

## **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. Colorado Anti-Discrimination Act (CADA), C.R.S. §24-34-801, et. seq.**

**Discrimination** includes a variety of actions or inactions that are intended to – or have the effect of – treating a parent with a disability worse than a parent without a disability. This can be through intentional discrimination, failing to identify or make appropriate accommodations, or employing a policy that has a disparate impact on parents with disabilities. 28 C.F.R. §35.130(b)(1), (2)

**Reasonable modifications (accommodations)**– A public entity **shall make reasonable modifications** in policies, practices, or procedures when the modifications are **necessary to avoid disability discrimination**, 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. Also, though marijuana is illegal under federal law, an argument can be made for protection under the Colorado Anti-Discrimination Act or even as a reasonable modification under the ADA.

### **DISABILITY?**

- SSI/SSDI
- HCBS/ Medicaid Waiver Services
- IEP/504 Plan
- NGRI/Incompetent
- Institutionalization
- CCB Services
- Ongoing Medical/Mental Health Care
- Allegations in the D & N Petition

## **FEDERAL GUIDANCE**

**THE SARA GORDON LETTER** – Letter of findings against the Massachusetts Department of Children and Families for disability discrimination against a young mother with I/DD. Sara’s daughter was removed at the hospital, based on concerns about Sara’s ability to parent, without regard to Sara’s natural supports, including living with her parents. [https://www.ada.gov/ma\\_docf\\_lof.pdf](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.
- **Formalized assessments are not always necessary** – Agencies must use information they have available through case files and school or medical records to make an individualized assessment. P. 13.
- **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.

**DOJ/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 if the agency’s current providers cannot meet the parent’s needs. P. 15.

**Resources & Training Required:** Federal and state law, together with regulations, guidance, and Volume VII require that all stakeholders in the child welfare system be fully apprised of disability laws and their application to dependency and neglect, including effectively working with people with disabilities. Additionally:

- State courts and child welfare agencies with 50 or more employees must have an **ADA/504 Coordinator** and a **grievance process** for clients with disabilities (28 C.F.R. §35.107(a)(b))
- Attorneys must address **communication** barriers with clients, including hiring interpreters or making other reasonable accommodations to effectuate communication (C.R.P.C. 1.4, ABA Formal Ethics Opinion 500)
- County child welfare agencies shall have a “**disability services plan**” (12 CCR 2509-7.604(D))
- County child welfare agencies should **consult with and include organizations that support and advocate for rights of individuals with disabilities** in their policymaking and training efforts. (DOJ/HHS Technical Assistance Document p. 12).

**Practice Tip** – Disability is personal, and a parent must agree to disclosure before an RPC can address it in court. This may not happen at the first hearing. It is important for caseworkers and RPC to build rapport with a parent to discover important and relevant disability-related information.

## STATE LAW

**People ex. Rel. C.Z** - 360 P.3d 228 (Colo.App. 2015) – Finding no appropriate treatment plan, even if based on a parent’s disability, does not violate the ADA if the disability renders the parent unfit. ¶34

- The ADA applies to child welfare cases and all provision of services. ¶22
- Section 19-3-604(1)(b)(1) implicitly requires the trial court to consider whether reasonable accommodations can be made to rehabilitate the parent to meet the child’s needs. ¶28

**People In Interest of S.K.**, 440 P.3d 1240 (Colo.App. 2019) – Termination of rights upheld for parents with disabilities who were unable to complete treatment plans despite being provided individualized services in the home.

- Agencies have an affirmative duty to accommodate parents with disabilities. ¶18
- The department must accommodate disabilities of which they have notice, either because it has been disclosed **or because the disability is obvious**. ¶22

4. *In applying this case, it is important to remember that the ADA requires each entity (RPC, department, court) to accommodate disabilities that the entity knows or should know of and if an accommodation is denied, it can only be denied if it is a **fundamental alteration** or **undue financial burden** (which requires the head of the child welfare agency to declare in writing that all available resources have been considered and providing the accommodation would cause an undue financial burden). See 28 C.F.R. §§35.130(b)(7), 35.164*

**Carrie Ann Lucas Parental Rights for People with Disabilities**, C.R.S. §24-34-805, et. al. This law was passed in 2018 (HB18-1104) to address and formalize rights for parents with disabilities in dependency and neglect, guardianship, foster, and adoption cases. It was renamed in 2021 after the law’s primary advocate, Carrie Ann Lucas. The legislative findings include:

Persons with disabilities continue to face unfair, preconceived, and unnecessary **societal biases**, as well as **antiquated attitudes**, regarding their ability to successfully parent their children.

Persons with disabilities have faced these biases and preconceived attitudes in **family and dependency law proceedings** concerning parental responsibilities and parenting time decisions, public and private adoptions, guardianship, and foster care.

Because of these societal biases and antiquated attitudes, children of persons with disabilities historically have been **vulnerable to unnecessary removal** from one or both of their parents’ care or are restricted from enjoying meaningful time with one or both parents.

- ***A parent’s disability alone must not serve as a basis for denial or restriction of parenting time or parental responsibilities*** except when it impacts the health or welfare of a child; C.R.S. §24-34-805(2)(a)(III)
- ***Reasonable accommodations must be in treatment plan*** & dispositional report. C.R.S. §19-3-507(1)(c)
- Before making a finding of no appropriate treatment plan based on a parent’s disability, ***the court shall make findings*** that the provisions of reasonable accommodations will not remediate the impact of the parent’s disability on the health or welfare of the child. C.R.S. §19-3-604(1)(b)(I)

**Volume VII** – State regulations require child welfare agencies to comply with the ADA and 504, including hiring qualified staff, making programs accessible, and obtaining interpreters. 12 CCR 2509-7.604(A)-(G).

**Guardians Ad Litem** – Upon request and following notice, hearing, and opportunity to object, courts may appoint a GAL for a parent with a disability. In accordance with C.R.S. §19-1-111(2)(c), consider:

- Adult GALs do not have oversight or specific training in working with people with disabilities
- Appointing an adult GAL requires a finding (implicit or explicit) of disability of the adult
- The attorney/client privilege does not extend to an adult GAL
- Appointing an adult GAL **is only** an accommodation **if** that is what the parent’s disability requires

**Motions Practice** – It is critical that disability issues be put on the record and fully litigated to preserve any issues for appeal. Common motions practice should include:

- **Notice of ADA Applicability** – An RPC (or GAL) should file this Notice upon discovering that the parent (or child) has an actual or record of disability or is regarded as disabled (such as from facts in the petition). This is to ensure that all parties and the court are on notice that the parent (or child) is protected from discrimination. *The Notice does not need to be accompanied by a request for reasonable modifications.*
- **Motion for Reasonable Modifications** – An RPC should file this motion together with or at any time after filing a Notice of ADA Applicability. The purpose is to seek and/or verify modifications that a parent needs based on their disability to fully and meaningfully participate in court, the treatment plan objectives, or any aspect of the case. The RPC must tie the request to the disability. Modifications must be granted unless the department or court can demonstrate they would cause a fundamental alteration of the program or services.
- **Motion for Summary Judgment** – This can be filed if there are not safety concerns regarding parenting, but the case remains open based on stereotypes or preconceived ideas of the parent’s disability.
- **Lack of Reasonable Efforts** – An RPC should file this motion if the department has not provided reasonable accommodations, has not individualized the treatment plan or goals, and/or is not working with the parent in a way that meets the parent’s disability-related needs.
- **No Appropriate Treatment Plan** – If a parent’s disability, even with reasonable modifications and natural supports, renders them unfit to parent, the law allows a finding of NATP. If the court grants this motion, it must make findings on the record that, ***based on the evidence in this particular case, with these particular set of facts,*** “reasonable accommodations will not remediate the impact of the parent’s disability on the health or welfare of the child.” *C.R.S. §19-3-604(1)(b)(I).*
- **Discovery** – The parties should engage in vigorous discovery practice on cases involving disability to determine prior evaluations, accommodations provided, training of case workers, etc.

**Practice Tip** – Courts can use and direct others to use the court’s ADA/504 Coordinator to request accommodations needed to access court hearings and the court process. Accommodations needed for communication with case workers, service providers, or for the treatment plan should be developed informally and, if needed, through court.

## 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 (TASP)**– training for those supporting parents with Intellectual/Developmental Disabilities (I/DD) <https://achancetoparent.net/>
- **Job Accommodation Network** – for ideas on accommodations <https://askjan.org/>
- **Centers for Independent Living (ILCs)** – support organizations run by and for people with disabilities, providing various resources and services for independence <https://coloradosilc.org/colorado-centers-for-independent-living/>
- **Community Centered Boards (CCBs)** – providing case management, benefits eligibility, and direct services for children and adults with I/DD <https://hcpf.colorado.gov/community-centered-boards>
- **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 I/DD <https://thearcofco.org/>
- **Division of Vocational Rehabilitation (DVR)** -providing job training skills and supports for youth and adults with disabilities <https://dvr.colorado.gov/>
- **Hearing Voices Network** – providing services and supports for people who hear voices, see visions, or experience other unusual perceptions <https://www.hearing-voices.org/>