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The inclusion of disability as a condition for termination of parental rights[☆]

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ARTICLE INFO

Article history:

Received 11 September 2008
Received in revised form 2 July 2010
Accepted 8 July 2010
Available online 27 October 2010

Keywords:

Termination of parental rights
Disability
Parents with disabilities
Parenting
State policy
Child protection
Child welfare

ABSTRACT

Objectives: All 50 states and the District of Columbia have statutes outlining the grounds for terminating parental rights (TPR) in relation to child abuse and neglect. Although recent research has found that parents with disabilities are not more likely to maltreat their children than parents without disabilities (Glaun & Brown, 1999; Oyserman, Mowbray, Meares, & Firminger, 2000), studies have found very high rates of TPR of parents with disabilities (Accardo & Whitman, 1989). The objective of this study is to examine how states are including disability in their TPR statutes.

Methods: This study used legal document analysis, consisting of a comprehensive Boolean search of the state codes of the 50 states and District of Columbia (DC) relating to TPR, using the most recent state code available on Lexis-Nexis in August 2005. TPR and related statutes were searched for contemporary and historical disability related terms and their common cognates, such as: “mental,” “disability,” “handicap,” and “incapacity.” Two researchers independently conducted the searches, and the searches were reconciled. A code list was then developed to measure for inclusion of disability, preciseness, scope, use of language, and references to accessibility or fairness. Statutes were then reanalyzed, and groupings developed.

Results: Thirty-seven states included disability-related grounds for termination of parental rights, while 14 states did not include disability language as grounds for termination. Many of these state codes used outdated terminology, imprecise definitions, and emphasized disability status rather than behavior. All of the 14 states that do not include disability in TPR grounds allowed for termination based on neglectful parental behavior that may be influenced by a disability.

Conclusions: The use of disability language in TPR statutes can put an undue focus on the condition of having a disability, rather than parenting behavior.

Implications: This paper recommends that states consider removing disability language from their statutes, as such language risks taking the emphasis away from the assessment based on parenting behavior.

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Introduction

Historically, social policy has regulated the parenting activities of people with disabilities in several different ways, including forced sterilization, institutionalization, and termination of parental rights. The overall policy landscape has changed

[☆] This project was supported in part by the School of Social Work and by the Institute of Community Integration through grant #90DD0579 from the Administration on Developmental Disabilities, U.S. Department of Health and Human Services, both of the College of Education and Human Development at the University of Minnesota.

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for people with disabilities in many ways, and people with disabilities are more included in school, work, and community settings. The federal Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973 prohibit state and local governments from discriminating against people with disabilities in their programs and services. However, these anti-discrimination laws do not cover child custody and child protection proceedings, and parents with disabilities still face discrimination in these arenas.

All 50 states and the District of Columbia have statutes outlining the grounds for terminating parental rights (TPR) in relation to child abuse and neglect. However, TPR and parents with disabilities are, in general, a neglected area of study and research. Although recent research has found that parents with disabilities are not more likely to maltreat their children than parents without disabilities (Glaun & Brown, 1999; Oyserman, Mowbray, Meares, & Firminger, 2000), evidence shows that courts have terminated parental rights based on an emphasis on a parent's disability (Accardo & Whitman, 1989; Sackett, 1991; Watkins, 1995).

While a cursory analysis shows that many states include parental disability as statutory grounds for TPR (National Clearinghouse for Child Abuse and Neglect, 2002), there has been no formal analysis of the inclusion of disability as grounds for TPR in state codes. Thus, the purpose of this study is to examine how states are including disability in their TPR statutes, to identify state legislative innovations related to parents with disabilities, and to offer legislative change strategies for states considering updating child custody codes related to parents with disabilities. While this study examines state TPR statutes from a broad view of disability, much of the supporting literature is specific to parents with intellectual and/or developmental disabilities.

Background

As social attitudes and practices towards people with disabilities have evolved from institutionalization and compulsory sterilization to a community-based approach, the numbers of parents with disabilities have increased (Dowdney & Skuse, 1993; Llewellyn, 1990; Swain & Cameron, 2003; Tymchuck, Llewellyn, & Feldman, 1999). While their numbers have clearly grown, there are few accurate sources of information on the prevalence of parents with disabilities. Reasons for this lack of information include the lack of universally accepted definition of disability and the lack of administrative and research data on parents with disabilities (Llewellyn, 1990; McConnell & Llewellyn, 2002; Sackett, 1991). The best estimate of the USA population of parents with disabilities comes from the National Health and Information Survey's 1994/1995 Disability Supplement's data on mothers of 1 or more children under the age of 18. Using this data, Anderson, Byun, Larson, and Lakin (2005) found that there were approximately 175,000 mothers with intellectual and/or developmental disabilities, and about 1.35 million mothers with significant functional limitations but not intellectual or developmental disabilities.

Despite these increasing numbers, people with disabilities often struggle with family, community, and social ambivalence about their becoming parents (Ackerson, 2003; Llewellyn, 1990). Parents with disabilities face social stereotypes and prejudicial presumptions that they will inevitably maltreat their children or put them at risk from others, or that they have irremediable parenting deficiencies that put their children at risk and risk their developmental outcomes (Ackerson, 2003; McConnell & Llewellyn, 2002; Sackett, 1991). Many child welfare protocols indicate that a parental disability is a high risk for abuse so parents with disabilities may experience higher scrutiny from child protection agencies.

Currently no national studies of the number of parents with disabilities who have been involved in the child welfare system exist. Most child welfare agencies do not collect data on parents with disabilities; therefore, information available is from very small studies or anecdotal information. There have been estimates that between 40% and 60% of children of parents with intellectual disabilities have been removed from the home (McConnell & Llewellyn, 2002). Studies of child protection court proceedings have found that parents with disabilities are often disproportionately involved in the child protection system (Glaun & Brown, 1999; Swain & Cameron, 2003; Taylor et al., 1991). Parents with disabilities who are involved with the child protection system are more likely to be facing allegations of neglect than of abuse or risk of abuse (Collentine, 2005; McConnell & Llewellyn, 2002). Swain and Cameron (2003) examined the perceptions of the court system among parents with disabilities and found that parents with disabilities reported that they suffer prejudicial or discriminatory treatment from child protection and the courts. Glaun and Brown (1999) characterized the court's approach to child protection with parents with disabilities as one of "risk management," where the children's rights are balanced against the rights of the parents.

Parents with certain types of disabilities, such as intellectual disabilities, are likely to have other risk factors that trigger their involvement with child welfare (Dowdney & Skuse, 1993; McConnell & Llewellyn, 2002). Parents with intellectual disabilities often come from families that have experienced poverty and social exclusion (McConnell & Llewellyn, 2002; Swain & Cameron, 2003). Many parents with intellectual disabilities have reported being abused or neglected themselves, social isolation, little extended family support, meager incomes, and welfare dependence (McConnell & Llewellyn, 2002; Tymchuck et al., 1999). Parents with intellectual and/or developmental disabilities are not the only parents with disabilities being observed in relation to risks for child maltreatment. In their study on parental fitness of people with psychiatric diagnoses, Benjet, Azar, and Kuersten-Hogan (2003) found that mental illness as predictor of abuse is less significant than other perpetrator characteristics, such as poverty, stress, history of abuse, and social isolation. Unfortunately, as Swain and Cameron (2003) found, "...disability tends to be seen as the principle determinant of inability to care for children, but where poverty, housing issues, and the like are also present, these are seen as further confirmation of parental inadequacy" (p. 167).

Despite disproportionately greater involvement in the child welfare system, a growing body of research on the outcomes for children of parents with disabilities does not necessarily support the assumption that parents with disabilities are more likely to abuse or neglect their children. Studies have found that children of parents with intellectual disabilities can have successful outcomes (McConnell & Llewellyn, 2002). Other studies have indicated that it is impossible to predict parenting outcomes based on the results of intelligence testing (Dowdney & Skuse, 1993). However, laws addressing parents with disabilities have tended to focus on disability in a categorical fashion rather than looking at individual parenting behaviors or abilities.

The legal status of parents with disabilities

The USA legal system has been involved in regulating parenting activities since the 19th century, including efforts to regulate fertility and to protect children. Sterilization of people with disabilities was upheld by the United States Supreme Court in 1927, and subsequent court decisions have continued to classify mental retardation or developmental disability as a legal condition that may require specific guidance or limitations (Watkins, 1995).

Since the mid to late 19th century, states have taken legal steps to protect the rights of children (Sackett, 1991). As early as 1851, state laws provided that the courts may “. . . in their sound discretion, and when the morals, or safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere” (Kent, 1851, p. 211). All states adopted versions of child welfare laws, which protect children via many interventions ranging from temporary removal from parental custody to TPR. When a parent’s rights are terminated, there is a severance of the legal relationship between the parent and child and, generally, a permanent separation of the parent from the child (Sackett, 1991). A 1982 Supreme Court decision, Santosky vs. Kramer, found that courts could not terminate parental rights based on presumptions of “ascribed status,” in this case a father’s unwed status, but through individual inquiry regarding the specific person’s ability to parent their child effectively (Watkins, 1995).

In an effort to create more uniform protections for children, model statute language for TPR was proposed by the Neglected Children Committee of the National Council of Juvenile Court Judges in 1976 (Lincoln, 1976). It was written as a model that state legislatures could adopt or adapt to improve their current statutes (Lincoln, 1976). The model language states that state courts may terminate parental rights when the Court:

. . . finds the parent unfit or that the conduct or condition of the parent is such as to render him/her unable to properly care for the child and that such conduct or condition is unlikely to change in the foreseeable future. In determining unfitness, conduct, or condition, the Court shall consider, but is not limited to the following: . . . Emotional illness, mental illness or mental deficiency of the parent of such duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child (Lincoln, 1976, p. 7).

Many states adopted this language verbatim into their child welfare statutes.

Statutes that include disability as grounds for termination may lead to the presumption that disability is equivalent to parental unfitness, justifying state intervention (Watkins, 1995). Presumptions of unfitness to parent often lead to parents losing custody of their children before birth under a theory of prospective neglect (Collentine, 2005; Watkins, 1995). Court studies have found that “. . . the presumption of incompetence evoked by the diagnosis of intellectual disability is so influential that evidence challenging it may not be readily accepted” (McConnell & Llewellyn, 2002, p. 309). Parenting abilities of parents with disabilities are often ignored in favor of presumptions about the parenting abilities of all people with disabilities. For example, Watkins (1995) documents cases in Illinois, Louisiana, South Carolina, and New York where courts have made decisions to terminate parental rights for people with disabilities based on expert testimony focusing on presumptions of unfitness by parents with disabilities based on the characteristics about people with certain disability labels, rather than observation of individual parenting abilities [In re Karen Y., 550 N.Y.S.2d 67 (N.Y. App. Div. 1989); Orangeburg County Department of Social Services v. Harley, 393 S.E. 2d 597.2d 597 (S.C. Ct. App. 1990); 563 N.E.2d 1200 (Ill. App. Ct. 1990); C.L.R. v. Russo, 567 So. 2d 703 (La. Ct. App. 1990)]. Further, Watkins (1995) documents how parents with disabilities have often lost their parental rights upon the birth of their children or after they had not been provided with appropriate reunification services. Challenges to current state statutes that include a parent’s disability status have been made citing the equal protection clause of the Fourteenth Amendment of the Constitution (Sackett, 1991) and Title II of the Americans with Disabilities Act (Watkins, 1995). To date, none of these challenges has been successful.

The Adoption and Safe Families Act of 1997 (ASFA), designed in part to shorten the stay of abused or neglected children in foster care, has mandated that state courts become even more involved in TPR. ASFA required TPR in cases where a child has been in foster care 15 of the most recent 22 months, when a child has been abandoned, or when a parent has committed or been involved in murder, voluntary manslaughter, or felonious assaults of one of their children. Since 1997, all states have added the ASFA requirement to their state codes (National Clearinghouse on Child Abuse and Neglect Information, 2002). In addition to the ASFA related TPR grounds, most states have additional grounds for terminating parental rights, some which date back many decades. States vary in their non-ASFA related grounds with some having extensive and explicit lists of grounds for termination and others having very limited and/or very broad grounds for termination. Examples of other common grounds include chronic substance abuse, failure to maintain contact with a child, or failure to maintain support of a child (National Clearinghouse on Child Abuse and Neglect Information, 2002).

At the time of the adoption of ASFA, a national taskforce reminiscent of the Neglected Children Committee of 1976 was formed called Adoption 2002: The President's Initiative on Adoption and Foster Care. In 1997, Adoption 2002 released its Guidelines for Public Policy and State Legislation Governing Permanence for Children ([National Clearinghouse on Child Abuse and Neglect Information, 2002](#)). These guidelines were being developed simultaneously to the adoption of the ASFA legislation and, thus, include many recommendations to states related to the new emphasis on permanency for children. Strikingly similar to the 1976 Committee, the Adoption 2002 Initiative again included a recommendation that states include parental incapacity in TPR statutes ([National Clearinghouse on Child Abuse and Neglect Information, 2002](#)).

While parental incapacity can be defined in a number of ways, it is often defined to include a parent's disability ([National Clearinghouse on Child Abuse and Neglect Information, 2002](#)). Adoption 2002 specifically states that:

many [state codes] do not make it clear that, in some cases, sufficient evidence of parental incapacity is enough to establish grounds for termination ([National Clearinghouse on Child Abuse and Neglect Information, 2002](#)).

Thus, these recommendations appear to still promote TPR based either partially or primarily on a disability in instances when parents' incapacity is a disability.

The purpose of this study is to ascertain the current legislative status of parents with disabilities within state TPR statutes. Although states may have policy directives (i.e., agency practices), which provide alternative guidance for decision outcomes for parents with disabilities, state statutes remain at the crux of the issue. Since more and more parents with disabilities of all types are having children, it is important to understand the extent to which states focus on parental disability within TPR statutes and the nature of the discussion of parental disability.

Methodology

This study used legal document analysis consisting of a comprehensive Boolean search of the state codes of the 50 states and District of Columbia relating to TPR using the most recent state code available on Lexis-Nexis in August 2005. TPR and related statutes were searched for contemporary and historical terms related to disability and their common cognates, such as: disability, mental, handicap, disorder, and incapacity. When language surrounding disability was found in codes relating to child welfare, this language was then searched throughout the entire state code to see how these terms were defined elsewhere. For example, if "emotional illness" was used in the TPR code of a certain state, the entire state code was searched for a definition of "emotional illness." Further, definitions for child welfare terms such as "unfit parent" and "best interest of the child" were explored to see if these were statutorily defined elsewhere as specifically including or excluding parental disability. Two researchers independently conducted the searches, and the searches were reconciled by going over findings on a state-by-state basis. A code list was then developed to measure for preciseness, scope, use of language, and references to accessibility or fairness, and statutes were reanalyzed, and groupings developed.

Results

Parental disability in state TPR statutes

The majority of states include parent's disability in their codes as grounds for TPR if a disability impacts a parent's ability to care for his or her child or as a condition to take into consideration when determining whether a person is unfit to parent. As of August 2005, 37 states included disability-related grounds for TPR while 14 states did not include disability language as grounds for termination. The vast majority of these state statutes related to parental disability use outdated terminology, have imprecise definitions of disability, and emphasize conditions rather than behaviors.

All of the states that include disability in their grounds for termination specify explicit types of disabilities for courts to consider. Currently, 36 states have specific grounds for mental illness, 32 have specific grounds for intellectual or developmental disability, 18 have grounds for emotional illness, and 7 have grounds of physical disability (see [Table 1](#)

). Two states, Missouri and Tennessee, also use the generic mental condition, which can imply a mental illness or an intellectual or developmental disability. North Carolina is the only state that also specifies organic brain syndrome as a specific disability to consider when terminating parental rights. Eleven states use a common combination of disability types, "emotional illness, mental illness and mental deficiency," that came directly from the Neglected Children Committee of the National Council of Juvenile Court Judges of 1976.

Outdated terminology and imprecise definitions

The vast majority of the state codes relating to terminating parental rights use outdated terminology when discussing a parent's disability. Many codes use language from the 1940s and 1950s. This archaic language does not easily translate to contemporary legal, medical, or social definitions of disability. Further, many people in the USA consider the type of language contained in the state statutes to be offensive.

An example of the outdated language seen in the state codes is in reference to parents with intellectual or developmental disabilities. Thirty-two state codes include a reference to a disability that in modern terminology would consist of an intellectual or developmental disability (I/DD). However, the term intellectual disability is never used, and developmental disability

Table 1
Disability language in state termination of parental rights statutes.

State	Disability included in TPR grounds	Intellectual or developmental disabilities in TPR grounds	Mental illness in TPR grounds	Emotional illness in TPR grounds	Physical disability in TPR grounds	Other disability in TPR grounds	Disability language used within statutes
Alabama	Yes	X	X	X			Emotional illness, mental illness, mental deficiency
Alaska	Yes	X	X	X			Mental illness, serious emotional disturbance, mental deficiency
Arizona	Yes	X	X				Mental illness, mental deficiency
Arkansas	Yes	X	X	X			Mental illness, emotional illness, mental deficiencies
California	Yes	X	X				Developmentally disabled, mentally ill, mentally disabled, mental incapacity' mental disorder
Colorado	Yes	X	X	X			Emotional illness, mental illness, mental deficiency
Connecticut	No						
Delaware	Yes	X	X				Mental illness, psychopathology, mental retardation, mental deficiency
District of Columbia	Yes		X	X	X		Physical, mental and emotional health
Florida	No						
Georgia	Yes		X	X	X		Medically verifiable deficiency of the parent's physical, mental, or emotional health
Hawaii	Yes	X	X				Mentally ill, mentally retarded
Idaho	No						
Illinois	Yes	X	X	X			Mental impairment, mental illness, mental retardation, developmental disability
Indiana	No						
Iowa	Yes		X				Chronic mental illness and has been repeatedly institutionalized
Kansas	Yes	X	X	X	X		Emotional illness, mental illness, mental deficiency, physical disability
Kentucky	Yes	X	X				Mental illness, mental retardation
Louisiana	No						
Maine	No						
Maryland	Yes	X	X				Mental disorder, mental retardation
Massachusetts	Yes	X	X				Mental deficiency, mental illness
Michigan	No						
Minnesota	No						
Mississippi	Yes	X			X		Severe mental deficiencies, extreme physical incapacitation
Missouri	Yes					X	Mental condition (undefined)
Montana	Yes	X	X	X			Emotional illness, mental illness, mental deficiency
Nebraska	Yes	X	X				Mental illness, mental deficiency
Nevada	Yes	X	X	X			Emotional illness, mental illness, mental deficiency
New Hampshire	Yes	X	X				Mental deficiency, mental illness
New Jersey	No						
New Mexico	Yes	X	X		X	X	Physical disorder or incapacity, mental disorder or incapacity, hospitalization
New York	Yes	X	X				Mental illness, mental retardation
North Carolina	Yes	X	X			X	Mental retardation, mental illness, organic brain syndrome
North Dakota	Yes	X	X	X	X		Physical illness or disability, mental illness or disability, emotional illness or disability, other illness or disability

Table 1 (Continued)

State	Disability included in TPR grounds	Intellectual or developmental disabilities in TPR grounds	Mental illness in TPR grounds	Emotional illness in TPR grounds	Physical disability in TPR grounds	Other disability in TPR grounds	Disability language used within statutes
Ohio	Yes	X	X	X	X		Chronic mental illness, chronic emotional illness' mental retardation physical disability
Oklahoma	Yes	X	X				Mental illness, mental deficiency
Oregon	Yes	X	X	X			Emotional illness, mental illness, mental deficiency
Pennsylvania	No						
Rhode Island	No						
South Carolina	Yes	X	X		X		Mental deficiency, mental illness, extreme physical incapacity
South Dakota	No						
Tennessee	Yes		X	X			Mental condition, mental and emotional status
Texas	Yes	X	X	X			Mental or emotional illness, mental deficiency
Utah	Yes	X	X	X			Emotional illness, mental illness, mental deficiency
Vermont	No						
Virginia	Yes	X	X	X			Mental or emotional illness, Mental deficiency
Washington	Yes	X	X				Psychological incapacity, mental deficiency
West Virginia	Yes	X	X	X			Emotional illness, mental illness, mental deficiency
Wisconsin	Yes	X	X			X	Presently, and for at least two of the previous five years, has been an inpatient at a hospital, licensed treatment facility or state treatment facility due to mental illness of developmental disability
Wyoming	No						
Totals	Yes: 37 No: 14						

is only used by 3 states. The most commonly used description of I/DD in statutes is “mental deficiency,” used by 21 states. The term mental deficiency was in common usage in the USA from the 1940s through the 1960s with the main professional association called the American Association on Mental Deficiency through the 1970s. However, this term fell out of favor and by the 1970s was replaced by the term mental retardation. Now both terms are considered pejorative with many advocates and researchers recently adopting the term intellectual disability as a more respectful term for mental retardation. The term developmental disability is a broader term than mental retardation and includes other types of disabilities occurring during the developmental period, such as cerebral palsy, that may not involve an intellectual disability.

The states using the more modern terms developmental disabilities or mental retardation in their TPR statutes tend to have much more precise definitions of the disability. All 3 of the states using the term developmental disabilities relied on a state definition of developmental disabilities, which generally mirrors the federal definition. Likewise, most of the 8 states that use the term mental retardation or mentally retarded have a precise definition of mental retardation that is similar to standard diagnostic usage. Twenty-one states use the very outdated term “mental deficiency” with no state definition of mental deficiency anywhere within their state code. As there is no modern definition of this term, courts have to rely on precedent that may be well out of date.

Similarly, 18 states include a reference to emotional disability with 13 referring to it as emotional illness, 2 as emotional health, and 1 each as emotional disability, emotional disturbance, and emotional status. Like the term mental deficiency, the term emotional illness does not have an agreed upon current definition by medical, psychological, or advocacy groups. While the term emotional disturbance is often used in reference to children who have functional impairments, it does not refer to a particular diagnosis and most often is used for people under age 18 (US Department of Health and Human Services, 1999). Emotional illness was not defined in any of the state codes except to say that it must not be transitory. In a number of states, the only place the term emotional illness is used in the entire state code is in the child welfare statutes.

Likewise, while mental illness is the most commonly included disability in TPR statutes, many states either have no definition of their terminology related to mental illness, or else a very broad definition of mental illness. For example, Colorado's code allows for TPR if there exists clear and convincing evidence of “emotional illness, mental illness or mental deficiency of the parent of such duration or nature as to render the parent unlikely within a reasonable time to care for the

ongoing physical, mental, and emotional needs and conditions of the child” [C.R.S. 19-3-604(1)(b)(1) (2004)]. There is no definition of mental illness provided in the particular section of the code nor is there direction given as to an appropriate definition that may be present in other parts of the code. Other states have mental illness more explicitly defined, generally by using a general state definition of the term.

Several states have more narrowly defined definitions of how mental illness can be used for terminating parental rights, usually including severity and/or chronicity. For example, Iowa’s state code specifies that parental rights may be terminated if a parent has a chronic mental illness, has been repeatedly institutionalized, and presents a danger to his or herself or others [Iowa Code § 232.116 (2004)]. Similarly, Wisconsin limits the use of mental illness as grounds for termination solely for individuals who are currently hospitalized and have been hospitalized for 2 of the previous 5 years [Wis. Stat. § 48.415 (2004)].

Focus on conditions rather than behaviors

A major concern about the inclusion of disability in the grounds for TPR is that it can shift the focus from a parent’s behavior to a parent’s condition. Almost all of the non-disability related grounds for TPR are based on parent’s past or current behaviors, such as neglect, abuse, or abandonment. While no states have criteria indicating that having a disability is, by itself, grounds for termination, it is one of the only grounds for termination based on a contributing factor to a parent’s behavior rather than the parent’s behavior itself. By contrast, of the many states that include failing to financially support a child as means for termination, none lists the causes of lack of financial support in their statutes, such as chronic unemployment or lack of a high school diploma.

Currently, there are 14 states that do not refer to a parent’s disability in their state TPR statutes. All of these states include language in their codes allowing states to terminate parental rights based on abusive or neglectful behavior of a parent that may be influenced by his or her disability. However, with disability not included in the state statute, the focus necessarily has to be more on the individual’s behavior rather than the individual’s condition.

Discussion

The findings from this study show that many states include disability in their TPR related statutes. While including disability language in TPR statutes does not mean that all or even most parents with disabilities are at risk for having their children removed if they come in contact with the court system, it does point to a risk that parents with disabilities may face. While no state focused solely on disability as a cause for TPR and many courts in states that include disability in their state code have concluded that disability alone is not a sufficient basis to terminate parental rights [In re Michael B., 604 N.W. 2d 405, 412 (Neb. 2000)], there is a chance that the child protection system will put a heavier emphasis on disability if it is included in the state statute.

The inclusion of disability within state statutes is different from many of the other grounds for TPR required by ASFA. When disability is included in a state statute, it can place the emphasis on the mental or physical diagnosis of the parent rather than the ability for a parent to nurture and provide a safe environment for his or her child. While most professionals involved in the child welfare system might remain focused on parenting, it could become more difficult when the court proceedings place an emphasis on the diagnosis rather than specific parental behavior.

From this study, it appears that many states that include disability do so in an inappropriate manner using outdated terminology to refer to a person’s disability, or using imprecise definitions of disability. Terms such as emotional illness, mental illness, or mental deficiency are vague. Such vaguely worded state statutes tie disability with a parent’s inability to care for the child but are not specific in what this means or how child protection and the courts should interpret the statutes (Collentine, 2005). The advantage of vague language is that it allows child protection authorities and the courts flexibility to adapt interventions and findings to best meet the specific needs of each case. However, vague laws can also lead to imbalanced interpretation and enforcement, as previous court studies have found (McConnell & Llewellyn, 2002). Of the states that do not include disability-related language in their TPR statutes, all had general provisions that would allow TPR of parents with disabilities though such a TPR would focus on the individual’s parental behavior rather than disability status.

As a result of this review of state statutes and the potential for discrimination, there is clearly a need for child welfare agencies to review their terminology concerned disabilities, especially relating to TPR, and perhaps change their statutes to deemphasize the disability of the parent and refocus on behavior. Indeed, there is evidence that states are interested in this change. Rhode Island and Idaho have recently changed the language about disability within their state TPR statutes. The rationale in both states was that the disability language was unnecessary and could result in unequal treatment in the state courts for people with disabilities. In Idaho, the state not only eliminated the disability language but also inserted protections for people with disabilities, and inserted a provision in child protection and adoption statutes that parents with disabilities have the opportunity to show how their use of adaptive equipment can aid in their parenting (Lightfoot, LaLiberte, & Hill, 2007; Idaho Code § 16-1501b; Idaho Code § 16-1506; Idaho Code § 16-1601-1643; Idaho Code § 16-2001-2015; & Idaho Code § 32-1005).

While this study provides a comprehensive overview of the extent to which state TPR statutes include disability language, it is limited in several ways. First, this study only focuses on the state codes and does not examine how parents with disabilities

have fared under state codes that include or do not include disability language. Thus, this study does not examine the link between state codes and the decision-making processes of the child welfare and court systems nor does it examine the link between the codes and the decision outcomes. Second, while court records in most states were studied as background information for this project, there was no systematic attempt to see how courts were interpreting state statutes. Certainly, the language in a state statute is only one of many factors that can influence the termination of parental rights, and this study does not examine the broader array of influences. Future research in this area could explore further the relationship between these varied influences including examining how the various actors in the TPR process view parents with disabilities, and what types of guidance, such as state statutes, policy directives, professional experience, personal knowledge, evidence-base, they rely on when making decisions. Likewise, more inquiry is needed into how parents with disabilities fare when encountering the child welfare system with attention placed on both child and parent outcomes.

Conclusion

Many state statutes continue to institutionalize discriminatory language regarding disability and, therefore, potentially enable discriminatory practices that could cause unnecessary concerns about the safety of children and unnecessarily disrupt their permanence and well-being. While many state court decisions have clearly ruled that disability alone is not a sufficient basis to terminate parental rights, previous research has also found that parents with disabilities are often at a disadvantage in court proceedings surrounding the custody of their children (Collentine, 2005; McConnell & Llewellyn, 2002; Swain & Cameron, 2003), which may be due in part to the vague language and guidance provided by state statutes. Clearly, parents with disabilities should be evaluated based on their ability to parent rather than on a categorical decision based on a permanent condition. While some people with disabilities may have disability-related factors limiting their ability to parent, others with disabilities may not. There certainly is a possibility that individual worker decisions, state or county policy directives, or judicial decision-making have more of an impact than the language in the state laws, but state TPR laws do provide the guidelines for the actors within the system.

States should review their child welfare statutes for terminology concerning disabilities in their assessment and other processes, not solely regarding termination of parental rights. During this review, some states may find that they indeed need to clearly emphasize behavior rather than the condition of the parent in their state statutes, and states may want to consider removing disability language from these state statutes. States that include language focusing on the condition of having a disability risk taking the emphasis away from the parenting behavior. Considering that states which do not have disability listed within their statutes are still able to terminate parental rights based on abuse or neglect, there appears to be no compelling reason to include disability within the statutes.

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