

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Book Chapters

Faculty Scholarship

---

2015

### Representing Parents with Disabilities

Joshua B. Kay

*University of Michigan Law School, jbkay@umich.edu*

Available at: [https://repository.law.umich.edu/book\\_chapters/264](https://repository.law.umich.edu/book_chapters/264)

Follow this and additional works at: [https://repository.law.umich.edu/book\\_chapters](https://repository.law.umich.edu/book_chapters)



Part of the [Disability Law Commons](#), and the [Family Law Commons](#)

---

#### Publication Information & Recommended Citation

Kay, Joshua. "Representing Parents with Disabilities." In *Representing Parents in Child Welfare Cases*, edited by Vivek S. Sankaran and Martin Guggenheim, 253-268. Chicago: American Bar Association, 2015.

This Book Chapter is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Book Chapters by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

REPRESENTING PARENTS IN  
**CHILD WELFARE  
CASES**

*Advice and Guidance for Family Defenders*

MARTIN GUGGENHEIM AND VIVEK S. SANKARAN

# Representing Parents with Disabilities

*Joshua B. Kay*

## **12.01 Introduction: Scope and Nature of the Problem**

Parents with disabilities are more likely than other parents to become involved in the child welfare system, and once involved, their cases are more likely to end in termination of parental rights. This chapter covers basic information about parents with disabilities and child welfare involvement, including the prevalence of disability among parents generally and the frequency with which parents with disabilities are involved in child welfare cases. It discusses why these parents are disproportionately involved in child welfare proceedings and the biases of professionals that contribute not only to this frequent involvement but also to the poor outcomes in many of these cases. The chapter also covers the legal framework specifically applicable to these cases and key elements of effective advocacy, including how to raise claims under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 (2014) to ensure that these parents’ disabilities are reasonably accommodated when reunification services are provided.

### ***12.01(a) Prevalence of Disability Among Parents and Frequency of Child Welfare Involvement***

Many parents have a disability of some type, whether physical, sensory, cognitive, or psychiatric. National estimates indicate that at least 8.4 million and possibly more than 10 million parents with disabilities have children under the age of eighteen living in the home. See Megan Kirshbaum & Rhoda Olkin, *Parents with Physical, Systemic, or Visual Disabilities*, 20 *SEXUALITY & DISABILITY* 65 (2002); Rhoda Olkin et al.,

*Comparison of Parents with and Without Disabilities Raising Teens: Information from the NHIS and Two National Surveys*, 51 REHABILITATION PSYCHOL. 43, 44 (2006). Child welfare issues are a significant concern for parents with disabilities, because these parents are disproportionately involved in the child welfare system. Once entangled in the system, they are far more likely than parents without disabilities to have their parental rights terminated. Parents with psychiatric and cognitive disabilities appear to be especially at risk of child welfare involvement and eventual termination of their parental rights. The problems that parents with disabilities encounter in the child welfare system are so severe that the National Council on Disability released an extensive report substantially dedicated to these issues. See NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN (2012).

Parents with cognitive or psychiatric disabilities are more likely than non-disabled parents to access state services, inviting close scrutiny by state personnel, and they have considerable contact with professionals who are mandated reporters of suspected child abuse and neglect. See Susan Kerr, *The Application of the American with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 403 (2000). These professionals are often the source of a Children's Protective Services (CPS) referral, and they have considerable credibility with CPS, so their reports are likely to prompt the Agency to intervene in the matter. See *id.* This situation contributes to the high rate of child welfare involvement for these parents and eventual termination of their parental rights. It is estimated that among mothers with mental illness, 40 to 75 percent lose custody of one or more of their children, a range of rates substantially higher than for mothers without mental illness. See Colby Brunt & Leigh Goodmark, *Parenting in the Face of Prejudice: The Need for Representation for Parents with Mental Illness*, 36 CLEARINGHOUSE REV. 295, 297-98 (2002). Even higher percentages have been found among parents with intellectual disabilities, which may be the group most likely to become entangled in a CPS matter and eventually lose their parental rights. A prominent researcher has found in his sample groups that upward of 80 percent of parents with intellectual disabilities have experienced a termination of parental rights. See Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, in HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 401, 415 (John R. Lutzker ed., 1998). Rates of child welfare involvement for parents with physical and sensory disabilities also exceed those in the general population.

### **12.01(b) The Role of Poverty in the Involvement of Parents with Disabilities in the Child Welfare System**

A significant contributor to the disproportionate involvement of parents with disabilities in the child welfare system is poverty. It is well established that poverty is among the

strongest predictors of child welfare involvement, and parents with disabilities are twice as likely as other parents to be living in poverty. See Olkin, *supra* at 44. Whereas people with greater financial resources can purchase services privately to help them with family problems, those who live in poverty are more likely to come to the attention of the state by accessing public assistance. See, e.g., Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 FAM. L.Q. 253, 290 (1991). This reliance on the public system of care contributes to the close scrutiny experienced by parents with disabilities. For example, parents with a cognitive or psychiatric disability are likely to obtain services from a publicly funded mental health clinic while also getting other public benefits, such as Social Security or cash assistance. These parents have a great deal of contact with various caseworkers and other professionals who may refer them to CPS.

### *12.01(c) Common Biases and Assumptions about Parents with Disabilities*

Negative assumptions about parents with disabilities appear to be common among various professionals, including CPS caseworkers. The combination of frequent contact with professionals, close scrutiny by state workers, and negative assumptions about the parental fitness of people with disabilities can be devastating. For example, the belief that people with psychiatric conditions are dangerous and largely beyond help is widespread in the child welfare field and may motivate lackluster service planning. See Theresa Glennon, Symposium, *Walking with Them: Advocating for Parents with Mental Illness in the Child Welfare System*, 12 TEMP. POL. & CIV. RTS. L. REV. 273, 292 (2003). In contrast, high-quality research suggests that most parents with a psychiatric disability—or a cognitive disability—can provide appropriate parenting for their children with proper treatment and support.

Many caseworkers and other professionals, including psychologists who perform evaluations of parents in CPS cases, believe that a mental illness or, especially, a cognitive disability, cannot be changed, so no amount of treatment or support would allow the parent to provide adequate care for a child. Faced with this assumption, caseworkers are not motivated to engage in careful service planning with these parents, and psychologists are less likely to develop detailed treatment recommendations to address identified problems. In turn, the lack of treatment and other services increases the likelihood of eventual termination of parental rights.

The nature of disability varies a great deal within categories such as “cognitive,” “psychiatric,” “physical,” and “sensory.” There is wide variability even within subcategories, such as specific psychiatric diagnoses like schizophrenia or bipolar disorder, or cognitive disabilities such as intellectual or memory impairment. Placing a parent in a general disability or diagnostic category contributes little to an understanding of that individual parent’s strengths, weaknesses, and needs. A categorical view of disability, in which the criteria for a particular category are emphasized instead of the person’s actual capacities, contributes to the assumption that a disability is pervasive and static,

because a caseworker may believe that a parent in a given category must have some set of characteristics assumed to be common to that category. *See* Alexander J. Tymchuk, *The Importance of Matching Educational Interventions to Parent Needs in Child Maltreatment: Issues, Methods, and Recommendations*, in *HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT* 421, 422–23 (John R. Lutzker ed., 1998). In other words, caseworkers and other professionals may assess the category into which they have put the parent rather than the parent him- or herself. Once a person is categorized as disabled in some particular way, assumptions about what that means for parenting can dictate further actions by professionals. The child welfare system generally takes this approach to people with disabilities, which undermines service planning and increases the chances of termination of parental rights. *See id.*

In contrast, a “functional” perspective emphasizes what an individual person—rather than a broad category of people—can do and learn, and the circumstances under which the person successfully learns or applies what is learned. *See id.* at 22. A focus on abilities and contexts allows for a better fit between individual needs and educational methods and services. *See id.* The functional perspective on disability leads to a thorough assessment of relevant skills and deficits, which leads to the provision of high-quality services. This perspective fits well with the legal requirement that reasonable efforts include treatment plans tailored to the specific needs of parents and children.

Agency assumptions about disability are often reflected in petitions filed against parents with disabilities. When reviewing a termination Petition, it is especially important to determine whether the Petition indicates a nexus between the disability of the parent and actual parenting ability and any risk to the child. Does the Agency allege problems with actual parenting? Is a risk to the child articulated in the Petition? Or is there merely a recitation of disability-related facts, such as psychiatric symptoms that the parent may have? If no nexus to parenting ability is made clear, or the risk to the child is not described, it may be possible to get the Petition dismissed or challenge the Agency’s request for removal. For strategies regarding removal hearings, *see* Chapter 4.

## **12.02 The Need for Appropriate Family Services**

In nearly all cases, child welfare agencies must make “reasonable efforts” to prevent removal or reunify a family. Much of what constitutes reasonable efforts is included in a case service plan, which identifies family needs and services to address those needs. Although case service plans must be tailored to the specific needs of an individual case, in reality many are “one-size-fits-all” plans that list identical services for almost every case. These services may include parenting classes, training about domestic violence and anger management, a psychological evaluation, psychotherapy or counseling, drug testing, and substance abuse evaluation and treatment. Few parents, whether or not they have a disability, are well served by cookie cutter case service plans, but parents with disabilities may be most vulnerable to the ineffectiveness of the low-quality,

generic services so often provided. It is difficult for parents with disabilities to demonstrate any benefit from services not provided in a manner that accommodates their disability, and this difficulty can put them on a path to termination of their parental rights.

For example, a parent with mental illness is likely to require psychiatric and psychotherapeutic care, yet there may be a long waiting list for public clinics. This problem is especially serious given the short time frames allowed in child welfare cases, time frames that courts may be reluctant to extend. Even once services are provided, they may be of low quality or otherwise a poor fit for the parent's needs, slowing any improvement. Furthermore, many public mental health services are structured as brief interventions, yet more intensive, long-term intervention may be necessary to give the parent adequate support and keep psychiatric symptoms at bay. Besides psychotherapeutic and psychiatric care, many parents with disabilities need concrete services, such as cash assistance, help with housing, medical care, food aid, and transportation. To develop, maintain, and make needed adjustments to an individualized package of services to make it effective, excellent assessment and thorough case reviews are needed. Too often, those elements are missing from child welfare cases, particularly when a parent has a disability and caseworkers and other professionals lack the expertise to work successfully with that person. For a more detailed discussion of case service planning for parents with disabilities, see Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 380 (2000); Glennon, *supra* at 282–83, 296.

Tailored services can be effective for improving the parenting skills of parents with disabilities, including intellectual disabilities, contrary to the assumptions of many caseworkers and courts. For parents with intellectual disabilities, a group particularly vulnerable to inappropriate service provision and eventual termination of parental rights, Maurice Feldman has found that in-home interventions are best, particularly if they include techniques such as simplified instructions, pictorial prompts, modeling, feedback, role-playing, and positive reinforcement. He has further found that gains made by parents during these interventions are maintained for a longer term and that the rates of termination of parental rights were greatly reduced in the cases that received interventions compared to what the same parents had experienced in prior cases and to comparison groups. When in-home programming is not feasible, several hallmarks of these interventions can still be implemented, including one-on-one work, simplified instructions, modeling, visual cues, and the like. See, e.g., Feldman, *supra*.

In cases involving parents with disabilities, obtaining appropriate services is among an attorney's greatest challenges, yet without them, there is little chance that the case will end favorably for the client. Unfortunately, there are relatively few professionals with adequate expertise in working with parents with disabilities, and fewer still work on contract with child welfare agencies. However, service provision is the area of a child

welfare case most readily addressed by the ADA, which provides significant protection for these parents.

### **12.03 Applicability and Operation of the ADA in Child Welfare Cases**

To obtain appropriate services for parents with disabilities, advocates must bring to bear more than just the reasonable efforts standard required in most child welfare cases. Services to prevent removal or reunify a family must comply with the ADA, which requires that a service recipient's disabilities be reasonably accommodated by the Agency. Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Reasonable accommodations under the ADA may include modifications to programs, extension of time limits, access to more specialized services, and the like. In essence, reasonable accommodations are designed to make services as effective for people with disabilities as they are for those without a disability such that similar results are likely to be achieved.

#### ***12.03(a) Raising an ADA Claim: Timing, Reasonable Efforts, and Reasonable Accommodations***

The timing of an ADA claim in a child welfare case is crucial. Advocates must not wait to raise a claim for ADA protections until a supplemental Petition for termination of parental rights is filed. Numerous courts have declared that the ADA provides no defense to termination of parental rights. The reasoning for this holding has varied. Some courts have decided that termination of parental rights is not a service, program, or activity within the meaning of the ADA. *See, e.g., S.G. v. Barbour Co. Dep't of Human Res.*, 148 So. 439 (Ala. Civ. App. 2013); *In re Anthony P.*, 84 Cal. App. 4th 1112, 1116, 101 Cal. Rptr. 2d 423 (2000); *In re Antony B.*, 54 Conn. App. 463, 472, 735 A.2d 893 (1999); *Interest of B.K.F.*, 97-572, p. 5 (La. App. 5 Cir. 11/25/97), 704 So. 2d 314, 317; *Adoption of Gregory*, 434 Mass. 117, 121, 747 N.E.2d 120 (2001); *In re Terry*, 240 Mich. App. 14, 25, 610 N.W.2d 563 (2000); *Matter of La'Asia S.*, 191 Misc. 2d 28, 41-42, 739 N.Y.S.2d 898 (Fam. Ct. 2002); *Matter of Chance Jahmel B.*, 187 Misc. 2d 626, 632, 723 N.Y.S.2d 634 (Fam. Ct. 2001); *In re Kayla N.*, 900 A.2d 1202 (R.I. 2006), *cert. denied*, *Irving N. v. R.I. Dep't of Children, Youth & Families*, 549 U.S. 1252 (2007); *In re B.S.*, 166 Vt. 345, 351-52, 693 A.2d 716 (1997).

Other courts have decided that by the time termination of parental rights is sought, a parent can only bring a separate case alleging discrimination, but such a case would not constitute a defense to termination of parental rights. *See, e.g., In re Anthony P.*, 84 Cal. App. 4th at 1116; *In re Antony B.*, 54 Conn. App. at 472; *In re Doe*, 100 Haw. 335, 343, 60 P.3d 285 (2002); *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000);

*Interest of B.K.F.*, 97–572, p. 5 (La. App. 5 Cir. 11/25/97), 704 So. 2d at 317; *Matter of Chance Jahmel B.*, 187 Misc. 2d at 632; *In re Harmon*, No. 00-CA-2693, 2000 WL 1424822 (Ohio Ct. App. Sept. 25, 2000); *In re B.S.*, 166 Vt. at 351–52 (noting that juvenile court is of limited jurisdiction and may not consider claim under ADA); *In re Torrance P.*, 187 Wis. 2d 10, 522 N.W.2d 243 (Wisc. Ct. App. 1994). Instead, the parent would seek damages for discrimination in the provision of services, and termination of their parental rights would unlikely be affected.

Still other courts have held that allowing an ADA claim as a defense to termination would improperly elevate the rights of parents over those of children in child protection proceedings. *See, e.g., J.T. v. Ark. Dep't Human Servs.*, 329 Ark. 243, 258, 947 S.W.2d 761 (1997); *People in Interest of T.B.*, 12 P.3d 1221, 1224 (Colo. Ct. App. 2000); *In re Guardianship of R.G.L.*, 344 N.J. Super. 418, 441, 442, 782 A.2d 458 (2001). Finally, some courts have decided that the ADA was not intended to change obligations imposed by unrelated statutes, so the ADA cannot be used to avoid termination of parental rights. *See, e.g., Interest of T.B.*, 12 P.3d at 1224 (finding nothing in ADA indicates that a violation of the statute would interfere with the right of the state to terminate parental rights); *In re Antony B.*, 54 Conn. App. at 472; *In re Doe*, 100 Haw. at 343 (finding nothing in ADA or legislative history suggests it was intended to be grafted onto state statutes for purpose of supplementing remedies already provided for in such statutes); *In re Torrance P.*, 187 Wis. 2d at 16. Regardless of the reasoning, the holding remains the same: Waiting too long to raise an ADA claim in a child welfare case is fatal, because the ADA provides no defense to termination of parental rights.

There is broad agreement that an ADA claim may be brought when services provided by the Agency are so inadequate that they discriminate against parents with disabilities. Such a claim does not attack the termination of parental rights, nor does it wait until that late in a case; instead, it targets the Agency's provision of inadequate services and seeks an order that appropriate services be provided. Courts have found that the reasonable accommodation requirement under the ADA is consistent with the reasonable efforts requirement such that if the Agency does not make reasonable accommodations, the court cannot find that reasonable efforts were made to reunite the family. *See* Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1473 (1995). *See also J.H. v. State Dep't of Health & Soc. Servs.*, 30 P.3d 79, 86 n.11 (Alaska 2001); *C.W. v. State Dep't of Health & Soc. Servs.*, 23 P.3d 52, 55 (Alaska 2001); *Cassidy v. Ark. Dep't Human Servs.*, 76 Ark. App. 190, 196–97, 61 S.W.3d 880 (2001) (Vaught, J., dissenting); *In re Antony B.*, 54 Conn. App. at 473 n.9; *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); *Stone v. Daviess Cnty. Div. of Children & Family Servs.*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995); *Adoption of Gregory*, 434 Mass. at 122–25; *In re Terry*, 240 Mich. App. at 25, 26; *In re Guardianship of R.G.L.*, 344 N.J. Super. at 8; *Matter of La'Asia S.*, 191 Misc.

2d at 42 (noting ADA guidelines are helpful supplement to State's diligent efforts standard); *Matter of Chance Jahmel B.*, 187 Misc. at 632; *In re Welfare of Angelo H.*, 124 Wash. App. 578, 587, 102 P.3d 822 (2004).

It is crucial to determine whether courts in the jurisdiction have decided the issue of the reasonable accommodation requirement and whether they have put any parameters in place (e.g., Can the ADA be used to require the creation of new services or merely modifications to existing services or provision of additional services?). If the issue has not been decided in the jurisdiction, research whether nearby jurisdictions have considered it, as findings from nearby states may be persuasive.

A claim for reasonable accommodations under the ADA—or, similarly, a claim that the Agency has failed to make reasonable efforts because the provided services have not reasonably accommodated a parent's disability—must be made as soon as possible. Basically, once the ADA violation is or should reasonably be apparent, a parent's attorney should raise the claim. Better yet, the parent's attorney can raise the issue of disability in the initial disposition hearing, invoke ADA protections, and demand reasonable accommodations. It may be fruitful to discuss the claim with the Agency ahead of time, when case services are being planned, as the Agency may provide the accommodations, preventing a court battle (though it is important to put the applicability of the ADA on the record in court). Thus, it is critical that parents tell the Agency about their disability as soon as possible and request accommodations accordingly so that any ADA issues can be raised early in the case.

If the Agency does not make reasonable accommodations despite the court finding that the ADA applies, a court may later find that reasonable efforts were not made. This finding threatens the Agency's access to federal funds to help pay for the case and also could slow any eventual effort to terminate the parent's rights. There are incentives on all sides to deal squarely with disability issues: Parents cannot afford to waive an ADA claim by failing to inform the Agency and the court of their disability and demand accommodations, the Agency cannot afford to ignore the parent's disability, and the child cannot afford the delay that may occur if disability issues are not addressed.

### **12.03(b) Raising an ADA Claim: Proving Disability**

The threshold for whether the ADA applies in a child welfare case is whether the parent has a disability. That question was the focus of much litigation for many years in ADA cases, but the ADA Amendments Act of 2008, P.L. 110-325, clarified the definition of disability and the intent of Congress in passing the ADA. 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." 42 U.S.C. § 12102(1). Whether a person is disabled is to "be construed in favor of broad coverage." 42 U.S.C. § 12102(4)(A). The ADA Amendments Act of 2008 clarified that the focus of an ADA case should be on whether

covered entities have complied with their obligations under the law, not on whether the claimant has a disability. P.L. 110-325 § 2(a)(7), (b)(5). The ADA lists numerous “major life activities” that may be limited and thus fall under ADA protection. These activities include many physical and cognitive tasks. 42 U.S.C. § 12102(2)(A). The non-exhaustive list in the statute includes, among other activities, learning, reading, concentrating, thinking, communicating, and working. In other words, the list includes tasks that may well be impaired for parents with disabilities, and these impairments may interfere with a parent’s ability to benefit from the standard services provided by the Agency.

Although the ADA Amendments Act of 2008 made it easier to qualify for ADA protection, evidence of disability is still needed to trigger protection under the statute. Evidence might include facts found in medical and mental health records, Social Security determinations, and educational records. Importantly, even where a parent lacks evidence of a disability, agency caseworkers may have made written or verbal statements that indicate that they regard the parent as having a disability, which may be the key to gaining ADA protection for the parent. Often, the allegations within the Agency’s Petition include assertions that a parent has a mental illness that interferes with parenting, is intellectually impaired in a manner that affects parenting, or lacks the capacity to parent effectively or to learn new parenting skills. Similarly, court reports filed by the caseworker may contain statements that demonstrate the caseworker’s doubts about capacity or concerns about mental illness, cognitive impairment, or many disability-related issues. These statements can trigger ADA protection for a parent because they indicate that the Agency regards the parent as having an impairment that is a disability under the law. *See* 42 U.S.C. § 12102(1)(C).

Under the ADA, people may be regarded as having a disability and thus protected if (1) they have an impairment that does not actually substantially limit a major life activity but are treated by a public entity as being substantially limited in a major life activity; (2) they have an impairment that substantially limits a major life activity because of the attitudes of others toward the impairment; or (3) they are simply treated by a public entity as having an impairment that substantially limits a major life activity. 28 C.F.R. § 35.104. *See also* 42 U.S.C. § 12102(3)(A). Many commentators have noted with concern that caseworkers and other professionals in child welfare cases often focus on the disabilities of parents. *See, e.g.,* NAT’L COUNCIL ON DISABILITY, *supra*, for a detailed overview. Yet this very focus can trigger ADA protection thanks to the “regarded as disabled” provision.

### ***12.03(c) Raising an ADA Claim: “Qualified Individual” and “Public Entity”***

Protection under the ADA applies to 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.” 42 U.S.C. § 12131(2). Parents

with disabilities in child welfare cases meet these criteria, because they are eligible for family preservation and reunification services in most cases regardless of any modifications. It is their parenthood that makes them eligible for services, not their disability or associated accommodations. It is worth noting, however, that where aggravated circumstances are alleged, so that a parent would not be entitled to family preservation or reunification services, and the Agency has denied services based on those grounds, having a disability does not entitle the parent to services. *See* 42 U.S.C. § 671(a)(15)(D) (aggravated circumstances provision of the Adoption and Safe Families Act of 1997 stating that reasonable efforts are not required in such cases). For a similar provision codified in state law, *see, e.g.,* MICH. COMP. LAWS § 712A.19a(2) (2014)). In such cases, parents are not entitled to services regardless of disability, because ADA protections do not provide an exception to aggravated circumstances statutes. Furthermore, parents are no longer “qualified individuals” for reunification services if the Agency and court determine that reasonable efforts are not required due to aggravated circumstances.

As for the “public entity” requirement for protection under the ADA, this is not a part of an ADA claim that is likely to be litigated in the child welfare context. Under the statute, a “public entity” includes any department of a state or local government. 42 U.S.C. § 12131(1)(B). Child welfare agencies—and the private agencies that work under contracts with governmental child welfare agencies—qualify as public entities.

### *12.03(d) Raising an ADA Claim: The Need for Specificity*

Another important part of an ADA claim is specificity about which accommodations are needed. Counsel must articulate why the services offered do not reasonably accommodate the parent’s disability and suggest to the court and Agency how the disability may be reasonably accommodated through modifications to the services. Generally, both the court and the Agency will lack expertise about disability issues, so it is incumbent on counsel to propose options for accommodations. A combination of knowledge, connections with experienced professionals, and, most importantly, close consultation with the client about the disability and the parent-child relationship is essential to successful advocacy.

Sometimes, even after consultation with the client and other steps, counsel will not know what accommodations might be most effective, often because the assessment of the client by the caseworker and other professionals has been inadequate. In that case, the first accommodation may be for the Agency to arrange a thorough assessment by an expert familiar with parents with disabilities. Such experts may include occupational therapists, speech and language therapists, psychologists, physicians, rehabilitation consultants, and other professionals. Also, clients may have worked with professionals they trust who might be in an excellent position to provide a thorough assessment and ongoing treatment services.

Remember that accommodations may vary considerably from case to case, and there are many options. Accommodations can address where, how, when, and for how long a service is provided. Specialized services, or services from providers with particular expertise in disability as opposed to the Agency's usual roster of providers, can be ordered. Instead of class or large group formats, one-on-one or small group approaches can be used. Think broadly and creatively and consult closely with the client and professionals with expertise in the field. It may be possible to negotiate with the Agency outside of court to obtain many accommodations, and then a plan can be presented to the court. This approach has the added benefit of allowing all of the players time to put together an individualized package of services, creating a sense of "buy-in" and well-tailored interventions. Some child welfare offices may have certain caseworkers with specialized training in disability issues who can be assigned to the case as a consultant or as the primary caseworker.

### *12.03(e) Raising an ADA Claim: Summary*

A parent may claim ADA protection regarding services provided by the Agency by demonstrating that he or she is a qualified person with a disability who requires a reasonable accommodation of that disability by a public entity. This claim must be raised as early in the case as possible and cannot first be raised when termination of parental rights is sought or on appeal. Courts have rejected the ADA as a defense to termination of parental rights but have supported its use to guarantee that the services provided by the Agency reasonably accommodate a parent's disability. Because courts have equated reasonable accommodations with reasonable efforts, such that they may find that reasonable efforts have not been made if a parent's disabilities have not been reasonably accommodated, a timely ADA claim can cause a later reversal of a termination of parental rights if the parent shows that the trial court failed to timely address the disability issue or the Agency failed to make required accommodations, and thus reasonable efforts were not made. The key is to make the ADA claim early and, if the court or the Agency does not address it properly, be persistent so the record repeatedly reflects that the claim was made.

Finally, it may be worth using ADA noncompliance to challenge an order that the Agency initiate termination of parental rights proceedings under the Adoption and Safe Families Act's fifteen-of-twenty-two-months provision. Under that provision, if a child has been in foster care for fifteen of the past twenty-two months, the court shall order the Agency to initiate termination of parental rights proceedings unless an exception to the requirement applies. *See* 42 U.S.C. § 675(5)(E). One of the exceptions is a failure to make reasonable efforts. *See* 42 U.S.C. § 675(5)(E)(iii). Because a failure to provide reasonable accommodations may preclude a finding that reasonable efforts were made, ADA noncompliance may trigger this exception to the fifteen-of-twenty-two-months rule. Again, practitioners must raise the applicability of the ADA early and cannot wait until the

Agency seeks termination of parental rights. If the court has ordered the Agency to make reasonable accommodations, and the Agency has failed to do so, the court may be reluctant to order the Agency to initiate a termination of parental rights proceeding.

For technical assistance, practitioners may want to consult their state Protection and Advocacy office or Through the Looking Glass, a national center dedicated to serving families in which a parent, child, or grandparent has a disability. Also, in its *ROCKING THE CRADLE* report, the National Council on Disability provides a list of ADA requirements, which is reproduced here:

Pursuant to Title II of the ADA, child welfare agencies must:

1. Provide parents with disabilities an equal opportunity to participate in programs, services, and activities. To implement this mandate, the agencies must make reasonable modifications in policies, practices, or procedures, unless such modifications would fundamentally alter the nature of the service, program, or activity.
2. Administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified people with disabilities.
3. Not impose or apply eligibility criteria that screen out or tend to screen out any person with a disability from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.
4. Furnish auxiliary aids and services when necessary to ensure effective communication, unless an undue burden or fundamental alteration would result.
5. Provide, as needed, benefits, services, or advantages beyond those required by the regulation to people with disabilities.
6. Not impose surcharges on people with disabilities to cover the costs of measures to ensure nondiscriminatory treatment, such as making modifications required to provide program accessibility or providing qualified interpreters.
7. Not deny the benefits of programs, activities, and services to people with disabilities because entities' facilities are inaccessible.
8. Provide services, programs, and activities that, when viewed in their entirety, are readily accessible to and usable by people with disabilities.

NAT'L COUNCIL ON DISABILITY, *supra* at 88–89 (internal citations omitted).

## **12.04 Key Elements of Advocacy: Client Counseling, Strategies, and Building Expertise**

It is important that counsel ask their clients about any disabilities and accommodations that might be needed. Counsel should guide the client through the likely phases of the case, including a discussion of what the courthouse is like and the places in which a client might receive services, as various accommodations might be needed in these

settings. Clients often have considerable expertise about their disability, how it affects them in different contexts, how it might affect parenting, and how services and accommodations of all types might best be provided to them. The client is counsel's best resource.

Client interviewing and counseling can provide detailed information about the parent, the child, the parent-child relationship, family and other supports that have been in place or could be arranged, any services that the parent already receives, and whether any allegations against the parent that refer to disability are accurately linked to actual parenting skills or the home situation. For clients with cognitive disabilities, including learning or intellectual impairments, lawyers may need to take longer to explain the legal situation and should check in with clients to ensure that they have a good understanding of the case.

Clinical knowledge and professional contacts should be cultivated in areas such as mental health, medicine, social services, and rehabilitation. Attorneys should take the time to learn basic information about mental health treatment, social work practice with parents with disabilities, and issues such as Social Security or other public benefits, and common barriers in areas such as housing or employment. Interview any service providers the client may already have and get their ideas for what might be helpful. The services of these professionals may be included in the case service plan, and these providers may also have opinions and advice about how other parts of the plan can be implemented most effectively. Again, it is best if the client can play an active part in these discussions. Client counseling and consultations with service providers who have worked with the client and/or are knowledgeable about disability contribute a great deal to the ability of lawyers to argue for specific accommodations under the ADA, as discussed above.

In court, counsel must educate the judge about the client's disability, because otherwise the judge is left only with assumptions about what a parent with that disability can and cannot do. Emphasizing the actual parent-child relationship can be effective to counteract biases about parents with disabilities, which may include that a child would be better off with a non-disabled parent or that children of parents with disabilities do not love their parents or have as much of a bond with them as other children do. If the parent will need support in the home to provide care for the child, put together a plan of care. Even a partially formed plan of care can show the court that the parent is actively working to address any identified issues, decreasing the possibility that the court will see the case as one in which there will be no positive change. Case service plans must be scrutinized for specificity and to ensure that appropriate, measurable outcomes are identified. Often, requesting a more frequent hearing schedule can force the Agency to act more swiftly in developing and providing services and fight agency inaction. Sometimes, agency caseworkers pressure parents with disabilities to relinquish their parental rights, because the caseworkers believe that the parents will not be capable of caring for

their children. Counsel must shield clients from such pressure and provide caseworkers with a different narrative that emphasizes their clients' abilities and positive aspects of the parent-child relationship.

### **12.05 The Problem of Expert Testimony**

In many child welfare cases, and perhaps especially those involving parents with cognitive or psychiatric disabilities, agency workers often seek—and courts order—assessments of parents by mental health professionals. These assessments carry tremendous persuasive weight in many courts. Judges have little contact with the families before them, and often little expertise with disability issues, so they are likely to rely on expert reports and testimony. Experts too often go unchallenged as they offer their opinions about the parent's present level of psychological and cognitive functioning, capacity for change, and prognosis. Yet these experts may not have expertise in parenting with a disability and instead rely on what amount to class-based declarations about parents. Experts in child welfare cases may make blanket statements about the ability of people with intellectual impairment to parent children with little regard for how *this* parent takes care of that child or what supports might be effective to improve parenting in a particular case. Coupled with this tendency—and contributing to it—is the common reliance of mental health experts on psychometric testing, such as IQ testing, that has little to no direct connection to parenting skills. Similarly, experts may rely on the fact of a given psychiatric diagnosis to state that the parent lacks the ability to take care of his or her child, rather than thoroughly assessing an individual's actual parenting skills. Few observe the parent and child together.

In the face of this testimony, many courts and even attorneys fail to take a skeptical approach to expert testimony and often ask about the expert's qualifications and not the empirical basis for the expert's conclusions, even though qualifications alone are insufficient to establish expertise. See Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense, Daubert, and the Rules of Evidence*, 31 FAM. L.Q. 551, 564–65 (1997). There is little assurance that the methods employed by the expert are reliable and valid for the purpose for which they were used. Absent reliable and valid methods, what experts are really relying on are their subjective beliefs, biases, and extrapolations, which may not be supported by research in their field.

Ideally, a parent's attorney can obtain an evaluation from a different, trusted expert with which to challenge the conclusions of the Agency's expert. Too often, though, funds are not available, and these requests are denied. If counsel cannot secure her own expert, the only tool available to refute expert testimony may be vigorous cross-examination. When challenging expert testimony, the attorney should insist that the expert show that any assessments are actually relevant to parenting. Attorneys should also try to keep experts from testifying about behavior, test results, and clinical impressions not related

to parenting. Read expert reports carefully, learn about the procedures used, determine whether the psychometric tests employed by the evaluator are up-to-date and considered valid for the assessment, and check the licensing status of the expert.

It may be useful to research the scope of practice for a particular profession to determine whether the expert has exceeded his or her bounds, and attorneys for parents would do well to be familiar with the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct, to be in a position to discredit a psychology expert who did not complete an assessment in an ethical and professional manner. Psychologists are bound by their code of ethics and are vulnerable to licensing complaints for violations. All psychologists receive training in psychology ethics, and their licensing examination covers ethics requirements. These background facts are useful to bring out when cross-examining a psychologist who has failed to conduct an evaluation ethically. The American Psychological Association has also created several relevant best practice documents that are available on its website. *See* AM. PSYCHOLOGICAL ASSOC., GUIDELINES FOR ASSESSMENT OF AND INTERVENTION WITH PERSONS WITH DISABILITIES (2014); AM. PSYCHOLOGICAL ASSOC., GUIDELINES FOR PSYCHOLOGICAL EVALUATIONS IN CHILD PROTECTION MATTERS (2013); AM. PSYCHOLOGICAL ASSOC., SPECIALTY GUIDELINES FOR FORENSIC PSYCHOLOGY (2013). Although aspirational rather than binding, these documents illustrate the state of the art in the areas of child protection psychological evaluations, forensic evaluations, and how psychologists should work with people with disabilities. Practitioners should become familiar with them not only to facilitate challenging expert testimony, but also to know what to look for in a good independent evaluation.

## 12.06 Guardians ad Litem for Parents

In some cases, the possibility of appointing a guardian ad litem ("GAL") to represent a parent's best interests is raised because of indications that the parent is unable to direct his or her counsel. A request for a GAL by a parent's lawyer is drastic, as the need for the GAL is likely to be seen by the Agency and court as undermining any claim that the parent can provide adequate care for the child. Less drastic steps should be attempted first, such as use of a support person of the client's choosing to help the client participate in meetings with the lawyer, understand the case, and make decisions; using shorter meetings that cover less material more slowly; soliciting the client's understanding of what the lawyer has explained; giving the client enough time to discuss a decision in the case thoroughly with the lawyer and with others whom the client trusts; allowing the client enough time to make decisions; and using multiple modes of communication, after consultation with the client and professionals who have worked with the client about preferred modes of communicating.

Attorneys must be mindful that discussions about the case with third parties may jeopardize attorney-client privilege, but steps sometimes can be taken to mitigate the

concern, such as having the third party enter into a confidentiality agreement. The concern about attorney-client privilege may be less pressing than the need to avoid appointment of a GAL. Besides the impression given to the court by a request for a GAL, any GAL appointed by the court may have no particular expertise in working with people with disabilities. Little may be gained by their appointment, and much may be lost.

Nevertheless, attorneys who represent parents with disabilities must also be cognizant of Model Rule of Professional Conduct 1.14(a), which requires lawyers to, “as far as reasonably possible, maintain a normal client-lawyer relationship” with a client who has diminished capacity to make adequately considered decisions about the case. Again, steps should be taken consistent with this rule to try as much as possible to avoid appointment of a GAL. However, if those steps are not adequate, and a lawyer believes that a client’s diminished capacity places him or her “at risk of substantial physical, financial or other harm,” and the client “cannot adequately act” in his or her own interest, Model Rule 1.14(b) requires the lawyer to “take reasonably necessary protective action,” which may include “seeking the appointment of a guardian ad litem, conservator or guardian.” In such cases, it may be possible to identify a guardian who could provide care for both the client and the child, but again, the drastic step of enlisting a guardian—or a GAL—should be avoided if possible because it undermines the client’s argument that he or she is a competent parent.