Protecting the Rights of Parents and Prospective Parents with Disabilities

HHS Office for Civil Rights
September 7, 2018
As HHS’s law enforcement agency for civil rights, conscience and religious freedom rights, and health information privacy rights, OCR investigates complaints, enforces rights, promulgates regulations, develops policy, and provides technical assistance and public education to ensure understanding of and compliance with non-discrimination and health information privacy laws. OCR accomplishes this by:

- Ensuring that recipients of HHS federal financial assistance comply with federal civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, age, sex, and religion.

- Ensuring that federal agencies, state and local governments, health care providers, health plans, and others comply with federal laws protecting conscience and the free exercise of religion and prohibiting coercion and discrimination in health and human services.

- Ensuring the practices of health care providers, health plans, healthcare clearinghouses, and their business associates adhere to federal privacy, security, and breach notification laws under the Health Insurance Portability and Accountability Act (HIPAA), as amended, through the investigation of complaints, self-reports of breaches, compliance reviews, and audits.
Presentation Roadmap

• **Understanding the Issues**
  – “Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children” (National Council on Disability, 2012)
  – Common Findings in Child Welfare Cases

• **Partnership between HHS and DOJ**
  – Jurisdiction and Enforcement

• **Overview of Legal Requirements**

• **Application of Legal Requirements**
  – Full & Equal Opportunity
  – Reasonable Modification and Fundamental Alteration
  – Child Safety and Direct Threat
  – Individualized Assessment

• **Examples of Child Welfare Enforcement Efforts:**
  – Investigation of the Massachusetts Dept. of Children and Families
  – Investigation of the Georgia Department of Human Services
  – Investigation of the Florida Department of Children and Families

• **Resources**
Understanding the Issue

Under federal law, parents and prospective parents with disabilities are protected from unlawful discrimination in the administration of child welfare programs, activities, and services.
Discriminatory Practices

Despite federal laws protecting parents’ and prospective parents’ rights, individuals with disabilities still face discrimination and experience significant challenges when entering and navigating child welfare systems across this country.

- The rate of removal of children from families with parental disabilities — particularly psychiatric, intellectual, or developmental disabilities — is ominously higher than the rates for children whose parents do not have a disability.

- States continue to adopt laws that severely restrict the rights of people with disabilities to create and maintain families.

- 36 states and the District of Columbia have dependency statutes which cite disability as a ground for termination of parental rights – including intellectual, developmental, emotional and/or physical disabilities.

(Source: “Rocking the Cradle” Report - National Council on Disability)
State-by-State Analysis of Dependency Statutes

Legend: States that include disability as a ground for termination of parental rights.

- Do Include Disability
- Do Not Include Disability
In 2012, the National Council on Disability (NCD) published the report “Rocking the Cradle”, which examined the barriers people with disabilities experience in creating and maintaining families, and highlighted persistent and systemic discrimination against parents with disabilities.

The report analyzes how federal disability law applies to parents with disabilities within the child welfare system and the family law system, and the systems’ discriminatory treatment of parents with disabilities and their children.
Parents with disabilities are often inappropriately referred to the child welfare system and are disproportionately separated from their children.

Parents with intellectual disabilities often face significant discrimination. A substantial number of these parents, however, can acquire parenting skills, learn coping mechanisms and provide adequate child care.

Parents who are blind or deaf, as well as parents with other physical disabilities, report significant discrimination in the custody process.

Individuals with disabilities seeking to become foster/adoptive parents encounter bias due to stereotypes about their parenting abilities.

Discriminatory separation of parents from their children can result in long-term negative consequences for both the parent and the child.

(Source: “Rocking the Cradle” Report - National Council on Disability)
Rocking the Cradle: Case Examples

- A child welfare agency removed a newborn for 57 days from a couple because of assumptions and stereotypes about their blindness, undermining bonding between the parents and the infant.

- A child welfare agency removed a three-year old from his grandmother because she had arthritis and a mobility impairment. The toddler then developed behavioral issues and progressively detached from his grandmother.

(Source: “Rocking the Cradle” Report - National Council on Disability)
The U.S. Department of Health and Human Services (HHS) and the U.S. Department of Justice (DOJ) have received numerous complaints of discrimination from individuals with disabilities involved in the child welfare system.

Child welfare agencies and courts vary in the extent to which they have policies, practices and procedures in place to prevent discrimination against parents and prospective parents with disabilities.
Partnership between HHS and DOJ

In February 2015, HHS and DOJ entered a collaborative partnership to assist state and local child welfare agencies and courts in meeting their responsibilities to promote the safety, permanency, and well-being of children and their families while ensuring compliance with federal civil rights laws. Through this effort, a series of technical guidance documents have been jointly published.

**Participating Agencies:**
- HHS Office for Civil Rights (HHS OCR)
- HHS Administration for Children and Families (HHS ACF)
- DOJ Civil Rights Division (DOJ)
The Roles of HHS Divisions

HHS Office for Civil Rights ensures that individuals receiving services from HHS-funded programs are not subject to unlawful discrimination, providers and others can exercise their conscience rights, and individuals can exercise their rights to access their health information and can trust the privacy and security of their health information.

HHS ACF Children’s Bureau funds child welfare agencies and state courts. Recipients of federal funds from the Children’s Bureau are prohibited from discriminating on the basis of race, color, national origin, age, and disability (and sex in the context of education programs).
HHS OCR protects the civil rights of individuals who are subject to discrimination through various activities, including:

- Stakeholder Outreach
- Technical Assistance
- Compliance Reviews
- Complaint Investigations
- Violation Letters of Finding
- Settlement Agreements
- Enforcement Proceedings
The Children’s Bureau has several areas of focus to improve the overall health and well-being of our Nation’s children:

- Adoption
- Foster Care
- Child Abuse & Neglect
- Guardianship
- Child Welfare Services
- Tribes
All recipients of HHS funding must comply with:

- **Title VI of the Civil Rights Act of 1964** (prohibiting race, color, and national origin discrimination and requiring language access for limited English proficient persons);
- **Multiethnic Placement Act of 1994 (MEPA)**, as amended by Section 1808 (prohibiting race, color and national origin discrimination in foster and adoptive placements);
- **Title IX of the Education Amendments of 1972** (prohibiting sex discrimination in education and training programs);
- **Section 504 of the Rehabilitation Act of 1973** (prohibiting disability discrimination); and the
- **Age Act of 1975** (prohibiting age discrimination).
- In addition, state and local government entities must comply with **Title II of the Americans with Disabilities Act of 1990** (prohibiting disability discrimination in services provided by State and local governments).
Other Civil Rights Authorities

Conscience Protection Laws

• Church Amendments

• Section 245 of the Public Health Service Act

• Weldon Amendment

• Section 1303(b)(4) of the Affordable Care Act

[https://www.hhs.gov/civil-rights/for-individuals/conscience-protections/index.html]
Partnership between OCR and DOJ

HHS Office for Civil Rights Enforcement
Ensures that entities receiving federal funding from HHS, including child welfare agencies and local and state court systems, comply with their legal obligations under Section 504 to provide equal access to parents with disabilities.

HHS OCR and DOJ Civil Rights Division Enforcement of Title II of the ADA
Both HHS OCR and DOJ enforce Title II of the ADA against public entities, including child welfare agencies and local and state court systems.
Title II of the Americans with Disabilities Act of 1990:

“No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.
Overview of Legal Requirements:
Title II of the ADA (continued)

- Title II of the ADA applies to the services, programs, and activities of all state and local governments, including child welfare agencies and state courts.

- Covered services, programs, and activities include investigations, assessments, in-home services, removal of children from their homes, case planning, visitation, guardianship, adoption, foster care, and reunification services.

- The services, programs, and activities also extend to child welfare and custody hearings, as well as proceedings to terminate parental rights.
Overview of the Legal Requirements: Section 504

Section 504 of the Rehabilitation Act of 1973:

“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.

Covered Activities:
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.
HHS Funded Programs or Activities

All recipients of HHS federal financial assistance, either directly or indirectly, through a grant, contract or subcontract, are subject to Section 504.

Includes, but is not limited to:

- Titles IV-E and Title IV-B of the Social Security Act
- Medicare & Medicaid
- TANF & SNAP (Food Stamps)
- Grants and loans
- Donation of property
- Sale or lease of property in certain circumstances
- Services of federal personnel
Application of the Legal Requirements

How do we apply Title II and Section 504 in child welfare enforcement?
### Protected Individuals

Title II and Section 504 protect qualified individuals with disabilities from discrimination by child welfare agencies and courts.

**Protected individuals can include, but are not limited to:**

<table>
<thead>
<tr>
<th>Children</th>
<th>Parents</th>
</tr>
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<tbody>
<tr>
<td>Legal Guardians</td>
<td>Relatives</td>
</tr>
<tr>
<td>Companions</td>
<td>Other Caregivers</td>
</tr>
<tr>
<td>Foster Parents</td>
<td>Adoptive Parents</td>
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<tr>
<td>Applicants to</td>
<td>Applicants to</td>
</tr>
<tr>
<td>Become Foster Parents</td>
<td>Become Adoptive Parents</td>
</tr>
</tbody>
</table>
Covered Child Welfare Programs and Activities

All child welfare-related programs and activities are covered, including:

- Investigations
- Witness interviews
- Assessments
- Removal or children from their homes
- Case planning and service planning
- Guardianship
- Adoption
- Foster care
- Reunification services
- Family court proceedings
- Visitation

Title II of the ADA applies to the services, programs, and activities of all state and local governments, including court systems and child welfare agencies. Title II also prohibits disability discrimination through government contracting, licensing or other arrangements.

Section 504 applies to state and local court systems, government agencies and private child welfare agencies that receive federal financial assistance.
Non-Discriminatory Practices:
A child welfare agency or court may not, directly or through contract, engage in practices or methods that result in discrimination towards individuals with a disability, or that interfere or impair the objectives of the child welfare agency’s or court’s program for persons with disabilities.
Contractors and Sub-Recipients
A child welfare agency could be held responsible for the discriminatory actions of a private foster care or adoption agency with which it funds or enters into a contract.

Individualized Treatment
Under the ADA and Section 504, individuals with disabilities must be treated on a case-by-case basis consistent with facts and objective evidence.

Full and Equal Opportunity
Under the ADA and Section 504, individuals with disabilities must be provided opportunities to participate in child welfare programs and activities that are equal to those extended to individuals without disabilities.
Application of the Legal Requirements: Examples

- If a 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 could be held responsible for the sub-recipient or contractor’s practice of discriminating on the basis of disability.

- A child cannot be removed from his or her parent with a disability based on the stereotypical notion, unsupported by an individual assessment, that people with disabilities cannot safely parent children.

- An individual with a disability cannot be denied the opportunity to become a foster/adoptive parent without an individualized assessment of his or her parenting abilities.

- A child welfare agency must provide a sign language interpreter for a father or mother who is deaf when necessary to ensure that he or she can participate in the agency’s programs.
Compliance Recommendations for Child Welfare Agencies and Courts

- Regularly review and update policies and procedures to ensure compliance with the ADA and Section 504.

- Ensure employees and contractors are sufficiently trained in ADA and Section 504 compliance.

- Implement processes to ensure effective communication with individuals who interact with child welfare agencies and courts, including the provision of auxiliary aids and services when required.

- Coordinate with organizations representing people with disabilities to assist in service planning activities.
Reasonable Modifications

Public and private child welfare agencies must make reasonable modifications to policies, practices and procedures to avoid discrimination against individuals with disabilities. Individual requests for reasonable modifications may include:

-- requests by foster parents for substitute or respite caregivers

-- requests for one-on-one parenting training

-- requests for note takers or other auxiliary aides and services

Fundamental Alteration

Public and private child welfare agencies do not have to make reasonable modifications that would result in a fundamental alteration in the program, service, or activity, or result in a direct threat to the health or safety of others.
Child Safety
Under child welfare law, the child welfare agency must make a comprehensive assessment of the child’s safety, health and well-being and any barriers the family faces in keeping the child safe at home. The principle of “child safety” is not in conflict with the ADA and Section 504.

Direct Threat
Under the ADA and Section 504, a direct threat is a significant risk to the health and safety of others that cannot be eliminated by a modification of policies or practices, or by the provision of auxiliary aids or services.
Direct Threat Analysis
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 or practices will mitigate the risk.

Individualized Assessment and Objective Facts
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.
Examples of Child Welfare Enforcement Efforts

Massachusetts Dept. of Children and Families (MDCF)

On January 29, 2015, DOJ and HHS OCR issued a joint letter finding disability rights violations by MCDF on the basis of Section 504 and Title II by denying Sara Gordon, a mother with developmental disabilities, the opportunity to benefit from support services following the removal of her two-day-old infant.
Georgia Department of Human Services, Division of Family and Children Services (DFCS)

HHS OCR entered into a settlement with DFCS to improve access for qualified individuals with disabilities to participate in foster and adoptive parent programs. The Agreement resolved OCR’s violation letter, where OCR concluded that DFCS failed to make an individualized assessment of the Complainant’s ability to be a Foster-Adopt parent and improperly used disability as a criterion to make placement decisions. DFCS also failed to consider whether supportive services offered to other foster parents would have addressed DFCS’s concerns and allowed the Complainant to participate in the program.
Florida Department of Children and Families (FDCF)

In January 2010, HHS OCR and FDCF entered into a statewide settlement agreement after an investigation found the State violated Section 504 and Title II by failing to provide interpreters to deaf persons in critical situations, such as during child protective services investigations and during treatment in State mental health hospitals and treatment facilities.
What can individuals do when they believe they have been subjected to discrimination in violation of Title II of the ADA or Section 504?

- Raise Title II or Section 504 claims in child welfare proceedings.
- Contact your designated Protection and Advocacy Agency (P&A), Legal Aid Society, Legal Services office, and/or local bar association to get an attorney or other legal assistance.
- File complaint with DOJ. To file, visit: [http://www.ada.gov/index.html](http://www.ada.gov/index.html)
Resources Are Available

Child Welfare Technical Assistance Guidance

HHS Office for Civil Rights
http://www.hhs.gov/ocr/

HHS Administration for Children and Families – Children’s Bureau
http://www.acf.hhs.gov/programs/cb

Disability Rights Section, Civil Rights Division, U.S. Department of Justice
http://www.ada.gov/

National Council on Disability: Rocking the Cradle – Ensuring the Rights of Parents with Disabilities and Their Children
https://www.ncd.gov/publications/2012/Sep272012
QUESTIONS?
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THANK YOU!