

DISABILITIES IN CHILD WELFARE

It is illegal to directly – or through contract -discriminate against a person with a disability.
Americans with Disabilities Act (ADA), 42 U.S.C. §12101, et. seq., 28 C.F.R. §35.101 et. seq.
Section 504 of Rehabilitation Act of 1973 (§504), 29 U.S.C. §701, et. seq., 34 C.F.R. §104.1 et. seq.

Discrimination includes denying an individual with a disability the opportunity to participate in or benefit from a service and failing to make reasonable modifications, as necessary. 28 C.F.R. §35.130(b)(1), (2)

Reasonable modifications – 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. §35.130(b)(7)(1)

The ADA/504 applies 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. DOJ/HHS Technical Assistance Document, p. 3.

Covered entities include: *Courts *State & local child welfare agencies *Service providers
*Attorneys 42 U.S.C 12131 (1)(A), (B); 42 U.S.C. §12181(7)(F)

The definition of disability shall be construed in favor of broad coverage, to the maximum extent permitted by the law. 42 U.S.C. §12102(4). “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).

There are three ways to be qualified as a person with a disability:

1. a physical or mental impairment that substantially limits one or more major life activities (“**Actual disability**”);
2. a record of such an impairment (“**Record of disability**”); or
3. being regarded as having such an impairment (“**Regarded as**”)

42 U.S.C. 12102 (1)(A)-(C)

Physical or mental impairments include visual, speech, and hearing impairments, cancer, diabetes, intellectual disability, emotional illness, PTSD, brain injury, bi-polar disorder, autism, ADHD, HIV, drug addiction, and alcoholism. 28 C.F.R. §35.108(b)(2). **Major life activities** include caring for oneself, thinking, concentrating, communicating, interacting with others, as well as the operation of major bodily functions, such as the immune system, normal cell growth, cardiovascular, and individual organs.

28 C.F.R. §35.108(c)(1)(i), (ii).

Substance Use Disorder - The ADA does not prohibit discrimination against a person based on the *current illegal use of drugs* - meaning the use of drugs that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem. However, a public entity shall not discriminate against an individual who is not engaging in current illegal use of drugs and who—

1. Has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully;
2. Is participating in a supervised rehabilitation program; or
3. Is erroneously regarded as engaging in such use. 28 C.F.R. §35.131(a)(2)

Practice Tip – Alcohol and prescription medication taken in accordance with a doctor’s orders are not “illegal use.” This includes Medication Assisted Treatment (MAT), such as methadone and naltrexone. Depending on your state’s laws, you may be able to make an argument about marijuana use.

DISABILITY?

- SSI/SSDI
- Medicaid Waiver
- IEP/504 Plan
- Insanity or Incompetency
- Institutionalization
- Ongoing treatment or medications
- D & N Petition Allegations

Practice Tip – Disability is personal, and your client must agree before you raise it in your case, so spend time building rapport so that decision is well-informed. If agreed, file a Notice of ADA Applicability early in the case. Requests for accommodations, if needed, can be made on an on-going basis.

FEDERAL GUIDANCE

THE SARA GORDON LETTER – Letter of findings against the Massachusetts Department of Children and Families for disability discrimination against a young mother. https://www.ada.gov/ma_docf_lof.pdf

- **The ADA/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. P. 10
- **Family Centered Planning is necessary** - Agencies must focus on natural supports and family-centered – as opposed to solely independent – family planning, including proactively assisting in or even providing supports. P. 12, 19.
- **It is discriminatory to focus on diagnosis and delay implementing accommodations** – “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.” P. 14.

DOI/HHS Guidance – A 2015 Technical Assistance Document from the U.S. Departments of Justice and Health & Human Services outlining the obligations of child welfare agencies and courts regarding parents with disabilities in the child welfare system. <https://www.hhs.gov/sites/default/files/disability.pdf>

- The ADA requires *individualized treatment & full and equal opportunity*. P. 4
- Any determination that a parent’s disability renders them unfit to parent must be based on an individualized assessment and objective facts, including the nature, duration, and severity of the risk of harm, and the probability that the potential injury will actually occur. P. 5
- Service plans should be individually tailored and not require parents with disabilities to take unnecessary steps to “prove” their fitness. P. 13
- 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.” P. 14
- Child welfare agencies may be *required to contract with outside service providers* as a reasonable accommodation of a parent’s disability. P. 15

OTHER CONSIDERATIONS

- **Adult Guardians Ad Litem** – Consider client’s abilities and needs, the impact on the case, the GAL’s training/expertise, and loss of attorney/client privilege before seeking or agreeing to an adult GAL.
- **Use Discovery** – To get information on the agency’s policies, training, knowledge of disability, etc.
- **The Child Welfare Agency’s Policies** – Use their policies to support your case and accommodations.

Resources

- Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children - <https://www.ncd.gov/publications/2012/Sep272012>
- The Association for Successful Parenting – training for those supporting parents with intellectual/developmental disabilities <https://achancetoparent.net/>
- Job Accommodation Network – for ideas on accommodations <https://askjan.org/>
- Independent Living Centers – support organizations run by and for people with disabilities, providing various resources and services for independence <https://rsa.ed.gov/about/states>
- Supported Decision Making – a formalized agreement between a person with a disability and that person’s supporters to assist with life decisions <http://www.supporteddecisionmaking.org/>
- The Arc Network – providing advocacy services for adults and children with intellectual/developmental disabilities <https://thearc.org/>