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Chapter 12

LEGAL ISSUES IN CHILD WELFARE CASES INVOLVING CHILDREN WITH DISABILITIES

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This chapter examines the legal framework applicable when child maltreatment and disability intersect. It begins with a brief description of the constitutional foundation for parent-child-state relations. It provides an overview of relevant federal child welfare laws, which today shape each state's child protection system. It then considers the application of various federal laws governing work with children and families when a child has a disability. In doing so, we consider the Americans with Disabilities Act, the Individuals with Disabilities Education Act, and Section 504 of the Rehabilitation Act, and we touch upon Social Security benefits for children. This chapter does not examine child well-being legislation that establishes and funds programs such as Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), or publicly funded health care for children such as the State Children's Health Insurance Program.

INTRODUCTION

According to the Census Bureau in the United States (US), approximately 2.8 million school-aged children (ages 5–17 years) have a disability (1). These disabilities range from physical to cognitive, sensory to emotional. Having a disability may place a child at

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higher risk for maltreatment. In turn, maltreatment may cause a child to have a disability, such as when a child suffers from an inflicted head injury. Inevitably, children with disabilities will come into contact with the child protective system. Nationally each year, the confirmed cases of child maltreatment approach 1,000,000, which involve some 3,000,000 children. Among these are hundreds of thousands of children with disabilities and maltreatment in the US who will be involved in disparate legal proceedings designed for one or the other, but not both.

UNITED STATES CONSTITUTIONAL FRAMEWORK

The Constitution of the United States does not explicitly mention parents, children or families. For nearly a century, though, the Supreme Court has interpreted the Constitution to protect the rights of parents to raise their children and the rights of children to benefit from familial attachment free from interference by governmental authorities. At the same time, the Court has recognized a compelling governmental interest in protecting children from maltreatment at the hands of their parents, guardians or custodian. The establishment of these rights is rooted in the xenophobia surrounding World War I (2).

Before the advent of World War I, most states in the country protected the right of parents to educate their children in the language of their choice. During that war, however, a number of states enacted legislation requiring that public school children be taught in English, and prohibited educational lessons taught in other languages. The State of Nebraska enacted one such law in April 1919, which "made it a misdemeanor to teach any subject in a foreign language, or any foreign language as a subject" (2).

A year after the statute was enacted, a county attorney entered the classroom in Hampton, Nebraska, where Robert Meyer was teaching in German. Meyer was charged with violating the statute prohibiting the use of any foreign language when teaching school children. He was convicted of the misdemeanor and given the minimum fine provided by the law, $25. He appealed his conviction on grounds that the law prohibiting him from teaching in German violated his right to liberty under the Fourteenth Amendment to the Constitution, which provides that "No state shall … deprive any person of life, liberty, or property without due process of law" (3). The Nebraska Supreme Court upheld his conviction, and he appealed to the US Supreme Court.

In 1923, the Court issued its opinion in the case. The Court acknowledged that it had "not attempted to define with exactness the liberty thus guaranteed" (3). However, the court noted, "Without doubt, it denotes . . . the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"

(3). Thus, the court observed, "it is the natural duty of the parent to give his children education suitable to their station in life" (3). Because the parents of Mr. Meyer's students possessed this "natural duty," they had a right, protected by the liberty clause of the Fourteenth Amendment, to engage Mr. Meyer to fulfill this responsibility. Although the court recognized the State "may do much, go very far...in order to improve the quality of its citizens, physically, mentally and morally...the individual has certain fundamental rights which must be respected" (3).

Two years later, in *Pierce v. Society of Sisters* (1925), the Court held that the fundamental right established in *Meyer* extended to a parent's right to choose to educate his or her children in non-public, religious or military schools (4). In doing so, the Court observed that "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations" (4). Together, the *Meyer* and *Pierce* cases established the fundamental right of a parent to direct the upbringing of his or her child without undue interference from governmental authorities.

In both *Meyer* and *Pierce*, however, the Court made clear that State authorities are not entirely without power to regulate schools or, more broadly, parents' choices in directing their children's upbringing. The limitations on a parent's right to direct their children's upbringing were addressed in 1944. Massachusetts had enacted certain child labor laws, which prohibited children of certain ages from engaging in certain activities. Sarah Prince was charged with violating the law when she permitted her two children and a third child over whom she had legal guardianship to sell religious pamphlets for $.05 on the streets of Brockton, Massachusetts. She was convicted of violating the law and appealed.

The case *Prince v Massachusetts* raised two issues related to the Constitutional right to liberty: 1) the right of a parent to direct a child's religious development; and 2) the right of the children to observe and participate his or her family's religious activities. In *Prince*, the Court more squarely articulated the sometimes adverse positions of the parent and the state vis-à-vis the child. The Court acknowledged both the parent's interest in raising her or his child without governmental interference and the right of the State, as the ultimate guardian of the child, to act to protect the child's welfare. The Court noted, "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents" (5). But the Court went on to state that "the family is not beyond regulation in the public interest...neither the rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well-being, the state...may restrict the parent's control" in a number of ways, including by mandating school attendance and prohibiting child labor (5). Thus, the Court ruled, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare" (5).

What of the rights of children relative to the rights of the state and the parents in this mix? The rights of children in this triangle of rights are somewhat less defined. Courts have, however, recognized that, generally speaking, parents and children have reciprocal rights. Parents have the right to raise their children as they see fit and children have the right to benefit from the day-to-day nurturing provided by parents and to their benevolent decision-making (6). That is, parents have the right to care, custody and control in raising of their children and children have the right to benefit from that care and concern. However, "the power of the parent...may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens" (7).

In subsequent years, the Supreme Court has applied this basic doctrine balancing the rights of parents and the rights of state authorities to familial living arrangements (8), medical and mental health decision-making (6), and whether a grandparent has the right to visit a child over the objections of the custodial parent (9). The rule that pertains from the Court's cases, read together, is that a fit parent, one who has not been found to have maltreated his or her child, has the right in the first instance to raise his or her child as he or she sees fit. Parents' rights are weakest when they have been shown to have maltreated their child.

CHILD MALTREATMENT AND THE UNITED STATES CONSTITUTION

The law begins with the presumption that a parent is fit and will, therefore, make parenting decisions that are in the best interests of her or his child. The Supreme Court has articulated the rationale for this presumption: "The law's concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life's difficult decisions...[H]istorically, it has recognized that natural bonds of affection lead parents to act in the best interests of their children" (6). While the state may have a legitimate interest in separating a child from an abusive or neglectful (i.e., unfit) parent, the state has no legitimate interest in separating a child from a fit parent (10).

When one wishes to invoke the law in order to protect a child from parental neglect or abuse, that individual must assume the burden of demonstrating parental unfitness. In asserting the unfitness of a parent to parent his or her child, the law will not rest on presumptions, and the actual unfitness of the parent must be demonstrated (10). Thus, for example, where the State of Illinois enacted a law that presumed that all unmarried

fathers were unfit to provide care and custody for their children upon the death of the child's mother and automatically took the children into the foster care system, the Court held the law to be an unconstitutional violation of the father's right to both equal protection of the law due process of law (10). Under the state's statutory scheme, a mother, a married father or a divorced father had the right to have a hearing at which state authorities were required to demonstrate the parent's unfitness before their children could be removed. The statute, however, allowed the state to remove children from their father if he had never married their mother on the theory that because most unwed fathers were unfit, the children of all these fathers could be removed. The Supreme Court struck down this law, requiring that state authorities demonstrate that the particular father at issue is unfit to care for his children.

Cases involving the fathers of children present some unique legal challenges. While a child's mother is known, and her rights established, at the time of birth, the identity of a child's father may be more difficult to ascertain, and determination of his rights more complicated. In *Lehr v. Robertson*, the Supreme Court was required to define the rights of a father who was not married to the child's mother and who had never established a relationship with his child (11). Because the father did not grasp the opportunity to parent his child, he did not have the same rights as a father who had grasped that opportunity. In short, a father must actually exercise his parental rights and attend to his parental responsibilities or he may be deprived of his rights more easily than a father who has asserted them.

While parents and children possess reciprocal rights in their relationship with one another and share an interest in the preservation of their family free from governmental interference (12), there is no absolute constitutional right to remain together as a family, and state authorities, acting on the orders of a court, may remove a child from an abusive or neglectful parent's custody (13). Once a state trial court finds that a parent is unfit, the State's "urgent interest" in protecting the child from harm prevails over the parent's right to care, custody and control of the child.

While child protective services caseworkers may act to protect a child from harm by seeking to remove him from abusive or neglectful parents, the state is under no obligation to do so. Thus, where children's protective services were involved with a family but failed to remove the child from the parent's custody, the child could not successfully sue the state authorities after his father beat him causing extensive brain damage (13).

While the state may demonstrate parental unfitness by a preponderance of the evidence standard (i.e., that child maltreatment more likely than not occurred), it may not permanently terminate a parent's rights unless it can show by clear and convincing evidence that abuse or neglect has occurred (12). The Supreme Court has explained the need for this higher burden of proof:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures. (12)

Note that this standard applies only to non-Indian children. A higher standard, "beyond a reasonable doubt," applies to the termination of parental rights to an Indian child, as will be discussed more fully later in this chapter. While the Supreme Court has held that the Constitution does not require, as a matter of due process of law, that parents be appointed legal counsel in every case (15), most states, either in interpreting their constitutions (16) or by way of statutory enactment (17), provide for the appointment of a lawyer in every child protection proceeding at public expense if the parent is unable to afford one. Although appointment of legal counsel is not constitutionally required, the provision of a transcript of the trial court proceedings at public expense is mandatory if the parent is unable to afford to pay for the transcript to be produced (18). With this constitutional framework in mind, we will next consider the statutory schemes utilized by states to protect children from inadequate parenting.

THE FEDERAL STATUTORY FRAMEWORK OF CHILD WELFARE CASES

Every state has a statutory scheme for responding to alleged child maltreatment that occurs at the hands of a child's parents or legal custodians. (19) While these statutes differ in their particulars, they are substantially similar largely because of the federal government's involvement in funding child protection services since the mid-1970s. To understand how this came to be, it will be helpful to begin with a very brief history lesson.

The United States has always provided some mechanism by which the larger community can step in and assume the care of a child who is without parents or whose parents are unable or unwilling to provide an appropriate home. By the early 1800s, the doctrine of *parens patriae*—the notion that the sovereign was ultimately responsible for safeguarding the welfare of those who lacked legal capacity—was well-established in American law. Where children were placed when their parents were unable to provide and appropriate home has changed over time, from basically indenturing them to placing them in congregate care facilities, to foster family homes.

In the 1960s, in the wake of the publication of the Kempe et al. seminal paper "The battered child syndrome" in the Journal of the American Medical Association (20), states began to enact laws requiring physicians and other professionals to report cases of suspected child abuse to state authorities (21). Those laws were expanded over time to broaden both what was to be reported—e.g., child neglect and sexual abuse in addition to physical abuse—and categories of professionals who were mandated to report their concerns— initially only medical professionals were required to report, but that was expanded to social workers, teachers and others professionals who come into frequent contact with children. These laws resulted in substantial increases in the number of abused and neglected children coming to the attention of state child protection authorities.

By the mid-1970s, there were about a half-million children in the foster care system nationwide. It was not unusual for children entering the foster care system to remain in the system for years with no effort being made either to reunify them with their families of origin or to move them into alternative permanent homes. This phenomenon came to be known as foster care "limbo" and was accompanied by another phenomenon, foster care "drift," in which children would often move from home to home. Children remained in foster homes for so many years that the United States Supreme Court was called on in *Smith v. Organization of Foster Families for Equality and Reform* to determine whether long-term foster families had the same or similar constitutional rights as biological families. Eventually, these concerns were brought to the attention of Congress, which enacted legislation intended to bring about reform of the nation's child protection systems. Space limitations do not permit a detailed discussion of federal child welfare law.

CHILD ABUSE PREVENTION AND TREATMENT ACT

The United States is a federal system, which means that some matters of public policy are handled by the federal government while others are handled by the individual states. Legal issues relating to families are regulated by the states. The federal government may influence state policy by enacting legislation pursuant to its spending authority and placing conditions on the receipt of federal money. In the child protection arena, the federal government has established a stream of funding that allows the states to draw down large amounts of federal money if they design their state child protection systems to meet federal standards.

The first such statute that Congress enacted was the Child Abuse Prevention and Treatment Act (CAPTA). Signed into law in 1974, and repeatedly amended and

reauthorized since, CAPTA provides support for state systems of preventing and responding to reported cases of child maltreatment. CAPTA also provides funding to support research into all aspects of child maltreatment—causes, prevention, and consequences—as well as program evaluation and technical assistances to states, Indian tribes and non-profit organizations (22).

ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980

Concerned about the number of children in foster care, the length of time they remained in what was intended to be a temporary system, and placement instability, in 1980, Congress passed and the President signed into law the Adoption Assistance and Child Welfare Act of 1980. This statute added two sections to the Social Security Act to provide funding to states to address child protection. Broadly speaking, this statute, which, like CAPTA, has been amended and reauthorized repeatedly since its initial enactment, has three purposes: 1) reducing the number of children entering foster care; 2) shortening stays in foster care; and 3) moving children to permanent homes, either through return to their family of origin, or, when return home is not possible, moving children into adoptive homes. We will look at each of these goals in a bit more detail.

To reduce the number of children entering foster care, the law required that state child welfare authorities make "reasonable efforts" to prevent children from entering the system by developing programs to provide in-home services to children and their families aimed at maintaining the family. To accomplish this, Congress added Title IV-B to the Social Security Act, which funnels federal money to states to prevent the removal of maltreated children from their homes. In response, states developed intensive family preservation programs which seek to address the family's needs and problems in functioning in order that children may remain safely in their homes.

Next, the statute addressed those cases in which the child cannot be safely maintained in the home and must be removed. To accomplish this, Congress created Title IV-E of the Social Security Act. The law incentivizes states to make "reasonable efforts" to return children to their families. To accomplish this goal, state child protection authorities are required to develop individualized case plans aimed at addressing the needs of individual family members such as drug or mental health treatment for parents and medical and mental health care for the children. The aim of the service plan is to resolve the problems in functioning that lead to the child's removal and facilitate the safe return of the child to the custody of his or her parents.

The third requirement of the statute is that states consider "the child's sense of time." rather than adult's sense of time. Generally, Congress determined that children need decisions about returning home or being freed for adoption to be made much more quickly than was happening before the enactment of the stature. Thus, the law required that states hold permanency planning hearings (PPH) after a child had been in foster care for a designated period of time. Originally, the PPH was to be held 18 months after the child entered foster care. That requirement was subsequently shortened to one year.

Finally, the 1980 law provided a package of adoption incentives that were intended to move children from temporary foster care into permanent homes. These incentives include the state rather than the adoptive family paying for the costs of the adoption (e.g., court fees) and by providing both cash assistance and medical benefits for special needs children (e.g., children with disabilities and older children).

In the early 1980s, these statutes began to have their intended impact, the numbers of children entering foster care edged down slightly. But then two phenomena converged to increase the numbers of children entering care. First, a more conservative federal government began to cut public benefits available to families, increasing the risk of child maltreatment. Secondly, the combination of the crack cocaine epidemic and the advent of HIV/AIDS had devastating impacts on certain communities. The need for foster care increased.

A related problem also emerged. In the 1980 law, Congress never defined what it meant by "reasonable efforts," and many states, in part as a means of saving money, defined it to mean every conceivable effort had to be made before a child could be removed from the home. That is, states began to overuse intensive family preservation programs beyond their capacities, which resulted in a number of high profile child deaths and many lesser harms inflicted on children (23).

ADOPTION AND SAFE FAMILIES ACT

As a result, in 1997, Congress passed and President Clinton signed into law the Adoption and Safe Families Act (ASFA), which was intended to clarify the intent of Congress regarding the 1980 Act in general and the "reasonable efforts" requirement in particular. While it renewed the federal government's commitment to family preservation, it made clear that children's health and safety are to be the paramount concerns of the nation's child protection systems.

The ASFA maintained the basic framework of the 1980 Act but made a number of adjustments and clarifications. The new law tightened the timeline for permanency planning hearings from 18 months to one year. It also made clear that there is a set of

cases involving very serious child maltreatment—e.g., death of a child, torture of a child—in which "reasonable efforts" shall not be made to preserve or reunify the family, and the state authorities are mandated to seek the termination of the parents' rights immediately.

Next, ASFA permitted each state to define for itself a category of "aggravated circumstances" cases in which state authorities may determine that "reasonable efforts" to either preserve or reunify a family are unnecessary, and thereby permit the child protection agency to pursue immediate termination of parental rights. While each state is free to define this group of cases for itself, the federal legislation suggests that appropriate circumstances for its use include abandonment, chronic abuse, and sexual abuse.

The final major change in the law under ASFA is that the state child welfare agency may seek, and the juvenile or family court may grant, termination of parental rights in any case without making "reasonable efforts" to preserve or reunify the family if the specific circumstances warrant such action. Illinois is one state that has codified this possibility. It statute provides that parental rights may be terminated "in those extreme cases in which the parent's incapacity to care for the child, combined with an extremely poor prognosis for treatment or rehabilitation, justifies expedited termination of parental rights" (24).

In the wake of ASFA's enactment a number of states have adopted definitions of "reasonable efforts" in order to guide state child welfare authorities and courts in making decisions about whether this requirement has been complied with. For instance, Missouri law provides as follows:

> "Reasonable efforts" means the exercise of reasonable diligence and care . . . to utilize all available services related to meeting the needs of the juvenile and the family. In determining reasonable efforts to be made and in making such reasonable efforts, the child's present and ongoing health and safety shall be the paramount consideration. In support of its determination of whether reasonable efforts have been made, the court shall enter findings, including a brief description of what preventive or reunification efforts were made and why further efforts could or could not have prevented or shortened the separation of the family. The [state child welfare authorities] shall have the burden of demonstrating reasonable efforts. (25)

ASFA also permitted the use of concurrent planning, which allows state child protection authorities to simultaneously seek to reunify the family and develop an alternative plan in the event that reunification services are not successful. By engaging in the duel planning process, children's stays in foster care can be shortened and they can achieve permanency more quickly. The law also expanded permanency options to include both permanent legal guardianship and a designation called "another planned permanent

living arrangement," which is typically used in cases of older foster children who can neither be returned to their families of origin nor placed for adoption, and includes alternatives such as independent living or, perhaps, discharge into the adult foster care system for incapacitated adults.

MULTIETHNIC PLACEMENT ACT AND THE INTERETHNIC ADOPTION PROVISIONS

Historically, minority children, particularly African Americans, were excluded from receiving public child welfare services. In more recent years, there has been concern not of underserving minority children but of the overrepresentation of minority — again, specifically African American — children in the child protection system. As a result, there has been debate about the availability of services to meet the needs of these children. One ongoing controversy is the placement of African American children across racial lines for adoption. One response to this concern was for state authorities to engage in conscious race matching. As a result, some African American children's placement from institutional care into foster family homes or for adoption in a suitable home was delayed or denied. Some jurisdictions had explicit waiting periods before a child could be placed into or adopted across racial lines.

In 1994, Congress enacted the Multiethnic Placement Act, which sought to eliminate (or, at least, dramatically reduce) the use of race, color or national origin as a basis on which foster or adoptive placement could be determined. The law's language, however, was easily interpreted as permitting some racial matching, so two years later, Congress passed clarifying language in the Interethnic Adoption Provisions, which were intended to ban outright the use of race, color or national origin in placement decision-making except in the rarest of circumstances.

If the placement of a child into either a foster or adoptive home is delayed or denied on the basis of race, color or national origin, the law explicitly provides that the aggrieved person—the child or the foster/adoptive parent—may sue the state child welfare agency. This is a rare exception to the governmental immunity from lawsuits typically enjoyed by child welfare agencies.

THE FOSTER CARE INDEPENDENCE ACT

Each year, approximately 20,000 children age out of the foster care system. Many of these youth are ill-prepared to make a successful transition to young adulthood. Historically, most had not graduated from high school, many were ending up homeless, nearly half were themselves parents, and some 80% of them were unable to support themselves financially. To address the unique problems facing this sub-population of the foster care population, Congress enacted The Foster Care Independence Act in 1999, commonly known as the "Chafee Act," so named for its author, Senator John Chafee (1922-1999).

The Chafee Act provided a separate funding stream to states to allow them to develop programming for children who were in the foster care system on or after their 14th year birthday. In addition to providing Medicaid coverage for these youth until the age of 21 years, the Act required that foster parents of these youth be specially trained to meet their needs and that state agencies assist youth in developing independent living skills such as how to seek employment and how to manage a household budget. Agencies were also to provide assistance with completing high school and making the transition to job training or college. The law also provided additional adoption subsidies to encourage and support the adoption of these older children.

In 2008, the Congress amended Title IV-E to allow states to extend these youth in the foster care system until their 21st year birthday. It also mandated that state agencies develop a personalized, youth-directed plan for each youth in order to address the transition to adulthood, including educational, housing, health insurance, and other considerations.

INDIAN CHILD WELFARE ACT

In 1978, in an effort to respond to overzealous child welfare practices aimed at assimilating Indian children into the dominant culture through unnecessary removals, Congress enacted the Indian Child Welfare Act (ICWA). Unlike the other federal child welfare laws discussed in this chapter, which are funding statutes, the ICWA is substantive law. That is, unlike the funding statues, which the states may choose to follow or not (if they choose not to, of course, they will not be able to draw down some or all of the federal funding they would be able to draw down if they complied), the states are mandated to comply with the ICWA in every child protection case involving an

"Indian child." This distinction results because the Constitution of the United States explicitly reserves to the Congress the authority to make laws relating to the Indian tribes.

Two threshold issues are important to keep in mind regarding the application of the ICWA. First, the law defines an "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." The federal government has given formal recognition to 567 "tribal entities" across the country. Of note, it is possible for a child to be of Native American ancestry but not qualify as an "Indian child" within the meaning of the law, because each tribe defines for itself its tribal eligibility requirements. Some, but not all, tribes have a blood quantum requirement. Secondly, unlike child protection proceedings involving non-Indian children, in a proceeding involving an "Indian child" the child's tribe is a party to the proceeding. Thus, the tribe or the parents may, generally speaking, elect to move the case from the state court to a tribal court. Alternatively, the tribe may intervene as a party to and participate in a state child protection proceeding.

When an "Indian child" resides on a reservation, state courts may make only emergency orders that are necessary to ensure a child's immediate safety. In situations such as this, the law provides that the case must be transferred the tribal court. Most tribes that have tribal courts have separate child welfare codes. However, these codes are substantially similar to state child welfare codes. As with state child protection systems, the various federal laws allow tribes to access federal funding to support their child protection efforts so long as the tribal system meets the federal requirements.

The ICWA provides a unique set of procedures applicable to cases of Indian children that are explicitly intended to make it more difficult to remove an Indian child from his or her home. The law accomplishes this goal in several ways. First, it increases the amount of evidence (i.e., the standard of proof) which state authorities must present to a court before an Indian child may be removed from the home. While a non-Indian child may typically be removed from the home based upon a showing of probable cause that a child has been harmed, before an Indian child may be removed, the state authorities must present clear and convincing evidence. This is the same standard by which the parental rights of a non-Indian child's parent may be permanently terminated. To terminate the rights of an Indian child's parents requires proof beyond a reasonable doubt, the highest standard of proof known to the law, which is typically used to convict a defendant of a criminal offense.

The ICWA also requires that at both the removal stage and the termination of parental rights stage in a child protection proceeding state authorities prove that "active efforts" have been made to maintain or reunify the Indian family. The Bureau of Indian Affairs within the Department of the Interior in 2015 issued updated guidance for state

authorities in applying the ICWA. (26) It said that, "Active efforts are intended primarily to maintain and reunite an Indian child with his or her family or tribal community and constitute more than reasonable efforts" as required by other federal funding legislation. The BIA provides examples of "active efforts," including:

- "Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services."
- "Taking into account the Indian child's tribe's prevailing social and cultural conditions and way of life, and requesting the assistance of representatives designated by the Indian child's tribe with substantial knowledge of the prevailing social and cultural standards."
- "Offering and employing all available and culturally appropriate family preservation strategies."
- "Completing a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal."

Some question the viability of the ICWA given that consideration of race in matters of public decision-making is restricted, and ask how the ICWA squares with the Multiethnic Placement Act and the Interethnic Adoption Provisions. The basic answer is that tribes are sovereign nations, and enrollment in a tribe constitutes a political designation rather than a racial or ethnic classification.

In response to the enactment of the ICWA, several states—e.g., Iowa, Michigan, Minnesota—have enacted comparable statutes at the state level. These statutes may be more expansive or protective than the federal law, and therefore may apply to children and families that would not be covered under the federal ICWA.

APPLICATION OF DISABILITY LAW TO CHILD WELFARE CASES: THE AMERICANS WITH DISABILITIES ACT AND SIMILAR LAWS

The services provided in child welfare cases to prevent the removal of a child from a parent's custody or to reunify a family often are designed to address parenting problems identified by the child welfare agency. These problems with parenting may be the ones that prompted agency involvement in the first place or may be ongoing or new concerns that contribute to continued foster care placement. In contrast, less attention may be paid to the social service and educational needs of children involved in the child protection system. Child welfare agencies need to carefully ascertain what kinds of assistance

children may require, and special attention must be paid to ensuring that the needs of children with disabilities are met.

It is well-established that any services provided to parents by child welfare and associated agencies must reasonably accommodate a parent's disability under Title II of the Americans with Disabilities Act (ADA) (26). If these services do not reasonably accommodate a parent's disability, they may not be considered "reasonable efforts" by the courts, jeopardizing the state's access to federal funding in that case and potentially interfering with later efforts by the agency to terminate the parent's rights. Similarly, but perhaps considered less frequently by child welfare agencies and the service providers with whom they work, the ADA also protects children with disabilities. Therefore, any services provided to a child with a disability must accommodate that disability such that the child has an opportunity to benefit from the service as much as a non-disabled child might.

The ADA is a federal civil rights law that is designed "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" (27). It is not the only law to do so. For example, Section 504 of the Rehabilitation Act of 1973 also addresses disability discrimination, but only in entities that receive federal funding (28). Many organizations and agencies providing services to children in the child welfare system receive federal funds, so Section 504 would apply to them much as the ADA does. So too would analogous state disability rights statutes where they exist. Because the application is quite similar between these statutes, and the ADA is the more encompassing federal law, this chapter focuses on how the ADA applies in these cases. Readers should simply be mindful that other disability rights laws are likely to apply as well.

APPLICATION OF THE ADA

The threshold for whether the ADA applies to a child in a given child welfare case is whether the child has a disability. Disability is defined as "(A) a physical or mental impairment that substantially limits one or more major life activities of [the] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment" (29). Whether a person is disabled is to "be construed in favor of broad coverage" (30). The statute provides a non-exhaustive list of many "major life activities," both physical and cognitive, that may be limited and therefore fall under the Act (31). These include learning, reading, concentrating, thinking, and communicating, all tasks that are germane in educational and other contexts, such as psychotherapy and health care, in which children may engage. Impairments in these and other areas of functioning may interfere

with a child's ability to benefit from services provided by child welfare and other agencies if reasonable accommodations are not made.

Unless the agency will stipulate to the fact that a child is disabled or has portrayed the child as disabled in its court pleadings or other documents or verbal statements, evidence of disability will be needed to trigger ADA protections. This evidence may include information from medical and mental health evaluation reports or other records, Social Security determinations, or educational evaluations and records. Although child welfare agencies frequently describe disabling impairments in parents, it is less common for them to note how the child functions in different domains. Therefore, practitioners should not rely on the agency to "tip them off" to a child's disability, and thorough evaluation of the child is a critical component of ensuring that any disabilities are identified and accommodated.

Sometimes, however, the agency does report that the child has a disability or describes the child's functional status in a way that implies that it regards the child as disabled. In these cases, the ADA applies. Under the ADA, disability may be inferred if a person is treated by a public entity as having an impairment that substantially limits a major life activity (32). In essence, this treatment by the agency amounts to the child being regarded as having an impairment, thereby triggering ADA protections.

In order to be eligible for ADA protection, the child must be a "qualified individual with a disability," which is defined as a person who, "with or without reasonable modifications," "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity" (33). There is no doubt that children with disabilities who are involved in child welfare proceedings are eligible to receive services from the agency and are therefore qualified individuals under the ADA. Finally, child welfare agencies are clearly public entities, including private agencies that enter into contracts with the state or county child welfare agency to do work that would otherwise fall to the public agency. Therefore, they are required to follow the requirements of the ADA. It is important to note that the ADA applies to child protection agencies regardless of whether the case is court-involved. Child welfare agencies take only a small fraction of cases to court, mostly when children must be removed from the custody of their parents. Many cases are handled by the agency directly with the families involved and never go to court, and in all of these matters, the agency must comply with the ADA. Therefore, the agency must accommodate the disabilities of the parents and children with whom they work, from ensuring accessibility to agency and other facilities to providing any educational materials in an accessible format and using training approaches tailored to the needs of the individual.

DEVELOPING REASONABLE ACCOMMODATIONS

When reasonable accommodations are required in order to meet the needs of a child with a disability who is receiving services, it is important to think carefully about exactly what kinds of accommodations might be in order. That determination may rely on having a thorough assessment, which may need to be a multidisciplinary assessment, of the child's needs. That assessment should take a "functional" view of disability. The functional view emphasizes the child's actual, functional abilities across whatever domains are relevant (34). Therefore, a functional evaluation may reveal how the child learns best or applies what he or she learns, or how the child navigates the word physically, or the child's behaviors in various circumstances, and the like. In addition, the functional perspective emphasizes the interaction of the individual and his or her environment, recognizing that the environment itself, including not only physical barriers but also policies, attitudes, and teaching styles, can be disabling or contribute to diminished functioning (35). A functional approach provides the most guidance in planning interventions, including how best to accommodate the disability.

In contrast, a "categorical" view of disability emphasizes the criteria for various categories of disability, such as a type of mental illness, intellectual disability, or a specific physical disability, much like a medical diagnosis. (34) The categorical approach reveals little about the person's actual functioning and thus provides scant information for the purpose of service planning and reasonable accommodations. Unfortunately, many professionals are tempted to approach disabilities categorically, because it is easier to diagnose and label than it is to do a deeper, more meaningful assessment. Over-reliance on the categorical approach contributes to service provision that is not tailored to the actual needs of the individual.

Given the complexities of disability coupled with the trauma history that is inherent to most child protection cases, the gold standard for an assessment that is likely to result in excellent service planning tailored to the child's needs is multidisciplinary, trauma-informed assessment completed by a team that has expertise in working with children with disabilities. These types of evaluation can yield rich data that effectively guide interventions across the medical, mental health, and educational spectra. When considering reasonable accommodations, there are no set approaches, and it is best to consult with the child if he or she is old enough, his or her parents, providers who may have worked with the child in the school, medical, and mental health contexts, and expert evaluators in order to determine what accommodations may be needed.

SPECIAL EDUCATION LAW

It is critical to consider the educational needs for every child in the child welfare system, and children with disabilities may encounter extra challenges in school. They also are supposed to receive specific protections. Children with disabilities are legally entitled to receive a "free, appropriate public education" (FAPE), and the special education system is intended to provide them with just that (36). The Individuals with Disabilities Education Act (IDEA) is the main federal law that governs the provision of special education services, though the ADA and Section 504 of the Rehabilitation Act of 1973 can be useful as well. A special education program is deemed appropriate if it was created through an Individualized Education Program (IEP) process and is reasonably calculated to confer educational benefit (37). Through special education, children with disabilities can receive specialized instruction, adapted transportation to and from school, various therapies, and a wide range of supplementary aids and services, including assistive technology devices, to the extent that any of these services are needed in order for the child to receive a FAPE (38).

Generally, education rights flow through the *parents* of children, not the children themselves. If a child with a disability remains with his or her parent during the pendency of a child welfare case, the parent can seek special education services for the child. Assistance from the child welfare agency in doing so may be necessary and appropriate, but the caseworker cannot sign an IEP. If a child is in foster care, a parent can still seek special education services, as can a foster parent (39). In addition, the court may designate an educational surrogate for the purposes of special education planning if a child is a court ward (40).

A written referral indicating that a student may need special education services begins the process. School personnel may write these referrals, as can parents, guardians, or foster parents. The referral triggers an evaluation to determine the child's eligibility. Special education evaluations must be designed to assess both the student's eligibility and the student's educational needs in order to inform what services should be put into place (41). IDEA has numerous eligibility categories, such as cognitive impairment, specific learning disability, speech and language impairment, etc., but it is important to note that the category does not determine or limit what services the child might receive (42). Rather, the category simply makes the child eligible for all necessary services to benefit from his or her education. Therefore, advocates and caregivers should consider the eligibility category merely as a means of entry into the special education system. Once a parent or other caregiver consents to an evaluation, the school district has sixty calendar days or less to complete it (43).

Once an evaluation is completed, an Individualized Education Planning Team (IEPT) is convened to determine the student's eligibility for special education services based on the evaluation. As noted above, if a student is eligible for special education services, an Individualized Education Program (IEP) must be developed by the IEPT (44). The IEP must be reassessed at least yearly, and either the school or parent can request that an IEP meeting be held sooner if needed. The child must be educated in the least restrictive environment that is appropriate to meet his or her needs (45). The IEP should indicate the settings in which services will occur, exactly what services will be provided, how long and how often services will be provided, the student's current level of functioning, how progress will be measured, and any supplementary aids or services that are necessary for the student to receive a FAPE. The goals for what the student is expected to achieve in the following year should be clear, objective, and measurable. Special education students must be included in state educational testing, albeit with accommodations, or in alternate assessments if they cannot participate in state educational testing even with accommodations (46).

For children in foster care, all of this may be more difficult to accomplish, especially if the child has changed schools. If the parent is uninvolved, there may be a dearth of background knowledge about the child and his or her educational programming, even if the school has up to date records. Agency personnel and the child's lawyer should endeavor to bridge any gaps, which may include arranging for school personnel from the child's previous school to attend an IEP meeting and consult with the new school in an ongoing manner. Another option may be to advocate for a thorough re-evaluation.

Finally, caregivers and advocates should be aware that while IDEA is the primary legal scheme under which special education services are provided, some children with disabilities do not qualify under IDEA's eligibility categories. In such cases, the Americans with Disabilities Act or Section 504 of the Rehabilitation may still mandate that the school accommodate the child's disability. It is important to consult with a student advocacy center or with the state's Protection and Advocacy office for representation or advice about how to access special education services or other accommodations as appropriate. See www.ndrn.org for a list of state Protection and Advocacy offices.

SOCIAL SECURITY

Children with disabilities may be eligible for Supplemental Security Income (SSI) payments from the Social Security Administration. For SSI purposes, a child is considered disabled if he or she is under 18 years of age and "has a medically

determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months" (47). If the child is in foster care, SSI payments will go to the child welfare agency to offset the cost of the child's care. Despite the fact that such payments might not appear to benefit the child directly, it is important to apply for SSI benefits if the child might be eligible. The child's disability may require ongoing financial support beyond the time that the child is in foster care, and either the child's family of origin or the child's adoptive family could benefit substantially from SSI payments, materially improving the child's standard of living. If a child is in foster care, the child welfare agency should apply for SSI benefits on the child's behalf.

To determine whether the child is disabled and therefore eligible for SSI benefits, Social Security requires detailed information about the child's condition and how it affects his or her functioning in daily life, including at home, in school, and in other contexts. Reports or other data from doctors, therapists, teachers, etc., also provide information for the eligibility determination. Unfortunately, it may be difficult to gather adequate medical and school records for children in foster care, especially if they have changed schools or providers and records have not transferred successfully, but it is important to try to do so. Also, the income and resources of the child's household will be considered in the SSI eligibility determination—if income and resources are more than the allowed amount, the child will not be eligible for SSI payments. However, this requirement should not affect children living in foster care.

CONCLUSION

It is inevitable that some children with disabilities will come to the attention of child protection authorities or that maltreated children will become disabled. This chapter has addressed the legal framework for addressing the needs of children when these two phenomena intersect. It has summarized the constitutional framework governing relationships between parents, child, and the state and provided an overview of important federal child protection and disability law. It is essential that child welfare agency caseworkers, lawyers, and other professionals consider a child's disability in the course of a child protection case and seek expert consultation as necessary so as to ensure that children's needs are met.

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[38] See generally 20 U.S.C. § 1401 *et seq.*
[39] 20 U.S.C. § 1401(23)(A). State law may differ as to whether a foster parent can sign an IEP.
[40] 20 U.S.C. § 1401(23)(D).
[41] 20 U.S.C. § 1414(b).
[42] 34 C.F.R. § 300.304(c)(6).
[43] 34 C.F.R. § 300.301(c). State law or regulation may provide a shorter timeframe, which then overrides the federal rule.
[44] 20 U.S.C. § 1412(a)(4).
[45] 20 U.S.C. § 1412(5).
[46] 20 U.S.C. § 1412(16).
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