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 Americans with Disabilities Act in state laws and in practice.

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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, told me 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.

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 “loving foster mother.” I didn’t want to explain to Tanya 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.

2 For purposes of preserving attorney-client confidentiality, all client and party names have been changed.
3 I represented Gaby as a law guardian in New York State Family Court. Under New York Law, the law guardian “helps protect [the minor’s] interests…and expresses [his or her] wishes to the court.” N.Y. FAM. CT. ACT § 241 (2007).
4 As Gaby’s counsel, I would not have advised an adversary; however, I did have permission to speak with Tanya from her attorney.
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 Americans with Disabilities Act. In Section III, I conclude by calling for a change in state laws and practice, particularly New York’s, by taking into account how a few states have amended their statutes since the passage of the ADA to incorporate 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 Americans with Disabilities Act, 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. Over 54 million Americans are protected under the ADA, including anyone with a “mental impairment that substantially limits one or more major life activities; or a record of such an impairment; or being regarded as having such an impairment.” 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.”

Prior legislation, Section 504 of the Rehabilitation Act of 1973, had prohibited discrimination against disabled individuals by governmental and

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private entities who received federal financial assistance. Title II of the Americans with Disabilities Act 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. 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.”

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.” But the fact-findings and the Purpose Statement, which invokes “the sweep of congressional authority,” 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” Congress also stipulated that the ADA is “a clear and comprehensive national mandate for the elimination of discrimination.” Indeed, the application of the ADA to termination of parental rights proceedings was not beyond the scope of Congress’ findings.

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 which receive federal financial assistance. According to the Supreme Court, the DOJ is crucial when interpreting Title II: "[b]ecause the Department of Justice is the agency directed

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11 28 C.F.R. §35.102.
13 See Tennessee v Lane, 541 U.S. 509 (2004). 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.”
14 42 U.S.C. §12101 (b)(4)
15 28 U.S.C. § 12101(b)(1)
16 28 C.F.R § 35.102
18 28 C.F.R. 42.503(e)-(f) (applying to all court systems receiving federal financial assistance).
The Supreme Court itself has held that providing the disabled with access to courts is a constitutional mandate of Title II. The Supreme Court has not, however, directly addressed whether the substance of state court proceedings, or specifically TPRs, constitutes a state “activity” or “service.” 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.

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.” Federal courts also have interpreted Title II broadly, applying it to social services; zoning activity; access to public areas and public meetings; arrests; education; housing; loans; and transportation, to name a few. Notably, the Ninth Circuit has

20 Tennessee v Lane, 541 U.S. 509 (2004).
21 Id at 531 (2004).
22 Id at 532.
23 Id at 527.
24 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 to In re Kayla M., 900 A.2d 1202 (R.I. 2006) on February 26 2007, http://www.supremecourtus.gov/docket/06-603.htm.
26 Id at 212.
27 Henrietta v Bloomberg, 331 F.3d 261 (2d Cir. 2003).
28 Innovative Health Systems, Inc. v. City of White Plains 117 F.3d 37 (2d Cir. 1997).
31 Delano-Pyle v. Victoria County, 302 F.3d 567 (5th Cir. 2002).
34 Gaona v Town & Country Credit, 324 F.3d 1050, 1056 (8th Cir. 2003).
applied Title II to parole proceedings, which, according to the court, exist to protect the public, just as TPRs serve to protect children. 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.”

Of course, litigants have not always been successful in Title II cases. But the applicability of Title II is rarely the problem; the difficulty more often lies in factual shortcomings. There is strong support, then, for applying Title II to TPRs. As a state service or activity, a parent cannot be subject to discriminatory treatment during or related to these proceedings.

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.” According to the court, “the ADA was designed to deal with access to public services and accommodations, rather than to alter the rights of

35 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).
36 Thompson v. Davis, 295 F.3d 890 (9th Cir. 2002)
37 Thompson v. Davis, 295 F.3d 890, 896-99 (9th Cir. 2002)
38 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-children relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights.”; infra note 74.
39 Innovative Health Systems, Inc. v. City of White Plains, 117 F.3d 37, 42 (2d Cir. 1997).
40 See E.g., Patrice v Murphy, 43 F. Supp 2d 1156 (W.D. Wash 1999); Riherva v Sheahan, 1998 WL 531875 (N.D. Ill. 1998); Darian v University of Massachusetts Boston, 980 F. Supp. 77 (D. Mass. 1997).
41 Patrice v Murphy, 43 F. Supp 2d 1156 (W.D. Wash 1999) (finding no ADA violation in the arrest of a deaf person because probable cause existed, and officers provided accommodations in accord with the ADA); Riherva v Sheahan, 1998 WL 531875 (N.D. Ill. 1998) (finding no ADA violation where AIDS patient was barred access to court because it was her status as a patient, not her affliction with AIDS, that was the reason she was not permitted to appear in court); Darian v University of Massachusetts Boston, 980 F. Supp. 77 (D. Mass. 1997) (finding that nursing student disabled by pregnancy-related conditions failed to state a claim where the state university reasonably accommodated her in a clinical course and was not required to eliminate other course requirements which are reasonably necessary to the proper use of a degree).
parents in state termination of parental rights statutes.\textsuperscript{43} Other states have similarly held that court proceedings are not a state activity or service.\textsuperscript{44}

However, some courts have found the ADA applicable to TPRs. In \textit{Matter of M.H. and G.H.},\textsuperscript{45} 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.\textsuperscript{46} Similarly, in the \textit{Interest of K.K.},\textsuperscript{47} 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.\textsuperscript{48} According to the Alaska Supreme Court, an ADA violation could bar a showing of “reasonable efforts” as necessary before termination.\textsuperscript{49}

Other courts have acknowledged the applicability of the ADA to TPRs, despite procedural problems. In the \textit{Interest of K.M.},\textsuperscript{50} 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 the \textit{Interest of T.M.},\textsuperscript{51} 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

\textsuperscript{43} Id.
\textsuperscript{45} 333 Mont. 286 (Mont. 2006).
\textsuperscript{46} \textit{See infra} n.155.
\textsuperscript{47} 2004 Iowa App. 2004 LEXIS 556, 3 (2004), aff’d, 682 N.W.2d 83 (2004).
\textsuperscript{48} Washington State also has applied the ADA to TPR proceedings, though no actual violations have been found. See \textit{In re Welfare of A.J.R.}, 896 R2d 1298, 1302 (Wash. App. 1995); \textit{In re Dependency of C.C.}, 1999 WL 106824 (Wash. App. 1999).
\textsuperscript{49} \textit{J.H. v. State Dept’ 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”); \textit{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).
\textsuperscript{50} 131 P.3d 1281, 1285 (Kan. App. 2006).
\textsuperscript{51} 715 N.W.2d 771 (Iowa App. 2006).
services were offered; a similar finding was made in the *Matter of Prentiss Ratliff* for a mentally ill mother who first raised the ADA on appeal of a TPR.\textsuperscript{52}

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 the *Matter of Aundre Murphy*,\textsuperscript{53} 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. In *Roby v. Arkansas Dept. of Human Services*,\textsuperscript{54} 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.”\textsuperscript{55} Numerous other states have held that the ADA applies to reunification services\textsuperscript{56}, but that parents can only litigate ADA claims in federal court or following other procedures under the ADA.\textsuperscript{57}

\textsuperscript{52} 2005 WL 675798 , 8 (Ohio App. 10 Dist. 2005). *See also Matter of John D.*, 934 P.2d 308 (N.M. 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).


\textsuperscript{54} 2006 WL 3425011, 3 (Ark. App. 2006).

\textsuperscript{55} *In re B.S.*, Juvenile, 693 A.2d 716, 722 (Vt. 1997).

\textsuperscript{56} Defined infra note 123.

Likewise, Indiana held that if services are provided, they must be non-discriminatory.58 “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.”59 The court found, however, that an ADA violation was not a defense to a TPR, solely because all parents were treated the same way under Indiana law.60 Regardless of disability, no parent in Indiana was entitled to services before a TPR at the time of this ruling.61

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.62 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 arrangements.”63 Services offered to parents are an inherent part of the evidence used by both sides in a TPR.64 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.”65 State and contract agencies, as well as family and juvenile courts, are both under the jurisdiction of state laws.66

59 Id at 796.
60 Id.
61 Id.
62 Supra notes 45, 47, 48, 49, 50, 51, 52, 53, 54, 58.
63 28 CFR 35.130(b)(1).
64 As acknowledged by the Alaska Supreme Court, supra note 45.
65 28 CFR 35.130(b)(3)(ii).
(and are both subject to Title II\textsuperscript{67}). 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, governs their conduct\textsuperscript{68}. Some courts have been favorable to this argument: “Congress did not intend to change the obligations imposed by unrelated statutes.”\textsuperscript{69} 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.”\textsuperscript{70} 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.”\textsuperscript{71} As a Florida Court of Appeals stated, “dependency proceedings are held for the ‘benefit’ of the child, not the parent.”\textsuperscript{72}

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.\textsuperscript{73} 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.\textsuperscript{74} The child is always the focus of a

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{67} 28 CFR 35.130(b)(1). Title II regulations state that the public entity may not discriminate either directly or “through contractual, licensing, or other arrangements.” \textit{Id.}.
    \item \textsuperscript{68} Infra notes 69-72.
    \item \textsuperscript{69} Interest of Torrance \textit{P.}, 522 N.W.2d 243, 246 (Wis. Ct. App. 1994).
    \item \textsuperscript{70} \textit{In re B.S.}, 693 A.2d 716, 721 (Vt. 1997).
    \item \textsuperscript{71} \textit{Id.}
    \item \textsuperscript{72} \textit{MC. v Department of Children and Families}, 750 So.2d 705 (Fla. App 2003).
    \item \textsuperscript{73} supra note 62.
    \item \textsuperscript{74} The purpose of child protection statutes is to protect the safety and interests of children. See, e.g., \textit{N.Y. Fam. Ct. Act} § 1011 (“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”); \textit{A.R.S.} § 8-800 (2007); 23 Pa.C.S.A. § 6302 (2007).
\end{itemize}
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family court proceeding, even when the court is examining a potential violation of the ADA. 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 relationship is severed, in part or in whole, because of this discriminatory treatment, the severance has drastic, and potentially harmful, 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. But they are precisely that which Congress intended to target in invoking its “sweep,” 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.

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. This view has been reiterated by numerous courts, even though at least one federal district court has held

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75 Id.
76 see Appendix D.
77 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 161), the child will not be allowed any contact with the parent. See N.Y. SOC. SERV. LAW §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), N.Y. COMP. CODES R. & REGS. tit. 22, §205.17(c) (2007) (providing that a parent whose rights have been terminated will not be notified of permanency hearings); Matter of April C. 31 AD3d 1400 (N.Y. App. Div. 2004), where respondent lacked to standing to challenge permanency hearing orders because her parental rights had been terminated.
78 Infra notes 314-322.
79 See, E.g., CA GOVT § 65000 (2007); NY COUNTY LAW § 225 (Mckinney 2007); 10 V.S.A. § 6086 (2007)
80 Supra note 14
81 See, E.g., Innovative Health Sys. Inc., 117 F.3d 37 (2d Cir. 1997).
83 See, e.g., In re Brendan C., 874 A.2d 826, 836 (Conn. App. 2005); In re E.T.C., 141 S.W.3d 39, 48 (Mo. App. 2004); In re Doe, 60 P.3d 285, 291-293 (Haw. 2002); In re Kassandra T., 2001 WL 1243364 at 3 (Wis. App. 2001); Adoption of Gregory, 747 N.E.2d 120, 125 (Mass. 2001).
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that it cannot hear a TPR-related ADA claim, so long as there is a pending state proceeding.  

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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 influenced by the Supreme Court’s finding in School Board of Nassau County v. Arline that “society’s accumulate myths and fears about disability and disease are as handicapping as…physical limitations.” There is no evidence that Congress had a different intent than the plain language stemming from these findings indicates.

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.” Federal cases such as Innovative Health Systems, Inc. v. City of White Plains and Civic Association of the Deaf v. Giuliani have reiterated that, as a remedial statute, the ADA must be broadly construed or the congressional purpose will be frustrated. As the Second Circuit stated, “Title II’s enforcement provision extends relief to ‘any person alleging discrimination on the basis of disability.’” 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.

84 Mcleod v State of Maine Department of Human Services 1999 WL 33117123 at 2 (D. Me. 1999) (granting defendant’s motion to dismiss on grounds that a federal court, pursuant to the Younger doctrine, must abstain from hearing a case or 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).


87 See also supra notes 13-17.

88 524 U.S. 206, 212.

89 117 F.3d 37 (2d Cir.1997).


92 117 F.3d at 46 (2d Cir.1997).
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. Courts have held that parents must identify why the agency’s service plan is inappropriate and what kinds of services they should be receiving. 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.” 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.”

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. 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 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. The court did not say how progress was to be measured in therapy and.

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93 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 parents 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 (N.Y. FAM. CT. ACT §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. FAM. CT. ACT §1089 (a) (2) and (3)). All states have hearings and meetings after the initial fact-finding, though different states use different terminology. See statutes in Appendix B.

95 787 N.E.2d at 578.
97 See Matter of Latasha F. 251 A.D.2d 1005 (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.”).
98 See In the Matter of 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 the Matter of Brandon OO. 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); Matter of 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
did not order Tanya to take medication or to comply with programs specific to individuals, or to parents, with schizophrenia. This omission is common for dispositional orders following abuse and neglect findings. 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.

The argument that a parent must raise an ADA violation prior to the TPR trial also is 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. 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. Furthermore, home for the child); see also Matter of Clarence Michael W., 33 AD3d 485 (N.Y. App. Div. 2006); Matter of Octavia Lorraine O., 34 AD3d 258 (N.Y. App. Div. 2006); Matter of Emma L., 35 AD3d 250 (N.Y. App. Div. 2006); Matter of Amani T., 33 AD3d 542 (N.Y. App. Div. 2006); Matter of Alec B., 34 AD3d 1110 (N.Y. App. Div. 2006); Matter of Edward GG, 35 AD3d 1144 (N.Y. App. Div. 2006); Matter of Dessa F., 35 AD3d 1096 (N.Y. App. Div. 2006); Matter of Brian C., 31 AD3d 1124 (N.Y. App. Div. 2006); Matter of Jose R., 32 AD3d 1284 (N.Y. App. Div. 2006); Matter of Ruena O., 31 AD3d 946 (N.Y. App. Div. 2006); Matter of Kenneth D., 32 AD3d 1237 (N.Y. App. Div. 2006).

Parenting classes for individuals with mental illnesses are offered at community agencies in New York City. The Brooklyn Borough of Community Service provides homemaker services to parents with disabilities and has classes that focus on managing the household, budgets and parenting skills, http://www.bbcs.org/programs.php#adult. See e.g., In the Matter of Brandon O.O, 304 A.D.2d 873 (N.Y. App. Div. 2003) See e.g., Matter of Latasha F. 251 A.D.2d 1005 (N.Y. App. Div. 1998) See In the Matter of Allen T. and Noah T. 801 N.Y.S.2d 776 (N.Y.Fam.Ct. 2005) (finding that agency failed to follow-up appropriately with dispositional orders, while respondent did “virtually everything” to comply); Matter of Latasha F. 251 A.D.2d 1005 (N.Y. App. Div. 1998) (finding that agency failed to advise incarcerated respondent, who had been wholly compliant with services and visitation, that her plan for the care and eventual return of her child was unacceptable, and did not assist her in formulating a new plan before filing a TPR).

homelessness, while extremely difficult for anyone, can exacerbate the symptoms of a person suffering from schizophrenia.104 Thus, in failing to explore housing possibilities, the caseworker likely perpetuated the problems that necessitated removing Gaby from Tanya’s care. Tanya’s transient home situation is common among mentally disabled parents, who require accommodation with respect to housing.105

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.106 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.107 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.108

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 2004.109 Because a TPR fact-finding is likely to take place years after a child

105 NICHOLSON et al. CRITICAL ISSUES FOR PARENTS WITH MENTAL ILLNESS AND THEIR FAMILIES. (Center for Mental Health Services Research, Department of Psychiatry University of Massachusetts Medical School 2001).
106 Services such as a homemaker services can be provided to prevent foster care or reunify families, see N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b)(5).
108 See N.Y. SOC. SERV. LAW § 384-b
109 According to N.Y. FAM. CT. ACT §262, respondent parents are entitled to representation at all child protective proceedings. However, prior to a law taking effect in 2004 (A.2106-B/S.1406-B as applied to NY JUD § 35 (Mckinney 2007) and NY COUNTY LAW Art. 18b (McKinney 2007)) which increased the rate-of-pay for court appointed lawyers (infra note 263), there was a shortage of court appointed attorneys in New York. See PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, JUSTICE DENIED: THE CRISIS OF LEGAL REPRESENTATION FOR BIRTH PARENTS IN CHILD WELFARE PROCEEDINGS (2000); JULIA VITULLO-MARTEN & BRIAN MAXEY, NEW YORK FAMILY COURT: COURT USER PERSPECTIVES (Vera Institute of Justice 2000); New York APPELLATE
has entered foster care, a substantial portion of recent and pending TPRs have a history of permanency hearings in which the parents lacked representation. 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. 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.

Furthermore, under the federal 1997 Adoption and Safe Families Act (ASFA), 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

110 The reasons for this are threefold: the goal upon entering foster care is almost always reunification (infra notes 130, 131); the agency ordinarily will not file a petition for TPR until the child has been in care at least 15 months (infra note 115); and the family court calendar is extremely backlogged (see Julia Vitullo-Marten & Brian Maxey, New York Family Court: Court User Perspectives (Vera Institute of Justice 2000). The average length of time in foster care in New York -- as elsewhere -- is 58 months).


113 Interest of Jane Doe, 60 P.3d 285, 294 (Haw. 2002).

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. The parent will have to prove three things: that the agency is a public entity; that she is a qualified individual

115 42 U.S.C. 675(5). ASFA’s 15 out of 22 month timeline has been adopted in almost every state, infra note 315. .

116 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. Dept. of Mental Health, 100 Cal. Rptr. 2d 39, 42 n.4 (Cal. App. 2 Dist. 2000); but see Mcleod, 1999 WL 33117123 at 2, supra note 84.
with a disability; and that she has been subjected to discrimination on the basis of this disability.\footnote{The first prong is easy. As discussed, any state or municipal agency, including a contract private agency, is a public entity.\footnote{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.”\footnote{The first definition may be difficult for a parent to prove if her mental illness is managed;\footnote{however, mental disability claims in other contexts have survived this test.\footnote{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.}}}}\footnote{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.}}


118 28 CFR §35.130(b)(1).


120 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 U. of Cincinnati 268 F.3d 307 (6th Cir. 2001) (periodic mental illness with successful treatment is not disability).

121 Taylor v Phoenixville Sch. Dist, 113 F. Supp2d at 773 (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 University, 184 F. 3d 1017 (8th Cir. 1999) (summary judgment denied to defendant where plaintiff was a medical student and suffered from Obsessive Compulsive Disorder); McAlindin v County of San Diego, 192 F.3d 1226 (9th Cir. 1999) (summary judgment denied to defendant where plaintiff had a panic disorder that significantly affected major life activities, such as sexual relations, sleeping and interpersonal interactions).

122 See eg cases in supra note 44.; cases in infra note 230.

123 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), N.Y. FAM. CT. ACT § 1089(d)(2)(viii)(F); SC ST § 20-7-764 (B) (3) (2006); see also infra note 128; Appendix B.
the ADA. States have argued that certain parents are not “qualified” to be parents, and therefore not entitled to these services. 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.” 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.

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 preventive and/or reunification services to parents, at some stage during the course of a child protective case. 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, and

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124 Morrison v Commissioner of Special Services, 1996 WL 684426 (E.D.N.Y); Bartell v. Lohiser 215 F.3d 550 (6th Cir. 2000); Mcleod v State of Maine Department of Human Services 1999 WL 33117123 at 2 (D. Me. 1999) (granting defendant’s motion to dismiss on grounds that a federal court, pursuant to the Younger doctrine, must abstain from hearing a case or 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).

125 Morrison v Commissioner of Special Services, 1996 WL 684424, 4 (E.D.N.Y).

126 Id at 4.

127 Supra note 73.

128 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. See also ALM GL ch. 18B, § 3(a)(1) (2007); Fla. Stat. § 39.402(7)(2007); CAL. WELF. & INST. CODE § 11400(l) (2007).

129 Supra notes 123, 128.

130 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, 96 P.L. 272 § 471(a)(15)(B) (1980); Adoption and Safe Families Act of 1997, 105 P.L. 89 §101(a)(15)(b)(i) (1997). Reasonable efforts must also be made after a child has been removed in order to reunify the family. See AACWA, 96 P.L. 272 § 471(a)(15)(B) (1980); ASFA, 105 P.L. 89, 111 Stat. 2115 §101(a)(15)(b)(ii) (1997). New York’s child protective statutes, like all states’, provide the same. See N.Y. FAM. CT. ACT 1015-a; 1022(a)(iii)(iv), (c); 1027(b)(i); 1089(d)(2)(viii)(F) N.Y. SOC. SERV. LAW § 358 (2) (a); 409 (2007). 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.

131 See, E.g. N.Y. SOC. SERV. LAW §384-b (1)(iii) (“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”); SC
because biological parents have certain fundamental rights. The Supreme Court has long held that parenting 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. 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”; 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 qualified individuals include those who are not receiving services voluntarily. 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. Yet the caseworker made little effort

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132 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. Department of Social Services, 452 U.S. 18, 27 (1981) (“a parent’s interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.”).

133 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, (*Stanley* at 645), and *Santosky* requires that termination be proved by “clear and convincing evidence,” (*Santosky* at 745)


135 Yeskey v Pennsylvania, 118 F.3d 168, 170 (3d Cir. 1997).

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to reunite Tanya and Gaby, because of what appeared to be a disbeli
in Tanya’s potential parenting capabilities. Biased treatment by the agency is all too common for mentally disabled parents.  

In the alternative, a parent could prove that she was unintentionally
discriminated against by making a disparate impact claim. When state law
mandates services to non-disabled parents but not disabled ones, as in New
York, 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.

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.” 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.” Parenting skills classes or housing assistance that is not
tailored to a parent’s mental disability are unproductive and therefore
essentially a denial of benefits.

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 qualified for it according to the
state’s professional evaluation. 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 “confinement in an institution severely diminishes the everyday
life activities of individuals, including family relations.”

In the context of parenting, the Third Circuit held in Helen L. v.
Diario 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

137 See cases in infra notes 348-350.
138 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, 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.
139 See infra note 222.
140 See Glennon, supra note 138 at 306.
142 28 C.F.R. § 35.130(b) (7).
143 527 U.S. 581.
144 Id at 600-01.
145 46 F.3d 325 (3d Cir. 1995).
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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 in community-based settings with their children, instead of institutionalizing them and placing their children in foster care. As previously noted, there are numerous supportive housing programs in New York, as well as around the country, 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. 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. 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. And since child welfare cases already have multiple levels of caseworkers, specialized caseworkers should not be considered a fundamental alteration 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

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146 Supra note 103
147 Many states have housing programs that enable mentally disabled parents to live their children. The HUD Section 811 Supportive Housing for Persons with Disabilities program is one such program. See New York State Campaign for Mental Health Housing, http://www.campaign4housing.org/members.html ; West Central Illinois Continuum of Care, http://www.wciccc.com/HousingDirectory/; Iowa City Housing Information, http://www.jeonet.com/city/planning/ichi/iid.htm.
149 See Glennon, supra note 138, at 306.
150 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 NEW YORK CITY ADMINISTRATION FOR CHILDREN’S SERVICES, SAFEGUARDING OUR CHILDREN 2006 ACTION PLAN (2006). Regardless of the structure, all child welfare cases in all states have at least one caseworker and one supervisor.
151 28 C.F.R. § 35.130(b) (7).
person;\textsuperscript{152} that it does not have to serve someone who poses a direct threat,\textsuperscript{153} and that the state is immune to suit by private citizens.\textsuperscript{154}

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.\textsuperscript{155} Title III explicitly includes an “undue burden” defense, which also has been applied to Title II defendants.\textsuperscript{156} 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.\textsuperscript{157}

In \textit{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.”\textsuperscript{158} A New York court applied the balancing test in \textit{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.\textsuperscript{159}

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.\textsuperscript{160} 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;\textsuperscript{161} even if the

\textsuperscript{152} 28 C.F.R. § 35.130(b) (7).
\textsuperscript{153} 28 C.F.R. §36.208.
\textsuperscript{154} US Const. Amend. 11.
\textsuperscript{155} 28 C.F.R. § 35.130(b) (7).
\textsuperscript{157} 28 C.F.R. § 36.104
\textsuperscript{158} 527 U.S. 581, 597 (1999).
\textsuperscript{159} 2000 N.Y. Misc. LEXIS 139 (Sup. Ct. 2000).
\textsuperscript{160} 527 U.S. 581, 597 (1999).
\textsuperscript{161} See Leslie Kaufman, \textit{New York Acts To Ease Process In Foster Care}, \textit{NEW YORK TIMES}, B1 (March 22, 2007) (stating the average length of stay in foster care for a child in New York City is 58 months); see also \textit{ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM, CHILDREN’S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (January 2000),}
child is adopted (which is not always the case), 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 York). 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 capabilities increase. 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 parents have a fundamental interest in retaining their parental rights.

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,” 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. For example, New York requires “diligent efforts” for reunifying non-disabled parents with their children, which may entail a variety of services (including “personal services” such as homemakers). Disabled parents are entitled to services that have the same potential, with or without reasonable modification, for facilitating reunification.

available at http://statistics.adoption.com/information/adoption-statistics-foster-care-1999.html (‘Approximately 3% of waiting children have waited less than a month to be adopted after the termination of parental rights. 16% of the children waited 1-5 months, 30% waited 6-11 months, 20% waited 12-17 months, 12% waited 18-23 months, 7% waited 24-29 months, 4% waited 30-35 months, 7% waited 3-4 years and 2% waited 5 or more years’); see also infra notes 314, 316.

162 supra note 161; infra notes 314, 316, 318, 319, 322.
164 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).
165 Supra note 132-133.
166 28 C.F.R. § 135.
169 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).
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 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.\textsuperscript{170}

\textbf{ii. Direct Threat}

States also could argue that requiring services for mentally disabled parents poses a “direct threat” to the safety of their children.\textsuperscript{171} 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 modification of policies.”\textsuperscript{172} 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”\textsuperscript{173} if the receipt of those services poses a direct threat to a third person (in this case, a child).\textsuperscript{174}

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

\textsuperscript{170} Supra note 164.
\textsuperscript{171} While states have not raised this issue directly in the few federal ADA-TPR cases that have been litigated, \textit{supra} note 124, or in the state cases where the ADA has been raised, see eg \textit{supra} notes 42, agencies generally argue that mentally disabled parents pose a danger or are a direct threat to their children. \textit{See, e.g. In the Interest of E.M.M.W} 2002 WL 987947 (Iowa App. 2002); \textit{In the Interest of B.J.F} 623 S.E.2d 547 (Ga. App. 2005); \textit{In the Matter of John D.}, 934 P.2d 308 (N.M.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).
\textsuperscript{172} 28 C.F.R. § 36.208.
\textsuperscript{173} 42 U.S.C. § 12131(2).
\textsuperscript{174} This approach was first articulated in \textit{School Board v. Arline}, 480 U.S. 273 (1987), 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.
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 her children, or has committed a felony assault resulting in serious bodily harm to one of her children; or if the parent’s rights to another child have been terminated involuntarily. This mandate has been adopted in the child protective statutes of each state. The plain language of the federal statutes indicates that these were the only circumstances Congress established as a presumptive threat. 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. 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. 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. 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, suggesting that the direct threat concern often may be overstated.

iii. Sovereign Immunity

Another obstacle to a parent’s federal claim is state sovereign immunity under the Eleventh Amendment. 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.

176 In New York, N.Y. FAM. CT. ACT § 1039-b delineates the exceptions for reasonable efforts). See infra notes 229, 245, 246, 247, 248, 253 for the reasonable efforts statutes of every state.
177 Supra note 175.
178 Under all TPR statutes, a child must first be removed from the respondent’s home and placed in foster care (and usually in foster care for at least 15 months) before a TPR can be filed. See E.g., N.Y. SOC. SERV. LAW § 384-b; see Appendix C (addressing the grounds for TPR statutes of each state).
179 See, E.g., N.Y. SOC. SERV. LAW § 384-b and Appendix C.
180 Supra notes 62.
181 See cases in infra notes 348-357.
182 US Const. Amend. 11. “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.”
back to family court. 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.

The status of immunity and Title II is murky at this point. Title IV of the ADA specifically revokes state sovereign immunity, and Congress invoked the Fourteenth Amendment as the source of its authority to enact the ADA, but this revocation has been partially invalidated by Supreme and circuit court jurisprudence as it applies to Title II. In Board of Trustees 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. 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. The Court held only that Title II validly abrogates state 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. 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.

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. 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

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183 42 U.S.C. § 12133; § 12133 also provides for compensatory damages for successful claimants.
184 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).
185 42 U.S.C. § 12202.
188 531 U.S. 356, 360 n.1.
189 546 U.S. 151.
190 Id. at 155.
192 546 U.S. 151, 155.
has to show that it has a rational basis for treating disabled parents differently than non-disabled ones to maintain its sovereign immunity.\textsuperscript{194}

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.\textsuperscript{195} 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.\textsuperscript{196} 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.”\textsuperscript{197} 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 complete reunification services is inherently linked to the evidence used in TPR proceedings.\textsuperscript{198}

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 Congress "developed a legislative record documenting a pattern of discrimination against persons with disabilities in the administration of public programs and services and heard specific evidence about their exclusion from courthouses and court proceedings."\textsuperscript{199} 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).

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.\textsuperscript{200} In New York, the Second Circuit denied a Title II claim in the

\textsuperscript{194} Id.
\textsuperscript{195} Tennessee v. Lane 541 U.S. 509 (2004).
\textsuperscript{196} Id at 533.
\textsuperscript{198} supra note 73.
\textsuperscript{199} Lane, 541 U.S. at 529.
\textsuperscript{200} See Sacca v. Buffalo State College, 2004 WL 2095458 at 3 (W.D.N.Y. 2004); Johnson v. S. Conn. State Univ., 2004 WL 2377225 at 4 (D. Conn. 2004); see also Roe v Johnson, 334 F.
context of public education, finding that there was no fundamental right of access to post-secondary education for the disabled.\textsuperscript{201} 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.\textsuperscript{202}

Even if a court finds that the state is immune, a parent still may be able to seek injunctive relief under \textit{Ex Parte Young}, which provides an exception to Eleventh Amendment immunity.\textsuperscript{203} In order to qualify under \textit{Ex Parte Young}, the injunctive relief must end a continuing violation of federal law by a state employee acting in his official capacity.\textsuperscript{204} The applicability of \textit{Ex Parte Young} has been upheld in ADA cases.\textsuperscript{205} The Supreme Court also has stated that an \textit{Ex Parte Young} exception would be valid in Title I claims,\textsuperscript{206} although the question has not yet been addressed with respect to Title II.\textsuperscript{207}

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.\textsuperscript{208} Implementation of this regulation varies nationally, but the ADA coordinator is

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\item[\textsuperscript{201}] Press \textit{v State University of New York at Stony Brook}, 388 F. Supp. 2d 127 (E.D.N.Y. 2005).
\item[\textsuperscript{202}] There have been ADA-TPR cases in federal courts, but none have reached the circuit court level with an argument based on two sets of fundamental rights. See \textit{Morrison v Commissioner of Special Services}, 1996 WL 684426 (E.D.N.Y); \textit{McLeod v State of Main Department of Human Services} 1999 WL 33117123 (D. Me); \textit{Bartell v Lohiser} 12 F.Supp. 2d 640 (E.D. Mich 1998), 215 F.3d 550 (6th Cir. 2000), (appealed and affirmed 215 F.3d 550 (6th Cir. 2000), 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; however, the issue of the fundamental right to court access was not raised).
\item[\textsuperscript{203}] 209 U.S. 123 (1908).
\item[\textsuperscript{204}] Id.
\item[\textsuperscript{205}] See, \textit{e.g.}, Koslow \textit{v Commonwealth of Pennsylvania} 302 F.3d 161 (3d Cir. 2002).
\item[\textsuperscript{206}] See \textit{Garrett}, 531 U.S. at 374 n.9.
\item[\textsuperscript{208}] 28 C.F.R. 35.107(a) (“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.”).
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generally an employee of a state or county who oversees ADA compliance among public and contract agencies.\textsuperscript{209} 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;\textsuperscript{210} however, the person named on the website does not appear to know that ADA coordination is one of her job responsibilities.\textsuperscript{211} 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.\textsuperscript{212} But filing a complaint with an ADA coordinator could be a potential avenue for advocacy, at least outside of New York City.

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\textsuperscript{213} (in this case, the U.S. Department of Health and Human Services, Administration for Children and Families, Region 2).\textsuperscript{214} There is no penalty for filing with the

\textsuperscript{209} Id.
\textsuperscript{210} Office of Administrative Trials and Hearings, http://www.nyc.gov/oath; http://nyc.gov/html/oath/html/ada_grievances.html. 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. 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 conversation, 8/2/07. 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 conversation, 8/6/07.
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; for more information on the ADA, the website links to the DOJ’s ADA website, http://www.ada.gov. (searches conducted 8/9/07 and 8/10/07).

\textsuperscript{211} 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 were ever informed of an ADA coordinator.
\textsuperscript{212} ROBERT M. LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES 177 (Southern Illinois University Press 1996).
\textsuperscript{214} http://www.acf.hhs.gov/programs/region2/index.html.
wrong agency, and a complaint can always be made 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 this fails, it may issue a letter of findings. If the situation is still not ameliorated, the federal agency has the authority to sue the state or local government for the violation. 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. Furthermore, the DOJ has never sued a state or local government on behalf of a parent in any jurisdiction in the country.

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, on the basis of disability, be excluded from participation in or denied the benefits of the services, programs, or activities of

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216 Id.
217 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 conversations 8/1/07; 8/2/07; 8/6/07.
When a subsequent phone call to ACS’s Parent’s & Children’s Rights Hotline at the Office of Advocacy, http://www.nyc.gov/html/acs/html/advocacy/office_advocacy.shtml, was placed on 8/7/07, the research assistant was told that the Office of Advocacy has never 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 are already represented by Legal Aid (90% of subject children in New York City are represented by Legal Aid, http://legal-aid.org/en/whatwedo/juvenilepractice.aspx). A respondent parent cannot be represented by Legal Aid if the firm already represents one or more their children, because this creates a conflict.
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 218, this is highly unlikely to ever be the case.
218 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).
a public entity." 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, ASFA requires state agencies to engage in “reasonable efforts” to reunify all families. Exceptions can only be made when a court determines that one of three conditions exists.

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.

1. States that do not require reunification services for mentally disabled parents

New York is the only state in which the court may terminate the rights of mentally disabled parents without providing any services to them beforehand. 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. And ASFA requires states to make reasonable efforts toward reunification for all parents. ASFA’s exceptions to reasonable efforts were codified in the New York law for the “sole purpose” of complying with ASFA, and the two statutes are virtually identical. Furthermore, New York County Family Court has held that in a motion asking to dispense with reasonable efforts, the movant is required to prove that one of the three conditions delineated in ASFA exists.

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221 Supra note 175.
222 N.Y. SOC. SERV. LAW § 384-b (4)(c).
223 N.Y. SOC. SERV. LAW § 384-b (7)(f)(3); (7)(a); (8)(a)(iv); (8)(b)(iii); N.Y. FAM. CT. ACT § 1039-b.
224 Supra note 220.
225 N.Y. FAM. CT. ACT § 1039-b.
227 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).
228 Pursuant to N.Y. FAM. CT. ACT § 1039-b.
229 Matter of Marino S., Jr., 993 N.Y.S.2d at 833.
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.\textsuperscript{230} According to the courts, the TPR statute\textsuperscript{231} lacks a diligent efforts mandate for causes of action based on mental disability or illness.\textsuperscript{232} “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.”\textsuperscript{233} 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,\textsuperscript{234} 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 him incapable of utilizing reunification services.”\textsuperscript{235} California’s statute is similar, but two medical health experts must provide the clear and convincing evidence of the parent’s mental disability.\textsuperscript{236} Other states have comparable standards, allowing courts to decide that a service plan is unwarranted either because of the parent’s mental disability,\textsuperscript{237} or because it is generally inconsistent with the child’s best interests.\textsuperscript{238} New York, however, is

\textsuperscript{231} N.Y. SOC. SERV. LAW § 384-b (4)(c).
\textsuperscript{233} Id at 27.
\textsuperscript{234} 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, 413
See also In re Amelia W., 772 A.2d 619 (Conn. App. Ct. 2001) (court found that father would not benefit from services); In re Adoption/Guardianship No. 10941 642 A.2d 201 (Conn. App. Ct.
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.” 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.

The majority of mental disability TPRs in New York result in termination judgments, without such proof.

2. States that do require reunification services for mentally disabled parents

The majority of states (thirty) statutorily require services for all parents, including mentally disabled parents. These statutes only exclude services under the aggravated circumstances delineated in ASFA. Courts in these states usually uphold this right to services for mentally disabled parents. However, a statutory mandate is not a guarantee that mentally disabled parents will receive these mandated services. In *B.S. v. Cullman*, 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 the agency, which was “already struggling with its duty to rehabilitate those parents and reunite those families who could be aided by its assistance.”

In *N.R. v. State Department of Human Resources*, 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*. 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.

### 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 right and that states have the discretion to construct and implement termination of parental rights statutes, limited by the *Stanley v. Illinois* requirement that a state make an “individual inquiry” into the fitness of the parent, not based on status, and the *Santosky v. Kramer* requirement that termination be proved by “clear and convincing evidence.” As *Stanley* makes clear, the protection of the family unit is inveterate. Indeed, a prevalent quotation among courts and scholars is that termination of parental rights is

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246 Id. at 1196.
249 *see* N.Y. SOC. SERV. LAW 384-b 4 (c) and (6) infra note 280.
251 405 U.S. 645 (1972).
253 *Stanley* at 651 (“[W]e 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 ‘[rights 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”).
THE RIGHTS OF MENTALLY DISABLED PARENTS

“the family law equivalent of the death penalty in a criminal case.” States, however, vary in their compliance with the ADA and Supreme Court jurisprudence on the use of disabled status as a basis for termination. 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.” 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.” Mental retardation is defined as “subaverage intellectual functioning which originates during the developmental period and is associated with 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.”

The termination must be proven by “clear and convincing evidence,” including an examination by a court-appointed psychiatrist or psychologist. Under the statute and case law, this person may base his testimony on a single interview and is not required to review any records. 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.” Although a parent is allowed to call her own expert to testify, this is often

256 See N.Y. SOC. SERV. LAW § 384-b and and Appendix C.
257 N.Y. SOC. SERV. LAW § 384-b (4) (c).
258 N.Y. SOC. SERV. LAW § 384-b (6) (a).
259 N.Y. SOC. SERV. LAW § 384-b (6) (a).
260 N.Y. SOC. SERV. LAW § 384-b (3) (g), -b (6) (c).
262 N.Y. SOC. SERV. LAW § 384 b (6)(e).

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impossible for indigent parents and their court-appointed lawyers. New York’s indigent defense system has, in fact, been characterized as a “crisis” by numerous authorities. Nevertheless, mental illness terminations have been held constitutional by the New York Court of Appeals.

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,

263 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, Second Judicial Department, Law Guardian Program Administrative Handbook (2006). (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 extremely high case loads, can result in sub-par defense. 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.”


the psychiatrist inevitably makes statements based on presumptions about group characteristics rather than on his own actual observations of individual behavior.266 Making assumptions based on disability is precisely what Congress intended to eliminate with the 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.”267 In light of the ADA’s purpose, one “expert” arguably does not satisfy the burden of proof required under Stanley,268 for an individual inquiry, and under Santosky,269 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.”270 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,271 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.272 Therefore, requiring a more in-depth mental health evaluation of the parent would not infringe on the state’s interests.

266 It should also 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, 1173-4 (1991). See also Kerr, supra note 234, at 413 (arguing for input from a variety of sources, not just one psychiatrist).
267 42 USC § 12101 § (b) (4).
271 Supra notes 38, 74; see also N.Y. SOC. SERV. LAW § 384-b (“the health and safety of children is of paramount importance.”); see also Appendix D.
272 When a TPR is denied, the agency is usually ordered to better plan with and service the parent. 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) 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.
New York’s statute is also problematic in that TPRs are based on predictions about future behavior. In civil confinement cases, courts make decisions based on predictions of “dangerousness,” 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, and the American Psychiatric Association states that unreliability of these predictions is “an established fact within the profession.” 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. And, as discussed above, the decision in a TPR

273 N.Y. SOC. SERV. LAW § 384-b (4)(c).
277 See Robert Hayman, Jr., Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent, 103 HARV. L. REV. 1201, 1219 (1990) (“scientific evidence does not suggest a meaningful correlation between mental retardation and inadequate parenting...the evidence does suggest that any deficiencies in parenting are not immutable, but can be remedied with proper training); M. Craft, Low Intelligence and Delinquency, in MENTAL HANDICAP 53 (M. Craft, J. Bicknell & S. Hollins eds.,1985) (research indicates no correlation between mental retardation and violence generally); Schilling et. al., Child Maltreatment and Mentally Retarded Parents: Is There a Relationship?, 20 MENTAL RETARDATION 201, 206 (1982) (authors note that evidence is contradictory on whether mental retardation is correlated with child maltreatment); T. Jacobsen et al., Assessing Parenting Competency in Individuals with Severe Mental Illness: A Comprehensive Service, JOURNAL OF MENTAL HEALTH ADMINISTRATION 24, 189-199 (1997) (authors find 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 discuss the methodological shortcomings of some widely used assessment strategies); R. Seifer et al., Parental Psychopathology, Multiple Contextual Risks, and One-year Outcomes in Children, JOURNAL OF CLINICAL CHILD PSYCHOLOGY 25, 423-435 (1996) (findings point to the importance of examining different aspects of maternal mental illness in social context, and that maternal illness is not universally associated with adverse child outcomes); KS Budd & MJ Holdsworth, Methodological Issues in Assessing Minimal Parenting Competence, JOURNAL OF CLINICAL CHILD PSYCHOLOGY 25, 2–14 (1996) (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 (1996) (analysis of recent studies of violent behavior by individuals with serious mental illness concludes 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 “as the depressed mothers recovered, many, but not all, of the reported problems in the mothers' relationships with other children improved, and many of the adolescents' problems
does not 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].” 278

Thirty-one other states279 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.280 As described in Part I, there is an array of services for parents with disabilities,281 and many can care for children with appropriate support,282 but when the statutory definitions are diminished as well.”); Mullick, et al., *Insight into Mental Illness and Child Maltreatment Risk Among Mothers with Major Psychiatric Disorders*, PSYCHIATRIC SERVICES 52, 488–492 (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).


279 See Appendix C. One other state, Wisconsin, terminates mentally disabled parents’ rights on the basis of disability, but only if the parent is presently, and for a cumulative period of at least two years within the five years immediately prior to the filing of the petition, an inpatient at one or more hospitals or treatment facilities on account of his or her mental disability. *Wis. Stat.* Ann. § 48.415(3)(a) (West 2007).

280 See Collentine, Alexis C., *Note, 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 at 234 at 413.


282 See David McConnell & Gwynyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 J. SOC. WELFARE & FAM. L. 297 (2002); Robert Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201 (1990); D. Oyserman et al., *Resources and Supports for Mothers with Severe Mental Illness*, HEALTH AND SOCIAL WORK 19:132-142, 1994 (authors note that there is no reason to assume that women with severe mental illness cannot function as mothers); J. Basar, *Mentally Ill Moms Aided in Keeping Their Children*, THE APA MONITOR 32 (December 1990) (authors conclude that a large percentage of mothers with severe mental illness can be successful as mothers with adequate support programs); PARENTAL PSYCHIATRIC DISORDER 114 (Michael Gopfert, et al., eds., Cambridge University Press 2004) (authors note that services that build on a mentally ill parent’s strengths and engage the parent in a collaborative process are more successful); J. Nicholson, J. & A. Blanch, *Rehabilitation for Parenting Roles for People*
vague, it becomes easy 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.\textsuperscript{283} In New York, TPRs based on permanent neglect\textsuperscript{284} and TPRs based on severe or repeated abuse\textsuperscript{285} are 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.\textsuperscript{286} This dispositional hearing is the only time the court considers best interest, and custody is not transferred until the conclusion of the hearing.\textsuperscript{287} 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.\textsuperscript{288} 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.”\textsuperscript{289}

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.\textsuperscript{290} Numerous states require consideration of the child’s wishes either in the TPR itself\textsuperscript{291} or as a compelling reason why the agency


\textsuperscript{283} N.Y. SOC. SERV. LAW § 383-b (4) (c) and (6).
\textsuperscript{284} N.Y. SOC. SERV. LAW § 384-b (4) (d).
\textsuperscript{285} NY § 384-b (4) (e).
\textsuperscript{286} NY § 384-b (3)(g). For permanent neglect, as provided in N.Y. FAM. CT. ACT § 623, 631; for severe or repeated abuse, as provided in N.Y. SOC. SERV. LAW §384-b (8) (f). N.Y. FAM. CT. ACT § 622 also provides for this in permanent neglect cases.
\textsuperscript{287} N.Y. SOC. SERV. LAW § 384-b; N.Y. FAM. CT. ACT § 631; \textit{Matter of Commitment of Troy M.} 156 Misc.2d 1000 (N.Y. Fam. Ct 1992) N.Y. SOC. SERV. LAW § 384-b; N.Y. FAM. CT. ACT § 631; \textit{Matter of Commitment of Troy M.} 156 Misc.2d 1000 (N.Y. Fam. Ct 1992)
\textsuperscript{288} See Appendix D.
\textsuperscript{289} \textit{In re Kristen B.}, 558 A.2d 200, 203 (R.I. 1989).
\textsuperscript{290} 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)). Many state laws expand on the types of situations that fit the “not in the best interest” category, infra notes 292, 296, 297, 301, 343. .
\textsuperscript{291} California: CAL. WELF. & INST. CODE § 366.26 (for children 12 years and older); Connecticut: C.G.S.A. § 17a-112 (j)(k) (2006) (all children); DC: D. C. CODE § 16-2353 (b)(4); Iowa: IOWA CODE. § 232.111 (children 10 and older); Maine: ME. REV. STAT. ANN. 22, § 4055 (children 12 and older); Maryland: MD Code, Family Law, § 5-323 (children of any age); Virginia: Va. Code Ann. § 16.1-283 (children 14 and older). N.Y. SOC. SERV. LAW § 384-b 3 (k) does state that “where the child is over fourteen years of age, the court may, in its discretion,
does not have to file a TPR petition.\footnote{292} New York considers the child’s wishes as a compelling reason,\footnote{293} but the agency may still, under the law, choose to file a TPR petition.\footnote{294} And if it does choose to file a petition, the potential for adoption will not factor into the court’s rulings during the TPR fact-finding,\footnote{295} which is the only hearing a mentally disabled parent receives.

Many states also consider the character of the parent-child relationship,\footnote{296} including the record of visitation and communication\footnote{297} (even when this is not part of proving the TPR\footnote{298}) and the maintenance of regular contact with the guardian or other custodian of the child;\footnote{299} the potential effects on the child of severing the relationship;\footnote{300} the potential of the child to be adopted;\footnote{301} what effect a TPR would have on a sibling relationship,\footnote{302} including 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”\footnote{303}; however, the court does not actually consider best interest until the dispositional hearing, which does not occur in mental disability cases.

\footnote{292} Colorado: COLO. REV. STAT. § 19-3-702 5 (a) (II); New Mexico: N. M. STAT. § 32A-4-29; North Dakota: N.D. CENT. CODE § 27-20-20.1 7. (b); West Virginia: W. Va. Code § 49-6-5b.
\footnote{293} N.Y. SOC. SERV. LAW § 384-b 3 (l)(ii)(C) (“the child is fourteen years of age or older and will not consent to his or her adoption.”)
\footnote{294} N.Y. SOC. SERV. LAW § 384-b 3 (l) (i)(ii).
\footnote{295} infra note 313..
\footnote{297} California: CAL. WELF. & INST. CODE § 366.26; Connecticut: C.G.S.A. § 17a-112 (j)(k);
\footnote{298} Cf. N.Y. SOC. SERV. LAW §384-b (7) (providing that visitation and communication issues are only considered in a TPR based on permanent neglect, as part of the fact-finding).
\footnote{299} See, eg Arkansas: ARK. CODE. ANN. § 9-27-341(A)(i)-(ii); California: CAL. WELF. & INST. CODE § 366.26. 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 eg Colorado COLO. REV. STAT. § 19-3-702 5 (a) (III); DC: D. C. CODE § 16-2354. 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 eg Connecticut: C.G.S.A. §17a-111a; Missouri §211.447; Oregon §419B.498.
\footnote{300} Under N.Y. SOC. SERV. LAW § 384-b 3 (l)(ii)(B), New York allows an agency not to file a petition if the permanency goal is other than adoption. But see supra notes 294, 295.
\footnote{301} See, eg Arkansas: ARK. CODE. ANN. § 9-27-341(A)(i)-(ii); California: CAL. WELF. & INST. CODE § 366.26. 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 eg Colorado COLO. REV. STAT. § 19-3-702 5 (a) (III); DC: D. C. CODE § 16-2354. 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 eg Connecticut: C.G.S.A. §17a-111a; Missouri §211.447; Oregon §419B.498.
\footnote{302} Maryland MD Code, Family Law, § 5-323; Ohio: OHIO REV. CODE. ANN. § 2151.414 (D) (1)-(2).
whether it would substantially interfere with it, the general potential for the TPR to do more harm than good, and the child’s adjustment to community, home, placement, and school. 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, or that she had good cause for failing to comply with the service plan; or because of other circumstances, such as a parent being committed to an institution, including a hospital, or if the parent’s absence in the child’s life is due to service in the armed forces. Utah also forbids the court to terminate rights on the ground that the parent has failed to complete a treatment plan. 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,” 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. 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. Unlike in the states discussed above, the potential of a child to be adopted is not part of the court’s consideration during

305 Maryland: MD Code, Family Law, § 5-323.
306 Kentucky: KY. REV. STAT. ANN. § 625.090.
307 Vermont: VT. STAT. ANN. Tit. 15A § 3-504.
308 Iowa: IOWA CODE § 231.111.
309 UTAH CODE ANN. § 78-3a-407 (2).
310 C.G.S.A. § 17a-112 (j)(k).
312 In New York, a young person 14 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 14 years or older, plans to consent to adoption. However, the potential to be adopted is not considered at the TPR fact-finding, infra note 313, 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 note 314, solely because the grounds for TPR are proven, even if there is little likelihood that he or she will be adopted.
a TPR fact-finding in New York, adoptability would be considered at a dispositional 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. This problem of “legal orphans” also has been exacerbated by the strict timelines of ASFA, and is endemic across the country. In New York, these young people essentially

313 N.Y. SOC. SERV. LAW § 383-b 3 (i) “….proof 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 Matter of Peter GG 822 N.Y.S.2d 668 (N.Y. App. Div. 2006) “…courts have terminated parental rights even though ‘preadoptive homes [have] not been found…and ‘there is no evidence that adoption is contemplated.’”


315 supra notes 115. Almost all states, including New York (N.Y. SOC. SERV. LAW § 384-B (3)(l)(i)) have adopted the 15 out of 22 month requirement in to 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 eg Ala. Code 1975 § 26-18-5; COLO. REV. STAT.§ 19-3-604; MASS. GEN. LAWS, ch. 119 §§ 26, 29C; ch 210 § 3 .. Some states have a fewer than 15-month requirement for a child to be in care before a TPR petition must be filed. See eg ARK. CODE. ANN. § 9-27-341; R.I. Gen. Laws § 15-5-7

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have no legal recourse and often wonder why they are in limbo. Sometimes their parents’ behavior improves, or the parent-child relationship flourishes 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. Aside from the emotional turmoil of longing to be reunified with the parent, this enduring or rekindled relationship can provide much-needed support and stability for the child.

Some states have changed their laws because of the problem of legal orphans. Washington (House Bill 1624 added a new section to RCW 13.34 in 2007) and California (AB 519, enacted in 2005) 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)); in D.C., (D. C. CODE § 16-2360 (b)(c)) the court “must review the adoption every 6 months and can order change of agency for lack of progress.”

Agencies are prohibited from having any contact with parents whose rights have been terminated, supra note 77. It is technically possible to vacate a termination of parental rights judgment under NY CPLR § 5015 (2007), but this rarely happens. Diane Riggs, Permanence Can Mean Going Home, ADOPTALK (Spring 2006) (author notes 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.”), available at http://www.nacac.org/adoptalk/permanence.html. But, as discussed supra note 316, this can be done more easily in Washington and California under new laws specific to vacating TPRs.

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.

For example, one 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. ACT §1087 (a); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 430.12(l)(3)(c); 441.2(a)(ii)(c), 628.3(a)(1)(vii)). In fact, his mother did not have a place for him to live, but the client was so frustrated with the agency’s inability (supra note 77) 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.
bond can have the unintended consequence of motivating a young person to leave the system before he or she is ready, in order to be with the parent, because the parent cannot be a discharge resource once her rights have been terminated. There is arguably no reason, then, to terminate the parental rights of a child who lacks a concrete adoption plan, even if 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.

New York’s law also is problematic in that it does not allow for a suspended judgment of a TPR based on mental disability, as it does for TPRs based on permanent neglect or severe or repeated abuse. Therefore, whatever the “expert” testifies to regarding a mentally disabled parent’s abilities in the foreseeable future will have permanent effects; unlike non-

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320 Supra note 319; also, 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 STANGLER, 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 Subcommittee on Income Security and Family Support of the Committee on Ways and Means (110th Cong.) (July 12, 2007) (testimony of Mark E. Courtney, Chapin Hall Faculty Associate); ROBERT M. GOERGE, 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).

321 Supra note 77.

322 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 unfounded; however, neither of the clients ever spoke to the foster mother, who was the person that was supposed to adopt them, again. At the present time, the clients are living in another foster home, but adamantly wish to return to their mother. Stories like these are extremely commonplace in the foster care system. See also Matter of 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 to a child 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 because it was the only available avenue for permanency, endorsed by the forensic psychologist, for this child aside from institutionalization.)

323 N.Y. SOC. SERV. LAW § 384-b (12), N.Y. SOC. SERV. LAW 384-b (8), (f), and N.Y. FAM. CT. ACT § 633 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.


325 N.Y. SOC. SERV. LAW § 384-b (12).

326 N.Y. SOC. SERV. LAW 384-b (8).
disabled parents.\textsuperscript{327} Disabled parents are never 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.\textsuperscript{328} 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.\textsuperscript{329} 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.\textsuperscript{330}

2. States that do not specify mental disability as a ground for termination of parental rights.

Seventeen states, as well as the District of Columbia,\textsuperscript{331} 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.\textsuperscript{332} 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.”\textsuperscript{333} 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.”\textsuperscript{334} 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

\textsuperscript{327} 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 Judgment: Suspended Judgments, http://www.nyskwic.org/access_data/ind_profile.cfm?subIndicatorID=85&go.x=9&go.y=10
\textsuperscript{328} See supra n. 324.
\textsuperscript{329} In re Welfare M.R. 2002 WL 31655025 (Minn. App. 2002) (at the scheduled TPR, all parties agreed to postpone the trial for 4-6 months to allow mentally disabled respondent more time to complete her programs, and the trial court found that this postponement was in the best interests of the children).
\textsuperscript{330} Supra notes 339.
\textsuperscript{331} See Appendix C.
\textsuperscript{332} See also MICH. COMP. LAWS § 712A.19b (2007).
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. 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

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. Numerous scholars and practitioners have noted that court proceedings are often ineffective for addressing a family’s needs and for holding the agency to its mandate.

One state, Arkansas, has actually written the Americans with Disabilities Act into its child welfare statute. 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...provided, however that the department shall make reasonable

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335 N.Y. SOC. SERV. LAW § 384-b (4)(c) was held constitutional for this reason in Matter of Nereida S., 454 N.Y.S.2d 61 (N.Y. 1982).
337 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.”)
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.” Other state statutes, although making no reference to the ADA, explicitly require that reunification services be appropriate, accessible, and realistic to the needs of parents.

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.” This right is limited, however, by what follows: “nothing in this section 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.” This provision seems to hint at the fundamental alteration defense available to states in ADA claims, 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. 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 and

342 Minnesota: MINN. STAT. § 260.012. (h) (2), (4), (6).
343 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 eg Alabama: Ala. Code 1975 § 26-18-5(b)(3); Alaska: ALASKA STAT. § 47.10.088(e)(2); Colorado: Colo. Rev. Stat. § 19-3-604; Connecticut: Conn. Gen. Stat. § 17a-111a(b); District of Columbia: D.C. Code § 16-2354(g)(3); Florida: Fla. Stat. § 39.8055(2)(b)(5); Illinois: 705 Ill. Comp. Stat. § 405/2-23, 750 Ill. Comp. Stat. § 50/1; Indiana: Ind. Code § 31-35-2-4.5; This is also a compelling reason for an agency not to file a petition under ASFA, 42 U.S.C. § 675(5), supra note 309.
345 Id.
346 28 C.F.R. § 35.130(b)(7).
347 Supra notes 162,163.
THE RIGHTS OF MENTALLY DISABLED PARENTS

ensuring that such services are tailored so they have a chance to prove themselves. 349

Even some New York courts have reached the conclusion that mentally disabled parents must be treated equitably, independent of state or federal mandates. 350 Before the ASFA and the ADA, the court in Matter of L. Children denied a mental illness termination because of an agency’s failure to engage in diligent efforts with a mentally retarded parent. 351 “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.’” 352 The Court of Appeals in Matter of Joyce T. also held that “termination [for mental illness] requires a…consideration of measures on the part of the State to maintain the family setting.” 353

349 In the Matter of Welfare of the Children of M.R. 2002 WL 31655025 (Minn. Ct. App. 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 Christopher B, 823 A.2d 301 (R.I. 2003) (“[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.”); Matter of Welfare of D.F., C.F., 1997 WL 407799 (Minn. Ct. App. 1997) (court stated 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 Interest of C.P.B., 641 S.W.2d 456 (Mo. Ct. App. E.D. 1982 (reunification plan must make clear what criteria would be applied to determine compliance); see also In re Welfare of B.L.W. 395 N.W.2d 426 (Minn. Ct. App. 1986); Matter of Custody and Parental Rights of M.M., 894 P.2d 298 (Mont. 1995); In re Interest of D.L.S., 432 N.W.2d 31 (Neb. 1988); In re Victoria M., 255 Cal. Rptr. 498 (Cal. Ct. App. 1989); In re S.P.W., 707 S.W.2d 814 (Mo. Ct. App. W.D. 1986); Matter of M.L.W. 452 A.2d 1021 (Pa. Super. Ct.1982); In Interest of C.M.E., 448 A.2d 59 (Pa. Super. Ct. 1982); In re Dependency H.W. 961 P.2d 963 (Wash. Ct. App. 1998). See also, supra n. __, 415 (emphasizing the importance of tailored services).

350 In re W.W. Children, 736 N.Y.S.2d 567 (N.Y. Fam. Ct. 1986), 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 N.Y. SOC. SERV. LAW § 384-b(4)(c) did not require reasonable efforts, the agency had an obligation to do so under the federal statutes ASFA and AACWA (supra note 136); see also In Matter of DSS on Behalf of Viana Children, 476 N.Y.S.2d 750 (N.Y. Fam. Ct. 1984).


352 Id., at 596.

But New York and other states can do more about what the courts often acknowledge is an unfair and “painful” process. In *Matter of 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. 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; in *In re Antonio*, the respondent mother’s rights 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.

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. 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. 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. Also, as discussed, because of the epidemic of legal orphans, some states now allow young people to petition to vacate their parents’ TPRs, 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

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355 Id.
361 Supra note 332.
other needs. 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, many of whom can be primary caretakers if they receive support, 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. 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. 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. But New York is not such a state, having failed to enact subsidized guardianship legislation in 1996 and again

363 Supra notes 105, 108, 152, 297, 298; see also In re Eden F., 741 A.2d 873 (1999) (holding that in order to avoid a TPR, a parent does not have to prove that she is able to assume full responsibility for her child, unaided by available support systems.).
365 “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 Normans that value extended family and mutual interdependence.” CHILDREN’S DEFENSE FUND, STATES’ SUBSIDIZED GUARDIANSHIP LAWS AT A GLANCE (2004). 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. Most (31) states require that the child be in state care prior to receiving the subsidy, although the majority do not specify a minimum time length. Id.
366 In Kansas, under KAN. STAT. ANN § 38-1583, the court may award permanent guardianship at the end of a TPR, even if the grounds were proven, in lieu of granting TPR; the same is true in Mississippi, under Miss. Code Ann. § 93-15-103, although Mississippi’s guardianship is not subsidized. If a child is being cared for by a relative, this is also a compelling reason for an agency not to file a TPR under many state statutes, supra notes 309 and 315. 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 has to transfer from the state to the relative or another adult in the child’s life.
368 In 1996, Congress passed an amendment to the Social Security Act offering states the option to apply for a waiver to allow them to still receive federal funding for children in child protective
in 1997. New York does have post-adoption agreements, which are now legally enforceable as contracts if they are part of the original adoption order. 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 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?

369 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 (Generations United, Washington D.C.), available at http://ipath.gu.org/documents/A0/GU_NY.pdf. Waivers to the Social Security Act are still available, although New York has yet to apply. CHILDREN’S DEFENSE FUND, STATES’ SUBSIDIZED GUARDIANSHIP LAWS AT A GLANCE (2004). 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.

## Appendix A

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

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

### Reunification Services for Mentally Disabled Parents

29 States Requiring Services (and DC)  
21 States Not Requiring Services

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>State</th>
<th>Statute</th>
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## The Rights of Mentally Disabled Parents

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<thead>
<tr>
<th>State</th>
<th>Statute/Code</th>
<th>State</th>
<th>Statute/Code</th>
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<tbody>
<tr>
<td>Rhode Island</td>
<td>R.I. GEN. LAWS § 15-7-7 (2006)</td>
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<tr>
<td>Texas</td>
<td>TEX. FAM. CODE ANN. § 161.003 (2007)</td>
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<tr>
<td>Washington, DC</td>
<td>D. C. CODE § 4-1301.09a (2007)</td>
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</table>
**Appendix C**

**Mentally Disability as a Grounds for Termination**

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<thead>
<tr>
<th>33 States With (Including WI)</th>
<th>17 States (and DC) Without</th>
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<tbody>
<tr>
<td><strong>State</strong></td>
<td><strong>Statute</strong></td>
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<tr>
<td>Montana</td>
<td>MONT. CODE. ANN. § 41-3-</td>
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<tr>
<td>State</td>
<td>Statute/Code</td>
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<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. ANN. § 128.106(1) (West 2007)</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. SOC. SERV. LAW § 384-b(4)(c)</td>
</tr>
<tr>
<td>Ohio</td>
<td>OHIO REV. CODE. ANN § 2151.353(5)(b) (West 2007)</td>
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<td>Oklahoma</td>
<td>OKL. STAT ANN. tit. 10, § 7006-1.1(13)(c) (West 2007)</td>
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<tr>
<td>Oregon</td>
<td>OR. REV. STAT. § 419B.504(1) (2006)</td>
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<tr>
<td>Utah</td>
<td>UTAH CODE ANN. § 78-3a-408 (2)(a) (2007)</td>
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### Appendix D:

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

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
<th>State</th>
<th>Statute</th>
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<tbody>
<tr>
<td>Louisiana</td>
<td>LA. CHILD CODE ANN. art. 1015 (2006)</td>
<td>Utah</td>
<td>UTAH CODE ANN. § 62A-4a-203.5</td>
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<thead>
<tr>
<th>State</th>
<th>Statute and Section</th>
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