



U.S. Department of Justice
Civil Rights Division

**U.S. Department of Health and
Human Services**
Office for Civil Rights



Via Email and Overnight Mail

January 29, 2015

Erin Deveney
Interim Commissioner
Department of Children and Families
Executive Office of Health and Human Services
Commonwealth of Massachusetts
600 Washington Street
Boston, Massachusetts 02111

Re: Investigation of the Massachusetts Department of Children and Families by the United States Departments of Justice and Health and Human Services Pursuant to the Americans with Disabilities Act and the Rehabilitation Act (DJ No. 204-36-216 and HHS No. 14-182176)

Dear Commissioner Deveney:

We write concerning the investigation of the Massachusetts Department of Children and Families (DCF) by the United States Departments of Justice and Health and Human Services (collectively, Departments) pursuant to Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794.

Title II and Section 504 prohibit disability-based discrimination by DCF, including the denial of opportunities to benefit from services, the failure to reasonably modify policies and procedures, and imposing methods of administration that have the effect of discriminating on the basis of disability.¹ The Departments' investigation has revealed that DCF has committed extensive, ongoing violations of Title II and Section 504 by discriminating against Sara Gordon²

¹ Title II applies to public entities, which include state and local governments, and their departments and agencies, such as DCF. 42 U.S.C. § 12131(1). Section 504 applies to the programs and activities of recipients of federal financial assistance. 29 U.S.C. § 794(b)(1)(A), (B). DCF operates child welfare programs and activities and receives financial assistance from the Administration for Children and Families, U.S. Department of Health and Human Services.

² We use pseudonyms throughout this letter for family members.

on the basis of her disability, and denying her opportunities to benefit from supports and services numerous times over the past two years, including her existing family supports.

Sara Gordon is a 21-year-old woman who has a developmental disability. In November 2012, Ms. Gordon gave birth to Dana Gordon. Two days later, DCF removed the baby from Ms. Gordon's custody while she was recovering from childbirth in the hospital. Ms. Gordon lives with her parents, who do not have developmental disabilities. Her parents have continually intended to provide her support in parenting her child. Ms. Gordon's mother quit her job to provide full-time support for Ms. Gordon and her baby.

In this letter, pursuant to 28 C.F.R. § 35.172(c) and 45 C.F.R. § 80.7(d) (incorporated by reference in the Section 504 implementing regulation at 45 C.F.R. § 84.61), we identify our findings of fact, conclusions of law, and minimum steps DCF needs to take to remedy the violations.³

The Departments find that DCF acted based on Ms. Gordon's disability as well as on DCF's discriminatory assumptions and stereotypes about her disability, without consideration of implementing appropriate family-based support services. DCF has continued to deny Ms. Gordon access to appropriate family-based support services it makes available to parents to successfully achieve reunification and has failed to reasonably modify its policies, practices, and procedures to accommodate Ms. Gordon's disability. DCF staff assumed that Ms. Gordon was unable to learn how to safely care for her daughter because of her disability, and, therefore, denied her the opportunity to receive meaningful assistance from her mother and other service providers during visits. Finally, DCF changed the permanency goal to adoption and has sought to terminate Ms. Gordon's parental rights on the basis of her disability.

During the past two years, multiple community-based service providers, two experts who have completed parenting assessments, Dana's court-appointed attorney, and even a majority of DCF's most recent Foster Care Review panel all have agreed that a family-supported parenting plan would be appropriate. In this matter, a family-supported parenting plan means that Dana would be placed with Ms. Gordon and her parents in their home and Ms. Gordon's mother (Dana's grandmother) would maintain guardianship of Dana. In particular, Dr. Nicole Brisson, Ph.D., LCMHC, a nationally-recognized expert in assessing parents with developmental and intellectual disabilities to ascertain appropriate parenting supports, evaluated Ms. Gordon in October 2014 and found Ms. Gordon "is a loving, caring, and conscientious mother who is willing to do whatever it takes to have her daughter in her life." Dr. Brisson also found there was "no discernible reason revealed [by her] assessment that [Ms. Gordon] and her parents do not have the ability to care for [Dana] safely." Brisson, Competence-Based Family Assessment at 23-24 (Oct. 24, 2014).

In this letter of findings, the Departments do not seek a remedy under Title II and Section 504 that requires DCF to immediately transfer custody of Dana to Ms. Gordon and her family. Instead, the Departments identify as a remedial measure that DCF immediately implement

³ The U.S. Department of Justice makes findings under Title II. The U.S. Department of Health and Human Services makes findings under Title II and Section 504.

services and supports for an appropriate amount of time to provide Ms. Gordon a full and equal opportunity to pursue reunification with Dana, in consideration of the denials over the past two years and the evaluations of the professionals that have opined on this case.

The Departments recognize and respect the important responsibility placed on DCF and its social workers to investigate, protect, and care for infants and children involved with the child welfare system. However, the violations in this letter highlight systemic failures by DCF to ensure social workers follow appropriate policies and procedures and have necessary training to perform their duties without discriminating on the basis of disability.

Background

The child welfare system is a group of services designed to promote the well-being of children by ensuring safety, strengthening families, and achieving permanency. Pursuant to Title IV-E of the Social Security Act, DCF is required to make reasonable efforts to preserve and reunify families prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and to make it possible for a child to safely return to the child's home. *See* 42 U.S.C. § 671(a)(15). To that end, families with children in custody typically participate in developing a permanency plan for the child and a service plan for the family, which guide the child welfare agency's work. Family reunification, except in unusual and extreme circumstances, is the permanency plan for most children. If efforts toward reunification are not successful, the plan may be changed to another permanent living arrangement, such as adoption or transfer of custody to a relative.

DCF, through its more than two dozen offices across the Commonwealth of Massachusetts, is the State agency responsible for receiving and responding to reports of child abuse and neglect; providing and administering programs to strengthen families; making reasonable efforts to encourage and assist families to use all available resources to maintain the family unit intact and to reduce the risk of a child's placement into substitute care; and providing substitute care only when child safety and risk factors cannot be reasonably reduced or eliminated through services to the child's family.⁴

The Departments recognize and respect the important responsibility placed on DCF and its social workers to investigate, protect, and care for infants and children involved with the child welfare system. The Departments' investigation in this matter has revealed, however, that DCF has discriminated against Ms. Gordon in violation of Title II and Section 504 since November 2012.

⁴ Although the Federal Government plays a major role in supporting States in the delivery of services by funding of programs and legislative initiatives under Titles IV-B and IV-E of the Social Security Act, the primary responsibility for child welfare services rests with the States. Child Welfare Information Gateway, *How the child welfare system works*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau (2013) (available at: <https://www.childwelfare.gov/pubs/factsheets/cpswork/>).

The Departments' Investigation

On June 30, 2014, the Office for Civil Rights, U.S. Department of Health and Human Services (OCR) notified DCF that it had opened an investigation of a complaint filed by Ms. Gordon under Title II and Section 504. OCR's letter also requested data from DCF concerning the allegations of the complaint, including copies of all Juvenile Court orders, petitions, and reports prepared for the Court and DCF child protection policies, procedures, and practices. On August 20, 2014, the Disability Rights Section, Civil Rights Division, U.S. Department of Justice (DRS) notified DCF that it, too, had opened an investigation of the services DCF provides to individuals with disabilities and the removal and subsequent placement of Dana Gordon. DRS also requested data from DCF concerning its policies, practices, and procedures and administrative and court files related to Dana, Ms. Gordon, and Ms. Gordon's parents. DRS explained that the Departments of Justice and Health and Human Services may conduct a joint investigation of DCF.

When DCF failed to provide all of the requested material five months after the OCR request and three months after the DRS request, the Departments again requested information responsive to their initial inquiries as well as additional information on November 25, 2014. To date, DCF has failed to fully comply in providing materials, such as email, and failed to timely seek to secure access to court records.

During the course of our investigations, the Departments interviewed:

- Ms. Gordon and her parents, Kim and Sam Gordon, on multiple occasions;
- DCF social workers providing direct services to Ms. Gordon, Dana, and the foster parents, the adoption social worker, the investigators who responded to and recommended the initial removal, their respective supervisors, and an Area Program Manager;
- DCF-funded service providers who have provided services to Ms. Gordon and Dana, including representatives from Valuing Our Children (VOC) and The United Arc; and
- Dr. Nicole Brisson from Sage Haven Associates, located in Fairfax, Vermont.

The Departments also reviewed extensive records, including:

- Hospital and family practice medical records dating back nearly two decades;
- Educational records;
- DCF records concerning Ms. Gordon, Dana, Kim and Sam Gordon, and the foster parents; and
- DCF's policies, practices, procedures, regulations, and training materials.

The Departments have also regularly requested that DCF submit any materials that DCF believes would be important for the Departments to consider in their investigation.

Summary of the Facts

Ms. Gordon lives with her parents in rural Massachusetts. Ms. Gordon volunteers for an organization in her community matching families with donated clothing and household items. She is finishing a few courses in a special education program in her high school in order to obtain her diploma. Ms. Gordon is interested in pursuing education beyond high school and finding a part-time job, perhaps in construction or in teaching art or preschool. Mostly, Ms. Gordon aspires to parent Dana. If reunified, Ms. Gordon hopes to do the things that most parents take for granted, such as taking Dana to the park, sharing a quiet moment with her daughter at bedtime, and teaching her to fish and ride a bike. According to Dr. Brisson, Ms. Gordon has realistic expectations and acknowledges that it would be difficult to care for Dana on her own, and fully recognizes that she needs the assistance of her parents.

Ms. Gordon has a developmental disability that manifests in several ways. Among other things, she requires repetition, hands-on instruction, and frequency in order to learn new things. She has difficulty reading and following oral instructions, and explains that she learns best visually and through practice. Dr. Brisson evaluated her and found that she displays characteristics of a mild intellectual disability that affects some conceptual areas of her learning.

In November 2012, while Ms. Gordon was in the hospital, recovering from giving birth to Dana two days earlier, DCF received a report containing allegations of neglect regarding Ms. Gordon and Dana.⁵ According to DCF's Intake Report, DCF reviewed the report and decided to conduct an emergency response investigation, noting concerns that Ms. Gordon "was not able to comprehend how to handle or care for the child due to the mother's mental retardation." DCF's November 26, 2012 Emergency Investigation report documented the investigators' observations that 19-year-old Ms. Gordon had difficulties holding and feeding Dana, and that she had to be reminded by an investigator to burp the baby and clean spit out of the baby's mouth. The investigators also observed that Ms. Gordon was uncomfortable at changing the baby's diaper. DCF's Intake Report also alleged that Ms. Gordon forgot to feed Dana during one night shift.⁶ Ms. Gordon explained to the investigators that she could not read an analog clock, which is why she had trouble remembering when she last fed her daughter. Ms. Gordon also reported that she started keeping a journal to track feedings.

During the investigation, DCF personnel also learned that Ms. Gordon's mother, Kim Gordon, intended to assist Ms. Gordon with parenting Dana. DCF also learned of the Gordons' involvement with the agency in the 1990s. However, DCF had closed all services to the family based on the Gordons' cooperation and successful completion of DCF's service plan.⁷ DCF did

⁵ Such reports are called "51A reports" under Massachusetts child welfare law. See M.G.L. c. 119, § 51A.

⁶ Notably, during the course of the Departments' investigation, it confirmed that hospital staff did not permit Ms. Gordon's parents, Kim and Sam Gordon, to stay with Ms. Gordon and their grandchild, Dana, at the hospital pursuant to its policy that permitted only a spouse or significant other to remain after visiting hours. The Gordon grandparents explained that they were asked to leave the hospital when they stayed an hour-and-a-half past visiting hours the first night after the baby was born.

⁷ DCF investigators reported that Sam Gordon did not want to meet with them during the emergency investigation. The investigative report reflects that Mr. Gordon said he did not want to meet with DCF, but that he "wanted to do

not identify any current or recent safety concerns with Kim and Sam Gordon. The investigators also visited the Gordons' home, finding ample baby supplies and noting no concerns.

Nonetheless, on November 25, 2012, at the conclusion of DCF's investigation, the agency removed Dana from Ms. Gordon's custody and placed her in foster care. According to DCF's Emergency Investigation report, DCF decided to conduct an "emergency removal," because Ms. Gordon was "unable to recognize, comprehend and react to the demands of an infant. . . . The concerns are there are no services in place. . . . [Dana] needs to come into foster care at this time. There are concerns with [Ms. Gordon's] ability to meet the basic needs of a newborn child." DCF also noted that Ms. Gordon and her parents had a previous history with DCF and that she has "serious developmental delays."

Over the next two years, DCF provided minimal supports and opportunities to Ms. Gordon while she sought to reunify with Dana. DCF set visitation at once per week for one hour, despite Ms. Gordon's request for more frequent visits. Visits were supervised by DCF and took place at DCF offices and at a community organization. DCF would not permit Kim Gordon and staff from VOC to assist Ms. Gordon for most of the visits. The frequency of visits was reduced to once every other week after seven months, when DCF changed Dana's permanency planning goal from reunification to adoption.

In addition, to the extent that DCF has continued to reference unspecified concerns regarding the Gordon's past DCF case history, DCF has not identified any current or recent safety concerns with Kim and Sam Gordon. On the contrary, Dr. Brisson and the psychologist that conducted the family's parenting assessment both reported that they identified no recent or current concerns.

As a part of Ms. Gordon's DCF service plan, Ms. Gordon agreed with DCF's requirement for her to work with a parent aide during her visitation with Dana to learn and utilize effective parenting skills. A parent aide is a trained individual who provides support and strengthens parenting skills. However, DCF failed to provide Ms. Gordon parent aide services for more than eight months and only provided these services after it already decided that Ms. Gordon would not be fit to parent Dana and changed the goal to adoption.⁸ Even after the parent

what is best for his daughter and grandchild." Mr. Gordon explained to the Departments during the interviews that he was angry with DCF's involvement. It was not until November 7, 2013, that the social worker contacted Mr. Gordon by letter and explained that she wanted to meet with him following a DCF Foster Care Review panel which recommended that such a meeting be added to the service plan. There is no record that DCF sought to explain to any of the Gordons until this time the consequences of Mr. Gordon not meeting with the agency. Since that time, Mr. Gordon made himself available to DCF to address any concerns, and DCF has identified no current or recent concerns.

⁸ DCF personnel suggested that this was because Ms. Gordon refused to sign a consent to release her information to The United Arc, the service provider DCF chose to provide parent aide services. On the advice of her attorney, Ms. Gordon did not sign the consent because, in the attorney's opinion, the consent presented by DCF was overly broad. However, DCF did not express willingness or propose to modify the standard form to limit the scope of information that DCF could discuss, did not suggest that Ms. Gordon contact the parent aide agency herself directly, as she had initiated services from VOC on her own behalf, or permit Kim Gordon or staff from VOC to fill in to provide hands-on parenting support to Ms. Gordon during weekly visitations in the interim while the breadth of the release was being worked out.

aide was secured, DCF limited the parent aide's participation to the last thirty minutes of Ms. Gordon's visits with Dana. The parent aide was otherwise tasked by the agency with training Ms. Gordon on parenting skills using a "life-like" doll.

During the early visits with Dana, DCF noted that Ms. Gordon had some difficulty with feedings, diaper changes, and transitioning Dana between people. DCF also noted that Ms. Gordon walked away from the changing table on a couple of occasions, during supervised visits. Since that time, Ms. Gordon has participated in numerous parenting classes and her parenting skills have improved significantly. On the other hand, DCF has repeatedly overlooked numerous safety concerns in Dana's pre-adoptive foster care placement. Specifically, over the past two years in the foster home, Dana received a black eye, bumps, bruises, scrapes, burnt hands on two occasions, and was left unattended on a kitchen table when she was only a few weeks old.

As described below, several professionals have reviewed this case and found that a family-supported parenting plan with Ms. Gordon's parents would be appropriate. The Gordons' family-supported parenting plan involves Kim and Sam Gordon obtaining guardianship and responsibility for making educational, medical, and other significant decisions, while Ms. Gordon would live in the home and learn how to care for her daughter with Ms. Gordon's assistance. Among the professionals are service providers from VOC and The United Arc, the psychologist that conducted the Parenting Assessment, Dr. Brisson, the majority of DCF's most recent Foster Care Review panel, and Dana's court-appointed attorney.

VOC: VOC is a community-based organization that provides supports to, among others, families involved with DCF. VOC is also a contractor of DCF. VOC personnel have attended most, if not all, visits between Ms. Gordon and Dana (though not permitted to provide hands-on assistance). Ms. Gordon has participated in multiple parenting courses through VOC. VOC personnel work with the Gordons on a regular basis and are intimately aware of the family's current functioning. Multiple VOC staff have repeatedly advocated for DCF to increase services, visitation, and to reconsider its decision-making. VOC has supported the Gordons and their family-supported parenting plan since the organization became involved on November 26, 2012, when Ms. Gordon contacted the agency on her own the day after Dana's removal.

The United Arc: The United Arc is also a community-based organization that provides a number of services to, among others, parents with developmental and intellectual disabilities. The United Arc is also a contractor of DCF. Beginning in 2013, The United Arc was retained by DCF to provide parent aide services for Ms. Gordon. The United Arc staff believe that Ms. Gordon has an "amazing support system" through her parents and staff at VOC and any of DCF's concerns about Ms. Gordon parenting alone are sufficiently resolved through a family-supported parenting plan.

Psychologist's Parenting Assessment: In October 2013, a psychologist retained by Ms. Gordon's court-appointed counsel conducted an assessment of the parenting abilities of both Ms. Gordon and Kim Gordon. The evaluation included review of Ms. Gordon's school records, interviews with Ms. Gordon and her parents, and observation of Ms. Gordon, Dana, and Kim Gordon during a supervised visit. The psychologist noted that Dana had been teething during the visit, which impacted her mood, but that "[Ms. Gordon] appeared interested and involved with

her daughter and acted appropriately at all times exhibiting patience and tolerance with her daughter's upset." The psychologist found that "[b]oth [Ms. Gordon and Kim Gordon] provided praise and encouragement and set some limits and redirected [Dana's] behavior when the situation dictated the need for this. They appeared to have a very good sense of how to interact and respond to this young child." The psychologist found no concerns with emotional maltreatment or physical touching, and explained that the participation of both Ms. Gordon and Kim Gordon "was defined by an entirely positive, nurturing, enthusiastic and patient presentation." Ultimately, the psychologist concluded that DCF should reconsider its adoption goal, and instead develop a plan involving greater visitation among Ms. Gordon, Kim Gordon, and Dana to help transition to the ultimate goal of reunification, where Kim and Sam Gordon would assume guardianship over Dana in a family-supported parenting plan.

Dr. Brisson's Competence-Based Family Assessment: In September 2014, DCF agreed to permit a Competence-Based Family Assessment by Dr. Nicole Brisson with Sage Haven Associates, a licensed clinical mental health counselor and a nationally recognized expert on parenting with a mental disability. Dr. Brisson conducted an in-home assessment of Ms. Gordon, Kim Gordon, and Dana, reviewed records, interviewed numerous collaterals including her social worker and supervisors, and conducted interviews of Ms. Gordon and Kim Gordon.⁹

Dr. Brisson provided the following conclusion in her assessment:

Clearly, [Ms. Gordon] is a loving, caring, and conscientious mother who is willing to do whatever it takes to have her daughter in her life. She is capable of learning new skills and has done so through her visits with [Dana], despite them being infrequent. . . . With continued dedication by support providers and [the] willingness [of Ms. Gordon and Kim Gordon] to continue to work with them, it is likely that [Dana] can return home and will be well cared for by her mother and grandparents. It is important to remember that all parents receive help at some time, and [Ms. Gordon] should be no exception. There is no discernible reason revealed by this assessment that [Ms. Gordon] and her parents do not have the ability to care for her child safely.

⁹ Dr. Brisson utilized numerous instruments to complete her thorough assessment, including:

- A social history questionnaire;
- A drug and alcohol screening tool;
- Medical emergency questions to determine responses to serious cuts, choking, and medication administration;
- The Community Life Skills Scale, intended to measure an individual parent's ability to negotiate in the community, including transportation, budgeting, support services, support-involvement, interests, hobbies, and routines of daily live;
- The Parenting Awareness Skills Survey, designed to illuminate strengths and needs in awareness skills a parent accesses in reaction to typical childcare situations;
- The Impediments-Supports Checklist, which evaluates effective parenting and family outcomes;
- The Infant/Toddler HOME Inventory, designed to measure the quality and extent of stimulation available to a child in the home environment;
- The Mental Health Screening Form III; and
- Parent Education Program Checklists, which evaluate basic child-care, health, safety, and interactional skills.

Brisson Assessment of Oct. 24, 2014 at 24. Dr. Brisson recommended that Dana be reunified with the Gordons, that the Gordons and the foster parents should exchange information to ensure a smooth transition, and that Ms. Gordon and Kim Gordon should continue to participate in services to further enhance their parenting skills.

DCF Foster Care Review: In November 2014, a majority of a DCF Foster Care Review panel also found that “the goal of permanency through Adoption is no longer the most appropriate permanency plan. . . . This Foster Care Review panel supports the goal of Permanency through Guardianship on behalf of [Dana] with her maternal grandparents with her mother residing with them and them co-parenting.” The DCF Review Panel majority recommended that this goal should be achieved by May 2015, and that the Service Plan should be updated for DCF to increase visits among Ms. Gordon, Dana, and the grandparents and provide them in their home for extended time frames. A majority of the DCF Review panel further recommended that DCF provide the Gordons with the dates of Dana’s medical appointments, network them with Dana’s early intervention providers, and if distance is a barrier, at minimum, explore phone communication. DCF Foster Care Review panels also include a community volunteer. The Community Volunteer on the November 2014 Panel disagreed with the goal change, citing only the longevity of Dana’s placement, and not any concern of the Gordons.

While the Foster Care Review panel can make a recommendation, DCF must make a goal change at a Permanency Planning Conference meeting. DCF subsequently held an internal Permanency Planning Conference but has not changed the goal.

Dana’s Court-Appointed Attorney: For the past two years, Dana’s court-appointed attorney has supported reunification with appropriate supports. Dana’s attorney has also repeatedly advised DCF that she believed the agency was violating Ms. Gordon’s rights under the ADA and Section 504 by denying Ms. Gordon the opportunity to benefit from supports and services. For virtually all of Dana’s life, DCF has flatly refused such a plan and failed to provide a full and equal opportunity for her to participate in and benefit from DCF’s program to pursue reunification with Dana.

Statutory and Regulatory Background

Congress enacted the ADA nearly 25 years ago “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). Congress found that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, [and] independent living” and that “the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to . . . pursue those opportunities for which our free society is justifiably famous.” 42 U.S.C. § 12101(a)(7), (8). Title II provides:

[N]o 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 any such entity.

42 U.S.C. § 12132. Congress enacted the ADA to broaden the coverage of the Rehabilitation Act of 1973, which similarly prohibits discrimination against individuals with disabilities by recipients of federal financial assistance. 29 U.S.C. § 794. Section 504 similarly provides:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. § 794(a).

Title II covers essentially everything state and local governments and their agencies do. *See Pa. Dept. of Corrs. v. Yeskey*, 524 U.S. 206, 209-12 (1998) (discussing the breadth of Title II's coverage). Section 504 also applies to all of the activities of agencies that are federally funded and as a general rule violations of Section 504 also constitute violations of Title II.¹⁰ As such, Title II and Section 504 apply to everything DCF does, including its investigations, assessments, removals, family preservation, provision of services, determining goals and permanency plans, setting service plan tasks, reunification, guardianship, adoption, and assisting clients in meeting such tasks.¹¹

Pursuant to congressional directive, *see, e.g.*, 42 U.S.C. § 12134; 28 C.F.R. § 41.4, the Departments of Justice and Health and Human Services have promulgated regulations implementing Title II and Section 504. *See* 28 C.F.R. pt. 35 (Title II); 45 C.F.R. pt. 84 (HHS Section 504); 28 C.F.R. pt. 42, subpt. G (DOJ Section 504). Both agencies are responsible for investigating complaints and conducting compliance reviews under Title II. *See* 28 C.F.R. pt. 35, subpt. F, G. Because DCF receives financial assistance from the U.S. Department of Health and Human Services, it has jurisdiction under Section 504. 45 C.F.R. § 84.61.

Under these regulations, covered entities may not directly, contractually, or through other arrangements “deny a qualified individual with a disability the opportunity to participate in or

¹⁰ A “program or activity” is defined under Section 504 to include “all of the operations of a department, agency, . . . or other instrumentality of a State or of a local government” and “the entity of such 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.” 29 U.S.C. § 794(b)(1)(A), (B). As such, all operations of a state government agency are covered by Section 504 if any part of it receives federal financial assistance. Title IV-B and Title IV-E of the Social Security Act are the primary sources of federal child welfare funding, and DCF accepts such funding.

¹¹ During the Departments’ investigation, DCF suggested, based on *Adoption of Gregory*, 434 Mass. 117, 121 (2001), that the ADA may not be raised as a defense to proceedings to terminate parental rights because such proceedings do not constitute a “service” under the ADA. The Justice Department has long taken the position in its regulatory guidance, technical assistance, and enforcement actions that Title II applies to everything a public entity does—all of the child welfare services it provides, including recommendations and petitions related to child welfare matters and proceedings to terminate parental rights. The legal conclusion that termination proceedings are not covered by the ADA similarly cannot be squared with the U.S. Supreme Court’s unanimous pronouncement in *Yeskey*, 524 U.S. at 209-12 (finding, beyond question, that a non-voluntary motivational boot camp in state prison was covered for participation by inmates with disabilities).

benefit from [an] aid, benefit, or service.” 28 C.F.R. § 35.130(b)(1)(i); *see also* 45 C.F.R. § 84.4(b)(1)(i). Covered entities also may not “[a]fford 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.” 28 C.F.R. § 35.130(b)(1)(ii); *see also* 45 C.F.R. § 84.4(b)(1)(ii).

Covered entities may not “utilize criteria or methods of administration “[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.” 28 C.F.R. § 35.130(b)(3)(i), (ii); *see also* 45 C.F.R. § 84.4(b)(4)(i), (ii). The preamble to the 1991 Title II regulation explains that the criteria and methods of administration are the policies and practices of the public entity. 28 C.F.R. pt. 35, App. B (discussing 28 C.F.R. § 35.130(b)(3)). A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities only if those safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities. 28 C.F.R. § 35.130(h).

In addition to these prohibitions, covered entities must take certain steps to avoid discrimination on the basis of disability. In particular, covered entities are required to “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 being offered.” 28 C.F.R. § 35.130(b)(7); *see also* 45 C.F.R. § 84.4(a); U.S. Dep’t of Justice, Title II Technical Assistance Manual § II-6.1000, Illustration 2 (1993) (explaining that public entities may need to make modifications to programs such as individualized assistance to permit individuals with disabilities to benefit).

The ADA and Section 504 thus seek to ensure parents with disabilities are free from discrimination in the provision of services, programs, and activities of child welfare agencies. This includes a prohibition on making child custody decisions on the basis of generalized assumptions about disability, relegating parents with disabilities to lesser services and opportunities, imposing overprotective or unnecessarily restrictive rules, and failing to reasonably modify policies, practices, and procedures. 42 U.S.C. § 12101(a)(5).

Findings

We conclude that DCF has repeatedly and continuously denied Ms. Gordon the opportunity to participate in and benefit from its services, programs, and activities, and has otherwise subjected her to discrimination in violation of Title II. 42 U.S.C. § 12132. The U.S. Department of Health and Human Services similarly finds that DCF has violated Section 504. 29 U.S.C. § 794(a). Initially, DCF failed to individually analyze Ms. Gordon to determine what services and supports were appropriate for her in an effort to prevent Dana’s continued out-of-home placement. DCF then failed to (1) implement appropriate reunification services while Dana was in foster care; (2) identify appropriate service plan tasks; (3) assist Ms. Gordon in meeting service plan tasks to achieve reunification; (4) provide meaningful visitation and

opportunities to enhance Ms. Gordon's parenting skills; and (5) impose only necessary and legitimate safety requirements.

In particular, we conclude that DCF has violated its obligations under Title II and Section 504 at each stage of its process by (1) denying Ms. Gordon equal opportunities to participate in and benefit from its services, programs, and activities, 28 C.F.R. § 35.130(a), (b)(1)(i)-(ii); 45 C.F.R. § 84.4(a), (b)(1)(i)-(ii); (2) utilizing criteria and methods of administration having the effect of discriminating against Ms. Gordon on the basis of disability and defeating or substantially impairing accomplishment of the objectives of its reunification program with respect to Ms. Gordon, 28 C.F.R. § 35.130(b)(3); 45 C.F.R. § 84.4(b)(3); and (3) failing to reasonably modify its policies, practices, and procedures where necessary to avoid discriminating against Ms. Gordon on the basis of her disability, 28 C.F.R. § 35.130(b)(7). As a result, for more than two years, DCF has denied Ms. Gordon and Dana the opportunity to be a family and now threatens to deny them that opportunity permanently.

Instead, DCF has continually asserted that Ms. Gordon poses a safety risk to Dana if she were to parent on her own, without consideration of any supports. However, DCF has ignored the fact that Ms. Gordon is not proposing to parent on her own without any supports, has ignored its own ability and obligation to provide such supports, and has repeatedly ignored the objective evaluations of various clinical and service professionals (including the majority of the most recent Foster Care Review panel) who have reviewed this case and found that Ms. Gordon's plan to parent Dana with her family's support is appropriate. Instead, DCF has refused to reconsider the permanency plan for adoption and has sought to terminate Ms. Gordon's parental rights.¹²

I. DCF acted on assumptions about Ms. Gordon's disability and failed to individually analyze what services and supports would be appropriate considering her disability.

DCF failed to conduct an appropriate individualized analysis of Ms. Gordon and what family support services it needed to provide and accommodations it needed to make at the outset of its involvement, and for more than two years. Instead, it repeatedly acted on its own assumptions about Ms. Gordon's disability. Among the ADA's most "basic requirement[s]" is that covered entities evaluate persons with disabilities on an "individualized basis." See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 690 (2001). The guidance to the Title II regulation explained in 1991 that "[s]uch an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks." 28 C.F.R. pt. 35, App. B (discussing definition of "qualified individual with a disability"). This obligation to act based on the facts of a person's disability and the situation at hand, rather than on assumptions and stereotypes, is necessary to comply with the obligation to provide individuals with disabilities opportunities to participate in and

¹² While we identify various ways that DCF denied Ms. Gordon opportunities under its own policies, ADA and Section 504 liability is not limited to such circumstances. DCF may be required to reasonably modify policies, practices, and procedures governing their services, programs, and activities when necessary to avoid discriminating on the basis of disability beyond the circumstances identified in this letter. See 28 C.F.R. § 35.130(b)(7); *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

benefit from services, programs, and activities; to avoid utilizing criteria or methods of administration that discriminate or that substantially impair achievement of the objectives of a public entity's programs; and to reasonable modify policies, practices, and procedures where necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(a), (b)(1), (b)(3), (b)(7); 45 C.F.R. § 84.4(a), (b)(1), (b)(3).

DCF clearly presumed from the initial opening of its case that Ms. Gordon lacked the capacity to parent Dana due to her developmental disability without consideration of appropriate supports and services. Indeed, DCF investigators reported their view that Ms. Gordon could not “recognize, comprehend and react to the demands of an infant,” and that “[t]he concerns are there are no services in place,” Ms. Gordon requires “parental education,” and she “should engage in every service available to her as a new parent.” 51A Emergency Investigation Report of Nov. 26, 2014. The report further explained: “[Ms. Gordon] has a previous history with DCF which indicates she has serious developmental delays.” *Id.* During the Departments’ interviews of DCF staff, one investigator explained that his view of Ms. Gordon’s capacity to parent was based on his “intuition” and stating that “[w]hen you meet with someone, you get a vibe whether they are going to be able to do it or not.”

Throughout the pendency of this matter, DCF acted on these unwarranted assumptions, repeatedly failing to conduct an individualized analysis of Ms. Gordon’s current and future capacity to parent Dana with in-home services and family supports. After Dana’s removal, DCF assigned a social worker and case supervisor to Ms. Gordon’s case. Over the next two months, Ms. Gordon’s social worker conducted what the agency terms a Comprehensive Assessment and the social worker and supervisor concluded that Ms. Gordon “needs to learn the basic skills in order to appropriately parent her child. There is concern that her cognitive limitations affect her ability to safely parent her child. It is hoped that by working with the appropriate services such as counseling, and working with a parent aide [Ms. Gordon] will learn how to provide for [Dana’s] basic needs.”¹³ However, instead of evaluating the overall level of risk to Dana and focusing on the services that Ms. Gordon would need to be reunified with her daughter based on the ample information it had, the record indicates that DCF focused on obtaining a diagnosis for Ms. Gordon. Ms. Gordon’s February 27, 2013 service plan, explained that, while Ms. Gordon had a “very supportive family,” she has “cognitive limitations,” and “[t]here was no diagnosis for the mother[’]s mental retardation.”¹⁴ Indeed, staff involved in this case repeatedly told the Departments during interviews that they did not know how to assist Ms. Gordon because they

¹³ Following a supported 51A investigation, a case is “opened for services” and DCF is required to complete a “full assessment” of the family’s situation in order to evaluate the overall level of risk to the child, identify the family’s strengths, determine the goal of the service plan, and identify the tasks and services in the service plan. *See* 100 C.M.R. § 5.01-5.03; DCF Assessment Policy, #85-011 (rev. Sept. 6, 2000). Notably, an “overall risk level rating” was not documented in the Comprehensive Assessment worksheet.

¹⁴ Presumably, this focus was based on DCF’s Assessment Protocol, “Factors Used to Determine Parental Unfitness,” which states that in determining the goal of the case and developing a permanency plan, social workers are advised to consider whether “mental deficiency” is a parental condition that is likely to continue for a prolonged period of time and makes it unlikely for an individual to provide adequate caretaking and that it is “[i]mportant to have a formal diagnosis.” DCF Assessment Policy, #85-011, Appendix F (Assessment Protocol # PR 94-007) at 204.

did not have a diagnosis of her disability, despite having extensive information and being unable to articulate why a diagnosis was necessary. Staff also repeatedly emphasized the importance of IQ in determining how to assist Ms. Gordon. However, as the U.S. Supreme Court recently noted, an “[i]ntellectual disability is a condition, not a number.” *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2013).

In fact, DCF had sufficient information to meet its obligations under the ADA and Section 504. DCF was aware at intake that Ms. Gordon potentially had a disability that impacted her learning, DCF’s investigators identified as much, and Ms. Gordon’s social worker was able to observe her on multiple occasions. Furthermore, Ms. Gordon’s social worker contacted Ms. Gordon’s high school counselor, and documented in her Dictation Notes that Ms. Gordon “mostly had an intellectual diagnosis” but her school counselor was unsure of the “exact number” of her IQ. DCF’s excessive focus on the need for a disability diagnosis and IQ, and reliance on the absence of this information as the basis for failing to consider or provide necessary services resulted in a denial of an equal opportunity to participate and benefit from DCF services, programs, and activities on the basis of disability. 28 C.F.R. § 35.130(a), (b); 45 C.F.R. § 84.4(a), (b). Even if DCF did not have all of the information it believed was necessary to optimally serve Ms. Gordon, DCF was still required to provide services and supports with the information it had. Instead, as discussed below, DCF imposed restrictions on Ms. Gordon’s existing supports, undermining the supports and services DCF agreed to provide in Ms. Gordon’s service plan.

Although the record is clear that DCF personnel recognized that the manifestation of Ms. Gordon’s disability called for services and education, and although DCF had those services at its disposal, DCF failed to provide them. Specifically, DCF failed to provide her with repetitive, frequent, hands-on, visual learning. DCF was required to determine what would work for Ms. Gordon considering her disability, as it does for other parents involved in its system. Instead, DCF implemented minimal services and imposed unnecessary restrictions during visits, making it difficult for Ms. Gordon to learn some parenting skills. Instead of recognizing the need to adjust and provide appropriate supports and services, including additional time to learn, DCF personnel regularly asserted they simply had “concerns” about Ms. Gordon’s independent ability to care for an infant because of her disability. If DCF requires all parents to show their independent proficiency to parent, DCF was required to reasonably modify that practice for Ms. Gordon. 28 C.F.R. § 35.130(b)(7). Instead, DCF speculated about Ms. Gordon’s ability to parent, assumed she would never be able to learn, and refused to provide services to help her learn, thus creating a self-fulfilling circumstance leading to DCF’s decision to seek to terminate Ms. Gordon’s parental rights. Notwithstanding all of this, the community service providers and experts agree that Ms. Gordon has shown the ability to learn appropriate parenting techniques and that a family-supported parenting plan with Kim Gordon having guardianship would be appropriate.

Reliance on unwarranted assumptions about Ms. Gordon’s developmental disability is precisely the sort of an outdated approach that the ADA and Section 504 were enacted to prohibit. *See* 28 C.F.R. pt. 35, App. B (providing in 1991 preamble to the Title II regulation that the provisions in 28 C.F.R. § 35.130(b) are, “[t]aken together, . . . intended to prohibit . . . 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 on presumptions as to what a class of individuals with disabilities can or cannot do.”) As explained below, however, DCF did not implement appropriate services and supports, denying her an opportunity to benefit from DCF’s reunification program.

II. DCF did not provide Ms. Gordon an opportunity to benefit from its services in support of reunification.

DCF failed to provide Ms. Gordon the opportunity to benefit from its services in support of reunification with her family, failed to reasonably modify its policies, practices, and procedures where necessary to avoid discriminating, and utilized methods of administration having the effect of discriminating and defeating or substantially impairing the objectives of DCF’s program with respect to Ms. Gordon. 28 C.F.R. § 35.130(b)(1)(i), (b)(3), (b)(7); 45 C.F.R. § 84.4(b)(1)(i), (b)(3).

A. DCF denied Ms. Gordon the opportunity to utilize her family resources and individualized, in-home parenting supports in an effort to achieve reunification.

DCF denied Ms. Gordon the opportunity to benefit from her existing family resources and in-home parenting supports. This obstructed Ms. Gordon’s ability to prevent Dana’s continued placement into foster care and to address DCF’s concerns regarding Ms. Gordon’s ability to safely parent. *See* 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

Pursuant to state law, DCF is obligated to make reasonable efforts to maintain the family unit and to prevent the unnecessary removal of a child from his or her home. *See* M.G.L. c. 119 § 29C. Under DCF’s own Placement Prevention and Placement Policy, the agency must make “reasonable efforts to prevent or eliminate the need for placement.” Placement Prevention and Placement Policy, #90-004 at 355 (emphasis added). “Reasonable efforts” are defined in DCF’s Placement Prevention and Placement Policy as DCF’s

best efforts to assess the individual child and family situation regarding the appropriateness and accessibility (within limits of available resources) of preventive services and to offer the family and assist (as appropriate) in providing such services to the family whenever possible. It is the responsibility of the Social Worker and Supervisor to develop a Service Plan with the family that identifies the resources and activities needed to enable the family to adequately care for and protect the child.

Id.

Ms. Gordon could have significantly benefitted from a number of supports and services the agency provides or makes available to families involved in the child welfare system and which could have prevented the ongoing placement of Dana into foster care. In particular, DCF first failed to consider a plan that relied on Ms. Gordon’s own family resources. To the extent DCF continued to have concerns, it could have implemented various in-home supports to afford

Ms. Gordon the opportunity to have Dana at home. Instead, DCF immediately placed Dana into foster care and changed the permanency goal to adoption seven months later.

At the time of Dana's placement into foster care, Ms. Gordon already had family supports in place. Kim Gordon left her job to provide full time support for Ms. Gordon and Dana.¹⁵ DCF investigators noted no concerns with the Gordons' home and found that the family had ample baby supplies. DCF's ongoing social worker and supervisor noted in January 2013 in the Comprehensive Assessment that Ms. Gordon had a "very supportive family" and identified it as one of her strengths. However, DCF continued to deny Ms. Gordon the opportunity to utilize her own family supports to prevent the continued out-of-home placement of Dana. Dana's court-appointed attorney repeatedly requested that DCF place Dana in Kim and Sam Gordon's custody.

When DCF continued with Dana's out-of-home placement, Ms. Gordon's parents presented DCF with a plan to be Dana's primary caregivers and seek legal guardianship of Dana, if necessary. Ms. Gordon's father agreed to provide financial support for the family and Ms. Gordon's mother would provide for Dana's day-to-day care.

DCF maintained that it had concerns about placement of Dana with the Gordons because DCF was involved with the family when Ms. Gordon was a child. However, experts who have reviewed this case find that the concerns about Ms. Gordon's parents in the 1990's do not represent the current functioning of the family. DCF personnel apparently also believed that its concerns were sufficiently resolved when it closed its services to the family in 2000. During the Departments' investigation, DCF did not cite any current or recent safety concerns about Kim or Sam Gordon. Reliance on family supports is one of DCF's regular tools for preventing removal. One reasonable modification DCF should have considered was an agreement that would have afforded Ms. Gordon the opportunity to parent Dana in the home with family supports by making Kim Gordon responsible for Dana's care. 28 C.F.R. § 35.130(b)(7).

If DCF had any legitimate safety concerns about Kim's supervision of Dana, it had a wide variety of supports and services at its disposal to mitigate such concerns. In fact, use of such supports and services is specifically called for in this type of situation by DCF's own policies. DCF's Placement Policy identifies an example of "reasonable efforts" DCF can take to prevent out-of-home placement in exactly the situation at issue here; namely, providing assistance in accessing parent aide services and/or specialized training to help the primary caretaker "compensate for deficits, if problem is due to primary caretaker's lack of certain capacities due to mental retardation, mental or physical illness." DSS Policy #90-004(R) (1998) at 363; *see also* 110 C.M.R. § 7.061.

¹⁵ DCF investigators learned during the emergency investigation that the Gordon grandparents did not seek guardianship of Dana because they had not considered the formality to be necessary when the family had planned for Ms. Gordon and Dana to live in their home. However, in evaluating the risk to Dana and the family's overall functioning subsequent to the emergency removal, DCF did not consider whether guardianship or another arrangement could prevent the continued out-of-home placement of Dana. While Sam Gordon explained that he "wanted to do what is best for his daughter and grandchild," the record reflects that DCF personnel did not seek to interview Mr. Gordon to specifically evaluate any safety concerns until November 2013, after a DCF Foster Care Review panel recommended that the agency do so.

Ms. Gordon is a member of the “target population” for precisely such services. 110 C.M.R. § 7.061. According to DCF’s regulations, the target population includes parents whose families are at risk of neglect “due to physical, developmental and/or emotional disability.” *Id.* Yet, DCF did not consider or implement these supports until eight months after Dana was removed and, even then, for only limited time. Thus, DCF administered its program in a way that had the purpose or effect of defeating or substantially impairing accomplishment of the reunification program objectives with respect to Ms. Gordon. 28 C.F.R. § 35.130(b)(3)(ii); 45 C.F.R. § 84.4(b)(4)(ii).

Examples of these types of family supports are found in DCF’s regulations. These include family support services, such as visiting nurse assistants and home health aides, and homemaker services.

Family support services: DCF denied Ms. Gordon the opportunity to benefit from in-home “family support services,” which include a “spectrum of services that supports maintenance of the family unit, and enables adults or children to meet the goals of a service plan.” 110 C.M.R. § 7.030. Such services are intended to “provide social and developmental opportunities for a family or for individual family members.” *Id.* Family support services are broadly defined, and could include a visiting nurse assistant – a service that was discussed with Ms. Gordon and Kim Gordon by hospital staff, but not considered by DCF – or a home health aide.

Homemaker services: DCF also denied Ms. Gordon the opportunity to benefit from in-home “homemaker services,” which “provide support, assistance and training to families in the activities of daily functioning. Homemakers provide a monitoring and teaching function within a family, and also help care for children and act as a role model for parents.” 110 C.M.R. § 7.020. The regulations provide that homemaking services are appropriate in “assisting the family in ensuring that abuse and neglect are not occurring in the home.” 110 C.M.R. § 7.021. Homemaking services can be authorized for a prolonged period of time. 110 C.M.R. § 7.022.

At any time over the past two years, DCF could have provided the opportunity for Dana to live at home with an agreement that Kim Gordon be primarily responsible for Dana and, if necessary, utilize homemaker, visiting nurse assistant, home health aide, or parent aide services to support Ms. Gordon in learning how to care for a child. Instead, despite its own policies, DCF refused to provide or did not consider in-home support services, and denied Ms. Gordon this natural learning environment and opportunity to spend critical time with her infant daughter. The failure to consider and provide these services denied Ms. Gordon an equal opportunity to benefit from DCF programs and services. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

Even if in-home services such as parent aides, family support services, or homemaker services had not been specifically identified in DCF policies, DCF would be required to reasonably modify its policies to ensure that Ms. Gordon received the appropriate supports and services to prevent Dana’s removal and ongoing foster care placement. Given the breadth of

services offered by DCF, we do not believe that offering these services to Ms. Gordon would have resulted in a fundamental alteration. 28 C.F.R. § 35.130(b)(7).¹⁶

B. DCF failed to implement services while Dana was placed in foster care to provide Ms. Gordon a meaningful opportunity to reunify her family.

After DCF placed Dana in foster care, the agency failed to implement services to provide Ms. Gordon a meaningful opportunity to reunify with Dana, including meaningful visitation and opportunities to learn how to respond to Dana's developmental delays. 28 C.F.R. § 35.130(b)(1)(i), (b)(3), (b)(7); 45 C.F.R. § 84.4(b)(1)(i), (b)(3).

At the time DCF opened Dana's case, DCF investigators and social workers noted their concern that Ms. Gordon did not have appropriate services in place. However, DCF did not design or implement services appropriate to her disability-related learning style. Ms. Gordon is a visual learner who requires repetition, modeled behavior, and hands-on assistance. Thus, appropriate service plans would have included frequent in-home visits with continual assistance, such as by Kim Gordon, VOC staff, or a parent aide. Appropriate service plans would also have included opportunities to attend Dana's medical and Early Intervention Services appointments.

DCF's Service Planning and Referral Policy, # 97-003 at 239 (rev. 2000) (Service Policy) explains that "[s]ervice planning is a fundamental component of social work practice and is intended to be a dynamic, interactive process which involves the Department, family members, substitute care and other service providers." Every family receiving services from DCF must have a written service plan, which is a time-limited agreement between DCF and the family describing the tasks to be undertaken and the services to be provided in support of the goal of the service plan. *See* 110 C.M.R. § 6.01-6.03. The service plan goal identifies the purpose of DCF's involvement with the family and identifies the permanency plan for the child, which may be to stabilize an intact family, to reunify a family, or to establish an alternative permanent plan such as guardianship, adoption, care with kin, etc. *See* 110 C.M.R. § 6.04. For families with children in substitute care, service plans are required to identify the reasons for the child's current placement, efforts made by DCF and the family to prevent placement, family visitation, and tasks the family needs to complete to achieve the permanency goal. *See* 110 C.M.R. § 6.03-6.04. Service planning is required to occur when a case is opened and reviewed at least every six months. *See* 110 C.M.R. § 6.07-6.08. As noted, DCF provides numerous services directly and through contractual arrangements, and services are broadly defined to allow individualization for each case.

¹⁶ In *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001), the U.S. Supreme Court found under Title III's analogous reasonable modifications requirement that policies that facially restrict certain activities may need to be modified without working a fundamental alteration. Various federal courts have also found under Title II's reasonable modifications provision that it is not a fundamental alteration to provide in-home supports, even if it may carry significant expense and administration. *See, e.g., Pashby v. Delia*, 709 F.3d 307, 323-24 (4th Cir. 2013) (affirming preliminary injunction that state agency failed to reasonably modify a policy, implemented by statute, revoking in-home personal care assistance services for individuals with disabilities and placing them at risk of institutionalization, and finding that agency did not satisfy fundamental alteration defense based on budgetary arguments); *see also M.R. v. Dreyfus*, 663 F.3d 1100, 1121 (9th Cir. 2011); *Townsend v. Quasim*, 328 F.3d 511, 520 (9th Cir. 2003).

Once an ongoing social worker was assigned to Ms. Gordon's case, DCF implemented an emergency service plan on December 20, 2012, which required Ms. Gordon to "appropriately participate in visits" with Dana and work with a parent aide "to learn how to parent her child." While provision of a parent aide would have been (and indeed later was) an opportunity for Ms. Gordon to receive the hands-on, modeled behavior she needed, provision of a parent aide was delayed because DCF required Ms. Gordon to sign a consent form authorizing DCF to disclose her information before DCF would make a referral to The United Arc for parent aide services. Ms. Gordon's appointed counsel had concerns about the scope of information that could be disclosed between DCF and The United Arc based on the scope of the release. Thus, Ms. Gordon did not sign the form.

Although DCF's policies and regulations provide for a wide variety of services to be tailored to individual circumstances, while awaiting resolution of the problem with the consent form, DCF prevented Ms. Gordon from fully utilizing other assistance. Ms. Gordon was already working with staff from VOC outside of visits, and for parts of visits. However, DCF personnel insisted that only a parent aide from The United Arc would be appropriate, and VOC staff were not permitted to provide hands-on demonstrations during most visits. Nor would DCF permit Kim Gordon to provide Ms. Gordon hands-on assistance during the majority of visits. DCF's social worker also would only observe visits, with the occasional verbal prompts, which were not helpful to Ms. Gordon given her learning style.¹⁷

DCF's Service Plan for February 15, 2013-August 15, 2013, required Ms. Gordon to meet with DCF in her home once per month, participate in parenting classes at VOC, work with a parent aide, engage in individual counseling to "address stressors" and "cognitive limitations," participate in visits, and work with VOC staff. Ms. Gordon diligently complied with these requirements, with the exception of working with the parent aide because of the disagreement over the scope of the consent form. However, DCF still required Ms. Gordon to show that she could parent on her own *without assistance* during the majority of the supervised visits. DCF thus continued to hold her to a higher standard than necessary, to deny her a variety of available services, to insist on criteria and methods of administration that did not allow her to succeed because of her disability, and to fail to reasonably modify its practices. 28 C.F.R. § 35.130(b)(7).¹⁸ DCF's subsequent Service Plans were modeled on this February 15, 2013-

¹⁷ Ms. Gordon's objection to the DCF consent form does not provide a basis for DCF to refuse to provide appropriate services to her or to fail to reasonably modify its policies and practices to accommodate her disability. The ADA provides that an individual with a disability need not accept an accommodation, aid, service, opportunity, or benefit if she so chooses. 42 U.S.C. § 12201(d); 28 C.F.R. § 35.130(e)(1). However, such a refusal does not relieve a public entity of its obligations under the ADA. Even if DCF viewed Ms. Gordon's attorney's unwillingness to sign the consent form as Dana's non-cooperation, and as a basis to deny access to appropriate supports and services, DCF was required to offer and provide other reasonable services to Ms. Gordon that would have met her need to learn parenting skills in the interim.

¹⁸ DCF also insisted that Ms. Gordon submit to a neuropsychological evaluation in order to understand Ms. Gordon's "learning style." Ms. Gordon did not consent to the evaluation on the advice of counsel, but did provide access to information from her high school about her learning style. In addition, DCF had extensive information about Sara's learning style – including dozens of observations during visits where she regularly had difficulty following verbal directions. While DCF's Service Policy repeatedly notes that the requirements of a service plan are to be jointly created and subject to negotiation, there is also no requirement in DCF regulations or policies that an individual submit to a neuropsychological evaluation, DCF refused to reconsider and negotiate on the required task

August 15, 2013 plan and were similarly deficient to address the objectives that DCF had identified for Ms. Gordon.

DCF denied Ms. Gordon the opportunity for frequent, meaningful visitation with support to learn appropriate care for her daughter and to address the agency's concerns. This denied Ms. Gordon an equal opportunity to benefit from DCF's programs. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a). DCF is required to plan and promote regular and frequent visitation between children and their families consistent with their service plans. 110 C.M.R. § 7.128; Ongoing Casework Policy, Procedures, and Documentation, # 86-011 at 263-64 (rev. 1998).¹⁹ While, in most cases, visitation occurs once a week, DCF policy explicitly contemplates circumstances when it may be necessary to increase the frequency of visits between a parent and a child. For example, DCF policy indicates that the social worker and supervisor should consider more frequent child-family visitation based on the age of the child and the projected date for the child's return home (or other permanent placement). Given Dana's age, Ms. Gordon's learning through repetition, hands-on instruction, and frequency, and the goal of reunification, DCF should have provided frequent visitation. Instead, DCF denied Ms. Gordon and Dana's attorney's request for daily visits with Dana. DCF also refused to modify the requirements it placed on Ms. Gordon during visitation, even though Ms. Gordon attended all visits, was actively engaged in services, and regularly made DCF aware that she intended to do whatever was necessary to reunify with her daughter. The failure to provide frequent visitation denied Ms. Gordon an equal opportunity to benefit from DCF's programs. 28 C.F.R. § 35.130(a); 45 C.F.R. § 84.4(a).

of submitting to a neuropsychological evaluation. Notably, Dr. Brisson also explained in her Competence-Based Family Assessment that neuropsychological evaluations are often not conducted by individuals with specialized knowledge of parents with disabilities, they are standardized against a population that does not include appropriate norms or accommodations for parents with disabilities, and they often lead to improper conclusions. Dr. Brisson explained: "Parenting is a complex set of variables that cannot be reduced to simply tests. Instead the parents' learning style/ability is better evaluated through direct clinical observation." Brisson Evaluation at 22 (Oct. 24, 2014). As noted, Title II and Section 504 prohibit utilization of criteria or methods of administration that defeat or substantially impair accomplishment of program objectives for individuals with disabilities, and the failure to reasonably modify policies, practices, and procedures where necessary to avoid discriminating on the basis of disability. 28 C.F.R. § 35.130(b)(3)(ii), (b)(7); 45 C.F.R. § 84.4(b)(3)(ii), (b)(7). Though DCF had sufficient information, it continued to insist on the neuropsychological exam, so that the agency could understand her learning style and assess for any further services, well after its personnel reported to the Departments that they understood Ms. Gordon to have a visual, hands-on learning style. As recently as November 5, 2014, DCF reported that Ms. Gordon was partially out of compliance with her service plan, because she had not completed the evaluation, thus utilizing criteria (if a policy) or a method of administration (if a practice) in violation of this prohibition.

¹⁹ The American Bar Association has articulated the importance of frequent, meaningful, and individualized visitation between parents and children between 0-3 years of age. Among other things, frequent visitation strengthens the parent-child relationship, helps parents gain confident and learn and practice new skills, provides a setting for a caseworker or parent coach to suggest how to improve on interactions, and helps with the transition to reunification. See American Bar Assoc., *Visitation with Infants and Toddlers in Foster Care* at 6 (2007). The ABA recommends that child welfare agencies implement daily visits for parents and infants, and visits every two-to-three days for parents and toddlers, because "physical proximity with the caregiver is central to the attachment process." *Id.* at 11. The ABA similarly recommends that visits occur in the least restrictive, most natural setting while ensuring the safety and well-being of the child. *Id.*

DCF also refused to allow Ms. Gordon and Dana to visit in her home. Home visits are commonly allowed for parents pursuing reunification, particularly when they are supervised or there are no concerns with the home. Despite the fact that DCF at no time noted any concerns about the Gordons' home, Dana was only ever permitted at the Gordons' home once, and it was for Dr. Brisson's assessment – nearly two years after the initial removal. Because the Gordons' home was the best environment for Ms. Gordon's learning style, requiring that such visits to occur in an office setting, or even at VOC, was a failure by DCF to reasonably modify its practices. 28 C.F.R. § 35.130(b)(7).

On a few visits, Dana cried and Ms. Gordon could not console her. DCF staff repeatedly told Ms. Gordon that if she could not stop Dana's crying, they would end visits, and indeed ended visits without seeking to show Ms. Gordon how to console Dana. As implemented by DCF, these visits were neither suited to assisting Ms. Gordon to learn effective parenting, nor suited to assisting with reunification. Nor were they justified by legitimate safety concerns. Under the Title II regulation, public entities may impose safety requirements for the safe operation of their programs, but they must be legitimate and necessary. 28 C.F.R. § 35.130(h). DCF staff told us during interviews that they ended visits because they did not believe it was in the best interests of a child to cry for 20 or more minutes. This requirement was *unnecessary* because DCF staff could have attempted to console Dana before ending visits – an opportune teaching moment. Similarly, if Kim Gordon or VOC staff were permitted in visits, they could have done the same.

During visits, DCF expected Ms. Gordon – a first-time young mother with a developmental disability – to demonstrate independent proficiency in caring for her daughter. This expectation was wholly unrealistic given that Ms. Gordon's opportunities to practice with support were so limited. Even if it were DCF's general practice to require parents without developmental disabilities to demonstrate independent proficiency during visits, DCF was required to reasonably modify its practices here. 28 C.F.R. § 35.130(b)(7).

DCF also denied Ms. Gordon the opportunity to participate in and benefit from attending Dana's medical and Early Intervention Services sessions and thereby denied her an equal opportunity to benefit from DCF's programs. *See* 28 C.F.R. § 35.130(b)(1)(i), 45 C.F.R. § 84.4(b)(1)(i). Dana has fine and gross physical and speech developmental delays, and has received early intervention services, including medical screenings and weekly physical therapy sessions. DCF's policy on Health Care Services to Children in Placement, # 85-003 (rev. 1998), provides that “[p]arents should be encouraged to assume as much responsibility in the provision of health care as possible, especially if the goal in the Service Plan is reunification.”

Despite Ms. Gordon's repeated requests to attend these appointments so that she could learn how to respond to Dana's developmental delays, the records indicate that DCF permitted Ms. Gordon to attend only one medical appointment. Social workers either prevented Ms. Gordon from attending such appointments, or failed to make appropriate accommodations so Ms. Gordon could attend them. For example, DCF personnel repeatedly told Ms. Gordon and her advocates that Ms. Gordon and Kim Gordon were prohibited from participating in Dana's Early Intervention Services because the services were provided in the foster parent's home. DCF made no effort to move the location of the sessions despite the willingness of Early Intervention

Services personnel to do so. The Early Intervention program focuses, in part, on assisting parents in understanding the developmental needs of their children and in learning activities and strategies to help them grow. If DCF required Ms. Gordon to learn these specific parenting skills, the agency should have allowed her to participate in the program. The failure to do so provided Ms. Gordon an unequal opportunity to participate in and benefit from the guidance of Dana's healthcare providers, than was afforded to the foster family. 28 C.F.R. § 35.130(b)(1)(ii); 45 C.F.R. § 84.4(b)(1)(ii).

III. After DCF changed Dana's permanency goal to adoption, DCF failed to consider Ms. Gordon's continued engagement and progress.

Notwithstanding Ms. Gordon's active engagement and cooperation, on June 20, 2013 – seven months after the removal – DCF changed Dana's goal to adoption, and DCF subsequently initiated proceedings to terminate Ms. Gordon's parental rights. The stated reason for the goal change was Ms. Gordon's "cognitive limitations," and DCF's determination that Ms. Gordon was "not able to care" for Dana, and that Kim Gordon "does not seem to understand that [Ms. Gordon] cannot parent and has not intervened when [Ms. Gordon] has placed [Dana] at risk." DCF did not identify any instance where Kim Gordon failed to intervene, and indeed she was prevented by DCF from assisting her daughter during the majority of most visits. In making the goal change, DCF ignored the failure to provide a parent aide or any other supports mentioned above.

Under the ADA and Section 504, even if it changes the permanency goal to adoption, DCF had a continuing obligation to provide Ms. Gordon the opportunity to participate in and benefit from its aids, benefits, and services for reunification, 28 C.F.R. § 35.130(b)(1)(i); 45 C.F.R. § 84.4(b)(1)(i); *see also Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the State proves parental unfitness, the child and [her] parents share a vital interest in preventing erroneous termination of their natural relationship."). Notwithstanding these obligations, DCF reduced visitation to once every other week for one hour, thus further undermining Ms. Gordon's ability to learn parenting skills and address the agency's concerns.

Despite this permanency goal change, Ms. Gordon redoubled her efforts to acquire additional parenting skills. She attended all visits with Dana, worked with the parent aide to the extent DCF's funding would permit, and engaged in a number of parenting courses that significantly increased her parenting capacity.²⁰ In addition, Kim and Sam Gordon also continued to engage in services. Sam Gordon made himself available to DCF to resolve any unarticulated concerns of the agency. Kim and Sam Gordon regularly participated in a Grandparent Support Group aimed at helping grandparents strengthen families, identify

²⁰ For example, Ms. Gordon completed "Changing Courses," a 10-week course provided focused on stress, communication, and interpersonal skills for parents with children in DCF custody. Ms. Gordon has participated in a series of "Positive Parenting" classes, which covered the importance of routines for children, responding appropriately to children's emotions, and role modeling for children. Ms. Gordon also received certification in CPR-AED for adults, infants, and children by the American Heart Association. Ms. Gordon has participated in and facilitated a number of groups focused on parenting and regularly volunteers in her community. Ms. Gordon and Kim Gordon attended several "Parent Cafes" together, which are parent support groups that focus on a variety of parenting challenges.

resources and services, and learn about topics such as healthy nutrition, technology safety, substance abuse and recovery options, and more. They also attended a conference aimed at grandparents raising grandchildren through Worcester State University. During this conference, the Gordons spoke directly with DCF executive staff about this case.

DCF has repeatedly refused to change Dana's permanency goal back to reunification and is seeking to terminate Ms. Gordon's parental rights by citing "concerns" about Ms. Gordon's independent parenting ability. However, as discussed here, DCF itself thwarted Ms. Gordon's attempts to learn how to parent.

Ms. Gordon has had some visits where she has had difficulties. On one occasion, she bumped Dana's head three times during a visit, and during another when Dana was learning to roll over, Dana bumped her head. But Dana did not cry and did not have bruises from either incident. On a few other occasions, Ms. Gordon walked away from a changing table or lost focus on play equipment.

While the safety of the child is paramount, DCF did not provide available services, imposed unnecessary restrictions on the services that were provided, and failed to reasonably modify its practices to provide Ms. Gordon an opportunity to learn how to safely parent. As noted by Dr. Brisson, there is no current risk when Ms. Gordon's mother or a parent aide is permitted to assist her. Furthermore, DCF's obligation to individually analyze an individual with a disability is ongoing. DCF staff explained during the interviews, as well as in Dictation Notes and assessments, that Ms. Gordon's parenting skills increased over time, particularly in 2014 when she had a parent aide. Beyond all of this, Ms. Gordon has entered an agreement with her parents where they will take guardianship of Dana, so Ms. Gordon can be involved in her life.

DCF held Ms. Gordon to a standard for Dana that was not met in Dana's pre-adoptive foster care placement. DCF was aware of, and dismissed, numerous injuries to Dana, including a black eye, bumps, bruises, cuts, and burnt hands that occurred during the time in foster care. When Dana was only a few weeks old, she was left unattended on a table in the foster home.²¹

IV. DCF has failed to provide appropriate policies and training for social workers to understand their obligation to ensure the civil rights of parents with disabilities.

It is clear that the social workers involved in this case were not provided appropriate policies and training to guide their decision-making. DCF regulations provide that "[t]he Department recognizes the special needs of handicapped clients. The Department shall make reasonable accommodations to ensure that its services . . . are accessible to all handicapped persons." 110 C.M.R. § 1.08. But the agency has no procedures for social workers to implement

²¹ We note that DCF did not produce documents related to this incident in response to our request for information, dated August 20, 2014, for all records in DCF custody or control related to Dana, including all 51A Reports, and all records related to Dana's placement in a foster care or pre-adoptive home. DCF did not provide these documents during our interviews of DCF staff, where we specifically asked about a dictation note in their records that vaguely referenced this incident. These documents were withheld from production until mid-December 2014, and only after we specifically inquired as to what appeared to be missing documents.

or understand how this requirement applies to assessments, service planning and implementation, obligations during visits, the obligation to make reasonable modifications where necessary to avoid discrimination, and the imposition of legitimate safety requirements. Indeed, social workers involved in this case identified that services and supports were needed, but did not recognize how to implement them consistent with the requirements of Title II and Section 504.

While DCF does provide training concerning mental health issues, it does not provide formalized training concerning civil rights obligations related to individuals with disabilities, including training that would have assisted social workers in preventing the ADA and Section 504 violations identified in this letter.

The lack of procedures and training to guide social workers led to a focus on diagnoses and numbers, and assumptions and generalizations, and a failure to consider what services and modifications to policies and practices are appropriate to ensure an individual with a disability – in this case, Ms. Gordon – had an equal opportunity to fully benefit from DCF’s reunification program.

Minimal Remedial Measures

DCF should promptly implement the following minimal measures to remedy the deficiencies discussed above.

- Withdraw the petition to terminate Ms. Gordon’s parental rights.
- Immediately take all necessary actions to address the violations identified in this letter, including:
 - Implementation of services and supports appropriate to provide Ms. Gordon a full and equal opportunity to seek reunification consistent with and in consideration of the two years of violations identified in this letter; and
 - Once implemented for an amount of time appropriate for Ms. Gordon, an evaluation of the then-current functioning of the family based on the opinions of the experts, community-based service providers, and DCF’s Foster Care Review.
- Pay compensatory damages to Ms. Gordon in an appropriate amount for injuries suffered as a result of the DCF’s failure to comply with the law as set forth here.
- Develop and implement procedures addressing how ADA and Section 504 requirements apply to DCF programs, services, and activities, including assessments, service planning and implementation, visitation, and safety requirements.
- Implement a training program for all investigators, social workers, family resource workers, supervisors, and Area Program Managers on compliance with Title II and Section 504.

Conclusion

Please note that this Letter of Findings is a public document and will be posted on the Civil Rights Division's and OCR's website. We will provide a copy of this letter to any individual or entity upon request, and will share it with the complainants and other affected individuals who participated in our investigation.

Please also note that no one may intimidate, threaten, coerce, or engage in discriminatory conduct against anyone because he or she has taken action, assisted, or participated in an investigation to secure rights protected by the ADA and Section 504. *See* 42 U.S.C. § 12203; 28 C.F.R. § 35.134; 45 C.F.R. § 80.7(e)(incorporated by reference in the Section 504 implementing regulation at 45 C.F.R. § 84.61). Any individual alleging such harassment or intimidation may file a complaint with the Department of Justice or the Department of Health and Human Services. We would investigate such a complaint if the situation warrants.

We hope to be able to work with you and other officials in an amicable and cooperative fashion to resolve our concerns with respect to the Massachusetts child welfare system. Please contact William F. Lynch at (202) 305-2008 or William.Lynch@usdoj.gov of the U.S. Department of Justice and Susan M. Pezzullo Rhodes at (617) 565-1347 or Susan.Rhodes@hhs.gov of the U.S. Department of Health and Human Services by February 2, 2015 if you are willing to resolve this matter voluntarily in a manner that will bring DCF into compliance with Title II and Section 504.

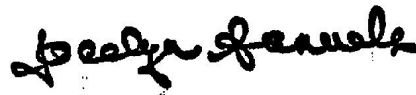
We are obligated to advise you that, in the event that we are unable to reach a resolution regarding our concerns, the Attorney General may initiate litigation pursuant to the ADA and Section 504 once we have determined that we cannot secure compliance voluntarily to correct the deficiencies identified in this letter. *See* 42 U.S.C. § 12131-34; 29 U.S.C. § 794; 42 U.S.C. § 2000d-1. We would prefer, however, to resolve this matter by working cooperatively with you.

If you have any questions regarding this letter, you may call William Lynch, Trial Attorney, U.S. Department of Justice.

Sincerely,



Vanita Gupta
Acting Assistant Attorney General
Civil Rights Division
U.S. Department of Justice



Jocelyn Samuels
Director
Office for Civil Rights
U.S. Department of Health and Human Services



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Cc:

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Patricia Casey, Deputy General Counsel
Counsel for Sara, Dana, Kim, and Sam Gordon