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Notes

***785 "TRYING TO CURE A SEVEN-YEAR ITCH": THE ADA DEFENSE IN TERMINATION OF PARENTAL RIGHTS ACTIONS [FN1]**

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I. Introduction

In 1990, Congress found that over 43,000,000 Americans with disabilities faced "serious and pervasive" discrimination without a legal recourse in a number of "critical areas" including "public accommodations," "institutionalization," and "access to public services." [FN1] In response to such discrimination, Congress unanimously enacted the Americans with Disabilities Act (ADA). [FN2] Heralded as a major piece of civil rights legislation, the ADA's purpose was to end discrimination against people with disabilities at all levels of society:

[The ADA] is powerful in its simplicity. It will ensure that people with disabilities are given the basic guarantees for which they have worked so long and so hard: independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream. [FN3]

Five titles, each with a purpose or area of coverage, comprise the ADA. Title I prohibits employment discrimination in private sector employment. [FN4] Title II prohibits discrimination in the provision of services, programs, or activities by public entities and incorporates the provisions of Titles I and III. [FN5] *786 Title III covers public accommodation services provided by private entities. [FN6] Additionally, it requires architectural modifications to newly constructed facilities [FN7] and transportation. [FN8] Title IV is the miscellaneous provision section. [FN9] A significant miscellaneous provision denies state immunity under the Eleventh Amendment and subjects the states to all the remedies, both legal and equitable, available against private organizations. [FN10]

This Note concerns the ADA as it specifically applies to the states through Title II's public entity coverage. [FN11] It will also explore whether the ADA applies to state protective agencies during actions to terminate parental rights (TPR), and whether the ADA provides a valid defense to TPR. [FN12] The Act defines a "public entity" as "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government." [FN13] Therefore, Title II applies to executive, legislative and judicial branches of all state and local governments. [FN14] Public entities may not, on the basis of disability, exclude an individual with a disability from receiving the benefits of any of the entity's services, programs, or activities. [FN15] In addition, the Act prohibits public entities from perpetuating *787 another public entity's discrimination "if both entities are subject to common administrative control or are agencies of the same State." [FN16]

In spite of this clear language, compliance with the ADA has been slow. [FN17] Even courts have been reluctant to bring themselves into compliance with the ADA. [FN18] In addition, the judiciary has been hesitant on the state

level to apply the ADA to state law. [FN19] One such area has been in state court TPR actions.

Because the termination of a parent's rights affects a fundamental liberty interest, [FN20] such actions are among the most severe actions found in family courts. [FN21] State protective agencies are the largest source of termination of parental rights actions. [FN22] When the state suspects child abuse or neglect, the state sends its protective agency to investigate. [FN23] The agency may undertake a number of actions ranging from mere investigation to TPR. [FN24]

Each day in courtrooms across the United States, a recurring drama unfolds. Parents who want to maintain a relationship with their child will be told they cannot because, in the state's view, they are unfit beyond *788 redemption. They will be told that the companionship, custody and care of their child will be forever denied to them. They will no longer have the right to participate in their child's upbringing, or even to visit the child. The child will permanently lose the connection to his or her natural family. If the child is not subsequently adopted, that child will forever remain a judicially mandated orphan. [FN25]

A disabled parent raises the ADA defense when the agency refuses to provide family reunification services on the basis of the parent's disability, refuses to provide "reasonable accommodations" for family reunification services, or makes a determination to seek TPR based on the parent's disability. The parent is essentially alleging that but for the way the agency responded to the parent's disability, family reunification would have been achievable. The parent may seek a number of different remedies depending on the alleged violation. Such remedies include the following: (1) the court's rejection of the TPR petition, as unsupported or made in bad faith, or appellate reversal on the same grounds; (2) additional time to investigate and propose accommodations; or (3) additional time to attempt rehabilitation and subsequent reunification after the re-provision of services with the requested accommodations. [FN26]

Part II of this note summarizes and analyzes four state court cases where disabled parents raised ADA defenses to TPR actions. Part III summarizes the analytical failings of those state court decisions. Part IV presents the appropriate state court analysis for ADA defenses raised in TPR cases. Part V uses cases that appeared before state courts to suggest ways that courts, protective agencies, and practitioners can better accommodate disabled parties in family disputes.

II. Four Adjudications of the ADA Defense in TPR

Four state courts have addressed the attempted use of a state protective agency's ADA violation as a defense to TPR. The first case attempting an ADA defense was *In re Torrance P.*, [FN27] in which an illiterate, developmentally disabled father alleged the state protective agency violated the ADA when it failed to provide affirmative services beyond those normally provided for nondisabled*789 parents. [FN28] The father alleged the failure to accommodate substantially caused the TPR order [FN29] and, thus, the failure should invalidate the order. [FN30] The claim of a failure to accommodate rested primarily on the caseworker's written correspondence with the illiterate father. [FN31] The trial court, however, found that the father failed to show he was unable to find someone to read the letters to him. [FN32] Additionally, the father and caseworker spoke on eight or ten occasions about substantially all the information in the correspondence. [FN33] Further, the caseworker testified she was aware the father was "slow," but not that he was illiterate. [FN34] The court held that the agency efforts had been diligent as required under the Wisconsin statute. [FN35] In addition to holding the father's children in foster care for four years, the agency had also assisted the father after his alcoholism treatment by modifying the reunification plan to accommodate his new sobriety. [FN36] The court held that alleged ADA violations do not provide a defense under the TPR statute, because the TPR statute, not the ADA, regulates agency conduct. [FN37] Therefore, the ADA did not alter the agency's responsibilities or the burden of proof. [FN38] The court further reasoned the father could still sue the agency for any ADA violation, in a separate proceeding. [FN39] The Torrance court stated, "Congress did not intend to change the obligations imposed by unrelated statutes." [FN40]

Low-functioning adult parents attempted to use the ADA as a defense in *Stone v. Daviess County Division of Children & Family Services*, [FN41] by claiming the state protective agency's services were insufficient to assist them

*790 with family reunification. [FN42] The state removed five school-age children due to sexual abuse of one daughter by her grandfather, unsafe and unsanitary conditions in the home, and improper hygiene, nutrition, medical care, and supervision. [FN43] The protective agency also believed the children were excessively disciplined because the father admitted using a belt. [FN44] During the four years the children were in foster care, the parents participated in agency-provided services “including parenting classes, homemaker services, visitation provisions, family counseling, and individual counseling.” [FN45] Both parents continued to deny the abuse and insisted they had no parenting defects. [FN46] The children, however, showed substantial emotional and psychological problems, including a lack of toilet training in the ten-year-old twins. [FN47] After four years of foster care the children were still suffering the effects of prolonged abuse. [FN48] The Stone court initially noted most courts faced with the issue avoid addressing the ADA defense in TPR by simply holding that the agency had complied with the ADA. [FN49] The court then recounted Torrance and found it was applicable to a limited extent because the court based the holding on a substantial conflict between the ADA and Wisconsin law. [FN50] Relying heavily on the Torrance finding that Congress did not intend to affect unrelated laws, [FN51] the Stone court held the ADA does not invoke the Supremacy Clause. [FN52] The court found this holding in Torrance even more applicable to the Indiana statute because it did not mandate parenting services. [FN53] The court not, *791 however, if the statutory scheme had required service provision to all parents, then service provision that violated the ADA would create a defense to TPR. [FN54] In addition, the court held, when the protective agency provides services, it must comply with the ADA. [FN55] The Stone court, however, found the agency did comply with the ADA. [FN56] The court also noted disability alone is not a sufficient basis on which to order TPR and is but one factor to be considered when determining parental fitness. [FN57]

In re B.S., [FN58] the third case to address the ADA defense to TPR, involved a mentally retarded mother who alleged her disability necessitated assisted parenting. [FN59] The state protective agency originally obtained temporary custody of B.S. on the day he was born, based on previous abuse of two siblings already in foster care. [FN60] Two weeks after obtaining custody pursuant to a written agreement, the agency placed B.S. with his mother in a residential, assisted-parenting center. [FN61] After two weeks of caring for the infant, the mother left the child unattended and went to visit the child's father. [FN62] The protective agency immediately placed B.S. back in foster care. [FN63] The agency agreed to continue reunification efforts with the mother if she enrolled in an extensive parenting skills program. [FN64] Even with social worker assistance, however, the mother's parenting skills minimally improved. [FN65] When informed the agency was anticipating filing TPR, the mother requested consideration of alternative placement with a relative in New Hampshire. [FN66] The court granted a continuance to provide New Hampshire time to investigate the fitness of the proposed home. [FN67] Although the parties waited for months, a fitness report from New Hampshire never arrived, and inquiries suggested the delay would *792 last several more months. [FN68] Near the child's first birthday, the agency moved for TPR. [FN69] The mother countered with a suggestion of immediate interim placement of the child with the mother's aunt in-state. [FN70] The trial court refused to consider the interim placement or wait longer for the New Hampshire assessment because the mother had been unable to sufficiently improve her parenting skills. [FN71] The court, therefore, found TPR in the child's best interests. [FN72] The family court found the agency failed to treat the mother with respect and compassion, was generally demeaning to her, and intimidated and ignored the mother during visitation. [FN73] In addition, the agency failed to respond to simple requests for grandparent visitation and family photographs. [FN74] After indicating its displeasure with the agency's treatment of the mother, the family court held the issue was not whether the agency violated the ADA, but rather whether violation of the ADA was a defense to a TPR proceeding. [FN75]

On appeal, the mother claimed the agency violated the ADA by failing to consider alternative placements with family members. [FN76] The appellate court agreed with the family court that the ADA was not a defense to TPR, reasoning that “TPR proceedings are not services, programs or activities' within the meaning of Title II of the ADA.” [FN77] The appellate court cited *Buhl v. Hannigan* [FN78] and *Aquaro v. Zoning Board of Adjustment* [FN79] without discussion. [FN80] The court then noted that, even if the ADA did apply to TPR actions, the statute itself was neutral because mental retardation alone was not a basis for terminating parental rights. [FN81]

The court rejected the mother's argument that the ADA required the state protective agency to provide services appropriate for her disability and the *793 agency's refusal was responsible in whole or in part for the TPR order.

[FN82] The appellate court held the limited jurisdiction of juvenile court prohibited it from entertaining “side issues that do not directly concern the status of the juvenile before it.” [FN83] The court reasoned that grafting of ADA requirements into “unrelated statutes” was not required because the ADA does not specifically list TPR denial as a remedy to an ADA violation. [FN84] It denied the mother's argument that the right of action under the ADA created a defense to TPR because the listed remedies under the ADA do not include relief from TPR. [FN85] The court then cited Torrance and Stone to support its holding. [FN86]

In re B.S. is distinguishable from Torrance and Stone as the only case in which a lower court found evidence of discrimination based on disability. In both Torrance and Stone, the actual accommodations made by the protective agencies may have been sufficient under the ADA because neither parent was able to show that a different result would have been reached had additional accommodations been provided, or even articulate what those accommodations might have been. In B.S., however, it is very clear that provision of the requested accommodations might have resulted in the mother retaining her parental rights. Although the record is unclear, the agency's actions seem to indicate a belief that the father had physically abused the couple's other children, resulting in the agency taking custody of B.S. at birth. The agency never evaluated the alternative placements. The agency's failure to accommodate the mother's requests for visitation arguably resulted in the stagnation of the mother's bond and ability to care for her child, which was the ultimate reason for terminating parental rights. Also, nothing in the record indicates whether the court provided legal counsel to the mother before the termination proceeding, although the child's removal and the discrimination began a year earlier.

J.T. v. Arkansas Department of Human Services [FN87] is the fourth case discussing the ADA defense to TPR proceedings. J.T. was a TPR proceeding *794 involving a mother, J.T., and her eleven-year-old daughter, T.T. [FN88] Both were mentally ill. [FN89] Specifically, the mother suffered from bipolar disorder that, untreated, rendered her a delusional paranoid. [FN90] The mother was constantly homeless and on the move from one shelter to another and from one state to another. [FN91] The daughter began to experience shared psychotic disorder [FN92] and exhibited parentified [FN93] behavior. [FN94] The protective agency became involved after complaints from the school that the mother dragged her child into the school, disrupted the school by swearing at school officials, and that the daughter exhibited symptoms of mental illness. [FN95] The court removed the daughter by emergency order and placed her in residential psychiatric treatment as part of the rehabilitation plan. [FN96] The family court also ordered the daughter to participate in family therapy with her mother and ordered the mother to undergo psychiatric treatment. [FN97] The daughter improved and was released into foster care, but regressed during therapy sessions with her mother. [FN98] The daughter's therapist terminated visitation and family therapy and recommended adoption, as the daughter, then eleven, wished. [FN99]

Despite the court order to do so, the state protective agency did not supply the mother with counseling until nineteen months later. [FN100] The mother complied with all court orders and showed improvement in counseling. [FN101] The mother's therapist testified reunification was best for the mother but that it needed to occur slowly and incrementally. [FN102] Based on a single interview, a state therapist testified the mother was incapable of parenting her daughter *795 because the daughter was high-risk and a bipolar person would never be able to cope with the daughter's tantrums. [FN103] The trial court noted the mother had a strong bond with her child, but the child wished termination and immediate stability, which her mother could not yet provide. [FN104] Because the appropriate standard was the child's best interests, the trial court ordered TPR. [FN105] The mother appealed alleging violation of the ADA and an Arkansas statute requiring the protective agency to comply with the ADA. [FN106] The mother's first argument was that the daughter's therapist terminated visitation based on her disability without consideration of reasonable accommodations. [FN107] Additionally, the mother argued the state therapist's determination that the mother was a threat to her daughter violated the ADA because it was based on a stereotype of the mother's disability and not an individualized assessment. [FN108]

The family court responded to the ADA arguments by noting it had taken the same action when parents were not disabled, and had allowed retention of custody when parents were disabled. [FN109] Therefore, the family court concluded it did not discriminate based on disability. [FN110]

The appellate court noted the mother did not offer any examples of accommodations that should have been provided. [FN111] In addition, ADA discrimination under Title II was a matter of first impression, requiring review of other states' cases. [FN112] The court cited Torrance for the proposition that ADA actions were separate from family court actions. [FN113] The court next examined *In re C.M.*, [FN114] a case where the ADA defense was not allowed because the issue was not argued at the lower level, and erroneously interpreted it to suggest that provision of many accommodations is proof of no ADA violation. [FN115] Finally, the court turned to *Stone* for authority that, when both children and parents suffer disabilities, the child's needs become *796 paramount under the "best interests of the child" standard. [FN116] The court, however, noted *Stone* largely relied on the parents' denial of need for services. [FN117] Turning next to the state's statutory language, the J.T. court stressed that the law required that the protective service agency make a "meaningful effort" which includes "reasonable accommodations." [FN118] The sole relevant inquiry was whether the protective agency provided reasonable accommodations to assist with reunification. [FN119] The appeals court found the long list of services provided to the mother was sufficient to rebut the allegation of failure to accommodate. [FN120] Further, the denial of the mother's visitation did not occur until it was "detrimental" to the daughter. [FN121]

The court rejected the mother's second argument that the denial of individual assessment of any threat the mother posed to the daughter violated the ADA. [FN122] Because the threat determination was based solely on the effect the mother had on the daughter, and not a perceived defect in the mother, the decision was not based on the mother's disabled status. [FN123] Finally, the court held that even if the agency violated the mother's ADA rights, the TPR decision was proper. [FN124]

The dissent argued forcefully that TPR was improper because the evidence was insufficient to demonstrate the mother was incapable of becoming a fit parent, as constitutionally required. [FN125] Further, the rule for TPR is that the court must find mental illness will render the parent unable to be fit in the "foreseeable future." [FN126] The dissent rejected the state therapist's statement that the mother's bipolar condition made her incapable of handling her daughter as stereotypical evidence, which the ADA prohibits. [FN127] Further, the dissent *797 noted the mother did not receive counseling until nineteen months into her daughter's foster care and TPR occurred five months later, although family court noted the mother made significant progress in counseling. [FN128] This significant progress in such a short period inadequately demonstrates that the mother was incapable of becoming a fit parent, as constitutionally required for TPR order. [FN129]

III. Analytical Failings of State Court Cases

These state court determinations, that the ADA does not apply to either TPR or agency reunification actions by protective agencies, are flawed because they fail to understand the broad sweep Congress drafted into the ADA. [FN130] These state courts err when they assume that, because the language of the ADA does not specifically say it applies to TPR, it does not. [FN131] A fair reading of the ADA and regulations indicates Congress sought in Title II to change the access the disabled received at all levels of state government. [FN132] The extensive fact-findings [FN133] and purpose statement [FN134] included in the ADA indicate Congress meant to target all public services and "invoke the sweep of congressional authority." [FN135] Congress included Title II to force states to remove barriers at all levels.

Yet, the TPR cases suggest that the ADA somehow fails to fall under the Supremacy Clause, [FN136] even though no evidence supports the suggestion that Congress had a different intent than the plain language indicates. Specifically, *798 if Congress did not attempt to invoke the Supremacy Clause, why would Title IV contain the express revocation of the states' Eleventh Amendment immunity? [FN137] Why would Congress speak of "invoking the sweep" of its authority? [FN138] Most importantly, why would Congress have invoked the Fourteenth Amendment as the source of its authority to enact the ADA? [FN139] Clearly, Congress intended to use the power of the federal courts to force states into compliance with Title II.

Under these interpretations, Title II becomes superfluous verbiage because states are free to fail to accommodate the disabled as long as they do so in an “unrelated” statute. In this context, “unrelated” appears to be any statute that does not specifically refer to the matter under consideration, here TPR, because the perceived focus of the ADA is employment. This is, however, clearly error. Only Title I specifically targets employment; the other four titles target different areas of discrimination and accommodation. Indeed, the actual names Congress gave the titles would negate this interpretation. [FN140]

In addition, the argument that the ADA is unrelated to TPR is dubious on its face. TPR actions use evidence of the parental disability as at least part of the determination. [FN141] Using the actual presence of a disability against the disabled individual, without an individual assessment of ability, is exactly what the ADA seeks to counter. [FN142] Disabled individuals are to be assessed by what they as individuals are capable of achieving with reasonable accommodations.

*799 Furthermore, as noted in the introduction above, the ADA prohibits one public entity from perpetuating a second public entity's discrimination. [FN143] Here, discrimination by one public entity, the protective agency, is perpetuated by another public entity, the court. The attempt to shield both the court and the agency by relying on the state statute is ineffective because the statute is created by the legislature, a third public entity. Under Title II, none of these three public entities can refuse to provide reasonable accommodations in any public services. [FN144]

The argument that TPR is not a service is flawed because all court actions are considered services under the ADA. [FN145] Indeed, the Department of Justice has formulated guidelines for courts to use in both civil and criminal proceedings. [FN146] Surely TPR is not less a “service” to a parent, than facing trial is a “service” to the criminally accused. Clearly, parents in TPR proceedings, like the accused in criminal proceedings, would prefer not to be the recipient of the adjudication “service” of the court. Indeed, the federal courts have held that the ADA applies to prisoners, who are involuntary recipients of the state's incarceration “service.” [FN147]

The reliance placed on Buhl and Aquaro is particularly troubling because it is evidence of poor legal research. The ADA is a federal act, and therefore its application is a federal question. The state courts, however, relied on these two state court holdings to construe the parameters of the Act, rather than the existing wealth of federal case law, which takes a very different interpretation. [FN148] Federal courts have expansively interpreted the ADA to apply to a host of situations, such as little league baseball regulations, [FN149] municipal “open burning,” [FN150] mental health warrants, [FN151] theater wheelchair *800 seating in federally owned buildings, [FN152] state welfare assistance services, [FN153] and state bar examinations. [FN154] In addition, both Buhl and Aquaro presented very dubious arguments under the ADA, and both were resolvable without answering the federal question. [FN155]

Moreover, the analysis used by the courts suggests that because a state statute does not require service provision, the ADA does not mandate accommodation. The ADA challenge, however, does not need to be a facial challenge to the state statute. An agency can be in full compliance with state statutes and simultaneously violate the ADA by failing to provide adequate accommodations to the disabled individuals eligible under that statute for services. [FN156] This argument also fails because the ADA mandates accommodation beyond mere access to identical services and mandates tailored accommodations in order to provide the same opportunity for benefit. [FN157] Here, the inquiry is not whether some or a number of accommodations were made but, rather, whether these accommodations provided the same opportunity for benefit. [FN158]

The fallacy of the reasoning becomes apparent when we consider the hypothetical case of an agency claiming it made a reasonable effort to accommodate individuals with visual impairments by providing them with Braille documents. Under the ADA, this is not a reasonable accommodation for visually impaired people who do not read Braille and, thus, require documents in large text or audio formats. The ADA calls for individualized accommodations and determinations of the appropriateness of accommodations. Finally, the argument that the lack of a state mandate to

provide services means no violation of the ADA has occurred fails to recognize that the overall distribution of a state's services must also comply *801 with the ADA. [FN159]

The courts seem to misunderstand the nature of an ADA defense. [FN160] An ADA defense is not an attempt to litigate the ADA violation in the family court. Instead, an ADA defense is an evidentiary attack against the agency's presumption of fairness. Violation of the ADA indicates that whatever testimony or evidence the protective agency is offering is flawed. More fundamentally, the ADA defense attacks the substantive determination of unfitness, because a failure to provide or take into account the reasonable accommodations that the ADA requires tainted the evaluation. For example, the dissent in J.T. noted that the agency's assertion that a bi-polar parent could not succeed was based upon a short interview two years previous, before the mother received any treatment. [FN161] In addition, that testimony directly conflicted with that of the mother's therapist, who stated the mother was capable. [FN162] Surely, central to the jurisdiction of the lower court is the weighing of evidence from the agency and the parent. Because the inquiry balances the child's best interests against the parents' constitutionally protected rights, agency bias, and non-compliance with the ADA, it may raise important due process and equal protection issues. [FN163] Resolution of these issues is necessary before consideration of the TPR order.

At a minimum, the lower court should attempt to assess whether the *802 alleged violation contaminated the agency's recommendation and evidence enough to require a new agency evaluation. The balancing of the child's best interests against the parents' constitutionally protected rights hinges almost exclusively on the agency's determination. [FN164] The idea that the legality of the agency's action is a "side issue" creates a situation that lacks review of the discriminatory nature of an agency's actions and, thus, potentially skews the court's balancing. [FN165] The constitutional burden rests with the party attempting to terminate parental rights. [FN166] Surely, if an agency is using evidence insufficient to meet constitutional mandates, examination of the offered evidence, the agency evaluation, must be within the implied jurisdiction of any court.

Finally, although the list of statutory remedies under the ADA does not include TPR, the ADA provides for injunctive relief and damages. [FN167] Here, a family court cannot act in a child's best interests if the family court action can be enjoined in federal court. Federal court intervention is certain to cause a delay and increase the risk of foster-care drift, a condition clearly not in the child's best interests. [FN168] Such a ruling is inconsistent with the goal of stability for children. The above holdings, however, would leave a parent with no other choice. Parents cannot wait for appellate review, because the rift of the parent-child bond occurring between trial and appeal has been weighed against the parent, as yet another reason to uphold TPR orders. [FN169]

*803 IV. Model of Analysis for ADA Defenses to TPR

If the ADA applies to TPR and other family court actions, the next question becomes how to incorporate the ADA into the court procedures. As an initial matter, the protective agency should identify whether a given case involves or may involve an individual with a disability when completing its initial investigation. If the true goal of the protective agency is reunification of the family and rehabilitation of the parents, then the agency should identify relevant disabilities as early in the process as possible. Often, the parent may not receive court-appointed counsel until the TPR action. The agency and the prosecution can avoid needless, lengthy delays by taking a prophylactic approach and inquiring if a disability exists. After identifying a disability, the agency must ensure the reunification plan provides the necessary accommodations. Many smaller agencies may not have staff with the experience and education necessary to judge the reasonableness of accommodations. Organizations for the disabled exist in every state and can provide suggestions and materials or make referrals. In addition, federally mandated mainstreaming of disabled children has resulted in a proliferation of trained state and local school board employees with vast expertise and training in educating, accommodating, and counseling individuals with disabilities. These educational resources also consist of scientifically tested and proven lesson plans and methods for developing a wide array of self-sufficiency and interpersonal skills.

Family courts can more actively probe protective agencies about the resources consulted and measures taken to

accommodate parents. Courts should question skeptically an agency's assertion that no resources are available. Cases such as J.T. are avoidable if the court imposes deadlines on agencies for provision of counseling and other services to parents. Courts should warn agencies and parents at the initial meeting that delays in complying with orders will be prejudicial, as they are not in the child's best interest. State protective agencies should compile databases of identified materials, organizations, and individual experts. Courts can order offending agencies to provide their caseworkers access to either an in-house agency expert or a referral database. In addition, caseworkers should receive in-service training to ensure better service provision to disabled children and disabled parents. [FN170]

*804 Family courts should also be more demanding of "testimony" of professionals not supported by adequate investigation. The Supreme Court's standard for scientific evidence applies with equal vigor to a family court terminating a constitutional right. [FN171] In addition, the ADA itself clearly prohibits a line of testimony and a decision based solely on what given classes of disabled people are capable or incapable of doing. [FN172] Instead, the ADA mandates individualized investigations of a given parent's ability to acquire skills and improve. No longer is an IQ test or diagnosis standing alone enough. [FN173] Sufficient evidence would be an inability to acquire a skill despite provision of all relevant accommodations and adequate repetitions. [FN174] Such evidence might focus on failure to learn from practical demonstrations instead of lectures or films.

The parent's counsel should endeavor immediately to learn if a disability exists and the accommodations already made. In addition, witness qualifications should be carefully examined to ensure they have practical and sufficient experience accommodating or treating a given disability. Counsel should carefully scrutinize the length and frequency of contact to ensure cursory examinations and stereotypes are not substituted for individual assessments. Effective legal representation necessitates particular attention to materials given to parents and the parents' ability to understand the materials. For example, if counsel confronts a situation where an agency fails to provide interpreters for a deaf or hearing-impaired parent, either in meetings with the agency or during other service provisions, the agency's conclusion that the parent is unfit is open to attack. [FN175] The parent's inability to acquire the skill or act may be the direct result of the agency's failure to accommodate the hearing loss with interpreters or captioning, and not the parent's inability to acquire the *805 skill.

Courts should approach ADA defenses as attacks on evidence and reliability of agency testimony. The court should presume that the agency has complied, until a parent raises the issue. At that point, the burden should shift to the agency to demonstrate it has actively worked with the parent to provide adequate accommodations. If the agency knew of the disability and failed to make the reasonable accommodations necessary, the court should order the agency to provide the accommodations. The court should continue the TPR hearing and require the agency to report periodically to the court on its progress with supplying accommodations. If, after accommodations, the parent remains unfit, then ordering TPR is proper. If the agency can produce a documented list of accommodations provided, then the parent's counsel should be given adequate time to investigate the adequacy and accuracy of those accommodations. At this point, the court should apply a presumption of adequacy of the accommodations provided. Courts should require that counsel demonstrate accommodations were inadequate, or the agency should prevail.

V. Practical Suggestions for ADA Accommodation

The ADA does not come with textbook solutions. It rejects standardization in favor of flexibility and case-by-case analysis. The flexibility mandated by the statute requires that courts develop creative solutions. Therefore, if at any point the court feels accommodations have not been adequately explored, it should appoint its own independent expert. Courts should insist that ADA interpretation arguments be supported by federal cases and federal agency interpretations whenever possible.

Perhaps no situation calls for greater flexibility and creativity under the ADA than when a court faces conflicting needs between a child's disability and a parent's disability. A textbook answer might be that the child's best interest comes first. Courts, however, should be flexible and realize that an unconventional solution may provide for the child in a way that is far less detrimental to the parent's rights. For example, in *In re S.N.*, [FN176] the father suffered

permanent organic brain damage as a result of a car accident. [FN177] The mother left the family and waived her parental rights, and the father could not function as independent caretaker due to his disability. [FN178] The father asked the *806 court to provide for long-term foster care. [FN179] The court noted the tight bond between the children and the father, but held long-term placements were against public policy because the children might be rendered unadoptable. [FN180] It is difficult to believe causing these children to lose their entire extended family and each other could possibly be preferable to making at least an attempt at finding an open placement.

A more flexible approach might have been to allow a single person to openly adopt them. A single adoptive parent might have welcomed an open adoption if it came with child support from the natural father. The natural father may have preferred paying support to losing his children entirely. Such an arrangement would hardly subject the children to scrutiny among their peers, many of whom are children of divorced parents, living in similar arrangements. Additionally, an open adoption would have minimized the trauma the children and the family suffered as a result of the loss of the mother.

Some courts have shown tremendous flexibility in accommodating disabilities. For example, in *In re Marriage of Allen*, [FN181] the court granted custody of the husband's deaf son to the stepmother. The court reasoned that neither the natural mother nor father ever learned sign language, and so they could not communicate with their child. [FN182] The evidence clearly demonstrated that before the child came to live with his stepmother and her children the child lagged years behind in language and other development. [FN183] The stepmother not only learned sign language but also insisted her children sign to the stepson. [FN184] At the time of the hearing, the stepson was functioning at grade level and was happy and well adjusted for the first time in his life. [FN185] The court held the father's failure to adequately learn to sign and his attitude that a deaf son would never be successful made him an unfit parent for the child. [FN186] While such decisions are novel, they clearly comply with the best interest of the child standard. Such flexibility and understanding is to be commended and encouraged. It represents the best American jurisprudence *807 has to offer and hopefully a small taste of what is possible.

[FN1]. Finalist, Best Note Award 1997-98.

[FN1]. Peter A. Susser, *The ADA: Dramatically Expanded Federal Rights for Disabled Americans*, 16 *Employee Rel. L.J.* 157, 158 (1990).

[FN2]. *Pub. L. No. 105-220*, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

[FN3]. *Remarks on Signing the Americans with Disabilities Act of 1990*, 2 *Pub. Papers* 1067, 1068 (July 26, 1990).

[FN4]. See 42 U.S.C. §§ 12111-12117 (1994).

[FN5]. See 42 U.S.C. §§ 12131-12165 (1994 & Supp. 1996).

[FN6]. See 42 U.S.C. §§ 12181-12189 (1994 & Supp. 1995).

[FN7]. See § 12183.

[FN8]. See § 12184.

[FN9]. See 42 U.S.C. §§ 12201-12213 (1994 & Supp. 1995).

[FN10]. See § 12202.

[FN11]. See Mark C. Weber, Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, 36 Wm. & Mary L. Rev. 1089 (1995), for a full discussion of the ADA's various titles and § 504.

[FN12]. Other commentators have addressed the needs of disabled parents and the possibility of ADA protection from discrimination during TPR. See, e.g., Paul Bernstein, Termination of Parental Rights on the Basis of Mental Disability: A Problem in Policy and Interpretation, 22 Pac. L.J. 1155 (1991); Julie Odegard, The Americans with Disabilities Act: Creating "Family Values" for Physically Disabled Parents, 11 Law & Ineq. J. 533 (1993); Chris Watkins, Comment, Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded, 83 Cal. L. Rev. 1415, 1435 (1995).

[FN13]. § 12131 (1)(A)-(B).

[FN14]. See John J. Coleman & Marcel L. Debruge, A Practitioner's Introduction to ADA Title II, 45 Ala. L. Rev. 55, 57 (1993).

[FN15]. See *id.* In contrast, lawyers are specifically listed under "public accommodations and services operated by private entities" in Title III, a weaker provision. Unless there is an undue hardship, practitioners are required to provide appropriate legal services and accommodations so that disabled clients receive the same benefit as non-disabled clients. See also Susser, *supra* note 1, at 169-70.

[FN16]. 28 C.F.R. § 35.130(b)(3)(iii) (1997). The regulation appears to allow for one state's agency to perpetuate discrimination advanced by another state's agency if the two agencies involved do not share common control. However, a better interpretation is that it is not a separate violation in these instances for one agency to perpetuate the discrimination of another.

[FN17]. No figures of compliance or noncompliance are available. Numerous articles, however, illustrate this point. See, e.g., Robert J. Brookes, Recent ADA and Rehabilitation Act Cases, 44 Syracuse L. Rev. 861 (1993); Jay Seaton, Forcing Cities into Compliance with the Americans with Disabilities Act: What Should Courts Do?, 4 Kansas J.L. & Pub. Pol'y 71 (1995).

[FN18]. But see Jody Hickey, The Judiciary's Compliance with ADA, 29 Md. Bar J. 38 (Mar./Apr. 1996) (detailing Maryland judiciary's efforts to comply with ADA and providing an excellent model for courts).

[FN19]. See, e.g., Buhl v. Hannigan, 20 Cal. Rptr. 2d 740 (Ct. App. 1993); Aquaro v. Zoning Bd. of Adjustment, 673 A.2d 1055, 1061 (Pa. Commw. Ct. 1996).

[FN20]. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[FN21]. See Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) ("Lassiter declared it 'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right") (quoting Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981) (citations omitted)).

[FN22]. See Douglas E. Cressler, Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases, 32 J. Fam. L. 785, 786 (1993-1994); Watkins, *supra* note 12.

[FN23]. See Cressler, *supra* note 22, at 786.

[FN24]. See *id.*

[FN25]. *Id.* at 786-87 (citation omitted).

[FN26]. A formal list of ADA defenses to TPR does not exist; therefore, the provided list is meant to be illustrative rather than exhaustive.

[FN27]. 522 N.W.2d 243 (Wis. Ct. App. 1994).

[FN28]. See *id.* at 224.

[FN29]. This may not have been a valid complaint under the ADA. The father was unable to offer any examples of accommodations that would have resulted in a different outcome. He was aware of the court-ordered requirements for reunification, yet he failed to keep in contact with either the children or the case worker. See *id.* at 245.

[FN30]. See *id.* at 244.

[FN31]. See *id.* at 246.

[FN32]. See *id.*

[FN33]. See *id.*

[FN34]. See *id.*

[FN35]. See *id.* at 245 (The appellate court upheld the trial court's finding because it was not clearly erroneous).

[FN36]. See *id.* at 244-45.

[FN37]. See *id.*

[FN38]. See *id.* at 245-46.

[FN39]. See *id.* at 246.

[FN40]. *Id.*

[FN41]. 656 N.E.2d 824 (Ind. Ct. App. 1995).

[FN42]. This may not have been a valid ADA complaint. It appears the agency attempted to provide appropriate services that seem to have complied with the ADA. See *id.* at 830-31.

[FN43]. See *id.* at 826-27.

[FN44]. See *id.* at 827.

[FN45]. *Id.*

[FN46]. See *id.*

[FN47]. See *id.*

[FN48]. See *id.*

[FN49]. See *id.* at 829 (citing In re C.M., 526 N.W.2d 562, 566 (Iowa Ct. App. 1994); In re Angel B., 659 A.2d 277, 279 (Me. 1995); In re A.J.R., 896 P.2d 1298, 1302 (Wash. Ct. App. 1995)).

[FN50]. See *id.* at 829-30.

[FN51]. See *id.* at 830.

[FN52]. See *id.* U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”)

[FN53]. See Stone, 656 N.E.2d at 830. Parenting services are an essential component of the family reunification plan and typically consist of visitation, parenting classes, family counseling, individual counseling, anger management, nutrition classes, homemaker classes, and other services designed to teach individuals the skills necessary for them to resume parental and other family responsibilities.

[FN54]. See *id.*

[FN55]. See *id.*

[FN56]. See *id.*

[FN57]. See *id.* at 831.

[FN58]. 693 A.2d 716 (Vt. 1997).

[FN59]. The mother attempted to have various relatives' homes evaluated as potential temporary placements. See *id.* at 718.

[FN60]. See *id.* at 717.

[FN61]. See *id.*

[FN62]. See *id.*

[FN63]. See *id.*

[FN64]. See *id.* at 718.

[FN65]. See *id.*

[FN66]. See *id.*

[FN67]. See *id.*

[FN68]. See *id.*

[FN69]. See *id.*

[FN70]. See *id.*

[FN71]. See *id.*

[FN72]. See *id.*

[FN73]. See *id.* at 720.

[FN74]. See *id.*

[FN75]. See *id.*

[FN76]. See *id.* at 719-20.

[FN77]. *Id.* at 720.

[FN78]. 20 Cal. Rptr. 2d 740 (Ct. App. 1993).

[FN79]. 673 A.2d 1055 (Pa. Commw. Ct. 1996).

[FN80]. See *B.S.*, 693 A.2d at 720 (citing *Buhl*, 20 Cal. Rptr. 2d at 746; *Aquaro*, 673 A.2d at 1061).

[FN81]. See *id.*

[FN82]. See *id.* at 720-21.

[FN83]. *Id.* at 720.

[FN84]. See *id.* at 721 (citing *Buhl*, 16 Cal. Rptr. 2d at 746); see also *Aquaro*, 673 A.2d at 1061; *Pack v. Arkansas Valley Correctional Facility*, 894 P.2d 34, 39 (Colo. Ct. App. 1995) (holding the ADA does not create a remedy for a negligence claim).

[FN85]. See *B.S.*, 693 A.2d at 721-22.

[FN86]. See *id.* at 722 (citing *Stone v. Daviess County Div. of Children & Fam. Servs.*, 656, N.E.2d 824, 830 (Ind. Ct. App. 1995); *In re Torrance P.*, 522 N.W.2d 243, 244 (Wis. Ct. App. 1994)).

[FN87]. 947 S.W.2d 761 (Ark. 1997).

[FN88]. See id. at 764.

[FN89]. See id.

[FN90]. See id. at 765.

[FN91]. See id. at 762.

[FN92]. Shared psychotic disorder occurs in those with close relationships to psychotic individuals. Over time, the exposed individuals begin to exhibit the same psychosis they witness. See id. at 764.

[FN93]. Parentification refers to children who assume the role of acting parent and manage the household due to their superior parenting skills. See id. at 765.

[FN94]. See id. at 764.

[FN95]. See id. at 762.

[FN96]. See id. at 763.

[FN97]. See id.

[FN98]. See id. at 764.

[FN99]. See id.

[FN100]. See id. at 770.

[FN101]. See id.

[FN102]. See id. at 765.

[FN103]. See id.

[FN104]. See id. at 766.

[FN105]. See id.

[FN106]. See id. at 766-67.

[FN107]. See id. at 766.

[FN108]. See id. at 766-67.

[FN109]. See id. at 767.

[FN110]. See id.

[FN111]. See *id.*

[FN112]. See *id.*

[FN113]. See *id.* (citing *In re Torrance P.*, 522 N.W.2d 243 (Wis. Ct. App. 1994)).

[FN114]. 526 N.W.2d 562 (Iowa Ct. App. 1994).

[FN115]. See J.T., 947 S.W.2d at 767 (citing C.M., 526 N.W.2d at 562).

[FN116]. See *id.* at 767-68 (citing *Stone v. Daviess County Div. of Children & Family Servs.*, 656 N.E.2d 824 (Ind. Ct. App. 1995)).

[FN117]. See *id.* at 768 (citing *Stone*, 656 N.E.2d at 824).

[FN118]. *Id.* (quoting Ark. Code Ann. § 9-27-341(b)(2)(A), - 341(b)(2)(E) (Michie 1998)).

[FN119]. See *id.*

[FN120]. See *id.*

[FN121]. See *id.*

[FN122]. See *id.* at 769.

[FN123]. See *id.*

[FN124]. See *id.* at 768.

[FN125]. See *id.* at 769 (Thornton, J., dissenting) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977)).

[FN126]. *Id.* (Thornton, J., dissenting) (quoting Ann M. Haralambie, Handling Child Custody, Abuse and Adoption Cases § 13.13, at 26 (1993)).

[FN127]. See *id.* at 770 (Thornton, J., dissenting) (citing *In re J.N.M.*, 655 P.2d 1032, 1036 (Okla. 1982)).

[FN128]. See *id.* (Thornton, J., dissenting).

[FN129]. See *id.* (Thornton, J., dissenting).

[FN130]. Indeed, federal courts have noted that the ADA as a remedial statute must be broadly construed or the congressional purpose will be frustrated. See, e.g., *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 232-33 (S.D.N.Y. 1996); *Civic Ass'n of the Deaf v. Giuliani*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996).

[FN131]. The preamble to the Department of Justice regulations states, “[t]itle II applies to anything a public entity does. . . . All governmental activities of public entities are covered.” See Preamble to Regulation on Nondiscrimina-

tion on the Basis of Disability in State and Local Government Services, 28 C.F.R. pt. 35, App. A (1998).

[FN132]. This does not mean that Title II requires denial of TPR as a remedy to violation of the ADA. The state courts that have concluded the ADA does not apply to TPR, however, are in error because the ADA applies to all state action.

[FN133]. See 42 U.S.C. § 12101(a) (1994).

[FN134]. See § 12101(b).

[FN135]. § 12101(b)(4).

[FN136]. See Stone v. Daviess County Div. of Children & Family Servs., 656 N.E.2d 824, 830 (Ind. Ct. App. 1995).

[FN137]. See 42 U.S.C. § 12202 (1994).

[FN138]. § 12101(b)(4).

[FN139]. See § 12101 (citing Congressional power to enforce the Fourteenth Amendment and regulate commerce); see also, Watkins, supra note 12, at 1463-68 (arguing Congress clearly meant to apply heightened scrutiny to ADA violations); Lisa A. Montanaro, Comment, The Americans with Disabilities Act: Will the Court Get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases, 15 Pace L. Rev. 621 (1995) (arguing ADA is Congressional recognition of the disabled as a suspect class for purposes of the Equal Protection Clause).

[FN140]. See 42 U.S.C. §§ 12131-12165 (1994 & Supp. 1996) ("Public Service"); 42 U.S.C. §§ 12181-12189 (1994 & Supp. 1995) ("Public Accommodations and Services Operated by Private Entities"); 42 U.S.C. §§ 12201-12213 (1994 & Supp. 1995) ("Miscellaneous Provisions").

[FN141]. Although the effect a parental disability has on the determination of fitness under state statutes varies, many states consider it a factor. See, e.g., Stone, 656 N.E.2d at 831 (citing R.M. v. Tippecanoe County DPW, 582 N.E.2d 417, 420 (Ind. Ct. App. 1991)).

[FN142]. Cf. Cramer v. Florida, 885 F. Supp. 1545 (M.D. Fla. 1995), aff'd, 117 F.3d 1258 (11th Cir. 1997) (ADA requires individual determinations as evidenced by EEOC Interpretive Guidance to Title I, 29 C.F.R. § 1630 (1997)).

[FN143]. See 28 C.F.R. § 35.130 (1997).

[FN144]. See Coleman & Debruge, supra note 14.

[FN145]. See id.

[FN146]. Cf. Implementation of Section 504 of the Rehabilitation Act of 1973, General Provisions, 28 C.F.R. § 42.503(e)-(f) (1997) (applying to all court systems receiving federal financial assistance).

[FN147]. See, e.g., Yeskey v. Pennsylvania, 118 F.3d 168, 170 (3d Cir. 1997).

[FN148]. The majority of courts to consider the question whether the ADA applied to zoning have held that it does. See United States v. Freer, 864 F. Supp. 324 (W.D.N.Y. 1994); Oxford House, Inc. v. Cherry Hill, 799 F. Supp. 450

(D.N.J. 1992); United States v. Marshall, 787 F. Supp. 872 (W.D. Wis. 1991).

[FN149]. See Shultz v. Hemet Youth Pony League, Inc., 943 F. Supp. 1222 (C.D. Cal. 1996).

[FN150]. See Heather K. v. City of Mallard, 946 F. Supp. 1373, 1375 (N.D. Iowa 1996).

[FN151]. See Roe v. County Comm'n, 926 F. Supp. 74, 78 (N.D. W. Va. 1996).

[FN152]. See Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 37-38 (D.D.C. 1994).

[FN153]. See Helen L. v. DiDario, 46 F.3d 325, 337-39 (3d Cir. 1995).

[FN154]. See Ellen S. v. Florida Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1493-96 (S.D. Fla. 1994).

[FN155]. Buhl argued a helmet impeded his use of a hearing aid. See Buhl v. Hannigan, 20 Cal. Rptr. 2d 740, 742 n.3 (Ct. App. 1993). It is extremely doubtful a hearing aid would be useful with all the interference from the engine of the motorcycle. See *id.* Aquaro was a dentist who no longer resided in the house where he practiced, a zoning violation. See Aquaro v. Zoning Bd. of Adjustment, 673 A.2d 1055, 1057-58 (Pa. Commw. Ct. 1996). The dentist claimed he had to expand his house in order to provide a quiet room for emotionally disturbed patients, although his drawings indicated it was to serve as a lobby and overflow treatment area. See *id.*

[FN156]. See Helen L., 46 F.3d at 337-38.

[FN157]. See 28 C.F.R. § 35.102, App. A (1997).

[FN158]. See 28 C.F.R. § 35.160 (1997).

[FN159]. See 28 C.F.R. § 35.150 (1997).

[FN160]. Courts have held that the ADA protects infertility as a physical impairment. See, e.g., Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996); Pacourek v. Inland Steel Co., 916 F. Supp. 797 (N.D. Ill. 1996); Erickson v. Bd. of Governors, 911 F. Supp. 316 (N.D. Ill. 1995). But see Lehmuller v. Incorporated Village of Sag Harbor, 944 F. Supp. 1087 (E.D.N.Y. 1996) (holding pregnancy is normal condition and not a disability), *rev'd* on other grounds, 982 F. Supp. 132 (E.D.N.Y. 1997); Zatarain v. WDSU Television, Inc., 881 F. Supp. 240 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996) (holding fertility disorder is not a disability under ADA). Therefore, parental unfitness arguably involves a major life activity impairment sufficient to invoke ADA protection. See Odegard, *supra* note 12, at 554. However, at least in the employment context, the ADA does not require that disabled individuals be accommodated when to do so would pose a direct threat to the safety of others. See Rizzo v. Children's World Learning Ctrs., Inc. 84 F.3d 758, 764 (5th Cir. 1996); Equal Employment Opportunity Comm'n v. Exxon Corp., 967 F. Supp. 208, 210 (N.D. Tex. 1997) (citing 42 U.S.C. § 12113(b) (1994)). Therefore, even if all unfit parents could successfully claim ADA protection, the threat to their children would still permit TPR, if no accommodations would remove that threat.

[FN161]. See J.T. v. Arkansas Dep't of Human Servs., 947 S.W.2d 761 (Ark. 1997).

[FN162]. See *id.*

[FN163]. See Montanaro, *supra* note 139.

[FN164]. See Lassiter v. Department of Social Servs., 452 U.S. 18, 46-47 (1981) (Burger, J., concurring).

[FN165]. It is the prospect of agency error that moved Justice Burger to concur in Lassiter, 452 U.S. at 44 (Burger, J., concurring) (urging appointment of counsel should be mandatory in TPR).

[FN166]. See Santosky v. Kramer, 455 U.S. 745, 747-48 (1982).

[FN167]. Weber, *supra* note 11, at 1107-09, 1128-29 (remedies include injunctions, actual damages, and in some cases punitive damages).

[FN168]. Due to the churning of foster children in state care, children eventually protect themselves from the anticipated loss of their caretakers by refusing to bond with them or any other adults. Such children are considered at high risk for a variety of problems including mental disorders, drug abuse, and juvenile delinquency. Congressional concern over the phenomenon resulted in the passage of the Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §§ 5101-5107 (1997), which required states to create guardian ad litem programs in order to receive federal assistance. See 142 Cong. Rec. S5710-01 (June 4, 1996) (remarks of Sen. Dewine on Foster Children debate).

[FN169]. See In re B.S., 693 A.2d 716, 722 (Vt. 1997) (stating parental rights might not have been terminated if ADA complaint had been raised “vigorously and in a timely fashion” when state protective agency initially took children).

[FN170]. Disabled children are at a much greater risk for all forms of abuse than other children. See, e.g., Disabled Children Get More Abuse Than Others, Study Finds, Com. Appeal (Memphis, Tenn.), Oct. 7, 1993, at A2 (reporting disabled children twice as likely to be physically abused, nearly twice as likely to be sexually abused, and three times as likely to be emotionally abused).

[FN171]. See Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 7.8 (1995) (discussing Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) which requires that scientific evidence be screened for reliability and “fit” with the relevant inquiry).

[FN172]. See Bernstein, *supra* note 12, at 1166-77 (providing overview of studies and cases proving that predictions of mental health professionals are grossly inaccurate).

[FN173]. See Watkins, *supra* note 12, at 1423-24, 1448-54.

[FN174]. See *id.*

[FN175]. This is not a hypothetical. In Michigan, deaf parents, who were never provided an interpreter during hearings, reunification services, or investigative interviews, lost their children through TPR based on the unsubstantiated claims of a mentally-ill stepmother. See Dateline: Hear No Evil (NBC television broadcast, July 14, 1997).

[FN176]. 500 N.W.2d 32 (Iowa 1993).

[FN177]. See *id.* at 33-35.

[FN178]. See *id.* at 33.

[FN179]. See *id.* at 35.

[FN180]. See *id.* at 34-36.

[FN181]. 626 P.2d 16, 23-24 (Wash. Ct. App. 1981). Although this is a pre-ADA case, it is included as evidence of the powerful effect of accommodating disabilities.

[FN182]. See id. at 19.

[FN183]. See id.

[FN184]. See id.

[FN185]. See id.

[FN186]. See id. at 20.

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