

ADA Title II Guidance from the United States Department of Justice is Instructive to Participants in Maryland's Guardianship System

by Thomas F. Coleman
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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](https://www.ada.gov/cjta.html) 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 delivery of services. (<https://www.ada.gov/cjta.html>) 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 adult guardianship 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 guardianship proceedings in Maryland.

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 “adult guardianship system” and change “public defense attorneys” to “court-appointed attorneys” and the relevance of this mandate to judges, attorneys, and other participants in the adult guardianship 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 guardianship court is a justice system entity. An attorney appointed to represent a proposed ward is equivalent to a public defense attorney. Investigators and guardians-ad-litem (GALs) are equivalent to pre-trial service providers or a probation service providers. GALs and attorneys in guardianship 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 adult guardianship 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, guardians-ad-litem, and court-appointed attorneys in guardianship proceedings know, by virtue of the allegations in a petition, that the proposed ward 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 guardianship 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 actual or perceived 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 wards 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, guardians ad litem, and court-appointed attorneys is also necessary in the guardianship 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 Washington Supreme Court is currently reviewing an ADA complaint filed by Spectrum Institute alleging that the state’s guardianship system is not in compliance with the ADA. However, the court has not yet adopted 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 31 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 adult guardianship proceedings is a topic that needs further development. Little attention has been given to people with cognitive and communication 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 Maryland’s guardianship system may find instruction in other relevant publications and materials. This is one of them.

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