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I. INTRODUCTION

The United States has 4.1[1] million parents with disabilities, meaning 6.2% of parents within the U.S. have at least one reported disability.[2] This statistic is even greater for certain subgroups—13.9% of parents who identify as American Indian or Alaska Native[3] and 8.8% of parents who identify as African American report having a disability.[4] These statistics are especially important in the dependency and child welfare context, as multiple studies have found that parents with disabilities are significantly overrepresented within the welfare system.[5] Furthermore, parents with disabilities, or even mere speculated disability,[6] are not only entering the system at

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1. This number is an approximation, recent estimates vary between 4.1 million to nine million. *See* H. Steven Kaye, *How Many Parents with Disabilities are There in the U.S.?*, THROUGH THE LOOKING GLASS (2012), https://www.lookingglass.org/national-services/research-a-development/126-current-demographics-of-parents-with-disabilities-in-the-us; *see also Parenting with a Disability: Know Your Rights Toolkit*, NAT'L COUNCIL ON DISABILITY, 4 (May 5, 2016), https://ncd.gov/sites/default/files/Documents/Final%20508_Parenting%20Toolkit_Plain%20Language_0.pdf.

2. *See Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*, NAT'L COUNCIL ON DISABILITY, 44 (Sept. 27, 2012), https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf; Kaye, *supra* note 1.

3. Throughout this paper, all race and ethnic labels are verbatim language that the studies' researchers utilized. While this paper will intentionally utilize the language chosen by the researchers, it must be acknowledged that those labels are not necessarily inclusive, and persons who may have identified as those labels for purposes of the research may not personally choose to identify themselves with such language (i.e., Indigenous versus American Indian; Black versus African American).

4. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 44.

5. Ella Callow & Jean Jacob, *Parental Disability in Child Welfare Systems and Dependency Courts: Preliminary Research on the Prevalence of the Population*, 93 CHILD WELFARE 73, 85–87 (2014) (discussing the study's general finding that parents with disabilities are overrepresented in child welfare cases is consistent with prior scholarship).

6. *Id.* at 84, 87 (finding that speculation that a parent's disability renders parent unfit to be a significant reason for opening a child welfare case: 43.3% in El Paso, 48.6% in Los

disproportional rates, but are facing further discrimination throughout the child welfare process based solely, or in part, on their identification as a person with a disability.[7] For example, a study found that parents with disabilities were three times more likely to experience a termination of parental rights (TPR) than parents without a disability.[8]

Notably, even though scholarship has offered statistics regarding the prevalence of parents with disabilities that enter the child welfare system and some insight into the discrimination these individuals face, scholars have questioned whether these statistics are truly representative of the actual population.[9] First, since disability is difficult to consistently measure, we cannot be certain that the current statistics are representative of the actual population of parents with disabilities that fall within the system.[10] Moreover, "when parents are being assessed in order to retain custody of their children, parents may be resistant to the evaluation process and reticent to disclose pertinent information that can impact the assessor's ability to diagnose mental health conditions."[11]

This paper will address the rights that parents with disabilities have in the child welfare context. Additionally, this paper will indicate what is required of all child welfare agency players under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.[12] This paper will conclude with recommendations to ensure all child welfare players are not impermissibly discriminating against parents with disabilities, but are instead ensuring parents with disabilities are given the opportunity to participate in, and benefit from, the agency's services in support of reunification with their children.

Though this paper's primary focus is on the child welfare system's

Angeles, and 16% in Hennepin).

7. *See* Sarah H. Bernard & Jean O'Hara, *Needs of Parents with Intellectual Disabilities: An Ecological Perspective*, CW360, THE INTERSECTION OF CHILD WELFARE AND DISABILITY: FOCUS ON PARENTS, 10 (Fall 2013), https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf ("[p]arents with intellectual disabilities are more likely to have their children removed for reasons not lying with poor parenting alone").

8. LaLiberte, T., Lightfoot, E., Mishra, S., & Piescher, K., *Parental Disability and Termination of Parental Rights in Child Protection*, MINN-LINK, Brief No. 12 (2012), https://cascw.umn.edu/wp-content/uploads/2015/06/Brief-12-ParentalDisabilityTPR_2015.WEB_a.pdf.

9. *See* Traci L. LaLiberte & Elizabeth Lightfoot, *Parenting with Disability—What Do We Know?*, CW360, THE INTERSECTION OF CHILD WELFARE & DISABILITY: FOCUS ON PARENTS, 4 (Fall 2013), https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf; Callow & Jacob, *supra* note 5, at 86.

10. *See* LaLiberte & Lightfoot, *supra* note 9, at 4 (noting that there are about 200 different federal definitions of "disability" and that researchers also use varying definitions and measurements in their scholarship).

11. Callow & Jacob, *supra* note 5, at 86.

12. *See* Americans with Disabilities Act Title II, 42 U.S.C. §§ 12131-12165 (1990); *see also* Rehabilitation Act § 504, 29 U.S.C. § 701 (1973).

insidious relationship with parents with disabilities, we must, at minimum, acknowledge that these already vulnerable individuals may face disability discrimination coupled with wealth and race discrimination in the system. In a study, researchers found that African American parents were overrepresented in the child welfare system in comparison to their actual population in the community.[13] Specifically, the study focused on three different geographical areas and the percentage of parents with disabilities within each area's child welfare system.[14] The study found alarming statistics involving the intersection of race and disability in all three geographical areas surveyed.[15] For example, in a survey of Hennepin County, African Americans comprised only 11.6% of the population, yet the study found that 44% of the cases with parental disability involved mothers who identified as African American.[16] While these statistics alone are alarming, another facet must also be acknowledged—the intersection[17] of poverty in the child welfare system—that families may experience poverty discrimination in addition to race, disability, and other discrimination all at once. To briefly exemplify the intersection of race and poverty, a study found that African American and Hispanic children were twice as likely as White children to be part of a family living in poverty.[18] To exemplify the intersection of poverty, disability, and child welfare, a study found that parents with disabilities who experienced a termination of parental rights (TPR) are likely to come from impoverished backgrounds.[19]

If real change is to be sought regarding the significant prevalence of parents with disabilities that are brought into the system, and the discrimination they face, then those who seek change must *intentionally* question how poverty and race may also contribute to the discrimination these parents already face. "If we truly care about children and families, it is time to stop confusing poverty with neglect and devote ourselves to doing something about it."[20] On the same note, it is time to stop confusing

13. Callow & Jacob, *supra* note 5, at 87–88.

14. *Id*.

15. *Id*.

16. *Id*.

17. Kimberlé Crenshaw coined the term "intersectionality," which represents the relation between a person's multiple identities. Such intersection may contribute to the amplification of oppression a person may experience. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

18. Megan Martin & Alexandra Citrin, *Prevent, Protect & Provide: How Child Welfare Can Better Support Low-Income Families*, STATE POL'Y ADVOC. & REFORM CTR. 2 (2014).

19. LaLiberte et al., *supra* note 8 (69% of parents that experienced TPR qualified for free or reduced lunch).

20. Jerry Milner & David Kelly, *It's Time to Stop Confusing Poverty with Neglect*,

disability with neglect, and do something about it.

II. THE INTERCONNECTION OF THE SIGNIFICANT RIGHTS, INTERESTS, AND RISKS AT STAKE IN DEPENDENCY LAW: THE TRADITIONAL BALANCING

Within the context of dependency, addressing the rights of parents with disabilities is significant not only due to the overwhelming portion of parents with disabilities that come within the system but because of the multiple interests at play. Child welfare is already a heightened, sensitive situation that involves balancing the government's (local or state child welfare agencies and juvenile courts) interest in ensuring the health, safety, and wellbeing of children and families, with the parents' fundamental right to raise their children. In addition to those factors, as this paper addresses, governments must also balance the rights of parents with disabilities to be free from discrimination on the basis of disability.

Since 1923,[21] the U.S. Supreme Court has recognized that parents have a constitutional rights to the care, custody, and control of their children.[22] In 1923, the U.S. Supreme Court in *Meyer v. Nebraska* first established that parents have the right to raise their children as they choose, when the Court found that a statute banning second language teaching interfered with the "power of parents to control the education of their own."[23] Since then, many cases have reemphasized the original findings in *Meyer*.[24] In the most recent parental rights U.S. Supreme Court decision, *Troxel v. Granville,* the Court echoed the precedent supporting constitutional parental rights, stating, "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care,

CHILD. BUREAU EXPRESS (2019), https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=212&sectionid=2&articleid=5474.

21. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (first U.S. Supreme Court case establishing that "the right to marry, establish a home, and bring up children" are liberties protected under the Due Process Clause of the Fourteenth Amendment); *Parental Rights Cases to Know*, A.B.A. (Feb. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/february-2016/parental-rights-cases-to-know/.

22. *Meyer*, 262 U.S. at 390.

23. Id. at 401.

24. *See Parental Rights Cases to Know*, *supra* note 21; *see also* Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (striking down state law that required attendance at public schools, and reaching analogous conclusion Court found in *Meyer*); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child").

custody, and control of their children."[25]

While it is clear that the Court has established and continually supported the fundamental right to parent without interference by the state, that right is not without limit. This right is balanced by the doctrine of *parens patriae*, Latin for "parent of his or her country."[26] Under the *parens patriae* doctrine, the state, such as child welfare agencies, is given the power to "act as a guardian for those who are unable to care for themselves, such as children or persons with disabilities. For example, under this doctrine a judge may change custody, child support, or other rulings affecting a child's well-being, regardless of what the parents may have agreed to."[27]

In 1944, the Supreme Court in *Prince v. Massachusetts* held, in echoing the doctrine of *parens patriae*, that parental authority is not without limit, and that the government has broad discretion to restrict a parent's authority if doing so is in the best interest of the child's welfare.[28] The Court recognized the government's broad authority by emphasizing that although children share many of the rights of adults, children also face different potential harms from similar activities.[29]

While caselaw has continuously established and recognized the fundamental nature of parental rights, it has also emphasized that a parent's right is not without limitation—that the government may limit a parent's right when doing so is in the best interest of the child. This is the source of dependency law that includes the right of the government to terminate parental rights.

Even though the government holds the power to terminate parental rights on the basis that the termination is in the best interest of the child, this right is not without limitation.[30] In exercising this power, states must comply with standards of due process. For example, the Supreme Court held that a state could not terminate an unwed father's rights to his children before a hearing on his parental fitness.[31] In *Stanley v. Illinois*, the Supreme Court articulated that the lower court's presumption, that unwed fathers are unsuitable and neglectful parents, did not comport with due process

25. Troxel v. Granville, 530 U.S. 57, 66 (2000).

26. *Parens Patriae*, NOLO'S PLAIN-ENGLISH LAW DICTIONARY (May 2009), https://www.nolo.com/dictionary/parens-patriae-term.html.

27. *Id.*

28. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

29. *See Prince*, 321 U.S. at 169 ("It is true children have rights, in common with older people, in the primary use of highways. But even in such use streets afford dangers for them not affecting adults. And in other uses, whether in work or in other things, this difference may be magnified. This is so not only when children are unaccompanied but certainly to some extent when they are with their parents. What may be wholly permissible for adults therefore may not be so for children, either with or without their parents' presence.").

30. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 48.

31. *See id.*; *see also* Stanley v. Illinois, 405 U.S. 645 (1972).

requirements.[32] The Court emphasized at least one limitation on the state's power to terminate parenteral rights: the state must prove unfitness by an *individualized* inquiry rather than a mere presumption based on a parent's ascribed status.[33] The Court analogized their holding (requirement of individualized inquiry of parental unfitness) to a situation where a state's statutory scheme, regarding license suspension, violated the Due Process Clause by depriving a driver of his license without any reference to the very reason (fault in driving).[34]

Furthermore, in 1982, in *Santosky v. Kramer*, the Supreme Court established another obstacle the government must overcome before terminating parental rights: the state must prove parental unfitness by *clear and convincing evidence*, and a child must remain with his or her parent if the state could not prove the required burden.[35] The Court explained that the state must overcome this *strong* presumption against termination because "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[36] The Court once again echoed the existence of "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their children," emphasizing the crucial, indispensable nature of ensuring that parents facing dissolution of their parental rights have "fundamentally fair procedures."[37]

III. A NECESSARY ADDITIONAL FACTOR TO THE TRADITIONAL BALANCING TEST: STATE CHILD WELFARE SYSTEMS MUST COMPLY WITH TITLE II & SECTION 504 TO ENSURE PARENTS WITH DISABILITIES ARE PROTECTED

Part of ensuring a "fundamentally fair process" includes guaranteeing that parents with disabilities do not face discrimination on the basis of disability. Thus, the rights of parents under the federal and state disability

32. *Stanley*, 405 U.S. at 649.

33. *See Stanley*, 405 U.S. at 654–55 ("It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring."); NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 48.

34. *Stanley*, 405 U.S. at 653 (citing Bell v. Burson, 402 U.S. 535 (1971)).

35. Santosky v. Kramer, 455 U.S. 745 (1982).

36. *Id.* at 760; *see* NAT'L COUNCIL ON DISABILITY, *supra* note 2, at 48.

37. *Santosky*, 455 U.S. at 753.

rights laws are a critical component in the balancing of rights that dependency systems must do.

In 1990, Congress enacted the Americans with Disabilities Act (ADA), amended in 2008,[38] "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[39] Moreover, Congress specifically indicated, within the initial findings and purpose section, that one of the purposes of the Act was "to ensure that the Federal Government plays a central role in enforcing the standards established in [the] Act on behalf of individuals with disabilities."[40] Currently, more than 54 million Americans are covered.[41]

Title II of the ADA prohibits "public entities" from discriminating on the basis of disability, stating "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[42] Similarly, Section 504 of the Rehabilitation Act also prohibits such discrimination by any entity receiving federal funds.[43]

A "public entity," for purposes of Title II, includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or a local government."[44] In other words, Title II applies to all the services, programs, and activities of all state and local governments.

To be in compliance with Title II and Section 504, public entities must provide qualified individuals with, when necessary, three types of reasonable accommodations: "(1) reasonable modifications to the rules, polices, or practice; (2) the removal of architectural, communication, or transportation barriers; and (3) the provision of auxiliary aids."[45] While public entities are required to make *reasonable* modifications, the ADA does not require public

38. ADA Amendments Act (ADAAA) of 2008 became effective on January 1, 2009. The major purpose of the ADAAA was to broaden the definition of disability. *See* ADA Amendments Act of 2008, 42 U.S.C.S. § 12101 (LexisNexis, Lexis Advanced through Pub. L. No. 110-325) ("[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled"); RUTH COLKER & PAUL D. GROSSMAN, THE LAW OF DISABILITY DISCRIMINATION 15 (8th ed. 2013).

39. 42 U.S.C. § 12101(b)(1) (2020).

40. 42 U.S.C. § 12101(b)(3) (2020).

41. *How Many People in the United States Have a Disability?*, ADA NAT'L NETWORK (last updated Oct. 2020), https://adata.org/faq/how-many-people-united-states-have-disability.

42. 42 U.S.C. § 12132 (2020).

43. *See* COLKER & GROSSMAN, *supra* note 38, at 167.

44. 42 U.S.C. § 12131(1)(B) (2020).

45. COLKER & GROSSMAN, *supra* note 38, at 168.

entities to make "fundamental alterations" to their rules, polices, or practice.[46]

A. State Child Welfare Systems Are Covered by Title II of the ADA, Section 504, and Other Federal Statutes Addressing the Rights of Persons with Disabilities

1. Title II of the Americans with Disabilities Act

State child welfare courts, agencies, and proceedings are local government services, programs, and activities; therefore, simply based on the text of Title II, Title II applies to child welfare agencies and court systems.[47] Additionally, the U.S. Department of Justice, the agency charged with enforcing Title II of the ADA against public entities, has supported this view. The U.S. Department of Justice has indicated that:

> Title II of the ADA applies to the services, programs, and activities of all state and local governments throughout the United States, including child welfare agencies and court systems. The "services programs, and activities" provided by public entities include, but are not limited to, investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services. "Services, programs, and activities" also extend to child welfare hearings, custody hearings, and proceedings to terminate parental rights.[48]

In summary, Title II is applied to *all* aspects of a state or local child welfare case.

2. Section 504 of the Rehabilitation Act and Social Security Act

Similarly, local and state child welfare systems must also comply with Section 504 of the Rehabilitation Act, as local and state child welfare systems receive federal funding. The major source of federal funding for local and state child welfare programs comes from the Social Security Act.[49]

46. PGA Tour, Inc. v. Martin, 532 U.S. 661, 682 (2001).

47. *See* U.S. Dep't of Justice & Dep't of Health & Human Services, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act* 3 (Aug. 2015), https://www.hhs.gov/sites/default/files/disability.pdf [hereinafter *U.S. DOJ & HHS Technical Assistance*].

48. *Id.* at 3 (citing various sections of the ADA).

49. *See* 42 U.S.C. § 671 (2020).

Additionally, "Section 504 applies to all of the operations of agencies and sub-agencies of state and local governments, even if [the Social Security Act federal funding] is directed to [only] one component of the agency or for one purpose of the agency."[50]

The Social Security Act also provides a few additional requirements that child welfare system funding recipients must follow. For example, the Social Security Act delineates specific exceptions to the termination of parental rights when a child is in foster care for the preceding fifteen out of twenty-two months.[51] It is important to note, one exception to the termination of parental rights is when the "the state . . . has failed to provide such *services deemed necessary* for the safe return of the child to his or her home."[52] Child welfare agencies are required to provide services that meet the unique needs of families; and, a failure to provide services to address a parent's disability-needs may qualify as an exception to the termination requirement.[53]

To summarize, child welfare courts and their proceedings, agencies, and even private service providers, must comply with Title II of the ADA and Section 504 of the Rehabilitation Act by not discriminating against parents with disabilities and providing these parents with reasonable accommodations.

3. Limitations and Defenses Available

The Americans with Disabilities Act recognizes the special balancing of interests the government must do in order to preserve their interest in ensuring children and families are safe, and their duty to ensure parents with disabilities are not discriminated against in proceedings:

> Child welfare agencies have an obligation to ensure the health and safety of children. . . . Under child welfare law, child welfare agencies must make decisions to protect the safety of children. The ADA and Section 504 are consistent with the principle of child safety. For example, the ADA explicitly makes an exception where an individual with a disability represents a "direct threat." Section 504 incorporates a similar principle.[54]

50. *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 3 (citing to 28 U.S.C. § 794(b)).

51. *See* 42 U.S.C. § 675(5)(E)(i)-(iii) (2020).

52. *See* 42 U.S.C.§ 675(5)(E)(iii) (2020); *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 14 (emphasis added).

53. *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 13.

54. *Id*. at 16; *see* 28 C.F.R. § 35.139 (2020) (DOJ regulation indicating that a public entity is not required "to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or

B. Continued Discrimination Against Parents with Disabilities: Inconsistent Application of Title II and Section 504 in State and Federal Child Welfare Systems

The plain language of Title II and Section 504 clearly suggest the anti-discrimination provisions are required by state child welfare agencies and courts, as public entities. Nevertheless, a history of discrimination against parents with disabilities involved with the child welfare system remains.[55]

However, courts have been inconsistent in applying the ADA in proceedings involving a termination of parental rights. For example, federal and state courts have consistently held that the ADA does not apply to parents facing a termination of parental rights.[56] One court found that a termination of parental rights proceeding is not a "service, program, or activity" within the meaning of the ADA.[57] In rejecting the ADA applying to parents facing a termination of parental rights, one court even went so far as to say that "a juvenile court's jurisdiction cannot interpret a federal law or conduct 'an open-ended inquiry into how the parents might respond to alternative services and why those services have not been provided'."[58]

Some courts have allowed ADA claims to be raised but only prior to a termination of parental rights.[59] At least one court has erroneously held that the ADA cannot be raised in dependency proceedings.[60] However, some courts have allowed the ADA to be a defense to a termination of parental rights.[61] Nevertheless, in those cases, the courts ruled that no ADA violations occurred because the services given to the parents were sufficiently reasonably modified to accommodate, and thus did not run afoul of the ADA.[62]

safety of others" and that the "public entity must make an individualized assessment" when making such a determination).

55. *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 1.

56. *See* Dale Margolin Cecka, *Parents with Mental Disabilities: The Legal Landscape*, CW360, THE INTERSECTION OF CHILD WELFARE & DISABILITY: FOCUS ON PARENTS, 14 (Fall 2013), https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf.

57. Adoption of Gregory, 434 Mass. 117, 121 (2001).

58. Cecka, *supra* note 56, at 14 (quoting *In re* B. S., 166 Vt. 345, 353 (1997)).

59. *See id.*

60. *See* M.C. v. Dep't of Children & Families, 750 So. 2d 705, 706 (Fla. Dist. Ct. App. 2000) (stating dependency proceedings are for benefit of child, not the parent, thus ADA defense cannot be used).

61. *See, e.g.*, State *ex rel.* Children, Youth & Families Dep't. v. *In re* John D., 123 N.M. 114, 120 (1997) ("it would take extraordinary, rather than reasonable, efforts to get Mother to participate voluntarily in the treatment plan.").

62. *See, e.g.*, *id.*

C. Getting Consistent: U.S. Departments of Justice and Health and Human Services Enforcement of Title II and Section 504 in Child Welfare Systems and Proceedings

In 2015, the U.S. Departments of Justice and Health and Human Services investigated a complaint made by Sara Gordon, a parent with a developmental disability involved in the child welfare system, against the Massachusetts Department of Children and Families (DCF) pursuant to Title II and Section 504.[63] The Departments found that DCF impermissibly "acted based on Ms. Gordon's disability . . . [and made] discriminatory assumptions and stereotypes about her disability, without consideration of implementing appropriate family-based support services."[64] Specifically, the Department found that DCF failed to: (1) initially analyze Ms. Gordon to determine what services and supports were appropriate for her to prevent the continued out-of-home placement of her child, (2) implement *appropriate* reunification services while her child was in foster care, (3) identify appropriate service plan tasks, (4) assist Ms. Gordon in completing service plan tasks in order to achieve reunification with her child, and (5) provide *meaningful* visitation with her child and opportunities to enhance her parenting skills.[65] The Departments concluded that DCF violated its obligations under Title II and Section 504, and as a result DCF "denied Ms. Gordon and [her child] the opportunity to be a family."[66] The specific examples of DCF's violations were extensive, however a few notable examples are discussed below.

First, throughout the case, DCF acted on its own assumptions about Ms. Gordon's disability.[67] The ADA's most basic requirement is that "covered entities evaluate persons with disabilities on an 'individualized basis.'"[68] However, DCF, on multiple occasions, acted on their own perceived biases and unwarranted assumptions regarding Ms. Gordon's developmental disability, instead of a true individualized assessment.[69] After DCF removed the child from Ms. Gordon's custody, a DCF social worker conducted their form of a "comprehensive assessment," which ultimately concluded that Ms. Gordon needed to learn basic skills in order to parent appropriately, focusing

63. *See* Letter from Vanita Gupta, Acting Assistant Att'y Gen., Civil Rights Division, U.S. Dep't of Just., et al., to Erin Deveney, Interim Comm'r, Dep't of Child. and Fams., Exec. Off. of Health and Hum. Servs. (Jan. 29, 2015) 1, 5, https://www.hhs.gov/sites/default/files/mass_lof.pdf [hereinafter U.S. DOJ & HHS Letter]; *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 1–2.

64. *See* U.S. DOJ & HHS Letter, *supra* note 63, at 2.

65. *Id*. at 11–12.

66. *Id.* at 12.

67. *Id*.

68. *Id*.; *see PGA Tour*, 523 U.S. at 690.

69. U.S. DOJ & HHS Letter, *supra* note 63, at 13.

on how her disability limits her ability to safely parent.[70] Notably this "comprehensive assessment" lacked any sort of evaluation of the risk to the child and the services needed to get Ms. Gordon towards a path of reunification with her child.[71] The "comprehensive assessment" focused on the significance of (1) her "cognitive limitations," and (2) obtaining a diagnosis for Ms. Gordon.[72] The Departments concluded that:

> DCF's excessive focus on the need for a disability diagnosis and IQ, and reliance on the absence of this information as the basis for failing to consider or provide necessary services resulted in a denial of an equal opportunity to participate and benefit from DCF services, programs and activities on the basis of disability.[73]

Another example of a particularly egregious violation was DCF's failure to implement services that were appropriate and tailored to Ms. Gordon and her particular disability.[74] Even though Ms. Gordon complied with majority of the service plan,

> DCF still required [her] to show that she could parent on her own without assistance during majority of the supervised visits. DCF thus continued to hold her to a higher standard than necessary, deny her a variety of services, insist on criteria and methods of administration that did not allow her to succeed because of her disability, and to failed to reasonably modify its practices.[75]

The Departments also recognized the case workers involved were not provided with appropriate policies, procedures, or training to aid their decision-making involving parents with disabilities, even though DCF regulations "recognizes the special needs of handicapped individuals."[76] In addition to the specific individual remedies, the Departments concluded that DCF should:

> Develop and implement procedures addressing how ADA and Section 504 requirements apply to DCF programs, services, and activities, including assessments, service planning and

70. U.S. DOJ & HHS Letter, *supra* note 63, at 13.

71. *Id*.

72. *Id.*

73. *Id.* at 14.

74. *Id.* at 18. Notably, DCF investigators and social workers contemporaneously recognized that Ms. Gordon did not have appropriate services in place. *Id*.

75. *Id*. at 19.

76. *Id.* at 23.

> implementation, visitation, and safety requirements[, and i]mplement a training program for all investigators, social workers, family resource workers, supervisors, and Area Program Managers on compliance with Title II and Section 504.[77]

Later, in August 2015, as a response to the findings of discrimination against Ms. Gordon, the U.S. Department of Health and Human Services Office for Civil Rights and the U.S. Department of Justice Civil Rights Division issued a Technical Assistance to assist local and state child welfare agencies and courts in ensuring their compliance with Title II and Section 504.[78] The Departments specifically indicated the Technical Assistance was made because:

> Both the HHS Office for Civil Rights and DOJ Civil Rights Division . . . received numerous complaints of discrimination from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising. …. OCR and DOJ have found that child welfare agencies and courts vary in the extent to which they have implemented polices, practices, and procedures to prevent discrimination against parents and prospective parents with disabilities in the child welfare system.[79]

The Technical Assistance also noted the issues parents with disabilities face within the child welfare system are "long-standing and widespread."[80] The Technical Assistance provided a much needed reality check, stating "parents with disabilities are overly, and inappropriately, referred to child welfare services," and parents with intellectual or psychiatric disabilities "face the most discrimination based on stereotypes, lack of individualized assessments, and failure to prove needed services."[81]

The Technical Assistance provided a brief, yet clear summary of the legal requirements of local and state child welfare agencies and courts under Title II of the ADA and Section 504 of the Rehabilitation Act—specifically *how* those legal requirements are applied to local and state child welfare agencies and courts.[82] In addition, the Technical Assistance provided detailed information and specific implementation examples to aid child welfare agencies and courts to ensure that "parents and prospective parents

77. U.S. DOJ & HHS Letter, *supra* note 63, at 24.
78. *See U.S. DOJ & HHS Technical Assistance*, *supra* note 47.
79. *See id.* at 1.
80. *See id.* at 2.
81. *Id.*
82. *Id.* at 1–5.

with disabilities have an equal access to parenting opportunities while ensuring children safety remain in or are placed in safe and caring homes."[83]

While the Technical Assistance provided immense and detailed guidance for child welfare agencies and courts, the most significant guidance was the confirmation that "Title II covers *all* of the programs, services, and activities of state and local governments, their agencies, and departments."[84] This guidance ultimately challenged many of the earlier-mentioned court holdings[85] that the ADA does not apply to termination of parental right proceedings specifically, or child welfare systems at all.[86] Moreover, the Technical Assistance confirmed that even programs of private and nonprofit agencies that offer services to families on behalf of the state or municipality come within the requirements of Title II and Section 504, making "child welfare agencies responsible for the programs and activities of private and non-profit agencies that provide services to children and families on behalf of the state or municipality."[87]

At the most basic level, the Technical Assistance clarifies that, under Title II and Section 504, parents with disabilities must be given *individualized* treatment, which means the child welfare "services must be adapted to meet the needs of a parent or prospective parent who has a disability to provide meaningful and equal access to the benefit."[88] For example, if an agency provides a general parenting class, and a parent with a cognitive disability needs a different method of instruction, the agency is required to provide that parent with the method of instruction they require "unless doing so would result in a fundamental alteration."[89] Let's say a parent who requires more individualized assistance in learning new skills is enrolled in a required group parenting class. Under Title II and Section 504, the agency may need to modify this particular group training by allowing more frequent, longer, or more meaningful training for this specific parent.[90] These are examples of the agency complying with the requirement of reasonable modification under Title II and Section 504.

The Technical Assistance clarifies two narrow situations when an agency or court may lawfully discriminate against a parent. First, as mentioned above, the agency or court is not required to make modifications to its policies, procedures, or practices when "doing so would result in a

83. *See U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 5.
84. *Id.* at 8.
85. *See supra* Section III B.
86. *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 8.
87. *Id*.
88. *Id.* at 5.
89. *Id*.
90. *Id.* at 10.

fundamental alteration to the nature of the program."[91] Second, while Title II and Section 504 aim to protect the rights of persons with disabilities, parents who pose a "direct threat" to their children are not protected under the federal statutes, stating "a parent or prospective parent with a disability may not be appropriate for child placement because he or she poses a significant risk to the health or safety of the child that cannot be eliminated by a reasonable modification."[92] The Technical Assistance makes clear that discrimination based on disability via disparate treatment[93] or disparate impact[94] are both impermissible.

Finally, the Technical Assistance offered multiple remedies and courses of action for parents who have been aggrieved due to discrimination.[95] The Departments recommended the following actions for parents that have been discriminated against due to their disability: (1) raise a Title II or Section 504 claim in the child welfare proceeding, (2) in some cases, pursue a complaint under Title II or Section 504 in federal court, and/or (3) file complaints with the departments (HHS and DOJ).[96]

D. (Some) States Leveling the Playing Field: Comparison of State Legislative (In)actions in Ensuring Parents with Disabilities Are Not Discriminated Against

States should pass parent-protective legislation to ensure parents with disabilities are supported. Currently seventeen states[97] have passed

91. *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 5.

92. *Id.*; *see* 28 C.F.R. § 35.139 (2020) (DOJ regulation regarding direct threat ADA); Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 287–88 (1987) (explaining under Section 504, court must conduct an individualized inquiry and make appropriate findings, based on reasonable medical judgment about the nature of the risk, duration of risk, severity of risk of potential harm to others, and probabilities the disease will be transmitted).

93. "A child welfare agency or court may not . . . engage in practices or methods of administration that . . . have the *purpose* . . . of defeating or substantially impairing accomplishment of the objectives of the child welfare agency's or court's program for persons with disabilities." *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 4 (emphasis added).

94. "A child welfare agency or court may not . . . engage in practices or methods of administration that have the *effect* of discriminating on the basis of disability." *Id.* at 4 (emphasis added).

95. *See id.* at 17.

96. *See id.*

97. Washington, California, Idaho, Utah, Arizona, Colorado, Kansas, Missouri, Illinois, Arkansas, Tennessee, Alabama, Georgia, South Carolina, West Virginia, Maryland, and Vermont have passed legislation that supports parents with disabilities. *See Map of Current State Legislation Supporting Parents with Disabilities*, BRANDEIS: HELLER SCH. FOR SOC. POL'Y & MGMT. (Feb. 28, 2020), https://heller.brandeis.edu/parents-with-disabilities/map/index.html.

legislation that supports parents with disabilities. Eleven other states[98] have legislation currently pending. By contrast, twenty-two states[99] and the District of Columbia do not have any sort of legislation that supports parents with disabilities.

In 2003, Idaho became the first state to pass legislation that included disability protections in their termination of parental right statutes by removing disability as a ground for termination.[100] In that same year, Idaho passed legislation that focused on eliminating discrimination against persons involved in the child welfare system on the basis of disability.[101] Specifically, the Idaho legislature added in their initial policy section, "[n]othing in this chapter shall be construed to allow discrimination on the basis of disability."[102] The Idaho legislature defined "disability" by tracking similar language of the ADA:

> "Disability" means, with respect to an individual, any mental or physical impairment which substantially limits one (1) or more major life activity of the individual including, but not limited to, self-care, manual tasks, walking, seeing, hearing, speaking, learning or working, or a record of such an impairment, or being regarded as having such an impairment.[103]

The Idaho legislature also defined the meaning of "supportive services."[104] In addition to defining supportive services, the Idaho legislature also added that parents with disabilities have a right during the adjudicatory hearing to "introduce admissible evidence regarding how use of adaptive equipment or supportive services may enable [them] to carry out the responsibilities of parenting the child by addressing the reason for the removal of the child."[105]

98. Oregon, Hawaii, New Mexico, Oklahoma, Nebraska, Minnesota, Indiana, Kentucky, New York, Massachusetts, and Rhode Island have pending legislation that supports parents with disabilities. *See* BRANDEIS, *supra* note 97.

99. Alaska, Nevada, Montana, Wyoming, North Dakota, South Dakota, Texas, Iowa, Wisconsin, Michigan, Ohio, Louisiana, Mississippi, Florida, Maine, New Hampshire, Connecticut, Delaware, Pennsylvania, New Jersey, Virginia, North Carolina, and the District of Columbia have not passed any legislation to specifically support parents with disabilities. *See id.*

100. *See Idaho's Success Story*, CW360, THE INTERSECTION OF CHILD WELFARE & DISABILITY: FOCUS ON PARENTS, 11 (Fall 2013), https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf; IDAHO CODE § 16-1601 *et seq.* (2020).

101. 2003 Idaho Sess. Laws 279.

102. *Id*.

103. *Id.*

104. *Id.*

105. *Id.*

Finally, the Idaho legislation required that the agency's multi-disciplinary team "develop a written protocol for investigation of child abuse cases . . . including protocols for investigations involving a family member with a disability."[106]

IV. PROPOSAL: RECOMMENDATIONS FOR CHILD WELFARE PLAYERS TO ENSURE THEY ARE SUPPORTING PARENTS WITH DISABILITIES TO THE EXTENT THAT TITLE II AND SECTION 504 REQUIRE

Parents with disabilities have just as much of an equal right to parent their children as parents without disabilities. In order to achieve this, the agency, court, service providers, attorneys and advocates for parents need to understand what their role is in supporting parents with disabilities, and ensure they themselves are not violating these parents' rights. Many child welfare courts, agencies, and attorneys lack knowledge of the federal Title II and Section 504 requirements, especially how those federal requirements are applied in the state child welfare system. As each child welfare player assess the competing rights and responsibilities at issue, they should, in this assessment, include the rights of parents with disabilities. These recommendations acknowledge this lack of understanding by recommending comprehensive trainings for all child welfare players, with tailored recommendations for specific child welfare players. In addition to the discussion of the recommended trainings, the first recommendation emphasizes the need to build a strong foundation, by taking the lead through legislative action.

A. State Legislative Action

To prevent the practice of courts[107] refusing to apply Title II or Section 504 in any portion of a child welfare proceeding due to mere reasoning that juvenile courts cannot interpret federal law, all state legislatures that do not currently have any legislation that support parents with disabilities should immediately start seeking and proposing such legislation.

In the event that state legislatures are slow to act on their own, it is recommended that local and state disability advocates engage in policy advocacy and outreach to their representatives to push for this necessary legislation. The success story of Idaho is an exemplar for disability advocates. The success of passing the 2003 Idaho legislative actions that

106. 2003 Idaho Sess. Laws 279

107. *See* Cecka, *supra* note 56, at 14 (quoting *In re* B. S., 166 Vt. 345, 353 (1997)).

supported parents with disabilities was not an overnight success story.[108] An advocacy organization, called the Fathers and Mothers Independently Living with their Youth (FAMILY), started their efforts in 1999.[109] Yet FAMILY only saw the fruits of their efforts after many failed attempts. The persistence and drive by FAMILY eventually resulted in the enactment of state legislation supporting parents with disabilities within just four years.[110]

The legislation states adopt should not merely support parents with disabilities, but should track the language that is used in Title II and Section 504. Adding language that is verbatim from Title II and Section 504 would be the ideal way to ensure that the purposes and goals of the federal laws are reflected at the state and local levels. Additionally, States should opt to adopt language, such as Idaho's[111], that require child welfare agencies to develop protocols for child welfare investigations involving family members with disabilities.

While legislative action will not stop parents with disabilities from being discriminated against in any part of the child welfare system, legislative action is a start. Ideally all fifty states and the District of Columbia should have some sort of legislation protecting parents with disabilities in child welfare proceedings.

B. Required Comprehensive Training for the Dependency System: Courts and Agencies

In order to ensure parents with disabilities are not discriminated against during *any* of their interactions with the child welfare system, all court and agency child welfare players must be uniformly and accurately informed. Therefore, it is recommended that that all child welfare judges and agency workers (this includes attorneys, social workers, and agency private and non-profit service providers) be required to take an annual comprehensive training provided by the municipality or state. The importance of a *single* training for all child welfare players is essential to ensure that all players are being taught the same accurate law and practice. These trainings should be done on an annual basis because (1) child welfare and federal disability law is ever-changing, and (2) this ensures that new child welfare players are aware of the federal disability law requirements and how to apply them in their role within local and state child welfare proceedings.

It is recommended that annual comprehensive trainings be conducted by a local protection and advocacy agency that has particular knowledge

108. *See Idaho's Success Story*, *supra* note 100, at 11.
109. *See id*.
110. *See id*.
111. *See* 2003 Idaho Sess. Laws 279.

regarding that state or local dependency system. The annual comprehensive training should include the following topics:

1. Training of Title II and Section 504 and how they are applied in the local or state child welfare system;
2. Importance of early detection of parents at risk;[112]
3. Understanding the requirement of a true comprehensive assessment of parenting abilities;[113]
4. Significance of revisiting assessment and service plans in order to assess whether plans need to be modified; and,
5. Understanding what appropriate services and adjustments of services look like.

One of the most effective, efficient ways to ensure parents with disabilities are not impermissibly discriminated against is for the child welfare system to have set procedures in place to ensure accurate and early detection of parents at risk.[114] Once the child welfare agency is made aware that a parent has a disability, the agency can then start to immediately make appropriate and reasonable modifications to that particular parent's service plan.

To prevent child welfare agencies and courts from relying on the type of inappropriate assessments that the Massachusetts child welfare agency relied on in Ms. Gordon's case, the comprehensive training needs to include what constitutes an appropriate comprehensive assessment of parental abilities. The training must reinforce the idea that the framework should shift from "lack of parenting capacity" to "how parenting can be [optimized] through community supports."[115] These assessments should also consider the availability of family supports, and the characteristics and importance of a parent's family relationships and connections.[116] Finally, the training should make clear that unreliable assessments, such as assessments that solely focus on statistics without any individualized analyzation of the parent, are not to be used.[117]

112. *See* Bernard & O'Hara, *supra* note 7, at 11; IDAHO CODE § 16-1601 *et seq.* (2020).

113. *See* Bernard & O'Hara, *supra* note 7, at 11.

114. *See id.*; IDAHO CODE § 16-1601 *et seq.* (2020).

115. Bernard & O'Hara, *supra* note 7, at 11.

116. *Id*.

117. Nicole Brisson, *Determining the Parenting Capacity of Parents with Low IQ*, YOUTH, RTS. & JUST. JUV. L. READER 3 (Autumn 2017), https://youthrightsjustice.org/wp-content/uploads/reader-archive/Juvenile_Law_Reader_14-3.pdf.

C. Required Knowledge and Practice-Based Training for Attorneys Representing Parents

Aside from recommending that attorneys representing parents take part in the comprehensive trainings, it is recommended that attorneys be required to take an annual parent advocacy knowledge and practice-based training that covers the following topics:

1. Understanding that early detection is crucial for attorneys that represent parents with disabilities, as this ensures attorneys are appropriately and zealously advocating for these parents from the very start.
2. Understanding how Title II and Section 504 may be applied to an attorney's work in representing parents with disabilities in child welfare proceedings; and,
3. Understanding the significance of clear, empathetic communication and explanation with their clients, and how this this looks is practice.

Understanding the requirements of Title II and Section 504 is crucial, but knowing how these provisions may be applied to your work as an attorney advocating for clients who have disabilities is necessary. For example, attorneys must understand that they can advocate for their clients by requesting an extension of time as an accommodation.[118] This extension of time as an accommodation request can be made at the outset of the child welfare proceeding to allow for a more comprehensive assessment, or the request can be made to aid in completing a required portion of the parent's service plan.[119] Even when these advocacy efforts fail, attorneys should be aware that they can, and should, immediately raise a Title II or Section 504 claim in the child welfare proceeding.[120]

Parents "are more likely to endure the process when they feel they have had a strong defense and a caring professional who listens to and respects them."[121] Attorneys can show parents that they respect them by being clear and empathetic in their communications and explanations, which has the added benefit of decreasing the parent's stress as a result of simply being involved with the child welfare system.[122] In being clear, attorneys should

118. Brisson, *supra* note 117, at 5.

119. *See id.*

120. *U.S. DOJ & HHS Technical Assistance*, *supra* note 47, at 17.

121. Martin Guggenheim, *The Role of Counsel in Representing Parents*, 35 A.B.A. CHILD. L. PRAC. 17, 23 (2016).

122. *See* Brisson, *supra* note 117, at 5.

"ensure parents understand the court process and what [the child welfare agency or court] is asking of them. Provide empathy, validation, encouragement, and coping strategies."[123]

Finally, attorneys should also recognize the own biases they may possess against their own clients with disabilities. For example, instead of automatically dismissing a client's incompliance, attorneys should understand that parents may experience cognitive overload because of stress from the case, which may manifest in the result of "missed visits, disorganization, and fatigue and should not be mistaken as a lack of cooperation, disinterest in parenting, or used against them."[124]

D. Recommendations for the U.S. Departments of Justice and Health and Human Services

While the U.S. Departments of Justice and Health and Human Services have already taken the step of incorporating the rights of parents with disabilities into their findings and guidelines, the Departments do not appear to be doing enough to enforce those positions. These recommendations conclude by encouraging the Departments to engage in more proactive researching, finding, investigating, and enforcing of violations of particularly egregious local and state child welfare systems.

Identifying particularly egregious local and state child welfare systems may be difficult, so it is recommended that the Departments partner with local protection and advocacy agencies to collect data on the Title II and Section 504 violations that occur within their local child welfare systems. And if they discover systemic violations within their locality, these protection and advocacy agencies should raise a complaint to the Departments.

V. CONCLUSION

Though Title II and Section 504 protects parents with disabilities from being discriminated against in child welfare proceedings, not all local and state child welfare agencies and courts apply the federal law. While some states have passed legislation tracking the federal law, much more is needed to ensure parents with disabilities are not discriminated against based on their disability. July 26, 2020 marked the 30th anniversary of the Americans with Disabilities Act, so it is about time we ensure parents with disabilities that come within the child welfare system are respected and afforded all of their rights under the ADA.

123. *See* Brisson, *supra* note 117, at 5.
124. *See id*.

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