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# Accommodating Parents

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Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 **Calif. L. Rev.** __ (forthcoming 2022), available at SSRN.

The child protection legal system is supposed to work towards the reunification of parents and children in foster care through individualized services to help parents raise their children safely. But that legal system has long been criticized for frequent and severe invasions into the family integrity rights of parents with disabilities and their children, treating parental disabilities as grounds for permanent separation instead of individual characteristics to be accommodated. Several years ago, it seemed that the law was turning. In 2015, the U.S. Departments of Health and Human Services and Justice issued joint guidance stating that the Americans with Disabilities Act (ADA) applied to parents with disabilities in child protection cases. The joint guidance urged states to more effectively help reunify families with a disabled parent and prevent their separation in the first instance. A small number of state courts issued decisions requiring truly individualized accommodations for parents with disabilities.[1] But those cases remain outliers. Sarah H. Lorr has done the child protection legal field an excellent service by outlining just how far it has left to go in her forthcoming article *Unaccommodated: How the ADA Fails Parents*.

Since the 2015 guidance, state courts have only inconsistently applied ADA protections to parents with foster care cases. Lorr documents how the largest set of reported state appellate decisions since the 2015 guidance "remain completely hostile to parents raising discrimination-based claims under the ADA," (P. 38), often directly contradicting the federal guidance. (P. 39.) Nor do federal courts provide a meaningful remedy. As Lorr shows, a variety of doctrines – *Rooker-Feldman*,[2] various abstention doctrines, and collateral estoppel – have made federal court vindication of the rights of parents with disabilities very difficult to obtain. (Pp. 40-49.)

The resulting harms are significant. Families with disabled parents are separated when accommodations could have kept them together. Families are kept separated when accommodations could speed reunification. Lorr identifies one leading case (Pp. 33-34) whose facts illustrate how: A child protection agency demanded that a parent with an intellectual disability attend parenting classes, participate in therapy, earn a GED, and find her own employment and housing. The parent, struggling to take care of herself as her family support system collapsed, could not meet the demands of the child protection agency, which were "geared toward a parent of average cognitive functioning."[3] Through her lawyer, the parent sought individualized assistance so she could understand and participate in those services, including asking the agency to obtain help from an organization which could provide intensive supports to accommodate her disability.[4] After failing to take those steps, the agency petitioned the family court to terminate her relationship with her children, which the trial court granted.[5]

Those trial-level facts demonstrate what can and does happen when, as Lorr documents, state courts fail to apply the joint guidance. (In one of the few decisions to follow the joint guidance, the termination was reversed on appeal – a decision that, as Lorr demonstrates, remains an outlier). Lorr aptly builds on scholars who have documented how parents with disabilities, especially intellectual disabilities, are more likely to have their children placed in foster care, remain in state custody, and face the system's most severe consequence, termination of the parent-child relationship. (Pp. 5, 8.) Moreover, as Lorr points out, parents with disabilities of which child protection agencies are unaware face a catch 22: they must disclose their disabilities if they want an accommodation, but doing so is not likely to lead to meaningful legal protection and may worsen the state's intervention in their families, discussing a Sixth Circuit case where that result seems to have occurred. (Pp. 50-51, *citing* Marble v. Tennessee, 767 F. App'x 647 (6th Cir. 2019).)

Lorr points to discrete solutions for lawyers defending parents with disabilities. Consistent with the joint guidance, she urges more assertive family court action to demand accommodations for disabled parents. (Pp. 54-56.) She goes further, urging more access to and meaningful remedies from federal courts. (Pp. 51-54.) Finally, Lorr urges closing of significant gaps in state data reporting about families with disabilities. (The federal government's primary system for tracking information about children separated from their parents and placed in foster care, known as AFCARS, tracks when children enter foster care, how long they stay, and whether they reunify with their parents or leave foster care to a new family. But it does not track when parents have a disability, and other data systems fail to fill the void.) (P. 18.)

Lorr also invites more transformational steps, seeking to "radically alter" the present system from "a corrective, judgmental force brought upon Black, Brown, poor, and disabled parents" to one providing meaningful supports. (P. 62.) This call identifies a problem at the core of the present child protection system: it makes demands of families in its ambit without adequate or individualized support to help parents raise their children, thus undermining the law's commitments to respecting family integrity and prioritizing reunification with families of origin. This project is larger, of course, than a single article – but that project needs Lorr's contribution and analysis to succeed.

1. *See, e.g., In re* Hicks/Brown, 893 N.W.2d 637 (Mich. 2017) (finding that by failing to accommodate parent's disability, CPS agency failed to make reasonable efforts to reunify family, thus invalidating termination of parental rights). Lorr points to a Colorado case that followed *Hicks/Brown*, *In re S.K.*, 440 P.3d 1240 (Colo. Ct. App. 2019) (*cited in* Lorr at 34-35). Citations to Lorr's article are to the version posted to SSRN.
2. As the Supreme Court later described it, the *Rooker-Feldman* doctrine provides that federal courts lack subject matter jurisdiction over "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 284 (2005).
3. *In re* Hicks/Brown