THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2006-0833

In re Juvenile 2006-0833

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APPEAL FROM THE FAMILY DIVISION

BRIEF OF DISABILITIES RIGHTS CENTER, INC., AS AMICUS CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Treatises

Other Authorities

INTEREST OF *AMICI CURIAE*

Amicus, Disabilities Rights Center, Inc. ("DRC"), submits this brief to inform the Court of the all too common experience of persons with mental illness in attempting to maintain their parental rights in the child welfare system in New Hampshire and around the country, to point to research which suggests that with appropriate services and accommodations that most persons with mental illness can provide the love and support their children need and deserve, and to argue that state and federal law, indeed, require such services and accommodations to maintain, when possible, the integrity of the family.

Since 1978, the DRC has provided a full range of legal assistance to people with disabilities in New Hampshire, including legal representation, regulatory and legislative advocacy, and education and training. Much of the DRC's work relates to the application and interpretation of laws prohibiting discrimination against persons with disabilities and requiring the State to provide appropriate and necessary services to such persons. Over the years, *Amicus* has been involved in hundreds of cases in New Hampshire's juvenile court. It has also participated in many important cases before this court and the United States District Court for the District of New Hampshire involving the rights of children In addition, *Amicus* is part of a network of protection and advocacy systems located in all 50 States, the District of Columbia, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa, and the Northern Marianas Islands). Protection and advocacy systems ("P&A's") are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of people with disabilities in a variety of settings. Collectively, the P&A network is the nation's largest provider of such services for persons with disabilities. P&As are particularly active in providing

assistance to persons with mental illness and other disabilities under the Americans with Disabilities Act. Because of its extensive involvement in juvenile cases in New Hampshire, as well as in this network, and its familiarity with the protections afforded by each State to persons with disabilities, the DRC readily has information regarding child welfare laws in this and other state and how such laws operate in practice. The DRC is thus well placed to assist the Court in surveying the impact upon persons with mental illness state laws governing the termination of parental rights.

STATEMENT OF FACTS

Amicus adopts the statement of fact of the Appellant in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court, as well as the United States Supreme Court, has recognized that natural parents possess a fundamental liberty interest in the care and upbringing of their children. In re Shannon M., 146 N.H. 22 (2001); Santosky v. Kramer, 455 U.S. 745 (1982). Parents with mental illness, no less than other parents, have a fundamental liberty interest in having and raising children, an interest which may not be extinguished on the basis of blanket legal presumptions about their status as unfit parents. Stanley v. Illinois, 405 U.S. 645, 657-58 (1972). Nonetheless, parents with mental illness lose their children in state termination proceedings at an astonishing rate.[1]

[1] Although there is no data specifically addressing the extent to which the parental rights of parents with mental illness are terminated, estimates for parents with intellectual disabilities indicate a rate of between 40% and 60%. *See* David McConnell & Gwynnyth Llewellyn, Stereotypes, Parents with Intellectual Disability and Child Protection, 24 J. SOC. WELFARE & FAM. L. 297, 299-300 (2002). A review of case law involving parents with mental illness suggests a similarly high rate of termination. See e.g. In re Jonathan T., 148 N. H. 296, 299 (2002) (Rejecting argument that the State must make "every effort" and must "[work] with the parents" to help them provide a family for their children, and holding, merely, that the State must put forth reasonable efforts given its available staff and financial resources to maintain the legal bond between parent and child.); In re Kristopher B., 125 N. H. 678, 681-82 (1984) (The division of welfare's obligation to make "every effort" to work with the natural parents may be limited by practical considerations, including the staff and funds available to the division.). This is true in other states as well. See e.g. In re J.E. and E.E., 745 A.2d 1250, 1255-56 (Pa. Super. 2000)(finding mother's mental illness to be relevant in the termination of parental rights); In re Angry, 522 A.2d 73 (Pa. Super. 1987)

This rate of termination cannot be explained by reference to the natural abilities of people with mental illness to act as parents. Researchers have demonstrated that with reasonable accommodation, people with mental illness can act as competent and loving parents.[2] The effort necessary to keep a family united could be as simple as providing a parenting plan, counseling aimed at increasing parenting skills, or, as requested in this case, assistance with obtaining necessary medications. Sadly, however, DCYF refuses to make even minor and manifestly reasonable accommodations. As a result, people with mental illness in New Hampshire retain their parental rights to their children only at the sufferance of DCYF and state courts. Worse, this arbitrary and unreasonable state discrimination systematically deprives the children of such parents of their constitutional and natural rights to the undisturbed love and nurture of their parents.

Neither Appellant nor *amicus* claim that every parent with mental illness is entitled to retain custody of his or her child in every case. Like a physical disability such as blindness or paraplegia, a mental disability may indeed affect certain aspects of an individual's ability to

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(suggesting that where mental illness impairs parent's ability to cope with own problems, termination of parental rights is appropriate); In re Adoption of Vidal, 777 N.E.2d 1290, 1292 (Mass. App. 2002)(stating that mother's manifestations of mental illness are relevant to proving parental unfitness); In the Matter of N.A., B.A. & A.A., 59 P.3d 1135 (Mont. 2002)(stating that parent's own admission of mental health difficulties is relevant in the evaluation of the ability to care for children); In the Matter of Philip R., 740 N.Y.S.2d 421, 422 (N.Y. App. Div. 2002)(finding parents' refusal of treatment for mental illness to be a factor in determination regarding parental rights); In re Hardesty, 563 S.E.2d 79, 83 (N.C. App. 2002)(finding mental instability to play a role in the termination of parental rights); In the Matter of R.C.V. & O.V., 2002 WL 31730899 at *6 (Tenn. App. 2002)(considering mental illness as one reason not to release children into mother's care).

However, see In re Doe, 123 N. H. 634, 643 (1983) (In upholding the termination of parental rights to one parent and reversing as to the other, the court held that "to support such an extreme and irreversible action as a termination of parental rights pursuant to RSA 170-C:5, IV (Supp.1981), where there is no evidence of mental illness as manifested by child abuse by the parent, the probate court must make explicit findings beyond a reasonable doubt, supported by the record, as to the detrimental effect of the parent's mental illness on the child, so as to require termination of parental rights.")

[2] Joanne Nicholson, et al., Critical Issues for Parents with Mental Illness and their Families, National Mental Health Information Center, available at http://www.mentalhealth.org/publications/allpubs/KEN-01- 0109/ch1.asp (July 30, 2001) at Chap. 3. Similar conclusions have been reached regarding parents with intellectual disabilities. Maurice A. Feldman, Parenting Education for Parents with Intellectual Disabilities: A Review of Outcome Studies, 15 Res. Dev. Dis. 299, 301 (1994); Maurice A. Feldman & Laurie Case, Teaching Child-Care and Safety Skills to Parents with Intellectual Disabilities Through Self-Learning, 24 J. Intell. & Developmental Dis. 27, 28 (1999)

parent. Petitioners and *amicus* claim only that before allowing DCYF to initiate the process for terminating parental rights, the State must do what state and federal law requires: ensure that it has provided reasonable accommodation of the parent's mental illness, or that it has taken into account how the parent's capabilities could improve if reasonable accommodations were afforded.

As the decision of the lower court exemplifies, all too often parents with disabilities are not able to obtain the accommodations or services they need contrary to the mandate of the ADA and the constitution. As a clearly erroneous application of law on an issue of extreme importance to parents with mental disabilities and their children, this Court should reverse the district court's decision, order that DCYF assist the parent in obtaining necessary medications, and remand the case to the district court for the development and oversight of a permanency plan consistent with this court's opinion.

ARGUMENT

I. A CHILD WELFARE SYSTEM THAT FAILS TO PROVIDE APPROPRIATE SERVICES AND ACCOMMODATIONS DISPROPORTIONATELY DEPRIVES PARENTS WHO ARE POOR AND HAVE DISABILITIES OF THEIR PARENTAL RIGHTS.

Each year, approximately 176,000 children in this country, including hundreds in New Hampshire, are taken into state custody after reports of neglect or abuse.[3] More than half a million children are in foster care in the United States at one time.[4] However, the child welfare system in general does not affect all parents equally. A disproportionate number of persons involved in the child welfare system consist of parents who are women, parents who are poor, parents who are racial minorities,[5] and parents with mental illness.[6] While the number and experiences of parents with mental illnesses involved in the child welfare system have been largely ignored, one estimate is that twenty percent of parents involved in the child welfare system have mental health problems.[7]

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[3] U.S. Dept. of Health & Hum. Servs., Administration for Children, Youth and Families, http://www.calib.com/nccanch/pubs/factsheets/canstats.cfm (last updated Feb. 24, 2003).

[4] U.S. Dept. of Health & Hum. Servs., The AFCARS Report Interim FY 1999, available at http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.htm (last updated May 22, 2001).

[5] *See generally* Annette R. Appell, Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay], 48 S.C. L. Rev. 577 (1997).

[6] The U.S. Surgeon General describes mental illness as referring collectively to all diagnosable mental disorders. Mental disorders are "health conditions that are characterized by alterations in thinking, mood, or behavior (or some combination thereof) associated with distress and/or impaired functioning." U.S. Dept. of Health and Hum. Servs., Mental Health: A Report of the Surgeon General, available at http://www.surgeongeneral.gov/library/mentalhealth/chapter1/sec1.html5 (last updated Mar. 19, 2003)(hereinafter "U.S. Surgeon General"). The Surgeon General notes that "what it means to be mentally healthy is subject to many different interpretations that are rooted in value judgments that may vary across cultures." *Id*. The report also highlights the interrelatedness of mental health and physical health. *Id.*

[7] U.S. Dept. of Health & Hum. Servs., Children's Bureau, National Study of Protective, Preventative and Reunification Services Delivered to Children and Their Families, available at http://www.acf.dhhs.gov/programs/cb/publications/97natstudy/natstudy.htm.ch.3.tbl.310 (last updated Mar. 3,

As in most areas of daily life, individuals with mental illnesses face discrimination in the child welfare system.[8] While a mental illness can detrimentally affect an individual's ability to parent, just as it can interfere with other major life activities, most parents, if they receive the proper treatment and support, can provide the parenting their children need.[9] Unfortunately, many parents with mental illness are reluctant to seek mental health treatment because they fear that being involved in treatment programs will result in the loss of their children.[10]

The widespread fear of and discomfort around people with mental illnesses harms parents with mental illnesses who become involved in the child welfare system. Numerous studies report that individuals with mental illnesses are viewed as responsible for their condition, unpleasant, and undeserving of sympathy and assistance.[11] These attitudes may make child welfare caseworkers less likely to take steps to preserve or reunify families where parents have mental illnesses. Most damaging to parents involved in the child welfare system is the deeply embedded belief that individuals with mental illnesses are unpredictable and dangerous.[12] This belief makes

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2003)(stating that approximately 22% of parents involved with child welfare agencies have mental health problems) at ch. 3, tbl. 3-10.

[8] Susan Stefan, Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act 20-22 (Am. Psychol. Assn. 2000).

[9] Joanne Nicholson, et al., Critical Issues for Parents with Mental Illness and their Families, National Mental Health Information Center, available at http://www.mentalhealth.org/publications/allpubs/KEN-01-_0109/ch1.asp (July 30, 2001) at Chap. 3..

[10] Stefan, Unequal Rights, *supra* at 21 (citing Deborah Belle, Lives in Stress: Women and Depression 201 (1982)("The most alarming barrier to mental health treatment was the fear women expressed that their children would be taken away from them if it became known [they] had emotional problems.... One woman who lost her child after she sought treatment explained: 'If you have a breakdown, it will follow you faster and further than a prison record.'"). *See also* Nicholson, et al., *supra* at ch. 3.

[11] Stefan, Unequal Rights, *supra* at 8-9.

[12] *Id.* at 9-10.

it difficult for parents with mental illnesses, despite long periods of good behavior, to shake the impression that they would endanger their children.[13]

In addition to making it more likely that they will be involved in child welfare system, poverty poses additional risks for parents with mental illnesses who become involved in that system.[14] While middle class parents can purchase private mental health treatment, childcare, and other in-home assistance, poor parents must turn to public systems of care.[15] These services may not permit parents to stay at home with their children while they receive the treatment they need, and their parenting may be subject to close scrutiny.[16] Although not factors in this case, it is important to note, as well, that studies show African American parents face systematic racial discrimination at all levels in the child welfare system,[17] while many impoverished parents risk losing their children due to inadequate housing.[18] These problems are compounded for parents with mental illnesses, who may be less resilient in the face of tremendous adversity.[19]

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13 *Id*. at 10.

14 Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 7-10 (BasicCivitas Books 2002); Kathleen Bailie, The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of Lawyers Who Represent Them, 66 Fordham L. Rev. 2285, 2294-95 (1998)("families involved in neglect proceedings are overwhelmingly poor.").

15 U.S. Dept. of Health and Hum. Servs., Mental Health: A Report of the Surgeon General, available at http://www.surgeongeneral.gov/library/mentalhealth/chapter1/sec1.html5 at 407-08 (last updated Mar. 19, 2003).

16 Joanne Nicholson, et al., Critical Issues for Parents with Mental Illness and their Families, National Mental Health Information Center, available at http://www.mentalhealth.org/publications/allpubs/KEN-01- 0109/ch1.asp.ch.3 (July 30, 2001).

17 *Id*.; Roberts, *supra* at 8 (stating that "Black families are the most likely of any group to be disrupted by child protection authorities.").

18 Katelyn's Case Was a Rare Exception, Wash. Post B8 (Jan. 28, 2001) (stating that first receiver of the D.C. child welfare system estimated that approximately one-third of the children in foster care could have been safely back in their homes if the parent had adequate housing).

19 Nicholson, *et al*., *supra* at ch. 3.

The disproportionate treatment of persons with mental disabilities has deep roots. In a particularly unfortunate chapter of this country's history, state legislatures motivated by eugenicist ideals sought to prevent persons with emotional and intellectual disabilities from forming families. By 1913, 24 States barred "imbeciles," "idiots," "lunatics," the "feebleminded," or those of "unsound mind" from marriage.[20] Many such laws remained on the books until recently.[21] During the same period, the States began to enact statutes authorizing the involuntary sterilization of "mental defectives." The Supreme Court endorsed this practice in Buck v. Bell, 274 U.S. 200, 205 (1927),[22] a decision that ranks with Plessy v. Fergusson, 163 U.S. 537 (1896), as one of the Court's least defensible moments. In the decades following this decision, dozens of States implemented programs of compulsory sterilization by passing laws modeled on the statute upheld in Buck.[23] As of 1960, the States had sterilized over 60,000 people deemed to be "defective."[24] As late as the 1970s, several state statutes permitted termination of

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[20] Phillip R. Reilly, The Surgical Solution: A History Of Involuntary Sterilization In The United States 26 (1991).

[21] Reilly, *supra* at 45-55, 88.

[22] As a condition of being released from the State Colony of Epileptics and Feeble Minded, Carrie Buck was to undergo a salpigngectomy, a surgical operation performed by opening the abdominal cavity and cutting the fallopian tubes to sterilize an individual. This procedure intends to prohibit reproduction of those "defective" persons, who if discharged, would become a menace, but if incapable of procreating might be discharged with safety and become self-supporting. While this procedure is no longer a condition of deinstitutionalization, the holding of Buck, permitting the involuntary sterilization of allegedly feebleminded or defective persons, has never been explicitly overturned.

In his decision, Justice Holmes opined that the statute in question successfully balanced the interests of the disabled with society's interest in eradicating feeblemindedness, stating, "It would be strange if [the state] could not call upon those who already sap the strength of the state for these lesser sacrifices ... in order to prevent our being swamped with incompetence." Id. at 207. The statute was upheld and Carrie Buck was sterilized. See id. at 208. Given this decision, it is inexcusable that the unfounded, discriminatory stereotypes of the early 20th century remain pervasive at the dawn of the 21st century. See Jay Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. Rev. 30 (1985).

[23] Samuel J. Brakel, John Parry, Barbara A. Weiner, The Mentally Disabled And The Law, 532-38 (3d ed. 1985) (As of 1985, twenty-one states still prohibited marriage of persons who are "insane," "weakminded," "imbeciles," or similar.).

[24] *Id*. at 94.

parental rights on a finding of a mental disability, without more. *See, e.g.*, Helvey v. Rednour, 408 N.E.2d 17 (Ill. App. Ct. 1980) (holding unconstitutional state statute that permitted the court to free for adoption, without parents' consent, the child of parents deemed mentally impaired).

Although mandatory sterilization is no longer practiced, Buck v. Bell has never been explicitly overruled.[25] Nevertheless, the underlying belief that persons with mental disabilities should not reproduce and are inherently unable to provide proper parenting to their children survives today. In August 2005, at least thirty States, including New Hampshire, expressly included mental disability as a ground for the termination of parental rights. In New Hampshire, persons with mental disabilities are, most often, subjected to proceeding to terminate their parental rights on one or both of the following grounds provided for by RSA 170-C:5: (1) they have failed to correct the conditions leading to a neglect finding pursuant to RSA 169-C within 12 months of the finding despite reasonable efforts under the direction of the district court to rectify the conditions, or (2) "[b]ecause of mental deficiency or mental illness, the parent is and will continue to be incapable of giving the child proper parental care and protection for a longer period of time than would be wise or prudent to leave the child in an unstable or impermanent environment." RSA 170-C:5 (III) and (IV).

As is evidenced in this case, it is not surprising that persons with mental disabilities are more likely to have their cases referred for termination of parental rights. Although termination of parental rights statutes such as RSA 170-C:5, on their face, require some showing that the parent's intellectual disability will create an inability to discharge parental responsibilities, such

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[25] In Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), however, the Supreme Court struck down a mandatory sterilization law for thieves, but not embezzlers. The Court resolved the issue on equal protection grounds, stressing the importance of marriage and procreation as among "the basic civil rights of man." *Id.* In reaching this conclusion, the Court noted that "marriage and procreation are fundamental to the very existence and survival of the race." *Id.*

statutes tend to focus the court's inquiry on the parent's status as a person with a mental disability or condition rather than on her conduct towards or relationship with her child.

In addition, as this court recognized in In re Jonathan T., 148 N. H. at 301 and In re Kristopher B., 125 N. H. at 682-83, there is a paucity of resources available to parents with disabilities who, given more time and assistance, could develop acceptable parenting skills.[26] Given this paucity of resources, federal legislation exacerbates the inability of troubled parents to salvage their parental relationship. The Adoption and Safe Families Act of 1997 ("ASFA"), 42 U.S.C. § 675(5)(E), aimed at reducing the number of children languishing in long-term foster care, imposes time constraints that act to accelerate the process of termination of parental rights.[27]

Most notably, ASFA requires that the state file a petition to terminate parental rights if the child has been in foster care for fifteen of the most recent twenty-two months.[28] The statutes of every state, including New Hampshire have been amended to comply with the mandates of

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[26] See Annette R. Appell, Virtual Mothers and the Meaning of Parenthood, 34 U. Mich. J.L. Reform 683, 775-76 (2001) ("[O]nce the state coercively removes children from their families, it all too frequently fails to provide meaningful and sufficient services to support or reunify the families. On the contrary, the unavailability of needed services and inappropriateness of some provided services are well-established.") (footnotes omitted).

[27] See 42 U.S.C. § 675(5) (2000); Richard L. Brown, Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights, 70 Mo. L. Rev. 125, 128-31 (2005) (Providing a brief overview of the effect of federal legislation, including ASFA, on the termination of parental rights process; see also Libby S. Adler, The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997, 38 Harv. J. on Legis. 1 (2001); Robert M. Gordon, Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997, 83 Minn. L. Rev. 637 (1999); Richard Wexler, Take the Child and Run: Tales from the Age of AFSA, 36 New Eng. L. Rev. 129 (2001).

[28] The filing requirement, however, is subject to several statutory exceptions:

> The state will not be required to file a petition to terminate parental rights if
> (i) at the option of the State, the child is being cared for by a relative;
> (ii) a State agency has documented in the case plan ... a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
> (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 671(a)(15)(B)(ii) of the title are required to be made with respect to the child.

Id. § 675(5)(E)(i)-(iii).

ASFA.[29] As a consequence of ASFA, the "law creates an implicit presumption that a parent who allows a child to linger in foster care for fifteen months is unfit."[30] A cure to problems such as mental illness may well be impossible within a fifteen-month time frame.[31] There may, for instance, be long waiting periods for admittance to treatment programs[32] and, once admitted, successful treatment may require successive courses of treatment to stabilize the individual.[33]

With these issues in mind, it is clear that if the parent-child relationship is to be remediated, consistent with the purposes set forth in RSA 169-C:2, appropriate supportive services coordinated by unbiased and knowledgeable caseworkers must be provided. As will be discussed in the following sections of this brief, *Amicus* respectfully suggests that the federal and state law provide a framework for ensuring that, in fact, such services will be provided.[34]

II. THE AMERICANS WITH DISABILTIES ACT PROVIDES A FRAMEWORK FOR INTERPRETING THE OBLIGATIONS IMPOSED BY STATE LAW TO ENSURE THAT PERSONS WITH MENTAL ILLNESS HAVE A REASONABLE OPPORTUNITY TO OBTAIN COORDINATED, COMPREHENSIVE TREATMENT THEY NEED WHILE MAINTAINING THEIR HIGHLY VALUED PARENT/CHILD RELATIONSHIPS.

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29 See 169-C:24-a. *See also* Catherine J. Ross, The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings, 11 Va. J. Soc. Pol'y & L. 176, 198 (2004).

30 Id. at 198. ASFA requires that a petition for termination be filed within the prescribed time period. See Madelyn Freundlich, Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament? 28 Cap. U. L. Rev. 97, 100 (1999). It does not, however, require that parental rights in fact be terminated. *Id.* at 101.

31 *See* Ross, *supra* at 209.

32 *See id*. at 211.

33 *Id*. at 212.

34 *Amicus* recognizes that the ADA was not asserted as a claim below, and thus will not be specifically considered by this court in determining whether the lower court erred in authorizing DCYF to initiate termination of parental rights proceedings. Amicus submits, however, that the ADA should inform this court's construction of the RSA 169-C as it pertains to the lower court's oversight over DCYF's obligation to provide services to parents with mental illness. This is so for several reasons. First, courts have an obligation under the ADA to ensure that persons with disabilities are not discriminated against in the services that it offers. Tennessee v. Lane, 541 U.S. 509 2004. Second, this court has general supervisory obligations over lower courts under the New Hampshire's Constitution and state law. Part 2, Article 37 of the New Hampshire Constitution; RSA 490:4. Finally, this court often utilizes federal law to inform its construction of similar anti-discrimination provisions of states. *See e.g.* Scarborough v. Arnold, 117 N.H. 803 (1977). Given the obligation of DCYF under RSA 169-C to individually tailor services to and accommodate the needs of parents and the frequency with which parents with mental illness come before the lower courts, *Amicus* submits that the provisions of RSA 169-C are similar to those of the ADA.

A. The ADA Was Designed To End Discrimination Due To Prejudicial And Stereotypical Attitudes Towards Persons With Disabilities And To Ensure That Public Entities Reasonably Modify Their Services To Meet Their Disability-Related Needs.

Although the rights of parents are not unassailable and terminations will be upheld if applicable due process requirements have been met, this court has recognized that "the parent-child relationship is a fundamental liberty interest clothed in constitutional protections." In re Doe, 123 N. H. 634, 641 (1983); State v. Robert H., 118 N.H. 713, 715 (1978). Therefore, claims that a parent has been denied services needed to maintain her relationship with her children warrant "careful consideration in light of the nature of the parental relationship which may be subject to termination pursuant to RSA chapter 170-C." In re Doe, 123 N. H. at 641.

As noted, discrimination imposed on parents with mental illnesses may lead to the destruction of dearly-held familial bonds that could, with appropriate supportive services coordinated by unbiased and knowledgeable caseworkers, be preserved and strengthened. Designed to end discrimination due to prejudicial and stereotypical attitudes towards persons with disabilities and to ensure that public entities reasonably modify their services to meet their disability-related needs, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., provides a framework for interpreting the obligations imposed by state law to ensure that persons with mental illness have a reasonable opportunity to obtain coordinated, comprehensive treatment they need while maintaining their highly valued parent/child relationships.

The ADA was enacted in 1990 as a civil rights law designed to remedy discrimination against individuals with a broad range of disabilities in many areas of public life. The ADA requires that public entities, such as the courts, the Department of Health and Human Services and DCYF, make reasonable modifications to their rules, policies, and practices of the services

they provide in accommodating persons with disabilities that utilize their services. The services provided by these entities include individual assessments and reunification programs designed to evaluate and assist persons in developing their parenting skills when their children are removed from their custody.

Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity." 42 U.S.C. § 12132. "Disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual," a "record of such impairment," or "being regarded as having such an impairment." *Id.* § 12102(2). Mental illness is specifically covered by the ADA. The term "mental impairment" includes "[a]ny mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 28 C.F.R. § 35.104 (emphasis added).

The ADA definition of disability is functional and a matter of degree.[35] Disabilities that "substantially limit one or more of the major life activities" are covered by the ADA. 28 CFR § 35.104. Major life activities include caring for oneself, walking, seeing, learning, and working. *Id.* These activities are considered to be substantially limited when the individual either cannot perform the activity or is significantly restricted as to "the condition, manner or duration under which [he] can perform" it as compared to the average person in the general population.[36] The

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[35] Cary LaCheen, Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs, 8 Geo. J. on Pov. L. & Policy 1, 41 (2001). 28 CFR pt. 35, App. A, Section by Section Analysis, Subpart A, Section 35.100 Test A.

[36] In addition, the nature and severity of the impairment, the duration or expected duration of the impairment, and the permanent or long term impact of, or resulting from, the impairment should be considered in determining whether an individual is substantially limited in a major life activity.

record in this case indicates that the parent in this case is a person with a disability within the meaning of the ADA.[37]

The ADA, like Section 504, recognizes that persons with disabilities may be subjected to various types of discrimination. 28 C.F.R. § 35.131. It states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs or activities of a public entity." 42 U.S.C. § 12132. Congress directed the Department of Justice to promulgate regulations to implement this prohibition. *Id.* § 12134. These regulations, adopted by the Department of Justice, state that with regard to aids, programs or services, individuals with disabilities cannot be denied or given an unequal or less effective opportunity to participate or obtain the same result or benefit. 28 C.F.R. § 35.130(b)(1). Neither may the aids, benefits or services be different or separate except when necessary to make them effective. *Id.* § 35.130(b)(1)(iv). Public entities may not use "criteria or methods of administration" that have a discriminatory effect, or that have the purpose or result of substantially impairing the goals of the program or services for people with disabilities. Id. § 35.130(b)(3). They may not use eligibility criteria that screen out or tend to screen out individuals or a class from full enjoyment of programs and services unless needed to provide the service. *Id.* § 35.130(b)(8). Much of this language directly parallels federal regulations under Section 504. 29 U.S.C. § 794.

B. The ADA Applies To DCYF Services And To The District Court In Its Oversight Of The Provision Of Services Under RSA 169-C And Congress Intended the ADA to Provide Comprehensive Protection, Including Protection From State Discrimination in Participation in Family Life.

Although this Court can decide that the ADA applies to DCYF services and to the district court in its oversight of the provision of services under RSA 169-C on the basis of the "plain and

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[37] See Report of Dr. Andrew R. Connery Ed.D., on June 6, 2005. Appendix, Exhibit G, Page 44.

unambiguous" language of the ADA, the legislative history also supports the conclusion that the ADA applies to DCYF services. To presume that the ADA was not intended to cover DCYF services is to dismiss the undoubtedly comprehensive nature of the ADA, as well as the pervasive discriminatory attitudes and practices in the United States, vis-à-vis childbearing and child-rearing by individuals with disabilities, that existed when the ADA was enacted.

As noted above, people with disabilities were subjected to widespread discrimination in the area of family life prior to the enactment of the ADA and, not too long ago most states authorized compulsory sterilization of individuals with mental illness or mental retardation, and at least four states authorized sterilization of individuals who had epilepsy.[38] The U.S. Commission on Civil Rights also found that, historically, many states prohibited people with disabilities from marrying, and many states terminated the parental rights of parents with disabilities through unjustified proceedings. *Id.*

The ADA was enacted, to provide a "clear and comprehensive national mandate" to address these issues. By the end of the 1980s, the United States Senate and House of Representatives both recognized that the existing statutes, including Section 504, were "inadequate" to address "the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, 101st Cong., 1st Sess. 18 (1989); H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 47 (1990). The Senate emphasized that there was a need for "omnibus civil rights legislation" for individuals with disabilities, to remedy the persisting discrimination. S. Rep. No. 116, 101st Cong., 1st Sess. 19 (1989). Attorney General Richard Thornburgh, speaking on behalf of President George Bush, described the purpose of the ADA:

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[38] U.S. Commission on Civil Rights, Accommodating the Spectrum of Individual Disabilities, at 37. Congress relied heavily on this U.S. Commission on Civil Rights report as it evaluated the nature of the discrimination against individuals with disabilities. The report was entered into testimony before House and Senate subcommittees, and was quoted in the Committee Reports of the Senate Comm. on Labor and Human Relations, S.Rep. No. 101-116, at 8 (1989), and the House Comm. on Educ. and Labor, H.R. Rep. No. 101-485, pt.2, at 28, 31 (1990).

> One of its [ADA's] most impressive strengths is its comprehensive character. Over the last 20 years civil rights laws protecting disabled persons have been enacted in a piecemeal fashion. Thus, existing federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protection.

H.R. Rep. No. 101—485, pt. 2, at 48; S. Rep. No. 101116, at 19 (1989)

To guarantee a comprehensive effect to the coverage of Title II of the ADA, Congress deliberately chose "not to list all of the types of actions that are included within the term 'discrimination,' as was done in Title I and III." H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367. Furthermore, Congress legislated as to its intent to eradicate discrimination in *all* areas of daily life; "[t]he Congress finds that - the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101 (a) (8).

The terms "full participation" and "equality of opportunity" include full participation in family life. 42 U.S.C. § 12101 (a) (8)**.** The U.S. Supreme Court has recognized that the ADA prohibits state conduct that is based on or "perpetuates *unwarranted assumptions* that persons [with disabilities] **. . .** are incapable of participating in community life" or that "severely diminish the everyday activities of individuals, including family relations..." Olmstead v. L.C., 527 U.S. 581, 600-01 (1999) (emphasis added).[39]

"Equality of opportunity" must be read to include the equality of opportunity to parent, because the "rights to conceive and to raise one's children have been held to be 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399 (1923), 'basic civil rights of man,' Skinner v. Oklahoma,

[39] A decade before the ADA's enactment, the Supreme Court of California anticipated the U.S. Supreme Court's Olmstead holding, when it recognized that integration of people with disabilities into the mainstream of society includes, "the integration of the handicapped into the responsibilities and satisfactions of family life, cornerstone of our social system." In re: the Marriage of Ellen J. and William T. Carney, 24 Cal. 3d 725, 741 (1979) (reversing and remanding the trial court's decision because it was based on stereotypes of the ability of a person with a disability to parent).

316 U.S. 535, 541 (1942), and 'rights far more precious...than property rights,' May v. Anderson, 345 U.S. 528, 533 (1953)." Stanley v. Illinois, 405 U.S. 645, 651 (1972); 42 U.S.C. § 12101 (a)(8). This right can be infringed upon, under the *parens patria* doctrine, when such infringement is in the best interests of the child. However, the best interests of the child cannot be determined until *after* parental unfitness is established: "[u]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the fact-finding stage of any proceeding, the interests of the child and his natural parents coincide. Santosky v. Kramer, 455 U.S. 745, 760-61 (1982). Therefore, both a parent and a child are initially presumed to share an interest in their family's integrity. *Id*.

It is impossible to read the legislative history of the ADA, and the clear and unambiguous language in the statute, and conclude that it excludes the "services, programs, and activities" of DCYF and the district court. DCYF and the district court exercise immense control over many parents, as well as children, with disabilities, in the precious social arena of family life, and ultimately influences whether the family unit will remain intact or will be dissolved. DCYF services and the functions of the district court are covered by this comprehensive legislation, and must be provided free of discrimination.[40]

C. The Rights Provided By The ADA Include The Right To Reasonable Accommodations In Services.

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[40] It is important to note that the parent in this case has a separate protected right to reasonable accommodations under state law. As will be discussed below, by requiring individualized tailored services, RSA 169-C also suggests that the needs of parents with disabilities must be accommodated. The ADA specifically provides that:

> [n]othing in this Act shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or *law of any state* or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

42 U.S.C. §12201(b) (emphasis added).

The ADA regulations adopt an important concept from the Section 504 regulations: reasonable accommodation. 28 C.F.R. § 35.130(b)(7). While the Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment only protects individuals with disabilities from irrational state action, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001), the ADA's concept of discrimination includes the failure to make "reasonable modifications" in policies, practices or procedures when necessary to prevent discrimination. 28 C.F.R. § 35.130(b)(7). Public entities are not required to make accommodations that would "fundamentally alter" the nature of the program or service, *Id.* § 35.164, or result in "undue financial and administrative burdens."

Qualified individuals with disabilities, who are recipients of services from a public entity, such as the Mother in this case, are entitled to the protections of the ADA. First, as previously indicated, they are protected by the non-discrimination mandate of Title II of the ADA. 42 U.S.C. § 12132. Also, included among parents' rights are: (a) the right to reasonable modifications in DCYF services, when the modifications are necessary to avoid discrimination on the basis of disability, unless DCYF can demonstrate that "making the modifications would fundamentally alter the nature of the service," 28 C.F.R. § 35.130(b) (7); and (b) the right to receive a service that is "as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others." 28 C.F.R. **§** 35.130(b) (1) (iii).[41]

The requirement that public entities, such as DCYF and the district court, provide reasonable accommodations for persons with disabilities is well established. *See* Alexander v. Choate, 469 U.S. 287, 301 (1985). Under Section 504 of the Rehabilitation Act of 1973, an Act

[41] Federal regulations clearly state that it is not discrimination to provide benefits, services and advantages to people with disabilities or to a particular class of individuals with disabilities that are "beyond" those provided to others. *Id.* § 35.130(c).

which parallels, but is narrower in scope than the ADA, public entities that receive federal financial assistance are required to take "'modest affirmative steps' to accommodate the handicapped." Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir.1982); *see also* Leary v. Crapsey, 566 F.2d 863, 865 (2d Cir.1977); Rothschild v. Grottenthaler, 716 F.Supp. 796, 800 (S.D.N.Y.1989). Other courts have interpreted both the ADA and the Rehabilitation Act to require reasonable accommodations. *See, e.g.*, Tyler v. City of Manhattan, 849 F.Supp. 1429, 1439 (D.Kan.1994) (refusing to grant defendant's motion for summary judgment on plaintiff's ADA claim based on his exclusion from City Commission meeting due to lack of wheelchair accessibility); Concerned Parents to Save Dreher Park Ctr. v. City of W. Palm Beach, 846 F.Supp. 986, 992 (S.D.Fla.1994) (granting plaintiffs' motion for preliminary injunction requiring defendant to take steps to afford benefits of City's recreational program to persons with disabilities); Noland v. Wheatley, 835 F.Supp. 476, 483 (N.D.Ind.1993) (denying defendants' motion to dismiss plaintiff's ADA claim based on prison's failure to provide basic accommodation to semi-quadriplegic prisoner).

Taken together, these cases stand for the proposition that an individual with a disability is entitled to meaningful access to the benefits and services provided by a public agency or an agency receiving federal funds. Access alone is insufficient. *See* Alexander, 469 U.S. at 301. Rather, a court may require an agency, under certain circumstances, to take affirmative steps to ensure that the access is meaningful. *See id.;* Dopico, 687 F.2d at 652. At issue here is whether the accommodations being requested by the Mother in this case are reasonable.

The termination of a parent’s rights to his child is one of the most severe forms of action that a state entity can take. Santosky, 455 U.S. at 759. As demonstrated above, the ADA applies by its plain terms to the services provided by DCYF and the district court. The ADA’s purpose is

to prevent individuals with disabilities from suffering purposeful, unequal treatment resulting from "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. § 12101(a). When state courts fail to ensure that parents with mental illness are provided with the services they need to maintain family unity consistent with the purposes of RSA 169-C, they violate the rights to equal treatment and to individualized assessment safeguarded to such parents by the ADA and engage in precisely the sort of discrimination that Congress intended to extinguish. With the provision of the reasonable accommodations such as required by the ADA, many parents with mental illness, including in the parent in this case, could retain their rights to the care and nurture of their natural children. Only the application of the principles established in the ADA to such determinations can protect parents with mental illness and their children from discrimination by state entities.

III. THE DISTRICT COURT ERRED UNDER STATE LAW IN FAILING TO REQUIRE DCYF TO PROVIDE APPELLANT WITH APPROPRIATE SERVICES AND ACCOMMODATIONS TO ADDRESS HER MENTAL HEALTH PROBLEMS, WHERE THE EVIDENCE INDICATED THAT SUCH SERVICES WERE REASONABLY LIKELY TO BE EFFECTIVE.

A. Under RSA 169-C, DCYF Must Provide Services To Parents With Disabilities That Have Been Found To Have Neglected Or Abused Their Children That Are Reasonably Tailored To Accommodate Their Needs.

Under New Hampshire law, RSA 169-C, DCYF must provide services to parents that have been found to have neglected or abused their children and, if the parent has a disability, those services must be reasonably tailored to accommodate the needs of a person with a disability. Under RSA 169-C, DCYF must make "reasonable efforts" to prevent the removal of children from their parent's custody, if possible, or to provide appropriate services and other corrective action toward reunification of the family when removal of the child from the home is required. RSA 169-C:24-a IV. It is only after such efforts have failed, generally after a 12-month

period that DCYF is required to seek termination of parental rights.

New Hampshire law, like the ADA and Section 504, requires more than a one-size-fits-all approach. "[I]n determining whether the state has made reasonable efforts to prevent placement and reunify the family, the district court shall consider whether services to the family have been accessible, available, and appropriate." RSA 169-C:24-a, III (c). Implicit in this requirement is that DCYF must make reasonable accommodations to ensure the delivery of services that will truly meet the needs of the family being served. Indeed, the failure to make such efforts may serve as a basis for denying DCYF's request to proceed with termination of parental rights. RSA 169-C:24-a, III. "Reasonable efforts" at reunification requires that child welfare services be tailored to meet the needs of parents with mental illnesses. *See e.g.* In re Elizabeth R., 42 Cal. Rptr. 2d 200, 209 (Cal. Ct. App. 1995)(when parent has a mental illness, the "reunification plan, including social services provided, must accommodate the family's unique hardship").

Pursuant to DCYF's rules, children removed from their families pursuant to RSA 169-C must have a Permanency Plan. *See* He-C 6355.15(c)(2)(b). '"Permanency plan" means a document designed by DCYF, DJJS, the parents and the child, when appropriate, that describes the set of goal directed activities that will achieve legal, emotional and physical permanency for children in foster care. He-C 6355.01(x)." While the Permanency Plan process is an opportunity to advocate for the services that parents with mental illnesses need in order to regain their children, some many parents are fearful of alienating their caseworkers by being too demanding; fear being stigmatized by their caseworker if they are seen as mentally ill; or may not be ready to acknowledge the presence of mental illness.[42] Any of these factors, together with an overloaded

[42] ASFA reduces an agency's focus on reunification by requiring social workers to engage in concurrent two-track planning for children in out-of-home placement. Even as a social worker makes efforts to reunify a family, he

case docket for the caseworker and limited funding for services for the family, can result in a Permanency Plan that is inadequate to meet the family's needs.[43] The result is often Permanency Plans that are heavily weighted with requirements that parents must fulfill, but provide very limited services to help parents meet these requirements.[44]

Parents with mental illnesses face many obstacles in obtaining needed services listed in the Permanency Plan. Child welfare workers are unlikely to be knowledgeable about mental illness and the range of appropriate services for parents with mental illnesses.[45] Typically, social worker's do not directly provide mental health services to parents.[46] Instead, they may simply refer them to community mental health services. At these centers, parents are often placed on lengthy waiting lists for the services they do receive or they may receive only minimal treatment due to funding limitations.[47] Thus, community mental health centers are often unresponsive to the short timelines parents must meet to prevent removal of their children or parental termination.

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or she must also plan for the failure of those efforts by paving the way for the termination of parental rights and for adoption. 42 U.S.C. § 675(5)(C). A "permanency hearing" to develop a permanency plan must be held within twelve months of a child's entrance into foster care. 42 U.S.C. § 675(5)(C). Because of the negative perceptions of individuals with mental illnesses, caseworkers may be more apt to focus on developing cases for termination than aiding the efforts of parents with mental illnesses to regain their children.

[43] *See e.g.* Annette Appell, Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System, 48 S.C. L. Rev. 577, 597-603 (1997).

[44] Roberts, *supra* at 135 (citing studies that demonstrate that "services to maltreated children and their families are increasingly nonexistent, inaccessible, or inappropriate")(quoting Catherine A. Faver, et al., Services for Child Maltreatment: Challenges for Research and Practice, 21 Children and Youth Serv. Rev. 89 (1999)).

[45] Ackerson, supra n. 6, at 189.

[46] *Id.*

[47] The dire problems that plague the Nation's public mental health system have been the subject of many reports. See e.g. Bazelon Center for Mental Health Law, supra n. 8; National Council on Disability, The Well Being of Our Nation: An Intergenerational Vision of Effective Mental Health Services and Supports, http://www.ncd.gov/newsroom/publications/mentalhealth.html (Sept. 16, 2002)(describing the public mental health system as highly dysfunctional with lengthy waiting lists, priorities for service); Freedom Mental Health Commission, Interim Report to the President, http:// mentalhealthcommission.gov/reports/reports.htm (Oct. 29, 2002)(The commission, established by President Bush, found the mental health delivery system to be "fragmented and in disarray").

As in this case, Parents also can have difficulty obtaining funding for mental health treatment, and may encounter denials of or limitations on payments for treatment.[48] Mental health treatment rarely focuses on patients as parents and often ignores their need to improve their parenting quickly even as they work on longer-term mental health issues.[49] In addition, parents may lack the funds for necessary medications, transportation to appointments, or other needed support services.

Parents with mental illnesses also face great discrimination in obtaining and keeping the jobs that DCYF often considers crucial to reunification with their children. Employment discrimination against individuals with mental illnesses is widely documented.[50] For those who are unable to work due to their mental illness, obtaining social security disability payments is an arduous and complex process that stymies many who attempt to navigate the system without legal assistance.[51] Parents with mental illnesses who cannot comply with work requirements may find themselves cut off from welfare assistance.[52] The barriers to economic stability that parents with mental illnesses face become barriers to remaining with or reunifying with their children.

Once a child is in placement, time is of the essence. Typically, Permanency Plans are reviewed every six months, prior to judicial review of the child's placement. When a child has been in placement for fifteen of the last twenty-two months, the agency is under great pressure to

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48 Stefan, Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act, *supra* at 202-13.

49 Nicholson, *et al*., supra n. 8, at ch. 3; Ackerson, *supra* n. 6, at 189.

50 Susan Stefan, Hollow Promises: Employment Discrimination Against People with Mental Disabilities, 3-4, 13-15 (Am. Psychol. Assn. 2002)(citing numerous studies reporting widespread discrimination in employment, including a survey conducted by the author).

51 Stefan, Unequal Rights, *supra* at 220-223.

52 *Id.* at 223.

terminate the parent's rights and free the child for adoption.[53] Even if parents promptly pursue all avenues for assistance, any waiting periods they encounter in obtaining such assistance do not stop the clock's progress toward ASFA's fifteen-month requirement. Timing concerns place great pressure to amend an inadequate Permanency Plan or to get services in place more quickly while they must concurrently consider whether to challenge the CWAs treatment of their clients.

With these issues in mind, numerous courts have held that the ADA requires a state social service agency to provide reasonable accommodations in services to qualified parents with disabilities prior to petitioning to terminate parental rights.[54] The Texas Court of Appeals held that the ADA is an "affirmative defense" to a petition to terminate parental rights, and that it must be pleaded to avoid waiver. See In the Interest of C.M., S.M., D.M., and J.M., 996 S.W.2d 269, 270 (Tex. App. 1999)**.** The New Mexico Court of Appeals stated that, "[w]e understand Section 12132 of the ADA to apply in situations where a state has a statutory duty or otherwise undertakes to assist a person." In the Matter of John D., 934 P.2d 308, 313 (N.M. Ct. App. 1997)**.** The Appellate Court of Connecticut held that the ADA applies to reunification services and programs that the department must provide in order to meet the parents' specialized needs. In Re Anthony B. *et. al.*, 735 A.2d 893, 899, n.9 (Conn. App. Ct. 1999). The Michigan Court of Appeals in the case of Family Independence Agency v. Terry, concluded that "the ADA does require a public agency, such as Family Independence Agency (FIA), to make reasonable accommodations for those individuals with disabilities. Thus, the reunification services and programs provided by the FIA must comply with the ADA." 610 N.W.2d 563, 570 (Mich. Ct. App. 2000)**.** In the case of Stone v. Davies County Division County Division of Children and

[53] 42 U.S.C. § 675(5)(E)(stating that after a child has been in foster care for 15 of the last 22 months, the burden shifts to the State to show why termination of parental rights petition should not be filed).

[54] States also vary in their determinations as to how a parent properly raises the issue of a social service agency's failure to provide reasonable accommodations in services. See Section III, *infra*.

Family Services, the Indiana Supreme Court noted that the ADA would apply to their state agency's services if their state statute required services to be provided:

> If our termination statute required that services be provided to all parents prior to the termination of parental rights, under the doctrine of preemption an ADA violation by the [Division of Children and Family Services] in fulfilling that statutory duty would provide grounds for attacking the termination pursuant to the statute.

656 N.E.2d 824, 830 (Ind. Ct. App. 1995). The Indiana Supreme Court stated that once the "agency opts to provide services...the provision of those services must be in compliance with the ADA." *Id*.

Many courts have also applied an ADA analysis to the facts before them, without making a specific holding as to the applicability of the ADA. In In Re Angel B., *et. al.*, 659 A.2d 277, 279 (Me. 1995), the Maine Supreme Court ruled that the services provided to the mother were effective in affording her an equal opportunity[55] to rehabilitate and reunify with her children on the basis of her disability. Therefore, the court concluded that the Department of Human Services (DHS) offered the mother services that were compliant with the ADA. *Id.* The Washington Court of Appeals held that the services provided by the state agency were in compliance with the ADA and therefore, the ADA had not been violated. In Re the Welfare of A.J.R., 896 P.2d 1298, 1302 (Wash. Ct. App. 1995).[56]

In Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631 (Mass. 1975), the Court stated that the tests for best interest of the child and parental unfitness "reflect different degrees of emphasis on the same factors," and "that

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[55] It is noteworthy that the term "equal opportunity" is the precise language used in the ADA. 42 U.S.C. § 12101 (a) (8).

[56] *See also* In the Interest of C.M., 526 N.W.2d 562 (Iowa Ct. App. 1994). Although the court held that the issue of a violation of the ADA was not properly raised and therefore could not be considered on appeal, the court stated, after examining the services provided and the special training of the service providers, that reasonable accommodations for the mother were made.

the tests are not separate and distinct but cognate and connected." *Id*. at 641. The best interest of a child, therefore, properly becomes the court's focus only after parental unfitness is established. *Id*. Parental unfitness can be established only after a court determines that a state social service agency provided a parent with a disability with reasonable accommodations in services, and that the parent still remains unfit. While it may be easier to conceptualize the impropriety of a court ignoring the issue of reasonable accommodations when the facts involve a parent who is deaf and was provided parenting services without an interpreter, the reasoning applies equally to parents who have learning disabilities, mental retardation, or mental illness.

Finally, at least one court has specifically required its state child welfare agency to provide the services being sought in this case, and more. In Arkansas Department of Human Services v. Clark, 802 S.W.2d 461 (Ark. 1991), the court affirmed an order of the juvenile court requiring the agency to pay for parent's anti-depression medication and transportation to family counseling sessions. As the court noted in reaching its decision, "[a]mong the requirements imposed on the juvenile court are those to consider what efforts have been made, to determine if those efforts have been sufficient, and to make prospective orders based on its determinations." *Id.* at 464.

B. DCYF Failed, In This Case, To Provide Services To The Mother That Are Reasonably Tailored To Accommodate Her Needs.

A primary issue this case, from the outset of DCYF's involvement, was the Mother's mental illness and its effect on her ability to parent her child. See e.g. Appendix, Exhibit G, Page 43 ([The Mother] cannot objectively parent her child at this time due to profound mental illness and difficulties that she has had over a distinct period of time that prevent her from providing the necessary care, nurturance, and support for a young child.") On June 6, 2005, Dr. C. , a court ordered evaluator recommended "a licensed psychiatrist prescribe medication for the

Cyclothymic Disorder [a form of bipolar disorder] and for other depressive features that the patient currently experiencing.**"** Appendix, Exhibit G, Page 44. Dr. C. also recommended that Mother should receive individual counseling from a mental health provider. *Id.*

At a hearing on November 9, 2005, the Mother, who has a low wage job, indicated that she was unable to afford the medications she needed and reiterated an earlier request that the State assist her in obtaining her necessary psychiatric medications. Appendix, Exhibit K, Pages 69-76. As a follow-up to the recommendations of Dr. C. and others, the mother had been prescribed a number of medications to address both her mental and physical health problems, including Depakote and Lexapro. Appendix, Exhibit T, pg. 119. As the result of the Mother's request, the court, on the same day, issued an order that "DCYF shall use all reasonable efforts to help [Mother] receive these medically recommended medications. Appendix, Exhibit L, Pg. 82.

Despite this order, in report to the court four months later, DCYF reported to the court that it was "not able to assist clients with payment of prescriptions. DCYF Report, dated February 3, 2006, Appendix, Exhibit N, Pg. 93. On March 15, 2006, after many months and numerous futile requests to DCYF for effective assistance in purchasing medications, the Mother filed a motion to require DCYF to pay for medication necessary to be able to act as a parent. Appendix, Exhibit T, pg. 117. Based on the recommendation of her health care provider, the Mother estimated the cost of the medications could "run upwards of $700 a month." *Id*.; Appendix, Exhibit Y-1, pg. 163. However, a nurse noted, only the "Depakote and Lexapro are essential to maintain her emotional status and ability to parent and maintain employment." *Id.* In its objection and argument before the court, DCYF rationalized the denial of assistance on the grounds that the costs of the medications would be "potentially well in excess of $100,000…over the period of [the child's] minority." Appendix, Exhibit S, pg. 114; Appendix, Exhibit Y-5, Pg.

178.

Clearly, DCYF failed to even attempt to reasonably accommodate the Mother in this case. Even assuming that the Mother's medications cost the full $700 per month, DCYF's assertion that the costs could be "well in excess of $100,000" is overblown. The annual costs of medication were merely $8,400 per year, and that assumes that DCYF would have had to purchase all the medications. As the nurse noted, however, of the 10 medications listed, it appears that only two, Depakote and Lexapro, were essential to her ability to parent, and those only cost $180 per month. Appendix, Exhibit K, Pages 73.

Alternatively, DCYF could have arguably accomplished what was necessary by purchasing insurance for the family rather than the medication. The father testified that insurance for the whole family, including the children, could have been purchased for $150 per week, an amount slightly less than estimate of $700 per month, just for the Mother's medications. Appendix, Exhibit K, Pages 73.

Finally, had there been a will on the part of DCYF to make sure that the Mother was receiving the services she needed to learn parenting skills, other means for funding might have been discovered. Instead, however, DCYF chose to ignore the orders of the court and half-heartedly refer the Mother to agencies that were clearly not ready, willing, or able to provide the level of assistance she needed.

In any case, there is simply no evidence to suggest that by agreeing to pay for medication in 2006, that DCYF would have been on the hook until the child became an adult. Presumably, the medication would either be effective in restoring the Mother's parenting skills or it would fail. In either case, the issue would come to a head within a year or two. Had an investment of $8,400 per year been successful, then DCYF would realize a windfall since the children would

probably no longer need foster care or other services, all of which are easily more expensive than the cost of the Mother's medication.

IV. AN ORDER REQUIRING DCYF TO PROVIDE PETITIONER WITH REASONABLE ACCOMMODATIONS WILL SERVE THE ENDS OF JUSTICE.

If this court grants the relief being sought by Appellant, it is possible that a decision will need to be made sometime in the future regarding whether to continue services or to pursue termination. *Amicus*, therefore, urges this court to fashion a procedural approach and a remedial framework that both honors the best interest standard and protects parents from discrimination. Such an approach should: 1) allow timely ADA and state law discrimination claims or request for accommodation to be made and heard in the juvenile court; 2) require the parent to establish a *prima facie* case that she has been discriminated against by DCYF; 3) provide DCYF with the opportunity to rebut the inference of disability discrimination by demonstrating that it made efforts to modify its service plan and accommodate the parent with a disability, and that further modification would be unreasonable;[57] 4) allow the court to stay any termination of the parental rights of a qualified parent with a disability pending the implementation of a non-discriminatory service plan; and 5) allow the issuance of a specific remedial order subject to modification and accommodation.[58]

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[57] In judging whether DCYF has sufficiently rebutted the inference of discrimination, the court cannot simply rely on the subjective opinions of DCYF caseworkers who may not have the training and experience to predict whether a parent with a mental disability will remain unable to care for the child with reasonable accommodations. Such opinions must be viewed with caution in light of what we know about stereotypes and stigma. For example, a 1993 study concluded that the "current incapacity of the seriously and persistently mentally ill mother may be routinely viewed in a negative light," and that even "[m]ental health professionals may have unspoken assumptions about the wisdom of allowing" mentally ill women to parent. See *Joanne Nicholson et al.,* State Policies and Programs that Addressed the Needs of Mentally Ill Mother's In the Public Sector, 44 Hosp. & Community Psychiatry 44, 487-88 (1993)

[58] Such remedial orders should be based upon current professional understanding of the service modifications necessary to accommodate parents with mental disabilities. Recent studies have shown that when individuals with

The framework suggested by *Amicus* is congruent with current New Hampshire practice in neglect and abuse proceedings. Determinations of parental fitness must be based upon an individualized inquiry. Both the state law and the ADA determinations are intense fact-based determinations that must be considered carefully by the court on a case-by-case basis. Neither the analysis of the issue of the parent's child-rearing capabilities, nor the issue of the parent's disability and need for accommodations, can be based upon pre-conceived ideas or presumptions. As the Supreme Court has stated in addressing disability based discrimination: "The District Court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if §504 [and now the ADA] is to achieve its goal of protecting handicapped individuals from deprivation based on prejudice, stereotypes or unfounded fear…." School Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987).

The question of whether DCYF has offered a reasonable accommodation does not and cannot turn simply on whether it or some other agency has made efforts to provide Petitioner with some services. Rather, the question must turn on whether the accommodations in question, considered separately or in the aggregate, meet that mandate of the ADA that accommodations be individually tailored to the circumstances[59] and that they be effective.[60]

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mental disabilities are provided with appropriate training and support services to assist them in parenting, these individuals frequently develop adequate parenting skills. A number of studies have established that individuals with mental disabilities make good parents particularly when they received individually tailored training or assistance. *See, e.g. Susan Stefan*, Whose Egg Is It Anyway? Reproductive Rights of Incarcerated, Institutionalized, and Incompetent Women, 13 Nova L. Review 405, 451-52 (citing several studies); A. Loiselle, ed., Special Needs Parenting: A Resource Guide For Working with Parents Who Have Developmental Disabilities or Mental Illness, Thurston County Interagency Coordinating Council, Olympia, Washington (2000) . (On file with DRC).

[59] PGA Tour v. Martin, 532 U.S. 661, 688 (2001)("Petitioner's refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. ... To comply with [Title III], an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration."); School Board of Nassau County, Fla. v. Arline, 480 U.S. 273, 287 (1987)("To answer this question [whether Arline is otherwise qualified] in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact.").

Amicus is mindful that the federal and state non-discrimination mandate is not absolute. It is well established that the duty of a public agency, such as DCYF, to modify its services to accommodate individuals with disabilities can be limited in that DCYF does not have to make accommodations that are unduly costly or burdensome. *See* Alexander v. Choate, 469 U.S. 287 (1985); Southeastern Community College v. Davis, 442 U.S. 397 (1979).[61]

Thus, when the extreme step of terminating the parent-child relationship of a disabled parent is sought by DCYF, the ADA claim simply puts in front of the court the duty which DCYF has to reasonably accommodate a disabled parent so that, the court may properly be guided by evidence demonstrating reason to believe that a parent with a disability, with reasonable accommodations will correct a condition or weakness that currently disables the parent from serving his or her child's best interests.

The ADA and state law do not elevate the prerogatives of parents with disabilities above the interests of their children. They simply provide an equal opportunity for parents with disabilities to participate in services readily made available to parents without disabilities so they, too, can correct the circumstances that may, without correction, lead to an adverse determination of their fitness as parents.

CONCLUSION

For the reasons stated above, this Court should conclude that both the ADA and Section

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[60] U.S. Airways v. Barnett, 535 U.S. 391, 400 (2002) ("It is the word 'accommodation,' not the word 'reasonable,' that conveys the need for effectiveness. An *ineffective* 'modification' or "adjustment" will not *accommodate* a disabled individual's limitations."); Chisolm v. McManimon, 275 F.3d 315, 328-29 (3rd Cir. 2001) (jail obliged to provide auxiliary aid to deaf inmate under the ADA had burden of showing provided aids (pencil and paper) were effective; Marthon v. Maple Grove Condominium Association, 101 F.Supp.2d 1041, 1048 (N.D. Ill. 2000) (discussing effectiveness and appropriateness of solutions to tenants disturbed by man with Tourette's syndrome).

[61] In addition, Title II of the ADA requires state agencies to make reasonable modifications to practices, policies, or procedures when necessary in order to avoid discrimination on the basis of disability, unless the entity can establish that a fundamental alteration of the practice, policy or procedure at issue would result. 28 C.F.R. §35.130(h) (7).

504 impose a duty upon DCYF to provide reasonable accommodations to the parent in this case. In light of this duty, the order of the district court determination that DCYF should proceed to terminate the parent-child relationship should be vacated and DCYF should be ordered to provide the parent with the reasonable accommodations she needs and has requested.

Respectfully submitted the 14th day of May, 2007.

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REQUEST FOR ORAL ARGUMENT

The *Amicus Curiae* requests oral argument estimated at 15 minutes to be presented by Ronald K. Lospennato, Esq.

Ronald K. Lospennato, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2007, a copy of the foregoing was sent by first-class mail to counsel of record, New Hampshire Attorney General's Office, Naomi

Butterfield, Esq. and Anne Edwards, Esq. representing, and David Sandberg, CASA. & William D. Woodbury, Esquire.

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Ronald K. Lospennato, Esq.