



OFFICE OF RESPONDENT PARENTS' COUNSEL

Protecting the Fundamental Right to Parent

Using the ADA in Child Welfare Cases.

Americans with Disabilities

Act: The landmark ADA, 42 U.S.C. § 10101 et seq., and its predecessor, the Rehabilitation Act of 1973, 29 U.S.C. 794, established comprehensive national mandates prohibiting discrimination on the basis of disability. Collectively, these two laws prohibit public and private entities from discriminating against people with disabilities and ensure equal opportunity to participate in and benefit from a wide range of services and programs. In light of the ADA's intended "clear and comprehensive national mandate for the elimination of discrimination," the ADA ensures the rights of people with disabilities to create and maintain families in a variety of ways. 42 U.S.C. § 12101(b)(1). Indeed, before the passage of the ADA, Congress gathered an unprecedented amount of testimony concerning discrimination against people with disabilities, including stories of people with disabilities who had lost custody of their children.

Resources:

- DOJ Child Welfare Technical Assistance: <https://bit.ly/2Fs9gpf>
- DOJ/HHS Letter of Finding: <https://bit.ly/2HCbqc1>
- Rocking the Cradle report: <https://bit.ly/2w5rXjs>

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For years, prevailing caselaw in Colorado held a failure to comply with the ADA was not a defense to termination. Many courts across the country took the same position. In response, in 2012, the National Council on Disability issued a groundbreaking report about the rights of parents with disabilities called Rocking the Cradle. The report detailed hundreds of instances of discrimination faced by disabled parents. Following the report, the US DOJ and HHS investigated a case of discrimination in Massachusetts and found the Department of children and families had been discriminating against a developmentally disabled parent. In 2015, the Colorado Court of Appeals held the ADA applies to the provision of assessment, treatment and services. In 2018 the Children's Code was amended to require compliance with the ADA at several points of a D&N case.

BACKGROUND

The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." Major life activities are activities like caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and parenting. Major life activities also include the operation of major bodily functions like functions of the immune system, normal cell growth, digestive, bowel, or bladder, neurological, brain, and respiratory, circulatory, endocrine, and reproductive functions. Alcoholism and addiction based upon legal drug use are considered impairments under the ADA, even if there is current use. See 42 U.S.C. § 12102 & § 12210

An "individual with a disability" under the ADA does not include a person who is currently engaged in the illegal use of drugs, when the agency acts based on the illegal drug use. However, a person is typically included in the definition of disability due to illegal drug if they have successfully completed a drug rehabilitation program or has otherwise been successfully rehabilitated and is no longer engaging in drug use, or is participating in a supervised rehabilitation program and is no longer engaging in drug use.

WHAT IS A DISABILITY

Clients may not self-identify as having a disability. Screen all clients by asking questions like:

- Do you have a disability?
- Did you ever receive extra help in school?
- Did you graduate from high school?
- Do you have a hard time learning new things?
- Have you ever received social security benefits?
- Do you have a hard time walking / hearing / seeing / reading etc.?
- Do you use marijuana for a medical condition?
- Due to pain medication on a regular basis?
- Did you have to stop working because of a medical condition?

SCREENING FOR DISABILITY

As soon as you know the client has a disability, ask them what helps remediate their disability. Remember they are experts in their own condition. Sample Accommodations:

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| ▪ Increase frequency/extend length of service provision | ▪ Provide in-home parent modeling |
| ▪ Links of parent with a co-parent or mentor | ▪ Assist in reading materials |
| ▪ Tailor parenting education to the needs of the parent | ▪ Provide interpreters |
| ▪ Provide independent living skills education | ▪ Provide accessible transportation |
| ▪ Day care services | ▪ Respite care |
| ▪ Give frequent reminders for appointments/services | ▪ Aide or personal assistant |
| ▪ Parent helper/child care assistant | ▪ Supported housing |
| ▪ Provide services at an individual's home or alternative accessible site | |
| ▪ Provide all information in large print, audio tape, Braille, or digital format | |
| ▪ Offer note-taking or transcriptions of meetings and court activities | |
| ▪ Family or informal support networks (church, neighbors) | |
| ▪ Pictorial representation or step by step task reminders | |

ACCOMMODATIONS



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HB18-1104 Fact Sheet

The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." Major life activities are activities like caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and parenting. Major life activities also include the operation of major bodily functions like functions of the immune system, normal cell growth, digestive, bowel, or bladder, neurological, brain, and respiratory, circulatory, endocrine, and reproductive functions. Alcoholism and addiction based upon legal drug use are considered impairments under the ADA, even if there is current use. *See* 42 U.S.C. § 12102 & § 12110

Current untreated illegal drug use is not a disability.

However, a person is typically included in the definition of disability due to illegal drug if they have successfully completed a drug rehabilitation program or has otherwise been successfully rehabilitated and is no longer engaging in drug use or is participating in a supervised rehabilitation program and is no longer engaging in drug use.

HB18-1104 was introduced because people with disabilities continue to face unfair preconceived and unnecessary societal biases as well as antiquated attitudes regarding their ability to successfully parent their children. People with disabilities have faced these biases and attitudes in D&N proceedings. HB18-1104 was signed into law by Gov. Hickenlooper on April 25, 2018. This bill provides protections for disabled parents in D&N, guardianship, adoption, and domestic relations cases. This fact sheet will focus on the changes in D&N cases only. A new section to the Colorado Revised Statutes § 24-34-805 is added. Additionally, several sections of the Children's Code are amended. Counties must provide reasonable accommodations and modifications, courts must now make additional findings, and treatment plans should include reasonable modifications.

BACKGROUND

WHAT IS NEW HB18-1104 mandates that a parent's disability alone may not serve as a basis for denial or restriction of parenting time parental responsibilities in D&N cases except when it impacts the health or welfare of a child. Additionally, a prospective parent or guardian's disability alone may not serve as a basis for denial of temporary custody except when it impacts the health or welfare of the child.

The new law adopts the definition of disability as used in the Americans with Disabilities Act. *See* 42 U.S.C. § 12102, 42 U.S.C. § 12210, 28 C.F.R. § 35.108. The law also adopts the definitions of reasonable modifications in the ADA. *See* 28 C.F.R. § 35.130.

Reasonable efforts for disabled parents includes the provision of services pursuant to the new § 24-34-805(2), C.R.S.

Services counties are required to provide pursuant to § 19-3-208, C.R.S. Include the provision of reasonable modifications.

When a respondent parent's disability is alleged to impact the health or welfare of a child courts are required to make findings whether reasonable accommodations and modifications were provided to avoid nonemergency removal based on disability. **REQUIRED FINDINGS**

When reasonable modifications are necessary to complete treatment plan components, those modifications shall be listed in the report prepared for the dispositional hearing.

When a court finds there is no appropriate treatment plan and terminates parental rights based on emotional illness, behavioral or mental health disorder or intellectual and developmental disability of the parent, courts shall make findings that the provision of reasonable modifications will not remediate the impact of the parent's disability on the child's health and safety.

REASONABLE MODIFICATIONS Reasonable modifications are changes to policies, practices, or procedures that are necessary to avoid discrimination based on disability. These are services that allow disabled parent in equal opportunity to succeed with their treatment plan as a nondisabled parent. Some sample modifications include:

- Increase frequency/extend length of services
- Extend EPP guidelines
- Tailor parenting education to the needs of the parent
- Provide independent living skills education
- Protective day care services
- Give frequent reminders for appointments/services
- Parent helper/child care assistant
- Provide services at an individual's home or alternative accessible site
- Provide all information in large print, audio tape, Braille, or digital format
- Offer note-taking or transcriptions of meetings and court activities
- Family or informal support networks (church, neighbors)
- Pictorial representation or step by step task reminders
- Provide in-home parent coaching
- Assist in reading materials
- Provide interpreters
- Provide accessible transportation
- Respite care
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