



ADA, Section 504, and Child Welfare

North Carolina Association of County
Social Services Attorneys Conference
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HHS OCR Role

- HHS OCR is responsible for ensuring that entities receiving Federal financial assistance (FFA) 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, HHS OCR enforce Title II of the ADA against public entities, including child welfare agencies and state courts.

Title II of the ADA

- 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. 42 U.S.C. § 12132.
- 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. 42 U.S.C. § 12131(1)(A), (B); see 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.

Section 504 of the Rehabilitation Act

- 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. ²⁹ U.S.C. § 794(a).
- Section 504 applies to all of the operations of agencies and sub-agencies of state and local governments, even if FFA is directed to one component of the agency or for one purpose of the agency. ²⁹ U.S.C. § 794(b).
- Recipients of FFA must agree to comply with Section 504, and generally other civil rights laws, as a condition of receiving Federal financial assistance. ³⁰ See, e.g., 45 C.F.R. § 84.5.

Who Must Comply

- Because Title II covers all programs, services, and activities of state and local governments, their agencies and departments must comply
- Because Section 504 applies to all recipients of FFA, all child welfare-related activities and programs of child welfare agencies and courts must comply.

Who Must Comply Cont.

- Title II and Section 504 apply to the programs, services, and activities of family court.
 - State court proceedings, such as termination of parental rights proceedings, are state activities and services for purposes of Title II. ³¹ 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.");
 - Section 504 also applies to state court proceedings to the extent that court systems receive Federal financial assistance. ³² 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."

Who Must Comply Cont.

- Title II and Section 504 apply to private contractors of child welfare agencies and courts
- Title II prohibits discrimination in child welfare programs and services when those services are provided by contractors. • See 28 C.F.R. § 35.130(b)(1), (3).
- Section 504 prohibits discrimination in child welfare programs receiving FFA, including programs receiving FFA operated by private entities under contract with child welfare agencies. • 29 U.S.C. § 794(a); 45 C.F.R. §§ 84.3(h); 84.4(b)(1), (4).

Who is Protected by the ADA and Section 504

- The ADA and Section 504 protect the rights of individuals with disabilities. 42 U.S.C. § 12132; 29 U.S.C. § 794(a).
- A “disability” is defined as a physical or mental impairment that *substantially limits a major life activity*. 42 U.S.C. § 12102(1), (2)(A); 29 U.S.C. § 705(9)(B).
- To be eligible, an individual with a disability must be “qualified.” To be qualified means that 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. 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).

Application in Child Welfare

- 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. 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).

Two Main Principals

- Two principles that are fundamental to Title II of the ADA and Section 504 are:

(1) individualized treatment; and

(2) full and equal opportunity.

Individualized Treatment

- Individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence. 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).
- Persons with disabilities may not be treated on the basis of generalizations or stereotypes. See, e.g., *id.*

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. See 28 C.F.R. §§ 35.130(b)(1)(i)-(iv), (vi), (b)(7); 45 C.F.R. § 84.4(b)(1)(i)-(iii); see also 28 C.F.R. § 42.503(b)(1)(i), (iii).
- 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. See, e.g., 28 C.F.R. § 35.130(b)(1)(i)-(iv).

Reasonable Modification

- A public entity shall 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.” 28 C.F.R. Section 35.130(b)(7).

Exception

- In some circumstances, 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 reasonable modification. 28 C.F.R. § 35.139(a)-(b); Arline, 273 U.S. at 287.
- 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 C.F.R. § 35.139(b); Arline, 273 U.S. at 288.

Exception Cont.

- 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. 2928 C.F.R. § 35.139(b); Arline, 273 U.S. at 288.
- 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. See 28 C.F.R. § 35.130(h).

Ensuring obligations are met under
Title II of the ADA and Section 504

- Child welfare agencies should take steps to ensure that their obligations under Title II and Section 504 are met by reviewing the following:
 - (1) existing policies, practices, and procedures;
 - (2) how the agency actually processes cases;
 - (3) the agency's licensing and eligibility requirements for foster parents and guardians; and
 - (4) whether there are staff training or professional development needs.
