U. S. Department of Health And Human Services
Office for Civil Rights
Administration for Children And Families

U.S. Department of Justice
Civil Rights Division
Disability Rights Section

Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act

The United States Department of Health and Human Services (HHS) and the United States Department of Justice (DOJ) are issuing this technical assistance to assist state and local child welfare agencies and courts to ensure that the welfare of children and families is protected in a manner that also protects the civil rights of parents and prospective parents[1] with disabilities. This guidance provides an overview of the issues and application of civil rights laws, answers to specific questions and implementation examples for child welfare agencies and courts, and resources to consult for additional information.

Section 504 of the Rehabilitation Act of 1973 (Section 504)[2] and Title II of the Americans with Disabilities Act of 1990 (ADA)[3] protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services.[4] At the same time, child welfare agencies and courts have the responsibility to protect children from abuse and neglect. The goals of child welfare and disability non-discrimination are mutually attainable and complementary. For example, ensuring that parents and prospective parents with disabilities have equal access to parenting opportunities increases the opportunities for children to be placed in safe and caring homes.

Need for This Technical Assistance

Both the HHS Office for Civil Rights (OCR) and DOJ Civil Rights Division have received numerous complaints of discrimination from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising. In the course of their civil rights enforcement activities, OCR and DOJ have found that child welfare agencies and courts vary in the extent to which they have implemented policies, practices, and procedures to prevent discrimination against parents and prospective parents with disabilities in the child welfare system.

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[1] The term "parents" includes biological, foster, and adoptive parents. It also includes caretakers such as legal guardians or relatives. Prospective parents include individuals who are seeking to become foster or adoptive parents.
[2] 29 U.S.C. § 794.
[3] 42 U.S.C. §§ 12131-12134.
[4] Children with disabilities also have nondiscrimination protections under Section 504 and Title II of the ADA, but the focus of this technical assistance is on parents and prospective parents with disabilities.

For example, in a recent joint investigation by OCR and DOJ of practices of a State child welfare agency, OCR and DOJ determined that the State agency engaged in discrimination against a parent with a disability.[5] The investigation arose from a complaint that a mother with a developmental disability was subject to discrimination on the basis of her disability because the State did not provide her with supports and services following the removal of her two-day-old infant. The supports and services provided and made available to nondisabled parents were not provided to this parent, and she was denied reasonable modifications to accommodate her disability. As a result, this family was separated for more than two years.

These issues are long-standing and widespread. According to a comprehensive 2012 report from the National Council on Disability (NCD), parents with disabilities are overly, and often inappropriately, referred to child welfare services, and once involved, are permanently separated at disproportionately high rates.[6] In a review of research studies and other data, NCD concluded that among parents with disabilities, parents with intellectual disabilities and parents with psychiatric disabilities face the most discrimination based on stereotypes, lack of individualized assessments, and failure to provide needed services.[7] Parents who are blind or deaf also report significant discrimination in the custody process, as do parents with other physical disabilities.[8] Individuals with disabilities seeking to become foster or adoptive parents also encounter bias and unnecessary barriers to foster care and adoption placements based on speculation and stereotypes about their parenting abilities.[9]

Discriminatory separation of parents from their children can result in long-term negative consequences to both parents and their children. In addition to the OCR and DOJ case where a mother and daughter were deprived of the opportunity for maternal/child bonding for two years, the National Council on Disability report is replete with case studies with similar consequences. For example, a child welfare agency removed a newborn for 57 days from a couple because of assumptions and stereotypes about their blindness, undermining precious moments for the baby and parents that can never be replaced.[10] Similarly, after a child welfare agency removed a three-year-old from his grandmother because she had arthritis and a mobility disability, the toddler developed behavioral issues and progressively detached from his grandmother, though he had had no such experiences before this separation.[11] Any case of discrimination against parents and caregivers due to their disability is not acceptable.

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[5] Letter from the U.S. Department of Justice, Civil Rights Division and U.S. Department of Health and Human Services, Office for Civil Rights to the Massachusetts Department of Children and Families (Jan. 29, 2015), at www.ada.gov/ma_docf_lof.pdf andwww.hhs.gov/ocr/civilrights/activities/examples/Disability/mass_lof.pdf(Massachusetts Department of Children and Families).

[6] National Council on Disability, Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children at 14, 18 (2012), at www.ncd.gov/publications/2012/Sep272012/.

[7] *Id.* at 114, 122-26.

[8] *Id.* at 92-93.

[9] *Id.* at 194-199.

[10] *Id.* at 114.

[11] *Id.* at 125-26.

Role of HHS and DOJ

The Children's Bureau in the HHS Administration for Children and Families administers funding for child welfare agencies and courts and provides guidance and technical assistance to child welfare agencies regarding child welfare law. HHS OCR is responsible for ensuring that entities receiving Federal financial assistance from HHS, including child welfare agencies and state courts, comply with their legal obligation under Section 504 to provide equal access to child welfare services and activities in a nondiscriminatory manner. In addition, both DOJ and HHS OCR enforce Title II of the ADA against public entities, including child welfare agencies and state courts.

Overview of Legal Requirements

Title II of the ADA

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.

Section 504 of the Rehabilitation Act

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

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[12] 42 U.S.C. § 12132.

[13] 42 U.S.C. § 12131(1)(A), (B); *see also, e.g.,* 28 C.F.R. § 35.130(b)(1) (prohibiting disability discrimination directly or through contractual, licensing, or other arrangements), 35.130(b)(3) (prohibiting methods of administration that have a discriminatory effect). Private entities involved in the child welfare system may also be independently covered by Title III of the ADA, 42 U.S.C. §§ 12181-12189.

[14] 29 U.S.C. § 794(a).

[15] *See, e.g.,* 28 C.F.R. § 42.105; 45 C.F.R. § 84.5.

[16] *See Grove City College v. Bell*, 465 U.S. 555, 564 (1984).

[17] 29 U.S.C. § 794(b).

agree to comply with Section 504, and generally other civil rights laws, as a condition of receiving Federal financial assistance.[18]

Application

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. For example, if the private foster care or adoption agency imposed discriminatory eligibility requirements for foster or adoptive parents that screened out prospective parents with HIV, the state child welfare agency would most likely be responsible for the contractor's practice of discriminating on the basis of disability.

Two principles that are fundamental to Title II of the ADA and Section 504 are: (1) individualized treatment; and (2) full and equal opportunity. Both of these principles are of particular importance to the administration of child welfare programs.

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] For example, prohibited treatment would include the removal of a child from a parent with a disability based on the stereotypical belief, unsupported by an individual assessment, that people with disabilities are unable to safely parent their children. Another example would be denying a person with a disability the opportunity to become a foster or adoptive parent based on stereotypical beliefs about how the disability may affect the individual's ability to provide appropriate care for a child.

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

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[18] *See, e.g.,* 45 C.F.R. § 84.5.

[19] *See* 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4);); *see also* 28 C.F.R. § 42.503(b)(3).

[20] *See, e.g.,* 28 C.F.R. § 35.130(b); *see also* 28 C.F.R. pt. 35, App. B (explaining in the 1991 Section-by-Section guidance to the Title II regulation that, "[t]aken together, the[] provisions [in 28 C.F.R. § 35.130(b)] are intended to prohibit exclusion . . . of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not presumptions as to what a class of individuals with disabilities can or cannot do."); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987).

[21] *See, e.g., id.*

[22] *See* 28 C.F.R. §§ 35.130(b)(1)(ii)-(iv), (vii), (b)(7); 45 C.F.R. § 84.4(b)(1)(ii)-(iii); *see also* 28 C.F.R. § 42.503(b)(1)(ii), (iii).

where necessary to ensure an equal opportunity to obtain the same result or gain the same benefit, such as family reunification.[23]

This does not mean lowering standards for individuals with disabilities; rather, in keeping with the requirements of individualized treatment, services must be adapted to meet the needs of a parent or prospective parent who has a disability to provide meaningful and equal access to the benefit.[24] In some cases, it may mean ensuring physical or programmatic accessibility or providing auxiliary aids and services to ensure adequate communication and participation, unless doing so would result in a fundamental alteration to the nature of the program or undue financial and administrative burden.[25] For example, a child welfare agency must provide an interpreter for a father who is deaf when necessary to ensure that he can participate in all aspects of the child welfare interaction. In other instances, this may mean making reasonable modifications to policies, procedures, or practices, unless doing so would result in a fundamental alteration to the nature of the program.[26] For example, if a child welfare agency provides classes on feeding and bathing children and a mother with an intellectual disability needs a different method of instruction to learn the techniques, the agency should provide the mother with the method of teaching that she needs.

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]

By applying these principles consistently in the child welfare system, child welfare agencies and courts can ensure that parents and prospective parents with disabilities have equal access to parenting opportunities while ensuring children safely remain in or are placed in safe and caring homes. The attached Questions and Answers provide more detailed information and specific implementation examples for child welfare agencies and courts.

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[23] *See, e.g.,* 28 C.F.R. § 35.130(b)(1)(ii)-(iv).
[24] *Id*; *see also Alexander v. Choate*, 469 U.S. 287 (1985).
[25] 28 C.F.R. §§ 35.149-151, 160-164; 45 C.F.R. §§ 84.21-23, 84.52(d); *see also* 28 C.F.R. §§ 42.503(e), (f), 42.520-522.
[26] *See* 45 C.F.R. §§ 84.12(a), 84.22(a) and (f), and 84.52(d); and 28 C.F.R. § 35.130(b)(7).
[27] 28 C.F.R. § 35.139(a)-(b); *Arline*, 273 U.S. at 287.
[28] 28 C.F.R. § 35.139(b); *Arline*, 273 U.S. at 288.
[29] 28 C.F.R. § 35.139(b); *Arline*, 273 U.S. at 288.
[30] *See* 28 C.F.R. § 35.130(h).

QUESTIONS AND ANSWERS

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

Answer: Title II of the ADA provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in, the services, programs, or activities of state and local government entities.[31] Section 504 similarly prohibits discrimination on the basis of disability against qualified individuals with a disability in programs, services, and activities receiving Federal financial assistance.[32]

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] Programs and services must be accessible to and usable by people with disabilities.[35] In addition, programs must provide people with disabilities with an equal opportunity to participate in and benefit from the programs, services and activities of the entity;[36] they are also prohibited from using methods of program administration, which includes written rules as well as agency practices, that have a discriminatory effect on individuals with disabilities.[37] 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]

Who is protected by disability nondiscrimination laws?

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

Answer: The ADA and Section 504 protect the rights of individuals with disabilities.[40] A "disability" is defined as a physical or mental impairment that substantially limits a major life activity, such as caring for oneself, performing manual tasks, breathing, standing, lifting, bending, speaking, walking, reading, thinking, learning, concentrating, seeing, hearing, eating, sleeping, or working.[41] Major life activities also include the operation of major bodily functions, including but not limited to, functions of the immune system, normal cell growth, digestive,

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[31] 42 U.S.C. § 12132.
[32] 29 U.S.C. § 794(a).
[33] 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).
[34] *Choate*, 469 U.S. 287.
[35] 28 C.F.R. § 35.150(a); 45 C.F.R. § 84.22(a).
[36] 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii);
[37] 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(4).
[38] 28 C.F.R. § 35.130(b)(7); *Choate*, 469 U.S. at 301.
[39] 28 C.F.R.§ 35.160(a)(1); *see also* 45 C.F.R. § 84.52(d) (requiring health and social services entities to provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question).
[40] 42 U.S.C. § 12132; 29 U.S.C. § 794(a).
[41] 42 U.S.C. § 12102(1), (2)(A); 29 U.S.C. § 705(9)(B).

bowel, or bladder, neurological, brain, and respiratory, circulatory, endocrine, and reproductive functions.[42]

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

An "individual with a disability" under the ADA and Section 504 does not include an individual who is currently engaged in the illegal use of drugs, when the state or local government program or program receiving Federal financial assistance acts on the basis of the illegal drug use.[46] However, an individual is not excluded from the definition of disability on the basis of the illegal use of drugs if he or she (1) has successfully completed a drug rehabilitation program or has otherwise been successfully rehabilitated and is no longer engaging in drug use, or (2) is participating in a supervised rehabilitation program and is no longer engaging in drug use.[47]

To be eligible, an individual with a disability must be "qualified." An individual with a disability is qualified if he or she meets the essential eligibility requirements of a service, program, or activity, with or without the provision of reasonable modifications, the provision of appropriate auxiliary aids and services, or the removal of architectural and communication barriers.[48]

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

Answer: 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

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[42] 42 U.S.C. § 12102(2)(B).
[43] 42 U.S.C. § 12102(4)(A); 29 U.S.C. § 705(9)(B).
[44] 42 U.S.C. § 12102(4)(E)(i); 29 U.S.C. § 705(9)(B); *see also* Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, at www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.
[45] 42 U.S.C. § 12102(2)(1)(B)-(C); 29 U.S.C. § 705(9)(B). The ADA Amendments Act of 2008 amended the definition of disability for Titles I, II, and III of the ADA as well as Section 504. Pub. L. No. 110 - 325, 122 Stat. 3553 (2008). For a discussion of the United States Department of Justice's (DOJ's) interpretation of the changes to the definition, see DOJ's Notice of Proposed Rulemaking to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839 (January 30, 2014). *See also* Equal Employment Opportunity Commission, Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, at www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.
[46] 42 U.S.C. § 12210(a); 29 U.S.C. § 794(d).
[47] 42 U.S.C. § 12210(b)(1)-(2); 29 U.S.C. § 794(d).
[48] 42 U.S.C. § 12131(1); 28 C.F.R. § 35.104; *see also* 45 C.F.R. § 84.3(l)(4) (defining "qualified handicapped person" under HHS' Section 504 regulation).

discrimination by child welfare agencies and courts.[49] Title II also protects individuals or entities from being denied or excluded from child welfare services, programs or activities because of association with an individual with a disability.[50] For example, Title II prohibits a child welfare agency from refusing to place a child with a prospective foster or adoptive parent because the parent has a friend or relative with HIV.

Title II and Section 504 also protect "companions" of individuals involved in the child welfare system when the companion is an appropriate person with whom the child welfare agency or court should communicate. A companion may include any family member, friend, or associate of a person seeking or receiving child welfare services.[51] For instance, when a child welfare agency communicates with an individual's family member who is deaf, appropriate auxiliary aids and services to the family member must be provided by the agency to ensure effective communication.[52]

Finally, the ADA and Section 504 protect individuals from any retaliation or coercion for exercising their right not to experience discrimination on the basis of disability. Individuals enjoy this protection whether or not they have a disability.[53]

Who is required to comply with the disability nondiscrimination laws?

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

> *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.

Answer: 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]

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[49] For a discussion of a "qualified individual with a disability," *see* discussion *supra* at Q&A 2.
[50] 28 C.F.R. § 35.130(g); 28 C.F.R. pt. 35, App. B.
[51] 28 C.F.R. § 35.160(a)(2).
[52] 28 C.F.R. § 35.160(a)(1); 28 C.F.R. pt. 35, App. A., Subpt. E (2010).
[53] 42 U.S.C. § 12203; 28 C.F.R. § 35.134; 45 C.F.R. § 84.61; 45 C.F.R. § 80.7(e).
[54] *See Pa. Dep't. of Corrs. v. Yeskey*, 524 U.S. 206, 209-12 (1998) (discussing the breadth of Title II's coverage).
[55] *See* 29 U.S.C. § 794(b)(1)(A), (B).
[56] *See* 28 C.F.R. §§ 35.130(b)(1), (3), 42.503(b)(1), (3); 45 C.F.R. § 84.4(b)(1), (4).

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

Answer: 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]

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] For example, if a conference or hearing is scheduled in a location that is inaccessible to wheelchair users, it should be moved to an accessible location in order to ensure a wheelchair user can participate fully in the conference or hearing.

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] For example, courts should provide appropriate auxiliary aids and services to a parent who is deaf so that he or she can access court proceedings as fully and effectively as those who are not deaf.

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]

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[57] *See Yeskey*, 524 U.S. at 209-12 (discussing the breadth of Title II's coverage); *cf. Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding judicial enforcement of racially discriminatory restrictive covenants state action in violation of the Fourteenth Amendment). *See also* 28 C.F.R. § 35.190(b)(6) (designating to the DOJ responsibility for investigation of complaints and compliance reviews of "[a]ll programs, services, and regulatory activities relating to . . . the administration of justice, including courts.").

[58] 29 U.S.C. § 794; *see U.S. Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n.4 (1986). We also remind judges and court personnel of their obligations under the American Bar Association, Model Code of Judicial Conduct, Rule 2.3 (b) that states: "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, . . . and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."

[59] *See* 28 C.F.R. § 35.130; 45 C.F.R. § 84.4; *see also* 28 C.F.R. § 42.503.

[60] 28 C.F.R. § 35.160-.164; 45 C.F.R. § 84.52(d); *see also* 28 C.F.R. § 42.503(f).

[61] 28 C.F.R. § 35.130(b)(7); *see also Choate*, 469 U.S. at 304-06.

[62] In addition, advocacy organizations, such as those within the Protection and Advocacy system, may provide assistance to individuals with disabilities when they become involved with the child welfare system.

[63] *See* 28 C.F.R. § 35.130(b)(7), 35.160-.164; *see also Choate,* 469 U.S. at 300-309.

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

Answer: 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]

What do the disability nondiscrimination laws require of child welfare agencies and courts?

7. What is a reasonable modification?

Answer: 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.[67] Parenting skills do not come naturally to many parents, with or without disabilities. To provide assistance to parents with disabilities that is equal to that offered to parents without disabilities, child welfare agencies may be required to provide enhanced or supplemental training, to increase frequency of training opportunities, or to provide such training in familiar environments conducive to learning. For example, child welfare agencies may have a parenting skills class once per week. For a parent with a disability who requires individualized assistance in learning new skills because of her or his disability, child welfare agencies may need to modify this training to allow more frequent, longer, or more meaningful training.

8. What are auxiliary aids and services? What does it mean to provide effective communication?

Answer: 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

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[64] *See* 28 C.F.R. § 35.130(b)(1), (3).
[65] 29 U.S.C. § 794(a); 45 C.F.R. §§ 84.3(h); 84.4(b)(1), (4).
[66] Private entities involved in child welfare activities may also be public accommodations with their own nondiscrimination obligations under Title III of the ADA. *See* 42 U.S.C. §§ 12181-12189 (Title III of the ADA).
[67] *See* 28 C.F.R. § 35.130(b)(7); 45 C.F.R. § 84.22(a). A fundamental alteration can be a change that is so significant that it alters the essential nature of the public entity's service, program, or activity. *Id.*; *cf.* U.S. Dep't of Justice, ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities § III-4.3600 (discussing a fundamental alteration as a modification that is so significant it alters the essential nature of services, privileges, and accommodations). A fundamental alteration is necessarily highly fact-specific. Child welfare entities have the burden of establishing that a proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens. A public entity still must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

effectively as individuals without disabilities.[68] Examples of auxiliary aids and services include, among others, qualified interpreters, note takers, computer-aided transcription services, accessible electronic and information technology, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, qualified readers, taped texts, audio recordings, braille materials, large print materials, and modifications to existing devices.[69]

Child welfare agencies and courts should consider whether they are taking appropriate steps to ensure that effective communication is provided in different settings and as cases develop. For example, a qualified interpreter may be necessary for smaller settings involving only a few people, such as home visits or assessments, whereas the use of real-time captioning may be appropriate during larger group meetings, such as family team meetings or in court, where numerous people are present or where the layout of the room makes it difficult to view an interpreter and obtain visual cues from the speaker.

The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual with a disability; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.[70] For example, a local child welfare agency may be required to provide qualified interpreters to ensure effective communication with individuals with disabilities during agency meetings to discuss service planning. However, to communicate a simple message such as an appointment date or address, handwritten notes may be sufficient.

> Child welfare agencies must refrain from using minor children as interpreters except in limited exigent circumstances. Adult companions may be used as interpreters only in emergencies and only when other factors are met.

State and local child welfare agencies and courts must give primary consideration to the auxiliary aid or service requested by the individual.[71] This means, for example, that if a parent with a disability requests a qualified interpreter who is an oral transliterator (a type of interpreter who facilitates spoken communication between individuals who are deaf or hard of hearing and individuals who are not), the agency must provide a qualified oral transliterator, unless the agency can demonstrate that it would pose a fundamental alteration or an undue administrative or financial burden and an alternative auxiliary aid or service provides communication to the individual that is as effective as communication provided to others.[72] If provision of a particular auxiliary aid or service would result in a fundamental alteration in the nature of a service, program, or activity, or if it would result in undue financial

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[68] 28 C.F.R. § 35.160; 45 C.F.R. § 84.52(d).
[69] 42 U.S.C. § 12103(1); 28 C.F.R. § 35.104.
[70] 28 C.F.R. § 35.160(b)(2). For further information on ensuring effective communication, *see* U.S. Dep't of Justice, ADA Requirements: Effective Communication (Jan. 31, 2014), at www.ada.gov/effective-comm.htm; *see also* U.S. Dep't of Justice and U.S. Dep't of Educ., Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (2015), at www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.pdf.
[71] 28 C.F.R. § 35.160(b)(2).
[72] 28 C.F.R. §§ 35.160(b)(2); 35.164.

> Child welfare agencies should consult with and include organizations that support and advocate for the rights of individuals with disabilities in their policy-making and training efforts.

and administrative burdens, a child welfare agency or court need not provide it.[73] These entities must nonetheless provide auxiliary aids or services that do not result in a fundamental alteration or undue burdens that place the individual with a disability on equal footing with individuals without disabilities to the maximum extent possible.

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]

Child welfare agencies and courts are prohibited from requiring individuals with disabilities to supply their own interpreters or other auxiliary aids and services.[75] Child welfare agencies and courts may not rely on minor children accompanying individuals with disabilities to interpret, except in emergencies involving imminent threats to the safety or welfare of an individual or the public where no interpreter is available.[76] Child welfare agencies and courts may rely on adults accompanying individuals with disabilities to interpret, but only in emergencies or where the individual with a disability specifically makes such a request, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.[77] State and local child welfare agencies and courts are also prohibited from placing a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of the provision of auxiliary aids or other services that are required to provide that individual or group with nondiscriminatory treatment.[78]

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?

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

Answer: Child welfare agencies are required to ensure that parents and prospective parents with disabilities involved in the child welfare system are afforded an opportunity to preserve their families and/or to become parents that is equal to the opportunity that the entities offer to individuals without disabilities.[79]

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

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[73] *See supra* footnote 67.
[74] 28 C.F.R. § 35.160(b)(2).
[75] 28 C.F.R. § 35.160(c)(1).
[76] 28 C.F.R. § 35.160(c)(2)(i), (3).
[77] 28 C.F.R. § 35.160(c)(2)(ii).
[78] *See* 28 C.F.R. § 35.130(f).
[79] 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. §§ 84.4(b)(1)(ii), 84.52(a)(2).

the outset and throughout any involvement that an individual with a disability has with the child welfare system.

Service plans for parents and prospective parents should address the individual's disability-related needs and the auxiliary aids and services the agency will provide to ensure equal opportunities. At the same time, service plans should not rely on fears or stereotypes to require parents with disabilities to accept unnecessary services or complete unnecessary tasks to prove their fitness to parent when nondisabled parents would not be required to do so.

Agencies also have an obligation to ensure that the aids, benefits, and services provided to parents and prospective parents in support of appropriate service plan activities and goals – such as visitation, parenting skills training, transportation assistance, counseling, respite, and other "family preservation services" and "family support services" – are appropriately tailored to be useful to the individual.[80] For example, if a child welfare agency provides transportation to visits for individuals without disabilities, it should provide accessible transportation to individuals with disabilities to ensure equal opportunity.

> Child welfare agencies should take steps to ensure that their obligations under Title II and Section 504 are met by reviewing the following:
>
> (1) existing policies, practices, and procedures;
> (2) how the agency actually processes cases;
> (3) the agency's licensing and eligibility requirements for foster parents and guardians; and
> (4) whether there are staff training or professional development needs.

To ensure that persons with disabilities have equal opportunity to retain or reunify with their children, it may be necessary for the agency to reasonably modify policies, practices, and procedures in child welfare proceedings. In general, agencies should consider whether their existing policies, practices, and procedures; their actual processing of cases; and their training materials comply with the nondiscrimination requirements of Title II and Section 504 for individuals with disabilities. Agencies should also take appropriate steps to ensure that components of child welfare processing, such as "fast-track" and concurrent planning, are not applied to persons with disabilities in a manner that has a discriminatory effect and that denies parents with disabilities the opportunity to participate fully and meaningfully in family reunification efforts.

In some instances, providing appropriate supports for persons with disabilities means selecting an appropriate alternative already provided in the Federal child welfare statutes. For instance, section 475 of the Social Security Act provides that the child welfare agency is required to file a petition to terminate parental rights when the child is in foster care for the preceding 15 out of 22 months. However, the law provides exceptions to this requirement and gives child welfare agencies the flexibility to work with parents who have a child in foster care beyond the 15 month

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[80] "Family preservation services" are services for children and families to protect children from harm and to help families at risk or in crisis. 42 U.S.C. § 629a(a)(1); 45 C.F.R. § 1357.10(c). "Family support services" are community-based services to promote the safety and well-being of children and families, to increase the strength and stability of families in various ways, and to enhance child development. 42 U.S.C. § 629a (a)(2); 45 C.F.R. § 1357.10(c).

period, including parents with disabilities.[81] Exceptions to the termination of parental rights requirement include situations where: (1) at the state's discretion, the child is being cared for by a relative; (2) there is a compelling reason for determining that filing the petition would not be in the best interests of the child; or (3) the state, when reasonable efforts are to be made, has failed to provide such services deemed necessary for the safe return of the child to his or her home. [82] As to number (3), a child welfare agency should provide the family of the child with the services necessary for the safe return of the child to the child's home in a manner that meets the unique needs of the family. Failure to provide services, including services to address family members' disability-related needs, could qualify as an exception to the termination of parental rights requirement. Decisions about whether this exception applies to a situation in which the supports necessary for a person with a disability to access services were not provided should be made on a case-by-case basis.

Given the responsibilities of agencies discussed above, we also recommend that courts consider whether parents and prospective parents with disabilities have been afforded an equal opportunity to attain reunification, including whether they have been provided with appropriate services and supports and other reasonable modifications to enable them to participate fully and meaningfully in family preservation efforts. Additionally, we suggest that courts consider whether any reasonable modifications are necessary and should be made for parents with disabilities. We also recommend that courts consider evidence concerning the manner in which the use of adaptive equipment or supportive services may enable a parent with disabilities to carry out the responsibilities of parenting.

Foster care and adoption agencies must also ensure that qualified foster parents and prospective parents with disabilities are provided opportunities to participate in foster care and adoption programs equal to opportunities that agencies provide to individuals without disabilities.[83] This may require foster care and adoption agencies to reasonably modify policies, practices, and procedures, where necessary to avoid discrimination on the basis of disability. For example, an adoption agency may be required to provide large print and electronically accessible adoption materials to accommodate the known needs of a visually impaired adoption program applicant.

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?

Answer: 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

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[81] 42 U.S.C. § 675(5)(E); 45 C.F.R. § 1356.21(i).
[82] 42 U.S.C. § 675(5)(E)(i)-(iii); 45 C.F.R. § 1356.21(i)(2)(i)-(iii).
[83] 42 U.S.C. § 12132; 29 U.S.C. § 794(a); 28 C.F.R. pt. 35 (Title II); 28 C.F.R. pt. 42, subpt. G (DOJ Section 504 regulation); 45 C.F.R. pt. 84 (HHS Section 504 regulation).
[84] *See* 28 C.F.R. pt. 35, App. B; *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001) (explaining that an individualized inquiry is among the ADA's most "basic requirement[s].").

Child welfare agencies may be required to modify their own services, or, when necessary, to arrange for services outside of the agency, in order to ensure equal opportunity for parents and prospective parents with disabilities

procedures and/or appropriate auxiliary aids and services during assessments to ensure equal opportunities for individuals with disabilities. For example, a child welfare agency or court may be required to provide a qualified sign language interpreter to accommodate an individual with a communication disability during an evaluation to ensure an accurate assessment.

11. How does the equal opportunity requirement apply to case planning activities of child welfare agencies?

Answer: The equal opportunity requirement applies throughout the continuum of a child welfare case, including case planning activities. In many instances, providing the same services and resources to an individual with a disability that are provided to individuals without disabilities will not be sufficient to provide an equal opportunity to an individual with a disability. Where this is the case, Title II and Section 504 may require agencies to provide additional, individually tailored services and resources to meet the requirement to provide an equal opportunity to participate in and benefit from the program. For example, when providing training to parents, agencies should consider the individual learning techniques of persons with disabilities and may need to incorporate the use of visual modeling or other individualized techniques to ensure equal opportunity to participate in and benefit from the training.

Staff should consider whether the agency is appropriately assisting family members in meeting service plan tasks and case goals, and whether modifications must be made. For example, if parenting training is not working, staff should evaluate whether there are any unnecessary barriers to the training that could be removed or reasonably modified, such as increased opportunities for modeling behavior. Agencies should also ensure that staff members develop appropriate service plan tasks and goals that address the individualized needs of all affected family members with disabilities, recognizing that allowing parents with disabilities to use family members as part of their support network may be appropriate.

12. Is an agency required to arrange for services to parents and prospective parents with disabilities that are necessary to avoid discrimination but are not available within the agency's programs?

Answer: In addition to providing to parents with disabilities all reunification services that it provides to parents without disabilities, a child welfare agency may be required, under Title II and Section 504, to arrange for available services from sources outside of the agency as a reasonable modification of its procedures and practices for parents with disabilities so long as doing so would not constitute a fundamental alteration. Arranging for such services from outside sources may be necessary to provide an equal opportunity to participate in and benefit from the agency's programs. Many specialized services to support persons with disabilities are often available from other social service agencies, as well as disability organizations. For example, for a person with a mental health disability, mental health services and supports, such as supportive housing, peer supports, assertive community treatment, and other community-based supports are often available from mental health service agencies. Child welfare agencies should coordinate with such agencies and organizations to ensure that parents and prospective parents with

disabilities receive the most complete set of support services possible, and also to ensure that reunification and other services are specifically tailored to their needs.[85] This requirement does not change an entity's responsibility to make available those reunification services provided to parents without disabilities or to reasonably modify them to provide equal opportunity.

13. Are child welfare agencies and courts permitted to impose a surcharge on persons with disabilities for the provision of reasonable modifications or auxiliary aids and services?

Answer: No. Title II prohibits the imposition of surcharges to cover the costs of measures required to provide an individual with nondiscriminatory treatment.[86] For example, child welfare agencies and courts may not charge persons with disabilities for any costs associated with providing effective communication during visitation, meetings, and court hearings, and may be required to provide transportation to accessible facilities when needed to fulfill their program access obligations.

14. Child welfare agencies have an obligation to ensure the health and safety of children. How can agencies comply with the ADA and Section 504 while also ensuring health and safety?

Answer: Under child welfare law, child welfare agencies must make decisions to protect the safety of children. The ADA and Section 504 are consistent with the principle of child safety. For example, the ADA explicitly makes an exception where an individual with a disability represents a "direct threat."[87] Section 504 incorporates a similar principle.[88]

Under the ADA and Section 504, a direct threat is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.[89] In determining whether an individual poses a direct threat to the health or safety of a child or others, child welfare agencies and courts must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain the nature, duration, and severity of the risk to the child; the probability that the potential injury to the child will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.[90]

As such, in some cases an individual with a disability may not be a qualified individual with a disability for child placement purposes. What both the ADA and Section 504 require, however, is that decisions about child safety and whether a parent, prospective parent, or foster parent represents a direct threat to the safety of the child must be based on an individualized assessment and objective facts and may not be based on stereotypes or generalizations about persons with disabilities.[91]

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[85] *See* 28 C.F.R. § 35.130(b)(1)(i)-(iv), (b)(7).
[86] *See* 28 C.F.R. § 35.130(f).
[87] 28 C.F.R. § 35.139.
[88] *See Arline*, 480 U.S. 273.
[89] 28 C.F.R. § 35.139(b).
[90] *Id.*
[91] *See* 28 C.F.R. § 35.139.

15. What are some other best practices for child welfare agencies and courts?

Answer: We recommend that child welfare agencies and courts review and update their policies and procedures on a regular basis to ensure that they comply with the ADA and Section 504. We recommend that child welfare agencies and courts also ensure that their employees and contractors are sufficiently trained in ADA and Section 504 compliance. In addition, we recommend that they look for ways to coordinate with disability organizations and agencies to assist in service planning and to support them in their efforts to ensure equal opportunity for parents and prospective parents with disabilities.

How can aggrieved persons file a complaint?

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

Answer: 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]

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]

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]

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]

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[92] *See* 28 C.F.R. §§ 35.170-172; 45 C.F.R. § 84.61; *see also* 28 C.F.R. § 42.530. In addition, child welfare agencies and courts that employ 50 or more persons are required to have grievance procedures for prompt and equitable resolution of complaints alleging actions prohibited by Title II and Section 504. 28 C.F.R. § 35.107; 45 C.F.R. § 84.6; *see also* 28 C.F.R. § 42.505.

[93] 28 C.F.R. §§ 35.172(c), 35.173; 45 C.F.R. § 84.61; *see also* 28 C.F.R. § 42.530.

[94] 28 C.F.R. § 35.174; 45 C.F.R. § 84.61.

[95] 42 U.S.C. § 12205; 29 U.S.C. § 794a(b); 28 C.F.R. § 35.175.

[96] *See* 42 U.S.C. § 2000d-1.

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.

You can also file a Section 504 or Title II ADA complaint with OCR at http://www.hhs.gov/ocr/civilrights/complaints/index.html.

General information about civil rights and child welfare issues can be found at: http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/index.html.

For information about ACF's Children Bureau, please visit: http://www.acf.hhs.gov/programs/cb.

For ACF and OCR regional offices, please visit:

- http://www.acf.hhs.gov/programs/oro
- http://www.hhs.gov/ocr/office/about/rgn-hqaddresses.html

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