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The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents

Julie Odegard*

Introduction

Today's culture is obsessed with "family values,"¹ with attempting to define a family² narrowly and with establishing who can or should be a parent.³ The debate is painfully familiar to physically disabled individuals whose right to be parents has been consistently denied and restricted⁴ even as technology has developed to assist disabled living.⁵ Ignorance of and fears about the disabled still bar them from the basic societal function of raising a family.⁶

The specific problem for physically disabled parents is that no social service agency ("social services") program in the nation pro-

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1. Additional sources: Jerry Z. Muller, *Classic Liberals Knew Their Value*, PHOENIX GAZETTE, Oct. 13, 1992, at A11; Jonathan Yardley, *No Bargains, Just Bigotry in the Current Cant of Family Values*, WASH. POST, Sept. 14, 1992, at D2. "Family values" has a multitude of definitions and connotations. The phrase is frequently associated with the following: stay-at-home mothers; motherhood, single motherhood, families; parental responsibility for children; social structure, discipline, and standards of behavior; religion; and politics. See Irving Kristol, 'Family Values' - Not a Political Issue, WALL ST. J., Dec. 7, 1992, at A14; Edward Walsh, *Clinton Stance Bolsters Growing Crusade to Enforce Child Support*, WASH. POST, Jan. 3, 1993, at A3.

2. "Family" is defined variously as a household (a group of individuals living under one roof); a nuclear family (two or more adults living together and caring for their children); a clan; and a race. Webster's Third New International Dictionary (1986). This article refers to the common definition of family: parent(s) and adopted or natural child.

3. By "parent" I refer to both the identity (a natural or adoptive father or mother of a child) and the caregiving functions of a parent to a child. See Webster's Third New International Dictionary (1986).

4. See Rick Pluta, *Family Rights Next Wave in Handicapper Rights War*, Proprietary to UPI, August 7, 1992, available in LEXIS, Nexis Library; See Garry Abrams, *Parents Without Power*, L.A. TIMES, July 26, 1992, at E7.

5. Pluta, *supra* note 4; Jay Mathews, *Custody Battle the Disabled Fight to Raise Their Children*, WASH. POST, Aug. 18, 1992, at Z10.

6. See Mathews, *supra* note 5, at Z10.

vides attendant service⁷ to assist physically disabled parents in caring for their healthy children during the childhood years.⁸ Although social services will assist disabled adults with home care directed toward the disabled individual, they will not assist with child care.⁹ As a result, physically disabled parents who cannot afford to hire a private attendant have no access to attendant child care services. Social services' and the courts' consistent response to this problem has been to label physically disabled parents as "unfit" and to terminate their legal rights as parents.¹⁰

Individuals such as Tiffany Callo,¹¹ a mother with cerebral palsy, have gained media attention by demanding a federal right to support services while raising their children.¹² The state took away Callo's two children because it believed her physical disability made her an "unfit" parent.¹³ In Callo's case, law and society ignored her fundamental right to be a parent.¹⁴ The courts' restrictive definition of "family" forced Tiffany Callo to create a separate model of the family that includes families headed by physically disabled parents. Callo's model extends the "family values" public policy protections to physically disabled parents by recognizing their federal right to child care assistance.

Increasingly, physically disabled individuals are starting families.¹⁵ Yet they still fear the consequence of the state taking away their children.¹⁶ Their invisibility has resulted in lack of a political

7. Attendant service provides a physically disabled adult with public funds to hire an attendant to help him/her perform physical tasks. Mathews, *supra* note 5, at Z10, Z12.

8. Pluta, *supra* note 4.

9. Ruth Richman, *A Family Pulled Apart: Disabled Mother Struggles With the Pain of Losing Two Children*, CHI. TRIB., Sept. 13, 1992, at 3.

10. See Abrams, *supra* note 4, at E7.

11. Tiffany Callo's biography describes her struggles with the Santa Clara County Department of Social Services and California courts to regain custody of her two sons. JAY MATHEWS, *A MOTHER'S TOUCH: THE TIFFANY CALLO STORY* (1992) [hereinafter *TIFFANY CALLO STORY*].

12. Individuals such as Leigh and William Earl, a physically disabled couple, argue that the Americans with Disabilities Act family preservation provisions mandate support services such as attendant care. Aileen Streng, *Disabled Couple to Testify About Raising a Child*, GANNETT NEWS SERVICE, August 7, 1992, available in LEXIS, Nexis Library.

13. In her biography, Tiffany Callo states that the state's evidence that she was an "unfit parent" mentally and psychologically was a pretext for disability discrimination. *TIFFANY CALLO STORY*, *supra* note 11, at 179; Streng, *supra* note 12.

14. *In re K.L.J.*, 813 P.2d 276, 279 (Alaska 1991)(quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); See also *In re Heather B.*, 11 Cal. Rptr. 2d 891, 900 (Cal. Ct. App. 1992).

15. See Pluta, *supra* note 4; Mathews, *supra* note 5, at Z10; Torri Minton, *They're Just Plain Mommy and Daddy*, SAN FRANCISCO CHRONICLE, March 6, 1991, at B3.

16. See Mathews, *supra* note 5, at Z10.

voice.¹⁷ No public policy has developed on the issue of physically disabled parenting, and these parents have been politically powerless when states move to terminate their parental rights.¹⁸

This article argues that this powerlessness ended with the passage of the Americans with Disabilities Act (ADA).¹⁹ The ADA prohibits public and private entities from discriminating on the basis of disability in areas such as employment, housing, and transportation. The ADA has rapidly accelerated the process of mainstreaming²⁰ the disabled into social and economic life. Mainstreaming under the ADA focuses primarily on giving the disabled equal access to employment and commerce by prohibiting employment discrimination and providing transportation and physical access to businesses.²¹ This article argues that the ADA mandates equal access to the fundamental right of parenting. It imposes a clear duty on states to provide social services to disabled parents and eliminate the crises that families headed by physically disabled individuals face in trying to stay together.

Part one of this article describes family law as applied to physically disabled parents: parental rights termination proceedings and their discriminatory treatment of physically disabled parents. Part two focuses on the ADA's "enabling" impact on physically disabled parents: extending family values protection to physically disabled individuals enables them to parent as effectively as non-disabled individuals. It will demonstrate that physically disabled parents have a federal cause of action under the ADA for support services which will give the physically disabled an equal opportunity to be parents, not just employees and customers.

17. Judy Jones, *Children Suffer As They Care For Disabled Parents*, INDEPENDENT, May 8, 1992, at 7.

18. Pluta, *supra* note 4.

19. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. 1991).

20. Both state and federal governments today pursue the goal of total integration of the disabled into the mainstream, i.e., the social and economic life of society. *In re Marriage of Carney*, 598 P.2d 36, 44 (Cal. 1979). Two groups have dominated the disabled rights movement. One group, the independence movement, felt that "disabled people could become most active and creative if they augmented their abilities with helpful methods and machines like signing and wheelchairs, even if this might aggravate popular prejudice against them and isolate them in some ways from nondisabled society." TIFFANY CALLO STORY, *supra* note 11, at 141. The other group, the mainstream movement, advocated that the disabled try to walk or learn to speak, no matter what the price in time and energy, and "behave like nondisabled people as much as possible or be denied social status and productive employment." *Id.*

21. The ADA is composed of five titles addressing disability discrimination in the areas of employment (Title I), public services including public transportation (Title II), public accommodations (Title III), telecommunications (Title IV), and miscellaneous provisions in Title V. 42 U.S.C. §§ 12101-12213 (Supp. 1991).

Part One: The Status Quo

A. Termination of Parental Rights

The Americans with Disabilities Act's impact on physically disabled parents can only be understood in the context of physically disabled parents' existing legal rights. Termination statutes govern states' abilities to terminate parents' rights to their children. The legislative standards and procedures for termination vary across jurisdictions.²² Various judicial interpretations of termination statutes have perpetuated termination proceedings' discriminatory impact on physically disabled parents.

General Overview

Involuntary termination of parental rights may be the state's most severe interference with the family relationship.²³ Although termination statutes vary across jurisdictions, some typical characteristics exist. The statutes uniformly provide vague criteria or grounds for termination which allow for considerable judicial discretion.²⁴ The Supreme Court has provided two general guidelines, however, for termination proceedings. First, the Court has held that the 14th Amendment's Due Process Clause does not require the appointment of counsel to represent poor parents in termination proceedings.²⁵ Second, the state must prove its allegations of neglect with clear and convincing evidence.²⁶

Because termination statutes vary, this article will use California's statute²⁷ to illustrate some of the typical characteristics of the termination proceeding as well as that state's unique approach. California's statute is the result of recent reforms to provide a more explicit and narrow basis for state intervention and better reunification and protective services.²⁸ The reformed statute is the result

22. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD ABUSE AND NEGLECT LITIGATION 242 (1981) (hereinafter CHILD ABUSE).

23. *Id.*

24. *Id.*

25. *Lassiter v. Department of Social Services*, 452 U.S. 18, 31 (1981).

26. *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). The Court required clear and convincing evidence when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money' (quoting *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

27. CAL. [WELF. & INST.] CODE § 366.26 (West Supp. 1993).

28. In *In re Heather B.*, 11 Cal. Rptr. 2d 891 (Cal. Ct. App. 1992), a California Court of Appeals noted that the changes brought about by the reforms fell into three categories: "(1) providing more explicit and restrictive basis for juvenile court intervention; (2) requiring clearly focused protective and reunification services, and (3) providing permanency planning at the earliest stage for these children who cannot live safely with their families." *Id.* at 893.

of concerns arising from interpretations of vague statutes that govern termination proceedings.²⁹

Across jurisdictions, children enter the juvenile dependency system when a parent either voluntarily gives social services temporary custody of a child or, frequently, when the state intervenes against the parent's will.³⁰ According to California's statute, a county social worker must have a reasonable belief that the child is in some "danger" before taking a child into temporary custody.³¹ The statute defines danger to a child as an immediate need for medical care, immediate danger of physical or sexual abuse, and immediate threat to the child's health or safety.³² Across jurisdictions, statutes also grant courts broad discretion in terminating parental rights on the basis of "neglect."³³ Courts have interpreted parental physical disability both as a factor in and an embodiment of neglect, creating a tenuous and uncertain legal status for parents with physical disabilities.

California's statute requires that the agency consider whether there are any "reasonable services"³⁴ that would circumvent such action before taking a child into temporary custody. If so, it must provide those services to the family.³⁵ The "reasonable" and "available" factors allow courts to limit the extent to which social services must seek out alternative support services.³⁶ Once courts define the agency's responsibility, the state files a dependency petition which triggers a prompt detention hearing in juvenile court.³⁷ At this hearing, the state must make a *prima facie* case showing that

29. Heather B., 11 Cal. Rptr. 2d at 894.

30. *Id.* Any person, however, may file a complaint alleging a child's abuse or neglect with a social service agency. CHILD ABUSE, *supra* note 22, at 44.

31. Heather B., 11 Cal. Rptr. 2d at 894.

32. *Id.*

33. A typical termination statute states the following as reasons for state intervention:

[t]he repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.

In re P.A.B., 570 A.2d 522, 523 (Pa. 1990). See also *In re E.M.*, 584 A.2d 1014, 1018 (Pa. 1991); *In re Jacobs*, 444 N.W.2d 789, 792 (Mich. 1989); UNIF. ADOPTION ACT § 19(c). 9 U.L.A. (pt I) (1988).

34. Reasonable services are forms of assistance that agencies give to a parent to enable the parent to maintain custody of his/her child. A reasonable service might be helping a physically disabled parent find housing.

35. Heather B., 11 Cal. Rptr. 2d at 895.

36. Courts accept the argument that since the service of 24 hour assistance is not "available" in any state it is not "reasonable," and the state consequently has no duty to provide that service. See *In re P.M.*, 581 N.E.2d 720, 721 (Ill. App. 1991); See also *infra* note 92.

37. Heather B., 11 Cal. Rptr. 2d at 896.

the child is in danger or the court will release the child to the parent's custody.³⁸ The court must consider whether social services made reasonable efforts to prevent removing the child in the first place and, if not, whether social services is in a position to provide the services necessary to restore parental custody.³⁹ If the court maintains temporary custody, it must order reunification services,⁴⁰ if appropriate.⁴¹ These must begin promptly if ordered.⁴²

Jurisdictional Hearing: Step 1

In order to expose the intricacies of California's termination proceeding, this analysis will divide it into two phases: the jurisdictional or adjudicative hearing and the dispositional hearing. At the jurisdictional hearing, the court considers whether the child comes within the court's jurisdiction under the state's juvenile code.⁴³ At the jurisdictional stage, the state must make *substantial* efforts to improve the home situation and, if possible, return the child to the parent's custody.⁴⁴ The state must also prove by a preponderance of the evidence its allegations concerning the child's neglect.⁴⁵ If the allegations are sustained, a dispositional hearing is necessary.

38. The court releases the child from custody unless the state shows prima facie evidence that the child comes within the applicable termination statute's definition of neglect. California requires the state to show that

[t]he minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the minor. . . or by the inability of the parent or guardian to provide regular care for the minor due to the parent's or guardian's mental illness, developmental disability." *Heather B.*, 11 Cal. Rptr. 2d at 895.

39. *Id.*

40. Reunification service plans are determined by social service agencies and used to pave the way to returning a child to the parent's custody. Typically, a parent receives counseling on parenting skills and visitation rights. A typical "reunification contract" will condition a parent's reunification with a child on certain requirements such as: maintaining stable and appropriate housing, acceptable housekeeping, and a good food supply; undergoing psychological assessment to determine fitness as a parent; maintaining regular visitation and showing appropriate parenting skills; participating in a parenting skills program and receiving good reports; and cooperating with social services. *In re Victoria M.*, 207 Cal. App. 3d 1317, 1322 (Cal. App. 5th Dist. 1989). Reunification services are a critical intermediate step to a parent regaining parental rights. See e.g., TIFFANY CALLO STORY, *supra* note 11, at 178.

41. *Heather B.*, 11 Cal. Rptr. 2d at 895.

42. *Id.*

43. The jurisdictional requirements are found in the termination statute's enumeration of substantial, immediate risks to the child. *Id.*

44. *In re Jacobs*, 444 N.W.2d 789, 795 (Mich. 1989).

45. *Id.* at 794 n.12; *Heather B.*, 11 Cal. Rptr. 2d at 895.

Dispositional Hearing: Step 2

At the dispositional hearing, the court determines whether the state can take the child from the parent's home.⁴⁶ At this stage, the court can take one of two routes: it can order the state to provide support services to preserve the family or it can declare the child a dependent of the state.⁴⁷ In order to declare the child dependent, the court must find by clear and convincing evidence that the child is in immediate danger and that the state has no choice but to remove the child from the parent's custody.⁴⁸ To make this finding, the court must consider whether social services made reasonable efforts to avoid the need to remove the child or whether it was reasonable under the circumstances to fail to do so.⁴⁹ The court must order reunification services unless it finds clear and convincing evidence that certain factors make them inappropriate.⁵⁰

An important consideration at the dispositional hearing is that of parental fitness.⁵¹ Parental fitness refers to the parent's conduct or culpability prior to the dispositional hearing.⁵² The state cannot terminate a parental relationship based solely upon the "best interests of the child" without a showing of parental unfitness.⁵³ The federal courts have not determined a standard for parental unfitness. States have variously defined parental unfitness as "parents who have failed, refused or neglected to provide proper or necessary care; children who are neglected, deprived, or abused; children who are in need of supervision;" or a parent's failure "to maintain contact with the child or to plan for his or her future."⁵⁴ At the end of the dispositional stage, the court decides whether to reunite the child and parents and order support services or to declare the child a dependent and terminate the relationship.⁵⁵

46. Heather B., 11 Cal. Rptr. 2d at 895.

47. *Id.* at 896.

48. *Id.*

49. *Id.*

50. *Id.*

51. Courts may consider parental unfitness in addition to the "best interests" of the child test. CHILD ABUSE, *supra* note 22, at 242.

52. A termination statute defines unfit parents according to their conduct and/or neglect of children prior to state intervention. See Heather B., 11 Cal. Rptr. 2d at 903.

53. *Id.*

54. *Id.* at 904.

55. Heather B., 11 Cal. Rptr. 2d at 896.

Dependent Children in Foster Care

If the court declares the child a dependent of the state, the state places the child in foster care.⁵⁶ The state must then periodically review the child's status.⁵⁷ According to California's statute, the court at this first review must order the state to return the child to the parent's custody unless it finds by a preponderance of evidence that returning the child would create a "substantial risk or detriment to the physical or emotional well-being of the child."⁵⁸ If the court makes such a finding, it must consider whether the state provided reasonable reunification services.⁵⁹ Unless it finds by clear and convincing evidence that such services are inappropriate, it must order their initiation or continuation.⁶⁰ At the next review hearing, the court must again decide between returning the child to parental custody under a preponderance of the evidence standard or leaving the child in foster care.⁶¹ At all stages in the process, the standard of proof is important because it directly affects how rigorously courts will protect parents' rights.

Standards of Proof

Courts apply two standards of proof in termination proceedings. They apply a clear and convincing evidence standard to most of the required findings. The California statute applies the clear and convincing standard to the initial finding that the state must remove a child from parental custody, the determination that reasonable reunification services were provided or were inappropriate, and the determination that the child is likely to be adopted.⁶² It applies the preponderance of evidence standard only when determining whether a child would incur a substantial risk of harm if returned to a home that the court already determined to be unfit by clear and convincing evidence.⁶³

56. *Id.*

57. CHILD ABUSE, *supra* note 22, at 241 (stating different programs have begun requiring regular review.)

58. *Heather B.*, 11 Cal. Rptr. 2d at 896.

59. *Id.*

60. *Id.*

61. *Id.* at 896-97.

62. The asserted rationale for the clear and convincing standard in termination proceedings is that the clear and convincing standard best impresses the factfinder with the importance of the decision and consequently, reduces the probability of an erroneous determination. *Santosky v. Kramer*, 455 U.S. 745, 762-65 (1982). Without a precise heightened standard, courts are left to make their own determinations guided only by open and subjective standards.

63. The rationale is that if a home has been proven unfit by clear and convincing evidence, the issue of returning the child to his/her parent must be determined under the lesser standard of preponderance of evidence so that the child does not

The clear and convincing standard's purpose, according to California, is to balance the conflicting interests of the parent and state.⁶⁴ The critical interests are: continuing a family relationship, preserving the integrity and privacy of the family without the state's intervention, and avoiding the resulting social stigma.⁶⁵ The child has an interest in a permanent, secure, stable and loving environment.⁶⁶ The state has a critical interest in protecting the child from harm, abuse, or neglect.⁶⁷

The clear and convincing proof standard protects the parent against the court's ability to underweigh probative evidence favoring the parent,⁶⁸ the state's greater ability to prepare its case, the state's power to shape the historical events that formed the basis for termination,⁶⁹ and a "double jeopardy" defense for parents subject to repeated state termination efforts.⁷⁰ Although the burden of proof is on the state in order to balance the interests of the state and the parent, the state actually appears to shift this burden to the physically disabled parent. Once social services begins an investigation, physically disabled individuals must prove they are fit parents despite their disability.⁷¹

Another obstacle for physically disabled parents has been the definition of parental "neglect." Courts have defined neglect to include parents' disability by arguing that neglect is an objective determination that does not require parental culpability.⁷² This definition results in discrimination against the physically disabled

"bear a disproportionate share of the risk of an erroneous determination." *Heather B.*, 11 Cal. Rptr. 2d at 903.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 901. One example of a judge's discretion to underweigh evidence in the parent's favor is the judge's determination of whether the parent planned for the child's future — a measure of whether the parent neglected the child. A judge can reject as "unrealistic" plans that the judge deems overly optimistic based on his/her own opinion of the parent's physical or financial abilities. A judge can also excuse a social service agency's lack of efforts to reunite the child and parent by concluding that this was not in the child's best interest. *Santosky v. Kramer*, 455 U.S. at 762-63 n.12.

69. *Santosky*, 455 U.S. at 762-63. For example, a state got court orders denying the parents the right to visit their child. The parents were later judged as neglecting their child because they failed to visit.

70. *Heather B.*, 11 Cal. Rptr. 2d at 901; *Santosky*, 455 U.S. at 762-764.

71. The state has the burden of proof on the issue of why parental custody cannot be restored, yet in practice parents often must prove their fitness. For example, physically disabled parents Leigh and William Earl state that they have had an ongoing affirmative burden of proving their competence since social services began an investigation of their family. See *Pluta*, *supra* note 4.

72. See, e.g., *In re Jacobs*, 444 N.W.2d 789, 794 (Mich. 1989). See also *In re Sterling*, 412 N.W.2d 284 (Mich. Ct. App. 1987) (substance abusing parent); *In re B.C.*,

because the objective test has a particularly harsh impact on the physically disabled. These courts rely on the argument that only the "objective" test of neglect sufficiently protects children from unfit parents.⁷³ Other courts, however, have held that parental neglect requires a finding of a parent's culpability and that courts cannot determine physically disabled parents to be unfit based solely on their physical disability.⁷⁴ A better interpretation is to require culpability regardless of whether a parent is physically disabled.⁷⁵ By eliminating the culpability requirement and ignoring the "objective" test of neglect's impact on the physically disabled, courts have essentially equated physical disability with neglect and severely jeopardized the disabled parent's rights.⁷⁶

Although termination statutes vary across jurisdictions, they share some common characteristics. The statutes use vague language to define neglect and parental unfitness, giving courts a great deal of discretion. States must prove neglect by clear and convincing evidence to terminate parental rights. By equating physical disability with neglect and not requiring parental culpability for neglect, courts have discriminated against the physically disabled.

B. Discrimination Against Physically Disabled Parents

In the past, courts have both criticized and perpetuated society's stereotypical view of the physically disabled as unfit parents. Two paradigm cases illustrate the evolving public policy toward the physically disabled parent. In *In re Marriage of Carney*,⁷⁷ the court decided that a father's physical disability was not a sufficient change of circumstance to require transferring custody of two sons to his ex-wife. The court balanced the protected right to parent against concern for the children's best interests.⁷⁸ The court recognized society's moral and legal obligation to respect the civil rights

582 A.2d 1196 (D.C. 1990) (parent who lacked contact with child); *Matter of Montgomery*, 316 S.E.2d 246 (N.C. 1984) (mentally disabled and mentally ill parent).

73. See, e.g., *Jacobs*, 444 N.W.2d at 794. See also *In re Sterling*, 412 N.W.2d 284 (Mich. Ct. App. 1987) (substance abusing parent); *In re B.C.*, 582 A.2d 1196 (D.C. 1990) (parent who lacked contact with child); *Matter of Montgomery*, 316 S.E.2d 246 (N.C. 1984) (mentally disabled and mentally ill parent).

74. See, e.g., *In re Tedder*, 389 N.W.2d 149 (Mich. Ct. App. 1986) (parent with paranoid schizophrenia); *In re Bailey*, 336 N.W.2d 499 (Mich. 1983) (mentally disabled parent).

75. *Jacobs*, 444 N.W.2d 789, 799-800 (Levin, J., dissenting) (physically disabled parent who sought state assistance determined neglectful and unfit according to the "objective" test of neglect).

76. *Id.*

77. 598 P.2d 36 (Cal. 1979).

78. *Id.* at 37.

of the physically disabled, including the right to parent.⁷⁹ Therefore, the state cannot take away the right on the basis of physical disability.

Carney was revolutionary because it acknowledged society's stereotypes of the physically disabled parent.⁸⁰ The court connected these stereotypes to the underlying restrictive definition of a parent as solely a physical role and then replaced the traditional physical definition of parenting with one that captures the "heart of the parent-child relationship"

its essence lies in the ethical, emotional, and intellectual guidance the parent gives to the child. . . [I]ts motive power is parental love and concern for the child's well-being; and its teachings deal with such fundamental matters as the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life.⁸¹

According to *Carney*, the policy of mainstreaming restrains a trial judge's discretion in a termination proceeding.⁸² One goal of the policy includes allowing the disabled to participate in central functions of society like parenting.⁸³ *Carney* established the principle that courts cannot interpret physical disability as prima facie evidence of parental unfitness.⁸⁴ Rather, they must view the disabled parent as an individual and the family as a whole.⁸⁵ *Carney* emphasized the expansive emotional, moral, and intellectual role of a parent, revealing the court's recognition that the physically disabled can assume a parental role as well as the non-disabled and may have particular advantages over them.⁸⁶

79. *Id.* at 41.

80. *Id.*

81. The Supreme Court of California criticized the trial court's belief that a physically disabled parent is an unfit parent because of physical limitations. *Id.* at 41-42. The trial court believed that the physically disabled father could not have a "normal relationship" with his sons because they couldn't play sports together such as baseball and fishing. *Id.* at 42. In addition, *Carney* dismissed the underlying stereotype that the parent's disability will disable the child. *Id.* at 43.

82. *Id.* at 44.

83. *Id.* at 44-45. See also *supra* note 20.

84. The public policy of civil rights for the physically disabled "includ[es] their right not to be deprived of their children because of their disability." *Id.* at 37. "No less important to this policy [mainstreaming] is the integration of the handicapped into the responsibilities and satisfaction of *family life, cornerstone of our social system*. . . [T]he trial courts must avoid impairing or defeating the foregoing public policy." *Id.* at 45. (emphasis added).

85. *Id.* at 42.

86. *Id.* According to *Carney*, a physically disabled parent has necessarily gained the asset of patience and tolerance by coping with his/her disability and society. *Id.* at 44.

Since *Carney*, courts have retreated from sensitivity to and recognition of discrimination against the physically disabled parent.⁸⁷ *In re Victoria M.*⁸⁸ focused on the state's obligation to show by clear and convincing evidence that it had tried to provide alternative support services for the disabled parent.⁸⁹ It held that a court may terminate parental rights if it has found that terminating the parent's rights is in the child's best interests and is the least detrimental alternative.⁹⁰ The court reached this last determination through a two step approach. First it explored all reasonable alternatives and, second, it weighed the parent's right to preserve the parent/child relationship against the child's interest in a secure environment.⁹¹ The court emphasized three principles when requiring the state to meet the heightened clear and convincing standard of showing that it investigated alternative support services to keep the child with the parent. These included the state's obligation to provide assistance to the disabled parent, the importance of support services to a disabled parent, and the critical distinction between an unfit parent and a parent who lacks adequate state assistance.

Many courts have declined to follow *Carney's* approach and create new social service programs to assist physically disabled parents. Some courts have viewed an order to create a program that does not exist as *per se* unreasonable.⁹² Therefore, physically disabled parents have found themselves in situations where they have been ordered to provide certain services to their children or lose

87. *Contra Matter of McDuel*, 369 N.W.2d 912 (Mich. Ct. App. 1985). *McDuel* reiterated *Carney* by holding that a physical disability such as multiple sclerosis, which requires the parent to use a wheelchair, cannot be the basis for a determination of neglect under the termination statute. The *McDuel* court's view of neglect required some blameworthy or culpable act by the parent. Since the disabled as a class are not blameworthy, the court held that physical disability alone could not be a basis for termination of parental rights. *Id.* at 916-17.

88. *In re Victoria M.*, 255 Cal. Rptr. 498 (Cal. Ct. App. 1989).

89. The *Victoria* court looked at the surrounding community's resources for the developmentally disabled and found that specialized services in the form of community regional centers for the developmentally disabled were available but that social services had not explored or utilized these for the parent. *Id.* at 504-05.

90. *Id.* at 506.

91. *Id.*

92. One case held that a mentally retarded mother was an unfit parent for her premature baby and that the 24-hour child care assistance that would make her fit was not required by either the equal protection or the due process clause. *In re P.M.*, 581 N.E.2d 720, 722 (Ill. Ct. App. 1991). Another court held that a mentally retarded mother's care for her child with cerebral palsy was insufficient without 24-hour child care assistance; the court further held that the mother had no statutory right to 24-hour assistance. *In re J.A.L.*, 432 N.W.2d 876, 879 (N.D. 1988).

them.⁹³ The problem is that these parents have no available means through which to obtain these services. This results from the courts' underestimation of the central importance of support services to disabled parents.

Weakening the Support Services Requirement

Courts have severely underestimated the effect that the absence of support services has on the evaluation of a physically disabled parent's fitness. Courts have accepted *less* than clear and convincing evidence when evaluating whether the statutory requirement of support services has been met and *uncritically* relied on states' arguments that providing support services would be unreasonable every time the services are unavailable. In stark contrast, courts have rigidly resisted disabled parents' counterargument that support services are reasonable when they are the only way to preserve their family and make them "fit" parents.

Courts have weakened the statutory requirement that states make support services available to disabled parents by not consistently requiring clear and convincing proof that social services investigated the family's needs and provided reasonable support services before the termination hearing. The court in *In re Jacobs*⁹⁴ held that the state provided reasonable services to a temporarily disabled mother who voluntarily sought assistance in caring for her children.⁹⁵ The state presented no evidence that it had offered any services in response to the mother's requests, yet the mother lost custody of her children solely because her requests triggered a state investigation and termination hearing.⁹⁶

Similarly, the court in *In re P.A.B.*⁹⁷ ignored the central issue of whether the state provided reasonable services. The state had provided social services to a developmentally disabled parent until

93. The typical situation arises when the state requires an attendant to assist the physically disabled parent with the child yet refuses to provide one. See Mathews, *supra* note 5, at Z10.

94. 444 N.W.2d 789 (Mich. 1989).

95. *Id.* at 795. The reviewing court viewed the evidence in the light most favorable to the respondent, the state, to determine whether reasonable services were provided. When there is substantial evidence to support the judgment, the court affirms the trial court's ruling. See *In re Misako R.*, 3 Cal. Rptr. 2d 217, 220 (Cal. Ct. App. 1991).

96. The social service agency's only response to the mother's requests was its offer to return the children to their estranged father who was unable to care for them. *Jacobs*, 444 N.W.2d at 791 n.5, 797. The unassisted mother found her own housing and even found a private attendant who could assist her with her children. *Id.* at 802 (Levin, J., dissenting).

97. 570 A.2d 522 (Pa. 1990).

it unilaterally decided that the services were "insufficient."⁹⁸ The court did not require the state to explain why it believed the services were "insufficient" or why it changed its evaluation of the situation during its relationship with the family.⁹⁹

On the other end of the spectrum, *In re Victoria M.* applied the clear and convincing standard and held that the state had not met its statutory burden when it required a disabled parent to obtain new housing but did not assist that parent in finding housing.¹⁰⁰ Consequently, the court reversed the prior termination of the parent's rights and remanded the case to the trial court to determine whether the state investigated and provided support services.¹⁰¹

Before the ADA's enactment, courts uncritically accepted states' arguments that services are unreasonable if they are currently unavailable despite the fact that the lack of the service can be the only reason a physically disabled parent is considered unfit. Generally, courts ruled that if a program or service is nonexistent, the state has no duty to create the service and ordering it to do so would be unreasonable.¹⁰² The rationale is that the Equal Protection Clause does not require the state to treat disabled parents differently from non-disabled parents by providing a service to disabled parents which is not also provided to non-disabled parents.¹⁰³ The counter-argument is that the Equal Protection Clause guarantees equal treatment of persons similarly situated and that physically disabled and non-disabled parents compose the same class: parents. The state currently treats physically disabled parents *differently* by not providing an essential service — twenty-four hour attendant care — to disabled parents. This results in excluding the physically disabled from the class of parents. Rejecting this argument, one court labeled the proposal to create a twenty-four hour attendant care assistance program "extravagant."¹⁰⁴ Another court stated that such a program would serve one parent's "sole benefit."¹⁰⁵

98. *Id.* at 523.

99. *Id.*

100. *In re Victoria M.*, 255 Cal. Rptr. 498, 503-05 (Cal. Ct. App. 1989).

101. *Id.* at 507.

102. *See supra* note 92 and accompanying text.

103. Generally, the disabled do not have constitutional protections distinct from the non-disabled except in the areas of education and employment. BONNIE P. TUCKER AND BRUCE A. GOLDSTEIN, *LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 2:5* (1992). The developmentally disabled have been held not to be a suspect class under the Equal Protection Clause.

104. *In re J.A.L.*, 432 N.W.2d 876, 879 (N.D. 1988).

105. *In re P.M.*, 581 N.E.2d 720, 722 (Ill. Ct. App. 1991). Perhaps the clearest example of this callous disregard for the physically disabled parent is the judge's

Courts have attenuated further the requirement of "reasonable services" by redefining it as "reasonable under the circumstances."¹⁰⁶ The phrase "under the circumstances" allows courts to examine factors such as the parent's mental condition, the parent's insight into the family's problems and the parent's willingness to accept and participate in appropriate services.¹⁰⁷ A "good faith effort" by social services satisfies this test.¹⁰⁸ But courts define social services' good faith effort by focusing on the *parent's* conduct. Social service agencies need only "offer" their available services¹⁰⁹ and parents must look after their own legal rights and seek to correct [their] own behavior to alleviate their parenting problems.¹¹⁰

Courts have ignored the importance of support services and have simultaneously reinforced the stereotype of the psychologically unstable, physically disabled parent. The myth that mental disability coincides with physical disability¹¹¹ is reflected in the law. According to federal and state law, for instance, anyone with cerebral palsy¹¹² is developmentally disabled.¹¹³ This definition is widely used despite the fact that only one-third of those with cerebral palsy have significant intellectual deficiency.¹¹⁴ Courts' unwillingness to order social services for physically disabled parents reinforces this legal fiction and confuses the physically disabled with the developmentally disabled.¹¹⁵ As noted below, the psychological testing of physically disabled parents has further reinforced this myth.

Psychological Evaluations and the State's Bias Against Reunification

During the termination process, parents often undergo psychological evaluation to determine their fitness for reunification

statement: "The sad reality is that some are less fortunate than others, so less fortunate that they, through no fault of their own, cannot care for a child." *Id.*

106. *In re Christina L.*, 4 Cal. Rptr. 2d 680, 688 (Cal. Ct. App. 1992).

107. *Id.*

108. *Id.* at 689.

109. *See id.* at 686-87.

110. *See id.* at 688-89.

111. *See infra* note 115, and accompanying text.

112. Cerebral palsy is a collection of possible symptoms such as spasms, involuntary muscle movement, unsteadiness, seizures, abnormal sensation and perception, impaired sight, hearing or speech, and mental retardation. TIFFANY CALLO STORY, *supra* note 11, at 32.

113. *Id.* at 112.

114. *Id.*

115. Tiffany Callo was permanently labeled as "mentally retarded" by an incorrect report which psychologists who later evaluated her parental fitness relied on. *Id.* at 114.

services and their fitness as parents.¹¹⁶ The frequent categorization of physically disabled parents as developmentally disabled jeopardizes their chance to regain custody rights. Psychological evaluations vary depending on whether the psychologist is employed by the state and whether the psychologist has experience with the physically disabled.¹¹⁷ In Tiffany Callo's situation, the social service agency gave her a barrage of psychological tests¹¹⁸ and determined that she suffered from "generalized anxiety, a borderline personality disorder with narcissistic histrionics and paranoid traits."¹¹⁹ When her attorney questioned the psychologist about her knowledge of Callo's disability, cerebral palsy, the psychologist revealed she had no knowledge of the disability and no insight into how it might affect responses to the psychological tests.¹²⁰ A noted expert on physically disabled parents, Dr. Megan Kirshbaum,¹²¹ evaluated Callo as a communicating and caring parent and testified that she ought to begin a reunification plan to continue and strengthen her existing parent/child relationship.¹²²

116. See *In re Victoria M.*, 255 Cal. Rptr. 498, 500 (Cal. Ct. App. 1989); See *TIFFANY CALLO STORY*, *supra* note 11, at 24-26.

117. See *McDuel*, 369 N.W.2d 912, 915 (Mich. Ct. App. 1985). Dr. Kirshbaum, a national expert on disabled parents, conducted research on 125 disabled parent families and found "severe problems" with professionals' abilities to accurately assess disabled parents. *TIFFANY CALLO STORY*, *supra* note 11, at 239.

118. Callo was given the Million Co-Axial Multivariate Inventory (MCMI), the Minnesota Multiphasic Inventory (MMPI), the Rorschach, and the Bender tests. *TIFFANY CALLO STORY*, *supra* note 11, at 24.

119. *Id.* at 24-25. Social services argued that Callo was psychologically and emotionally unfit to receive reunification services and that she posed a threat of possible neglect or abuse to her sons. *Id.* at 179.

120. *Id.* at 182. No research has yet been conducted to determine whether these frequently used psychological tests measure the mental health of the physically disabled, much less people with cerebral palsy. *Id.* Nevertheless, this evaluation was a significant factor in the hearing determining whether to give reunification services to Callo since the state's principal argument was that Callo was psychologically unfit to be a parent. *Id.* at 179. Experts later questioned whether the "emotional" problem uncovered by the test results was actually an organic result of the disability. *Id.* at 188. If so, this would have made the results inconclusive about her psychological status.

121. Dr. Kirshbaum is the director of the community non-profit organization, *Through the Looking Glass*, in Berkeley, California, which provides clinical and supportive services, training, and research to infants, young children, and families in which one or more members has a disability. *Through the Looking Glass* has received a grant from the National Institute of Disability and Rehabilitation Research to develop adaptive equipment such as special feeding and diapering enclosures that would assist parents in wheelchairs. Its mission is to educate professionals and the disabled themselves that the disabled can fully participate as parents. Telephone Interview with Dr. Megan Kirshbaum, Director of *Through the Looking Glass*, (Oct. 2, 1992). See also *TIFFANY CALLO STORY*, *supra* note 11, at 144-145.

122. Dr. Kirshbaum's view was that Callo, with the assistance of a backup attendant, should be allowed to show that she could handle caring for at least one of her two sons. *TIFFANY CALLO STORY*, *supra* note 11, at 209.

The psychological evaluations and the reliance on these evaluations reveal a disturbing and dangerous callousness toward the crisis situation of physically disabled parents. Courts are insensitive to the fact that depression and mood swings are "normal" reactions of a parent fighting to maintain custody rights. These reactions can be heightened when a physically disabled parent's fitness evaluation may also depend on her ability to lift a child. Agencies often focus on the physical limitations of physically disabled adults in their fitness evaluations.¹²³ The discriminatory belief that physically disabled parents can never be normal parents because of their physical limitations¹²⁴ underlies the courts' focus on physical limitations¹²⁵ and unwillingness to address the natural, logical solution: better support services.

This discriminatory belief takes the form of a bias against reunification and a policy which encourages adoption by non-disabled parents.¹²⁶ Tiffany Callo confronted bias in the form of her social worker's constant urgings that she place her child up for adoption and her unwillingness to respond to Callo's requests for reunification services.¹²⁷ When Callo complained to her social worker's supervisor about the worker's bias toward adoption, the supervisor disregarded her complaint and the social worker remained on her case.¹²⁸ The "unspoken reality" underlying agencies' action or failure to act is a belief that "more deserving able-bodied white middle-class infertile couples" should adopt a physically disabled parent's healthy white baby.¹²⁹ Fortunately, some states have acted to dispel this prejudicial belief.

Although no state requires social services to create and fund new programs to assist physically disabled parents,¹³⁰ several pilot programs have had success in preserving families and have produced savings for taxpayers.¹³¹ Several states, including California

123. *See id.* at 114-15 (agency's videotape of Callo diapering her child focuses on her physical limitations).

124. *In re Marriage of Carney*, 598 P.2d 36, 42 (Cal. 1979) (stating it is impermissible to use a person's physical handicap as prima facie evidence of the person's unfitness as a parent or of probable detriment to the child).

125. The court in Tiffany Callo's hearing focused on a videotape that social services made of Callo diapering her son. Social services and the court scrutinized the tape, measuring how long it took Callo to accomplish the task; whereas, Dr. Kirschbaum felt that the tape revealed Callo's loving communication with her son. The court, in contrast, failed to recognize the barriers that social services had erected for Callo's task. TIFFANY CALLO STORY, *supra* note 11, at 215-217.

126. *See Pluta, supra* note 4; *Abrams, supra* note 4, at E7.

127. TIFFANY CALLO STORY, *supra* note 11, at 111.

128. *Id.*

129. *Id.* at 213.

130. *See supra* note 8 and accompanying text.

131. TIFFANY CALLO STORY, *supra* note 11, at 242-43.

and Michigan, have set up pilot projects in which the state spends part of its foster care money on a variety of well-coordinated services to parents in crisis. The programs help parents with problems ranging from substance abuse to physical disability.¹³² California's Santa Clara County reported a \$1.72 savings for every dollar spent on the program.¹³³ The success of these programs in keeping families intact emphasizes the unfair and discriminatory treatment physically disabled parents receive from agencies and courts. The programs also represent the future of social service programs for the physically disabled. The ADA has also recognized this future.

The largest costs to taxpayers may come from states' resistance to recognizing that the ADA gives the physically disabled an equal opportunity to parent.¹³⁴ A major policy driving the ADA was the public's desire to get the disabled off public assistance, put them to work, and save taxpayer-money.¹³⁵ The arguments of those who resist recognizing a federal right to support services ignore the social costs of *not* recognizing a federal right. Failing to do so perpetuates discrimination and leaves the fundamental parental right in the hands of social service agencies and courts: the very groups that have placed this right in jeopardy. This resistance is foolish because it works against non-disabled society's self-inter-

132. Mathews, *supra* note 5, at Z12.

133. *Id.* This savings estimate did not include the court costs saved from keeping the children out of foster care. *Id.* The services were tailored to each parent's special needs. They ranged from help finding a job or doctor, to providing counselling, to helping manage a budget. TIFFANY CALLO STORY, *supra* note 11, at 243.

134. According to a social services spokesperson, the problem is that if social services provided 24-hour attendant care, "any parent in trouble would want 24-hour home care, and we can't afford it." Mathews, *supra* note 5, at Z12. In fact, considering the tax savings of several pilot programs in the nation, the proposed 24-hour attendant program might turn out to be a tax break. *See id.*

135. The ADA's chances for passage were bolstered by a 1988 Social Security Administration study which found that SSA and other social programs supporting many of the estimated 43 million Americans with disabilities cost the taxpayers a total of \$46.3 billion each year. ADA proponents argued that this figure would be greatly reduced and local, state, and federal tax revenues would be greatly increased if people with disabilities were employed to the fullest extent possible, and if they had maximum access to public and private facilities where goods and services are sold.

BUREAU OF NATIONAL AFFAIRS, INC., THE AMERICANS WITH DISABILITIES ACT 3 (1990) [hereinafter BNA]. This motive is not surprising because

[m]uch of the social treatment of handicapped people depends on the general society's perceptions of their potential for economic usefulness. The relationship between the general public and handicapped people appears to be governed by a concern for cost effectiveness — a concern that . . . [can] be described as a consequence of political individualism, an ethic of efficiency, and a doctrine of human capital.

CLAIRE H. LIACHOWITZ, DISABILITY AS A SOCIAL CONSTRUCT 9 (1988).

est.¹³⁶ Disability can be one car accident or stroke away. The non-disabled benefit by recognizing the disabled parent's right to parent.

Courts have demonstrated that they are ignorant of the benefit support services can confer upon the disabled parent by focusing on stereotypes of the physically disabled during parental termination proceedings. These decisions exhibit a belief that the physically disabled are developmentally disabled, emotionally unstable, and consequently, unfit parents. The simplicity and success of innovative approaches that have allowed families to stay together and have saved taxpayers' money highlight the discriminatory treatment physically disabled parents receive in the majority of jurisdictions.

Part Two: The Impact of the Americans with Disabilities Act

This section argues that the Americans with Disabilities Act¹³⁷ alters the legal rights of physically disabled parents in the termination proceedings described above. The ADA confers rights on a protected class of disabled individuals. Parents can claim protection under the ADA by pointing to its underlying policy and its implementing regulations. The ADA implicitly mandates that public entities such as social service agencies restructure existing programs and services or create new services to make parenting equally accessible to the physically disabled and the non-disabled. It rejects the states' arguments that they do not have a duty to create new programs for physically disabled parents that would mainstream the physically disabled. The ADA recognizes that discrimination occurs when programs do not exist which would give the physically disabled an equal opportunity to parent as effectively as the non-disabled.

My argument consists of two related approaches. First, I analyze the policy and purposes of the ADA, as revealed in its introduction and its pertinent titles. I argue that a federal right to modified and new social service programs giving the physically disabled equal access to parenting follows naturally from the ADA's policy objectives. Second, I analyze Title II of the ADA and its implement-

136. "To expect that ablebodied adults can learn to see their own interests in public treatment of physically disabled people seems silly and naive on its face — especially when many adults do not appear to see self-interest in favorable treatment of aged citizens." LIACHOWITZ, *supra* note 135, at 112.

137. 42 U.S.C. §§ 12101-12213 (Supp. 1991).

ing regulations to show that the statutory language directly supports this federal right.

A. *The Background and Legislative History of the ADA*

Before the ADA's enactment,¹³⁸ the Rehabilitation Act of 1973¹³⁹ was the only civil rights law conferring rights on the disabled. Section 504 of the Rehabilitation Act prohibits discrimination against any "otherwise qualified individual with handicaps" in programs or activities receiving federal financial assistance.¹⁴⁰ It was patterned generally after Title VII of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, and national origin in federally assisted programs.¹⁴¹ The Rehabilitation Act resulted from failed attempts to include disability discrimination within the Civil Rights Act.¹⁴²

The Rehabilitation Act is important to interpreting the ADA because the ADA incorporates some of Section 504's terminology, regulations and case law. This connection is strongest in the ADA's Title II, which concerns public entities.¹⁴³ Both the Rehabilitation Act and the ADA focus on equal opportunity for the disabled and both require that state and local governments make special accommodations or modifications to their policies and practices to achieve this goal.¹⁴⁴

The ADA is a civil rights statute which confers rights on the protected class of qualified individuals with a disability.¹⁴⁵ The need for the ADA was twofold: first, no law existed to prohibit all private entities from discriminating on the basis of disability,¹⁴⁶

138. Prior to analyzing the ADA, I will examine disabilities law in existence before the ADA's enactment and discuss how the ADA relates to it.

139. Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1988).

140. *Id.* § 794. Section 504 also applies to federal executive agencies and the Postal Service through the 1978 amendments. BNA, *supra* note 135, at 33 n. 40.

141. BNA, *supra* note 135, at 21.

142. Senators Humphrey and Vanik were the leaders of the failed attempt to amend the Civil Rights Act to include disability discrimination. BNA, *supra* note 135, at 21.

143. ADA COMPLIANCE GUIDE ¶ 800 (1990).

144. *Id.*

145. 42 U.S.C. §§ 12112, 12132, 12182, 12184 (1988). The definition of disability in the ADA comes from Section 504 of the Rehabilitation Act and the Fair Housing Amendments Act of 1988. ADA COMPLIANCE GUIDE, *supra* note 143, ¶ 800.

146. The American Bar Association's Mental and Physical Disabilities Law Reporter stated in 1984 that "[t]o date, laws prohibiting discrimination against handicapped people have applied only to federal agencies and recipients of federal grants, contracts, and other forms of federal assistance. Discrimination against handicapped persons should be prohibited in all contexts where Congress has seen fit to outlaw other forms of discrimination." BNA, *supra* note 135, at 28 (quoting Bergdorf & Bell, Eliminating Discrimination Against Physically and Mentally Handicapped

and second, disability discrimination was widespread.¹⁴⁷ President Bush signed the ADA into law on July 26, 1990,¹⁴⁸ after recognizing the ADA's overwhelming Congressional support. Iowa Senator Tom Harkin called the ADA the "Emancipation Proclamation" for the forty-three million people with disabilities in the United States.¹⁴⁹ Unlike the Rehabilitation Act, the ADA applies to entities, private and public, regardless of whether they receive federal financial assistance.¹⁵⁰ It bars the commonly recognized forms of discrimination in "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting and access to public services."¹⁵¹

The ADA's legislative history reflects the concern of advocates and activists over the issue of disabled parenting:

The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk — it has meant being excluded from public school, employment opportunities, and being deemed an *unfit parent*.¹⁵²

Throughout the legislative history, disabled individuals express their overwhelming sense of society's misconceptions about their disability and hostility toward their becoming truly equal members of society:

[T]he general public doesn't want to see you doing your laundry, being a caseworker, a shopper, or a *Mom*. It is difficult to see yourself as a valuable member of society, and sometimes it

Persons: A Statutory Blueprint, 8 MENT. & PHYS. DIS. LAW RPR., Jan./Feb. 1984, at 64,71).

147. The U.S. Commission on Civil Rights wrote in 1983 that "[d]espite some improvement, particularly during the last two decades, discrimination against handicapped people continues to be a serious and pervasive social problem." BNA, *supra* note 135, at 27 (quoting U.S. COMMISSION ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983)); The disabled have even been described by a judge as "the most discriminated [against] minority in our nation. BNA, *supra* note 135, at 27.

148. The effective dates for the ADA titles are as follows: Title I, 24 months after enactment; Titles II and III, 18 months after enactment (effective on Jan. 26, 1992); Title IV, must be operating in three years. COMMERCE CLEARING HOUSE, INC., AMERICANS WITH DISABILITIES ACT OF 1990: LAW AND EXPLANATION 10-11 (1990).

149. BNA, *supra* note 135, at xi.

150. COMMERCE CLEARING HOUSE, INC., *supra* note 148, at 9.

151. TUCKER & GOLDSTEIN, *supra* note 103, at 20:3.

152. *The Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomm. on Employment Opportunities and Select Education of the Committee on Education and Labor*, 101st Cong., 1st Sess. 78-79 (1989) (testimony of Arlene B. Mayerson) (emphasis added).

is hard to see yourself as a person worthy of so much more respect than you get from the general public.¹⁵³

This legislative history shows that the ADA's drafters and advocates recognized discrimination against physically disabled parents. Their comments and the statute's construction show that the ADA creates a federal right to parent.

The Policy and Purposes of the ADA

The ADA's introduction states its policy goals. Congress designed the ADA to be the solution to society's historical isolation and segregation of the disabled.¹⁵⁴ The ADA's language states that the proper goals regarding the disabled are eliminating discrimination and providing the disabled with "equality of opportunity, full participation, independent living, and economic self-sufficiency."¹⁵⁵ The ADA's central objective is to mainstream¹⁵⁶ the disabled into all the functions performed by non-disabled members of society.¹⁵⁷ By eliminating discrimination, the ADA seeks to grant rights currently held only by non-disabled citizens. Although it is not explicitly mentioned in the ADA, parenting is a central function of society and a right held by citizens.¹⁵⁸

The ADA describes discrimination as including "outright intentional exclusion," physical barriers, "overprotective rules and policies," "exclusionary qualification standards and criteria," and "relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."¹⁵⁹ This far-reaching description may include social service agency policies that label physically disabled parents as unfit per se.¹⁶⁰ Importantly, the ADA recognizes both the origin and consequences of discrimination. The origins are in "stereotypic assumptions" that do not reflect the individual's ability to partici-

153. *The Americans With Disabilities Act of 1988: Hearings on H.R. 4498 Before the Subcomm. on Select Education of the Committee on Education and Labor, 100th Cong., 2nd Sess. 87 (1988)* (testimony of Virginia Domini, Training Coordinator, Independence Unlimited) (emphasis added).

154. In the findings section, Congress found that society has historically tended to isolate and segregate individuals with disabilities. 42 U.S.C. § 12101(a)(2) (Supp. 1991).

155. *Id.* at (a)(8) and (b)(1).

156. *See supra* note 20.

157. 42 U.S.C. §§ 12101(a)(8)-(9) and (b)(1) (Supp. 1991).

158. *See supra* note 14 and accompanying text.

159. 42 U.S.C. § 12101 (a)(5) (Supp. 1991).

160. This far-reaching definition of discrimination includes the overprotective social services policy that deems physically disabled parents as per se unfit, by using a qualification test of a good parent that bars physical disability and that provides physically disabled parents with fewer services than the agency provides to substance-abusing parents. Abrams, *supra* note 4, at E1.

pate in and contribute to society.¹⁶¹ The consequences are "inferior status"¹⁶² and "political powerlessness."¹⁶³ These consequences apply to the legal rights of physically disabled parents in termination proceedings. As a result, the ADA's mainstreaming policy and its expansive discrimination definition support the idea that a federal right to support services exists for physically disabled parents.

The ADA's broad coverage provides support for this interpretation. Among the areas covered are employment, public transportation, public accommodations, and telecommunications.¹⁶⁴ This broad coverage demonstrates a clear agenda to mainstream disabled individuals into central societal functions and roles. The ADA imposes a duty on public and private entities¹⁶⁵ to reasonably accommodate the physically disabled.

Title II of the ADA

Title II states that public entities¹⁶⁶ have a duty not to discriminate against disabled individuals. Title II defines the extent of the duty, those protected, essential eligibility requirements for receiving a benefit or service, the meaning of equal opportunity to a service, the necessary reasonable modifications social service agencies must provide, and the limits or defenses to a state's duty. This article will analyze each of these factors and arrive at a composite of a state's duties. It will argue that a federal right to support services falls directly within this duty and that states have no defense against an individual's efforts to enforce this federal right.

Title II and its implementing regulations¹⁶⁷ prohibit discrimination against the disabled by state and local governments.¹⁶⁸ Title II's coverage is broad: "[b]asically everything a state or local governmental entity does, from providing *social services* and sponsoring cultural and recreational events to building facilities and offering job opportunities, must be accessible to disabled

161. 42 U.S.C. § 12101 (a)(7) (Supp. 1991).

162. *Id.* at (a)(6).

163. *Id.* at (a)(7).

164. See 42 U.S.C. Chapter 126 - table of contents (Supp. 1991).

165. Private entities are covered by Title III - Public Accommodations and Services Operated by Private Entities.

166. See *infra* note 168, and accompanying text.

167. The Assistant Attorney General of the Civil Rights Division of the Department of Justice issued regulations to implement Title II on July 26, 1991, under the authority granted in 42 U.S.C. § 12134(a). The regulations became effective on January 26, 1992. 28 C.F.R. § 35 (1992).

168. Title II applies to "public entities." A public entity is defined as any state or local government; any department, agency, special purpose district, or other instrumentality of a state or states or local government; and the National Railroad Passenger Corporation, and any commuter authority. 42 U.S.C. § 12131(1) (Supp. 1991).

individuals.¹⁶⁹ Title II's regulations explicitly state that its nondiscrimination provisions apply to social services.¹⁷⁰ The purpose of Title II is to "continue to break down barriers to the integrated participation of people with disabilities in *all aspects of community life*."¹⁷¹

B. Who the ADA Protects

Title II protects anyone who is a "qualified individual with a disability."¹⁷² This includes an individual who has a physical or mental impairment substantially limiting one or more major life activities, who has a record of such an impairment, or who is regarded as having such an impairment.¹⁷³ This definition covers individuals with cerebral palsy, like Tiffany Callo, and those with temporary disabilities, like those from a stroke or car accident.¹⁷⁴ Title II protects individuals who "*with or without reasonable modifications to rules, policies, or practices . . . meet the essential eligibility requirements*" to participate in a program or receive services offered by a public entity.¹⁷⁵ If a disabled individual fails to satisfy the eligibility requirements for receiving a service, the state has a duty to determine whether a reasonable accommodation would enable the individual to satisfy the requirements.¹⁷⁶

This approach reveals a critical policy: a person's qualification to receive a benefit or service cannot depend exclusively on the way "things have always been done" by the state.¹⁷⁷ A state must change in order to meet the statute's requirement. A disabled individual's ability to participate depends on "the 'essential' goals and objectives of a [service or program], not only on how such [programs and services] were structured and performed in the past. Due consideration must be given to *alternative methods* for achieving the 'essential' elements that would facilitate the participation of the in-

169. ADA COMPLIANCE GUIDE, *supra* note 143, ¶ 810 (emphasis added).

170. *Id.* at ¶ 800.

171. BNA, *supra* note 135, at 251 (emphasis added) (quoting the House Judiciary Comm. Report).

172. 42 U.S.C. § 12132 (Supp. 1991).

173. This definition is provided in the implementing regulations. 28 C.F.R. § 35.104 (1992). The ADA states: "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131 (2) (Supp. 1991).

174. ADA COMPLIANCE GUIDE, *supra* note 143, app. III at 155 (stating that impairments are not necessarily excluded because they are temporary).

175. 42 U.S.C. § 12131 (2) (Supp. 1991).

176. BNA, *supra* note 135, at 109.

177. *Id.* at 109-110.

dividual with a disability."¹⁷⁸ Title II includes the "essential eligibility" test which the Supreme Court defined in *School Board of Nassau County, Florida v. Arline*.¹⁷⁹

In *Arline*, the Court balanced the interests of the disabled against legitimate public safety concerns and indicated that public entities may consider safety factors in determining whether a disabled individual is qualified for employment.¹⁸⁰ As a result, if a safety threat to third persons arises, the state has a direct threat defense against the application of Title II's requirements.¹⁸¹ Title II allows states to exclude individuals from participating in or receiving its services if the individual poses a direct threat to the health or safety of others.¹⁸² A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated by modifying policies and practices or providing auxiliary aids or services.¹⁸³

Importantly, the direct threat test establishes that courts cannot base a determination of a direct threat on generalizations or stereotypes about a particular disability.¹⁸⁴ Rather, courts must perform an individualized, fact-based determination from medical information or the "best available objective evidence."¹⁸⁵ These strict requirements for the state's direct threat defense "[protect] disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear."¹⁸⁶

Although the "qualified individual with a disability" standard described above only addresses the state's duty of providing existing, already available services, the standard is crucial under the ADA for three reasons. First, Congress knew of the *Arline* decision

178. *Id.* at 110 (emphasis added).

179. *Id.* at 109. In *Arline*, the Court ruled that a person with a communicable disease is an individual with a handicap under Sec. 504 of the Rehabilitation Act of 1973. 480 U.S. 273, 289 (1987). The eligibility test outlined by the Court is an individualized two-part inquiry: 1) whether an individual meets all of a program's requirements, and 2) if the individual does not meet all requirements, whether a reasonable accommodation would enable the individual to meet all requirements. *Id.* at 287-89.

180. *Id.* at 288.

181. ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 157.

182. *Id.*

183. *Id.*

184. *Id.*

185. The direct threat determination "must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk." *Id.*

186. *Id.*

when it considered enacting a direct threat defense. It is reasonable to believe that Congress approved the reasonable accommodation policy regarding disabled individuals' needs and rejected a direct threat defense based on stereotypes of the capabilities of the disabled. In termination proceedings, the state uses such stereotypes when it assumes that a physically disabled parent is physically and emotionally unstable and will threaten a child's safety.¹⁸⁷ The direct threat standard requires evidence that a physically disabled parent actually threatens a child's safety; society's unfounded belief that a child is unable to adapt to a parent's disability¹⁸⁸ is insufficient to establish a direct threat. Second, the "qualified" standard recognizes the specific form of discrimination against the physically disabled in termination proceedings — the bias for adoption and against reunification services.¹⁸⁹ The "qualified individual" standard directs that the "essential goals" of a service or program are critical to determining whether the individual will receive the service.¹⁹⁰ Because an essential goal of social services is family preservation, the state has a duty to investigate services such as reunification which will achieve that goal. Third, the "qualified individual" test exposes the problem that courts have only recognized a state's duty to provide existing or available services. The Title II regulations which I will next analyze resolve this problem by requiring that states create new services. Together, the statute and the regulations create the law that states must follow when providing social services.

C. Title II Regulations: Equal Opportunity and Reasonable Modifications

Title II's regulations define the state's duty to create new services that provide the disabled with equal opportunity to public services, integration, and reasonable modifications.¹⁹¹ This equal opportunity provision expands Title II's definition of discrimination and is therefore important. Discrimination, as stated previously, occurs when a state denies a disabled individual an existing benefit or service based upon discriminatory eligibility requirements. The regulatory definition of discrimination includes a situation where a disabled individual receives services which are not as effective as

187. See *supra* text accompanying notes 111-115.

188. Dr. Kirshbaum's research has in fact shown that children of physically disabled parents can adapt their behavior to the parent's disability as very young babies. TIFFANY CALLO STORY, *supra* note 11, at 200-201.

189. See *supra* text accompanying notes 127-129.

190. See *supra* text accompanying notes 177-179.

191. ADA COMPLIANCE GUIDE, *supra* note 143, app.III, at 151.

those that others receive.¹⁹² Specifically, the state must provide services that are "as effective in affording equal opportunity to obtain the *same result*, to gain the same benefit, or to reach the same level of achievement as that provided to others."¹⁹³ This is a discriminatory effects test that does not require the state to intend to discriminate in order to provide relief to the victim of discrimination.¹⁹⁴ This test allows physically disabled parents to show they do not obtain the same result as non-disabled parents. If physically disabled parents do not receive twenty-four hour assistance and the result is that they cannot parent as well as non-disabled parents, then the state's failure to provide these services falls under Title II's definition of discrimination.

The regulations establish an affirmative duty to create new services to effectuate the central goal of equal opportunity: a state may not provide different or separate services to disabled individuals than it provides to the non-disabled "*unless* such action is necessary to provide qualified individuals with disabilities . . . services that are as effective as those provided to others."¹⁹⁵ This provision requires states to provide twenty-four hour assistance services because these services are "necessary" to give the physically disabled an equal opportunity to parent.

The state's failure to provide this service is a form of segregation prohibited under the equal opportunity provision of Title II.¹⁹⁶ Without these services, physically disabled parents are separated from the act of parenting and, most importantly, their children. Title II's mandate of integration requires that states create this service for physically disabled parents. The key objective underlying integration is allowing disabled individuals to enter the mainstream of society;¹⁹⁷ integration enables the disabled to interact with the non-disabled. The only way to effectuate the integration policy for physically disabled parents is for states to provide them with a new, supplemental service that allows them to interact with their non-disabled children. Without this service, the state is dis-

192. 28 C.F.R. § 35.130(b)(1)(iii) (1992).

193. *Id.* (emphasis added).

194. In contrast, the discriminatory effects/impact test of *Washington v. Davis*, 426 U.S. 229, 248 (1976), requires the plaintiff to prove discriminatory intent.

195. 28 C.F.R. § 35.130(b)(1)(iv) (1992) (emphasis added). Further support for the contention that Congress intended to allow separate programs for the disabled is that Congress included authority for separate programs in Title III of the ADA. Section 12182(b)(1)(A)(iii) of Title III provides for separate benefits in language that is similar to Title II's regulation. Also, section 12182(b)(1)(B) of Title III shares the "most integrated setting appropriate" requirement with Title II's regulation, 28 C.F.R. § 35.130(d)(1992).

196. 42 U.S.C. § 12132 (Supp. 1991).

197. ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 159.

criminating on the basis of disability by splitting up families headed by disabled individuals.

Title II specifically recognizes that discrimination may occur when states apply "nonessential policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity" to participate in or receive benefits from a program.¹⁹⁸ The traditional social service policy of *not* providing twenty-four hour assistant care is a nonessential policy that defeats and "substantially impair[s] [the] accomplishment of the objectives of the public entity's program (equal opportunity) with respect to individuals with disabilities."¹⁹⁹ Social services' central goal should be to preserve families, and its mandated goal under the ADA is to mainstream the disabled into non-disabled society.

Title II imposes a duty on states to create support services for the disabled not only through its central goal of equal opportunity but also through its requirement that states make reasonable modifications to their existing programs.²⁰⁰ The policy behind reasonable modifications supports the duty of social service agencies to structure their programs to the physically disabled's needs:

Discrimination against handicapped people cannot be eliminated if programs, activities, and tasks are always structured in the ways people with 'normal' physical and mental abilities customarily undertake them. Adjustments or modification of opportunities to permit handicapped people to participate fully have been broadly termed 'reasonable accommodation.'²⁰¹

States must "make reasonable modifications in policies, practices, or procedures . . . where necessary" to avoid discriminating on the basis of disability.²⁰²

The ADA defines "reasonable modifications" broadly. The ADA does not explicitly define "reasonable modifications." Rather, it states the "reasonable modification" duty as a general rule that is

198. *Id.* at 160.

199. 28 C.F.R. § 35.130 (b)(37)(ii)(1992), ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 176.

200. 42 U.S.C. § 12131 (2)(Supp. 1991). Title II and Title III (public accommodations) requirement of "reasonable modifications" is similar to Title I's (employment) requirement of "reasonable accommodations." 42 U.S.C. § 12112 (b)(5) (Supp. 1991). The Supreme Court has used the terms interchangeably. BNA, *supra* note 135, at 115.

201. BNA, *supra* note 135, at 114, (quoting the U.S. Commission on Civil Rights' report *Accommodating the Spectrum of Individual Abilities*).

202. 28 C.F.R. § 35.130 (b)(7) (1991). Section 12182(b)(2)(A)(ii) of Title III (Public Accommodations) of the ADA sets out the requirement specifically for public accommodations and the House Judiciary Committee Report directs the Attorney General to include these specific requirements in the Title II regulation. ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 161.

subject to certain exceptions.²⁰³ Although the ADA does not explicitly define "reasonable modifications," it provides several illustrations of what is "reasonable". Title II's list is broad and includes redesigning equipment, reassigning services to an accessible building, altering existing facilities, constructing new facilities, assigning aides, and making home visits.²⁰⁴ Under Title II, "reasonable" may be restructuring a job, modifying a work schedule, acquiring or modifying equipment, and providing qualified readers or interpreters.²⁰⁵ Title II's requirement that states provide the disabled with such auxiliary aids and services as are necessary for their effective communication²⁰⁶ emphasizes that the disabled are best qualified to define "reasonable." According to Title II, a disabled individual may request a particular aid or service, and the state must satisfy this request unless it can prove that an alternative, equally effective service is available or that it has one of the defenses that the ADA recognizes.²⁰⁷

D. The State's Defenses

1. Undue Burden/Fundamental Alteration

The states faced with altering social service programs or creating twenty-four hour attendant care programs will respond by arguing that this is not required by the ADA. Their defenses under the statute are that the change would be an undue burden, that it would fundamentally alter the nature of social services, and that alternative equally effective services are available.

The ADA does not require a state to take any action that would result in a fundamental alteration in the nature of its service, program, or activity or an undue financial or administrative burdens.²⁰⁸ The state, however, has the burden of proof for these defenses.²⁰⁹ A new service presents an undue burden only when the state shows that it investigated all available funding and could not provide the service because it would require additional financial resources that were unavailable.²¹⁰ Evidence shows, however, that a twenty-four hour assistant care service could produce cost-sav-

203. Reasonable modifications are to be made unless they "would fundamentally alter the nature of the service, program, or activity" 28 C.F.R. § 35.130(b)(7)(1992).

204. 28 C.F.R. § 35.150 (b)(1)(1992).

205. 42 U.S.C. § 12111(9)(Supp. 1991).

206. See 28 C.F.R. § 35.160(b)(1)(1992); ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 169.

207. ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 169.

208. 28 C.F.R. 335.164 (1992), however 28 C.F.R. § 35.160 (b)(2)(1992) asserts that states must give "primary consideration" to the specific requests of the disabled.

209. 28 C.F.R. § 35.150(a)(3) (1992).

210. See ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 166.

ings, not a financial burden. The successful pilot programs described earlier produced a tax-savings compared to the expensive current foster care system.²¹¹ In fact, social service agencies have never investigated the cost-benefits of the new program because the courts and legislatures have never recognized social services' duty to create these programs.

Another defense could be that a modification will fundamentally alter the nature of the program it provides to the community.²¹² By creating a new program of attendant care to physically disabled parents, the state would be fundamentally altering the services it has provided to physically disabled parents in the past. However, an alteration that *improves* social services to bring it in line with its goal of family preservation would hardly be a detriment to the agency or its clients.

2. Alternatives to Achieving Equal Opportunity

Contrary to courts' views, twenty-four hour attendant care for the physically disabled is not a unique or radical concept. Under workers' compensation, it is considered a reasonable service for the disabled. For example, workers' compensation reimburses employees or their survivors for their disabilities, medical costs, and sometimes, rehabilitation costs that they incur as a result of job-related physical or mental injuries.²¹³ In most U.S. jurisdictions, agencies administer and resolve employees' workers' compensation claims.²¹⁴ In every jurisdiction, except for the Virgin Islands, the medical coverage is unlimited and consists of a wide variety of services, including home attendant care.²¹⁵ Courts have widely recognized the duty to provide nursing and attendant care.²¹⁶ They broadly define this duty to include twenty-four hour attendant care.²¹⁷ One court stated there is a duty to furnish "reasonably necessary medical services."²¹⁸ Some courts have held that the duty

211. See *supra* notes 130-36 and accompanying text.

212. 28 C.F.R. § 35.150(a)(3) (1992); ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 178.

213. JEFFREY V. NACKLEY, PRIMER ON WORKER'S COMPENSATION 1 (1989).

214. *Id.* at 73. Only five states have court-administered workers' compensation: Alabama, Louisiana, New Mexico, Tennessee, and Wyoming. *Id.*

215. *Id.* at 57.

216. *Interchange Village v. Clark*, 363 S.E.2d 350, 352 (Ga. Ct. App. 1987); *Larson v. Squire Shops, Inc.*, 742 P.2d 1003, 1006 (Mont. 1987); *Quinn v. Archbishop Bergan Mercy Hosp.*, 439 N.W.2d 507, 510 (Neb. 1989).

217. *Hunter v. Hernando County Bd. of County Comm'rs*, 578 So.2d 798, 799 (Fla. Dist. Ct. App. 1991); *Hopson v. Hickman*, 357 S.E.2d 280, 283 (Ga. App. 1987); *St. Clair v. County of Grant*, 797 P.2d 993, 1003 (N.M. Ct. App. 1990).

218. *St. Clair*, 797 P.2d at 998.

also applies when a family member or spouse is the attendant.²¹⁹ Courts liberally construe workers' compensation statutes in favor of the disabled beneficiary.²²⁰ This accommodating approach contrasts sharply with courts' rejection of the states' duty to provide twenty-four hour attendant care for physically disabled parents.²²¹

Title II's regulations expressly mention that a state is not required "to provide attendant care . . . except in special circumstances, such as when the individual is an inmate of a custodial or correctional institution."²²² This statement, however, can be reconciled with a state's duty to create the service of attendant care by its own qualification, "except in special circumstances," and by the fact that the state may provide special benefits to a particular class of the disabled.²²³ The Justice Department's exception for prison inmates ought to be extended to parents because they also have no recourse without this public service. The plight of unassisted physically disabled parents is defined as such a special circumstance by the ADA's mandate that the state has an affirmative duty to give the disabled an equal opportunity to participate in the central functions of the community. Creating an attendant care program for physically disabled parents is the only means of achieving equal opportunity access to parenting.

Conclusion

Deficient state support policies and an insensitive court system discriminate against physically disabled parents. Together, social services and the courts have labeled these parents as unfit and ignored the logical solution to the purely *physical* difficulties of disabled parenting: attendant care assistance. The ADA rectifies this situation by recognizing that disabled individuals have a federal right to the support services that will give them an equal opportunity to parent. Until this ADA provision is enforced, states will continue to take away the children of low-income physically disabled parents like Tiffany Callo who love and want to raise their children.

219. See, e.g., *Hunter*, 578 So.2d 798 (Fla. Dist. Ct. App. 1991); *St. Clair*, 797 P.2d 993 (N.M. Ct. App. 1990).

220. *NACKLEY*, *supra* note 213, at 8.

221. See *supra* note 92.

222. ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 161.

223. 28 C.F.R. § 35.130(c) (1992); see also ADA COMPLIANCE GUIDE, *supra* note 143, app.III at 161.

