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Jennifer Wright Burke
University of Baltimore School of Law

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**AMERICANS WITH DISABILITIES ACT: AN ALLEGED
VIOLATION OF THE ADA SHOULD NOT BE A DEFENSE
IN A TERMINATION OF PARENTAL RIGHTS
PROCEEDING**

I. INTRODUCTION

Congress enacted the Americans with Disabilities Act (ADA) in 1990 to ensure persons with disabilities "equality of opportunity, full participation, independent living, and economic self-sufficiency."¹ The ADA attempts to stop discrimination against persons with disabilities,² as well as expand the reach of the Rehabilitation Act of 1973³ to the actions of all state and local governments.⁴ To accomplish these goals, Title II of the ADA prohibits a public entity⁵ from excluding an individual's participation in the public entity's services, programs, or activities based on the person's disability.⁶ In addition, Title II prohibits denials of the benefits of a public entity's services, programs, or activities on the same basis.⁷

Many disabled parents face an even more daunting challenge in their lives besides the possible denial or reduction in their benefits, namely the loss of a child. Now many disabled parents lose the right to raise their children based solely on their disabilities. As a result, disabled parents have attempted to cloak themselves in the ADA's protection as a defense in state termination of parental rights proceedings.⁸ Proponents of this argument justify using the ADA as a shield for parents because the State is a public entity; therefore, termination of their parental rights violates the ADA.⁹

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1. 42 U.S.C. § 12101(a)(8) (Supp. II 1991).
 2. *See* 42 U.S.C. § 12101(b).
 3. *See* 29 U.S.C. § 701 (Supp. IV 1992).
 4. *See id.*
 5. *See* 42 U.S.C. § 12131(1). The ADA defines a public entity as: "(A) any State or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and (C) the National Railroad Passenger Corporation, and any other commuter authority (as defined in section 502(8) of title 45)." *Id.*
 6. *See id.* § 12132.
 7. *See id.*
 8. *See infra* Part V.
 9. *See In re B.S.*, 693 A.2d 716, 720 (Vt. 1997) (concluding that the ADA does not apply to termination of parental rights proceedings because such "proceedings are not 'services, programs, or activities' within the meaning of . . . the

Further, some parents argue that because they are disabled, states should provide "intensive family preservation services" to help them keep their children.¹⁰ However, these arguments have not been successful.¹¹ For instance, in *In re C.M.*,¹² the court held that because the mother did not raise any ADA issues at trial she was precluded from doing so on appeal,¹³ and even if they were considered on appeal, the mother would lose because Social Services afforded "reasonable accommodations" in the form of services provided.¹⁴

In addition to unfavorable case law, parents face States that codified their own procedures for terminating parental rights. States differ regarding what constitutes termination of parental rights. Some do not require their agencies to offer any services to the parents before the parental rights can be terminated.¹⁵ Others, including Maryland, require services be provided to the parents in an attempt to reunite the child with the parents before termination proceedings can begin.¹⁶

Many disabled parents whose parental rights are terminated suffer from mental disorders and deficiencies, narcotics or alcohol dependency, and the like.¹⁷ In the cases decided since *In re C.M.*, most courts have held that while a violation of the ADA is not a defense in termination proceedings,¹⁸ parents can bring a separate action

ADA").

10. *In re C.M.*, 526 N.W.2d 562, 565-66 (Iowa Ct. App. 1994) (disagreeing with the mother's arguments that the ADA was violated).
11. See *infra* notes 12-14 and accompanying text.
12. 526 N.W.2d 562 (Iowa Ct. App. 1994).
13. See *id.* at 566.
14. *Id.*
15. See *Stone v. Daviess County Div. of Children and Family Servs.*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) (finding that "even a complete failure to provide services cannot serve as a basis to attack the termination of parental rights") (citing *S.E.S. v. Grant County Dept. of Welfare*, 594 N.E.2d 447, 448 (Ind. 1992)).
16. See MD. CODE ANN., FAM. LAW § 5-313(c)(2)(i) (1999) (listing one of the required considerations in determining to terminate parental rights as "the timeliness, nature, and extent of the services offered by the child placement agency to facilitate reunion of child with the natural parent").
17. See, e.g., *Stone*, 656 N.E.2d at 827 (addressing the termination of parental rights of a mentally deficient mother with an I.Q. of 67, and father with an I.Q. of 71); *Robinson v. Washington*, 896 P.2d 1298, 1300-01 (Wash. Ct. App. 1995) (addressing the termination of parental rights where both parents were mentally impaired, and the father abused drugs).
18. See *Stone*, 656 N.E.2d at 830 (stating that while the ADA was enacted to protect persons with disabilities it was not "intended ipso facto to re-write state sub-

against a public entity for allegedly violating their ADA rights.¹⁹ For example, in one of the leading cases, *Stone v. Daviess County Division of Children and Family Services*,²⁰ the court held that the ADA had no impact on termination statutes, and thus, if the parents' ADA rights had been violated their only remedy was to bring a separate proceeding.²¹

While the ADA consists of five titles covering areas such as employment, public accommodation, and transportation,²² this Comment concerns the ADA as it applies to Title II. The Comment asserts that an alleged violation of the ADA should not be a defense in termination of parental rights proceedings. As background for this assertion, Part II describes the termination of parental rights process in Maryland.²³ Part III discusses the Fourteenth Amendment to the United States Constitution, and the rights it affords parents to raise and direct the upbringing of their children.²⁴ Part IV describes the history and the purpose of the ADA.²⁵ Part V analyzes state and federal case law regarding alleged ADA violations in termination of parental rights cases.²⁶ Part VI discusses how Maryland courts may rule on the issue, as it is one of first impression in the State.²⁷ The Comment concludes in Part VII that a violation of the ADA is not a valid defense against termination of parental rights.²⁸

stantive law."); *In re B.K.F.*, 704 So. 2d 314, 317 (La. Ct. App. 1997) (finding that "termination of parental rights proceedings are not 'services, programs or activities' within the meaning of the ADA"); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997) (holding that the "ADA does not directly apply to [termination of parental rights] proceedings"); *In re Torrance P.*, 522 N.W.2d 243, 246 (Wis. Ct. App. 1994) (holding that the ADA is not a basis to attack a termination of parental rights order, however, it may be a basis for a separate cause of action).

19. See *Stone*, 656 N.E.2d at 829-30.

20. 656 N.E.2d 824 (Ind. Ct. App. 1995).

21. See *id.* at 830.

22. See 42 U.S.C. §§ 12111-12117 (employment); 12181-12189 (public accommodation); see also *infra* notes 180-81 and accompanying text.

23. See *infra* notes 29-104 and accompanying text.

24. See *infra* notes 105-75 and accompanying text.

25. See *infra* notes 176-215 and accompanying text.

26. See *infra* notes 216-320 and accompanying text.

27. See *infra* notes 321-64 and accompanying text.

28. See *infra* notes 365-68 and accompanying text.

II. TERMINATION OF PARENTAL RIGHTS IN MARYLAND

A. *Service Programs*

Legislative policy in Maryland requires the promotion of family stability, the preservation of family unity, and the assistance of families in achieving and maintaining self-reliance.²⁹ In accordance with this policy, each local Department of Social Services (DSS) developed a program offering services to families with children.³⁰ These programs are available to families who receive temporary monetary aid or Supplemental Security Income (SSI),³¹ and families whose gross income is 80% or less than the median adjusted income for a Maryland family of similar size.³² These programs offer assistance where the family, faced with a crisis,³³ needs help in locating and using community services,³⁴ family counseling,³⁵ or home management services.³⁶

B. *Statutory Scheme*

Unfortunately, situations often exist where these services or programs are not enough. For example, where children continue to be abused³⁷ and neglected,³⁸ Subtitle Seven of Title Five of the Ma-

29. See MD. CODE ANN., FAM. LAW § 4-401(1) (1999).

30. See *id.* § 4-402(a).

31. See *id.* § 4-402(a)(1). As part of the federal Social Security Act, Supplemental Security Income (SSI) provides funding for individuals who are over 65 years of age, blind, or disabled and have limited financial resources. See 42 U.S.C. §§ 1381, 1382(a).

32. See MD. CODE ANN., FAM. LAW § 4-402(a)(2). Maryland's median adjusted income per family is determined by the Social Services Administration. See *id.*

33. See *id.* § 4-402(b)(1). The crisis must be brought on by a devastating event such as loss of income, loss of home, physical or mental illness, death, desertion, or abandonment. See *id.*

34. See *id.* § 4-402(b)(3). Such services include health services. See *id.*

35. See *id.* § 4-402(b)(2). Counseling would be given to resolve marital, family, or parent-child conflicts, or to help parents learn proper parenting skills. See *id.*

36. See *id.* § 4-402(b)(4). This counseling program teaches parents how to run their household and how to make and maintain a budget. See *id.*

37. See *id.* § 5-701(b) (defining abuse as "the physical or mental injury of a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child . . . under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed").

38. See *id.* § 5-701(r) (defining neglect as "the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate: (1) that the

ryland Annotated Code, Family Law Article (Family Law Article) addresses this gap by protecting children against abuse and neglect by their natural parents.³⁹ The subtitle governs custody, guardianship, adoption, and general protections against parental abuse.⁴⁰

This comprehensive statutory scheme requires police officers, doctors, nurses, health care practitioners, teachers, and human services workers to report any belief that a child has been abused or neglected by her⁴¹ parents.⁴² The report must be made to the local DSS or to a local law enforcement agency.⁴³ There is also a statutory duty placed on the general public to make a report to the local police or DSS when reasons exist to believe that a child has been abused or neglected by her parents.⁴⁴

Subtitle Seven's statutory scheme directs DSS, once contacted by a teacher, doctor, neighbor, or other person alleging child abuse or neglect, to begin an investigation promptly.⁴⁵ When physical or sexual abuse is alleged, DSS must investigate within twenty-four hours of the report,⁴⁶ and when neglect or mental injury is alleged, the period for investigation is extended to five days.⁴⁷ DSS then assigns a case worker to investigate the report, which begins by meeting with the child.⁴⁸

While conducting an investigation, it is entirely appropriate for the social worker to check the child for bruises and other signs of abuse.⁴⁹ If the child is of school age, the social worker may speak

child's health or welfare is harmed or placed at substantial risk of significant harm; or (2) mental injury to the child or a substantial risk of mental injury").

39. *See generally id.* §§ 5-701-715 (addressing child abuse and neglect).

40. *See id.*

41. Throughout this Comment the feminine form of pronouns will be used, however, as is obvious, the material in this Comment applies in a gender-neutral manner.

42. *See id.* § 5-704(a).

43. *See id.*

44. *See MD. CODE ANN., FAM. LAW* § 5-705(a). An example of this would be when a neighbor sees a parent abusing a child or leaving a child alone at home and then reports the incident to the police or DSS.

45. *See id.* § 5-706(a).

46. *See id.* § 5-706(b).

47. *See id.*

48. *See id.* § 5-706(b)(1).

49. *See* Interview with C.J. Messerschmidt, Assistant Attorney General, Department of Human Resources, in Baltimore, Md. (Feb. 11, 2000) (C.J. Messerschmidt works on appellate claims in the area of termination of parental rights) (notes on file with the author).

with and examine the child at school.⁵⁰ If the child is not of school age, the social worker must go to the home to interview and examine the child.⁵¹ In addition, the social worker must attempt to have an at-home interview with the child's caretaker⁵² and make a determination as to the child's safety.⁵³ To determine if the child has been mentally abused, the social worker will arrange for the child to be seen by two of the following:⁵⁴ a licensed physician,⁵⁵ a licensed social worker,⁵⁶ or a licensed psychologist.⁵⁷

If the DSS investigation concludes that a child has been abused or neglected, DSS's initial goal is to keep the family together.⁵⁸ To encourage this goal, the Maryland General Assembly codified support services that the State must provide to preserve family unity.⁵⁹ These services must be offered to families before children are placed in the custody of the State.⁶⁰ If an emergency situation exists,⁶¹ the child can be removed from the home into the custody of the State, and services will be offered to reunite the child and the parents.⁶²

However, often the services provided to the parents do not help. In these cases, an administrative hearing is necessary to deter-

50. *Id.*

51. *Id.* If the parent resists allowing the social worker into the home, the police will accompany the social worker and make sure the social worker sees the child. *See* MD. CODE ANN., FAM. LAW § 5-709(b).

52. *See* MD. CODE ANN., FAM. LAW § 5-706(b)(2).

53. *See id.* § 5-706(b)(3).

54. *See id.* § 5-706(c).

55. *See* MD. CODE ANN., HEALTH OCC. § 14-101(g) (2000) (defining the qualifications of a licensed physician).

56. *See id.* § 19-101(d) (defining the qualifications of a licensed social worker).

57. *See id.* § 18-101(d) (defining the qualifications of a licensed psychologist).

58. *See* COMAR 07.02.11.14.A (1999).

59. *See* MD. CODE ANN., FAM. LAW § 4-401(1)(i) (1999). The Department of Social Services (DSS) must offer functional services, family counseling, referral services, and services concerning home management. *See id.* § 4-402(b)(2). DSS may also provide travel expenses to and from these services. *See* COMAR 07.02.11.14.B. In an effort to help preserve the family, other services may be provided, which include, but are not limited to, day care services and vocational counseling and training. *See id.* The vast majority of children in Maryland who come in contact with the foster care system are reunified with their parents. *See* Interview with C.J. Messerschmidt, *supra* note 49.

60. *See* MD. CODE ANN., FAM. LAW § 4-401(2).

61. An example of such a situation would be when a child has been left home alone with no one to care for her and someone contacts social services or the police. *See* Interview with C.J. Messerschmidt, *supra* note 49.

62. *See* MD. CODE ANN., FAM. LAW § 5-525(b)(1).

mine whether a child is a "child in need of assistance" (CINA).⁶³ Once determined to be a CINA by the court, she may temporarily be placed in the custody of the State, and put in an out-of-home placement program.⁶⁴ During that time, a permanency plan is established for the child placed out of the home,⁶⁵ with the goal to provide services to the parents so that the parents and child may eventually reunite.⁶⁶

There are times when no services can help to reunite the child and the parent.⁶⁷ In these instances, the State does not have to meet its statutory obligation of providing services before removing the child from the home or terminating the parental rights of the

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63. See MD. CODE ANN., CTS. & JUD. PROC. § 3-801(e) (1998). A child who is deemed to be a child in need of assistance (CINA) "requires the assistance of the court because: (1) [t]he child is mentally handicapped or is not receiving ordinary and proper care and attention; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's problems." *Id.* A child cannot be determined a CINA solely because the parent is homeless. See MD. CODE ANN., FAM. LAW § 5-525(c)(2)(i) (1999). The local DSS is responsible for finding the parent and the child shelter so they can remain together. See *id.* § 5-525(c)(2)(ii).
64. See MD. CODE ANN., FAM. LAW § 5-525(a).
65. See *id.* § 5-525(b)(2). During the out-of-home placement, the local DSS is responsible for providing care for the child 24 hours a day. See *id.* § 5-525(c). This out-of-home placement can be established through placement of the child into foster care, kinship care, group care, or residential treatment care. See *id.* at § 5-501(m). This care is to be on a short term basis. See *id.* § 5-525(c).
66. See *id.* § 5-525(b)(1). The best interest of the child is considered in developing the permanency plan. See *id.* § 5-525(e) (describing the development of the permanency plan and listing factors to be considered in determining a permanency plan that is in the best interest of the child). See also *infra* notes 81-82 and accompanying text.
67. See generally Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice and Public Policy*, 34 FAM. L.Q. 359, 364 (2000) (placing children with biological parents was preferred although other arrangements would be made if this was not possible); Susan V. Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency*, 48 BUFF. L. REV. 835, 877 (2000) (discussing the necessity to plan for children in foster care who are not reunited with families); Sean D. Ronan, Comment, *No Discretion, Heightened Tension: The Tale of the Adoption and Safe Families Act in New York State*, 48 BUFF. L. REV. 949, 968 (2000) (according to New York's Adoption and Safe Families Act, reasonable efforts are not necessary to reunite children with biological parents whose parental rights to another child have been terminated).

natural parents.⁶⁸ For example, in *In re Adoption/Guardianship No. J970013*,⁶⁹ the parental rights of a father were terminated without DSS offering services to help the family stay together.⁷⁰ The court noted that the father had a significant interest in raising his child, but found that the best interest of the child⁷¹ was best served by terminating the father's parental rights.⁷² Therefore, the court held that DSS did not have to provide any services toward the reunification of the father with his child, as they would be futile.⁷³

Again, in *In re Adoption/Guardianship No. 10941*, the court found providing services before terminating the parental rights was unnecessary.⁷⁴ The court found that the mother was mentally ill and

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68. See *In re Adoption/Guardianship Nos. CAA 92-10852 & CAA 92-10853*, 103 Md. App. 1, 19-20, 651 A.2d 891, 900 (1994) (repeating that social services does not have to meet its statutory obligations to provide services before terminating parental rights "if no amount of services [would] result in reunification of the parent with his or her child").
 69. 128 Md. App. 242, 252-56, 737 A.2d 604, 610 (1999) (holding that the termination of the parental rights of an incarcerated father was in the best interest of the child).
 70. See *id.* at 254-56, 737 A.2d at 611-12. The father had been convicted of drug-related first degree murder and sentenced to 20 years to life in jail. See *id.* at 246, 737 A.2d at 606. While in jail, the father participated in parenting classes, completed a drug program and attended group meetings on anger management. See *id.* at 246, 737 A.2d at 607. The mother's rights were also terminated, but she did not appeal. See *id.* at 245 n.1, 737 A.2d at 606 n.1.
 71. See *id.* at 252, 737 A.2d at 610; see also MD. CODE ANN., FAM. LAW § 5-525(e) (listing factors to be considered in determining what is in the best interests of a child); *In re Adoption/Guardianship Nos. CAA 92-10852 & CAA 92-10853*, 103 Md. App. 1, 10-13, 651 A.2d 891, 896-97 (1994) (discussing the factors used to determine the best interests of a child).
 72. See *In re Adoption/Guardianship No. J970013*, 128 Md. App. at 256-57, 737 A.2d at 612. The court did not want to place the child's welfare in "legal limbo" because of the scant possibility that his father someday would be released. *Id.*
 73. See *id.* at 256, 737 A.2d at 612. The court found that the father was not able to provide the basic necessities for his child. See *id.* The father's situation was "persistent and ongoing," and he could be in jail for the rest of his life. *Id.* at 256, 737 A.2d at 612. But see *In re Adoption/Guardianship Nos. CAA 92-10852 & CAA 92-10853*, 103 Md. App. 1, 29-30, 651 A.2d 891, 910 (1994) (holding that when there is a short jail term, the State must try to reunite the child and father before termination proceedings would be justified).
 74. 335 Md. 99, 113, 642 A.2d 201, 208 (1993) (clarifying "that the controlling factor in adoption and custody cases is not the natural parent's interest in raising the child, but rather what best serves the interest of the child"). There, the mother suffered from severe mental illnesses. See *id.* at 106, 642 A.2d at 205. She never had a permanent residence, often stayed in homeless shelters,

unfit to be a parent, and probably would never be fit to parent.⁷⁵ Thus, the court held that no services could help reunite the mother with her child,⁷⁶ and the mother's parental rights could be terminated without any services offered to her.⁷⁷

C. *Permanency Plan*

As noted earlier, once the court determines that a child is a CINA, DSS must define a permanency plan.⁷⁸ In creating a permanency plan for the child, DSS considers what is in the best interest of the child.⁷⁹ The factors that are taken into account when determining the best interest of the child include: the child's emotional bond to her parents and siblings; the child's emotional bond to her present caretaker; how long the child has been living with her present caretaker; the potential harm to the child if she is removed from the home of her present caretaker; and the potential harm to the child if she remains in the custody of the State for a prolonged period of time.⁸⁰

When DSS devises a permanency plan for the child, the first consideration is to return the child to her parents or legal guardian.⁸¹ If that is not in the child's best interests, the second consideration is to place the child with a relative who is willing to adopt or act as a guardian to the child.⁸² If there is no relative willing to adopt or act as a guardian, then DSS seeks foster parents willing to adopt the child.⁸³

D. *Termination Without the Natural Parents' Consent*

In order for the child to be legally adopted by foster parents without the consent of the natural parents, the court must terminate the parental rights of the natural parents.⁸⁴ The court must

did not have a job, and did not try to get treatment for her mental conditions. *See id.* at 118, 642 A.2d at 210-11.

75. *See id.* at 118-19, 642 A.2d at 211.

76. *See id.* at 119, 642 A.2d at 211.

77. *See id.*

78. *See supra* notes 65-66 and accompanying text.

79. *See* MD. CODE ANN., FAM. LAW § 5-525(b)(2) (1999).

80. *See id.* § 5-525(e)(1).

81. *See id.* § 5-525(e)(2)(i).

82. *See id.* § 5-525(e)(2)(ii).

83. *See id.* § 5-525(e)(2)(iii). If the present foster parent does not want to adopt the child, then DSS will place the child with another approved adoptive family. *See id.*

84. *See id.* § 5-313(a); § 5-312(b).

find by clear and convincing evidence⁸⁵ that it is in the best interest of the child⁸⁶ to terminate the parental rights of the natural parents.⁸⁷ When making this decision, the court must consider several factors.⁸⁸

After giving primary consideration to the safety and health of the child,⁸⁹ the court first looks at the services provided to the family in an attempt to reunite the child with her natural parents.⁹⁰ Second, if an agreement exists between the parents and DSS, the court

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85. *See id.* § 5-313(a). The Supreme Court has held that a state must prove by clear and convincing evidence that it is in the best interest of the child to terminate the parental rights of the natural parents, and that a lesser standard of proof is a violation of the natural parents' due process rights. *See Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) (holding that the Due Process Clause of the Fourteenth Amendment requires the State support its allegations by clear and convincing evidence before parental rights can be terminated). Some States have adopted the higher standard of beyond a reasonable doubt in termination proceedings. *See, e.g., State v. Robert H.*, 393 A.2d 1387, 1389 (N.H. 1978) (mandating that the government must prove a case beyond a reasonable doubt before the termination of parental rights can occur).
86. The Court of Appeals of Maryland adopted the best interest of the child as the applicable standard in determining contested adoption and custody cases. *See In re Adoption/Guardianship No. A91-71A*, 334 Md. 538, 561, 640 A.2d 1085, 1096 (1994).
87. In addition to finding that the termination of parental rights is in the best interest of the child, the court must also find that one of three additional factors is present. The court must find that the child has been abandoned such that the identity of the child's natural parents is unknown, and no one has claimed to be the child's natural parents in the past two months; or the court must find that in a prior juvenile proceeding the child has been deemed a CINA, an abused child, a neglected child, or a dependant child; or finally the court must find that the following circumstances exists: the child has been out of the custody of the natural parent and in the custody of DSS for at least one year; the reasons for the removal of the child still exist or circumstances of a possibly harmful nature still exist; it is unlikely that the situation will be rectified so that the child could return to the natural parents in the near future; and the continued relationship with the natural parents would be damaging to a child developing a strong and solid relationship with a permanent family. *See MD. CODE ANN., FAM. LAW § 5-313(a)* (1999).
88. *See MD. CODE ANN., FAM. LAW § 5-313(c)*; *see supra* note 80 and accompanying text for an enumeration of best interest factors, as well as *infra* notes 334-35 and accompanying text for a discussion of the court's standard in Maryland for terminating parental rights.
89. *See MD. CODE ANN., FAM. LAW § 5-313(c)(1)*.
90. *See id.* § 5-313(c)(2)(i). The court will look into when the services were offered, what kinds of services were offered, and the extent of the services offered to the family. *See id.*

must determine if both parties to the agreement satisfied their responsibilities.⁹¹ Third, the court must consider the child's feelings.⁹² Fourth, the court assesses the natural parents' efforts to change their circumstances, behavior, and lifestyle, that led to the removal of the child.⁹³

When a child has previously been deemed either a CINA, a neglected child, or an abused child, a court considers additional factors before parental rights are terminated.⁹⁴ These additional factors include: (1) whether the natural parent has a disability that leaves the parent regularly unable to care for the child for extended periods;⁹⁵ (2) whether the natural parent abused or neglected any child in the family previously;⁹⁶ (3) whether the natural parent has continually failed to provide food, shelter, clothing, schooling, and any other necessary care to the child, despite the natural parent's finan-

91. *See id.* § 5-313(c)(2)(iii).

92. *See id.* §§ 5-313(c)(2)(iii),(iv). The child's emotional ties to her natural parents and to her siblings will be taken into account, as well as her adaptation to home, school, and community. *See id.*

93. *See id.* § 5-313(c)(2)(v). The extent to which the natural parents tried to have regular contact with the child in an attempt to be reunited with the child is also considered. *See id.* Incidental visits, however, are not given much weight by the court. *See id.* § 5-313(c)(2)(v)(1). The court also considers whether the parents are able to contribute financially to the child; whether the natural parents keep in contact with the child's current caretaker; and whether any further services would help to rehabilitate the parents so that the child could be returned. *See id.* §§ 5-313(c)(2)(v)(2-4).

94. *See id.* § 5-313(d) (mandating that these factors be considered in addition to the factors in subsection c).

95. *See id.* § 5-313(d)(1)(i). The disabilities applicable to this section include a mental disorder (defined in MD. CODE ANN., HEALTH-GEN. I § 10-101(f)); mental retardation, (defined in § 7-101(l)); alcohol dependence, (defined in § 8-101(f)); and drug dependence, (defined in § 8-101(l)). *See MD. CODE ANN., FAM. LAW § 5-301(c)*. However, the Court of Special Appeals of Maryland held that the fact that a parent is an alcoholic is not grounds by itself to remove the child from the home. *See In re William B.*, 73 Md. App. 68, 73, 533 A.2d 16, 19 (1987). The State must also show that the parent's drinking affects the parent's ability to care for the child. *See id.* The court of special appeals also held that a parent's incarceration does not constitute a disability. *See In re Adoption/Guardianship Nos. CAA 92-10852 & CAA 92-10853*, 103 Md. App. 1, 29, 651 A.2d 891, 905 (1994) (holding that a father serving a nine month term was not under a disability). *But see In re Adoption/Guardianship No. J970013*, 128 Md. App. 242, 252-53, 737 A.2d 604, 610-11 (1999) (holding that although incarceration was not a disability *per se*, it was in the best interest of a child to terminate the parental rights of a father serving a 20 year to life sentence).

96. *See MD. CODE ANN., FAM. LAW § 5-313(d)(1)(ii)*.

cial ability to do so;⁹⁷ or (4) whether the child was born addicted to drugs or alcohol, and the parent refused to enter a detoxification program.⁹⁸

Furthermore, sometimes there are exceptional circumstances⁹⁹ that a court must consider when deciding to terminate the parental rights of the natural parents.¹⁰⁰ If a court decides not to terminate the parental rights, the child either remains in foster care or returns home.¹⁰¹ Reunification services should continue at this point.¹⁰² Nonetheless, the judge may still order termination of the parent's rights.

Once the parental rights of the natural parents have been terminated and the appellate process has been exhausted, the judgment is final and irrevocable.¹⁰³ The consequences of this drastic and permanent severing of the strongest and most basic relationship led the Maryland Legislature and courts to ensure that termination of parental rights does not occur over parental objection, unless it is clearly justified. The welfare and best interest of the child must be weighed with great care against every just claim of an objecting parent.¹⁰⁴

97. *See id.* § 5-313(d)(1)(iii).

98. *See id.* § 5-313(d)(1)(iv).

99. *See In Re Adoption/Guardianship No. A91-71A*, 334 Md. 538, 561-62, 640 A.2d 1085, 1096-97 (1994).

100. *See id.* According to the court:

The factors which emerge . . . include the length of time the child has been away from the biological parent, the age of the child when care was assumed by the third party, the possible emotional effect on the child of a change of custody, the period of time which elapsed before the parent sought to reclaim the child, the nature and strength of the ties between the child and the third party custodian, the intensity and genuineness of the parent's desire to have the child, [and] the stability and certainty as to the child's future in the custody of the parent.

Id. at 561-62, 648 A.2d at 1097 (quoting *Ross v. Hoffman*, 280 Md. 172, 191, 372 A.2d 582, 593 (1977)).

101. *See MD. CODE ANN., FAM. LAW* § 5-313(d)(5).

102. *See id.* § 5-524(2) (mandating that services should be provided to reunite the child with her parents after the child has been placed in foster care).

103. *See Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (holding that a New York decision terminating parental rights is final).

104. *Walker v. Gardner*, 221 Md. 280, 284, 157 A.2d 273, 275-76 (1960) (recognizing the serious consequences of adoption on the relationship between child and the natural parent); *see also Bridges v. Nicely*, 304 Md. 1, 14, 497 A.2d 142, 148 (1985) (remanding to the trial court to consider if adoption would be in the best interest of the child involved).

III. FOURTEENTH AMENDMENT DUE PROCESS CHALLENGES

The Fourteenth Amendment of the United States Constitution prohibits any State from depriving “any person of life, liberty, or property, without due process of law.”¹⁰⁵ The Due Process Clause provides individuals substantive¹⁰⁶ and procedural¹⁰⁷ protections in matters that are so fundamental to life that they are beyond the reach of governmental interference. Because parenting is recognized as a fundamental right,¹⁰⁸ governmental intrusion is only warranted in limited circumstances.¹⁰⁹ Accordingly, the Fourteenth Amendment Due Process Clause is used by parents in matters of family life.

A. *Parent’s Fundamental Rights*

The Supreme Court first challenged a State’s power to interfere with a parent’s right in directing the upbringing of children in 1923.¹¹⁰ The Court established a parent’s right to “establish a home and bring up children” as one of the fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment.¹¹¹ Recognizing that substantive due process under the Fourteenth Amendment afforded a parent the right to direct the upbringing of their children, the Court struck down a state statute prohibiting the teaching of foreign languages at an elementary school.¹¹² This early recognition of an area of family privacy, in which the State may not

105. U.S. CONST. amend. XIV, § 1.

106. See *infra* notes 111-30 and accompanying text for a discussion of the substantive safeguards afforded to families through the Due Process clause, and *infra* notes 135-36 for the minimum requirements needed to satisfy the substantive component of the Due Process clause.

107. See *infra* note 134 and accompanying text for the requirement needed to satisfy the procedural aspect of the Due Process clause.

108. See *infra* note 133 for references to the fundamental importance of the parent-child relationship.

109. See *infra* notes 131-32 and accompanying text for an introduction of the States’ permitted limitations on freedom; *infra* notes 137-38 and accompanying text for a general discussion of States’ authority to regulate; *infra* notes 139-51 and accompanying text discussing States’ police power regulation; and *infra* notes 152-58 explaining States’ regulation under the doctrine of *parens patriae*.

110. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that parents have a fundamental right to teach their children a foreign language).

111. See *id.*

112. See *id.* at 399. In *Meyer*, the Court stated that “[w]ithout doubt, [Due Process of the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the [parent] to . . . bring up children.” *Id.*

interfere,¹¹³ set the stage for a series of subsequent cases that “focused on the right of parents to make important decisions regarding their children’s upbringing.”¹¹⁴

Just two years later, the Court held in *Pierce v. Society of Sisters*¹¹⁵ that the constitutional “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”¹¹⁶ The notion of family autonomy was reinforced when the Court invalidated a state statute requiring parents to educate their children in public schools.¹¹⁷ The Court reasoned that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹¹⁸

In 1944, the Court declared in *Prince v. Massachusetts*¹¹⁹ that “[i]t is cardinal with us that the custody, care and nurture of the child reside[s] first in the parents, whose primary function and freedom include[s] preparation for obligations the state can neither supply nor hinder.”¹²⁰ Although the State’s regulation of child labor in this case prevailed over the guardian’s desire to allow her nine year old niece to sell religious literature on a city street, the Court spoke of the importance of parental rights, emphasizing a “private realm of family life which the state cannot enter.”¹²¹

Parental rights were further defined in 1972, when the Court in *Wisconsin v. Yoder*¹²² invalidated a state statute requiring all children to attend school until the age of sixteen.¹²³ Although the Court’s decision was largely based upon the First Amendment’s Free Exercise Clause, the Court explicitly reasoned that “when the interests of parenthood are combined with a free exercise claim . . . more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s

113. *See id.*

114. *See* Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 48-49 (1985).

115. 268 U.S. 510 (1925).

116. *Pierce*, 268 U.S. at 534-35 (holding that Oregon Compulsory Education Act requiring attendance at public schools violated the Fourteenth Amendment).

117. *See id.*

118. *Id.* at 535.

119. 321 U.S. 158 (1944).

120. *Id.* at 166 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925)).

121. *Id.*

122. 406 U.S. 205 (1972).

123. *See id.*

requirement under the First Amendment."¹²⁴ The Court expressed the significance of family autonomy by stating that "[t]he primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."¹²⁵

By the 1980s, Justice Stewart made it clear in *Lassiter v. Department of Social Services*¹²⁶ that the tradition of family unity and autonomy would continue to be a significant factor in cases involving parental rights.¹²⁷ He wrote that "[t]his Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"¹²⁸

Thus, the Supreme Court clearly established that parents have a constitutionally protected right to direct many aspects of the upbringing of their children even though this right is not expressly stated in the Constitution.¹²⁹ Believing that the "process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens,"¹³⁰ the Court continues to afford great deference to parental rights in many cases.

B. *The State's Rights*

Although parental rights are deemed fundamental liberties protected by the Constitution, they are not absolute.¹³¹ Notwithstanding the Court's establishment of family autonomy and integrity, under certain circumstances the parent-child relationship may also be regulated by a State.¹³²

124. *See id.* at 233.

125. *See id.* at 232 (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925)).

126. 452 U.S. 18, 27 (1981).

127. *See id.*

128. *Id.* (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

129. *See id.*

130. *Bellotti v. Baird*, 443 U.S. 622, 637-38 (1979) (Powell, J., concurring).

131. *See Lassiter*, 452 U.S. at 27 (clarifying that a parent's right to care for a child is important, but that a State may infringe upon the right if there is a legitimate interest).

132. *See supra* notes 10, 18-21, 41-42, 44-57 and accompanying text.

1. Substantive Due Process Requirements

State interference with a parent's rights is subject to judicial review and must meet certain standards of procedural and substantive due process.¹³³ Procedural due process requires the government to provide a fair procedure when depriving parents of their liberty interest in rearing their children.¹³⁴ However, when reviewing substantive due process issues the Court is "concerned with the constitutionality of the underlying rule rather than with the fairness of the process by which the government applies the rule to an individual."¹³⁵ Substantive due process requires the Court "to examine a law, including a court ruling, [to determine] whether the substantive rule of law is an unconstitutional limitation of life, liberty, or property interests."¹³⁶

A State's authority to regulate is drawn from two distinct authorities; the State's police power granted by the Constitution,¹³⁷ and the doctrine of *parens patriae*.¹³⁸ Under police power, the State

133. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 122-23 (1996) (holding that due process was violated when indigent mother was denied appeal of termination of parental right on the sole basis that she could not afford to pay mandatory fee for the preparation of a trial court record); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (invalidating a state statute requiring children to attend high school, because the statute violated the rights of Amish parents to educate their children in a religious atmosphere); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35, (1925) (holding that Oregon Compulsory Education Act requiring attendance at public schools violated the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (striking statute forbidding parents to teach children a foreign language); *In re David B.*, 91 Cal. App. 3d 184, 154 Cal. Rptr. 63 (1979) (upholding procedural and substantive due process challenge of the statute and process under which mother's parental rights were terminated); see also 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. LAW, SUBSTANCE AND PROCEDURE, § 18.30 (West 3d. ed. 1999) [hereinafter "ROTUNDA"] (stating that since the first parental cases in the 1920s, such cases continue to strongly weigh the fundamental constitutional importance of the parent-child and family relationships, and they cannot be terminated without meeting the standards of procedural and substantive due process).

134. See ROTUNDA, *supra* note 133, at § 14.6.

135. *Id.*

136. *Id.*

137. The Tenth Amendment is considered to be the source of state police power and provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. See *Meyer v. Nebraska*, 262 U.S. 390, 397-400 (1923) (discussing state police power).

138. See BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

"*Parens patriae*," literally "parent of the country," refers traditionally

is allowed to regulate certain family matters in order to promote family values¹³⁹ or matters of "public health, safety, morals, or general welfare."¹⁴⁰ The doctrine of *parens patriae* generally allows the State to act in the best interest of the child's welfare when a parent's or guardian's control falters.¹⁴¹

As the Court established in its earliest decisions, a State may not regulate parental rights with its police powers "under the guise of protecting the public interest."¹⁴² In order to justify this levying of authority for the public interest under its police powers, the State must show that it is in the interest of the public at large, and not just a specific group of individuals.¹⁴³ The State must further

to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents.

Id.

139. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (validating a land use project which allowed taking of property despite landowner's claim "for ridding an area of slums") (citing *Berman v. Parker*, 348 U.S. 26 (1954)). "The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 9. In *Berman v. Parker*, the Court noted: "Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Berman*, 348 U.S. at 32.
140. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court validated a zoning statute forbidding "apartment houses, business houses, retail stores and shops" from residential districts, and reasoning that "before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 366, 395. See *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905) (holding that a compulsory vaccination law is a valid exercise of police power).
141. See *Schall v. Martin*, 467 U.S. 253, 265 (1984) (recognizing that children "are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*").
142. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).
143. See *Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference . . .").

show that the means required for the achievement of the purpose are not unnecessarily oppressive.¹⁴⁴ When issues arise regarding the constitutionality of a state regulation under its police powers, the Court will balance the State's interest with the liberty interest of the parent's rights in raising children.¹⁴⁵

Some state regulations authorized under police powers are deeply rooted in the American tradition, generally accepted as commonplace, and often go unchallenged. Such regulations include child labor laws,¹⁴⁶ compulsory school attendance,¹⁴⁷ mandatory vaccinations,¹⁴⁸ age requirement for marriage,¹⁴⁹ prohibiting the sale of pornographic material,¹⁵⁰ and criminalizing child abuse and neglect.¹⁵¹

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144. *See id.* ("To justify the state in thus interposing its authority in behalf of the public, it must appear. . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.").
145. *See* *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("[A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests . . .").
146. *See* *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the State as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.") (citations omitted).
147. *See, e.g.,* *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (holding that a State has the power to impose reasonable regulations of its citizen's education).
148. *See, e.g.,* *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (" . . .[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.")
149. *See, e.g.,* *Moe v. Dinkins*, 533 F. Supp. 623, 630-31 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982) (upholding New York's law requiring parental consent for marriages of persons between the ages of 14 and 18).
150. *See, e.g.,* *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view . . . at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful.").
151. *See, e.g.,* *Faust v. State*, 354 So. 2d 866, 868 (Fla. 1978) (upholding the language of a statute defining the offense of aggravated child abuse); *State v. Fahy*, 440 P.2d 566, 569-70 (Kan. 1968) (upholding a statute proscribing torture and abuse of child under 16 years of age); *State v. Sinica*, 372 N.W.2d 445, 447 (Neb. 1985) (upholding a child abuse statute); *State v. Lucero*, 531 P.2d 1215, 1218 (N.M. 1975) (holding that the objective of cruelty to children was a sufficient interest for the State to regulate under its police powers); *State v. Fredell*, 195 S.E.2d 300, 304 (N.C. 1973) (holding that a statute providing that any parent of a child less than 16 years of age who inflicted physical injury on the child by other than accidental means was guilty of the misde-

The State's power of *parens patriae* for children is premised on principles that define and limit its power in interfering with family unity. First, there is a presumption that children lack the maturity and mental competence of adults.¹⁵² Second, recognizing that "[t]he child is not the mere creature of the State,"¹⁵³ the State must prove that the parents are either unable, unwilling or unfit to adequately care for the child.¹⁵⁴ Third, the State must show that it is exercising its *parens patriae* power solely to advance the best interest of the child.¹⁵⁵ Finally, the State must show it is advancing a "compelling state interest."¹⁵⁶

meanor of child abuse, was "a reasonable and proper exercise of the police power of the State").

152. "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." *Schall v. Martin*, 467 U.S. 253, 265 (1984); *see also* *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring in result) ("[A]t least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise . . . that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults."); *Parham v. J.R.*, 442 U.S. 584, 603 (1989) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions . . .").
153. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).
154. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (unanimous Court). In *Quilloin*, the Court stated that there would be little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Id.* at 555 (quoting *Smith v. Organization of Foster Families* 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in the judgment)); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) ("We do not question the assertion that neglectful parents may be separated from their children. . . [however] the State registers no gain towards its declared goals when it separates children from the custody of fit parents.").
155. "Countless custody cases in all fifty states have used the standard phrase, 'the best interest of the child.'" Gregory A. Kelson, *In the Best Interest of the Child: What Have We Learned From Baby Jessica and Baby Richard?*, 33 J.M. ARLR 353, 371 (2000).
156. *See Reno v. Flores*, 507 U.S. 292, 301-02 (1993) ("[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.") (citations omitted); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) (holding that a law re-

When the State acts under the power of *parens patriae*, it is generally to remove a child from a home or to terminate parental rights.¹⁵⁷ When a parent's right threatens the welfare of the child, the State may regulate these rights to protect the child's welfare, safety, and best interest.¹⁵⁸

2. Procedural Due Process Requirements

As parental rights are important constitutional liberties, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."¹⁵⁹ In proceedings to terminate parental rights, the Supreme Court has determined "[t]he nature of the process due . . . turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."¹⁶⁰

The Supreme Court has determined that procedural due process requires the State to prove its case against a parent by clear and convincing evidence in proceedings to terminate parental rights.¹⁶¹ In *Santosky v. Kramer*,¹⁶² the Supreme Court refused to permit the State to terminate a parent's rights.¹⁶³ The Court overruled

quiring high school attendance infringed upon the parent's right to direct the religious upbringing and education of their children; only those interests of the "highest order" can overcome those parental rights).

157. See Cheryl M. Browing & Michael L. Weiner, Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 214 (1979).

158. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (recognizing that the State, empowered as *parens patriae*, may limit parents' rights where the child's safety is threatened); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing that a State, acting as *parens patriae*, may restrict parents' rights to protect the welfare of the child); *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325 (1913) (recognizing that a State may restrict parents' control in order to guard a child's well-being by requiring school attendance).

159. *Santosky v. Kramer*, 455 U.S. 745, 745 (1982).

160. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

161. See *id.* at 765-68. The Court reasoned in *Santosky* that the use of a preponderance standard would equate to near neutrality "between erroneous termination of parental rights and erroneous failure to terminate those rights." *Id.* at 765. The Court reasoned that the preponderance standard was "constitutionally intolerable" because of the "relative severity" of the consequences of erroneous decisions in termination proceedings. *Id.* at 766-68.

162. 455 U.S. 745 (1982).

163. See *id.* at 747.

the State's decision to terminate, reasoning that a parent's liberty interest in raising her child is substantial, and thus the State must meet a higher burden of proof in order to interfere with those rights.¹⁶⁴ The Court stated that the higher burden of proof minimized the risk of an "inappropriate termination" of parental rights.¹⁶⁵

The Supreme Court altered its trend of deference toward parental rights in *Lassiter v. Department of Social Services*.¹⁶⁶ There, the Court ruled that due process does not automatically require an indigent parent to be appointed counsel in proceedings to terminate parental rights.¹⁶⁷ Although the Court ruled in favor of the State, the Court reached its decision through a balancing test.¹⁶⁸ After finding a presumption that an indigent parent has a right to counsel when her personal freedom is at stake, the Court measured the presumption against "[the] private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."¹⁶⁹ In balancing the three elements, the scale is weighed "against the presumption that there is a right to appointed counsel only where the indigent, if she is unsuccessful, may lose her personal freedom."¹⁷⁰

Although the Court acknowledged that a "unique kind of deprivation" is involved in parental termination proceedings,¹⁷¹ the Court determined that the parent's interests in *Lassiter* did not rebut the presumption that there is a right to appointed counsel.¹⁷² In balancing the elements, the Court considered the detriment that the parent already caused her children to suffer, her lack of interest in prior parental rights proceedings, and the fact that counsel would not have altered the outcome of the case.¹⁷³

The Court made it clear in *Lassiter* that the right to counsel in parental termination proceedings involving indigent parents is determined by the trial judge on a case-by-case basis, subject to appel-

164. *See id.* at 759.

165. *Id.* at 764-65.

166. 452 U.S. 18 (1981).

167. *See id.* at 32-33.

168. *See id.*

169. *Id.* at 27.

170. *Id.*

171. *Id.* at 26-27.

172. *See id.* at 33.

173. *See id.* at 32-33.

late review.¹⁷⁴ In effect, the *Lassiter* holding now requires an examination of whether procedural due process mandates appointment of counsel in all indigent parental termination proceedings.¹⁷⁵ Thus, this process provides a protective measure for a child who suffers from a parent's lack of proper care or attention.

IV. THE AMERICANS WITH DISABILITIES ACT

A. *Historical Purpose of the ADA*

Before the enactment of the ADA, the Federal Rehabilitation Act was the only civil rights legislation that afforded rights to the disabled. Under the Federal Rehabilitation Act, all state programs and services receiving federal funding could not deny services to the disabled based on their disabilities.¹⁷⁶ After five years of research, hearings, and discussions, Congress unanimously passed the ADA to combat discrimination of the disabled.¹⁷⁷ The ADA extended the nondiscrimination policy of the Rehabilitation Act to all actions of state and local governments, regardless of funding.¹⁷⁸ The ADA seeks to assure the disabled are provided the same rights as the non-disabled by creating a cause of action for those who have faced discrimination because of disabilities.¹⁷⁹ Congress determined that disabled individuals were being denied vital opportunities such as employment, education, housing, transportation, and health services solely as a result of their disabilities.¹⁸⁰ Congress designed the ADA to ensure that disabled persons are no longer denied public or private services, programs, or activities because of the unfounded fears, prejudice, or ignorance of others.¹⁸¹

174. *See id.* at 31-32.

175. *See id.*

176. *See* 29 U.S.C. § 701 (1994 & Supp. IV 1998).

177. *See* DEPT. OF EDUC., OFFICE OF CIVIL RIGHTS, ADA: COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT 1 (1990).

178. *See* 42 U.S.C. § 12132 (Supp. II 1991). The Rehabilitation Act applied only to entities that received federal funding. *See* 29 U.S.C. § 701. The ADA encompasses much of the language of the Rehabilitation Act, and therefore the Rehabilitation Act and its case law are important in interpreting the ADA.

179. *See* 42 U.S.C. § 12101(b).

180. *See id.* § 12101(a)(3).

181. *See generally id.* § 12101. (enunciating the ADA's purpose of eliminating discrimination and providing standards, enforceable by the federal and state governments).

B. Title II of the ADA

Title II of the ADA requires public entities to provide physical access to programs and services offered.¹⁸² In addition, Title II ensures that such services and activities are readily accessible to, and usable by, qualified individuals with disabilities.¹⁸³ Denial of access to any program, service, or facility violates the ADA.¹⁸⁴ In order to prove that a violation occurred, a plaintiff must show:

- (1) that she has a disability,¹⁸⁵
- (2) that she is “otherwise qualified” for the benefit that has been denied,
- (3) that she was either excluded for participation in or denied benefits of some public entity’s services, programs, or activities, or was otherwise discriminated against by the public entity, and,
- (4) that such discrimination was by reason of plaintiff’s disability.¹⁸⁶

The ADA defines a qualified individual as “an individual with a disability who, with or without reasonable modification to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or participation in programs or activities provided by a public entity.”¹⁸⁷

Title II states that a person alleging an ADA violation may bring a complaint under the public entity’s grievance procedure, file an administrative complaint with a corresponding federal agency or the Department of Justice, or file an individual complaint.¹⁸⁸ However, Title II does not specify how to implement grievance procedures.¹⁸⁹ Rather regulations have been promulgated to address these procedures. These regulations seems to suggest that if

182. *See id.* § 12132.

183. *See* *Watson v. Utah*, No. 95-4190, 1996 WL 70521, at *8 (10th Cir. Dec. 9, 1996) (per curiam) (re-emphasizing that the purpose of the Act is to assure the accessibility of programs and services to qualified individuals with disabilities).

184. *See id.*

185. *See* 42 U.S.C. § 12102(2) (defining disability of an individual under the ADA as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”).

186. *Morrison v. Commissioner of Special Servs.*, No. CV 94-5796 RJD, 1996 WL 684426, at *9-10 (E.D.N.Y. Nov. 18, 1996) (citing *Lincoln CERCPAC v. Health & Hosps. Corp.*, 920 F. Supp. 488, 497 (S.D.N.Y. 1996) (setting forth the elements for an ADA violation)).

187. 42 U.S.C. § 12131(2) (1994).

188. *See* ADAPTIVE ENVIRONMENT CENTER, INC., ADA TITLE II ACTION GUIDE FOR STATE & LOCAL GOVERNMENT 11-12 (1992).

189. *See* 28 C.F.R. § 35.107(b) (2000).

the public entity already has other grievance procedures in place, the entity may use those procedures for complaints of ADA violations.¹⁹⁰

The *ADA Title II Action Guide*¹⁹¹ recommends that when implementing a grievance procedure, the procedure should specify in detail how to file a complaint of an ADA violation.¹⁹² The procedures should also allow the decision to be appealed, and specify a reasonable time period for a review and a decision on the complaint.¹⁹³ A system should also keep accurate track of filed complaints, and the steps taken to resolve the complaint.¹⁹⁴

Title II specifies that when an individual brings their own lawsuit alleging a violation of the ADA, that person may receive injunctive relief and attorney's fees and cost.¹⁹⁵ However, the individual is not entitled to compensatory or punitive damages.¹⁹⁶

C. *State Defenses to Application of the ADA*

Exceptions exist to state compliance with Title II of the ADA. A state need not comply if it can show that compliance may cause an undue burden on the service or program, or reasonable modifications may fundamentally alter the nature of the service or program, or pose a direct threat to health or safety.¹⁹⁷

1. Reasonable modification

The ADA allows reasonable modifications, unless the modification "would fundamentally alter the nature of the service, program, or activity."¹⁹⁸ The ADA does not explicitly define "reasonable modifications" but requires a state to "make reasonable modifications in policies, practices, or procedures . . . where necessary" to avoid discriminating against the disabled on the basis of their disability.¹⁹⁹

The Supreme Court addressed the issue of reasonable modification as required by the Rehabilitation Act in *Southeastern Community*

190. *See id.*

191. ADAPTIVE ENVIRONMENT CENTER, *supra* note 188.

192. *See id.* at 41.

193. *See id.*

194. *See id.*

195. *See* 42 U.S.C. § 12133 (1994); 28 C.F.R. § 35.175 (2000).

196. *See* 42 U.S.C. § 12133; 28 C.F.R. § 35.175.

197. *See* 28 C.F.R. pt. 36, app. B. (2000).

198. *Id.* § 35.130(b)(7); *see also* 28 C.F.R. § 35.150(a)(3).

199. 28 C.F.R. § 35.150(b)(1).

College v. Davis.²⁰⁰ There, a woman with impaired hearing wanted to attend nursing school.²⁰¹ The school determined that, in order to accommodate her disability, it would have to offer her a program of only academic work because it could not in good conscience allow her to work on patients, even if they provided an individual faculty advisor every time she saw patients.²⁰² The plaintiff argued the school should offer her the option of only academic work to obtain her degree or provide her with individual aid when she saw patients to allow her to safely participate in the nursing program.²⁰³

The Court held that the plaintiff was not an otherwise qualified individual because "extensive modifications would be necessary to accommodate her."²⁰⁴ The Court defined otherwise qualified as an individual who can meet all the requirements of the program in spite of their disability.²⁰⁵ The Court found that the modifications necessary would fundamentally alter the nature of the program and were more than that required by the reasonable modification requirement of the Rehabilitation Act.²⁰⁶

Using the Supreme Court's definition of "otherwise qualified," disabled plaintiffs appealing termination judgments will have trouble proving that they are "'otherwise qualified' for the benefit that has been denied."²⁰⁷ It will be difficult because the benefit denied is the ability to parent their children. In order for the court to terminate the parental rights, it would have found that the parents are not able ("qualified") to act as parents to their children.²⁰⁸

200. 442 U.S. 397 (1979). When interpreting the ADA, precedent of the Rehabilitation Act is used. See *Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979) (discussing the deference given to the Rehabilitation Act, and how the Act does not always require an entity to undertake substantial modifications).

201. See *Southeastern Community College*, 422 U.S. at 400.

202. See *id.* at 407.

203. See *id.*

204. *Id.* at 410.

205. See *id.* at 406.

206. See *id.* at 410. But see *Camenisch v. University of Tex.*, 616 F.2d 127, 133 (5th Cir. 1980) (holding that the university must provide a sign language interpreter to deaf student to participate in University programs).

207. *Morrison v. Commissioner of Special Servs.*, No. CV 94-5796 RJD, 1996 WL 684426 at *10 (E.D.N.Y. Nov. 18, 1996) (discussing, via the plaintiff's case, the difficulty complainants face when alleging and organizing a violation of the ADA).

208. See *id.* The court analogized their definition of "otherwise qualified" to the definition in *Bradley v. University of Texas M.D. Anderson Cancer Center*, which held that within the context of employment an "otherwise qualified" person is one who can perform the essential functions of their job. See *Bradley v. Uni-*

Therefore, they are not otherwise qualified for the benefit of parenting their children.²⁰⁹

The ADA also specifies that the accommodations are not reasonable if they require an undue financial or administrative burden.²¹⁰ The State has the burden of showing that it has examined all possible financial sources and cannot find the funding to provide the accommodations.²¹¹

2. Direct threat

Title II of the ADA allows the State to deny services, programs, or activities to individuals who pose a "direct threat" to the health or safety of others.²¹² If an individual is classified as a direct threat, they are not an otherwise qualified individual.²¹³ The Supreme Court in *School Board of Nassau County v. Arline*²¹⁴ balanced the interests of a disabled teacher with tuberculosis against the public safety concerns of the school in preventing the transmission of the disease to students. The Court held that a public entity may consider health and safety risks in determining if a person is otherwise qualified for services, programs, or activities.²¹⁵

Using the direct threat test, States could seemingly avoid following the ADA where a parent threatens a child's health or safety. Where parental rights are terminated, a court has already decided by clear and convincing evidence that the parent is a threat to the health or safety of the child. Therefore, courts holding that the

versity of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 924 (5th Cir. 1993).

209. See *Morrison* at *10-11. (highlighting the difficulty to be considered otherwise qualified).

210. See 28 C.F.R. § 35.150; .164 (2000).

211. See 28 C.F.R. § 35.164 (2000).

212. See *id.* § 36.208.

213. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

214. 480 U.S. 273 (1987).

215. See *id.* at 288. In *Arline*, the plaintiff was fired from her job as a school teacher because she had tuberculosis. See *id.* at 276. The Supreme Court remanded the case and stated that to determine if a person poses a direct threat to health and safety of others, the court should consider the nature, severity, duration of the disability, and the possibility of disease transmittal. See *id.* at 288. On remand, the district court found that the medical evidence showed that the plaintiff had been "cured" of tuberculosis and any chance that she could infect others was "so extremely small as to not exist." *Id.* at 292. The Court further stated that the plaintiff had been terminated not on the medical evidence, but on society's myths about the disease. See *id.*

ADA does not apply to termination of parental rights proceedings could use the direct threat test to support the reasoning.

V. DISABILITY DISCRIMINATION CLAIMS

A. Federal Court Decisions

To date only three cases addressing use of the ADA in appealing a termination of parental rights judgment have been brought before the federal courts.²¹⁶ In the first case, *Watson v. Utah*,²¹⁷ the court held that the plaintiff failed to state a claim upon which the federal courts could grant relief, and granted defendant's motion to dismiss the complaint.²¹⁸ The federal court stated that the defendants were absolutely immune from suits for damages and dismissed the plaintiff's complaint.²¹⁹ In *Watson*, the plaintiff initiated a law suit against the State of Utah and various state employees after her parental rights had been terminated, and sought money damages as well as injunctive and declaratory relief.²²⁰ The plaintiff alleged, *inter alia*, a violation of the ADA claiming that her parental rights were terminated because she is blind.²²¹ The district court granted the defendant's motion to dismiss, and the plaintiff appealed.²²² On appeal the United States Court of Appeals for the Tenth Circuit held that the Eleventh Amendment gives States and their employees absolute immunity from suits by its citizens seeking damages.²²³ The court further held that the claims for injunctive or declaratory dam-

216. See *Watson v. Utah*, No. 95-4191, 1996 WL 705219, at *7-8 (10th Cir. Dec. 9, 1996) (discussing the issues of deference and statutory interpretation that must be considered when focusing on the Rehabilitation Act or the ADA); *Morrison v. Commissioner of Special Servs.*, No. CV94-5796RJD 1996 WL 684426, (E.D.N.Y. Nov. 18, 1996); *Bartell v. Lohiser*, 12 F. Supp. 2d 640, 649-50 (E.D. Mich. 1998), *aff'd*, 215 F.3d 550 (6th Cir. 2000) (discussing the existing limited scope of the provisions of the ADA, underlining the idea that it is not a blanket statute under which to bring suit).

217. No. 95-4191, 1996 WL 705219 (10th Cir. Dec. 9, 1996).

218. See *id.* at *1.

219. See *id.*

220. See *id.* The plaintiff admitted to being a substantiated child sex abuser. See *id.* at *2.

221. See *id.* at *3.

222. See *id.* at *1.

223. See *id.* (citing *Meade v. Grubbs*, 841 F.2d 1512, 1525 (10th Cir. 1988)). The court also held that the state prosecutors were entitled to qualified immunity for investigative functions and absolute immunity for activities "intimately associated with the judicial process." *Id.* (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993))).

ages were moot as by statute the only person who can bring a petition to terminate a parent's rights in Utah is the Attorney General, and the plaintiff did not name the Attorney General in her suit.²²⁴ Additionally, the court wrote that the plaintiff had not been denied access to any service or program offered by the State, and thus failed to state a claim upon which relief could be granted.²²⁵

Again in *Bartell v. Lohiser*,²²⁶ a federal court held that the defendants had qualified immunity from the particular claim, and granted the defendants' motions for summary judgment.²²⁷ There, the plaintiff's parental rights had been terminated.²²⁸ Instead of appealing, the plaintiff chose to bring a separate action alleging a violation of the ADA in terminating her parental rights.²²⁹ The plaintiff tried to commit suicide and had been hospitalized for depression.²³⁰ Shortly thereafter, the Family Independent Agency (FIA) received complaints that the plaintiff abused her child.²³¹ FIA then placed parental aids into the home to help the mother, but the attempts were unsuccessful, and the mother voluntarily placed her child in foster care.²³² When the mother sought to bring the child home, the FIA petitioned the court for custody of the child.²³³ The court granted the petition, and the child remained in the foster home.²³⁴ FIA then contracted with Lutheran Social Services (LSS)²³⁵ to provide services to the mother to help reunite her with her child.²³⁶ The mother was given a number of services, but still was unable to care for her child. Consequently, LSS recommended to FIA that termination proceedings be initiated.²³⁷ The court found by clear and convincing evidence that the mother was unable to care for her child due to her mental and emotional conditions and the child's

224. *See id.*

225. *See id.* at *3.

226. 12 F. Supp. 2d 640 (E.D. Mich. 1998).

227. *See id.* at 650.

228. *See id.* at 643.

229. *See id.* at 644.

230. *See id.* at 642.

231. *See id.*

232. *See id.*

233. *See id.* at 643.

234. *See id.*

235. Lutheran Social Services (LSS) is a private company that the State contracts with to provide services to families in need. *See id.*

236. *See id.*

237. *See id.*

developmental problems.²³⁸ The mother brought a separate action suing the state agency, the individual employees of the State involved in her case, and LSS and its employees.²³⁹

The State argued that it and its employees were immune from suit, as well as LSS and its employees who were acting for the State.²⁴⁰ The mother argued that her parental rights had been terminated because of her mental disabilities, and that determination violated the ADA.²⁴¹ The court mentioned the numerous services offered to the mother and stressed the fact that the mother did not offer any evidence that the State had offered services to non-disabled persons and excluded her because of her disability.²⁴² The court also stated that nothing in the ADA required a State to ignore a parent's disability when determining the parent's ability to raise a child, nor does the ADA require the provision of special services to the disabled.²⁴³ The court held that the government defendants were entitled to qualified immunity and that the private employees were also immune as they were acting as an "arm of the state."²⁴⁴ Therefore, the court granted the defendant's motions for summary judgment.²⁴⁵

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision.²⁴⁶ The court held that the ADA does not negate qualified immunity for States and their agencies.²⁴⁷ The court found that LSS was acting as an arm of the State, and therefore, qualified immunity applied "with particular force to the foster care services provided by the LSS."²⁴⁸ The court applied a two-step test to determine whether the State and its employees, including LSS, could properly assert qualified immunity in this case.²⁴⁹ The first step is whether a "clearly established" statutory or constitutional right has been violated.²⁵⁰ The second step is to determine whether the state official acted unreasonably in light of the

238. *See id.* at 650.

239. *See id.* at 644.

240. *See id.* at 645.

241. *See id.* at 649.

242. *See id.*

243. *See id.* at 650.

244. *See id.* at 645-46.

245. *See id.* at 650.

246. *See Bartell v. Lohiser*, 215 F.3d 550, 560 (6th Cir. 2000).

247. *See id.* at 556.

248. *Id.* at 557.

249. *See id.* at 557.

250. *Id.*

"clearly established" right.²⁵¹ The court held that the State did not violate the plaintiff's constitutional right to raise her child because the State's interest in the well-being of her child superceded the mother's interest.²⁵² Therefore, the court found that qualified immunity was properly granted in this case.²⁵³

The third case, *Morrison v. Commissioner of Special Services*,²⁵⁴ also was dismissed. There, the plaintiff filed an action alleging violations of the ADA and Rehabilitation Act.²⁵⁵ The plaintiff contended that she was being discriminated against as she was refused custody and visitation of her children because she was an African American, and because she had a mental illness.²⁵⁶ The plaintiff further claimed that she did not receive notice from the defendant of an intent to terminate her parental rights or notice that the defendant moved to stay an order returning visitation rights to the plaintiff.²⁵⁷ The plaintiff alleged that non-African Americans were given this notice.

The court pointed out that while the Supreme Court recognized a parent's liberty interest in raising her children, that interest is not absolute.²⁵⁸ The court stated that the government has a compelling state interest in protecting children from abuse and neglect, and parents do not have a constitutional right to rely on DSS to strengthen and reunite the parent with her children.²⁵⁹ The court found the plaintiff's claim that she did not receive notice was without merit.²⁶⁰ The plaintiff did receive a copy of the motion to stay the order for visitation, which included the date and place where the family court would hear the issue, and no evidence was presented that non-African American persons received more notice than the plaintiff.²⁶¹

251. *Id.*

252. *See id.* at 558.

253. *See id.*

254. No. CV94-5796RJD, 1996 WL 684426 (E.D.N.Y. Nov. 18, 1996).

255. *See id.* at *2.

256. *See id.*

257. *See id.*

258. *See id.* at *3.

259. *See id.* (quoting *Marisol v. Giuliani*, 929 F. Supp. 662, 677 (S.D.N.Y. 1996)). The court quoted from the Southern District Court of New York who stated that, "the only courts to apply the concept of family integrity to the child welfare context have done so when children in foster care were denied visitation with siblings and parents." *Marisol*, 929 F. Supp. at 676.

260. *See Morrison*, 1996 WL 684426, at *2.

261. *See id.* at *3.

In *Morrison*, the court created a four-part test to determine if the ADA had been violated.²⁶² Under the test a plaintiff must show:

262. *See id.* The court derived this four-part test from the tests stated in *Flight v. Gloeckler*, and *Lincoln CERCPAC v. Health and Hospitals Corp.* *See Flight v. Glocker*, 68 F.3d 61 (2d Cir. 1995); *Lincoln CERCPAC v. Health and Hosps. Corp.*, 920 F. Supp. 488 (S.D.N.Y. 1996).

In *Flight*, the plaintiff was disabled and confined to a wheel chair because he suffered from multiple sclerosis. *See Flight*, 68 F.3d at 63. He was a client of New York State's Office of Vocational and Educational Services for Individuals with Disabilities (VESID) for a number of years. *See id.* The VESID established an employment plan for him as a homemaker. *See id.* Although the plaintiff wished to purchase a van to accommodate his disability and requested financial assistance from VESID, its policy only provided for financial assistance to modify vehicles if the modifications were necessary in the pursuit of employment. *See id.* The policies allowed for 10,500 dollars if the disabled person would be the driver of the modified vehicle and 4,000 dollars if the disabled person was to be the passenger of the vehicle. *Id.* Plaintiff was not satisfied with the grant. *See id.* They determined that the plaintiff was too disabled to drive the modified vehicle and did not require the modified vehicle to work. *See id.* However, VESID offered to pay 4,000 dollars to help him modify the van despite their policies. *See id.* Thus plaintiff sued alleging violation of the Rehabilitation Act. *See id.* The court followed a four part test to determine if the Rehabilitation Act had been violated. The court stated that to prove a violation of the Rehabilitation Act section 504, a plaintiff would have to show:

- (1) that he has a disability for purposes of the Rehabilitation Act, (2) that he is "otherwise qualified" for the benefit that has been denied, (3) that he has been "denied the benefits" solely by reason of his disability, and (4) that the benefit is part of a "program or activity receiving Federal financial assistance."

Id. (citing *Doe v. New York Univ.*, 666 F.2d 761, 774-75 (2d Cir. 1981)). The court determined it had not. *See id.* at 64.

In *Lincoln*, the plaintiffs were disabled children who had been receiving services from a clinic that was shut down because of cuts in the budget. *See Lincoln*, 920 F. Supp. at 491. The plaintiffs were not satisfied with the solution of being transferred to another clinic and filed suit alleging violations of the ADA and Rehabilitation Act. *See id.* at 492. The court used a three part test to determine if there had been a violation of the ADA. *See id.* at 497. To establish a violation of Title II of the ADA, plaintiff must show that: "(1) he or she is a 'qualified individual with a disability,' (2) he or she is being excluded from participation in or being denied the benefits of some service, program or activity by reason of his or her disability, and (3) the entity which provides the service, program or activity is a public entity." *Id.* (citing *Civic Assoc. of the Deaf*, 915 F. Supp. 622, 634 (S.D.N.Y. 1996)). The court used a similar four part test to determine if there had been a violation of the Rehabilitation Act. *See id.* at 496. To prevail on a Rehabilitation Act claim a plaintiff must show: "(1) they are 'handicapped persons' under the Act; (2) they are 'otherwise qualified' for the benefit that has been denied; (3) they are being denied benefits solely by reason of their disabilities; and (4) the entity denying plaintiffs benefits re-

(1) that she has a disability, (2) that she is "otherwise qualified" for the benefit that has been denied, (3) that she was either excluded from participation in or denied benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity, and (4) that such discrimination was by reason of plaintiff's disability.²⁶³

The court ruled that the plaintiff could not prevail because she failed to satisfy the element requiring proof that she is otherwise qualified for the benefit that she was denied.²⁶⁴ The court held that the plaintiff was not qualified to act as a parent to her children.²⁶⁵

Therefore, under the *Morrison* four-part test for determining an ADA violation of parents, most plaintiffs will have difficulty prevailing in any actions. Obviously, if a parent's parental rights were terminated, a court has found her not qualified to raise and care for their children.²⁶⁶ Thus, under *Morrison*, a court will never find such parents otherwise qualified individuals as required in the four-part ADA test.²⁶⁷

B. State Courts and the Supremacy Clause

The Supremacy Clause deems state law contrary to federal law to be without effect.²⁶⁸ To determine whether a federal statute preempts state law under the Supremacy Clause, the legislative intent must be discerned.²⁶⁹ The purpose of the ADA is to "prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy the same

ceives federal financial assistance." *Id.* (citing *Flight v. Gloeckler*, 68 F.3d 61, 63 (2d Cir. 1995)). The court found that the plaintiff's had failed to show a public service or program that had been offered to the non-disabled but denied to the disabled. *See id.* at 496-97. The court wrote that the "disabled are not entitled to more public services than the abled receive, even if the disabled need them." *Id.* at 497 (quoting *Alexander v. Choate*, 469 U.S. 287, 301-02 (1995)).

263. *Morrison*, 1996 WL 684426, at *3.

264. *See id.* at *4.

265. *See id.*

266. *See id.*

267. *See id.*

268. *See* U.S. CONST. art. VI, cl. 2.

269. *See* *Stone v. Daviess County Div. of Children and Family Servs.*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995) (citing *California Fed. Sav. & Loan Ass'n. v. Guerra*, 479 U.S. 272, 280 (1987)).

privileges and duties afforded to all United States citizens.”²⁷⁰ The ADA was not meant, in and of itself, to re-write state substantive law.²⁷¹ State courts have said that it was not the intent of Congress to change the substantive obligations imposed by unrelated state statutes.²⁷² Therefore, the ADA has no impact on the operation of each state’s termination of parental rights statute.²⁷³ The courts state that whether an ADA violation occurred is a separate action other than whether the court properly determined to terminate parental rights.²⁷⁴ This is why state courts have held that it is inappropriate for parents to use alleged violations of the ADA as a defense or to appeal a termination proceeding.²⁷⁵

Other state courts have argued that even if the ADA does apply to the State’s substantive law they have followed the ADA in their termination proceedings, and no violations have occurred.²⁷⁶ The first case reported on this issue was *Stone v. Daviess County Division of Children and Family Services*.²⁷⁷ There, both parents had extremely low IQ’s²⁷⁸ and had five children who were deemed CINAs due to alleged sex abuse, malnutrition, dangerous living conditions, lack of

270. *Morrison v. Commissioner of Special Servs.*, No. CV94-5796RJD, 1996 WL 684426, at *3 (E.D.N.Y. Nov. 18, 1996) (quoting *Galloway v. Superior Ct. of D.C.*, 816 F. Supp. 12, 20 (D.D.C. 1993)); see also *Marisol v. Giuliani*, 929 F. Supp. 662, 685 (S.D.N.Y. 1996) (stating that the purpose of the ADA is to “provide reasonable accommodations for the handicapped”).

271. See *Stone*, 656 N.E.2d at 830.

272. See *In re Torrance P.*, 522 N.W.2d 243, 245 (Wis. Ct. App. 1994); see also *In re B.K.F.*, 704 So. 2d 314, 317-18 (La. Ct. App. 1997) (stating that “other courts have refused to graft ADA requirements onto unrelated statutes”); *In re B.S.*, 693 A.2d 716, 721-22 (Vt. 1997) (holding that ADA requirements are inapplicable to termination of parental rights proceedings).

273. See *Torrance P.*, 522 N.W.2d at 245; see also *B.K.F.*, 704 So. 2d at 317; *B.S.*, 693 A.2d at 721.

274. See *Torrance P.*, 522 N.W.2d at 245; see also *B.K.F.*, 704 So. 2d at 317; *B.S.*, 693 A.2d at 721.

275. See *Torrance P.*, 522 N.W.2d at 245; see also *B.K.F.*, 704 So. 2d at 317; *In re B.S.*, 693 A.2d at 721.

276. See *In re C.M.*, 526 N.W.2d 562, 566 (Iowa Ct. App. 1994) (holding that the State made reasonable accommodations and termination was proper); *In re Angel B.*, 659 A.2d 277, 279 (Me. 1995) (holding that a number of services had been offered and tailored to the mother’s cognitive defects, therefore no ADA violation occurred); *In re Welfare A.J.R.*, 896 P.2d 1298 (Wash. Ct. App. 1995) (holding services had been offered to parents who were mentally deficient and abused drugs and alcohol and termination was proper).

277. 656 N.E.2d 824 (Ind. Ct. App. 1995).

278. See *id.* at 827.

supervision, and truancy.²⁷⁹ While the parents began classes and counseling, the children were removed from the parents' home and placed in the custody of the State.²⁸⁰ Neither parent improved nor admitted that they were not properly caring for their children.²⁸¹ These services extended over four years, and the parents were still not able to properly care for their children.²⁸² Consequently, termination proceedings were initiated, and the court terminated their parental rights.²⁸³ The parents appealed the termination, alleging an ADA violation.²⁸⁴ The parents claimed that social services had a duty to offer services that accommodated their mental problems.²⁸⁵ The court found that Congress did not intend the ADA to impact unrelated state substantive law; therefore, the ADA had no impact on termination statutes.²⁸⁶ Indiana's termination statute did not require any services to be provided to any parent before parental rights were terminated.²⁸⁷ If social services violated the parents' ADA rights in providing the services, the parents' only remedy was to bring a separate proceeding.²⁸⁸

C. State Court Decisions

Wisconsin decided the first case addressing whether a parent could use an alleged violation of the ADA as a defense to the termination of parental rights.²⁸⁹ That court held that the inquiry into

279. *See id.* at 826.

280. *See id.* at 826-27.

281. *See id.* at 827.

282. *See id.*

283. *See id.*

284. *See id.* at 829.

285. *See id.*

286. *See id.* at 829-30 (citing *In re Torrance P.*, 522 N.W.2d 243, 246 (Wis. Ct. App. 1994)).

287. *See id.* at 830. Therefore, in this case, the Division of Children and Family Services exceeded what was required by the statute. *See id.* at 831. However, the court explained that once an agency provides some services, "the provision of those services must be in compliance with the ADA." *Id.* at 830. Nonetheless, the services provided to the Stone's were tailored to their specific needs. *See id.* at 831.

288. *See id.* at 829 ("[A]ny alleged non-compliance with the ADA . . . in the provision of services . . . would be a matter separate and distinct from the operation of our termination statute.").

289. *See In re Torrance P.*, 522 N.W.2d at 245-46; *see also* *Wright v. Alexandria Div. of Social Servs.*, 433 S.E.2d 500 (Va. Ct. App. 1994). *Wright* was the first case seeking to appeal a termination of parental rights judgment based on a violation of the ADA, but the court passed on the issue because it was procedurally

whether the father's rights under the ADA had been violated was separate and distinct from the issue of whether the trial court erred in terminating the father's parental rights.²⁹⁰ Wisconsin's termination statute required that diligent efforts be made to offer court-ordered services to parents to try to reunite the parent and child before the parental rights can be terminated.²⁹¹

In *In re Torrance P.*,²⁹² the Wisconsin court held that whether the State made a diligent effort to offer the court-ordered services must be considered by the "totality of the circumstances" of each case.²⁹³ There, the court found that the effort must be examined in light of the father's limitations, including his illiteracy.²⁹⁴ The *Torrance* court emphasized that the duty to provide the court-ordered services was proscribed by the State termination statute, not the ADA.²⁹⁵

The *Torrance* court further stated that the ADA does not increase that duty nor does it proscribe how to perform that duty.²⁹⁶ The purpose of an appeal is to determine whether the State has met its burden, under the state statute, in showing that it made a diligent effort to offer the court-ordered services in light of the father's limitations.²⁹⁷ Neither the father's disability, nor the ADA changes that test or the State's burden of proof.²⁹⁸

The *Torrance* court determined that the ADA did not apply to the case, so it did not determine whether the State reasonably accommodated the father's disability.²⁹⁹ The court instead held that the father's allegation of a violation of the ADA would have to be brought under a separate cause of action.³⁰⁰

A Louisiana appellate court in *In re B.K.F.*³⁰¹ affirmed the district court's decision that a mother with schizophrenia could not

barred since it had not been raised at the trial court level. *See Wright*, 433 S.E.2d at 505.

290. *See Torrance P.*, 522 N.W.2d at 245-46; *see also supra* notes 12-14, 18-21 and accompanying text.

291. *See* WIS. STAT. § 48.415(2)(b) (1997 & Supp. 2000-2001).

292. 522 N.W.2d 243 (Wis. Ct. App. 1994).

293. *See id.* at 245.

294. *See id.*

295. *See id.*

296. *See id.*

297. *See id.*

298. *See id.* at 245-46.

299. *See id.* at 246.

300. *See id.*

301. 704 So. 2d 314 (La. Ct. App. 1997).

raise a violation of the ADA as a defense to her termination of parental rights.³⁰² The court determined that the ADA did not apply to termination of parental rights proceedings because such proceedings are not services, programs, or activities covered by the ADA.³⁰³ The court noted that the mother should have filed a separate law suit to challenge an alleged ADA violation, and it refused to "graft ADA requirements onto unrelated statutes."³⁰⁴

The Vermont Supreme Court came to the same conclusion in *In re B.S.*³⁰⁵ In that case, a mother who was mentally retarded appealed the termination of her parental rights alleging a violation of the ADA.³⁰⁶ The mother argued that if she were to receive assistance from the Lund Family Center she would be able to care for her child, and therefore be otherwise qualified.³⁰⁷ The court held that the ADA does not apply to termination proceedings because those proceedings are not programs, services, or activities as described by Title II of the ADA.³⁰⁸ The court noted that the family court is concerned only with issues dealing with the child and cannot consider other issues such as alleged ADA violations.³⁰⁹ The court stressed that the ADA provides for a separate cause of action for violations of that statute; therefore, parents who allege a violation of the ADA should bring a separate law suit.³¹⁰

A Washington appellate court upheld the State's termination of a parental rights statute which provides that a State can take into account mental deficiencies when deciding to terminate parental rights.³¹¹ The court held that a statute is unconstitutionally applied when it has been applied arbitrarily.³¹² The court found that the evi-

302. *See id.* at 317.

303. *See id.*

304. *Id.* at 317-18.

305. 693 A.2d 716 (Vt. 1997).

306. *See id.* at 717.

307. *See id.* at 717-20.

308. *See id.* at 720; *see also In re Antony B.*, 735 A.2d 893 (Conn. App. Ct. 1999) (holding that a termination proceeding is not a service, program, or activity under the ADA and that the ADA does not provide a defense to or require special obligations in termination of parental right proceedings).

309. *See In re B.S.*, 693 A.2d at 721.

310. *See id.*

311. *See Welfare of H.S. v. Department of Soc. & Health Servs.*, 973 P.2d 474, 484 (Wash. Ct. App. 1999) ("While the State is barred from arbitrarily removing children merely because the parents are mentally ill, the mentally ill are not immune from having their children removed if they are unfit").

312. *See id.* at 483.

dence presented in this case showed that the decision was not arbitrary.³¹³ The record reflected the nature of the parents' illnesses and the effect the illnesses had on their ability to parent.³¹⁴ That court also held that the ADA does not require public entities to provide services to the disabled that are not provided to other individuals.³¹⁵

To date, most state courts addressing this issue have held that ADA violations are not a defense to termination of parental rights.³¹⁶ Other state courts have rejected the alleged violation of the ADA claims of the parents because the States provided services to the parents.³¹⁷ However, those courts do not discuss if the services provided met the statutory requirements, the ADA requirements, or both.³¹⁸ Two state courts have held that if the ADA did apply, the services offered were enough and the ADA was not violated.³¹⁹ Regardless of how the state courts reached their decisions, they all hold that the ADA did not provide a valid defense to termi-

313. *See id.* The court stated, "[t]he findings recite in detail the affirmative evidence on which the court relied in establishing current unfitness." *Id.*

314. *See id.*

315. *See id.* at 481.

316. *See, e.g.,* *J.T. v. Arkansas*, 947 S.W.2d 761, 768 (Ark. 1997) (stating that the "parent's rights under the ADA must be subordinate to the protected rights of the child"); *Stone v. Daviess County Div. of Children & Family Servs.*, 656 N.E.2d 824 (Ind. Ct. App. 1995); *In re B.K.F.*, 704 So. 2d 314, 317 (La. Ct. App. 1997) (holding that the "ADA may not be used as a defense in a parental rights termination case"); *In re John D.*, 934 P.2d 308, 314 (N.M. Ct. App. 1997) (stating that when "the evidence [is] sufficient for the . . . court to find that [the parent] was responsible for the destruction of the parent-child relationship despite reasonable efforts by the Department, . . . the ADA could not be used under the facts of this case to shift that responsibility").

317. *See In re C.M.*, 526, 566 N.W.2d 562, 566 (Iowa Ct. App. 1994) (holding that reasonable accommodations were made); *In re Welfare of L.L.*, No. 20483-5-II, 1997 WL 677961, at *6 (Wash. Ct. App. 1997) (holding that the mother did not meet her burden of showing that the statute was unconstitutional and that the state statute violated the ADA); *In re Joshua R.*, No. 15381-9-III, 1998 WL 465203, at *5 (Wash. Ct. App. 1998) (finding that "services previously provided to them were sufficiently tailored to address their disabilities . . .").

318. *See, e.g.,* *In re Joshua R.*, No. 15381-9-III; *In re Welfare of L.L.*, No. 20483-5-II, *Angel B.*, 659 A.2d 277 (Me. 1995); *Robinson v. Washington*, 896 P.2d 1298 (Wash. Ct. App. 1995).

319. *See In re Angel B.*, 659 A.2d at 279 (stating that the State "offered a number of services that took [the parent's] pace and cognitive skills into account"); *Robinson*, 896 P.2d at 1302-03 (Wash. Ct. App. 1995) (holding that the state-provided services were modified to accommodate the parents specific disabilities).

nation of parental rights.³²⁰

VI. MARYLAND LAW

A. *Issue of First Impression*

1. Maryland Courts Look to Other Jurisdictions for Guidance

In *In re Adoption/Guardianship No. 2633*,³²¹ the court was faced with a family law issue of first impression. In that case, foster parents wanted an opportunity to be heard when the foster children they were caring for were removed from their home and adopted by another couple. They alleged that their due process rights had been violated because they had a statutory preference to adopt the child, and they were not given a hearing or opportunity to adopt.³²² They contended that they had a protected liberty interest as foster parents and should be heard.³²³

Maryland's highest court has held that where there is an issue of first impression, the court must examine authority from other jurisdictions for guidance in deciding the issue under Maryland law,³²⁴ therefore the Court of Special Appeals of Maryland looked at the precedent of other courts who had decided that issue. Those courts

320. See, e.g., *Stone v. Daviess County Div. of Children & Family Servs.*, 656 N.E.2d 824 (Ind. Ct. App. 1995); *In re B.K.F.*, 704 So. 2d 314 (La. Ct. App. 1997); *In re John D.*, 934 P.2d 308 (N.M. Ct. App. 1997); *J.T. v. Arkansas*, 947 S.W.2d 761 (Ark. 1997).

321. 101 Md. App. 274, 646 A.2d 1036 (1994).

322. See *id.* at 293, 646 A.2d at 1045.

323. See *id.*

324. See *Harris v. State*, 312 Md. 225, 241, 539 A.2d 637, 644 (1988). In *Harris* the court was confronted with an issue of first impression as to whether successive sentencing of a defendant was cruel and unusual punishment. See *id.* The court noted that a majority of other jurisdictions that had addressed this issue had held that a successive sentencing of a defendant did not amount to cruel and unusual punishment. See *id.* at 241, 539 A.2d at 644. Thus, the court of appeals, after examining these cases from other jurisdictions, held that successive sentencing did not amount to cruel and unusual punishment. See *id.* at 241-42, 539 A.2d at 644-45. Again, in *Albert S.*, the court of special appeals was confronted with an issue of first impression. See *In re Albert S.*, 106 Md. App. 376, 664 A.2d 476 (1995). The court looked to other jurisdictions and noted that other state courts had consistently held that where an off-duty police officer "steps outside the sphere of legitimate private action" the Fourth Amendment applies to his conduct. *Id.* at 386, 664 A.2d at 481. After reviewing the state courts' decisions, the court came to the same conclusion as the other state courts and held the Fourth Amendment applied to the off duty officer's conduct. See *id.* at 386-92, 644 A.2d at 481-84.

held that foster parents do not have a protected liberty interest and that foster care allows the state to have ultimate control over the children while they are being cared for on a day-to-day basis by a foster family. As such, the State creates any relationship that exists between the foster family and the foster child and that relationship is deemed to be temporary; therefore, no state-created rights or liberty interest exists in the foster parents.³²⁵

The Court of Special Appeals of Maryland concluded that after reviewing the other courts' precedents on the issue it was "obliged to conclude" that foster families do not have a protected liberty interest.³²⁶ From the interpretation of these cases, Maryland courts when faced with an issue of first impression follow the precedent established by other courts where those courts have consistent holdings.

2. Other Jurisdictions and the Use of the ADA as a Defense in Termination of Parental Rights Proceedings

As the use of the ADA as a defense in a parental rights termination proceeding is an issue of first impression in Maryland, other jurisdictions must be examined.³²⁷ Two federal courts have addressed this issue and held that states are entitled to qualified immunity in ADA actions; therefore, the ADA is not a defense in termination of parental right proceedings.³²⁸ The federal court in *Bartell* stated that there is nothing in the ADA that requires a state to ignore a parent's disability when determining their ability to raise

325. See *In re Albert S.*, 106 Md. App. at 294-95, 646 A.2d at 1046 (citing *Kyees v. County Dep't. of Public Welfare*, 600 F.2d 693, 694 (7th Cir. 1979) (holding that foster families have more limited liberty than natural or adopted families)); *Drummond v. Fulton County Dept. of Family and Children's Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978) (holding that the foster relationship is temporary); *DeWees v. Stevenson*, 779 F. Supp. 25, 28 (E.D. Pa. 1991) (observing that "[f]oster parents do not have a cognizable liberty interest in maintaining a relationship with a foster child"); *Sherrard v. Owens*, 484 F. Supp. 728, 742 (W.D. Mich. 1980), *aff'd*, 644 F.2d 542 (6th Cir. 1981), *cert. denied*, 454 U.S. 828 (1981) ("[A]ny expectation of 'family' continuity or permanency based upon the provisional foster family license . . . was totally unreasonable.").

326. *In re Albert S.*, 101 Md. App. at 292, 646 A.2d at 1095. The court also stated that after reviewing the other court decision on this relevant issue they followed what the other courts decided but were "reluctant" in that decision. *Id.*

327. See *supra* Part VI.A.1.

328. See *Watson v. Utah*, No. 95-4191, 1996 WL 705219 (10th Cir. Dec. 9, 1996) *Bartell v. Lohiser*, 12 F. Supp. 2d. 640 (E.D. Mich. 1998).

their child, nor does the ADA require special services to be provided to the disabled.³²⁹

The federal court in *Morrison* determined that the ADA does not apply where a court terminates a parents rights because the parent is not an otherwise qualified individual.³³⁰ The court concluded that the plaintiff was not qualified to act as a mother to her child.³³¹

Other state jurisdictions have held that a violation of the ADA is not a defense to a termination of parental rights proceeding, because an inquiry into an ADA violation is separate and distinct from whether the court erred in terminating a person's parental rights.³³² Other state courts have held that a violation of the ADA is not a defense to a termination of parental rights proceeding as such proceedings are not services, programs, or activities covered by the ADA.³³³

The fact that a number of state and federal courts have consistently held that the ADA is not a defense to termination of parental rights is significant in determining whether Maryland should follow suit. Since the state and federal courts may differ on the reason why the ADA is not a defense in a termination proceeding, it is helpful to look at Maryland's position on termination, and how it has applied the ADA in other settings.

B. *Maryland's Current Position on Termination of Parental Rights*

Maryland recognizes the substantial interest that a parent has in raising her child, which is protected by the Constitution, com-

329. See *Bartell*, 12 F. Supp. 2d at 650.

330. See *Morrison v. Commissioner of Special Servs.*, No. CV94-5796RJD, 1996 WL 684426, at *4 (E.D.N.Y. Nov. 18, 1996).

331. See *id.*

332. See, e.g., *J.T. v. Arkansas*, 947 S.W.2d 761, 766-67 (Ark. 1997) (finding that a mother did not establish the Department of Health Services violated the ADA since denial of visitation was based on the best interest of the child rather than on the disability of the parent); *Stone v. Daviess County Div. of Children and Family Servs.*, 656 N.E.2d 824, 829 (Ind. Ct. App. 1995) (finding the State did not violate the ADA in terminating parental rights of parents of limited intelligence); *In re John D.*, 934 P.2d 308, 314 (N.M. Ct. App. 1997) (holding that the plaintiff has the burden of establishing she is a "qualified individual with a disability" to establish an ADA violation); *In re Torrance P.*, 522 N.W.2d 243, 246 (Wisc. Ct. App. 1994) (holding that Congress did not enact the ADA to change obligations imposed by unrelated statutes).

333. See *In re B.K.F.*, 704 So. 2d 314, 317 (La. Ct. App. 1997) (finding the ADA provided no defense to termination of a schizophrenic mother's parental rights); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997) (finding no specific discrimination against disabled persons in the termination process).

mon law and statute. Because of the substantial interest involved, Maryland has developed a detailed statutory scheme to be used in termination of parental rights proceedings.³³⁴ In addition to satisfying these statutes, the court must find by clear and convincing evidence that it is in the best interest of the child to terminate parental rights. This heightened standard of proof is required by due process protections guaranteed to the biological parent.³³⁵

Although the rights of a parent to raise their child is substantial, the Court of Appeals of Maryland has been clear in stating that in adoption and custody cases the controlling factor is not the rights of the natural parents, but instead what is in the best interest of the child.³³⁶ The court has stated "in all cases where the interest of a child are in jeopardy the paramount consideration is what will best promote the child's welfare, a consideration that is of 'transcendent importance.'" ³³⁷

In order to determine what is in the best interest of the child in a termination of parental rights proceeding, the court must consider subsections c and d of section 5-313 of the Family Law Article.³³⁸ One factor in section 5-313(d) provides that in determining what the best interest of the child, the court must consider whether the parent has a disability of alcoholism, drug abuse, mental illness, or mental retardation³³⁹ which prevents the parent from properly caring for her child.³⁴⁰ If the court finds this to be the case it can relieve social services of the obligation to provide services to reunify the parent and child.³⁴¹ While section 5-313(d) may seem to discriminate against individuals with the enumerated disabilities, the courts have made clear that the disability alone is not enough to terminate parental rights.³⁴² As a further safeguard against discrimination, the disability has to make the parent unable to care for the child now

334. See MD. CODE ANN., FAM. LAW, §§ 513(c)(d) (2000).

335. See *Stone*, 656 N.E.2d at 828.

336. *In re Adoption Guardianship No. A91-71A*, 334 Md. 538, 559, 640 A.2d 1085, 1095 (1994).

337. See *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 114, 642 A.2d 201, 209 (1993).

338. See *supra* notes 36-37 and accompanying text.

339. See *supra* note 95 and accompanying text.

340. See MD CODE ANN., FAM. LAW § 5-313(d)(1)(i).

341. See MD CODE ANN., FAM. LAW § 5-313(d)(3); see also *In re Adoption/Guardianship No. J970013*, 128 Md. App. 242, 253, 737 A.2d 612, 610 (1999) (finding the termination of parental rights of a father serving 20 years to life in prison was something that might never occur).

342. See *supra* note 95 and accompanying text.

and in the future.³⁴³ Ensuring a child's safety and stable living arrangements must come before the interests of the parents.

The court of appeals has further held in *In re Adoption/Guardianship No. 10941*³⁴⁴ that where the mother has severe mental disorders, is unfit to care for her child, and may remain unfit to care for her child indefinitely, attempts at reunification services would be futile and DSS does not have to offer assistance.³⁴⁵ In that case, the mother suffered from schizophrenia for many years.³⁴⁶ She moved from month to month sometimes living in homeless shelters, was unemployed, and refused to get help for her mental disorder.³⁴⁷ The court found that she was unfit to care for her child and that her situation was not a "temporary crisis" nor the result of a "string of bad luck."³⁴⁸ The court stated that DSS did provide a reasonable amount of assistance to reunify the parent with her child but even if they had not the termination would have been proper.³⁴⁹ Although the ADA was not considered in this case, the holding, along with the statutory counterpart, seems to agree with courts that have found the ADA does not apply because termination proceedings are separate and distinct from alleged violations of the ADA.³⁵⁰

C. Maryland Law on ADA Violations in Court Proceedings

The Court of Appeals of Maryland has held that a violation of the ADA cannot be used as a defense in a court proceeding.³⁵¹ In *Green v. North Arundel Hospital Association*,³⁵² a minor brought a medical malpractice action against a hospital and some physicians for failing to identify the shunt in his brain as malfunctioning, resulting

343. See *In re Adoption/Guardianship No. 10941*, 335 Md. 99, 119, 642 A.2d 201, 210-11 (1993).

344. 335 Md. 99, 642 A.2d 201 (1993).

345. See *id.* at 117-18, 642 A.2d at 210-11.

346. See *id.* at 118, 642 A.2d at 210-11.

347. See *id.*

348. See *id.* at 118-19, 642 A.2d at 211.

349. See *id.* at 117, 642 A.2d at 210.

350. See, e.g., *J.T. v. Arkansas*, 947 S.W.2d 761 (Ark. 1997); *Stone v. Daviess County Div. of Children & Family Servs.*, 656 N.E.2d 824 (Ind. Ct. App. 1995); *In re John D.*, 934 P.2d 308 (N.M. Ct. App. 1997); *In re Torrance P.*, 522 N.W.2d 243 (Wisc. Ct. App. 1994).

351. See *Green v. North Arundel Hosp. Ass'n.*, 126 Md. App. 394, 417-18, 730 A.2d 221, 234 (1998) (finding a disabled child who was in a vegetative state did not have the absolute right to attend his medical malpractice trial as an observer).

352. 126 Md. App. 394, 730 A.2d 221 (1998).

in a vegetative state.³⁵³ The trial judge bifurcated the trial on the issues of liability and damages.³⁵⁴ The defendants in the case made a motion in limine to exclude the plaintiff from the courtroom during the liability portion of the trial.³⁵⁵ The trial judge granted the motion on the basis that the plaintiff was not able to assist counsel, testify on his own behalf or even understand what was occurring in the proceedings.³⁵⁶ At the conclusion of the case, the plaintiff appealed *inter alia* that his exclusion from the trial was a violation of the ADA.³⁵⁷ The court of appeals held that a party does not have an absolute right to attend trial.³⁵⁸ The court held that

[F]ederal regulations implementing the requirements of the ADA state: 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.³⁵⁹

The court found that the ADA did not apply in that case.³⁶⁰ The court stated that the ADA provides only for injunctive relief and does not allow a judgment between two private parties to be reversed.³⁶¹

Assuming the ADA applied and had been violated in this case, the court held that the plaintiff's only recourse would be to bring a separate action against the judge in his official capacity since the ADA only allows for an action against the public entity for prospective relief.³⁶²

Having taken this approach to the ADA, it seems that the court of appeals would agree with other courts who decided that a viola-

353. *See id.* at 398, 730 A.2d at 223.

354. *See id.* at 400, 730 A.2d at 224.

355. *See id.*

356. *See id.*

357. *See id.* at 401, 730 A.2d at 224-25.

358. *See id.* at 417, 730 A.2d at 234.

359. *Id.* at 415-16, 730 A.2d at 233 (quoting 28 C.F.R. § 35.130(b)(7)(1999)); *see also* Weinreich v. Los Angeles County Metro. Transp. Auth., 114 F.3d 976, 979 (9th Cir. 1997), *cert. denied*, 522 U.S. 971 (1997) (finding that a public transit system's policy requiring disabled participants to re-certify that they are disabled did not discriminate against participants on the basis of their disability).

360. *See Green*, 126 Md. App. at 417, 730 A.2d at 233.

361. *See id.*

362. *See id.* at 416-17, 730 A.2d at 233.

tion of the ADA is not a defense to a termination of parental rights proceeding because they are separate and distinct proceedings. Further, the court in *Green* stated that if the ADA applied and had been violated the plaintiff's only recourse would be to bring a separate action.³⁶³ This is consistent with other state courts' holdings that a parent's only recourse would be to bring a separate action alleging a violation of the ADA.³⁶⁴

VII. CONCLUSION

The Americans with Disabilities Act is intended to protect people with disabilities from discrimination.³⁶⁵ It is not intended to preempt state law regarding termination of parental rights.³⁶⁶ Therefore, alleging a violation of the ADA is not a valid defense against termination of parental rights.³⁶⁷ However, a violation of the ADA gives to a parent a separate cause of action.³⁶⁸

While Maryland has not yet decided this issue, it seems likely that a Maryland court would follow the lead of a number of other state and federal courts, allowing a separate claim for alleged violations of the ADA. However, such actions would not allow parents to defend termination of parental rights by claiming violations of the ADA.

Jennifer Wright Burke

363. *See id.*

364. *See supra* Parts V.B-C.

365. *See supra* note 1 and accompanying text.

366. *See supra* notes 271-73 and accompanying text.

367. *See supra* note 350 and accompanying text.

368. *See supra* note 362 and accompanying text.