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ADVOCATING FOR CHILDREN WITH DISABILITIES IN CHILD PROTECTION CASES

*Joshua B. Kay**

I. INTRODUCTION

Children with disabilities are maltreated at a higher rate than other children and overrepresented in child protection matters, yet most social service caseworkers, judges, child advocates, and other professionals involved in these cases receive little to no training about evaluating and addressing their needs. Child protection case outcomes for children with disabilities tend to differ from those of nondisabled children, with more disabled children experiencing a termination of their parents' rights and fewer being reunified with their parents or placed with kin. They also tend to experience longer waits for adoption. Furthermore, the poor outcomes that plague youth who age out of foster care appear to be even more likely for youth with disabilities. While the literature about abuse and neglect in children with disabilities is fairly extensive, minimal attention has been paid to how their lawyers might advocate more effectively for them, including the possibility of using various disability rights laws to further child well-being.

This Article attempts to fill the legal advocacy void in the literature on children with disabilities in child protection proceedings. Part II covers definitions of disability and the prevalence of disability amongst children involved in child protection matters. Part III discusses the particular needs and outcomes of these children, framed as opportunities for better advocacy to address these challenges. Finally, Part IV describes available legal mechanisms advocates may use to ensure that the needs of maltreated, court-involved children with disabilities are met.

II. CHILDREN WITH DISABILITIES IN CHILD PROTECTION MATTERS

A. Legal Definitions of Disability

Children may experience a wide range of disabilities, including intellectual disability, physical disability, sensory disability (e.g., visual or hearing disability), psychiatric disability, or a chronic medical condition that substantially impairs functioning and requires specialized care.¹ The Americans with Disabilities Act (hereinafter “ADA”) defines disability 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.”² The ADA further states that whether a person is disabled is to “be construed in favor of broad coverage.”³ The statute provides a non-exhaustive list of “major life activities,” including physical, sensory, and cognitive functions, that fall under the Act if substantially impaired.⁴ Major life activities under the ADA include numerous tasks and functions, such as learning, reading, concentrating, thinking, and communicating, that are germane in educational and other contexts that are important for children.⁵ “Impairments in these and other areas of functioning may interfere with a child’s ability to

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¹ See, e.g., Elspeth Slayter, *Youth with Disabilities in the United States Child Welfare System*, 64 CHILD. & YOUTH SERVS. REV. 155, 157, 158 (2016); Tina M. Anctil et al., *Predictors of Adult Quality of Life for Foster Care Alumni with Physical and/or Psychiatric Disabilities*, 31 CHILD ABUSE & NEGLECT 1087, 1090 (2007). Slayter categorized youth with disabilities into five conditions that informed and largely track the categories presented here. Anctil generally included children with the same conditions as in the Slayter article, but grouped them into different categories.

² 42 U.S.C. § 12102(1) (2018).

³ *Id.* § 12102(4)(A).

⁴ *Id.* § 12102(2)(A).

⁵ *Id.*

benefit from services provided by child welfare and other agencies if reasonable accommodations are not made.”⁶

Disability is also defined under special education law. Specifically, the Individuals with Disabilities Education Act (hereinafter “IDEA”) conditions eligibility for special education services on a finding that a student falls under one of numerous categories of impairment—cognitive impairment, specific learning disability, speech and language impairment, etc.—and requires special education services.⁷ Indeed, a child may have a disability under the ADA but not under the IDEA. States may also have their own disability rights and special education statutes, which may include their own definitions of disability. Some researchers investigating disability amongst children in child protection proceedings have used special education eligibility as the determinant of whether a child has a disability.⁸

B. Prevalence

Perhaps as many as 18% of children in the United States have a disability.⁹ However, reports on the number of children with a disability vary. Recent figures indicate that approximately 13% of public school students receive special education services.¹⁰ Regardless of which population measure is used, the proportion of children in the child welfare system who have disabilities appears to be much higher. For example, a review of federal child welfare data found that 31.8% of the foster care population had a disability.¹¹ Examining only foster

⁶ Frank E. Vandervort & Joshua B. Kay, *Legal Issues in Child Welfare Cases Involving Children with Disabilities*, in CHILD ABUSE: CHILDREN WITH DISABILITIES 213, 228-29 (Vincent J. Palusci et al. eds., 2017).

⁷ 20 U.S.C. § 1401(3)(A) (2018); 34 C.F.R. § 300.8(a)(1)-(2)(i) (2018).

⁸ See, e.g., Patricia M. Sullivan & John F. Knutson, *Maltreatment and Disabilities: A Population-Based Epidemiological Study*, 24 CHILD ABUSE & NEGLECT 1257, 1259-60 (2000).

⁹ Paula Kienberger Jaudes & Lucy Mackey-Bilaver, *Do Chronic Conditions Increase Young Children’s Risk of Being Maltreated?*, 32 CHILD ABUSE & NEGLECT 671, 673 (2008). This number represents children with chronic conditions, including physical illness, developmental delay, intellectual disability, and behavioral and mental health conditions. *Id.* at 673-74.

¹⁰ *Children and Youth With Disabilities*, NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T EDUC., nces.ed.gov/programs/coe/indicator_cgg.asp (last updated Apr. 2018).

¹¹ Slayter, *supra* note 1, at 158. Importantly, the author noted that the caseworkers who enter this data are not necessarily trained in identifying disabilities. While this fact could technically skew the data to overestimate disability, it seems more likely that it would result in an underestimate of disability, because many disabilities are invisible. Also worth noting,

youth over age 18 increased the disability percentage to 52.7%.¹² Another research review found that 30% to 60% of children in foster care have chronic health conditions, and including behavioral, emotional, and developmental concerns jumped the number of foster children who have serious health care needs to above 80%.¹³ Evidence suggests that approximately one-third of children ages 0 to 14 years who are at all involved in the child welfare system have special health care needs, nearly three times the rate found in the general population.¹⁴ Research consistently yields disability rates amongst foster children of 30% to 80%.¹⁵ This number usually includes children with mental and behavioral health problems (i.e., psychiatric disability).¹⁶ Fully 60% of a sample of older foster youth had an identified disability that made them eligible for special education services.¹⁷ Children in foster care are 2.5 to 3.5 times more likely than other children to receive special education services.¹⁸

Maltreatment rates amongst children with disabilities are higher than in the general population. In a seminal study, Sullivan and Knutson found that 11% of a large sample of public school students

many children are involved with the child protection system but are not in foster care, and these children would not be included in these data.

¹² Slayter, *supra* note 1, at 160.

¹³ Heather Ringeisen et al., *Special Health Care Needs Among Children in the Child Welfare System*, 122 PEDIATRICS e232 (2008).

¹⁴ *Id.* at e239. It is important to note that these data were not limited to children in foster care. Instead, the sample included children involved in child protection investigations, which may explain the differences between these data and data comprised of foster children. *Id.* at e236.

¹⁵ See, e.g., Katharine Hill et al., *Foster Care Transition Services for Youth with Disabilities: Findings from a Survey of County Service Providers*, 89 CHILD WELFARE 63, 64 (2010); Katharine Hill, *Permanency and Placement Planning for Older Youth with Disabilities in Out-of-Home Placement*, 34 CHILD. & YOUTH SERVS. REV. 1418 (2012); Jennifer E. Blakeslee et al., *Reaching Everyone: Promoting the Inclusion of Youth with Disabilities in Evaluating Foster Care Outcomes*, 35 CHILD & YOUTH SERVS. REV. 1801, 1802 (2013); Sarah J. Geenen et al., *Youth with Disabilities in Foster Care: Developing Self-Determination Within a Context of Struggle and Disempowerment*, 15 EXCEPTIONALITY 17, 19-20 (2007); Susan Vig et al., *Young Children in Foster Care: Multiple Vulnerabilities and Complex Service Needs*, 18 INFANTS & YOUNG CHILD. 147 (2005) (stating that the majority of young foster children have medical, mental health, and/or developmental problems and experience several times the rate of acute and chronic health conditions, emotional adjustment problems, and developmental delays compared to young children not in foster care).

¹⁶ See, e.g., Hill, *supra* note 15, at 1418.

¹⁷ *Id.* at 1420.

¹⁸ Kristin Kelly et al., *Advocating for Educational Success for Children in Foster Care*, in CHILD WELFARE LAW AND PRACTICE 607, 617 (Donald N. Duquette et al. eds., 3d ed. 2016).

had experienced maltreatment.¹⁹ In contrast, when they examined children receiving special education services (i.e., children with disabilities), the maltreatment rate jumped to 31%.²⁰ Examining their data from a different angle, they found that 22% of maltreated children had a disability, while only 6.7% of non-maltreated children had a disability.²¹ Among the maltreated children, behavioral disorders were the most common form of disability, followed by intellectual disability, learning disability, and health-related disability (e.g., asthma, juvenile rheumatoid arthritis).²² Neglect was the most common form of maltreatment regardless of disability, although most maltreated children had experienced multiple forms of abuse and neglect.²³ Children with disabilities were even more likely than other children to experience multiple forms and multiple episodes of maltreatment.²⁴ Put in terms of risk, children with disabilities were three to four times more likely than other children to be neglected or abused physically, sexually, or emotionally.²⁵

Another study compared children in foster care to those receiving Aid to Families with Dependent Children (hereinafter “AFDC”) and found that foster children exhibited significant mental health problems at much higher rates, including depression, anxiety, attention-deficit/hyperactivity disorder, conduct disorder, bipolar disorder, and oppositional-defiant disorder.²⁶ The diagnosis rates for mental health problems among the foster children were similar to those in children receiving Supplemental Security Income benefits due to disability.²⁷ Given the high overlap in AFDC eligibility between the

¹⁹ Sullivan & Knutson, *supra* note 8, at 1261.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 1265-66. Children with behavior disorders had the greatest increased risk of maltreatment over children without disabilities. Jaudes & Mackey-Bilaver also found that children with behavioral and mental health problems, which they grouped together, were especially at risk of maltreatment, though their risk multiples were lower than those found by Sullivan & Knutson yet still alarming. Jaudes & Mackey-Bilaver, *supra* note 9, at 675.

²⁶ Jeffrey S. Harman et al., *Mental Health Care Utilization and Expenditures by Children in Foster Care*, 154 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1114, 1115-16 (2000). This study was particularly interesting because poverty rates are high in both groups, essentially controlling for the stress of poverty in comparing risk of mental health problems.

²⁷ *Id.* at 1116.

foster care and AFDC-only groups, the findings suggest that children in foster care are particularly likely to have psychiatric disabilities.

There may be many reasons for the high risk of maltreatment and subsequent child protection involvement experienced by children with disabilities. Evidence suggests that children with communication impairments, behavioral disorders, learning disabilities, and sensory impairments may be especially at risk.²⁸ It is possible that disabilities that affect a child's ability to communicate or discern when abuse is happening make the child a more likely target for abuse, because the abuser has less fear of discovery. In addition, research suggests that parents of children with disabilities experience more stress, and increased parental stress is associated with an increased risk of maltreatment.²⁹ One factor in this stress may be the lack of respite for many parents, particularly those who lack social or economic resources.³⁰ "Parents with limited social and community support may be at especially high risk of maltreating children with disabilities, because they may feel more overwhelmed and unable to cope with the care and supervision responsibilities that are required."³¹ More research is needed on the various—and probably overlapping—contributors to the increased risk of maltreatment in children with disabilities. What is clear at this point is that this increased risk is substantial: children with disabilities experience maltreatment and child protection involvement at disproportionate rates.

III. HEIGHTENED RISK OF UNMET NEEDS AND POOR OUTCOMES

Despite documenting significant unmet needs among children with disabilities in the child protection system, few authors even mention the potential for children's legal advocates to play a role in getting those needs met. Yet to the extent that there are untapped services to meet those needs or new services that might be created, children's lawyers have an opportunity, largely unrealized so far, to force change through advocacy. Before they can do so, it is critical

²⁸ Kirsten Stalker & Katherine McArthur, *Child Abuse, Child Protection and Disabled Children: A Review of Recent Research*, 24 CHILD ABUSE REV. 24, 32 (2012).

²⁹ Vig et al., *supra* note 15, at 148; Christopher G. Petr & David D. Barney, *Reasonable Efforts for Children with Disabilities: The Parents' Perspective*, 38 SOCIAL WORK 247 (1993).

³⁰ Roberta A. Hibbard et al., *Maltreatment of Children with Disabilities*, 119 PEDIATRICS 1018, 1020 (2007).

³¹ *Id.*

that they understand the needs of children with disabilities and the poor outcomes their young clients face when those needs go unaddressed.

Children with disabilities are at particular risk of experiencing a rocky course through their child protection cases. First, they are more likely than other children to be removed from their parents.³² Approximately 64% of a large sample of children with disabilities who had an active child protection case were placed outside their homes, making their risk of out-of-home placement nearly twice that of other children.³³ While it is possible that all of these removals were necessary in order to ensure children's safety, it is incumbent on advocates to examine each case, ask whether removal is indeed necessary, and prevent any unnecessary removals. Once removed, children face myriad risks in the foster care system, and these risks appear to be exacerbated for children with disabilities. Therefore, preventing unnecessary removals must be a priority for children's legal advocates.

Children with disabilities are twice as likely to be the subject child in a termination of parental rights case, meaning the agency is more likely to seek termination in cases in which children have disabilities.³⁴ There is also a higher rate of completed terminations in cases involving children with disabilities.³⁵ Predictably, therefore, these children are less likely than other children to have a trial home visit with their family of origin, since this is commonly a step preparatory to reunification.³⁶ Reunification is less likely to be the goal in their cases, and they are twice as likely as other children to have long-term foster care listed as the goal.³⁷ In addition, children with disabilities are more likely to experience congregate care, such as an institutional or group home placement.³⁸ They are 40% less likely than children without disabilities to be placed with relatives, and their stays

³² Hill et al., *supra* note 15, at 65.

³³ Elizabeth Lightfoot et al., *Prevalence of Children with Disabilities in the Child Welfare System and Out of Home Placement: An Examination of Administrative Records*, 33 CHILD. & YOUTH SERVS. REV. 2069, 2073 (2011). For the entire sample, children with disabilities were 1.87 times more likely than other children to be removed. However, the risk increased for somewhat older children with disabilities: those over age five were over twice as likely to be removed compared to nondisabled children.

³⁴ Slayter, *supra* note 1, at 160.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

in foster care tend to be longer.³⁹ In short, because kinship care is considered the best alternative to remaining with parents, and the ideal goal for children is reunification, child welfare cases involving children with disabilities do not appear to go as well, on average, as those involving other children.⁴⁰ Furthermore, once their parents' rights have been terminated, foster children with disabilities wait about twice as long as nondisabled peers to be adopted.⁴¹ Overall, they are also less likely to end up living with a relative or discharged to a guardianship, both outcomes that tend to keep children with extended family.⁴²

Foster youth who are age 18 or older and have disabilities are also less likely to end up living with a relative or reunified with a parent and more likely to be transferred from foster care to custody of another state agency.⁴³ Adoption, discharge to a guardianship, and emancipation are equally likely outcomes for these disabled young adults.⁴⁴ Considerable research has found poor outcomes in economic, social, employment, educational, and physical and mental health domains for nondisabled youth who age out of the foster system, including a greater likelihood of being incarcerated or homeless.⁴⁵

³⁹ *Id.* See also Stalker & McArthur, *supra* note 28, at 34 (noting longer foster care stays, lower reunification rates, lower kinship placement rates, and greater foster placement instability for children with disabilities); Vicki Welch et al., *Permanence for Disabled Children and Young People Through Foster Care and Adoption: A Selective Review of International Literature*, 53 CHILD. & YOUTH SERVS. REV. 137, 139, 140 (2015) (reviewing literature finding lower reunification rates, longer foster care stays, reduced likelihood of reunification or relative care being the care plan, and longer waits for adoption); Elspeth M. Slayter, *Foster Care Outcomes for Children with Intellectual Disability*, 54 INTELL. & DEV. DISABILITIES 299, 305, 306, 307 (2016) (detailing foster care challenges for children with intellectual disability vs. nondisabled peers, including a greater likelihood of termination of parental rights, lower likelihood of reunification or discharge to a relative, and longer waits for adoption).

⁴⁰ Slayter, *supra* note 1, at 160 (pointing out that placement with relatives and reunification are considered the best alternatives when removal is necessary).

⁴¹ *Id.* These findings were in children ages birth to 17 years.

⁴² *Id.*

⁴³ *Id.* Examples of other state agencies would include adult foster care or a mental health institution.

⁴⁴ *Id.* at 160-61.

⁴⁵ Anctil et al., *supra* note 1, at 1088. See also Tina M. Anctil et al., *An Evaluation of Recovery Factors for Foster Care Alumni with Physical or Psychiatric Impairments: Predictors of Psychological Outcomes*, 29 CHILD. & YOUTH SERVS. REV. 1021, 1022 (2007) (reviewing literature showing that foster care alumni who experience long foster stays generally experience more mental health problems, lower educational attainment, lower earnings, a higher risk of criminal activity, and higher unemployment rates, even if they do not age out of the system).

Youth with disabilities tend to fare even worse on these mental and physical health indicators, self-esteem, economic independence, and educational attainment.⁴⁶

During their stay in foster care, children with disabilities are more likely than other foster children to experience placement instability,⁴⁷ with children who have behavioral and emotional problems at greatest risk.⁴⁸ Research findings indicate that foster parents of children with disabilities are concerned about getting adequate services for the children.⁴⁹ Areas of stress for these foster parents include dealing with the local schools, navigating the health, child welfare, and education systems, getting respite from providing challenging care, and handling children's behaviors.⁵⁰ For foster teens, placement instability interferes with foster parents' ability to teach necessary skills for successful independent living.⁵¹

Foster parents require more training in meeting the needs of children with disabilities.⁵² They also need assistance accessing specialized supports, such as therapeutic services, mobility aids, and mental health services.⁵³ One study found that over half of foster children with serious emotional disturbances, such as schizophrenia, bipolar disorder, or another psychotic disorder, did not receive even the minimal standard of monthly mental health visits.⁵⁴ Similarly, young children in foster care have high rates of developmental and mental health problems, which often go untreated and can jeopardize placements.⁵⁵ Researchers have noted a lack of court orders that

⁴⁶ Antcil et al., *supra* note 1, at 1094.

⁴⁷ Slayter, *supra* note 1, at 159; Hill, *supra* note 15, at 1419; Geenen et al., *supra* note 15, at 23.

⁴⁸ Welch et al., *supra* note 39, at 140, 141; Toni Terling-Watt, *Permanency in Kinship Care: An Exploration of Disruption Rates and Factors Associated with Placement Disruption*, 23 CHILD. & YOUTH SERVS. REV. 111, 124 (2001). Terling-Watt also found that children's serious physical impairments are a significant factor in placement disruptions.

⁴⁹ Jason D. Brown & Susan Rodger, *Children with Disabilities: Problems Faced by Foster Parents*, 31 CHILD. & YOUTH SERVS. REV. 40, 44 (2009).

⁵⁰ *Id.* at 45.

⁵¹ Geenen et al., *supra* note 15, at 22, 23.

⁵² Welch et al., *supra* note 39, at 143. *See also* Hibbard et al., *supra* note 30, at 1020 (noting that foster parents often lack information and education about children's specific problems and needs).

⁵³ Welch et al., *supra* note 39, at 142.

⁵⁴ Cynthia A. Fontanella et al., *Continuity of Care for Youth in Foster Care with Serious Emotional Disturbances*, 50 CHILD. & YOUTH SERVS. REV. 38, 41 (2015).

⁵⁵ Laurel K. Leslie et al., *Addressing the Developmental and Mental Health Needs of Young Children in Foster Care*, 26 J. DEV. & BEHAV. PEDIATRICS 140, 141-42, 143-44 (2005).

address services for foster children.⁵⁶ Court orders could require specific services, including training for foster parents, and break down barriers to service provision, such as poor communication between caseworkers, foster parents, and health care providers.⁵⁷ Orders could also require that parents sign consents for assessment and intervention, since this can be another barrier to obtaining services.⁵⁸

A study of foster parents who care for children with disabilities found that they needed more financial support and a good relationship with an “understanding and supportive social worker.”⁵⁹ Support from the school was also helpful.⁶⁰ They also needed more information about disability generally and children’s specific disabilities and medical problems.⁶¹ Access to medical care from doctors willing to see children with disabilities, as well as help getting any necessary medical equipment, were areas of concern, as was the need for an array of therapeutic services, including in-home therapies.⁶² They also wanted respite care.⁶³ Foster parents of older youth noted the need for transition services in the areas of education and independent living.⁶⁴

In sum, children with disabilities experience longer foster stays, higher rates of termination of parental rights, lower rates of reunification, longer waits for adoption, more placement disruption, and less placement with relatives than other children. Foster youth with disabilities who age out are even more vulnerable to poor outcomes across health, educational, economic, and other domains than their nondisabled peers. It is clear that the needs of these children and youth are not being met, yet court orders tend not to mention or address them. Foster parents who provide care for children with disabilities have reported numerous challenges and identified services

⁵⁶ *Id.* at 146.

⁵⁷ *See id.* at 144.

⁵⁸ *Id.*

⁵⁹ Jason D. Brown et al., *Service Needs of Foster Families with Children who have Disabilities*, 14 J. CHILD & FAM. STUDIES 417, 422, 425 (2005).

⁶⁰ *Id.* at 424. Statistics indicate that a high percentage of foster children needs special education services, but far fewer actually receive them, even if they have been found eligible and have an Individual Education Plan. Sarah Geenen & Laurie E. Powers, *Are We Ignoring Youths with Disabilities in Foster Care? An Examination of Their School Performance*, 51 SOC. WORK 233 (2006). In addition, foster children with disabilities receive more restrictive special education placements than other students with disabilities. *Id.* at 238.

⁶¹ Brown et al., *supra* note 59, at 425.

⁶² *Id.*

⁶³ *Id.* at 426.

⁶⁴ *Id.*

that would help meet them, yet those services are difficult to access. All of these problems present opportunities for children's lawyers to make a difference through strong advocacy.

IV. ADVOCACY APPROACHES AND TOOLS

Lawyers for children with disabilities must be diligent and aggressive in their efforts to raise disability-related issues and obtain whatever evaluations are necessary to determine their clients' needs. They must then ensure that those needs are met through targeted services. Most advocates are not experts on disability, and it may be difficult to ascertain whether a child is disabled and what additional services and modifications to services are needed. Caseworkers may not be much help, because they are not necessarily trained in identifying disabilities either.⁶⁵ In fact, there is a general lack of experts on abuse and disability in the United States, and documenting information about children with disabilities in the child welfare system has been inconsistent.⁶⁶ Nevertheless, there are professionals available who can assess the health, educational, and psychological needs of children with disabilities.⁶⁷ Advocates must press courts to order the child protection agency to obtain appropriate, comprehensive assessments of these children.

In order to know whether to seek such evaluations, children's lawyers must thoroughly investigate their cases. They need to observe and, if the child has sufficient speech abilities, interview their clients. They should try to interview the parents as well with a focus on determining the child's needs.⁶⁸ Specifically, child advocates need to inquire about the child's developmental, physical and mental health, and educational history. They should find out whether the child has ever seen therapy professionals and why, including the names and

⁶⁵ Slayter, *supra* note 1, at 157.

⁶⁶ Stalker & McArthur, *supra* note 28, at 34.

⁶⁷ For example, multidisciplinary treatment teams in hospitals that offer pediatric rehabilitation services. The author served for several years as a rehabilitation psychologist and neuropsychologist on one such team, which was staffed by a wide array of professionals, including physicians, nurses, social workers, speech-language therapists, physical therapists, occupational therapists, and others.

⁶⁸ Of course, the parents' lawyers might not permit such an interview, but in the face of an initial refusal, child advocates should explore the possibility of having the parents' lawyers participate in the interview or offer to limit the scope of the interview to the child's developmental, health, and educational history coupled with a discussion of the child's needs. The author has had success with these approaches.

contact information of those professionals. Obviously, any history of special education services, which may include services provided during the preschool years, is important to discover. Any leads should be carefully followed with additional interviews and records reviews. Regardless of whether there are leads, advocates should interview children's teachers, day care providers, physicians, and extended family members. Most of all, children's lawyers need to ask directly about disability. It is not a topic to shy away from.

Child advocates should adopt a "functional" view of disability. This approach emphasizes what the child knows, is able to do and learn, and the circumstances under which the child successfully learns or applies what is learned.⁶⁹ A functional approach to disability requires an individualized analysis of a child's abilities without highlighting disability merely because it is present.⁷⁰ By focusing on actual abilities and contexts, rather than assumptions based on a particular disability label, services can be tailored to the needs of the individual child.⁷¹

In contrast, the "categorical" perspective emphasizes the criteria for placement in a particular category of disability, such as a specific mental illness, intellectual disability, or physical disability, similar to making a medical diagnosis.⁷² Once the type of disability is known, a professional who takes a categorical view draws conclusions about the features of the disability and its effects on areas of functioning based on the diagnosis rather than an evaluation of the individual's actual capacities.⁷³ This approach has little regard for context and none for individual variation. It is not empirically supportable, because it is inappropriate to extrapolate from group statistics to ascribe traits to any one individual.⁷⁴ Child protection caseworkers tend to take a categorical approach to disability.⁷⁵

⁶⁹ 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 (John R. Lutzker ed., 1998).

⁷⁰ See Stephanie N. Gwillim, Comment, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341, 356 (2009).

⁷¹ See Tymchuk, *supra* note 69, at 422.

⁷² *Id.* at 422-23.

⁷³ *Id.*

⁷⁴ See Jeanne M. Kaiser, *Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases When Parents Have a Mental Illness*, 11 WHITTIER J. CHILD & FAM. ADVOC. 3, 13 (2011).

⁷⁵ Tymchuk, *supra* note 69, at 422-23; Gwillim, *supra* note 70, at 342.

Advocates must counter this approach to ensure that their clients' needs are accurately assessed and high quality, targeted services are provided.

If a child client has a disability, the advocate can and should draw on numerous statutory schemes to meet the client's needs, including the need for a comprehensive evaluation in order to determine what further issues must be addressed.⁷⁶ Most broadly, child welfare statutes give courts broad authority to make orders that are in the best interest of children. In addition, the Americans with Disabilities Act requires reasonable modifications to services provided to children with disabilities so that these children have an equal opportunity to benefit from the services.⁷⁷ In the school setting, special education law can be used to obtain many therapeutic and other services. Public benefits also may be available for children with disabilities to help fund their care, and Medicaid programs mandate comprehensive evaluation and treatment services.

A. Child Welfare Statutes

Child welfare statutes are state-specific, but they may offer an avenue for advocacy on behalf of children with disabilities.⁷⁸ For example, Michigan law grants courts hearing child protection matters broad authority to "make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of . . . juveniles under [court] jurisdiction."⁷⁹ By statute, the court must consider the case service plan before entering an order of disposition and may order compliance with any and all of it.⁸⁰ While this power is commonly used to order service plan compliance by parents, agencies can be ordered to comply as well, including in the provision of services to children. The court also has broad authority to modify the case service plan as needed.⁸¹ Advocates may ask for an

⁷⁶ To be clear, advocates need not be complete experts in disability. They must be alert to the possibility that a client has a disability, gather as much information as they can, and work to obtain evaluations that can recommend various services the client needs. Often, a better evaluation than may be sought in a case involving a nondisabled client is the first "accommodation" needed for a child with a disability.

⁷⁷ Vandervort & Kay, *supra* note 6, at 227.

⁷⁸ Child welfare statutes also offer a legal means to obtain services on behalf of children without disabilities, of course, but that is outside the scope of this article.

⁷⁹ MICH. COMP. LAWS § 712A.6 (2018).

⁸⁰ *Id.* § 712A.18f(4).

⁸¹ *Id.* § 712A.19(7).

accelerated hearing at any time to review and modify the plan.⁸² Doing so can be an excellent way to place the issue of inadequate service planning before the court. Even before adjudication, a court may order that a child be evaluated by medical or mental health professionals.⁸³ In short, courts have considerable authority to ensure that the needs of children with disabilities are met, and it is critical that advocates appeal to that authority.

B. The Americans with Disabilities Act

The ADA is an important tool for any lawyer working on behalf of people with disabilities. “The ADA is a federal civil rights law that is designed ‘to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.’”⁸⁴ ADA protections apply to people with disabilities in child protection cases, including children, especially by requiring reasonable modifications to reunification and other services provided.⁸⁵ States must provide adequate care for children in their custody, and in order to be compliant with the ADA in doing so, the state must ensure that the children in its care can access and benefit from state services.⁸⁶

⁸² *Id.* § 712A.19(4).

⁸³ *Id.* § 712A.12.

⁸⁴ Vandervort & Kay, *supra* note 6, at 227 (citing 42 U.S.C. § 12101(b)(2) (2009)). The ADA definition of disability was provided in Part II.A., *supra* note 2 and accompanying text.

⁸⁵ Lightfoot et al., *supra* note 33, at 2074 (asserting that children with disabilities must have an equal opportunity to benefit from services offered by the system); Vandervort & Kay, *supra* note 6, at 227. *See, e.g., In re Hicks/Brown*, 893 N.W.2d 637, 642 (Mich. 2017) (requiring the child protection agency to modify its services to accommodate a parent’s disability in order for reunification efforts to be found reasonable); *Stone v. Daviess Cty. Div. of Children & Family Servs.*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995); *In re Antony B.*, 735 A.2d 893 (Conn. App. Ct. 1999); *In re E.E.*, 736 N.E.2d 791, 796 (Ind. Ct. App. 2000); *J.H. v. State of Alaska, Dep’t of Health & Soc. Servs.*, 30 P.3d 79, 86 n.11 (Alaska 2001) (noting that “reasonable efforts” requirement in state law is identical to ADA reasonable accommodation requirement); *In re Guardianship of R.G.L.*, 782 A.2d 458 (N.J. Super. Ct. App. Div. 2001); *In re Custody and Guardianship of La’Asia S.*, 739 N.Y.S.2d 898 (Fam. Ct. 2002) (noting ADA guidelines are a helpful supplement to state’s diligent efforts standard); *In re Welfare of Angelo H.*, 102 P.3d 822 (Wash. Ct. App. 2004). Although these cases are about the application of ADA protections in the provision of services to parents, their reasoning holds for children as well.

⁸⁶ *See DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). The Court declared that the state taking someone into custody is what triggers its duty to protect safety and well-being. Therefore, the state must ensure adequate care for foster children.

Title II of the ADA declares 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.”⁸⁷ A “qualified individual with a disability” means

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.⁸⁸

Children with disabilities in child protection matters clearly qualify for state child welfare services and programs.

The federal government has issued a technical assistance document outlining ADA protections for parents with disabilities who are involved in child protection matters.⁸⁹ The reasoning in that document also holds for children with disabilities. Child protection agencies must give children with disabilities an equal opportunity to participate in and benefit from their programs and services.⁹⁰ Agencies may not discriminate against children with disabilities.⁹¹ They must make reasonable modifications (i.e., reasonable accommodations) in their policies, practices, and/or procedures to avoid discrimination.⁹² Agencies must treat children with disabilities “on a case-by-case basis consistent with facts and objective evidence” and not on the basis of “generalizations or stereotypes.”⁹³ Individualized treatment and full

⁸⁷ 42 U.S.C. § 12132 (2018). Foster care is a service of the state, so it must be provided in a nondiscriminatory manner.

⁸⁸ *Id.* § 12131(2).

⁸⁹ U.S. DEP’T OF HEALTH & HUMAN SERV., OFFICE FOR C.R. ADMIN. FOR CHILD. & FAMILIES & U.S. DEP’T OF JUSTICE, C.R. DIV. DISABILITY RIGHTS SECTION, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT 2 (Aug. 2015), http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf [hereinafter TECHNICAL ASSISTANCE].

⁹⁰ *See id.* at 6. The DHHS/DOJ technical assistance addresses the rights of parents with disabilities, but its reasoning holds for children with disabilities as well.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 4.

and equal opportunity are core principles of the ADA.⁹⁴ The ADA does not require agencies or courts to lower their standards for child safety.⁹⁵ Rather, the ADA requires meaningful and equal access to the benefits provided by the agency.⁹⁶

Advocates will need to prove that a child is disabled in order to invoke ADA protections. As a practical matter, the agency may stipulate that the child is disabled, or may have described the child in court pleadings or other documents or statements in ways that indicate recognition of the child's disability.⁹⁷ If not, advocates should gather evidence of disability from medical and mental health reports and records, Social Security determinations, educational evaluations and records, and the like.⁹⁸ "[T]horough evaluation of the child is a critical component of ensuring that any disabilities are identified and accommodated."⁹⁹ Once the agency knows that a child has a disability requiring accommodations, it must act on that knowledge. In fact, the Michigan Supreme Court recently found that the child welfare agency has an affirmative responsibility to make any needed reasonable accommodations as soon as it knows that the person in question has a disability.¹⁰⁰ Agency knowledge may be inferred because the disability is obvious, or the agency has been informed of it, or from statements the agency has made indicating its knowledge.¹⁰¹

A child protection agency may defend itself against an ADA claim by showing that a recipient poses a direct safety threat, or the requested accommodation is unduly burdensome or represents a fundamental alteration to the nature of the program.¹⁰² As a practical matter, the direct threat defense does not map well onto children's ADA claims in the child protection context. Agencies have an obligation to provide adequate care for the children in their custody.¹⁰³

⁹⁴ *Id.* The centrality of individualized treatment in the ADA's protective scheme means that thorough evaluation lies at the heart of the ADA, because high-quality evaluations are needed to determine what the person with a disability needs.

⁹⁵ *Id.* at 5.

⁹⁶ *Id.*

⁹⁷ Vandervort & Kay, *supra* note 6, at 228.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *In re Hicks/Brown*, 893 N.W.2d 637, 640-41 (Mich. 2017). This decision was about parents with disabilities, but its reasoning holds for children with disabilities.

¹⁰¹ *Id.* In particular, see note 5 in the opinion, which details the evidence that the agency knew of the mother's disability.

¹⁰² TECHNICAL ASSISTANCE, *supra* note 89, at 10, 15.

¹⁰³ *DeShaney v. Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989).

Therefore, even if a child poses a threat, the agency must provide services, such as therapies designed to reduce the child's threatening behavior. In order for these services to be effective and non-discriminatory, they would need to reasonably accommodate the child's disability.

As for the fundamental alteration defense, its contours are not entirely clear. However, the DHHS/DOJ position is that depending on the needs of the recipient, the ADA may extend the time that services are provided or require the agency to obtain services from outside professionals or develop new services, with none of these representing a fundamental alteration to the nature of the program.¹⁰⁴ Finally, if financial resources are unavailable for the modification or additional service, the undue burden defense may be effective.¹⁰⁵ However, if an agency argues that service provision would be unduly burdensome, the court should require a comparison of those burdens against the burden of not providing the service, including likely long term costs that may be increased by the agency's inaction.¹⁰⁶ In that light, the burden of services might be less arduous, and the evidence of burden may be insufficient as a defense.

C. Individuals with Disabilities Education Act

Children in foster care are far more likely than other children to receive special education services.¹⁰⁷ Children with disabilities must receive a "free, appropriate, public education" (hereinafter "FAPE"), which the special education system is designed to provide.¹⁰⁸ The Individuals with Disabilities Education Act (hereinafter "IDEA") "mandates that each [referred] child be comprehensively evaluated to identify disabilities requiring specialized instruction to help the child learn effectively."¹⁰⁹ For youth ages 16 years and up, transition

¹⁰⁴ TECHNICAL ASSISTANCE, *supra* note 89, at 13-14, 15.

¹⁰⁵ Julie Odegard, *The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents*, 11 LAW & INEQ. 533, 561 (1993).

¹⁰⁶ Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 LAW & INEQ. 153, 207 (1998). *See also* Dale Margolin Cecka, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112, 139 (2007).

¹⁰⁷ Kelly et al., *supra* note 18, at 617. *See also* Geenen & Powers, *supra* note 60, at 233.

¹⁰⁸ 20 U.S.C. § 1401(9) (2018).

¹⁰⁹ Kelly et al., *supra* note 18, at 619. The IDEA, 20 U.S.C. §§ 1400-1482 (2018), is the federal special education law. States may have their own special education laws as well, which

planning—planning for what will happen after high school, as the youth transitions toward adulthood—is required.¹¹⁰ The IDEA specifies eligibility categories, and special education evaluations are designed to determine whether a student is eligible and under what category.¹¹¹ However, the category in which a child is determined to be eligible does not determine or limit what services the child may receive.¹¹² Eligible students must receive all the services necessary for them to benefit from their education.¹¹³ Those services are specified in Individualized Education Programs (hereinafter “IEPs”) that are reasonably calculated to confer educational benefit.¹¹⁴

A parent or foster parent can seek special education services for a child.¹¹⁵ If needed, the court may designate an educational surrogate for the purposes of special education planning if a child is a court ward.¹¹⁶ Once a student is referred for special education services, an evaluation is completed to assess eligibility and educational needs and, if the child is eligible, to inform the creation of an IEP.¹¹⁷ IEPs may include numerous programs and services, including 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 is needed in order for the child to receive a FAPE.¹¹⁸ The

may be more protective than federal law. *See, e.g.*, MICH. COMP. LAWS § 380.1701 *et seq.* (2018); MICH. ADMIN. CODE r. 340.1701 (2018).

¹¹⁰ Kelly et al., *supra* note 18, at 624. Kelly et al. note that transition planning can begin before age 16, and some states require as much. *Id.*

¹¹¹ *See supra* note 7. *See also* 20 U.S.C. § 1401(3)(A) (2018); 34 C.F.R. § 300.8(a)(1)-(2)(i) (2018). It is worth noting that Title II of the ADA, 42 U.S.C. § 12132 (2018), and the Rehabilitation Act of 1973, 29 U.S.C. § 701 (2018), as well as state disability rights statutes, also provide legal tools for meeting the needs of students with disabilities. If a student does not fit one of the categories in the IDEA, the student may still qualify for services under broader disability rights statutes.

¹¹² 34 C.F.R. § 300.304(c)(6) (2018).

¹¹³ *Id.*

¹¹⁴ Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206 (1982). Rowley does not require that students receive services designed to help them reach their maximum potential. Services need only be designed to confer educational benefit.

¹¹⁵ 20 U.S.C. § 1401(23)(A) (2018). State law may differ as to whether a foster parent can sign a child’s IEP.

¹¹⁶ *Id.* § 1401(23)(D); 34 C.F.R. § 300.519(a), (c). It is important that children’s lawyers ensure that a child has a “parent” for special education purposes under the IDEA, either by making sure the parent or foster parent is seeking needed services or by seeking court appointment of a surrogate. Kelly et al., *supra* note 18, at 619-20.

¹¹⁷ 20 U.S.C. § 1414(b).

¹¹⁸ *See* 34 C.F.R. § 300.324.

IDEA requires that students with disabilities be educated in the least restrictive environment that is appropriate to meet their needs.¹¹⁹

Foster children with disabilities face particular challenges in getting their special education needs met. As described by Geenen and Powers, successful navigation of the special education system relies on parental advocacy and participation, which many foster children lack.¹²⁰ There is evidence that the vast majority of foster parents are uninvolved in the special education process.¹²¹ Also, while many foster children need special education services, many do not receive them even once they are found eligible.¹²² It is possible that this gap is a function of typical compliance violations by schools that go unaddressed for many foster children due to the lack of parental advocacy.¹²³ Many foster children also change placements, creating discontinuities in their special education services.¹²⁴ When they do receive special education services, foster children experience more restrictive placements than other students with disabilities.¹²⁵ Older foster youth, for whom careful transition planning is critically important to prepare them for successful young adulthood, tend to have little input into these plans.¹²⁶ There is too little coordination between child welfare and special education systems regarding transition services for youth.¹²⁷

Despite these challenges, child welfare caseworkers often pay little attention to the educational needs of foster children, because they are overwhelmed by immediate child protection needs.¹²⁸ Lawyers for these children must be prepared to address these issues. Children's advocates can and should raise educational concerns in and out of court by asking detailed questions about educational history and school programs. Possible information sources include clients, parents, foster parents, caseworkers, teachers, and other professionals. Advocates

¹¹⁹ 20 U.S.C. § 1412(5).

¹²⁰ Geenen & Powers, *supra* note 60, at 233.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* Children with disabilities are even more likely than other foster children to experience placement disruptions. Blakeslee et al., *supra* note 15, at 1802.

¹²⁵ Geenen & Powers, *supra* note 60, at 238.

¹²⁶ Geenen et al., *supra* note 15, at 25.

¹²⁷ Katharine Hill, *Individuals with Disabilities Act of 2004 and the John H. Chafee Foster Care Independence Act of 1999: What Are the Policy Implications for Youth with Disabilities Transitioning from Foster Care?*, 88 CHILD WELFARE 5, 9 (2009).

¹²⁸ Geenen & Powers, *supra* note 60, at 234.

must also obtain educational records, press caseworkers and foster parents to attend to the educational needs of their clients, bring issues before the court as needed, ask the court to order action by parents, foster parents, and/or caseworkers, request that educational surrogates be appointed if necessary, and attend IEPs if appropriate.¹²⁹ Advocates should also consult with their state Protection and Advocacy office for advice about how to access special education services or other accommodations as appropriate.¹³⁰

D. Public Benefits

Advocates for children with disabilities would do well to keep in mind public benefits programs, two of which are discussed here. First, children with disabilities may be eligible for Supplemental Security Income (hereinafter “SSI”) 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.”¹³¹ Although SSI payments for foster children go to the child welfare agency to offset the cost of the child’s care, it is important that the agency apply for these benefits if the child might be eligible, because the child with a disability may require financial support beyond the time the child is in foster care. Whether the child ends up reunified with his or her family, placed with kin, or adopted, the child could benefit substantially from SSI payments. Advocates can bring the need for an SSI application to the attention of caseworkers and ensure that they follow through.

Another public benefit program of which lawyers for children with disabilities should be aware is Early and Periodic Screening, Diagnosis, and Treatment (hereinafter “EPSDT”). According to the United States Children’s Bureau, most children in foster care are

¹²⁹ The “parent” for special education purposes has a right to participate in the special education evaluation and IEP process and can invite others, such as children’s advocates, to attend. Kelly et al., *supra* note 18, at 624.

¹³⁰ See www.ndrn.org for a list of state Protection and Advocacy offices. Advocates in these offices can provide a wealth of information and guidance about a wide variety of disability-related legal issues.

¹³¹ 42 U.S.C. § 1382c(a)(3)(C)(i) (2018).

eligible for Medicaid.¹³² Medicaid programs must include EPSDT services.¹³³ These services mandate comprehensive health and developmental screening, dental services, vision and hearing screening and treatment, and any necessary physical and mental health care.¹³⁴ Taken together, EPSDT services can provide much or all of a child's health care, including specialized care for children with disabilities. Multiple authors have noted that high-quality, comprehensive medical and mental health care is critical for addressing the complex medical, mental health, and/or developmental problems that are frequently seen in foster children; EPSDT is an important tool for doing so.¹³⁵ Advocates need to be aware of EPSDT so that they can track child welfare agency compliance in assisting children with disabilities to access necessary care.

V. CONCLUSION

Children with disabilities are more likely than other children to experience maltreatment, and they are overrepresented in the child protection system. Once they are in the system, they have a higher risk of removal from their families and tend to fare more poorly than children without disabilities. Children with disabilities who are in foster care are more likely to experience placement instability, longer foster care stays, higher rates of termination of parental rights, lower rates of reunification, longer waits for adoption, and poor educational and vocational outcomes. These children often have numerous physical health, mental health, and educational needs, and they are at risk of these needs going unaddressed. In other words, children with disabilities are even more vulnerable than other foster children to significant threats to their health, development, and future. It is critical that their lawyers and other advocates explore the nature of their clients' disabilities and demand appropriate evaluation and services.

¹³² U.S. CHILDREN'S BUREAU, HEALTH CARE COVERAGE FOR YOUTH IN FOSTER CARE—AND AFTER 2 (May 2015), http://www.childwelfare.gov/pubPDFs/health_care_foster.pdf [hereinafter HEALTH CARE COVERAGE]. See also 42 U.S.C. § 1396a(a)(43); 42 U.S.C. § 1396d(a)(4)(B); 42 U.S.C. § 1396d(r).

¹³³ HEALTH CARE COVERAGE, *supra* note 132, at 7.

¹³⁴ *Id.* at 7-8.

¹³⁵ See, e.g., Vig et al., *supra* note 15, at 155-56; Leslie et al., *supra* note 55, at 142-43 (suggesting EPSDT as a route to accessing services to address developmental and mental health problems in foster children).

Specialized services do exist—lawyers for children with disabilities must ensure that their clients have access to them.