

Family Court, Kings County
Docket No. NN-11606/14

Appellate Division Docket No. 2016-13341

New York Supreme Court
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of
MICHAEL A.

A Child Under Eighteen Years of Age Alleged to be Neglected by

CLAUDIA A.,

Respondent-Appellant.

ADMINISTRATION FOR CHILDREN'S SERVICES,

Petitioner-Respondent.

BRIEF OF PROPOSED *AMICI CURIAE*
IN SUPPORT OF ATTORNEY FOR
RESPONDENT-APPELLANT CLAUDIA A.

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PRELIMINARY STATEMENT

Amici submit this brief in opposition to the Kings County Family Court’s November 16, 2016 Order denying appellant’s motion for reasonable accommodations pursuant to Title II of the Americans with Disabilities Act (“ADA”) and finding that the New York City Administration for Children’s Services (“ACS”) had made reasonable efforts to reunify appellant with her son pursuant to §1089 of the Family Court Act.

While much research exists demonstrating the ability of individuals with intellectual disability to parent with needed supports,¹ parents with intellectual disability,² such as the Appellant Claudia A., remain an especially vulnerable population given pervasive and harmful stereotypes of people with disabilities. Their abilities are frequently underestimated, and they remain subject to the outdated notion that, by reason of their disabilities alone, they are simply incapable of parenting. Without proper enforcement of the ADA, these vulnerable parents

¹ See, e.g., The National Council on Disability, *Rocking The Cradle: Ensuring The Rights Of Parents With Disabilities And Their Children* (2014).

² *Amici* use the term “intellectual disability” in place of “mental retardation” except when directly quoting others. Although the latter term appears in some relevant case law and other documents cited here, it is offensive to many persons and has been replaced by more sensitive and appropriate terminology. As the United States Supreme Court stated in *Hall v Florida*, 134 S Ct 1986, 1990; 188 L Ed 2d 1007 (2014): “Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon. See Rosa’s Law, 124 Stat. 2643 (changing entries in the U.S. Code from “mental retardation” to “intellectual disability”); Schalock et. al, *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 *Intellectual & Developmental Disabilities* 116 (2007).”

have no recourse or remedy should ACS or its contracting agency Edwin Gould Services for Children and Families (“Edwin Gould”) deny them equal access to the services, programs, or activities that they and their families require to reunite or to remain together.

Following the 2015 guidance issued by the U.S. Departments of Justice and Health and Human Services,³ courts and agencies throughout the country have increasingly understood the way in which the ADA must be applied in the child welfare context. At the same time, a growing body of research establishes that parents with intellectual disability who require additional supports in order to meet agency requirements can strengthen their parenting capacities with supports and accommodations to which they are entitled under the ADA.

The Family Court’s November 16, 2016 Order ignores these developments, permitting ACS and Edwin Gould to overlook the growing body of case law, regulatory guidance, and social science research that confirms parents with intellectual disability can effectively parent. In disregarding these developments, the lower court fails to apply the ADA. Further, the lower court’s improper conclusion that ACS was not required to tailor services for Ms. A. perpetuates the

³ Department of Justice/Health and Human Services, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, (2015).

discriminatory conduct that the ADA is intended to address. The court's position effectively creates a roadblock for parents with disabilities in accessing parenting services and supports that accommodate their disability. The Order does not align with the ADA, or New York case law that has long recognized the requirement that child welfare agencies must tailor parenting services to the individualized needs of the parents they serve. Further, numerous studies establish that parents with intellectual disability who require additional supports in order to meet agency requirements can strengthen their parenting capacities with appropriate assistance.

Ms. A. is a parent with intellectual disability. She needs meaningful, substantive supportive services that can assist her in parenting her child. As set forth here, she unequivocally has the right under the ADA to access those services with reasonable modifications that take her disability into account. Such modifications to services exist and are reasonable in nature. ACS and Edwin Gould as the agency performing these services have a legal obligation under the ADA to provide modified services, but have failed to do so. Only once reasonable efforts are made to provide such services can the state properly assess Ms. A.'s ability to parent her child.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae are the American Civil Liberties Union; the Autistic Self Advocacy Network; The Arc of the United States; the Civil Rights Education and Enforcement Center; Disabled Parents' Rights; Katherine Moore; the National Federation of the Blind; the New York University School of Law Family Defense Clinic; the Office of Respondent Parents' Counsel; and Robyn M. Powell.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit nonpartisan organization of almost 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons. The ACLU’s Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the community, and in which people with disabilities have jobs, homes, education, healthcare, and families. This means a country in which people with disabilities are no longer segregated into, and overrepresented in, civil and criminal institutions such as nursing homes, psychiatric hospitals, jails, and prisons.

The Autistic Self Advocacy Network (“ASAN”) is the nation's leading 501(c)(3) advocacy organization run by and for autistic individuals. ASAN seeks to advance the principles of the disability rights movement with regard to autism. ASAN believes that the goal of autism advocacy should be a world in which autistic people enjoy equal access, rights, and opportunities. ASAN works to empower autistic people across the world to take control of our own lives and the future of our common community, and seek to organize the autistic community to ensure our voices are heard in the national conversation about us. Nothing About Us, Without Us!

The Arc of the United States (“The Arc”) is the nation's largest community-based organization of and for people with intellectual and/or developmental disabilities. The Arc promotes and protects the human and civil rights of people with such disabilities and actively supports their full inclusion and participation in the community. The Arc has a vital interest in ensuring that all individuals with intellectual and/or developmental disabilities receive the protections and supports provided by law. The Arc has long taken the position that people with intellectual and/or developmental disabilities have the right to make decisions about having and raising children and to have access to the proper supports on an individual basis to assist them in raising their children within their own home. With over 650 state and local chapters nationwide, The Arc is well positioned to comment on the

impact of state family law statutes upon people with intellectual and developmental disabilities and their children.

The Civil Rights Education and Enforcement Center (“CREEC”) is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC’s efforts to defend human and civil rights extend to all walks of life, including ensuring that people with disabilities have access to all programs, services, and benefits of public entities, especially programs as fundamental as those that support parenting and families, and the accommodations necessary to sustain them. CREEC lawyers have extensive experience in the enforcement of Title II of the Americans with Disabilities Act and believe the arguments in this brief are essential to realize the full promise of that statute.

Disabled Parents Rights (“DPR”) is a Colorado non-profit organization dedicated to combating discrimination that impacts parenting for disabled parents. DPR was founded in response to the widespread involvement of parents with disabilities in child welfare cases. DPR represented respondent parents in dependency and neglect cases throughout the state of Colorado, and provides technical assistance to attorneys representing parents across the United States and abroad. DPR staff teaches continuing legal education, seminars, and classes to attorneys, judges, and social workers about best practices in representing disabled

parents, as well as compliance with state and federal law and regulations. Through direct representation, education, research, and training, the DPR combats discrimination that impacts parenting for disabled parents. Focused exclusively on the rights and representation of disabled parents, DPR is particularly suited to comment on the treatment of parents with disabilities in child welfare systems.

Katherine Moore is an Associate Professor at Seton Hall University School of Law. Professor Moore is currently developing a new Medical-Legal Partnership Clinic (“MLP Clinic”) at Seton Hall. The MLP Clinic will represent low-income people via medical settings in New Jersey in a variety of civil legal matters, including housing, public benefits, and advance directives. The MLP Clinic will also train health and medical professionals to identify health-harming social conditions, and will improve policies and regulations that have a negative impact on population health. The mission of the MLP Clinic will be to address the social and environmental determinants of health such as income, access to health care, access to housing, healthy housing conditions, access to healthy food, education, job stability, and personal safety. Professor Moore is a scholar of disability law, health law, family law, and poverty law. Prior to joining the faculty at Seton Hall, Professor Moore was an Acting Assistant Professor at New York University School of Law. Professor Moore was also a Staff Attorney and Kirkland & Ellis Fellow at the Bronx Defenders Family Defense Practice, where she represented

parents in child welfare cases in Bronx Family Court. Professor Moore is licensed to practice law in New York.

The National Federation of the Blind (“NFB”) is the largest and most influential membership organization of blind people in the United States. With more than 50,000 members, and affiliates in all fifty states, in the District of Columbia, and in Puerto Rico, and over 700 local chapters in most major cities, the ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. Since its founding in 1948, the NFB has devoted significant resources toward advocacy, education, research, and development of programs to ensure that blind individuals, including blind parents, enjoy the same opportunities enjoyed by others. The NFB has taken a significant role in advocating for blind parents, including working with legal advocates to ensure that the interests of blind parents are represented in child welfare proceedings and in private custody disputes and that state laws protect the rights of parents with disabilities against the biases and assumptions that many people make about the ability of parents with disabilities to safely and confidently parent. The NFB has developed a resource library at <https://nfb.org/blindparents> which it hopes will be helpful to anyone involved in protecting the rights of blind parents.

Established in 1990, the New York University School of Law Family Defense Clinic (“Family Defense Clinic”) was the first law school clinic in the

country to train students to represent parents accused of child abuse and neglect and prevent the unnecessary break-up of indigent families. A pioneer of interdisciplinary representation in the field, the Family Defense Clinic teaches law and graduate-level social work students to collaborate to protect family integrity and help families access services that keep children safe and out of foster care. Family Defense Clinic faculty teach, research, and write in the field of child welfare, advocate for policy reform, and train and provide technical support to parent advocates around the country. The Family Defense Clinic represents indigent parents in New York City Family Courts in child protective and termination of parental rights and related custody and visitation proceedings.

The Office of Respondent Parents' Counsel ("OPRC") was established on January 1, 2016 by Senate Bill 14-203 (Section 13-92-101 through 104, C.R.S.) as an independent office in the Colorado Judicial Department. The office provides centralized oversight over independent contracting attorneys who represent parents throughout Colorado's twenty-two judicial districts. In addition, the office provides other litigation supports, such as investigators and experts, as well as appellate consultation, and state legislative advocacy. The ORPC's mission is to protect the fundamental right to parent by providing effective legal advocates for indigent parents in child welfare proceedings. This right is protected when a parent has a dedicated advocate knowledgeable about child welfare laws and

willing to hold the state to its burden. The office's duties are to provide accountability, training, and resources, develop practice standards, and advocate for systemic and legislative changes in Colorado. Since its inception, the ORPC has taken an interest in the treatment of disabled parents in child welfare proceedings, and adequate application of the tenets of the Americans with Disabilities Act to protect those parents' fundamental right to parent. The lack of adequate guidance on the proper application of the ADA to disabled Colorado Parents is an issue of some concern.

Robyn M. Powell is a disability rights attorney with more than a decade of professional experience. Currently, she is a Research Associate at the Lurie Institute for Disability Policy as well as a disability law and policy consultant. Ms. Powell also serves as co-investigator of the National Research Center for Parents with Disabilities. For nearly five years, Ms. Powell served as an Attorney Advisor at the National Council on Disability ("NCD"), an independent federal agency that advises the President and Congress on matters concerning people with disabilities. Previously, she served as the Disability Rights Program Manager at the Equal Rights Center, Assistant Director for Policy and Advocacy at the Disability Policy Consortium, and Staff Attorney at Greater Boston Legal Services. While in law school, Ms. Powell interned for both the NCD and the Disability Law Center, the Massachusetts Protection & Advocacy agency.

Ms. Powell is one of the country's foremost authorities on the rights of parents with disabilities. Ms. Powell is principal author of NCD's *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children*. Ms. Powell has written and presented extensively on the needs and experiences of parents with disabilities, including several publications in peer-reviewed journals and law reviews. Ms. Powell has also been interviewed by various news outlets, including NPR, BBC, ABC News, the Daily Beast, and the Associated Press, regarding parents with disabilities. Recently, Ms. Powell founded the Disabled Parenting Project. As a disability rights activist and scholar, Ms. Powell is a member of several organizations, including the American Association on Intellectual and Developmental Disabilities, International Association for the Scientific Study of Intellectual and Developmental Disabilities, American Public Health Association, National Association of Lawyers with Disabilities, and the Boston Bar Association. In August 2015, Ms. Powell was appointed to the American Bar Association's Commission on Disability Rights. Ms. Powell is also a Board Member of the Disability Policy Consortium. Ms. Powell is currently pursuing her PhD at the Heller School for Social Policy and Management at Brandeis University and holds a Bachelor of Science degree in Social Work from Bridgewater State University, a Juris Doctor from Suffolk University Law School, and a Masters of Arts degree in Social Policy from Brandeis University. Ms.

Powell is licensed to practice law in Massachusetts and the U.S. District Court of Massachusetts.

Amici bring to this case an expertise in the issue raised in this appeal. The work of Amici center on enhancing the independence and self-determination of the clients we serve. In light of this mission, Amici seek to protect the rights of parents with disabilities who face discrimination in the child welfare system. Amici seek to aid the Court in establishing the applicability of the ADA to Article 10 proceedings. The ADA is a critical civil rights protection that is specifically designed to address the pervasive discrimination faced by parents with disabilities in the child welfare system, including parents with intellectual disabilities.

STATEMENT OF FACTS AND PROCEEDINGS

Amici adopt the Statement of Facts from the brief of the Respondent-Appellant mother Claudia A.

ARGUMENT

I. Parents With Intellectual Disability Are Subject To Pervasive Discriminatory Treatment In The Child Welfare System

A. Understanding Intellectual Disability

Approximately six million adults have an intellectual or developmental disability, or a condition that limits cognitive functioning. Matthew W. Brault, *U.S. Census Bureau, Americans with Disabilities: 2010 Household Economic Studies*, 1-24, 9 (2012), available at, <http://www.census.gov/prod/2012pubs/p70-131.pdf>. Developmental disability is an umbrella term that includes intellectual disability. Intellectual disability is characterized by significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical skills. American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010) (hereinafter “AAIDD”). The cognitive aspect of intellectual disability refers to reasoning, planning, solving problems, thinking abstractly, comprehending complex ideas, and learning. Adaptive functioning refers to a collection of conceptual, social, and practical skills that are learned and performed by people in their everyday. *Id.*

Persons with intellectual disability have limitations in certain adaptive behaviors that impact conceptual, social, or practical functioning. *See* AAIDD;

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders Intellectual Disability Fact Sheet*, available at https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DS_M-5-Intellectual-Disability.pdf (hereinafter “DSM-5 Fact Sheet”). Conceptual functioning relates to the ability to communicate orally, read, write, reason, learn and retain knowledge and information. *Id.* Social functioning encompasses the ability to have empathy, make social judgments, socialize, interact with others and make and retain friendships. *Id.* Practical functioning may involve the ability to engage in personal care, manage money, use transportation, conduct housekeeping activities, maintain a safe environment, use the phone and perform other activities of daily living. *See* The Arc, *Introduction to Intellectual Disability*, <http://www.thearc.org/page.aspx?pid=2448>.

Historically, a diagnosis of intellectual disability was considered an insurmountable barrier to achieving independence and self-sufficiency. As a result, persons with intellectual disability faced involuntary institutionalization, forced sterilization and segregation from the community. In the landmark decision *Olmstead v. L.C. ex rel. Zimring*, the United States Supreme Court determined that unjustified institutional segregation of individuals with intellectual disability constituted discrimination under Title II of the Americans with Disabilities Act (ADA). *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 596 (1999). Following

Olmstead, States were no longer allowed to warehouse individuals with disabilities in state- run institutions if they were capable of – and consented to – being integrated into the community. *Id.*

Under what is now commonly referred to as the *Olmstead* integration mandate under the ADA, states are required to provide community-based services to individuals with disabilities who are transitioning into the community unless doing so would fundamentally alter the nature of the government service, program or activity. *Id.* at 597. Through medical advancements, policy initiatives and government programs and supports, individuals with intellectual disability are more fully integrated into the community. Much of this integration has flowed largely from successful litigation to enforce the *Olmstead* integration mandate, designed to increase independence, autonomy and self-determination. The “treatments and training techniques,” for example, which focus on strengthening adaptive functioning “have proven effective in increasing the mental capacity” of individuals with an intellectual disability to learn and develop conceptual, social and practical skills. Karen Andreasian *et. al.*, *A Report Of The Mental Health Law Committee And The Disability Law Committee Of The New York City Bar Association: Revisiting S.C.P.A 17-A: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. Rev. 287, 294 (2015).

B. Individuals With Intellectual Disability And The Right To Form a Family

States have long played a central role in regulating the rights of individuals with intellectual disability to have and raise children. Women with intellectual disability were targeted as early subjects of what would become a sweeping global eugenics movement that spanned from 1890 to the early 1940s, and decades longer in some marginalized communities. *See, e.g.*, James W. Trent Jr., *Inventing the Feeble Mind: A History of Mental Retardation in the United States*, 193-194 (1994); Lutz Kaelber, *Eugenics/Sexual Sterilizations in North Carolina*, *Eugenics: Compulsory Sterilization in 50 American States*, <https://www.uvm.edu/~lkaelber/eugenics/NC/NC.html>.

The purported goal of the eugenics movement was to create a “superior human stock” by eradicating the reproduction of those deemed “unfit.” Trent, *supra* at 136. Eugenacists believed that social problems, such as so-called feeble-mindedness, poverty, and unwanted children, could be alleviated by controlling social breeding. *Id.* Approximately 70,000 women and men were involuntarily sterilized in the United States during the eugenics movement. Adam Cohen, *The Supreme Court Ruling that led to 70,000 Forced Sterilizations*, NPR WNYC Radio (March 7, 2016), *available at* <http://www.npr.org/sections/health-shots/2016/03/07/469478098/the-supreme-court-ruling-that-led-to-70-000-forced->

sterilizations.

In 1927, the United States Supreme Court sanctioned the eugenics movement by upholding a Virginia law that permitted involuntary sterilization of people with disabilities when a state institution deemed it in the best interest of the resident and society. *Buck v. Bell*, 274 U.S. 200, 206 (1927). Justice Oliver Wendell Holmes, Jr., a fervent supporter of eugenics, wrote the opinion for the Court. In a decisive two-page decision, he determined it was the duty of society to “prevent those who are manifestly unfit from continuing their kind,” and ended the opinion with his now infamous words: “Three generations of imbeciles are enough.” *Id.* at 207. By 1930, more than 30 states had passed involuntary sterilization statutes. Although no longer regarded as defensible law, the United States Supreme Court has not yet explicitly overruled *Buck v. Bell*.

Although *Buck v. Bell* was decided nearly 90 years ago, the biases and stereotypes that drove the eugenics movement continue to harm parents with intellectual disability today. As recently as 2001, child welfare agency workers told a parent with intellectual disability that if she consented to sterilization she would get her children back. *Vaughn v. Ruoff*, 253 F.3d 1124, 1127-28 (8th Cir. 2001). The mother underwent a tubal ligation. *Id.* at 1128. The child welfare agency nonetheless moved forward to recommend the termination of the mother’s parental rights. *Id.*

The U.S. Court of Appeals for the Eighth Circuit upheld the lower court’s decision that the child welfare agency workers violated the parent’s due process rights by coercing the mother to undergo sterilization. *Id.* Yet at the same time, citing *Buck*, the court noted that involuntary sterilization is not always unconstitutional, and that “the mentally handicapped, depending on their circumstances, may be subjected to various degrees of government intrusion that would be unjustified if directed at other segments of society.” *Id.* at 1129. The reasoning of *Vaughn v. Ruoff* underscores the challenges of parents with intellectual disability to overcome the systematic discrimination driven by biases grounded in *Buck v. Bell*.

C. Pervasive Discrimination Of Parents With Intellectual Disability In The Child Welfare System

Parents with intellectual disability confront overwhelming obstacles driven by systematic discrimination when subject to the child welfare system. According to a report published by The National Council on Disability, *Rocking The Cradle: Ensuring The Rights Of Parents With Disabilities And Their Children*, 1-352, 76, 78 (2014), available at http://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf (hereinafter *Rocking the Cradle*), “[s]ystematic discrimination by state courts, child welfare agencies, and legislatures against parents with disabilities and their

families” results in removal rates of up to 80 percent for a parent with intellectual disability.

Rocking the Cradle provided the first comprehensive look at the impact of discriminatory laws and policies on parents with intellectual disability in the child welfare system. Due to limited research, there is currently no precise data on the number of parents with intellectual disability. *Id.* at 16. Current research suggests, however, that there are 4.1 million parents with disabilities in the United States. *Id.* at 15. Overwhelming evidence confirms that parents with intellectual disability face “significant discrimination based largely on ignorance, stereotypes, and misconceptions.” *Id.* at 68. The removal of children from the home of parents with intellectual disability is often “carried out with far less cause, owing to specific, preventable problems in the child welfare system.” *Id.* at 43.

Child welfare agencies fail to afford parents with intellectual disability the same access or opportunities to benefit from parenting services. Studies report that this differential treatment is based on “[n]egative expectations and outmoded beliefs that . . . parenting deficiencies are irremediable[,]” and therefore supports tailored to a parent’s intellectual disability are not considered by child welfare agencies. *Id.* at 80; *see also* David McConnell & Gwynnyth Llewellyn, *Stereotypes, Parents with Intellectual Disability and Child Protection*, 24 *J. Soc. Welfare & Fam. L.* 297, 299, 302 (2002). Parents with intellectual disability, like

all adults, are “more likely to be effective in their roles as parents” when they are “provided access to appropriate and effective supports as needed to fulfill the basic responsibilities of child rearing.” The Arc, *Parents with Intellectual and/or Developmental Disabilities*, <http://www.thearc.org/who-we-are/position-statements/life-in-the-community/parents-with-idd>. Furthermore, “despite research which documents the ability of many parents with intellectual and/or developmental disabilities to raise a child successfully with appropriate and effective supports, access to these supports continues to be limited, fragmented and uncertain.” *Id.*

“[T]here is little empirical support” for the presumption that parenting deficiencies are irremediable, yet it often forms a basis for the alarmingly high removal rates of children from parents with intellectual disability. *See* McConnell & Llewellyn, *supra* at 303. Rather, it is well documented that parents with intellectual disability who require assistance to meet agency regulations can improve their parenting with the proper supports. *See, e.g.*, Trupti Rao, *Implementation of an Intensive, Home-Based Program for Parents With Intellectual Disabilities*, *Journal of Public Child Welfare* 7(5): 691- 706, 701 (October 2013) (“improvements were noted in eight of 10 parenting skills areas taught (communication, feeding an older child, home management, infant child care, parent/child interaction, planning/problem solving, time out and toileting) . . .

. [f]ollowing [the] implementation of an intensive, in-home based service” for parents with intellectual disabilities); Maurice A. Feldman, *Self-Directed Learning of Child-Care Skills by Parents with Intellectual Disabilities*, J. of Soc. Welfare and Fam. L., 17-31, 1, 17, 25 (2004) (study of 33 families – 79% of whom were under the supervision of child protective services – found that parents with intellectual disability can improve parenting skills when guided in using “self-directed learning” materials (self-instructional audiovisual child-care materials) that “teach basic child-care, health, and safety skills”); McConnell & Llewellyn, *supra* at 306 (identified breadth of “studies on parental learning” that found “parents with intellectual disability can and do learn, apply new knowledge and maintain new skills.” (citations omitted)).

Furthermore, the developmental status of children of parents with intellectual disability does not vary significantly from age-norm specifications, in any of the following domains: physical, self-help, social, and academic. See David McConnell et. al., *Developmental Profiles of Children Born to Mothers With Intellectual Disability*, 28 (2) Journal of Intellectual & Developmental Disability 122–134 (June 2003).

Despite these findings, child welfare agencies typically fail conduct an individualized assessment or observation of a parent with intellectual disability to determine the most appropriate services. *Rocking the Cradle* at 132. Experts have

also found that “parents with intellectual disabilities are often held to a higher standard of parenting than non-disabled parents.” *Id.* at 80. There is also evidence to suggest that child-protective services workers have different emotional reactions to parents with intellectual disability, influenced by stereotypes. S.N. Proctor & S.T. Azur, *The Effect of Parental Intellectual Disability Status on Child Protection Service Worker Decision Making*, 57(12) J. Intellectual Disability Research 1104 (2012). Significantly, CPS workers made notably higher ratings of “risk” for parents with ID than for parents without ID. *Id.* at 1110.

By these actions and inactions – the failure to provide any parenting services, the failure to tailor parenting services to make them effective, the unfair use of higher parenting standards, and the noxious influence of stereotypes – child welfare agencies are failing to equally serve parents with intellectual disability. This failure to provide equal and equally effective services creates barriers to achieving the goal of family reunification. As a result, parents with intellectual disability often face insurmountable discriminatory barriers to family reunification.

II. Title II Of The Americans With Disabilities Act Requires ACS And Edwin Gould to Modify Their Services And Supports For Ms. A.

A. The ADA Framework

The explicit purpose of the ADA is “to provide a clear and comprehensive

national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(1). In enacting the ADA, Congress recognized the systemic discrimination against persons with disabilities in accessing government services, programs and benefits. 42 U.S.C. § 12101(a)(5), (7); *Tennessee v. Lane*, 541 U.S. 509, 525 (2004). Congress outlined the broad goals of the ADA regarding persons living with disabilities including, but not limited to, “equality of opportunity, full participation, independent living, and economic self-sufficiency.” 42 U.S.C. § 12101(a)(7).

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act contains parallel prohibitory language that is applicable to programs, services, and activities receiving Federal financial assistance. 29 U.S.C. § 794(a); 28 C.F.R. §§ 41.51(a), (b)(1)(i); 24 C.F.R. § 8.4(a). The ADA is substantially similar to the Rehabilitation Act, and a similar analysis applies to claims brought under both statutes. *See, e.g., Lyons v. Legal Aid Soc’y*, 68 F.3d 1512, 1515 (2d Cir. 1995).

Under ADA implementing regulations, “[a] public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of

administration” that “have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to persons with disabilities,” 28 C.F.R. § 35.130 (b)(3)(ii), and must provide reasonable modifications in policies, practices or procedures to avoid disability- based discrimination. 28 C.F.R. § 35.130(b)(7).

Courts have held that a public entity’s program must be modified to assure meaningful access to the entity’s programs and services. *See Disabled in Action v. Board of Elections in City of New York*, 752 F.3d 189, 197 (2d Cir. 2014); *Rothschild v. Grottenthaler*, 907 F.2d 286, 292 (2d Cir. 1990) (citing *Alexander v. Choate*, 469 US 287, 301 (1985)).⁴ Simply providing access to services is not an acceptable defense under the ADA if a public agency fails to accommodate an individual’s disability; access must be meaningful. *Marisol v Giuliani*, 929 F.Supp. 662, 685 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 372 (2d Cir. 1997). The ‘reasonable modification’ requirement even “contemplates modification to state laws” where

⁴ Title II of the ADA requires that public agencies make “**reasonable modifications**” to their services or programs. (*See* 28 C.F.R. §§ 35.130(b)(7)(i), “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” By contrast, Title I requires that employers make “**reasonable accommodations**” for employees and applicants. (*See* 42 U.S.C. § 12111).

The terms “reasonable modifications” and “reasonable accommodations” are occasionally used interchangeably in Court decisions. Because this argument is based in Title II of the ADA, the term “reasonable modification” will be primarily used here throughout, except where utilizing quotation.

necessary. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144,163 (2d Cir. 2013). Modifications to services include aids, benefits and services that are tailored to the individual's needs to ensure they obtain the same result, or gain the same benefit, as an individual without a disability. 42 U.S.C. § 12131(2).

The ADA imposes an affirmative duty on all public entities to address the barriers that limit equal access and opportunity to persons with disabilities. Courts have interpreted the reach of the ADA as expanding beyond claims of disparate treatment to create an affirmative duty on public entities. *See Alster v. Goord*, 745 F. Supp. 2d 317, 338 (S.D.N.Y. 2010) (“[t]he ADA not only protects against disparate treatment but also creates an affirmative duty to provide reasonable accommodations for the disabled”) (citing *Henrietta D. v. Bloomberg*, 331 F.3d 261, 275-76 (2d Cir. 2003)).

The Second Circuit in 2003 considered the New York City's Division of AIDS Services and Income Support (“DASIS”), and the “DASIS Law,” which combined under one umbrella several city agencies. The Court found that the Dasis Law, which “provides for intensive case management, for low client-caseworker ratios, and for imposition of clear deadlines” is “fundamentally procedural in nature,” and requiring compliance with that law “represents reasonable accommodation relief.” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 281 (2d Cir. 2003)

B. ACS Has An Affirmative Duty To Comply With The Americans With Disabilities Act

ACS has an affirmative duty to comply with the Americans with Disabilities Act. 28 C.F.R. §§ 35.130 (b)(1), (3); §§ 42.503(b)(1), (3). As a condition to receiving federal funding for foster care maintenance and adoption services, ACS is required to modify its administration of services to accommodate Ms. A., in its administration of services to achieve the permanency goal of reunification. Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(B)(ii); *see also* Family Court Act §§ 1089(c)(4), (d)(2)(iii); §§ 1055-b(a)(iv); §1027(b)(ii); § 1028 (b)-(d).

The Department of Health and Human Services Office of Civil Rights (HHS) and the Department of Justice (DOJ)⁵ recently issued joint technical assistance guidelines⁶ to assist state and local child welfare agencies and courts in

⁵The DOJ and HHS enforce Title II of the ADA against public entities, including child welfare agencies and state courts. HHS is the federal agency that ensures that entities receiving Federal financial assistance from HHS, including child welfare agencies and state courts, comply with their legal obligation under Section 504 of the Rehabilitation Act to provide equal access to child welfare services and activities in a non-discriminatory manner.

⁶The guidelines were a response to a joint investigation by the DOJ and HHS, which found that a State agency discriminated against a parent with intellectual disability in violation of the ADA and Rehabilitation Act. *See Investigation of the Massachusetts Department of Children and Families by the United States Departments of Justice and Health and Human Services Pursuant to the Americans with Disabilities Act and the Rehabilitation Act*, available at www.ada.gov/ma_docf_lof.pdf. The investigation recognized that parents with intellectual disability disproportionately experience discrimination based on “stereotypes, lack of individualized assessments, and failure to provide needed services.” *See* DOJ Technical Assistance at 2.

protecting the civil rights of parents with intellectual disability. Department of Justice/Health and Human Services, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, (2015), available at http://www.ada.gov/doj_hhs_ta/child_welfare_ta.pdf (hereinafter DOJ Technical Assistance). Courts may properly rely on the “well-reasoned views,” and “body of experience and informed judgment” of the DOJ for guidance in interpreting the ADA. *Olmstead*, 527 U.S. at 583.

The DOJ Technical Assistance clarifies that child welfare agencies must comply with Title II of the ADA:

all child welfare-related activities and programs of child welfare agencies and courts are covered [under the ADA] including, but not limited to, investigations, . . . assessments, removal of children from their homes, case planning and service planning, visitation, . . . foster care, reunification services, and family court proceedings.

DOJ Technical Assistance at 8. This coverage extends to private and non-profit agencies that contract with the state or municipality to provide services. *Id.* (citing

28 C.F.R. §§ 35.130(b)(1), (3); § 42.503(b)(1), (3); 45 C.F.R. § 84.4(b)(1), (4)).

Consistently, New York state courts have found that agencies must tailor services to the specific needs of the family. *See, e.g., In re Austin A.*, 243 A.D.2d 895, 898 (3d Dep't 1997) (the agency's lack of attention to the specific problems preventing reunification was characterized as a failure to tailor services to respondent's needs); *In re Michael E.*, 241 A.D. 635, 636-37 (3d Dep't 1997) (although aware of the parent's developmental disability, the child welfare agency failed to take affirmative steps to provide parenting classes targeted to the parent's disability); *In re Sheila G.*, 61 N.Y.2d 368, 385 (1984) (“[a]n agency must always determine the particular problems facing a parent with respect to the return of his or her child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps”).

In a recent 2016 decision, the Michigan Court of Appeals cited to the DOJ Technical Assistance and *Rocking the Cradle* in its finding that the Department of Health and Human Services (DHHS), the state child welfare agency, failed to reasonably accommodate a parent with intellectual disability in its provision of services. *In re Hicks/Brown*, 890 N.W.2d 696, 704 (Mich. Ct. App. 2016), *aff'd*, *In re Hicks/Brown*, 893 N.W.2d 637 (Mich. 2017). The court found, *inter alia*, that DHHS delayed in conducting an individualized assessment of the parent's intellectual functioning, failed to tailor services to her disability prior to the

assessment and failed to assist the parent or monitor her progress once tailored services were provided. *Id.* at *10. DHHS had moved to terminate the mother’s parental rights before attempting to locate or implement tailored services. The Court of Appeals held that “[t]he concept of giving disabled parents additional time to benefit from services is [] of import[,]” and until “appropriate assistive services” were identified and implemented DHHS could not move to terminate the mother’s parental rights. *Id.* at *8, *12. The Supreme Court of Michigan, affirming in part and vacating in part, agreed that “[a]bsent reasonable modifications to the services or programs offered to a disabled parent, the Department has failed in its duty under the ADA to reasonably accommodate a disability”. *In re Hicks/ Brown*, 893 N.W.2d 637, 640 (Mich. 2017). The Supreme Court vacated the termination order and remanded the case.

The Connecticut Court of Appeals held that reunification services fell into the category of services covered by the ADA. The Court held that if reunification services fail to meet the parent’s specialized needs created by mental disability this would be a violation of the parent’s right under the ADA. *In re Anthony B.*, 735 A.2d 893 at 899 (Conn. App. 1999). The Supreme Court of Vermont likewise affirmed this principle and went further, issuing a call to similarly situated parents in family court to boldly assert their rights. The Court stated, “We hope the effect of this decision is to encourage parents and other recipients of SRS [former name

of Vermont’s “Department of Children and Families”] services to raise complaints about services vigorously and in a timely fashion.” *In re B.S.*, 693 A.2d 716, 722 (Vt. 1997).

The Supreme Judicial Court of Massachusetts spoke with even greater detail. The Court gave helpful examples of the ways that modifications to the provision of preventative services were needed in *Adoption of Gregory*, 747 N.E.2d 120, 126 (Mass. 2001). These included, (1) scheduling visits twice a week, (2) “retaining a particular social worker because of her experience working with cognitively limited individuals,” (3) keeping a qualified social worker on the case rather than transferring the case from an investigative worker to an assessment worker to an ongoing social worker “as a direct response to the father’s special needs,” (4) seeking outside professional advice about “providing parenting instructions to cognitively limited adults,” and (5) referring parent to parenting program that specialized in “instructing cognitively limited adults.” *Id.* at 120, 126. The Court stated that parents in family court who believe their disability is not being accommodated “should claim a violation of [her] rights under either the ADA or other antidiscrimination legislation, either when the parenting plan is adopted, when [she] receives those services, or shortly thereafter.” *Id.* at 124.

The California Court of Appeals has said that, “[i]f mental illness is the starting point, then the reunification plan, including the social services to be

provided, must accommodate the family's unique hardship... [a] disabled parent is entitled to services which are responsive to the family's special needs in light of the parent's particular disabilities." *In re Elizabeth*, 42 Cal. Rptr. 2d 200 at 209 (Cal. Ct. App. 1995).

C. The Applicability Of The ADA To The Parties In This Proceeding

Disability is defined by the ADA as "(1) a physical or mental impairment that substantially limits one or more major life activities of such individual; (2) a record of such impairment; or (3) being regarded as having such impairment." 42 U.S.C.A. § 12102. The U.S. Department of Justice's regulations implementing the ADA Amendments Act of 2008 state that "[i]ntellectual disability substantially limits brain function." 28 C.F.R. § 35.108(d)(2)(iii)(C). Individuals with intellectual and developmental disabilities are considered individuals with disabilities under various New York State laws, such as New York Surrogate's Court Procedure Act, NY Surr. Ct. Pro. § 1750 and the Mental Hygiene Law, NY Ment. Hyg. § 15.01.

Ms. A. is an individual with a disability under the ADA. 42 U.S.C. § 12102 (1), (2)(A); 29 U.S.C. § 705(9)(B). Between May 2014 and November 2016, Ms. A. was evaluated three times, once by the Family Court itself. All three evaluations found that Ms. A. had cognitive limitations, including intellectual disability.

(Montego Evaluation, May 2014; New York State Institute on Disability Evaluation, September 2014; Family Court’s Mental Health Services Evaluation, March 2016). Further, Ms. A. is regarded as having a disability based upon the ACS’s actions. *See* 42 U.S.C.A § 12102 (1) (C), (3)(A). ACS’s Neglect Petition alleged that Ms. A. was “cognitively limited,” and stated that a mental status examination reflected “primitive and irrational decision making.” (Neglect Petition dated May 5, 2014).

Furthermore, a “qualified individual with a disability” is defined as “an individual with a disability who ... meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *United States v. Georgia*, 546 U.S. 151, 153–54 (2006) (quoting 42 U.S.C. § 12131(2)). Ms. A was qualified to receive ACS services.

ACS is a “public entity” under the ADA because it is an agency of the City of New York. 42 U.S.C. § 12132. As a public entity, ACS must comply with the ADA in the administration of its services, programs and activities, and is liable for the discriminatory actions of its contracting agencies. 28 C.F.R. § 35.130(b)(1). ACS contracted with Edwin Gould to provide services to Ms. A., and therefore Edwin Gould is also bound to ADA compliance.

III. ACS and Edwin Gould Are Required to Make Reasonable Modifications to Their Programs And Services That Take Ms. A.’s Specific Support Needs Into Account

A. The ADA Requires ACS and Edwin Gould To Provide Ms. A. With Supportive Services That Accommodate Her Disability

To comply with the ADA and to ensure meaningful access to the reunification services offered, ACS and Edwin Gould must modify their policies, practices or procedures to accommodate Ms. A.'s intellectual disability. 28 C.F.R. § 35.130(b)(7). The ADA requires child welfare agencies to accommodate a parent's disability to ensure meaningful access to their programs and services. 42 U.S.C. § 12131(1)(A), (B); 28 C.F.R. §§ 35.130(a), (b)(1), (b)(3).

Title 18, § 423.2 of the New York City Rules and Regulations explains what services ACS may provide generally to any parent. These services include case management, case planning and case work contact and supportive services (e.g. parent aide services, homemaker services, home health aide services, parent training services, housekeeper/chore services and home management services). They also include clinical or specialized rehabilitative services (e.g., assessment, diagnosis, testing, psychotherapy, and specialized therapies by a social worker, psychologist, psychiatrist, or other recognized therapist); intensive home-based family preservation services; and a wide range of housing, transportation, and child-care and cash/goods services. 18 N.Y.C.R.R. § 423.2. Given that ACS already provides many of the services that could be appropriately tailored to Ms. A's needs, ACS is well situated to provide the services that Ms. A. is entitled to under the ADA.

Reasonable modification to programs or services for a parent with a disability under the ADA may include providing different services than those listed above, *or* providing those services in a different way, with different frequency, or in a different setting. The agency should “provide enhanced or supplemental training, . . . increase frequency of training opportunities, or [] such training in familiar environments conducive to learning” that are tailored to Ms. A.’s intellectual disability. DOJ Technical Assistance at 10; *see also* 28 C.F.R. §35.130(b)(7).

B. ACS and Edwin Gould Must Modify their Policies and Procedures To Comply With The ADA, In Line With Other State And Federal Agencies

In order to comply with the ADA, ACS and Edwin Gould will need to change some aspects of the way they operate – as numerous offices in New York City, New York State, and across the country already have.

Employee training in this area is crucial. Caseworkers need to have the knowledge and skills necessary to assess and educate parents with intellectual disability. Jennifer A. Culhane, *A Challenge of California Family Code Section 7827: Application of This Statute Violates the Fundamental Rights of Parents Who Have Been Labeled Mentally Disabled*, 3 Whittier J. Child & Fam. Advoc. 131, 142 (2003). But agencies must also ensure that their employees are unbiased, nonjudgmental, and empathetic. *Id.* at 143. There are studies and resources

available for agencies to acquire this skill in order to comply with the law. *Id.*; see also Maurice A. Feldman & Munazza Tahir, *Skills Training for Parents With Intellectual Disabilities*, in *Handbook of Evidence-Based Practices in Intellectual and Developmental Disabilities*, 615-631 (Singh 2016).

Agencies must also consider human capacity-building within their organizations when addressing compliance with the ADA along with integrating appropriate models for working with people with disabilities. See Sandra T. Azar & Kristin N. Read, *Parental Cognitive Disabilities and Child Protection Services: The Need for Human Capacity Building*, 36 *J. Sociology & Social Welfare* 127 (2009). This can mean strengthening the “knowledge, abilities, and skills” of on-the-ground workers while also improving institutional structure and processes. *Id.* at 135. There is a rich depth of possibility for what this might mean for any individual organization, from “triage and referral skills” to worker understanding of “multiple systems of care.” *Id.* at 139. What is clear, however, is that agencies must take steps toward this capacity-building in order to sustainably integrate both compliance with the ADA and effective working relationships with their clients.

To comply with the ADA and to ensure meaningful access to the services offered, federal, state, and local government agencies routinely modify their general policies, practices or procedures to accommodate persons with disabilities.

For example, multiple agencies modify the way essential information is

provided so as to make it more accessible to persons with disabilities, including persons with intellectual disability. In addition to providing information in standard written form, through TDD/TDY or sign language interpreters, or in Braille, the Social Security Administration allows applicants for and recipients of Social Security benefits to receive information via audio recording, thereby accommodating those who are unable to read as well as those who process spoken information more effectively than written information. *See. E.g., Social Security Administration, What You Need to Know When You Get Supplemental Security Income* (Sept. 2016), <https://www.ssa.gov/pubs/EN-05-11011.pdf>.

Similarly, the New York Human Resources Administration, which administers cash and food assistance programs to low-income residents of New York City, instructs its front-line workers to actively offer to assist applicants with potential cognitive disabilities by helping them to read instructions and application forms, and by helping them to fill out these forms. *See NYC Human Resources Administration, Policy Bulletin No. 16-80-OPE, Revision to the New Screening Process to Help Identify Potential Reasonable Accommodations* (Oct. 18, 2016), http://onlineresources.wnyc.net/nychra/docs/pb_16-80-ope.pdf.

Agencies regularly modify timelines and other procedural requirements in order to allow persons with disabilities full access to the services they provide. For example, upon verification of a recipient's need for reasonable accommodations,

the New York City Department of Housing Preservation and Development, which administers the Section 8 voucher program in the city, will extend the length of the recipient's voucher, provide an exception to subsidy standards, or provide an exception to the general program rule against renting from a relative, as needed.

See NYC Department of Housing Preservation & Development, Request for Reasonable Accommodation,

<https://www1.nyu.gov/assets/hpd/downloads/pdf/request-for-reasonable-accommodation-form.pdf>.

Most agencies provide notice to applicants for and recipients of their services, informing them of their right to request a reasonable accommodation, listing examples of possible accommodations. *See, e.g., New York City Human Resources Administration, I Need Help: Disability Access,*

<https://www1.nyu.gov/site/hra/help/disability-access.page>; New York City Department of Housing Preservation & Development, *Request for Reasonable Accommodation*, <https://www1.nyc.gov/assets/hpd/downloads/pdf/request-for-reasonable-accommodation-form.pdf>.

In addition, a number of agencies go a step further and require front-line workers to actively screen for individuals with disabilities, so that they can then make necessary modifications to application procedures and program requirements. For example, the New York State Office of Temporary and

Disability Assistance (“OTDA”) requires local social service agencies that provide temporary cash, food and/or home energy assistance to not only “conduct an initial inquiry to identify an applicant or recipient’s disability needs,” but also to “use behavioral observations, historical data known to the agency or other means to help identify those persons who may not be able to self-disclose existing physical or mental conditions to district staff.” New York State Office of Temporary & Disability Assistance, *“Providing Access to Temporary Assistance Programs for Persons with Disabilities and/or Limited English Proficiency*, 06-ADM-05 Rev. at 10-11, <http://otda.ny.gov/policy/directives/2006/ADM/06-ADM-05.pdf>. Staff “may then offer reasonable modifications in policies, practices, and procedures to make benefits, programs or services accessible for those persons.” *Id.* at 11. *See also, e.g.*, NYC HRA Policy Bulletin No. 16-80-OPE (describing a pilot program to help workers better identify applicants with disabilities who might not self-identify as disabled, including applicants with mental health diagnoses and those with cognitive disabilities). In order to help parents acquire the skills necessary to successfully parent their children, agencies should consider what they can do in-house to expand the range of options available to caseworkers in their work with parents.

In order to provide specific accommodations to people with disabilities, city, state, and federal agencies alike have modified the way they do business, present

materials, and provide services, so that people with disabilities have equal access to services. People with disabilities must be able to access, use, and benefit from the services that these agencies provide. So too must ACS and Edwin Gould modify their policies, procedures, training, and services to comply with the ADA and to ensure that the disabled parents with whom they work have every chance to succeed.

C. ACS and Edwin Gould Violated The ADA By Failing To Provide Tailored Supportive Services To Ms. A.

There is an array of available services that Ms. A. could have benefitted from. These services include parenting-focused services as well as other services designed to assist any person with intellectual disability. The particular services from which an individual with intellectual disability might benefit must be curated and tailored by someone qualified to make that assessment, like a specialized caseworker with training in working with people with intellectual disability. (*See* discussion *infra* Section B.). The list of choices is not uniform, but rather the range of possibilities shows the necessity of careful planning, tailoring, and consideration.

i. Parenting-Specific Services

There is a growing body of social science literature that confirms that parents with intellectual disability can strengthen their parenting skills with services that use different modes of teaching and learning. For example, “[p]arents

with intellectual disabilities have been shown to acquire and maintain learned parenting skills when instruction uses modeling of skills, verbal instruction, and feedback of parent performance.” Katie MacLean & Marjorie Aunos, *Addressing the Needs of Parents with Intellectual Disabilities: Exploring a Parenting Pilot Project*, 16 J. Developmental Disabilities 18, 19 (2010) (internal citation omitted). In addition, “instruction is aided by visual depictions of each step of the task, the use of multiple exemplars to encourage skills generalization, ... the use of concrete, personalized and in-vivo practice sessions, and by being delivered in the home or a home-like environment.” *Id.* at 19-20.

Furthermore, research shows that persons with intellectual disability may acquire skills better when taught in the home or in a home-like environment. MacLean & Aunos, *Addressing the Needs of Parents with Intellectual Disabilities* at 19. Other simple changes to the way that caseworkers interact with parents can be effective.

One example of a successful model that could be easily adapted by agencies is found in Maurice Feldman’s *Self-Directed Learning of Child-Care Skills by Parents with Intellectual Disabilities*, 17(1) *Infants & Young Children* 17 (2004). Feldman describes visual materials that were provided to parents along with an audiocassette. The child-care skills the parents learned included basic child-care, health, safety, and interactive skills. *Id.* at 19. The materials used in the instruction

were “inexpensive” and “easily distributed”. *Id.* at 18. Ultimately, “96% of the self-trained skills rapidly reached the same level seen in competent parents and maintained as long as 3.5 years.” *Id.* at 17.

Another example of how using a different setting can improve the ability of a person with intellectual disability to acquire a skill can be seen in the location chosen for visitation. Visitation between Ms. A. and her son Michael could also have benefited from an appropriate modification. In *Guidelines for Practice with Parents with Intellectual Disabilities and their Children*, inappropriate evaluation and visitation are described as settings that are only “in an office setting”; where there are “too many people present” or “someone present who alters the situation – foster parent/someone with hostile relationship”. Furthermore, “[a]dequate and appropriate visitation needs to be established so that a parent/child relationship can be developed or sustained.” Through the Looking Glass, *Guidelines for Practice with Parents with Intellectual Disabilities and their Children*, <https://www.lookingglass.org/local-services/services-for-children-with-disabilities/98-guidelines-for-practice-with-parents-with-intellectual-disabilities-and-their-children>.

In Ms. A.’s case, visitation in a more home-like setting or with the aid of a visitation coach could have been beneficial, if it had been tried. Therapeutic visitation coaches are a well-known service referral in Family Court and are

available through agencies such as the New York Society for the Prevention of Cruelty to Children, Comprehensive Family Services, and can also be provided by an appointed mental health professional. *See* New York Society for the Prevention of Cruelty to Children Therapeutic Supervised Visitation Program, <http://www.nyspcc.org/our-work/therapeutic-supervised-visitation-program/>; Comprehensive Family Services Therapeutic Services, <http://cfs-nyc.com/services-view/therapeutic-services-2/>; New York City Bar Legal Referral Service, <http://www.nycbar.org/get-legal-help/article/family-law/child-custody-and-parenting-plans/visitation/>.

Researchers have demonstrated that with appropriate services for those who require them, people with intellectual disability can act as competent and loving parents. *See* Maurice A. Feldman, *Parenting Education for Parents with Intellectual Disabilities: A Review of Outcome Studies*, 15 Res. Dev. Dis. 299 (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 (1999). There is therefore every reason to support parents with intellectual disability in developing any skills they need to parent successfully.

ii. Other Services

In addition to parenting-focused services, “services for the parent should

include . . . support for ancillary and personal issues, as needed.” Maurice A. Feldman & Munazza Tahir, *Skills Training for Parents With Intellectual Disabilities*, in *Handbook of Evidence-Based Practices in Intellectual and Developmental Disabilities*, 615-631, 625 (Singh 2016). Ms. A.’s own service plan included other items in areas such as habilitation, job-training, and other supportive services. Ms. A. was not eligible for services via the New York State Office For People With Developmental Disabilities (“OPWDD”), because of her ineligibility for Medicaid. *See* OPWDD, Benefits Information, Medicaid – Introduction, https://opwdd.ny.gov/opwdd_resources/benefits_information/medicaid/introduction, stating that “[m]ost OPWDD Services are funded through Medicaid”. However, Ms. A. might have been eligible for other outside services, or Edwin Gould itself could have provided those services to Ms. A. (*See also* discussion *infra* Section B.) Courts may order these types of services, as the Supreme Judicial Court of Massachusetts did in *Adoption of Gregory*, 747 N.E.2d at 126.

As one example of the types of services Ms. A. could have received, Feldman & Tahir provide the following list of services that an individual with intellectual disability might benefit from: housekeeping, money management, mental health counseling, therapy, social skills training, academic upgrading, vocational training, building natural systems of support, accessing financial and community resources, and crisis support. Feldman & Tahir, *Skills Training for*

Parents With Intellectual Disabilities at 625.

Another framework suggests that, in addition to parent training programs, “home-based safety interventions, and the development of supportive peer relationships” can help too. Esther Coren et. al., *Parenting Training for Intellectually Disabled Parents: A Cochrane Systematic Review*, 21(4) *Research on Social Work Practice* 432, 433 (2011) (internal citations omitted).

And another list of supports that help parents with intellectual disability provide appropriate care, in addition to in-home parenting skills trainings: “Help with shopping and money management; Service coordination; Health care, learning to deal with doctors; Child care, early intervention services; Mental health counseling; Counseling for substance abuse and other addictions; Basic academic education for parents; Transportation for families; Play groups for children and parents; Crisis intervention services.” The Arc, *Parents with Intellectual Disabilities Fact Sheet* (2011), <http://www.thearc.org/document.doc?id=3659>.

Similarly, a 2011 report to the President’s Committee For People With Intellectual Disabilities (“PCPID”) identified the following five “critical areas of support”: employment, income support, long-term services and support, education, and health care. PCPID, *People with Intellectual Disabilities: Critical Supports that Promote Independence, Full and Lifelong Community Inclusion* at 1, <https://www.acl.gov/sites/default/files/programs/2017->

03/pr_2011_pcpid_report_b582.pdf (2011).

These lists give a taste of what individualized and appropriate service provision for a parent with intellectual disability might look like. Edwin Gould could have provided assistance with scheduling and time-management, repeating instructions, writing down appointments and calling with reminders the day of, or escorting Ms. A. to appointments rather than telling her to navigate on her own. *See In re Hicks/Brown*, LC No. 12–506605–NA, 2016 WL 1650104 (Mich. Ct. App. April 16, 2016). Edwin Gould operates an extensive “preventive services” program, which provides services directly to people with intellectual disability. *See Edwin Gould Services for Children and Families, Services for Adults with Intellectual or Developmental Disabilities*, <http://www.egscf.org/v3/media/2015/08/Flyer-Services-for-Adults-with-Intellectual-or-Developmental-Disabilities.pdf>. The expertise needed to provide these services in-house at Edwin Gould could be available if tapped for clients like Ms. A. who do not qualify for Medicaid.

Assistance in applying for and obtaining supportive housing was another unmet element of Ms. A.’s service plan. Had she been able to acquire supportive housing, some of her service needs could have been administered via that housing, and she would have had a stable residence for either visitation or ultimately for living with her son. (*See Permanency Hearing Report* dated Nov. 3, 2015, at 2;

May 4, 2016 Tr. at 10:22-11:3). In a 2013 report, New York Governor Andrew Cuomo's *Olmstead* Cabinet recognized that "New Yorkers with disabilities need affordable, accessible housing to lead integrated lives." *Report and Recommendations of the Olmstead Mandate*, 1-31, 19 (October 2013) available at <http://www.governor.ny.gov/sites/governor.ny.gov/files/archive/assets/documents/solmstead-cabinet-report101013.pdf>. New York invests \$900 million annually in supportive housing initiatives, which includes 24-hours supervised supportive housing. *Id.*

Supportive housing in New York City is administered via the Department of Health (DOH). The DOH website states the following:

Supportive Housing applications are generally prepared by a mental health professional. However other individuals, including family members, often assist people with this process.

The Center for Urban Community Services (CUCS) is available to help with the housing application process. Call CUCS at (212) 801-3333 and ask for a Housing Consultant for information about the HRA housing application and referral process.

New York City Department of Housing,

<https://www1.nyc.gov/site/doh/health/health-topics/housing-services-supportive-housing.page>. Nevertheless, Ms. A. was not referred directly to the DOH, she was not referred to CUCS, and she was not provided with information about how to have a mental health professional complete an application with her.

By failing to appropriately modify their services and provide the legally required individualized accommodations appropriate to the assessed needs of their client, ACS and Edwin Gould violated two fundamental principles that are central to the administration of child welfare services under the ADA: “(1) individualized treatment and (2) full and equal opportunity.” DOJ Technical Assistance at 4. To satisfy these principles, the “[s]ervices in support of appropriate service plan activities and goals – such as visitation, parenting skills training, transportation assistance, counseling, respite, and other” preventive and reunification services must be “appropriately tailored to be useful to the individual.” *Id.* at 14. ACS and Edwin Gould failed Ms. A. in that regard.

CONCLUSION

For the reasons discussed above, this Court should reverse the decision of the Family Court, and order that ACS and Edwin Gould provide Ms. A. with the services she requests, and order any other and such further relief as the Court deems appropriate.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 670.10.3(f) of this Court, the undersigned certifies that the foregoing brief was prepared in compliance with Rule 670.10.3. It is further certified that the brief was prepared on a computer using Times New Roman 14 point typeface with double line spacing for the body and Times New Roman 12 point with single line spacing for the footnotes. The computer states that the word count is 11,784.

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