities may experience physical and social barriers, reducing their access to the same opportunities and resources as their non-disabled peers. Unfortunately, many existing interventions tend to focus on young children or adults, without specific attention to the needs and interests of adolescents. This can negatively affect opportunities for adolescents to develop essential skills to participate in community. Key factors influencing personal development and socialization often include the attitudes and behaviors of parents, family members, teachers, mentors, and peers, and people in the community and society (Nosek, et al., 2001).

As adolescents with disabilities transition to post-secondary life, some school counselors have been found to be ill-prepared to help them navigate the college search and application process (Alvarez et al., 2020). Students with disabilities commonly face hurdles, such as acquiring accommodations for entrance exams (i.e., SAT, ACT). Students may also be overwhelmed in figuring out how to identify services at potential campuses as there are often different names for centers or services on campuses that provide entrance exam accommodations. Disability status should not play a role in the admissions process; disabled students must meet the same admissions standards as non-disabled students. In fact, disability status is confidential and is not indicated anywhere in students' applications unless they choose to disclose it. However, admission status has no bearing on providing accommodations.

Once in college, disability records are protected by the Family Educational Rights and Privacy Act (FERPA): FERPA applies to all students, including students with disabilities in private or public colleges, and seeks to provide eligible students or parents more control over their educational records. It blocks post-secondary institutions from disclosing "personally identifiable information" (PII) in educational records, including information regarding a student's specific disability, without written permission of the eligible student or parents, unless otherwise mandated by law (https://studentprivacy.ed.gov/faq/which-educational-agencies-or-institutions-does-ferpa-apply). Accordingly, accommodation letters do not include specific diagnoses. Disability service records are *not* considered part of a student's academic record, and disability-related information is not included on a student's transcript.

According to recent data from the National Center for Education Statistics (NCES), during the 2015 to 2016 academic year, 19.4% of undergraduate students and 11.9% of graduate students reported having a disability (NCES, 2019). Additional NCES survey data from Title 4 eligible postsecondary institutions (i.e., eligible for federal financial aid) indicate that the four most commonly occurring disability categories are learning disability, followed by ADHD, mental illness/psychological or psychiatric conditions, and health impairments (Raue & Lewis, 2011). Generally, the legal rights and responsibilities from K-12 to post-secondary schooling are dramatically different. Post-secondary students with disabilities must seek and request accommodations through their disability services office, and students have the responsibility to know what supports they may require and how to find them, whereas in K-12, the school is responsible for identifying accommodations and, quite often, a school psychologist works with an interdisciplinary team to identify disabilities, and then provide reasonable accommodations for student success.

The following table outlines common issues faced by students with disabilities and the primary responsible party for both K-12 and for college.

Many disabled college students struggle with aspects of self-advocacy because of the change in environment and shift in responsibility. The accessibility needs become more complex to navigate because the college environment is more unpredictable and includes more independent aspects of academic life, social life, and general life management. The level of supports for students to receive accommodations at the high school level is different than in the college environment (Hadley, 2011). There is a common trend of students who received accommodations in K-12 school who try college-level courses without needed accommodations as they may be seeking "a 'new beginning' in an educational setting by not having to deal with being labeled" (p. 77, Getzel & Thoma, 2008) or working extra hard to try and succeed academically without accommodations (Lyman et al., 2016). The onus is on the college student to take the initiative and self-advocate for accommodations (Mamboleo et al., 2019). Psychologists are encouraged to advocate and work with disabled clients in high school to set up anticipated needed supports and accommodations from the start of college. Once at a college or university, students will find numerous types of accommodations that may fit their academic needs, such as:

- Priority registration
- Extended time for assignments/exams
- Note-taking assistance
- Faculty-provided written course notes/assignments
- Alternate exam formats
- Test scribe or reader
- Preferential seating
- Permission to record lectures
- Computer access
- Reduced distraction environment
- Reduced course load
- Audiobooks
- Books in large print
- Use of adaptive equipment
- Retroactive withdrawal

ISSUE	**K-12**	**COLLEGE**
Identification	School	Student
Assessment	School	Student
Programming	School/Parent	Student/College
Advocacy	School/Parent	Student
Decision Making	Placement Team	Student
Transition Plan	Placement Team	Student

Socially, for many students with disabilities, college is the first time they have a community of others with disabilities to be around and from whom to learn (Minotti et al., 2021). The relationships and connections from this sense of community help students adjust to college life and learn how to navigate accommodations and self-advocate for services. Psychologists may help facilitate healthy social connections.

Psychologists may be a part of the assessment process to (1) administer testing to establish or rule out disability, (2) describe the functional impact of the disability, (3) identify accommodations and make recommendations to address functional impacts, and/or (4) educate others regarding how specific accommodations will increase accessibility. Psychologists may also be in the position to assess (1) how much the student knows about their disability, and (2) the student's ability to self-advocate for needed resources. A few helpful resources that psychologists are encouraged to explore related to supporting clients with disabilities who are transitioning to college are listed here:

- https://www2.ed.gov/about/offices/list/ocr/transitionguide.html
- https://accessiblecollege.com/
- https://aplaceforusdisability.org/

Transition is a complex and multifaceted process in which the individual gradually moves from a child being cared for to an autonomous young adult (Beghi et al., 2014; Borlot et al., 2014) who is expected to integrate into society and become independent (Khan et al., 2013). The challenges associated with this transition are magnified for youth with disabilities as it involves multiple concurrent changes, including the disability itself and potential cognitive, behavioral, or psychological issues that affect age-specific development. As of the 2019–2020 school year, 7.3 million children in the United States ages 3 to 21 received special education services through IDEA (National Center for Education Statistics, 2021). This number constitutes 14% of the total number of all students receiving public education (NCES, 2021), indicating the need for efficient, effective, and collaborative efforts to support students with disabilities during times of transition.

While the roles of professionals in the transition planning process will vary according to their expertise and the amount of time each devotes to the process, psychologists will likely need to coordinate their assessments and continuation of services. Several other stakeholders may be involved in helping students with disabilities during college. In addition to individuals with disabilities, their families, and school personnel, state vocational rehabilitation agencies, developmental disability agencies, and mental health and social service agencies may be part of a disabled student's support system. Throughout the transition process, psychologists are usually charged to conduct psychoeducational assessments, explain assessment results, and make recommendations to the transition team based on that assessment; assist in gathering additional information relevant to a student's cognitive, academic, and interpersonal skills; and provide interventions for students who experience mental health issues. Psychologists are encouraged to carefully monitor for the emergence of learning, vocational, and social needs (e.g., academic achievement, employment) facing children and adolescents with disabilities as the challenges may persist into adulthood.

Unfortunately, current transition services beyond academics do not often reflect the lifelong needs of youth with disabilities because the services may be diagnosis driven and relatively static. A few domains that deserve particular attention in a continuous, coordinated manner include psychosocial functions (e.g., emotional function, participation in education and employment), environmental factors (e.g., social support, stigma, peer acceptance), and personal factors (e.g., autonomy, self-concept, self-esteem, coping strategies, and adaptive behavior).

Comprehensive transition assessment helps facilitate a seamless and smooth transition. When psychologists plan assessments for youth with disabilities, they are encouraged to consider a holistic, biopsychosocial approach, especially to better identify, analyze, categorize, and address risk, protective factors, and outcomes. While neuropsychological assessment is beneficial for understanding cognition, (e.g., memory, executive processes; Fraser et al., 2010), functioning relevant to academic, social, and vocational activities, and determinants of quality work participation also involve an understanding of personal and environmental factors (Smeets et al., 2007).

Given the person–environment perspective, adopting a comprehensive holistic framework (e.g., the ICF) that reflects the dynamic and diverse needs of people with disabilities over the life span will help guide developmentally appropriate assessment and enhance transdisciplinary collaborative processes among all stakeholders to better inform transition planning, interventions, and service delivery. Studies have highlighted the promising applicability of the ICF as a conceptual framework to guide transition processes for young people with disabilities, including learning disabilities (King et al., 2005) and intellectual disabilities (Foley et al., 2012).

The next developmental step is employment. All people should have an opportunity to work, as work provides individuals with a sense of purpose, self-worth, and financial and economic independence. Yet people with disabilities are half as likely to be employed than their non-disabled peers; 38% of working age Americans with disabilities are in the labor force compared with 76% of those without disabilities (Erickson, Lee, & von Schrader, 2021). This results in higher levels of poverty and lower annual household income rates (Erickson, Lee, & von Schrader, 2021). People with disabilities have lower median annual household incomes too: $46,900 for a U.S. household with a person with a disability compared with $74,400 for those without a person with a disability (Erickson, Lee, & von Schrader, 2021). Most working-age people with disabilities want to work. While persistent stigmas remain an obstacle, evidence shows that individuals with disabilities, such as physical, cognitive, or intellectual disabilities, can be highly successful workers (Kessler Foundation, 2015; National Association of County Behavioral Health and Developmental Disability Directors, 2018; Padkapayeva et al., 2017).

Employment disability discrimination may occur at any point in the employment process, from hiring through termination. Data from the U.S. Equal Employment Opportunity Commission (EEOC), the enforcement agency for the employment provisions of the Americans with Disabilities Act of 1990 as amended (ADA), show that alleged unlawful discharge is the most common employment disability discrimination claim filed by individuals with disabilities (U.S. EEOC, 2020). Thus, when advising people about the return-to-work process, psychologists strive to be aware that clients may need coaching about possible discrimination risks when returning to the workplace and their rights in requesting accommodations under the ADA (U.S. EEOC, 2002). The ADA employment provisions (Title I) require an employer to provide reasonable accommodations to qualified individuals with disabilities who are eligible to become employees or applicants for employment, unless to do so would cause "undue hardship" to the employer. Generally, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy the same employment opportunities as individuals without disabilities. (U.S. EEOC, 2002).

Another development area for psychologists to be aware of related to disability is the aging process. Of the 41 million people with disabilities in the non-institutionalized U.S. population, 43% are 65 years of age or older (U.S. Census Bureau, 2019). Given the growth of the older adult population, there is increased likelihood that psychologists will encounter older adults in their professional roles. Even pediatric psychologists may encounter older adults as the number of grandparents providing childcare increases. There are more than 2.7 million American children being raised within homes of kin and grandparent caregivers (U.S. Census Bureau, 2019). Although the prevalence of disability has decreased within the older adult population due to improved health care (Mather, Jacobsen, & Pollard, 2015), older adults are still more likely than younger people to experience disability because the prevalence of disability increases with age (Freedman et al., 2014; Verbrugge, Latham & Clarke, 2017). The number of physical co-morbidities in older adults tends to be additive (Bleijenberg et al., 2017; Stenholm et al., 2015). (Refer the APA *Guidelines for Psychological Practice with Older Adults*, 2014, for a review of issues potentially affecting functional capacity.) The experience of disability and associated resources in older adults also interact with when the disability occurred and the type of disability experienced (for example, people with spinal cord injury have been shown to have less income than people with multiple sclerosis; people aging with sensory and visual difficulties may experience reduced social activities over time; disabilities impacting activities of daily living predict decreased independence and poorer outcomes) (Bleijenberg et al., 2017; Desrosiers et al., 2009; Dreer & Cox, 2019; Jensen et al., 2014; Turcotte et al., 2015; Verbrugge, et. al., 2017). Persistent disability is more likely to occur in older adults who are women, from a marginalized group (e.g., Blacks, Hispanics, transgender individuals) or those with less education and income, often due to co-morbidities created by social and economic disadvantages (Frederiksen-Goldsen et al., 2013; Jensen et al., 2014; Verbrugge et al., 2017). Women (75 years and older) are twice as likely as men to live in poverty and are more likely to live alone (Mather et al., 2015). Furthermore, by 2060 almost half of those 65 years and older will be racial/ethnic minorities. All these factors illustrate that attending to aging with disabilities will be an increasingly significant public health area psychologists are likely to address through clinical services and collaboration with other providers contributing to comprehensive health management.

Despite how an individual has acquired a disability, there are numerous common correlates with shortened life spans or increased morbidity for older adults with disabilities. These include lack of (1) continuing employment and financial strain (Szanton et al., 2008; Rohwedder & Willis, 2010), (2) social support and environmental access (Clarke et al., 2021; Jensen et al., 2014), (3) physical activity (Mather, et al., 2015), and (4) pain management (Cruz-Almeida et al., 2019; Li, Tse, & Tang, 2020). Related, there are additional transitions or potential transitions that arise for individuals as they age. These may require assessing or reassessing person and environment fit based on changing support needs. Despite challenges that may occur with aging, focusing on living in the community with appropriate supports as opposed to institutions or nursing homes is known as aging in place. Benefits of maintaining home residence include reduced cost, preservation of social connections, increased personal independence, and familiarity with surroundings (Clarke et al., 2021). However, aging in place may be complex and challenging depending on the situation, and may be a source of stress and/or discussion between older clients and/or family members and psychologists. Certain life changes that can be related to aging such as loss of income or widowhood may make it difficult to have a supportive environment to maintain aging in place (Clarke et al., 2021; Fuller-Thomson et al., 2009). Older disabled adults often lack qualified providers and adequate community services (Wacker & Roberts, 2008), partially because disability may be erroneously conceived as an inevitable aspect of aging, thus not requiring intervention. The reader is referred to the APA *Guidelines for Psychological Practice with Older Adults* (Guideline 2, 2014) for other common stereotypes about aging.

In addition to positivity, there are several protective factors, including economic resources and social and behavioral actions, that correlate with positive aging with disabilities, disability management self-efficacy, and overall health (Alschuler et al., 2018; Amtmann et al., 2019; Dreer & Cox, 2019; Freedman et al., 2014; Office of Disease Prevention and Health Promotion. 2021; Jeste et al., 2013; Mather et al., 2015; Terrill, 2016; Weintraub & Ashley, 2010). Psychologists may play a key role in facilitating the development and maintenance of several of these. Examples include:

- addressing quality and type of social supports, evolving personal care assistant needs, and participation in social roles;
- providing education and reinforcing reliance on acquired knowledge;
- working with clients to establish goals and routines, including healthy nutritional and sleep patterns;
- matching cognitive demands to cognitive abilities;
- facilitating pain and fatigue management;
- building resilience; and

- encouraging physical activity.

An objective of the Healthy People 2030 (Office of Disease Prevention and Health Promotion, 2021) is to increase the proportion of older adults with disabilities who get physical activity because those who are not physically active are more prone to falls and cognitive decline, and physical activity corresponds with psychological well-being (Avis et al., 2021). Along with other team members, such as the occupational therapist, the psychologist may discuss the availability, costs, and benefits of using applicable assistive devices and technology, and making environmental modifications to maintain activity and independence. As Bombadier et al. (2010) point out, "the modal response to disability and aging is not depression but resilience" (p. 292). Psychologists with appropriate training may help those getting older with a disability incorporate activities into their routine that support continued resilience and adjustment.

GUIDELINE 9

Psychologists strive to recognize the strengths and challenges of families of individuals with disabilities.

Families may have varied reactions when learning their loved one has a disability, from feeling overwhelmed and anxious to feeling validated and relieved because their diagnostic questions have been answered, such as autism spectrum conditions (Robinson, et al., 2015; Rotondi et al., 2007). Family members also typically take on additional roles as part of the social network of people with disabilities. Almost 18 million people in the U.S. serve as caregivers for older adults with health or functional limitations (Schulz, et al., 2016). Family members commonly become caregivers or personal care assistants, addressing self-care needs; providing transportation; keeping medical and therapy appointments that often result in lost work hours; researching a family member's disability; advocating for health, school, vocational, and community services; serving as surrogate decision makers; and often bearing extra financial burdens (Elliott, Berry, & Grant, 2009; Kuo et al., 2011; Rivera, 2012; Schulz et al., 2016). They are sometimes thrust into a medical world that can be fragmented, overwhelming to navigate, and costly. Along with these roles and stressors, family members may feel frustrated, angry, confused, exhausted, and sad (Brickell, et al., 2020; Robinson et al., 2015; Rolland & Walsh, 2006; Schulz, et al., 2016). Sometimes their support may be viewed as unhelpful (e.g., minimizing injury, giving unwanted advice) (Fong et al., 2006), because many families feel unprepared, inadequately trained, and lack formal support for these roles. Yet positive support, in general, has been shown to contribute to reduced morbidity and mortality and improved resilience of individuals with disabilities, and caregiver and personal care assistant contributions may be vital to the well-being of individuals with disabilities (Chronister et al., 2009; Lustig, 2002; Reblin & Uchino, 2008; Robinson et al., 2015; Rotondi et al., 2007; Wongvatunyu & Porter, 2008). Recognizing these important contributions, the U.S. Congress in 2018 passed the RAISE (Recognize, Assist, Include, Support and Engage) Family Caregivers Act for the U.S. Department of Health and Human Service (HHS) to develop a strategy to better support unpaid caregivers, including care assistants for individuals with disabilities.

Family functioning, caregiving demands, and everyday (non-clinical) behavioral challenges in individuals with specific developmental and acquired disabilities have been shown to directly affect overall familial caregiver stress and health (Brickell et al., 2020; Lach et al., 2009; Rania et al., 2005; Robinson et al., 2015; Rotondi et al., 2007; Pendergrass et al., 2017; Schulz et al., 2016). In some cases, these family dynamics and stressors may rise to the level of disability-related abuse (discussed in Guideline 10). Self-esteem and time spent providing care have been shown to be inversely linked to well-being (Cantwell, Muldoon, & Gallagher, 2015; Hart et al., 2007). Furthermore, families of individuals with disabilities may cope with stigma by association, negative perceptions, and misassumptions and blame by others (Andrews, 2020; Kinnear et al., 2016; Lalvani, 2015; Neely-Barnes et al., 2011; Robinson et al., 2015; van der Sanden et al., 2013; Werner & Shulman, 2015). In one study, teachers believed that the lives of parents of children with disabilities were characterized by long-term grief and loss and defined by their child's disability, beliefs the parents did not share. Although sometimes parents internalize public perceptions (Kinnear et al., 2016), they are more likely to frame their experiences in a sociocultural context creating the need for strong advocacy (working against dominant cultural stereotypes) (Lalvani, 2015). In fact, Scorgie et al. (2004) theorize that positive transformation may result from intentional choices to transcend stereotypical images and meanings parents (and other caregivers) confront across time.

Despite the challenges families face, they also experience many positive changes as the result of having a family member with a disability, especially as they learn more about disability over time and adjust to new roles. Examples of such positive changes include strengthening family bonds, achieving new social networks, gaining confidence, increasing sensitivity to disenfranchised groups, and gaining greater appreciation for life (National Council on Disability, 2012; Robinson et al., 2015; Schulz et al., 2016; Scorgie et al., 2004; Wongvatunyu & Porter, 2008). The limited research on siblings of individuals with disabilities is somewhat mixed, suggesting that most siblings adapt well, although some are at risk for emotional and behavioral issues, which are likely mediated by family function and/or financial status (Giallo et al., 2012; Giallo & Gavidia-Payne, 2006; Marquis, Hayes, & McGrail, 2019; Neely-Barnes & Graff, 2011).

Generally, family members experience quality family life by realigning their priorities, balancing the needs of all family members, accessing resources, and deciding what is important in life (Goodley & Tregaskis, 2006; Rosenthal et al., 2009; Wilgosh, Nota, Scorgie, & Soresi, 2004; Wilgosh & Scorgie, 2006). For many families, disability may be a meaningful growth experience. Family members recognize their own personal strengths, such as patience, humor, and problem-solving skills, while experiencing greater empathy for and understanding of others (Goodley & Tregaskis, 2006; Scorgie, Wilgosh, & Sobsey, 2004). In addition, stress management and a sense of mastery regarding caregiving have been shown to positively influence psychological health (Rania et al., 2005)

Like everyone else, individuals with disabilities get married and have families. These changes create new opportunities and challenges, some of which may limit full participation in family life if not addressed. Ableist assumptions that desexualize people with disabilities contribute to the myth that disabled individuals do not have intimate relationships or do not marry. Evidence suggests people with disabilities marry at a lower rate, and for those between the ages of 30 and 59, marry later than those without disabilities (Clarke & McKay, 2014; Tumin, 2016). This trend may in part be because of more limited social opportunities to initiate intimate relationships and lack of sex education (Andrews, 2020; Santinele Martino, 2017). LGBTQ individuals with disabilities have fewer role models and fewer comfortable spaces to explore their sexuality (Santinele Martino, 2017). One small study also suggests that internalized stigma as well as a partner's respect for disability-related concerns play a role in relationship adjustment for sexual minorities with disabilities (Dispenza et al., 2021).

Even though some adults with disabilities face competency and guardianship issues, the vast majority of adults with disabilities have the rights and capacity to engage in sexual intimacy, partnership, and marriage and family (O'Toole & Doe, 2002; Shuttleworth & Mona, 2020). The National Center for Parents with Disabilities indicates there are over 4 million parents with disabilities with children under the age of 18. Parental training has been shown to have positive effects for parents with insufficient parenting skills (Andrews & Ayers, 2016; National Council on Disability, 2012). Disability is not an independent predictor of problems children struggle with (National Council on Disability, 2012). Nevertheless, parents with disabilities fight against institutional policies and social and research biases and assumptions, including among health professionals, that they are unfit to parent and will have poorly adjusted children (Andrews & Ayers, 2016; Bergeron et al., 2012; Frederick, 2015; National Council on Disability, 2012; Olkin et al., 2006). Disabled parents also face barriers accessing healthcare before, during, and after pregnancy (Frederick, 2015; Powell, Andrews, & Ayers, 2021). Parents with disabilities may also fear that any misbehavior by their children will erroneously be attributed to their disability as confirmation of poor parenting, and that they risk removal of the child from the home, which is not unfounded (Andrews, 2020; National Council on Disability, 2012). Titles II and III of the ADA are designed to protect the rights of individuals with disabilities who become parents and those who want to adopt through public or private agencies (National Council on Disability, 2015). Despite these laws, disability is used to unfairly exclude prospective adoptive parents, and children are removed from parents with disabilities at a higher rate than for non-disabled parents simply based on disability status without evidence of harm (National Council on Disability, 2015). Parents with disabilities are further disadvantaged by inaccessible places, inadequate services, and lack of insurance coverage for adaptive equipment, limiting full participation and necessitating creative problem solving on their part (Andrews & Ayers, 2016; Bergeron et al., 2012).

Disability may not be a salient factor when the family of a disabled individual seeks psychological services. However, psychologists are encouraged, when appropriate, to include families in assessments and interventions to help them manage stress, develop resilience, enhance quality of family life, and resolve feelings or family conflicts about disability (Bailey et al., 2006; Ehrmann & Herbert, 2005; Power & Dell Orto, 2004; Rivera, 2012; Rosenthal et al., 2009; Scorgie et al., 2004; Turnbull & Turnbull, 2001; Wilgosh et al., 2004). Caregivers not exhibiting resilience or positive social support may experience initial psychological distress, indicating needed psychological intervention (Elliott et al., 2014). The resiliency model of family stress, adjustment, and adaptation (Kosciulek, McCubbin, & McCubbin, 1993; Lustig, 2002; Rosenthal et al., 2009) utilizes a systems approach and is particularly useful in describing and conceptualizing family interventions. Family reactions to disability may not necessarily reflect mourning and loss, but instead may be related to uncertainty about the present and future.

Disability may lead to a redefinition of family roles and expectations. Health care professionals may directly affect family mental health based on a constructive presentation of the disability and by listening closely to the family's initial concerns that, in turn, will help reduce the common family experience of feeling unsupported or overwhelmed by the health care system. The psychologist's provision of information and resources will also change over time as families adapt to their personal and environmental circumstances and engage in multiple systems (e.g., family dynamic, academic/vocational, interpersonal relationships). Psychologists strive to recognize the unique needs of each family based on that family's sociocultural background to help reduce barriers and facilitate family adjustment.

Facilitating positive problem-solving skills and developing resilience, social support, and self-esteem may strengthen family functioning (Elliott et al., 2014; Kurylo, Elliott, & Shewchuk, 2001). Teaching family members self-advocacy skills may also empower them to acquire resources or create change within stigmatizing or inaccessible environments (for example, a school psychologist helping parents of a child with a specific learning challenges advocate for educational needs).

GUIDELINE 10

Psychologists strive to recognize that people with disabilities are at increased risk for abuse and appropriately address abuse-related situations.

There is no single comprehensive source for data about abuse and violence against people with disabilities, and research criteria and quality vary significantly (Bowen & Swift, 2019; Hughes, Bellis, Jones, et al., 2012; Jones, Bellis, Hughes, et al., 2012). However, data across studies indicate that abuse is perpetrated against people with disabilities at significantly higher rates than those without disabilities (Alriksson-Schmidt, Armour, & Thibadeau, 2010; Emerson & Roulstone, 2014; Fisher et al., 2016; Harrell, 2017; Hughes et al., 2012; Jones et al., 2012). This abuse includes sexual, physical, emotional, financial, and disability-specific abuse (Curry et al., 2011; Emerson & Roulstone, 2014; Saxton et al., 2006). Abuse may be the initial cause of a disability or may exacerbate existing disabilities. Examples of disability abuse include withholding items fulfilling basic needs (food, hygiene items); withholding or administering too much medication; withholding or dismantling adaptive equipment (e.g., wheelchairs; communication devices); preventing health care appointments; and confining someone involuntarily and/or leaving them in a dangerous situation (Chang et al., 2003; Hughes, 2005; Lightfoot & Williams, 2009; Nosek, Foley, Hughes, & Howland, 2001; Oschwald et al., 2009; Plummer & Findley, 2012; Powers et al., 2008; Saxton et al., 2001). Lund (2020) reviews unique risk factors for and types of disability-related abuse heightened by the COVID-19 pandemic. Psychologists are also encouraged to review Taylor's work (2018), who provides a history of litigation against governmental and other agencies who failed to address appropriate emergency/disaster evacuation, shelter, and communication plans for individuals with disabilities. He cites several resources on emergency planning that can help avoid placing individuals with disabilities at risk of harm.

The latest five-year aggregated data from the U.S. Department of Justice (Harrell, 2017) for violent crime (rape, sexual assault, robbery, aggravated assault, and simple assault) show the following:

- People with disabilities experience violence perpetrated against them at 2.5 times the rate of people without disabilities (32.3 per 1000 compared with 12.7 per 1000); rape and sexual assault are over 3 times the rate (2.1 versus 0.6 per 1000).
- 12- to 15-year-olds with disabilities have the highest rate of violence perpetrated against them (144.1 per 1000, compared with 38.8 per 1000 people for those without disabilities).
- People with disabilities of two or more races have the highest rate of violence perpetrated against them (128.5 per 1000 for multiracial people with disabilities compared with 33.6 for multiracial people without disabilities).
- People with cognitive disabilities have the highest rate of violence perpetrated against them (57.9 per 1000) compared with those with other types of disabilities, which ranged from 15.7 to 30.8 per 1000 people.
- People with multiple disabilities are more likely than those with a single disability to experience violence perpetrated against them (35.2 compared with 29.6 per 1000), and 65% of rapes and sexual assaults against persons with disabilities occur against this group.
- Both men (31.8 per 1000) and women (32.8 per 1000) with disabilities have higher rates of violence perpetrated against them than do people without disabilities (14.1 and 11.4, respectively).

These statistics estimate abuse for people with disabilities who are 12 years of age or older living in non-institutionalized households. The statistics are striking, and yet still underestimate abuse. Morgan and Truman (2020) estimate that less than half of violent victimization in general is reported. In a large convenience national survey, only 37% of disabled individuals who experienced abuse reported that abuse (Baladerian, Coleman, & Stream, 2013). The statistics reported above exclude the homeless and residents of institutions, 95% of whom have disabilities (Harrell, 2017). Over 1.49 million people with disabilities and chronic diseases reside in nursing homes (CDC National Nursing Home Survey, 2004). Many of these individuals are elderly and the extent of abuse by guardians and caregivers among the elderly is not well known (Yon et al., 2019; National Center on Elder Abuse, ncea.acl.gov). However, Storey (2020) provides a startling statistic that older adults who experience abuse have a mortality rate three times higher than those who do not experience abuse. Elder abuse, regardless of disability, is a major public health crisis that has not received enough attention. Storey (2020) and Castle, Ferguson-Rome, and Teresi (2015) have summarized the limited research in this area The majority of individuals with disabilities who suffer abuse report that they have never been asked by a health care provider about possible abuse (Oschwald et al., 2009; Powers, et al., 2008; Powers et al., 2002). Examples of possible provider barriers include lack of accessible services and fears about police involvement, mandatory reporting, and a general sense of powerlessness (Oschwald et al., 2009).

Overall, research to date supports the premise that individuals with disabilities commonly know their perpetrators, and that they are at risk to be abused by multiple types of perpetrators (e.g., personal care assistants, spouses). Yon et al. (2019) found that 64.2% of staff admitted abusing an older resident in an institutional setting and that cognitive impairment and disability along with being over 74 years of age and female were primary risk factors of those who were abused. Both men and women who use personal assistance services, whether in institutions or community dwellings, experience a high incidence of neglect, verbal and/or physical abuse, and financial exploitation at the hands of their assistants (Oktay & Tompkins, 2004; Powers et al., 2008; Schulz et al., 2016). In one small retrospective study, parents were reported most frequently as the perpetrator of childhood abuse (defined as denial of activity of daily living care, permission, assistance, or denial of equipment before age 18; Lund et al., 2021). The Department of Justice statistics for noninstitutionalized individuals also provide evidence to support that abusers and those they abuse know each other.

- Forty percent of violence perpetrated against people with disabilities (compared with 32% of those without disabilities) is committed by someone known to them.
- Relatives (parents, children, etc.) account for a higher percentage of violent perpetration against disabled individuals compared with non-disabled individuals (10% versus 6%).
- Intimate partners account for 15% of violence perpetrated against people with disabilities; this does not significantly differ for those without disabilities (13%).

Other reports suggest intimate partner violence against women with disabilities is higher (Copel, 2006; Curry et al., 2011; Mitra, Mouradian, Fox, & Pratt, 2016). Unlike women with disabilities, men with disabilities report sexual violence is more likely to occur by a friend than an intimate partner (Mitra et al., 2016). Being able to recognize the risk factors in both the care assistant and recipient may help psychologists proactively manage abuse risk.

Personal care assistants and intimate partner abusers are likely to experience financial strain, caregiver stress or burnout without adequate coping skills, substance abuse, relationship conflict, and may hold a distorted sense of power and ableist views (Copel, 2006; Curry et al., 2011; Plummer & Findley, 2012; Powers et al., 2008; Storey, 2020). People with disabilities are at risk for abuse or continuing abuse because they are perceived to be powerless, easily exploited, and may be physically dependent or less mobile, socially isolated, overwhelmed by stress without adequate or appropriate coping skills or resources, self-blaming for abuse, emotionally depressed, have difficulty with behavioral regulation, fear retribution or loss of independence, have poor body image, and/or are sexually naïve. Research suggests individuals with intellectual disabilities are more vulnerable to abuse based on limited sexual knowledge and beliefs that others control their sexual experiences (Fisher et al., 2016). They are also at increased risk for becoming a perpetrator because of confused social cues (Bowen & Swift, 2019; Curtiss & Kammes, 2019). Additionally, disabled individuals may lack other options for personal assistance, emergency back-up services, or transportation (Powers et al., 2008; Saxton et al., 2006). Perpetrators, who often engage in repeated abuse, also have less risk of being reported or discovered, and people with disabilities are less likely to be believed or feel nothing will be done if they report abuse or neglect (Copel, 2006; Curry et al., 2011; Curtiss & Kammes; Fisher et al., 2016; Nosek et al., 2001; Plummer & Findley, 2012; Saxton et al., 2006). One reason men with disabilities give for not reporting is that people believe the misassumption that men cannot be abused (Powers et al., 2008; Saxton, et al., 2006). Men are also more likely than women to assume nothing can be done or to blame themselves (Saxton et al., 2006). Research suggests that approximately 21% of people with disabilities who are abused believe the police will not help (Harrell, 2017). Risk of disclosure can also create fear of increased violence, retribution, loss of child custody, or loss of independence (Baladerian et al., 2013; Copel, 2006; Curry et al., 2011; Lund, 2020; Oschwald et al., 2009; Powers et al., 2008). In at least one study, women indicated that they would not report abuse unless they were sure that abuse is what happened (Curry et al., 2011). In other studies, women and men also report being unclear about what constitutes abuse (Lightfoot & Williams, 2009; Saxton et al., 2006). Both studies suggest a need for psychologists to provide education in recognizing abuse and addressing marginalization/oppression that might contribute to this potential ambiguity.

Abuse may affect physical, psychological, economic, and social health. Examples include poorly maintained personal health and physical injury, low self-esteem and self-shaming, depression, anxiety, suicidal ideation, cognitive decline, separation from others, lack of trust and sense of safety, and difficulty keeping employment with resulting financial strain (Curry et al. 2011; Hughes et al., 2010; Kendall-Tackett et al., 2005; Mitchell & Buchele-Ash, 2000; Olkin et al., 2006; Plummer & Findley, 2012; Storey, 2020). Children may also show changes in behavior, such as bed wetting, irritability, and sleep disruption (Martinello, 2014). Sexual abuse also carries an increased risk of pregnancy, gynecological issues, and sexually transmitted disease.

Given that most people do not disclose abuse and the majority of individuals with disabilities report that a health care provider never asked about the abuse, inquiring about abuse is important to consider as a standard component of psychological assessment. Some researchers indicate that use of a screening tool that includes disability-specific questions, such as the AAS-D (Abuse Assessment Screen-Disability; McFarlane et al., 2001), increases disclosure compared with abuse screening tools without disability-specific questions or professional judgment alone (Oschwald et al., 2009; Plummer & Findley, 2012; Storey, 2020). Given disclosure might not be forthcoming, a psychologist's use of a screening tool complemented with the assessment of risk factors and recognition of the effects of abuse can help facilitate identification of abuse, understanding that trust and safety are paramount to the development of the therapeutic relationship.

Mikton, Maguire, and Shakespeare (2014) and Lund (2011) caution that research validating the effects of interventions is limited. However, based on risk factors and effects of abuse identified in the literature, several recommendations listed below apply to psychological practice with individuals with disabilities (Alriksson-Schmidt, Armour, & Thibadeau, 2010; Baladerian et al., 2013; Bowen & Swift, 2019; Copel, 2006; Hickson et al., 2015; Hughes et al., 2010; Martinello, 2014; Mitra et al., 2016; Plummer and Findley, 2012; Powers, Curry, & Oschwald, 2002; Nosek, Hughes, & Taylor, 2004).

1. Know the signs, symptoms, and dynamics of disability-related violence, including the unique areas of vulnerability noted above.
2. Screen for abuse and neglect, and intervene appropriately (see Oschwald et al., 2009 and Robinson-Whelen et al., 2010, for use of a computer-assisted tool for disclosure).
3. Document the history of abuse and neglect.
4. Discuss safety planning with clients, such as having a safe retreat, back-up personal care assistance, and social supports; also include assessment of disaster/emergency preparedness.
5. Maintain current contact information for accessible local domestic violence/sexual assault programs and disability service providers (e.g., Centers for Independent Living).
6. Learn state mandatory reporting requirements for violence against people with disabilities including children, older adults, and dependent adults, and when appropriate involve the person experiencing the abuse throughout the reporting process.
7. Be aware of potential long-term consequences of reporting, including possible deterioration in quality of care and need for accessible domestic violence shelters.

In addition to the actions listed above, psychologists, through individual, couples, and group therapy, may play a key role in reducing potential risk factors by identifying and addressing the needs of the individual and their partners or service providers. Several activities are recommended below, consolidated from the literature cited throughout this section. It is important to keep in mind that these activities will be shaped based on the cultural framework of the client, given their experiences are uniquely affected by their sociocultural circumstances (for example, refer to Lightfoot and Williams, 2009).

1. Provide education on the definitions/types of abuse, using multiple examples, and delineate the boundaries of care (for example, appropriate and inappropriate touch when addressing hygiene).
2. Discuss consensual relationships and healthy sexual development, especially as these are impacted by disability care needs and type of setting.
3. Facilitate education of the partner or caregiver on potential effects of disability on activities of daily living.
4. Help the client identify the abuser's use of power/control in restricting fulfillment of disability-specific needs, if applicable, as well as other aspects of the relationship.
5. Help empower the client through skills development in interpersonal communication and conflict resolution, relationship building, including supervision of the care assistant, active rather than avoidant problem solving, decision-making, stress management, and self-care.
6. Disrupt beliefs that the disabled person deserves to be abused by facilitating development of self-worth and affirmation of value as a person.
7. Discuss potential means to expand social networks to reduce risk of social isolation and create potential safety nets.
8. Teach self-advocacy skills related to interacting with agencies.
9. Evaluate potential readiness of the client to leave the relationship with the person who is abusive. (The Safety Self-Efficacy Scale piloted by Robinson-Whelen et al., 2010, may be useful in helping the client evaluate readiness and confidence in acquiring safety.)
10. Adapt safety plans if the individual has difficulty accessing community resources due to inaccessibility or other related factors; delineate how to get help when needed.
11. Assess need for assistive devices to enhance level of independence and communication.
12. Review signs of abuse and reporting information with a supportive family member (refer to Baladerian, 2013, for practical tips for parents and family members on responding to abuse).
13. Ensure staff are trained to recognize and report abuse perpetrated against individuals with disabilities.
14. Work with the school/other partners to ensure accessible materials are available related to disability and sexuality and that personnel are knowledgeable about the pervasiveness of abuse against people with disabilities and potential warning signs. In one study, domestic violence shelter personnel reported having educational needs related to disability (Chang et al., 2003), but also having success networking with other agencies to serve individuals with disabilities. Psychologists may contribute to improved services for disabled individuals through community networking.

GUIDELINE 11

Psychologists strive to learn about the opportunities and challenges presented by assistive technology.

Assistive technology (AT) is defined as devices that are used to increase, maintain, or improve functional capabilities of individuals with disabilities or services that help individuals with disabilities select such devices (Assistive Technology Act, Public Law 108-364, 2004). AT may help individuals with disabilities learn, compete in the work environment, achieve independence, and/or improve their quality of life (NIDILRR, 2019). People with disabilities have widely varying needs; therefore, AT may serve different purposes, examples of which are outlined below.

1. Aids for daily living include self-care aids, such as a fork with built-up handle, bath lift/seat, and button/shoe aids.
2. Augmentative and Alternative Communication (AAC) includes electronic and nonelectronic devices for expressive and receptive communication, such as communication book/boards, eye-controlled communicators, speech synthesizers, and text-to-voice devices.
3. Computer access aids enable people with disabilities to use a computer, including input and output devices (e.g., cursor control accessories), alternate access aids (e.g., head sticks), modified keyboards, switches, and special software (e.g., computer access interfaces/instruction).
4. Environmental control systems are mainly electronic systems that enable people with mobility limitations to control various appliances, electronics, and security systems, such as a Google Home and smart home switches that can be activated by pressure or breath.
5. Home/workplace modifications are structural adaptations or fabrications in the home, worksite, or other areas, such as ramps, elevators, stair lifts, and bathroom modifications, for increasing accessibility.
6. Prosthetics and orthotics provide a replacement, substitution, or augmentation of missing or injured areas of the body, such as knee prosthetics or ankle braces.
7. Seating and positioning are accommodations to a wheelchair or other seating system, such as cushion covers and trunk/pelvic supports, to increase stability, maintain posture, and reduce pressure on the skin.
8. Aids for vision impairment and for hearing access, such as magnifiers, Braille, large-prints, and telecommunications devices for the Deaf, are to help facilitate interpersonal communication and/or environmental engagement.
9. Wheelchairs/mobility aids, such as manual and electric wheelchairs, walkers, and mobility scooters, are used to maximize level of transportation independence.
10. Vehicle modifications, such as adaptive

driving aids, hand controls, modified vans, and acoustic cueing systems, are for personal transportation.

11. Service animals are trained to assist individuals with disabilities with specific tasks, such as item retrieval, navigation in space, and health status alerts (e.g., low blood glucose), to maintain or enhance independence.
12. Recreational assistance are methods and tools, such as three-wheel handcycles, homemade bowling ramps, and write paint brush holders, to enable people with disabilities to enjoy recreational activities.
13. Virtual reality programs and artificial intelligence (e.g., robots), while technically different from AT because of programming, are being used with the same intent as AT, which is to improve function and independence, such as virtual reality programs to facilitate improved mobility and robots to help individuals with autism spectrum conditions improve social skills (Howard, Chen, & Park, 2018; Pennisi et al., 2016).

Although psychologists or other health professionals, such as occupational and physical therapists, introduce, evaluate, and facilitate selection of AT, a client's involvement is key to successful, sustained use. Understanding a client's expectations and to what extent specific devices or aids fit the client's lifestyle, preferences, and values are important considerations in selecting specific AT (Brodwin, Star, & Cardoso, 2004; Falvo & Holland, 2019). A psychologist may work with the client to determine whether selected AT is effective, reliable, relatively easy, and comfortable to use (Brodwin et al., 2004).

It is important to remember that all technologies have advantages and disadvantages. Although technology offers people with disabilities opportunities, AT also imposes client responsibilities. Examples include researching new technologies and assistive devices, learning to use new technology (Pell, Gillies, & Carss, 1999), and funding and maintaining equipment (National Task Force on Technology and Disability Report, 2004). Matching the person with the appropriate technology requires assessing need, milieu, personality, and technology (e.g., Scherer, 2002, 2004). Not all people with disabilities and their families value, are interested in, or are enthusiastic about AT. People may be frustrated when there are high initial or ongoing costs, a lack of customization for the individual's unique needs, incompatibility for use in certain environments or additional barriers due to a device's shape, size, or weight (Howard et al., 2020). While AT may increase a person's independence, it may also pose a social barrier that makes the user feel too different or deficient (Lupton & Seymour, 2000). Even when one person eagerly uses technology to attain objectives or enhance overall sense of well-being, another may find it overwhelming. Appreciating how AT may affect a user's self-image, self-efficacy, coping, and adaptation skills is important for the psychologist when providing AT recommendations (Connor, Kuo, & Leahy, 2018).

Technologies, computer devices, and software programs (e.g., iPads and related apps) are rapidly being developed. For more information about different accessibility apps for people with different type of disabilities, readers can refer to https://iaccessibility.com/. Keeping up with technology's rapid advances to make appropriate recommendations may be difficult. Clients may also find it challenging to learn new technology and stay current with updates. Hence, psychologists strive to maintain awareness of the client's challenges and frustrations with new technology and, to avoid abandonment of the tool, help support their use of AT in daily activities. Psychologists may check their state AT center or refer their clients to appropriate local AT service providers to explore manageable options.

Various professional disciplines are represented in the memberships and activities of the AT field, including the Rehabilitation Engineering and Assistive Technology Society of North America (RESNA) and the Association for the Advancement of Assistive Technology in Europe (AAATE). Many APA divisions are also involved and engaged in the development and application of AT for people with disabilities.

Finally, universal design applies to AT, particularly in how AT is designed and accessed. The Disability Act 2005 defines universal design, or UD, as "a) the design and composition of an environment so that it may be accessed, understood, and used to the greatest possible extent, in the most independent and natural manner possible, in the widest possible range of situations, and without the need for adaptation, modification, assistive devices or specialized solutions, by any persons of any age or size or having any particular physical, sensory, mental health or intellectual ability or disability; and b) means, in relation to electronic systems, any electronics-based process of creating products, services or systems so that they may be used by any person" (Authority & Design, 2015). The seven principles of universal design are equitable use; flexibility in use; simple and intuitive use; perceptible information; tolerance for error; low physical effort; and size and space for approach and use (Null, 2013). The purpose of the seven principles is to guide the design of environments, products, and communications. According to the Center for Universal Design at North Carolina State University (1997), the principles "may be applied to evaluate existing designs, guide the design process and educate both designers and consumers about the characteristics of more usable products and environments."

TESTING AND ASSESSMENT

GUIDELINE 12

Psychologists strive to consider the interactions among disability and other individual and contextual dimensions in determining the breadth of assessment.

Psychological assessment has broad implications, including assisting with diagnosis and prognosis; school and vocational planning, re-entry, and monitoring; evaluating the effects of interventions and related services; and resolving disability claims and legal matters, including competency determinations. Therefore, ensuring that tests and broader assessments are reliable and valid for their intended use are significant psychologist responsibilities. Conducting assessments with people with disabilities presents unique considerations to ensure reliable, valid outcomes. In addition to ensuring the psychologist's competence, considerations include, but are not limited to, (1) the effects of the disability and related factors on test selection and provision of appropriate accommodations; (2) the test environment and corresponding administration; and (3) the interpretation of the client's performance based on integration of data.

Several professional associations have developed documents to provide guidance around testing and assessment practices, such as *The Professional Standards of the National Association of School Psychologists (2020)*, *Code of Fair Testing Practices in Education* (apa.org/science/fairtestcode.html), *Rights and Responsibilities of Test Takers: Guidelines and Expectations (APA Joint Committee on Testing Practices, 2020)*, and the *Ethical Principles of Psychologists and Code of Conduct* (2017). For psychologists, the *Standards for Educational and Psychological Testing* (*Standards*) (American Educational Research Association, 2014) is the document that is the most specific in describing appropriate uses of testing and assessment. The *Standards* make the distinction that, in applied settings, psychologists strive not just to *test* individuals, but to *assess* individuals. The *Standards* refer to tests as evaluative devices and to assessment as a broader term, involving the integration of test data with other information, such as educational, social, vocational, and health history. Psychological assessment involves answering questions from which to offer diagnostic impressions, make recommendations, and/or implement appropriate services. As part of the assessment with people with disabilities, traditional testing commonly measures cognition (e.g., intelligence, attention, memory, executive function), visual-perceptual and motoric skills, behavior, emotional status, and personality. (Beyond traditional batteries, one searchable database for rehabilitation measures is sralab.org/rehabilitation-measures). In addition to test results, assessments integrate information from a variety of sources, including personal data (e.g., educational, vocational, health, social, and psychological background), results from inventories, client and collateral interviews (e.g., family, school, health care providers, employers), and/or behavioral observation (*Standards*, 2014).

Conducting assessments, rather than relying solely on testing, provides more comprehensive data to fully support individuals with disabilities, in part because these recognize the importance of context and disability-related fluctuations to performance and outcomes. When conducting psychological assessments, psychologists strive to consider the interaction between the individual with a disability and the environment. Andrews (2020, p.128) indicates that the dimensions of this interaction include "how the individual functions over time, in varied situations, and in response to changing environmental demands" (refer also to Colella & Bruyère, 2011; Radnitz, Bockian, & Moran, 2000; Reed et al., 2005; Simeonsson & Rosenthal, 2001). The person-environment context has also been highlighted in capacity evaluation discussions (Moye, Armesto, & Karel, 2005).

Considering the central role of different contexts in assessing a person's psychological functioning is consistent with the ICF integrative model of disability (WHO, 2001, 2020). Understanding co-workers' attitudes, family members' responses, classroom design elements, or the effects of school or work accommodations may be important dynamics in assessing individuals with disabilities, depending upon the questions of interest (Andrews, 2020; Bruyère & Peterson, 2005; Bruyère et al., 2005; Chan et al., 2009; Peterson, 2005; Reed et al., 2005).

The experience of someone with a disability in specific contexts is also affected by numerous personal factors that lend themselves to assessment. Beyond traditional neuropsychological constructs, examples include overall functional status; coping, adaptation, and social support; and positive psychology concepts, such as meaning, positive growth, positive emotions, and optimism and resilience (Dunn, 2019; Ehde, 2010). Assessing personality factors may also help the psychologist understand the meaning of disability in the client's life, coping in response to stress, and experiencing intervention. When using established methods and instruments as part of assessment, whether it be in neuropsychology and rehabilitation, geropsychology, clinical, counseling, forensic, educational psychology or other specialties, the psychologist is encouraged to reference both client strengths and needs as well as interpret test performance in relation to function. In all specialty areas, it is recommended that the psychologist assess various qualities in a *person* with a disability in context, rather than the *disability* alone.

GUIDELINE 13

Psychologists strive to ensure the validity of assessments by considering disability-related factors when selecting assessment tools and evaluating test norms.

People present with a range of disabilities that may affect the psychologist's selection of tests included as part of a psychological assessment. As for any population being assessed, the psychologist strives to determine whether the assessment tools have been normed with appropriate samples. Who was included in the standardization groups? The relevant validation data should support each measure's use with people who have specific disabilities, just as they support its use for broader populations. Because disability status may significantly alter the meaning of test scores, test developers should strive to either include individuals with relevant disabilities in their norming groups or develop separate norms. For example, some depression scales have been normed without including individuals with specific disabilities. Given these scales measure perceived health, pain, and fatigue, the results might be misinterpreted to indicate a diagnosis of depression when none exists. Conversely, the psychologist might underestimate the effects of depression because items are erroneously attributed only to presenting health issues represented by the same items as depressive symptoms. Hughes et al. (2005) found that women with disabilities had significantly higher levels of depression as well as secondary health conditions (measured independently). They also found that rates of depression varied significantly across people with different disabilities, illustrating the importance of developing norms by disability subgroup.

Unfortunately, studies to develop and establish test norms have commonly excluded disabled people (e.g., Deaf or Blind people) because the methods used are not accessible (Bruce, Luckner, & Ferrell, 2017). Even when test norming includes some people with disabilities, generalizing from one type of disability group to another is not appropriate (Horin et al., 2012). The psychologist needs to determine whether either the test's general norms or any existing specialized norms are appropriate to use with individuals with disabilities based on the similarity of participants and constructs of interest. When standardized assessment instruments lack appropriate norms, the psychologist should attempt to find instruments that maximize collection of valid information and to consult test manuals and publishers for potentially applicable information (*Standards*, 2014). Psychologists should also strive to recognize threats to the validity of their assessment when the individual being assessed is not well represented in relevant normative samples. This becomes even more complicated when an individual with a disability is also part of another under-represented group. (For example, the reader is referred to the Council of National Psychological Associations for the Advancement of Ethnic Minority Interests for a review of testing fairness issues with people of color; https://apa.org/about/governance/bdcmte/ethnic-minority-interests.)

Psychologists are advised to avoid tests with documented biases or significant problems for use with individuals with disabilities. While it is best practice to use tests that are standardized with the disability reference groups of interest, few of these tests exist or match the access needs of individuals with different disabilities. Accordingly, the test battery selected may need to be changed. For example, administering an entire standardized test battery may not be appropriate for someone with a high-level spinal cord injury because of the motoric (e.g., fine motor coordination) and timed components involved. In this situation, it is recommended that psychologists explore the availability of motor-free assessment batteries for the constructs of interest. Similarly, Hill-Briggs et al. (2007) recommend that psychologists avoid cognitive tests that require extensive spoken language skills in the assessment of Deaf individuals whose language construction is not dependent on the structure of spoken English.

Psychologists are advised to remember that the results of assessment and diagnosis may potentially affect an individuals' future legal status. In *Atkins v. Virginia*, 536 U.S. 304, the U.S. Supreme Court ruled that executing people with intellectual disabilities violates the Eighth Amendment's ban on cruel and unusual punishment, but states define who has an intellectual disability. APA has discussed mitigating circumstances for culpability in crimes involving persons with intellectual disabilities. The diagnosis of an intellectual disability has significant implications in this type of legal case, and psychologists need to keep these implications in mind as they strive for valid assessment upon which to base diagnoses.

The psychologist will decide which tests available measure the areas of interest but also simultaneously provide a reasonable opportunity to obtain a reliable, valid outcome when considering disability status. Lombardi et al. (2018) provide a review of construct evidence for common instruments (e.g., depression, personality, ADHD scales) used in higher education with people with disabilities. Psychologists should strive to review previous records and history in making disability determinations and to use the most recent editions of assessment measures as well as determine the appropriate use of particular measures. In reviewing previous records, psychologists should strive to consider the validity of the results obtained through various methods, such as examination of the original protocol if available, which may be particularly important in the context of a forensic evaluation. Psychologists less familiar with psychological assessment with individuals with specific types of disabilities are encouraged to consult with colleagues who possess relevant expertise. Given the lack of available norms, appropriate test selection takes considerable acumen and knowledge of different disabilities and test construction to make informed choices and minimize construct-irrelevant variance (see Standards 9.1-9.3 and 9.7 in the *Standards*, 2014). Bersoff, DeMatteo, and Foster (2012) as well as the *Standards* aptly describe the importance of test user qualifications.

GUIDELINE 14

Psychologists strive to provide appropriate accommodations to individuals with disabilities to optimize meaningful participation in the assessment process.

Disability-related issues affecting test access (e.g., physical, cognitive, linguistic, etc.), and thus outcome, may necessitate taking advantage of the allowance for exceptions, such as different presentation modes or abbreviated testing, noted in the *Standards* (2014). Failure to provide appropriate test access may result in inaccurate diagnoses or therapeutic interventions that do not match the client's needs. Care must be taken to not diagnose a medical condition for what may be a cultural or disability-related difference that can be mitigated by providing appropriate accommodations. It is also important to remember that individuals with disabilities may or may not require accommodations for assessment.

To assess what accommodations the client may need to complete assessment batteries, having an open dialogue with the client and/or their parent/guardian about the client's needs can be very helpful. A psychologist might ask their client, "When you completed exams in school, did you ever receive any accommodations?" or "Have you ever received accommodations for a work assessment?" For example, a Blind or low-vision client might say they typically have test questions read aloud to them, provided in Braille, or audio recorded. Similarly, a job applicant with a learning disability might request time and a half to complete a written vocational test. However, not all clients will be aware of their eligibility and/or need for specific accommodations. Determining whether an accommodation is appropriate depends on both: (1) the presentation of the disability and associated factors and (2) the variables being assessed. Importantly, psychologists use their clinical judgment based on all available information to determine if an accommodation should be discussed with their client. Testing accommodations are discussed in detail below.

A testing accommodation is, in essence, a change in test format or presentation, test administration, or response procedures that does not alter the construct being measured, making scores comparable with the original test (*Standards*, 2014). Consider the following example: an individual wearing glasses can clearly see the items on the visually based test they are taking. Being assessed without their glasses might result in poor performance simply because the individual could not see the test used. Thus, a score falling in the impaired range would have nothing to do with the individual's competence on the tasks presented. Making accommodations helps the psychologist assess clients with varying levels of ability by removing access barriers that would likely affect the individual's results. An accommodated measure is expected to yield more valid results than the same measure without such accommodations. Still, validation research is always appropriate. Psychologists working with children may find Abedi and Ewers (2013) work quite helpful in considering accommodations. The researchers reviewed the evidence for use of a variety of accommodations for school-aged children based on whether each accommodation meets five conditions: effectively increases test accessibility, is valid, is sensitive to the student's background, is appropriate, and is feasible.

Accommodations are distinguished from modifications. Accommodations are testing changes that are not believed to fundamentally alter the construct being measured, whereas modifications are testing changes that may change the intended construct (Andrews, 2020). Similar to accommodations, the purpose of a modification is to improve accessibility while keeping intact as much of the original construct as possible (*Standards*, p, 190). The *Standards* present the example of a student with dyslexia (specific learning disorder in DSM-5) using a screen reader for a reading comprehension test involving decoding. When decoding is part of the construct, the screen reader (which reads passages aloud for the student) would be a modification because the student's scores would only reflect comprehension and not decoding. Therefore, the scores would not be comparable with those tested without a reader. On the other hand, a student with a visual disability using a large-print format for a reading test whose construct is comprehension may also need additional time to accommodate turning pages. Without the accommodation of extra time, which is unrelated to the construct being measured, assessing the student's reading ability would be incomplete, resulting in a lower, less valid score. Fortunately, for many educational tests, the general norms work adequately for people with disabilities receiving accommodations.

The 2014 *Standards* identified a variety of ways that tests might be adapted for administration to individuals with disabilities. Examples include (1) altering instructions or presentation format; (2) altering response format; (3) altering timing; (4) altering setting; (5) eliminating test items or section; and (6) using substitute tests or alternative assessments. Changing the presentation format is a common accommodation for many individuals with disabilities. A paper-and-pencil test may be alternatively administered in Braille, audiotape formats, or computerized. Permitting test takers with disabilities to use alternative response formats allows them to record their answers more accurately. Some test takers may also require assistance from an aide. An individual with an extreme movement challenge may have difficulty filling in bubbles on an answer sheet such that they are provided the accommodation to state the responses that are then filled in by someone else. When no other options are available, psychologists might develop an appropriate accommodation, but it would have to be clearly documented.

Altering testing time is often a valid accommodation, especially for academic achievement tests and when time is not a central construct. Changing the testing time frame for those with low stamina or attentional focus may be very helpful. Altering the setting is also a common accommodation, typically to make it physically accessible and/or to reduce distracting stimuli and noise. Partial use of a test typically occurs when the disability affects one's valid responding to specific components, such as motoric components of a standardized test battery. This would be the case for someone without functional use of hands (e.g., for some individuals with bilateral amputation, Parkinson's, or quadriplegia). Finally, using a replacement or alternative measure may be possible if it has comparable validity and is less influenced by the disability. Alternative assessment tools are sometimes used to assess academic achievement of individuals with intellectual disabilities who have alternate achievement standards (i.e., academic proficiency expectations) in the same subjects that other students take (Quenemoen & Thurlow, 2015; U.S. Department of Education, 2018; ncscpartners.org).

Psychologists strive to know about these processes when collecting school-related information and participating in assessment, IEP development, and other intervention planning.

If a disabled individual requires accommodations, psychologists are mandated to provide them under Section 504 of the Rehabilitation Act. They are not optional. Unfortunately, Horin et al. (2012) found in her study that only one-third of vocational rehabilitation professionals, mostly psychologists, indicated making any test adaptations in the past year. When adaptations were made, the most frequently occurring changes were giving an alternate test format and translating or interpreting tests. The psychologist's responsibility is to try to remove bias from assessments based on providing appropriate accommodations or modifications. To enhance decision-making, psychologists benefit from knowing whether a test publisher approves of certain accommodations for individuals with specific disabilities. Ideally, the accommodations should have been evaluated with such individuals by the test publisher and found to represent the construct underlying the test for members of the specific population (Standard 3.1, *Standards*, 2014). Significantly more research is needed to evaluate test administration accommodations and modifications.

When either modifications or adaptations are needed that affect the constructs being measured, the psychologist should document the exceptions and corresponding limits to interpretation in the report of findings so that other psychologists may clearly understand the effects of construct alterations. This practice is consistent with the *Standards* and the APA Ethics Code (Standard 9.06 Interpreting Assessment Results) and may also be of benefit if a different psychologist completes follow-up assessments. On the other hand, flagging scores simply because accommodations are made is not appropriate. *Flagging* is a controversial practice wherein an asterisk identifies scores earned by individuals taking an accommodated test. Typically, but not exclusively, flagging has been used in making academic admissions decisions. The ADA prohibits "flagging policies that impede individuals with disabilities from fairly competing for and pursuing educational and employment opportunities" (https://ada.gov/regs2014/testing_accommodations.html). Accommodations are provided to establish a fair assessment situation; therefore, accommodations that do not alter a construct should have no bearing on test interpretation. The reader is referred to Sireci (2005) for a discussion of flagging and the reasons testing agencies recommended discontinuing its practice.

GUIDELINE 15

Psychologists strive to validly assess individuals with disabilities by appropriately adapting test administration based on disability-related factors.

The experience of disability is typically not static. Suboptimal performance may occur if the test giver is not attuned to fluid factors affecting the experience of disability. Disability-specific factors that are irrelevant to the construct being assessed but affect the outcome result in a lack of fairness in the testing situation and affect the validity of the psychologist's interpretation of the individual's abilities and/or skills (*Standards*, 2014). It is the psychologist's ethical responsibility to take appropriate steps to ensure the intended constructs and not disability-related factors are being measured.

Common factors related to disability that can affect both the reliability and validity of assessment include physical strength, balance, and coordination; spasticity; energy level and stamina; timing of medication effects; processing and attentional speed; behavioral dysregulation; rate and clarity of communication; pain experienced; and needs related to bowel and bladder function. It is recommended that providers try to identify these issues based on records review and clinical interview before initiating assessment to anticipate potential adjustments needed during the test administration process, especially given these factors may vary based on environmental demands. For example, the examiner may need to spread testing across multiple sessions based on considerations of fatigue or cognitive overload. The psychologist needs to also be aware of potential comorbidities that may affect assessment, such as seizures, and individual characteristics, such as preferences for familiar people and predictable routines commonly seen in individuals with intellectual disabilities and autism spectrum conditions (Szarko, Brown, & Watkins, 2013; Thompson et al., 2018). Szarko et al. (2013) showed that rapport building could facilitate test taking with people with autism spectrum conditions. This work suggests that planned strategies before assessment to address disability-related issues may affect overall validity. Thompson et al. (2018) provide suggested accommodations by domain (e.g., behavioral, sensory, etc.) for individuals with intellectual disabilities. Being familiar with disability-related factors and possible accommodations will also help the psychologist proactively implement strategies that establish an appropriate testing environment, whether in person or virtual. The assessment environment and its accessibility include physical access as well as other aspects of access, such as communication as discussed in Guideline 5.

GUIDELINE 16

Psychologists strive to validly interpret assessment results based on consideration of co-occurring factors impacting the performance of individuals with disabilities.

Although many psychological tests have not included people with disabilities making both test selection and interpretation challenging, resources exist to help psychologists in their conceptualization of assessment results. Hill-Briggs et al. (2007) provide a comprehensive review of tests and accommodations commonly used with persons with different types of disabilities, with a particular focus on those with hearing and visual disabilities. They also include a discussion of factors to consider in test interpretation, including when there are no specific norms for people with disabilities. Age of disability onset may affect developmental progression of skill development, type of communication may affect processing of test instructions and materials, and comorbidities may suppress performance that is erroneously attributed to disability. Anxiety and depression are common correlates of chronic pain; traumatic brain injury, sometimes undiagnosed, commonly co-occurs with spinal cord injury; and autism spectrum conditions and anxiety commonly occur with intellectual disability (Thompson et al., 2018). Psychologists should also strive to be aware of non-disability factors that may affect test performance and, thus, interpretation of scores. The reader is referred to the APA *Handbook of Multicultural Psychology* (Volumes 1 and 2) for relevant discussion. For example, Suzuki, Naqvi, and Hill (2014) present the concept of stereotype threat in which the test taker's underperformance is a consequence of anxiety related to being judged by the negative stereotype of one's group (in this case having a disability). This commentary is consistent with the discussion of Bersoff et al. (2012) about collaborative assessment, a positive consequence of which is reducing any misunderstanding between assessor and test taker. These types of compounding issues may result in suboptimal performance even with appropriate accommodations. In addition, both Hill-Briggs et al. (2007) and the *Standards* (2014) include a caution that disability is not a unitary construct (also noted in *Guideline* 14). Understanding the person's individual disability background and stability are crucial to interpreting performance. Children with cerebral palsy who have co-occurring intellectual disabilities perform less well over time on activities of daily living than those without intellectual disabilities (Warschausky, Van Tubbergen, & Hasson, 2019). As further illustrations of this point, Hill-Briggs et al. (2007) note that individuals may acquire vision loss at different ages and have different levels and types of vision loss, interacting not only with neuropsychological test performance but also higher cortical function. Similarly, the mode of communication used by Deaf individuals (signing vs. cued speech) during development impacts cognitive processing and therefore influences neuropsychological test performance focusing on this ability. As previously noted, specific test items may confound interpretation when they describe physical factors or similar characteristics that are meant to reflect potential pathology, when in fact they simply reflect aspects of disability (Johnson-Greene & Touradji, 2010) (e.g., slowed initiation of activity due to multiple sclerosis; fatigue secondary to sleep disrupted by traumatic brain injury). Test selection and administration directly influence test interpretation (Bush & Rush, 2019).

Although one cannot account for every idiosyncratic characteristic, universal design concepts, when applied to test development, will significantly improve the validity of test interpretation. While accommodations focus on removing barriers (e.g., physical, sensory, cognitive, emotional), the intent of universal design is to make assessments fair for all test takers, regardless of disability characteristics (or other sociocultural factors). Universal design seeks to build flexibility into item–response format during test development (Ketterlin-Geller, 2005). As Ketterlin-Geller states, "the cornerstone of applying the principles of universal design to assessment is the elimination of inherent test characteristics that differentially influence student performance in the tested domain" (p. 18). Another might be to find ways to reduce the anxiety of the situation for those who find test-taking a particularly stressful activity. Providing advance information about the nature of the testing activity and what to expect or inviting an opportunity to explore the testing environment in advance of the actual session may be useful to reduce anxiety about the actual testing event.

Universal design allows a clearer distinction between actual performance on the construct being measured and superfluous factors that interfere with that performance, resulting in conclusions that either over- or under-estimate skills and abilities. Universal design will not eliminate the need for accommodations, but it will go a long way toward ensuring fairness. Meanwhile, psychologists working with people with disabilities are encouraged to be extremely vigilant in all aspects of assessment to support accurate interpretation. As noted in the *APA Guidelines for Psychological Assessment and Evaluation* (2020), "conclusions and/or recommendations resulting from use of instruments are expected to be fair; minimize bias; and are consistent with applicable standards or practice, policies, and laws" (p. 15).

Depending upon the specific questions the psychologist is trying to address, the psychologist may find multi-modal assessment useful to identify consensual patterns of performance and to address functional relevance. Multimodal assessment may help offset lack of normative data and lack of validation studies in interpreting results. It may also prevent bias that can result in needlessly grave consequences, such as children being taken away from their parents without cause (noted in *Guideline* 9). Multimodal assessment is discussed in *Guideline* 17.

GUIDELINE 17

Psychologists strive to conduct appropriate multi-modal assessment to provide diverse information to support valid interpretation of assessment results.

Psychologists are encouraged to utilize multiple modes of assessment tools to gain a holistic understanding of their client's needs. Multi-modal assessment recognizes multiple contributors to the definition and experience of disability. Test data combined with qualitative and functional assessments may provide rich additions to assessments for people with disabilities. As noted in *Guideline* 13, assessment can include consideration of the individual interacting with the environment, and a multi-modal approach provides a broader representation of how the person works in and adapts to various environments. Multi-modal assessment also helps bolster interpretations that would otherwise rely solely on tests without sufficient norming for people with specific disabilities. Based on the integration of different types of data and information, the psychologist may reinforce the accuracy of interpretation by identifying converging and diverging patterns. When discrepancies are encountered across different data types, the psychologist needs to consider the variables discussed in *Assessment Guidelines* 12–16 in attempting to reconcile differences as well as report any limitations to the interpretation or inferences made about the disabled individual.

The components and extent of a multi-modal assessment will depend on the constructs of interest. Standardized batteries and other tests may provide useful quantitative information for specific disability subgroups. However, quantitative measures tapping various domains, including different test scores, provide only one part of the overall performance picture. Specific strengths (e.g., psychological, spiritual, social, physical, and/or cognitive strengths) along with specific environmental adaptations for individuals with disabilities may counter-balance specific challenges resulting in more inclusive and independent participation in different domains of daily life. As noted in the *Standards* (2014), "the test user should not ignore how well the test taker is functioning in daily life" (*Standard* 9.13, p. 145). This is particularly the place where qualitative and functional data complement quantitative test data. An individual who performs poorly on tests assessing cognitive function may, nevertheless, do fine in a familiar, structured home, school, or work setting with or without accommodations. Conversely, through the use of multi-modal assessment, the psychologist may make important observations (e.g., regarding environmental stimuli; differences in performance at school, work, or home; parenting style; social interactions) that directly point to useful areas of intervention or that prevent misassumptions based on the spread effect where, for example, behavioral issues unrelated to disability are attributed to the disability without observational or social information to corroborate this attribution.

Since these *Guidelines* were originally published in 2011, research and reviews of research using qualitative data have proliferated. Such research includes research focused on psychotherapy with disabled clients (Olkin, 2017); children with disabilities and/or their parents (Alsem et al., 2017; Shields & Synnot, 2016); other caregivers (Lloyd, Patterson, & Muers, 2016); specific disability groups (Fadyl et al., 2019; Mahdi et al., 2017; Rose et al., 2019; Shirazipour et al., 2018; Silverman et al., 2017; Van den Bogaard et al., 2019); and disabilities in general (Hayre & Muller, 2019; Quale & Schanke, 2010). Lloyd, Patterson, and Muers (2016) have described qualitative research as a means to explore the subjective experience of disabled individuals, something for which quantitative methods are not designed. These data are useful in learning more directly about experiential aspects of disability to design appropriate interventions and policies. Therefore, a primary way for psychologists to gain an understanding about the experience of relevant disability subgroups is to read this type of research.

At the individual level, qualitative assessment is commonly used as part of a mixed-methods approach to assessment (e.g., clinical interview, behavioral observation, etc.). Qualitative assessment typically involves at least a semi-structured interview or focus group with disabled individuals and/or other people who are part of their daily life (e.g., school, work, home), the purpose of which is to understand the person's lived experience to gain a more holistic picture of assets and challenges. Qualitative measures may be especially useful with children with disabilities, individuals with multiple barriers to other forms of assessment, and when no psychometrically appropriate measures are available. Bruce et al. (2017) stated that standardized assessment is inappropriate for Deaf-Blind children and that effective assessment requires input from multiple adults across natural environments familiar to the child. The researchers provide a review of practice evidence in assessment for Deaf, Blind, and Deaf-Blind children.

In assessing a client with a disability, a psychologist may conduct an integrated, semi-structured interview focusing on the client's relevant disability-related issues, their relative importance among various personal concerns, and how the experience of disability interacts with other psychological issues (Mohr & Beutler, 2003). When appropriate in the context of the assessment goals, the psychologist may ask about the following: the client's type and origin of disability; perceived disability-related strengths and needs; the functional impact of the disability; others' reactions to the client's disability; required accommodations, aids, treatments, and medications; and necessary lifestyle modifications (Olkin, 2012). When the client uses AT or requires accommodations, the psychologist is advised to incorporate them into any behavioral observations or interviews to avoid capturing an unaccommodated disability rather than the target behavior (Einarsson et al., 2020; Olkin, 2012).

Functional assessment measures how a person interacts with the environment and focuses on various domains of real-life skills (e.g., strengths, adaptive coping skills) that enable the person to engage independently in various settings (Heineman & Mallinson, 2010; National Association of School Psychologists, 2010; Shriver, Anderson, & Proctor, 2001). Functional assessment may include both use of functional measures and observation. Like qualitative assessment and specific adaptive behavior assessment, functional assessment measures may be particularly useful for clients with intellectual disabilities and those with multiple barriers to testing (Tasse, 2006; Tasse et al., 2012). Functional assessment measures may include items that involve observation of a range of skills in the client's living, working, social, and/or learning environments and portray the extent of the client's adaptive behavior. The assessment may cover social and recreational behavior; activities of daily living, family, school, or work behavior; and/or communication, motor skills, and functional academic skills. Functional assessment also incorporates disability accommodations as part of the process. For example, in order for the psychologist to validly assess parenting skills for an individual with mobility restrictions, the home environment needs to be appropriately adapted. Subsequently, both behavior and environment may become targets for intervention (Bruyère & Peterson, 2005; Bruyère et al., 2005; Gaylord-Ross & Browder, 1991; Peterson, 2005; Reed et al., 2005). Several functional assessment measures have adequate reliability and validity for people with disabilities, and the advent of computerized administered testing has helped reduce the number of items and amount of time needed to complete functional measures (Heinemann & Mallinson, 2010), although some concerns have been raised about the algorithms for doing so.

Depending upon the range and type of skills assessed, clinical observation may accompany use of functional assessment measures. If observation is used that is not associated with a validated functional rating scale, psychologists are encouraged to consider establishing guidelines and a basic checklist of questions for these assessments somewhat akin to quantitative testing (even though norms are not available). Examples of these types of questions include:

1. What is the purpose of the observational assessment?
2. What concrete constructs is the psychologist trying to learn more about or what questions is the psychologist trying to address?
3. How will the psychologist know when each construct is demonstrated? How is performance rated or evaluated?
4. How long should the functional assessment last?
5. What settings facilitate likelihood of constructs of interest being observed (e.g., home kitchen for safely sequencing cooking steps, work setting for assessing appropriate use of accommodations to enhance work performance, etc.)?
6. Are multiple settings required to be confident in behavioral consistency?
7. Who are the participants and observers or bystanders? Do they hinder or facilitate constructs of interest, and how?
8. What external factors, if any, seem to contribute to or hinder demonstration of the acquisition of constructs of interest (e.g., accommodations used, environmental contingencies or setting, construct-irrelevant occurrences)?
9. What disability-related factors are affecting performance (e.g., arousal, psychomotor function, behavioral mannerisms, speech difficulties, medical symptoms)? Did anything help ameliorate observed difficulties?
10. What additional factors are contributing to changes or variations in performance observed within or across settings and time (e.g., interpersonal skills, mood, frustration tolerance, adaptation to changes, support given)?
11. How will the information gathered be used?

Information may need to be collected not only using different sources, but also across time given contextual and developmental factors that affect performance. The selection of appropriate time points will be directly affected by the purpose of the assessment, such as related to school planning or capacity determinations. Establishing some general consistency in one's approach to information gathering may assist the psychologist in collecting appropriate collateral information and minimizing bias, as well as potentially beginning to create an internal pool of information on relevant groups with whom they work. A consistent approach to information gathering may be particularly useful if the psychologist works with individuals who have less common disabilities or have significant comorbidities (making it unlikely standardized data would be available because norming pools would be too small).

In summary, psychologists are encouraged to consider a multidisciplinary perspective in assessing clients with disabilities, because clients commonly face barriers based on a combination of factors (e.g., social, environmental) that can impact assessment results and subsequent interpretation. Psychologists may also learn from their peers in other professional domains, including special education, clinical, occupational, and community rehabilitation. Functional assessment of work-related communication and social skills of a person with a severe brain injury, for example, may require a team comprising a psychologist, speech-language therapist, occupational therapist, social worker, vocational rehabilitation counselor, and others. Importantly, psychologists who perform assessments with persons with disabilities are encouraged to become familiar with key knowledge of disabilities to facilitate appropriate selection, administration, and interpretation of available assessment information. Understanding the disability and associated factors provides the foundation from which to evaluate whether the disability is relevant to the assessment process. By possessing critical disability knowledge, the psychologist may more effectively consider different types of data and information to include in an assessment, such as those summarized below, that support inferences made and resulting consequential outcomes.

- **Medical information**—comorbidities, medications, types of injuries, physical manifestations of disability, behavioral presentation affected by disability-related factors, developmental changes, psychological history
- **Clinical interview**—disability identity and related beliefs (e.g., cultural, spiritual), perceived strengths, familial roles and other social system supports (or dysfunction) related to inclusivity, behavioral and affective presentation, how disability intersects with life goals
- **Test data**—quantitative measures of constructs, effects of accommodations
- **Functional assessment data and observations**—task performance in relevant daily life environments; observation in real time
- **Records and inventories**—school and vocational information demonstrating patterns of performance over time with and without accommodations
- **Third-party information**—observations and input from other health care providers, school officials, employers, families, attorneys, etc., that might reflect behavioral patterns, adaptations, and relative strengths and weaknesses
- **Demographic and cultural information**—ethnicity, overall educational level attained or completing, employment and income, neighborhood, and social supports (e.g., accessible transportation, recreational facilities and parks, churches and synagogues, stores) that might affect coping resources.

GUIDELINE 18

Psychologists strive for accurate interpretation of assessment data by addressing personal biases and assumptions regarding individuals with disabilities.

Psychologists attempt to recognize any personal conceptions of and reactions to disability that may bias their interpretation of assessment data. By involving clients in a collaborative feedback process with the assessment results (Farley, Bolton, & Parkerson, 1992; Finn & Tonsager, 1997) and by using multiple independent information sources (Holzbauer & Berven, 1999; Vanderploeg, 2000), psychologists may help safeguard against bias-related issues negatively impacting assessment outcome.

Some literature on fairness in psychological assessment suggests several strategies for removing or minimizing bias. These strategies include

1. Delaying professional judgment and decision until *after* rather than *during* an evaluation (Sandoval, Frisby, Geisinger, Scheuneman, & Grenier, 1998; Tasse, 2006);
2. Identifying personal preconceptions about persons with disabilities (Sandoval et al., 1998);
3. Examining integrative primary and competing hypotheses regarding client issues and validating them using both confirmatory and nonconfirmatory assessment (Sandoval et al., 1998; Ziskin & Faust, 1988);
4. Developing complex schema or conceptions of clients with disabilities based on the pertinent literature and individual experience (Elliott & Umlauf, 1995; Groth-Marnat, 2003; Sandoval et al., 1998); and
5. Specifically addressing both strengths and weaknesses in functioning and focusing on the referral question (Schultz & Stewart, 2008).

Overall, psychologists strive to balance the consideration of social, clinical, and psychometric disability-related issues with other intra-individual factors (such as sociodemographic background, motivation, strengths, resources, or coping skills) and environmental factors such as attitudes and reactions of others, context of assessment, and various societal systems (Mackelprang & Salsgiver, 2016; Olkin, 2017). Care in this regard needs to be exercised by psychologists performing assessments in high stakes, potentially contentious contexts, such as criminal cases and medicolegal assessments for entitlement to disability benefits that utilize special methods for evaluation of symptom validity and effort.

Even with the use of multi-modal assessment, Carone and Bush (2018) have argued strongly for the inclusion of validity assessment by psychologists conducting assessments with individuals following disease, illness, or injury. (Please note that one exception is that validity assessment is *not* indicated for people with severe neurological impairment who require 24-hour care (Bush & Rush, 2019).) The intent of validity assessment is to determine whether the individual has put forth enough effort to perform well (preventing possible over-representation of need) or, conversely, has exaggerated responses (resulting in possible under-representation of need). Even with the implementation of appropriate accommodations, the psychologist still needs to distinguish between performance reflecting ability and under- or over-performance related to psychological issues, such as malingering or conversion disorder. In addition to medicolegal issues, Carone and Bush (2018) cite numerous reasons that may lead to invalid test performance, such as avoidance of responsibilities, attention seeking, poor insight, attempts to escape dangerous situations, and financial need. Johnson-Greene and Touradji (2010) note that motivation may also be affected by factors such as pain, fatigue, or depression. Without having confidence that the individual's performance is valid, the psychologist cannot rely on the assessment results to base clinical decisions. Carone and Bush (2018) also point out that behavioral observations and clinical judgment are insufficient to make validity decisions. Their commentary suggests that psychologists be vigilant regarding these types of issues as well as self-reflect on any potential professional motivations for presenting the individual in a favorable light (e.g., advocating for someone who has been marginalized, financial incentive for disability claim to succeed). Actions related to personal gain would violate multiple sections of the APA Ethics Code. Carone and Bush suggest a separation of roles, such that the clinician does not serve as the forensic expert, even though they will likely still provide clinically relevant data (often under subpoena) based on working with the disabled individual. Such a boundary helps remove an inherent conflict of interest that could potentially violate the ethical principle of nonmaleficence. This separation is also consistent with *Guideline* 1.02 Impartiality and Fairness, 1.03 Avoiding Conflicts of Interest, and *Guideline* 4.02 Multiple Relationships and its subcomponents from the *Specialty Guidelines for Forensic Psychologists* (APA, 2013). Simply conducting an assessment does not mean the psychologist is competent in forensic evaluation. Psychologists performing evaluations in this context are encouraged to consult the *Specialty Guidelines for Forensic Psychologists* (APA, 2013) and stay abreast of the literature. Similar care needs to be exercised in parenting, vocational capacity, and other evaluations for court purposes, especially in highly consequential situations, such as competency-to-stand-trial determinations in which standardized approaches are advised (Perlin, 2004).

Summative recommendations for psychologists working with people with disabilities include, but are not limited to, the following:

1. Clearly define the purpose of the assessment and the constructs needing to be assessed.
2. Before testing session(s), meet with the client to understand disability-specific characteristics related to constructs of interest; describe assessment (and subsequent results) in understandable terms that avoid jargon.
3. Review test manuals to understand norming samples and applicability to individuals or groups with specific disabilities.
4. Maintain standardized procedures if accessibility based on disability characteristics and related factors is adequate.
5. Identify specific accommodations needed to improve test accessibility.
6. Acknowledge that not all tests may be appropriately adapted.
7. Select tests that align most closely with both client characteristics and constructs of interest.
8. Create an environment ahead of time to maximize test access that supports achievement of a valid test performance (e.g., remove distracting stimuli, plan breaks, manage room temperature).
9. Schedule assessments at times expected to maximize performance (e.g., when medications are typically working at their peak and producing the fewest side effects, when the person is well rested).

10. Anticipate adaptations that may be needed during and across assessment sessions based on potential construct-irrelevant variance that may occur.
11. Review demographic and sociocultural factors intersecting with disability that may affect test scores (e.g., educational level, ethnicity).
12. Identify comorbidities that may affect assessment results (e.g., substance abuse, seizures, pain, emotional status).
13. Consider test items that overlap with physical (or other) characteristics of the disability.
14. Acknowledge one's own personal biases related to disability or related characteristics that may influence interpretation of assessment results.
15. Conduct multi-modal assessment to increase validity of interpretation.

INTERVENTIONS

GUIDELINE 19

Psychologists strive to identify their readiness to address their clients' disability-related concerns.

Psychologists provide interventions with disabled individuals and their families in a variety of settings, including outpatient and inpatient health care facilities, private practices, schools, employment settings, forensic settings, social service agencies, and disaster sites. For example, people with disabilities may be disparately impacted by emergency situations, such as those created by natural disasters (e.g., safety exits, access to health care) (Dodgen et al., 2016; Taylor, 2018). The psychologist's awareness of and appropriate sensitivity to disability-related issues is important to competent practice in any setting in which the psychologist provides services.

Although psychologists need to guard against presuming disability is the central reason a client seeks psychological services (as noted in *Guideline* 2), there are several potential issues linked either directly to disability and/or the effects of marginalization based on disability that are amenable to intervention for which a client and family may request services. It may also be the case that the client or family may not seek services based on their experience of disability, but that disability-related concerns relevant to the presenting issue may be identified or suspected during psychological assessment or arise as intervention progresses as the psychologist learns about the client's life experiences and/or the client becomes more aware of how specific experiences connect to each other.

Psychologists are encouraged to review the non-exhaustive list of possible areas of intervention below to self-reflect on their readiness to address these issues if they arise in their practice with clients with disabilities.

1. Planning and monitoring study skills strategies designed to maximize cognitive and academic performance (ultimately impacting economic self-sufficiency)
2. Participating in IEP development (parental and student preparation, strategy development and implementation, liaising with school personnel)
3. Facilitating positive disability identity development, which may include reframing beliefs and values imposed by non-disabled individuals that have been incorporated into the client's own beliefs and values
4. Managing bullying and discrimination related to disability
5. Managing pain, depression, anxiety, PTSD, suicidal ideation, or behavioral issues, the expressions of which are commonly mediated by multiple factors (psychological, physical, sociocultural, economic, and/or environmental)
6. Supporting development and maintenance of healthy friendships in school environments (and minimizing risk of joining problematic friend groups because of fear of social isolation based on disability)
7. Assisting with strategies to develop/support/maintain personal relationships and social support networks and interest in connecting with disability communities
8. Facilitating development of resilience and self-efficacy
9. Developing and implementing cognitive training programs
10. Facilitating appropriate compensatory strategies and accommodation selection and use for personal, social, and academic/work environments
11. Facilitating development of emergency plans for safe exit from commonly accessed indoor and outdoor physical spaces
12. Addressing reactions and concerns related to use of AT in social contexts
13. Addressing the development/maintenance of healthy body image
14. Supporting the development of sexual identity and expression and strategies for problem-solving potential challenges associated with sexual expression/intimacy (e.g., physical, environmental, and communication needs)
15. Facilitating constructive coping, safety, and self-esteem after sexual abuse/violence
16. Working with families and personal care assistants to address disability-related knowledge, stress management, connection to resources, and how to foster constructive relationships that help the client maximize level of independence
17. Navigating civil rights and disability laws, and financial resources and challenges, and facilitating the development of self-advocacy
18. Facilitating constructive communication strategies to respond to the public when they commit microaggressions or boundary transgressions

19. Evaluating and managing medications as well as risk of or actual substance abuse (e.g., contexts, perceived need and outcomes, rationale for decisions for under- or over-use of medications)
20. Strengthening coping overwhelmed by the effects of multiple marginalized intersections (LGBTQ and disabled; Black and disabled, etc.)
21. Facilitating transitions from one developmental stage to the next (e.g., school, work, partnership, retirement)
22. Promoting healthy behaviors to foster quality of life and prevent complications that risk reduction in independence (e.g., fall prevention, exercise strategies, sleep routines, monitoring body's cues)

If a client does not present with disability-related issues the psychologist believes are relevant to the presenting concerns, inquiring about the impact of disability is ethically appropriate by considering certain parameters. These include being able to justify the content relevance of the inquiry, the timing of the inquiry, and the client's readiness and resilience (with intent to avoid harm and facilitate progress). Generally, information the psychologist gathers may be useful in assessing the benefits and risks of specific recommendations or intervention pathways. Olkin (2017) suggests the following type of question: "Do you think your disability plays a role in this problem [issue]?" This approach empowers the client to choose whether disability is relevant and, if so, whether the client is interested in or has insight to address this aspect of intervention. Asking the question of the client also communicates that the psychologist is willing to explore rather than avoid disability-related issues, which can enhance the therapeutic relationship and collaborative process of intervention. Psychologists, regardless of years of experience, should seek additional knowledge, training, and consultation when working in less familiar or new areas with clients with disabilities. (For example, discussing sexual behavior and well-being may be a topic some psychologists are unfamiliar with or uncomfortable approaching. Mona, Cameron, and Cordes (2017) have recommendations in this important area.)

GUIDELINE 20

Psychologists strive to recognize that their choice of therapeutic approach is not dependent on the type of disability.

Psychologists are advised not to assume that certain treatment modalities, interventions, and theoretical orientations are appropriate or inappropriate based on the individual's type of disability. For example, a misassumption might be made that a client with an intellectual disability receives little benefit from individual psychotherapy (Butz, Bowling, & Bliss, 2000; Mason, 2007) or that the client does not recognize the benefit of therapy. In one study, clients with intellectual disabilities acknowledged problematic behavior, expressed that the therapy in which they were engaging was helpful, valued the supportiveness of the therapeutic relationship, and connected therapy to goals and outcomes, with concerns expressed about maintaining progress (Pert et al., 2013). Psychotherapy, regardless of the client, is shaped by the psychological concerns; the client's strengths and goals, negotiated with the psychologist; and meaningful, reasonably expected therapeutic outcomes based on available practice evidence. (For example, refer to the systematic reviews of cognitive rehabilitation programs by Cicerone et al. (2019) and Goverover et al. (2018), which include practice recommendations.) Potential therapeutic outcomes will depend on the therapeutic relationship and a realistic intervention plan within which to address goals and the psychologist's ability to understand the client's life circumstances (i.e., relevance to daily life), which may be more complex for people with disabilities.

Psychologists may find two resources helpful related to empirical bases for intervention. Livneh and Martz (2012) provide a detailed analysis of the literature on adaptation to disability and empirically supported approaches that demonstrate the complexity of disability-related issues. Similarly, in their chapter on rehabilitation psychology, Turner & Bombardier (2019) review several common areas of intervention for individuals with disabilities and the evidence base for addressing important areas, such as depression, anxiety, and family issues: They report, for example, that problem-solving approaches have the strongest empirical support when working with families of disabled individuals. Andrews (2020) also provides a review of disability-related factors in intervention as well as risk factors for suicidal ideation.

Olkin (2017) describes the use of disability affirmative therapy (D-AT) as a process that cuts across different theoretical orientations and facilitates mutual understanding of the client's current functioning by incorporating "key aspects of disability experiences and the role of these experiences in the client's current functioning, presenting problems, and relationships" (p. 5). Although this approach has not been empirically validated yet, psychologists unfamiliar with D-AT are encouraged to review this approach to gain a broader understanding of areas to explore regarding how the meaning of disability may shape the client's current presentation and the psychologist's potential therapeutic decisions.

Additionally, group counseling and psychotherapy have been used with a wide range of people with disabilities to address concerns and needs with regard to physical, psychological, social, vocational, financial, environmental, attitudinal, and recreational needs. The four modalities used most often are educational, social support, psychotherapeutic, and coping and skill training groups. Goal setting also encompasses affective, cognitive, and behavioral areas. Studies also show that building peer support networks and connecting people with disabilities with others may offer uniquely important informational and emotional support resources that buffer the impact of a functional impairment on well-being (Silverman et al., 2017).

Finally, psychologists working with clients with disabilities over time need to remain cognizant that interventions may require re-evaluation as the client's disability experience and adaptive skills change and the psychologist gains new disability specific knowledge that may enhance service provision.

GUIDELINE 21

Psychologists strive to honor the experience of disability in the development of the therapeutic relationship.

Potential therapeutic outcomes depend not only on a realistic intervention plan within which to address goals, but also on the development of a successful therapeutic relationship. This relationship reflects the psychologist's ability to understand and respond sensitively to the individual's (and family's) emotional reactions and perspectives on the meaning of disability. Similar to working with other individuals seeking psychological services, the psychologist recognizes that each person responds uniquely to their individual circumstances and to intervention.

Psychologists working with people with disabilities are encouraged to be mindful of the cognitive and emotional symptoms that may arise. Some individuals may experience an emotion, work through it, and then return to it later (Smart, 2001). Others may experience emotional reactions for which they do not follow a simple linear sequence toward adaptation after a disabling injury occurs (Livneh & Martz, 2012). For people with disabilities, talking about their disabilities may be complicated. Some people with disabilities may be anxious and worried about being judged when sharing stories of their disabilities and traumas, whereas others may prefer to draw strength and purpose from telling their stories of triumph over adversity, dispelling myths about disability, or advocating for better disability policies and political power for disabled people. Given the mixed cognitive and psychological reactions and emotions about sharing disability experiences with others, psychologists providing a positive, supportive response to individual disability stories can be validating. Research has also supported the concept that hope and positive disability identity contribute to overall well-being (Zapata, 2020), so creating a safe space for clients to share disability experiences toward positive identity development may be an important aspect of the therapeutic relationship and intervention plan. In addition, showing genuine empathy may strengthen the working alliance by reducing misunderstandings and judgment. A few small studies have noted the importance of the psychologist's characteristics and approach (e.g., empathy and disability knowledge) rather than the specific techniques used in supporting a positively perceived experience with intervention by individuals or parents of individuals with disabilities (Hampton, Zhu, & Ordway, 2011; Pert et al., 2013; Schreiber et al., 2011).

Acknowledging one's life circumstances (e.g., social support, income level), personality characteristics (e.g., optimism, hope, emotional reserves), and the interaction between disability and environment (e.g., the ability to return to work, legal issues, response to sociopolitical climate) are all potential considerations in assessing the person's response to disability as the psychologist develops a therapeutic relationship and designs and adapts responsive, appropriate interventions (Dunn, 2019; Elliott et al., 2002; Kennedy et al., 2000; Kortte & Wegener, 2004; Turner and Bombardier, 2019).

Finally, it is important for psychologists to recognize that although the disability experience is a common reason for seeking psychological services, many people with disabilities seek services for other reasons. Some clients may want psychological support to enhance their quality of life by improving their relationships, making career choices, or exploring new learning opportunities or enhancing their lived experience in other ways. Like everyone else, individuals with disabilities have unique strengths (e.g., Shogren et al., 2006). Personal strengths can include education, personality traits, self-advocacy, creativity and talent, social relationships, and access to necessary supports. Psychologists can strengthen the therapeutic relationship by recognizing the client's strengths, which, in turn, can lead to more positive outcomes. Interventions that consider the personal strengths of a disabled client have been shown to increase the individual's self-worth, empowerment, and resilience to deal with life's issues (Dunn & Dougherty, 2005; Dykens, 2006; Olkin, 2012). Further, the concept of resilience has been found easily integrated within a broad range of clinical work and intervention (Ten Hove & Rosenblum, 2018). Readers are referred to Amtmann et al. (2020) for a resilience item bank.

GUIDELINE 22

Psychologists strive to collaborate with other professionals and stakeholders across systems to facilitate clients' self-determination, informed choice, and social inclusion.

For individuals who have a disability, health or mental health condition requiring intervention and supports, psychology may offer important contributions to understanding, explaining, predicting, providing support, and advocacy. Significant contributions by the psychologist are made in a collaborative process with other professionals and stakeholders in the individual's biopsychosocial system. As noted throughout this document, the system may involve the individual; family; health professionals; community; educators and educational, vocational and legal systems; and other professionals. In this context, the psychologist's contributions are likely shared within a multi- or interdisciplinary group. Many community agencies and systems influence the lives and psychological well-being of individuals with disabilities and their families (Heinemann, 2005; Hernandez et al., 2006). Psychologists who work with organizations and/or systems that support and serve individuals with disabilities should strive to keep the clients' needs and perspectives paramount. Advocating with individuals with disabilities may also draw attention to the need for reform in various systems (e.g., educational, vocational, criminal justice). Many people with disabilities have faced barriers to quality education, employment opportunities, and mental health services, yet these factors are often not considered holistically by professionals and/or providers. Psychologists are encouraged to work with different systems to raise disability awareness, promote social inclusion, and advocate for supports and services more accessible to clients with disabilities. This may involve consulting with individuals, families, and support groups; working collaboratively with teams and organizations; and creating beneficial adaptations and accommodations as well as enabling environments.

In addition to considering a Biopsychosocial framework, it is recommended that psychologists consider Ecological Systems Theory (Bronfenbrenner,1995) when working with people with disabilities. While conceptualized as a way to understand facets of child development, this theory remains applicable throughout the life span in that individuals continuously experience their lives within distinct yet overlapping systems. These systems are defined as **Microsystem:** institutions or systems that directly affect or impact an individual in a single, immediate setting: *family, school, friends, church or synagogue groups, disability support groups*; **Mesosystem:** interaction between two or more settings in which an individual actively participates: *interaction between home and school/work and medical/health care settings*; **Exosystem:** settings where the individual may not actively participate, yet events occurring have the potential to impact them, such as *economic systems, healthcare systems, education systems, and legal systems*; **Macrosystem:** widely shared systems: *cultural beliefs, norms, laws and policies, values, customs*; **Chronosystem:** how these systems are experienced through time: *changes in the ways the mesosystem is experienced over time, changes in the microsystem throughout the life span.*

The ecological micro, meso, exo, and macro systems provide a lens to understand not only the ecological systems that individuals with disabilities operate within, but also the ways those systems overlap and intersect. Psychologists may advocate for persons with disabilities and family members to share their lived experience and perspectives as stakeholders and/or by participating in disability agency leadership roles. Psychologists may also support the aspirations of individuals with disabilities by appropriately involving each individual in intervention, educational, vocational, and life-care planning, and by emphasizing self-determination and participation in decision-making processes (Gill et al., 2003). Additionally, psychologists may possess expertise to provide organizational consultation and skills training to advocacy/support groups for individuals with disabilities who are eager to advocate for social change (Hernandez et al., 2006).

In the school context, psychologists working with adolescent students who have intellectual or learning disabilities should strive to involve the student and family in developing an IEP and making informed life choices (Combes, Hardy, & Buchan, 2004). To promote person-centered planning and making informed choices, psychologists also work with other professionals/service providers in schools to determine preferences and needs of individuals with disabilities. Similarly, in an employment context, psychologists may work with employers/human resources personnel and assist companies in developing disability awareness training for other employers, incorporating inclusive hiring practices, and building a management foundation that understands and motivates employees, and helping staff embrace the company's mission in disability inclusion. To that end, psychologists may work with disability service systems or support social networks to maximize disabled individuals' involvement in all appropriate decisions and ensure they receive appropriate services.

In addition to educational and employment settings, several general roles exist for psychologists in the legal system (Bottoms et al., 2004). Some psychologists are involved in evaluating the success of various legal interventions or reforms (e.g., the effectiveness of drug courts in reducing recidivism by emphasizing treatment and supervision rather than incarceration; Winick, 2003). According to a Bureau of Justice Statistics report, the rate of disability among those who have been incarcerated is significantly higher than in the general population—with 32% of those in prison and 40% of those in jail reporting at least one disability (Bronson et al., 2015). Two in 10 people in prison and 3 in 10 in jail reported having a cognitive disability. Psychologists may work with criminal justice systems to recommend changes to improve accessibility for those with disabilities. Examples include recommending installing ramps to allow those with physical disabilities to have easier access to outdoor recreation areas that usually are a step higher than the surrounding floor; providing technology to allow Deaf inmates to communicate within the prison or with those outside the prison; and ensuring therapy, religious services, and classes inside the jail are accessible.

One final group psychologists may work with are students. Understanding disability is clearly an important component of training. Psychology supervisors are critical to helping students embrace the Ethical Standards, which require awareness of and respect for individuals with disabilities with whom students work. Students cannot effectively meet the Ethical Standards without appropriate professional knowledge, skills, and self-reflection regarding attitudes and behavior toward people with disabilities. Conversely, psychologists who are educating students need to model inclusive practice. Such teaching includes removing barriers for students with disabilities to participate in all aspects of training. Although a paucity of data exists on the experience of psychology trainees with disabilities, the little research available suggests that there is both underrepresentation of disabled students in psychology graduate programs and that students with disabilities encounter misassumptions about capabilities and barriers to training, including internships (Andrews et al., 2013; Andrews & Lund, 2015). Additionally, research shows that psychology trainees with disabilities often report experiencing disability-related discrimination and benefit from mentorship from psychologists with disabilities (Lund et al., 2014; Lund et al., 2021). The field has called for the importance of culturally competent supervision for trainees with disabilities (Andrews et al., 2013), as stigma, bias, misinterpretations, or assumptions related to disability occur among some supervisors (Pearlstein & Soyster, 2019). Andrews et al. (2015) provide recommendations for culturally competent supervision. Psychology training programs are encouraged to integrate these guidelines into training of future psychologists. Lastly, psychologists may work with other team members and community agency collaborators to advocate for appropriate student access and reasonable accommodations as part of culturally sensitive, inclusive practice.

GUIDELINE 23

Psychologists strive to recognize the importance of health promotion and facilitate implementation and maintenance of healthy behaviors by individuals with disabilities.

Psychologists recognize that disability is not synonymous with disease or illness (Ravesloot et al., 2011). In fact, individuals with disabilities often lead healthy and independent lives, but experience more preventable and/or manageable secondary health conditions that may affect their financial status and employment, psychosocial health and well-being, and participation in community life (January et al., 2015; Karpur & Bruyere, 2012; Kinne, Patrick, & Doyle, 2004; Ravesloot, Seekins, & White, 2005; WHO, 2001). An unhealthy lifestyle also increases the risk for developing conditions associated with disability, such as stroke (Chiuve et al., 2008).

Recent research has found that people with disabilities who report engaging in adverse health behaviors (e.g., lack of exercise, insufficient sleep, smoking) report more mental distress than people with disabilities who do not report these behaviors (Cree et al., 2020). This is particularly problematic given that mental distress has been reported to be over four times more likely in individuals with disabilities compared with those without disabilities (Cree et al., 2020). Additionally, risk factors for secondary complications, such as obesity and diabetes, may be compounded by other minority identities, including race, ethnicity, and socioeconomic status/poverty (Anderson et al., 2013; Courtney-Long et al., 2017). On the other hand, engagement in constructive health behaviors by individuals with disabilities, such as through health promotion programs, has been linked to decreased secondary complications and health care costs and improved behavioral health, attention, and well-being (Anderson et al., 2013; Chan et al., 2012; Ferraz et al., 2018; Heller, Fisher, Marks, & Hsieh, 2014; Ginis et al., 2010, 2013; Ravesloot et al., 2016). Some research also suggests that positive health behavior (exercise), when combined with other intervention (cognitive training), has an additive effect on cognitive and motor function (Yeh, Chang, & Wu, 2019).

Given that physical and mental health are intimately related, psychologists may assist clients with disabilities in understanding how maintaining health and preventing secondary conditions may help them achieve life goals. As Eagle et al. (2017) note, “health promotion interventions have the potential to improve secondary physical health and mental health conditions, work performance, and health-related quality of life for people with chronic illness and disability” (p. 108).

Numerous health promotion models exist that psychologists might consider to address health behaviors with people with disabilities. Several of these have been reviewed by Eagle et al. (2017) as well as reviewed or applied to specific disability groups by others (Chiu et al., 2011; Ginis et al., 2013; Ipsen et al., 2012; Keegan et al., 2012; Turner & Bombardier, 2019). Eagle et al. (2017) note that these health promotion models share two key components: self-efficacy (perceived skills, resources, and ability to engage in healthy behavior) and outcome expectancy (perceived benefits and risks of engaging in healthy behavior). Self-efficacy and outcome expectancy are also primary components of health behavior change theories (Ravesloot et al., 2011). Eagle et al. (2017) also emphasize the importance of the client having access to and processing appropriate health information and engaging in goal setting as precursors to creating positive change. Psychologists may facilitate these components as part of health promotion interventions. They can help their clients (1) understand the beneficial relationship between health and well-being, (2) discuss the client’s perceived skills and resources, (3) evaluate their readiness for change, (4) anticipate potential barriers to change, (5) work collaboratively on a health promotion plan that includes concrete goals and actions, (6) encourage steps towards engagement, and (7) reinforce healthy lifestyle practice and maintenance that prevent both primary and secondary health problems (Gill & Brown, 2002; Heller, Hsieh, & Rimmer, 2002; Heller & Marks, 2002). Depending upon availability, psychologists may also refer clients to organizations providing structured health promotion programs, such as the Living Well with Disability program offered in multiple states through a partnership with the national network of Centers for Independent Living (Ravesloot et al., 2016).

There are several national organizations that address health promotion for people with disabilities. The National Center on Health, Physical Activity, and Disability (https://cdc.gov/ncbddd/disabilityandhealth/national-programs.html) works collaboratively with the Centers for Disease Control and Prevention (CDC) to offer resources on disability and healthy living for both professionals and people with disabilities and their families. The CDC also lists CDC-funded state disability and health programs and houses the Disability and Health Data System that allows users to search key health indicators by state (https://cdc.gov/ncbddd/disabilityandhealth/healthyliving.html).

Since the Surgeon General’s *Call to Action to Improve the Health and Wellness of Persons with Disabilities* (Carmona et al., 2010; Office of the Surgeon General, 2005), significant progress has been made promoting healthy living for people with disabilities. However, many barriers still exist affecting practice processes and outcomes as discussed in earlier guidelines in this document (Anderson et al., 2013). The Healthy People 2030 initiative has as one of its overarching goals to promote healthy development, healthy behaviors, and well-being across all life stages. Psychologists, through both practice and advocacy, have much to contribute to support the health and well-being of individuals with disabilities. Perhaps one of the most important roles is empowering people with disabilities.

CONCLUDING STATEMENTS

The *Guidelines for Assessment and Intervention with Persons with Disabilities* are recommendations that psychologists are encouraged to implement to strengthen their professional knowledge and skills in advancing the health and well-being of disabled individuals. It is a living document that will evolve as research, practice, and training advance. These *Guidelines* are based on the belief that disability is part of the rich diversity of our society. To that end, the *Guidelines* reflect several key points.

First, psychologists are uniquely positioned to work with individuals with disabilities and other stakeholders to facilitate disabled individuals' health and well-being, and to promote their full inclusion in our society. Second, psychologists may enhance their professional skills and ensure validity, fairness, and appropriateness of assessments and interventions by critically evaluating their own possible biases and stereotypes about disability. Third, psychologists strive to recognize that the disability experience is multifaceted and may be affected by different intersections and sociocultural contexts that may require exploration. Fourth, psychologists strive to recognize that not all clients seek clinical services based on disability-related issues. Psychologists can help individuals discover and balance personal strengths and challenges. Fifth, psychologists strive to promote equal access and opportunity for persons with disabilities by using all appropriate accommodations in their procedures and practices and by guarding against construct irrelevant factors affecting valid, fair assessments and interventions. Finally, psychologists may actively pursue disability-related training, education, and consultation with psychologists, other health professionals, and community service providers who have expertise in working with individuals with disabilities to maintain and strengthen their skills and knowledge to serve their clients competently and ethically. With these strengths, psychologists have the opportunity to be effective advocates for change that removes individual and systemic barriers and contributes to a more inclusive society.

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RESOURCE GUIDE

American Academy of Pediatrics Healthy Children
healthychildren.org

American Association on Intellectual
and Developmental Disabilities
aaidd.org

American Burn Association
ameriburn.org

American College of Rheumatology
rheumatology.org

American Diabetes Association
diabetes.org

American Foundation for the Blind
afb.org

American Printing House
aph.org

Amputee Coalition
amputee-coalition.org

Association of University Centers on Disabilities
aucd.org

Brain Injury Association of America
biausa.org

Centers for Disease Control and Prevention
cdc.gov

Center for Excellence in Universal Design
universaldesign.ie

Christopher & Dana Reeve Foundation
christopherreeve.org

Epilepsy Foundation
epilepsy.com

iAccessibility.com
iaccessibility.com

Job Accommodation Network
askjan.org

Mayo Clinic
mayoclinic.org

National Association of the Deaf
nad.org

National Cancer Institute
cancer.gov

National Center for Post-Traumatic Stress Disorder
ptsd.va.gov

National Federation of the Blind
nfb.org

National Institute of Arthritis and Musculoskeletal
and Skin Diseases
niams.nih.gov

National Institute on Drug Abuse
drugabuse.gov

National Institute of Mental Health
nimh.nih.gov

National Multiple Sclerosis Society
nationalmssociety.org

National Institute of Neurological Disorders
ninds.nih.gov

National Spinal Cord Injury Statistical Center
nscisc.uab.edu

Substance Abuse and Mental Health Services Administration
samhsa.gov

The Arc
thearc.org

United Cerebral Palsy
ucp.org

World Health Organization
who.int

Adaptive Sports

Athletics for All
athleticsforall.net

Challenged Athletes Foundation
challengedathletes.org

Move United
moveunitedsports.org

U.S. Olympic and Paralympic Committee
teamusa.orgTeam-USA-Athlete-Services/Paralympic-Sport-Development

National Center on Health, Physical Activity and Disability
nchpad.org

Paralyzed Veterans of America
pva.org

Special Olympics
specialolympics.org

In addition to the APA, its divisions, and the resources listed above, all of the following organizations provide free webinars and resource information. This is a sampling of a broad range of resources now available electronically.

Alzheimer's Association
alz.org

American Congress of Rehabilitation Medicine (ACRM)
Archived Webinars
acrm.orgresources/video-library/

Autism Self Advocacy Network
autisticadvocacy.org

American Society on Aging
asaging.org

Brain Injury Alliance of Iowa Archived Webinars
youtube.com/channel/UChA-bLo-2EGMJlJScPuoTzA/videos

Brain Injury Association of America Butch
Alterman Memorial Webinars
bit.ly/3v0AHnt

Craig Hospital brain and spinal cord injury resources
craighospital.org

Facing Disability.com for families facing spinal cord injuries
Facingdisability.com

Family Caregiver Alliance
caregiver.org

National Deaf Center on Postsecondary Outcomes
learn.nationaldeafcenter.org

National Paralysis Resource Center
christopherreeve.orgliving-with-paralysis/about-the-paralysis-resource-center

Shepherd Center Brain Injury and Spinal
Cord Injury/ Dysfunction Webinars
bit.ly/36oiFBA

Tourette's Association of America Webinar Series
tourette.orgresources/taa-webinars/

Parkinson's Foundation
parkinson.orgpd-library

Uniformed Services University, Center for Deployment Psychology
deploymentpsych.org

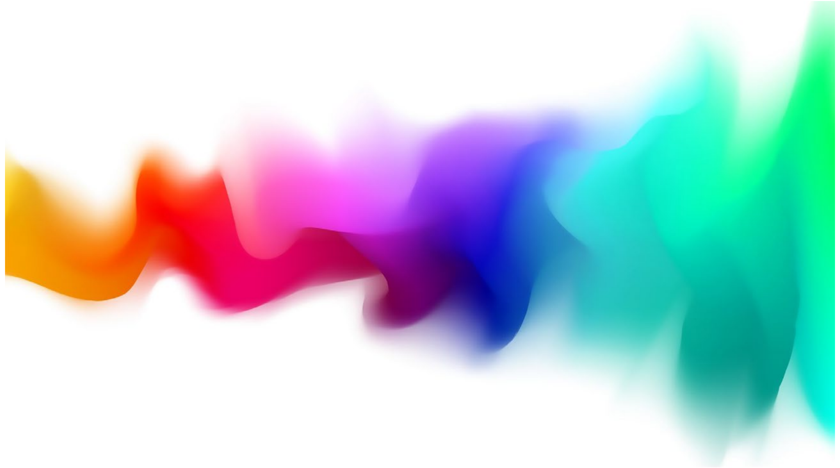
US Department of Veterans Affairs
research.va.gov

Epilepsy Centers of Excellence
epilepsy.va.gov/Provider_Education.asp

Spinal Cord Injuries and Disorders System of Care
sci.va.gov/VAs_SCID_System_of_Care.asp

Traumatic Brain Injury
research.va.gov/topics/tbi.cfm

AMERICAN
PSYCHOLOGICAL
ASSOCIATION



REASONABLE EFFORTS AND DISABILITIES

Timothy Heinle
UNC School of Government
August 2023

Failing to support parents with disabilities

U.S. Dep't of Justice
Civil Rights Division
Investigation of the Massachusetts Dept. of Children and Families Pursuant to the ADA and the Rehabilitation Act
DJ No. 204-36-216 (January 2015)

- 19-year-old Mom with a developmental disability that affected her learning-style and ability to follow instructions.
- Mom gives birth.
- Two days later, DCF removed Baby from hospital.

DCF…

"Failed to individually analyze" Mom for needs and appropriate services.

Investigative social worker told DOJ his view of Mom's parenting capacity was "based on his 'intuition'" and Mom's "vibe."

"Acted on [unwarranted] assumptions" about Mom's disability.

Ignored notion upheld by US Supreme Ct. that "intellectual disability is a condition, not a number."
Hall v. Florida, 134 S. Ct. 1986, 2001 (2013).

U.S. Dep't of Justice
Civil Rights Division
DJ No. 204-36-216 (January 2015)

DCF "repeatedly ignored"…

- Mom's support network
- DCF's own ability and obligation to provide supports
- Objective third-party professional evaluations of Mom's parenting capabilities

U.S. Dep't of Justice
Civil Rights Division
DJ No. 204-36-216 (January 2015)

DCF denied Mom the opportunity to…

- ☒ Utilize familial resources
- ☒ Benefit from in-home parenting supports
- ☒ Learn "homemaker services"
- ☒ Demonstrate growth through trial home placement

- ☒ Receive information through adaptive methods
- ☒ Have frequent, meaningful, supported visits
- ☒ Reunify, despite continued engagement and progress

U.S. Dep't of Justice
Civil Rights Division
DJ No. 204-36-216 (January 2015)

"For virtually all of [Baby's] life, DCF has flatly refused [to provide Mom with the opportunity to benefit from supports and services]...

…and to provide a full and equal opportunity to her" to benefit from reunification programs.

U.S. Dep't of Justice
Civil Rights Division
DJ No. 204-36-216 (January 2015)

REASONABLE EFFORTS

> “The **diligent use of preventive or reunification services**…when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time.”

REASONABLE EFFORTS

Courts must make findings about whether a DSS with custody or placement authority made reasonable efforts to prevent the need for placement of the child out-of-home.

G.S. 7B-507(a)(2) (Nonsecure), -903(a3) (Disposition), -906.1(e)(5) (PPH).

EXAMPLES OF DSS FAILING TO MAKE REASONABLE EFFORTS

Failed to interview other children in the home in an unexplained non-accidental injuries case.

- *In re J.M.*, 276 N.C. App. 291 (2021)

Did not provide mother with meaningful assistance to obtain housing.

- *In re S.D.*, 276 N.C. App. 309 (2021)

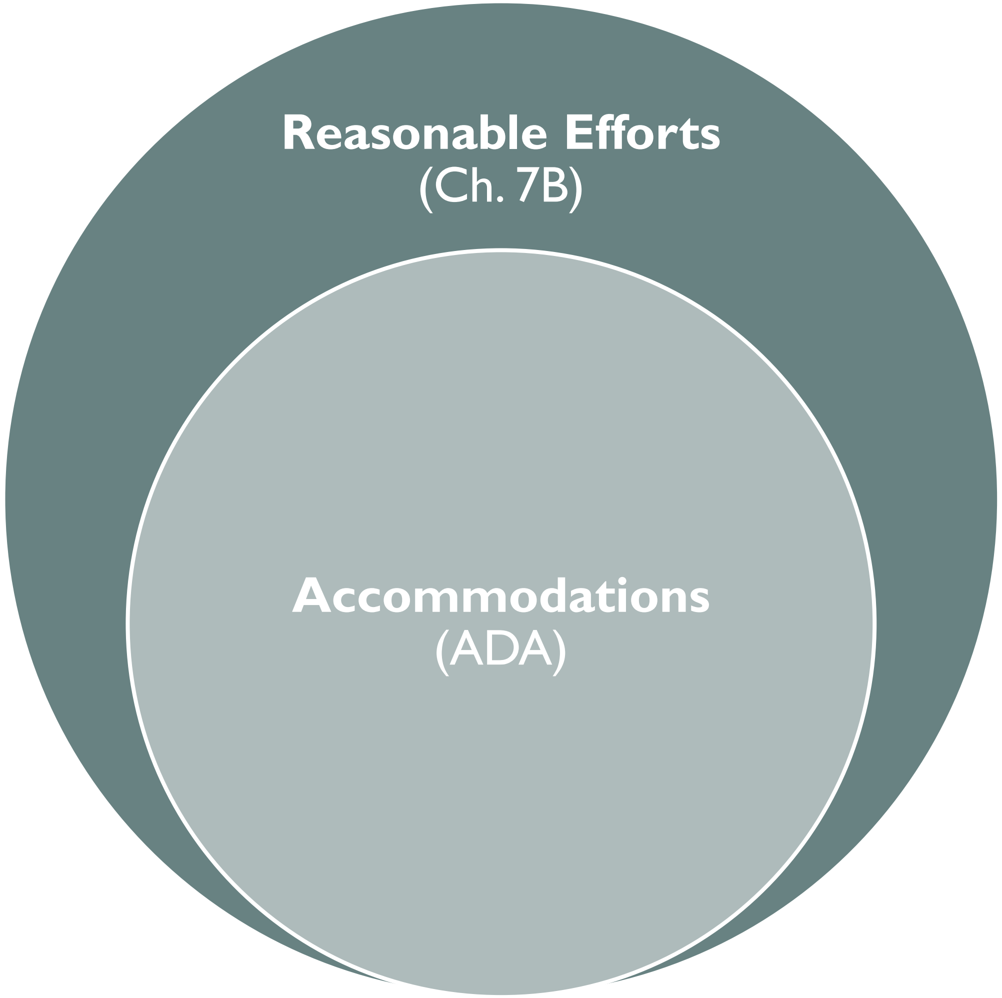
“Arguably non-existent” efforts, including no ICPC on mother’s Texas home.

- *In re J.C.-B.*, 276 N.C. App. 180 (2021)

Recommended services but did not provide them or connect parents to providers.

- *In re H.P.*, 278 N.C. App. 195 (2021)

CON$EQUENCE$



Reasonable Efforts
(Ch. 7B)

Accommodations
(ADA)

Reasonable efforts: the advocate's hammer

- Make your request and demonstrate the need.
- Challenge evidence supporting reasonable efforts.
- Review draft orders and propose changes.
- Raise the issue timely. *In re A.P.*, 281 N.C. App. 347 (2022) (waived if not raised prior to appeal).

Reasonable efforts: the advocate's hammer

Raise the issue timely. *In re A.P.*, 281 N.C. App. 347 (2022)

Be Specific

Reasonable efforts = DSS "necessarily complied" with requirement that parent not be "excluded from" or "denied the benefits of" a program.

Holding

Adequacy of services issue was waived when reasonable efforts was determined.

Distinguish

Here, DSS made referrals, offered psychological services and assisted living, and arranged supervised visits with a parenting skills teacher.

EXAMPLES OF SPECIFIC REASONABLE EFFORTS FOR PARENTS WITH DISABILITIES

<u>Adaptive baby-care equipment</u>

- Lifting harness
- Lowered cribs
- Talking thermometers
- Video baby monitors

<u>Adaptive supports</u>

- Personal assistant services
- Peer supports
- Parent education

EXAMPLES OF SPECIFIC REASONABLE EFFORTS FOR PARENTS WITH DISABILITIES

Additional modifications, services, or opportunities

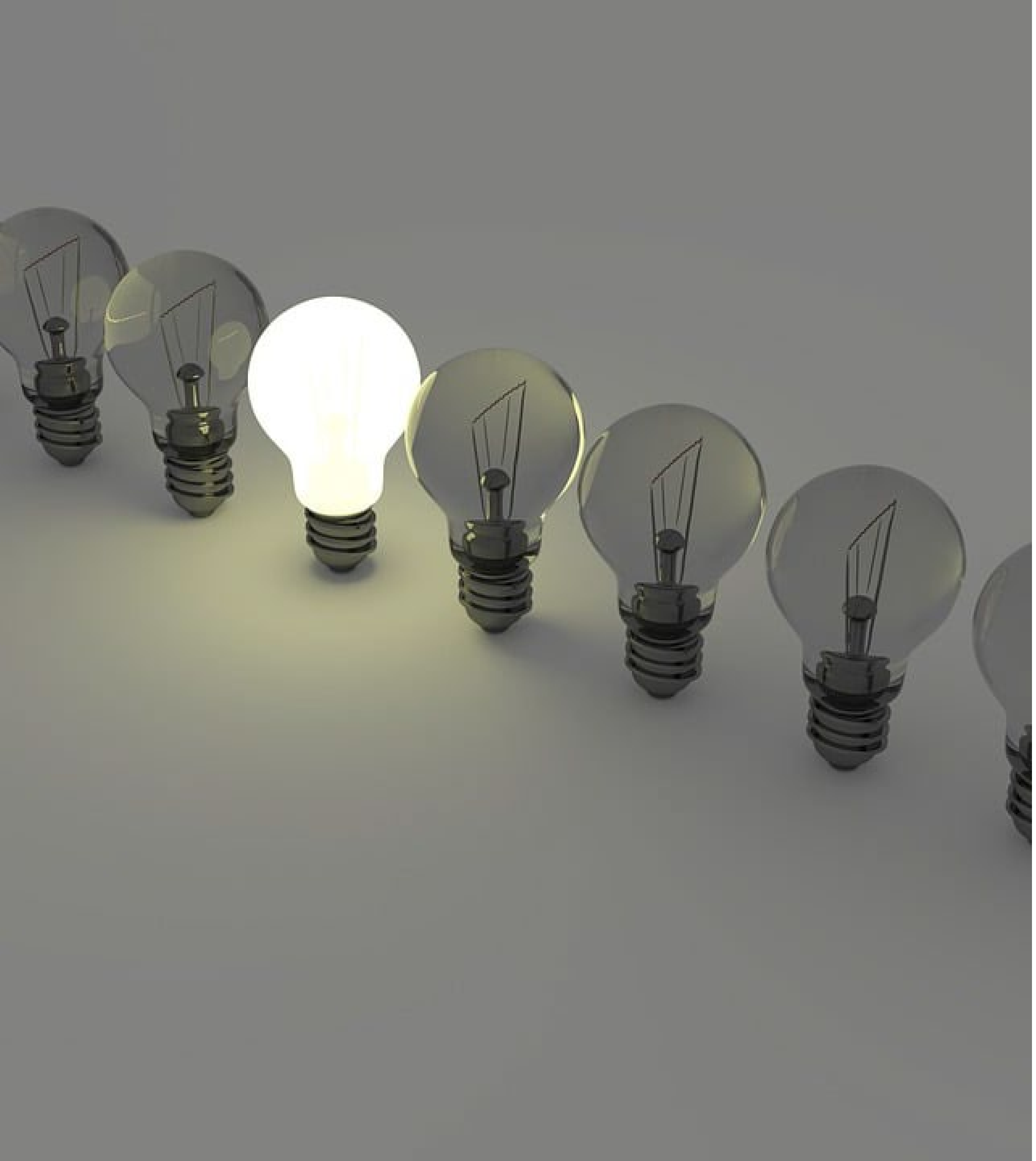
- In-home health aide
- Transportation adjustments
- Sign language or braille lessons
- Pace-adjusted courses
- Visitation supports
- Instruction methods
  - Varied-platform information sharing (e.g., audio, written)
  - Repeated or hands-on instruction
- Expedited approval for services or support
- Increased visits or trial home placement*

Lack of reliable, on-demand transportation

Placement location

Electronic ≠ visitation*

*_In re T.R.T._, 225 N.C. App. 567 (2013); _See also In re J.L._, 826 S.E.2d 258, 269 (N.C. Ct. App. 2019) (“the trial court effectively denied respondent visitation when it prohibited face-to-face visitation” but allowed phone calls).



MORE IDEAS

- Cite supportive research
- Bring players to the table
- Written requests to DSS
- File motions and request reviews
- Scrutinize plan vs return home
- Consult DHHS manual
- Remember to build client up

DISABILITY RIGHTS
NORTH CAROLINA

ENFORCING THE RIGHTS OF PARENTS WITH DISABILITIES

HOLLY STILES
Assistant Legal Director for Litigation

EXAMPLES OF CASES WE WORK ON

- Child removed at birth or shortly after because of parent’s disability
- Child removed because of parent’s physical disability – such as blindness or paralysis – based on belief they cannot safely parent
- Refusal to perform DNA testing and otherwise include putative disabled father who wants to parent
- Removal of disabled children because of systemic lack of services:
  - Threats and/or initiation of child welfare processes because parent wants community services and not institutionalization
  - Threats and/or initiation of child welfare processes because parent refuses to pick child up from emergency department and bring home where there are no services available to assist with child’s needs
- Institutionalization of child in DSS custody

WHO IS “DISABLED”?

COVERED DISABILITIES

- Physical or mental impairment that substantially limits one or more major life activities/major bodily functions

  OR

- Person with a record of such an impairment

  OR

- Person who is regarded as having such an impairment

The ADA: 42 U.S.C. § 12102(1)

The Rehabilitation Act: 29 U.S.C. § 794

NC Persons with Disabilities Protection Act: N.C. Gen. Stat § 168A-3(7a)

COVERED DISABILITIES – EXAMPLES

- Parent with significant hearing loss – wears (needs) hearing aids, communicates using sign language
- Parent with physical disability – may use wheelchair, walker, crutches, scooter, or other mobility aid
- Parent with substance use disorder
- Parent with learning disability and/or low IQ
- Parent who is blind
- Parent with mental health diagnosis - *possibly undiagnosed and newly acquired following removal of child*

If someone is referred to as “difficult” or “non-compliant” – are they actually a parent with a disability?

COVERED DISABILITIES - HEARING LOSS

Parent wears (needs) hearing aids and/or communicates using sign language

- ✓ Parent is “hard of hearing”
- ✓ Parent has “hearing loss”
- ✓ Parent is “deaf/Deaf”

Accommodations/modifications by parent defenders, DSS, court

- ✓ Sign language interpreters
- ✓ Assistive technology, such as ubi duo and personal FM systems
- ✓ Virtual meeting platforms that provide captions
- ✓ Face your client when speaking, meet in well-lit spaces

COVERED DISABILITIES – PHYSICAL

Parent uses wheelchair, walker, crutches, scooter, other mobility aid

- ✓ Parent has “mobility disability”
- ✓ Parent has “limited mobility”
- ✓ Parent uses a [mobility aid]

The terminology “handicapped,” “handicapable,” “crippled,” and “wheelchair-bound” are outdated and offensive to many individuals.

Accommodations/modifications by parent defenders, DSS, court

- ✓ Meetings in accessible locations
- ✓ Accessible witness stand?

COVERED DISABILITIES – SUBSTANCE USE DISORDER

Parent has inability to control use of drugs (legal or illegal)

- ✓ Parent has substance use disorder
- ✓ Parent is in recovery (not active user and/or receiving MOUD)

The terminology “addict” and “junkie,” are offensive to many individuals.

Accommodations/modifications by parent defenders, DSS, court

- ✓ Do not insist on abstinence-only

COVERED DISABILITIES – LEARNING RELATED

- ✓ Parent with learning disability (not a reference to IQ)
- ✓ Parent with intellectual disability (specifically refers to IQ)

Terminology of “r******d,” “dumb,” “special needs,” “mental age of…,” are outdated and/or offensive to many individuals.

Accommodations/modifications by parent defenders, DSS, court

- ✓ Provide information in alternative, accessible formats
- ✓ Allow family/friend to attend meetings as reasonable accommodation (communications are still privileged)
- ✓ Repeat/reinforce information as needed for parent to process

COVERED DISABILITIES – VISION LOSS

- ✓ Parent who is blind. *(“Blindness” is an umbrella term that includes individuals who have some remaining vision.)*

Terminology of “legally blind” is a great title for a movie, but it is not really a thing. It refers to the Social Security Administration’s statutory definition of who qualifies for benefits based on vision loss (20 C.F.R. § 404.1581: central visual acuity of 20/200 or less in the better eye with the use of a correcting lens).

Accommodations/modifications by parent defenders, DSS, court

- ✓ Provide information in alternative, accessible formats
- ✓ Do not exclude based on use of service animal or require parent to separate from service animal

COVERED DISABILITIES – MENTAL HEALTH

- ✓ Parent with “mental illness”
- ✓ Parent with “mental health disability”

Terminology of “crazy” is offensive to many individuals.

Accommodations/modifications by parent defenders, DSS, court

- ✓ Adjust meeting times to accommodate effects of medication (such as grogginess at certain times of day)
- ✓ Allow family/friend to attend meetings as reasonable accommodation (communications are still privileged)
- ✓ Repeat/reinforce information as needed for parent to process

COVERED DISABILITIES – ADDITIONAL EXAMPLES

- ✓ Autoimmune disorders (arthritis, lupus, fibromyalgia, Crohn’s etc.)
- ✓ Autism
- ✓ Diabetes
- ✓ Cancer
- ✓ ADHD
- ✓ Cerebral palsy
- ✓ Speech disorders
- ✓ Digestive disorders
- ✓ Amputation
- ✓ Traumatic brain injury (TBI)
- ✓ Acquired brain injury
- ✓ Paraplegia & quadriplegia
- ✓ Asthma
- ✓ Vertigo
- ✓ Dementia
- ✓ Muscular dystrophy
- ✓ COPD
- ✓ Congestive heart failure
- ✓ Obsessive compulsive disorder (OCD)
- ✓ Eating disorders

https://pixabay.com/users/905513-905513/, CC0, via Wikimedia Commons

Want more guidance on how to talk about disability? Check out the National Center on Disability and Journalism style guide: Disability Language Style Guide | National Center on Disability and Journalism (ncdj.org)

Also check out: https://www.npr.org/2022/08/08/1115682836/how-to-talk-about-disability-sensitively-and-avoid-ableist-tropes

PROHIBITED DISCRIMINATION AGAINST PARENTS WITH DISABILITIES

PROHIBITED DISCRIMINATION

- Failure to make reasonable modifications to policies, practices and procedures to provide equal access.
- Failure to furnish auxiliary aids and services when necessary to assure effective communication.
- Surcharges (charging parent for costs associated with providing equal access).
- Use of criteria or methods of administration that subject qualified individuals with disabilities to discrimination on the basis of disability or which have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program.

PROHIBITED DISCRIMINATION

Discrimination is prohibited by DSS and its contractors.

Cannot outsource discrimination!

ADA: 28 C.F.R. § 35.130(b)(1)

Rehab Act: 45 C.F.R. § 84.4(b)(1)

NC PDPA: N.C. Gen. Stat. § 168A-3(1)

Nick Youngson CC BY-SA 3.0 Pix4free.org

PROHIBITED DISCRIMINATION

*Are required to make **reasonable modifications** (often called reasonable accommodations) to policies, practices and procedures that deny equal access.*

Examples:

- Parent has a disability that affects reading (learning disability, blindness, etc.). DSS must provide parenting class materials in an alternative, accessible format.
- Must offer alternative locations or virtual classes if parent cannot physically access the classroom, the supervised visitation site, etc.

28 C.F.R. § 35.130(b)(7)(i) (ADA); N.C. Gen. Stat § 168A-3(10) (NCPDPA)

PROHIBITED DISCRIMINATION

*Must **furnish auxiliary aids and services** for effective communication.*

Examples:

- Parent is Deaf and first language is ASL. Sign language interpreters must be present during ALL interactions with parent, including at removal, during CFT meetings, and in court.
  - *No surcharge* - the parent(s) cannot be charged/assessed the cost of the interpreter; they must be provided free of charge.
- Parent is blind. DSS must provide documents in an alternative, accessible format (e.g., Braille, accessible PDF, or large print) in a timely manner and free of charge.

28 C.F.R. § 35.160(b) (ADA); 45 C.F.R. § 84.52(d) (Rehab Act); N.C. Gen. Stat § 168A-3(10)(b) (NCPDPA)


WHISPER CHALLENGE
WITH CHRIS EVANS
THE TONIGHT SHOW STARRING JIMMY FALLON

PROHIBITED DISCRIMINATION

Cannot use criteria or methods of administration that subjects qualified individuals with disabilities to discrimination on the basis of disability or which have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program.

Examples:

- DSS must not make assumptions that a parent cannot parent based solely on disability *and* must consider whether reasonable modifications, auxiliary aids and services, and/or other supports (such as Medicaid services) would assist the individual to parent.
- DSS must order DNA testing of putative disabled father (who wants to parent).
- DSS cannot rely on guardianship a sole basis to remove child.

28 C.F.R. § 35.130(b)(3) (ADA); 45 C.F.R. § 84.4(b)(4) (Rehab Act)

SERVICES AVAILABLE TO PEOPLE WITH DISABILITIES

RESOLVING DSS CONCERNS WITH SERVICES

Behavioral Health – LME/MCO

Legal Matters – LANC, Disability Rights NC, etc.

Publicly-funded services

Employment –

NC Division of Vocational Rehabilitation Services

Subsistence - DSS

BEHAVIORAL HEALTH SERVICES

All publicly-funded behavioral health services (including Medicaid and state funds) are managed by an LME/MCO. A “care coordinator” is responsible for receiving requests for services and managing the services the individual ultimately receives.

- A list of all available state-funded services can be found at: https://www.ncdhhs.gov/providers/provider-information/mental-health-development-disabilities-and-substance-abuse-services/service-definitions
- A list of Medicaid-funded services can be found under “Behavioral Health” at: https://medicaid.ncdhhs.gov/providers/program-specific-clinical-coverage-policies

EMPLOYMENT SERVICES - DVRS

Any individual with a disability that impacts their ability to find and maintain work is eligible for VR services. If they receive SSDI or SSI, they are presumptively eligible for VR services.

VR offers **wide-ranging** supports in service of an employment goal, including:

- Assistance with college
- Durable Medical Equipment
- Child care
- Housing assistance
- Clothing for interviews
- Transportation

https://disabilityrightsnc.org/resources/using-vocational-rehabilitation-vr-services/

LEGAL AID

Karen Arnold, CC0 Public Domain

Comprehensive list of legal aid providers is available online at https://ncprobono.org/nc-legal-services-providers/

Also be aware of Centers for Independent Living – disability rights advocates, not lawyers. Can provide direct financial assistance in certain situations. https://nc-silc.org/centers/

SUBSISTENCE - DSS

- Housing assistance
- Supplemental Nutrition Assistance Program (SNAP)
- Heating and cooling payments
- Childcare subsidy
- Paratransit

ANOTHER RESOURCE…

TASP

The Association for Successful Parenting

a chance to parent

TASP is a non-profit devoted to giving parents with I/DD a chance to parent. They offer training, webinars, and other supports. https://achancetoparent.net/

DISABILITY RIGHTS NC

DISABILITY RIGHTS NORTH CAROLINA

Disability Rights North Carolina is a legal advocacy agency that fights for the rights of people with disabilities in North Carolina.

DRNC is the federally mandated Protection & Advocacy for North Carolina. We handle cases involving discrimination, abuse and other rights violations. All of our services are at no cost to North Carolinians with disabilities.

We are a private, independent, 501(c)(3) nonprofit and a member of the National Disability Rights Network.

DISABILITY RIGHTS NORTH CAROLINA

We fight “***ableism***—prejudice and discrimination aimed at disabled people, often with a patronizing desire to “cure” their disability and make them “normal”… Ableism, either subtly or directly, portrays individuals who are being defined by their disabilities as inherently inferior to nondisabled people.” https://www.apa.org/ed/precollege/psychology-teacher-network/introductory-psychology/ableism-negative-reactions-disability

A deeper dive into how ableism intersects with racism:https://www.talilalewis.com/blog/longmore-lecture-context-clarity-grounding

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DISABILITY PRIDE

UN Photo/Devra Berkowitz, CC BY-NC-ND 2.0, https://www.flickr.com/photos/un_photo/19696332631

REMINDER: EXAMPLES OF CASES WE WORK ON

- Child removed at birth or shortly after because of parent’s disability
- Child removed because of parent’s physical disability – such as blindness or paralysis – based on belief they cannot safely parent
- Refusal to perform DNA testing and otherwise include putative disabled father who wants to parent
- Removal of disabled children because of systemic lack of services:
  - Threats and/or initiation of child welfare processes because parent wants community services and not institutionalization
  - Threats and/or initiation of child welfare processes because parent refuses to pick child up from emergency department and bring home where there are no services available to assist with child’s needs
- Institutionalization of child in DSS custody

QUESTIONS?

Holly Stiles
Assistant Legal Director for Litigation

THANK YOU

Please Consider Supporting Our Work

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DISABILITY RIGHTS
NORTH CAROLINA

U.S. Department of Health And Human Services

Office for Civil Rights Administration for Children and Families

U.S. Department of Justice

Civil Rights Division
Disability Rights Section

Protecting the Rights of Parents and Prospective Parents with Disabilities:

Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

The United States Department of Health and Human Services (HHS) and the United States Department of Justice (DOJ) are issuing this technical assistance to assist state and local child welfare agencies and courts to ensure that the welfare of children and families is protected in a manner that also protects the civil rights of parents and prospective parents[1] with disabilities. This guidance provides an overview of the issues and application of civil rights laws, answers to specific questions and implementation examples for child welfare agencies and courts, and resources to consult for additional information.

Section 504 of the Rehabilitation Act of 1973 (Section 504)[2] and Title II of the Americans with Disabilities Act of 1990 (ADA)[3] protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services.[4] At the same time, child welfare agencies and courts have the responsibility to protect children from abuse and neglect. The goals of child welfare and disability non-discrimination are mutually attainable and complementary. For example, ensuring that parents and prospective parents with disabilities have equal access to parenting opportunities increases the opportunities for children to be placed in safe and caring homes.

<u>Need for This Technical Assistance</u>

Both the HHS Office for Civil Rights (OCR) and DOJ Civil Rights Division have received numerous complaints of discrimination from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising. In the course of their civil rights enforcement activities, OCR and DOJ have found that child welfare agencies and courts vary in the extent to which they have implemented policies, practices, and procedures to prevent discrimination against parents and prospective parents with disabilities in the child welfare system.

For example, in a recent joint investigation by OCR and DOJ of practices of a State child welfare agency, OCR and DOJ determined that the State agency engaged in discrimination against a parent with a disability.[5] The investigation arose from a complaint that a mother with a developmental disability was subject to discrimination on the basis of her disability because the State did not provide her with supports and services following the removal of her two-day-old infant. The supports and services provided and made available to nondisabled parents were not provided to this parent, and she was denied reasonable modifications to accommodate her disability. As a result, this family was separated for more than two years.

These issues are long-standing and widespread. According to a comprehensive 2012 report from the National Council on Disability (NCD), parents with disabilities are overly, and often inappropriately, referred to child welfare services, and once involved, are permanently separated at disproportionately high rates.[6] In a review of research studies and other data, NCD concluded that among parents with disabilities, parents with intellectual disabilities and parents with psychiatric disabilities face the most discrimination based on stereotypes, lack of individualized assessments, and failure to provide needed services.[7] Parents who are blind or deaf also report significant discrimination in the custody process, as do parents with other physical disabilities.[8] Individuals with disabilities seeking to become foster or adoptive parents also encounter bias and unnecessary barriers to foster care and adoption placements based on speculation and stereotypes about their parenting abilities.[9]

Discriminatory separation of parents from their children can result in long-term negative consequences to both parents and their children. In addition to the OCR and DOJ case where a mother and daughter were deprived of the opportunity for maternal/child bonding for two years, the National Council on Disability report is replete with case studies with similar consequences. For example, a child welfare agency removed a newborn for 57 days from a couple because of assumptions and stereotypes about their blindness, undermining precious moments for the baby and parents that can never be replaced.[10] Similarly, after a child welfare agency removed a three-year-old from his grandmother because she had arthritis and a mobility disability, the toddler developed behavioral issues and progressively detached from his grandmother, though he had had no such experiences before this separation.[11] Any case of discrimination against parents and caregivers due to their disability is not acceptable.

Role of HHS and DOJ

The Children's Bureau in the HHS Administration for Children and Families administers funding for child welfare agencies and courts and provides guidance and technical assistance to child welfare agencies regarding child welfare law. HHS OCR is responsible for ensuring that entities receiving Federal financial assistance from HHS, including child welfare agencies and state courts, comply with their legal obligation under Section 504 to provide equal access to child welfare services and activities in a nondiscriminatory manner. In addition, both DOJ and HHS OCR enforce Title II of the ADA against public entities, including child welfare agencies and state courts.

Overview of Legal Requirements

Title II of the ADA

Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.[12] Title II of the ADA applies to the services, programs, and activities of all state and local governments throughout the United States, including child welfare agencies and court systems.[13] The "services, programs, and activities" provided by public entities include, but are not limited to, investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services. "Services, programs, and activities" also extend to child welfare hearings, custody hearings, and proceedings to terminate parental rights.

Section 504 of the Rehabilitation Act

Section 504 provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of any entity that receives Federal financial assistance, or be subjected to discrimination by such entity.[14] Federal financial assistance includes grants, loans, and reimbursements from Federal agencies, including assistance provided to child welfare agencies and the courts.[15] An entity can be a recipient of Federal financial assistance either directly or as a sub-recipient.[16] Section 504 applies to all of the operations of agencies and sub-agencies of state and local governments, even if Federal financial assistance is directed to one component of the agency or for one purpose of the agency.[17] Recipients of Federal financial assistance must agree to comply with Section 504, and generally other civil rights laws, as a condition of receiving Federal financial assistance.[18]

Application

A child welfare agency or court may not, directly or through contract or other arrangements, engage in practices or methods of administration that have the effect of discriminating on the basis of disability, or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the child welfare agency's or court's program for persons with disabilities.[19] Under these prohibitions, a child welfare agency could be responsible for the discriminatory actions of a private foster care or adoption agency with which it contracts when those actions are taken in fulfillment of the private entity's contractual obligations with the child welfare agency. For example, if the private foster care or adoption agency imposed discriminatory eligibility requirements for foster or adoptive parents that screened out prospective parents with HIV, the state child welfare agency would most likely be responsible for the contractor's practice of discriminating on the basis of disability.

Two principles that are fundamental to Title II of the ADA and Section 504 are:
(1) individualized treatment; and (2) full and equal opportunity. Both of these principles are of particular importance to the administration of child welfare programs.

Individualized treatment. Individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence.[20] Persons with disabilities may not be treated on the basis of generalizations or stereotypes.[21] For example, prohibited treatment would include the removal of a child from a parent with a disability based on the stereotypical belief, unsupported by an individual assessment, that people with disabilities are unable to safely parent their children. Another example would be denying a person with a disability the opportunity to become a foster or adoptive parent based on stereotypical beliefs about how the disability may affect the individual's ability to provide appropriate care for a child.

Full and equal opportunity. Individuals with disabilities must be provided opportunities to benefit from or participate in child welfare programs, services, and activities that are equal to those extended to individuals without disabilities.[22] This principle can require the provision of aids, benefits, and services different from those provided to other parents and prospective parents where necessary to ensure an equal opportunity to obtain the same result or gain the same benefit, such as family reunification.[23]

This does not mean lowering standards for individuals with disabilities; rather, in keeping with the requirements of individualized treatment, services must be adapted to meet the needs of a parent or prospective parent who has a disability to provide meaningful and equal access to the benefit. [24] In some cases, it may mean ensuring physical or programmatic accessibility or providing auxiliary aids and services to ensure adequate communication and participation, unless doing so would result in a fundamental alteration to the nature of the program or undue financial and administrative burden.[25] For example, a child welfare agency must provide an interpreter for a father who is deaf when necessary to ensure that he can participate in all aspects of the child welfare interaction. In other instances, this may mean making reasonable modifications to policies, procedures, or practices, unless doing so would result in a fundamental alteration to the nature of the program.[26] For example, if a child welfare agency provides classes on feeding and bathing children and a mother with an intellectual disability needs a different method of instruction to learn the techniques, the agency should provide the mother with the method of teaching that she needs.

Under Title II of the ADA or Section 504, in some cases, a parent or prospective parent with a disability may not be appropriate for child placement because he or she poses a significant risk to the health or safety of the child that cannot be eliminated by a reasonable modification.[27] This exception is consistent with the obligations of child welfare agencies and courts to ensure the safety of children. However, both the ADA and Section 504 require that decisions about child safety and whether a parent or prospective parent represents a threat to safety must be based on an individualized assessment and objective facts, including the nature, duration, and severity of the risk to the child, and the probability that the potential injury to the child will actually occur.[28] In addition, if the risk can be eliminated by a reasonable modification of policies, practices, or procedures, or by the provision of auxiliary aids or services, the child welfare agency must take such mitigating actions.[29] A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities, but they may not be based on stereotypes or generalizations about persons with disabilities.[30]

By applying these principles consistently in the child welfare system, child welfare agencies and courts can ensure that parents and prospective parents with disabilities have equal access to parenting opportunities while ensuring children safely remain in or are placed in safe and caring homes. The attached Questions and Answers provide more detailed information and specific implementation examples for child welfare agencies and courts.

QUESTIONS AND ANSWERS

1. *What are the basic requirements of ADA Title II and Section 504?*

   Answer: Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, the services, programs, or activities of state and local government entities.[31] Section 504 similarly prohibits discrimination on the basis of disability against qualified individuals with a disability in programs, services, and activities receiving Federal financial assistance.[32]

   Under the ADA and Section 504, programs cannot deny people with disabilities an opportunity to participate,[33] and must provide people with disabilities with meaningful and equal access to programs, services, and activities.[34] Programs and services must be accessible to and usable by people with disabilities.[35] In addition, programs must provide people with disabilities with an equal opportunity to participate in and benefit from the programs, services and activities of the entity;[36] they are also prohibited from using methods of program administration, which includes written rules as well as agency practices, that have a discriminatory effect on individuals with disabilities.[37] Moreover, programs must provide reasonable modifications in policies, practices, and procedures when necessary to avoid discrimination;[38] and must take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others through the provision of auxiliary aids and services.[39]

Who is protected by disability nondiscrimination laws?

2. Who is considered a person with a disability under Title II of the ADA and Section 504?

   Answer: The ADA and Section 504 protect the rights of individuals with disabilities.[40] A "disability" is defined as a physical or mental impairment that substantially limits a major life activity, such as caring for oneself, performing manual tasks, breathing, standing, lifting, bending, speaking, walking, reading, thinking, learning, concentrating, seeing, hearing, eating, sleeping, or working.[41] Major life activities also include the operation of major bodily functions, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, or bladder, neurological, brain, and respiratory, circulatory, endocrine, and reproductive functions.[42]

   Congress has made clear that the definition of disability in the ADA and Section 504 is to be interpreted broadly.[43] Even if an individual's substantially limiting impairment can be mitigated through the use of medication; medical supplies, equipment, and devices; learned behavioral or adaptive neurological modifications; assistive technology (e.g. a person with a hearing disability who uses hearing aids that substantially restores the sense of hearing); or reasonable modifications to policies, practices, or procedures, the individual is still protected by the ADA and Section 504.[44] The ADA and Section 504 also apply to people who have a record of having a substantial impairment (e.g., medical, military, or employment records denoting such an impairment), or are regarded as having such an impairment, regardless of actually having an impairment.[45]

   An "individual with a disability" under the ADA and Section 504 does not include an individual who is currently engaged in the illegal use of drugs, when the state or local government program or program receiving Federal financial assistance acts on the basis of the illegal drug use.[46] However, an individual is not excluded from the definition of disability on the basis of the illegal use of drugs if he or she (1) has successfully completed a drug rehabilitation program or has otherwise been successfully rehabilitated and is no longer engaging in drug use, or (2) is participating in a supervised rehabilitation program and is no longer engaging in drug use.[47]

   To be eligible, an individual with a disability must be "qualified." An individual with a disability is qualified if he or she meets the essential eligibility requirements of a service, program, or activity, with or without the provision of reasonable modifications, the provision of appropriate auxiliary aids and services, or the removal of architectural and communication barriers.[48]

3. Who do Title II of the ADA and Section 504 protect in child welfare programs?

   Answer: Title II of the ADA and Section 504 protect qualified individuals with disabilities, which can include children, parents, legal guardians, relatives, other caretakers, foster and adoptive parents, and individuals seeking to become foster or adoptive parents, from discrimination by child welfare agencies and courts.[49] Title II also protects individuals or entities from being denied or excluded from child welfare services, programs or activities because of association with an individual with a disability.[50] For example, Title II prohibits a child welfare agency from refusing to place a child with a prospective foster or adoptive parent because the parent has a friend or relative with HIV.

Title II and Section 504 also protect "companions" of individuals involved in the child welfare system when the companion is an appropriate person with whom the child welfare agency or court should communicate. A companion may include any family member, friend, or associate of a person seeking or receiving child welfare services.[51] For instance, when a child welfare agency communicates with an individual's family member who is deaf, appropriate auxiliary aids and services to the family member must be provided by the agency to ensure effective communication.[52]

Finally, the ADA and Section 504 protect individuals from any retaliation or coercion for exercising their right not to experience discrimination on the basis of disability. Individuals enjoy this protection whether or not they have a disability.[53]

Who is required to comply with the disability nondiscrimination laws?

4. What types of child welfare programs and activities are covered by these laws?

Answer: Title II covers *all* of the programs, services, and activities of state and local governments, their agencies, and departments.[54] Similarly, Section 504 applies to all of the activities of agencies that receive Federal financial assistance.[55] Therefore, all child welfare-related activities and programs of child welfare agencies and courts are covered, including, but not limited to, investigations, witness interviews, assessments, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, reunification services, and family court proceedings. Title II and Section 504 also make child welfare agencies responsible for the programs and activities of private and non-profit agencies that provide services to children and families on behalf of the state or municipality.[56]

> *All* activities of child welfare agencies are covered by Title II and Section 504, including removal proceedings and agencies' programs and activities must not discriminate on the basis of disability.

5. Do Title II and Section 504 apply to the programs, services, and activities of family courts?

Answer: Yes. State court proceedings, such as termination of parental rights proceedings, are state activities and services for purposes of Title II.[57] Section 504 also applies to state court proceedings to the extent that court systems receive Federal financial assistance.[58]

Title II and Section 504 require court proceedings to be accessible to persons with disabilities, and persons with disabilities must have an equal opportunity to participate in proceedings.[59] For example, if a conference or hearing is scheduled in a location that is inaccessible to wheelchair users, it should be moved to an accessible location in order to ensure a wheelchair user can participate fully in the conference or hearing.

Courts are required to provide auxiliary aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.[60] For example, courts should provide appropriate auxiliary aids and services to a parent who is deaf so that he or she can access court proceedings as fully and effectively as those who are not deaf.

Like child welfare agencies, courts must also make reasonable modifications to policies, practices, and procedures where necessary to avoid discrimination on the basis of disability.[61] For example, it may be necessary to adjust hearing schedules to accommodate the needs of persons with disabilities, if the need for the adjustment is related to the individual's disability. Or it may be necessary to provide an aide or other assistive services in order for a person with a disability to participate fully in a court event.[62] Such assistance should be provided unless doing so would result in a fundamental alteration.[63]

6. Do Title II and Section 504 apply to private contractors of child welfare agencies and courts?

Answer: Yes. Title II prohibits discrimination in child welfare programs and services when those services are provided by contractors.[64] Section 504 prohibits discrimination in child welfare programs receiving federal financial assistance, including programs receiving federal financial assistance operated by private entities under contract with child welfare agencies.[65] Accordingly, to the extent that courts and agencies contract with private agencies and providers to conduct child welfare activities, the agencies should ensure that in the performance of their contractual duties contractors comply with the prohibition of discrimination in Title II and Section 504.[66]

What do the disability nondiscrimination laws require of child welfare agencies and courts?

7. What is a reasonable modification?

Answer: Under Title II of the ADA and Section 504, child welfare agencies and courts must make changes in policies, practices, and procedures to accommodate the individual needs of a qualified person with a disability, unless the change would result in a fundamental alteration to the nature of the program.[67] Parenting skills do not come naturally to many parents, with or without disabilities. To provide assistance to parents with disabilities that is equal to that offered to parents without disabilities, child welfare agencies may be required to provide enhanced or supplemental training, to increase frequency of training opportunities, or to provide such training in familiar environments conducive to learning. For example, child welfare agencies may have a parenting skills class once per week. For a parent with a disability who requires individualized assistance in learning new skills because of her or his disability, child welfare agencies may need to modify this training to allow more frequent, longer, or more meaningful training.

8. What are auxiliary aids and services? What does it mean to provide effective communication?

Answer: Child welfare agencies and courts are required to take appropriate steps – including the provision of appropriate auxiliary aids and services – where necessary to ensure that individuals with communication disabilities understand what is said or written and can communicate as effectively as individuals without disabilities.[68] Examples of auxiliary aids and services include, among others, qualified interpreters, note takers, computer-aided transcription services, accessible electronic and information technology, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, qualified readers, taped texts, audio recordings, braille materials, large print materials, and modifications to existing devices.[69]

Child welfare agencies and courts should consider whether they are taking appropriate steps to ensure that effective communication is provided in different settings and as cases develop. For example, a qualified interpreter may be necessary for smaller settings involving only a few people, such as home visits or assessments, whereas the use of real-time captioning may be appropriate during larger group meetings, such as family team meetings or in court, where numerous people are present or where the layout of the room makes it difficult to view an interpreter and obtain visual cues from the speaker.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual with a disability; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.[70] For example, a local child welfare agency may be required to provide qualified interpreters to ensure effective communication with individuals with disabilities during agency meetings to discuss service planning. However, to communicate a simple message such as an appointment date or address, handwritten notes may be sufficient.

Child welfare agencies must refrain from using minor children as interpreters except in limited exigent circumstances. Adult companions may be used as interpreters only in emergencies and only when other factors are met.

State and local child welfare agencies and courts must give primary consideration to the auxiliary aid or service requested by the individual.[71] This means, for example, that if a parent with a disability requests a qualified interpreter who is an oral transliterator (a type of interpreter who facilitates spoken communication between individuals who are deaf or hard of hearing and individuals who are not), the agency must provide a qualified oral transliterator, unless the agency can demonstrate that it would pose a fundamental alteration or an undue administrative or financial burden and an alternative auxiliary aid or service provides communication to the individual that is as effective as communication provided to others.[72] If provision of a particular auxiliary aid or service would result in a fundamental alteration in the nature of a service, program, or activity, or if it would result in undue financial and administrative burdens, a child welfare agency or court need not provide it.[73] These entities must nonetheless provide auxiliary aids or services that do not result in a fundamental alteration or undue burdens that place the individual with a disability on equal footing with individuals without disabilities to the maximum extent possible.

In order to be effective, auxiliary aids and services must be provided in a timely manner and in such a way as to protect the privacy and independence of the individual with a disability.[74]

Child welfare agencies and courts are prohibited from requiring individuals with disabilities to supply their own interpreters or other auxiliary aids and services.[75] Child welfare agencies and courts may not rely on minor children accompanying individuals with disabilities to interpret, except in emergencies involving imminent threats to the safety or welfare of an individual or the public where no interpreter is available.[76]

Child welfare agencies should consult with and include organizations that support and advocate for the rights of individuals with disabilities in their policy-making and training efforts.

Child welfare agencies and courts may rely on adults accompanying individuals with disabilities to interpret, but only in emergencies or where the individual with a disability specifically makes such a request, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.[77]

State and local child welfare agencies and courts are also prohibited from placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of the provision of auxiliary aids or other services that are required to provide that individual or group with nondiscriminatory treatment.[78]

9. What steps are child welfare agencies required to take to ensure that parents and prospective parents with disabilities involved with the child welfare system have an equal opportunity to participate in and benefit from their programs and activities?

Answer: Child welfare agencies are required to ensure that parents and prospective parents with disabilities involved in the child welfare system are afforded an opportunity to preserve their families and/or to become parents that is equal to the opportunity that the entities offer to individuals without disabilities.[79]

Title II and Section 504 require that agency staff refrain from basing assessments, services, or decisions on assumptions, generalizations, or stereotypes about disability.

Agencies should take steps to ensure, for example, that investigators, social workers, supervisors, and others base their assessments of and decisions regarding individuals with disabilities on actual facts that pertain to the individual person, and not on assumptions, generalizations, fears, or stereotypes about disabilities and how they might manifest. The child welfare agency's obligation to ensure individualized assessments applies at the outset and throughout any involvement that an individual with a disability has with the child welfare system.

Child welfare agencies should take steps to ensure that their obligations under Title II and Section 504 are met by reviewing the following:

- existing policies, practices, and procedures;
- how the agency actually processes cases;
- the agency's licensing and eligibility requirements for foster parents and guardians; and
- whether there are staff training or professional development needs.

Service plans for parents and prospective parents should address the individual's disability-related needs and the auxiliary aids and services the agency will provide to ensure equal opportunities. At the same time, service plans should not rely on fears or stereotypes to require parents with disabilities to accept unnecessary services or complete unnecessary tasks to prove their fitness to parent when nondisabled parents would not be required to do so.

Agencies also have an obligation to ensure that the aids, benefits, and services provided to parents and prospective parents in support of appropriate service plan activities and goals – such as visitation, parenting skills training, transportation assistance, counseling, respite, and other “family preservation services” and “family support services” – are appropriately tailored to be useful to the individual.[80] For example, if a child welfare agency provides transportation to visits for individuals without disabilities, it should provide accessible transportation to individuals with disabilities to ensure equal opportunity.

To ensure that persons with disabilities have equal opportunity to retain or reunify with their children, it may be necessary for the agency to reasonably modify policies, practices, and procedures in child welfare proceedings. In general, agencies should consider whether their existing policies, practices, and procedures; their actual processing of cases; and their training materials comply with the nondiscrimination requirements of Title II and Section 504 for individuals with disabilities. Agencies should also take appropriate steps to ensure that components of child welfare processing, such as “fast-track” and concurrent planning, are not applied to persons with disabilities in a manner that has a discriminatory effect and that denies parents with disabilities the opportunity to participate fully and meaningfully in family reunification efforts.

In some instances, providing appropriate supports for persons with disabilities means selecting an appropriate alternative already provided in the Federal child welfare statutes. For instance, section 475 of the Social Security Act provides that the child welfare agency is required to file a petition to terminate parental rights when the child is in foster care for the preceding 15 out of 22 months. However, the law provides exceptions to this requirement and gives child welfare agencies the flexibility to work with parents who have a child in foster care beyond the 15 month period, including parents with disabilities.[81] Exceptions to the termination of parental rights requirement include situations where: (1) at the state’s discretion, the child is being cared for by a relative; (2) there is a compelling reason for determining that filing the petition would not be in the best interests of the child; or (3) the state, when reasonable efforts are to be made, has failed to provide such services deemed necessary for the safe return of the child to his or her home. [82] As to number (3), a child welfare agency should provide the family of the child with the services necessary for the safe return of the child to the child’s home in a manner that meets the unique needs of the family. Failure to provide services, including services to address family members’ disability-related needs, could qualify as an exception to the termination of parental rights requirement. Decisions about whether this exception applies to a situation in which the supports necessary for a person with a disability to access services were not provided should be made on a case-by-case basis.

Given the responsibilities of agencies discussed above, we also recommend that courts consider whether parents and prospective parents with disabilities have been afforded an equal opportunity to attain reunification, including whether they have been provided with appropriate services and supports and other reasonable modifications to enable them to participate fully and meaningfully in family preservation efforts. Additionally, we suggest that courts consider whether any reasonable modifications are necessary and should be made for parents with disabilities. We also recommend that courts consider evidence concerning the manner in which the use of adaptive equipment or supportive services may enable a parent with disabilities to carry out the responsibilities of parenting.

Foster care and adoption agencies must also ensure that qualified foster parents and prospective parents with disabilities are provided opportunities to participate in foster care and adoption programs equal to opportunities that agencies provide to individuals without disabilities.[83] This may require foster care and adoption agencies to reasonably modify policies, practices, and procedures, where necessary to avoid discrimination on the basis of disability. For example, an adoption agency may be required to provide large print and electronically accessible adoption materials to accommodate the known needs of a visually impaired adoption program applicant.

10. When a child welfare agency or court provides or requires an assessment of a parent during the processing of the child welfare case, what do Title II and Section 504 require regarding the assessment?

    Answer: Title II and Section 504 require that assessments be individualized.[84] An individualized assessment is a fact-specific inquiry that evaluates the strengths, needs, and capabilities of a particular person with disabilities based on objective evidence, personal circumstances, demonstrated competencies, and other factors that are divorced from generalizations and stereotypes regarding people with disabilities. Child welfare agencies and courts may also be required to provide reasonable modifications to their policies, practices, or procedures and/or appropriate auxiliary aids and services during assessments to ensure equal opportunities for individuals with disabilities. For example, a child welfare agency or court may be required to provide a qualified sign language interpreter to accommodate an individual with a communication disability during an evaluation to ensure an accurate assessment.

11. How does the equal opportunity requirement apply to case planning activities of child welfare agencies?

    <u>Answer</u>: The equal opportunity requirement applies throughout the continuum of a child welfare case, including case planning activities. In many instances, providing the same services and resources to an individual with a disability that are provided to individuals without disabilities will not be sufficient to provide an equal opportunity to an individual with a disability. Where this is the case, Title II and Section 504 may require agencies to provide additional, individually tailored services and resources to meet the requirement to provide an equal opportunity to participate in and benefit from the program. For example, when providing training to parents, agencies should consider the individual learning techniques of persons with disabilities and may need to incorporate the use of visual modeling or other individualized techniques to ensure equal opportunity to participate in and benefit from the training.

    Staff should consider whether the agency is appropriately assisting family members in meeting service plan tasks and case goals, and whether modifications must be made. For example, if parenting training is not working, staff should evaluate whether there are any unnecessary barriers to the training that could be removed or reasonably modified, such as increased opportunities for modeling behavior. Agencies should also ensure that staff members develop appropriate service plan tasks and goals that address the individualized needs of all affected family members with disabilities, recognizing that allowing parents with disabilities to use family members as part of their support network may be appropriate.

12. Is an agency required to arrange for services to parents and prospective parents with disabilities that are necessary to avoid discrimination but are not available within the agency's programs?

    > Child welfare agencies may be required to modify their own services, or, when necessary, to arrange for services outside of the agency, in order to ensure equal opportunity for parents and prospective parents with disabilities under Title II and Section 504.

    <u>Answer</u>: In addition to providing to parents with disabilities all reunification services that it provides to parents without disabilities, a child welfare agency may be required, under Title II and Section 504, to arrange for available services from sources outside of the agency as a reasonable modification of its procedures and practices for parents with disabilities so long as doing so would not constitute a fundamental alteration. Arranging for such services from outside sources may be necessary to provide an equal opportunity to participate in and benefit from the agency's programs. Many specialized services to support persons with disabilities are often available from other social service agencies, as well as disability organizations. For example, for a person with a mental health disability, mental health services and supports, such as supportive housing, peer supports, assertive community treatment, and other community-based supports are often available from mental health service agencies. Child welfare agencies should coordinate with such agencies and organizations to ensure that parents and prospective parents with disabilities receive the most complete set of support services possible, and also to ensure that reunification and other services are specifically tailored to their needs.[85] This requirement does not change an entity's responsibility to make available those reunification services provided to parents without disabilities or to reasonably modify them to provide equal opportunity.

13. Are child welfare agencies and courts permitted to impose a surcharge on persons with disabilities for the provision of reasonable modifications or auxiliary aids and services?

    <u>Answer</u>: No. Title II prohibits the imposition of surcharges to cover the costs of measures required to provide an individual with nondiscriminatory treatment.[86] For example, child welfare agencies and courts may not charge persons with disabilities for any costs associated with providing effective communication during visitation, meetings, and court hearings, and may be required to provide transportation to accessible facilities when needed to fulfill their program access obligations.

14. Child welfare agencies have an obligation to ensure the health and safety of children. How can agencies comply with the ADA and Section 504 while also ensuring health and safety?

    <u>Answer</u>: Under child welfare law, child welfare agencies must make decisions to protect the safety of children. The ADA and Section 504 are consistent with the principle of child safety. For example, the ADA explicitly makes an exception where an individual with a disability represents a "direct threat."[87] Section 504 incorporates a similar principle.[88]

    Under the ADA and Section 504, a direct threat is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.[89] In determining whether an individual poses a direct threat to the health or safety of a child or others, child welfare agencies and courts must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain the nature, duration, and severity of the risk to the child; the probability that the potential injury to the child will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.[90]

As such, in some cases an individual with a disability may not be a qualified individual with a disability for child placement purposes. What both the ADA and Section 504 require, however, is that decisions about child safety and whether a parent, prospective parent, or foster parent represents a direct threat to the safety of the child must be based on an individualized assessment and objective facts and may not be based on stereotypes or generalizations about persons with disabilities.[91]

15. What are some other best practices for child welfare agencies and courts?

Answer: We recommend that child welfare agencies and courts review and update their policies and procedures on a regular basis to ensure that they comply with the ADA and Section 504. We recommend that child welfare agencies and courts also ensure that their employees and contractors are sufficiently trained in ADA and Section 504 compliance. In addition, we recommend that they look for ways to coordinate with disability organizations and agencies to assist in service planning and to support them in their efforts to ensure equal opportunity for parents and prospective parents with disabilities.

How can aggrieved persons file a complaint?

16. What can individuals do when they believe they have been subjected to discrimination in violation of Title II or Section 504?

Answer: An aggrieved person may raise a Title II or Section 504 claim in child welfare proceedings. Additionally, subject to certain limitations, an aggrieved person may pursue a complaint regarding discrimination in child welfare services, programs, or activities under Title II or Section 504 in federal court. [92]

Aggrieved individuals may also file complaints with HHS and DOJ. HHS and DOJ also have authority to initiate compliance review investigations of child welfare agencies and courts with or without receiving a complaint. If an investigation of a complaint or a compliance review reveals a violation, HHS or DOJ may issue letters of findings and initiate resolution efforts.[93] DOJ may initiate litigation when it finds that a child welfare agency or court is not in compliance with Title II. HHS may also refer cases to DOJ for litigation where a violation is found and is not voluntarily resolved.[94]

Title II and Section 504 allow for declaratory and injunctive relief, such as an order from a court finding a violation and requiring the provision of reasonable modifications. Title II and Section 504 also allow for compensatory damages for aggrieved individuals. Individuals who prevail as parties in litigation may also obtain reasonable attorney's fees, costs, and litigation expenses.[95]

Under Section 504, remedies also include suspension and termination of Federal financial assistance, the use of cautionary language or attachment of special conditions when awarding Federal financial assistance, and bypassing recalcitrant agencies and providing Federal financial assistance directly to sub-recipients.[96]

Additional Resources

For more information about the ADA and Section 504, you may call the DOJ's toll-free ADA information line at 800-514-0301 or 833-610-1264 (TDD), or access its ADA website at archive.ada.gov. For more information about the responsibilities of child welfare agencies under the ADA and Rehabilitation Act, see "DOJ/HHS Joint Letter to Massachusetts Department of Children and Families," at www.ada.gov/new.htm. For more information about Title II of the ADA, including the Title II Technical Assistance Manual and Revised ADA Requirements: Effective Communication, see www.ada.gov/ta-pubs-pg2.htm.

Information about filing an ADA or Section 504 complaint with DOJ can be found at https://www.ada.gov/file-a-complaint/. Individuals who believe they have been aggrieved under Title II or Section 504 should file complaints at the earliest opportunity.

You can also file a Section 504 or Title II ADA complaint with OCR at http://www.hhs.gov/ocr/civilrights/complaints/index.html.

General information about civil rights and child welfare issues can be found at: http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/index.html.

For information about ACF's Children Bureau, please visit: http://www.acf.hhs.gov/programs/cb.

For ACF and OCR regional offices, please visit:

- http://www.acf.hhs.gov/programs/oro
- http://www.hhs.gov/ocr/office/about/rgn-hqaddresses.html

Duplication of this document is encouraged.

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[1] The term “parents” includes biological, foster, and adoptive parents. It also includes caretakers such as legal guardians or relatives. Prospective parents include individuals who are seeking to become foster or adoptive parents.

[2] 29 U.S.C. § 794.

[3] 42 U.S.C. §§ 12131-12134.

[4] Children with disabilities also have nondiscrimination protections under Section 504 and Title II of the ADA, but the focus of this technical assistance is on parents and prospective parents with disabilities.

[5] Letter from the U.S. Department of Justice, Civil Rights Division and U.S. Department of Health and Human Services, Office for Civil Rights to the Massachusetts Department of Children and Families (Jan. 29, 2015), at www.ada.gov/ma_docf_lof.pdf and www.hhs.gov/ocr/civilrights/activities/examples/Disability/mass_lof.pdf(Massachusetts Department of Children and Families).

[6] National Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children at 14, 18 (2012), at www.ncd.gov/publications/2012/Sep272012/.

[7] *Id*. at 114, 122-26.

[8] *Id.* at 92-93.

[9] *Id.*at 194-199.

[10] *Id*. at 114.

[11] *Id*. at 125-26.

[12] 42 U.S.C. § 12132.

[13] 42 U.S.C. § 12131(1)(A), (B); s*ee also, e.g.,* 28 C.F.R. § 35.130(b)(1) (prohibiting disability discrimination directly or through contractual, licensing, or other arrangements), 35.130(b)(3) (prohibiting methods of administration that have a discriminatory effect). Private entities involved in the child welfare system may also be independently covered by Title III of the ADA, 42 U.S.C. §§ 12181-12189.

14 29 U.S.C. § 794(a).

15 *See, e.g.,* 28 C.F.R. § 42.105; 45 C.F.R. § 84.5.

16 *See Grove City College v. Bell*, 465 U.S. 555, 564 (1984).

17 29 U.S.C. § 794(b).

18 *See, e.g.,* 45 C.F.R. § 84.5.

19 *See* 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4);); *see also* 28 C.F.R. § 42.503(b)(3).

20 *See, e.g.,* 28 C.F.R. § 35.130(b); *see also* 28 C.F.R. pt. 35, App. B (explaining in the 1991 Section-by-Section guidance to the Title II regulation that, "[t]aken together, the[] provisions [in 28 C.F.R. § 35.130(b)] are intended to prohibit exclusion . . . of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not presumptions as to what a class of individuals with disabilities can or cannot do."); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987).

21 *See, e.g.*, *id.*

22 *See* 28 C.F.R. §§ 35.130(b)(1)(ii)-(iv), (vii), (b)(7); 45 C.F.R. § 84.4(b)(1)(ii)-(iii); *see also* 28 C.F.R. § 42.503(b)(1)(ii), (iii).

23 *See, e.g.,* 28 C.F.R. § 35.130(b)(1)(ii)-(iv).

24 *Id*; *see also Alexander v. Choate*, 469 U.S. 287 (1985).

25 28 C.F.R. §§ 35.149-151, 160-164; 45 C.F.R. §§ 84.21-23, 84.52(d); *see also* 28 C.F.R. §§ 42.503(e), (f), 42.520-522.

26 *See* 45 C.F.R. §§ 84.12(a), 84.22(a) and (f), and 84.52(d); and 28 C.F.R. § 35.130(b)(7).

27 28 C.F.R. § 35.139(a)-(b); *Arline*, 273 U.S. at 287.

28 28 C.F.R. § 35.139(b); *Arline*, 273 U.S. at 288.

2928 C.F.R. § 35.139(b); *Arline*, 273 U.S. at 288.

30 *See* 28 C.F.R. § 35.130(h).

31 42 U.S.C. § 12132.

32 29 U.S.C. § 794(a).

33 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

34 *Choate*, 469 U.S. 287.

35 28 C.F.R. § 35.150(a); 45 C.F.R. § 84.22(a).

36 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii);

37 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4).

38 28 C.F.R. § 35.130(b)(7); *Choate*, 469 U.S. at 301.

39 28 C.F.R.§ 35.160(a)(1); *see also* 45 C.F.R. § 84.52(d) (requiring health and social services entities to provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question).

40 42 U.S.C. § 12132; 29 U.S.C. § 794(a).

41 42 U.S.C. § 12102(1), (2)(A); 29 U.S.C. § 705(9)(B).

42 42 U.S.C. § 12102(2)(B).

43 42 U.S.C. § 12102(4)(A); 29 U.S.C. § 705(9)(B).

44 42 U.S.C. § 12102(4)(E)(i); 29 U.S.C. § 705(9)(B); *see also* Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, at www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

45 42 U.S.C. § 12102(2)(1)(B)-(C); 29 U.S.C. § 705(9)(B). The ADA Amendments Act of 2008 amended the definition of disability for Titles I, II, and III of the ADA as well as Section 504. Pub. L. No. 110 - 325, 122 Stat. 3553 (2008). For a discussion of the United States Department of Justice's (DOJ's) interpretation of the changes to the definition, see

DOJ's Notice of Proposed Rulemaking to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839 (January 30, 2014). *See also* Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, at www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

46 42 U.S.C. § 12210(a); 29 U.S.C. § 794(d).

47 42 U.S.C. § 12210(b)(1)-(2); 29 U.S.C. § 794(d).

48 42 U.S.C. § 12131(1); 28 C.F.R. § 35.104; *see also* 45 C.F.R. § 84.3(l)(4) (defining "qualified handicapped person" under HHS' Section 504 regulation).

49 For a discussion of a "qualified individual with a disability," *see* discussion *supra* at Q&A 2.

50 28 C.F.R. § 35.130(g); 28 C.F.R. pt. 35, App. B.

51 28 C.F.R. § 35.160(a)(2).

52 28 C.F.R. § 35.160(a)(1); 28 C.F.R. pt. 35, App. A., Subpt. E (2010).

53 42 U.S.C. § 12203; 28 C.F.R. § 35.134; 45 C.F.R. § 84.61; 45 C.F.R. § 80.7(e).

54 *See Pa. Dep't. of Corrs. v. Yeskey*, 524 U.S. 206, 209-12 (1998) (discussing the breadth of Title II's coverage).

55 *See* 29 U.S.C. § 794(b)(1)(A), (B).

56 *See* 28 C.F.R. §§ 35.130(b)(1), (3), 42.503(b)(1), (3); 45 C.F.R. § 84.4(b)(1), (4).

57 *See Yeskey*, 524 U.S. at 209-12 (discussing the breadth of Title II's coverage); *cf. Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding judicial enforcement of racially discriminatory restrictive covenants state action in violation of the Fourteenth Amendment). *See also* 28 C.F.R. § 35.190(b)(6) (designating to the DOJ responsibility for investigation of complaints and compliance reviews of "[a]ll programs, services, and regulatory activities relating to . . . the administration of justice, including courts.").

58 29 U.S.C. § 794; *see U.S. Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n.4 (1986). We also remind judges and court personnel of their obligations under the American Bar Association, Model Code of Judicial Conduct, Rule 2.3 (b) that states: "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, . . . and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."

59 *See* 28 C.F.R. § 35.130; 45 C.F.R. § 84.4; *see also* 28 C.F.R. § 42.503.

60 28 C.F.R. § 35.160-.164; 45 C.F.R. § 84.52(d); *see also* 28 C.F.R. § 42.503(f).

61 28 C.F.R. § 35.130(b)(7); *see also Choate*, 469 U.S. at 304-06.

62 In addition, advocacy organizations, such as those within the Protection and Advocacy system, may provide assistance to individuals with disabilities when they become involved with the child welfare system.

63 *See* 28 C.F.R. § 35.130(b)(7), 35.160-.164; *see also Choate,* 469 U.S. at 300-309.

64 *See* 28 C.F.R. § 35.130(b)(1), (3).

65 29 U.S.C. § 794(a); 45 C.F.R. §§ 84.3(h); 84.4(b)(1), (4).

66 Private entities involved in child welfare activities may also be public accommodations with their own nondiscrimination obligations under Title III of the ADA. *See* 42 U.S.C. §§ 12181-12189 (Title III of the ADA).

67 *See* 28 C.F.R. § 35.130(b)(7); 45 C.F.R. § 84.22(a). A fundamental alteration can be a change that is so significant that it alters the essential nature of the public entity's service, program, or activity. *Id.*; *cf.* U.S. Dep't of Justice, ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities § III-4.3600 (discussing a fundamental alteration as a modification that is so

significant it alters the essential nature of services, privileges, and accommodations). A fundamental alteration is necessarily highly fact-specific. Child welfare entities have the burden of establishing that a proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens. A public entity still must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

68 28 C.F.R. § 35.160; 45 C.F.R. § 84.52(d).

69 42 U.S.C. § 12103(1); 28 C.F.R. § 35.104.

70 28 C.F.R. § 35.160(b)(2). For further information on ensuring effective communication, *see* U.S. Dep't of Justice, ADA Requirements: Effective Communication (Jan. 31, 2014), at www.ada.gov/effective-comm.htm; *see also* U.S. Dep't of Justice and U.S. Dep't of Educ., Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (2015), at www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.pdf.

71 28 C.F.R. § 35.160(b)(2).

72 28 C.F.R. §§ 35.160(b)(2); 35.164.

73 *See supra* footnote70.

74 28 C.F.R. § 35.160(b)(2).

75 28 C.F.R. § 35.160(c)(1).

76 28 C.F.R. § 35.160(c)(2)(i), (3).

77 28 C.F.R. § 35.160(c)(2)(ii).

78 *See* 28 C.F.R. § 35.130(f).

79 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. §§ 84.4(b)(1)(ii), 84.52(a)(2).

80 "Family preservation services" are services for children and families to protect children from harm and to help families at risk or in crisis. 42

U.S.C. § 629a(a)(1); 45 C.F.R. § 1357.10(c). "Family support services" are community-based services to promote the safety and well-being of children and families, to increase the strength and stability of families in various ways, and to enhance child development. 42 U.S.C. § 629a (a)(2); 45 C.F.R. § 1357.10(c).

81 42 U.S.C. § 675(5)(E); 45 C.F.R. § 1356.21(i).

82 42 U.S.C. § 675(5)(E)(i)-(iii); 45 C.F.R. § 1356.21(i)(2)(i)-(iii).

83 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 28 C.F.R. pt. 35 (Title II); 28 C.F.R. pt. 42, subpt. G (DOJ Section 504 regulation); 45 C.F.R. pt. 84 (HHS Section 504 regulation).

84 *See* 28 C.F.R. pt. 35, App. B; *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (explaining that an individualized inquiry is among the ADA's most "basic requirement[s].").

85 *See* 28 C.F.R. § 35.130(b)(1)(i)-(iv), (b)(7).

86 *See* 28 C.F.R. § 35.130(f).

87 28 C.F.R. § 35.139.

88 *See Arline*, 480 U.S. 273.

89 28 C.F.R. § 35.139(b).

90 *Id.*

91 *See* 28 C.F.R. § 35.139.

92 *See* 28 C.F.R. §§ 35.170-172; 45 C.F.R. § 84.61; *see also* 28 C.F.R. § 42.530. In addition, child welfare agencies and courts that employ 50 or more persons are required to have grievance procedures for prompt and equitable resolution of complaints alleging actions prohibited by Title II and Section 504. 28 C.F.R. § 35.107; 45 C.F.R. § 84.6; *see also* 28 C.F.R. § 42.505.

93 28 C.F.R. §§ 35.172(c), 35.173; 45 C.F.R. § 84.61; *see also* 28 C.F.R. § 42.530.

94 28 C.F.R. § 35.174; 45 C.F.R. § 84.61.

95 42 U.S.C. § 12205; 29 U.S.C. § 794a(b); 28 C.F.R. § 35.175.

[96] *See* 42 U.S.C. § 2000d-1.

The Americans with Disabilities Act authorizes the Department of Justice (the Department) to provide technical assistance to individuals and entities that have rights or responsibilities under the Act. This document provides informal guidance to assist you in understanding the ADA and the Department's regulations.

This guidance document is not intended to be a final agency action, has no legally binding effect, and may be rescinded or modified in the Department's complete discretion, in accordance with applicable laws. The Department's guidance documents, including this guidance, do not establish legally enforceable responsibilities beyond what is required by the terms of the applicable statutes, regulations, or binding judicial precedent.

THEORETICAL AND TEST USAGE ISSUES

The Responsible Use of Psychological Testing in Child Custody Evaluations: Selection of Tests

James R. Flens

SUMMARY. The responsible use of psychological tests in child custody evaluations requires an advanced understanding of both psychological issues of test selection and legal criteria regarding admissibility of

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expert testimony. This paper discusses the psychological and legal issues associated with test selection and with admissibility of expert testimony pertaining to psychological test data. It is argued that the legal standards of relevance and helpfulness require the methodology underlying an expert's testimony to be both reliable and valid. Therefore, it is essential to select psychological tests with demonstrated reliability and validity. Case law regarding expert testimony and the integration of professional practice guidelines pertaining to the use of psychological tests with ethical standards will be discussed. *[Article copies available for a fee from The Haworth Document Delivery Service: 1-800-HAWORTH. E-mail address: <docdelivery@haworthpress.com> Website: <http://www.HaworthPress.com>*

KEYWORDS. Assessment, child custody, ethics, evaluation, Daubert, Kumho, test selection

PART 1. SELECTION OF TESTS

> *Then the king said, "Bring me a sword." So they brought a sword before the king. And the king said, "Divide the living child in two, and give half to one, and half to the other." (1 Kings 3:24-25)*

As the first recorded child custody dispute reveals, historical resolution of child custody disputes was a little bit different than it is today. Unlike King Solomon–who had only his sword and his wits–today's custody evaluators operate in two worlds. They operate in the legal world, which encompasses state statutes, case law precedents, and rules of evidence. They also operate in the mental health world, which encompasses the application of forensic methods and procedures (Martindale & Gould, 2004) and an arsenal of tests and measures used in conducting child custody evaluations (Kirkpatrick, 2003; see, e.g., Ackerman, 2001; Condie, 2003; Gould, 1998, 1999; Heilbrun, 2001; Schutz, Dixon, Lindenberger, Child, & Ruther, 1989; Stahl, 1994; Woody, 2000). In this article, I describe the interdependence between legal standards and psychological ethics applied to the selection of psychological tests in child custody evaluations. I argue that evaluators' responsible use of psychological tests begins with an understanding of rules of evidence governing expert testimony and an understanding of legal and psychological concepts of reliability, relevance, and helpfulness.

A BRIEF REVIEW OF PSYCHOMETRIC CONCEPTS

The use of psychological testing in child custody evaluations requires evaluators to possess (or develop) an advanced understanding of psychometric issues (i.e., reliability, validity), the effects of context on the test data, the use of context-specific normative data, and the legal criteria and admissibility standards for psychological data that are found in statutes and case law. It also requires evaluators to consider sources of bias that may affect interpretation of test results, including evaluator biases such as confirmatory bias (Borum, Otto, & Golding, 1993), confirmatory distortion (Martindale, in press) or "psychotic certainty" (Martindale, 2004), and test-taker bias (e.g., response styles including impression management and self-deceptive enhancement; see e.g., Friedman, Lewak, Nichols, & Webb, 2001; Greene, 2000; Paulhus, 1998). A quick review of three common psychometric[1] terms might be appropriate at this time for those who are not familiar with testing terminology (see, e.g., American Educational Research Association, American Psychological Association, & National Council on Measurement in Education, 1999; Anastasi & Urbina, 1997). *Reliability* refers to the consistency of results, including but not limited to consistency across time, situation, and evaluator; it asks the question, "Does the test consistently measure what it is purported to measure?" *Validity* refers to the accuracy of the test; it answers the question, "Does the test accurately measure what it is purported to measure?" The *Standard Error of Measurement* refers to the margin of error surrounding a test score; it answers the question, "What are the likely upper and lower boundaries of a person's true score on a test?"

There are important relationships between the reliability and validity of a test. First, a test's validity cannot be more than its reliability because the reliability coefficient is part of the denominator of the validity equation. Second, a test may be reliable and invalid. That is, a test may measure something consistently, but does not measure the factor accurately. The converse is not true. If a test is valid, it must be reliable. Third, if a test has low reliability, it also has low validity. As Otto, Edens, and Barcus (2000) stated, "[T]he reliability of a measure limits its validity, tests with poor reliability are tests with poor validity, and tests with unknown reliability are tests with unknown validity" (p. 33).

It is important to understand that the term "reliability" has different meanings when used in the psychological or legal communities. From a psychological perspective, the term reliability means "consistency," as noted above. From a legal perspective, however, the term reliability refers to accuracy, which is "validity" from the psychological perspective. The different uses of this term may cause confusion when discussing psychological and legal issues.

AREAS OF THE LAW

Custody evaluators should be familiar their state's rules of evidence, with particular attention paid to rules governing expert testimony and the admissibility of expert testimony. For the purposes of this article, I draw attention primarily to these important areas of the law. However, evaluators also need to be familiar with two other areas of the law. It is important to have knowledge of case law decisions relevant to child custody determinations. Case law decisions are how the Court interprets and clarifies the legal standards (statute, rule). For example, many states may have case law decisions that specifically identify factors to be examined in a relocation case or factors that define a reliability analysis. Florida, for example, codified the relocation criteria espoused by the Court in *Mize v. Mize* (1993) and *Russenberger v. Russenberger* (1996). Various states have used case law to define and clarify the admissibility of expert opinion testimony. California, for example, modified the Frye test with *People v. Kelly* (1976). Tennessee, on the other hand, rejected the use of the Frye test in its opinion of *McDaniel v. CSX Transportation, Inc*. (1997). In that case, the Court expanded the Daubert criteria to make that state's rule more stringent than the federal standard.

The third area is knowledge of state statutes defining the best interest of the child standard and other concepts relevant to child custody determinations. These standards and concepts inform the evaluator about what specifically can and should be addressed in the evaluation itself. The Michigan Standard, for example, is often considered as the model set of guidelines or criteria the Court uses to determine the best interests of the child (see, e.g., Otto, Buffington-Vollum, & Edens, 2003) (see Table 1).

Rules of Evidence

Rules of Evidence define what can and cannot be admitted into evidence. There are Federal Rules of Evidence (FRE) that apply to federal courts and there are state rules of evidence that apply to state courts. Most state courts have adopted rules that closely resemble the FRE. It is

TABLE 1. Michigan's Child Custody Statute for Determining "Best Interests of the Child"

The "Michigan Standard"[4]
• The love, affection, and other emotional ties existing between the parties involved and the child;
• The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of educating and raising the child in his or her religion or creed, if any;
• The capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs;
• The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
• The permanence, as a family unit, of the existing or proposed custodial home;
• The moral fitness of the parties involved;
• The mental and physical health of the parties involved;
• The home, school, and community record of the child;
• The reasonable preferences of the child, if the court deems the child to be of sufficient age to express a preference;
• The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent;
• Any other factor considered by the court to be relevant to particular child custody dispute.

strongly recommended that custody evaluators become aware of relevant statutes, codes, rules of court, and case law. Although most states have evidence codes that are quite similar in structure and intent to the FRE, not all states follow the FRE. It is important, therefore, that evaluators know their state's evidence code in relevant areas. For the purposes of this article, the FRE will form the basis of our discussion.

Two of the most important sections of the evidence code that are used to determine the admissibility of expert testimony address the relevance of the evidence and the helpfulness to the judge of the evidence. State Evidence Codes will have at least one definition of relevance. The examples described below are from the FRE (see Table 2). The first rule (FRE 401) defines "relevant evidence" as any information that may make the existence of a fact more or less likely. The assumption is that the testimony provided to the court will help in determining a fact, and that without the testimony the determination of the fact would be less probable. All testimony is admissible unless the testimony does not help make a fact more or less likely. Then, the testimony is deemed as not relevant and, therefore, inadmissible (Rule 402). However, some evidence may be ruled as inadmissible if it is harmful, confusing, misleading, a waste of time, or a repetition of facts already in evidence (Rule 403).

Another important part of any evidence code (FRE 702; see Table 2) addresses opinions and testimony provided by experts. State codes, following the structure of the FRE, will often provide both a definition of

TABLE 2. Federal Rules of Evidence: Relevance and Helpfulness

Relevance (FRE 401, 402, 403) and Helpfulness (FRE 702)
Rule 401 Definition of "Relevant Evidence": "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
Rule 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible: All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.
Rule 403 Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.
Rule 702 Testimony by Experts: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

expert testimony and a description of the court might identify expert from no-expert testimony. As discussed below, the evidence rules governing expert testimony are drawn both from Rules of Evidence (see Table 2) and from case law.

Prior to 1923, admissibility of expert testimony was governed by the court's review of an expert's credentials and a review of the potential testimony to determine if this testimony would be helpful. If it was determined that the testimony would be helpful, the expert was then allowed to testify (see, e.g., *Congress & Empire Spring Co. v. Edgar*, 1878; *Winans v. New York & Erie Railroad Co.*, 1858). Beginning in 1923, however, the standard for admissibility of expert testimony was governed by the "General Acceptance Test" articulated in *Frye v. U.S.* (1923). In that case, a federal appellate court opined:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (p. 1014)

Echoing the court's focus on helpfulness, the Federal Court held in *Jenkins v. U.S.* (1962) that, "The test, then, is whether the opinion offered will be likely to aid the trier in the search for the truth" (p. 643).

Scholarly debate and diverging decisions in the Federal Court addressing whether the General Acceptance Test or an analysis of the reliability of the proffered testimony were the relevant admissibility standards led the Supreme Court of the United State to reexamine the criteria for admissibility of expert testimony (Goodman-Delahunty, 1997; Krauss & Sales, 1999; Shuman & Sales, 1999). In 1993, the U.S. Supreme Court ruled in *Daubert v. Merrell Dow Pharmaceuticals, Inc*. (1993) that the FRE focus on reliability was the proper standard for examining admissibility of expert testimony. This ruling has become known as the "Daubert standard" or "Daubert criteria." The *Daubert* Court defined "scientific knowledge" as follows:

> "The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation" (p. 590).

> But in order to qualify as scientific knowledge, an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation (i.e., "good grounds") based on what is known. In short, the requirement that an expert's testimony pertain to scientific knowledge establishes a standard of evidentiary reliability. (p. 590)

The *Daubert* Court identified the judge as a gatekeeper for admissibility of expert testimony. Judges now had the responsibility of examining the underlying scientific methodology for its reliability. If the methodology was judged reliable, then information that flowed from that methodology and the opinions upon which expert testimony was based were allowed. The standard envisioned was to be a flexible set of guidelines the trial Court *could* use (as opposed to "should") in determining the admissibility of expert testimony. More specifically, the Court noted:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993, pp. 592-593)

The following (flexible) guidelines were offered by the Court and became known as the *Daubert Standard*:

> [Testability or Falsifiability] Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "*Scientific methodology today is based on generating hypotheses and testing them* (emphasis added) to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." (p. 593)

> [Peer Review] Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with reliability, and in some instances well-grounded but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. . . . The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised. (pp. 593-594)
>
> [Error Rate and Standards of Control] Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation. (p. 594)
>
> [General Acceptance] Finally, "general acceptance" can yet have a bearing on the inquiry. A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community," may properly be viewed with skepticism. (p. 594)
>
> The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability–of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate. (pp. 594-595)

The Court went on to state:

> To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence–especially Rule 702–do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands. (p. 597)

In 1997, the U.S. Supreme Court further extended their thinking on *Daubert* in *General Electric Co. v Joiner* (1997). The *Joiner* decision focused attention on the need for the expert to show how opinions expressed were connected to the data upon which the opinions are based. No longer was an expert's say-so appropriate. An expert had to show a relationship between reliable data and expressed opinion:

> But conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit[2] of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. (p. 146)

In other words, the Court may not allow an expert to opine something simply because the expert "says it's so." There must be something more than just the expert's word tying the data and the opinion. The focus of the *Daubert* Court, noted in Footnote 8 from the Court's decision, was on scientific knowledge because that was the nature of the testimony offered into evidence in that case: "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here" (p. 590).

The third prong in what has come to be called the Daubert trilogy was a 1999 U.S. Supreme Court case that expanded the Daubert standard beyond scientific knowledge to include all expert testimony. In the case *Kumho Tire Co. v. Carmichael* (1999), the Court noted the following:

> The *Daubert* "gatekeeping" obligation applies not only to "scientific" testimony, but to all expert testimony. Rule 702 does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge, but makes clear that any such knowledge might become the subject of expert testimony. It is the Rule's word

> "knowledge," not the words (like "scientific") that modify that word, that establishes a standard of evidentiary reliability. *Daubert* referred only to "scientific" knowledge because that was the nature of the expertise there at issue. (p. 138)
>
> We conclude that *Daubert*'s general holding–setting forth the trial judge's general "gatekeeping" obligation–applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. We also conclude that a trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. (p. 141)

The Court clarified that the focus of attention on FRE 702 should be on the term "knowledge" rather than on "scientific" (see Table 2). The Court made clear that it was concerned about underlying reliable methodology as the foundation for expert testimony that is sound, reliable, and generally accepted and concerned about the opinion itself, whether such testimony came from a medical doctor or from a tire specialist. To borrow from the Clinton Presidential Campaign, "It's the methodology, stupid."

The *Daubert*, *Joiner*, and *Kumho* cases were clarifications of the FREs, and therefore did not apply directly to the states. Many states, however, have adopted the Daubert standard. Several states have continued their reliance on the Frye test, or an expanded version of the Frye test. California, for example, has the Kelly-Frye test (*People v. Kelly*, 1976) and Florida has the Ramirez-Frye test (*Ramirez v. State*, 1995). Both of these states have expanded the Frye test to determine if the methodology underlying the expert's opinion is reliable, valid, and helpful to the Court.

The relevance of these case law precedents to child custody evaluations is that the methodology underlying the evaluator's opinion must be reliable, relevant, and helpful to the court. Therefore, the prudent custody evaluator should select assessment tools that are both reliable and valid.

Test Selection and Relevance

In 1971, a case came before the U.S. Supreme Court that had nothing whatsoever to do with custody work, but the reverberations of which have been dramatically felt by evaluators. *Griggs et al. v. Duke Power Company* (1971) was a case involving procedures employed in the selection, placement, and promotion of personnel in an industrial setting. In deciding the case, the court ruled that any testing procedures must be demonstrably reasonable measures of (or predictors of) job performance. The lesson to be taken from the *Griggs* decision is that the selection of psychological tests must be reasonably linked to assessment of factors identified as the focus of the evaluation.

ETHICS, EXPERT TESTIMONY, AND THE SELECTION OF PSYCHOLOGICAL TESTS AND MEASURES

Rules of Evidence place a burden on psychologists–and other professions–to provide expert testimony that is reliable, relevant, and helpful. Expert testimony must reveal both a reliable methodology used in an evaluation and how the opinions drawn from the data derived from the use of the reliable methodology are connected to the data. Psychological ethics also place emphasis on reliability and relevance. For example, Section 2.04 of the American Psychological Association's (APA) *Ethical Principles of Psychologists and Code of Conduct* (APA, 2002; see also APA, 1992) describes that basis for scientific and professional judgments: "Psychologists' work is based upon established scientific and professional knowledge of the discipline." Psychologists also have a responsibility to keep up with changes in the field as noted in Section 2.03 (Maintaining Competence): "Psychologists undertake ongoing efforts to develop and maintain their competence" (p. 1064).

The APA Ethics Code section addressing use of psychological assessment techniques reveals a focus on reliability and relevance similar to the focus expressed in the evidence code standards discussed above. Similar to the *Joiner* concern about insuring that opinions are connected to reliable data, Standard 9.01(a) of the Ethics Code describes the need for psychologists to base their opinions on information and techniques sufficient to substantiate their findings: "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (p. 1071; see also

Standard 2.04, Bases for Scientific and Professional Judgments). Parallel to the Supreme Court decision in *Griggs* cited above, the APA Ethics Code further admonishes psychologists to uses tests that are relevant for the purpose for which it is intended to be used. Section 9.02 (Use of Assessments) states, "(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques" (p. 1071).

Remember that the lesson to be taken from the *Griggs* decision when applied to child custody work is that evaluators should focus their attention and their assessment efforts on functional abilities that bear directly upon the attributes, behaviors, attitudes, and skills that published research suggests are reliably associated with effective parenting and co-parenting. Examining an attribute in the absence of evidence of its connection to parenting effectiveness and related factors leaves a psychologist open to criticism on several fronts. For the custody evaluator, test selection and the data derived from the use of those tests must always be directly or indirectly addressing questions about parenting effectiveness, child development, or parent-child fit and co-parenting issues (Gould, this volume).

Admissibility of expert testimony is often dependent upon a showing that the methodology is reliable and that the opinions expressed by the expert are reasonably connected to the data. When psychologists select tests whose reliability and validity have not been established for use with members of the population tested, it is possible that legal standards of reliability and relevance would not permit testimony drawn from those tests to be admitted. The use of a test that has no demonstrated reliability and validity in the population for which it is being used may be viewed as an unreliable methodology. Opinions based upon unreliable methodology are, by definition, inadmissible. The requirement stated in Standard 9.02(b) to "describe the strengths and limitations of test results and interpretation" when "validity or reliability (of a test) has not been established" (APA, 2002, p. 1071) may be a critical component of any custody evaluation. The evaluator may need to explain how information drawn from a test of unknown reliability provides any probative value or how the presentation of information that appears to be scientifically derived yet is based upon an unreliable methodology is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading (the court or a) . . . waste of time" (FRE 403, see Table 2).

Standard 9.06 might be viewed as parallel to concerns expressed in *Daubert* about scientific knowledge. *Daubert* was concerned, in part, about expert testimony based upon the notion that "an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation–i.e., 'good grounds,' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability" (*Daubert* at 590).

I believe that the proper interpretation of psychological test data includes understanding test factors, test-taking abilities, and situational factors such as personal, linguistic, and cultural differences that might affect the accuracy of interpretations. There is a significant literature on test factors that may affect individual test responses in a forensic context. It is incumbent upon the evaluator to consider test factors and test-taking abilities when interpreting test results. It is also important to explain in the body of a report how each of these test factors may have affected the confidence in the meaning of the test data and the certainty of conclusions drawn from those data. Framed within the *Daubert* language, evaluators must apply the field's scientific knowledge when interpreting psychological test data in order to increase the probative value of expert testimony. As noted in the *Daubert* (1993) decision, "Scientific methodology today is based on generating hypotheses and testing them . . ." (p. 593). Conveniently for custody evaluators, the appropriate use of psychological testing in child custody evaluations (or any situation, for that matter) specifically involves generating and testing hypotheses. Consistent with this position is Section 9.06 (Interpreting Assessment Results) of the Ethics Code (APA, 2002):

> When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (See also Standards 2.01b and c, Boundaries of Competence, and 3.01, Unfair Discrimination) (p. 1072)

Another Ethical Standard tied to expert testimony is Section 9.09 (Test Scoring and Interpretation Services):

> (a) Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use.
> (b) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (See also Standard 2.01b and c, Boundaries of Competence.)
> (c) Psychologists retain responsibility for the appropriate application, interpretation, and use of assessment instruments, whether they score and interpret such tests themselves or use automated or other services. (p. 1072)

Standard 9.09(a) appears to parallel concerns about the reliability and relevance of testimony (see above). Courts may need to be informed about the purpose for selecting a particular test and how the interpretation of data from that test may be reasonably tied to the concerns before the court. A problem in the use of interpretive scoring programs provided by testing services is that the ethical criteria of 9.09(b) may be impossible to meet. Presently, the algorithms (i.e., program logic and decision rules) used to generate the statements in the computer generated test interpretations (CGTI) are proprietary secrets and not available for review by the evaluator. Therefore, it is not possible for evaluators to know how to answer important questions about how the program generates the statements found in CGTIs. This issue created enough concern that a letter, co-authored by three psychologists, was sent to the APA Ethics Committee for clarification. The response from the APA Ethics Committee Chairperson suggested two questions that psychologists should consider regarding the use of any CGTI program (Behnke, 2004): Given the purpose for which the service is utilized, what evidence of the program's validity do I require so that I may benefit, and not harm, my client? and What information about a program need I have in order to take responsibility for what my assessment contains? In addition to these two questions, I submit that evaluators might want to consider the following additional questions before using the interpretive statements offered on CGTI:

- Is the program an actuarial interpretation program or an automated interpretation program?
- What is the level of significance regarding the test scores?

- Are there different levels of significance for different scales?
- At what point does the program actually generate a statement for a particular scale?
- Are there different statements depending on the level of elevation for any given scale?
- Does the program take into consideration profile configurations or combinations of elevated scales, or are the statements based on single-scale elevation?
- Does the program take into consideration the response style when offering the CGTI statements?
- Does the program use context-specific normative data to facilitate interpretive statements?

These questions raise additional issues about what (and how much) "research" and/or "evidence of the usefulness" of a test is necessary and/or sufficient for use in a forensic evaluation in general, and more specifically, a child custody evaluation. This discussion is beyond the scope of the present article. Suffice it to say that the custodial evaluator should be prepared to address a variety of questions about the use of a CGTI report in the event the custody evaluation is challenged on legal or psychological grounds.

DEVELOPMENT OF CRITERIA FOR SELECTION AND USE OF PSYCHOLOGICAL TESTS IN CHILD CUSTODY CONTEXT

As mental health professionals have considered how best to assist courts in determinations of psychological and psychiatric issues, several authors have proposed criteria for the selection of psychological tests and measures used in court-related activities. Heilbrun (1992) developed a list of eight criteria that can be used by the evaluator in determining a test's appropriateness for use in forensic evaluation. More recently, Otto and colleagues (2000) have taken Heilbrun's eight-step model and adapted it specifically for the child custody context. The Heilbrun and Otto et al. models are quite similar, as can be seen in Table 3.

Depending on which model you choose, the answers to these questions can typically be found in the test manual and the relevant literature regarding the specific methodology. In addition, the literature is likely to include criticisms of a particular test or methodology. It is strongly recommended that copies of the relevant literature regarding specific assessment methodologies be readily available to the evaluator

TABLE 3. Model Criteria for Selection of Psychological Tests

Heilbrun (1992)	Otto et al. (2000)
Test must be commercially available	Is the test commercially published
Test must have published manual describing development, psychometric properties, and procedures for administration	Is a comprehensive test manual available
Test-retest reliability is at least 0.80	Are adequate levels of reliability demonstrated
There is ongoing research exploring its usefulness (validity)	Have adequate levels of validity been demonstrated
The test must be relevant to the legal issue or to a psychological construct underlying a legal issue	Is the test valid for the purposes in which it will be used
There is standard administration	What are the qualifications necessary to use this instrument
Test is reviewed in peer-reviewed journals	Has the instrument been peer reviewed
Test must have measures of response style	[The Otto et al. model does not address this issue][5]

for future reference, and also for defense of the evaluator's selection decisions. Critiques of the various methodologies used by the evaluator should also be included in this collection of literature. As can be imagined, the witness stand is the least desirable place to learn about a body of (substantial) literature that is highly critical of the chosen methodology.

It is important to remember that child custody evaluations take place in an adversarial legal system. It is not uncommon for the custody evaluator's report, opinions, and recommendations to be reviewed by another expert hired by the side dissatisfied with the report. This "battle of experts" can be unpleasant, and is not the appropriate forum to learn that the psychological tests employed by the evaluator have been bitterly attacked or criticized in the literature. It is therefore important for the prudent custody evaluator to have a balanced understanding of the literature on a particular assessment methodology that includes both supportive and critical reviews.

There are resources available regarding critical reviews of most published psychological tests. For example, the *Mental Measurements Yearbook* and *Tests in Print* (both published by the Buros Institute of Mental Measurement; for more information, go to www.unl. edu/ buros/) are two excellent sources for critical reviews. The literature also includes analyses of several psychological tests regarding their admissibility under different legal criteria (i.e., Frye test, Daubert's four-prong standard) and psychological issues of test selection. This includes Human Figure Drawings (Lally, 2001), the MCMI-III (McCann, 2002; see Rogers, Salekin, & Sewell, 2000, for an opposing view; and Dyer & McCann, 2000, for a reply), the MMPI-2 (see, e.g., Otto, 2002; Otto & Collins, 1995), the Rorschach (Gacono, Evans, & Viglione, 2002; McCann, 1998; for an opposing view, see, e.g., Grove & Barden, 1999; Grove, Barden, Garb, & Lilienfeld, 2002; Wood, Nezworski, Lilienfeld, & Garb, 2003; and for a reply see, e.g., Ritzler, Erard, & Pettigrew, 2002a, 2002b), and child custody-specific tests (e.g., the Bricklin scales, ASPECT, Parent-Child Relationship Inventory; see Ackerman, this volume; Connell, this volume; Otto et al., 2000; Yañez & Fremouw, 2004) and other parenting assessment instruments (i.e., Child Abuse Potential Inventory, Parenting Stress Index; Yañez & Fremouw, 2004).

Psychological test usage in the child custody context has not gone without criticism (Brodzinsky, 1993; Grisso, 1986, 2003; Melton, Petrilla, Poythress, & Slobogin, 1997). Early criticism involved inappropriate use of tests and diagnostic impressions that were misleading and pejorative (Grisso, 1986, 2003). Other criticisms involved overutilization of psychological tests without psycho-legal relevance (Brodzinsky, 1993; Melton et al., 1997). It would be appropriate for the responsible and competent evaluator to have an awareness of the literature regarding the pros and cons of test usage. Recent research, however, has found that current child custody evaluation practices do not support these concerns (Ackerman & Ackerman, 1997; Bow & Quinnell, 2001, 2002; Horvath, Logan, & Walker, 2002; Quinnell & Bow, 2001).

Several studies have looked at assessment methodology within the child custody context. These studies can be divided into two types:

those that utilized survey methodology (Ackerman & Ackerman, 1997; Bow & Quinnell, 2001; Karras & Berry, 1985; Keilin & Bloom, 1986; Quinnell & Bow, 2001) and those that reviewed the methodology contained within child custody reports (Bow & Quinnell, 2002; Horvath et al., 2002). The first study was conducted by Keilen and Bloom almost 20 years ago. The results of their survey showed that approximately 75% of respondents used testing with parents and children. The MMPI-2 was the most common test utilized with parents, used by approximately two-thirds of the respondents. This study serves as the jumping off point for all subsequent studies investigating psychological test usage in child custody evaluations.

In a follow-up to the Keilen and Bloom (1986) study, Ackerman and Ackerman (1997) found that custody evaluators spent an average of 5.2 hours doing psychological testing. Tables 2 and 3 [pp. 139-140] of their study show the frequency of test usage with children and adults. The Hagen and Castagna (2001) study raised an issue about the concept of "standard of practice" based on the Ackerman and Ackerman data. In a reanalysis of the Ackerman data, the authors found that none of the tests–except the MMPI-2–reached a level of usage consistent with a "standard of practice." LaFortune and Carpenter (1998) made several conclusions from their data, the most concerning of which is the following:

> Even with this large number of diverse findings, a number of general conclusions emerge from the data. . . . Eighth, although tests play a smaller role than interviews and observation, many experts employ procedures with little or no know [sic] valid basis for informing custody decisions. (p. 221)

Quinnell and Bow (2001) compared the results of their survey study to the Ackerman and Ackerman and the Keilen and Bloom studies, and noted the following:

> First, participants in the study only ranked psychological testing as moderately important (fourth and sixth) among ten main custody evaluation procedures. . . . These findings suggest that psychological testing is no longer the primary procedure in custody evaluations; but instead is used to supplement other procedures or to create "working hypotheses," as defined by Heilbrun (1995). (p. 498)

Otto et al. (2000) noted the following regarding child custody-specific tests (e.g., Bricklin Scales, ASPECT) after reviewing the above noted studies:

> Although these tests have good face validity (i.e., their item content makes senses and appears to assess factors relevant to child custody decision making), significant questions remain regarding their utility, and their appropriateness for use in custody evaluations at the present time. (p. 317)

After reviewing these child custody-specific tests (e.g., Bricklin Scales, ASPECT), Otto et al. noted:

> In essentially every published review of these custody assessment instruments, concerns about their reliability and validity have been identified, and the need for research has been made clear. Unfortunately, child custody evaluators continue to wait for that research. (p. 336)

In the first of two content analysis studies, Horvath et al. (2002) noted a somewhat surprising finding that custody evaluators may actually not use enough psychological testing in child custody evaluation cases. Specifically, they noted:

> On the basis of this review of custody evaluations and others (Logan, Walker, Jordan, & Horvath, in press), we found that there are clearly a few areas frequently neglected by evaluators, including assessment of domestic violence and child abuse, adequate assessment of parenting skills, assessment of health status, formal psychological testing, and using multiple methods of information gathering. (p. 563)

In addition to the need for standardized interviews, it also appears that evaluators need to be encouraged to include psychological testing or behavioral assessment instruments in their evaluations. There is a substantial risk to the intended objectivity of child custody recommendations when there are no independent anchors for opinions such as those that can be obtained through the use of validated instruments (p. 563). In the second content analysis study, Bow and Quinnell (2002) found similar results to those of the Quinnell and Bow (2001) study, and noted, "In general, psychological test findings were not given undue weight and reviewed as one data source" (p. 174).

Suggested Models of Test Selection

There are essentially two different models for the selection of psychological tests in a child custody evaluation. The descriptions of these two models are intentionally somewhat exaggerated and polarized for the sake of discussion. In the Scientist-Practitioner Model,[3] the evaluator selects testing methodologies based on the psycho-legal issues involved in the specific case and the psychometric qualities of the particular tests. Using the Scientist-Practitioner Model permits the evaluator to answer questions regarding a test's appropriateness for use in evaluation from both legal (i.e., relevance and helpfulness) and psychological perspectives (i.e., reliability and validity). Alternatively, in the Lemming Syndrome Model the evaluator selects testing methodologies based on the frequency of test usage described in the literature. The Lemming Syndrome Model allows the evaluator to answer questions regarding a test's appropriateness with the statement, "The research says that lots of people use it." This statement is offered by the evaluator to suggest that the reliability and validity of a test is both measured and increased by popular vote.

It is important to remember that a psychological test has little value if it does not measure something consistently or accurately. As noted above, both the Heilbrun (1992) and Otto et al. (2000) models recommend that a test should be commercially available/published and have an accompanying test manual. These two criteria, however, do not guarantee that the test is reliable, valid in general, or valid for specific use in a child custody evaluation. Publishers of psychological tests are in the business of making money. Colorful brochures and catchy phrases are marketing tools that should have no bearing on an evaluator's decision to use a test. As noted by Martindale (2001), "The frequency with which certain instruments are utilized may be attributable more to marketing and related phenomena than the psychometric integrity" (p. 500).

CONCLUSION

The decision to use psychological testing in the child custody context is a complex matter that involves both an understanding of and integration with legal and psychological concepts. The issues of relevance and helpfulness are two essential concepts regarding the admissibility of evidence in the legal arena. This is true with all expert testimony and not just that of the child custody evaluator. The child custody evaluation report, underlying methodology, and ultimate testimony are all considered evidence. Therefore, the report, the methodology underlying the evaluation, and the custody evaluator's testimony are all subject to the evidence code of a particular jurisdiction. As such, we can only provide information to the Court if the evidence is relevant to the issue at hand and helpful to the Court. Although this is not something we get to decide, our decisions about the selection of psychological testing can make it easier–or less likely–for the Court to accept our work product. Ensuring our methods and procedures comport with the essential elements of the law allows our work products and testimony to aid the Court in resolving these challenging child custody matters. Relevant and helpful evaluations do not, however, guarantee the expert's work product and testimony will go unchallenged on other legal (and psychological) grounds.

Equally as important to the legal issues of relevance and helpfulness are the psychological issues associated with test selection. Although these issues were discussed following the discussion of legal issues, the psychological issues involved in test selection I believe are of even more importance. Undoubtedly, the use of unreliable or invalid data collection methods cannot only undermine or compromise the evaluator's findings, but also raise legal challenges to the admissibility of the work product and resulting expert testimony. The use of reliable and valid psychological testing is one of multiple procedures underlying the evaluator's methodology. A review of the findings from the Daubert trilogy made it clear that the focus of the Court's inquiry into helpfulness will be the methodology underlying the expert's opinion. Using reliable and valid psychological testing is unarguably important to ensure the methodology underlying the work product passes muster with legal issues of relevance and helpfulness and psychological issues of reliability and validity.

The psychometric issues of reliability and validity are essential ingredients in the value of any psychological test. Value, here, can be measured by both how consistent (i.e., reliable) and accurate (i.e., valid) the specific assessment methodologies are as data collection methods. The APA (2002) Ethics Code speak to the issues of reliable and valid test instruments, as do writers addressing the use of psychological testing in a forensic context. The attention to the selection of reliable and valid assessment instruments transcends philosophical arguments about the (alleged) differences in models used by child custody evaluators. This appears to be a more simplistic argument: opinions and recommendations based on inconsistent and inaccurate data are of little or no value to anyone, let alone the Court. The statement by Otto et al. (2000) noted above deserves repeating at this point: "[T]he reliability of a measure limits its validity, tests with poor reliability are tests with poor validity, and tests with unknown reliability are tests with unknown validity" (p. 33).

The use of an unreliable assessment method provides inaccurate data and erroneous opinions and recommendations that form the basis of the evaluator's work product. Testimony resulting from this data, opinions, and recommendations will be misleading and unhelpful to the Court, the parents in dispute, and the child at issue. Therefore, the selection of both reliable and valid assessment instruments is crucial to developing a solid foundation from which the opinions and recommendation of the evaluator are based, and presented in the form of the work product or testimony.

NOTES

1. Psychometric qualities refer to the statistical properties of a test.
2. ipse dixit: "he himself said it; an assertion by one whose sole authority for it is the fact that he himself said it." Gifis, S. H. (1991). *Law Dictionary* (3rd ed., p. 252). Hauppauge, NY: Barron's Educational Series, Inc.
3. The term "Scientist Practitioner" is used with permission from Katherine Kuehnle, PhD. See, e.g., Kuehnle (1996, 1998).
4. *Michigan Child Custody Act of 1970*, MCL § 722.23 (1993 amended)
5. Apparently, this was an oversight, as the authors consider the need for response style measures essential in forensic assessment methodology (R. Otto, personal communication, October 6, 2004).

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U.S. Department of Justice
Civil Rights Division

U.S. Department of Health and Human Services
Office for Civil Rights

Via Email and Overnight Mail

January 29, 2015

Erin Deveney
Interim Commissioner
Department of Children and Families
Executive Office of Health and Human Services
Commonwealth of Massachusetts
600 Washington Street
Boston, Massachusetts 02111

Re: Investigation of the Massachusetts Department of Children and Families by the United States Departments of Justice and Health and Human Services Pursuant to the Americans with Disabilities Act and the Rehabilitation Act (DJ No. 204-36-216 and HHS No. 14-182176)

Dear Commissioner Deveney:

We write concerning the investigation of the Massachusetts Department of Children and Families (DCF) by the United States Departments of Justice and Health and Human Services (collectively, Departments) pursuant to Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794.

Title II and Section 504 prohibit disability-based discrimination by DCF, including the denial of opportunities to benefit from services, the failure to reasonably modify policies and procedures, and imposing methods of administration that have the effect of discriminating on the basis of disability.[1] The Departments' investigation has revealed that DCF has committed extensive, ongoing violations of Title II and Section 504 by discriminating against Sara Gordon[2]

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[1] Title II applies to public entities, which include state and local governments, and their departments and agencies, such as DCF. 42 U.S.C. § 12131(1). Section 504 applies to the programs and activities of recipients of federal financial assistance. 29 U.S.C. § 794(b)(1)(A), (B). DCF operates child welfare programs and activities and receives financial assistance from the Administration for Children and Families, U.S. Department of Health and Human Services.

[2] We use pseudonyms throughout this letter for family members.

on the basis of her disability, and denying her opportunities to benefit from supports and services numerous times over the past two years, including her existing family supports.

Sara Gordon is a 21-year-old woman who has a developmental disability. In November 2012, Ms. Gordon gave birth to Dana Gordon. Two days later, DCF removed the baby from Ms. Gordon's custody while she was recovering from childbirth in the hospital. Ms. Gordon lives with her parents, who do not have developmental disabilities. Her parents have continually intended to provide her support in parenting her child. Ms. Gordon's mother quit her job to provide full-time support for Ms. Gordon and her baby.

In this letter, pursuant to 28 C.F.R. § 35.172(c) and 45 C.F.R. § 80.7(d) (incorporated by reference in the Section 504 implementing regulation at 45 C.F.R. § 84.61), we identify our findings of fact, conclusions of law, and minimum steps DCF needs to take to remedy the violations.[3]

The Departments find that DCF acted based on Ms. Gordon's disability as well as on DCF's discriminatory assumptions and stereotypes about her disability, without consideration of implementing appropriate family-based support services. DCF has continued to deny Ms. Gordon access to appropriate family-based support services it makes available to parents to successfully achieve reunification and has failed to reasonably modify its policies, practices, and procedures to accommodate Ms. Gordon's disability. DCF staff assumed that Ms. Gordon was unable to learn how to safely care for her daughter because of her disability, and, therefore, denied her the opportunity to receive meaningful assistance from her mother and other service providers during visits. Finally, DCF changed the permanency goal to adoption and has sought to terminate Ms. Gordon's parental rights on the basis of her disability.

During the past two years, multiple community-based service providers, two experts who have completed parenting assessments, Dana's court-appointed attorney, and even a majority of DCF's most recent Foster Care Review panel all have agreed that a family-supported parenting plan would be appropriate. In this matter, a family-supported parenting plan means that Dana would be placed with Ms. Gordon and her parents in their home and Ms. Gordon's mother (Dana's grandmother) would maintain guardianship of Dana. In particular, Dr. Nicole Brisson, Ph.D., LCMHC, a nationally-recognized expert in assessing parents with developmental and intellectual disabilities to ascertain appropriate parenting supports, evaluated Ms. Gordon in October 2014 and found Ms. Gordon "is a loving, caring, and conscientious mother who is willing to do whatever it takes to have her daughter in her life." Dr. Brisson also found there was "no discernible reason revealed [by her] assessment that [Ms. Gordon] and her parents do not have the ability to care for [Dana] safely." Brisson, Competence-Based Family Assessment at 23-24 (Oct. 24, 2014).

In this letter of findings, the Departments do not seek a remedy under Title II and Section 504 that requires DCF to immediately transfer custody of Dana to Ms. Gordon and her family. Instead, the Departments identify as a remedial measure that DCF immediately implement

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[3] The U.S. Department of Justice makes findings under Title II. The U.S. Department of Health and Human Services makes findings under Title II and Section 504.

services and supports for an appropriate amount of time to provide Ms. Gordon a full and equal opportunity to pursue reunification with Dana, in consideration of the denials over the past two years and the evaluations of the professionals that have opined on this case.

The Departments recognize and respect the important responsibility placed on DCF and its social workers to investigate, protect, and care for infants and children involved with the child welfare system. However, the violations in this letter highlight systemic failures by DCF to ensure social workers follow appropriate policies and procedures and have necessary training to perform their duties without discriminating on the basis of disability.

Background

The child welfare system is a group of services designed to promote the well-being of children by ensuring safety, strengthening families, and achieving permanency. Pursuant to Title IV-E of the Social Security Act, DCF is required to make reasonable efforts to preserve and reunify families prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and to make it possible for a child to safely return to the child's home. *See* 42 U.S.C. § 671(a)(15). To that end, families with children in custody typically participate in developing a permanency plan for the child and a service plan for the family, which guide the child welfare agency's work. Family reunification, except in unusual and extreme circumstances, is the permanency plan for most children. If efforts toward reunification are not successful, the plan may be changed to another permanent living arrangement, such as adoption or transfer of custody to a relative.

DCF, through its more than two dozen offices across the Commonwealth of Massachusetts, is the State agency responsible for receiving and responding to reports of child abuse and neglect; providing and administering programs to strengthen families; making reasonable efforts to encourage and assist families to use all available resources to maintain the family unit intact and to reduce the risk of a child's placement into substitute care; and providing substitute care only when child safety and risk factors cannot be reasonably reduced or eliminated through services to the child's family.[4]

The Departments recognize and respect the important responsibility placed on DCF and its social workers to investigate, protect, and care for infants and children involved with the child welfare system. The Departments' investigation in this matter has revealed, however, that DCF has discriminated against Ms. Gordon in violation of Title II and Section 504 since November 2012.

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[4] Although the Federal Government plays a major role in supporting States in the delivery of services by funding of programs and legislative initiatives under Titles IV-B and IV-E of the Social Security Act, the primary responsibility for child welfare services rests with the States. Child Welfare Information Gateway, *How the child welfare system works*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau (2013) (available at: https://www.childwelfare.gov/pubs/factsheets/cpswork/).

The Departments' Investigation

On June 30, 2014, the Office for Civil Rights, U.S. Department of Health and Human Services (OCR) notified DCF that it had opened an investigation of a complaint filed by Ms. Gordon under Title II and Section 504. OCR's letter also requested data from DCF concerning the allegations of the complaint, including copies of all Juvenile Court orders, petitions, and reports prepared for the Court and DCF child protection policies, procedures, and practices. On August 20, 2014, the Disability Rights Section, Civil Rights Division, U.S. Department of Justice (DRS) notified DCF that it, too, had opened an investigation of the services DCF provides to individuals with disabilities and the removal and subsequent placement of Dana Gordon. DRS also requested data from DCF concerning its policies, practices, and procedures and administrative and court files related to Dana, Ms. Gordon, and Ms. Gordon's parents. DRS explained that the Departments of Justice and Health and Human Services may conduct a joint investigation of DCF.

When DCF failed to provide all of the requested material five months after the OCR request and three months after the DRS request, the Departments again requested information responsive to their initial inquiries as well as additional information on November 25, 2014. To date, DCF has failed to fully comply in providing materials, such as email, and failed to timely seek to secure access to court records.

During the course of our investigations, the Departments interviewed:

- Ms. Gordon and her parents, Kim and Sam Gordon, on multiple occasions;
- DCF social workers providing direct services to Ms. Gordon, Dana, and the foster parents, the adoption social worker, the investigators who responded to and recommended the initial removal, their respective supervisors, and an Area Program Manager;
- DCF-funded service providers who have provided services to Ms. Gordon and Dana, including representatives from Valuing Our Children (VOC) and The United Arc; and
- Dr. Nicole Brisson from Sage Haven Associates, located in Fairfax, Vermont.

The Departments also reviewed extensive records, including:

- Hospital and family practice medical records dating back nearly two decades;
- Educational records;
- DCF records concerning Ms. Gordon, Dana, Kim and Sam Gordon, and the foster parents; and
- DCF's policies, practices, procedures, regulations, and training materials.

The Departments have also regularly requested that DCF submit any materials that DCF believes would be important for the Departments to consider in their investigation.

Summary of the Facts

Ms. Gordon lives with her parents in rural Massachusetts. Ms. Gordon volunteers for an organization in her community matching families with donated clothing and household items. She is finishing a few courses in a special education program in her high school in order to obtain her diploma. Ms. Gordon is interested in pursuing education beyond high school and finding a part-time job, perhaps in construction or in teaching art or preschool. Mostly, Ms. Gordon aspires to parent Dana. If reunified, Ms. Gordon hopes to do the things that most parents take for granted, such as taking Dana to the park, sharing a quiet moment with her daughter at bedtime, and teaching her to fish and ride a bike. According to Dr. Brisson, Ms. Gordon has realistic expectations and acknowledges that it would be difficult to care for Dana on her own, and fully recognizes that she needs the assistance of her parents.

Ms. Gordon has a developmental disability that manifests in several ways. Among other things, she requires repetition, hands-on instruction, and frequency in order to learn new things. She has difficulty reading and following oral instructions, and explains that she learns best visually and through practice. Dr. Brisson evaluated her and found that she displays characteristics of a mild intellectual disability that affects some conceptual areas of her learning.

In November 2012, while Ms. Gordon was in the hospital, recovering from giving birth to Dana two days earlier, DCF received a report containing allegations of neglect regarding Ms. Gordon and Dana.[5] According to DCF's Intake Report, DCF reviewed the report and decided to conduct an emergency response investigation, noting concerns that Ms. Gordon "was not able to comprehend how to handle or care for the child due to the mother's mental retardation." DCF's November 26, 2012 Emergency Investigation report documented the investigators' observations that 19-year-old Ms. Gordon had difficulties holding and feeding Dana, and that she had to be reminded by an investigator to burp the baby and clean spit out of the baby's mouth. The investigators also observed that Ms. Gordon was uncomfortable at changing the baby's diaper. DCF's Intake Report also alleged that Ms. Gordon forgot to feed Dana during one night shift.[6] Ms. Gordon explained to the investigators that she could not read an analog clock, which is why she had trouble remembering when she last fed her daughter. Ms. Gordon also reported that she started keeping a journal to track feedings.

During the investigation, DCF personnel also learned that Ms. Gordon's mother, Kim Gordon, intended to assist Ms. Gordon with parenting Dana. DCF also learned of the Gordons' involvement with the agency in the 1990s. However, DCF had closed all services to the family based on the Gordons' cooperation and successful completion of DCF's service plan.[7] DCF did

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[5] Such reports are called "51A reports" under Massachusetts child welfare law. *See* M.G.L. c. 119, § 51A.

[6] Notably, during the course of the Departments' investigation, it confirmed that hospital staff did not permit Ms. Gordon's parents, Kim and Sam Gordon, to stay with Ms. Gordon and their grandchild, Dana, at the hospital pursuant to its policy that permitted only a spouse or significant other to remain after visiting hours. The Gordon grandparents explained that they were asked to leave the hospital when they stayed an hour-and-a-half past visiting hours the first night after the baby was born.

[7] DCF investigators reported that Sam Gordon did not want to meet with them during the emergency investigation. The investigative report reflects that Mr. Gordon said he did not want to meet with DCF, but that he "wanted to do

not identify any current or recent safety concerns with Kim and Sam Gordon. The investigators also visited the Gordons' home, finding ample baby supplies and noting no concerns.

Nonetheless, on November 25, 2012, at the conclusion of DCF's investigation, the agency removed Dana from Ms. Gordon's custody and placed her in foster care. According to DCF's Emergency Investigation report, DCF decided to conduct an "emergency removal," because Ms. Gordon was "unable to recognize, comprehend and react to the demands of an infant. . . . The concerns are there are no services in place. . . . [Dana] needs to come into foster care at this time. There are concerns with [Ms. Gordon's] ability to meet the basic needs of a newborn child." DCF also noted that Ms. Gordon and her parents had a previous history with DCF and that she has "serious developmental delays."

Over the next two years, DCF provided minimal supports and opportunities to Ms. Gordon while she sought to reunify with Dana. DCF set visitation at once per week for one hour, despite Ms. Gordon's request for more frequent visits. Visits were supervised by DCF and took place at DCF offices and at a community organization. DCF would not permit Kim Gordon and staff from VOC to assist Ms. Gordon for most of the visits. The frequency of visits was reduced to once every other week after seven months, when DCF changed Dana's permanency planning goal from reunification to adoption.

In addition, to the extent that DCF has continued to reference unspecified concerns regarding the Gordon's past DCF case history, DCF has not identified any current or recent safety concerns with Kim and Sam Gordon. On the contrary, Dr. Brisson and the psychologist that conducted the family's parenting assessment both reported that they identified no recent or current concerns.

As a part of Ms. Gordon's DCF service plan, Ms. Gordon agreed with DCF's requirement for her to work with a parent aide during her visitation with Dana to learn and utilize effective parenting skills. A parent aide is a trained individual who provides support and strengthens parenting skills. However, DCF failed to provide Ms. Gordon parent aide services for more than eight months and only provided these services after it already decided that Ms. Gordon would not be fit to parent Dana and changed the goal to adoption.[8] Even after the parent

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what is best for his daughter and grandchild." Mr. Gordon explained to the Departments during the interviews that he was angry with DCF's involvement. It was not until November 7, 2013, that the social worker contacted Mr. Gordon by letter and explained that she wanted to meet with him following a DCF Foster Care Review panel which recommended that such a meeting be added to the service plan. There is no record that DCF sought to explain to any of the Gordons until this time the consequences of Mr. Gordon not meeting with the agency. Since that time, Mr. Gordon made himself available to DCF to address any concerns, and DCF has identified no current or recent concerns.

[8] DCF personnel suggested that this was because Ms. Gordon refused to sign a consent to release her information to The United Arc, the service provider DCF chose to provide parent aide services. On the advice of her attorney, Ms. Gordon did not sign the consent because, in the attorney's opinion, the consent presented by DCF was overly broad. However, DCF did not express willingness or propose to modify the standard form to limit the scope of information that DCF could discuss, did not suggest that Ms. Gordon contact the parent aide agency herself directly, as she had initiated services from VOC on her own behalf, or permit Kim Gordon or staff from VOC to fill in to provide hands-on parenting support to Ms. Gordon during weekly visitations in the interim while the breadth of the release was being worked out.

aide was secured, DCF limited the parent aide's participation to the last thirty minutes of Ms. Gordon's visits with Dana. The parent aide was otherwise tasked by the agency with training Ms. Gordon on parenting skills using a "life-like" doll.

During the early visits with Dana, DCF noted that Ms. Gordon had some difficulty with feedings, diaper changes, and transitioning Dana between people. DCF also noted that Ms. Gordon walked away from the changing table on a couple of occasions, during supervised visits. Since that time, Ms. Gordon has participated in numerous parenting classes and her parenting skills have improved significantly. On the other hand, DCF has repeatedly overlooked numerous safety concerns in Dana's pre-adoptive foster care placement. Specifically, over the past two years in the foster home, Dana received a black eye, bumps, bruises, scrapes, burnt hands on two occasions, and was left unattended on a kitchen table when she was only a few weeks old.

As described below, several professionals have reviewed this case and found that a family-supported parenting plan with Ms. Gordon's parents would be appropriate. The Gordons' family-supported parenting plan involves Kim and Sam Gordon obtaining guardianship and responsibility for making educational, medical, and other significant decisions, while Ms. Gordon would live in the home and learn how to care for her daughter with Ms. Gordon's assistance. Among the professionals are service providers from VOC and The United Arc, the psychologist that conducted the Parenting Assessment, Dr. Brisson, the majority of DCF's most recent Foster Care Review panel, and Dana's court-appointed attorney.

<u>VOC</u>: VOC is a community-based organization that provides supports to, among others, families involved with DCF. VOC is also a contractor of DCF. VOC personnel have attended most, if not all, visits between Ms. Gordon and Dana (though not permitted to provide hands-on assistance). Ms. Gordon has participated in multiple parenting courses through VOC. VOC personnel work with the Gordons on a regular basis and are intimately aware of the family's current functioning. Multiple VOC staff have repeatedly advocated for DCF to increase services, visitation, and to reconsider its decision-making. VOC has supported the Gordons and their family-supported parenting plan since the organization became involved on November 26, 2012, when Ms. Gordon contacted the agency on her own the day after Dana's removal.

<u>The United Arc</u>: The United Arc is also a community-based organization that provides a number of services to, among others, parents with developmental and intellectual disabilities. The United Arc is also a contractor of DCF. Beginning in 2013, The United Arc was retained by DCF to provide parent aide services for Ms. Gordon. The United Arc staff believe that Ms. Gordon has an "amazing support system" through her parents and staff at VOC and any of DCF's concerns about Ms. Gordon parenting alone are sufficiently resolved through a family-supported parenting plan.

<u>Psychologist's Parenting Assessment</u>: In October 2013, a psychologist retained by Ms. Gordon's court-appointed counsel conducted an assessment of the parenting abilities of both Ms. Gordon and Kim Gordon. The evaluation included review of Ms. Gordon's school records, interviews with Ms. Gordon and her parents, and observation of Ms. Gordon, Dana, and Kim Gordon during a supervised visit. The psychologist noted that Dana had been teething during the visit, which impacted her mood, but that "[Ms. Gordon] appeared interested and involved with

her daughter and acted appropriately at all times exhibiting patience and tolerance with her daughter's upset." The psychologist found that "[b]oth [Ms. Gordon and Kim Gordon] provided praise and encouragement and set some limits and redirected [Dana's] behavior when the situation dictated the need for this. They appeared to have a very good sense of how to interact and respond to this young child." The psychologist found no concerns with emotional maltreatment or physical touching, and explained that the participation of both Ms. Gordon and Kim Gordon "was defined by an entirely positive, nurturing, enthusiastic and patient presentation." Ultimately, the psychologist concluded that DCF should reconsider its adoption goal, and instead develop a plan involving greater visitation among Ms. Gordon, Kim Gordon, and Dana to help transition to the ultimate goal of reunification, where Kim and Sam Gordon would assume guardianship over Dana in a family-supported parenting plan.

Dr. Brisson's Competence-Based Family Assessment: In September 2014, DCF agreed to permit a Competence-Based Family Assessment by Dr. Nicole Brisson with Sage Haven Associates, a licensed clinical mental health counselor and a nationally recognized expert on parenting with a mental disability. Dr. Brisson conducted an in-home assessment of Ms. Gordon, Kim Gordon, and Dana, reviewed records, interviewed numerous collaterals including her social worker and supervisors, and conducted interviews of Ms. Gordon and Kim Gordon.[9]

Dr. Brisson provided the following conclusion in her assessment:

> Clearly, [Ms. Gordon] is a loving, caring, and conscientious mother who is willing to do whatever it takes to have her daughter in her life. She is capable of learning new skills and has done so through her visits with [Dana], despite them being infrequent. . . . With continued dedication by support providers and [the] willingness [of Ms. Gordon and Kim Gordon] to continue to work with them, it is likely that [Dana] can return home and will be well cared for by her mother and grandparents. It is important to remember that all parents receive help at some time, and [Ms. Gordon] should be no exception. There is no discernible reason revealed by this assessment that [Ms. Gordon] and her parents do not have the ability to care for her child safely.

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[9] Dr. Brisson utilized numerous instruments to complete her thorough assessment, including:

- A social history questionnaire;
- A drug and alcohol screening tool;
- Medical emergency questions to determine responses to serious cuts, choking, and medication administration;
- The Community Life Skills Scale, intended to measure an individual parent's ability to negotiate in the community, including transportation, budgeting, support services, support-involvement, interests, hobbies, and routines of daily live;
- The Parenting Awareness Skills Survey, designed to illuminate strengths and needs in awareness skills a parent accesses in reaction to typical childcare situations;
- The Impediments-Supports Checklist, which evaluates effective parenting and family outcomes;
- The Infant/Toddler HOME Inventory, designed to measure the quality and extent of stimulation available to a child in the home environment;
- The Mental Health Screening Form III; and
- Parent Education Program Checklists, which evaluate basic child-care, health, safety, and interactional skills.

Brisson Assessment of Oct. 24, 2014 at 24. Dr. Brisson recommended that Dana be reunified with the Gordons, that the Gordons and the foster parents should exchange information to ensure a smooth transition, and that Ms. Gordon and Kim Gordon should continue to participate in services to further enhance their parenting skills.

DCF Foster Care Review: In November 2014, a majority of a DCF Foster Care Review panel also found that "the goal of permanency through Adoption is no longer the most appropriate permanency plan. . . . This Foster Care Review panel supports the goal of Permanency through Guardianship on behalf of [Dana] with her maternal grandparents with her mother residing with them and them co-parenting." The DCF Review Panel majority recommended that this goal should be achieved by May 2015, and that the Service Plan should be updated for DCF to increase visits among Ms. Gordon, Dana, and the grandparents and provide them in their home for extended time frames. A majority of the DCF Review panel further recommended that DCF provide the Gordons with the dates of Dana's medical appointments, network them with Dana's early intervention providers, and if distance is a barrier, at minimum, explore phone communication. DCF Foster Care Review panels also include a community volunteer. The Community Volunteer on the November 2014 Panel disagreed with the goal change, citing only the longevity of Dana's placement, and not any concern of the Gordons.

While the Foster Care Review panel can make a recommendation, DCF must make a goal change at a Permanency Planning Conference meeting. DCF subsequently held an internal Permanency Planning Conference but has not changed the goal.

Dana's Court-Appointed Attorney: For the past two years, Dana's court-appointed attorney has supported reunification with appropriate supports. Dana's attorney has also repeatedly advised DCF that she believed the agency was violating Ms. Gordon's rights under the ADA and Section 504 by denying Ms. Gordon the opportunity to benefit from supports and services. For virtually all of Dana's life, DCF has flatly refused such a plan and failed to provide a full and equal opportunity for her to participate in and benefit from DCF's program to pursue reunification with Dana.

Statutory and Regulatory Background

Congress enacted the ADA nearly 25 years ago "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress found that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, [and] independent living" and that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to . . . pursue those opportunities for which our free society is justifiably famous." 42 U.S.C. § 12101(a)(7), (8). Title II provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Congress enacted the ADA to broaden the coverage of the Rehabilitation Act of 1973, which similarly prohibits discrimination against individuals with disabilities by recipients of federal financial assistance. 29 U.S.C. § 794. Section 504 similarly provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

Title II covers essentially everything state and local governments and their agencies do. *See Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 209-12 (1998) (discussing the breadth of Title II's coverage). Section 504 also applies to all of the activities of agencies that are federally funded and as a general rule violations of Section 504 also constitute violations of Title II.[10] As such, Title II and Section 504 apply to everything DCF does, including its investigations, assessments, removals, family preservation, provision of services, determining goals and permanency plans, setting service plan tasks, reunification, guardianship, adoption, and assisting clients in meeting such tasks.[11]

Pursuant to congressional directive, *see, e.g.*, 42 U.S.C. § 12134; 28 C.F.R. § 41.4, the Departments of Justice and Health and Human Services have promulgated regulations implementing Title II and Section 504. *See* 28 C.F.R. pt. 35 (Title II); 45 C.F.R. pt. 84 (HHS Section 504); 28 C.F.R. pt. 42, subpt. G (DOJ Section 504). Both agencies are responsible for investigating complaints and conducting compliance reviews under Title II. *See* 28 C.F.R. pt. 35, subpt. F, G. Because DCF receives financial assistance from the U.S. Department of Health and Human Services, it has jurisdiction under Section 504. 45 C.F.R. § 84.61.

Under these regulations, covered entities may not directly, contractually, or through other arrangements "deny a qualified individual with a disability the opportunity to participate in or

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[10] A "program or activity" is defined under Section 504 to include "all of the operations of a department, agency, . . . or other instrumentality of a State or of a local government" and "the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government." 29 U.S.C. § 794(b)(1)(A), (B). As such, all operations of a state government agency are covered by Section 504 if any part of it receives federal financial assistance. Title IV-B and Title IV-E of the Social Security Act are the primary sources of federal child welfare funding, and DCF accepts such funding.

[11] During the Departments' investigation, DCF suggested, based on *Adoption of Gregory*, 434 Mass. 117, 121 (2001), that the ADA may not be raised as a defense to proceedings to terminate parental rights because such proceedings do not constitute a "service" under the ADA. The Justice Department has long taken the position in its regulatory guidance, technical assistance, and enforcement actions that Title II applies to everything a public entity does—all of the child welfare services it provides, including recommendations and petitions related to child welfare matters and proceedings to terminate parental rights. The legal conclusion that termination proceedings are not covered by the ADA similarly cannot be squared with the U.S. Supreme Court's unanimous pronouncement in *Yeskey*, 524 U.S. at 209-12 (finding, beyond question, that a non-voluntary motivational boot camp in state prison was covered for participation by inmates with disabilities).

benefit from [an] aid, benefit, or service." 28 C.F.R. § 35.130(b)(1)(i); *see also* 45 C.F.R. § 84.4(b)(1)(i). Covered entities also may not "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 35.130(b)(1)(ii); *see also* 45 C.F.R. § 84.4(b)(1)(ii).

Covered entities may not "utilize criteria or methods of administration "[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3)(i), (ii); *see also* 45 C.F.R. § 84.4(b)(4)(i), (ii). The preamble to the 1991 Title II regulation explains that the criteria and methods of administration are the policies and practices of the public entity. 28 C.F.R. pt. 35, App. B (discussing 28 C.F.R. § 35.130(b)(3)). A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities only if those safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. § 35.130(h).

In addition to these prohibitions, covered entities must take certain steps to avoid discrimination on the basis of disability. In particular, covered entities are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(7); *see also* 45 C.F.R. § 84.4(a); U.S. Dep't of Justice, Title II Technical Assistance Manual § II-6.1000, Illustration 2 (1993) (explaining that public entities may need to make modifications to programs such as individualized assistance to permit individuals with disabilities to benefit).

The ADA and Section 504 thus seek to ensure parents with disabilities are free from discrimination in the provision of services, programs, and activities of child welfare agencies. This includes a prohibition on making child custody decisions on the basis of generalized assumptions about disability, relegating parents with disabilities to lesser services and opportunities, imposing overprotective or unnecessarily restrictive rules, and failing to reasonably modify policies, practices, and procedures. 42 U.S.C. § 12101(a)(5).

Findings

We conclude that DCF has repeatedly and continuously denied Ms. Gordon the opportunity to participate in and benefit from its services, programs, and activities, and has otherwise subjected her to discrimination in violation of Title II. 42 U.S.C. § 12132. The U.S. Department of Health and Human Services similarly finds that DCF has violated Section 504. 29 U.S.C. § 794(a). Initially, DCF failed to individually analyze Ms. Gordon to determine what services and supports were appropriate for her in an effort to prevent Dana's continued out-of-home placement. DCF then failed to (1) implement appropriate reunification services while Dana was in foster care; (2) identify appropriate service plan tasks; (3) assist Ms. Gordon in meeting service plan tasks to achieve reunification; (4) provide meaningful visitation and opportunities to enhance Ms. Gordon's parenting skills; and (5) impose only necessary and legitimate safety requirements.

In particular, we conclude that DCF has violated its obligations under Title II and Section 504 at each stage of its process by (1) denying Ms. Gordon equal opportunities to participate in and benefit from its services, programs, and activities, 28 C.F.R. § 35.130(a), (b)(1)(i)-(ii); 45 C.F.R. § 84.4(a), (b)(1)(i)-(ii); (2) utilizing criteria and methods of administration having the effect of discriminating against Ms. Gordon on the basis of disability and defeating or substantially impairing accomplishment of the objectives of its reunification program with respect to Ms. Gordon, 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(3); and (3) failing to reasonably modify its policies, practices, and procedures where necessary to avoid discriminating against Ms. Gordon on the basis of her disability, 28 C.F.R. § 35.130(b)(7). As a result, for more than two years, DCF has denied Ms. Gordon and Dana the opportunity to be a family and now threatens to deny them that opportunity permanently.

Instead, DCF has continually asserted that Ms. Gordon poses a safety risk to Dana if she were to parent on her own, without consideration of any supports. However, DCF has ignored the fact that Ms. Gordon is not proposing to parent on her own without any supports, has ignored its own ability and obligation to provide such supports, and has repeatedly ignored the objective evaluations of various clinical and service professionals (including the majority of the most recent Foster Care Review panel) who have reviewed this case and found that Ms. Gordon's plan to parent Dana with her family's support is appropriate. Instead, DCF has refused to reconsider the permanency plan for adoption and has sought to terminate Ms. Gordon's parental rights.[12]

I. DCF acted on assumptions about Ms. Gordon's disability and failed to individually analyze what services and supports would be appropriate considering her disability.

DCF failed to conduct an appropriate individualized analysis of Ms. Gordon and what family support services it needed to provide and accommodations it needed to make at the outset of its involvement, and for more than two years. Instead, it repeatedly acted on its own assumptions about Ms. Gordon's disability. Among the ADA's most "basic requirement[s]" is that covered entities evaluate persons with disabilities on an "individualized basis." *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001). The guidance to the Title II regulation explained in 1991 that "[s]uch an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks." 28 C.F.R. pt. 35, App. B (discussing definition of "qualified individual with a disability"). This obligation to act based on the facts of a person's disability and the situation at hand, rather than on assumptions and stereotypes, is necessary to comply with the obligation to provide individuals with disabilities opportunities to participate in and

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[12] While we identify various ways that DCF denied Ms. Gordon opportunities under its own policies, ADA and Section 504 liability is not limited to such circumstances. DCF may be required to reasonably modify policies, practices, and procedures governing their services, programs, and activities when necessary to avoid discriminating on the basis of disability beyond the circumstances identified in this letter. *See* 28 C.F.R. § 35.130(b)(7); *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

benefit from services, programs, and activities; to avoid utilizing criteria or methods of administration that discriminate or that substantially impair achievement of the objectives of a public entity's programs; and to reasonable modify policies, practices, and procedures where necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(a), (b)(1), (b)(3), (b)(7); 45 C.F.R. § 84.4(a), (b)(1), (b)(3).

DCF clearly presumed from the initial opening of its case that Ms. Gordon lacked the capacity to parent Dana due to her developmental disability without consideration of appropriate supports and services. Indeed, DCF investigators reported their view that Ms. Gordon could not "recognize, comprehend and react to the demands of an infant," and that "[t]he concerns are there are no services in place," Ms. Gordon requires "parental education," and she "should engage in every service available to her as a new parent." 51A Emergency Investigation Report of Nov. 26, 2014. The report further explained: "[Ms. Gordon] has a previous history with DCF which indicates she has serious developmental delays." *Id.* During the Departments' interviews of DCF staff, one investigator explained that his view of Ms. Gordon's capacity to parent was based on his "intuition" and stating that "[w]hen you meet with someone, you get a vibe whether they are going to be able to do it or not."

Throughout the pendency of this matter, DCF acted on these unwarranted assumptions, repeatedly failing to conduct an individualized analysis of Ms. Gordon's current and future capacity to parent Dana with in-home services and family supports. After Dana's removal, DCF assigned a social worker and case supervisor to Ms. Gordon's case. Over the next two months, Ms. Gordon's social worker conducted what the agency terms a Comprehensive Assessment and the social worker and supervisor concluded that Ms. Gordon "needs to learn the basic skills in order to appropriately parent her child. There is concern that her cognitive limitations affect her ability to safely parent her child. It is hoped that by working with the appropriate services such as counseling, and working with a parent aide [Ms. Gordon] will learn how to provide for [Dana's] basic needs."[13] However, instead of evaluating the overall level of risk to Dana and focusing on the services that Ms. Gordon would need to be reunified with her daughter based on the ample information it had, the record indicates that DCF focused on obtaining a diagnosis for Ms. Gordon. Ms. Gordon's February 27, 2013 service plan, explained that, while Ms. Gordon had a "very supportive family," she has "cognitive limitations," and "[t]here was no diagnosis for the mother[']s mental retardation."[14] Indeed, staff involved in this case repeatedly told the Departments during interviews that they did not know how to assist Ms. Gordon because they

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[13] Following a supported 51A investigation, a case is "opened for services" and DCF is required to complete a "full assessment" of the family's situation in order to evaluate the overall level of risk to the child, identify the family's strengths, determine the goal of the service plan, and identify the tasks and services in the service plan. *See* 100 C.M.R. § 5.01-5.03; DCF Assessment Policy, #85-011 (rev. Sept. 6, 2000). Notably, an "overall risk level rating" was not documented in the Comprehensive Assessment worksheet.

[14] Presumably, this focus was based on DCF's Assessment Protocol, "Factors Used to Determine Parental Unfitness," which states that in determining the goal of the case and developing a permanency plan, social workers are advised to consider whether "mental deficiency" is a parental condition that is likely to continue for a prolonged period of time and makes it unlikely for an individual to provide adequate caretaking and that it is "[i]mportant to have a formal diagnosis." DCF Assessment Policy, #85-011, Appendix F (Assessment Protocol # PR 94-007) at 204.

did not have a diagnosis of her disability, despite having extensive information and being unable to articulate why a diagnosis was necessary. Staff also repeatedly emphasized the importance of IQ in determining how to assist Ms. Gordon. However, as the U.S. Supreme Court recently noted, an "[i]ntellectual disability is a condition, not a number." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2013).

In fact, DCF had sufficient information to meet its obligations under the ADA and Section 504. DCF was aware at intake that Ms. Gordon potentially had a disability that impacted her learning, DCF's investigators identified as much, and Ms. Gordon's social worker was able to observe her on multiple occasions. Furthermore, Ms. Gordon's social worker contacted Ms. Gordon's high school counselor, and documented in her Dictation Notes that Ms. Gordon "mostly had an intellectual diagnosis" but her school counselor was unsure of the "exact number" of her IQ. DCF's excessive focus on the need for a disability diagnosis and IQ, and reliance on the absence of this information as the basis for failing to consider or provide necessary services resulted in a denial of an equal opportunity to participate and benefit from DCF services, programs, and activities on the basis of disability. 28 C.F.R. § 35.130(a), (b); 45 C.F.R. § 84.4(a), (b). Even if DCF did not have all of the information it believed was necessary to optimally serve Ms. Gordon, DCF was still required to provide services and supports with the information it had. Instead, as discussed below, DCF imposed restrictions on Ms. Gordon's existing supports, undermining the supports and services DCF agreed to provide in Ms. Gordon's service plan.

Although the record is clear that DCF personnel recognized that the manifestation of Ms. Gordon's disability called for services and education, and although DCF had those services at its disposal, DCF failed to provide them. Specifically, DCF failed to provide her with repetitive, frequent, hands-on, visual learning. DCF was required to determine what would work for Ms. Gordon considering her disability, as it does for other parents involved in its system. Instead, DCF implemented minimal services and imposed unnecessary restrictions during visits, making it difficult for Ms. Gordon to learn some parenting skills. Instead of recognizing the need to adjust and provide appropriate supports and services, including additional time to learn, DCF personnel regularly asserted they simply had "concerns" about Ms. Gordon's independent ability to care for an infant because of her disability. If DCF requires all parents to show their independent proficiency to parent, DCF was required to reasonably modify that practice for Ms. Gordon. 28 C.F.R. § 35.130(b)(7). Instead, DCF speculated about Ms. Gordon's ability to parent, assumed she would never be able to learn, and refused to provide services to help her learn, thus creating a self-fulfilling circumstance leading to DCF's decision to seek to terminate Ms. Gordon's parental rights. Notwithstanding all of this, the community service providers and experts agree that Ms. Gordon has shown the ability to learn appropriate parenting techniques and that a family-supported parenting plan with Kim Gordon having guardianship would be appropriate.

Reliance on unwarranted assumptions about Ms. Gordon's developmental disability is precisely the sort of an outdated approach that the ADA and Section 504 were enacted to prohibit. *See* 28 C.F.R. pt. 35, App. B (providing in 1991 preamble to the Title II regulation that the provisions in 28 C.F.R. § 35.130(b) are, "[t]aken together, . . . intended to prohibit . . . the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.") As explained below, however, DCF did not implement appropriate services and supports, denying her an opportunity to benefit from DCF's reunification program.

II. DCF did not provide Ms. Gordon an opportunity to benefit from its services in support of reunification.

DCF failed to provide Ms. Gordon the opportunity to benefit from its services in support of reunification with her family, failed to reasonably modify its policies, practices, and procedures where necessary to avoid discriminating, and utilized methods of administration having the effect of discriminating and defeating or substantially impairing the objectives of DCF's program with respect to Ms. Gordon. 28 C.F.R. § 35.130(b)(1)(i), (b)(3), (b)(7); 45 C.F.R. § 84.4(b)(1)(i), (b)(3).

A. DCF denied Ms. Gordon the opportunity to utilize her family resources and individualized, in-home parenting supports in an effort to achieve reunification.

DCF denied Ms. Gordon the opportunity to benefit from her existing family resources and in-home parenting supports. This obstructed Ms. Gordon's ability to prevent Dana's continued placement into foster care and to address DCF's concerns regarding Ms. Gordon's ability to safely parent. *See* 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

Pursuant to state law, DCF is obligated to make reasonable efforts to maintain the family unit and to prevent the unnecessary removal of a child from his or her home. *See* M.G.L. c. 119 § 29C. Under DCF's own Placement Prevention and Placement Policy, the agency must make "reasonable efforts to prevent or eliminate the need for placement." Placement Prevention and Placement Policy, #90-004 at 355 (emphasis added). "Reasonable efforts" are defined in DCF's Placement Prevention and Placement Policy as DCF's

> best efforts to assess the individual child and family situation regarding the appropriateness and accessibility (within limits of available resources) of preventive services and to offer the family and assist (as appropriate) in providing such services to the family whenever possible. It is the responsibility of the Social Worker and Supervisor to develop a Service Plan with the family that identifies the resources and activities needed to enable the family to adequately care for and protect the child.

Id.

Ms. Gordon could have significantly benefitted from a number of supports and services the agency provides or makes available to families involved in the child welfare system and which could have prevented the ongoing placement of Dana into foster care. In particular, DCF first failed to consider a plan that relied on Ms. Gordon's own family resources. To the extent DCF continued to have concerns, it could have implemented various in-home supports to afford

Ms. Gordon the opportunity to have Dana at home. Instead, DCF immediately placed Dana into foster care and changed the permanency goal to adoption seven months later.

At the time of Dana's placement into foster care, Ms. Gordon already had family supports in place. Kim Gordon left her job to provide full time support for Ms. Gordon and Dana.[15] DCF investigators noted no concerns with the Gordons' home and found that the family had ample baby supplies. DCF's ongoing social worker and supervisor noted in January 2013 in the Comprehensive Assessment that Ms. Gordon had a "very supportive family" and identified it as one of her strengths. However, DCF continued to deny Ms. Gordon the opportunity to utilize her own family supports to prevent the continued out-of-home placement of Dana. Dana's court-appointed attorney repeatedly requested that DCF place Dana in Kim and Sam Gordon's custody.

When DCF continued with Dana's out-of-home placement, Ms. Gordon's parents presented DCF with a plan to be Dana's primary caregivers and seek legal guardianship of Dana, if necessary. Ms. Gordon's father agreed to provide financial support for the family and Ms. Gordon's mother would provide for Dana's day-to-day care.

DCF maintained that it had concerns about placement of Dana with the Gordons because DCF was involved with the family when Ms. Gordon was a child. However, experts who have reviewed this case find that the concerns about Ms. Gordon's parents in the 1990's do not represent the current functioning of the family. DCF personnel apparently also believed that its concerns were sufficiently resolved when it closed its services to the family in 2000. During the Departments' investigation, DCF did not cite any current or recent safety concerns about Kim or Sam Gordon. Reliance on family supports is one of DCF's regular tools for preventing removal. One reasonable modification DCF should have considered was an agreement that would have afforded Ms. Gordon the opportunity to parent Dana in the home with family supports by making Kim Gordon responsible for Dana's care. 28 C.F.R. § 35.130(b)(7).

If DCF had any legitimate safety concerns about Kim's supervision of Dana, it had a wide variety of supports and services at its disposal to mitigate such concerns. In fact, use of such supports and services is specifically called for in this type of situation by DCF's own policies. DCF's Placement Policy identifies an example of "reasonable efforts" DCF can take to prevent out-of-home placement in exactly the situation at issue here; namely, providing assistance in accessing parent aide services and/or specialized training to help the primary caretaker "compensate for deficits, if problem is due to primary caretaker's lack of certain capacities due to mental retardation, mental or physical illness." DSS Policy #90-004(R) (1998) at 363; *see also* 110 C.M.R. § 7.061.

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[15] DCF investigators learned during the emergency investigation that the Gordon grandparents did not seek guardianship of Dana because they had not considered the formality to be necessary when the family had planned for Ms. Gordon and Dana to live in their home. However, in evaluating the risk to Dana and the family's overall functioning subsequent to the emergency removal, DCF did not consider whether guardianship or another arrangement could prevent the continued out-of-home placement of Dana. While Sam Gordon explained that he "wanted to do what is best for his daughter and grandchild," the record reflects that DCF personnel did not seek to interview Mr. Gordon to specifically evaluate any safety concerns until November 2013, after a DCF Foster Care Review panel recommended that the agency do so.

Ms. Gordon is a member of the "target population" for precisely such services. 110 C.M.R. § 7.061. According to DCF's regulations, the target population includes parents whose families are at risk of neglect "due to physical, developmental and/or emotional disability." *Id.* Yet, DCF did not consider or implement these supports until eight months after Dana was removed and, even then, for only limited time. Thus, DCF administered its program in a way that had the purpose or effect of defeating or substantially impairing accomplishment of the reunification program objectives with respect to Ms. Gordon. 28 C.F.R. § 35.130(b)(3)(ii); 45 C.F.R. § 84.4(b)(4)(ii).

Examples of these types of family supports are found in DCF's regulations. These include family support services, such as visiting nurse assistants and home health aides, and homemaker services.

<u>Family support services:</u> DCF denied Ms. Gordon the opportunity to benefit from in-home "family support services," which include a "spectrum of services that supports maintenance of the family unit, and enables adults or children to meet the goals of a service plan." 110 C.M.R. § 7.030. Such services are intended to "provide social and developmental opportunities for a family or for individual family members." *Id.* Family support services are broadly defined, and could include a visiting nurse assistant – a service that was discussed with Ms. Gordon and Kim Gordon by hospital staff, but not considered by DCF – or a home health aide.

<u>Homemaker services</u>: DCF also denied Ms. Gordon the opportunity to benefit from in-home "homemaker services," which "provide support, assistance and training to families in the activities of daily functioning. Homemakers provide a monitoring and teaching function within a family, and also help care for children and act as a role model for parents." 110 C.M.R. § 7.020. The regulations provide that homemaking services are appropriate in "assisting the family in ensuring that abuse and neglect are not occurring in the home." 110 C.M.R. § 7.021. Homemaking services can be authorized for a prolonged period of time. 110 C.M.R. § 7.022.

At any time over the past two years, DCF could have provided the opportunity for Dana to live at home with an agreement that Kim Gordon be primarily responsible for Dana and, if necessary, utilize homemaker, visiting nurse assistant, home health aide, or parent aide services to support Ms. Gordon in learning how to care for a child. Instead, despite its own policies, DCF refused to provide or did not consider in-home support services, and denied Ms. Gordon this natural learning environment and opportunity to spend critical time with her infant daughter. The failure to consider and provide these services denied Ms. Gordon an equal opportunity to benefit from DCF programs and services. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

Even if in-home services such as parent aides, family support services, or homemaker services had not been specifically identified in DCF policies, DCF would be required to reasonably modify its policies to ensure that Ms. Gordon received the appropriate supports and services to prevent Dana's removal and ongoing foster care placement. Given the breadth of services offered by DCF, we do not believe that offering these services to Ms. Gordon would have resulted in a fundamental alteration. 28 C.F.R. § 35.130(b)(7).[16]

B. DCF failed to implement services while Dana was placed in foster care to provide Ms. Gordon a meaningful opportunity to reunify her family.

After DCF placed Dana in foster care, the agency failed to implement services to provide Ms. Gordon a meaningful opportunity to reunify with Dana, including meaningful visitation and opportunities to learn how to respond to Dana's developmental delays. 28 C.F.R. § 35.130(b)(1)(i), (b)(3), (b)(7); 45 C.F.R. § 84.4(b)(1)(i), (b)(3).

At the time DCF opened Dana's case, DCF investigators and social workers noted their concern that Ms. Gordon did not have appropriate services in place. However, DCF did not design or implement services appropriate to her disability-related learning style. Ms. Gordon is a visual learner who requires repetition, modeled behavior, and hands-on assistance. Thus, appropriate service plans would have included frequent in-home visits with continual assistance, such as by Kim Gordon, VOC staff, or a parent aide. Appropriate service plans would also have included opportunities to attend Dana's medical and Early Intervention Services appointments.

DCF's Service Planning and Referral Policy, # 97-003 at 239 (rev. 2000) (Service Policy) explains that "[s]ervice planning is a fundamental component of social work practice and is intended to be a dynamic, interactive process which involves the Department, family members, substitute care and other service providers." Every family receiving services from DCF must have a written service plan, which is a time-limited agreement between DCF and the family describing the tasks to be undertaken and the services to be provided in support of the goal of the service plan. *See* 110 C.M.R. § 6.01-6.03. The service plan goal identifies the purpose of DCF's involvement with the family and identifies the permanency plan for the child, which may be to stabilize an intact family, to reunify a family, or to establish an alternative permanent plan such as guardianship, adoption, care with kin, etc. *See* 110 C.M.R. § 6.04. For families with children in substitute care, service plans are required to identify the reasons for the child's current placement, efforts made by DCF and the family to prevent placement, family visitation, and tasks the family needs to complete to achieve the permanency goal. *See* 110 C.M.R. § 6.03-6.04. Service planning is required to occur when a case is opened and reviewed at least every six months. *See* 110 C.M.R. § 6.07-6.08. As noted, DCF provides numerous services directly and through contractual arrangements, and services are broadly defined to allow individualization for each case.

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[16] In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001), the U.S. Supreme Court found under Title III's analogous reasonable modifications requirement that policies that facially restrict certain activities may need to be modified without working a fundamental alteration. Various federal courts have also found under Title II's reasonable modifications provision that it is not a fundamental alteration to provide in-home supports, even if it may carry significant expense and administration. *See, e.g., Pashby v. Delia*, 709 F.3d 307, 323-24 (4th Cir, 2013) (affirming preliminary injunction that state agency failed to reasonably modify a policy, implemented by statute, revoking in-home personal care assistance services for individuals with disabilities and placing them at risk of institutionalization, and finding that agency did not satisfy fundamental alteration defense based on budgetary arguments); *see also M.R. v. Dreyfus*, 663 F.3d 1100, 1121 (9th Cir. 2011); *Townsend v. Quasim*, 328 F.3d 511, 520 (9th Cir. 2003).

Once an ongoing social worker was assigned to Ms. Gordon's case, DCF implemented an emergency service plan on December 20, 2012, which required Ms. Gordon to "appropriately participate in visits" with Dana and work with a parent aide "to learn how to parent her child." While provision of a parent aide would have been (and indeed later was) an opportunity for Ms. Gordon to receive the hands-on, modeled behavior she needed, provision of a parent aide was delayed because DCF required Ms. Gordon to sign a consent form authorizing DCF to disclose her information before DCF would make a referral to The United Arc for parent aide services. Ms. Gordon's appointed counsel had concerns about the scope of information that could be disclosed between DCF and The United Arc based on the scope of the release. Thus, Ms. Gordon did not sign the form.

Although DCF's policies and regulations provide for a wide variety of services to be tailored to individual circumstances, while awaiting resolution of the problem with the consent form, DCF prevented Ms. Gordon from fully utilizing other assistance. Ms. Gordon was already working with staff from VOC outside of visits, and for parts of visits. However, DCF personnel insisted that only a parent aide from The United Arc would be appropriate, and VOC staff were not permitted to provide hands-on demonstrations during most visits. Nor would DCF permit Kim Gordon to provide Ms. Gordon hands-on assistance during the majority of visits. DCF's social worker also would only observe visits, with the occasional verbal prompts, which were not helpful to Ms. Gordon given her learning style.[17]

DCF's Service Plan for February 15, 2013-August 15, 2013, required Ms. Gordon to meet with DCF in her home once per month, participate in parenting classes at VOC, work with a parent aide, engage in individual counseling to "address stressors" and "cognitive limitations," participate in visits, and work with VOC staff. Ms. Gordon diligently complied with these requirements, with the exception of working with the parent aide because of the disagreement over the scope of the consent form. However, DCF still required Ms. Gordon to show that she could parent on her own *without assistance* during the majority of the supervised visits. DCF thus continued to hold her to a higher standard than necessary, to deny her a variety of available services, to insist on criteria and methods of administration that did not allow her to succeed because of her disability, and to fail to reasonably modify its practices. 28 C.F.R. § 35.130(b)(7).[18] DCF's subsequent Service Plans were modeled on this February 15, 2013-

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[17] Ms. Gordon's objection to the DCF consent form does not provide a basis for DCF to refuse to provide appropriate services to her or to fail to reasonably modify its policies and practices to accommodate her disability. The ADA provides that an individual with a disability need not accept an accommodation, aid, service, opportunity, or benefit if she so chooses. 42 U.S.C. § 12201(d); 28 C.F.R. § 35.130(e)(1). However, such a refusal does not relieve a public entity of its obligations under the ADA. Even if DCF viewed Ms. Gordon's attorney's unwillingness to sign the consent form as Dana's non-cooperation, and as a basis to deny access to appropriate supports and services, DCF was required to offer and provide other reasonable services to Ms. Gordon that would have met her need to learn parenting skills in the interim.

[18] DCF also insisted that Ms. Gordon submit to a neuropsychological evaluation in order to understand Ms. Gordon's "learning style." Ms. Gordon did not consent to the evaluation on the advice of counsel, but did provide access to information from her high school about her learning style. In addition, DCF had extensive information about Sara's learning style – including dozens of observations during visits where she regularly had difficulty following verbal directions. While DCF's Service Policy repeatedly notes that the requirements of a service plan are to be jointly created and subject to negotiation, there is also no requirement in DCF regulations or policies that an individual submit to a neuropsychological evaluation, DCF refused to reconsider and negotiate on the required task

August 15, 2013 plan and were similarly deficient to address the objectives that DCF had identified for Ms. Gordon.

DCF denied Ms. Gordon the opportunity for frequent, meaningful visitation with support to learn appropriate care for her daughter and to address the agency's concerns. This denied Ms. Gordon an equal opportunity to benefit from DCF's programs. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a). DCF is required to plan and promote regular and frequent visitation between children and their families consistent with their service plans. 110 C.M.R. § 7.128; Ongoing Casework Policy, Procedures, and Documentation, # 86-011 at 263-64 (rev. 1998).[19] While, in most cases, visitation occurs once a week, DCF policy explicitly contemplates circumstances when it may be necessary to increase the frequency of visits between a parent and a child. For example, DCF policy indicates that the social worker and supervisor should consider more frequent child-family visitation based on the age of the child and the projected date for the child's return home (or other permanent placement). Given Dana's age, Ms. Gordon's learning through repetition, hands-on instruction, and frequency, and the goal of reunification, DCF should have provided frequent visitation. Instead, DCF denied Ms. Gordon and Dana's attorney's request for daily visits with Dana. DCF also refused to modify the requirements it placed on Ms. Gordon during visitation, even though Ms. Gordon attended all visits, was actively engaged in services, and regularly made DCF aware that she intended to do whatever was necessary to reunify with her daughter. The failure to provide frequent visitation denied Ms. Gordon an equal opportunity to benefit from DCF's programs. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

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of submitting to a neuropsychological evaluation. Notably, Dr. Brisson also explained in her Competence-Based Family Assessment that neuropsychological evaluations are often not conducted by individuals with specialized knowledge of parents with disabilities, they are standardized against a population that does not include appropriate norms or accommodations for parents with disabilities, and they often lead to improper conclusions. Dr. Brisson explained: "Parenting is a complex set of variables that cannot be reduced to simply tests. Instead the parents' learning style/ability is better evaluated through direct clinical observation." Brisson Evaluation at 22 (Oct. 24, 2014). As noted, Title II and Section 504 prohibit utilization of criteria or methods of administration that defeat or substantially impair accomplishment of program objectives for individuals with disabilities, and the failure to reasonably modify policies, practices, and procedures where necessary to avoid discriminating on the basis of disability. 28 C.F.R. § 35.130(b)(3)(ii), (b)(7); 45 C.F.R. § 84.4(b)(3)(ii), (b)(7). Though DCF had sufficient information, it continued to insist on the neuropsychological exam, so that the agency could understand her learning style and assess for any further services, well after its personnel reported to the Departments that they understood Ms. Gordon to have a visual, hands-on learning style. As recently as November 5, 2014, DCF reported that Ms. Gordon was partially out of compliance with her service plan, because she had not completed the evaluation, thus utilizing criteria (if a policy) or a method of administration (if a practice) in violation of this prohibition.

[19] The American Bar Association has articulated the importance of frequent, meaningful, and individualized visitation between parents and children between 0-3 years of age. Among other things, frequent visitation strengthens the parent-child relationship, helps parents gain confident and learn and practice new skills, provides a setting for a caseworker or parent coach to suggest how to improve on interactions, and helps with the transition to reunification. *See* American Bar Assoc., Visitation with Infants and Toddlers in Foster Care at 6 (2007). The ABA recommends that child welfare agencies implement daily visits for parents and infants, and visits every two-to-three days for parents and toddlers, because "physical proximity with the caregiver is central to the attachment process." *Id.* at 11. The ABA similarly recommends that visits occur in the least restrictive, most natural setting while ensuring the safety and well-being of the child. *Id.*

DCF also refused to allow Ms. Gordon and Dana to visit in her home. Home visits are commonly allowed for parents pursuing reunification, particularly when they are supervised or there are no concerns with the home. Despite the fact that DCF at no time noted any concerns about the Gordons' home, Dana was only ever permitted at the Gordons' home once, and it was for Dr. Brisson's assessment – nearly two years after the initial removal. Because the Gordons' home was the best environment for Ms. Gordon's learning style, requiring that such visits to occur in an office setting, or even at VOC, was a failure by DCF to reasonably modify its practices. 28 C.F.R. § 35.130(b)(7).

On a few visits, Dana cried and Ms. Gordon could not console her. DCF staff repeatedly told Ms. Gordon that if she could not stop Dana's crying, they would end visits, and indeed ended visits without seeking to show Ms. Gordon how to console Dana. As implemented by DCF, these visits were neither suited to assisting Ms. Gordon to learn effective parenting, nor suited to assisting with reunification. Nor were they justified by legitimate safety concerns. Under the Title II regulation, public entities may impose safety requirements for the safe operation of their programs, but they must be legitimate and necessary. 28 C.F.R. § 35.130(h). DCF staff told us during interviews that they ended visits because they did not believe it was in the best interests of a child to cry for 20 or more minutes. This requirement was *unnecessary* because DCF staff could have attempted to console Dana before ending visits – an opportune teaching moment. Similarly, if Kim Gordon or VOC staff were permitted in visits, they could have done the same.

During visits, DCF expected Ms. Gordon – a first-time young mother with a developmental disability – to demonstrate independent proficiency in caring for her daughter. This expectation was wholly unrealistic given that Ms. Gordon's opportunities to practice with support were so limited. Even if it were DCF's general practice to require parents without developmental disabilities to demonstrate independent proficiency during visits, DCF was required to reasonably modify its practices here. 28 C.F.R. § 35.130(b)(7).

DCF also denied Ms. Gordon the opportunity to participate in and benefit from attending Dana's medical and Early Intervention Services sessions and thereby denied her an equal opportunity to benefit from DCF's programs. *See* 28 C.F.R. § 35.130(b)(1)(i), 45 C.F.R. § 84.4(b)(1)(i). Dana has fine and gross physical and speech developmental delays, and has received early intervention services, including medical screenings and weekly physical therapy sessions. DCF's policy on Health Care Services to Children in Placement, # 85-003 (rev. 1998), provides that "[p]arents should be encouraged to assume as much responsibility in the provision of health care as possible, especially if the goal in the Service Plan is reunification."

Despite Ms. Gordon's repeated requests to attend these appointments so that she could learn how to respond to Dana's developmental delays, the records indicate that DCF permitted Ms. Gordon to attend only one medical appointment. Social workers either prevented Ms. Gordon from attending such appointments, or failed to make appropriate accommodations so Ms. Gordon could attend them. For example, DCF personnel repeatedly told Ms. Gordon and her advocates that Ms. Gordon and Kim Gordon were prohibited from participating in Dana's Early Intervention Services because the services were provided in the foster parent's home. DCF made no effort to move the location of the sessions despite the willingness of Early Intervention

Services personnel to do so. The Early Intervention program focuses, in part, on assisting parents in understanding the developmental needs of their children and in learning activities and strategies to help them grow. If DCF required Ms. Gordon to learn these specific parenting skills, the agency should have allowed her to participate in the program. The failure to do so provided Ms. Gordon an unequal opportunity to participate in and benefit from the guidance of Dana's healthcare providers, than was afforded to the foster family. 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii).

III. After DCF changed Dana's permanency goal to adoption, DCF failed to consider Ms. Gordon's continued engagement and progress.

Notwithstanding Ms. Gordon's active engagement and cooperation, on June 20, 2013 – seven months after the removal – DCF changed Dana's goal to adoption, and DCF subsequently initiated proceedings to terminate Ms. Gordon's parental rights. The stated reason for the goal change was Ms. Gordon's "cognitive limitations," and DCF's determination that Ms. Gordon was "not able to care" for Dana, and that Kim Gordon "does not seem to understand that [Ms. Gordon] cannot parent and has not intervened when [Ms. Gordon] has placed [Dana] at risk." DCF did not identify any instance where Kim Gordon failed to intervene, and indeed she was prevented by DCF from assisting her daughter during the majority of most visits. In making the goal change, DCF ignored the failure to provide a parent aide or any other supports mentioned above.

Under the ADA and Section 504, even if it changes the permanency goal to adoption, DCF had a continuing obligation to provide Ms. Gordon the opportunity to participate in and benefit from its aids, benefits, and services for reunification, 28 C.F.R. § 35.130(b)(1)(i); 45 C.F.R. § 84.4(b)(1)(i); *see also Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the State proves parental unfitness, the child and [her] parents share a vital interest in preventing erroneous termination of their natural relationship."). Notwithstanding these obligations, DCF reduced visitation to once every other week for one hour, thus further undermining Ms. Gordon's ability to learn parenting skills and address the agency's concerns.

Despite this permanency goal change, Ms. Gordon redoubled her efforts to acquire additional parenting skills. She attended all visits with Dana, worked with the parent aide to the extent DCF's funding would permit, and engaged in a number of parenting courses that significantly increased her parenting capacity.[20] In addition, Kim and Sam Gordon also continued to engage in services. Sam Gordon made himself available to DCF to resolve any unarticulated concerns of the agency. Kim and Sam Gordon regularly participated in a Grandparent Support Group aimed at helping grandparents strengthen families, identify

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[20] For example, Ms. Gordon completed "Changing Courses," a 10-week course provided focused on stress, communication, and interpersonal skills for parents with children in DCF custody. Ms. Gordon has participated in a series of "Positive Parenting" classes, which covered the importance of routines for children, responding appropriately to children's emotions, and role modeling for children. Ms. Gordon also received certification in CPR-AED for adults, infants, and children by the American Heart Association. Ms. Gordon has participated in and facilitated a number of groups focused on parenting and regularly volunteers in her community. Ms. Gordon and Kim Gordon attended several "Parent Cafes" together, which are parent support groups that focus on a variety of parenting challenges.

resources and services, and learn about topics such as healthy nutrition, technology safety, substance abuse and recovery options, and more. They also attended a conference aimed at grandparents raising grandchildren through Worcester State University. During this conference, the Gordons spoke directly with DCF executive staff about this case.

DCF has repeatedly refused to change Dana's permanency goal back to reunification and is seeking to terminate Ms. Gordon's parental rights by citing "concerns" about Ms. Gordon's independent parenting ability. However, as discussed here, DCF itself thwarted Ms. Gordon's attempts to learn how to parent.

Ms. Gordon has had some visits where she has had difficulties. On one occasion, she bumped Dana's head three times during a visit, and during another when Dana was learning to roll over, Dana bumped her head. But Dana did not cry and did not have bruises from either incident. On a few other occasions, Ms. Gordon walked away from a changing table or lost focus on play equipment.

While the safety of the child is paramount, DCF did not provide available services, imposed unnecessary restrictions on the services that were provided, and failed to reasonably modify its practices to provide Ms. Gordon an opportunity to learn how to safely parent. As noted by Dr. Brisson, there is no current risk when Ms. Gordon's mother or a parent aide is permitted to assist her. Furthermore, DCF's obligation to individually analyze an individual with a disability is ongoing. DCF staff explained during the interviews, as well as in Dictation Notes and assessments, that Ms. Gordon's parenting skills increased over time, particularly in 2014 when she had a parent aide. Beyond all of this, Ms. Gordon has entered an agreement with her parents where they will take guardianship of Dana, so Ms. Gordon can be involved in her life.

DCF held Ms. Gordon to a standard for Dana that was not met in Dana's pre-adoptive foster care placement. DCF was aware of, and dismissed, numerous injuries to Dana, including a black eye, bumps, bruises, cuts, and burnt hands that occurred during the time in foster care. When Dana was only a few weeks old, she was left unattended on a table in the foster home.[21]

IV. DCF has failed to provide appropriate policies and training for social workers to understand their obligation to ensure the civil rights of parents with disabilities.

It is clear that the social workers involved in this case were not provided appropriate policies and training to guide their decision-making. DCF regulations provide that "[t]he Department recognizes the special needs of handicapped clients. The Department shall make reasonable accommodations to ensure that its services . . . are accessible to all handicapped persons." 110 C.M.R. § 1.08. But the agency has no procedures for social workers to implement

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[21] We note that DCF did not produce documents related to this incident in response to our request for information, dated August 20, 2014, for all records in DCF custody or control related to Dana, including all 51A Reports, and all records related to Dana's placement in a foster care or pre-adoptive home. DCF did not provide these documents during our interviews of DCF staff, where we specifically asked about a dictation note in their records that vaguely referenced this incident. These documents were withheld from production until mid-December 2014, and only after we specifically inquired as to what appeared to be missing documents.

or understand how this requirement applies to assessments, service planning and implementation, obligations during visits, the obligation to make reasonable modifications where necessary to avoid discrimination, and the imposition of legitimate safety requirements. Indeed, social workers involved in this case identified that services and supports were needed, but did not recognize how to implement them consistent with the requirements of Title II and Section 504.

While DCF does provide training concerning mental health issues, it does not provide formalized training concerning civil rights obligations related to individuals with disabilities, including training that would have assisted social workers in preventing the ADA and Section 504 violations identified in this letter.

The lack of procedures and training to guide social workers led to a focus on diagnoses and numbers, and assumptions and generalizations, and a failure to consider what services and modifications to policies and practices are appropriate to ensure an individual with a disability – in this case, Ms. Gordon – had an equal opportunity to fully benefit from DCF's reunification program.

Minimal Remedial Measures

DCF should promptly implement the following minimal measures to remedy the deficiencies discussed above.

- Withdraw the petition to terminate Ms. Gordon's parental rights.
- Immediately take all necessary actions to address the violations identified in this letter, including:
    - Implementation of services and supports appropriate to provide Ms. Gordon a full and equal opportunity to seek reunification consistent with and in consideration of the two years of violations identified in this letter; and
    - Once implemented for an amount of time appropriate for Ms. Gordon, an evaluation of the then-current functioning of the family based on the opinions of the experts, community-based service providers, and DCF's Foster Care Review.
- Pay compensatory damages to Ms. Gordon in an appropriate amount for injuries suffered as a result of the DCF's failure to comply with the law as set forth here.
- Develop and implement procedures addressing how ADA and Section 504 requirements apply to DCF programs, services, and activities, including assessments, service planning and implementation, visitation, and safety requirements.
- Implement a training program for all investigators, social workers, family resource workers, supervisors, and Area Program Managers on compliance with Title II and Section 504.

Conclusion

Please note that this Letter of Findings is a public document and will be posted on the Civil Rights Division's and OCR's website. We will provide a copy of this letter to any individual or entity upon request, and will share it with the complainants and other affected individuals who participated in our investigation.

Please also note that no one may intimidate, threaten, coerce, or engage in discriminatory conduct against anyone because he or she has taken action, assisted, or participated in an investigation to secure rights protected by the ADA and Section 504. *See* 42 U.S.C. § 12203; 28 C.F.R. § 35.134; 45 C.F.R. § 80.7(e)(incorporated by reference in the Section 504 implementing regulation at 45 C.F.R. § 84.61). Any individual alleging such harassment or intimidation may file a complaint with the Department of Justice or the Department of Health and Human Services. We would investigate such a complaint if the situation warrants.

We hope to be able to work with you and other officials in an amicable and cooperative fashion to resolve our concerns with respect to the Massachusetts child welfare system. Please contact William F. Lynch at (202) 305-2008 or William.Lynch@usdoj.gov of the U.S. Department of Justice and Susan M. Pezzullo Rhodes at (617) 565-1347 or Susan.Rhodes@hhs.gov of the U.S. Department of Health and Human Services by February 2, 2015 if you are willing to resolve this matter voluntarily in a manner that will bring DCF into compliance with Title II and Section 504.

We are obligated to advise you that, in the event that we are unable to reach a resolution regarding our concerns, the Attorney General may initiate litigation pursuant to the ADA and Section 504 once we have determined that we cannot secure compliance voluntarily to correct the deficiencies identified in this letter. *See* 42 U.S.C. § 12131-34; 29 U.S.C. § 794; 42 U.S.C. § 2000d-1. We would prefer, however, to resolve this matter by working cooperatively with you.

If you have any questions regarding this letter, you may call William Lynch, Trial Attorney, U.S. Department of Justice.

Sincerely,

Vanita Gupta
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice

Jocelyn Samuels
Director
Office for Civil Rights
U.S. Department of Health and Human Services

Susan M Pezzullo Rhodes

Susan M. Pezzullo Rhodes
Regional Manager
Office for Civil Rights, Region I
U.S. Department of Health and Human Services

Cc:

Andrew Rome, General Counsel
Patricia Casey, Deputy General Counsel
Counsel for Sara, Dana, Kim, and Sam Gordon

A Biopsychosocial Summary of Traumatic Stress Reactions

BIO	PSYCHO	SOCIAL
Fatigue, sleep problems	Sadness, despair, anguish, numbing, indifference	Isolating, withdrawing
Trouble concentrating	Anxiety, rigidity	Irritability/Anger
Jumpy, edgy, anxious	Changed meanings about the world	Feeling misunderstood
Trouble breathing	Troubling intrusive thoughts, images	Feeling suspicious, mistrustful
Headache, body aches, stomach distress	Dread/Sense of Foreboding	Feeling lonely, feeling cut off
Feeling spacey, disconnected	Self attack, other-blame	Frightened of others

Victoria Reynolds, Ph.D.

PREVENTION & HARM REDUCTION

STRATEGY: ASSESS YOUR EXPOSURE

- List your exposure to potential trauma in past month
- Count the quantity (# of times)
- Count the frequency (daily, weekly, monthly)
- Rate the strength of the intensity (subjective distress) on a scale of 1-10 (numbing/absence of feeling is also a form of distress)

Victoria Reynolds, Ph.D.

Assess Your Trauma **Dosage**
(past month)

Trauma Exposure (type)	How Many Times?/How Often?	Intensity (1-10)
TOTALS		

Victoria Reynolds, Ph.D.

4/4/4 BREATHING

- A simple and *very effective* breathing technique in the following pattern:
  - Breathe in through your nostrils with your mouth closed for a slow count of 4
  - Hold the breath you have just inhaled for a count of 4
  - Exhale slowly through your mouth for a count of 4

Practicing this in unstressed moments makes it easier to use when stressed

Victoria Reynolds, Ph.D.

What Would Prevention Look Like In Your Professional Practice?

- Ideas for **lowering unnecessary trauma** exposure
  - ___________________
  - ___________________
- Ideas for **lowering the frequency** of trauma exposure
  - ___________________
  - ___________________
- Ideas for **lowering the intensity** of trauma exposure
  - ___________________
  - ___________________
- Ideas for **adding a meaningful** activity into your life
  - ___________________
  - ___________________

Victoria Reynolds, Ph.D.