# Complaint to Sacramento County Superior Court

Per ADA Title II Regulations
Sections 35.104, 35.107, 35.170(a)

Per Section 504 of the
Rehabilitation Act of 1973

Per California Government
Code Section 11135

Exhibit G

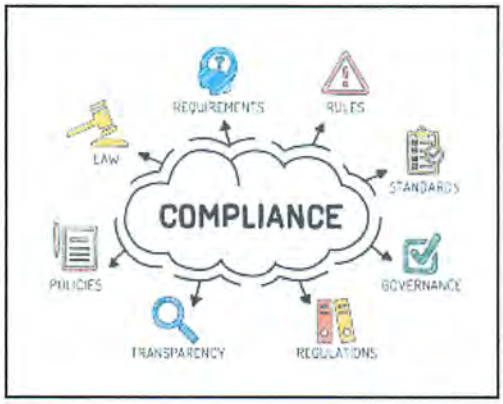
ADA Reference Materials

# Compliance with the ADA Requires the Sacramento County Superior Court to Appoint Lawyers for *All* Proposed Conservatees

By Thomas F. Coleman
May 15, 2018

This commentary is written to explain how the failure of the Sacramento County Superior Court to appoint attorneys to represent proposed conservatees violates the due process rights of these involuntary litigants, as well as their rights under applicable federal nondiscrimination laws.

These federal civil rights statutes preempt provisions of the California Probate Code which appear to make the appointment of counsel discretionary. Because people with serious cognitive and communication disabilities will not receive access to justice without the assistance of counsel in these cases, proceeding to judgment without appointed counsel creates structural error that should invalidate an order of conservatorship as a matter of law.




Hundreds of new petitions for conservatorship are filed each year in the Sacramento County Superior Court. In each of these new cases, a judge must decide whether an individual will retain any of his or her decision-making rights – in matters such as health, finances, residence, sex, marriage, education, vocation, or social and recreational opportunities – or whether control over these matters will be transferred to another person. Fundamental liberties are at stake in what the court decides.

Most of the proposed conservatees lack the ability to understand complex legal proceedings or to advocate for or defend themselves. As explained herein, due process requires that a lawyer should be appointed to advocate for the rights of these individuals and to help them navigate through the legal process to make sure that all participants in the proceedings are following the law.

Because the nature of their disabilities prevents them from representing themselves in these proceedings, the Americans with Disabilities Act requires the court to appoint an attorney as a way to ensure they have effective communications and access to justice in their cases. These involuntary litigants cannot have meaningful participation in the proceedings without an advocacy attorney bound by ethical obligations of loyalty and confidentiality and who is obligated to provide effective representation.

Because the superior court receives federal funding for some of its programs and services, the court is also subject to the requirements of Section 504 of the Rehabilitation Act of 1973 – a disability rights law that pre-dates the ADA. Section 504 is similar to the ADA in its scope.

The Americans with Disabilities Act and Section 504 require the superior court to use pro-active measures to ensure that litigants with known disabilities have meaningful participation in their cases.

Even without a request, a public entity must provide the necessary support to maximize the possibility that someone with a known disability is able to have meaningful participation in the service being provided. Appointing an attorney is one such step in a conservatorship proceeding. Failure to appoint an attorney for proposed conservatees also violates state law. Government

Code Section 11135 requires state-funded public entities to obey the ADA. Violations of the ADA are violations of Section 11135 – a civil rights statute that is enforced by the California Department of Fair Employment and Housing.

**ADA Compliance Duties of the Court**

The Americans with Disabilities Act was passed by Congress more than 27 years ago. The law's constitutionality has been upheld by the United States Supreme Court as proper implementation of the Fourteenth Amendment.

The ADA builds upon and extends beyond the requirements of federal due process. The Due Process Clause of the Fourteenth Amendment requires state courts to protect the procedural and substantive rights of litigants in state proceedings. The ADA goes even further and may require extra accommodations to people with disabilities involved in legal proceedings.

The term "Due Process *Plus*" describes the duties of judges who interact with litigants with cognitive and communication disabilities in state guardianship and conservatorship proceedings. (*Due Process Plus: ADA Advocacy and Training Standards for Appointed Attorneys in Adult Guardianship Proceedings – 2015*) Due Process *Plus* is a White Paper submitted by Spectrum Institute to the United States Dept. of Justice. (http://spectruminstitute.org/white-paper/)

While no one would seriously doubt that the ADA applies to conservatorship proceedings, the Sacramento County Superior Court is acting as though it has no ADA duties in these cases. It does – and the duties are significant.

Title II of the ADA applies to services provided by public entities. The term "public entity" includes state and local courts. The service provided by the superior court in conservatorship proceedings is the administration of justice.

Under Title II, judges must take affirmative steps to ensure that litigants with cognitive and communication disabilities receive access to justice in conservatorship proceedings. Under the concept of Due Process *Plus*, extra steps (modifications of normal policies and practices) may be required to ensure effective communication between the litigant and all participants in the proceedings.

In addition to ensuring effective communication, various supports and services may be necessary to maximize the prospect that a litigant with serious disabilities has meaningful participation in all stages of the proceeding – both in and out of court. The duty to provide such supports and services does not depend on a request from a litigant with disabilities – especially when the court knows that the nature of the disability precludes the litigant from making such a request.

The responsibility of judges to provide accommodations or modifications is *sua sponte* when it is known that a serious disability may hinder a litigant's ability to have meaningful participation in the case. It is obvious in conservatorship proceedings – just by virtue of the allegations made in the petition and evidence supporting those allegations – that the respondent has serious cognitive disabilities and may have significant communication and other disabilities as well.

The duty of a public entity to provide meaningful access to its services actually pre-dates the passage of the ADA. It is rooted in Section 504 of the Rehabilitation Act of 1973 – a federal law that did, and still does, apply to state and local government entities. Speaking of Section 504, the United States Supreme Court said: "[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." (Alexander v. Choate, 469 U.S. 287, 301 (1985))

The requirement of "meaningful access" to public services is not limited to Section 504. Many federal appellate courts have ruled that the ADA also requires public entities to provide "meaningful access" to people with disabilities so as not to deprive them of the benefits of the services provided. (Ability Center of Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004); Randolph v. Rogers, 170 F.3d 850 858 (8th Cir. 1999); Lee v. City of Los Angeles, 350 F.3d 668, 691 (9th Cir. 2001); Chaffen v. Kansas State Fair Board, 348 F.3d 850, 857 (10th Cir. 2003)).

A subtle clarification should be made at this point. ADA terminology makes a distinction between "accommodations" and "modifications." Under Title I of the ADA, a "reasonable accommodation" is only required by employers to avoid discrimination against employees with disabilities. Under Title II, public entities have an obligation to make "reasonable modifications" of policies and practices to ensure meaningful access to their services.

The two terms, however, may pose a distinction without a difference. For all practical purposes, the two terms are essentially equivalent. (McGary v. City of Portland, 386 F.3d 1259, 1266, n.3 (9th Cir. 2004). Courts often use the terms interchangeably. (Tyler v. City of Manhattan, 118 F.3d 1400, 1407 (10th Cir. 1997)).

Another requirement of the ADA is that a public entity take appropriate steps to ensure that communications with recipients of its services are as effective as communications with others. (Robertson v. Las Animas County Sheriff's Department, 500 F.3d 1185 (10th Cir. 2007)) To fulfill this duty, an entity may need to provide auxiliary aids and services.

The duty to provide accommodations, modifications, and effective communications applies to "known" disabilities. An entity, such as a court, cannot take steps to respond to a disability it does not know about. As the court in Robertson explained: [T]he entity must have knowledge that the individual is disabled, either because the disability is obvious or because the individual (or someone else) has informed the entity of the disability." In other words, it is the knowledge of the disability, even without a request for accommodation, that triggers the entity's obligation to take reasonable steps to compensate for the disability in order to maximize the possibility of meaningful access to the services.

In the context of conservatorship proceedings, the mere filing of a petition should be sufficient to trigger a duty of the court to inquire into the types of modifications or the extent of supports and services that are necessary to give the respondent meaningful access to the legal proceedings. The same is true about the court's duty to ensure effective communications between the respondent and all court participants.

The filing of a conservatorship petition is predicated on allegations that a respondent has significant cognitive or other disabilities. The mere filing of such a petition, therefore, puts the court on notice that the respondent has a known disability that may require accommodations. In addition, other documents submitted with the petition would give the court and attorneys additional information as to the types of disabilities the respondent has.

A review of court records in conservatorship cases in the Sacramento County Superior Court, and information from Alta Regional Center, show a pattern and practice by the court of not appointing counsel for proposed conservatees in scores of general conservatorship cases. It appears that counsel is appointed as a matter of routine and without fail in limited conservatorship proceedings, but not so in general conservatorship cases.

Under Probate Code Section 1471(b), the court shall appoint counsel if the court determines that it is necessary to protect the interests of the conservatee or proposed conservatee. As a matter of due process as well as ADA and Section 504 law, it is always necessary to appoint

counsel to protect the right of an involuntary litigant with cognitive disabilities to have access to justice in conservatorship proceedings.

A task force convened by the Chief Justice of California in 2006 had this to say about an ambiguity in California law as to whether counsel should automatically be appointed in every probate conservatorship case: "It is the task force's view that the Judicial Council should adopt a policy that an attorney should be automatically appointed for the proposed conservatee in connection with every petition to establish a conservatorship. A basic premise of the current statute is that counsel be appointed for those who request appointment. The reality is that if the individual truly lacks capacity and cannot request an appointment of counsel, that is when advocacy is most needed." (Report, "Status of Implementation," Administrative Office of the Courts (Dec. 9, 2008)

The implementation report added: "The task force concludes that practices in appointing counsel vary widely within the state, with many jurisdictions appointing attorneys only when mandated and others appointing attorneys in every instance. The needs of conservatees for representation do not vary by physical location within the state and should be met uniformly. This was the most far reaching policy issue that the task force grappled with."

The remarks on this issue concluded: "In forming its recommendation, the task force likened the situation of a conservatee to that of others within the judicial system. Conservatees are as vulnerable as dependents in our juvenile dependency system, are as at risk as minors in our family law system, and are as subject to deprivation of personal liberty and property as defendants in our criminal law system. Putting all of these factors together, it became apparent that the most effective way of affording protection to conservatees is to require the appointment of counsel in all cases. This need to safeguard the rights of the conservatee, the task force decided, far outweighs the arguments that it would be too costly or not necessary in all cases."

An ADA violation in a legal proceeding may create "structural error" that requires reversal per se. No showing of prejudice is needed because a presumption of prejudice exists.

Some errors in civil cases are reversible per se, "primarily where the error calls into question the very fairness of the trial or hearing itself." (Biscaro v. Stern, 181 Cal.App. 4th 702 (2009)) "Wrongful denial of an [ADA] accommodation is structural error infecting a legal proceeding's reliability, which stands to reason because an accommodation's purpose is to help a party meaningfully participate in a way that enhances our confidence in a proceeding's outcome." (Id, at p. 710)

The superior court should use its administrative authority to adopt a local rule of court requiring the appointment of counsel for all conservatees and proposed conservatees in furtherance of the due process and ADA rights of these litigants and in compliance with the court's obligations under the ADA and Section 504.

Appointing counsel in all conservatorship proceedings will bring the court into compliance with its duties as a public entity under the ADA. Such voluntary action will preclude the necessity of anyone seeking intervention by the Department of Fair Employment and Housing or the United States Department of Justice. ◊◊◊

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# Title II of the ADA Applies to State Courts

Under Tennessee v. Lane, 541 U.S. 509 (2004), the
Doctrine of Sovereign Immunity is No Defense

In 2004, the Supreme Court issued a decision in Tennessee v. Lane, holding that individuals may sue States directly to require States to make their courts and judicial services accessible under the ADA.

The plaintiffs alleged that the State of Tennessee and 25 of its counties violated the ADA by having inaccessible courthouses. They asked the federal court to order that the courts be made accessible and to award compensatory damages. One plaintiff, a wheelchair user who was charged with two misdemeanor offenses, alleged that he had to crawl up two flights of stairs to make a required court appearance. The other, a court reporter who is also a wheelchair user, alleged that many of Tennessee's courthouses and courtrooms had barriers that made it difficult for her to practice her profession.

The Court held that Title II is an appropriate response by Congress to prevent denial of the right of access to state courts in light of the history of unconstitutional treatment by States of people with disabilities.

Quote from Tennessee v. Lane:

"[T]itle II does not require States to employ any and all means to make judicial services accessible or to compromise essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. Ibid. Title II's implementing regulations make clear that the reasonable modification requirement can be satisfied in various ways, including less costly measures than structural changes. This duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard in its courts. Boddie, 401 U. S., at 379. A number of affirmative obligations flow from this principle. Cases such as Boddie, Griffin v. Illinois, 351 U. S. 12, and Gideon v. Wainwright, 372 U. S. 335, make clear that ordinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts. Judged against this backdrop, Title II's affirmative obligation to accommodate is a reasonable prophylactic measure, reasonably targeted to a legitimate end."

**Robertson v. Las Animas Cty. Sheriff's Dep't, 500 F.3d 1185, 1197 (10th Cir. 2007) – Excerpts from decision – Knowledge of disability triggers duty to accommodate**

The ADA requires more than physical access to public entities: it requires public entities to provide " *meaningful* access" to their programs and services. *Chaffin v. Kansas State Fair Bd.*, 348 F.3d 850, 857 (10th Cir.2003); *see also Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir.1999) (holding that although deaf inmate could physically attend prison activities, he did not have "meaningful access" without a sign language interpreter). The Department of Justice ("DOJ") promulgated regulations to implement the nondiscrimination mandate of Title II. *See* 42 U.S.C. § 12134(a) (requiring the Attorney General to promulgate regulations to implement Title II).

. . .

The DOJ's regulations interpreting Title II are entitled to substantial deference. *Marcus v. Kan. Dept. of Revenue*, 170 F.3d 1305, 1307 n. 1 (10th Cir.1999).

. . .

Title II's use of the term "reasonable modifications" is essentially equivalent to Title I's use of the term "reasonable accommodation." *See McGary v. City of Portland*, 386 F.3d 1259, 1266 n. 3 (9th Cir.2004) ("Although Title II of the ADA uses the term `reasonable modification,' rather than `reasonable accommodation,' these terms create identical standards."). In Title II cases, this Court has used the terms interchangeably, referring to an individual's request for a "modification" under Title II as a request for "accommodation." *See, e.g., Tyler v. City of Manhattan*, 118 F.3d 1400, 1407 (10th Cir.1997).

. . .

(a) A public entity shall take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.

(b) (1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.

. . .

[B]efore a public entity can be required under the ADA to provide an auxiliary aid necessary toafford an individual an equal opportunity to participate in the entity's services, programs, or activities, the entity must have **knowledge** that the individual is disabled, either because that disability is **obvious** or because the individual (or someone else) has informed the entity of the disability. **(emphasis added)**

**Comment:** Courts in guardianship cases have knowledge that respondents have serious disabilities. In initial proceedings, such knowledge is gained from the petition. The courts know that the nature of the respondent's cognitive disabilities are severe enough to impede the ability of the respondent to understand and make decisions on basic matters. Communication and emotional disabilities are also often involved. The courts therefore know that affirmative measures will be needed to ensure effective communication and to ensure the respondent has an opportunity for meaningful participation in his or her case.

Excerpts from
*A.G. v. Paradise Valley Unified School District No. 69*
Case No. 13-16239 / Filed March 3, 2016

United States Court of Appeals for the Ninth Circuit

**Ruling on Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973**

## No Request for Accommodation Is Needed

Quotes: The district court also observed that A.G.'s parents never requested some of the services she later argued the school district should have provided. We agree with this observation, but it overlooks that A.G.'s parents did not have the expertise—nor the legal duty—to determine what accommodations might allow A.G. to remain in her regular educational environment. *See* 1 Americans with Disabilities: Practice and Compliance Manual § 1:247 (2015) ("[A] plaintiff's failure to expressly 'request' an accommodation is not fatal to a claim where the defendant otherwise had knowledge of an individual's disability and needs but took no action."); *Duvall*, 260 F.3d at 1136 (Section 504 "create[s] a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary.").

## Deliberate Indifference if No Accommodation Once Put on Notice

Quotes: Thus, a public entity can be liable for damages under § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons." *Lemahieu*, 513 F.3d at 938 . . . . "Where, as here, the plaintiff seeks damages under section 504 and the ADA, she must show the defendant had notice of her need for an accommodation and "fail[ed] to act." *Duvall*, 260 F.3d at 1139. She can establish notice by showing that she "alerted the public entity to [her] need for accommodation;" or that "the need for accommodation [was] obvious, or required by statute or regulation." *Id.* When an entity is on notice of the need for accommodation, it "is required to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation." *Id.*

## Comment by Spectrum Institute

Washington State is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. Just as a school district is a "public entity" within the ADA and Section 504, so is a state court system. By its recent letter to the Washington Supreme Court, Spectrum Institute has placed Washington courts on notice that modifications and accommodations are needed to give guardianship respondents, as a class, access to justice. This includes the appointment of trained attorneys who provide effective advocacy services to respondents with cognitive and communication disabilities. Failure to take appropriate remedial action to ensure effective advocacy services for this class of individuals with disabilities would constitute willful indifference. Due to their disabilities, these litigants are unable to request modifications and accommodations in their individual cases.

# Conservatorship Reform in California:
# Three cost-effective recommendations

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May 2009

*The authors conducted this study as part of the program of professional education at the Goldman School of Public Policy, University of California at Berkeley. This paper is submitted in partial fulfillment of the course requirements for the Master of Public Policy degree. The judgments and conclusions are solely those of the authors, and are not necessarily endorsed by the Goldman School of Public Policy, by the University of California, or by any other agency.*

The laws made significant improvements to the system for establishing conservatorships, several of which are highlighted below:

- *Licensing for professional fiduciaries.* The Professional Fiduciaries Act created the Professional Fiduciaries Bureau within the Department of Consumer Affairs. The Bureau regulates the profession by requiring every practicing professional fiduciary to obtain a license from the Bureau and agree to a Professional Fiduciaries Code of Ethics.[11] Licensing requires passing an exam, 30 hours of initial education courses, and 15 annual hours of continuing education credit for renewal.[12]

- *Mandatory court investigator reports for temporary conservatorship hearings.* Unlike before the 2006 reforms, court investigators are now required to submit a written report to the court prior to the temporary conservatorship hearing (or within two days of the hearing if before is not feasible).[13] The court investigator is required to submit a second report for the permanent conservatorship hearing.

- *New educational requirements.* The 2006 Omnibus Act requires that the Judicial Council of California establish qualifications and educational requirements for court-employed attorneys, examiners and court investigators. In addition, court-appointed attorneys, probate judges and public guardian staff are required to take specific educational classes. Finally, the Act orders the Judicial Council to develop a short educational program to be made available to proposed conservators and guardians.[14]

The Judicial Council of California estimated $17.4 million dollars were needed to implement the legislation's reforms in fiscal year 2007-2008. This appropriation was eliminated from the final budget.[15] Consequently, court resources and staff are severely strained, as courts are expected to meet new requirements without any additional funding from the state.[16] The 2006 reforms strengthened the conservatorship system by creating additional oversight and requirements for actors involved in the system. However, as our analysis will demonstrate, the process through which conservatorships are granted can still be substantively improved. Given the current state budget crisis, we pay particular attention to cost-effectiveness in making our recommendations.

## Quantitative analysis of data

Our dataset consists of sixty randomly selected conservatorship case files originated in San Francisco County in 2007. We chose 2007 to gain a clear picture of how the system is operating in the wake of the 2006 reforms. We selected 2007, not 2008, in order to allow time for the courts to issue rulings. Statistical software was used to select cases randomly from a pool of all eligible filings.

[11] Professional Fiduciaries Bureau, California Department of Consumer Affairs, 9 May 2009 <http://www.fiduciary.ca.gov/>.
[12] Professional Fiduciaries Bureau.
[13] AB 1363, Jones, Omnibus Conservatorship and Guardianship Reform Act, (2006) (enacted), p. 16.
[14] AB 1363, p. 1 and 4.
[15] Probate Conservatorship Task Force Recommendations to the Judicial Council, p. 2 to 3.
[16] Courts did receive $8.5 million in funding from the Judicial Council of California Trial Improvement Fund, however this was on a one-time basis in fiscal year 2008-2009.

We summarize our main findings below:

- *Petitions for temporary and permanent conservatorships were infrequently denied.* Among cases in which the proposed conservatee did not die prior to the hearing and no competing petition was filed, 84 percent of petitions for permanent conservatorship (37 of 44) were granted. Similarly, 88 percent of petitions for temporary conservatorship (42 of 48) were granted.

- *Petitions were usually accompanied by requests for temporary conservatorships.* Eighty percent (48 of 60) of petitions for permanent conservatorships were accompanied by petitions for temporary conservatorship. According to one attorney we interviewed, the high rate of filings for temporary conservatorship may be due to the long waiting time between filing a petition for permanent conservatorship and the hearing. Our data showed that, on average, petitioners wait 92 days for a permanent conservatorship hearing to take place. This delay is due at least in part to the workload of court investigators. According to a probate official, investigators in San Francisco County typically have 10 to 20 active investigations on their desks at any given time. Investigations require from six to more than 40 hours to complete.

- *Proposed conservatees rarely attended temporary or permanent conservatorship hearings.* Only 21 percent (9 of 42) of proposed conservatees attended their temporary conservatorship hearings. This figure rises only modestly for permanent conservatorship hearings, with 27 percent (11 of 41) of proposed conservatees attending. Many proposed conservatees do not attend because of medical inability. However, it is noteworthy that few proposed conservatees have the opportunity to personally express their wishes in court.

73% = conservatee NOT PRESENT

- *Proposed conservatees are more likely to have attorney representation at permanent conservatorship hearings than at temporary conservatorship hearings.* An attorney for the proposed conservatee was present at 46 percent (19 of 41) of permanent conservatorship hearings, a surprisingly low figure. Attorney representation during temporary conservatorship hearings, however, is even lower, at 31 percent (13 of 42). The 15-percentage point difference is likely due to the quick 5-day turnaround between filing a petition for temporary conservatorship and the hearing. Many proposed conservatees may have difficulty securing an attorney in that time.

54% = NO ATTORNEY

- *Proposed conservatees were more likely to be permanently conserved when represented by an attorney.* Seventy-three percent (11 of 15) of petitions for permanent conservatorship were granted when the proposed conservatee did not have an attorney. Surprisingly, the percentage climbed to 90 percent (26 of 29) when the proposed conservatee had an attorney.[17]

84% of petitions granted

- *Zero conservatorship cases went to jury trial.*

[17] One explanation for this statistic might be that those with an attorney may actually need a conservatorship more than those without. For example, someone in a coma may need the protection of a conservatorship; however, a court might be wary to grant it without the proposed conservatee having representation.


# How California's Limited Conservatorship System Is Failing to Protect the Rights of People with Developmental Disabilities

Materials for a Series of Conferences Sponsored
by the Conservatorship Reform Project of
Spectrum Institute

May 9, 2014
www.disabilityandabuse.org

# Limited Conservatorships: A System that Protects Adults with Developmental Disabilities Needs *Major* Reform

## Pre-Conference Report

## Preliminary Findings

This set of Preliminary Findings is being released prior to the first conference. The findings will be revised as the conference series progresses and as we learn more about the Limited Conservatorship System and its participants.

Please send any suggestions for corrections or additions to tomcoleman@earthlink.net.

**General Information on the System**

1. About 1,200 new petitions for limited conservatorships are filed each year in the Los Angeles County Superior Court.

2. About 90 percent of these petitions are filed by parents or family members who are not represented by an attorney. These are called "pro per" cases.

3. Prior to 2013, petitions were filed and cases were heard in the downtown court as well as several district court locations. In April 2013, court consolidation due to fiscal problems resulted in all cases being filed and heard downtown. Most cases are assigned to Department 29 where two judges alternate hearing cases. The only exception is that cases can still be filed in Lancaster.

4. There may be more than 30,000 "open cases" in limited conservatorships in Los Angeles County at any given time. There could be thousands more than that. Cases become open when the conservatorship order is initially granted and remain open until the conservatee dies. Petitions for modifications, or investigations due to suspected abuse, can be filed at any time, since conservatees are under the protection of the Probate Court.

5. The law requires court investigators to conduct investigations in all initial petitions, an annual review one year later, and then biennial investigations in conservatorships and guardianships.

6. There are about 2,000 new conservatorship cases (general and limited) filed each year in Los Angeles. There are about 2,000 new guardianship cases filed each year as well, for a total of 4,000 cases.

7. By our calculations, the Probate Court employs 10.5 investigators to investigate annually 4,000 new filings, 4,000 annual reviews, and 15,000 biennial reviews of the 30,000 open cases. That is 23,000 investigations per year that are mandated by law.

8. In 2008, the court's annual report said it had 10 investigators to do 10,000 investigations annually. Even if that were still true, that would require each investigator to do 5 investigations per field day (4 days a week, with one day to write 20 reports), taking vacations and holidays into consideration.

9. About 98 percent of new petitions are granted without objection and therefore without an evidentiary hearing. In the few cases in which a contested hearing does occur, the issue is generally about who should be appointed as conservator. Contested hearings on retention of rights by the proposed limited conservatee are rare. Appeals are more rare.

98%

10. Educational programs are not offered by the court, by Regional Centers, or by nonprofit organizations, to teach parents or others prior to filing petitions about the duties of conservators, the rights of conservatees, or the criteria for assessing whether the proposed conservatee has or does not have the

# ADA Title II Regulations

## Applicable to Guardianship and Conservatorship Proceedings

**Summary:**

**Complaints.** An ADA complaint may be filed by an individual who believes that a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity. (Section 35.170(a)) Complaints may be filed on behalf of classes or third parties. (Section 35.104)

**Government Services.** The prohibitions against discrimination on the basis of disability apply to all services, programs, or activities of a public entity. (Section 35.102(a)) A public entity includes a state or local government, or any department, agency, or instrumentality of a state of local government. (Section 34.104)

**Notice, Self Evaluation, Complaint Procedure.** A public entity shall make available to the beneficiaries of its services information about the ADA and its applicability to the entity's services. (Section 35.106) A public entity shall conduct a self evaluation of its services and programs to determine if they comply with the requirements of the ADA and if they do not then to modify them in a manner to make them compliant. (Section 35.105) A public entity with 50 or more employees shall adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints alleging any action that would violate the ADA. (Section 35.107)

**ADA Duties.** A public entity shall not deny the **benefit of its services** to someone on the basis of his or her disability. (Section 35.130(a)) The opportunity to benefit from services shall be provided on an **equal basis** as provided to participants without a disability. (Section 35.130(b)) A public entity shall make **reasonable modifications** to policies, practices, or procedures in order to avoid discrimination on the basis of disability. (Section 35.130(b)(7)) A public entity shall take appropriate steps to ensure that **communications** with service recipients with disabilities are as **effective** as communications with others.(Section 35.160)

**Regulations:**

### § 35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S. C. 12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

### § 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of this part.

**§ 35.104 Definitions.**

For purposes this part, the term—

*Complete complaint* means a written statement that contains the complainant's name and address and describes the public entity's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of this part. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

*Public entity* means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

**§ 35.105 Self-evaluation.**

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

**§ 35.106 Notice**

A public entity shall make available to applicants, participants, beneficiaries, and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity, and make such information available to them in such manner as the head of the entity finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

**§ 35.107 Designation of responsible employee and adoption of grievance procedures**

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

**§ 35.130 General prohibitions against discrimination**

(a) No qualified individual with a disability shall, on the basis of 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 any public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an **opportunity to participate** in or benefit from the aid, benefit, or service that is not **equal to that afforded others**;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program

(vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(b) (7) (i) 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.

**Subpart E—Communications**

**§ 35.160 General.**

(a) (1) A public entity shall 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.

**Subpart F—Compliance Procedures**

**§ 35.170 Complaints**

(a) *Who may file*. An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) *Time for filing*. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

(c) *Where to file*. An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in §35.171(a)(2).

**References:**

These excerpts have been taken from the regulations found online at:
https://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#a35101

Title II applies to state and local courts. Tennessee v. Lane, 541 U.S. 509, 531 (2004).

Courts must comply with the ADA in judicial proceedings. https://www.ada.gov/cjta.html

Guardianship proceedings are services that are subject to the mandates of the ADA.
https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html

**§ 35.172 Investigations and compliance reviews.**

(a) The designated agency shall investigate complaints for which it is responsible under § 35.171. (b) The designated agency may conduct compliance reviews of public entities in order to ascertain whether there has been a failure to comply with the nondiscrimination requirements of this part.

**§ 35.190 Designated Agencies.**

(6) *Department of Justice*: All programs, services, and regulatory activities relating to law enforcement, public safety, and the **administration of justice, including courts** and correctional institutions . . .

# *Excerpts from ADA Title II Regulations Issued by the Department of Justice*

**Part 35 Nondiscrimination on the Basis of Disability in State and Local Government Services** (as amended by the final rule published on August 11, 2016)

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510; 42 U.S.C. 12134, 12131, and 12205a.

## Subpart A—General

### § 35.101 Purpose and broad coverage.

(a) *Purpose.* The purpose of this part is to implement subtitle A of title II of the Americans with Disabilities Act of 1990 (42 U.S. C. 12131–12134), as amended by the ADA Amendments Act of 2008 (ADA Amendments Act) (Public Law 110–325, 122 Stat. 3553 (2008)), which prohibits discrimination on the basis of disability by public entities.

(b) Broad coverage. The primary purpose of the ADA Amendments Act is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the ADA Amendments Acts purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

### § 35.102 Application.

(a) Except as provided in paragraph (b) of this section, this part applies to all services, programs, and activities provided or made available by public entities.

(b) To the extent that public transportation services, programs, and activities of public entities are covered by subtitle B of title II of the ADA, they are not subject to the requirements of this part.

### § 35.104 Definitions

*Public entity means* —

1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

### § 35.107 Designation of responsible employee and adoption of grievance procedures

(a) *Designation of responsible employee.* A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph.

(b) *Complaint procedure.* A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.

## Subpart B—General Requirements

### § 35.130 General prohibitions against discrimination

(a) No qualified individual with a disability shall, on the basis of 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 any public entity.

(b)

(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others . . .

(7)

(i) 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.

# Subpart E—Communications

## § 35.160 General

(a)

(1) A public entity shall 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.

(2) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

(b)

(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

# Subpart F—Compliance Procedures

## § 35.170 Complaints

(a) *Who may file.* An individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity may, by himself or herself or by an authorized representative, file a complaint under this part.

(b) *Time for filing.* A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the designated agency for good cause shown. A complaint is deemed to be filed under this section on the date it is first filed with any Federal agency.

(c) *Where to file.* An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in §35.171(a)(2).

## § 35.178 State immunity.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

# Subpart G—Designated Agencies

## § 35.190 Designated Agencies

(b) The Federal agencies listed in paragraph (b)(1)-(8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

(6) *Department of Justice*: All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (*e.g.*, audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

Section 504 of the Rehabilitation Act

**Section 504 of the Rehabilitation Act - Nondiscrimination Under Federal Grants and Programs**

Sec. 504 (a) No otherwise qualified individual with a disability in the United States, as defined in section 7(20), shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of Congress, and such regulations may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) For the purposes of this section, the term "program or activity" means all of the operations of -

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship-

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection.

(d) The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

## DENIAL OF MEANINGFUL ACCESS

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, prohibits discrimination against the handicapped by recipients of federal funds. Each federal agency has its own regulations that are applicable to federal fund recipients.

Under the Rehabilitation Act, in *Alexander v. Choate,* 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), the Supreme Court held that:

> The balance struck in *Davis* [*Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979)] requires that an otherwise qualified handicapped individual be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantees program or benefit may have to be made. *Id.* at 301.

In a decision under Title III of the Americans with Disabilities Act (ADA), the Supreme Court held that:

> Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations. In this case, Congress did more than suggest this construction; it adopted a specific statutory provision in the ADA directing as follows:
>
> "Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et. seq.) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a)
>
> **The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act.** (emphasis added). See *Bragdon v. Abbott,* 524 U.S. 624, 631-32, 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1998).

In a decision under Title II of the ADA, the U.S. Court of Appeals for the Ninth Circuit explained "meaningful access" as it was used in *Alexander v. Choate.* The *Crowder* Court explained:

> The Supreme Court interpreted the Rehabilitation Act in *Alexander v. Choate.* In *Choate,* the Court concluded that Congress intended to protect disabled persons from discrimination arising out of both discriminatory animus and "thoughtlessness," "indifference," or "benign neglect." The Court held, however, that judicial review over each and every instance of disparate impact discrimination would be overly burdensome. Rather than attempt to classify a type of discrimination as "deliberate" or "disparate impact," the Court determined it would be more useful to access whether disabled persons were denied "meaningful access" to state-proved services. (citations omitted). See *Crowder v. Kitagawa,* 81 F.3d 1480, 1484 (9th Cir. 1996)

Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, prohibits public entities from discriminating against the disabled. The regulations for the ADA are 28 C.F.R. Part 35.

Title II's definition section states that "public entity" includes "any State or local government" and "any department, agency or special purpose district." See *Olmstead v. L.C. by Zimring,* 527 U.S. 581, 590, 119 S.Ct. 2176, 2182, 144 L.Ed.2d 540 (1999).

The U.S. Court of Appeals for the First Circuit held that the protection afforded by the ADA is characterized as a guarantee of "meaningful access" to government benefits and programs which broadly means that public entities must take reasonable steps to ensure that individuals with disabilities can take advantage of such public undertakings. See *Theriault v. Flynn,* 162 F.3d 46, 48 (1st Cir. 1998).

The U.S. Court of Appeals for the Second Circuit held that otherwise qualified handicapped individuals are entitled to "meaningful access" to activities that a public entity offers under the Rehabilitation Act in *Rothschild v. Grottenthaler,* 907 F.2d 286, 292 (2nd Cir. 1990).

The U.S. Court of Appeals for the Second Circuit held that "meaningful access" applied to the ADA in *Henrietta D. v. Bloomberg,* 331 F.3d 261, 273, 277 (2nd Cir. 2003).

The U.S. Court of Appeals for the Third Circuit held that "meaningful access" applied to Section 504 of the Rehabilitation Act in *Three Rivers Center for Independent Living, Inc. v. Housing Authority of the City of Pittsburg*, 382 F.3d 412, 427 (3rd Cir. 2004).

The U.S. Court of Appeals for the Fifth Circuit stated that although Supreme Court precedent suggests that denial of "meaningful access" is equivalent to a full denial of access under the ADA it did not address the issue in *Melton v. Dallas Area Rapid Transit,* 391 F.3d 669, 672 n.2.

The Fifth Circuit includes Louisiana, Mississippi, and Texas. Texas State Senator Rodney Ellis requested that the Texas Attorney General issue an opinion as to whether or not "meaningful access" applies to Title II of the ADA with regard to a public entity's programs in Texas. The Texas Attorney General answered in the affirmative in Opinion No. GA-0579.

The opinion can be viewed in html format at:
http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2007/htm/ga-0579.htm

The opinion can also be downloaded in pdf format at:
http://www.oag.state.tx.us/opinions/opinions/50abbott/op/2007/pdf/ga0579.pdf

The U.S. Court of Appeals for the Fifth Circuit had previously held that "meaningful access" applies to Section 504 of the Rehabilitation Act in *Brennan v. Stewart,* 834 F.2d 1248, 1261 (5th Cir. 1988).

The U.S. Court of Appeals for the Sixth Circuit held that the ADA requires that public entities provide "meaningful access" to disabled individuals so as not to deprive them of the benefits of the services that the public entities provide in *Ability Center of Toledo v. City of Sandusky,* 385 F.3d 901, 907 (6th Cir. 2004).

The U.S. Court of Appeals for the Eighth Circuit held that the ADA and the Rehabilitation Act require that otherwise qualified individuals with disabilities receive "meaningful access" to a public entities programs and activities in *Randolph v. Rogers,* 170 F.3d 850, 858 (8th Cir. 1999).

The U.S. Court of Appeals for the Ninth Circuit held that if a public entity denies an otherwise qualified individual "meaningful access" to its services, programs, or activities by reason of his or her disability, that individual may have an ADA claim against the public entity in *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001).

The U.S. Court of Appeals for the Ninth Circuit held that Section 504 of the Rehabilitation Act guarantees "meaningful access" to programs or activities receiving federal financial assistance in *Bonner v. Lewis*, 857 F.2d 559, 561 (9th Cir. 1988).

The U.S. Court of Appeals for the Tenth Circuit held that the ADA requires public entities to provide disabled individuals "meaningful access" to their programs and services in *Chaffin v. Kansas State Fair Board,* 348 F.3d 850, 857 (10th Cir. 2003).

The U.S. District Court for the Middle District of Florida held that the ADA requires "meaningful access" to a public entities benefits under the ADA in *Harding v. Winn-Dixie Stores, Inc.,* 907 F.Supp. 386, 391 (M.D.Fla. 1995).

So, if individuals with disabilities caused or exacerbated by second hand tobacco smoke are entitled to "meaningful access" to airports, why are they assaulted by second hand tobacco smoke in some airports?

There are a number of reasons for this and one of those reasons is that when they complain about access to airports they claim that they are being "denied a reasonable accommodation" rather than claim that they are being denied "meaningful access" to the airport in violation of *Alexander v. Choate,* 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985))."

Another reason is the fact that the Department of Transportation and the Federal Aviation Administration allow airports to "make reasonable accommodations on an individual basis" rather than require airports to make "meaningful access" to individuals with disabilities. (See letter to Betty Campbell at http://www.gaspoftexas.com/bettycampbell.pdf)

In 1996, Ms. Patricia L. Young made a complaint to the City of Dallas, Texas, alleging that she was being "denied meaningful access" to Dallas Love Field in violation of the Supreme Court decision in *Alexander v. Choate,* 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985)."

Ms. Diane Emery contacted Ms. Diana M. Sword, Director of Human Recourses, City of Dallas, every day until Ms. Sword responded to Patty's complaint in a letter to Diane.

In her letter to Diane Emery, dated September 18, 1996, Ms. Sword stated:

> I am writing to follow-up our telephone conversation regarding smoking at City facilities. The Office on Disability, Department of Human Recourses, has been working with City facilities concerning smoking as a barrier to people with respiratory disabilities. Reunion Arena and Love Field are now smoke-free environments.

See letter to Diane Emery at http://www.gaspoftexas.com/dianeemery.pdf .

Also, Ms. Young made a disability discrimination complaint to Michael DiGirolamo, Deputy Executive Director of Operations, DFW Airport, and that resulted in DFW Airport going smoke-free. This was reported in the media, both in print and on television.

Therefore, complaints made to public entities, such as airports, should allege "denial of meaningful access in violation of *Alexander v. Choate,* 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985)."

Also, in complaints regarding "denial of meaningful access," the following text should be included:

> Actually, the ADA language requiring "reasonable accommodation" appears in Title I of the ADA and applies only to *employers.* The language applicable to public services, benefits and programs is found in the regulations implementing Title II of the ADA. These regulations require "reasonable *modifications"* to public services and programs that discriminate on the basis of disability unless such modifications would fundamentally alter the nature of the service or program. (citing 28 C.F.R. § 35.130(b)(7)) (emphasis in original). See *Weinreich v. Los Angeles Metropolitan Transportation Authority,* 114 F.3d 976, 978 n.1 (9th Cir. 1997) *cert. denied* 118 S.Ct. 976.

The statutes and regulations cited above can be accessed at http://www.law.cornell.edu.



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# 28 CFR 42.505 - Administrative requirements for recipients.

**§ 42.505 Administrative requirements for recipients.**

**(a)** ***Remedial action.*** If the Department finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this subpart, the recipient shall take the remedial action the Department considers necessary to overcome the effects of the discrimination. This may include remedial action with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program when such discrimination occurred, and with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

**(b)** ***Voluntary action.*** A recipient may take steps, in addition to the requirements of this subpart, to increase the participation of qualified handicapped persons in the recipient's program or activity.

**(c)** ***Self-evaluation.***

**(1)** A recipient shall, within one year of the effective date of this subpart, evaluate and modify its policies and practices that do not meet the requirements of this subpart. During this process the recipient shall seek the advice and assistance of interested persons, including handicapped persons or organizations representing handicapped persons. During this period and thereafter the recipient shall take any necessary remedial steps to eliminate the effects of discrimination that resulted from adherence to these policies and practices.

**(2)** A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Department on request:

**(i)** A list of the interested persons consulted,

**(ii)** A description of areas examined and problems identified, and

**(iii)** A description of modifications made and remedial steps taken.

**(d)** ***Designation of responsible employee.*** A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall designate at least one person to coordinate compliance with this subpart.

**(e)** ***Adoption of grievance procedures.*** A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of $25,000 or more shall adopt grievance procedures that incorporate due process standards (*e.g.* adequate notice, fair

hearing) and provide for the prompt and equitable resolution of complaints alleging any action prohibited by this subpart. Such procedures need not be established with respect to complaints from applicants for employment. An employee may file a complaint with the Department without having first used the recipient's grievance procedures.

**(f)** ***Notice.***

**(1)** A recipient employing fifty or more persons and receiving Federal financial assistance from the Department of more than $25,000 shall, on a continuing basis, notify participants, beneficiaries, applicants, employees and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this subpart. The notification shall state, where appropriate, that the recipient does not discriminate in its programs or activities with respect to access, treatment or employment. The notification shall also include identification of the person responsible for coordinating compliance with this subpart and where to file section 504 complaints with the Department and, where applicable, with the recipient. A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this subpart. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

**(2)** Recruitment materials or publications containing general information that a recipient makes available to participants, beneficiaries, applicants, or employees shall include a policy statement of nondiscrimination on the basis of handicap.

**(g)** The Department may require any recipient with fewer than fifty employees and receiving less than $25,000 in Federal financial assistance to comply with paragraphs (c)(2) and (d) through (f) of this section.

**(h)** The obligation to comply with this subpart is not affected by any State or local law or requirement or limited employment opportunities for handicapped persons in any occupation or profession.

# 28 CFR 42.504 - Assurances required.

**§ 42.504 Assurances required.**

**(a)** ***Assurances.*** Every application for Federal financial assistance covered by this subpart shall contain an assurance that the program or activity will be conducted in compliance with the requirements of section 504 and this subpart. Each agency within the Department that provides Federal financial assistance shall specify the form of the foregoing assurance and shall require applicants for Department financial assistance to obtain like assurances from subgrantees, contractors and subcontractors, transferees, successors in interest, and others connected with the program or activity. Each Department agency shall specify the extent to which an applicant will be required to confirm that the assurances provided by secondary recipients are being honored. Each assurance shall include provisions giving notice that the United States has a right to seek judicial enforcement of section 504 and the assurance.

**(b)** ***Assurances from government agencies.*** Assurances from agencies of State and local governments shall extend to any other agency of the same governmental unit if the policies of the other agency will affect the program or activity for which Federal financial assistance is requested.

**(c)** ***Assurances from institutions.*** The assurances required with respect to any institution or facility shall be applicable to the entire institution or facility.

**(d)** ***Duration of obligation.*** Where the Federal financial assistance is to provide or is in the form of real or personal property, the assurance will obligate the recipient and any transferee for the period during which the property is being used for the purpose for which the Federal financial assistance is extended or for another purpose involving the provisions of similar benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

**(e)** ***Covenants.*** With respect to any transfer of real property, the transfer document shall contain a covenant running with the land assuring nondiscrimination on the condition described in paragraph (d) of this section. Where the property is obtained from the Federal Government, the covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant.

**(f)** ***Remedies.*** The failure to secure either an assurance or a sufficient assurance from a recipient shall not impair the right of the Department to enforce the requirements of section 504 and this subpart.


# Aliens' Right to Counsel in Removal Proceedings: In Brief

**Kate M. Manuel**
Legislative Attorney

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Congressional Research Service
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www.crs.gov
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CRS REPORT
Prepared for Members and
Committees of Congress

## Rehabilitation Act

Section 504 of the Rehabilitation Act has also been construed to require the appointment of "qualified representatives"—a term which includes (but is not limited to) legal counsel—for aliens who are "mentally incompetent" to represent themselves in removal proceedings.[68] Section 504 states, in relevant part, that no "qualified individual with a disability" may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination ... under any program or activity conducted by any Executive agency,"[69] and has been construed to mean that agencies cannot deny qualified individuals with disabilities any "reasonable accommodation" that they might need in order to enjoy meaningful access to the benefits of public services.[70] As used here, *disability* includes "a physical or mental impairment that substantially limits one or more major life activities of such individual."[71]

In the litigation that gave rise to this finding, *Franco-Gonzales v. Holder*, the government apparently did not contest that the plaintiffs—who included aliens found incompetent to stand trial for criminal offenses—had established a *prima facie* case under Section 504.[72] Instead, the plaintiffs and the government disagreed over whether current statutory and regulatory protections, discussed above, suffice to protect the rights of "mentally incompetent" aliens in removal proceedings[73] and, if not, what would constitute a reasonable accommodation.[74] The court agreed with the plaintiffs that the existing statutory and regulatory protections are inadequate, in part, because "near relatives" or "friends" acting as the alien's "representatives" cannot be compelled to appear in removal proceedings and are often unable to adequately represent the alien's interests.[75] The court also agreed with the plaintiffs that the appointment of "qualified representatives," either *pro bono* or at the government's expense, for the entirety of the immigration proceedings constituted a reasonable accommodation.[76] In so finding, the court expressly rejected the government's argument that Section 504 is "only intended to level the playing field and not to provide advantages to the disabled" on the grounds that an

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(...continued)

removal proceeding, though many cases reiterate the fundamental fairness standard.").

[68] *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010). Initially, the court expressly declined to address the merits of the plaintiffs' claim that due process also requires the appointment of counsel for them. *Id.* at 1059. However, dicta in a subsequent decision suggest that the court may have viewed the plaintiffs as having a "constitutional right to representation" at the government's expense. *See* Franco-Gonzalez v. Holder, 828 F. Supp. 2d 1133, 1145 (C.D. Cal. 2011).

[69] 29 U.S.C. §794(a).

[70] 28 C.F.R. §35.130(b)(7); Alexander v. Choate, 469 U.S. 287, 300-301 n.21 (1985); Mark H. v. Hamamoto, 620 F.3d 1090, 1098 (9th Cir. 2010).

[71] 42 U.S.C. §12102(1).

[72] *See* 767 F. Supp. 2d at 1052.

[73] *Id.* at 1052-1053. The defendants conceded that the protections required under existing law had not been provided here. *Id.* 1053.

[74] *Id.* at 1053-1056. *But see* Barker v. Att'y Gen., 792 F.3d 359, 363 (3d Cir. 2015) (rejecting plaintiff's suggestion that immigration judges must undertake questioning to ascertain the competence of all aliens in removal proceedings because "[t]here is nothing fundamentally unfair about a framework that presumes aliens to be competent and requires immigration judges to address the alien's competency only when there are indicia of incompetency").

[75] 767 F. Supp. 2d at at 1054.

[76] *Id.* at 1058. The court expressly rejected the plaintiffs suggestion that counsel be appointed pursuant to the Criminal Justice Act, 18 U.S.C. §2006A(a)(1)(D) and (I), on the grounds this provision contemplates the appointment of criminal defense attorneys, and expertise in criminal law is not necessarily relevant to removal proceedings. *Id.* at 1058 n.20.

accommodation which provides a preference can constitute a "reasonable accommodation" for purposes of the Rehabilitation Act.[77]

In a 2010 decision, the *Franco-Gonzales* court adopted the plaintiffs' proposed definition of a *qualified representative* as a person (1) obligated to provide zealous representation; (2) subject to sanction by the immigration courts for ineffective assistance of counsel; (3) free of any conflicts of interest; (4) having adequate knowledge and information to provide representation at least as competent as that provided by an alien detained pending removal proceedings with ample time, motivation, and access to legal material; and (5) obligated to maintain the confidentiality of information.[78] However, it did not directly address whether qualified representatives must be attorneys. A subsequent decision, issued in 2011, clarified that qualified representatives can include not only licensed attorneys but also law students or graduates who are directly supervised by retained attorneys and "accredited representatives."[79] *Accredited representatives* are persons employed by certain non-profit religious, charitable, social service, or similar organizations who have been accredited by the Board of Immigration Appeals (BIA) and are effectively registered to practice before the immigration judges and the BIA.[80]

In 2013, as a result of the *Franco-Gonzales* litigation, the Departments of Justice and Homeland Security adopted a "nationwide policy" regarding unrepresented immigration detainees with "serious mental disorders or conditions that may render them mentally incompetent to represent themselves in immigration proceedings." Among other things, this policy calls for procedures that would make qualified representatives available to such individuals.[81]

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[77] 767 F. Supp. 2d at 1056.

[78] *Id.* at 1058.

[79] *Franco-Gonzalez*, 828 F. Supp. 2d at 1147.

[80] 8 C.F.R. §1292.1(a)(4).

[81] Dep't of Justice, Press Release, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions, Apr. 22, 2013, *available at* http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html. The announcement of this policy coincided with the court's issuance of an order permanently enjoining the government to provide qualified representatives, "whether *pro bono* or at Defendants' expense," for the plaintiffs. *See* Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), Partial Judgment and Permanent Injunction, at ¶¶ 2 and 6 (D.C. Cal., April 23, 2013) (copy on file with the author). For purposes of this order, representation must be provided for appeals and custody hearings. *Id.* at ¶ 6.

# ADA Title II Guidance from the U. S. Department of Justice is Instructive to Participants in the Limited Conservatorship System

by Thomas F. Coleman
January 16, 2017

Title II of the Americans with Disabilities Act prohibits public entities from discriminating on the basis of disability against recipients of the services of such entities. Title II applies to state and local government entities, including state and local courts. The service that courts provide is the administration of justice. Title II requires public entities to modify policies and practices, when appropriate, to provide necessary accommodations to people with disabilities to ensure they have meaningful access to the services of such entities.

The United States Department of Justice posted a Technical Assistance Publication on its website on January 11, 2017, to provide guidance to criminal justice agencies on how to comply with Title II of the ADA in the administration of their programs and delivery of their services. Much of what is said in that publication is relevant to the administration of justice by courts and ancillary personnel (court investigators, court-appointed attorneys, and guardians ad litem) in conservatorship proceedings. As a result, I am providing some excerpts from that publication here, with comments on how they are relevant to the need for compliance with the ADA in the administration of justice, and provision of legal services, in limited conservatorship proceedings.

**Application of Title II to Public Entities**

Quote: "Title II of the Americans with Disabilities Act (ADA) protects individuals with mental health disabilities and intellectual and developmental disabilities (I/DD) from discrimination within the criminal justice system. Pursuant to the ADA, state and local government criminal justice entities—including police, courts, prosecutors, public defense attorneys, jails, juvenile justice, and corrections agencies—must ensure that people with mental health disabilities or I/DD are treated equally in the criminal justice system."

Comment: Replace "criminal justice system" with "limited conservatorship system" and change "public defense attorneys" to "court-appointed attorneys" and the relevance of this mandate to judges and attorneys in the limited conservatorship system is clear.

**General Requirements**

Quote: "Title II of the ADA provides that no qualified individual with a disability shall, because of that disability, be excluded from participation in, denied the benefits of, or subjected to discrimination in the services, programs, and activities of all state or local government entities, including law enforcement, corrections, and justice system entities. Such services, programs, and activities include: Interviewing and questioning witnesses, victims, or parties, negotiating pleas, assessing individuals for diversion programs, conducting arraignment, setting bail or conditions of release, taking testimony, sentencing, providing notices of rights, determining whether to revoke probation or parole, or making service referrals, whether by prosecutors and public defense attorneys, courts, juvenile justice systems, pre-trial services, or probation and parole services."

Comment: A conservatorship court is a justice system entity. An attorney appointed to represent a proposed conservatee is the equivalent of a public defense attorney. A court investigator is the equivalent of a pre-trial service provider or a probation service provider. Investigators and attorneys in conservatorship proceedings also conduct interviews, assess individuals, and

provide notices of rights. Attorneys also negotiate dispositions. Therefore, the ADA mandates mentioned in this guidance memo are applicable to similar services in limited conservatorship proceedings.

**Modifications and Accommodations**

Quote: "Under Title II, state and local government entities must, among other obligations . . . Make reasonable modifications in policies, practices, or procedures when necessary to avoid disability discrimination in all interactions with people with mental health disabilities or I/DD, unless the modifications would fundamentally alter the nature of the service, program, or activity. The reasonable modification obligation applies when an agency employee knows or reasonably should know that the person has a disability and needs a modification, even where the individual has not requested a modification, such as during a crisis, when a disability may interfere with a person's ability to articulate a request."

Comment: The need to make modifications of policies and practices in order to ensure meaningful participation in public services does not depend on a request from someone with a disability if a representative of a public entity knows the person has a disability and needs a modification. Judges, court investigators, and court-appointed attorneys in limited conservatorship proceedings know, by virtue of the allegations in a petition, that the proposed conservatee likely has serious cognitive and/or communication disabilities that require some form of accommodation in order for the person to participate in the proceeding in a meaningful way. They therefore have a duty to conduct an assessment of the person's needs and to develop a disability accommodation plan.

**Effective Communication**

Quote: "Under Title II, state and local government entities must, among other obligations . . . Take appropriate steps to ensure that communication with people with disabilities is as effective as communication with people without disabilities, and provide auxiliary aids and services when necessary to afford an equal opportunity to participate in the entities' programs or activities. Even when staff take affirmative steps to ensure effective communication, not everyone will understand everything in the same way and there will necessarily be a spectrum of comprehension across the population based on many factors, including but not limited to age, education, intelligence, and the nature and severity of a disability. Public entities are not required to take any action that would result in a fundamental alteration in the nature of a service, program, or activity, or undue financial and administrative burdens."

Comment: The very nature of conservatorship proceedings involves the need to assess a person's capacity to make decisions and to care for his or her own basic needs. By definition, the people who are intended to receive the benefit of judicial and legal services in these proceedings are individuals with cognitive and communication disabilities. Therefore, it cannot be reasonably argued that providing the necessary supports and services needed for effective communication would fundamentally alter the nature of the service, i.e., the administration of justice. Maximizing the potential for effective communication with proposed conservatees may be difficult, but it is essential to do so in order to interview and assess the intended beneficiaries of these judicial and legal services.

**Training**

Quote: "Appropriate training can prepare personnel to execute their ADA responsibilities in a manner that . . . respects the rights of individuals with disabilities; ensures effective use of criminal justice resources; and contributes to reliable investigative and judicial results."

Comment: Training of judges, investigators, and court-appointed attorneys is also necessary in the limited conservatorship system so they can execute their ADA responsibilities.

**Analysis of Policies and Practices**

Quote: "Criminal justice entities have reviewed their policies, practices, procedures, and standing orders to ensure that they do not discriminate against people with mental health disabilities or I/DD. For example, entities have collected, aggregated, and analyzed data regarding individuals served by the entity and outcomes to determine whether people with disabilities are subjected to bias or other discrimination. Where potential discrimination has been found, entities have taken necessary corrective measures, such as revising policies and procedures; refining quality assurance processes; and implementing training."

Comment: In some states the judicial branch has established a statewide task force or advisory committee to review policies and practices in guardianship or conservatorship systems. For example, this has occurred in Pennsylvania, Nevada, Washington, and some other states. However, to my knowledge none of these entities has included a review of the compliance or noncompliance of the system with the ADA. The California State Bar has recently shown an interest in access to justice for individuals with disabilities in the limited conservatorship system. However it has not yet proposed a formal action plan to assess and address this issue.

**Observations and Conclusions**

A search of the website of the U.S. Department of Justice for information or publications on the ADA and guardianship or conservatorship proceedings yields no results. Apparently, the DOJ has not yet issued any guidance memos or technical assistance manuals on this topic.

A DOJ website search also turned up no results for complaints filed against state or local agencies that administer such proceedings. No litigation by the DOJ or settlement agreements on this topic can be found on its website.

I am aware of one formal investigation which was opened by the DOJ and which is pending. It was filed against the Los Angeles Superior Court by my own organization – Spectrum Institute – for ADA violations involving the voting rights of people with developmental disabilities in limited conservatorship proceedings.

I am also aware of a second complaint against the Los Angeles Superior Court – also filed by Spectrum Institute – for ADA violations due to deficient legal services by court-appointed attorneys in limited conservatorship proceedings. The complaint names the court as the source of the problem since it is the court that appoints the attorneys and mandates their training. It also highlights the lack of quality assurance controls by the local entity that funds the legal services, and the lack of standards by the state entity that promulgates rules for legal proceedings.

That complaint was filed in June 2015 and has been pending with the DOJ for 18 months now. The DOJ has placed considerable resources into the investigation of this complaint. However, there has been no indication yet as to what, if any, responsive action it may take.

The application of the ADA to guardianship and conservatorship proceedings is a topic that needs further development. Little attention has been given to people with intellectual and developmental disabilities and how to ensure they have access to justice in these proceedings.

Until there is formal action taken by the DOJ – in the form of investigations, settlements, litigation, guidance memos, or technical assistance manuals – participants in the limited conservatorship system may find instruction in other relevant publications and materials. This is one of them.

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# 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**

# Washington State Recognizes the Appointment of an Advocate as a Necessary ADA Accommodation in Legal Proceedings

by Thomas F. Coleman

Appointment of an attorney or other "suitable representative" soon will become an element of ADA-accommodation law in some Washington legal proceedings. Although the new rule by Office of Administrative Hearings (OAH) is limited to administrative law proceedings in the state, it may signal the need for a similar court rule for judicial proceedings involving litigants with significant disabilities.

The rule, which goes into effect January 1, 2018, was requested by the Fred T. Korematsu Center for Law and Equality and Disability Rights Washington. It was approved by Hon. Lorraine Lee, the state's Chief Administrative Law Judge. The Access to Justice Board, an agency created by the Supreme Court in 1994, supported the new rule.

The rule requires an ADA-accommodation inquiry to occur "If, during any stage of an adjudicative proceeding, the administrative law judge or any party has a reasonable belief that an otherwise unrepresented party may be unable to meaningfully participate in the adjudicative proceeding because of a disability." Once the judge presiding in the case has such a reasonable belief, the judge "shall refer the party to the agency ADA coordinator" for an accommodation assessment.

If the assessment shows that the nature of the party's disability necessitates the assistance of a "suitable representative" to ensure the party has meaningful participation in the case, such a representative shall be appointed by the chief administrative law judge for the duration of the proceedings. Since an advocate for a party in an administrative proceeding is not required to be licensed to practice law, the representative appointed to assist the party in advocating or defending may or may not be a lawyer.

However, lawyer or not, the new rule requires the judge to consider several factors about the potential advocate before appointing him or her as a representative for the litigant. This includes his or her knowledge, skills, and abilities of the procedural rules and the substance at issue in the proceeding, as well as his or her level of experience and training in advocating for people with disabilities.

A network of potential advocates will be established by the agency. To be placed on the list of potential advocates, individuals will be required to receive uniform qualification training or demonstrate equivalent experience and training. Training will also be required of all OAH staff involved with the ADA assessment and appointment process, including training on the requirements of the ADA and equivalent state law on disability discrimination. Part of the staff training includes a requirement for learning "the process for assessing and determining accommodations necessary to ensure meaningful participation in the adjudicative proceeding."

A monitoring component has been built into this new ADA-accommodation program. Performance and outcomes will occur two years after the program starts to determine its effectiveness. Feedback from parties, staff, suitable representatives, judges, and others will be included in the monitoring process.

The Supreme Court should review this rule and agency comments in developing a court rule requiring appointment of counsel as an ADA requirement in some court proceedings. In addition to the ADA, federal due process requires appointment of counsel when a court knows a litigant has a disability that precludes the person from meaningful participation in his or her case. Virtually all respondents in adult guardianship proceedings meet that test.

In November 2017 Spectrum Institute filed an ADA complaint with the Supreme Court that attorneys are not being appointed for respondents in *all* guardianship cases and that performance standards and training are not required when they are appointed. Spectrum Institute issued a report to the court – The Justice Gap – in March 2016 on the same subject.

**WSR 17-17-079**
**PERMANENT RULES**
**OFFICE OF**
**ADMINISTRATIVE HEARINGS**
[Filed August 16, 2017, 11:25 a.m., effective January 1, 2018]

Effective Date of Rule: January 1, 2018.

Purpose: This rule making is initiated in response to the petition filed by CB (a resident of Washington), the Fred T. Korematsu Center for Law & Equality at Seattle University School of Law, and Disability Rights Washington. The petition requested that a new rule be adopted to provide an assessment for representational accommodation for parties in adjudicative proceedings before office of administrative hearings (OAH). The access to justice board submitted a letter of support urging rule making on this topic.

**Main objectives:**

Establish within OAH a process for the referral of a pro se party with disabilities to the OAH Americans with Disabilities Act (ADA) coordinator.

Establish a network of individuals to assist those pro se parties with accessing OAH's adjudicative proceedings (comparable to nondisabled pro se parties) and to ensure that they are not denied meaningful access to adjudicative proceedings.

Establish a training program for (1) OAH administrative law judges (ALJ) and support staff and (2) individuals who are trained to assist pro se parties determined to need assistance to access an OAH adjudicative proceeding.

**Rule proposal elements:**

Assessment:

Establish a process for OAH ALJs or any party to refer a party to the OAH ADA coordinator when an issue is raised on whether a party's disability precludes meaningful access to the OAH adjudicative process.

Establish a "reasonable belief" standard for when an ALJ's referral to the ADA coordinator is appropriate.

Establish a separate process and file for responding to the party's need due to disabilities.

Protect the party's privacy interest by maintaining a separate file that is kept confidential (from the other party) and from the ALJ presiding over the hearing on the merits.

Establish the OAH ADA coordinator as the first decision maker on whether accommodation is necessary with an appeal opportunity to the chief ALJ.

Accommodation Response:

If no other accommodation provides for meaningful participation in an adjudicative proceeding and an accommodation under this rule is determined to be necessary, OAH will provide a suitable representative to assist the party at no cost to the party.

OAH will establish a network of individuals who can be appointed by OAH to assist these parties with a disability.

Training:

All OAH staff will receive initial and annual refresher training commensurate within the scope of their duties.

OAH's ADA coordinator will also receive specialized training initially and thereafter as necessary to ensure an adequate knowledge and understanding of the requirements of federal and state law with respect to assessing the need for reasonable accommodations.

Suitable representatives will receive uniform qualification training, or demonstrate equivalent experience or training, as established by the chief ALJ.

Data Collection:

Within two years after the effective date of the rule, the program will be assessed for effectiveness and the results of the review will be made available to the public. OAH will track the timeliness of the process; hearing outcomes; number of suitable representation requests granted and denied; sources of referrals to the OAH ADA coordinator; and, number and outcome of appeals of

denials to the chief ALJ. OAH will review feedback from parties, OAH's ADA coordinator, persons appointed as suitable representatives, ALJs, and referring agency representatives on how this rule may be improved.

Citation of Rules Affected by this Order: New WAC 10-24-010.

Statutory Authority for Adoption: RCW 34.12.080 and 34.05.250.

Other Authority: RCW 34.12.030, 34.12.080.

Adopted under notice filed as WSR 17-09-084 on April 19, 2017.

Changes Other than Editing from Proposed to Adopted Version: This rule was initially proposed for inclusion in the model rules of procedure as WAC 10-08-055; OAH now proposes to create a new chapter in Title 10 WAC for clarity and change the section number to WAC 10-24-010.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 0, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 1, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 1, Amended 0, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 1, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 1, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

Date Adopted: August 7, 2017.

Lorraine Lee
Chief Administrative Law Judge

# Chapter 10-24 WAC
# ACCESS TO OAH FACILITIES AND SERVICES

NEW SECTION

**WAC 10-24-010 Accommodation.** (1) Accommodation requests under the federal Americans with Disabilities Act (ADA) by a party to an office of administrative hearings adjudicative proceeding are handled pursuant to the office of administrative hearings' policy. This section specifically applies to requests for representation as an accommodation in adjudicative proceedings before the office of administrative hearings. The appointment of a suitable representative may be an appropriate response in those cases where the party is unable to meaningfully participate in an adjudicative proceeding. This section is intended to ensure that all requests for accommodation are addressed in accordance with the requirements of the ADA and that any accommodation response is the minimum necessary to effectively address the needs of the party.

(2) Definitions.

(a) "Disability" as used in this section is defined under 42 U.S.C. Sec. 12102. Disability does not include factors such as lack of education, lack of English proficiency, or other nondisability factors.

(b) "Suitable representative" means an individual who is qualified under subsection (11) of this section to provide the assistance needed to enable an otherwise unrepresented party with a disability to meaningfully participate in the adjudicative proceeding.

(c) "Agency ADA coordinator" is an administrative law judge designated by the chief administrative law judge to make the assessment and accommodation determinations described in subsection (3) of this section.

(3) If, during any stage of an adjudicative proceeding, the administrative law judge or any party has a reasonable belief that an otherwise unrepresented party may be unable to meaningfully participate in the adjudicative proceeding because of a disability, with that party's consent the administrative law judge shall refer the party to the agency ADA coordinator and delay commencing or resuming the adjudicative proceeding until the accommodation request is addressed by the ADA coordinator.

(4) The agency ADA coordinator will expedite the assessment and accommodation process to the greatest extent practicable and consistent with the party's limitations.

(5) All records considered in the decision whether to appoint a suitable representative shall be kept confidential and held separately from the adjudicative proceeding record.

(6) Upon a party's request for a suitable representative or referral from the administrative law judge, the agency ADA coordinator must determine whether the party is a person with a disability. The agency ADA coordinator may require documentation from the party at the coordinator's discretion.

(7) If the party is a person with a disability, the agency ADA coordinator must determine whether the party is unable to meaningfully participate in the adjudicative proceeding as a result of the disabil-

ity. The existing assistance of a legal guardian, near relative, or friend shall not affect the agency ADA coordinator's determination of whether the party is able to meaningfully participate in the adjudicative proceeding. The agency ADA coordinator shall consider the following:

(a) Whether the party has a rational and factual understanding of:

(i) The nature and object of the adjudicative proceeding;

(ii) The right of representation;

(iii) The right to present, examine, and object to evidence;

(iv) The right to cross-examine witnesses; and

(v) The right to appeal.

(b) Whether the party has sufficient present ability to:

(i) Exercise the rights in (a) of this subsection;

(ii) Make informed decisions about whether to waive the rights in (a) of this subsection;

(iii) Physically participate in the adjudicative proceeding;

(iv) Respond to any allegations, issues, arguments, and evidence presented by other parties;

(v) Evaluate and coherently discuss arguments and defenses;

(vi) Present evidence relevant to eligibility for relief;

(vii) Present coherent testimony based upon adequate recall; and

(viii) Act upon instructions and information presented by other parties and the administrative law judge.

(8) If the party is unable to meaningfully participate in the adjudicative proceeding as a result of a disability, the agency ADA coordinator will commence an interactive process with the party to determine the type of accommodation required to allow the party to meaningfully participate in the adjudicative proceeding, specifically:

(a) Whether an alternative accommodation can adequately address the party's specific disability-related limitations; or

(b) Whether a suitable representative is the most appropriate accommodation.

(9) If the agency ADA coordinator determines that appointment of a suitable representative is not the accommodation needed, the agency ADA coordinator will inform the party in writing, or any other communication appropriate to the situation, of the denial of a suitable representative, including how to seek review of the decision under subsection (17) of this section.

(10) If the agency ADA coordinator determines that appointment of a suitable representative is the accommodation necessary for a party's meaningful participation in an adjudicative proceeding, the agency ADA coordinator will identify an individual to assist the party at no cost to the party.

(11) To identify an individual, the agency ADA coordinator will consider the needs identified in the assessment under subsection (7) of this section and any other factors, including:

(a) The party's preferences;

(b) The knowledge, skills and abilities of the individual being considered, including:

(i) Knowledge of or the ability to attain knowledge of the procedural rules;

(ii) Knowledge of or ability to attain knowledge of the substance at issue;

(iii) Experience and training in advocating for people with disabilities; and

(iv) The individual's availability to meet the timelines and duration of the particular adjudicative proceeding.

(c) An individual is not eligible to be appointed as a suitable representative if the individual is employed by the office of administrative hearings, or is prohibited by law from representing the party.

(d) The agency ADA coordinator will inform the party with a disability that an individual has been identified to assist as the party's suitable representative. The party will show acceptance of the appointment in writing or in any other form consistent with the party's disability. If the party disagrees with the appointment, the party will contact the agency ADA coordinator. The agency ADA coordinator will evaluate the party's reconsideration request, and may consider identifying another individual to be appointed as the party's suitable representative, if the request for reconsideration contains new disability or suitability related information.

(12) The appointment of a suitable representative is made by the chief administrative law judge. The appointment is effective upon acceptance of the accommodation by the party with a disability. The party has the right to reject the appointment of a suitable representative.

(13) Upon appointment the suitable representative will file a notice of appearance under WAC 10-08-083 or other applicable rule or law to inform all parties and representatives of record of the suitable representative's name, address, and telephone number.

(14) The appointment under this section ends when the time expires to file a petition for review of the administrative law judge's initial or final order, unless earlier terminated by the party or the suitable representative. The suitable representative will file a notice of withdrawal under WAC 10-08-083 or other applicable rule or law if the appointment is terminated prior to the deadline for the petition for review.

(15) In the event a higher authority remands the case to the office of administrative hearings, the agency ADA coordinator will determine whether the party is able to meaningfully participate in the remanded adjudicative proceeding under subsection (7) of this section and the appropriate accommodation under subsection (8) of this section. If a suitable representative is still the most appropriate accommodation, the agency ADA coordinator will determine if the individual previously appointed is available or will identify another individual to be the suitable representative. The party with a disability may state a preference for or disagree with an individual's appointment, or reject an appointment.

(16) If the party is not satisfied with a decision by the agency ADA coordinator, the party may request review of the accommodation request by the chief administrative law judge, whose decision shall be final.

(17) The office of administrative hearings will establish a network of individuals who are able and available to be appointed by the chief administrative law judge as suitable representatives.

(18) The chief administrative law judge will ensure that all office of administrative hearings staff receive both initial and annual training commensurate with the scope of their duties. The training selected will include specific reference to the requirements of the ADA, as amended, as well as the Washington state law against discrimination, as they relate to the issues of reasonable accommodation throughout an adjudicative proceeding, with particular regard to the

process for assessing and determining accommodations necessary to ensure meaningful participation in an adjudicative proceeding.

(19) The agency ADA coordinator will also receive specialized training initially and thereafter as necessary to assure an adequate knowledge and understanding of the requirements of federal and state law with respect to assessing the need for reasonable accommodations. The agency ADA coordinator will make recommendations to the chief administrative law judge regarding the necessary training for agency staff and for suitable representatives.

(20) Suitable representatives shall receive uniform qualification training, or demonstrate equivalent experience or training, as established by the chief administrative law judge.

(21) The chief administrative law judge or his/her designee will develop routine reports that reflect the number of requests for accommodation pursuant to this section, the result of those requests, and the costs, if any, associated with any such accommodation. Personal health information and other confidential data will be redacted from reports in order to comply with relevant privacy laws.

(22) Two years following the effective date of this section the program will be reviewed and assessed for its effectiveness. The results of this assessment will be made available on the OAH public web site for inspection and will also be provided to the office of financial management and all persons or organizations who express an interest in receiving the report. The assessment will include a review of:

(a) The timeliness of the process, including the suitable representative process and the impact on the scheduling of the adjudicative proceeding;

(b) The adjudicative proceeding outcome for parties with suitable representation, including how many cases resulted in: Settlement, orders affirming or reversing agency action, or defaults;

(c) The number of suitable representation requests granted and denied;

(d) The sources of referrals to the agency ADA coordinator;

(e) The number and outcome of appeals of denials to the chief administrative law judge; and

(f) Feedback from parties, the agency ADA coordinator, persons appointed as suitable representatives, administrative law judges, and referring agency representatives on how the provisions of this section may be improved.

## NY court: ward has due process right to counsel in guardianship proceedings

**10/03/2016, Litigation, Guardianship/Conservatorship of Adults - Ward**

In *Matter of Leon*, 43 N.Y.S.3d 769 (N.Y. Surr. Ct. 2016), the court held that an indigent proposed ward in a guardianship proceeding under Article 17-A of the Surrogate's Court Procedure Act (which applies only to persons with a diagnosis of a developmental or intellectual disability) is constitutionally entitled to appointed counsel. The court noted that NY CLS SCPA § 407(b) gives the Surrogate Court the authority to appoint counsel in any case where the judge "determines that such assignment of counsel is mandated by the constitution of this state or of the United States", and the court held that this case fit that description.

The court observed that "*Gideon*'s due process mandate has been extended to civil proceedings and quasi-criminal proceedings when fundamental interests no less important than freedom from incarceration are threatened", and it noted past NY cases finding a right to counsel for cases involving termination of parental rights, transfers of mental health patients, parole revocation proceedings, and others. The court also pointed to the recent efforts around Intro 214-a, which would provide a right to counsel in NYC housing cases, and noted former Chief Judge Lippman's support for a civil right to counsel as well as the NY Legislature's endorsement of the civil right to counsel principle.

The court held:

Given that the right to assigned counsel is recognized in a myriad of quasi-criminal and civil proceedings, ranging from military eviction and child custody, to involuntary commitment and employment litigation, there is no question that in Article 17-A proceedings, where a person's decision-making authority in every aspect of life is at stake, constitutional protections are warranted. The resulting deprivation of fundamental liberty interests inherent in the appointment of an Article 17-A guardian constitutes 'a loss of liberty as significant as those which previously have triggered the appointment of counsel' ... The fundamental liberty interests of an individual to self-determination, privacy, and autonomy are certainly equal to, if not greater than, the private interests implicated in proceedings involving the rights of parents in neglect proceedings or of tenants in housing court. Article 17-A guardianship infringes on a person's fundamental right to privacy, a fundamental right to refuse unwanted medical treatment, and a fundamental right to make personal decisions regarding marriage, procreation, contraception, family relationship, child rearing, and education.

The court also held that appointment of a guardian ad litem would not satisfy the due process need for a "vigorous advocate on the respondent's behalf."

# CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
## PRE-COMPLAINT INQUIRY
### Discrimination by State-operated, funded, or financially-assisted entity

**The completion and submission of this Pre-Complaint Inquiry will initiate an intake interview with a Department of Fair Employment and Housing (DFEH) representative. The Pre-Complaint Inquiry is not a filed complaint. The DFEH representative will determine if a complaint can be accepted for investigation. Your submission of this document acknowledges that you have read and agree to the DFEH's Privacy Policy.**

**COMPLAINANT:**

NAME: Spectrum Institute (for class of persons with developmental disabilities)

TELEPHONE NUMBER: 818-230-5156

ADDRESS: 555 S. Sunrise Way - Suite 205

EMAIL ADDRESS: tomcoleman@specctruminstitute.org

CITY/STATE/ZIP: Palm Springs, CA 92264

Do you need an interpreter during the complaint process? No ☑ Yes ☐ If yes, indicate language _____

**STATE BODY, STATE ENTITY, STATE AGENCY OR RECIPIENT OF STATE FUNDING OR FINANCIAL ASSISTANCE THAT YOU WISH TO FILE AGAINST (e.g., name of State agency or recipient of state funding or financial assistance being complained about, name of program or activity where violation occurred:**

NAME: Superior Court of the State of California for the County of Sacramento

TELEPHONE NUMBER: 818-230-5156

ADDRESS: 720 9th Street

CITY/STATE/ZIP: Sacramento, CA 95814

NUMBER OF EMPLOYEES: 787

1. I ALLEGE THAT I EXPERIENCED DISCRIMINATION OR DENIAL OF FULL AND EQUAL ACCESS

**BECAUSE OF MY ACTUAL OR PERCEIVED:**

- ☐ Age
- ☐ Ancestry
- ☐ Color
- ☑ Disability - (physical or mental) OF MEMBERS OF THE CLASS
- ☐ Ethnic Group Identification
- ☐ Genetic Information - (information about genetic tests or participation in clinical research or manifestation of disease)
- ☐ Marital Status
- ☐ Medical Condition - Including cancer or cancer related medical condition or genetic characteristics (a gene, chromosome or characteristic not presently associated with symptoms of disease)
- ☐ National Origin - Includes language use restriction and use and possession of a driver's license issued to persons unable to prove their presence in the U. S. is authorized under federal law
- ☐ Race
- ☐ Religion - Includes religious dress and grooming practices
- ☐ Sex - Gender
- ☐ Sex - Gender identity or Gender Expression
- ☐ Sex - Includes pregnancy, childbirth, breastfeeding and/or related medical conditions
- ☐ Sexual Orientation
- ☐ Other - (specify)

THE CLASS
AS A RESULT, X WAS DENIED FULL OR EQUAL ACCESS TO THE BENEFITS OF, OR SUBJECT TO DISCRIMINATION UNDER, A PROGRAM OR ACTIVITY THAT WAS CONDUCTED, OPERATED, OR ADMINISTERED BY THE STATE OR A STATE AGENCY, OR A RECIPIENT FUNDED OR RECEIVING FINANCIAL ASSISTANCE FROM THE STATE OR A STATE AGENCY.

DATE OF MOST RECENT HARM (Month/Day/Year): April 2018 (current and ongoing)

2. Do you have an attorney who agreed to represent you in this matter? Yes ☑ No ☐

If yes, please provide the attorney's contact information.

Attorney Name: Thomas F. Coleman

Attorney Firm Name: Thomas F. Coleman

Attorney Address: 555 S. Sunrise Way, Suite 205 City, State: Palm Springs, CA Zip: 92264

3. Briefly describe the type of program or activity and the denial of benefits or full and equal access you experienced:

This inquiry will be filed by Spectrum Institute and others on behalf of third parties -- a class of people with developmental disabilities who are not given court-appointed attorneys in conservatorship cases in the Sacramento Superior Court. The class consists of adults whose disabilities preclude them from asking for an attorney, waiving an attorney, or knowing the value of an attorney in these cases. The class includes proposed and adjudicated conservatees with disabilities. By failing to appoint an attorney to represent them in the proceedings, the Superior Court is violating the mandates of Title II of the ADA, Section 504 of the Rehabilitation Act, and Government Code Section 11135. The nature of their disabilities precludes these litigants from representing themselves in an effective manner. Without an attorney, they lack the ability to defend their rights, to investigate the facts, to test the sufficiency of the complaint and the evidence, to question the capacity assessment, to seek less restrictive alternatives, to produce evidence in support of retention of rights, to assess the qualifications of the proposed conservator, to offer an alternative choice for conservator, etc. Without an attorney they are denied effective communication with the court, court investfaigator, and other participants. Without an attorney, they are denied meaningful participation in their cases. The only reason they are denied an attorney is the fact that the petitioners chose to file a petition for a general conservatorship. Had a limited conservatorship petition been filed in these cases, an attorney would have been appointed. The ADA and Section 504 are federal laws that preempt the probate code. The Sacramento Superior Court is a public entity subject to Title II of the ADA. It receives federal funds and is subject to Section 504. It is state funded and subject to Section 11135. Conservatorship respondents have qualified disabilities that entitle them to protection under these laws. There is no excuse for the court failing to appoint an attorney to advocate for and defend the rights of these involuntary litigants with disabilities. The courts appoint counsel as a matter of right when a petition for limited conservatorship is filed. It is a violation of due process and equal protection (in addition to the ADA, 504, and 11135) to fail to appoint an attorney for respondents in general conservatorship proceedings -- a proceeding that poses a greater threat to liberty.

Section 11135 incorporates the ADA as a matter of state law. ADA regulations make it clear that an interested individual or organization may file a complaint to vindicate he rights of a class or third parties who are victims of discrimination. State law allows an interested person to organization to bring a pattern and practice of discrimination to the attention of the DFEH director with a request that a director's investigation be opened that the director represent the interests of the affected class.

This pre-complaint inquiry should be construed as a referral to the director for the purpose of him initiating a director's investigation into and complaint against the Superior Court for violations of the rights of persons with developmental disabilities who recently have been who are, and who will be proposed conservatees in general conservatorship proceedings in that court and who were not given court-appointed attorneys. The inquiry will be filed with DFEH if these unlawful practices are not voluntarily corrected by the superior court.

# CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
## PRE-COMPLAINT INQUIRY
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TELEPHONE NUMBER: 818-230-5156

ADDRESS: 555 S. Sunrise Way - Suite 205

EMAIL ADDRESS: tomcoleman@specctruminstitute.org

CITY/STATE/ZIP: Palm Springs, CA 92264

Do you need an interpreter during the complaint process? No ☑ Yes ☐ If yes, indicate language _____

**STATE BODY, STATE ENTITY, STATE AGENCY OR RECIPIENT OF STATE FUNDING OR FINANCIAL ASSISTANCE THAT YOU WISH TO FILE AGAINST (e.g., name of State agency or recipient of state funding or financial assistance being complained about, name of program or activity where violation occurred:**

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TELEPHONE NUMBER: 818-230-5156

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NUMBER OF EMPLOYEES: 787

1. I ALLEGE THAT I EXPERIENCED DISCRIMINATION OR DENIAL OF FULL AND EQUAL ACCESS

**BECAUSE OF MY ACTUAL OR PERCEIVED:**

- ☐ Age
- ☐ Ancestry
- ☐ Color
- ☑ Disability - (physical or mental)
- ☐ Ethnic Group Identification
- ☐ Genetic Information - (information about genetic tests or participation in clinical research or manifestation of disease)
- ☐ Marital Status
- ☐ Medical Condition - Including cancer or cancer related medical condition or genetic characteristics (a gene, chromosome or characteristic not presently associated with symptoms of disease)
- ☐ National Origin - Includes language use restriction and use and possession of a driver's license issued to persons unable to prove their presence in the U. S. is authorized under federal law
- ☐ Race
- ☐ Religion - Includes religious dress and grooming practices
- ☐ Sex - Gender
- ☐ Sex - Gender identity or Gender Expression
- ☐ Sex - Includes pregnancy, childbirth, breastfeeding and/or related medical conditions
- ☐ Sexual Orientation
- ☐ Other - (specify)

AS A RESULT, I WAS DENIED FULL OR EQUAL ACCESS TO THE BENEFITS OF, OR SUBJECT TO DISCRIMINATION UNDER, A PROGRAM OR ACTIVITY THAT WAS CONDUCTED, OPERATED, OR ADMINISTERED BY THE STATE OR A STATE AGENCY, OR A RECIPIENT FUNDED OR RECEIVING FINANCIAL ASSISTANCE FROM THE STATE OR A STATE AGENCY.

DATE OF MOST RECENT HARM (Month/Day/Year): April 2018 (current and ongoing)

2. Do you have an attorney who agreed to represent you in this matter? Yes ☑ No ☐

If yes, please provide the attorney's contact information.

Attorney Name: Thomas F. Coleman

Attorney Firm Name: Thomas F. Coleman

Attorney Address: 555 S. Sunrise Way, Suite 205 City, State: Palm Springs, CA Zip: 92264

3. Briefly describe the type of program or activity and the denial of benefits or full and equal access you experienced:

This inquiry will be filed by Spectrum Institute and others on behalf of a class of people with cognitive disabilities other than developmental who are not given court-appointed attorneys in conservatorship cases in the Sacramento Superior Court. The class consists of adults whose disabilities preclude them from asking for an attorney, waiving an attorney, or knowing the value of an attorney in these cases. The class includes proposed and adjudicated conservatees with disabilities. By failing to appoint an attorney to represent them in the proceedings, the Superior Court is violating the mandates of Title II of the ADA, Section 504 of the Rehabilitation Act, and Government Code Section 11135. The nature of their disabilities precludes these litigants from representing themselves in an effective manner. Without an attorney, they lack the ability to defend their rights, to investigate the facts, to test the sufficiency of the complaint and the evidence, to question the capacity assessment, to seek less restrictive alternatives, to produce evidence in support of retention of rights, to assess the qualifications of the proposed conservator, to offer an alternative choice for conservator, etc. Without an attorney they are denied effective communication with the court, court investfaigator, and other participants. Without an attorney, they are denied meaningful participation in their cases. The reason they are denied an attorney is the court's failure to respect the interests of these respondents under state and federal disability rights laws. Self representation does not ensure meaningful access to justice as required by the ADA and Section 504 -- federal laws that preempt the probate code. The Sacramento Superior Court is a public entity subject to Title II of the ADA. It receives federal funds and is subject to Section 504. It is state funded and subject to Section 11135. Conservatorship respondents have disabilities that entitle them to protection under these laws. There is no excuse for the court failing to appoint an attorney to advocate for and defend the rights of these involuntary litigants with disabilities. The court routinely appoints counsel in limited conservatorship and dementia proceedings. It is a violation of due process and equal protection (in addition to the ADA, 504, and 11135) to fail to appoint an attorney for respondents in general conservatorship proceedings which pose equal or greater risks to liberty interests.

Section 11135 incorporates the ADA as a matter of state law. ADA regulations make it clear that an interested individual or organization may file a complaint to vindicate he rights of a class or third parties who are victims of discrimination. State law allows an interested person to organization to bring a pattern and practice of discrimination to the attention of the DFEH director with a request that a director's investigation be opened that the director represent the interests of the affected class.

This pre-complaint inquiry should be construed as a referral to the director for the purpose of him initiating a director's investigation into and complaint against the Superior Court for violations of the rights of persons with disabilities other than developmental who recently have been, are, or will be proposed or adjudicated conservatees in general conservatorship proceedings and who were not given court-appointed attorneys. The inquiry will be filed with DFEH if these unlawful practices are not voluntarily corrected by the superior court.