Disabling the Presumption of Unfitness: Utilizing the Americans with Disabilities Act to Equally Protect Massachusetts Parents Facing Termination of Their Parental Rights

"The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '[r]ights far more precious . . . than property rights[.]' . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .'"[1]

I. INTRODUCTION

Parents' rights to the custody and care of their children are fundamental, recognized and protected by the Fourteenth Amendment to the U.S. Constitution and Article 10 of the Massachusetts Declaration of Rights.[2] Children also have a respective constitutional interest in having their natural parents raise them.[3] A child's interest in being free from abuse and neglect, coupled with the State's interest in its citizens' safety, sometimes leads to State intervention that initiates a care and protection (C&P) case against an at-risk child's parent or parents.[4] With such fundamentally important interests at stake, the government has the burden of properly balancing each party's interests before depriving a parent of custody.[5]

1. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (internal citations omitted).

2. *See* U.S. CONST. amend. XIV (establishing constitutional right to due process, extending to parental rights); MASS. CONST. pt. I, art. X (entitling Massachusetts citizens to similar due process rights in family context); Santosky v. Kramer, 455 U.S. 745, 753-54 (1982) (declaring parental right to care and custody of children fundamental); *Stanley*, 405 U.S. at 649 (mandating due process before denying unwed father custody of his natural children); *accord* Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406, 408 (Mass. 1979) (declaring parental rights fundamental).

3. *See* Care & Prot. of Manuel, 703 N.E.2d 211, 217 (Mass. 1998) (recognizing child's interests also require due process during relevant proceedings).

4. *See* Care & Prot. of Robert, 556 N.E.2d 993, 995-96 (Mass. 1990) (explaining which interests courts must balance in C&P cases).

5. *See id*. (discussing considerations used to effectuate removal of children from parental home). The government must assert that a child

> (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, . . . or (d) has a parent . . . who is unwilling, incompetent or unavailable to provide any such care, discipline or attention.

MASS. GEN. LAWS ch. 119, § 24 (2016).

In the United States alone, more than five million children are born to a parent with a serious mental illness.[6] The stigma surrounding mental illness blinds many who are involved with the care and protection of children, making parents with disabilities more likely to become involved with the child welfare system and face termination of their parental rights.[7] Child welfare agencies struggle to effectively implement appropriate services to enhance safe parenting practices and strengthen the family dynamic because of disabled parents' varying diagnoses, symptoms, and functional levels.[8] Approximately seventy to eighty percent of parents who have lost custody of their children have been diagnosed with a mental or intellectual disability.[9] The lack of individualized services and the prevalence of stereotypes regarding disabled parents further stack the deck against them during State-initiated custody proceedings.[10]

In November 2012, Sarah Gordon, then a nineteen-year-old woman with a developmental disability living with her parents, gave birth to her daughter, Dana.[11] When Dana was two days old, and Sarah was still recovering in the hospital, the Massachusetts Department of Children and Families (DCF) removed Dana from Sarah's custody based on a report alleging Sarah neglected her infant daughter.[12] According to DCF's emergency investigation, Sarah struggled to appropriately feed and change Dana, especially without the support of her parents who were not permitted to stay with her at the hospital.[13] Though Sarah's parents made it clear to DCF that they intended to support and help Sarah parent Dana, DCF placed Dana out of the home and, after two years

6. Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307, 310 (2015); *see also* Ella Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 9, 15-16 (2011) (providing statistical history of families with parents who have disabilities).

7. *See* Jude T. Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa's Child Welfare System and the Americans with Disabilities Act*, 59 DRAKE L. REV. 1165, 1171 (2011) (explaining higher scrutiny and rates of child welfare reports toward parents with disabilities).

8. *See id*. at 1174-75 (drawing distinctions between standardized services and those required for parents with mental disabilities).

9. *See* Callow et al., *supra* note 6, at 15 (estimating removal rate of 40-60% from parents with developmental impairments, and 70-80% with psychiatric illnesses); Pannell, *supra* note 7, at 1172 (reporting 76.2% of parents facing termination in Boston diagnosed with mental disabilities).

10. *See* Smith, *supra* note 6, at 309-10 (summarizing correlation between parents with mental disabilities and termination of parental rights).

11. *See* Letter from U.S. Dep't. of Justice & U.S. Dep't of Health & Human Servs., to Interim Comm'r Erin Deveney, Mass. Dep't of Children & Families 2 (Jan. 29, 2015), http://www.ada.gov/ma_docf_lof.pdf [http://perma.cc/MSH5-96E7] [hereinafter DCF Investigation Letter] (discussing C&P case involving mother with mental disabilities).

12. *Id*. at 5-6 (explaining circumstances of Dana's removal).

13. *See id.* (recounting DCF's findings and noting initial failure to provide accommodations). DCF explained its concerns regarding Sarah's ability to respond to her newborn's needs, especially based on Sarah's perceived "developmental delays." *See id.* at 6. These concerns ultimately led to the emergency removal of newborn Dana from Sarah's care. *Id.*

of foster care and weekly or bi-weekly visitation, DCF changed the goal from reunification between Sarah and Dana to adoption.[14]

The U.S. Department of Justice (DOJ) and Health and Human Services (DHHS) issued a letter of investigation to the Massachusetts DCF in January 2015.[15] The letter notified DCF of its failure to comply with the Americans with Disabilities Act (ADA) when dealing with parents with disabilities in C&P and termination of parental rights (TPR) cases.[16] In August 2015, the DOJ filed a report of findings containing recommendations for improvement in order for DCF to meet the standards the ADA requires.[17] The suggestions serve as a "first step"—a guiding document—aiming to lead to successfully implementing new policies and enhanced protection for children and disabled parents.[18] Once implemented, this guiding document will better equip attorneys, social workers, and family advocates to properly strengthen families upon the enactment of new sound regulations and legislation.[19]

This Note first discusses the ADA and its definitions, disability classifications, and required accommodations that public entities must provide individuals with disabilities.[20] This Note then examines DCF's roles and

14. *Id.* (discussing Dana's contact with Sarah while in DCF custody and DCF's changed goals). To decrease or terminate visitation between the parent and the child, DCF must demonstrate harm to the child "or the public welfare." 110 MASS. CODE REGS. 7.128 (2016).

15. *See* DCF Investigation Letter, *supra* note 11, at 1 (informing DCF of DOJ and DHHS joint investigation).

16. *See id.* at 11-24 (enumerating failures of Massachusetts DCF). The investigation concluded that DCF acted on conjecture about Sarah's disability, and failed to determine the specific supportive services that would appropriately aid a parent with Sarah's limitations. *Id*. at 12. DCF did not encourage Sarah, or even provide her an adequate opportunity, to engage in services that would lead to reunification. *Id*. at 15. DCF's case-course decisions were based on stereotypes surrounding parents with disabilities instead of actual observations and progress within Sarah's specific case. *See id*. at 22. Most significantly, DCF failed to implement appropriate exercises and regulations to teach DCF social workers of their obligation to make reasonable accommodations for families with disabilities, ignoring their need to comply with ADA requirements. *See id*. at 23-24.

17. *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. DEP'T OF JUSTICE, PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT (Aug. 2015), http://www.ada.gov/doj_hhs_ta/child_welfare_ta.html [http://perma.cc/8AW8-93FS] [hereinafter PROTECTING PARENTS] (providing suggestions for change and enhanced adherence to standards).

18. *See* U.S. Dep't of Health & Human Servs. & U.S. Dep't of Justice, Cover Letter on Technical Assistance (Aug. 2015), http://www.ada.gov/doj_hhs_ta/child_welfare_ltr.html [http://perma.cc/5XFQ-GBLM] (introducing recommendations to state and local child welfare agencies).

19. *See* PROTECTING PARENTS, *supra* note 17 (providing guidance for child welfare agencies); *see also* H.R. 1370, 189th Gen. Court (Mass. 2015) (proposing language prohibiting discrimination against and protecting parents with disabilities in juvenile court proceedings); NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 307-09, 316, 322-23 (2012), http://www.ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf [http://perma.cc/US5N-Z8PA] [hereinafter ROCKING THE CRADLE] (recommending numerous legislative and policy changes to protect parents with disabilities nationwide).

20. *See infra* Part II.A.

responsibilities, as well as the processes and procedures involved in C&P cases that potentially involve terminating parental rights.[21] Additionally, this Note analyzes the history of parents with disabilities and their involvement with the child welfare system.[22] This Note argues that the Massachusetts legislature must update its child welfare statutes in order to protect the rights of parents with mental and intellectual disabilities.[23] Then, it recommends policy and practice updates for DCF's implementation.[24] Finally, this Note applies the proposed statutory and regulatory changes, demonstrating their effect on parents with disabilities within the child welfare system.[25]

II. HISTORY

A. The ADA and the Reasonable Accommodations Requirement for Public Entities

Congress enacted the ADA in 1990 to counter the pervasive effects of discrimination against individuals with disabilities in the United States.[26] With guidelines for accommodations and remedies for disability-based discrimination, the ADA sought to eradicate public mistreatment of individuals with disabilities by providing them with equal protection of the law.[27] A disability requiring ADA protections is defined as "a physical or mental impairment that substantially limits one or more major life activities."[28] The Diagnostic and Statistical Manual of Mental Disorders, widely used by psychiatric professionals, characterizes mental disorders as syndromes that disrupt individuals' cognitive, emotional, regulatory, or behavioral tendencies, and often signify underlying "psychological, biological, or developmental" disturbances that are coupled with "significant distress" throughout important daily functions.[29]

21. *See infra* Part II.B.

22. *See infra* Part II.C.

23. *See infra* Part III.A.

24. *See infra* Part III.B.

25. *See infra* Part III.C.

26. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(a)-(b) (2012) (listing findings regarding disabilities in United States, and stating ADA's purpose).

27. *See id.* § 12101(b)(4) (aiming to provide Fourteenth Amendment protections to individuals with disabilities); *accord* MASS. CONST. art. CXIV (prohibiting discrimination against persons with handicaps).

28. 42 U.S.C. § 12102(1)(A). The ADA definition is construed broadly to extend coverage and protection to all eligible individuals. *Id.* § 12102(4)(A). Individuals who struggle to read, learn, concentrate, or communicate, and those with major bodily function impairments may seek protection from the ADA. *See id.* § 12102(2)(A)-(B) (generalizing qualifying disabilities).

29. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 20 (5th ed. 2013) [hereinafter DSM-V]. An "intellectual developmental disorder" is classified as a deficit in intellectual and adaptive functioning "with onset during the developmental period." *Id.* at 33. Impaired functioning may be prevalent in "reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience." *Id.* Individuals with an intellectual disability may also struggle to

American households struggle with mental disorders every day, which commonly include anxiety, mood, personality, eating, or sleeping disorders, substance abuse, schizophrenia, and major depression.[30] Many parents grapple with cognitive and intellectual limitations, a subclass of mental disorders that includes developmental, behavioral, attention-deficit, learning, and communication disorders.[31] The ADA seeks to promote inclusion, equality, and self-sufficiency for individuals with such disabilities.[32]

After years of study, Congress found that individuals with disabilities faced discrimination in the specific form of limited access to public services.[33] Thus, the ADA precludes public entities from excluding otherwise qualified individuals from the benefits of public "services, programs, or activities" because of a disability.[34] Public entities, especially those receiving federal funding, such as DCF, are required to offer these services in a manner that makes them easily accessible and available to individuals with disabilities.[35]

reach social and developmental milestones that demonstrate independence and responsibility. *Id.*

30. Smith, *supra* note 6, at 312-13.

31. *Id*. at 313 (defining common intellectual disabilities considered mental disorders); *see also* Callow et al., *supra* note 6, at 16 (reporting prevalence and classification of disabilities in U.S. parents). Parents with such mental and intellectual disabilities face discrimination and higher scrutiny in many aspects of their lives, especially in others' perceptions of their ability to parent their children. *See, e.g.*, *In re* Adoption of Ilona, 944 N.E.2d 115, 124 (Mass. 2011) (holding mother with major depression and learning disorder unfit to parent); *In re* Laurent, 22 N.E.3d 974, 976 (Mass. App. Ct. 2015) (reversing trial court deciding mother with attention-deficit/hyperactivity disorder (ADHD), anxiety, and cognitive limitations currently unfit); Adoption of Abigail, 499 N.E.2d 1234, 1237 (Mass. App. Ct. 1986) (terminating rights of mother with psychological deficiencies to her special needs child).

32. *See* 42 U.S.C. § 12101(a)(7) (explaining nation's goal of encouraging individuals with disabilities' equal opportunities and societal participation). This Note specifically considers parents with mental, intellectual, neurodevelopmental, and neurocognitive disabilities, including autism spectrum disorders, communication or language disorders, and learning disorders, as defined in the Diagnostic and Statistical Manual of Mental Disorders. *See* DSM-V, *supra* note 29, at 40-42, 50-51, 66-68, 86 (defining intellectual disabilities, explaining communication, language, autism spectrum, specific learning, and other neurodevelopmental disorders). Reference may also be made to ADHD, depression, anxiety, and substance abuse disorders. *See id*. at 59-61, 184-88, 222-26, 485-90 (describing, generally, ADHD, depression, anxiety, and substance abuse disorders).

33. *See* 42 U.S.C. § 12101(a)(3) (explaining struggle to access employment, education, transportation, public accommodations, recreation, and health services).

34. *Id.* § 12132; *see also* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012) (prohibiting disability discrimination when program or activity receives federal funding). A "public entity" is any division or branch of state or local government, including established departments and agencies. 42 U.S.C. § 12131(1). A "qualified individual with a disability" is one who—but for the need for reasonable accommodations or modifications—satisfies the eligibility requirements to participate in or receive services from the public entity. *Id.* § 12131(2). Administrators and courts interpret these definitions broadly to include all possible participants in all potential activities. *See* Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206, 210-12 (1998) (discussing breadth of ADA interpretation, applicability, and coverage); DCF Investigation Letter, *supra* note 11, at 10 & n.11 (applying *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) to all governmental programs and activities).

35. *See* 29 U.S.C. § 794; 28 C.F.R. § 35.150(a) (2016); *see also* 110 MASS. CODE REGS. 1.09 (2016) (prohibiting discrimination when DCF provides families with services); Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 388 (2000) (acknowledging extension of service modification

B. The Massachusetts DCF, C&P Cases, and TPR

Massachusetts established DCF to strengthen and encourage families, assist and support parents, and protect children.[36] DCF may resort to substitute care of a child *only* when the family, with available resources, is unable to ensure the requisite care and protection to promote the "physical, mental, spiritual and moral" wellbeing of the child.[37] The statute requires DCF to work with families to facilitate achieving these goals and, therefore, DCF must assist and encourage parental participation to meet their parental responsibilities.[38] Supporting families in this manner balances the competing interests of the State, the parent, and the child by attempting to promote family unity and child safety before resorting to removal and separation.[39]

DCF becomes involved with families when a report of suspected abuse or neglect is filed against them.[40] If DCF has "reasonable cause" to believe that the allegations are substantiated and the child's health or safety is in immediate danger, DCF may immediately transfer custody and remove the child from his or her home.[41] Removing a child on an emergency basis entitles DCF to temporary custody for seventy-two hours; a judge must then determine,

requirement to child welfare agencies). Public services should provide these accommodations unless doing so would "threaten or destroy" a historic meaning or landmark, fundamentally alter the nature of the service, or impose an undue financial burden. 28 C.F.R. § 35.150(a)(2)-(3).

36. MASS. GEN. LAWS ch. 119, § 1 (2016) (establishing roles and responsibilities of DCF).

37. *Id.*; 110 MASS. CODE REGS. 1.02(2) (2016) (requiring State intervention only when clearly necessary for child protection).

38. *See* MASS. GEN. LAWS ch. 119, § 1; 110 MASS. CODE REGS. 1.02(5)-(9) (discussing DCF assisting contact with children, use of services, and compliance with service plan).

39. *See* Santosky v. Kramer, 455 U.S. 745, 758 (1982) (analyzing factors balancing interests between State, parent, and child); Care & Prot. of Robert, 556 N.E.2d 993, 997-98, 1000 (Mass. 1990) (expanding upon competing interests); 110 MASS. CODE REGS. 1.01 (2016) (describing DCF role to balance obligation to protect children and respect family sovereignty).

40. *See* MASS. GEN. LAWS ch. 119, § 51A (describing process of reporting child abuse and neglect in Massachusetts). Anyone may file abuse and neglect allegation reports (51A reports) if they have a suspicion of child abuse or neglect, but professional mandated reporters, such as doctors, teachers, and ministers, must report suspicions when they reasonably believe a child is physically or emotionally suffering. *See* MASS. GEN. LAWS. ch. 119, § 21 (defining mandated reporters with numerous examples); *id.* § 51A (outlining reporting process for mandated reporters and others).

41. *See* MASS. GEN. LAWS ch. 119, § 51B(c), (e) (requiring "reasonable cause" to necessitate immediate emergency removal). A judge from the juvenile court must first approve DCF's request for temporary custody. *See id.* § 24 (describing statutory process of committing child to DCF custody); *Care & Prot. of Robert*, 556 N.E.2d at 995 (permitting ex parte hearing for emergency removal and transfer of custody). State-initiated cases more often follow the pattern of removal and reunification than maintaining parent custody while implementing improvement services. Callow et al., *supra* note 6, at 24. If DCF does not proceed with immediately removing the child, an investigation into the allegations of abuse and neglect must commence within two days of receiving the report. MASS. GEN. LAWS ch. 119, § 51B(d). The investigation must include a visit to the home, the names of the child and other household members, findings regarding the cause and extent of injuries, including the individual suspected of causing such injuries, observations of the parents and the home, and any other pertinent discoveries. *Id.* § 51B(b). If the investigation leads to the conclusion that the 51A report is unsubstantiated, the investigation may cease. *See* Cobble v. Comm'r of Dep't of Soc. Servs., 719 N.E.2d 500, 508 (Mass. 1999) (finding insufficient evidence to support 51A report of abuse and closing case).

following testimony from DCF and the parents, whether DCF should maintain custody until a hearing on the merits occurs.[42]

If DCF maintains custody, the C&P case remains open in the juvenile court until a disposition is reached.[43] Though DCF's interest in protecting children from abuse and neglect is paramount, the overall child welfare system has a compelling interest in preventing the premature transfer of child custody.[44] Thus, statutory time standards allow C&P cases to remain open for approximately fifteen months, supposedly to encourage both parents and DCF to work toward timely reunification and minimize parent-child separation.[45]

During the pendency of a C&P case, in order to promote reunification, DCF must provide services on a "fair, just, and equitable basis."[46] Parents receive a

42. MASS. GEN. LAWS ch. 119, § 24 (explaining parental entitlement to notice of seventy-two-hour hearing); *Care & Prot. of Robert*, 556 N.E.2d at 995 (establishing three-part process to transfer custody of child to DCF). Because a parent's interest in child custody is jeopardized only temporarily, the child's interest in being free from abuse and neglect is compelling, and the State's interest in protecting the welfare of children is substantial, the State must prove at the seventy-two-hour hearing that continued DCF custody is necessary under a "fair preponderance of the evidence" standard. *Care & Prot. of Robert*, 556 N.E.2d at 1001 (balancing private and State interests to establish required burden of proof).

43. MASS. GEN. LAWS ch. 119, § 26 (discussing adjudication of child in need of C&P following hearing on merits); *see also id.* § 25 (allowing placement of child with caregiver or foster care agency pending hearing on merits). The court may return the child to the parent's home with or without court supervision conditions, transfer legal custody to an individual or agency qualified to care for the child or to DCF, or terminate parental rights to free the child for adoption. *Id.* § 26(b)(1)-(4). The parent or DCF may petition the court for custody reconsideration every six months. *Id.* § 26(c).

44. *See* Smith, *supra* note 6, at 323 (explaining financial and legal burden of unnecessary TPR); Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1457 (1995) (summarizing competing parent, child, and societal interests in avoiding removal). Although DCF seeks to promote child stability, immediately transferring custody to DCF frequently places children in the "foster care drift," providing less security and more uncertainty. *See* Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785, 816 (2010) (defining "foster care drift" movement between multiple foster home placements); *see also* Callow et al., *supra* note 6, at 24-25 (reporting many children experience three or more foster placements during thirteen to twenty-three month period). When children are removed from their caregivers' home, they move through challenging and detrimental emotional phases. *See* Callow et al., *supra* note 6, at 23-24 (discussing rejection, desperation, and detachment stages). Children in foster care often experience educational disadvantages, abuse within the foster home, and reduced attachment due to changes in placement and inconsistency. *See* Rachmilovitz, *supra*, at 815-17 (discussing contradictions between foster care and child's best interest); *see also* Callow et al., *supra* note 6, at 25 (providing statistics on foster children's risk for abuse and behavioral, attention, and mood issues).

45. *See* Adoption and Safe Families Act of 1997(ASFA), 42 U.S.C. § 675(5)(E) (2012) (requiring TPR commencement when child remains in State custody for fifteen of prior twenty-two months); *accord* MASS. GEN. LAWS ch. 119, § 26(b)(4), (c) (incorporating federal time standards into Massachusetts law). Within these fifteen to twenty-two months, the State should provide the parents with a case plan, including services to promote reunification, and expend reasonable efforts to ensure parental fitness and child safety. *See* 42 U.S.C. § 675(5)(E)(iii) (abandoning time standard in absence of services and reasonable efforts); MASS. GEN. LAWS ch. 119, § 26(c) (extending time standard when parent made "consistent and goal-oriented progress" leading to child's return); *see also* 42 U.S.C. § 671(a)(15) (2012) (requiring reasonable efforts to make child's safe return home possible).

46. *See* 110 MASS. CODE REGS. 1.05 (2016) (stating need for equality in services provided); *see also* 110

service plan that illustrates the steps required to prevent the issues that initiated DCF involvement from recurring, and if followed, intends to lead parents to successful and lasting reunification and stability.[47] A variety of agencies may provide parents and children services, encompassing numerous specialties that promote the goal of reuniting families.[48] Services may continue after the C&P case closes if such support would benefit the family by maintaining positive and effective parenting practices.[49]

Before a hearing on the merits, DCF must make reasonable efforts to reunite parents and children by implementing necessary services for each individual family.[50] While DCF holds custody, it must make reasonable efforts to provide

MASS. CODE REGS. 1.08 (2016) (requiring reasonable accommodations for individuals with disabilities).

47. *See* 42 U.S.C. § 675(1)(B) (requiring services to improve home environment and effectuate reunification); *see also* 110 MASS. CODE REGS. 6.01 (2016) (describing service plan goals); 110 MASS. CODE REGS. 6.03 (2016) (listing elements of plan, including areas needing improvement, tasks, goals, and specific services provided). DCF must assess each family's individual situation to determine necessary services and providers, as well as to ascertain the ultimate goals for improvement and change. *See* 110 MASS. CODE REGS. 5.01 (2016) (outlining procedure of family assessment); 110 MASS. CODE REGS. 5.03 (2016) (discussing complete assessment process of evaluating risk to child); 110 MASS. CODE REGS. 5.04 (2016) (explaining process of conducting family assessment). In situations where a child is removed from the home, the service plan must include an analysis of the reason for removal, the collaborative steps taken by DCF and the family to prevent placement, and the child's permanent placement plan. 110 MASS. CODE REGS. 6.04 (2016). If a parent agrees with only part of the plan, the parent may add services that he or she would like DCF to provide. 110 MASS. CODE REGS. 6.06(3) (2016) (discussing joint effort between parents and DCF to develop service plan).

48. *See* 110 MASS. CODE REGS. 7.010 (2016) (permitting referrals when families request additional services). DCF may work in conjunction with educational agencies, the Department of Mental Health, the Department of Public Welfare, the Department of Public Health, or others if the service required is within the purview of an agency or department within Massachusetts. *Id.*

49. *See In re* Laurent, 22 N.E.3d 974, 979 (Mass. App. Ct. 2015) (holding service plan appropriate to mitigate DCF's concerns about future parental fitness). Continuing services supports parental progress and prevents the parent from reverting to the behaviors and practices that led to DCF's initial involvement. *See* Smith, *supra* note 6, at 336 (advocating for post-reunification services for families to maintain stability). When services are prematurely discontinued or when the parent and child are hastily reunited, the parent may struggle to preserve his or her improvements, risking a subsequent loss of custody and presenting an even stronger possibility of TPR. *See id*. DCF specifically recognizes the importance of continuing services for youth that remain in DCF custody into young adulthood. *See* 110 MASS. CODE REGS. 8.02 (2016) (committing DCF to support adolescents past age of majority).

50. *See* 42 U.S.C. § 671(a)(15) (enumerating federal reasonable efforts requirements for states to receive foster care and adoption funding); MASS. GEN. LAWS ch. 119, § 29C (mandating reasonable efforts to avoid removal before granting DCF custody); *see also* Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL'Y 100, 103-04 (2009) (discussing reasonable efforts standard in Massachusetts). When a parent has a disability or limitation, DCF must provide services that accommodate the parent's needs in order to satisfy the reasonable efforts requirement. *See In re* Adoption of Gregory, 747 N.E.2d 120, 126 (Mass. 2001) (requiring reasonable accommodations for parents with disabilities before seeking TPR); *In re* Adoption of Beatrix, No. 15-P-933, 2016 WL 3912083, at *5 (Mass. App. Ct. July 20, 2016) (reminding DCF of obligation to make reasonable efforts and accommodate parents); *see also In re* Adoption of Lenore, 770 N.E.2d 498, 503 n.3 (Mass. App. Ct. 2002) (recognizing DCF's duty to provide services according to needs, and requiring trial judge ensure compliance); 110 MASS. CODE REGS. 1.08 (mandating reasonable accommodations to ensure accessibility of "services, facilities, and communications" to handicapped parents). Massachusetts has clarified, however, that DCF's reasonable efforts burden requires only that DCF merely connect parents to available services, and it need not make additional efforts to "fill the gaps." Kaiser, *supra*, at 116; *see also In re* Adoption of Ilona, 944

appropriate and accessible services that promote family preservation and reunification.[51] Even when DCF inappropriately tailors services to a parent or a family, or insufficiently encourages parental participation, trial courts—and later appellate courts—overwhelmingly conclude that DCF satisfies its reasonable efforts burden, permitting DCF to move forward with TPR.[52] When the service plan's elements seemingly fail to ensure parental fitness, DCF may change the goal from reunification to extended temporary or permanent custody to DCF or to TPR, dispensing with parental consent to free the child for adoption.[53]

Before a court will grant DCF extended custody of a child, whether or not terminating the natural parent's rights, DCF has the burden of proving that the natural parent is currently unfit, unwilling, or unavailable to sufficiently care for and protect his or her child.[54] To determine unfitness, courts examine statutory factors such as: the abandonment, abuse, and neglect of the child;

N.E.2d 115, 124 (Mass. 2011) (recognizing shortcomings of DCF services, yet still finding reasonable efforts standard met); *In re Lenore*, 770 N.E.2d at 503 (finding reasonable efforts despite service provider's rejection of parents' application). If DCF fails to satisfy the reasonable efforts requirement, such failure does not prohibit the court from ruling based on the child's best interest. MASS. GEN. LAWS ch. 119, § 29C.

51. *See* Smith, *supra* note 6, at 324 (recognizing broad and vague state definitions of reasonable efforts); *see also* 45 C.F.R. § 1356.21(b) (2012) (listing factors to consider when determining whether reasonable efforts made). DCF defines reasonable efforts as: "best efforts to assess the individual child and family situation regarding the appropriateness and accessibility (within limits of available resources) of preventive services and to offer the family and assist (as appropriate) in providing such services to the family whenever possible." DCF Investigation Letter, *supra* note 11, at 15. DCF social workers and supervisors are responsible for identifying the necessary and appropriate services and programs to promote safety, parental fitness, and family unity. *See id*.

52. *See* Kaiser, *supra* note 50, at 111-20 (articulating Massachusetts's tendency to affirm reasonable efforts satisfaction despite evidence of unsatisfactory services). The infrequency of appellate court reversals based on DCF's failure to provide reasonable efforts toward reunification makes it nearly impossible to find an example of unreasonable DCF efforts. *See id*. at 111 n.40 (noting only two instances of appellate court reversal based on insufficient efforts or services). By the time a C&P or TPR case reaches the appellate court, the child has lived within the child welfare system for an extended period, making the appellate court hesitant to disrupt any stability the child may have enjoyed since the closure of the trial court proceeding. *See id*. at 112. Courts have routinely based decisions on child stability rather than DCF's statutory compliance, disadvantaging parents who did not receive reasonable accommodations and support during the initial C&P or TPR proceeding. *See id*. at 114-16. Massachusetts courts also have a propensity to conclude that DCF made reasonable efforts when parents are unreasonable and refuse to engage in proposed or provided services. *Id*. at 117-18. Moreover, the lax reasonable efforts standard in Massachusetts specifically disadvantages parents with disabilities when appellate courts uphold decisions to maintain child stability after a parent has failed to enthusiastically participate in services. *See id*. at 119-20 (explaining courts place burden on parents with disabilities to seek treatment when most vulnerable).

53. *See* MASS. GEN. LAWS ch. 119, § 26(b) (detailing custody options when child found in need of care and protection); MASS. GEN. LAWS ch. 210, § 3(b) (2016) (permitting petition for adoption without parental consent when DCF has care and custody of child).

54. *See* Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding all parents entitled to determination of parental fitness before TPR); *accord* Custody of a Minor, 452 N.E.2d 483, 489-90 (Mass. 1983) (requiring evidence of parental unfitness before terminating parental rights); *see also In re* Adoption/Guardianship Nos. J9610436 & J9711031, 796 A.2d 778, 798 (Md. 2002) (requiring evidence of poor, uneducated, or disabled parent's inability, with assistance, to sufficiently raise child).

parental visitation, contact, and interaction with the child; financial or material contributions to the child; the duration of DCF custody; and the effectiveness, participation, and success of services cultivated by the parent.[55] The Massachusetts TPR statute specifically states that a parent's incarceration status alone does not warrant TPR.[56] The statute does, however, allow the judge to consider a parent's mental status when determining whether to terminate parental rights.[57] The statute clarifies that a TPR determination may rest on whether a parent's mental condition is likely to continue and renders the parent "unlikely to provide minimally acceptable care of the child."[58] DCF must prove, with evidentiary and statutory support, that the parent places the child at risk of substantial harm.[59]

If DCF properly demonstrates parental unfitness, the court must then determine whether TPR is in the best interest of the child.[60] An analysis of the child's best interest is based on state statutory factors; Massachusetts often considers the child's specific needs, stated preferences, developmental level, and the effectiveness of the services provided to the child and the parents.[61] As

55. MASS. GEN. LAWS ch. 210, § 3(c) (enumerating situations demonstrating parental unfitness).

56. *Id.* § 3(c)(xiii) (requiring additional demonstration of child instability during incarceration for incarceration to affect TPR).

57. *Id.* § 3(c)(xii) (allowing TPR when mental illness prevents parent from providing acceptable childcare). The Massachusetts legislature proposed a bill that would prevent DCF from considering a parent's disability as a "negative factor" when adjudicating a child in need of care and protection, and/or terminating a parent's rights. *See* H.R. 1370, 189th Gen. Court (Mass. 2015).

58. MASS. GEN. LAWS ch. 210, § 3(c)(xii). *But see* Adoption of Frederick, 537 N.E.2d 1208, 1213 (Mass. 1989) (allowing consideration of disability only to determine parents' abilities to care for child's special needs); Adoption of Abigail, 499 N.E.2d 1234, 1237 (Mass. App. Ct. 1986) (recognizing disability alone insufficient to terminate parental rights). The court may weigh a mental or intellectual disability or condition more heavily against the parent than other positive or negative factors. *See* Callow et al., *supra* note 6, at 22 (discussing judicial consideration of parental disability when determining whether to terminate parental rights).

59. *See In re* Yetta, 2 N.E.3d 910, 914-16 (Mass. App. Ct. 2014) (reversing trial court adjudication of unfitness because no serious parental failings found). A court may find a parent unfit because the parent places the child in danger. *See* Care & Prot. of Bruce, 694 N.E.2d 27, 29 (Mass. App. Ct. 1998) (explaining inquiry beyond "good" or "ideal" nature of parent). Parental unfitness, based on any combination of the statutory factors, must be supported by specific judicial findings, demonstrating careful consideration of the evidence. Adoption of Hugo, 700 N.E.2d 516, 520 (Mass. 1998).

60. *See In re* Adoption of Nancy, 822 N.E.2d 1179, 1182 (Mass. 2005) (emphasizing two-part analysis when terminating parental rights); Adoption of Carlos, 596 N.E.2d 1383, 1388 (Mass. 1992) (requiring evidence of parent's inability to promote child's best interest). *But see In re* New England Home for Little Wanderers, 328 N.E.2d 854, 860 (Mass. 1975) (considering tests related but not distinct). The Massachusetts Appeals Court emphasized that some situations exist where, though the parent has been adjudicated unfit, termination is not in the child's best interest. *See, e.g.*, *In re* Adoption of Thea, 942 N.E.2d 190, 195-96 (Mass. App. Ct. 2011) (observing insufficient evidence to determine adolescent's best interest, reversing TPR without convincing rationale); *In re* Adoption of Flora, 801 N.E.2d 806, 812 (Mass. App. Ct. 2004) (considering child's preference when making TPR determination); *In re* Adoption of Ramona, 809 N.E.2d 547, 553 (Mass. App. Ct. 2004) (recognizing child's ability and right to state preference against TPR). Thus, it seems clear that a court must deem a parent unfit *before* it may analyze the child's best interest; however, case law has insisted that a parent's fundamental right to the care and custody of his or her own child is "secondary to the child's best interest." *See In re* Adoption of Gregory, 747 N.E.2d 120, 121 (Mass. 2001).

61. *See* MASS. GEN. LAWS ch. 119, § 1 (2016) (listing child's best interest factors). Courts should

the court is tasked with determining which parent or caretaker promotes the child's best interest, the court must also consider: whether the parent meets the physical, emotional, educational, mental, and medical needs of the child; the custodial history and the effect of such caretaking arrangements on the child; the presence of domestic, substance, or sexual abuse in the home; and the mental and physical health of the parents seeking custody.[62] If the court finds the parent unfit, and that severing parent-child contact is in the best interest of the child, it may terminate the parent's rights.[63] DCF must prove parental unfitness and the best interest of the child by clear and convincing evidence before stripping a parent of his or her fundamental, constitutional right to custody of his or her own child.[64]

C. Parents with Mental and Intellectual Disabilities Facing TPR

Parents with mental and intellectual disabilities are subjected to a biased

presume the parent and child share the same vital interest in preserving their natural familial relationship until DCF can prove parental unfitness. *See* Santosky v. Kramer, 455 U.S. 745, 760 (1982).

62. Callow et al., *supra* note 6, at 13. The court also considers the effect of removal and termination on the child, if the biological parent-child relationship contains a positive bond, and whether TPR may traumatize, rather than heal or protect. Rachmilovitz, *supra* note 44, at 815 (proposing broader inquiry into child's best interest). Above all, the court is concerned with the child's ability to maintain permanency and stability. *See id*. at 815-16. Many children of mentally disabled parents struggle to be adopted; these children face constant relocations that prevent them from finding forever families. *See id*. at 816.

63. *See supra* note 60 (explaining two-part analysis leading to TPR).

64. *See Santosky*, 455 U.S. at 747-48 (establishing clear and convincing evidence standard to constitutionally terminate parental rights); *accord* Custody of a Minor, 452 N.E.2d 483, 490 (Mass. 1983) (requiring clear and convincing evidence for TPR in Massachusetts). When determining the requisite due process adjudication procedures, the Court has considered three factors: the private interests, the government's interests, and the risk of wrongly depriving the interested parties of rights based on the chosen procedure. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The standard of proof chosen for the adjudication of a case mirrors the societal value of each liberty interest at stake. Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971). In *Lassiter v. Department of Social Services of Durham County*, the Court balanced the interests of the State and the parents facing TPR, while minimizing the risk of error in the context of appointing representation for parents during trial. *See* 452 U.S. 18, 27-32 (1981) (acknowledging strong interests and risks, but leaving counsel appointments to trial courts according to circumstances). The sequence of interests presented in *Lassiter* laid the foundation for the due process standard of proof argument in *Santosky*: "In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight." *Santosky*, 455 U.S. at 758. In cases threatening TPR, parents have a strong interest in preserving their ability to care for and protect their children. *See id*. at 758-59. The State correspondingly holds a compelling interest in saving children in its jurisdiction from abuse and neglect. *See id*. at 766. Children whose parents face termination share vital interests with the parents and the State: children have an interest in being free from physical, mental, and emotional harm, but they also have an interest in maintaining their natural familial relationships. *See id*. at 760, 766-67. The risk of inaccurate or mistaken rulings in TPR cases is high because the proceedings utilize vague standards, the judge holds immense discretion to overvalue negatives while under weighing favorable evidence for the parent, and parents are often members of vulnerable, marginalized groups where decisions may be based on bias. *See id*. at 762-65 (explaining disparity between State's and parents' resources, persuasion, and case success). This immense risk of error, liberty deprivation, and fundamental and procedural unfairness led the Court to establish a strong clear and convincing evidence standard of proof requirement in TPR proceedings. *See id*. at 756, 769.

cycle within the child welfare system that perpetuates the notion that they are unfit, unable, and unwilling to effectively parent, and should not maintain care and custody of their own children.[65] Because individuals with disabilities are often involved with multiple mandated reporters, such as teachers, physicians, and therapists, these professionals frequently report these parents' alleged shortcomings and flaws, leading to State intervention and removal of the child.[66] The child welfare system's assumptions of the disabled parent's inability to care for, provide for, or protect his or her child dictate the path of the C&P case, shifting the burden to the parent to prove his or her fitness, competence, and ability to parent adequately—instead of mandating that DCF demonstrate unfitness.[67] Because of the limitations a parent's disability places on his or her capacity to improve specific skills, the "boilerplate services" DCF provides often fail to enhance parental fitness, thus effectuating the inevitable termination of parental rights.[68]

65. *See e.g.*, *In re* Adoption of Ilona, 944 N.E.2d 115, 122 (Mass. 2011) (holding mother with major depression and learning disorder currently unfit to parent); *In re* Laurent, 22 N.E.3d 974, 976 (Mass. App. Ct. 2015) (reversing trial court's unfitness determination of mother with ADHD, anxiety, and cognitive limitations); Adoption of Abigail, 499 N.E.2d 1234, 1237 (Mass. App. Ct. 1986) (terminating parental rights of mother with psychological deficiencies to her child with special needs); Watkins, *supra* note 44, at 1438 (listing layers of discriminatory presumptions toward mentally disabled parents child welfare professionals hold). The "attitudinal bias" present within the United States causes individuals to automatically assume that a parent with a mental disability should not retain custody of his or her child. *See* Callow et al., *supra* note 6, at 17-18. Courts specifically demonstrate this bias by equating mental disability with unfitness and terminating parental rights based on a parent's mental status. Kerr, *supra* note 35, at 401-02 (discussing courts' assumptions without legitimate nexus); *see also* ROCKING THE CRADLE, *supra* note 19, at 158-60 (analyzing perpetuation of bias from initial family assessment to final TPR or C&P adjudication). Many recognize an individual with a cognitive limitation and assume, "without proving a nexus between the disability and its manifestations," that the individual lacks the capability to parent appropriately. Kerr, *supra* note 35, at 402. These presumptions ignore research indicating that disabled individuals, with proper supportive services, can overcome their limitations to successfully care for and protect their own children. *See* Susan Stefan, *Accommodating Families: Using the Americans with Disabilities Act to Keep Families Together*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 135, 140 (2008) (proposing solution to assist entire disabled individuals' families with parenting).

66. *See* Kerr, *supra* note 35, at 402 (detailing process of reporting abuse and neglect suspicions at hands of disabled parents); Stefan, *supra* note 65, at 170 (confirming mental health professionals often report disabled parents to child welfare agencies); *see also supra* note 10 (discussing removal and TPR rate in parents with mental disabilities).

67. *See* Stefan, *supra* note 65, at 162-63 (discussing parents' challenging burden of proving fitness while requiring service accommodation). Inappropriately shifting the burden from DCF to disabled parents preserves the presumption that parents are responsible for service failures, even when DCF's services are inadequate because of the disabled parent's inability to participate. *See supra* note 52 (detailing flaws in constantly finding DCF made reasonable efforts to correct parental shortcomings). "[N]o [Massachusetts appellate court] decision has ever found that the Department failed to fulfill this [reasonable efforts] obligation, no matter what the nature or severity of the disability involved." Kaiser, *supra* note 50, at 119 (demonstrating courts favor DCF over parents during TPR proceedings). *But see id*. at 111 n.40 (noting two appellate cases reversing trial court based on insufficient efforts or services).

68. Smith, *supra* note 6, at 327 (demonstrating failure of current system for parents with disabilities); *see also In re* Adoption of Beatrix, No. 15-P-933, 2016 WL 3912083, at *5 (Mass. App. Ct. July 20, 2016) (recognizing DCF's obligation to tailor services to parental needs). The system's bias, stigma, and judgment projected onto disabled individuals already place such parents in a lower, less-deserving, or less-qualified class,

In TPR proceedings, parents are routinely deemed unfit based exclusively on their disability.[69] This single-factor analysis allows courts to terminate parental rights solely because a parent has a mental or intellectual disability seems inherently contrary to any child's best interest.[70] Courts have increasingly ruled, however, that without proving a nexus between the parent's disability and the parent's inability to care for and promote his or her child's best interest, terminating parental rights violates the parent's fundamental constitutional right to the care and custody of his or her own child.[71]

The statutory time standards for adjudicating C&P cases disadvantage parents with disabilities.[72] The medical and therapeutic appointments that these

preventing them from receiving the requisite attention and adequate services to truly promote family reunification and stability. *See* Smith, *supra* note 6, at 327. Appellate courts often assume that no amount of DCF effort will remedy a disabled parent's capacity to care for his or her child. *See* Kaiser, *supra* note 50, at 112 (examining appellate courts' hesitation to reverse trial courts' TPR determinations).

69. ROCKING THE CRADLE, *supra* note 19, at 158 (recounting expert opinions regarding TPR decisions based solely on mental disability); Callow et al., *supra* note 6, at 17 (reporting two-thirds of states allow TPR based solely on parental disability); *see also* Alexis C. Collentine, Note, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 554 (2005) (articulating issues within statutes allowing TPR based on assumptions toward parent's disability); Watkins, *supra* note 44, at 1440-41 (explaining negative effect of including mental disability in statutory grounds for unfitness and TPR determinations).

70. *Cf.* Adoption of Katharine, 674 N.E.2d 256, 262 (Mass. App. Ct. 1997) (remanding trial court's unfitness determination based solely on drug use without evidence of child harm). *See supra* notes 10 and 65 and accompanying text (describing widespread stereotypes and biases surrounding disabled parenting community and correlating TPR rates). Courts frequently consider the limitations a mental or intellectual disability places on a parent contrary to a child's interest in achieving a normal, healthy, and successful future. *See* Rachmilovitz, *supra* note 44, at 815 (describing how courts connect parents' mental condition to children's best interest); Collentine, *supra* note 69, at 545 (demonstrating presumption mentally disabled parents cannot adequately support child development); *see also* Stefan, *supra* note 65, at 162-63, 171, 174 (challenging courts' presumption of how disabled parents cannot meet children's best interests); Rachel L. Lawless, Comment, *When Love Is Not Enough: Termination of Parental Rights When the Parents Have a Mental Disability*, 37 CAP. U. L. REV. 491, 499-500 (2008) (discussing Ohio case reversing TPR adjudication of disabled parents). Such unsubstantiated determinations are unlikely to be contrary to the child's best interest, and merely reflect society's belief that a disabled parent is not the best kind of parent to raise a child. *See In re* D.A., 862 N.E.2d 829, 835-36 (Ohio 2007) (requiring more than speculation disabled parents hinder child's physical, emotional, or mental wellbeing); Lawless, *supra*, at 500 (stating disability must cause or threaten harm before running afoul against child's best interest). Regardless, basing such an irreversible, detrimental decision solely on the best interest of the child, without demonstrating parental unfitness, is inherently unconstitutional, depriving the parent of due process. *See* Santosky v. Kramer, 455 U.S. 745, 772-73 (1982) (Rehnquist, J., dissenting) (asserting importance of considering both parental unfitness and child interests).

71. *See* Stanley v. Illinois, 405 U.S. 645, 657-58 (1972) (requiring proof of unfitness based on individualized inquiry, not presumptions based on status); *Adoption of Katharine*, 674 N.E.2d at 261 (determining cocaine habit absent abuse or neglect insufficient to find parental unfitness). A parent's mental or intellectual disability is only relevant regarding the parent's ability to assume responsibility for his or her child. Adoption of Frederick, 537 N.E.2d 1208, 1213 (Mass. 1989); *see also In re* Ugo, No. 07-P-1173, 2008 WL 2230721, at *6-7 (Mass. App. Ct. June 2, 2008) (finding sufficient evidence mother lacked ability to provide minimally acceptable care without mental health treatment).

72. Callow et al., *supra* note 6, at 22 (discussing timeline challenge for disabled parents); *see also* Smith, *supra* note 6, at 328 (explaining problems with strict timelines for parents with disabilities need); *supra* note 45 (allowing fifteen months of services before adjudicating child in need of C&P).

parents attend—through DCF mandate or by their own initiative—can interfere with the classes and programs that DCF includes on service plans to ensure reunification.[73] Noncompliance within the mandated timeframe leads to TPR based on failure to remedy the issues leading to initial intervention, which may be the mental disability itself, and the continuous inability to parent at DCF's expectation level.[74]

When fighting to avoid TPR, the largest barrier that parents with disabilities face is access to adequate and effective reunification services.[75] Though states must provide services in order to receive federal funding, reunification services may be omitted if it is determined that a parent's disability prevents him or her from caring for and controlling his or her child.[76] The Massachusetts Supreme Judicial Court (SJC) ruled that a parent cannot assert an ADA defense in C&P or TPR cases because court proceedings are not "services, programs, or activities" under the ADA.[77] The SJC recognized, however, that the ADA requires public entities, such as DCF, to reasonably accommodate parents with disabilities when providing reunification services at a TPR proceeding to enhance safe parenting practices and strengthen the family dynamic.[78] But, in

73. *See* Smith, *supra* note 6, at 328 (demonstrating conflict between mental health treatment and service plan elements); *see also* 110 MASS. CODE REGS. 6.03(3)-(5) (2016) (describing service plan elements and requirement of task completion).

74. *See* Stacia Walling Driver & Wright S. Walling, *Examining the Intersection of Chemical Dependency and Mental Health Issues with the Juvenile Protection System Timelines As Related to Concurrent Planning and Termination of Parental Rights*, 40 WM. MITCHELL L. REV. 1008, 1032-33 (2014) (explaining inevitable failure when tasks and treatment fail to make parent "better" during statutory timeframe); *see also* DCF Investigation Letter, *supra* note 11, at 19 (stating DCF held mother with disability to unnecessarily high standard when evaluating parental ability).

75. *See* Smith, *supra* note 6, at 327; *see also* ROCKING THE CRADLE, *supra* note 19, at 172-80 (listing inadequacies in assessment and reunification services for disabled parents in child welfare system). Parents with disabilities would benefit from the implementation of creative, rarely used DCF services. *See, e.g.*, 110 MASS. CODE REGS. 7.020 (2016) (explaining monitoring and teaching function of homemaker services); 110 MASS. CODE REGS. 7.030 (2016) (discussing family support services providing "social and developmental opportunities for a family"); 110 MASS. CODE REGS. 7.061 (2016) (providing parent aide services to high-risk populations); Smith, *supra* note 6, at 331 (describing specifically tailored services benefiting parents with disabilities).

76. Callow et al., *supra* note 6, at 12 (explaining services requirement).

77. *In re* Adoption of Gregory, 747 N.E.2d 120, 124 (Mass. 2001) (concluding termination proceedings not "services" requiring ADA accommodations). During their investigation of DCF, the DOJ and DHHS criticized the conclusion that TPR proceedings are not included in ADA protections. DCF Investigation Letter, *supra* note 11, at 10 n.11 (rejecting ruling of *In re Adoption of Gregory*, 747 N.E.2d 120 (Mass. 2001) due to its inconsistency with *Yeskey*). The DOJ explained that the ADA applies to everything, including child welfare petitions, recommendations, and services. *Id*.

78. *See In re Gregory*, 747 N.E.2d at 126 (acknowledging need for accommodating services before TPR trial and adjudication). After *In re Gregory*, some cases involving parents with disabilities suggest adherence to the requirement that DCF provide parents with reasonably modified services. 747 N.E.2d 120 (Mass. 2001); *see In re* Adoption of Ilona, 944 N.E.2d 115, 123-24 (Mass. 2011) (acknowledging reasonable services provided to mother with depression and learning disorder); *In re* Adoption of Lenore, 770 N.E.2d 498, 503 (Mass. App. Ct. 2002) (ascertaining reasonable efforts when no services could improve mother and father's parenting skills).

order to receive the necessary and appropriate services, the parent bears the burden to request ADA modifications promptly so that DCF may provide reasonable accommodations; a parent's mental disability, however, may prevent him or her from successfully raising such request.[79]

When dealing with parents with disabilities, DCF often mandates psychological testing, evaluation, or counseling, as well as evidence of a diagnosis, before submitting to the requested modified services.[80] DCF uses the absence of a diagnosis—lack of a specified mental disorder triggering the ADA reasonable accommodations requirement—to implement only standard parenting support services, such as parenting classes and counseling.[81] Without adequately tailored services, parents with disabilities fail to improve, inevitably leading to TPR.[82]

III. ANALYSIS

DCF has failed to substantially support parents with disabilities in their efforts to reunite with their children.[83] The initial evaluation failure leads to perpetual oversights, allowing DCF to provide bare minimum services that

79. *See In re Gregory*, 747 N.E.2d at 127 (placing burden on disabled parent to request accommodating services); *see also In re* Terrence, 787 N.E.2d 572, 577-78, 580 (Mass. App. Ct. 2003) (denying mother's ADA claim because disability and need for accommodation not raised before trial); Smith, *supra* note 6, at 327 (discussing parents' struggle to request accommodating services).

80. *See* Walling Driver & Walling, *supra* note 74, at 1031 (explaining process of parental intake involving mental health evaluations); Lawless, *supra* note 70, at 495 (discussing requirement of establishing existence of disability and its effect on parenting ability). A parent involved with DCF already experiences trauma and embarrassment; forcing a parent with a disability to prove a particular diagnosis often asks too much of an individual with an already limited understanding of the C&P and TPR processes. *See* Pannell, *supra* note 7, at 1174-75 (demonstrating challenge of navigating and understanding child welfare system and service requirements); Stefan, *supra* note 65, at 141-42, 166-67 (considering TPR "final blow" to already struggling and disadvantaged parents); *see also In re* Kristin H., 54 Cal. Rptr. 2d 722, 726-27 (Cal. App. 1996) (quoting social worker's perception of mother's deteriorated mental health throughout TPR proceeding, highlighting her disadvantage).

81. *See* DCF Investigation Letter, *supra* note 11, at 13-14 (avoiding implementation of proper services without formal diagnosis); *see also* Smith, *supra* note 6, at 327 (demonstrating flaws in vaguely defining reunification services). Sarah Gordon's case exemplifies this problem: Sarah presented DCF with evidence of her intellectual and cognitive limitations, but without a diagnosis, DCF concluded that they did not know how to assist her in parenting Dana. DCF Investigation Letter, *supra* note 11, at 13-14. DCF social workers recognized, however, that Sarah had specific learning limitations. *Id.* at 13. DCF could have provided more effective services within its disposal, such as "repetitive, frequent, hands-on, visual learning," to support and strengthen Dana's parenting abilities. *See id.* at 14. Instead, DCF recommended counseling and a parent aide. *Id.* at 13.

82. *See In re* Adoption of Beatrix, No. 15-P-933, 2016 WL 3912083, at *5 (Mass. App. Ct. July 20, 2016) (recognizing DCF's failure to implement services tailored to mother's cognitive abilities, resulting in TPR); ROCKING THE CRADLE, *supra* note 19, at 173 (analyzing effect of bias toward mentally disabled parent on services provided and case outcome); Smith, *supra* note 6, at 327 (recognizing unavoidable TPR when services improperly provided to disabled parents).

83. *See supra* note 16 and accompanying text (detailing DCF's broad discriminatory failure to reasonably modify services and practices for disabled parents). DCF's failure is evident throughout each of the requisite processes involving child welfare and family strengthening. DCF Investigation Letter, *supra* note 11, at 12.

have no chance of improving a disabled parent's competency, or remedying the issues that led to DCF's involvement.[84] To enhance and strengthen their parenting practices, parents with disabilities require services to be adapted to their functional level, learning style, and participation capacity.[85] Instead of encouraging parents to engage in supportive services, DCF's refusal to recognize parents' specific needs leads to noncompliance with service plans, lack of progress, and eventually the inevitable loss of custody.[86] The pervasive discrimination within DCF necessitates substantial legislative and regulatory change to promote equal protection and encouragement of Massachusetts parents and families with disabilities.[87]

A. A Call for Change from the Massachusetts Legislature

The current Massachusetts TPR statute allows courts to terminate a natural parent's parental rights—freeing the child for adoption without parental consent—if the court finds that the parent is currently unfit, unwilling, or unavailable to parent the child effectively.[88] The statute provides courts with an exhaustive fourteen-factor list, which they may consider when terminating parental rights; only one of the fourteen factors targets a marginalized community of parents, allowing consideration of the parent's individual status.[89] The statute allows the court to consider the parent's mental or intellectual disability while recognizing that the disability's analysis should concentrate on its continuousness and the parent's ability to care for his or her

84. *See* DCF Investigation Letter, *supra* note 11, at 13 (discussing spiral effect of DCF's initial presumption of disabled parent's capacity).

85. *See* Smith, *supra* note 6, at 331-33 (exemplifying customized services provided to support disabled parents' needs).

86. *See* DCF Investigation Letter, *supra* note 11, at 12-15 (reasoning DCF's failure to analyze parents individually caused systemic ADA noncompliance); *supra* note 75 (exemplifying DCF's lack of disability-accommodating services). DCF assesses the progress of parents with disabilities without the familial support they would unquestionably have at home; requiring disabled parents to care for their children without assistance sets these parents up for foreseeable failure. *See* DCF Investigation Letter, *supra* note 11, at 19, 21. Initially, while conducting its investigation, DCF must evaluate the family dynamic taking into consideration family support and services already in place. *See* 110 MASS. CODE REGS. 5.04(2)-(8) (2016) (requiring assessment of entire family at commencement of DCF involvement); DCF Investigation Letter, *supra* note 11, at 16. DCF's administrative functions ignore the specific needs of parents with disabilities, "defeating or substantially impairing accomplishment of the reunification program objectives." DCF Investigation Letter, *supra* note 11, at 15; *see also* Walling Driver & Walling, *supra* note 74, at 1033 (discussing inescapability of nonsuccess when services fail to improve parenting).

87. *See supra* note 19 (outlining changes required to enhance parenting in disabled community). DCF continuously fails to avoid discrimination by not incorporating reasonable modifications into its policies and procedures. DCF Investigation Letter, *supra* note 11, at 12.

88. *See* MASS. GEN. LAWS ch. 210, § 3 (2016) (detailing process of dispensing with parental consent for adoption and terminating parental rights).

89. *Compare id.* § 3(c)(i)-(xi), (xiii)-(xiv) (enumerating factors to consider when terminating parental rights), *with id.* § 3(c)(xii) (targeting parents with addiction and mental illness when considering TPR).

child because of this disability.[90] While this language seems to narrow the court's use of mental illness in TPR determinations, the other thirteen factors in the statute substantially support a TPR ruling for the same lack of parenting ability without focusing on a parent's mental status.[91]

If a parent's mental or intellectual disability prevents him or her from "provid[ing] minimally acceptable care" to the child, parental unfitness is evident; but a parent without a disability is also deemed unfit if he or she cannot minimally provide for the child.[92] Thus, specifically considering the parent's mental disability and its effect on his or her parenting ability is superfluous, inviting presumptuous and discriminatory termination based on mental disability.[93] When inadequate care, abuse, neglect, abandonment, failure to support, and lack of bond entitle a court to terminate a natural parent's rights, such parental flaws lead to TPR regardless of whether the shortcomings are due to the parent's mental disability.[94] Therefore, removing this discriminatory factor—allowing TPR when a parent's mental disability renders him or her unable to care for the child—still permits the termination of mentally disabled parents' rights because their parenting flaws will fall into one of the remaining enumerated factors demonstrating unfitness.[95]

The Massachusetts statute allows TPR when the severing of parent-child contact is in the best interest of the child, but only *after* the parent has been deemed unfit.[96] Massachusetts has continuously asserted an improper

90. *See id*. § 3(c)(xii).

91. *See id.* § 3(c)(i)-(xi), (xiii)-(xiv) (including abandonment, abuse, neglect, failure to support and other status-neutral reasons for TPR).

92. *Compare* MASS. GEN. LAWS ch. 210, § 3(c)(xii) (permitting TPR when mental status prevents parent from providing adequate childcare), *with id.* § 3(c)(vi) (permitting TPR when parent "fails to provide proper care or custody for the child").

93. *See supra* note 92 and accompanying text (stressing similarity in statutory language and TPR outcome for parents with and without mental disabilities); *supra* notes 65 and 69 (exposing system-wide bias and effect on TPR for disabled parents). Termination based on the presumption that disabled individuals are unfit to parent is discriminatory and unconstitutional. *See supra* note 71 (emphasizing need to find parental unfitness absent focus on mental status).

94. *Compare* MASS. GEN. LAWS ch. 210, § 3(c)(i)-(xi), (xiii)-(xiv) (listing parental shortcomings leading to TPR), *with id.* § 3(c)(xii) (allowing TPR when mental illness causes parental shortcomings). Parental flaws in mentally or intellectually disabled parents will be evident through the statutory factors that routinely demonstrate non-disabled parents' unfitness. *See* Collentine, *supra* note 69, at 550 (explaining state statutes assuming disabled parent's flaws covered in other statutory factors); Kerr, *supra* note 35, at 411-12 (recognizing mandatory removal when parent fails to adequately provide for child, regardless of mental disability).

95. *See supra* note 94 (highlighting similarity between mentally disabled parents' unfitness and unclassified parents' unfitness); *see also* Collentine, *supra* note 69, at 564 (considering mental disability classifications in TPR statutes discriminatory).

96. *See* MASS. GEN. LAWS ch. 119, § 26(b)(4) (2016) (allowing TPR when child needs care and protection, and TPR serves child's best interest); ch. 210, § 3(b) (recognizing court's finding of child in need of care and protection before analyzing best interest); ch. 210, § 3(c) (highlighting "paramount, but not exclusive" consideration of child's health and safety when adjudicating TPR cases); *see also In re* Adoption of Nancy, 822 N.E.2d 1179, 1182 (Mass. 2005) (emphasizing two-part TPR analysis); *In re* Adoption of Carlos, 596 N.E.2d

hierarchy of rights, placing the child's interests above the parent's fundamental right to the care and custody of his or her own child.[97] This drastic misinterpretation has allowed courts to terminate parental rights when parental unfitness has not been supported by clear and convincing evidence, but the best interest of the child seems to be better served by severing parent-child contact indefinitely.[98] In order to properly adjudicate TPR cases, courts must focus on a natural parent's fundamental parental rights before considering the best interest of the child; this appropriately balanced analysis leads to TPR only when absolutely necessary.[99]

Likewise, the Massachusetts C&P statute recognizes that a child may be found in need of C&P if the parent is unfit, unwilling, or unavailable to provide adequate childcare.[100] The statute contains no language alluding to parental status—physical, mental, emotional, financial, or otherwise—and is thus neutral and nondiscriminatory on its face.[101] The Massachusetts legislature proposed a bill specifying that a court may not consider a parent's mental disability as a "negative factor" when determining a child's need for C&P.[102] Though this proposed addition attempts to prevent discrimination against disabled parents, adding a provision that draws attention to a parent's mental status only further ostracizes them in an already biased child welfare system.[103] The bill's language merely invites the court to consider a mental disability, but only if the mental disability relates to the parent's alleged harm of the child.[104] This relationship between mental or intellectual disability and parental harm is unnecessary: a child subjected to harm from a parent will be in need of C&P regardless of the parent's mental disability.[105] Therefore, the legislature should avoid implementing this statutory language change because it summons the court to maintain the presumption that mental disability causes a parent to harm

1383, 1388 (Mass. 1992) (requiring proof parent cannot promote best interest of child for TPR).

97. *See In re* Adoption of Gregory, 747 N.E.2d 120, 125 (Mass. 2001) (placing parent's rights secondary to child's interests).

98. *See* Lawless, *supra* note 70, at 499-500 (rejecting Ohio court's TPR decision, representing proper case outcome).

99. *See supra* note 96 (emphasizing proper order of rights); *see also* Smith, *supra* note 6, at 340-41 (discussing benefits of favoring reunification, properly burdening DCF to prove necessity of TPR).

100. *See* MASS. GEN. LAWS ch. 119, § 24 (listing instances where child requires C&P).

101. *See id*. (focusing on needs of child instead of status of parents).

102. *See* H.R. 1370, 189th Gen. Court (Mass. 2015) (suggesting language prohibiting negative consideration of mental disability in C&P adjudication).

103. *See* Kerr, *supra* note 35, at 401-02 (discussing label of mental disability equating unfitness based on assumptions); Watkins, *supra* note 44, at 1440-41 (explaining use of disability in child welfare statute invites continued presumption of unfitness).

104. *See* H.R. 1370 (requiring nexus between mental disability and harm to child). The SJC previously ruled that a parent's mental or intellectual disability must cause harm to the child for TPR based on the mental deficiency. *See* Adoption of Frederick, 537 N.E.2d 1208, 1213 (Mass. 1989) (holding mental disorder only relevant in analysis of parental responsibility).

105. *Cf. supra* note 94 and accompanying text (arguing consideration of disability in TPR cases unnecessary).

his or her child, and that such parent is therefore categorically unfit to parent at all.[106]

B. Incorporating Reasonable Accommodations into DCF Procedures, Policies, and Regulations

As a public entity, the Massachusetts DCF must provide its activities and services in an appropriately accessible manner to all qualified individuals, regardless of their individual status.[107] Therefore, DCF must reasonably accommodate parents with disabilities by updating its policies and practices.[108]

First and foremost, DCF must dispense with its bias toward parents with mental or intellectual disabilities when it conducts its initial assessment of the family; DCF must evaluate the child, parents, home environment, and familial support together as a cohesive family unit.[109] DCF must consider the current family and in-home supports and resources available to ensure safe and appropriate parenting and childcare practices before resorting to removing the child.[110] Parents with disabilities may learn appropriate parenting skills based on their strengths by engaging with and relating to parents in "peer support networks"; these groups provide insight and support based on personal parenting experiences and life lessons.[111] Allowing and encouraging parents with mental disabilities to learn proper parenting skills from individuals who they are comfortable with will motivate parents to work diligently to improve and maintain custody, or in some cases, regain it altogether.[112]

Secondly, instead of relying on generic testing, DCF should strive to ascertain the specific mental or intellectual disability that the parent struggles with in order to provide and utilize effective and appropriate parenting

106. *See supra* note 103 and accompanying text (emphasizing bias created and perpetuated by including mental disability in child welfare considerations).

107. *See supra* notes 34-35 and accompanying text (requiring DCF comply with ADA reasonable accommodations when providing services).

108. *See* DCF Investigation Letter, *supra* note 11, at 12 (recognizing DCF's failure to accommodate parents by implementing nondiscriminatory policies and procedures); *supra* note 19 (outlining proposed updates to ensure equal protection for parents with disabilities).

109. *See supra* note 47 (detailing process of assessing family upon DCF involvement); *see also* ROCKING THE CRADLE, *supra* note 19, at 264 (stressing importance of focusing on entire family structure to benefit both parents and children).

110. *See* MASS. GEN. LAWS ch. 119, § 1 (2016) (allowing substitute care *only* when current resources fail to protect child); Stefan, *supra* note 65, at 164, 166 (explaining benefits of family preservation); DCF Investigation Letter, *supra* note 11, at 16 (recognizing possible improvements if parent could learn from family resources with child at home).

111. *See* ROCKING THE CRADLE, *supra* note 19, at 260-61 (suggesting parenting support and lessons from network of disabled parent peers).

112. *See id.* at 264 (highlighting importance of community integration and family support); Smith, *supra* note 6, at 332-33 (explaining harms of removal from family and community support, and providing resolutions); Stefan, *supra* note 65, at 164, 166 (recognizing positive outcomes when courts prioritize family unity and stability); DCF Investigation Letter, *supra* note 11, at 15-17 (stressing benefit of existing family support and in-home resources).

services.[113] Although some scholars discourage using a diagnosis to determine parental aptitude, diagnosis coupled with observation of parent-child interactions will provide DCF with a comprehensive understanding the parents' particular strengths, capabilities, and needs.[114] To avoid providing boilerplate services when a parent's specific diagnosis is unknown, DCF should consider evidence of any mental deficiency, which is often apparent during the initial investigation, as an indication that a parent requires an accommodation.[115] Further exploration of the parent's specific limitations—from observation, conversation, and evaluation—will provide DCF with sufficient information to present appropriately modified services.[116]

Once DCF learns that a parent requires service modifications, it should explore accommodating services within its repertoire.[117] Many parents with mental or intellectual disabilities require individualized and hands-on services; DCF offers parent aide, homemaker, and family support services that have the potential to provide parents with the personalized, supportive, and instructive services that benefit them most.[118] DCF also contracts to provide services through outside agencies that provide a range of services, including mental

113. *See supra* notes 80-81 and accompanying text (detailing challenges of requiring and ascertaining parental diagnosis). *But see* ROCKING THE CRADLE, *supra* note 19, at 163 (explaining inadequacies of assessment testing to determine parental ability without adequately observing parent-child dynamic); DCF Investigation Letter, *supra* note 11, at 14 (reprimanding DCF for improperly focusing on absence of diagnosis).

114. *See* ROCKING THE CRADLE, *supra* note 19, at 157-58 (questioning validity of assessment without observation of parent-child interaction); DCF Investigation Letter, *supra* note 11, at 14 (admonishing focus on diagnosis). Obtaining an accurate mental diagnosis is challenging; however, a diagnosis would enhance social workers' knowledge, who draft service plans for parents, and allow the implementation of services that are appropriately tailored to improving mentally disabled parents' parenting skills. *See* Kerr, *supra* note 35, at 413 (discussing importance of utilizing appropriate evaluators of mental illness); *see also* ROCKING THE CRADLE, *supra* note 19, at 164, 178-79 (demonstrating problems with undereducated evaluators and benefits of specialists). Additionally, when proper evaluators can observe the parent-child relationship, more appropriately tailored services can be implemented to support the parent's specific childcare needs. *See* Callow et al., *supra* note 6, at 19 (encouraging use of occupational therapist to incorporate effective parenting services and strategies).

115. *See* DCF Investigation Letter, *supra* note 11, at 14 (demonstrating DCF's knowledge of parent's disability and specific learning style); *see also supra* note 82 (observing detrimental effect of delivering subpar or standard services to parents with additional needs).

116. *See* DCF Investigation Letter, *supra* note 11, at 15 (enumerating sources providing additional insight into parent's disability and service needs). Even without a formal diagnosis, DCF will have adequate evidence of parental disability to execute a reasonably accommodating service plan. *See id*. 14-15 (recognizing DCF's knowledge of, yet blatant disregard for, parent's disability and specific service needs).

117. *See supra* note 35 and accompanying text (discussing DCF's obligation to provide accommodations to disabled parents); *see also* DCF Investigation Letter, *supra* note 11, at 17 (recognizing range of DCF services available to support parents with disabilities).

118. *See* ROCKING THE CRADLE, *supra* note 19, at 264 (outlining successful services focusing on disabled parent's learning style and needs); Smith, *supra* note 6, at 331-32 (stressing importance of individualized parenting services); *see also* 110 MASS. CODE REGS. 7.020 (2016) (explaining homemaker services); 110 MASS. CODE REGS. 7.030 (2016) (discussing family support services); 110 MASS. CODE REGS. 7.061 (2016) (providing parent aide services).

health and addiction counseling, therapy, and educational services.[119] Parents with disabilities can require a diverse collection of accommodating services.[120] Most disabled parents, however, do not require twenty-four-hour assistance or supervision, thus DCF may still reasonably, creatively, and individually accommodate parents without exhausting its budget.[121]

Due to a parent's specific disability, he or she may be unable to grapple with the stress of parenthood without additional support from his or her community.[122] Aside from learning how to parent and respond to their children safely and effectively, parents with disabilities will benefit from community assistance in child transportation, organization, recreation, and discipline.[123] Maintaining a safe and secure home is also a challenge for parents with disabilities; offering family-oriented, and disability-accessible public housing assistance will allow parents to focus on their interactions and relationships with their children more than on income and expenses.[124] Without providing reasonably accommodating services, the court cannot find that DCF has satisfied its burden to provide reasonable efforts to attain reunification.[125]

Finally, DCF must afford parents with disabilities the opportunity to continue their engagement with services even after their C&P case closes.[126] In order to reduce the risk of future harm and future removal, DCF should continue to support parents with disabilities to ensure the sustainability of reunification and family stability.[127] Providing ongoing and consistent support and services will encourage parents with mental disabilities to keep up their

119. *See supra* note 48 (highlighting outside service providers accepting referrals from DCF). Parents with disabilities require a wide range of services, both specific to childrearing and general life lessons. *See* Smith, *supra* note 6, at 332 (listing areas in which disabled parents require special focus).

120. *See supra* note 118 and accompanying text (providing comprehensive services to support parents with disabilities).

121. *See* ROCKING THE CRADLE, *supra* note 19, at 172-73 (recognizing possibility of parental improvement and independence with services).

122. *See supra* note 28 and accompanying text (defining wide range of disabilities and limitations); *see also* ROCKING THE CRADLE, *supra* note 19, at 264 (highlighting importance of community integration and family support).

123. *See* ROCKING THE CRADLE, *supra* note 19, at 240-41 (explaining need for personal and parental assistance services).

124. *See id*. at 245-47 (outlining struggle to access family friendly and disability accommodating housing). Financial and employment assistance is also necessary to support parents and families with disabilities. *See id*. at 250-52 (discussing struggle to maintain income, even with welfare and public benefits, throughout disabled communities).

125. *See In re* Adoption of Gregory, 747 N.E.2d 120, 126 (Mass. 2001) (requiring reasonably tailored services before seeking termination of disabled parent's rights); 110 MASS. CODE REGS. 1.08 (2016) (insisting DCF make reasonable accommodations in effort to serve parents with disabilities); *supra* note 50 (detailing reasonable efforts requirement); *see also supra* note 52 (demonstrating lax Massachusetts reasonable efforts standard and disadvantage to parents with disabilities).

126. *See* ROCKING THE CRADLE, *supra* note 19, at 264 (requiring ongoing services to adequately support disabled parents and their children); *supra* note 49 and accompanying text (stressing importance of continuing services after DCF's involvement ceases).

127. *See* Smith, *supra* note 6, at 336 (acknowledging importance of providing aftercare services).

efforts, maintain improvements, and prevent setbacks.[128]

C. Applying the Necessary Updates in Practice

If Massachusetts had imposed the suggested legislative and regulatory updates when Sarah Gordon's case came to DCF's attention, Sarah and Dana's story would have ended differently.[129] Dana would not have been removed in the first place; Sarah was reported to DCF due to concerns about her disability and, thus, her presumed inability to care for Dana.[130] Without demonstrating that Sarah posed a threat of harm to Dana, DCF would have had insufficient grounds to remove Dana from Sarah's custody.[131] Even if DCF could have removed Dana, proper investigation into Sarah and Dana, their family and home environment, and Sarah's abilities, needs, and learning style, would have reasonably informed DCF of Sarah's familial and community resources that could substantially support Sarah to be a safe and effective parent.[132] Specifically, DCF would have concluded that Sarah's mother, Kim—who Sarah already lived with and who was already planning to support Sarah as she parented Dana—adequately ensured Dana's safety in Sarah's care.[133]

DCF's knowledge of Sarah's specific limitations and needs due to her disability would have enabled them to enroll her in appropriate and effective reunification or stabilization services, such as in-home assisted visits and a parent aide.[134] If, after facilitating and encouraging Sarah's participation in these services, DCF still concluded that the services had failed to ensure parental fitness and it moved to terminate Sarah's parental rights to Dana, DCF must prove Sarah's inability to provide minimally acceptable care—without blaming her mental disability.[135] The only way DCF would succeed in terminating Sarah's parental rights is if the court found that Sarah could not appropriately parent Dana with the support of her family and other resources,

128. *See id*. (explaining benefits of endless wraparound services).

129. *See* DCF Investigation Letter, *supra* note 11, at 11-12 (outlining DCF's failures when dealing with Sarah Gordon's case).

130. *See id*. at 5-6 (reporting removal based on mental disability); *supra* note 94 and accompanying text (arguing for separation between parental mental disability and unfitness).

131. *See supra* note 59 and accompanying text (requiring significant risk of parental harm before granting TPR); *see also supra* note 41 (explaining process of initially removing child from home).

132. *See* DCF Investigation Letter, *supra* note 11, at 15-17 (detailing beneficial family supports Sarah could have received); *supra* notes 110 and 118 and accompanying text (demonstrating improvements available with family support services).

133. *See* DCF Investigation Letter, *supra* note 11, at 16 (recognizing Sarah's parents' willingness and ability to support Sarah and Dana on daily basis).

134. *See id*. at 17 (listing DCF services appropriate and available for Sarah during DCF involvement); *supra* note 118 (exemplifying appropriately tailored services for parents with disabilities).

135. *See* DCF Investigation Letter, *supra* note 11, at 22-23 (detailing DCF's ignorance toward Sarah's improvement and inappropriate focus on disability and limitations); *supra* note 94 and accompanying text (arguing TPR must result from irremediable parental flaws, not inherent parental status).

and that TPR was in Dana's best interest.[136]

IV. CONCLUSION

Complying with the ADA is not optional; it is mandatory for all public entities, including the Massachusetts DCF. Because DCF's priority is to serve families, it must do so in a manner that supports the wide range of family dynamics within Massachusetts. Thus, DCF must accommodate a financially struggling, two-parent home as much as it assists a single father with a history of addiction, and as much as it supports a young mother with a mental disability. The rights and interests of the children of these diverse parents do not change; they wish to be raised in a safe and loving home, and their preferred caretaker is their natural mother and/or father. Likewise, the rights and interests of these distinct parents do not change either, as they want to raise, care for, and bond with their children. Thus, strengthening, supporting, and protecting these children and parents requires DCF to accommodate and serve them on an individualized basis.

By viewing each parent, child, and family situation individually, DCF will avoid holding parents to unattainable standards and expectations. By considering the specific family dynamic at hand, DCF will analyze their needs and implement services in a manner that is appropriate to improve and remedy parenting issues requiring DCF intervention. These services will allow the parent to engage in, learn, and improve from detailed and explicit lessons and activities tailored to reinforce his or her parenting practices. When these services fail to ensure parental safety and fitness, DCF must consider the child's best interest in asking the court to consider TPR. But, when these services succeed in supporting, encouraging, and strengthening parents, families affected with disabilities will flourish from reunification.

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136. *See supra* notes 94 and 96 and accompanying text (explaining proper process of terminating parental rights).