

# Legal Issues for Parents With Disabilities in DCF Proceedings

Presented by:

Barbara Prine, Disability Law Project of Vermont Legal Aid

A.J. Ruben, Disability Rights Vermont

## A. Introduction

Concerns about the possible discrimination facing parents with disabilities whose children are taken into State's custody have been raised by many participants in the child protection and judicial systems. Anecdotally, professionals in these fields report parents with disabilities have a harder time working with the system to retain or regain custody of their children. According to the 2010 National Council on Disability report *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children*, children of parents with intellectual disabilities were removed from their homes at the alarmingly high rate of 70-80%. A Minnesota study determined that parents with a disability label in their school records were more than three times more likely to lose custody of their children through a TPR proceeding than their non-labeled peers. *Id.* Other studies show that these custody decision often comes from prejudice rather than valid concerns over the child's welfare. A 1991 study in Boston reported that families with parents having IQ's below 79 that had less prior court involvement and greater compliance with court-ordered services than the other families in the study had their children were removed as frequently as substance abusing parents and more frequently than parents with no disability diagnosis. *Id.*

Laws such as the Americans with Disabilities Amendment Act, as amended, and the Vermont Fair Housing and Public Accommodations Act have clarified the government's position that no person with a disability should be deprived due to their disability of the benefits of services or programs offered by the States.

Both the U.S and Vermont Supreme Courts have recognized the unique role that government has in ensuring the rights of people with disabilities to access the full range of government services. Failure to provide people with disabilities access to fundamental government services can result in money damages being awarded. Furthermore, all government services are public services and must ensure that they are not discriminating. These decisions have further focused all of our awareness on the issue of equality and fair treatment for the millions of us who have disabilities.

Beside these larger trends run more specific mandates that social workers, courts, attorneys and other service providers provide reasonable accommodations to parents with disabilities.

## **B. Keeping Children and Families Safe Act of 2003 Supports Parents with Disabilities**

The Child Abuse Prevention and Treatment Act (CAPTA) placed requirements on all child protection agencies that receive federal funds to have basic protections for children and families. In 2003 Congress amended CAPTA through the Keeping Children and Families Safe Act. Now, all child protection agencies must demonstrate that they work with parents with disabilities to develop plans for appropriate services as a prerequisite to continued federal funding.

“The Secretary shall make grants.....for the purpose of – developing, operating, expanding and enhancing Statewide networks of community-based, prevention-focused, family resource and support programs that demonstrate a commitment to meaningful parent leadership, including among parents of children with disabilities, **parents with disabilities**, racial and ethnic minorities, and members of other under represented or under served groups.” CAPTA, 42 U.S.C. §5116(b)(1)(G).

CAPTA requires that state child protection agencies:

- work with parents with disabilities in an interdisciplinary, collaborative, public-private sector manner to provide direction on services;
- integrate its efforts with individuals and organizations experienced in working in partnership with parents with disabilities;
- demonstrate *a financial commitment* to these activities;
- report on the number of families served who include parents with disabilities; and
- report on the involvement of a diverse representation of these families in the design, operation, and evaluation of community-based and prevention-focused programs and activities designed to strengthen and support families to prevent child abuse and neglect. Id.

## **C. Americans With Disabilities Act**

No qualified individual with a disability shall by reason of the 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 such entity.

Government agencies cannot provide to people with disabilities services that are **not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others**

**Disability** means

"physical or mental impairment that substantially limits one or more major life activities of such individual; a record of such impairment; or being regarded as having such an impairment."

### **Public Agencies Must Make Reasonable Accommodations that Aren't Undue Burdens**

First the individual must request the specific accommodation to prevent discrimination.

**People do not need to use “magic words” to get accommodated programing.** If the agency knows that the person has a disability that would impact the person’s ability to gain the same benefits as others, the agency must accommodate it.

The public agency program has an obligation to make reasonable accommodations in their programs to end the discrimination, or the agency must prove that the accommodation isn’t reasonable because it fundamentally alters their program.

In Vermont, the court has said that sometimes states may have to expend resources to make sure that programs provide equal benefits to people with disabilities, as long as it is a reasonable expense for the benefit.

### **Special laws for Communications**

Communications must be **as effective** with individuals with disabilities. The public entity must furnish auxiliary aids and services to ensure effective communication.

Auxiliary aids and services includes sign language interpreters, transcription services, braille, taped texts.

**The Communication Support Project is one such type of auxiliary aide**  
(discussed later in this training).

#### **D. ADA Issues Must Be Raised Early in Child Protection Proceedings**

The Vermont Supreme Court has addressed the issue of when and how to raise disability issues in child protection proceedings. The Court has held that the ADA cannot be raised at the eleventh hour to stop the termination of parental rights. In re: B.S. 166 Vt. 345 (1997). Case law is now quite clear that an alleged violation of the ADA in respect to DCF's provision of reasonable accommodations to the parent in the reunification effort will not impact a decision to TPR because the TPR analysis is rooted in best interests of child and reasonable time of reunification, not the parent's right to accommodations. Recent Vermont Supreme Court decisions clarify that the parents' need for more time due to disability is not relevant to the TPR issue of whether the child will be better off freed for adoption than waiting additional time for a potential successful reunification. See In re A.R. and C.R., 2008 WL 3976494 (court is not required to conduct "an open-ended inquiry into how the parents might respond to alternative [DCF] services and why those services have not been provided." In re B.S., 166 Vt. at 353, 693 A.2d 716.); In re S.M. and E.M., 2006 WL 5844803; In re E.S., A.S., and D.S., 2003 WL 25745100 (court was not obligated to consider what services SRS might have provided, and the possible effect they might have had on mother's parenting ability, in arriving at its conclusion that mother had stagnated.). Our bottom line is that parent's attorneys have to aggressively raise ADA reasonable accommodation issues early, pursue them vigorously, provide ideas for where and how to obtain appropriate accommodations for parents. If the social service agency fails to provide the identified and necessary reasonable accommodations, counsel for parents with disabilities must raise the alarm at both the administrative level within agency and with the court, possibly with a Motion for Protective Order to assure that appropriate services are in place in a timely manner to avoid a stagnation argument for TPR. Parents may also bring suit in Superior Court to enforce their ADA rights pending or post child custody determinations.

#### **E. Adoption and Safe Families Act and the Rights of Parents with Disabilities.**

You are all aware of the Adoption and Safe Families Act, 42 U.S.C. §671 et seq., and the emphasis that law, and our overall social policy, places on "permanency" for children in custody. As you know, one of the most important and at times

difficult provisions of ASFA is the REQUIREMENT FOR PROCEEDINGS section that requires TERMINATION OF PARENTAL RIGHTS proceedings to commence if a child has been in custody for 15 of the last 22 months. 42 U.S.C. §675(5)(E). This requirement is in force unless DCF identifies a COMPELLING REASON that a TPR petition is not in the child's interest or if the court finds DCF failed to provide the family with necessary services. One statutory reason that the court may deny a Motion to Terminate Parental Rights is a finding that the State did not employ “reasonable efforts” in it’s family reunification plan. 42 U.S.C. §675(5)(E)(iii).

Although often perceived to exist, in fact there is no conflict between ASFA's requirement for permanency for the child and reasonable efforts to reunify the family and the ADA's requirement that people with disabilities be given a fair shot at success through the provision of reasonable accommodations. First, if reasonable efforts to accommodate parents with disabilities are provided early, there may never need to be an extension to the time frame requirements. Second, the exceptions to ASFA's time-frame requirement can include a recognition of that additional time is necessary to provide the full benefit of certain accommodations. DCF can report to the court that, even after 15 months of custody, TPR is not in the child's best interest because the case plan for reunification is making progress and will take longer than the 15 months due to the reasonable accommodations being utilized by the parents.

## **Conclusion**

The key to effectively working with parents with disabilities is to identify the potential need for accommodations very early in the custodial process and work diligently and in an informed manner to create or find reasonable accommodations to reunification and child-supervision programs. In this way participants in the child protection system can satisfy our society's clear and unambiguous preference to afford parents with disabilities every opportunity consistent with child safety to regain or retain custody of their children.

*These materials were developed in April 2007 and modified in September 2013 by Barbara Prine, Esq. of the Disability Law Project of Vermont Legal Aid, 1-800-747-5022 [bprine@vtlegalaid.org](mailto:bprine@vtlegalaid.org); , and A.J. Ruben, Esq. of Disability Rights Vermont, 1-800-834-7890, [aj@disabilityrightsvt.org](mailto:aj@disabilityrightsvt.org). Please contact either agency with any questions, or check our websites: [www.vtlawhelp.org](http://www.vtlawhelp.org) and [www.disabilityrightsvt.org](http://www.disabilityrightsvt.org) .*