

The ADA and Guardianship Courts

Excerpts from DOJ and HHS Joint Guidance to Courts in Child Welfare Proceedings, With Comments on Their Application to Adult Guardianship Proceedings

In August 2015, the United States Department of Justice and the Department of Health and Human Services issued a joint memo to provide guidance to court systems and other public entities involved in child welfare proceedings involving parents with disabilities. The joint memo explains how the Americans with Disabilities Act and Section 504 of the Rehabilitation Act apply to such proceedings. https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html

This commentary focuses on specific provisions of the joint memo and explains how the guidance is equally applicable to court systems and adult protective service agencies interacting with people with disabilities who are involved in adult guardianship proceedings.

The DOJ has not yet issued an ADA guidance memo specifically addressing adult guardianship proceedings. Therefore, until such guidance is published, guardianship courts can find indirect advice about their ADA obligations in guidance memos issued by the DOJ for other types of court proceedings. This is one such guidance memo. Another is a memo to courts and law enforcement agencies involved in criminal proceedings. <http://disabilityandabuse.org/doj-guidance-memo.pdf> Spectrum Institute used that memo as the basis for another commentary about ADA obligations of guardianship courts. <http://disabilityandabuse.org/doj-guidance-and-maryland.pdf>

Overview of Legal Requirements

Title II of the ADA

Quote: “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.” (Emphasis added)

Comment: The requirements of Title II apply to all court systems and all welfare agencies whether the service involves children or adults with disabilities. The ADA applies to all guardianship

proceedings whether the ward or proposed ward is an adult or a child. Therefore the mandates of the ADA apply to court systems, investigations, assessments, case planning, service planning, and visitation of adults with cognitive and communication disabilities who find themselves as voluntary or involuntary participants in adult guardianship proceedings.

Section 504 of the Rehabilitation Act

Quote: “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”

Comment: Many if not most state and local courts receive federal funding of some sort. As a condition of receiving such funds, the courts have agreed to abide by the requirements of Section 504 in all of their services. Guardianship proceedings are a service provided by court systems. As a result, the courts are required by follow the mandate of Section 504 – a parallel law to the ADA.

Application

Quote: “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.”

Comment: A guardianship court may not directly violate the mandates of the ADA or Section 504, nor may it escape fulfilling its Title II responsibilities as a public entity by delegating authority to individuals, organizations, or agencies through contracts or other arrangements. If the court authorizes actions of agents through delegation of authority – such as court investigators, guardians ad litem, capacity assessment professionals, or court-appointed attorneys – the court is responsible for ensuring that the actions of these agents comply with the ADA and Title II. Such responsibility can be fulfilled by adopting ADA-compliant performance standards for these agents, making sure they are appropriately trained in how to comply with the ADA, and by implementing an effective monitoring mechanism to ensure the training and services of these agents are in conformity with the requirements of the ADA and Section 504. A court cannot delegate authority to such agents and by doing so absolve itself of its duty to ensure that people with disabilities have meaningful

participation in their cases, including meaningful and effective communication with the court and its appointed agents.

Individualized Treatment and Equal Opportunity

Quote: "Two principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity."

Quote: "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"

Quote: "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"

Quote: "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"

Comment: In order for courts and agents appointed by the court to provide individualized treatment and a full and equal opportunity to participate in the guardianship proceeding, they must be properly educated about the specific disabilities of the respondent or ward, know how to effectively communicate with the adult in question, and ensure that the adult has received an individualized assessment of capacity to make decisions in each of the relevant areas of concern by a professional who is qualified to make such an assessment. The court or its agents may only restrict the rights of the respondent or ward based on such assessments and on objective facts – not assumptions or generalizations. Such assessments take time and cost money. Finding qualified professionals to conduct such assessments may not be easy, especially in areas of a state where such professionals are hard to find. The fact that compliance with the ADA is not easy, however, does not authorize noncompliance.

QUESTIONS AND ANSWERS

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

Quote: "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 "

Quote: "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"

Comment: A guardianship court must take steps to ensure that a respondent or ward who has cognitive or communication disabilities has meaningful participation in court proceedings – both inside and outside of the courtroom. When a guardianship petition or notice of hearing is filed, the court is placed on notice that a respondent in the proceeding has disabilities that may impede him or her from having equal access to the administration of justice. In order to maximize the potential for meaningful participation in the proceeding, the court must rely on its employees and appointed agents to conduct an ADA needs assessment of the individual in question. Based on an individualized assessment, the court and its agents can develop a plan to ensure that communications with the individual are as effective as reasonably possible.

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

Quote: "The ADA and Section 504 protect the rights of individuals with disabilities.⁴⁰

Quote: "Congress has made clear that the definition of disability in the ADA and Section 504 is to be interpreted broadly.⁴³

Quote: "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"

Comment: Respondents and wards in guardianship proceedings are protected by the ADA since they have actual or perceived disabilities that impair major life functions. The filing of a petition or notice of hearing puts the court and its personnel and agents on notice that the respondent or ward has a significant disability that is impairing his or her ability to understand or communicate.

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

Quote: "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"

Comment: Whether a person with an actual or perceived cognitive or communication disability is a petitioner or respondent, a proposed ward or conservatee or an adjudicated ward or conservatee, the individual in question is protected by Title II of the ADA and Section 504.

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

Quote: "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."

Quote: "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

Comment: All activities of guardianship courts and employees and agents of such courts are covered by Title II of the ADA and Section 504. Such activities include investigations, witness interviews, assessments, case planning and service planning, advocacy and defense services, and court proceedings.

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

Quote: "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

Quote: "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 "

Quote: "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"

Quote: "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"

Comment: Guardianship court proceedings, like child welfare court proceedings, are considered services of a public entity governed by Title II of the ADA and Section 504.

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

Quote: "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"

Comment: The direct role of judges in guardianship proceedings is limited to activities inside of the courtroom. However, both pre-adjudication and post-adjudication, most activities occur outside of the courtroom through the actions of court investigators, professionals who conduct assessments, guardians ad litem, guardians, and court-appointed attorneys. Because such individuals are employed by or appointed by the court to perform these services, they are also covered by Title II of the ADA and Section 504.

7. What is a reasonable modification?

Quote: "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."

Comment: Judges, court personnel, and agents appointed by the court must take whatever steps are reasonably necessary to ensure that the respondent or ward has meaningful participation in his or her case. Generally the first step would be to appoint an attorney to provide advocacy and defense services for the individual – an attorney whose primary duty is to ensure that the rights of the client are protected, including his or her rights under the ADA. In order to comply with the ADA, court-appointed attorneys and other court personnel and agents must receive training in what the ADA requires of them. Compliance with the ADA is not discretionary and may not be left to chance.

8. What does it mean to provide effective communication?

Quote: "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"

Quote: "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"

Comment: The first step to ensure effective communication between a respondent or ward and the court or agents of the court would be to appoint an attorney to represent the respondent or ward in the proceeding. The attorney would ensure that an ADA needs assessment is conducted so that appropriate supports and services can be provided to help the litigant understand the proceeding and effectively give and receive communications with the judge, court personnel, and all appointed agents.

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?

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

Quote: "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."

Comment: The ADA requires that adults with disabilities who are involved in guardianship proceedings receive individualized assessments by qualified professionals. These assessments must address which rights should be retained as well as which areas of decision-making should be transferred to a guardian. Such an assessment must also address the issue of less restrictive alternatives that may be viable with ancillary supports and services. Capacity and alternatives to guardianship are issues at the very core of a guardianship proceeding. Individualized assessments by qualified professionals must be a part of each and every guardianship proceeding in order for the proceeding to comply with Title II of the ADA.

Quote: "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."

Comment: A court is not fulfilling its Title II responsibilities unless it has assessed its own policies and procedures to ensure they are complying with Title II requirements. Most courts do not acknowledge that the ADA applies to guardianship proceedings and to all of the official participants in the proceedings. Without such an acknowledgment, there will not be a meaningful assessment of court policies and practices to determine if they are in fact complying with the ADA.

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?

Quote: “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.

Comment: The same requirements for individualized assessments that are discussed above in connection with child welfare court proceedings also apply to adult guardianship proceedings.

16. What can individuals do when they believe they have been subjected to discrimination in violation of Title II or Section 504?

Quote: “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”

Quote: “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

Quote: “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

Quote: “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"

Comment: A complaint may be filed against a court, or against agents who have assumed responsibilities delegated to them by a court in a guardianship proceeding for violations of Title II of the ADA or Section 504. An objection may be filed with the court or a complaint for systemic violations may be filed with the state court system. An appeal may be filed with an appellate court. ADA violations may be considered structural error that makes the judgement or order of the court reversible per se. An individual or class-based complaint may be filed with the DOJ against an individual court entity or against the state court system as a whole if the violation is based on statewide policies and practices of the court system. The DOJ may also initiate an investigation on its own motion if it learns of an individual or class-oriented violation.

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 800-514-0383 (TDD), or access its ADA website at www.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 www.ada.gov/filing_complaint.htm. Individuals who believe they have been aggrieved under Title II or Section 504 should file complaints at the earliest opportunity.

Endnotes are found in the original join memo.

Published by Spectrum Institute

February 16, 2018

<http://spectruminstitute.org/guardianship/>

Email: tomcoleman@spectruminstitute.org