

Representing Parents with Disabilities: Strategies & Solutions



Honorable Marguerite Downing
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Agenda

- ▶ Parenting with a Disability: Past & Present
- ▶ Disability Law & Child Welfare
- ▶ DOJ/HHS Letter of Findings (“Sara Gordon” case)
- ▶ DOJ/HHS Technical Assistance
- ▶ *In re Hicks/Brown*
- ▶ *Watley et al. v. Katz*
- ▶ Representing Parents with Disabilities: Strategies & Solutions
- ▶ ABA Resolution
- ▶ Q & A;



Parenting with a Disability: Past & Present



Parenting with a Disability: Historical Perspective

▶ Involuntary sterilization

- ▶ 30 states legalized compulsory sterilization of those perceived “socially inadequate”
- ▶ *Buck v. Bell*, 274 U.S. 270 (1927)
- ▶ By 1970, more than 65,000 Americans were sterilized

▶ Restrictions on marriage

- ▶ In 1974, ~40 states had laws forbidding people with disabilities, mostly intellectual or psychiatric disabilities, from marrying
- ▶ As of 1997, 33 states still had statutes limiting or restricting people with intellectual or psychiatric disabilities from marrying
- ▶ Three rationalizations, all which are akin to those raised during the eugenics era, have been traditionally advanced to justify this restriction: children must be protected, people with disabilities must be protected, and society-at-large must be protected

Parenting with a Disability Today: The Eugenic Movement's Backdoor?

- ▶ 26 years after the passage of the ADA...
- ▶ *Buck v. Bell* has never been overturned
- ▶ Several states still have some form of involuntary sterilization laws on their books
- ▶ Today, women with disabilities contend with coercive tactics designed to encourage sterilization or abortions because they are deemed not fit for motherhood
- ▶ Pervasive myth that people with disabilities are either sexually unwilling or unable

Parenting with a Disability Today

- ▶ Removal rates of parents with psychiatric disabilities are as high as 70-80%
- ▶ Removal rates of parents with intellectual disabilities are as high as 80%
- ▶ Extremely high removal rates and loss of parental rights for parents with sensory or physical disabilities
- ▶ More than two-thirds of dependency statutes include disability as grounds for termination of parental rights (TPR)
- ▶ In every state, disability may be considered when determining the best interest of a child for purposes of a custody determination in family or dependency court

Parenting with a Disability Today

- ▶ Parents with disabilities are more likely to lose custody of their children after divorce
- ▶ Prospective adoptive parents with disabilities regularly encounter barriers erected by discrimination and bias
- ▶ People with disabilities face significant barriers to receiving assisted reproductive technologies



Who are Parents with Disabilities and Their Children?

- ▶ At least 4.1 million parents with reported disabilities in the United States have children under age 18; meaning that at least 6.2 percent of American parents who have children under age 18 have at least one reported disability.
- ▶ Estimates indicate 6.1 million children in the U.S. have parents with disabilities - Nearly 1 in 10, almost 10% of the population.



Source: Kaye, H. Steven. (2012). *Current Demographics of Parents with Disabilities in the U.S.* Berkeley, CA: Through the Looking Glass.

The Child Welfare System & Parents with Disabilities

▶ Recurring barriers include:

- ▶ State statutes that include disability as grounds for TPR
- ▶ Disparate impact of certain provisions of the ASFA
- ▶ Perceived limits on the application of the ADA, especially at the termination phase
- ▶ Bias and speculation
- ▶ A lack of training regarding parents with disabilities

Disability NOT
Considered
when
Terminating
Parental
Rights

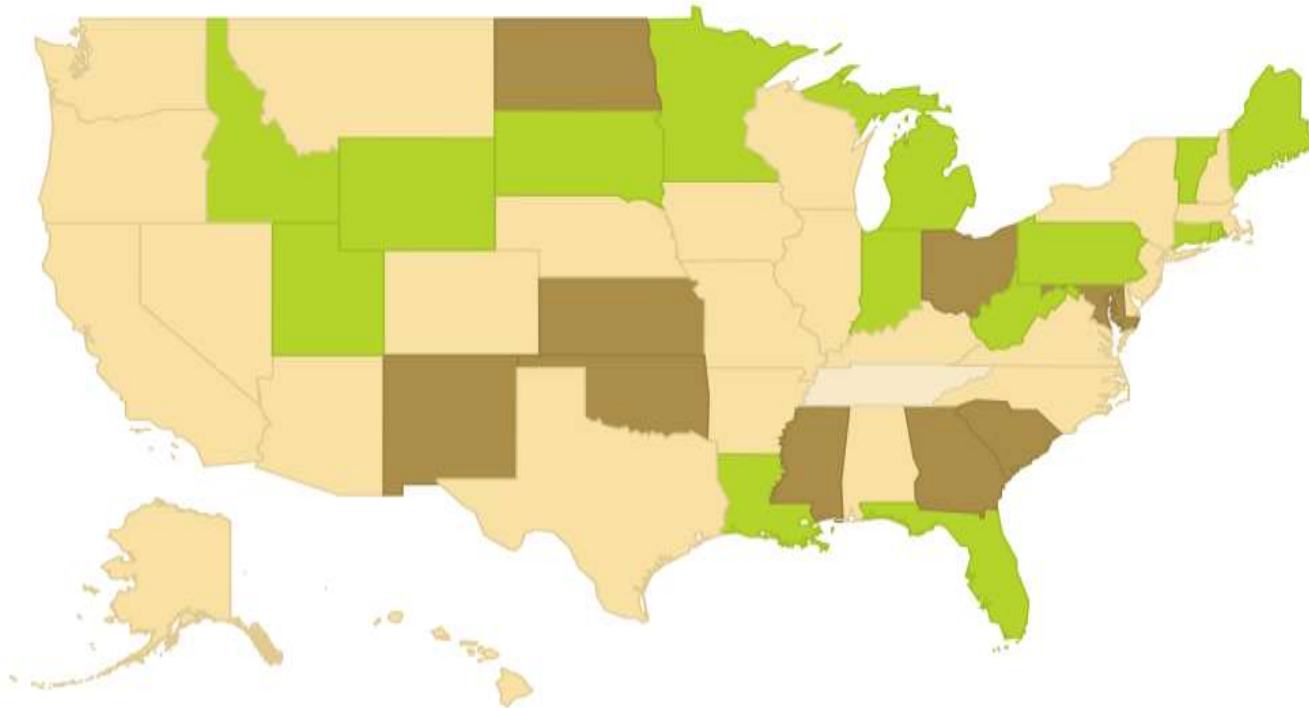
Intellectual/
Developmental
Disability
Considered
when
Terminating
Parental Rights

Mental Illness/Emotional
Disability &
Intellectual/Developmental
Disability Considered
when Terminating Parental
Rights

Mental Illness
and Physical
Disability
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Rights

Mental Illness/Emotional
Disability &
Intellectual/Developmental
Disability & Physical
Disability Considered
when Terminating Parental
Rights

 District of Columbia
(not available on main map)



Disability Law & Child Welfare

- ▶ Both the ADA and Section 504 of the Rehabilitation Act (for agencies receiving federal funding) apply to the child welfare system.
- ▶ The ADA was passed with the intent of ensuring “full and equal opportunity” for Americans with disabilities.



Rehabilitation Act (Section 504) - 29 U.S.C. § 794

- ▶ “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).

Who is a Person with a Disability Under ADA and Section 504?

- ▶ Three ways to meet definition:
 - ▶ Physical or mental impairment that substantially limits one or more major life activities;
 - ▶ A record of such an impairment; or
 - ▶ Being regarded as having such an impairment.
- ▶ Major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and major bodily activities.
- ▶ Major bodily activities: immune system functions, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Substance Abuse and the ADA

- ▶ Drug addiction is an impairment under the ADA. A public entity, however, may base a decision to withhold services or benefits in most cases on the fact that an addict is engaged in the **current** and illegal use of drugs.
- ▶ "Current use" is the illegal use of controlled substances that occurred recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem.
- ▶ Title II prohibits discrimination against drug addicts based solely on the fact that they previously illegally used controlled substances.

Americans with Disabilities Act (ADA)

- ▶ Title II applies to public entities, which include state and local governments, and their departments and agencies 42 U.S.C. § 12131(1)
- ▶ Accordingly, the child welfare system must comply with Title II's mandate: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12131 *et seq.*

The ADA, Continued...

Child welfare agencies must...

- ▶ Provide parents with disabilities an **equal opportunity** to participate in programs, services, and activities, including **reasonable modifications**, unless such modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)
- ▶ Administer services, programs, and activities in the **most integrated setting** appropriate to the needs of qualified parents with disabilities. 28 C.F.R § 35.130(d).
- ▶ **Not impose or apply eligibility criteria** that screen out or tend to screen out any parents with a disability from fully and equally enjoying any service, program, or activity...28 C.F.R. § 35.130(b)(8).

The ADA, Continued...

Child welfare agencies must...

- ▶ Furnish **auxiliary aids and services** when necessary to ensure effective communication. 28 C.F.R. § 35.160(a)(1),(b)(1), 28 C.F.R. § 35.164.
- ▶ Provide, as needed, benefits, services, or advantages **beyond those required by the regulation**. 28 C.F.R. § 35.130(c).
- ▶ **Not impose surcharges** on parents with disabilities to cover the costs of measures to ensure nondiscriminatory treatment. 28 C.F.R. § 35.130(f).
- ▶ **Not deny** the benefits of programs, activities, and services to parents with disabilities because entities' facilities are inaccessible. 28 C.F.R. § 35.149.
- ▶ Provide services, programs, and activities that, when viewed in their entirety, are **readily accessible to and usable by** parents with disabilities. 28 C.F.R. § 35.150.

What are “services, programs, and activities” and “aids, benefits, services?”

Virtually anything a public entity does, including “family preservation services” and “family support services” under 42 U.S.C. § 629a:

- Investigations
- Removals
- Referrals to services
- Service planning
- Visitation
- Meetings
- Reunification
- Adoption
- Guardianship
- Foster care
- Communications
- Safety planning
- Mentoring and teaching
- Assessments
- Pre-placement services
- Counseling
- Domestic violence assistance
- Temporary child care/respite
- Therapeutic services for families
- Peer-to-peer mentoring
- Support groups
- Transportation
- Follow-up support after reunification

Individualized Assessment

- ▶ 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).
- ▶ "Such 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.
- ▶ Diagnosis and quantitative evaluations versus competence and opportunity.
- ▶ Individualized services considering manifestation of disability, adaptive techniques, individualized training, hands-on practice, adapted equipment and devices, and other appropriate accommodations.
- ▶ Continuing obligation.

Exceptions / Defenses

- ▶ Fundamental Alteration
- ▶ Undue Financial and Administrative Burdens
- ▶ Direct Threat
- ▶ Legitimate Safety Requirements

The ADA: Limits and Lessons

- ▶ Discrimination against parents with disabilities was an issue documented during congressional hearings on the ADA at passage.
- ▶ Almost every case has found that the ADA is not a defense to termination of parental rights.
- ▶ There seems to be a misconception that Title II does not therefore apply to child welfare practice.
- ▶ Reasonableness: “Agencies must make reasonable modifications in policies, practices, or procedures, unless such modifications would fundamentally alter the nature of the service, program or activity.” 28 CFR § 35.130(b)(7). Onus on the state to show why not reasonable.
- ▶ Equal Access: Also must provide people with disabilities an equal opportunity to participate in programs, services and activities.” 28 CFR § 35.130(b).
- ▶ Broadness: “The ADA’s broad language makes no exception for activities that implicate strong state interests.” *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 2006 (1998).

DOJ/HHS Letter of Findings ("Sara Gordon" case)

- ▶ January 29, 2015 Letter of Findings to DCF
- ▶ Mother with I/DD, lost custody of newborn
- ▶ State violated ADA and Section 504
- ▶ State must provide mother appropriate supports and opportunity to demonstrate fitness
- ▶ Available at http://www.ada.gov/ma_docf_lof.pdf
- ▶ Family was reunited after 2 years, 3 months, and 12 days!



DOJ/HHS Technical Assistance

- ▶ August 10, 2015
- ▶ Overview of the issues and application of ADA and Section 504
- ▶ Answers to specific questions and implementation examples for child welfare agencies and courts
- ▶ Resources to consult for additional information.
- ▶ Available at http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf

How to File Complaints with DOJ & HHS

- ▶ DOJ - Civil Rights Division, Disability Rights Section

- ▶ http://www.ada.gov/filing_complaint.htm

- ▶ HHS - Office for Civil Rights

- ▶ <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf>

In re Hicks/Brown, 2016 WL 1650104, (Michigan Court of Appeals, April 26, 2016)

- ▶ Mother with intellectual disability, never provided reasonable accommodations.
- ▶ Reversed TPR and held that the agency and the court have a responsibility to ensure that a parent's disabilities are reasonably accommodated if they know of or should know of the disabilities.
- ▶ Hence, it places the responsibility on the courts and agency to ensure that the parent's disability is properly evaluated and accommodated
 - ▶ Before, the parent had to raise the ADA or its protections were deemed waived.
- ▶ Can be a model for decisions in other states? Hopefully.

Watley et al. v. Katz, 3:13-cv-01858

2nd Circuit Court of Appeals

- ▶ 11-year fight in Connecticut
- ▶ Children removed based on “predictive neglect”
- ▶ Parents have mental health diagnoses
- ▶ Parental rights terminated
- ▶ Children placed in foster care and later adopted
- ▶ Did DC violate the ADA by failing to provide reasonable accommodations?
- ▶ Seeking monetary damages

*I represent a disabled
parent...*

What do I do?

Tips for Representing Parents with Disabilities

- ▶ Screen every client for disability.
- ▶ Connect the parent with appropriate disability services (e.g., local Center for Independent Living) that can provide assistance with housing, employment, transportation, personal assistance services, and financial or health benefits.
- ▶ Make sure the parent receives an adapted parenting assessment by someone with experience evaluating parents with disabilities.
- ▶ Help the parent make a claim under the ADA as soon as possible. A parent may make an ADA claim by demonstrating that he or she is a qualified person with a disability who requires a reasonable accommodation of that disability by a public entity.

Tips for Representing Parents with Disabilities, Continued...

- ▶ Consider appealing and/or filing an ADA complaint in the federal court if:
 - ▶ the removal was based solely on the parent's disability;
 - ▶ the court will not order accommodations of hearings, meetings, or services; or
 - ▶ a decision of the court to continue jurisdiction over the child is not reasonable based on witness and expert testimony and other evidence.
- ▶ Also, if the parent is denied a reasonable accommodation, be prepared to appeal (where such process exists) or to file a complaint with the departmental, state, or federal agency empowered to investigate discrimination by the court or child welfare agency.
 - ▶ At the federal level, a complaint can be filed with the U.S. Department of Justice (DOJ) as well as the U.S. Department of Health and Human Services (HHS) Office for Civil Rights.

Tips for Representing Parents with Disabilities, Continued...

- ▶ Know your client's disability
- ▶ Communicate with providers and support systems; obtain referrals - skill-building services, groups, classes, education, etc.
- ▶ Know your client's strengths/abilities - when advocating for accommodations in services, and the kind of services
- ▶ Encourage providers/peers to be advocates for a parent!
- ▶ Evidentiary and legal standards around mental health records, privilege, evaluations/assessments, competence and capacity
- ▶ Be creative and practical to reach solutions
- ▶ **BE A ZEALOUS ADVOCATE!**

Myth: IQ = Parenting Ability

- ▶ A review of all the existing research literature in 2002 found IQ tests not a valid measure for prediction in most instances, as there was no reliable correlation between IQ scores and parenting skills until the IQ was below 50. (Feldman & Tymchuk, 2002).
- ▶ “a parent’s IQ level is not indicative of her/his parenting abilities unless associated with other environmental, familial, or individual factors such as poverty, a poor social network, poor mental and physical health, and a great number of children.” (Aunos, Goupil & Feldman, 2005)

Myth: Parents with Intellectual Disabilities can't Learn

- ▶ Parents with intellectual disabilities learn and *maintain* parenting skills when instruction uses modeling of skills, verbal instruction, and feedback of parent performance (Feldman et al., 1992).
- ▶ Llewellyn (1997) also found that parents with ID also learn parenting skills informally-- family traditions, interactions with others, trial and error, and changing routines.
- ▶ Mildon, Wade, and Matthews (2008) found that when parents with ID were taught in a manner that acknowledged their goals and values, parents reported feeling more satisfied and confident in their parenting roles. (MacLean & Aunos, 2011)

Parenting Assessments

- ▶ Often crucial in child welfare proceedings
- ▶ Evaluators may harbor their own biases regarding parents with disabilities
- ▶ Evaluators often have no training or experience assessing parents with disabilities and are unaware of supports and the use of adaptive equipment
- ▶ Parenting assessments are often inaccessible
 - ▶ Observation in the home setting is crucial during evaluation of parents with disabilities, because the functioning of the parent and the parent-child dyad can be profoundly affected by being in an unfamiliar environment, without the adaptations and home modifications that are normally used
- ▶ ADA and Rehabilitation Act require evaluations to be accessible, including modifications
- ▶ Inappropriate reliance on IQ testing
 - ▶ Researchers have consistently found that there is no clear relationship between parental fitness and intelligence (Booth & Booth, 1993; Dowdney & Skuse, 1993; Tymchuk & Feldman, 1991)

American Psychological Association Guidance

- ▶ Guidelines for Psychological Evaluations in Child Protection Matters
(<http://www.apa.org/practice/guidelines/child-protection.aspx>)
- ▶ Guidelines for Assessment of and Intervention with Persons with Disabilities
(<http://www.apa.org/pi/disability/resources/assessment-disabilities.aspx>)

Examples of Reasonable Modifications

- ▶ Increase frequency/extend length of service provision
- ▶ Provide in-home parent modeling
- ▶ Links of parent with a co-parent or mentor
- ▶ Tailor parenting education to the needs of the parent
- ▶ Provide services at an individual's home or alternative accessible site
- ▶ Give frequent reminders for appointments/services
- ▶ Provide accessible transportation
- ▶ Provide all information in large print, audio tape, Braille, or digital format
- ▶ Offer note-taking or transcriptions of meetings and court activities
- ▶ Assist in reading materials
- ▶ Provide interpreters

See University of Minnesota, Center for Advanced Studies in Child Welfare, *Guide for Creating Legislative Change: Disability in the Termination of Parental Rights and Other Child Custody Statutes* (2007).

Examples of Reasonable Accommodations

- ▶ Day care services
- ▶ Respite care
- ▶ Family or informal support networks (church, neighbors)
- ▶ Parent helper/child care assistant
- ▶ Aide or personal assistant
- ▶ Supported housing
- ▶ Pictorial representation or reminders of tasks (step by step)
- ▶ Housekeeping services
- ▶ Adaptive equipment (e.g. adaptive cribs and child care equipment, communication devices, specialized computer software, cooking/feeding equipment)
- ▶ Adaptation to physical environment (e.g. ramps, lower counters, level handled door knobs)

See University of Minnesota, Center for Advanced Studies in Child Welfare, *Guide for Creating Legislative Change: Disability in the Termination of Parental Rights and Other Child Custody Statutes* (2007).

ABA Resolution 114

- ▶ ABA urges federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that custody, visitation, and access shall not be denied or restricted, nor shall a child be removed or parental rights be terminated, based on a parent's disability, absent a showing—supported by clear and convincing evidence—that the disability is causally related to a harm or an imminent risk of harm to the child that cannot be alleviated with appropriate services, supports, and other reasonable modifications.
- ▶ ABA urges federal, state, territorial, and tribal governments to enact legislation and implement public policy providing that a prospective parent's disability shall not be a bar to adoption or foster care when the adoption or foster care placement is determined to be in the best interest of the child.

Resources

- ▶ Brandeis University, National Research Center for Parents with Disabilities (www.lurie.brandeis.edu)
- ▶ Disabled Parenting Project (www.disabledparenting.com)
- ▶ Through the Looking Glass (www.lookingglass.org)
- ▶ Center for Rights of Parents with Disabilities (www.disabledparentrights.org)
- ▶ Bazelon Center for Mental Health Law (www.bazelon.org)
- ▶ The Association for Successful Parenting (www.achancetoparent.org)

Thank You!

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