

Disability Discrimination of Prospective Adoptive and Foster Parents

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Table of Contents

List of Figures	iii
I. INTRODUCTION TO DISABILITY DISCRIMINATION IN ADOPTION AND FOSTER CARE	1
A. Analysis of a 50 State Survey of Laws and Regulations on Adoption, Foster Care, and Discrimination in the United States	10
1. Method	11
2. Statutory Construction Issues	11
3. Vague Health Requirements and Reasonable Accommodations	14
4. Individualized Assessment and Professional Input	18
II. PRACTICES THAT DO NOT COMPLY WITH EXISTING FEDERAL LAWS	26
A. Laws and Regulations that do not Discuss Disability Discrimination	27
B. The Importance of Reasonable Accommodation	33
C. The Importance of Individualized Assessment	38
III. IMPROVING NON-DISCRIMINATION IN ADOPTION AND FOSTER CARE	48
A. Statutes and Regulations with provisions that Support Prospective Parents with Disabilities	48
B. Reducing Discrimination	51
1. Monitoring	52
2. Federal Government Approach	54
3. State Government Approach	56
CONCLUSION	57
References	59

List of Figures

Statutory Construction Issues	13
Consistency	14
Health Requirements	16

There are an estimated over 400,000 children in foster care.¹ 102,000 children are waiting to be adopted.² While 50,000 children are adopted through the foster care system, around 30,000 reach the age of 18 without ever finding home.³ There is a continuous and dire need for adoptive and foster parents in the United States.

Research from multiple fields confirms that the family unit, safety, stability, and nurturing environments make significant impact on the ability of children to succeed and thrive.⁴ Children who are raised in stable home environments are better adjusted than children who are exposed to difficult or harmful experiences, and research demonstrates that children exposed to highly unstable environments are more likely to experience developmental difficulties.⁵ The worst outcomes include impairments in their physical

¹ The AFCARS Report, 2013, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf>.

² *Id.*; Trends in Foster Care and Adoption (FFY 2002- FFY 2012), U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf.

³ Foster Care Adoption Facts and Figures, CHILDREN'S ACTION NETWORK, <HTTP://CHILDRENSACTIONNETWORK.ORG/RESOURCES.HTML#4>.

⁴ Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 CHILDREN, FAMILIES, AND FOSTER CARE 1, 30, 32 (2004).

⁵ *Id.*

health, cognitive development, academic achievement, interpersonal relationships, and mental health.⁶ A lack of continuity or constancy in caregiving has been associated with poor developmental outcomes. Children in need of homes are particularly vulnerable to detrimental outcomes as lack of stable home environment puts all children in need of homes at risk.⁷

Despite the importance of stable home environments, and the many children seeking homes, the adoption process and foster care licensing system can be a difficult journey for prospective parents. There is competition among parental applicants, long wait times, and extreme costs up to \$40,000, experts say.⁸ While most reputable agencies are upfront about fees, it can be hard to predict any additional medical expenses for the child, or the mother in adoptions, and longer wait times contribute to the added costs.⁹ Foster care adoption offers an alternative where prospective parents are open to adopting siblings and older children. In those cases, the state is the legal guardian of the child and they cover agency and placement fees. In addition, those foster children with special needs, which include those with a deceased parent or medical conditions, may qualify for state or federal subsidies.¹⁰ Yet, foster care adoption is not right for every family, and even this route carries costs and waits.

⁶ *Id.*

⁷ *Id.*

⁸ Kathleen Kingsbury, *Longer Wait Times, Higher Costs for U.S. Adoptions*, REUTERS (Jan. 15, 2013).

⁹ *Id.*

¹⁰ *Id.*

Parenthood is a notion shared throughout the globe, but for persons with disabilities, the laws and regulations surrounding the adoptive and foster care process create unnecessary barriers. In 1995 a couple applied to become parents, but was immediately told by their local welfare agency that their disabilities made them unqualified.¹¹ A deaf couple, that had previously raised biological children, was denied the ability to adopt on the basis of their disabilities because despite it being a “happy home” it was not a “normal home.”¹² In online forums, prospective adoptive parents reach out to discuss fears as to whether screws in their spine, their husband’s schizophrenia, or their chronic illness will impede their ability to adopt.¹³ These stories highlight the need for discussion

¹¹ Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

¹² *In re Adoption of Richardson*, 59 Cal. Rptr. 323 (Ct. App. 1967). *But see Marriage of Carney*, 24 Cal.3d 725 (1979) (This case discussed whether a wheelchair-bound father in a divorce case was able to parent his children. The court acknowledged that health or physical condition of parents may be taken into account in custody determinations regarding the child’s best interests, but the Supreme Court in California rejected a per se finding by the trial court that disabled parents were categorically unable to meaningfully contribute to the child).

¹³ *See*, ADOPTION.COM, <http://forums.adoption.com/getting-started/383840-adoptive-parent-disability.html> (last visited July 30, 2012); Sheena MacRae, *Adoption, Parenting, and Disability*, RAINBOWKIDS.COM (July 26, 2007),

on how a prospective parent's disability should factor in adoption and foster care applications and licensing.

There are three types of domestic adoption in the United States.¹⁴ Public agency adoptions are usually run by state or city governments and are licensed by the state.¹⁵ Private agency adoptions are also licensed and are managed privately, by both commercial for profits, or non-profits.¹⁶ There are also independent adoptions that involve direct placement of a child usually with a point person facilitating.¹⁷ Agencies link children who are in need of homes to prospective families by evaluating whether the parents are eligible to adopt the child and assisting with the legal process.¹⁸ Every adoption agency has criteria that prospective parents must meet in order to adopt that may include a home study, background check,¹⁹ and several factors including age, religion,

<http://www.rainbowkids.com/expertarticledetails.aspx?id=86>; NATIONAL ADOPTION CENTER, <http://www.adoptspeak.org/forum/topics/i-was-a-successful-past> (last visited Mar. 12, 2014).

¹⁴ Shauna L. Gardino, Andrew E. Russell, & Teresa K. Woodruff, *Adoption After Cancer: Adoption Agency Attitudes and Perspectives on the Potential to Parent Post-Cancer*, in *ONCOFERTILITY* 153, 154 (T.K. Woodruff et al., eds) 2010.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

financial stability, emotional health, marital status, quality of marital relationship, motives for adoption, and overall health.²⁰ These criteria vary by agency as every agency has its own set of policies.²¹ Differing policies can make it difficult for prospective parents with disabilities to find an agency to work with and start their family. The current system is also managed state by state leaving room for differing standards throughout the U.S.

In 2011, the state of Virginia approved regulations allowing adoption agencies to use disability as a sole reason to deny persons the ability to adopt.²² North Dakota has a statute that prohibits the state from denying licensure to adoption and foster care agencies even if the agency has policies denying certain classes of people the opportunity to adopt,

²⁰ Brenda K. DeVries, *Health Should Not Be a Factor of Whether One Will Be a Suitable Adoptive Parent*, 6 Ind. Health L. Rev. 137, 142 (2009).

²¹ Shauna L. Gardino, Andrew E. Russell, & Teresa K. Woodruff, *Adoption After Cancer: Adoption Agency Attitudes and Perspectives on the Potential to Parent Post-Cancer*, in ONCOFERTILITY 153, 154 (T.K. Woodruff et al., eds) 2010.

²² Associated Press, *Va. Board Allows Adoption Agencies to Discriminate Based on Sexual Orientation, Other Factors*, WASH. POST, December 15, 2011. *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10,

<http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

including those with disabilities.²³ These regulations inhibit those with disabilities from becoming adoptive or foster parents.²⁴ Vague health requirements, lack of protections for disabled prospective parents, and the patchwork of state laws threaten that disability also impedes disabled persons throughout the United States from becoming adoptive or foster parents. Prospective parents with disabilities may face categorical denials when seeking to adopt or foster children.²⁵ Many face bias and speculation concerning their parenting abilities during their application process.²⁶ Ranking systems used by domestic adoption agencies force prospective adoptive parents with disabilities to wait for indefinite periods before a match is found which may lead to these prospective parents being completely precluded from adopting or fostering.²⁷ The effects of these practices are felt not only by

²³ N.D. Cent. Code § 50-12-03; *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

²⁴ See Section I.A for a discussion on the meaning of discrimination.

²⁵ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

²⁶ *Id.*

²⁷ *Id.*

those who seek to expand their families, but also the growing number of children awaiting homes.²⁸

Elizabeth Pazdral lives with cerebral palsy, wears a brace, and uses crutches to walk. When she and her husband decided to adopt, an adoption agency in her hometown of Davis, California billed her an advance fee of \$3,400, then advised the couple that the agency had "serious reservations" about her ability to be a parent. She sought the help of an occupational therapist to come to her house to assess her capabilities. With that support, the agency dropped its objections. Although it meant "sleep-deprived nights, higher levels of chronic pain, and the challenge of maintaining energy", Pazdral and her husband, a Stanford University physicist, adopted a baby girl.²⁹

Kaney O'Neill is a Navy veteran and a quadriplegic. While disability discrimination can occur in the adoption process, it is also a parallel issue in maintaining custody. Ms. O'Neill faced a legal battle to keep custody of her son where her ex alleged that she was

²⁸ *Id.* See also Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE UNIV. L. REV. 213-16 (1997) (explaining that a law that prohibits discrimination based on disability opens more potential homes for children and "[b]y providing more placement options, the new law better safeguards the rights of children to a stable and permanent home."); Elizabeth Bartholet, "What's Wrong with Adoption Law?" *International Journal of Children's Rights* 4 (1996): 265–66.

²⁹ David Crary, *Report: Disabled Parents Face Bias, Loss of Kids*, ASSOCIATED PRESS, Nov. 26, 2012.

"not a fit and proper person" to care for the child because of her disability. To refute the allegation, "she demonstrated how she had prepared for motherhood by working with an occupational therapy program, adapting her house, securing specialized baby-care equipment, and using personal assistants to help her as needed." Having successfully retained custody, Ms. O'Neill and her son are "thriving."³⁰

Persons with cancer, or a history of cancer, face "informal prejudice" when seeking to become prospective parents.³¹ Infertility is often a consequence of cancer treatment, and because they are no longer able to conceive biologically, a growing number of survivors are seeking to become parents through adoption. About 1.5 million men and women will be diagnosed with cancer per year, but survival rates are increasing.³² As both cancer incidence and survival rates are rising, more and more people will face the issue of loss of fertility. While there is not extensive research on the potential for becoming an adoptive parent after cancer, the research that does exist concludes that "cancer patients lack access to information about adoption and may face discrimination in domestic and international adoption."³³

These people had to struggle against an assumption that their disability made them unfit to parent. Disability rights law has often focused on employment discrimination, but the Americans with Disabilities Act aimed to create equal opportunity beyond those

³⁰ *Id.*

³¹ Gardino, *infra* note 21.

³² *Id.* at 153.

³³ *Id.*

boundaries, including within adoption and foster care systems. The fifty state survey of the adoption and foster care laws and regulations done in tandem with this article presents several problems within this arena. First, many states do not include anti-discrimination provisions in their laws and regulations covering adoption and foster care. This includes internal inconsistencies where states may prohibit discrimination in adoption, but not foster care, or discuss non-discrimination in regulations but not statutes, and vice versa. Second, within adoption and foster care provisions are vague health requirements for prospective parents that allow for disability discrimination. Persons without medical knowledge or knowledge regarding occupational therapy often evaluate prospective parents' ability to care for a child. Third, the state processes for adoption and foster care often do not include reasonable accommodations for persons with disabilities, to change the adoption or foster care process to enable a person with a disability to participate.

States are charged with administering foster care licensing and adoption approvals often through their departments of human services. Parental health is a common criterion given a state's duty to protect the welfare of children in need of homes.³⁴ The standard by which most states measure prospective parents is whether they will meet the best interests of the child, which can be interpreted differently by different agencies, or courts. In addition to this charge, states are obligated to comport with Federal laws prohibiting discrimination based on disability including Section 504 of the Rehabilitation Act

³⁴ Brenda K. DeVries, *Health Should Not Be a Determinative Factor of Whether One Will Be a Suitable Adoptive Parent*, 6 INDIANA HEALTH LAW REVIEW 144 (2009).

(Section 504) and the Americans with Disabilities Act (ADA).³⁵ Fulfilling the best interests of the child must remain the paramount purpose of public and private agencies, but that should not mean that prospective parents with disabilities are denied the ability to adopt or foster when their home meets the best interests standard.³⁶ As the number of children seeking homes remains high,³⁷ discriminatory and vague health requirements should be replaced with non-discrimination provisions and specific practices outlining a way for prospective parents with disabilities to become adoptive or foster parents when it is in the best interests of the child. In addition, physician input, occupational therapists, adaptive equipment, and other resources should be considered when analyzing a prospective parent with a disability's ability to adopt or foster children.

A. Analysis of a 50 State Survey of Laws and Regulations on Adoption, Foster Care, and Discrimination in the United States.

The laws of the 50 states differ greatly in whether they include non-discrimination provisions, discuss health requirements, or consider reasonable accommodations. These

³⁵ Madelyn Freundlich, *The Americans with Disabilities Act: What Adoption Agencies Need to Know*, The Evan B. Donaldson Adoption Institute, 1(1999)
www.adoptioninstitute.org/policy/ada.html.

³⁶ See Section I.C for a description of this standard.

³⁷ Foster Care Statistics 2012, CHILD WELFARE INFORMATION GATEWAY,
<https://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

laws and regulations offer a patchwork defense against discrimination for those persons with disabilities who hope to become adoptive or foster parents.

Discrimination is the name of the game in adoptive parenting. Those who procreate live in a world of near-absolute parenting rights. Those who would adopt have no rights. They must beg for the privilege of parenting and do so in a state-administered realm that denies them both the right to privacy and the civil rights that we have come to think of as fundamental. Differential treatment on the basis of age, race, religion, and disability has been outlawed in almost all areas of our communal lives in the United States. Increasingly the law forbids discrimination on the basis of marital status and sexual orientation. It is only in the area of adoption that our system proclaims not simply the right to discriminate on all these bases but the importance of doing so. It is not just the prospective parents who are treated shabbily, but also the children, in whose best interests the system is supposedly designed.³⁸

1. Method

The data in this section is based on a survey completed on the laws and regulations concerning adoption and foster care of the 50 states and the District of Columbia. To complete this state survey I used the legal search engine Westlaw and several states' statutory compilation websites and department of human services websites. Westlaw was used for the majority of the research. It was often easy to find a state's statutes and regulations on adoption, which were commonly compiled completely under "family," "children," or "domestic" labels. Foster care statutes and regulations were often more difficult to locate because the relevant statutes and regulations are more scattered among licensing provisions, sections on termination of parental rights, and the many different definitions in each state on what a foster parent is called or required to do. In my work I searched a list of 9 terms for every state in both statutes and regulations. Those terms

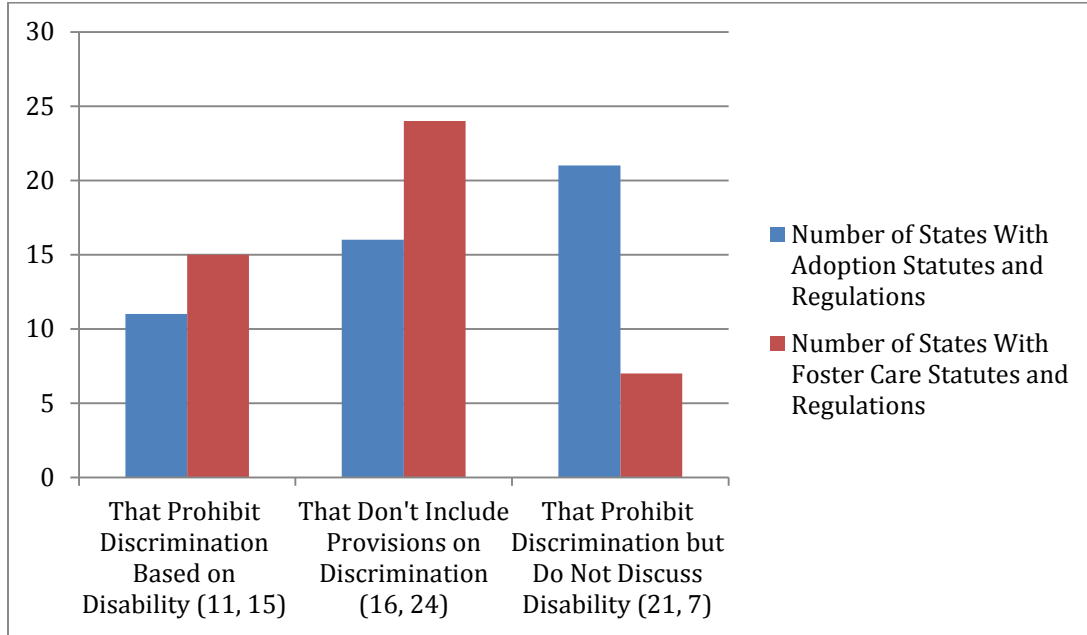
³⁸ Elizabeth Bartholet, *What's Wrong with Adoption Law?*, 4 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 265–66 (1996).

include: discrimination, disability, handicap, disease, health, medical, physician, race, and national origin. While I found a wealth of information, this study should be premised with the fact that there may be statutes or regulations that cover health requirements or discrimination that were missed.

2. Statutory Construction Issues

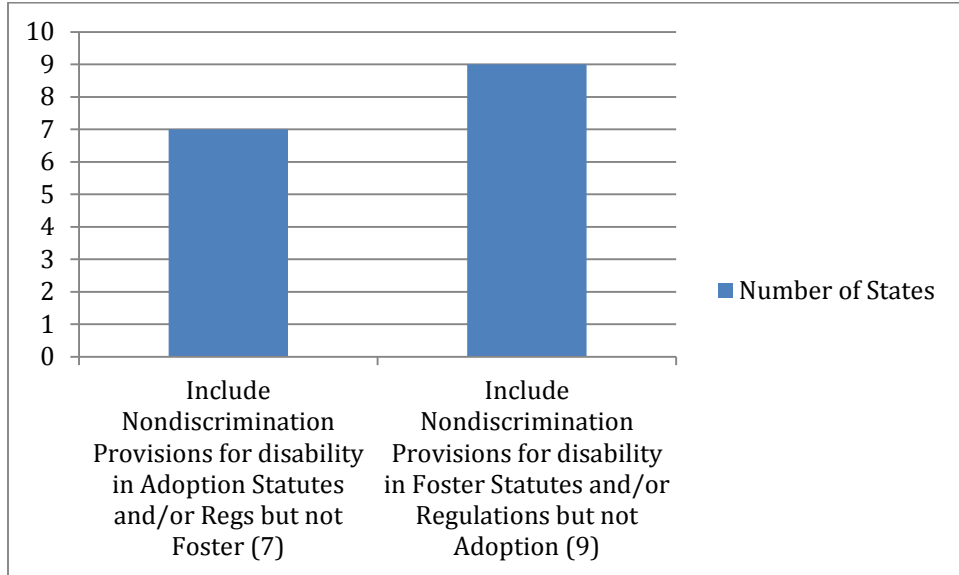
There are two trends of statutory construction issues in adoption and foster care statutes and regulations. First, many states include nondiscrimination provisions for race, national origin, color, sex, and other protected groups, but exclude disabled persons. Second, there is a confusing trend of states including nondiscrimination provisions for persons with disabilities in the context of foster care and not adoption or in their regulations and statutes on adoption but not foster care. In addition, states include disability nondiscrimination provisions in their regulations, but not statutes and vice versa.

Statutory Construction Issues



Twenty-one states include nondiscrimination provisions for other protected groups in their adoption statutes and regulations, but omit nondiscrimination based on disability. Seven states include prohibitions of discrimination provisions in their foster care statutes and regulations but do not include disabled persons. By their plain meaning, these statutes simply don't include prohibitions of discrimination based on disability. This makes these statutes and regulations confusing and suggests a lack of attention to the issue of discrimination of prospective parents with disabilities in adoption and foster care.

Consistency



Approximately seven states include disability nondiscrimination provisions in their adoption statutes or regulations but omit similar protections in their statutes and regulations concerning foster care. Approximately nine states prohibit discrimination based on disability in their foster care statutes and regulations but do not afford these same protections to disabled adoption applicants. This inconsistency suggests that the states intended to cover nondiscrimination of disabled persons applying for one of these but not the other. This is problematic in that it affords unequal protections, and confusing standards for agencies.

3. Vague Health Requirements and Reasonable Accommodations

The differences among state health requirements of prospective adoptive and foster parents are vast. State's requirements regarding health reflect the state's duty to place children in homes that will serve the child's best interests. Most states require in home

studies that include an investigation of a prospective parent's health.³⁹ Health requirements from states might also be framed as asking prospective adoptive or foster parents to submit medical histories or reports with their application.⁴⁰ A state may also ask for a signed statement from a physician attesting to the ability of the applicant to care for a child.⁴¹ Louisiana uniquely asks applicants to testify as to their health in a pre-placement hearing.⁴² The graph below gives a quick overview of the types of health assessments used throughout the United States mentioned in regulations and statutes. This graph shows the varying types of requirements, as they are different in each state and different when seeking to be a foster or adoptive parent.

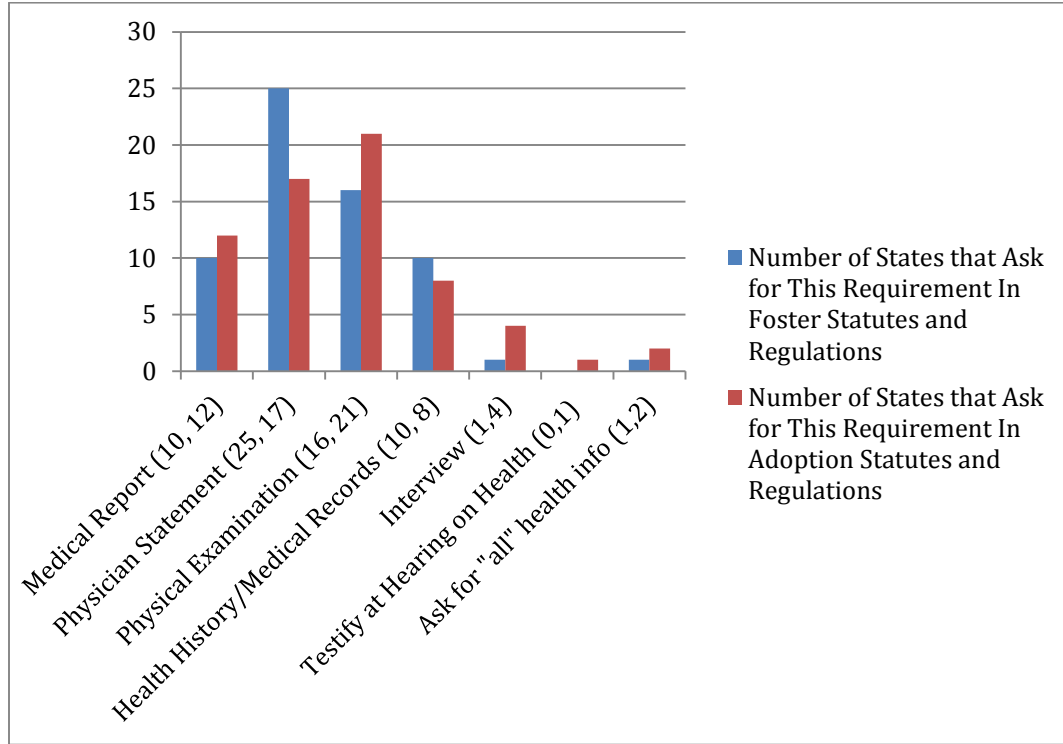
³⁹ *See eg.*, Minn. Stat. Ann. § 259.41 (West); Miss. Code. Ann. § 93-17-11 (West).

⁴⁰ *See*, Conn. Agencies Regs. § 17a-145-132; Ga. Code 290-9-2-.06(3)(d)(6).

⁴¹ *See*, Ala. Admin. Code r. 660-5-42.06.

⁴² *See*, La. Child. Code Ann. Art. 1177.

Health Requirements



The many requirements described above can be general and vague, or can be a helpful tool to establishing the parenting capabilities of the applicant to ensure the best interests of the child. Vague and generalized health requirements or those that do not include considerations of reasonable accommodations to consider the strengths or limits of a prospective parent may screen out persons who are otherwise qualified adoptive and foster parents with disabilities.

Vague health requirements also pose a hurdle for disabled prospective adoptive and foster parents. Different agencies, employees, and administrators can interpret how health is measured and defined in conflicting and varying ways. A number of states discuss

requirements of “good” health.⁴³ Requiring prospective parents to be in “good” health may exclude disabled individuals if those assessing prospective adoptive and foster care parents define good health as free from disability.

Beyond the ambiguous language requiring good health, several other states require that disabilities not “interfere” or “impact” the child.⁴⁴ This could categorically exclude persons with disabilities from being an adoptive or foster parent. Approximately ten states include language that discusses the applicant’s health issues interfering or impacting as a barrier to participation in their foster care statutes and regulations and nine states use these vague terms in adoption statutes and regulations. Disabilities may interfere or impact care of a child but should not necessarily be a barrier to the ability to adopt. A disability can change the relationship of the parent and child, but may not lead to any harm or endangerment that might be a legitimate reason to deny a person the

⁴³ See Mont. Admin. R. 37.51.301 (Montana foster care regulations); Nev. Admin. Code § 424.550 (Nevada foster care licensing regulations); NH ADC HE-C 6448.13 (New Hampshire adoption regulations).

⁴⁴ Washington D.C.’s regulations covering foster and adoption require a medical report with the application that verifies the person has no disabilities that would “interfere with the family’s ability to parent a child.” D.C. Mun. Regs. Tit. 29, § 1620; D.C. Mun. Regs. Tit 29, § 1639. The term “interference” invites broad interpretation. Similarly, New Mexico requires their pre-placement studies of adoptive parents include investigation into health issues that “may impact” the ability of the applicant to care for the child. N.M. Admin. Code § 8.26.3.

ability to adopt or become a foster parent. The small difference in wording that changes the standard from endangerment, to anything that may impact or interfere could allow for discrimination. They also suggest that a state may deny a person the ability to adopt or foster based on their disability, without taking into account reasonable modifications the prospective parent may acquire to meet the standards of the agency. Reasonable accommodations might include a parent's use of daycare services, or allowing persons to adopt or foster older children rather than infants.

Using these imprecise and obscure requirements subject to broad interpretation gives agencies too much discretion to deny disabled persons without taking into account reasonable accommodations. Broad discretion combined with vague terms can lead to discrimination based on disability or a discriminatory impact. These generalized terms may allow for denials to be made based on fears, prejudices, and ignorance that Section 504 was enacted to prevent.⁴⁵

4. Individualized Assessment and Professional Input

Individualized inquiry is “essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear”⁴⁶ while keeping in mind legitimate health and safety risks to others. Along with individualized assessment Section 504 requires replacing “reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments.”⁴⁷

⁴⁵ *Sch. Bd. of Nassau County*, 480 U.S. at 284.

⁴⁶ *Id.* at 287.

⁴⁷ *Id.* at 285.

Many state statutes and regulations have health requirements that do not outline a process that involves professional input like a physician assessment of capabilities or use of an occupational therapist. Without this professional judgment, agencies may make unfounded judgments about a person's capability to adopt or foster children. Only twenty-five states discuss requirements of physician or medical professional statements of capability to provide foster care and just seventeen states mention physician or medical professional statements of capability to adopt. Little is discussed on the role of occupational therapists, and prospective parents with disabilities often must seek the help of an occupational therapist's skills in evaluating their ability to parent outside the adoption and foster care process.⁴⁸ This issue of not using professional knowledge is apparent in three trends throughout state regulations and statutes. First, using interviews and home studies only to analyze health completely omits medical knowledge and the skills of an occupational therapist in evaluating and creating programs to allow persons living with disabilities to make progress in work, home, daily or difficult tasks. Second, agencies may not have the proper skills to analyze medical records, health histories, and results of physical exams that they ask for as part of their health requirements. Finally, several states include in their statutes and regulations the option of asking for medical professional input, but only at the agency's discretion meaning that a disabled person can be denied without professional input from a physician or an occupational therapist.

A majority of states require in home assessments and interviews as part of evaluating prospective foster and adoptive parents. This can become problematic when this is the

⁴⁸ David Crary, *Report: Disabled Parents Face Bias, Loss of Kids*, ASSOCIATED PRESS, Nov. 26, 2012.

only part of pre-placement evaluations that looks into the parent's health because Section 504 and the ADA require denials to be based in professional medical knowledge. Kansas' adoption regulations require an adoptive home study with an interview to assess physical health and any medical or health conditions that would affect their ability to parent.⁴⁹ It is unclear whether any professional medical input or input from an occupational therapist is used to determine parental fitness and seems to imply that the interviewer from the agency will be doing the assessment of health. Vermont also evaluates prospective parents in an interview process that includes the interviewer's account of physical and mental health.⁵⁰ There is no mention of a physical exam or involvement of a physician or nurse. The foster care regulations for Florida state that the staff person doing the home study should document any health concerns but a staff person's observations hardly amount to sound medical judgment.⁵¹ A disabled person's application to be denied based on these health requirements without a basis in any professional medical knowledge.

Often states do require medical input in the form of physical exams, medical records, and documented health histories. This information may be important to analyzing a prospective parent's ability to care for a child, but only qualified persons ought to make that assessment including medical professionals and occupational therapists. Several states collect these documents but do not explain that a professional should be analyzing them to determine parental eligibility and whether any reasonable accommodations

⁴⁹ *See*, Kan. Admin. Regs. §28-4- 176.

⁵⁰ *See*, Vt. Stat. Ann. tit. 15A, § 3-602 (West).

⁵¹ Fla. Admin. Code Ann. R.65C-13.025.

would allow them to adopt or foster. For example, Florida in their foster care regulations requires submission of a medical history and Florida's adoption regulations ask for a health history.⁵² Minnesota's adoption statute describes the in home study as including medical history and assessment of current health, but does not discuss involvement of a medical professional in evaluating the medical history or current health.⁵³ In addition, the fact that this health history is discussed in the context of a home study suggests that the health history is either determined through agency questioning or self-reporting. Oregon's foster care regulations ask for a relevant health history and statement of physical health, but states that agencies may request an applicant to provide a report from a medical professional.⁵⁴ It is problematic that anyone behind a desk in the agency can deny a person the ability to adopt based on the applicant's health history without analysis by qualified individuals.

Finally, several states discuss that if there is a health concern, they reserve the ability to seek a professional medical opinion. This is a step towards including professional medical judgment in analyzing prospective parents, but it is problematic because it still involves agency discretion in deciding whether or not medical professional input is needed. An agency may still deny a person the ability to adopt based on their disability without consulting a professional including physicians and occupational therapists who are able to evaluate parenting ability. For example, Alaska's adoption regulations require

⁵² See, Fla. Admin. Code Ann. R65C-13.025 and Fla. Admin. Code Ann. R65C-16.005.

⁵³ See, Minn. Stat. Ann. § 259.41 (West).

⁵⁴ See, Or. Admin. R. 413-215-0321.

the agency to collect “all available information” about applicant’s physical and mental health, but an agency *may* in its discretion require an evaluation from a health professional on any problems the agency feels could be detrimental to the child.⁵⁵ Mississippi mentions that some applicants with serious medical conditions *may* be asked to obtain a statement from their physician in addition to the medical forms filed with the application.⁵⁶ Texas’ home study requirements discuss observations of the health status of everyone in the home, and states that the agency has discretion to decide where professional evaluation is necessary to follow up on any potential problems.⁵⁷ Nebraska’s adoption regulations state that a medical report may be requested if there appears to be a health condition and a negative report can be the basis for denial of an application.⁵⁸ It seems the agency has the option to deny applicants without a medical report meaning no medical evidence as a basis. This stands in contrast to the foster care regulations in Nebraska which says that if there is a concern over an applicant’s health, they “shall” request a physical examination.⁵⁹ It is at the discretion of the agency to obtain

⁵⁵ Alaska Admin. Code tit. 7, § 56.660.

⁵⁶ Code Miss. R. 18.

⁵⁷ Tex. Fam. Code. Ann. § 264.108 (West).

⁵⁸ 390 Neb. Admin. Code § 7-001.

⁵⁹ 474 Neb. Admin. Code § 6-003. Similar discretionary involvement of medical professionals is discussed in Nevada, Oregon and Washington’s foster care regulations. *See*, Nev. Admin. Code § 424.550; Or. Admin. R. 413-215-0321; Wash. Admin. Code 388-148-0035.

professional input on the applicant's ability to care for a child and they may still be denied the ability to adopt or foster without this added information.

Two models of thought surrounding disability continue to define it. The *medical model* treats disability as a physical or mental trait with significant consequences personally and socially for the individual and views limits faced by persons with disabilities as a result solely from their impairment.⁶⁰ A *social model* focuses more on the relationship between disabled persons and their environments, explaining that physical or mental characteristics are only limits because social practice excludes persons with those different characteristics.⁶¹ Many justice theorists following the 1973 Rehabilitation Act followed the medical model, but by the 1990's and the passage of the ADA, the social model was accepted among political philosophers in the mainstream.

The medical model of disability views the disadvantages associated with disability as inherent.⁶² This theory involves medical correction or material compensation whereas the social model favors social reconstruction including more accessible structures and a society that aims to be more inclusive of a variety of people.⁶³ Changing societal structures to be more inclusive raises difficult issues because of the range and diversity of

⁶⁰ DISABILITY AND JUSTICE, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 23, 2013) <http://plato.stanford.edu/entries/disability-justice/>.

⁶¹ *Id.*

⁶² DISABILITY AND JUSTICE, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 23, 2013) <http://plato.stanford.edu/entries/disability-justice/>.

⁶³ *Id.*

physical and mental differences within the broad term of persons with disabilities.⁶⁴ The question of what justice requires to make an environment accessible is hard to answer, but in discussing how to make the adoption and foster care process accessible, the conversation can be narrowed.

Differences based in disability may be mitigated with medical treatment or rehabilitation, adaptive equipment, or altering the environment to make it manageable for those with disabilities, but in which situations are these considered moral obligations?⁶⁵ Should agencies considering parenting candidates with disabilities take into account existing mitigating factors, or provide mitigating factors themselves?⁶⁶

With respect to the social model, a minimum standard for how disabled applicants should be evaluated would set up an easy to follow metric for those who evaluate

⁶⁴ There has been very little discussion by philosophers and bioethicists about justice for persons with cognitive disabilities or persons with psychiatric disabilities. It has been discussed in the context of inclusion in education at greater length. *See e.g.*, Howe, K., 1996, *Educational Ethics, Social Justice and Children with Disabilities*, in *DISABILITY AND THE DILEMMAS OF EDUCATION AND JUSTICE*, C. Christensen and F. Rizvi (eds.), 46–62; LADENSON, R.F., (2005); *THE ZERO-REJECT POLICY IN SPECIAL EDUCATION: A MORAL ANALYSIS*, *THEORY AND RESEARCH IN EDUCATION*, 3(3): 273–298.

⁶⁵ ANITA SILVERS, ET AL., *DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY* 16 (1999).

⁶⁶ *DISTRIBUTIVE JUSTICE*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Sept. 22, 1996) <http://plato.stanford.edu/entries/justice-distributive/>.

applicants. This could involve a requirement for physician input, occupational therapist knowledge, an opportunity for appeal of a decision, and the inclusion of non-discrimination based on disability as part of every state's laws and regulations. In addition, equality would involve recognition of the issue of discrimination in adoption and foster care. This would include greater transparency from adoption agencies and foster care licensors. It would involve monitoring of when disabled individuals are denied the ability to adopt or foster. In addition, it would acknowledge differences among applicants. To require adoption and foster care agencies to be responsible for mitigating limitations of disabled individuals that might make them less able to become parents would likely create undue burdens.

This approach does not displace the overarching goal of adoption and foster care of placing children in need of homes in an environment that places their best interests first. While agencies should provide reasonable accommodations throughout the process, this would not include providing mitigating factors to make a prospective parent meet minimum standards in health to meet the best interests of the child standard. Rather, with the help of professional knowledge, parental abilities could be properly evaluated. Prospective parenting abilities could be qualified in line with the requirements of individual which might include such qualifications as the adoptive or foster parent seeking only to care for a teenager rather than an infant or use of daily childcare assistance, leading to better outcomes for parents and children.

II. PRACTICES THAT DO NOT COMPLY WITH EXISTING FEDERAL LAWS

The ADA requires that persons with disabilities not be discriminated against in adoption and foster care systems. In *Doe v. County of Centre* the Third Circuit explained that a blanket prohibition against placing foster children in a home where a family member has HIV/AIDS is discrimination because it involves an overbroad generalization of the capabilities of persons living with HIV.⁶⁷ This leaves open the question of how to address discrimination that is indirect, including the vague health requirements and disjointed laws and regulations that may indirectly lead to screening out disabled persons.

Many states laws and regulations concerning adoption and foster care are not in compliance with the ADA. First, many states do not discuss non-discrimination based on disability in their laws or regulations, giving the false impression that agencies are not required to be in compliance with the ADA. Second, many states do not take into account reasonable accommodation in evaluating prospective parents with disabilities, as required by the ADA. Third, many states use vague health requirements and do not properly exercise individualized assessments of prospective parents, in compliance with the ADA.

A. Laws and Regulations that do not Discuss Disability Discrimination

In the 1960's, a movement developed rejecting the previous custodial approach to persons with disabilities.⁶⁸ The custodial model was medically oriented and the disabled

⁶⁷ *Doe v. County of Centre*, 242 F.3d 437, 449 (3d Cir. 2001).

⁶⁸ MARK C. WEBER, UNDERSTANDING DISABILITY LAW, 1 (2007).

were viewed as needing to be sheltered, cured, or isolated.⁶⁹ The movement in the 1960's, in contrast, sought integration into society where persons with disabilities could participate equally.⁷⁰ This began as placing attention on physical barriers like steps without ramps and curbs without cuts, but also attitudinal barriers.⁷¹ This civil rights approach to disability brought about the Americans with Disabilities Act (ADA).⁷²

Persons with disabilities are protected from discrimination under section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act. Section 504 of the Rehabilitation Act was the first exclusive Federal statute giving plaintiffs the ability to sue for disability discrimination. Section 504 prohibits any program or entity that receives federal funding from discriminating against, excluding, or denying the benefits of an otherwise qualified individual with a disability.⁷³ This also bars discrimination by federal executive agencies and the United States Postal Service.⁷⁴

While the Rehabilitation Act only applied to entities receiving federal funding, the Americans with Disabilities Act (ADA) of 1990 expanded the reach of protections for

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2.

⁷³ *See* 29 U.S.C. § 794(a) (1994).

⁷⁴ MARK C. WEBER, UNDERSTANDING DISABILITY LAW, 5 (2007).

persons with disabilities.⁷⁵ Neither Section 504, nor the ADA outlaws discrimination across the board.⁷⁶ Only a person who meets the definition of a person with a disability is protected by the law.⁷⁷ These laws cover discrimination in the enjoyment of services, including those services part of public and private adoption and foster care.⁷⁸ Title II of the ADA prohibits discrimination by public entities that are run or are funded by state or local governments, which includes public adoption agencies.⁷⁹ Private adoption agencies are covered by Title III of the ADA, which prohibits any public accommodation from discriminating against persons with disabilities by denying access to goods or services. Title III makes clear that private adoption agencies are covered by the ADA as it includes “adoption agency” in the definition of public accommodations.⁸⁰

⁷⁵ *See*, 42 U.S.C. §§ 12111-12117 (1994 & Supp. 2002); 42 U.S.C. §§ 12131-12165 (1994 & Supp. 2002); 42 U.S.C. §§ 12181-12189 (1994 & Supp. 2002); MARK C. WEBER, UNDERSTANDING DISABILITY LAW, at v (2007).

⁷⁶ *Id.* at 5.

⁷⁷ *Id.* This is in contrast to, for example, Title VII of the Civil Rights Act of 1964 that states that all persons should be free from discrimination based on race, ethnic origin, religion, and sex. *Id.* at 13.

⁷⁸ Madelyn Freundlich, *The Americans with Disabilities Act: What Adoption Agencies Need to Know*, The Evan B. Donaldson Adoption Institute, 1(1999) www.adoptioninstitute.org/policy/ada.html.

⁷⁹ 42 U.S.C. § 12131

⁸⁰ 42 U.S.C. § 12181; 28 C.F.R. § 36.104.

Disability is defined in the ADA as (1) “a physical or mental impairment that substantially limits one or more of the major life activities” of the individual; (2) “a record of such an impairment;” or (3) “being regarded as having such an impairment.”⁸¹ Section 504 defines disability as “a physical or mental impairment that substantially limits one or more major life activities,” including someone who has an actual impairment, has a record of an impairment, or is regarded as having an impairment.⁸² These definitions reflect a concern of congress that discrimination of disabled persons is not always rooted in prejudice, rather it stems from insensitivity and erroneous, yet prevalent, perceptions of what it means to be an individual with a disability.⁸³

⁸¹42 U.S.C. § 12102(2) (2006); MARK C. WEBER, UNDERSTANDING DISABILITY LAW, 13-14 (2007).

⁸² 29 U.S.C. § 705(20)(B) (2006); 42 U.S.C. §§ 423(d)(1)(A); MARK C. WEBER, UNDERSTANDING DISABILITY LAW, 14 (2007).

⁸³ *See, Id.* at 279. Courts have interpreted the ADA and Rehabilitation Act as consistent. The Fifth, Seventh, and Ninth Circuit have stated that the two offer identical protections. *See, Pace v. Bogalusa City Sch. Bd.* 325 F.3d 609 n. 11 (5th Cir. 2003), *Grzan v. Charter Hospital of Northwest Ind.* 104 F.3d 116, 121 (7th Cir. 1997), *Barker v. Riverside County Office of Education* no. 07-56313 (9th Cir. 2009). The Eighth Circuit has held that the procedures and rights under Title II of the ADA are the same as under section 504. *See, Hoekstra v. Independent Sch. Dist. No. 283* 103 F.3d 624 (8th Cir. 1996). The second Circuit has held that the two hold identical obligations on employers. *See, Kilcullen v. NY State Dep’t of Labor* 205 F.3d 77 n. 1 (2d Cir. 2000).

Meeting the definition of disability is often the first hurdle to a successful discrimination suit.⁸⁴ Until recently, this presented a significant barrier.⁸⁵ A plaintiff had to establish a disability with the effect of (1) substantial limitation on (2) a major life activity. In 2008, amendments to the ADA greatly expanded interpretations of the definition of disability,⁸⁶ overturning several Supreme Court cases that Congress believed had interpreted ‘disability’ too narrowly.⁸⁷ The ADA Amendments Act (ADAAA) rejects the conclusion in the Supreme Court case *Toyota Motor Mfg., Kentucky, Inc. v. Williams*.⁸⁸ *Toyota* interpreted the ADA to require that “the terms ‘substantially’ and ‘major’ in the definition of disability under the ADA ‘need to be interpreted strictly to

⁸⁴ MARK C. WEBER, UNDERSTANDING DISABILITY LAW, 13 (2007).

⁸⁵ *Id.*

⁸⁶ 42 U.S.C. 12102(4) (2006); ADA Amendments Act of 2008, Pub. L. No. 110-325 § 8, 122 Stat. 3553; Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 58 (May 25, 2011) (to be codified at 29 C.F.R. pt. 1630); Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.

⁸⁷ Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.

⁸⁸ 534 U.S. 184, 197 (2002).

create a demanding standard for qualifying as disabled.”⁸⁹ By rejecting this conclusion, the ADAAA expanded the number of persons who can claim they are disabled under the law, and therefore expanded the number of persons who may use the law to protest being denied access or the ability to adopt or foster based on their disability.

The EEOC regulations further explain the ADAAA and make clear that determining whether an impairment substantially limits a major life activity must be done without regard to ameliorative effects of mitigating measures, like for example medication or hearing aids.⁹⁰ These regulations also make it easier for individuals to establish coverage under the ADA when they are “regarded as” having a disability because the focus for establishing coverage is on how a person has been treated based on a physical or mental impairment, rather than on what may have believed about the nature of the person's impairment.⁹¹

The definition of disability affects whether an individual has legal protections under the ADA and for those facing discrimination in the adoption and foster care licensing system, the changes expanding the definition of disability under the ADAAA, increases who is covered by these protections. For example, before the ADAAA it was unclear whether persons with internal illnesses like cancer, diabetes, or epilepsy were covered by

⁸⁹ ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553.

⁹⁰ Fact Sheet on the EEOC’s Final Regulations Implementing the ADAAA, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm.

⁹¹ 29 C.F.R. § 1630.2.

these federal protections.⁹² Persons with cancer, or a history of cancer, face “informal prejudice” when seeking to become prospective parents.⁹³ Expanding the definition of disability under the ADA to cover people with cancer, or a history of cancer gives these individuals the opportunity to contest categorical denials that keep them from being parents.

By excluding prohibitions of discrimination based on disability in the entirety, confusingly prohibiting discrimination based on disability in statutes but not regulations or vice versa, or mysteriously prohibiting discrimination in either adoption or foster care but not the other, many state laws are not in compliance with the ADA. Plain meaning doctrine dictates that “[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”⁹⁴ The rule of statutory interpretation *expressio unius est exclusio alterus* explains that the inclusion of one provision and the exclusion of another should be presumed intentional.⁹⁵ This would suggest that it was the intention of the legislators or interpreting agencies not to include disabled persons as a protected group in the context of adoption and foster care. While this exclusion may be premised on a reasonable intention to give strength to the states’ health requirements,

⁹² Fact Sheet on the EEOC’s Final Regulations Implementing the ADA, A.A.,

http://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm

⁹³ Gardino, *infra* note 21.

⁹⁴ *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

⁹⁵ *See, Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir. 2000); *Indep. Ins.*

Agents of Am., Inc. v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000).

states must be able to prohibit disability discrimination in a way that continues to uphold their obligation to the health and welfare of children in need of homes. It becomes even more important to include nondiscrimination provisions in foster and adoption statutes and regulations for the very fact that there are health requirements and an increased risk of discriminatory outcomes or disparate effects for persons with disabilities applying to be parents. These statutes and regulations should be rewritten to avoid confusion and state expressly that disability discrimination is prohibited.

B. The Importance of Reasonable Accommodation

The ADA requires that “a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity...”⁹⁶ Some states’ adoption and foster care regulations and statutes either explicitly or implicitly conflict with Section 504 or the ADA because they don’t take into account reasonable accommodations. For example, Iowa’s adoption regulations suggest that an individual or family “shall” be denied for documented concerns of physical and mental health.⁹⁷ Similarly, South Carolina requires that adoptive parents participate in a medical examination to verify that each family member suffers from *no* illness or disability that would interfere with the family’s ability to parent a child.⁹⁸ Before

⁹⁶ 28 C.F.R. § 35.130.

⁹⁷ Iowa Admin. Code r. 441-200.11 (600).

⁹⁸ S.C. Code Ann. Regs. 114-4980 (emphasis added).

determining if a placement is in the best interests of the child, it may be necessary to consider reasonable accommodations for prospective parents, as that may affect the impact, if any, on the ability of the applicant parent to care for a child.

A public entity failing to make reasonable modifications in policies, practices, or procedures to avoid discrimination on the basis of disability violates the ADA.⁹⁹ “Where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program” refusing to modify a program may be considered discriminatory.¹⁰⁰ Both the ADA and Section 504 limit the application of “reasonable accommodations” to those instances in which accommodations do not cause any “undue burden” or “fundamental alteration to the program in question¹⁰¹ and reasonable accommodations upheld under Section 504 are most often upheld under the ADA as well.¹⁰² Defining what is considered reasonable accommodation is an important part of the discussion of what is legally owed to prospective parents with disabilities during the application process to increase access, and to establish policies regarding specific practices to uphold the best interests of the child standard while practicing non-discrimination based on disability.

⁹⁹ *See*, *Southeastern University Commun. Coll. v. Davis* 442 U.S. 397, 410 (1979).

¹⁰⁰ *Id.* at 412.

¹⁰¹ 28 C.F.R. §35.130(b)(7) (Title II).

¹⁰² *See*, *Pangburn v. Northern Ky. Univ.*, 210 F.3d 372 (6th Cir. 2000); *Guckenberger v. Boston Univ.*, 8 F. Supp. 2d 82 (D. Mass. 1998).

The ADA requires all adoption agencies to provide reasonable modifications to prospective adoptive and foster parents with disabilities in the agency's policies, practices, and procedures.¹⁰³ This might include auxiliary aids and services as necessary to ensure effective communication, throughout the application, home study, and interview.¹⁰⁴ An important question to ask is which modifications to ensure equal access are reasonable. Should a state have to assume added expenses to enable a disabled person to adopt? If so, how much added expense? Case law on this question centers around whether the reasonable accommodation is a fundamental alteration to the system in question. A fundamental alteration might mean that an intrinsic part of system is changed, even if it affects every applicant equally.¹⁰⁵ Modifications of policies or practices may be fundamental alterations if they alter the nature of the service in question, impose too many burdens on the agency, change the scope, undermine the goals of the program, or create unsafe conditions.¹⁰⁶

¹⁰³ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

¹⁰⁴ *Id.*

¹⁰⁵ 532 U.S. 661 (2001).

¹⁰⁶ *Roberts v. Kindercare Learning Centers Inc.* held that having a one-on-one aide for a significant portion of the week at a private day care center constituted a fundamental alteration and therefore the aide was not afforded to a child with a traumatic brain injury.

The court held that the agency was in the group care business and one-on-one care

Primarily, a modification could be made in policies and procedures of agencies evaluating prospective parents to ensure that the best interests of the child are served without screening out disabled prospective parents. The ADA prohibits the use of “standards or criteria or methods of administration—(i) that have the effect of discriminating on the basis of disability; or (ii) that perpetuate the discrimination of others who are subject to common administrative control.”¹⁰⁷ Use of criteria that are unrelated to parenting ability and are non-discriminatory on their face but disproportionately affect parents with disabilities violates the ADA.¹⁰⁸

requirements would alter the nature of the service. 896 F. Supp. 921 (D. Minn. 1995), *aff'd*, F.3d 844 (8th Cir. 1996) (per curium); MARK C. WEBER, UNDERSTANDING DISABILITY LAW, 144 (2007). In *Breece v. Alliance Tractor-Trailer Training II, Inc.* a court determined that a hearing impaired trainee truck driver was not entitled to modifications including a driving simulator, greater direction or instruction, a sign language interpreter in the truck, or an amplification device. 824 F. Supp. 576 (E.D. Va. 1993). *Southeastern Community College v. Davis* held that modifications were not required at an academic program when the requested modifications undermined the goals of the program, changed the programs scope, or created unsafe conditions. 442 U.S. 397 (1979).

¹⁰⁷ 42 U.S.C. § 12182(b)(1)(D).

¹⁰⁸ Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act* 16 J. LAW AND INEQ. 153, 193 (1998).

In the adoption and foster care context, agencies may claim that processes would be fundamentally altered.¹⁰⁹ Changing procedures to consider reasonable accommodations involving professional knowledge may discourage agencies from issuing negative home studies to disabled prospective parents. “[T]he result may well be an acceptance of an individual with a significant disability, such as, for example, a woman who has crippling degenerative arthritis but whose home has been thoroughly adapted to enable her to function and whose husband is actively involved in parenting and home management.”¹¹⁰

Requiring agencies or the state to provide mitigating equipment, technologies, or support may be viewed as a fundamental alteration. For example, if a disabled person can care for a child only with the help of a full-time aide, is the state required to provide one? This is analogous to the case discussed above where a child required one-on-one care but the daycare provided only group care.¹¹¹ To provide a full time aide could arguably alter the purpose of the agency from child placement to providing extensive support to disabled prospective parents. Distinguishing the grayer areas between policy modification and what constitutes fundamental alteration is beyond the scope of this article. This

¹⁰⁹ See 42 U.S.C. § 12182(2)(b)(2)(A)(ii) (2014) (explaining that a failure to modify is not discrimination if the modification would fundamentally alter the nature of services).

¹¹⁰ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

¹¹¹ *Roberts v. Kindercare Learning Centers Inc.* 896 F. Supp. 921 (D. Minn. 1995), *aff'd*, F.3d 844 (8th Cir. 1996) (per curium).

article aims to point out the patchwork of state laws and suggest policy and parental evaluation strategies that include consideration of reasonable accommodations may assist agencies in avoiding disability discrimination and continuing to promote the best interests of the child.

C. The Importance of Individualized Assessment

In addition, a number of statutes and regulations by either omission, or implication do not require an individualized assessment and professional medical opinion in analyzing the capability of prospective parents, which case law has established as a requirement of the evaluation process.¹¹² Where states fail to include professional input, they may violate Section 504 or Title II of the ADA.

The Department of Justice initially interpreted Title II to exclude coverage for persons who pose a direct threat, or “a significant risk to the health or safety of others that cannot be eliminated by modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”¹¹³ In determining if a person poses a direct threat, the decision must be based on an “individualized inquiry and make appropriate findings of fact, based on reasonable medical judgments given the state of medical knowledge...”¹¹⁴ and not based on “prejudice, stereotypes, or unfounded fear.”¹¹⁵ Issues

¹¹² *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 285 (1987).

¹¹³ *ADA Title II DOJ Interpretive Guidance* on 28 C.F.R. § 35.104.

¹¹⁴ *Sch. Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 274, 107 S. Ct. 1123, 1124, 94 L. Ed. 2d 307 (1987)

¹¹⁵ *Id.* at 287.

arise when agencies face the issue of whether prospective parents pose risks to the health and safety of the children they hope to adopt or foster. The direct threat exception can lead to different outcomes.¹¹⁶ Vague standards make it more difficult for prospective parents with disabilities to escape bias when facing this exception to the non-discrimination provisions of the ADA.

Agencies may not use “standards or criteria or methods of discrimination that have the effect of discriminating on the basis of disability.”¹¹⁷ Adoption agencies are prohibited from “imposing or applying eligibility criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities from fully and equally enjoying” any services “unless the criteria can be shown to be necessary for the provision” of those services.¹¹⁸ Adoption agencies have a lot of discretion in deciding fitness of prospective parents.¹¹⁹ In *Adams v. Monroe County*, the court dismissed an

¹¹⁶ A First Circuit case, *Abbott v. Bragdon*, involved a dentist refusing to treat an HIV positive patient. The Court found that routine dental care with a patient that is HIV positive did not present a direct threat to the dentist’s health and safety. *Abbott v. Bragdon*, 163 F.3d 87, 89 (1st Cir. 1998). On the other hand, the Fourth Circuit found that a young boy living with AIDS did pose a direct threat to other students in his martial arts class. *Montalvo v. Radcliffe*, 167 F.3d 873, 879 (4th Cir. 1999).

¹¹⁷ 28 C.F.R. § 36.204

¹¹⁸ 28 C.F.R. § 36.301(a).

¹¹⁹ *Devries*, at 159.

action by a blind woman, holding that adoption and foster care agencies may take physical disability into account as a legitimate consideration with the caveat that an agency may not routinely exclude disabled applicants from being considered based solely on their disability.¹²⁰

The state has a duty to the health and welfare of children within the foster and adoption systems, and assessing prospective parental health as part of their investigating fitness to be a parent is a part of that duty. Generally, adoption agencies may not categorically deny applicant parents with disabilities the opportunity to adopt or obtain a foster care license on the basis of the individual's disability. Despite this prohibition, there are some exceptions and defenses. Adoption agencies may impose safety related screening criteria under the ADA to ensure safe operation of their services, programs, or activities.¹²¹ The agency may only impose these restrictions if the safety requirements are based on actual risk, not on speculation, stereotypes, or generalizations about persons with disabilities.¹²² In addition, the direct threat provisions of the ADA allow an exception. Agencies are not required to permit a person with a disability to participate in

¹²⁰ *Id.*

¹²¹ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>; Madelyn Freundlich, *The Americans with Disabilities Act: What Adoption Agencies Need to Know*, The Evan B. Donaldson Adoption Institute, (1999) www.adoptioninstitute.org/policy/ada.html.

¹²² 28 C.F.R. §§ 35.130(h), 36.301.

or benefit from their services if they pose a direct threat to the health and safety of others.¹²³ To determine whether an individual poses a direct threat, adoption agencies must do an “individualized assessment based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence to ascertain the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.”¹²⁴ These exceptions may be used to exclude prospective parents with disabilities. This also highlights the importance of individualized assessment and the use of professional expertise in evaluating prospective parents with disabilities. When laws, regulations, and policies do not make this clear, they are in tension with the ADA.

An important ADA law case, *School Board of Nassau County v. Arline* explains the criteria for determining whether a prospective parent with a disability is otherwise qualified or whether they pose a direct threat to the health and safety of others.¹²⁵ This court held that the goal of the ADA is to protect “handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate

¹²³ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>

¹²⁴ 28 C.F.R. §§ 35.139, 36.208.

¹²⁵ 480 U.S. 273, 287-88 (1987).

weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.”¹²⁶ Considerations of safety risks should include:

“[Findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.”¹²⁷

The direct threat exception comes into play as households are evaluated for their fitness to take in an adoptive or foster child. In *Doe v. County of Centre*, the Third Circuit heard a case of discrimination concerning a family that was denied the ability to foster children because one of the family members was HIV positive. The County had a general prohibition on placing children in a home where a family member has an infectious disease.¹²⁸ The District Court found the policy valid because under the *Arline* analysis the family member that was HIV positive posed a serious risk to others.¹²⁹ The Circuit Court reversed the District Court and found that a blanket prohibition against placing foster children in a home where a family member has HIV/AIDS is a violation of the ADA and section 504.¹³⁰

While the ADA protects persons with disabilities from discrimination, the first court to address the applicability of the ADA to decisions of adoption and foster care agencies

¹²⁶ *Id.* at 287.

¹²⁷ *Id.* at 288.

¹²⁸ *See Doe v. County of Centre*, 242 F.3d 437, 449 (3d Cir. 2001).

¹²⁹ *See, Doe v. County of Centre*, 80 F. Supp 2d 437, 441 (M.D. Pa. 2000).

¹³⁰ *See Doe v. County of Centre*, 242 F.3d at 449.

held that agencies may take disability into account as a “legitimate consideration.”¹³¹ The court also explains that in the assessment of a person’s fitness to become a parent, the agency may not categorically exclude applicants with disabilities solely based on their disability.¹³² This case held that three elements were necessary for an ADA claim: (1) show that the plaintiff was disabled under the definition of the ADA; (2) show that the prospective adoptive or foster parents were otherwise qualified individuals, meaning they met the requirements for placement; (3) show that the plaintiff had not received a child because of discrimination based on disability. This couple filed suit alleging violation of the ADA, but the court found in favor of the agency decision because discrimination was not shown, rather there was an alleged safety issue related to a particular child, not a blanket denial that the couple could never adopt.¹³³ This case sets a precedent that could be damaging for any prospective parents with disabilities. What may be called a legitimate consideration by adoption agencies may also be arbitrary or based on

¹³¹ *Adams v. Monroe Cty.*, 21 F.Supp.2d 235, 240 (W.D.N.Y. 1998) *Adams* involved a blind woman and her husband who had qualified in their county to participate as parents in adoption and foster care but did not receive a placement throughout the year. The agency would not place a child with them that was very active based on the wife’s disability.

¹³² *Id.*

¹³³ *Id.*

prejudice.¹³⁴ The best interests of the child must remain paramount but these cases establish the need for greater attention to how often prospective parents with disabilities are denied the ability to adopt or foster and what, if any, legal support the agency relied on in its decision. In addition, it highlights the danger of arbitrary concerns rather than professional medical opinion or the opinion of an occupational therapist regarding the effect of a prospective parent's disability on their ability to raise a child.

Adoption creates a legal relationship of parenthood between persons without a biological link.¹³⁵ The underlying principle to adoption law is the best interests of the child standard.¹³⁶ This foundational standard was first established in 1865 in *Curtis v. Curtis* with the holding language that “adoption is not a question of mere property... the interests of the minor is the principal thing to be considered.”¹³⁷ Common factors considered by courts include: the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers; the capacity of the parents to provide a safe home and adequate food, clothing, and medical care; the mental and physical health needs of the child; the mental and physical health of

¹³⁴ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

¹³⁵ *Id.* at 155.

¹³⁶ *Id.*

¹³⁷ *Id.*

the parents and the presence of domestic violence in the home.¹³⁸ These factors are logical, but this standard has been criticized as ambiguous, which allows for situation specific interpretation, and also wide variability in policy, practice, and interpretation.¹³⁹ The best interest standard has been disparaged for being vague as it is often not clearly statutorily defined.¹⁴⁰ While determining the merits of the “best interests of the child” standard is beyond the scope of this thesis, it is important to note that this standard contributes to the issues regarding disability discrimination in adoption and foster care. Agencies have few regulations to govern them and with the varied policies and procedures around the country, adoption can be a “complicated construct” legally for prospective parents.¹⁴¹ The best interest standard creates uncertainty and room for variability that contributes to bias against persons with disabilities in adoption and foster care licensing.¹⁴²

¹³⁸ Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. Department of Health and Human Services, Children’s Bureau, at 3 (2013).

¹³⁹ *Id.*

¹⁴⁰ Brenda K. DeVries, *Health Should Not Be a Factor of Whether One Will Be a Suitable Adoptive Parent*, 6 Ind. Health L. Rev. 137, 142 (2009).

¹⁴¹ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

¹⁴² *Id.*

There is no national legal framework for adoption, so the fifty states differ in what the best interest standard means, and what protections there are for prospective parents.¹⁴³ Adoption is a state by state matter, and the fact that there are differing structures of adoption agencies, and varied regulation means that there is no clear definition of what makes a prospective parent “fit.”¹⁴⁴ Vague standards could lead to discriminatory decisions by agencies, and reviewing courts.¹⁴⁵ Hillary Clinton wrote, “the best interests standard... is not properly a standard. Instead it is a rationalization by decision makers justifying their judgments about a child’s future, like an empty vessel into which adult perceptions and prejudices are poured.”¹⁴⁶ All states use the best interests standard when assessing prospective parents.¹⁴⁷ Without guidance, anyone may interpret the best interests of the child standard to exclude all persons with disabilities. The issue of the interaction of the best interests of the child standard and the variability in policies and procedures of agencies across the United States should be addressed with increased monitoring of agency denials, better regulation of agency health requirements, and more enforcement of the ADA in adoption and foster care settings.

¹⁴³ Shauna L. Gardino, Andrew E. Russell, & Teresa K. Woodruff, *Adoption After Cancer: Adoption Agency Attitudes and Perspectives on the Potential to Parent Post-Cancer*, in *ONCOFERTILITY* 153, 155 (T.K. Woodruff et al., eds) 2010.

¹⁴⁴ *Id.*

¹⁴⁵ DeVries, *supra* note 140 at 143.

¹⁴⁶ *Id.*

¹⁴⁷ DeVries, *supra* note 20 at 144.

Most nations throughout the world have constitutional or statutory prohibitions against discrimination.¹⁴⁸ In general, political, legal, and philosophical discussion of discrimination begins with the premise that the practice is morally wrong. Legally, disability discrimination occurs when an entity that is covered by the federal laws outlawing disability discrimination, the Americans with Disabilities Act and the Rehabilitation Act, treats an individual who is “qualified” or can perform the essential functions required, unfavorably because that person has a disability, has a history of disability (like cancer that is in remission), or because they believe that person has a physical or mental impairment, even if they don’t have any such impairment. These laws also require reasonable accommodation for persons with disabilities, and to not do so constitutes disability discrimination.¹⁴⁹ Those state laws and regulations which don’t discuss disability discrimination, don’t consider reasonable accommodations, or those that allow agencies to make arbitrary decisions regarding safety or risk without individualized assessment, are not in tension with federal non-discrimination laws.

¹⁴⁸ Altman, Andrew, "Discrimination", *The Stanford Encyclopedia of Philosophy*, Spring 2011 Edition, Edward N. Zalta ed.,

<http://plato.stanford.edu/archives/spr2011/entries/discrimination/>.

¹⁴⁹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Disability Discrimination*,

<http://www.eeoc.gov/laws/types/disability.cfm>.

III. IMPROVING NON-DISCRIMINATION IN ADOPTION AND FOSTER CARE

Given that current practices in adoption and foster care are in tension with the ADA, changes should be made. Current systems that support prospective parents with disabilities should be highlighted, monitoring of denials should begin, and guidance should be issued.

A. Statutes and Regulations with Provisions that Support Prospective Parents with Disabilities

Several states regulations and statutes prohibit discrimination based on disability. In 1994 Michigan amended its laws to prohibit agencies from discriminating against potential adoptive parents on the grounds of age, race, religion, disability, or income level.¹⁵⁰ Wisconsin's adoption laws state "[a]lthough otherwise qualified, no person shall be denied the benefits of this section because the person is deaf, blind or has other physical handicaps."¹⁵¹ While these laws are a significant step, the potential for disability discrimination based on health requirements does not disappear with a prohibition in a statute that may or may not be diligently followed by agency staff. Attention to the policies and practices of agencies should be evaluated and formulated to give prospective parents with disabilities equal opportunity in the application process.

Some states provide more qualifications on their prohibitions of disability discrimination. For example, the Missouri adoption and foster care statutes state that

¹⁵⁰ See Mich. Comp. Laws Ann. § 722.957.

¹⁵¹ Wis. Stat. § 48.82(4)-(6) 48.82.

“[t]he disability or disease of a prospective adoptive parents shall not constitute a basis for a determination that the petitioner is unfit or not suitable to be an adoptive parent without a specific showing that there is a causal relationship between the disability or disease and a substantial and significant risk of harm to the child.”¹⁵² This qualifies how a reviewing agency should look at a prospective parent with a disability, but it still leaves a lot of discretion with a non-medical professional. New York foster care regulations ask for written statements from physicians, or other health practitioners regarding the foster family’s health and any physical conditions that might affect the proper care of a foster child.¹⁵³ Similarly, New Jersey asks for a physician’s written statement attesting that a foster parent’s health status is such that they are capable physically of providing foster care services.¹⁵⁴ A medical professional has may consider reasonable accommodations, have a better opportunity to discuss with a prospective parent how to mitigate disabilities that may affect their ability to parent, or a health practitioner may make recommendations about the prospective parent’s fitness to care for different ages, difficulty levels, or requirements of children so as to avoid a blanket denial.

Some states give prospective parents with disabilities a chance to rebut conclusions that their disabilities prevent them from being foster or adoptive parents. Idaho’s adoption statute bars discrimination on the basis of disability¹⁵⁵ and further provides that

¹⁵² M. Rev. Stat. § 45.070; Mo. Ann. Stat. § 210.496.

¹⁵³ N.Y. Comp. Codes R. & Regs. Tit. 18 § 443.2.

¹⁵⁴ N.J. Admin. Code 10:121A-5.5.

¹⁵⁵ Idaho Code Ann. § 16-1501.

“the prospective adoptive parent shall have the right to provide evidence to the court regarding the manner in which the use of adaptive equipment or supportive services will enable the parent to carry out the responsibilities of parenting the child.”¹⁵⁶ New York, while requiring that that applicants have the energy and other abilities needed to fulfill parental responsibilities, provides prospective parents the opportunity to rebut health determinations with another medical opinion and filing of a second medical report before a decision is final.¹⁵⁷ Louisiana prohibits discrimination based on disability stating that “handicapping conditions of foster parent(s) or household members are to be considered only as they affect the ability of the household to care for the clients.”¹⁵⁸ In Louisiana, all prospective adoptive parents testify under oath concerning their fitness to receive a child into their home.¹⁵⁹ These opportunities to present evidence and rebut conclusions about a person’s ability to adopt provide prospective parents with disabilities a better chance of evading an agency’s mistaken conclusion that they would be unable to parent because of their disability.

While important, laws and regulations regarding non-discrimination are effective only when they translate into practice at the agency level. The examples above using medical professional knowledge, and the opportunity to rebut denials will curb discrimination by

¹⁵⁶ Idaho Code Ann. § 16-1501B.

¹⁵⁷ N.Y. Comp. Codes R. & Regs. Tit. 18 § 421.16.

¹⁵⁸ La. Admin. Code. tit. 67, pt. V, § 6305.

¹⁵⁹ *Id.* at § 5101.

giving detailed agency practices. This is a more reliable response than a policy, law, or regulation that paints broad strokes regarding prohibitions of discrimination.

B. Reducing Discrimination

Adoption agencies are prohibited from “imposing or applying eligibility criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities from fully and equally enjoying” any services “unless the criteria can be shown to be necessary for the provision” of those services.¹⁶⁰ An agency facing an asserted ADA violation may simply claim that no discrimination occurred.¹⁶¹ “The adoption process is complex, and because it frequently involves personal judgments by parents, social workers, judges, and other adoption professionals, it is fraught with the opportunity for discrimination.”¹⁶²

To face the issue of disability discrimination of prospective parents in adoption and foster care several avenues of reformation should be pursued. This should include monitoring as well as steps from the federal government and state governments.

¹⁶⁰ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

¹⁶¹ Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act* 16 J. LAW AND INEQ. 153, 192 (1998).

¹⁶² *Id.*

1. Monitoring

A 2010 research study at Northwestern University examined the experiences of cancer survivors applying to be adoptive parents.¹⁶³ The study focused on adoption agencies attitudes towards several medical conditions.¹⁶⁴ The study found “Although existing legislative documents such as the Americans with Disabilities Act (ADA) protect cancer survivors’ rights to adopt a child, these protections are largely inconsequential in practice.... [The] network of adoption agencies working with potential parents in the U.S. is characterized by fundamental variability and ambiguity... [and] the current adoption system permits informal prejudice in practice that likely varies from one agency to the next.”¹⁶⁵ Additional studies on adoption agencies, both public and private, and foster care

¹⁶³ *Rocking the Cradle*, (citing Shauna L. Gardino, Andrew E. Russell, and Teresa K. Woodruff, Adoption After Cancer: Adoption Agency Attitudes and Perspectives on the Potential to Parent Post-Cancer,” author manuscript, *Cancer Treatment and Research*, 156 (2010): 153–170).

¹⁶⁴ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>. The additional medical conditions discussed included: contractible diseases; AIDS; active, life-threatening diseases; use of antidepressants; terminal illnesses that shorten lifespan; conditions that require a large amount of narcotics that render the person unconscious; substance addiction; and severe mental conditions like schizophrenia

¹⁶⁵ *Id.*

licensing agencies, could shed light on the issue of disability discrimination, but more importantly, monitoring denials of persons with disabilities would raise awareness of the problem. These studies could be used as education materials for those who work in adoption and foster care and in disability rights to highlight the issue. Disability discrimination can exist subconsciously, without agency intent to exclude or discriminate. Additional education could illuminate this habit and begin to resolve some of the problems faced by persons with disabilities in applying to be foster and adoptive parents.

Monitoring should be facilitated and the data gathered and interpreted by the Department of Health and Human Services Office for Civil Rights (OCR). This fits with OCR's mission to protect citizens from discrimination in social services including adoption agencies.¹⁶⁶ In addition, given the broad and differing laws on adoption and foster care licensing throughout the U.S., it would be beneficial to understanding this problem to have the federal government managing this data. At this time, OCR has published an article on their website describing the legal rights and protections for prospective parents from discrimination based on race, color, and national origin, but does not discuss the similar civil rights protections for prospective parents who live with disabilities.¹⁶⁷ They can remedy this by beginning to monitor denials of prospective

¹⁶⁶ DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS, <http://www.hhs.gov/ocr/office/>.

¹⁶⁷ U.S. Department of Health and Human Services, "Protection from Race, Color, and National Origin Discrimination in Adoption and Foster Care," October 6, 2014, <http://www.hhs.gov/ocr/civilrights/resources/specialtopics/adoption/index.html>.

adoptive and foster parents with disabilities, publishing this information on their website, and making clear that OCR plays a role in investigating discrimination allegations of prospective parents with disabilities.

As the U.S. has several different laws, policies, and practices in adoption and foster care, monitoring could also help discern which state practices assure the best interests of the child while affording prospective parents with disabilities equal rights. Prospective parents with disabilities could have a forum to come forward and discuss the practices at the agencies they worked with. This open discussion of policies that worked and those that did not, would increase awareness, which would reduce subconscious discrimination, and encourage changes in laws and policies described throughout this thesis.

2. Federal Government Approach

In 2002, the DOJ reached a settlement agreement with Maple Star Nevada, a nonprofit agency in Las Vegas.¹⁶⁸ This agreement stated that the agency would allow deaf and hard of hearing applicants to be considered for selection as foster parents and the agency must provide effective communication, specifically in this case sign language interpreters. In addition, the agency agreed to comply with the ADA and create additional agency policies to do so. The DOJ and HHS should collaborate and issue guidance to both public and private adoption agencies in the U.S. to publicize this issue. In addition, the guidance should stress agencies' duty to provide reasonable accommodations through

¹⁶⁸ DEPARTMENT OF JUSTICE, *Nevada Foster Care Agency Agrees to Provide Effective Communication with Deaf Mother who Seeks to be a Foster Parent*, March 20, 2002, http://www.justice.gov/opa/pr/2002/March/02_crt_164.htm.

each phase of the process and establish that all presumptions about parental competency based on disability are in violation of the ADA.¹⁶⁹ The ADA and the Rehabilitation act make it illegal to discriminate against persons based on their disability, but additional guidance is important to taking these overarching laws and implementing their principles in real world practice.

This guidance document could include best practices to better illustrate what kinds of approaches ensure the best interests of the child while practicing non-discrimination. From looking directly at state laws and regulations, several things described in this paper could be included. Some best practices would include transparency in the process when a denial is based on a disability. Much of the application process is shielded from applicants, but to ensure fairness for applicants with disabilities, an open discussion of an applicant's limitations and the agency's concerns could help to eliminate non-obvious discrimination. The federal government could promote an appeals process where those whose applications are denied based on disability could give further evidence of how their disability would not inhibit their ability to be a parent. Finally, this guidance could admonish the language in statutes and regulations that is completely prohibitory of considering applicants with disabilities. It could point out the issues of vague health requirements, state concerns about statutory construction issues and consistency, and

¹⁶⁹ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

require individualized assessments and medical professional knowledge and occupational therapists.

Congressional action would also help to allay the discrimination of prospective adoptive and foster care parents with disabilities. Congress could address this issue in a similar fashion to their response to discrimination against prospective parents based on race, color, or national origin. The Multiethnic Placement Act of 1994 (MEPA) prohibits the use of a child's or prospective parent's race, color, or national origin to deny or delay the placement of a child.¹⁷⁰ Congress ought to pass similar legislation in order to make clear that prospective parents with disabilities have rights, and that disability should not necessarily be a barrier to becoming an adoptive or foster parent.¹⁷¹

3. State Government Approach

In addition to a federal approach, states must play a role. States must participate in facilitating monitoring of agency denials of prospective parents with disabilities, and use the information gathered to improve agency practice. In addition state courts must assure that agencies comply with the federal non-discrimination laws.¹⁷² With the placing of this

¹⁷⁰ 42 U.S.C. § 1996b.

¹⁷¹ *Rocking the Cradle: Ensuring the Rights of Parents With Disabilities and their Children*, National Council on Disability, Chapter 10, <http://www.ncd.gov/publications/2012/Sep272012/Ch10>.

¹⁷² See e.g., *In re Adoption of Richardson* 59 Cal. Rptr. 323 (Ct. App. 1967) (involving a deaf couple denied the ability to adopt where the judge stated: "Is this a normally happy home? There is no question about it, it is a happy home, but is it a normal home? I don't

issue in a public light, and improvements in the adoption and foster care licensing process, compliance with federal non-discrimination laws and an application process free from discrimination based on disability is possible.

CONCLUSION

As the number of children seeking homes remains high,¹⁷³ discriminatory, vague, and misleading health requirements should be replaced with non-discrimination provisions and specific practices outlining a way for prospective parents with disabilities to become adoptive or foster parents when it is in the best interests of the child. The goal is to ensure that an applicant's disability is only a part of the decision making process when it would inhibit the best interests of the child. Disability would not be a reason to deny an adoptive placement that would be in a child's best interests, but can influence a placement that would not be in a child's best interests. People with disabilities face an unclear path to becoming a foster or adoptive parent. This harm is felt not only by those persons with disabilities who apply to be parents, but also the growing number of children awaiting homes. With continued attention to this issue, changes in the laws and regulations, and

think the court could make a finding that it is a normal home when these poor unfortunate people, they are handicapped, and what can they do in the way of bringing this child up to be the type of citizen we all want him to be?" While this decision was reversed on appeal and is from many years ago, it represents the potential for bias.

¹⁷³ Foster Care Statistics 2012, CHILD WELFARE INFORMATION GATEWAY,

<https://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

the establishment of best practices, disability discrimination of prospective adoptive and foster care parents with disabilities can be eliminated.

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