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NO CHANCE TO PROVE THEMSELVES: THE RIGHTS OF MENTALLY DISABLED
PARENTS UNDER THE AMERICANS WITH DISABILITIES ACT AND STATE LAW

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Abstract

This article explores the relationship between state child welfare laws that terminate parental rights and the federal Americans with Disabilities Act (ADA). The article begins by analyzing the application of the ADA to termination of parental rights proceedings against parents with mental disabilities. It then surveys state child welfare laws, focusing on the treatment of parents under New York State law. The article concludes by advocating for a change to reflect the principles of the ADA in state laws and in practice.

Introduction	113
I. The Americans with Disabilities Act (ADA) and Termination of Parental Rights Proceedings (TPRs)	115
A. Title II of the ADA	115
B. The Application of Title II to TPRs	116
1. Federal Interpretations of Title II	116
2. State Interpretations of Title II	118
3. An Alternative Interpretation of the ADA's Application to TPR Proceedings	121
C. The ADA as a Defense at TPR proceedings	122
D. Bringing an ADA-TPR Claim in Federal Court	131
1. Prima Facie Case	131
2. State Defenses	138
i. Fundamental Alterations	138
ii. Direct Threat	141
iii. Sovereign Immunity	143
E. Filing an ADA Grievance	146
II. The Americans with Disabilities Act and State Child Welfare Law	149
A. Services for Mentally Disabled Parents	149
1. States without Reunification Services Requirements	150
2. States with Reunification Services Requirements	152
B. Mental Disability as a Ground for Termination	153
1. States in which Mental Disability Is an Express Statutory Ground for Termination of Parental Rights	154
2. States in which Mental Disability Is Not an Express Statutory Ground for Termination of Parental Rights	169
C. New York State Law as a Prime Example of an ADA Violation	170
III. A Call for Change in Statutes and Practice, Based on Recognition of the Rights Granted under the ADA	170
APPENDIX A	178
APPENDIX B	179
APPENDIX D	187

*113 Introduction

"I love mommy. I always want to see her when we go to the agency."

This is what my five year-old client, Gaby,¹ told me² after a one-hour visit with her mother, Tanya, which took place in the chaotic waiting area of their foster care agency. No rooms were available that day, so Gaby had to play on her mother's lap until the allotted hour was up. Tanya was composed, though she had certainly had her ups-and-downs as a woman suffering from paranoid schizophrenia. Still, she had never missed a visit with Gaby in the five years the child was in foster care, and had diligently followed all other court orders - to attend therapy and parenting classes, and to consistently test negative for drugs. She lived independently and had successfully cared for Gaby on the sporadic overnight visits she had been granted.

*114 As Tanya pulled toys and clothing out of a shopping bag for Gaby, she asked me about the petition to terminate her parental rights based on mental illness, which was pending in New York State Family Court. The foster care agency considered it a heartbreaking case because of Tanya's compliance with the court orders, her steadfast love for Gaby, and their undeniably strong bond. But the agency was going forward with the petition so Gaby could be adopted by her current foster mother. I didn't want to explain to Tanya³ what I knew would likely happen: her rights would be terminated because her mental illness rendered her "unable" to care for Gaby. Gaby had told me she wanted to live with her foster mother, but had also expressed a strong and consistent desire to see Tanya regularly. By the time the case went to trial, I no longer represented Gaby and could not express her wishes to the court. But I doubt it would have made a difference; Tanya's parental rights could be terminated with ease under New York statutes and case law.

This article examines the relationship between state child welfare laws that terminate parental rights and the federal Americans with Disabilities Act (ADA). I focus on the treatment of parents who suffer from mental illness or mental retardation under New York Social Services Law; it is one of many state statutes that, I argue, are in violation of the ADA.

In Section I, I discuss the scope of the ADA, including whether and how it can apply to termination of parental rights proceedings (TPRs). Section II explores the treatment of mentally disabled parents under state child welfare law, focusing on New York, and the relevance of this treatment to the ADA. I posit that New York State law and other state statutes are discriminatory on their face under the ADA because they terminate the rights of mentally disabled parents on the basis of status and speculation over future behavior. It is also my contention that New York's law is uniquely discriminatory in that mentally disabled parents are never entitled to services or a dispositional hearing at the conclusion of their TPR trials. A parent in New York State can have her rights terminated without a single opportunity to ameliorate her situation, flying in the face of the purpose and mandate of the ADA. In Section III, I conclude by calling for a change in state laws and practice, particularly those of New York, by taking into account how a few states have amended their statutes since the passage of the ADA to incorporate *115 this landmark federal legislation into their case law.

I. The Americans with Disabilities Act (ADA) and Termination of Parental Rights Proceedings (TPRs)

A. Title II of the ADA

The ADA, enacted in 1990 with strong support from a diverse coalition in Congress as well as the American public, is civil rights legislation intended to remedy discrimination against disabled individuals.⁴ Over 54 million Americans are protected under the ADA,⁵ including anyone with a "mental impairment that substantially limits one or more . . . major life activities . . . ; a record of such an impairment; or being regarded as having such an impairment."⁶ Mental impairment is defined as "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."⁷

Prior legislation, Section 504 of the Rehabilitation Act of 1973, had prohibited discrimination against disabled individuals by governmental and private entities who received federal financial assistance.⁸ Title II of the ADA similarly proscribes discrimination on the basis of disability by a public entity, which includes (1) any state or local government, and (2) any department, agency, special purpose district, or other instrumentality of a state or states or local government.⁹ The regulations addressing the implementation of Title II state that it applies to “all services, programs, and activities provided or made available by public entities.”¹⁰

***116 B. The Application of Title II to TPRs**

Title II does not specifically indicate whether court proceedings, including termination of parental rights trials, are “state activity.”¹¹ But the fact-findings¹² and the purpose statement, which invokes “the sweep of congressional authority,”¹³ indicate that Congress intended the ADA to eliminate all forms of state discrimination, with Title II specifically targeted to public services (as opposed to Title I, which applies only to employment, and Title III, to public facilities). Congress' goal was “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals [and] to ensure that the Federal Government plays a central role in enforcing the standards.”¹⁴ Congress also stipulated that the ADA is “a clear and comprehensive national mandate for the elimination of discrimination.”¹⁵ Indeed, the application of the ADA to termination of parental rights proceedings was not beyond the scope of Congress' findings.¹⁶

1. Federal Interpretations of Title II

The Department of Justice (DOJ) considers court actions to be “state activity” for purposes of the ADA. The DOJ has specifically prohibited discrimination in all state judicial systems receiving federal financial assistance.¹⁷ According to the Supreme Court, the DOJ is crucial when interpreting Title II: “[b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect.”¹⁸

***117** The Supreme Court itself has held that providing the disabled with access to courts is a constitutional mandate of Title II.¹⁹ According to the Court, the “unequal treatment of disabled persons in the administration of judicial services has a long history,”²⁰ which the ADA sought to redress. States must provide a “meaningful opportunity to be heard,”²¹ including reasonable accommodations for paraplegic and hearing and visually impaired litigants. Of particular relevance to mentally disabled parents, the Court cited the “failure to permit testimony of adults with developmental disabilities”²² as one of the congressional findings leading to the enactment of the ADA.

The Supreme Court has not, however, directly addressed whether the substance of state court proceedings, or specifically TPRs, constitutes a state “activity” or “service.”²³ But the Court's Title II jurisprudence indicates a broad interpretation of “service.” Incarceration counts, regardless of the fact that prison services are involuntary and not wholly for the benefit of the prisoner.²⁴

Indeed, the Supreme Court has stated that “the fact the [ADA] can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’”²⁵ Federal courts also have interpreted Title II broadly, applying it to social services;²⁶ access to public areas²⁷ and public meetings;²⁸ arrests;²⁹ education;³⁰ housing;³¹ loans;³² and transportation,³³ to name a few. Notably, the Ninth Circuit ***118** has applied Title II to parole proceedings,³⁴ which, according to the court, exist to protect the public,³⁵ just as TPRs serve to protect children.³⁶ In New York, the Second Circuit has held that “programs, services, or activities” is a “catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.”³⁷

2. State Interpretations of Title II

In spite of federal guidance and case law, many state courts have held that TPRs are not a state activity or service. The courts reason that TPRs are about parents' rights and children's best interests; not state programs. Appendix A contains a table of state court decisions regarding the applicability of the ADA to TPRs and the use of the ADA as a defense at TPRs.

In New York, a trial court held that TPRs are “not services, programs, or activities.”³⁸ According to the court, “the ADA was designed to deal with access to public services and accommodations, rather than to alter the rights of parents in state termination of parental rights statutes.”³⁹ Other states have similarly held that court proceedings are not a state activity or service.⁴⁰

***119** However, some courts have found the ADA applicable to TPRs. In *Matter of M.H. and G.H.*,⁴¹ the Supreme Court of Montana entertained the claim of the respondent father that he suffered from a mental impairment which was not reasonably accommodated under the ADA; however, the court held that the father would need assistance “‘every minute’ . . . in order to get. . . to a point at which he would be a minimally adequate parent,” and that this would be a fundamental alteration in state services, which is not required by the ADA.⁴² Similarly, in *the Interest of K.K.*,⁴³ the Court of Appeals of Iowa held that the state complied with the ADA in the way it treated a mother with a substance abuse problem.⁴⁴ According to the Alaska Supreme Court, an ADA violation could bar a showing of “reasonable efforts” as necessary before termination.⁴⁵

Other courts have acknowledged the applicability of the ADA to TPRs, despite procedural problems. In *In re K.M.*,⁴⁶ the Court of Appeals of Kansas held that the mother's ADA claim was moot, but then went on to note that she failed to make a prima facie ADA case, because she did not provide evidence that she was disabled. Likewise, in *In re T.M.*,⁴⁷ the Court of Appeals of Iowa held that the mentally retarded mother could argue that the state's treatment of her was discriminatory under the ADA at a TPR, but such a claim would have to be made first at a removal or review hearing, or when services were offered; a similar

***120** finding was made in *In re Prentiss Ratliff* for a mentally ill mother who first raised the ADA on appeal of a TPR.⁴⁸

Several courts have specifically held that states are obligated under the ADA to be non-discriminatory in their treatment of respondent parents, even if the ADA does not directly apply to TPRs. In *In re Aundre Murphy*,⁴⁹ the Michigan Court of Appeals stated, “the ADA does require. . . the . . . Agency to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services.” The court went on to note that the ADA is not a defense to a TPR; however, it analyzed the record to see whether the mentally disabled father was properly accommodated.⁵⁰

In *Roby v. Arkansas Dept. of Human Services*,⁵¹ the Arkansas Court of Appeals also acknowledged that the ADA is relevant at a TPR by noting that the state provided “reasonable accommodations in accordance with the ADA” to a mentally ill parent.

Even some courts which wholly refuse to entertain ADA claims have acknowledged that the services involved in TPRs must be non-discriminatory. The Vermont Supreme Court specifically stated that by not entertaining an ADA claim it did “not mean to suggest that parents lack any remedy for [the agency's] alleged violations of the ADA. We hope that the effect of this decision is to encourage parents and other recipients of [agency] services to raise complaints about services vigorously and in a timely fashion.”⁵² Numerous other states have held that the ADA applies to reunification services,⁵³ but that parents can only litigate ADA claims in federal court or following other procedures under the ADA.⁵⁴

***121** Likewise, Indiana held that if services are provided, they must be non-discriminatory.⁵⁵ “When an agency opts to provide services to assist parents in improving parental skills, the provision of those services must be in compliance with the ADA.”⁵⁶ The court found, however, that an ADA violation was not a defense to a TPR, solely because all parents were treated

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

the same way under Indiana law.⁵⁷ Regardless of disability, no parent in Indiana was entitled to services before a TPR at the time of this ruling.⁵⁸

Overall, courts are reluctant to apply the ADA to TPRs outright, but many acknowledge its principles of equitable treatment in holdings and in dicta.

3. An Alternative Interpretation of the ADA's Application to TPR Proceedings

Even if the general consensus of state courts is that a TPR is not a state activity or service, it can be argued that the ADA still applies to the proceeding because it involves an examination of other services that are administered by the state. Indeed, many courts have alluded to this interpretation.⁵⁹ As noted above, social services fall under the umbrella of Title II, including those administered through contract agencies (all state, county, municipal and contract agencies will be referred to herein as "agencies"); Title II regulations prohibit discrimination by the state either directly or "through contractual, licensing, or other *122 arrangements."⁶⁰ Services offered to parents are an inherent part of the evidence used by both sides in a TPR.⁶¹ In order to make a determination, the court looks at the state's actions with regard to the parent and whether the parent complied with the service plan; even in a mental disability case, where in certain situations service plans are not mandated, some contact with the parent will have to be made and, later, examined at trial.

The ADA prohibits one public entity from perpetuating another public entity's discrimination if "both entities are subject to common administrative control or are agencies of the same State."⁶² State and contract agencies, as well as family and juvenile courts, are both under the jurisdiction of state laws⁶³ (and are both subject to Title II⁶⁴). Therefore, if an agency has discriminated against a parent by not making appropriate contact with him or her, a family court cannot perpetuate this lack of action by admitting the agency's evidence without allowing the parent to challenge it; one such way is to argue that the evidence violates the ADA.

C. The ADA as a Defense at TPR proceedings

Even if a state acknowledges that Title II applies to a TPR, it still has been difficult for parents actually to raise the ADA as a defense to the termination of their rights. The ADA applies to TPRs because of the breadth of Title II and because a failure to provide appropriate services is an attack on the evidence (such as testimony and records) the state uses to prove the termination.

There are, however, other challenges to raising the ADA defense at a TPR. State and contract agencies argue that state law, not the ADA, *123 governs their conduct.⁶⁵ Some courts have been favorable to this argument: "Congress did not intend to change the obligations imposed by unrelated statutes."⁶⁶ In Vermont, the Supreme Court went further, holding that the limited jurisdiction of the juvenile court prohibits it from entertaining "side issues that do not directly concern the status of the juvenile before it."⁶⁷ The court feared that an "open-ended inquiry into how the parents might respond to alternative . . . services" would "ignore the needs of the child and divert the attention of the court to disputes between [social services] and the parents."⁶⁸ As a Florida Court of Appeals stated, "dependency proceedings are held for the benefit of the child, not the parent."⁶⁹

But, as contended, the TPR and the ADA are inherently related: the TPR involves an examination of both a person's disability and the state's implementation of services.⁷⁰ Furthermore, contrary to the fears of some state courts, allowing a parent to assert a violation of the ADA does not mean that that the child's rights will be compromised.⁷¹ The child is always the focus of a family court proceeding, even when the court is examining a potential violation of the ADA.⁷² In virtually every state, the "best interest" of the child is considered during the TPR.⁷³ Furthermore, a parent's evidentiary attack should not be viewed as necessarily contrary to the interests and rights of a child; if a parent has been discriminated against, and the parent-child

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

relationship is severed, in part or in whole, because of this discriminatory treatment, the *124 severance has drastic,⁷⁴ and potentially harmful,⁷⁵ consequences for the child.

Moreover, Title II would have no purpose if states could fail to accommodate disabled people as long as they did so through “unrelated” statutes. Most statutes involving state services, programs, and activities were in place long before the ADA and are not specifically related to the disabled.⁷⁶ But they are precisely that which Congress intended to target in invoking its “sweep”;⁷⁷ if states could argue that their laws were “unrelated,” Congress would have had no reason to enact Title II. Rather, courts have appropriately found that Title II is significant in examining these services, programs, and activities.⁷⁸

In addition, agencies have argued that the ADA cannot be raised at the TPR because denial of a TPR is not an appropriate remedy for a violation of the ADA. According to a New York court, nothing in the ADA suggests that denial of a TPR is a remedy under the Act, though a respondent might be able to sue for monetary damages in federal court.⁷⁹ This view has been reiterated by numerous courts,⁸⁰ even though at least *125 one federal district court has held that it cannot hear a TPR-related ADA claim, so long as there is a pending state proceeding.⁸¹

This reasoning is flawed. First of all, when a parent raises the ADA at a TPR, she is not attempting to litigate the violation in family court, or claiming that a dismissal of the TPR is a remedy. Instead, she is attacking the agency's evidence and its presumption that it has treated her fairly and in accordance with the law. If she has been discriminated against, the TPR should be rejected because of flawed evidence, not because of an ADA violation per se.

Moreover, as established above, Congress intended the ADA to be broad. Legislators were strongly influenced⁸² by the Supreme Court's finding in *School Board of Nassau County v. Arline* that “society's accumulated myths and fears about disability and disease are as handicapping as . . . physical limitations.”⁸³ There is no evidence that Congress had a different intent from what the plain language stemming from these findings indicates.⁸⁴

Furthermore, as discussed, the Supreme Court promoted the scope of the ADA (applying it to prison services) by holding that Title II's ambiguity “demonstrates breadth.”⁸⁵ Federal cases such as *Innovative Health Systems, Inc. v. City of White Plains*⁸⁶ and *Civic Association of the Deaf v. Giuliani*⁸⁷ have reiterated that, as a remedial statute, the ADA must be broadly construed or the congressional purpose will be *126 frustrated.⁸⁸ As the Second Circuit stated, “Title II's enforcement provision extends relief to ‘any person alleging discrimination on the basis of disability.’”⁸⁹ There is nothing in the statute to indicate that it is inappropriate for a parent to raise a violation of the ADA at a state TPR trial.

Another argument agencies make is that alleged ADA violations must be raised before TPRs, either at the dispositional hearing following the initial finding of child abuse or neglect, or at a permanency hearing or a service plan review while the child is in foster care.⁹⁰ Courts have held that parents must identify why the agency's service plan is inappropriate and what kinds of services they should be receiving.⁹¹ According to a Massachusetts court, “a parent who believes that the department is not reasonably accommodating her disability ‘should claim a violation . . . either when the . . . plan is adopted, when [she] receives those services, or shortly thereafter.’”⁹² A New York court similarly held that the ADA may “provide a sound argument at a permanency hearing for the development of an individualized service plan including reasonable accommodations.”⁹³

However, as anyone who has practiced in this field knows, family court cases do not always proceed so smoothly. Courts in New York, for example, frequently fail to order concrete service plans at the dispositional hearings following neglect and abuse fact-finding trials.⁹⁴ *127 At the post neglect-finding disposition against Tanya (the respondent mother of the case described in the Introduction), the court only stipulated that she attend biweekly therapy, maintain sobriety, and secure housing, and that

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

the agency perform random urine analysis on her. These stipulations are identical to those made for non-disabled parents in the majority of abuse and neglect proceedings in New York.⁹⁵ The court did not say how progress was to be measured in therapy and did not order Tanya to take medication or to comply with programs specific to individuals, or to parents, with schizophrenia.⁹⁶ This omission is common for dispositional orders following abuse and neglect findings.⁹⁷ The court also made no mention of alcohol counseling, even though the agency indicated a concern over Tanya's alcohol use, which further illustrates the ways in which dispositional orders often fail to be holistic.⁹⁸

***128** The argument that a parent must raise an ADA violation prior to the TPR trial is also problematic in that, even if a court's orders at disposition are characterized as the "service plan," a parent and her counsel cannot know how the agency will accommodate her after the plan has commenced.⁹⁹ In Tanya's case, the agency did not comply with its plan: although it performed the drug tests and made a referral for parenting classes, it failed to provide any meaningful assistance with housing. Such assistance was crucial, as Tanya was living intermittently with her brother, but the court made it clear that it would not discharge Gaby to the brother's home. The caseworker never referred Tanya for public housing or discussed with her the option of moving to a residential facility for a period of time in order to become stable. The caseworker also never explored the possibility of Gaby living with her mother in an assisted facility, even though an assisted living situation can be a viable reunification plan for parents with mental disabilities and would promote the ADA's objective of integration into the community.¹⁰⁰ Furthermore, homelessness, while extremely difficult for anyone, can exacerbate the symptoms of a person suffering from schizophrenia.¹⁰¹ Thus, in failing to explore housing possibilities, the caseworker likely perpetuated the problems that necessitated removing ***129** Gaby from Tanya's care. Tanya's transient home situation is common among mentally disabled parents, who require accommodation with respect to housing.¹⁰²

Moreover, the caseworker failed to follow-up with Tanya's therapist about the appropriateness of her treatment and strategies for fostering reunification, including options such as in-home services.¹⁰³ Lastly, the caseworker did not offer job assistance and/or referrals for educational opportunities. Tanya had held several clerical jobs, but was not employed during the time of the child protective proceedings. She told the caseworker that she enjoyed working, and employment or classes may have stabilized her.¹⁰⁴ Indeed, throughout most of the time Gaby was in foster care (close to five years), Tanya was on her own, without help from the agency. And because the TPR that emanated from the original case was based on mental illness, in the end it did not matter that she had complied with all of the dispositional orders; at the TPR, the agency only had to prove, through the testimony of a court-appointed psychiatrist, that Tanya was incapable of providing adequate care for Gaby now and in the foreseeable future.¹⁰⁵

A lack of counsel at permanency hearings in New York and around the country also inhibits raising ADA claims. In New York, most respondent parents were unrepresented at permanency hearings prior to legislation enacted in 2004.¹⁰⁶ Because a TPR fact-finding is likely to ***130** take place years after a child has entered foster care,¹⁰⁷ a substantial portion of recent and pending TPRs have a history of permanency hearings in which the parents lacked representation.¹⁰⁸ Furthermore, prior to 2004, even if a parent had a lawyer at one permanency hearing, she was not necessarily represented by the same person at the next hearing, or at the TPR.¹⁰⁹ In Tanya's case, she did not have representation at any of the permanency hearings. Without a lawyer, Tanya could not have been expected to know that she was entitled to reasonably accommodated services under the ADA, and that the services she was receiving were not appropriate. Like most respondent parents, her goal was to follow the agency's plan without objection, because that is the only path to reunification. At least one other state has acknowledged the importance of counsel in this regard: "[w]hile it could be argued that Mother was hampered in asking for assistance . . . we note that Mother was represented by counsel, who could have notified DHS on [her] behalf."¹¹⁰

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

*131 Furthermore, under the federal 1997 Adoption and Safe Families Act (ASFA),¹¹¹ even if a parent raises an ADA violation at a permanency hearing, in most states, a TPR still could be filed if her child has been in foster care for 15 of the previous 22 months.¹¹² Thus, a permanency hearing should not be the only time that courts entertain the ADA.

A parent's claim that an agency violated the ADA is relevant at the TPR because the ADA prohibits discrimination by the state. The parent's objection is with the manner in which the state has treated her with respect to the evidence and the decision at the TPR. The TPR may be the only feasible time for her to raise such an objection. She is asking that the TPR be denied because it is based on inadequate evidence, and not because this is a "remedy" for the state's violation of the ADA. A remedy for the state's violation of her rights and the rights of all disabled respondent parents can be litigated separately in federal court.

Although New York and other states have been reluctant to allow parents to raise ADA violations at TPRs, the reasoning of these courts is in conflict with the legislative intent and the plain language of the ADA. States should follow the Supreme Court and federal courts' broad interpretation of Title II; parents should not be barred from asserting that the ADA guarantees certain rights, and that any violation of these rights is relevant in deciding whether to grant the TPR.

D. Bringing an ADA-TPR Claim in Federal Court

1. Prima Facie Case

A parent can file an ADA case in federal court, raising a claim of discrimination based on disability at any time during her interaction with an agency - after the initial neglect or abuse filing; between permanency hearings; while a TPR is pending; after a state court has terminated rights, regardless of whether the ADA was raised; or pending an appeal of the TPR - but the focus here is a potential ADA claim after a TPR.¹¹³ *132 The parent will have to prove three things: that the agency is a public entity; that she is a qualified individual with a disability; and that she has been subjected to discrimination on the basis of this disability.¹¹⁴

The first prong is easy. As discussed, any state or municipal agency, including a contract private agency, is a public entity.¹¹⁵ To fulfill the second prong, a parent must demonstrate that she has a "mental impairment that substantially limits one or more major life activities . . . ; or a record of such impairment; or of being regarded as having such an impairment."¹¹⁶ The first definition may be difficult for a parent to prove if her mental illness is managed;¹¹⁷ however, mental disability claims in other contexts have survived this test.¹¹⁸ It probably is not in a parent's interest to claim that parenting is a life activity substantially limited by her mental disability, because this might undercut her argument that she is a fit parent or fit for services (even if this should be irrelevant, as discussed below). A parent also can demonstrate a record of impairment or of being regarded as having an impairment by admitting into evidence the initial allegations, the finding, or the subsequent case record.¹¹⁹

*133 In addition, the second prong of the prima facie case requires that the parent prove she is "eligible" for a benefit offered by the state. The benefit pertaining to TPRs is reunification services.¹²⁰ Although only a few ADA-TPR cases have been litigated in federal court, mentally disabled parents have had difficulty demonstrating that they are eligible for reunification services under the ADA.¹²¹ States have argued that certain parents are not "qualified" to be parents, and therefore not entitled to these services.¹²² One district court dismissed a mentally ill parent's ADA claim, after a New York family court had made a neglect finding and granted a termination of parental rights, because "the Family Court has ruled, and it is not within the authority of this Court to question that ruling, that plaintiff is not qualified to act as a parent to her children."¹²³ Apparently, the federal court was reluctant to question the substance of the family court's rulings, even if they were inherently intertwined with the ADA claim.¹²⁴

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

Even aside from the relationship between TPRs and the ADA, the claim that certain parents are not “qualified” under the ADA fails because all states provide preventive¹²⁵ and/or reunification¹²⁶ services to *134 parents, at some stage during the course of a child protective case.¹²⁷ States provide these services not to bolster already “qualified” parents, but because there is a state and national interest in preserving families, particularly ones at risk,¹²⁸ and because biological parents have certain fundamental rights.¹²⁹ The Supreme Court has long held that parenting *135 is a fundamental right, though the state may intervene under the doctrine of *parens patriae* to protect the interest of a child, subject to legal safeguards for parents.¹³⁰ Indeed, it is illegal under the Adoption Assistance and Child Welfare Act of 1980 (AACWA), ASFA, and state law for states to remove children before making “reasonable efforts” to preserve the family.¹³¹ It also is a violation of the ADA to provide services to some parents and not others. In any event, it is a parent's inabilities which “qualify” her for services, not her abilities.

Moreover, the Supreme Court has held that for the purposes of the ADA, qualified individuals include those who are not receiving services voluntarily.¹³² This category should include parents who are ordered to comply with programs, as invariably occurs after a case has been filed - whether at a pre-fact-finding hearing, at the disposition, or at a permanency hearing.

The third prong of the *prima facie* case can be met by showing intentional or unintentional discrimination. A parent could attempt to prove that she did not receive assistance because of unfounded beliefs about her disability and its effect on parenting. Tanya, for example, had raised Gaby until the age of two, and the only neglect finding against her was of excessive corporal punishment, identical to that of countless non-disabled parents who are eventually reunified with their children.¹³³ Yet *136 Tanya's caseworker, perhaps based on what appeared to be a disbelief of Tanya's potential parenting capabilities, made little effort to reunite Tanya and Gaby. Such biased treatment by the agency is all too common for mentally disabled parents.¹³⁴

In the alternative, a parent could prove that she was unintentionally discriminated against by making a disparate impact claim.¹³⁵ When state law mandates services to non-disabled parents but not disabled ones, as in New York,¹³⁶ the law has a disparate impact. A disparate impact argument could also be made where services to disabled, but not non-disabled, parents have been cut because of budget constraints.¹³⁷

A parent also can claim that she was discriminated against because the state did not adapt its reunification services to her needs, thereby denying her the benefits of public “services . . . , programs or activities.”¹³⁸ The ADA requires that “a public entity . . . make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.”¹³⁹ Parenting skills classes or housing assistance that are not tailored to a parent's mental disability are unproductive and therefore essentially a denial of benefits.¹⁴⁰

Reasonable modifications should include integration into the community wherever possible. In *Olmstead v. L.C.*, the Supreme Court found an ADA violation where the state did not provide community-based treatment for mentally disabled individuals who were deemed qualified under the state's professional evaluation.¹⁴¹ The Court held that institutionalization is a form of discrimination because it “perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life,” and that *137 “confinement in an institution severely diminishes the everyday life activities of individuals, including family relations.”¹⁴²

In the context of parenting, the Third Circuit held in *Helen L. v. Diario*¹⁴³ that the state had violated the ADA by not providing in-home services to a mother of two who used a wheelchair and required “assistance with certain activities of daily living.” This failure to provide services forced the woman to live in a nursing home separate from her children. While this holding is not specific to mentally disabled parents, it serves as strong precedent in support of assisted living for parents residing

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

with their children in community-based settings. Such plans would serve as an alternative to institutionalization of mentally disabled parents and foster care for their children. As previously noted, there are numerous supportive housing programs in New York,¹⁴⁴ as well as around the country,¹⁴⁵ for mentally disabled parents to live with their children.

Similarly, in *Henrietta D. v. Guiliani*, a district court found an ADA violation where New York City had not provided intensive case management services to individuals with AIDS.¹⁴⁶ The court held that it was necessary and reasonable for the City to maintain a single service center where individuals with AIDS could seek housing, medical, and financial assistance. It can be argued that the special needs of people with AIDS are parallel to those of mentally disabled parents, who must navigate the complex and intimidating child welfare system.¹⁴⁷ It would be reasonable, then, for the state to specially train certain caseworkers to work with mentally disabled parents and refer them for services tailored to their needs. Moreover, since child welfare cases already have multiple *138 levels of caseworkers,¹⁴⁸ specialized caseworkers should not be considered a fundamental alteration¹⁴⁹ to the state's program (the fundamental alteration defense is explored below).

2. State Defenses

There are three defenses to the ADA: that the state does not have to make fundamental alterations to its programs in order to serve a disabled person,¹⁵⁰ that it does not have to serve someone who poses a direct threat,¹⁵¹ and that the state is immune to suit by private citizens.¹⁵²

i. Fundamental Alterations

Title II permits an exception to the “no discrimination” requirements if doing so would “fundamentally alter” the nature of the program or service at issue.¹⁵³ Title III explicitly includes an “undue burden” defense, which also has been applied to Title II defendants.¹⁵⁴ The ADA's regulations specify several factors to consider in an “undue burden” claim, including the nature and cost of the proposed alteration, the overall financial resources of the agency, and the type of work the agency performs.¹⁵⁵

*139 In *Olmstead v. L.C.*, the Supreme Court followed this balancing test by holding that “in evaluating a State's fundamental-alteration defense, the . . . Court must consider, in view of the resources available to the State, not only the cost of the providing . . . care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.”¹⁵⁶ A New York court applied the balancing test in *Sanon v. Wing*, which held that the state had to continue providing home health care to plaintiffs through its Medicaid program instead of placing them in a nursing home because the state had not shown that the cost of home care was unreasonable with respect to the system as a whole.¹⁵⁷

States can argue that providing services to mentally disabled parents, such as long term therapy, constitutes a fundamental alteration of its foster care program because they are unreasonably expensive. These costs, then, must be weighed against those incurred when a child remains in foster care, both before and after a termination of parental rights.¹⁵⁸ In New York, as in the rest of the country, most children remain in foster care after the TPR for a substantial length of time while an adoptive home is sought and finalized;¹⁵⁹ even if the child is adopted (which is not always the case),¹⁶⁰ the state often continues to bear the cost of foster care through adoption subsidies, which are paid until the child is 18 (and 21 in some states, including New York¹⁶¹). In fact, it has been shown that some of the most expensive reunification services can actually save states money in the long run, because many services, such as 24-hour attendant care, are not necessary as the child gets older or the parent's *140 capabilities increase.¹⁶² The initial cost of the services is offset by future savings, when the child is no longer in foster care. The question of an “undue financial burden” is a fact-specific inquiry; under the ADA, there is no justification for a total absence of services for mentally disabled parents when non-disabled parents are entitled to these services, especially since

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

parents have a fundamental interest in retaining their parental rights.¹⁶³ The cost of reunification services would have to be astronomically and universally high in order for states to justify depriving all mentally disabled parents of the potential to be reunified with their children. Such an outcome is not supported by the facts.

States also can claim that because the ADA's regulations specifically exclude "personal services,"¹⁶⁴ they therefore are excused from providing services such as 24-hour attendant care to mentally disabled parents. This regulatory language should be read as clarifying that the ADA does not create a requirement that a public entity provide personal services. However, if a right to personal services exists through another law or practice, the ADA mandates that this be implemented in a non-discriminatory way.¹⁶⁵ For example, New York requires "diligent efforts"¹⁶⁶ for reunifying non-disabled parents with their children, which may entail a variety of services (including "personal services" such as homemakers¹⁶⁷). Disabled parents are entitled to services that have the same potential, with or without reasonable modification, for facilitating reunification.

As mentioned, in Tanya's case, the additional services that she required are not extremely costly. The essential components (more intensive casework services and prompt housing referrals) have little or no cost, and the other aspects, such as homemaker services, substance abuse counseling, and job assistance, are the same or similar to what *141 non-disabled parents receive. Regardless, these costs certainly did not outweigh Tanya's interest in regaining custody of her daughter; in fact, it had appeared for the first few years of the case, despite the lack of effort by the caseworker, that mother and daughter would be reunified (Tanya was visiting regularly, maintaining housing with her brother, and had not had any acute schizophrenic episodes). A state's potential savings through reunification of a family, rather than bearing the cost of maintaining a child in foster care, has been documented in similar cases.¹⁶⁸

ii. Direct Threat

States also could argue that requiring services for mentally disabled parents poses a "direct threat" to the safety of their children.¹⁶⁹ Title III includes a defense to a "direct threat," when the service or accommodation poses a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies"¹⁷⁰ Although Title II does not explicitly include the "direct threat" defense, it could be argued that a disabled person does not meet the "essential eligibility requirements for the receipt of services"¹⁷¹ if the receipt of those services poses a direct threat to a third person (in this case, a child).¹⁷²

*142 However, the "direct threat" argument is without merit because the AACWA and AFSA mandate "reasonable efforts" to reunify families except when a court determines that one of three specific situations exists: if the parent has subjected the child to severe and repeated abuse; if the parent has committed, attempted to commit, or aided in the murder or involuntary manslaughter of one of his or her children, or has committed a felony assault resulting in serious bodily harm to one of his or her children; or if the parent's rights to another child have been terminated involuntarily.¹⁷³ This mandate has been adopted in the child protective statutes of each state.¹⁷⁴ The plain language of the federal statutes indicates that these were the only circumstances Congress established as a presumptive threat.¹⁷⁵ By the time a parent is eligible for "reasonable" efforts, any other "threat" has been eliminated by virtue of the fact that the child already has been removed from the parent's care.¹⁷⁶ If the state thinks that a parent's mental illness constitutes a direct threat that cannot be ameliorated, it will have to prove this threat by clear and convincing evidence during the TPR.¹⁷⁷ As discussed, it is impossible for a state to meet this standard, in light of the ADA, without an inquiry involving evidence from some provision of services.¹⁷⁸

In Tanya's case, she clearly did not constitute a direct threat to Gaby, as the caseworker never reported any inappropriate behavior toward her during the supervised visits, or any suspicion of such for the short time when visits were unsupervised. Similarly successful visits are common for mentally disabled parents and their children, according to casework notes,¹⁷⁹ suggesting that the direct threat concern often may be overstated.

***143** iii. Sovereign Immunity

Another obstacle to a parent's federal claim is state sovereign immunity under the Eleventh Amendment.¹⁸⁰ Although local government and contract agencies are not immune, any action contesting a TPR also will involve the state because TPRs are governed by state child welfare laws and state court decisions. A parent's primary goal in filing an ADA claim after a TPR likely will be injunctive relief, seeking to reinstate her rights and remand the case to family court.¹⁸¹ However, if a court finds that the state is immune in a particular case, it will be protected from all forms of relief, whether monetary, injunctive, or punitive.¹⁸²

The status of immunity and Title II is murky at this point. Title IV of the ADA specifically revokes state sovereign immunity,¹⁸³ and Congress invoked the Fourteenth Amendment as the source of its authority to enact the ADA,¹⁸⁴ but this revocation has been partially invalidated by Supreme and circuit court jurisprudence as it applies to Title II.¹⁸⁵ In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court determined that states could not be sued for monetary damages under Title I of the ADA, but specifically declined to address whether the same applied for Title II.¹⁸⁶ In 2006, the Supreme Court granted certiorari in *U.S. v. Georgia* to consider whether Title II validly abrogates sovereign immunity, but then did not squarely address the issue.¹⁸⁷ The Court held only that Title II validly abrogates state ***144** sovereign immunity when it proscribes conduct that actually violates the Fourteenth Amendment; it left to the lower courts to determine, on a case-by-case basis, the more difficult question of whether conduct that violates Title II but does not violate the Fourteenth Amendment is still valid under Congress' Section 5 enforcement power under the Fourteenth Amendment.¹⁸⁸ To be valid under Section 5, the remedy proscribed by Congress must be congruent and proportional to specific findings of a pattern of state constitutional violations.¹⁸⁹

In a TPR-ADA claim, a parent must prove either that her Fourteenth Amendment rights were violated, or that the state's conduct is actionable because it is legitimately prohibited by Congress under Section 5.¹⁹⁰ It would be difficult to demonstrate that a parent's Fourteenth Amendment rights have been violated because the disabled are not a suspect class, and the state only has to show that it has a rational basis for treating disabled parents differently than non-disabled ones to maintain its sovereign immunity.¹⁹¹

However, a Section 5 argument is easier to make because the Supreme Court, applying the Section 5 test, has found that Congress validly abrogated state sovereign immunity in cases involving the right of access to courts.¹⁹² According to the Court in *Tennessee v. Lane*, access to courts is a fundamental right, stemming from the constitutional guarantees under the Due Process Clause of the Fourteenth Amendment.¹⁹³ The Supreme Court also has held that parental rights derive from Due Process: "a parent's interests in the nurture, upbringing, companionship, care and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."¹⁹⁴ Therefore, in an ADA case, a parent could argue that being denied services outright or services that are tailored to her disability is a violation of two sets of fundamental rights: those of a parent and those of a person trying to access the courts. And these rights intersect; a parent's ability to ***145** complete reunification services is inherently linked to the evidence used in TPR proceedings.¹⁹⁵

The counter-argument is that *Lane* involved physical access to courts and not the more nuanced issue of evidence. But a parent's case will be bolstered if she can also prove a pattern of discrimination based on her disability. In *Lane*, the Supreme Court noted that "the unequal treatment of disabled persons in the administration of judicial services has a long history," which justifies prophylactic measures by Congress.¹⁹⁶ If, as in *Lane*, a court finds that a state's treatment of a disabled parent reflects that which Congress intended to prevent, and that Title II is an appropriate remedy, then Section 5 should apply (and state sovereign immunity will be validly abrogated).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

It is unclear, however, how this argument would be received by a circuit court, as the courts are divided in their interpretations of the Lane holding.¹⁹⁷ In New York, the Second Circuit denied a Title II claim in the context of public education, finding that there was no fundamental right of access to post-secondary education for the disabled.¹⁹⁸ However, a respondent parent's case may be distinguishable because both parental rights and the right of access to courts are fundamental, though no circuit court has yet to be confronted with this overlap.¹⁹⁹

*146 Even if a court finds that the state is immune, a parent still may be able to seek injunctive relief under *Ex parte Young*, which provides an exception to Eleventh Amendment immunity.²⁰⁰ In order to qualify under *Ex parte Young*, the injunctive relief must end a continuing violation of federal law by a state employee acting in his official capacity.²⁰¹ The applicability of *Ex parte Young* has been upheld in ADA cases.²⁰² The Supreme Court also has stated that an *Ex parte Young* exception would be valid in Title I claims,²⁰³ although the Court has not yet addressed this question addressed with respect to Title II.²⁰⁴

E. Filing an ADA Grievance

Aside from pursuing a federal case, a parent could file an ADA complaint with the local "ADA coordinator," according to federal regulation.²⁰⁵ Implementation of this regulation varies nationally, but the ADA coordinator is generally an employee of a state or county who oversees ADA compliance among public and contract agencies.²⁰⁶ However, judging by New York City, this procedure is, at best, underutilized and unfamiliar to respondent parents. According to New York City's government website, the City has an ADA coordinator,²⁰⁷ *147 however, the person named on the website does not appear to know that ADA coordination is one of her job responsibilities.²⁰⁸ Moreover, even if this person is capable of acting as New York City's ADA coordinator, she never surfaces in child protection proceedings and no one informs respondent parents that an ADA coordinator is supposed to be available.²⁰⁹ But filing a complaint with an ADA coordinator could be a potential avenue for advocacy, at least outside of New York City.

*148 A parent could also file a claim within 180 days of the discriminatory act with the Department of Justice (DOJ) or with the federal agency that is "most closely associated with the activity of the state or local government"²¹⁰ (in this case, the U.S. Department of Health and Human Services, Administration for Children and Families, Region 2).²¹¹

There is no penalty for filing with the wrong agency, and a complaint can always be filed with the Department of Justice, as long as it is within the 180-day period. The federal agency has authority to investigate the complaint. It may attempt to resolve the problem informally. If informal resolution fails . . . it may issue a letter of findings.²¹²

If the situation still is not ameliorated, the federal agency may exercise its authority to sue the state or local government for the violation.²¹³ But again, the procedure for filing a claim with the local federal agency (the Administration for Children and Families) or with the Department of Justice in New York State is unknown to respondent parents, and, to my knowledge, has never been used in the State.²¹⁴ *149 Furthermore, the DOJ has never sued a state or local government on behalf of a parent in any jurisdiction in the country.²¹⁵

II. The Americans with Disabilities Act and State Child Welfare Law

A. Services for Mentally Disabled Parents

According to the Americans with Disabilities Act, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity" ²¹⁶

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

Therefore, if a state offers services to non-disabled parents, it should do the same for those who are disabled. There is a strong argument that disabled parents are “qualified” under the ADA for the services. Furthermore, the Adoption and Safe Families Act (ASFA) requires state agencies to engage in “reasonable efforts” to reunify all families.²¹⁷ Exceptions can only be made when a court determines that one of three conditions exists.²¹⁸

State child protection laws, however, vary in their compliance with the ADA and ASFA in equal access to services for parents. Appendix B contains a chart of state laws regarding entitlement to reunification services.

***150** 1. States without Reunification Services Requirements

New York is the only state in which the court may terminate the rights of a mentally disabled parent without proof that the agency provided reunification services and without a prior court decision allowing the agency to forego these services.²¹⁹ New York does require child welfare agencies to engage in “diligent efforts,” which involves providing services, to reunify parents with their children before a court can terminate rights on the basis of permanent neglect, severe abuse, or repeated abuse.²²⁰ And ASFA requires states to make reasonable efforts toward reunification for all parents.²²¹ ASFA's exceptions to reasonable efforts were codified in the New York law²²² for the “sole purpose” of complying with ASFA,²²³ and the two statutes are virtually identical.²²⁴ Furthermore, New York County Family Court has held that in a motion²²⁵ asking to dispense with reasonable efforts, the movant is required to prove that one of the six conditions delineated in ASFA exists.²²⁶

However, in spite of the ADA, ASFA, and state law, New York courts have continually held that agencies do not have to engage in any “diligent” or “reasonable” efforts before a court may terminate parental rights on the basis of mental illness.²²⁷ According to the courts, the TPR statute lacks a diligent efforts mandate for causes of action based on ***151** mental disability or illness.²²⁸ “The diligent efforts requirement in a neglect proceeding is specifically required by statute. It is not, however, required by statute in a proceeding [for mental illness], and we decline to read such a requirement into the statute.”²²⁹ However, to my knowledge, no mentally disabled parent in New York has raised the ADA as the basis for entitlement to “diligent” or “reasonable” efforts prior to termination.

The treatment of mentally disabled parents under New York law is indicative of discriminatory treatment around the country,²³⁰ although parents in other states are entitled to procedural safeguards. In Utah, there is a statutory presumption against reunification services when the court finds by clear and convincing evidence that a “parent is suffering from a mental illness of such magnitude that it renders the parent incapable of utilizing reunification services.”²³¹ California's statute is similar, but two medical health experts must provide the clear and convincing evidence of the parent's mental disability.²³² Other states have comparable standards, allowing courts to decide that a service plan is unwarranted either because of the parent's mental disability,²³³ or because it is generally inconsistent with the child's best interests.²³⁴ ***152** New York, however, is alone in failing to require proof in court before dispensing with reunification services. The only time an agency in New York is required to engage in reasonable efforts with a mentally disabled parent is before the initial removal of the child, and only if the court considers it “appropriate.”²³⁵ Once the child has been removed, and the agency thinks the case is progressing toward TPR, it will not be obligated to assist the parent further, since TPRs based on mental disability do not require proof of diligent efforts.²³⁶ The majority of mental disability TPRs in New York result in termination judgments, without such proof.²³⁷

2. States with Reunification Services Requirements

The majority of states (thirty, as well as DC) statutorily require services for all parents, including mentally disabled parents.²³⁸ These statutes only exclude services under the aggravated circumstances delineated in ASFA.²³⁹ Courts in these states

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

usually uphold this right to services for mentally disabled parents.²⁴⁰ However, a statutory mandate *153 is not a guarantee that mentally disabled parents will receive these mandated services. In *B.S. v. Cullman*,²⁴¹ two psychologists opined that rehabilitative services might not enable the mother to successfully parent on her own. Therefore, the court determined that providing services “would place an undue burden on an agency, [which was] already struggling with its duty to rehabilitate those parents and reunite those families who [could] be aided by its assistance.”²⁴² In *N.R. v. State Department of Human Resources*,²⁴³ the court similarly held that the statute requiring services did not apply where a parent's conduct was unlikely to change in the future; a Texas court found likewise in *Salas v. Texas Department of Protective and Regulatory Services*.²⁴⁴ These cases demonstrate that, even in states with statutory obligations to provide services, mentally disabled parents face barriers based on what may be ambiguous or discriminatory criteria.²⁴⁵

B. Mental Disability as a Ground for Termination

The ADA prohibits decisions based on a person's disabled status. Supreme Court jurisprudence extends this prohibition to decisions regarding parents. As discussed, the Court has long held that parenting is a fundamental right²⁴⁶ and that states have the discretion to construct and implement termination of parental rights statutes, limited by the *Stanley v. Illinois*²⁴⁷ requirement that a state make an “individual inquiry” into the fitness of the parent, not based on status, and the *Santosky v. Kramer*²⁴⁸ requirement that termination be proved by “clear and convincing evidence.” As *Stanley* makes clear, the protection of the family unit is inveterate.²⁴⁹ Indeed, a prevalent quotation among courts *154 and scholars²⁵⁰ is that termination of parental rights is “the family law equivalent of the death penalty in a criminal case.”²⁵¹ States, however, vary in their compliance with the ADA and Supreme Court jurisprudence on the use of disabled status as a basis for termination.²⁵² Appendix C contains a chart of state laws regarding mental disability as a ground for a TPR.

1. States in which Mental Disability Is an Express Statutory Ground for Termination of Parental Rights

Under New York law, parental rights may be terminated when the parent is “presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child who has been in the care of an authorized agency for the period of one year.”²⁵³ Mental illness is defined as “an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child.”²⁵⁴ Mental retardation is defined as “subaverage intellectual functioning which originates during the developmental period and is associated with *155 impairment in adaptive behavior to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined by the family court act.”²⁵⁵

The termination must be proven by “clear and convincing evidence,” including an examination by a court-appointed psychiatrist or psychologist.²⁵⁶ Under the statute and case law, this person may base his testimony on a single interview and is not required to review any records²⁵⁷ or to perform any psychological tests on the parent.²⁵⁸ If the parent does not make herself available for the interview, the court-appointed psychiatrist or psychologist may testify on the basis of “other available information.”²⁵⁹ Although a parent is allowed to call her own expert to testify, this is often impossible for indigent parents and their court-appointed lawyers.²⁶⁰ New York's indigent defense system has, in *156 fact, been characterized as a “crisis” by numerous authorities.²⁶¹ Nevertheless, mental illness terminations have been held constitutional by the New York Court of Appeals.²⁶²

Although New York's termination of parental rights statute never has been reviewed in federal court; nor has the Court of Appeals addressed it since the ADA's enactment, the statute likely would not survive judicial scrutiny. The statute's "clear and convincing" standard arguably is in violation of both the ADA and Supreme Court jurisprudence. Important factual determinations often are based on the opinions of a single psychiatrist who conducts only one interview, assuming the parent consents to be interviewed by a psychiatrist at all; because he has very limited interaction with the mentally disabled parent, the psychiatrist inevitably makes statements based on presumptions about group characteristics rather than on his own actual observations of individual behavior.²⁶³ Making assumptions based on disability is precisely what Congress intended to eliminate with the *157 ADA, as shown by its finding that "individuals with disabilities are a discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment . . . based on . . . stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society."²⁶⁴ In light of the ADA's purpose, one "expert" arguably does not satisfy the burden of proof required under Stanley,²⁶⁵ for an individual inquiry, and under Santosky,²⁶⁶ for clear and convincing evidence, in a termination proceeding.

It is true that the Supreme Court has shown great deference to "professional" opinions in the involuntary commitment context. In *Youngberg v. Romeo*, the Court held that "decisions made by the appropriate professional [in an institution] are entitled to a presumption of correctness" because this "is necessary to enable institutions of this type . . . to continue to function."²⁶⁷ However, the circumstances of a TPR are different in that the state's interest in protecting institutions is not involved. The state does have a compelling interest in protecting the safety and "best interest" of the child,²⁶⁸ but when considering testimony at a TPR, safety is not at issue because a child is never immediately returned to the parent if the TPR is denied. Indeed, it likely will be a year or more before the parent regains physical custody.²⁶⁹ Therefore, *158 requiring a more in-depth mental health evaluation of the parent would not infringe on the state's interests.

New York's statute is also problematic in that TPRs are based on predictions about future behavior.²⁷⁰ In civil confinement cases, courts make decisions based on predictions of "dangerousness,"²⁷¹ but experts acknowledge the inaccuracy of these judgments; a quintessential review of the scientific research concluded that two out of three clinical predictions of future dangerousness were wrong,²⁷² and the American Psychiatric Association states that unreliability of these predictions is "an established fact within the profession."²⁷³ It is also clinically difficult to predict the future behavior of mentally disabled parents, and thus the impact of that behavior on the safety and well-being of the child.²⁷⁴ And, as discussed above, the decision in a TPR does not *159 involve a calculation of imminent risk, yet the holding of the New York Appellate Division was to resolve conflicting evidence of potential parental abilities in favor of the petitioning agency. As the court explained, "[W]e have consistently held that the possibility that respondent's condition, with proper treatment, may improve in the future is insufficient to over turn Family Court's determination . . . Accordingly, to the extent that the expert opinions conflict with respect to respondent's future ability to care for her children, we agree with Family Court's resolution [terminating rights]."²⁷⁵

*160 Thirty-one other states²⁷⁶ also link mental disability to a present and future inability to care for a child, leaving the terms open to interpretation and ripe for potentially discriminatory judgments.²⁷⁷ As described in Part I, there are an array of services for parents with disabilities,²⁷⁸ and many can care for children with appropriate support,²⁷⁹ but when the statutory definitions are vague, it becomes easy *161 to make an automatic leap from disability to inability to care for a child, in both casework practice and as proof in court.

Another problematic, but unique, aspect of New York's statute is that once parental rights are terminated based on mental disability, the case is closed; there is no statutory requirement that the court decide whether the TPR also is in the best interest of the child.²⁸⁰ In New York, TPRs based on permanent neglect²⁸¹ and TPRs based on severe or repeated abuse²⁸² are

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

bifurcated proceedings: first, the grounds for the TPR are proven at trial, and then a dispositional hearing is held to decide whether it is in the child's best interest to be committed to the custody and guardianship of the agency.²⁸³ This dispositional hearing is the only time the court considers best interest, and custody is not transferred until the conclusion of the hearing.²⁸⁴ In every other state, the TPR proceeding is not bifurcated; the court contemplates the grounds for a TPR simultaneously with the best interest of the child, and custody is committed at the conclusion of a single trial.²⁸⁵ The Supreme Court of Rhode Island encapsulates the reasoning behind this: "Once [parental unfitness] is established, the best interests of the child outweigh all other considerations."²⁸⁶

Many states also elaborate on the best-interest criteria to be used in a TPR, and ASFA waives its mandate for filing a TPR if it is against the best interest of a child.²⁸⁷ Numerous states require consideration of the *162 child's wishes either in the TPR itself²⁸⁸ or as a compelling reason why the agency does not have to file a TPR petition.²⁸⁹ New York considers the child's wishes as a compelling reason,²⁹⁰ but under the law, the agency may still choose to file a TPR petition.²⁹¹ If the agency does choose to file a petition, the potential for adoption will not factor into the court's rulings during the TPR fact-finding,²⁹² which is the only hearing a mentally disabled parent receives.

Many states also consider the character of the parent-child relationship,²⁹³ including the record of visitation and communication²⁹⁴ *163 (even when this is not part of proving the TPR)²⁹⁵ and the maintenance of regular contact with the guardian or other custodian of the child;²⁹⁶ the potential effects on the child of severing the relationship;²⁹⁷ the potential of the child to be adopted;²⁹⁸ what effect a TPR would have on a sibling relationship,²⁹⁹ including whether it would substantially interfere with it;³⁰⁰ the general potential for the TPR to do more harm than good;³⁰¹ and the child's adjustment to community, home, placement, and school.³⁰² Some states also allow courts to find that a TPR is not in a child's best interest if the parent proves by a preponderance of evidence that the child will not be harmed in the future,³⁰³ or that she had good cause for failing to comply with the service plan;³⁰⁴ or because of other circumstances, such as a parent being committed to an institution, *164 including a hospital, or if the parent's absence in the child's life is due to service in the armed forces.³⁰⁵ Utah also forbids the court to terminate rights on the ground that the parent has failed to complete a treatment plan.³⁰⁶ Interestingly, Connecticut factors into best interest "the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person,"³⁰⁷ which presumably includes a caseworker.

In contrast to these states' extensive best-interest inquiries, which are mandated for all TPRs, courts in New York repeatedly have held that a dispositional hearing is not necessary for terminations based on mental illness or mental retardation.³⁰⁸ Not only is this unequal treatment for disabled parents, but it can, in fact, be contrary to the best interest of the child. This is frequently the case when adoption is a long-shot or the child is over the age of fourteen and does not want to be adopted.³⁰⁹ Unlike in the states discussed above, the potential of a child to be adopted is not part of the court's consideration during a TPR fact-finding in New York;³¹⁰ adoptability would be considered at a dispositional *165 hearing, but, again, mentally disabled parents are not entitled to these hearings.

New York's lack of dispositional hearings following mental disability TPRs has contributed to the multitude of young people still in the state's foster care system (particularly adolescents) whose parents' rights had been terminated years ago but who never were adopted.³¹¹ This problem of "legal orphans" also has been exacerbated by the strict timelines of ASFA,³¹² and is endemic across the country.³¹³ In New *166 York, these young people essentially have no legal recourse³¹⁴ and often wonder why they are in limbo.³¹⁵ Sometimes their parents' behavior *167 improves, or the parent-child relationship flourishes

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

outside the watchful eye of the system, and the parents become viable resources again, especially as the child grows older and issues such as excessive corporal punishment become irrelevant.³¹⁶ Aside from the emotional turmoil of longing to be reunified with the parent, this enduring or rekindled bond can have the unintended consequence of motivating a young person to leave the system before he or she is ready³¹⁷ in order to be with the parent, because the parent cannot be a discharge resource once her rights have been terminated.³¹⁸ There is arguably no reason, then, to terminate the parental rights of a child who lacks a concrete adoption plan, even if *168 reunification seems far-fetched at the time the agency contemplates filing a TPR. As practitioners know, the long life of a child welfare case is unpredictable and it is often best to keep all options open.³¹⁹

New York's law also is problematic in that it does not allow for a suspended judgment of a TPR³²⁰ based on mental disability,³²¹ as it does for TPRs based on permanent neglect³²² or severe or repeated abuse.³²³ Therefore, whatever the "expert" testifies to regarding a mentally disabled parent's abilities in the foreseeable future will have permanent effects; unlike non-disabled parents,³²⁴ disabled parents are never *169 granted an additional year to make improvements if the grounds for the TPR are weak or if it does not appear to be in the child's best interest to terminate rights at the time of the TPR fact-finding.³²⁵ While no other states have provisions for suspended judgments, some courts have granted comparable time periods to allow both disabled and non-disabled parents to reform.³²⁶ In contrast, New York's statute and case law regarding suspension of judgments explicitly treats disabled parents differently than non-disabled parents, and does not allow for exceptions.³²⁷

2. States in which Mental Disability Is Not an Express Statutory Ground for Termination of Parental Rights

Seventeen states, as well as the District of Columbia,³²⁸ do not specify mental disability as a ground for termination, but leave it to the court to determine a parent's abilities given all relevant factors. Vermont and Minnesota are illustrative of such a viewpoint.³²⁹ In Vermont, the court may consider providing financial support, being in regular communication, meeting the child's physical and emotional needs, and providing a safe environment.³³⁰ In Minnesota, the court can terminate rights

because of a consistent pattern of specific conduct . . . or of specific conditions directly relating to the parent and child relationship either of which are determined by the court to be of a duration or nature that renders the parent unable, for the reasonable foreseeable future, to care appropriate for . . . the child.³³¹ *170 In these states, a mentally disabled parent's rights could be terminated if one or more of the statutory factors are met, but never simply because of the parent's disabled status.

C. New York State Law as a Prime Example of an ADA Violation

New York's termination of parental rights statute is discriminatory on its face because it mandates services for non-disabled parents but not for disabled parents. New York's law also is discriminatory in that it allows a court to terminate parental rights on the basis of status; without services, parents with mental disabilities cannot demonstrate their individual capabilities, and judges therefore make decisions based on the mental illness instead of on the parent's individual capabilities.

The counter-argument is that a parent's rights are terminated because there is "clear and convincing evidence" that the disability renders her unable to care for her child, and not because of her illness per se.³³² But, as contended, the standard by which this is proven--based on the testimony of one expert who may interview the parent just once, and without review of records--is not satisfactory.

Furthermore, the lack of a dispositional hearing (and the possibility of a suspended judgment) following a mental illness termination is both discriminatory and potentially against the best interest of the child.

III. A Call for Change in Statutes and Practice, Based on Recognition of the Rights Granted under the ADA

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

Some states have incorporated the principles of the Americans with Disabilities Act into their statutes and case law, but more can be accomplished by state legislatures and judiciaries, as well as by arguably the most influential arm of child welfare--the agencies and their caseworkers. The caseworker is the one, after all, who is most involved in the daily life of a family; lawyers and judges are often unaware of the intricacies and difficulties of a case until a court appearance.³³³ Numerous scholars and practitioners have noted that court proceedings *171 are often ineffective for addressing a family's needs and for holding the agency to its mandate.³³⁴

One state, Arkansas, has actually written the Americans with Disabilities Act into its child welfare statute.³³⁵ A court can only terminate parental rights after it has found, by clear and convincing evidence, that "despite a meaningful effort . . . to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent,"³³⁶ provided, however, that "[t]he department shall make reasonable accommodations in accordance with the Americans with Disabilities Act. . . .to parents with disabilities in order to allow them meaningful access to reunification and family preservation services."³³⁷ Other state statutes, although making no reference to the ADA, explicitly require that reunification services be appropriate,³³⁸ accessible,³³⁹ and realistic³⁴⁰ to the needs of parents.³⁴¹

In addition, Idaho's TPR statute provides that, if the parent "has a disability, the parent shall have a right to provide evidence to the court regarding the manner in which adaptive equipment or supportive services will enable the parent to carry out parenting responsibilities."³⁴² This right is limited, however, by what follows: "Nothing in this section *172 shall be construed to create any new or additional obligation on state or local governments to purchase or provide adaptive equipment or supportive services for parents with disabilities."³⁴³ This provision seems to hint at the fundamental alteration defense available to states in ADA claims,³⁴⁴ but without the strict guidance of the federal law, which requires a balancing test to determine when reasonable accommodations must be made for the disabled.³⁴⁵ Still, the Idaho statute at least acknowledges the existence of disabled parents and the need to examine reasonable accommodations at TPRs. Moreover, the case law in some other states indicates an acknowledgment of the need to treat disabled parents equitably--providing services where non-disabled parents receive them,³⁴⁶ and ensuring that such services are tailored so they have a chance to prove themselves.³⁴⁷

*173 Even some New York courts have reached the conclusion that mentally disabled parents must be treated equitably, independent of state or federal mandates.³⁴⁸ Before ASFA and the ADA, the court in *In re Catholic Guardian Society of the Diocese of Brooklyn* denied a mental illness termination because of an agency's failure to engage in diligent efforts with a mentally retarded parent.³⁴⁹ "The failure of petitioner to make diligent efforts. . . is critical, not because Social Services Law Section 384-b(4)(c) contains a diligent efforts mandate, but because [this failure makes it] difficult if not impossible to assess the foreseeable future parental capacity of the respondent. It could be said that the question of diligent efforts is but one issue that is subsumed within the more general mandate in SSL Section 384-b(4)(c) to demonstrate. . . what the respondent's adaptation will be in the 'foreseeable future.'"³⁵⁰ The Court of Appeals in *re Joyce T.W. Burton Richardson*, also held that "termination [for mental illness] requires a . . . consideration of measures on the part of the State to maintain the family setting."³⁵¹

But New York and other states can do more about what the courts often acknowledge is an unfair and "painful"³⁵² process for mentally disabled parents. In *In re Henry W.*, a New York court reluctantly terminated the parental rights of a mildly retarded father who held a job and acquired a home, not because of any "wrong doing or fault on [the parent's] part" but because a psychologist, who performed two evaluations of the father, concluded that he could not parent the child independently.³⁵³ Similarly, in *In re Ashley L.*, the respondent mother showed "substantial improvements in her ability to tolerate stress, take her medications and cooperate in treatment." but the TPR was granted; *174³⁵⁴ in *In re Antonio*, the respondent mother's rights

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

were terminated, despite the fact that she had completed her service plan and was seeing a psychiatrist weekly, because of the court-appointed psychologist's testimony, which was based on a single interview.³⁵⁵

New York and other states could avoid these heart-wrenching decisions by following the lead of some other states, which have found innovative ways to avoid or mitigate the permanency of a TPR while still providing the child of a mentally disabled parent with stability. In West Virginia, for example, the Supreme Court upheld a TPR only after the agency arranged a post-TPR visitation plan with the respondent parent, and it instructed the lower courts to consider this option in future cases.³⁵⁶ Similarly, in Nebraska, the juvenile court retains jurisdiction to enter orders following the termination of a parent's rights which are consistent with the best interests of the children, including provision for continued contact with a natural parent.³⁵⁷ Massachusetts has held likewise, and also allows a TPR order to be modified if there are changed circumstances post-trial, including when an adoption is no longer feasible.³⁵⁸ Also, as discussed, because of the epidemic of legal orphans, some states now allow young people to petition to vacate their parents' TPRs,³⁵⁹ although this is a band-aid, not a solution, to problematic court findings.

Alternative living arrangements also can be utilized for children with mentally disabled parents, where appropriate. In Delaware, a court rejected a TPR in favor of an alternative planned permanent living arrangement where the 14 year-old child had thriving relationships with both her foster mother and her natural mother, and where the mentally disabled respondent mother had been providing assistance to the foster parent with the child's transportation and other needs.³⁶⁰ Cases like this one illustrate the possibility of agreements, whether in or out of court, that can be made between biological and foster parents. These arrangements are especially important for mentally disabled parents, *175 many of whom can be primary caretakers if they receive support,³⁶¹ or who can provide assistance to another caretaker. A solution of this kind may have been possible with Tanya, who had a strong reciprocal bond with her daughter as well as an amiable relationship with the foster mother. Terminating Tanya's rights may not have been necessary, if an alternative were available which allowed all of the people in Gaby's life to work together.

In fact, thirty-nine states have legalized a crucial alternative: subsidized guardianship.³⁶² Subsidized guardianship provides relatives and other caregivers the opportunity to become permanent legal guardians for children when neither returning the child to the disabled parent's home nor adoption is appropriate.³⁶³ Some states even allow this alternative to be ordered at the conclusion of a TPR, instead of terminating parental rights, even when the grounds for termination are proven.³⁶⁴ But New York is not such a state,³⁶⁵ having failed to enact *176 subsidized guardianship legislation in 1996³⁶⁶ and again in 1997.³⁶⁷ New York does have post-adoption agreements, which are now legally enforceable as contracts if they are part of the original adoption order.³⁶⁸ But a parent still has to surrender her rights (and many, like Tanya, are unwilling to do so), or those rights must be terminated, which, as discussed, can be psychologically traumatic for both parent and child, and against the child's best interest.

It is time to reform the black-and-white decision-making process behind too many TPRs, and to protect both the rights of mentally disabled parents and the interests of their children, consistent with the mandates and guidance of the ADA. New York and other states' laws should be reformed so that all parents receive services, that these services are tailored and accommodating, and that all TPR determinations are based on a comprehensive examination of a parent's abilities, as demonstrated through fulfillment of a sound service plan. But aside from, and perhaps more important than, legal reform, it is time for agencies, lawyers, and judges to be more flexible and fluid in their decision-making, allowing children to maintain all of the important *177 relationships in their lives when appropriate. No one is an island, especially not a child. Why strand a young person when we can at least consider building and strengthening his bridges?

***178 Appendix A**

State Court Decisions Regarding the Applicability of the ADA to TPRs and the use of the ADA as a Defense at TPRs

States that have applied the ADA to TPRs	IA, KS, MT, WA
States that have acknowledged the relevance of the ADA to TPRs	AK, AR, IN, MI, NM
States holding that services must be non-discriminatory, despite finding that the ADA is not applicable to TPRs	VT
States holding that an ADA violation can be raised in a child protective proceeding, but must be done prior to TPR	IA, MA, NY
State holding that TPRs are not "services, programs, or activities" under the ADA	CA, CT, LA, MA, MI, NY, RI, VT
States holding that the ADA is unrelated to TPRs	FL, VT, WI
States holding that a dismissal of a TPR is not a remedy for an ADA violation	AR, CA, CO, CT, FL, HI, IN, MA, MI, MO, NY, OH, PA, TX VT, WI
States holding that parents must raise ADA violations in separate lawsuits or procedures according to the ADA	CA, CT, HI, MA, NY, OH, VT, WI

***179 Appendix B**

Reunification Services for Mentally Disabled Parents:

30 States Requiring Services (and DC)		20 States Not Requiring Services	
State	Statute	State	Statute
Alabama	Ala. Code § 26-18-7(a)(6) (2007)	Alaska	Alaska State § 47.10.086 (c)(5) (2006)
Arkansas	Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a)-(b) (Supp. 2007)	Arizona	Ariz. Rev. Stat. Ann. § 8-846(B)(1)(b) (2007)
Delaware	Del. Code Ann. tit. 13, § 1103(d) (2006)	California	Cal. Welf. & Inst. Code § 361.5(c) (West 2007)
Georgia	Ga. Code Ann. § 15-11-58 (2006)	Colorado	Colo. Rev. Stat. § 19-3-604(1)(b) (2007)
Hawaii	Haw. Rev. Stat. § 587-26 (2006)	Connecticut	Conn. Gen. Stat. § 17a-112(j) (2006)
Idaho	Idaho Code Ann. § 16-1621 (2007)	Florida	Fla. Stat. Ann. § 39.8055(1)(d) (West 2006)
Illinois	20 Ill. Comp. Stat. 505/5(1) (2007); 325 ILL. COMP. STAT. 5/8.2 (2007)	Kentucky	Ky. Rev. Stat. Ann. § 610.127(6) (West 2007)
Indiana	Ind. Code Ann. § 31-34-21-5.5 (West 2007)	Maine	Me. Rev. Stat. Ann. tit. 22, § 4041(2) (A-2)(1)-(2) (2007)
Iowa	Iowa Code § 232. 102(5) (2007)	Massachusetts	Mass. Gen. Laws ch. 119, § 29C (2007)
Kansas	Kan. Stat. Ann. § 38-2269(b)(7) (2006)	Minnesota	Minn. Stat. § 260.012(a) (5) (2007)
Louisiana	La. Child Code Ann. art. 675(B)(2) (2003)	Montana	Mont. Code Ann. § 41-3-609(4)(B) (2005)
Maryland	Md. Code Ann., Fam. Law § 5-524 (West 2007)	Nevada	Nev. Rev. Stat. § 432B.550(6)(a)(2) (2005)
Michigan	Mich. Comp. Laws § 712A.18f (2007)	New Mexico	N.M. Stat. § 32A-4-28(B)(2) (2007)
Mississippi	Miss. Code Ann. § 43-21-609(f)(iii) (2007)	New York	N.Y. Soc. Serv. Law § 384-b(4)(c) (McKinney 2007)

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

Missouri	Mo. Ann. Stat. § 211.183 (West 2007)	North Carolina	N.C. Gen. Stat. § 7B-507(b)(1) (2007)
Nebraska	Neb. Rev. Stat. § 43-283.01 (2006)	South Carolina	S.C. Code Ann. § 20-7-1572 (2006)
New Hamp-shire	N. H. Rev. Stat. Ann. § 169- C:24-a(III)(c) (West 2007)	Utah	Utah Code Ann. § 78-3a-311(3)(d)(i) (B) (2007)
New Jersey	N. J. Stat. Ann. § 30:4C-11.3 (West 2007)	Vermont	Vt. Stat. Ann. tit. 33, § 5515(f) (2006)
North Dakota	N. D. Cent. Code § 27-20-32.2 (2005)	West Virginia	W. Va. Code § 49-6-5(b)(6) (2006)
Ohio	Ohio Rev. Code Ann. § 2151.419 (West 2007)	Wyoming	Wyo. Stat. Ann. § 14-2-309(c)(iii) (2007)
Oklahoma		Okla. Stat. tit. 10, § 7003-4.6 (2007)	
Oregon		Or. Rev. Stat. § 419B.340 (2005)	
Pennsylvania		42 Pa. Cons. Stat. Ann. § 6351(b)(2) (West 2006)	
Rhode Island		R. I. Gen. Laws § 15-7-7 (2006)	
South Dakota		S. D. Codified Laws § 26-8A-21 (2007)	
Tennessee		Tenn. Code Ann. § 37-1-166 (2006)	
Texas		Tex. Fam. Code Ann. § 161.003(a)(4) (Vernon 2007)	
Virginia		Va. Code Ann. § 16.1-283(B)(2) (2007)	
Washington		Wash. Rev. Code § 13.34.132 (2007)	
Washington, DC		D. C. Code § 4-1301.09a (2007)	
Wisconsin		Wis. Ann. Stat. § 48.355 (West 2006)	

*183 Appendix C

Mentally Disability as Grounds for Termination

33 States With (Including WI)		17 States (and DC) Without	
State	Statute	State	Statute
Alabama	Ala. Code § 26-18-7 (2007)	Connecticut	Conn. Gen. Stat. § 45a-715 (2007)
Alaska	Alaska Stat. § 47.10.011 (2006)	Florida	Fla. Stat. § 39.802 (2007)
Arizona	Ariz. Rev. Stat. Ann. § 8-533 (2007)	Idaho	Idaho Code Ann. § 16-1624 (2007)
Arkansas	Ark. Code Ann. § 9-27-341 (2007)	Indiana	Ind. Code Ann. § 31-35-2-4 (2007)
California	Cal. Fam. Code § 7826 (West 2007)	Louisiana	La. Child. Code Ann. art. 1015 (2006)
Colorado	Colo. Rev. Stat. § 19-3-604 (2007)	Maine	Me. Rev. Stat. Ann. tit. 22, § 4055 (2007)
Delaware	Del. Code Ann. tit. 13, § 1103 (2006)	Michigan	Mich. Comp. Laws § 712A.19b (2007)
Georgia	Ga. Code Ann. § 15-11-94 (2006)	Minnesota	Minn. Stat. § 260C.301 (2007)
Hawaii	Haw. Rev. Stat. § 571-61 (2006)	New Jersey	N.J. Stat. Ann. § 30:4C-15.1 (2007)
Illinois	705 Ill. Comp. Stat. 405/2-3 (2007)	New Mexico	N.M. Stat. § 32A-4-28 (2007)
Iowa	Iowa Code § 232. 116 (2007)	North Dakota	N.D. Cent. Code § 27-20-20.1 (2005)
Kansas	Kan. Stat. Ann. § 38-2269 (2006)	Pennsylvania	23 Pa. Cons. Stat. Ann. § 2511 (West 2006)
Kentucky	Ky. Rev. Stat. Ann. § 610.127 (West 2007)	Rhode Island	R.I. Gen. Laws § 15-7-7 (2006)
Maryland	Md. Code Ann., Fam. Law § 5-523 (West 2007)	South Dakota	S.D. Codified Laws § 26-8A-26 (2007)
Massachusetts	Mass. Gen. Laws ch. 119, § 24 (2007)	Tennessee	Tenn. Code Ann. § 37-1-147 (2006)

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

Mississippi	Miss. Code Ann. § 93-15-103 (2007)	Vermont	Vt. Stat. Ann. tit. 15A, § 3-504 (2006)
Missouri	Mo. Ann. Stat. § 211.447 (West 2007)	Washington, DC	D.C. Code § 16-2353 (2007)
Montana	Mont. Code Ann. § 41-3-609 (2005)	Wyoming	Wyo. Stat. Ann. § 14-3-431 (2007)
Nebraska		Neb. Rev. Stat. § 42-364 (2006)	
Nevada		Nev. Rev. Stat. Ann. § 128.106 (West 2007)	
New Hampshire		N. H. Rev. Stat. § 170-C:5 (2007)	
New York		N.Y. Soc. Serv. Law § 384-b (McKinney 2007)	
North Carolina		N. C. Gen. Stat. Ann. § 7B-1111 (West 2007)	
Ohio		Ohio Rev. Code Ann. § 2151.353 (West 2007)	
Oklahoma		Okla. Stat. Ann. tit. 10, § 7006-1.1 (West 2007)	
Oregon		Or. Rev. Stat. § 419B.504 (2006)	
South Carolina		S. C. Code Ann. § 20-7-1572 (2006)	
Texas		Tex. Fam. Code Ann. § 161.003 (Vernon 2007)	
Utah		Utah Code Ann. § 78-3a-408 (2007)	
Virginia		Va. Code Ann. § 16.1-283 (2007)	
Washington		Wash. Rev. Code § 13.34.180 (2007)	
West Virginia		W. Va. Code § 49-6-5 (2006)	
Wisconsin		Wis. Stat. Ann. § 48.415 (West 2006)	

***187 Appendix D**

States that contemplate best interest of the child simultaneously as TPR (every state except New York)

State	Statute
Alabama	Ala. Code § 26-18-7 (2006)
Alaska	Alaska Stat. § 47.10.088 (2006)
Arizona	Ariz. Rev. Stat. Ann. § 8-533 (2007)
Arkansas	Ark. Code Ann. § 9-27-341 (2007)
California	Cal. Welf. & Inst. Code § 366.26 (2007)
Colorado	Colo. Rev. Stat. § 19-3-602 (2007)
Connecticut	Conn. Gen. Stat. § 45a-715 (2007)
Delaware	13 Del. Code Ann. § 1103 (2006)
Florida	Fla. Stat. § 39.802 (2007)
Georgia	Ga. Code Ann. § 15-11-94 (2006)
Hawaii	Haw. Rev. Stat. § 571-61 (2006)
Idaho	Idaho Code Ann. § 16-1624 (2007)
Illinois	705 Ill. Comp. Stat. 405/2-21 (2007)
Indiana	Ind. Code Ann. § 31-35-2-4 (2007)
Iowa	Iowa Code § 232. 111 (2007)
Kansas	Kan. Stat. Ann. § 38-2365 (2006)
Kentucky	Ky. Rev. Stat. Ann. § 625.050 (West 2006)
Louisiana	La. Child. Code Ann. art. 1015 (2006)
Maine	Me. Rev. Stat. Ann. tit. 22, § 4055 (2007)
Maryland	Md. Code Ann., Fam. Law § 5-337 (West 2007)
Massachusetts	Mass. Gen. Laws ch. 119, § 29C (2007)
Michigan	Mich. Comp. Laws § 712A.19b (2007)
Minnesota	Minn. Stat. § 260C.301 (2007)
Mississippi	Miss. Code Ann. § 93-15-103 (2007)
Missouri	Mo. Ann. Stat. § 211.452 (West 2007)
Montana	Mont. Code Ann. § 41-3-604 (2005)
Nebraska	Neb. Rev. Stat. § 42-292 (2006)

Nevada	Nev. Rev. Stat. Ann. § 128.105 (West 2006)
New Hampshire	N.H. Rev. Stat. § 169-C:24 (2007)
New Jersey	N.J. Stat. Ann. § 30:4C-15.1 (2007)
New Mexico	N.M. Stat. § 32A-4-28 (2007)
North Carolina	N.C. Gen. Stat. Ann. § 7B-1104 (West 2007)
North Dakota	N.D. Cent. Code § 27-20-20.1 (2005)
Ohio	Ohio Rev. Code Ann. § 2151.414 (West 2007)
Oklahoma	Okla. Stat. Ann. tit. 10, § 7006-1.1 (West 2007)
Oregon	Or. Rev. Stat. § 419B.500 (2005)
Pennsylvania	23 Pa. Cons. Stat. Ann. § 2511 (West 2007)
Rhode Island	R.I. Gen. Laws § 15-7-7 (2006)
South Carolina	S.C. Code Ann. § 20-7-768 (2006)
South Dakota	S.D. Codified Laws § 26-8A-26 (2007)
Tennessee	Tenn. Code Ann. § 37-1-147 (2006)
Texas	Tex. Fam. Code Ann. § 161.003 (Vernon 2007)
Utah	Utah Code Ann. § 62A-4a-203.5 (2007)
Vermont	Vt. Stat. Ann. tit. 15A, § 3-504 (2007)
Virginia	Va. Code Ann. § 16.1-283 (2007)
Washington	Wash. Rev. Code § 13.34.132 (2007)
Washington, DC	D.C. Code § 16-2353 (2007)
West Virginia	W.Va. Code § 49-6-5b (2006)
Wisconsin	Wis. Stat. Ann. § 48.417 (West 2006)
Wyoming	Wyo. Stat. Ann. § 14-3-431 (2007)

Footnotes

- ^{a1} Fellow, St. John's University School of Law; Interim Director, Child Advocacy Clinic, St. John's University School of Law; Skadden Fellow, Legal Aid Society, Juvenile Rights Division; J.D. 2004, Columbia Law School. I would like to thank Professors Leigh Goodmark, Theresa Hughes, and Michael Simons for their insight and support of this article.
- ¹ For purposes of preserving attorney-client confidentiality, all client and party names have been changed.
- ² I represented Gaby as a law guardian in New York State Family Court. Under New York law, the law guardian “help[s] protect [the minor's] interests and [expresses his or her] wishes to the court.” *N.Y. Fam. Ct. Act § 241* (2007).
- ³ As Gaby's counsel, I would not have advised an adversary; however, I did have permission to speak with Tanya from her attorney.
- ⁴ Kevin L. Cope, Comment, *Sutton Misconstrued: Why the ADA Should Now Permit Employers to Make Their Employees Disabled*, 98 *Nw. U. L. Rev.* 1753, 1758 (2004).
- ⁵ See Office on Disability, U.S. Dep't of Health & Human Services, ADA Fact Sheet (2005), <http://www.hhs.gov/od/documents/ADAFactSheet.doc>; see also Lita Jans & Susan Stoddard, Chartbook on Women and Disability in the United States §4.2 (1991), available at <http://www.infouse.com/disabilitydata/womendisability> (including at least 6.9 million Americans with disabilities between the ages of 18 and 64 who are custodial parents).
- ⁶ 42 U.S.C. § 12102(2)(A)-(C) (2007).
- ⁷ 28 C.F.R. § 35.104 (2007).
- ⁸ 29 U.S.C.A. § 794 (2007).
- ⁹ 42 U.S.C. §12131 (1)(A)-(B) (2007).
- ¹⁰ 28 C.F.R. § 35.102 (2007).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 11 42 U.S.C. § 12131 (1)(A)-(B).
- 12 See *Tennessee v. Lane*, 541 U.S. 509, 526 (2004) (discussing that in the deliberations that led to the enactment of the ADA, Congress found “hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions”).
- 13 42 U.S.C. § 12101(b)(4) (2007).
- 14 § 12101(b)(2)-(3).
- 15 § 12101(b)(1).
- 16 See, e.g., H.R. Rep. No. 101-485, Part 3 at 25 (1990) (House Judiciary Committee Report on the ADA observing that “discriminatory policies and practices affect people with disabilities in every aspect of their lives,” including “securing custody of their children”).
- 17 28 C.F.R. § 42.503(a)-(f) (2007) (applying to all court systems receiving federal financial assistance).
- 18 *Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999).
- 19 *Tennessee v. Lane*, 541 U.S. at 546 (Rehnquist, C.J., dissenting).
- 20 *Id.* at 531 (majority opinion).
- 21 *Id.* at 532.
- 22 *Id.* at 527.
- 23 The Supreme Court has not ruled on the applicability of Title II to TPRs. Most recently, it denied a petition for a writ of certiorari in the case of *In re Kayla N.*, 900 A.2d 1202 (R.I. 2006), cert. denied, 127 S. Ct. 1372 (2007).
- 24 *Yeskey v. Pennsylvania*, 524 U.S. 206 (1998).
- 25 *Id.* at 212 (citing *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).
- 26 *Henrietta v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003).
- 27 *Tennessee v. Lane*, 541 U.S. at 511.
- 28 *Pascuiti v. N.Y. Yankees*, 87 F. Supp. 2d 221, 224 (S.D.N.Y. 1999).
- 29 *Delano-Pyle v. Victoria County*, 302 F.3d 567(5th Cir. 2002).
- 30 *Smith v. Univ. of State of N.Y.*, 1997 WL 800882 (W.D.N.Y. 1997); *Essen v. Bd. of Educ. of Ithaca City Sch. Dist.* 16 A.D.D. 179 (N.D.N.Y. 1996); *Garret v. Chi. Reform Bd. of Trs.*, 17 A.D.D. 810 (N.D. Ill. 1996).
- 31 *Burgess v. Alameda Hous. Auth.*, 98 Fed. Appx. 603(9th Cir. 2004).
- 32 *Gaona v. Town & Country Credit*, 324 F.3d 1050, 1056 (8th Cir. 2003).
- 33 *Tandy v. City of Wichita*, 380 F.3d 1277(10th Cir. 2004); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 379 (11th Cir. 2001).
- 34 *Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002).
- 35 *Id.* at 896-99.
- 36 See, e.g., New York's TPR statute, *N.Y. Soc. Serv. Law §384-b*, which provides that “it is the intent of the legislature ... to provide procedures ... where positive ... parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights.” See also *infra* note 69.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 37 [Innovative Health Sys., Inc. v. City of White Plains](#), 117 F.3d 37, 45 (2d Cir. 1997).
- 38 [In re La'Asia S.](#), 739 N.Y.S.2d 898, 909. (N.Y. Fam. Ct. 2002).
- 39 *Id.*
- 40 See, e.g., [In re Kayla N.](#), 900 A.2d 1202 (Supp. Ct. R.I. 2006); [In re Ronald Dietrich](#), 2006 WL 2355135 (Mich. App.); [In re Ivan M.](#) 2006 WL 1487173 (Cal.App. 4 Dist.); [Adoption of Terrence](#), 787 N.E.2d 572, 577 (Mass. App. Ct. 2003); [In re Antony B.](#), 735 A.2d 893, 899 (Conn. App. 1999); [State ex rel. B.K.F.](#), 704 So.2d 314, 317 (La. App. 1997); [In re B.S., Juvenile](#), 693 A.2d 716, 720-721 (Vt. 1997).
- 41 143 P.3d 103, 107 (Mont. 2006).
- 42 28 C.F.R. § 35.130(b)(7) (2007).
- 43 No. 4-173/04-0166, 2004 LEXIS 556, at *5 (Iowa Ct. App. Mar. 24, 2004), [aff'd 682 N.W.2d 83 \(2004\)](#).
- 44 Washington State also has applied the ADA to TPR proceedings, though no actual violations have been found. See, e.g., [In re Dependency of C.C.](#), No. 40888-7-I, 1999 WL 106824, at *5 (Wash. Ct. App. Mar. 1, 1999); [In re Welfare of A.J.R.](#) 896 P.2d 1298, 1302 (Wash. Ct. App. 1995).
- 45 [J.H. v. State Dep't of Health & Social Services](#), 30 P.3d 79, 86 n.11 (Alaska 2001) (assuming, arguendo, that the ADA applies to TPR proceedings, but holding that “AS 47.10.086(a)'s requirement that the department make reasonable efforts to provide [respondent] with family support services appears to be essentially identical to the ADA's reasonable accommodation requirement”); [In re Terry](#), 610 N.W.2d 563, 570 (Mich. App. 2000) (holding same, while simultaneously finding that a parent may not raise the ADA as a defense to a TPR).
- 46 131 P.3d 1281, 1285 (Kan. App. 2006).
- 47 715 N.W.2d 771 (Iowa Ct. App. 2006).
- 48 No. 04AP-803, 2005 WL 675798, at *8 (Ohio Ct. App. Mar. 24, 2005). See also [In re John D.](#), 934 P.2d 308, 313-15 (N.M. Ct. App. 1997) (holding that “Section 12132 of the ADA [applies] in situations where a state has a statutory duty or otherwise undertakes to assist a person,” including TPRs, but finding that section inapplicable because the ground for TPR was abandonment and the state did not have a statutory obligation to provide services to any parent in an abandonment case).
- 49 No. 250791, 2004 WL 895950, at *3 (Mich. Ct. App. April 27, 2004).
- 50 *Id.*
- 51 No. CA 06-626, 2006 WL 3425011, at *3 (Ark. Ct. App. Nov. 29, 2006).
- 52 [In re B.S., Juvenile](#), 693 A.2d 716, 722-23 (Vt. 1997).
- 53 See definition *infra* note 120.
- 54 See [In re Doe](#), 60 P.3d 285, 291 (Haw. 2002); [In re Chance Jahmel B.](#), 723 N.Y.S.2d 634, 640 (N.Y. Fam. Ct. 2001); [Adoption of Gregory](#), 747 N.E.2d 120, 126-127 (Mass. 2001); [In re Anthony P.](#), 101 Cal. Rptr. 2d 423, 425-426 (Cal. App. 2000); [In re Harmon](#), No. 00 CA 2693, 2000 WL 1424822, at *12 (Ohio Ct. App. Sept. 25, 2000); [In re Antony B.](#), 735 A.2d 893, 899 n.9 (Conn. App. 1999); [In re A.P.](#), 728 A.2d 375, 379 (Pa. Super. 1999); [In re B.S.](#), 693 A.2d at 722; [In re Torrance P.](#), 522 N.W.2d 243, 246 (Wis. Ct. App. 1994). But see *infra* note 81.
- 55 [In re E.E.](#), 736 N.E.2d 791, 796 (Ind. Ct. App. 2000).
- 56 *Id.* at 796.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 57 Id.
- 58 Id.
- 59 See, e.g., *J.H. v. State*, 30 P.3d 79; *Roby*, 2006 WL 3425011; In re E.E., 736 N.E.2d 791; In re K.K., 682 N.W.2d 83; In re T.M., 715 N.W.2d 771; In re K.M., 131 P.3d 1281; In re *Murphy*, 2004 WL 895950; In re *Terry*, 610 N.W.2d 563; In re M.H., 143 P.3d 103; In re *John D.*, 934 P.2d 308; In re *Ratliff*, 2005 WL 675798; In re *Welfare of A.J.R.*, 896 P.2d 1298; In re *Dependency of C.C.*, 1999 WL 106824.
- 60 28 C.F.R. § 35.130(b)(1) (2007).
- 61 As acknowledged by the Alaska Supreme Court, *J.H. v. State Dep't*, 30 P.3d at 86 n.11.
- 62 28 C.F.R. § 35.130(b)(3)(iii) (2007).
- 63 See, e.g., N.Y. Fam. Ct. Act (McKinney 2007); Cal. Welf. & Inst. Code (West 2007).
- 64 See 28 C.F.R. § 35.130(b)(1) (2007) (prohibiting a public entity from discriminating either directly or “through contractual, licensing, or other arrangements”).
- 65 See, e.g., *M.C. v. Dep't of Children & Families*, 750 So.2d 705 (Fla. Dist. Ct. App. 2000); In re *B.S.*, 693 A.2d 716 (Vt. 1997); In re *Torrance P.*, 522 N.W.2d 243 (Wis. Ct. App. 1994).
- 66 In re *Torrance P.*, 522 N.W.2d at 246.
- 67 In re *B.S.*, 693 A.2d at 721.
- 68 Id.
- 69 *M.C. v. Dep't of Children & Families*, 750 So.2d at 706.
- 70 See supra text accompanying note 59.
- 71 The purpose of child protection statutes is to protect the safety and interests of children. See, e.g., N.Y. Fam. Ct. Act § 1011 (McKinney 2007) (“This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being.”); see also *Ariz. Rev. Stat. Ann. § 8-800* (2007); *23 Pa. Cons. Stat. §6302* (2007).
- 72 See supra note 69.
- 73 See Appendix D.
- 74 As long as the child welfare agency is involved (which will usually be for at least a year, while the child awaits adoption, see infra note 159), the child will not be allowed any contact with the parent. See N.Y. Soc. Serv. § 384-b (permitting courts to terminate parental rights, after which the biological parent-child relationship has no legal meaning); N.Y. Fam. Ct. Act § 1089(a)(1) (McKinney 2007) (providing that a parent whose rights have been terminated will not be notified of permanency hearings); In re *April C.*, 31 A.D.3d 1200 (N.Y. App. Div. 2006) (finding that respondent lacked standing to challenge permanency hearing orders because her parental rights had been terminated).
- 75 See infra notes 316-22.
- 76 See, e.g., Cal. Gov't Code § 65000 (2007); N.Y. County Law § 225 (McKinney 2007); Vt. Stat. Ann. tit. 10, § 6086 (2007).
- 77 See supra text accompanying note 13.
- 78 See, e.g., *Innovative Health Sys. Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 79 [In re La'Asia S.](#), 739 N.Y.S.2d at 909.
- 80 See, e.g., [In re Brendan C.](#), 874 A.2d 826, 836 (Conn. App. Ct. 2005); [In re E.T.C.](#), 141 S.W.3d 39, 48 (Mo. Ct. App. 2004); [In re Doe](#), 60 P.3d 285, 291-93 (Haw. 2002); [Adoption of Gregory](#), 747 N.E.2d 120, 125 (Mass. 2001); [In re Cassandra T.](#), No. 01-1477, 2001 WL 1243364, at *3 (Wis. Ct. App. Oct. 18, 2001).
- 81 [McLeod v. State Dep't of Human Servs.](#), No. 99-233-P-H, 1999 WL 33117123, at *1 (D. Me. Nov. 2, 1999) (granting defendant's motion to dismiss on grounds that “[a] federal court, pursuant to the Younger doctrine, must abstain from hearing a case over which it has jurisdiction ‘so long as there is (1) an ongoing state judicial proceeding ... that (2) implicates an important state interest, and (3) provides an adequate opportunity for the plaintiff to raise the claims advanced in [her] federal lawsuit’”).
- 82 See Michael L. Perlin, “What's Good is Bad, What's Bad is Good, You'll Find out When You Reach the Top, You're on the Bottom”: Are the Americans with Disabilities Act (and [Olmstead v. L.C.](#)) Anything More than “Idiot Wind?”, 35 U. Mich. J.L. Reform 235, 242 (2002).
- 83 [Arline](#), 480 U.S. at 284.
- 84 See [supra](#) notes 13-17.
- 85 [Yeskey](#), 524 U.S. at 212.
- 86 [Innovative Health Sys.](#), 117 F.3d 37.
- 87 [Civic Ass'n of the Deaf of N.Y. City v. Giuliani](#), 970 F. Supp 352 (S.D.N.Y. 1997).
- 88 See [id.](#) at 361.
- 89 [Innovative Health Sys.](#), 117 F.3d at 47.
- 90 These terms are used in New York State. The disposition is the hearing immediately following a fact-finding for neglect or abuse and determines the child's best interest and the parent's service plan, [N.Y. Fam. Ct. Act § 1045](#); the permanency hearing takes places within eight months after the child was first removed and placed in foster care, and every six months thereafter, [§ 1089](#); a service plan review is an out of court meeting with the parents, child, and agency which also takes place every six months, [N.Y. Soc. Serv. Law § 409-e\(2\)-\(3\)](#) (2006). All states have hearings and meetings after the initial fact-finding, though different states use different terminology. See statutes cited in Appendix B.
- 91 [Terrence](#), 787 N.E.2d at 577-78; [In re M.C., Jr. D.C., N.C.](#), No. 02-0860, 2002 WL 1758359, at *2 (Iowa Ct. App. July 31, 2002).
- 92 [Terrence](#), 787 N.E.2d at 577-78.
- 93 [In re Chance Jahmel B.](#), 723 N.Y.S.2d at 640.
- 94 See [In re Latasha F.](#), 251 A.D.2d 1005, 1006 (N.Y. App. Div. 1998) (stating that respondent mother “would be required to demonstrate her ability to provide a safe and adequate home environment for the child before the child was returned to her care and custody”).
- 95 See [In re Allen T. and Noah T.](#), 801 N.Y.S.2d 776 (N.Y. Fam. Ct. 2005) (dispositional order for non-disabled parent was to: 1) submit to an evaluation for drug/alcohol abuse counseling and to follow the recommendation of the evaluators, 2) submit to a psychological evaluation and to follow the recommendation of the evaluator, and 3) obtain housing); [In re Brandon O.O.](#), 304 A.D.2d 873 (N.Y. App. Div. 2003) (non-disabled respondent to participate in mental health counseling, complete a substance abuse treatment program, refrain from using illegal drugs and alcohol, and complete a protective parenting class); [In re Latasha F.](#), 251 A.D.2d 1005 (N.Y. App. Div. 1998) (DSS service plan for non-disabled incarcerated mother was to attend drug and alcohol counseling and provide a safe and adequate home for the child). See also [In re Clarence Michael W.](#), 33 A.D.3d 485 (N.Y. App. Div. 2006); [In re Octavia Lorraine O.](#), 34 A.D.3d 258 (N.Y. App. Div. 2006); [In re Emma L.](#), 35 A.D.3d 250 (N.Y. App. Div. 2006); [In re Amani T.](#), 33 A.D.3d 542 (N.Y. App. Div. 2006); [In re Alec B.](#), 34 A.D.3d 1110 (N.Y. App. Div. 2006); [In re Edward G.G.](#), 35 A.D.3d 1144 (N.Y. App.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

Div. 2006); *In re Dessa F.*, 35 A.D.3d 1096 (N.Y. App. Div. 2006); *In re Brian C.*, 31 A.D.3d 1124 (N.Y. App. Div. 2006); *In re Jose R.*, 32 A.D.3d 1284 (N.Y. App. Div. 2006); *In re Raena O.*, 31 A.D.3d 946 (N.Y. App. Div. 2006).

96 Parenting classes for individuals with mental illnesses are offered in New York City. The Brooklyn Borough of Community Service provides homemaker services to parents with disabilities that focus on managing the household and parenting skills. Posting of adult services, <http://www.bbcs.org/programs.php#adult> (last visited Nov. 6, 2007).

97 See, e.g., *In re Brandon O.*, 304 A.D.2d 873 (N.Y. App. Div. 2003).

98 See, e.g., *In re Latasha F.*, 251 A.D.2d 1005 (N.Y. App. Div. 1998).

99 See *In re Allen T. and Noah T.*, 801 N.Y.S.2d 776 (finding that agency failed to follow-up appropriately with dispositional orders, while respondent did “virtually everything” to comply); *In re Latasha F.*, 251 A.D.2d 1005 (finding that agency failed to advise incarcerated respondent, who had complied with services and visitation, that her plan for the care and return of her child was unacceptable, and did not assist her in formulating a new plan before filing a TPR).

100 See *L.C.*, 527 U.S. 581; *Henrietta*, 331 F.3d 261; *Helen L. v. Didario*, 46 F.3d 325 (3d Cir. 1995) (discussing intensive case management). Possible facilities in New York City include: Center for Urban Community Services--posting of vacancies available through the Center for Urban Community Services, <http://www.cucs.org> (last visited Nov. 6, 2007); Unique People, posting of vacancies available through Unique People, <http://www.forhome.org> (last visited Nov. 6, 2007); Women In Need, posting of vacancies available through Women In Need, <http://www.women-in-need.org/> (last visited Nov. 6, 2007).

101 For studies examining the relationship between life stressors and schizophrenic symptoms, see Ross M.G. Norman & Ashok K. Malla, *Stressful Life Events and Schizophrenia I: A Review of the Research*, 162 *Brit. J. Psychiatry* 161-166 (1993); Joseph Ventura et al., *A Prospective Study of Stressful Life Events and Schizophrenic Relapse*, 98 *J. Abnormal Psychol.* 407-411 (1989).

102 Joanne Nicholson et al., *Critical Issues for Parents with Mental Illness and their Families* 14 (Center for Mental Health Services Research, Department of Psychiatry University of Massachusetts Medical School 2001).

103 Services such as homemaker services can be provided to prevent foster care or reunify families. *N.Y. Comp. Codes R. & Regs. tit. 18, § 423.2(b)(5)* (2007).

104 See Gary R. Bond et al., *Does Competitive Employment Improve Nonvocational Outcomes for People with Severe Mental Illness?*, 69 *J. Consulting & Clinical Psychol.* 489, 497-99 (2001).

105 *N.Y. Soc. Serv. Law §§ 384-b(4)(c), 6(e)* (McKinney 2007).

106 According to *N.Y. Fam. Ct. Act § 262* (McKinney 2006), respondent parents are entitled to representation at all child protective proceedings. However, prior to a law taking effect in 2004 which increased the rate-of-pay for court appointed lawyers (Act effective Jan. 1, 2004, ch. 62, pt. J, sec. 5, 2003 N.Y. Sess. Laws as applied to *N.Y. Jud Law § 35* (McKinney 2007) and *N.Y. County Law § 722(b), (c), (f)* (McKinney 2007); see also *infra* note 260), there was a shortage of court appointed attorneys in New York. See Julia Vitullo-Martin & Brian Maxey, *New York Family Court: Court User Perspectives* 12-16 (Vera Institute of Justice 2000), available at http://www.vera.org/publication_pdf/nyfamilycourt.pdf; Klaus Eppler et al., *Report of the Appellate Division First Department Committee on Representation of the Poor: Crisis in the Legal Representation of the Poor* (2001), available at <http://nysl.nysed.gov/Archimages/4826.PDF>; Somini Sengupta, *Lack of Lawyers Crippling Family Court*, *Report Says*, *N.Y. Times*, May 14, 2000, § 1, at 35. Because of this shortage, respondent parents did not retain their appointed counsel from the original neglect proceedings, and were rarely, if ever, notified of their right to an attorney at permanency hearings. It was unusual for a parent to have representation at permanency hearings. Julia Vitullo-Martin & Brian Maxey, *New York Family Court: Court User Perspectives* 15 (Vera Institute of Justice 2000), available at http://www.vera.org/publication_pdf/nyfamilycourt.pdf.

107 The reasons for this are threefold: the goal upon entering foster care is almost always reunification (*infra* notes 127- 28); the agency ordinarily will not file a petition for TPR until the child has been in care at least 15 months (*infra* note 112); and the family court calendar is extremely backlogged (see Vitullo-Martin, *supra* note 106; Eppler, *supra* note 106; Sengupta, *supra* note 106; *infra* note 159 (the average length of time in foster care in New York, as elsewhere, is 58 months)).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 108 See, e.g., *In re Destiny CC.*, 40 A.D.3d 1167 (N.Y. App. Div. 2007); *In re Dessa F.*, 35 A.D.3d 1096 (N.Y. App. Div. 2006); *In re Vivian OO.*, 34 A.D.3d 1111 (N.Y. App. Div. 2006); *Termination of Parental Rights Proceeding Lakeside Family and Children's Service v. Conchita J.*, 814 N.Y.S.2d 565 (N.Y. Fam. Ct. 2005); *In re W.N.*, 801 N.Y.S.2d 243 (N.Y. Fam. Ct. 2005); *In re Edward V.V.*, 814 N.Y.S.2d 560 (N.Y. Fam. Ct. 2005).
- 109 Vitullo-Marten, *supra* note 106.
- 110 *In re Jane Doe*, 60 P.3d 285, 294 (Haw. 2002).
- 111 Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amendments to scattered sections of 42 U.S.C.).
- 112 42 U.S.C. § 675(5). ASFA's 15 out of 22 month timeline has been adopted in almost every state, *infra* note 312.
- 113 State and federal courts appear to have concurrent jurisdiction over matters that relate to parental rights and the ADA. See Theresa Glennon, *Lawyering for the Mentally Ill: Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 Temp. Pol. & Civ. Rts. L. Rev. 273, 300 (2003); see also *McInnes-Mesnor v. Maine Medical Center*, 211 F. Supp. 2d 256, 263 (D. Me. 2002), *aff'd* 319 F.3d 63 (1st Cir. 2003); *Black v. Dep't of Mental Health*, 100 Cal. Rptr. 2d 39, 42 n.4 (Cal. App. 2 Dist. 2000); but see *McLeod v. State of Maine Dep't of Human Servs.*, No. 99-233-P-H, 1999 WL 33117123 at *2 (D. Me. Nov. 2, 1999).
- 114 See Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 8 Geo. J. on Poverty L. & Pol'y. 1, 39-47 (2001).
- 115 See 28 CFR § 35.130(b)(1).
- 116 42 U.S.C. § 12102(2)(A)-(C).
- 117 See *Ryan v. Grae & Rybicki, P.C.*, 135 F.3d 867, 872 (2d Cir. 1998) (finding no substantial limitation where impairment limited plaintiff's ability "only periodically"); *Swanson v. Univ. of Cincinnati*, 268 F.3d 307, 315-317 (6th Cir. 2001) (periodic mental illness with successful treatment is not disability).
- 118 *Taylor v. Phoenixville Sch. Dist.*, 113 F. Supp. 2d 770, 773 (E.D. Pa. 2000) (prima facie case made out for plaintiff by a showing that "he or she (1) has a disability (2) is a qualified individual and (3) has suffered an adverse employment action because of that disability"); *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1027-28 (8th Cir. 1999) (summary judgment denied to defendant where plaintiff was a medical student and suffered from Obsessive Compulsive Disorder).
- 119 See, e.g., case cited *supra* note 41; cases cited *infra* note 227.
- 120 Reunification services are provided and/or coordinated by the agency and facilitate the reunification of a family when a child has been placed in foster care. They can include parenting classes, individual and/or family therapy, education, employment and housing assistance, and programs addressing domestic violence, substance abuse, anger management, etc. as appropriate. See, e.g., *N.Y. Fam. Ct. Act* §§ 1055(c), 1089(d)(2)(viii)(F) (2007); *S.C. Code Annot. § 20-7-764(B)(3)* (2006); see also Appendix B.
- 121 *McLeod*, 1999 WL 33117123 at *1-2 (granting defendant's motion to dismiss on grounds that a federal court, pursuant to the Younger doctrine, "must abstain from hearing a case over which it has jurisdiction so long as there is (1) an ongoing state judicial proceeding that (2) implicates an important state interest and (3) provides an adequate opportunity for the plaintiff to raise the claims advanced in [her] federal lawsuit"); *Morrison v. Comm'r of Special Servs.*, No. CV 94-5796 RJD, 1996 WL 684426 (E.D.N.Y. Nov., 18, 1996); *Bartell v. Lohiser*, 215 F.3d 550 (6th Cir. 2000).
- 122 *Morrison*, 1996 WL 684426, at *4.
- 123 *Id.*
- 124 See *supra* text accompanying note 59.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 125 Preventive services are designed to avoid removing the child from his home and placing him in state custody. New York's Social Services Law defines such services as "supportive and rehabilitative services provided ... to children and their families for the purpose of: averting an impairment or disruption of a family which will or could result in the placement of a child in foster care; enabling a child who has been placed in foster care to return to his family at an earlier time than would otherwise be possible; or reducing the likelihood that a child who has been discharged from foster care would return to such care." *N.Y. Soc. Serv. Law* § 409 (McKinney 2003). See also *Mass. Gen. Laws ch. 18B, § 3(A)(1)* (2002); *Fla. Stat. § 39.402(7)* (West Supp. 2007); *Cal. Welf. & Inst. Code* § 11400(l) (West 2001) (amended 2007).
- 126 *Supra* notes 120 and 125.
- 127 Federal legislation, such as AACWA and ASFA, specifically provide that reasonable efforts must be made before removing children from their biological parents. See Adoption Assistance and Child Welfare Act of 1980, *Pub. L. No. 96-272*, § 471(a)(15)(A), 94 Stat. 501, 503; Adoption and Safe Families Act of 1997, *Pub. L. No. 105-89, 111 Stat. 2116*, 2116 §101(a)(15)(B)(i). Reasonable efforts must also be made after a child has been removed in order to reunify the family. See Adoption Assistance and Child Welfare Act § 471(a)(15)(B); Adoption and Safe Families Act §101(a)(15)(B)(ii). New York's child protective statutes, like all states', provide the same. See *N.Y. Fam. Ct. Act §1015-a* (McKinney 1999); § 1022(a)(iii)-(iv), (c) (McKinney Supp. 2007); §1027(b)(i) (McKinney Supp. 2007); § 1089(d)(2)(viii)(F) (McKinney Supp. 2007); *N.Y. Soc. Serv. Law* § 409 (McKinney 2003). But see Appendix A for New York and other state statutes under which mentally disabled parents are not always entitled to services after a child has been removed.
- 128 See, e.g., *N.Y. Soc. Serv. Law* § 384-b(1)(a)(iii) (McKinney Supp. 2007) ("the state's first obligation is to help the family with services to prevent its break-up or reunite it if the child has already left home"); *S.C. Code Ann. § 20-7-764(B)(1)(b)* (West. Supp. 2006) ("[t]he [child protection] plan must be oriented to correcting [the] problems and circumstances [of the family] in the shortest possible time in order to expedite the child's return to the home"); Pa. Cons. Stat. Ann. § 6302 (West 2001) (a purpose of child protective law is to "stabilize and protect the integrity of family life."). Also, New York, like all other states, puts reunification as the automatic goal upon the initial filing of a child protective case. *N.Y. Fam. Ct. Act* § 1015-a; § 1022(a)(iii)-(iv), (c); §1027(b)(i); § 1089(c)(4)(i).
- 129 See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982). According to the Santosky Court, "the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *Id.* at 753. See also *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) ("A parent's interest in the accuracy and injustice of the decision to terminate his or her parental rights is a commanding one").
- 130 States have the discretion to construct and implement termination of parental rights statutes, but Stanley requires that a state make an "individual inquiry" into the fitness of the parent, not based on status, 405 U.S. at 645, and Santosky requires that termination be proved by "clear and convincing evidence", 455 U.S. at 746.
- 131 See Adoption and Safe Family Act § 101(a)(15)(b)(i); Adoption Assistance and Child Welfare Act § 471(a)(15)(A); *Cal. Welf. & Inst. Code* § 11400(l) (2007); *Fla. Stat. Ann. § 39.402(7)* (2007); *Mass. Gen. Laws Ann. ch. 18B, § 3(a)(1)*(2007); *N.Y. Soc. Serv. Law* §§ 358(2)(a), 409 (2006).
- 132 Yeskey, 118 F.3d at 173.
- 133 According to statistics from the U.S. Department of Health and Human Services' Administration for Children and Families, in 2005, 70,878 children in New York were the subjects of substantiated reports of maltreatment, including excessive corporal punishment. John A. Gaudiosi, U.S. Dep't of Health & Human Serv., Child Maltreatment 39 (2005), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf>. According to the Child Welfare League of America, 65% of the children in foster care in 2001 were reunited with their biological families. Child Welfare League of America, New York's Children 2004, <http://www.cwla.org/advocacy/statefactsheets/2004/newyork.pdf> (last visited November 6, 2007).
- 134 See cases cited *infra* notes 346-48.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 135 Theresa Glennon, [Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System](#), 12 Temp. Pol. & Civ. Rts. L. Rev. 273, 305 (2003). A disparate impact claim under the ADA could be made where a state fails to provide meaningful access to a benefit that non-disabled individuals receive. *Id.*
- 136 See *infra* note 219.
- 137 See Glennon, *supra* note 135, at 306.
- 138 42 U.S.C. § 12131.
- 139 28 C.F.R. § 35.130(b)(7) (2007).
- 140 See Glennon, *supra* note 135, at 296, 307.
- 141 527 U.S. 581.
- 142 *Id.* at 600-01.
- 143 46 F.3d at 328.
- 144 *Supra* note 100.
- 145 Many states have housing programs that enable mentally disabled parents to live with their children. The U.S. Department of Housing and Urban Development's Section 811 Supportive Housing for Persons with Disabilities program is one such program. See, e.g., Iowa City Housing Information, <http://www.jeonet.com/city/planning/ichi/iiid.htm> (last visited November 5, 2007); New York State Campaign for Mental Health Housing, <http://www.campaign4housing.org/members.html> (last visited November 5, 2007); West Central Illinois Continuum of Care, <http://www.wciccc.com/HousingDirectory/> (last visited November 5, 2007).
- 146 119 F. Supp. 2d 181.
- 147 See Glennon, *supra* note 135, at 307.
- 148 In New York City, for example, most child welfare cases are handled by two casework teams, one at ACS and one at the contract agency. ACS assigns a "case manager," who reports to multiple levels of supervisors, and the contract agency assigns a caseworker who also reports to multiple levels of supervisors. See http://www.nyc.gov/html/acs/downloads/pdf/ioc_initiative_org_chart.pdf for an organizational chart of the executive management of ACS; the Deputy Commissioner of Family Permanency Services oversees the Executive Director of Case Management, who supervises the case managers, who monitor the "provider" agencies. For an example of the levels of supervision at a contract agency, see <http://www.essnyc.org/staff.html>. Regardless of the structure, all child welfare cases in all states have at least one caseworker and one supervisor. See also Glennon, *supra* note 135, at 307.
- 149 28 C.F.R. § 35.130(b)(7) (2007).
- 150 § 35.130(b)(7).
- 151 § 36.208.
- 152 U.S. Const. amend. XI.
- 153 § 35.130(b)(7).
- 154 See, e.g., *Helen L.*, 46 F.3d at 338.
- 155 28 C.F.R. § 36.104 (2007).
- 156 527 U.S. at 597.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 157 2000 N.Y. Misc. LEXIS 139 (N.Y. Sup. Ct. 2000).
- 158 See [Olmstead](#), 527 U.S. at 597.
- 159 See Leslie Kaufman, New York Acts To Ease Process In Foster Care, N.Y. Times, Mar. 22, 2007, at B1 (stating that, in 2006, the average length of stay in foster care for a child in New York City was 58 months); see also U.S. Dept. of Health & Human Servs., Admin. for Children and Families, Adoption and Foster Care Analysis System Report (2000), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/tpr_tbl4_2005.htm and http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm (stating that, in New York, the mean length of time between TPR and adoption in 2005 was 19.03 months and that the national mean length of time in 2005 was 27 months); see also *infra* notes 311 & 313.
- 160 See *infra* notes 311, 313, 315-17, & 319.
- 161 N.Y. Soc. Serv. Law § 451(1) (2007).
- 162 See Jay Mathews, Custody Battle: The Disabled Fight to Raise Their Children, Wash. Post., Aug. 18, 1992, at Z10 (describing Santa Clara County, California program that reported a \$1.72 savings for every dollar spent on intensive family reunification services).
- 163 See *supra* notes 129-30.
- 164 28 C.F.R. § 35.135 (2007).
- 165 42 U.S.C. § 12132 (2006); 28 CFR § 35.130(b)(7) (2007).
- 166 N.Y. Soc. Serv. Law § 384-b(7)(f)(3)(McKinney 2007).
- 167 Non-disabled parents often are given homemakers/housekeepers and other in-home assistance. See N.Y. Comp. Codes R. & Regs. tit. 18, § 423.2(b)(5) (2007).
- 168 *Supra* note 162.
- 169 While states have not raised this issue directly in the few federal ADA-TPR cases that have been litigated, *supra* note 118, or in the state cases where the ADA has been raised, see, e.g., *supra* notes 41 and 43, agencies generally argue that mentally disabled parents pose a danger or are a direct threat to their children. See, e.g., *In re B.J.F.*, 623 S.E.2d 547 (Ga. Ct. App. 2005); *In re E.M.M.W.*, No. 01-0726, 2002 WL 987947 (Iowa Ct. App. 2002); *In re John D.*, 934 P.2d 308 (N.M. Ct. App. 1997) (holding the ADA inapplicable because the ground for the TPR was abandonment, and the state had no obligation to provide services to any parent when alleging abandonment).
- 170 28 C.F.R. § 36.208 (2007).
- 171 42 U.S.C. § 12131(2) (2007).
- 172 This approach was first articulated in [Arline](#), 480 U.S. 273, in which a teacher was dismissed because she was infected with tuberculosis. The court found that she did not meet the requirements for protection under the Rehabilitation Act of 1973 because she might constitute a threat to her students. The Rehabilitation Act was the precursor to the ADA and the standards from this case were incorporated into the regulations implementing the “direct threat” defense in Title III.
- 173 42 U.S.C. § 671(a)(15)(B) (2007).
- 174 New York delineates the exceptions for reasonable efforts. N.Y. Fam. Ct. Act § 1039-b (McKinney 2007). See Appendix B for the reasonable efforts statutes of each state.
- 175 42 U.S.C. § 671(a)(15)(B) (2007).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 176 Under all TPR statutes, a child must first be removed from the respondent's home and placed in foster care (and usually must spend at least 15 months in foster care) before a TPR can be filed. See, e.g., [N.Y. Soc. Serv. Law § 384-b \(McKinney 2007\)](#). See also Appendix C (addressing the grounds for TPR statutes of each state).
- 177 See, e.g., [N.Y. Soc. Serv. Law § 384-b](#); Appendix C; supra note 130.
- 178 See, e.g., cases cited supra note 59.
- 179 See cases cited infra notes 346-349, 351-353 & 355.
- 180 [U.S. Const. amend. XI](#). (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State”).
- 181 [42 U.S.C. § 12133 \(2000\)](#). This section also provides for compensatory damages for successful claimants.
- 182 The Eleventh Amendment on its face applies equally to suits in law and equity. The Supreme Court stated, in [Seminole Tribe v. Florida](#), that “the relief sought by a plaintiff suing a State is irrelevant to the question of whether the suit is barred by the Eleventh Amendment ... [and] whether Congress has power to abrogate States' immunity.” [517 U.S. 44, 58 \(1996\)](#).
- 183 [42 U.S.C. § 12202 \(2000\)](#).
- 184 [§ 12101\(b\)\(4\)](#).
- 185 [United States v. Georgia, 546 U.S. 151 \(2006\)](#); see cases cited infra notes 189 & 197-98.
- 186 [531 U.S. 356, 360 n.1 \(2001\)](#).
- 187 [546 U.S. 151](#).
- 188 [Id.](#) at 159.
- 189 See [Lane, 541 U.S. 509](#); [City of Boerne v. Flores, 521 U.S. 507, 520 \(1997\)](#); [Garrett, 531 U.S. at 365](#).
- 190 [Supra](#) note 189.
- 191 [Cleburne Living Ctr., 473 U.S. at 432](#).
- 192 [Lane, 541 U.S. 509](#).
- 193 [Id.](#) at 533-34.
- 194 [Troxel v. Granville, 530 U.S. 57, 77 \(2000\)](#).
- 195 [Supra](#) note 59.
- 196 [Lane, 541 U.S. at 531](#).
- 197 See [Sacca v. Buffalo State Coll., No. 01-CV-881A, 2004 WL 2095458, at *3 \(W.D.N.Y. Sept. 20, 2004\)](#); [Johnson v. S.C. State Univ., No. CIV3:02-CV-2065\(CFD\), 2004 WL 2377225, at *4 \(D. Conn. Sept. 30, 2004\)](#); see also [Constantine v. Rectors of Geo. Mason Univ., 411 F.3d 474, 490 \(4th Cir. 2005\)](#); [Ass'n for Disabled Am., Inc. v. Fla.Int'l. Univ., 405 F.3d 954, 958-59 \(11th Cir. 2005\)](#); [Roe v. Johnson, 334 F. Supp. 2d 415, 421 n.9 \(S.D.N.Y. 2004\)](#). But see [Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 287 \(5th Cir. 2005\)](#) (declining to address whether the holding in [Lane](#) extends to disability discrimination in addition to public education).
- 198 [Press v. State Univ. of N.Y. at Stony Brook, 388 F. Supp. 2d 127, 135 \(E.D.N.Y. 2005\)](#).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 199 There have been ADA-TPR cases in federal courts, but none has reached the circuit court level with an argument based on two sets of fundamental rights. See [Bartell v. Lohiser](#), 215 F.3d 550 (6th Cir. 2000), aff'g, 12 F.Supp. 2d 640 (E.D. Mich. 1998) (holding that the state did not violate the mother's constitutional right to raise her child because the state's interest in the child was greater than the mother's; the issue of the fundamental right to court access was not raised); [McLeod](#), 1999 WL 33117123; [Morrison](#), 1996 WL 684426.
- 200 209 U.S. 123 (1908).
- 201 *Id.* at 159.
- 202 See, e.g., [Koslow v. Pennsylvania](#), 302 F.3d 161, 179 (3d Cir. 2002).
- 203 See [Garrett](#), 531 U.S. at 374 n.9.
- 204 Ruth Colker & Adam Milani, The [Post-Garrett World: Insufficient State Protection Against Disability Discrimination](#), 53 Ala. L. Rev. 1075, 1080 n.13 (2002) (noting that although the Supreme Court has not directly addressed the question of whether *Ex parte Young* applies to Title II, federal courts have permitted Title II claims made solely for injunctive relief to go forward under the doctrine).
- 205 28 C.F.R. § 35.107(a) (2007) (“A public entity that employs 50 or more persons shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Part 35, Non Discrimination on the Basis of Disability in State and Local Government Services], including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part. The public entity shall make available to all interested individuals the name, office address, and telephone number of the employee or employees designated pursuant to this paragraph”).
- 206 *Id.*
- 207 Office of Administrative Trials and Hearings, <http://www.nyc.gov/oath>; http://nyc.gov/html/oath/html/ada_grievances.html. (last visited Oct. 31, 2007). According to the website and two phone calls placed to the Office of Administrative Trials and Hearings (OATH) by my research assistant (8/2/07; 8/6/07), the person designated in New York City is Cherron Howard-Williams. Telephone interview (Aug. 2 and 6, 2007). A search on New York State government's website, <http://www.ny.gov>, for the “Americans with Disabilities Act” results in various document intended to help businesses and other facilities comply with the ADA. The only document of relevance to an individual with a claim is a health care complaint form, but there is no accompanying or explanatory text. The search also leads to the New York City Mayor's Office for People with Disabilities, which in turn links to the DOJ's ADA website, <http://www.ada.gov> (searches conducted 8/9/07 and 8/10/07).
- 208 My research assistant called the OATH office twice. The first time he asked for the Americans with Disabilities Act coordinator, and was connected to Cherron Howard-Williams. Ms. Howard-Williams, however, stated that she is not the ADA coordinator, but works with disciplining government employees when they make mistakes. She stated that she did not know who the ADA coordinator is and did not have any suggestions for how to find that person. Telephone interview (Aug. 2, 2007). On the second phone call to OATH, the research assistant again asked the operator for the person who coordinates or works with the Americans with Disabilities Act, or the ADA. The research assistant was again connected to Cherron Howard-Williams. This time, Ms. Howard-Williams reiterated that she does not work with the Americans with Disabilities Act in any capacity and, furthermore, has never been involved in any child protective matter in any capacity in New York City. Telephone interview (Aug. 6, 2007). A search on New York State government's website (www.ny.gov) for the “Americans with Disabilities Act” results in various document intended to help businesses and other facilities comply with the ADA. The only document of relevance to an individual with a claim is a health care complaint form, but there is no accompanying or explanatory text; for more information on the ADA, the website links to the DOJ's ADA website (<http://www.ada.gov>). New York State, <http://www.ny.gov> (search “Americans with Disabilities Act”) (last visited Aug. 9 and 10, 2007).
- 209 Having represented hundreds of children in New York City and Nassau County Family Courts from 2002 to the present, I have no knowledge of an ADA coordinator ever appearing in Family Court, nor do the numerous colleagues with whom I work on a daily basis. In addition, no parent or parent's attorney with whom I have spoken has indicated that they ever were informed of an ADA coordinator.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 210 Robert M. Levy & Leonard S. Rubenstein, *The Rights of People with Mental Disabilities* 177 (Norman Dorsen ed., S. Ill. Univ. Press 1996).
- 211 ACF Region 2, <http://www.acf.hhs.gov/programs/region2/index.html> (last visited Oct. 31, 2007).
- 212 Levy & Rubenstein, *supra* note 210, at 177.
- 213 *Id.*
- 214 My research assistant placed three phone calls to the federal Administration for Children and Families, Region 2. On the first two calls, the people answering the phone expressed complete bewilderment over the question of how to file an ADA claim and what a respondent parent could or should do in this type of case. The research assistant was referred both times to New York City's Administration for Children's Services (ACS) (the City's social services agency). On the third phone call to the federal Administration for Children and Families, the research assistant was told to call the Legal Aid Society and that a parent would have to do the same. Telephone interviews (Aug. 1, 2, and 6, 2007). When a subsequent phone call to ACS's Parent's & Children's Rights Hotline at the Office of Advocacy (information available at http://www.nyc.gov/html/acs/html/advocacy/office_advocacy.shtml) was made on August 7, 2007, the research assistant was told that the Office of Advocacy has never handled, and would not handle, an ADA claim, and that a parent would have to call the Legal Aid Society. The Office of Advocacy did not mention that this would be impossible for nearly all of the parents whose children are the subject of abuse and neglect proceedings in New York City, because the children already are represented by Legal Aid. Legal Aid Society of New York, <http://legal-aid.org/en/whatwedo/juvenilepractice.aspx> (last visited Nov. 7, 2007) (stating that 90% of subject children in New York City are represented by Legal Aid). A respondent parent cannot be represented by Legal Aid if the firm already represents one or more of their children, because this creates a conflict of interest. In order to contact the DOJ, a respondent parent would have to be aware of the ADA, the DOJ, and the possibility of this type of advocacy. Based on the above phone calls, my five years of work in New York City and Nassau County Family Courts, and the search described *infra* note 215, it is highly unlikely that a parent ever would have such an awareness.
- 215 According to the most comprehensive search of cases available from the Department of Justice's ADA Enforcement website, <http://www.usdoj.gov/crt/ada/enforce.htm> (covering April 1994 to June 2006).
- 216 42 U.S.C. § 12132 (2007).
- 217 Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended to scattered sections of 42 U.S.C.).
- 218 42 U.S.C. § 671(a)(15)(B) (2007).
- 219 N.Y. Soc. Serv. Law § 384-b (4)(c) (2007); *infra* notes 231-34.
- 220 *Id.* § 384-b (7)(a), (7)(f)(3), (8)(a)(iv), (8)(b)(iii).
- 221 Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended to scattered sections of 42 U.S.C.).
- 222 N.Y. Fam. Ct. Act § 1039-b (McKinney 2007).
- 223 *In re Marino S., Jr.*, 693 N.Y.S.2d 822, 824 (N.Y. Fam. Ct. 1999). See also *In re Jordy O.*, 696 N.Y.S.2d 654, 655 (N.Y. Fam. Ct. 1999).
- 224 N.Y. Fam. Ct. Act § 1039-b(b)(1)-(6) (providing that severe and repeated abuse of the subject child; murder/manslaughter or felony assault of the subject child, or another child of the parent; and termination with regard to another child are grounds for being excused from reasonable efforts).
- 225 N.Y. Fam. Ct. Act § 1039-b (McKinney 2007).
- 226 *In re Marino S., Jr.*, 693 N.Y.S.2d at 833.

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 227 See *In re Kyle F.*, 14 A.D.3d 822, 823 (N.Y. App. Div. 2005); *In re Michael D.*, 306 A.D.2d 938, 938 (N.Y. App. Div. 2003); *In re Harry K.*, 706 N.Y.S.2d 657, 657 (N.Y. App. Div. 2000); *In re Juliana V.*, 671 N.Y.S.2d 105, 106 (N.Y. App. Div. 1998); *In re Belinda S.*, 592 N.Y.S.2d 372, 373 (N.Y. App. Div. 1993); *In re Demetruis F.*, 575 N.Y.S.2d 552, 553 (N.Y. App. Div. 1991).
- 228 *In re Jammie CC.*, 540 N.Y.S.2d 27, 28 (N.Y. App. Div. 1989).
- 229 *Id.*
- 230 See Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. Contemp. Health L. & Pol'y 387, 412 (2000).
- 231 Utah Code Ann. § 78-3a-311(3)(d)(i)(B) (2007).
- 232 Cal. Welf. & Inst. Code § 361.5(b)(2) (2007); Cal. Fam. Code § 7827(c) (2003).
- 233 Alaska Stat. §47.10.086(c)(5) (2006); Ariz. Rev. Stat. § 8-846(B)(1)(b) (2007); Ky. Rev. Stat. Ann. § 610.127(6) (2007).
- 234 Colo. Rev. Stat. § 19-3-604(1)(b)(I) (2007); Conn. Gen. Stat. Ann. §17a-112(j)(2) (2006); Fla. Stat. Ann. § 39.8055(2)(b) (2006); Ga. Code Ann. §15-11-55(d) (2006); Me. Rev. Stat. Ann. Tit. 22, § 4041(2)(A-2)(2)(2007); Mass. Gen. Laws ch. 119, § 29C (2007); Minn. Stat. Ann. §260.012(a) (2007); Mont. Code Ann. §41-3-609(4)(c) (2005); Nev. Rev. Stat. §432B.393(2) (2005); N.M. Stat. Ann. § 32A-4-28(A) (2007); N.C. Gen. Stat. Ann. § 7B-507(b)(1) (2007); S.C. Code Ann. § 20-7-1572(6) (2006); Vt. Stat. Ann. tit. 33, § 5515(d) (2006); W. Va. Code Ann. § 49-6-5(b)(6) (2006); Wyo. Stat. Ann. § 14-2-309(c)(iii) (2007). See also *In re Amelia W.*, 772 A.2d 619, 622 (Conn. App. Ct. 2001) (finding that father would not benefit from services); *In re Adoption/Guardianship No. 10941*, 642 A.2d 201, 210 (Md. Ct. App. 1994) (holding that agency is not required to provide services where evidence overwhelmingly suggests that parent will never be fit again).
- 235 N.Y. Fam. Ct. §§ 1022 (a)(iii), 1027(b)(ii), 1028(b) (McKinney 2005).
- 236 N.Y. Soc. Serv. § 384-b(4)(c) (McKinney 2007).
- 237 New York State Kids' Well-Being Indicators Clearinghouse, KWIC Indicator Profile: Foster Care TPR Judgments - Terminated Judgments, http://www.nyskwic.org/access_data/ind_profile.cfm?subIndicatorID=83 (stating that, in 2005, 59.1% of all TPRs in New York State, and 64.7% in New York City, ended in terminated judgments). An even higher proportion of mental disability TPRs end in terminated judgments. See, e.g., *In re Peter GG*, 33 A.D.3d 1104 (N.Y. App. Div. 2006); *In re Loretta C.*, 32 A.D.3d 764 (N.Y. App. Div. 2006); *In re Henry W.*, 31 A.D.3d 940 (N.Y. App. Div. 2006); *In re Kyle F.*, 14 A.D.3d 822; *In re Nina D.*, 6 A.D.3d 702 (N.Y. App. Div. 2004); *In re Michael D.*, 306 A.D.2d 938; *In re Lisa Marie S.*, 304 A.D.2d 762 (N.Y. App. Div. 2003). Compare *In re Robert M. P. -D.*, 31 A.D.3d 560 (N.Y. App. Div. 2006) (holding that rights are not terminated where petitioner only introduced the forensic reports of a psychologist without having him testify); *In re Lina Catalina R.*, 21 A.D.3d 563 (N.Y. App. Div. 2005) (finding mentally disabled parent's rights not terminated where court-appointed psychologist stated that she did not have reasonable degree of certainty as to the foreseeable future).
- 238 See Appendix B.
- 239 42 U.S.C.A. § 671(a)(15)(D) (West 2007).
- 240 See, e.g., *In re Brianna D.*, 798 A.2d 413, 415 (R.I. 2002); *In re Chapman*, 631 P.2d 831 (Or. Ct. App. 1981).
- 241 865 So. 2d 1188 (Ala. Civ. App. 2003).
- 242 *Id.* at 1196.
- 243 606 So. 2d 161 (Ala. Civ. App. 1992).
- 244 71 S.W.3d 783 (Tex. App. 2002).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 245 See *N.Y. Soc. Serv. § 384-b(4)(c)*, (6) (McKinney 2007).
- 246 *Stanley*, 405 U.S. 645; *Santosky*, 455 U.S. 745.
- 247 405 U.S. at 657.
- 248 455 U.S. at 756.
- 249 *Stanley*, 405 U.S. at 651 (“[We have] ... frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed ‘essential,’ *Meyer v. Nebraska*, 262 U.S. 390, 399, (1923), ‘basic civil rights of man,’ *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 (1942), and ‘[r]ights far more precious than property rights,’ *May v. Anderson*, 345 U.S. 528, 533, (1953). ‘It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.’ *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, *supra*, 262 U.S. at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, *supra*, 316 U.S. at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496, (1965) (Goldberg, J., concurring”).
- 250 See, e.g., *In re FM*, 163 P.3d 844, 851 (Wyo. 2007); *In re K.D.L.*, 58 P.3d 181, 186 (Nev. 2002); *In re Hayes*, 679 N.E.2d 680, 683 (Ohio 1979); Douglas E. Cressler, *Requiring Proof Beyond A Reasonable Doubt in Parental Rights Termination Cases*, 32 U. Louisville J. Fam. L.785, 794 (1994); Melissa L. Breger, *Introducing the Construct of the Jury into Family Violence Proceedings and Family Court Jurisprudence*, 13 Mich. J. Gender & L. 1, 12 (2006); Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. Chi L. Sch. Roundtable 1, 2 (1995); Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 63 Ky. L. J. 613, 626 (2004).
- 251 *In re Smith*, 601 N.E.2d 45, 54 (Ohio Ct. App. 1991).
- 252 See *N.Y. Soc. Serv. Law § 384-b* (McKinney 2007); see also Appendix C.
- 253 *Id.* § 384-b (4)(c) (McKinney 2007).
- 254 *Id.* § 384-b (6)(a) (McKinney 2007).
- 255 *Id.*
- 256 *Id.* §§ 384-b (3)(g), 384-b (6)(c) (McKinney 2007).
- 257 See *In re Loretta C.*, 32 A.D.3d 764, 765 (N.Y. App. Div. 2006) (interview lasting only 40 minutes).
- 258 *In re Peter GG.*, 33 A.D.3d 1104 (N.Y. App. Div. 2006).
- 259 *N.Y. Soc. Serv Law § 384 b* (6)(e) (McKinney 2007).
- 260 Court-appointed lawyers in New York are paid \$75 per hour in and out-of-court, and the state will reimburse them up \$125 per hour for a psychiatrist to testify, and \$90 per hour for a psychologist to testify. State of New York, Appellate Division, Supreme Court, Third Judicial Department, Law Guardian Program Administrative Handbook (2007) (prior to 2004, the rate-of-pay for court-appointed lawyers was \$40 in-court and \$25 out-of-court). According to a report commissioned by Chief Judge Kaye, these rates for court-appointed lawyers and their experts are inadequate, and coupled with extremely high case loads, can result in sub-par defense. Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services (June 16, 2006), available at [http:// www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf](http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf). Court-appointed attorneys also have difficulty retaining experts: “There are situations where lawyers have to go begging for experts ... to take cases on 18-b rates.” *Id.* For a discussion of the crisis in the representation of parents in child protective proceedings around the country, including a lack of skill and resources, see Kathleen A. Baillie, *The Other Neglected Parties in Child Protective Proceedings: Parents in Poverty and the Lawyers Who Represent Them*, 66 *Fordham L. Rev.* 2285 (1998); Susan Calkins, *Ineffective Assistance*

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts, 6 J. App Prac & Process 179 (2004). See also Mark Green et al., Public Advocate for the city of new york, Justice Denied: The Crisis of Legal Representation for Birth Parents in Child Welfare Proceedings, 30-31 (2000) (citing a study that found that only 5% of Family Court cases in the Bronx contained at least one motion by a parent's attorney).

261 “New York's indigent defense system is in a serious state of crisis.... Every day - and for years - this dysfunctional system subjects indigent adults ... across the state to a severe and unacceptable risk of being denied meaningful and effective representation in violation of their state and federal right to counsel. This crisis cannot be adequately addressed without a substantial increase in statewide indigent defense funding.” The Spangenberg Group, Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services ii (2006), available at <http://www.courts.state.ny.us/ip/indigentdefensecommission/SpangenbergGroupReport.pdf>; see also Vitullo-Marten, supra note 109; New York Appellate Division First Department Committee on Representation of the Poor, Crisis in the Legal Representation of the Poor (2001); Sengupta, supra note 106.

262 *In re Nereida S.*, 439 N.E.2d 870 (N.Y. 1982).

263 It also should be noted that diagnosis of mental illness is not always accurate. Studies show that an individual who is hostile to the examiner is more likely to be diagnosed with a serious mental illness, and many therapists “view the lack of cooperation as evidence of mental illness.” Paul Bernstein, *Termination of Parental Rights on the Basis of Mental Disability: A Problem in Policy and Interpretation*, 22 PAC. L.J. 1155, 1175 (1991). See also Kerr, supra note 230, at 413 (arguing for input from a variety of sources, not just one psychiatrist).

264 42 U.S.C. § 12101(a)(7) (2007).

265 *Stanley*, 405 U.S. 645.

266 *Santosky*, 455 U.S. 745.

267 457 U.S. 307, 324 (1982).

268 Supra note 69; see also N.Y. Soc. Serv. Law § 384-b(1)(a) (McKinney 2007) (“[T]he health and safety of children is of paramount importance”); see also Appendix D.

269 When a TPR is denied, the agency is usually ordered to better plan with and service the parent. See, e.g., *In re Shantelle W.*, 185 A.D.2d 935, 940 (N.Y. App. Div. 1992) (“Under the circumstances of this case, the petitioner's efforts fell short of the reasonable efforts necessary to alleviate the mother's mental illness and fulfill its obligation to strengthen the parental tie between mother and child. Accordingly, we reverse the Family Court's finding, and direct the petitioner to take additional steps to assist the mother in overcoming her problems”); see also *In re Jean G.*, 225 A.D.2d 779 (N.Y. App. Div. 1996) (overturning TPR because summons was deficient in that it did not give notice that adoption of the child, without the parent's consent, could result); *In re Dochingozi B.*, 57 N.Y.2d 641 (N.Y. App. Div. 1982) (finding that statutory requirements for a TPR had not been met, and remitting the matter to Family Court for further proceedings). The child remains in foster care until the parent has complied with the revised service plan, the visits have increased, and a trial discharge has occurred. Under N.Y. Fam. Ct. Act § 1089 (d)(2)(viii)(C) (McKinney 2007), neither trial nor final discharge can take place without the court finding that this is appropriate and issuing an order allowing for it. It is usually at least one year following the denial of a TPR before the child is reunited with the parent on either trial or permanent status.

270 N.Y. Soc. Serv. Law § 384-b(4)(c) (McKinney 2007).

271 See *Addington v. Texas*, 441 U.S. 418, 426 (1979); *O'Connor v. Donaldson*, 422 U.S. 563, 573-4 (1975); *Scopes v. Shah*, 398 N.Y.S.2d 911, 913 (App. Div. 1977); see also Levy & Rubenstein, supra note 210.

272 John Monahan, *The Clinical Prediction of Violent Behavior* 6-7 (National Institute of Mental Health 1981).

273 Brief Amicus Curiae for the American Psychiatric Association at 12, *Barefoot v. Estelle*, 463 U.S. 880 (1983).

- 274 See Robert Hayman, Jr., [Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent](#), 103 *Harv. L. Rev.* 1201, 1219 (1990) (“Scientific evidence, however, does not suggest a meaningful correlation between mental retardation and inadequate parenting. Moreover, the evidence does suggest that any deficiencies in parenting are not immutable, but can be remedied with proper training”); Michael Craft, *Low Intelligence and Delinquency*, in *Mental Handicap* 53 (Michael Craft, Joan Bicknell & Sheila Hollins eds., 1985) (stating that research indicates no correlation between mental retardation and violence generally); Robert F. Schilling et al., *Child Maltreatment and Mentally Retarded Parents: Is There a Relationship?*, 20 *Mental Retardation* 201, 206 (1982) (noting that evidence is contradictory on whether mental retardation is correlated with child maltreatment); Teresa Jacobsen et al., *Assessing Parenting Competency in Individuals with Mental Illness*, 24 *J. Mental Health Admin.* 189 (1997) (suggesting that determining the parenting capabilities of individuals with severe mental disorders who are alleged perpetrators of child abuse or neglect is a profoundly difficult task and discussing the methodological shortcomings of some widely used assessment strategies); Ronald Siefer et al., *Parental Psychopathology, Multiple Contextual Risks, and One-Year Outcomes in Children*, 25 *J. Clinical Child Psychol.* 423 (1996) (pointing to the importance of examining different aspects of maternal mental illness in social context and noting that maternal illness is not universally associated with adverse child outcomes); Karen S. Budd & Michelle J. Holdsworth, *Issues in Clinical Assessment of Minimal Parenting Competence*, 25 *J. Clinical Child Psychol.* 2 (1996) (stating that many of the tools currently used for parenting assessments, such as projective tests, personality profiles, and intelligence tests, were not intended for the purpose of evaluating parenting capability or for parents with major psychiatric illness, and they are not empirically linked with observed parenting behavior); Harriet P. Lefley, *Family Caregiving in Mental Illness* 72 (David E. Biegel & Richard Schulz eds. 1996) (“[An] analysis of recent studies ... of violent behavior by individuals with serious mental illness ... conclude[s] that the vast majority of mentally ill persons are not more dangerous than others in the general population”); Morton M. Silverman, *Children of Psychiatrically Ill Parents: A Prevention Perspective*, 40 *Hosp. & Community Psychiatry* 1257, 1259 (1989) (A 1983 study found that “[a]s the depressed mothers recovered, many, but not all, of the reported problems in the mothers’ relationships with other children improved, and many of the adolescent’s problems diminished as well”); Mrinal Mullick, et al., *Insight into Mental Illness and Child Maltreatment Risk Among Mothers with Major Psychiatric Disorders*, 52 *Psychiatric Services* 488 (2001) (concluding that insight into mental illness may function as a protective factor that influences the risk of child maltreatment in mothers with mental illness and that measures of insight could be usefully incorporated into comprehensive parenting assessments for mothers with psychiatric disorders).
- 275 *In re Trebor*, 295 A.D.2d 648 (N.Y. App. Div. 2002).
- 276 See Appendix C. One other state, Wisconsin, terminates mentally disabled parents’ rights on the basis of disability but only “when the parent is presently, and for a cumulative period of at least 2 years within the 5 years immediately prior to the filing of the petition has been, an inpatient at one or more hospitals ... licensed treatment facilities ... or state treatment facilities” on account of mental illness or developmental disability. *Wis. Stat. Ann.* § 48.415(3)(a) (West 2007).
- 277 See Alexis C. Collentine, [Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes](#), 34 *Hofstra L. Rev.* 535 (2005); see also Kerr, *supra* note 230.
- 278 See *supra* notes 96 and 100 for a description of the services in New York and *supra* note 145 for a description of the national housing programs. See also Invisible Children’s Project, http://www.nmha.org/go/icp_project (last visited Oct. 31, 2007); Mental Health America, *Frequently Asked Questions: How do I find a local Mental Health America affiliate?*, http://www.nmha.org/go/find_affiliate (last visited Oct. 31, 2007); Mental Health Association in New Jersey Programs and Services, http://www.mhanj.org/ProgramsServices/prog_serv2.htm (last visited Oct. 31, 2007); Beth R. Hinden et al., *A Survey of Programs for Parents with Mental Illness and Their Families: Identifying Common Elements to Build the Evidence Base*, 33 *J. Behav. Health Services & Res.* 21 (2006).
- 279 See David McConnell & Gwynnyth Llewellyn, [Stereotypes, Parents with Intellectual Disability and Child Protection](#), 24 *J. Soc. Welfare & Fam. L.* 297 (2002); Hayman, *supra* note 274; Daphna Oyserman et al., *Resources and Supports for Mothers with Severe Mental Illness*, 19 *Health & Social Work* 132, 141 (1994) (“[T]here is no reason to assume that women with [severe mental illness] cannot function as mothers”); J. Bazar, *Mentally Ill Moms Aided in Keeping Their Children*, *The APA Monitor* 32 (Dec. 1990) (concluding that a large percentage of mothers with severe mental illness can be successful as mothers with adequate support programs); Teresa Jacobsen, *Mentally Ill Mothers in the Parenting Role: Clinical Management and Treatment*, in *Parental Psychiatric Disorder: Distressed Parents and Their Families* 114 (Michael Göpfert et al. eds., Cambridge University Press, 2d ed. 2003) (noting

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

that services that build on a mentally ill parent's strengths and engage the parent in a collaborative process are more successful); Joanne Nicholson & Andrea Blanch, *Rehabilitation for Parenting Roles for People with Serious Mental Illness*, 18 *Psychosocial Rehabilitation J.* 109 (1994) (outlining a model of effective rehabilitation for parents).

- 280 See [N.Y. Soc. Serv. Law § 384-b\(4\)\(c\)](#), (6) (McKinney 2007).
- 281 [Id.](#) § 384-b(4)(d).
- 282 [Id.](#) § 384-b(4)(e).
- 283 [Id.](#) § 384-b(3)(g). Dispositional hearings are conducted in cases of permanent neglect as provided in [N.Y. Fam. Ct. Act §§ 623, 631](#) (McKinney 2007), and in cases of severe or repeated abuse, as provided in [N.Y. Soc. Serv. Law § 384-b\(8\)\(f\)](#).
- 284 See [N.Y. Soc. Serv. Law § 384-b](#) (McKinney 2007); [N.Y. Fam. Ct. Act §631](#) (McKinney 2007); *In re Troy M.*, 156 Misc.2d 1000, 1003-05 (N.Y. Fam. Ct. 1992).
- 285 See Appendix D.
- 286 *In re Kristen B.*, 558 A.2d 200, 203 (R.I. 1989).
- 287 ASFA provides the following as compelling reasons not to file a TPR: the child is being cared for by a relative; the state agency has documented in the case plan that a TPR is not in the best interest of the child; or reasonable efforts by the agency to reunify the family have not been made. [42 U.S.C. §675\(5\)\(E\)\(i\)-\(iii\)](#) (2007). Many state laws expand on the types of situations that fit the “not in the best interest” category. See *infra* notes 289, 293-94, 298 & 341.
- 288 [Cal. Welf. & Inst. Code § 366.26\(c\)\(1\)\(B\)](#) (2007) (for children 12 years and older); [Conn. Gen. Stat. Ann. § 17a-112\(j\)\(k\)](#) (2007) (all children); [D.C. Code Ann. § 16-2353\(b\)\(4\)](#) (2007); [Iowa Code Ann. § 232.116\(3\)\(b\)](#) (2006) (for children 10 and older); [Me. Rev. Stat. Ann. tit. 22, § 4055](#) (2007) (for children 12 and older); [Md Code Ann., Fam. Law, § 5-323\(d\)\(4\)\(i\), \(iii\)](#) (2007) (for children of any age); [Va. Code Ann. § 16.1-283\(G\)](#) (2007) (for children 14 and older). [N.Y. Soc. Serv. Law § 384-b\(3\)\(k\)](#) (McKinney 2007) states that, “where the child is over fourteen years of age, the court may, in its discretion, consider the wishes of the child in determining whether the best interests of the child are promoted by the commitment of guardianship and custody of the child”; however, the court does not actually consider best interest until the dispositional hearing, which does not occur in mental disability cases.
- 289 See [Colo. Rev. Stat. § 19-3-702\(5\)\(a\)\(II\)](#) (West 2007); [N.M. Stat. Ann. § 32A-4-29\(G\)\(3\)](#) (West 2007); [N.D. Cent. Code § 27-20-20.1\(7\)\(b\)\(5\)](#) (2007); [W. Va. Code Ann. § 49-6-5b\(b\)\(2\)](#) (West 2007).
- 290 See [N.Y. Soc. Serv. Law § 384-b\(3\)\(l\)\(ii\)\(C\)](#) (McKinney 2007) (considering whether the child is fourteen years of age or older and will not consent to his or her adoption).
- 291 See [id.](#) § 384-b(3)(l)(i)(B).
- 292 See *infra* note 310.
- 293 See [Conn. Gen. Stat. Ann. § 17a-112\(j\)\(3\)\(D\)](#) (West 2007); [Iowa Code Ann. § 232.111\(2\)\(b\)\(2\)](#) (West 2007); [Md. Code Ann., Fam. Law § 5-323\(d\)\(4\)\(i\)](#) (West 2007); [Mo. Ann. Stat. § 211.447\(7\)1](#) (West 2007); [Nev. Rev. Stat. Ann. § 128.108\(1\)](#) (West 2007); [N.M. Stat. Ann. § 32A-4-29\(G\)\(2\)](#) (West 2007); [Ohio Rev. Code Ann. § 2151.414\(D\)\(1\)-\(2\)](#) (West 2007); [Tenn. Code Ann. § 36-1-113\(i\)\(4\)](#) (West 2007); [Vt. Stat. Ann. tit. 33 § 5540\(4\)](#) (2007). A positive parent-child relationship also is a compelling reason not to file a TPR in New Mexico. [N.M. Stat. Ann. § 32A-4-29\(G\)\(2\)](#) (West 2007).
- 294 See [Cal. Welf. & Inst. Code § 366.26\(c\)\(1\)\(A\)](#) (West 2007); [Conn. Gen. Stat. Ann. § 17a-112\(k\)\(6\)\(A\)](#) (West 2007); [Mo. Ann. Stat. § 211.447\(6\)](#) (West 2007). A record of visitation also is a compelling reason not to file a TPR in Colorado. [Colo. Rev. Stat. Ann. § 19-3-702\(3.5\)\(a\), \(5\)\(a\)\(I\)](#) (West 2007). General compliance and progress with the service plan is a compelling reason not to file a TPR in New Mexico and Oregon. [N.M. Stat. Ann. § 32A-4-29\(G\)\(1\)](#) (West 2007); [Or. Rev. Stat. Ann. § 419B.498\(2\)\(b\)\(A\)](#) (West 2005).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 295 Cf. *N.Y. Soc. Serv. Law* § 384-b(7)(b) (McKinney 2007) (providing that visitation and communication issues are only considered in a TPR based on permanent neglect, as part of the fact-finding).
- 296 See *Conn. Gen. Stat. Ann.* § 17a-112(k)(6)(B) (West 2007).
- 297 *Md. Code Ann., Fam. Law* § 5-323 (2007).
- 298 See, e.g., *Ark. Code Ann.* § 9-27-341(b)(3)(A)(i) (2007); *Cal. Welf. & Inst. Code* § 366.26 (2007). In addition, under several state statutes, if adoption is not the permanency plan, but the child is otherwise in an appropriate placement, this can be a compelling reason for the agency to be permitted not to file a TPR petition. See, e.g., *Colo. Rev. Stat.* § 19-3-702(5)(a)(III) (2007). Another compelling reason under numerous state statutes not to file a TPR petition, when otherwise required, is if the child is being cared for by a relative. See, e.g., *Conn. Gen. Stat.* § 17a-111a (2007); *Mo. Rev. Stat.* § 211.447 (2007); *Or. Rev. Stat.* § 419B.498 (2005). Under *N.Y. Soc. Serv. Law* § 384-b(3)(l)(ii)(B) (McKinney 2007), New York allows an agency not to file a petition if the permanency goal is other than adoption. But see *supra* note 291; *infra* note 310.
- 299 *Md. Code Ann., Fam. Law* § 5-323 (2007); *Ohio Rev. Code Ann.* §2151.414(D)(1) (2007).
- 300 *Cal. Welf. & Inst. Code* § 366.26(E) (2007).
- 301 *Cal. Welf. & Inst. Code* § 366.26 (2007); *Iowa Code* § 232.111 (2006); *Mich. Comp. Laws* § 712A.19b (2007); *Minn. Stat.* § 260C.312 (2006); *N.J. Stat. Ann.* § 30:4C-15.1(a)(4) (2007).
- 302 *Md. Code Ann., Fam. Law* § 5-323 (2007).
- 303 *Ky. Rev. Stat. Ann.* § 625.090 (2007).
- 304 *Vt. Stat. Ann. tit. 15A*, § 3-504 (2007).
- 305 *Iowa Code* § 232.1163 (e) (2006).
- 306 *Utah Code Ann.* § 78-3a-407(2) (2007).
- 307 *Conn. Gen. Stat.* § 17a-112(k)(7) (2007).
- 308 See *In re Henry W.*, 818 N.Y.S.2d 348 (N.Y. App. Div. 2006); *In re Winston Lloyd D.*, 7 A.D.3d 706 (N.Y. App. Div. 2004); *In re Nina D.*, 6 A.D.3d 702 (N.Y. App. Div. 2004); *In re Guardianship of P.E.G.*, 2004 WL 2921862 (N.Y. Fam. Ct. 2004); *In re Harry K.*, 270 A.D.2d 928 (N.Y. App. Div. 2000); *In re Juliana V.*, 249 A.D.2d 314 (N. Y. App. Div. 1998).
- 309 In New York, a young person fourteen years or older must consent to his or her adoption unless the court “dispenses with such consent.” *N.Y. Dom. Rel. Law* § 111(1)(a) (McKinney 2007). In the dispositional hearing following a TPR based on permanent neglect or severe or repeated abuse, the judge will ask the law guardian whether her client, if he or she is fourteen years or older, plans to consent to adoption. However, the potential to be adopted is not considered at the TPR fact-finding, *infra* note 310, which is the only hearing a mentally disabled parent receives. So, a young person with a mentally disabled parent can become a legal orphan, *infra* notes 311 and 313, solely because the grounds for TPR are proven, even if there is little likelihood that he or she will be adopted.
- 310 *N.Y. Soc. Serv. Law* § 384-b(3)(i) (McKinney 2007) (“[P]roof of likelihood that the child will be placed for adoption shall not be required in determining whether the best interest of the child would be promoted by the commitment of the guardianship and custody of the child to an authorized agency”). This has been upheld in *In re Peter GG.*, 33 A.D.3d 1104, 1105 (N.Y. App. Div. 2006) (“[C]ourts have terminated parental rights even though ‘readoptive homes [have] not been found’ ... and ‘there is no evidence that adoption is contemplated’” (internal citations omitted)).
- 311 In 2005, there were 9,219 such children awaiting adoption in New York, and this number excludes those who were sixteen and older with a goal of discharge to another planned permanent living arrangement (not adoption). U.S. Department of Health & Human Services, Administration for Children & Families, Children in Public Foster Care Waiting to be Adopted (2007), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/waiting2005.pdf. The mean length of time in New York between a TPR and

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

adoption is 19.07 months. U.S. Department of Health & Human Services, Administration for Children & Families, Time Between TPR and Finalization (2007), [http:// www.acf.hhs.gov/programs/cb/stats_research/aN.Y.FAM.CT.ACTrs/statistics/tpr_tbl4_2005.htm](http://www.acf.hhs.gov/programs/cb/stats_research/aN.Y.FAM.CT.ACTrs/statistics/tpr_tbl4_2005.htm). New York ranks the lowest among all fifty states in the number of children who are adopted within twenty-four months of entering foster care. U.S. Department of Health & Human Services, Administration for Children & Families, child welfare outcomes 2003: Annual report (2003), [http:// www.acf.hhs.gov/programs/cb/pubs/cwo03/chapters/chapterthree2003.htm](http://www.acf.hhs.gov/programs/cb/pubs/cwo03/chapters/chapterthree2003.htm).

- 312 Supra note 112. Almost all states, including New York, *N.Y. Soc. Serv. Law* § 384-b(3)(l)(i) (McKinney 2007), have adopted the fifteen out of twenty-two month requirement into their statutes, either requiring an agency to file a petition when a child has been in care under this time frame, or as a ground for TPR, or both. See, e.g., *Ala. Code* § 26-18-5 (1975); *Colo. Rev. Stat.* § 19-3-604; *Mass. Gen. Laws ch. 119, §§ 26, 29C; ch. 210, § 3* (2003). Some states have a fewer than fifteen-month requirement for a child to be in care before a TPR petition must be filed. See, e.g., *Ark. Code Ann.* § 9-27-341 (2007); *R.I. Gen. Laws* § 15-7-7 (1956).
- 313 Since ASFA became law, there have been approximately 117,000 more terminations than actual adoptions. Adoptions Stall, More Legal Orphans Created by Failed Law, National Child Advocacy Group Says, Ascribe Newswire, <http://www.ascribe.org/cgi-bin/ behold.pl?ascribeid=20041228.091006&time=09%2030%CS#T&year=2004&public=1>. In January 2005, there were 117,395 legal orphans nationwide. Id. Because of this problem, a study of legal orphans was commissioned by the federal Administration for Children & Families. US Department of Health & Human Services, Administration for Children & Families, Abuse, Neglect, Adoption & Foster Care Research, Terminating the Parental Rights of Older Children, 2003-2004, [http:// www.acf.hhs.gov/programs/opre/abuse_neglect/term_rights/term_rights_overview.html#overview](http://www.acf.hhs.gov/programs/opre/abuse_neglect/term_rights/term_rights_overview.html#overview). See also Esther Wattenberg & Meghan Kelley, A Memo on Legal Orphans: Are We Creating a New Class of Children in Limbo? (April 30, 1999), http://ssw.che.umn.edu/img/assets/4467/Legal_Orphans_Memo.pdf; Barbara White Stack, Law to Increase Adoptions Results in More Orphans, Pittsburgh Post Gazette, Jan. 2, 2005, available at [http:// seattlepi.nwsource.com/national/206256_orphans03.html](http://seattlepi.nwsource.com/national/206256_orphans03.html). Some states have changed their laws because of the problem of legal orphans. Washington (House Bill 1624 added a new section to *Wash. Rev. Code* § 13.34.215 in 2007) and California (AB 519, enacted in 2005 to amend *Cal. Welf. & Inst. Code* §§ 213.5, 366.26 (2007)) now allow children to petition to reinstate their parents' rights. Some states also have strict statutory mandates for reviewing the status of a child's adoption post-TPR, and for reconsidering the TPR if there is a lack of progress. Rhode Island requires that "in the event any child, the parental rights to whom have been finally terminated, has not been placed by the agency in the home of a person or persons with the intention of adopting the child within thirty (30) days from the date of the final termination decree, the family court shall review the status of the child." *R.I. Gen. Laws* § 15-7-7(g) (1956). In D.C., the court must review the adoption every six months and can order change of agency for lack of progress. *D.C. Code* § 16-2360(b), (e) (2001).
- 314 Agencies are prohibited from having any contact with parents whose rights have been terminated. See statutes cited supra note 74. It is technically possible to vacate a termination of parental rights judgment under *N.Y. C.P.L.R.* 5015 (2007), but this rarely happens. See Diane Riggs, Permanence Can Mean Going Home, ADOPTALK (Spring 2006), available at [http:// www.nacac.org/adoptalk/permanence.html](http://www.nacac.org/adoptalk/permanence.html) (noting that judges in New York "are not inclined to reverse something as serious as a TPR without irrefutable evidence that a child's best interests are served by the reversal"). However, this can be done more easily in Washington and California under new laws specific to vacating TPRs. See sources cited supra note 313.
- 315 I have represented and spoken with hundreds of young people who are confused and distraught over this situation. They do not understand why their parents' rights were terminated in the past if they never wanted this and there was never a substantial likelihood that they would be adopted. At the time of the termination, many desired to see their parents, and they continued to do so in the years they remained in foster care. This includes young people with mentally disabled parents. One 20 year-old client of mine, who had been in foster care since she was two years old, and now had four children of her own, maintained a relationship with her mentally disabled mother outside the system. Her mother provided much needed help with child care as well as financial and emotional support.
- 316 For example, one of my former clients, whose mother's rights were terminated eight years earlier (prior to my representation) because of mental illness and drug addiction, was living in a residential treatment facility after two pre-adoptive placements had failed. The plan was for him to remain at the facility at least until he completed his high school degree and had a way of supporting himself. However, as he approached his eighteenth birthday, he began communicating with his mother again, and was insistent on discharging himself after his eighteenth birthday so he could have more contact with her (a young person in New York State can remain in foster care after his or her eighteenth birthday, until age 21, but must consent to do so. See *N.Y. Fam. Ct.* § 1087(a) (McKinney 2007); *N.Y. Comp. Codes R. & Regs. tit. 18, §§ 430.12(f)(3)(c), 441.2(a)(ii)(c), 628.3(a)(1)(vii)* (McKinney 2007)). In fact, my client's mother

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

did not have a place for him to live, but my client was so frustrated with the agency's inability and refusal to plan with her, that he insisted on discharging himself. I encouraged him to remain in foster care until he had a place to live, a high school diploma, and an income. He was still in foster care at the time I transferred the case, but I do not know what has happened since.

317 See statutes cited supra note 316. This contributes further to the problem of youth who are discharged from foster care without housing, education, or employment, which is endemic around the country. See Martha Shirk & Gary Strangler, *On Their Own: What Happens to Kids When They Age Out of Foster Care* (Westview Press 2004); *Children Who Age Out of the Foster Care System: Hearing Before the Subcomm. on Income Security and Family Support of the Comm. on Ways and Means, 110th Cong.* (2007) (testimony of Mark E. Courtney, Chapin Hall Faculty Associate); Robert M. George, et al., *Employment Outcomes For Youth Aging Out of Foster Care* (Chapin Hall Publications 2002); *The Youth Advocacy Center, The Future of Teens in Foster Care* (2001).

318 See sources cited supra note 74.

319 Two other clients of mine, adolescent sisters, wavered for two years over whether they wanted to be reunited with their mother or be adopted by their foster mother. However, one day I received a phone call that the sisters had been removed from their foster home on an emergency basis because of allegations of a sexual relationship between the foster mother's son and one of the sisters. These allegations were later shown to be unfounded; however, neither of the clients ever spoke to the foster mother, the person who was supposed to adopt them, again. At the present time, the clients are living in another foster home, but fervently wish to return to their mother. Stories like this one are extremely common in the foster care system. See, e.g., *In re Rasheed A.*, G19009/06, N.Y.L.J. (8/3/07) (holding that, despite state and federal precedent that a parent whose rights have been terminated cannot subsequently seek guardianship or custody of the same child, it was proper in this case to award guardianship to terminated mother because of the extremely complicated and difficult experience and behavior of the child in his adoptive home, his profound attachment to his mother, and it was the only available avenue for permanency endorsed by the forensic psychologist for this child, aside from institutionalization).

320 N.Y. Soc. Serv. Law § 384-b(8)(f), (12) (McKinney 2007), and N.Y. Fam. Ct. Act 633 (McKinney 2007) allow for the court, at the conclusion of the TPR, to grant a period of up to one year (with the possibility of a subsequent one-year extension) during which the judgment on the TPR is suspended, as long as the parent complies with court-ordered conditions. At the end of the period, if the parent has complied, the TPR will be dismissed.

321 See *In re Ernesto Thomas A.*, 5 A.D.3d 380, 381 (N.Y. 2004); *In re Sarah-Beth H.*, 34 A.D.3d 242 (N.Y. App. Div. 2006); *In re Dionne W.*, 267 A.D.2d 1096 (N.Y. App. Div. 1999).

322 N.Y. Soc. Serv. Law § 384-b(12) (McKinney 2007).

323 *Id.* § 384-b(8)(f).

324 Suspended judgments are a significant possibility for respondents in permanent neglect and severe/repeated abuse cases. In 2005, 8.3% of TPRs in New York ended in suspended judgments. New York State Kids' Well-being Indicators, KWIC Indicator Profile: Foster Care TPR Judgments: Suspended Judgments, http://www.nyskwic.org/access_data/ind_profile.cfm?subIndicatorID=85&go.x=9&go.y=10.

325 See cases cited supra note 321.

326 See, e.g., *In re M.R.*, 2002 WL 31655025 (Minn. App. 2002) (affirming trial court's finding that, when all parties agreed at the scheduled TPR to postpone the trial for four to six months to allow mentally disabled respondent more time to complete her programs, this postponement was in the best interests of the children).

327 Supra notes 320-22.

328 See Appendix C.

329 Minn. Stat. Ann. § 260C.301(1)(b)(4) (2007); Vt. Stat. Ann. tit. 15A § 3-504 (2006). See also Mich. Comp. Laws § 712A.19b (2007).

330 Vt. Stat. Ann. tit. 15A § 3-504 (2006).

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

- 331 Minn. Stat. Ann. § 260C.301(1)(b)(4) (2007).
- 332 N.Y. Soc. Serv. Law § 384-b(4)(c) (McKinney 2007) was held constitutional for this reason in *In re Nereida S.*, 454 N.Y.S.2d 61 (N.Y. 1982).
- 333 See Jennifer Ayres Hand, Note, [Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights](#), 71 N.Y.U. L. Rev. 1251, 1281 n.164 (1996).
- 334 *Id.* at 1281 (“Indeed, more than one commentator has suggested that some judges “‘rubber stamp’ reasonable efforts’ on cases without insisting that the agency meet its burden”).
- 335 Ark. Code Ann. § 9-27-341(b)(1)(B)(vii)(b) (2007).
- 336 *Id.* § 9-27-341(b)(1)(B)(i)(a).
- 337 *Id.* § (b)(1)(B)(vii)(b) (internal citations omitted).
- 338 325 Ill. Comp. Stat. § 5/8.2 (West 2007); N.H. Rev. Stat. § 169-C:24-a III.(c) (2007); S.D. Codified Laws § 26-8A-21 (2007).
- 339 Minn. Stat. § 260.012(h)(2), (4), (6) (2007); N.H. Rev. Stat. § 169-C:24-a III(c).
- 340 Minn. Stat. § 260.012(h)(2), (4), (6).
- 341 Under numerous state statutes, another compelling reason to refrain from filing a petition to terminate rights arises if the parent has not been afforded reasonable opportunity to avail herself of services, or services had not been provided to her. See, e.g., Ala. Code 1975 § 26-18-5(b)(3) (2007); Alaska Stat. § 47.10.088(e)(2) (2007); Colo. Rev. Stat. § 19-3-604 (2007); Conn. Gen. Stat. § 17a-111a(b) (2007); D.C. Code § 16-2354(g)(3) (2007); Fla. Stat. § 39.8055(2)(b)(5) (2007); 705 Ill. Comp. Stat. § 405/2-23 (2007), 750 Ill. Comp. Stat. § 50/1 (2007); Ind. Code § 31-35-2-4.5 (2007). This also is a compelling reason for an agency not to file a petition under ASFA, 42 U.S.C. §675(5) (2006).
- 342 Idaho Code Ann. § 16-2005(6) (2007).
- 343 *Id.*
- 344 28 C.F.R. § 35.130(b)(7) (2007).
- 345 *Supra* note 155.
- 346 *In re Christopher B.*, 823 A.2d 301 (R.I. 2003); *In re Welfare of S.Z.*, 547 N.W.2d 886 (Minn. 1996); *In re Welfare of K.D.W.*, No. Co-91-155, 1991 WL 151349 (Minn. Ct. App. August 13, 1991); *In re Chapman*, 631 P.2d 831 (Or. Ct. App. 1981).
- 347 *In re Christopher B.*, 823 A.2d at 313 (“[W]e hold that [the agency], in petitioning for a TPR decree on mental-deficiency grounds, was required to demonstrate that it undertook reasonable efforts to address these mental-deficiency issues in the services it offered to this parent...reasonable efforts to reunify a family must in some way include an offer of services that would be reasonable under the particular circumstances of each given case-taking into account the particular needs of the subject family-including the mental deficiency of a parent”); *In re Welfare of the Children of M.R.*, No. C4-02-446, 2002 WL 31655025 (Minn. Ct. App. Nov. 26, 2002) (“Generally, for services to be ‘reasonable,’ the responsible agency must provide services that would assist in alleviating the conditions that led to the out-of-home placement”); *In re Welfare of D.F.*, No. C0-97-461, 1997 WL 407799 (Minn. Ct. App. July 22, 1997) (stating that it is necessary to assess whether services go beyond mere logistics, such as scheduling of appointments, to provide genuine assistance that might conceivably improve the circumstances of the parent and the relationship of the parent with the child.); *In re C.P.B.*, 641 S.W.2d 456 (Mo. Ct. App. 1982) (stating reunification plan must make clear what criteria would be applied to determine compliance). See also *In re Dependency of H.W.*, 961 P.2d 963 (Wash. Ct. App. 1998); *In re Custody and Parental Rights of M.M.*, 894 P.2d 298 (Mont. 1995); *In re Victoria M.*, 255 Cal. Rptr. 498 (Cal. Ct. App. 1989); *In re D.L.S.*, 432 N.W.2d 31 (Neb. 1988); *In re Welfare of B.L.W.*, 395 N.W.2d 426 (Minn. Ct. App. 1986); *In re S.P.W.*, 707 S.W.2d 814 (Mo. Ct. App. 1986);

NO CHANCE TO PROVE THEMSELVES: THE RIGHTS..., 15 Va. J. Soc. Pol'y &...

In re M.L.W., 452 A.2d 1021 (Pa. Super. Ct.1982); In re C.M.E., 448 A.2d 59 (Pa. Super. Ct. 1982); Kerr, supra note 230, at 415 (emphasizing the importance of tailored services).

348 In In re Dependency of W.W. Children, the court actually rejected the agency's position that it could determine that a mentally retarded parent was unable to care for her children in the foreseeable future without providing services, because even though "a reading of [N.Y. Soc. Serv. Law] § 384-b (4)(c) clearly shows that ... the legislature does not mandate a showing of diligent efforts by the agency, it does not in any way preclude such a showing." 736 N.Y.S.2d 567, 576 (N.Y. Fam. Ct. 2001). See also In re Viana Children, 476 N.Y.S.2d 750 (N.Y. Fam. Ct. 1984).

349 499 N.Y.S.2d 587 (N.Y. Fam. Ct. 1986).

350 Id. at 596.

351 65 N.Y.2d 39, 48 (N.Y. 1985).

352 In re Henry W., 818 N.Y.S.2d at 351.

353 Id.

354 22 A.D.3d 915 (N.Y. App. Div. 2005).

355 26 A.D.3d 332, 333 (N.Y. App. Div. 2006).

356 In re Daniel D., 562 S.E.2d 147, 160-61 (W. Va. 2002).

357 In re Stacey D., 684 N.W.2d 594, 603 (Neb. Ct. App. 2004).

358 In re Adoption of Cesar, 856 N.E.2d 198, 204 (Mass. App. Ct. 2006).

359 Supra note 313.

360 In re Division of Family Services, 2003 WL 22265071 (Del. Fam. Ct. 2003).

361 Supra notes 103, 148, and 281-82; see also In re Eden F., 741 A.2d 873, 892 (Conn. 1999) (holding that a parent does not have to prove that she is able to assume full responsibility for her child, unaided by available support systems, to avoid a TPR).

362 Children's Defense Fund, States' Subsidized Guardianship Laws At A Glance (2004), http://www.childrensdefense.org/site/DocServer/guardianship_laws.pdf?docID=544.

363 "Some ... caregivers choose not to adopt because they do not want to permanently alter family relationships or remain hopeful that the child's parents will address their problems and be able to resume caring for the child. Sometimes older children do not want to be adopted and sever legal ties to their parents, even though they wish to live permanently with a relative. In some cultures, terminating parental rights is contrary to cultural norms that value extended family and mutual interdependence." Id. States subsidize guardianship through a variety of local, state, and federal funding sources. The programs vary significantly, but the universal goal is to provide permanency for children by preventing them from entering, or enabling them to exit, state custody, without severing parental rights. Id. Most states (31) require that the child be in state care prior to receiving the subsidy, although the majority do not specify a minimum time length. Id.

364 In Kansas, the court may award permanent guardianship at the end of a TPR proceeding, even if the grounds were proven, in lieu of granting TPR. Kan. Stat. Ann. § 38-2272 (2006). The same is true in Mississippi, although Mississippi's guardianship is not subsidized. Miss. Code Ann. § 93-15-103 (2007). If a child is being cared for by a relative, this also is a compelling reason for an agency not to file a TPR under ASFA and many state statutes. Supra note 290. But this does not necessarily result in permanency or release from the foster care system; it only means that parental rights will not be terminated. In order to exit the foster care system, guardianship or custody must transfer from the state to the relative or another adult in the child's life.

- 365 Supra note 362.
- 366 In 1996, Congress passed an amendment to the Social Security Act offering states the option to apply for a waiver allowing them to continue receiving federal funding for children in child protective proceedings while testing alternative approaches for kinship care. New York Subsidized Guardianship (Generations United, Washington D.C.), available at [http:// ipath.gu.org/documents/A0/GU_NY.pdf](http://ipath.gu.org/documents/A0/GU_NY.pdf). New York did not submit an application for a waiver. *Id.* Waivers to the Social Security Act still are available, although New York has yet to apply. Supra note 362. Funding is also available from other federal sources, such as Temporary Assistance for Needy Families (TANF) program funds, and Title XX Social Services Block Grant (SSBG) Funds. *Id.*
- 367 In 1997, when ASFA was enacted, many states established subsidized guardianship as a permanency option for children in kinship care. New York did not do so. New York Subsidized Guardianship, supra note 369. Ever since, there has been a movement in New York urging state officials to pass legislation that supports “subsidized kinship guardianship,” but no such law has passed. Federation of Protestant Agencies, Inc., *Subsidized Kinship Guardianship: It's Time* (2002).
- 368 N.Y. Dom. Rel. Law §112-b (2006). See also *Ronald D., Sr. v. Doe*, 673 N.Y.S.2d 559, 561 (N.Y. App. Div. 1998).