



DEPARTMENT OF HEALTH & HUMAN SERVICES

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OFFICE OF THE SECRETARY

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DEC 10 2014

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Atlanta, Georgia 30303

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Transaction Number: 09-102792

Dear [REDACTED]

The U.S. Department of Health and Human Services, Office for Civil Rights (OCR) Region IV has completed its investigation of the complaint filed by [REDACTED] (Complainant) against the Georgia Department of Human Services, Gwinnett County Division of Family and Children Services program. The complaint alleged that DFCS denied the Complainant's application to become a Foster-Adopt parent on the basis of her disability (Chronic Fatigue Syndrome and other health conditions).

Jurisdiction

OCR is responsible for determining the compliance status of recipients of HHS Federal financial assistance with Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and its implementing regulation at 45 C.F.R. Part 84 (Section 504), which prohibit discrimination on the basis of disability. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 et seq., and its implementing regulation at 28 C.F.R. Part 35 (ADA), as they apply to all programs and activities of state and local government entities, regardless of whether they are recipients of Federal financial assistance.

The Georgia Department of Human Services (DHS), Division of Family and Children Services (DFCS), receives Federal financial assistance from the Administration for Children and Families, U.S. Department of Health and Human Services (HHS). As a recipient of Federal financial assistance, DHS/DFCS is obligated to comply with Section 504. As an instrumentality of the state of Georgia responsible for administering the State's foster/adoptions programs, among others, DHS/DFCS also constitutes a public entity covered under Title II of the ADA.

Background

DHS is the state agency that is responsible for the delivery of health and social services in the state of Georgia. Designated by law to administer Georgia's foster care and adoption programs, DHS develops standards for public and private child placing agencies through DFCS and the Office of Regulatory Services.¹ DFCS, through its county offices, serves as the public child placing agency providing temporary and permanent homes for children. DFCS placements include regular family foster homes, relative foster homes, and Foster-Adopt homes.²

DFCS provides an array of supportive services to foster parents including financial assistance, medical coverage, specialized services, and respite care. Respite care is a support service for foster parents who require some "time away" from their parenting responsibilities and may involve overnight care or day care. Children in DFCS approved foster homes and Private Agency foster homes are eligible for this service.

To obtain full approval as a family foster home, prospective parents must meet specific DHS minimum standards. These include: evidence of maturity; stability; fitness; and skills and competency to successfully protect, nurture, and meet the developmental needs of children. Prospective parents must support the agency's established case goals and permanency plan for children placed in their care and be at least ten (10) years older than children to be placed (and, if unmarried, at least 25 years of age). Prospective parents must also successfully complete mandatory safety checks, Orientation, Pre-service Training, and a Family Assessment.

Safety checks include: fingerprint checks with the Georgia Crime Information Center (GCIC) and the National Crime Information Center (NCIC); checks with Child Protective Services (CPS), the Sexual Offenders Registry, the State Board of Pardons and Parole, the Georgia Department of Corrections, and the child abuse and neglect registry in any other state in which the prospective foster/adoptive parent or any adult household member over eighteen has resided within the past five years; and completion of a Health Exam. Orientation provides basic information to help prospective parents decide whether to pursue fostering and/or adoption. Pre-Service training is DHS' comprehensive training program which prepares prospective parents for fostering and adoption. Prospective parents must successfully complete training as a condition to licensing and demonstrate at least minimal mastery and internalization of the skills and competencies presented during

¹Private agencies providing foster care services are licensed by DHS through the Office of Regulatory Services.

²Regular family foster homes provide temporary care for children who have a range of parenting needs. Relative Foster Homes are placements with relatives who must meet the same requirements as regular foster parents. Foster-Adopt homes are approved placements of a specific child for whom the established goal is adoption. Such placement resources must demonstrate the skills required in carrying out the role and responsibilities of a foster-adopt resource. Foster-adopt homes must meet the regular standards of care required for approved family foster homes and any conditions specified in that approval.

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the training. At the end of the course, participants are evaluated to determine whether they meet the minimum standards for parenting.

The Family Assessment/Family Home Evaluation is a comprehensive evaluation of prospective parents who choose to continue with the licensing process after the first Pre-Service training session. Recommendations made in this report are based on trainer observations, information obtained during the training sessions, and consultations with the prospective parents.

If a prospective foster parent is unable to meet one or more of the requirements within the approval process, DHS policy grants the DFCS County Director discretion to waive a minimal number of requirements as long as the home can provide the expected level of care based on the needs of a child.

Complainant is diagnosed with Chronic Fatigue Syndrome, immune dysfunction, Fibromyalgia, cervical lumbar radiculopathy, and mild depression secondary to chronic illness. Complainant filed an application with DFCS to become a Foster-Adopt parent in 2006. Complainant successfully completed foster parent Orientation and Pre-service Training.³ A Family Assessment/Family Home Evaluation was completed by DFCS indicating that Complainant met the minimum standards to become a Foster-Adopt parent. Complainant's application was forwarded to senior DFCS officials for review. The officials denied Complainant's application to become a Foster-Adopt parent, citing concerns about Complainant's ability to meet the needs of children in foster care. Specifically, DFCS officials concluded that because Complainant's health conditions prevented her from working, she was not capable of meeting the daily needs of any child in foster care.

Complainant filed a complaint with OCR on [REDACTED] 2007, alleging that DFCS denied her application to become a Foster-Adopt parent based on her disabilities. OCR investigated the complaint (OCR Transaction Number 07-63233) and concluded that DFCS' decision was not grounded in discrimination. OCR found that DFCS' evaluations suggested that Complainant's health conditions would limit her ability to safely care for children in foster care. Complainant filed a request for reconsideration challenging OCR's determination. Complainant maintained that documentation from her treating medical providers supported her application to be a Foster-Adopt parent. After additional consideration, OCR decided to conduct a supplemental investigation (OCR Transaction Number 09-102792).

³A DHS Pre-Service training evaluation form, dated [REDACTED] 2006, certified that Complainant met the Minimum Standards to become a Resource Parent. Complainant also received a certificate of completion for the Pre-Service training.

Parties' Positions

Complainant's Position

In both her original complaint and request for reconsideration, Complainant asserts that DFCS' decision to deny her application to become a Foster-Adopt parent was based on assumptions and stereotypes about her disabilities, rather than the findings of an individualized assessment. Complainant states that despite having successfully met all of DHS' requirements to become a Foster-Adopt parent, DFCS determined that her health conditions were a permanent barrier to her ability to safely care for any child in foster care. Complainant asserts that medical documentation presented to DFCS contradicts the agency's assertions. Complainant also alleges that DFCS bolstered its conclusion that Chronic Fatigue Syndrome (CFS) made her an inappropriate caregiver by distorting a comment she made about taking naps. Complainant takes particular exception to DFCS' position that she could not safely care for children because CFS causes her to have difficulty remaining awake. Complainant contends that the inability to stay awake is not a symptom associated with CFS but a symptom attributed to narcolepsy, a neurological disorder. Complainant explains that she was not diagnosed with narcolepsy nor does she experience symptoms associated with narcolepsy. Complainant suggests that DFCS' failure to appreciate the distinctions between the two disorders is evidence of the agency's failure to rely on an individualized assessment rather than stereotypes. Complainant states that while she does on occasion take naps to alleviate symptoms of CFS, this is not equivalent to a pattern of uncontrollable napping as suggested by DFCS. Complainant states that napping is only one technique she has developed over the last 13 years to manage CFS. Complainant also takes medication and employs behavioral modification techniques to manage her conditions.

Complainant also alleges that DFCS disregarded favorable medical evidence that supports her application. Complainant's health care providers submitted medical reports which described Complainant's health conditions and certified that there were few limitations to her ability to care for children. Complainant argues that DFCS' determination that her disabilities barred her from caring for any child ignores the findings of her treatment providers in favor of the speculative opinions of DFCS non-medical personnel. Further, Complainant contends that because DFCS relied on preconceived assumptions that her disabilities were too severe for her to serve as a Foster-Adopt parent, the agency never attempted to contact her providers to clarify its concerns or to determine whether supportive services provided to other foster parents could address its concerns.

Covered Entity's Position

DHS' position statements set out the basis for the DFCS' decision to deny the Complainant's application to become a Foster-Adopt parent. DHS concluded that Complainant's health conditions were so debilitating that the agency could not approve her to become a Foster-Adopt parent. The agency cited the findings of its assessments, medical documentation, and Complainant's receipt of Social Security disability benefits

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as factors that support its determination that Complainant would be unable to meet the physical and emotional needs of children placed in her care. DHS stated that it considered categories of children and their unique needs in concluding that Complainant was unable to care for any child in foster care.

DHS asserted that Complainant's application was not denied because she has a disability, but because CFS could interfere with her ability to take care of a foster child placed in her home. The agency stated that after reviewing the Complainant's medical documentation, DHS did not feel that Complainant would be able to meet the demanding physical and emotional needs of any then-current foster care children. In its response to OCR, DHS explained that foster parents must be able to physically meet the everyday, all day, challenges of fostering. DHS emphasized that if it is determined that the potential foster parent does not meet the minimum standards necessary to protect the child, then it is in the best interest of the child that the applicant not serve as a foster parent.

The agency also provided statements of DFCS officials who participated in the decision to deny Complainant's application. The statements reflected the agency's concerns about the Complainant's health conditions and her ability to parent children.

Legal Standard

As a public entity and recipient of HHS funds, DHS has an affirmative obligation to ensure that all of its programs, services and activities, including DFCS, operate in compliance with the ADA and Section 504. The obligations set forth in the ADA and Section 504 regulations illustrate the scope of the statutory non-discrimination and equal opportunity requirements. These obligations are not independent, but rather, operate to implement the ADA and Section 504.

Under the ADA and Section 504, the term "disability" means, with respect to an individual, a physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. The ADA and Section 504 provide that no qualified individual with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination by a covered entity. 45 C.F.R. § 84.4(a).

Under the ADA and Section 504, DHS, must provide a qualified individual with a disability with an equal opportunity to participate in and benefit from all of its programs, services, and activities. The determination of whether an individual is "qualified" requires a review of the essential eligibility requirements of the program and an individualized assessment of the specific abilities of the individual and the manner in which the individual may be able or enabled to meet those requirements, with or without reasonable modifications. An adequate individualized assessment must be fact-based and cannot rely on unfounded preconceptions or stereotypes about the individual's disability.

Under the ADA and Section 504, DHS may not deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service related to fostering and adopting on the basis of disability. 28 C.F.R. § 35.130(b) and 45 C.F.R. § 84.4(b). DHS may not use criteria or methods of administration that have the effect of subjecting a qualified individual with a disability to discrimination on the basis of disability or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of DHS' fostering and adoption programs and activities with respect to the Complainant, an individual with a disability. 28 C.F.R. § 35.130(a), (b)(1)(i)-(iii), and (b)(3), and 45 C.F.R. § 84.4(b)(4). In addition, the ADA requires public entities 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 constitute an undue burden or would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7).

There is no dispute that Complainant has a disability or that the agency regarded her as having a disability. At issue is whether the Complainant is a "qualified individual with a disability" entitled to protections under the ADA and Section 504. To be qualified, the individual with a disability must meet the essential eligibility requirements for receipt of services or participation in a public entity's programs, with or without reasonable modifications to a public entity's rules, policies, or practices. The "essential eligibility requirements" for participation in many activities of covered entities may be minimal or may be quite stringent. A covered entity may not, however, impose "eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program or activity, unless such criteria can be shown to be necessary" for the provision of the service, program, or activity. 28 C.F.R. § 35.130(b)(8). Legitimate safety requirements necessary for the safe operation of an entity's programs, services, and activities must be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities." 28 C.F.R. § 35.130(h). The determination that a person who poses a significant risk to others will not be a qualified individual "may not be based on generalizations or stereotypes about the effects of a particular disability." Instead, it must be based on "an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence."⁴

Discussion and Analysis

DHS' position statements do not specifically address the issue of whether Complainant is a qualified individual with a disability. Instead, the agency simply asserts that Complainant's application was denied because her disabilities prevented her from safely caring for children. Although DHS acknowledged that there are no specific physical requirements for foster and adoptive parents, the agency asserts that Complainant's medical conditions, history of depression, and need for ongoing counseling indicated that she was not "fit" to meet the physical and emotional needs of children. It also asserts that

⁴28 C.F.R. Part 35, Appendix B, discussion of "qualified individual with a disability."

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Complainant's receipt of Social Security disability benefits was another indicator that she was too disabled to care for children. DHS' statements indicate that it determined that Complainant did not meet the essential eligibility requirements for foster parents, which include "fitness" and the ability to "protect, nurture, and meet the developmental needs of children." Thus, DHS' denial of Complainant's application was based on a determination that she was not qualified because it believed she could not safely care for children.

OCR's review of the evidence supports a finding that DHS' conclusions were unreasonable and not based on an individualized assessment which relied on current medical evidence of Complainant's abilities. Instead, the record strongly indicates that DHS' conclusions were grounded in unsupported layman's opinions about Complainant's health conditions and stereotypes about individuals with disabilities. Statements provided by DFCS officials were replete with stereotypical assumptions about how Complainant's daily activities are affected by CFS and did not reflect or take into account Complainant's statements about her actual abilities.

For example, DFCS officials concluded that CFS prevented Complainant from caring for teenage mothers and their infants because Complainant would have "too much responsibility for supervision of the infant and not be able to provide the necessary supervision if her fatigue was truly as chronic as presented in the documentation." Similarly, a DFCS staff member stated that Complainant's plan to sleep while the children were at school was rejected based on the group's consensus that "this disorder results in one being constantly fatigued." A DFCS official who reviewed Complainant's assessment said she had concerns about Complainant's ability to foster small children "with her Chronic Fatigue Syndrome based on [Complainant's] statements that she often had difficulty remaining awake." But the Complainant never said she had difficulty staying awake; nor did she say she was constantly fatigued. Instead, the Complainant said that she has joint and muscle pain and copes with her CFS symptoms by taking naps. In addition, DFCS' statements ignore favorable references, which document Complainant's record of providing care for her friends' children and her elderly parents, and medical evidence from Complainant's health care providers that addresses the effect of CFS and other health conditions and demonstrates that she is qualified to care for children.

OCR reviewed the materials DHS/DFCS utilized to gauge Complainant's fitness. These were a Form 36 Medical Report; a statement from Complainant's psychologist; a mental health questionnaire; a Resource Family Home Evaluation; and the findings of a Stress Test.

DHS' mandatory medical report, "Form 36", describes the current health, medical history, and a medical opinion of an applicant's physical capabilities. Complainant's medical report indicated that she was physically capable of parenting except with respect to providing care to medically fragile children and those who required continuous lifting. The report also stated that Complainant did not have any physical or cognitive limitations that would prevent her from parenting. Subject to the above limitations, the report explicitly supports Complainant's application to become a Foster-Adopt parent.

OCR also evaluated two mental health related documents that DFCS utilized to evaluate Complainant's application. The first document, a letter provided by Complainant's psychologist, described his treatment of Complainant and offered a professional opinion on whether Complainant could serve as a Foster-Adopt parent. In his statement, the psychologist explicitly stated that Complainant's diagnosis of mild depression was not a barrier to her ability to care for children. He described the scope of his treatment with Complainant as focusing on adjustment to life events, including living with chronic illnesses and the death of her parents. The psychologist concluded that Complainant "has the stability and coping skills to serve successfully as a foster or adoptive parent." The second document, a mental health questionnaire, did not indicate any findings that suggest Complainant's conditions would impact her ability to parent children.

The Resource Family Home Evaluation, a comprehensive in-home evaluation of prospective resource parents, covers a range of topics including the prospective parents' personal history, religious preferences, and childrearing philosophies. The Complainant's evaluation details how she manages her health and describes her child care plan during instances when she may experience symptoms associated with her disabilities. Complainant indicated that she would nap if necessary and if needed, she would ask that her approved resources provide her with temporary respite. The unsigned evaluation concludes with a recommendation that DFCS approve Complainant as a foster/adoptive parent.

The results of Complainant's Stress Test also support Complainant's argument that CFS was not a barrier to Complainant serving as a foster/adoptive parent. The "Stress Scale" test measures prospective parents' stress tolerance level. This test was adapted from the Social Readjustment Rating Scale (SRRS) tool created by psychiatrists, Thomas Holmes and Richard Rahe. In its original format, the tool was designed to quantify an individual's level of stress and correlate this to physical illness. DHS' adaptation indicates that if an individual has experienced total stress within the last 12 months of 250 or greater, even with normal stress tolerance, the individual may be "overstressed." Persons with low stress tolerance may be "overstressed" at levels as low as 150. The Complainant's Stress Test score of [REDACTED] shows that she was not "overstressed" and supports a finding that she could safely provide care for a child or children.

OCR also rejects DHS' assertion that Complainant was not fit to care for children by virtue of her receipt of Social Security disability benefits. The Social Security Act's (SSA) definition of disability is inherently different from the ADA's definition. The SSA definition focuses on whether a person is unable to engage in any gainful employment by reason of any medically determinable impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. Also, the SSA definition does not consider whether the individual can work with reasonable accommodations. The focus is on an applicant's ability to work without accommodations.

In contrast to the SSA disability determination, the ADA requires an individualized inquiry into Complainant's ability to parent a child, not obtain gainful employment. In addition, the ADA requires DHS to consider whether reasonable modifications would allow an otherwise qualified individual with a disability to fully participate in its program unless such modifications would require the entity to fundamentally alter its program. Because of the different nature of the SSA inquiry, the fact that Complainant had been deemed eligible for Social Security disability benefits is not dispositive on the determination of whether she was a qualified individual for purposes of DHS' foster-to-adopt program.

There is also nothing in the record to suggest that DHS considered providing Complainant with program supports that are available to foster parents without disabilities. Instead, the record demonstrates that DFCS officials were resolute in their position that there were no circumstances under which Complainant could be approved to care for children. For example, one staffer remarked "you can make accommodations, but children get sick and are up all night, there are weekends, spring and summer breaks from school. As a parent, it is not always possible to nap during the day, or get full night's sleep." Another remarked that Complainant could not be approved based on "overwhelming concerns" that she would not be able to adequately supervise "any child placed in her home." DHS' statements show a concern for the possibility that the Complainant would need help to care for a child at times, due to fatigue caused by her disability, and DHS' statements suggest that this possibility made her unfit to parent.

DHS' position in this matter, however, conflicts with its own policies regarding the provision of supportive services for foster parents who may be temporarily unable to provide supervision or care for children. DHS policy 1015.19, Special Safety Issues in Foster Homes, allows foster parents to use substitute caregivers for occasional, short-term, as well as routine in-home/out-of-home childcare. The policy also authorizes the use of respite care when foster parents need time away from their parenting responsibilities or are otherwise unable to provide for the child's care in the home. The availability of these services demonstrates recognition of the possibility that qualified foster parents may need assistance in caring for children. DHS practice is also to allow parents to use childcare, if they work, or to use the assistance of approved resources, such as friends or family, who have been screened and trained.

Conclusion

OCR's review of the available evidence finds that Complainant was a qualified individual with a disability. The evidence shows that Complainant's treating professionals deemed her capable of parenting a child, so long as the child did not have special needs and did not need to be constantly lifted. DHS' own assessments, which include the "Form 36" Medical Report; a statement from Complainant's psychologist; a mental health questionnaire; a Resource Family Home Evaluation; and the findings of a Stress Test, provide evidence that Complainant met the minimum eligibility requirements to become a Foster/Adopt parent. Also, DHS approved Complainant's child care plan, which addressed concerns or barriers caused by her disabilities. OCR's conclusion is also

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supported by the fact that, after being denied by DFCS, Complainant applied and was approved to be a foster parent for two children of any age by Georgia Mentor, a private child-placement agency. Complainant has successfully served as a respite placement for foster children since 2007.

OCR finds that rather than relying upon the assessments and documentation usually used to determine eligibility determinations, DHS' conclusion that Complainant was unable to parent or foster any child was based on assumptions and stereotypes about the Complainant's disabilities. In addition, OCR finds that DHS treated Complainant differently, in that the agency failed to consider whether supportive services that are offered to other foster parents would have addressed their concerns and allowed Complainant to participate in the program.

For the reasons stated above, OCR finds that DHS' denial of Complainant's application to be approved as a Foster-Adopt parent based on her disabilities violates 28 C.F.R. §35.130(a), (b)(1)(i) and 45 C.F.R. §84.4(a), (b)(1)(i). Similarly, by improperly using disability as a criteria to make placement decisions, DHS treated Complainant differently on the basis of disability in determining whether she could adequately parent and afforded her different opportunities on the basis of disability in violation of 28 C.F.R. §35.130(b)(1)(i-iv) and (b)(3), and 45 C.F.R §84.4(b)(1)(ii), (b)(iv) and (b)(4). Lastly, DHS did not make reasonable modifications to its policies, practices and procedures in violation of 28 C.F.R. § 35.130(b)(7).

In order to remedy the violation outlined above, DHS must enter into a written settlement agreement with OCR that defines the specific steps DHS will take to resolve each of the deficiencies noted in this letter. In addition to specific actions DHS will take, the written agreement must provide implementation dates for each action.

DHS has **thirty (30) calendar days** from the date of this letter to respond and **sixty (60) calendar days** from the date of this letter to negotiate a settlement agreement with OCR. To that end, we have enclosed a proposed settlement agreement for your consideration. If compliance has not been secured by the end of the sixty-day negotiation period, OCR may initiate formal enforcement action by commencing administrative proceedings, or by other means authorized by law. These proceedings could result in the termination of Federal financial assistance to the recipient.

Advisements

Please be advised that DHS may not retaliate, intimidate, threaten, coerce or discriminate against an individual because she has filed a complaint or participated in any manner in the investigation of this complaint. Individuals who believe they are being subjected to such discriminatory or retaliatory conduct may file a complaint with OCR.

OCR may publish this letter and may be required to release related case material , to any person upon request, consistent with the requirements of the Freedom of Information Act, 5 U.S.C. § 522, and its implementing regulations, 45 C.F.R. Part 5. In the event

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OCR receives such a request, we will make every effort permitted by law to protect information that identifies individuals or that, if released, would constitute an unwarranted invasion of privacy.

We appreciate your cooperation regarding this matter. If you have any questions regarding this letter or OCR's proposal, please contact **[REDACTED]**.

Sincerely,

/s/

[REDACTED]
Regional Manager

Encl: Draft Settlement Agreement