Fordham Urban Law Journal

Volume 48
Number 2 *Segregation and Inequality in New York City Schools*

Article 6

2021

The Child Welfare Hyper Surveillance State: Reimagining Supporting Parents with Mental Illnesses in 1028 Hearings

Rachel M. Patterson

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

Recommended Citation
Rachel M. Patterson, *The Child Welfare Hyper Surveillance State: Reimagining Supporting Parents with Mental Illnesses in 1028 Hearings*, 48 Fordham Urb. L.J. 545 (2021).
Available at: https://ir.lawnet.fordham.edu/ulj/vol48/iss2/6

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE CHILD WELFARE HYPER SURVEILLANCE STATE: REIMAGINING SUPPORTING PARENTS WITH MENTAL ILLNESSES IN 1028 HEARINGS

Rachel M. Patterson[*]

Introduction 546
I. Article 10 Cases from Report to Resolution 551
A. An Introduction to Article 10 Cases 551
i. Article 10 Cases 552
ii. Start of an Article 10 Case 553
B. Trials and 1028 Hearings 557
II. The Americans with Disabilities Act and the Adoption and Safe Families Act 559
A. The ADA Generally 560
B. The ADA Applied to the Child Welfare System 561
C. The Adoption and Safe Families Act of 1997 565
III. Surveillance and the Standard of "Imminent Risk" at 1028 Hearings 568
A. Overview of the Four Layers of Surveillance 569
B. The Standard and Its Application 573
C. Positive Impacts of the Imminent Risk Standard for Parents with Mental Illnesses 576
i. Improved Procedural Time Frame 576
ii. Decreased Effects of Racial Bias 577

[*] J.D. Candidate, 2021, Fordham University School of Law; B.A., 2014, Loyola University Chicago. This Note is dedicated to the memory of my mother, Janice Patterson. Special thanks to Professor Clare Huntington for the wisdom, guidance, and compassion she has provided throughout publishing this piece and my law school career. I would also like to thank the *Fordham Urban Law Journal* editors and staff for their commitment to this Note. Especially Nora Stephens, who always empowers me to be the fiercest advocate I can be. Thank you to my friends and family, who supported me through the process, and a special thank you to Michael Lockyer for his endless love and support before, during, and beyond law school.

D. Negative Impacts of the Imminent Risk Standard for Parents with Mental Illnesses 578
i. Procedurally, the Process Is Too Slow, and Parents Have Only One Opportunity 578
ii. The ASFA Timeline Is Particularly Detrimental for Parents with Mental Illnesses 581
iii. No Protection Against Discrimination: Judges Do Not Recognize the ADA in the Child Welfare Context 582
iv. Caseworker and Service Provider Bias 582
IV. Surveillance Is Not Safety for Families, Especially for Parents with Mental Illnesses 584
A. Recommendations to Better Support Parents with Mental Illnesses in a 1028 Hearing in a Child Welfare System with Hyper Surveillance 584
i. Consider the ADA in 1028 Hearings 586
ii. Mental Illness Trainings for Everyone in Family Court 587
iii. Train Service Providers 588
B. In the Age of Defund ACS: Reimagining Support for Parents with Mental Illnesses in a Child Welfare System with Less Surveillance 589
i. Nothing About Us Without Us 590
ii. Incentivize Reunifying Families, Including Parents with Disabilities 592
Conclusion 593

INTRODUCTION

> When my oldest daughter went into foster care five years ago, I was 20 and struggling. I'd signed myself out of foster care two years earlier and had been bouncing between youth shelters and my mom's place.
>
> I went into a shelter after my daughter was born, but a few months later my mother asked me to move in with her . . . . [My mother] placed me in foster care at 14 because she couldn't handle me acting up, cutting class and staying out late. She eventually got me diagnosed with bipolar disorder.
>
> Still, I was grateful to see how much my mom loved her granddaughter.
>
> . . . .
>
> Things changed when my daughter was 18 months and I started a new relationship and quickly got pregnant. My mother and I argued; she

told me to have an abortion. I packed up my baby and went to my boyfriend's place. Then my mother told CPS that I was with my daughter and without medication while dealing with a crippling illness, and my daughter was taken from me.

I felt betrayed.

Shortly after that, my boyfriend became physically abusive. I lived in terror for my entire pregnancy — I didn't have anywhere else to go and I believed that he loved me.

I became very depressed, stopped going to therapy and often missed visits with my daughter.

I was allowed to take my second daughter home when she was born — with the understanding that I would be living in a shelter and staying away from my boyfriend. I didn't do that, and shortly after I gave birth, my boyfriend and I argued and he cut my ear open with a knife and threatened to kill us all.

The court said I was putting my baby in imminent danger, and she was removed as well.

I felt worthless for losing my children. I was in such a dark place.

. . . .

When I'd met my first caseworker, I was nervous, but she seemed genuinely concerned.

By the time my second daughter entered foster care, my worker had left the agency. I hoped that her replacement would be as caring, but she talked to me like I was too young and dumb to take care of my kids. She made me feel low for being the victim of domestic violence, but she never referred me to DV counseling or a shelter for battered women.

Months later, I had another worker. She referred me to DV counseling, but she also made me feel ashamed for being stuck in the relationship.

It was hard to make any progress. As time passed the agency tacked on new services, but they were always the same. I completed a parenting class six times and Parenting Journey three times.

But none of those services addressed my deeper issues — instead of bipolar, I had been newly diagnosed with PTSD and anxiety due to being thrown into foster care and the trauma I suffered there.

When I went and found my own trauma-focused therapy, my worker said I wasn't complying because it didn't address bipolar disorder.

I sank deeper into the dark. Some days I just couldn't get out of bed.

. . . .

> Things began looking up a year later when I started dating the man who is now my husband.
>
> . . . .
>
> When I had my son, we were able to raise him together for two years without incident, and I attended workshops on co-parenting with an abusive ex and on self-care. Yet my daughters remained in foster care.
>
> Then I got pregnant again.
>
> My pregnancy was high-risk . . . . I was put on bed rest and didn't do services or visit my kids for most of the pregnancy.
>
> I also was smoking weed at times.
>
> When my daughter was born, the hospital found THC in my system and she was taken from me. The next day, a worker went by my place and said that I didn't have enough food and my house was unkempt. She removed my son.[1]

While Ms. Carol's bipolar disorder[2] might not have been the focal point of her engagement with the child welfare system, it is the mental illness she lives with every day.[3] Her bipolar disorder might not have dictated every action she took, but it affected her and the decisions she made. Despite multiple levels of surveillance, including mandated reporters[4] like hospital staff and caseworkers, Ms. Carol still felt unseen and unheard in the child welfare system[5] — a system designed to, among other things, strengthen families.[6]

---

1. *Life Support — After Years of Chaos, I'm Moving Forward with the Right Help*, RISE MAG. (May 2, 2018) [hereinafter *After Years of Chaos*], https://www.risemagazine.org/2018/05/life-support-after-years-of-chaos-im-moving-forward-with-the-right-help/ [https://perma.cc/4729-UETB]. This essay was written by an anonymous author whom this Note refers to as "Ms. Carol."

2. Bipolar disorder typically requires lifelong treatment. *See Bipolar Disorder*, NAT'L INST. MENTAL HEALTH, https://www.nimh.nih.gov/health/publications/bipolar-disorder/index.shtml#:~:text=Although%20the%20symptoms%20come%20and,treatment%20leads%20to%20better%20outcomes [https://perma.cc/M76T-RRFW] (last visited Oct. 8, 2020).

3. *See After Years of Chaos*, *supra* note 1.

4. *See infra* Section III.A.

5. *See After Years of Chaos*, *supra* note 1.

6. *See How Does the Child Welfare System Work*, MENTALHELP.NET, https://www.mentalhelp.net/abuse/how-does-the-child-welfare-system-work/ [https://perma.cc/BTV4-87GY] (last visited Oct. 8, 2020).

People with disabilities represent approximately 15% of the population.[7] There are 4.1 million parents with disabilities[8] and approximately 6.6 million children who have parents with disabilities in the United States.[9] This means nearly one in ten children live with a parent who suffers from a mental or physical disability.[10] As of 2012, 19% of children in the foster care system were removed, at least in part, because of parental disability.[11] A study of mothers in Philadelphia with serious mental illnesses receiving Medicaid indicated that they were almost three times as likely as mothers without mental illnesses to have child welfare involvement or child custody loss.[12]

Focusing on New York State, this Note asserts that hyper surveillance disadvantages parents with mental illnesses at every stage of the child welfare system such that they are rarely afforded the opportunity to ask for their children to return to their care while the case is pending and, when they are, the child is rarely returned to their care. This Note further asserts that the child welfare system exposes

---

7. *See* Phillip A. Swain & Nadine Cameron, *"Good Enough Parenting": Parental Disability and Child Protection*, 18 DISABILITY & SOC'Y 165, 171 (2003).

8. *See* NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 15 (2012) [hereinafter ROCKING THE CRADLE], https://ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/VTF8-9AQ2].

9. *See Additional Information on the 2012 National Data on Parents with Disabilities and Their Children*, THROUGH LOOKING GLASS, https://www.lookingglass.org/national-services/research-a-development/127-additional-information-on-the-2012-national-data-on-parents-with-disabilities-and-their-children [https://perma.cc/YX9J-863F] (last visited Oct. 8, 2020); *see also Impairments, Activity Limitations, and Participation Restrictions: What Is Disability?*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/disabilityandhealth/disability.html#:~:text=A%20disability%20is%20any%20condition,around%20them%20(participation%20restrictions [https://perma.cc/GSR7-FK7Y] (last visited Oct. 8, 2020) (defining disability as "any condition of the body or mind (impairment) that makes it more difficult for the person with the condition to do certain activities (activity limitation) and interact with the world around them (participation restrictions)").

10. *See Additional Information on the 2012 National Data on Parents with Disabilities and Their Children*, *supra* note 9.

11. *See* Elizabeth Lightfoot & Sharyn DeZelar, *The Experiences and Outcomes of Children in Foster Care Who Were Removed Because of a Parental Disability*, 62 CHILD. & YOUTH SERVS. REV. 22, 22 (2016).

12. *See* Jung Min Park, Phillip Solomon & David S. Mandell, *Involvement in the Child Welfare System Among Mothers with Serious Mental Illness*, 57 PSYCHIATRIC SERVS. 493, 493 (2006).

parents[13] to Four Layers[14] of Surveillance[15] throughout the pendency of their abuse or neglect cases.[16] Layer One is mandatory reporting; Layer Two is the State Central Registry investigation; Layer Three is the report generated in the SCR; and Layer Four is services, court-ordered or otherwise. These four layers highlight the different effects various forms of surveillance have based on who is doing the surveilling and at what point in the child welfare case, or beyond. The child welfare system exposes parents to each layer sequentially as their case progresses. By the time a parent reaches Layer Four and requests through an emergency hearing for her child to return home to her care, she has entered the sphere of hyper surveillance.[17]

Part I of this Note introduces Article 10 cases in the context of the surveillance that parents with mental illnesses[18] experience, and subsequent trials and 1028 hearings. Part II explores the Americans with Disabilities Act and the Adoption and Safe Families Act, two statutes that predominantly guide child welfare agencies. Part III introduces, via this Note's proposed Four Layers of Surveillance system, the surveillance parents experience in the child welfare system. Part III explains the Four Layers of Surveillance and the relevant "Imminent Risk" standard relevant in a 1028 hearing. It also illustrates how the standard both serves and disservices parents with mental

---

13. "Parent" in this Note refers to the parent or person who is legally responsible for a subject child's care.

14. This Note proposes categorizing methods of state surveillance into four layers to better assess how different types of surveillance affect different parents. *See infra* Section III.A.

15. This Note defines "surveillance" as state-mandated monitoring of individuals and families for some purpose, such as child safety or family safety. Surveillance today is commonly associated with technology and democracy. *See The Effectiveness of Surveillance Technology: What Intelligence Officials Are Saying*, 34 INFO. SOC'Y 88 (2017); *see also* Richard Stallman, *Stallman: How Much Surveillance Can Democracy Withstand?*, WIRED (Oct. 14, 2013, 9:30 AM), https://www.wired.com/2013/10/a-necessary-evil-what-it-takes-for-democracy-to-survive-surveillance/ [https://perma.cc/QA7J-3LHP]. Child welfare workers do not call their work surveillance; however, this Note asserts that the work child welfare workers engage in is still necessarily state-mandated monitoring for the purpose of child or family safety.

16. This Note focuses on neglect cases and does not discuss abuse cases, which would require a different analysis. *See infra* Section III.A.

17. This Note uses the term "hyper surveillance" to describe the combination of all Four Layers of Surveillance the child welfare system could subject parents to.

18. *See Mental Health Conditions*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/Learn-More/Mental-Health-Conditions [https://perma.cc/H6PR-UXEH] (last visited Oct. 8, 2020) (defining "mental illness" as a "condition that affects a person's thinking, feeling, behavior or mood," and providing examples).

illnesses. Part IV asserts that surveillance does not equate to safety for families, especially for parents with mental illnesses. Instead, this Note offers two sets of solutions to better support parents with mental illnesses in the child welfare system. This Part recommends a more just operation of the Four Layers of Surveillance as the system exists today. Part IV further recommends developing a system with less surveillance in the age of defunding the Administration for Children's Services.

I. ARTICLE 10 CASES FROM REPORT TO RESOLUTION

A. An Introduction to Article 10 Cases

The child welfare system is a group of services designed to promote children's well-being by ensuring safety, achieving permanency, and strengthening families to successfully care for their children.[19] In New York State, the child welfare system is responsible for receiving and investigating, among other things, reports of possible child abuse and neglect.[20] Article 10 of the Family Court Act (FCA) governs these proceedings and defines "neglect";[21] the resulting cases are known as "Article 10 cases."[22] This set of laws intends to be rehabilitative

---

19. *See How Does the Child Welfare System Work*, *supra* note 6.

20. *See* CHILD.'S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 3 (2013) [hereinafter HOW THE CHILD WELFARE SYSTEM WORKS], https://www.childwelfare.gov/pubPDFs/cpswork.pdf [https://perma.cc/M9QR-575T].

21. *See* N.Y. FAM. CT. ACT § 1032(a) (McKinney 2018). A "neglected child" is

> a child less than eighteen years of age . . . whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter or education . . . or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so . . . .

Id. § 1012(f) (McKinney 2019). An "abused child" is

> a child less than eighteen years of age whose parent or other person legally responsible for his care . . . inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or . . . creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ . . . .

Id. § 1012(e).

22. *See id.* § 1032(a).

instead of punitive, as a family court case aims to promote the best outcome for the families involved.[23]

i. Article 10 Cases

The life of an Article 10 case begins with Layer One Surveillance, when a person, often a mandatory reporter, calls the Statewide Central Register of Child Abuse and Maltreatment (SCR).[24] In New York State, the Office of Children and Family Services is the governmental agency that maintains the SCR and receives all telephone calls alleging child abuse or maltreatment.[25] SCR staff relay relevant information from the local Child Protective Services (CPS) calls for investigation.[26] In New York City, the Office of Children and Family Services designated the Administration for Children's Services (ACS) as the CPS authorized to investigate and file neglect proceedings.[27] SCR staff call ACS to conduct investigations into all reports made to the SCR.[28]

From there,[29] an ACS investigator contacts the person who made the report within 24 hours to gather more information and begin the 60-day investigation into the allegations.[30] Next, the assigned CPS

23. *See* People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994) ("The orientation of Family Court is rehabilitative, directed at protecting the vulnerable child, as distinct from the penal nature of a criminal action which aims to assess blame for a wrongful act and punish the offender.").

24. *See Do You Suspect Abuse or Maltreatment? Report it Now!*, N.Y. ST. OFF. CHILD. & FAMILY SERVS. [hereinafter *Do You Suspect Abuse or Maltreatment?*], https://ocfs.ny.gov/main/cps/ [https://perma.cc/57J3-2H76] (last visited Oct. 8, 2020).

25. *See id.*

26. *See id.* SCR also monitors their prompt response and identifies whether there are prior child abuse or maltreatment reports.

27. *See How to Make a Report*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., https://www1.nyc.gov/site/acs/child-welfare/how-to-make-report.page [https://perma.cc/8EB7-KVZZ] (last visited Nov. 7, 2020).

28. *See Do You Suspect Abuse or Maltreatment?*, *supra* note 24; *see also Child Protective Services Manual*, N.Y. ST. OFF. CHILD. & FAM. SERVS. ch. 9, C-1 (Dec. 2017) [hereinafter *2017 Child Protective Services Manual*], https://ocfs.ny.gov/main/cps/manual/CPS-ch09-Family-Court-Proceedings.pdf [https://perma.cc/D64C-9EUJ] ("CPS may find it necessary to file an Article 10 petition in Family Court during a CPS investigation if court intervention is required to protect the child from being abused or neglected.").

29. *See infra* Section III.A (discussing who can make calls to the SCR, which constitutes Layer One Surveillance).

30. *See A Parent's Guide to a Child Abuse Investigation*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page#:~:text=Unfounded%20means%20that%3A,that%20the%20report%20was%20unfounded [https://perma.cc/CK68-EC84] (last visited Oct. 26, 2020); *see also* N.Y. SOC. SERV. LAW § 414 (McKinney 2019) ("In addition to those persons and officials required to report suspected child abuse or maltreatment, any person may make such a report

worker makes an unannounced visit to the home. The investigator must see and speak to all the children living with the person accused of abuse or neglect in the report.[31] The investigator will also speak to other caretakers, as well as any children present in the home during the investigation, even if they were not named in the call to the SCR,[32] as they look for "some credible evidence of child abuse and/or maltreatment."[33] At the end of an investigation, CPS will either mark the report "unfounded" or "indicated."[34] An unfounded report means there was not enough evidence for CPS to support the claim that a child has been abused or neglected, whereas an indicated report means there was enough evidence.[35] Indicated and unfounded reports have different implications for a family.[36] For instance, an indicated report triggers SCR surveillance, or Layer Two Surveillance.[37]

ii. Start of an Article 10 Case

If ACS finds some credible evidence,[38] it may file a petition in family court alleging facts sufficient to establish the child is an abused[39] or neglected[40] child.[41] ACS files the petition on behalf of the child; the "parent, guardian[,] or other person legally responsible for the child who is alleged to have abused or neglected the child" becomes the

---

if such person has reasonable cause to suspect that a child is an abused or maltreated child."); *Do You Suspect Abuse or Maltreatment?*, *supra* note 24 (the SCR receives calls from anyone at any time if he or she suspects a child may be experiences abuse or maltreatment).

31. *See A Parent's Guide to a Child Abuse Investigation*, *supra* note 30.

32. *See id.*

33. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(iv) (2020).

34. *See id.*

35. *See* N.Y. SOC. SERV. LAW § 412(6)–(7) (McKinney 2017) (stating that an "unfounded report" means any report bereft of some credible evidence of abuse or maltreatment, and that an "indicated report" means a report for which an investigation determines that some credible evidence of the alleged abuse or maltreatment exists); *A Parent's Guide to a Child Abuse Investigation*, *supra* note 30.

36. *See infra* Section III.A.

37. *See infra* Section III.A.

38. *See Credible Evidence Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/c/credible-evidence/#:~:text=Credible%20evidence%20is%20not%20evidence,make%20it%20easy%20to%20believe [https://perma.cc/7XBT-LTKP] (last visited Oct. 28, 2020). Credible evidence is an evidentiary standard referring to evidence that is not necessarily true but is reasonable. *See infra* Part III.

39. *See* N.Y. FAM. CT. ACT § 1012(e) (McKinney 2019); *2017 Child Protective Services Manual*, *supra* note 28, at ch. 9, C-1.

40. *See* N.Y. FAM. CT. ACT § 1012(f); *2017 Child Protective Services Manual*, *supra* note 28, at ch. 9, C-1.

41. *See* N.Y. FAM. CT. ACT § 1012(b).

respondent.[42] ACS may remove a child allegedly abused or neglected before filing a petition if the investigator determines the child is not safe in their parent's care.[43]

However, the state must make "reasonable efforts" to keep families together. The "reasonable efforts"[44] standard applies to state social services' actions aimed at providing assistance and services needed to preserve and reunify families.[45] Suppose a child remains in the home after ACS files an Article 10 petition. In that case, the government must use "reasonable efforts" to prevent removing the child before moving the child to an out-of-home placement such as foster care.[46] Additionally, if a child is removed before ACS files an Article 10 petition, the state must also make reasonable efforts to return the child.[47] These two reasonable efforts requirements apply to all families, regardless of a parent's particular circumstances. For example, when a parent has a disability, such as a mental illness, ACS is required to ensure that the parent is "afforded an opportunity to preserve [his or her family] and/or to become [a] parent[] that is equal to the opportunity that the entities offer to individuals without disabilities."[48]

---

42. *Id.* § 1012(a).

43. *See Will My Child Be Removed?*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., https://www1.nyc.gov/site/acs/child-welfare/will-acs-take-my-child.page [https://perma.cc/TKU3-UZKL] (last visited Oct. 28, 2020).

44. *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 104–15 (2002). Reasonable efforts requirements were introduced in the Adoption Assistance and Child Welfare Act of 1980 and refined by the Adoption and Safe Families Act of 1997.

> The Adoption Assistance and Child Welfare Act of 1980 encouraged states to replace costly and disruptive out-of-home placements with preventive and reunification programs. The law, which is still in effect today, requires that before placing children in foster care, state agencies must make "reasonable efforts" to enable them to remain safely at home. It also mandates that states make reasonable efforts to safely return children in foster care to their parents.

Id. at 105.

45. *See* 42 U.S.C. § 671(a)(15)(B); CHILD.'S BUREAU, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1 (2019) [hereinafter REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES], https://www.childwelfare.gov/pubPDFs/reunify.pdf [https://perma.cc/4NJS-GKWF].

46. *See* Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004).

47. *See* 42 U.S.C. § 671(a)(15)(B)(ii).

48. U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF JUST., PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES: TECHNICAL ASSISTANCE FOR STATE AND LOCAL CHILD WELFARE AGENCIES AND COURTS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE

Federal laws and regulations provide all-encompassing standards and guidelines for child protection, child welfare, and adoption.[49] Each state, however, has its own laws and regulations for child welfare matters.[50] In New York State, reasonable efforts generally are "reasonable attempts by an agency to assist, develop, and encourage a meaningful relationship between the parent and child."[51] For example, by way of "[c]onsultation and cooperation with the parents in developing a plan for appropriate services" and "[m]aking suitable arrangements for the parents to visit the child" or through the "[p]rovision of services and other assistance . . . so that problems preventing the discharge of the child from care may be resolved."[52] Depending on the case, the government may have several obligations under the "reasonable efforts" requirement to prevent removal and reunite a child with her family after being removed.[53]

None of these obligations, however, are spelled out in federal law. Judge Leonard Edwards, now retired, sat on the Superior Court of California, Santa Clara County bench for 26 years.[54] Despite the lack of clarity in federal law, Judge Edwards explained that making reasonable efforts findings is "the most powerful tool[] given to the courts by the federal legislation."[55] This tool enables the court to

---

REHABILITATION ACT 12 (2015) [hereinafter PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES], https://www.hhs.gov/sites/default/files/disability.pdf [https://perma.cc/DM7M-H2BA].

49. *See Federal and State Laws and Regulations*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/management/administration/requirements/laws/ [https://perma.cc/DX6V-L7DM] (last visited Oct. 28, 2020); *see also infra* Part II.

50. *See Federal and State Laws and Regulations*, *supra* note 49.

51. *See* REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES, *supra* note 45, at 38.

52. *See* N.Y. SOC. SERV. LAW § 384-b(7)(f)(1)–(3) (McKinney 2019).

53. *See In re* Marino S., 795 N.E.2d 21, 24–25 (N.Y. 2003) ("As a rule, when a child has been removed from the home based on alleged abuse or neglect . . . the social services official responsible for the child must attempt to reunite the child with the birth parent; this includes efforts at rehabilitation so as to render the parent capable of caring for the child."). Such efforts typically include facilitation of parent-child visits and provision of services to the parent, including assistance with housing, employment, counseling, medical care, and psychiatric treatment. *See* N.Y. FAM. CT. ACT § 1055(c) (McKinney 2020).

54. *See About Judge Edwards*, JUV. JUDGE'S CORNER, http://judgeleonardedwards.com/aboutjudgeedwards.html [https://perma.cc/QV2A-EGV7] (last visited Oct. 28, 2020). Judge Edwards was then Judge-In-Residence at the Center for Families, Children & the Courts — a division of the Judicial Council of California — for six years. In all, Judge Edwards worked in the juvenile court for over 20 years. *See id.*

55. Leonard Edwards, *Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention*, IMPRINT (Dec. 5, 2018),

determine whether "the agency has done its job to prevent removal, assist in reunifying families, and achieve timely permanency for the child,"[56] with virtually no guidance from the federal laws that govern the reasonable efforts standard.[57]

Congress has also noted a handful of circumstances in which reasonable efforts to reunite are not required.[58] Notably, the word "disability" is only mentioned twice in the 2016 Children's Bureau's 43-page report, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*.[59]

For parents with disabilities, courts have acknowledged that "reasonable efforts" at reunification require child welfare services to be tailored to meet the needs of parents with mental illnesses.[60] In some states, parents with mental illnesses may be denied reunification services.

> For example, in Utah, the court may order that reunification services not be provided if it finds by clear and convincing evidence that the "the parent is suffering from a mental illness of such magnitude that it renders him incapable of utilizing reunification services . . . based on competent evidence from a mental health professional establishing that, even with provision of services, the parent is unlikely to be capable of adequately caring for the child within twelve months."[61]

In states where parents are not denied reunification services, they may fear "alienating their caseworkers by being too demanding" or "being stigmatized by their caseworker if they are seen as mentally ill[,] or may not be ready to acknowledge the presence of mental illness." [62] Coupled with overloaded case dockets and limited funding for families, permanency plans are often inadequate to meet families' needs.[63] If a

---

https://imprintnews.org/top-stories/ignoring-reasonable-efforts-why-court-system-fail-promote-prevention/32974 [https://perma.cc/3EKQ-EFWM].

56. *Id.*

57. *See infra* Section II.B.

58. *See* 42 U.S.C. § 671 (a)(15)(D).

59. *See* REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES, *supra* note 45, at 10, 45. ("disability" is mentioned only in the summaries of California and Puerto Rico laws, in sections titled "When Reasonable Efforts Are NOT Required").

60. *See* Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & C.R. L. REV. 273, 282 (2003); *see, e.g.*, *In re* Elizabeth R., 42 Cal. Rptr. 2d 200, 209 (Cal. Ct. App. 1995) (when a parent has a mental illness, the "reunification plan, including social services to be provided, must accommodate the family's unique hardship").

61. Glennon, *supra* note 60, at 282 (alteration in original).

62. ROCKING THE CRADLE, *supra* note 8, at 93.

63. *See* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System*, 48 S.C. L. REV. 577 (1997); Catherine

parent's interaction with the child welfare system is through an Article 10 case, she is already subjected to several layers of surveillance by the time she arrives in family court to determine if she has even neglected her child.

B. Trials and 1028 Hearings

To prove that abuse or neglect occurred, a fact-finding hearing, also known as a trial, is held.[64] At trial, ACS presents evidence to prove the allegations in the petition.[65] If the judge finds the alleged abuse or neglect did not occur, the judge will dismiss the petition and reunify the child with the parent.[66] CPS may only introduce evidence of events that occurred on or before the petition filing date.[67] At trial for determining neglect, the substantive standard is when a child's "physical, mental or emotional condition has been impaired or is in *imminent danger* of becoming impaired."[68] This means that at trial, when the court is trying to determine whether the respondent parent committed the alleged abuse or neglect, ACS must show by a preponderance of the evidence[69] that the child is in imminent danger.[70] The courts have construed "imminent" to mean "near" or "impending," not merely "possible."[71]

A. Faver et al., *Services for Child Maltreatment: Challenges for Research and Practice*, 21 CHILD. & YOUTH SERVS. REV. 89, 93 (1999).

64. *See* N.Y. FAM. CT. ACT § 1044 (McKinney 2008).

65. *See Child Protective Proceedings (Abused or Neglected Children)*, NYCOURTS.GOV, http://ww2.nycourts.gov/COURTS/nyc/family/faqs_abusedchildren.shtml#cp5 [https://perma.cc/5FK9-ATUD] (last visited Oct. 29, 2020).

66. *See* N.Y. FAM. CT. ACT § 1051(c) (McKinney 2016); *see also 2017 Child Protective Services Manual*, *supra* note 28, at ch. 9, J-3 (sustaining or dismissing an Article 10 petition). Just because a case is dismissed does not mean all surveillance has ended. Layer Three Surveillance is still ongoing because the case will remain in the SCR for 28 years or until a parent files a claim with the SCR. *See infra* Section III.A.

67. *See* Jessica H. Ressler, *What Is a Fact Finding Hearing in a Child Abuse or Neglect Case?*, WESTCHESTER MATRIMONIAL, https://westchestermatlaw.com/what-is-a-fact-finding-hearing-in-a-child-abuse-or-neglect-case/ [https://perma.cc/XCF8-WZJB] (last visited Nov. 5, 2020).

68. N.Y. FAM. CT. ACT § 1012(f) (McKinney 2019) (emphasis added) (the statute defines a "neglected child" as a child "whose physical, mental or emotional condition has been impaired or is in *imminent danger* of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of [the education law]").

69. *See id.* § 1046(b) (McKinney 2009).

70. *See id.* § 1012(f).

71. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 845 (N.Y. 2004).

ACS can remove children from their homes at any stage of a court proceeding without prior judicial approval.[72] While the case is pending, parents have the right to request the agency return the subject child to their care.[73] Families receive the highest level of due process at the beginning stages of a case — a parent has a statutory right to a hearing when her[74] child is removed.[75]

If a child is removed from his home and placed in the custody of a suitable person other than his parent or guardian,[76] a respondent parent has the option of filing for a "1028 hearing" to have the child released to the parent's care pending the outcome of the case.[77] Pursuant to FCA Section 1028(a), "the court must reunite the parent and the subject child unless it finds that doing so would put the child's life or health at 'imminent risk.'"[78] Accordingly, once a parent requests a 1028 hearing, "such hearing shall be held within three court days" and may not be adjourned "except for good cause shown."[79]

A 1028 hearing is akin to a trial but with important distinctions in the evidentiary standard. Similar to a trial, in a 1028 hearing, there are rights inherent in a due process hearing, including testimony under oath, advocacy, and adjudication.[80] At this hearing, the parent may testify and cross-examine the petitioner, ACS's caseworker, and witnesses, and the petitioner must present evidence to justify the

---

72. *See* N.Y. FAM. CT. ACT § 1024(a) (McKinney 2009).

73. *See id.* § 1027(a)–(b) (McKinney 2016); *id.* § 1028(a) (McKinney 2010).

74. This Note acknowledges the disproportionate impact the child welfare system has on Black and Latinx mothers. For this reason, this Note uses primarily she/her pronouns when describing parents in the system. *See* Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow,'* N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/SS2J-88N4].

75. *See* N.Y. FAM. CT. ACT § 1027(a)–(b); *id.* § 1028(a). A child also has the right to a hearing when she is removed from home, prior to her parent being adjudicated as neglectful. *See id.* § 1027(a)(ii).

76. *See Neglect and Abuse*, NYCOURTS.GOV, http://ww2.nycourts.gov/courts/7jd/courts/family/case_types/neglect_and_abuse.shtml [https://perma.cc/YAQ3-DFRV] (last visited Oct. 8, 2020).

77. *See id.* The parent may request a hearing pursuant to FCA Section 1027 if the child was removed before the Article 10 case was filed. *See* N.Y. FAM. CT. ACT § 1027(a)(i).

78. PROTRACTED 1028 HEARINGS, BRONX DEFS. 1 (2013), https://www.bronxdefenders.org/wp-content/uploads/2013/05/Bronx-Protracted-1028-Hearings.pdf [https://perma.cc/3YFS-DN8T]; *see also* N.Y. FAM. CT. ACT § 1028(a).

79. N.Y. FAM. CT. ACT § 1028(a); *see also infra* Section III.D.

80. *See* N.Y. FAM. CT. ACT § 1028; *In re* Barbara R., 410 N.Y.S.2d 894 (N.Y. App. Div. 1978).

continued removal.[81] At trial, only evidence that is material, relevant, and competent may be admitted.[82]

At a 1028 hearing, the legal standard is "imminent risk."[83] Any determination that a child is abused or neglected must be based on a preponderance of the evidence.[84] Under FCA Section 1028, a court must grant a parent's application for the return of a child unless it finds that returning the child would "present[] an imminent risk to the child's life or health."[85] In analyzing an application for a child's return during a 1028 hearing, a court must engage in a balancing test, weighing the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal.[86] In determining whether imminent risk exists, a judge will consider ways to mitigate the risk of harm and the harmful impact the removal would have on the child.[87]

II. THE AMERICANS WITH DISABILITIES ACT AND THE ADOPTION AND SAFE FAMILIES ACT

Part II describes the relevant federal laws and their application in the context of parents with mental illnesses. Section II.A explains the Americans with Disabilities Act (ADA), and Section II.B highlights the implications of the Department of Justice Guidance Document issued to ensure child welfare systems understand their responsibilities under the ADA. Section II.C explains the Adoption and Safe Families Act's (ASFA) key provisions and the complications ASFA poses for parents with disabilities.

---

81. *See* N.Y. FAM. CT. ACT § 1028; *In re Barbara R.*, 410 N.Y.S.2d at 894.

82. *See* N.Y. FAM. CT. ACT § 1046(c) (McKinney 2009) (evidence must be material and relevant, which means hearsay is permitted); *see also id.* § 1046(a) (statutory exceptions to material and relevant evidence).

83. *See id.* § 1028.

84. *See id.* § 1046(b)(i).

85. *See id.* § 1028; *see also id.* § 1027(b)(i) (McKinney 2016) ("[I]f the court finds that removal is necessary to avoid imminent risk to the child's life or health, it shall remove or continue the removal of the child."); *id.* § 1028(a) ("[T]he court shall hold a hearing to determine whether the child should be returned [home] . . . . Upon such hearing, the court shall grant the application [for return], unless it finds that the return presents an imminent risk to the child's life or health.").

86. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 852 (N.Y. 2004).

87. *See id.* (explaining that the court must determine, in the factual setting before it, whether the imminent risk of harm to the child can be eliminated by other means, such as issuing an order of protection for the child or for one parent against another parent).

A. The ADA Generally

The ADA[88] is a federal law that provides broad protections to "individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public."[89] The ADA offers "civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, state and local government services, and telecommunications."[90]

The ADA comprises five sections, referred to as titles.[91] Regarding parents in the child welfare system, the ADA protects "qualified individuals with disabilities from discrimination by child welfare agencies and state court systems."[92] Title II of the ADA "covers *all* of the programs, services, and activities of state and local governments,

---

88. Americans with Disabilities Act, 42 U.S.C. § 12101. "[I]n the context of the ADA, 'disability' is a legal term . . . ." *What is the Definition of Disability Under the ADA?*, ADA NAT'L NETWORK, https://adata.org/faq/what-definition-disability-under-ada [https://perma.cc/9JMU-LMAY] (last visited Nov. 1, 2020). The ADA's definition of "disability" is distinguishable from the definition under other laws. *See id.*

> The ADA defines a person with a disability as a person who has a physical or mental impairment that substantially limits one or more major life activity. This includes people who have a record of such an impairment, even if they do not currently have a disability. It also includes individuals who do not have a disability but are regarded as having a disability. The ADA also makes it unlawful to discriminate against a person based on that person's association with a person with a disability.

Id.

89. *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada [https://perma.cc/54HR-YDFG] (last visited Nov. 5, 2020); *see also* 29 U.S.C. § 794; 42 U.S.C. § 12101.

90. *What Is the Americans with Disabilities Act (ADA)?*, *supra* note 89.

91. *See id.* (ADA subtitles are Employment; State and Local Government; Public Accommodations; Telecommunications; and Miscellaneous Provisions); *see also* 29 U.S.C. § 794; 42 U.S.C. § 12101.

92. *Protection from Discrimination in Child Welfare Activities*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/civil-rights/for-individuals/special-topics/adoption/index.html [https://perma.cc/V9YB-RCYR] (last visited Nov. 5, 2020) (stating that qualified individuals with disabilities include "children, parents, legal guardians, relatives, other caretakers, foster and adoptive parents, and individuals seeking to become foster or adoptive parents").

their agencies, and departments."[93] In the child welfare system generally, the ADA applies mostly to physical or cognitive disabilities and not mental illnesses.[94] Although scholars have analyzed the application of the ADA in Termination of Parental Rights proceedings,[95] Title II does not specifically indicate whether court proceedings, including 1028 hearings, are "state activity."[96]

B. The ADA Applied to the Child Welfare System

In 2016, the Department of Health and Human Services (HHS) and the Department of Justice (DOJ) issued a technical assistance document (DOJ Guidance Document)[97] in response to "numerous complaints of discrimination from individuals with disabilities involved with the child welfare system."[98] The groundbreaking DOJ Guidance Document explains that Section 504 of the Rehabilitation Act of 1973 and ADA Title II "protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child

---

93. PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 8 (alteration in original); *see also* 42 U.S.C. § 12131; 28 C.F.R. §§ 35.130(b)(1), (3), 42.503(b)(1), (3); 45 C.F.R. § 84.4(b)(1), (4); Pa. Dep't. of Corr. v. Yeskey, 524 U.S. 206, 209–12 (1998) (discussing the breadth of Title II's coverage).

94. *See* ROCKING THE CRADLE, *supra* note 8, at 225–26 (for example, a communication support specialist is considered a necessary accommodation under the ADA, to "assist people with cognitive disabilities who might otherwise be confused by proceedings or who have difficulty expressing themselves by preparing them for proceedings, simplifying language and abstract concepts, checking for understanding, using alternative means of communication, and alerting the judge or hearing officer if the client does not understand or needs a break. The communication support specialist's role is that of neutral communication facilitator, analogous to a sign language interpreter for the deaf").

95. *See* Dale Margolin Cecka, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112 (2007); *see also* Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 FAMILY CT. REV. 37, 37 (2019) (the ADA also applies to visitation and custody disputes).

96. *See* Tennessee v. Lane, 541 U.S. 509, 526 (2004) (discussing that, in the deliberations that led to the ADA's enactment, Congress found "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions").

97. *See* PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48; *see also* Press Release, U.S. Dep't of Just., Departments of Justice and Health and Human Services Issue Joint Guidance for Child Welfare Systems (Oct. 19, 2016), https://www.justice.gov/opa/pr/departments-justice-and-health-and-human-services-issue-joint-guidance-child-welfare-systems [https://perma.cc/42S5-22JM].

98. PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 1.

welfare programs, activities, and services."[99] Concurrently, child welfare agencies, such as ACS in New York City, are responsible for protecting children from abuse and neglect.[100] The DOJ Guidance Document asserts that these two goals are not only mutually attainable but complementary.[101]

The DOJ Guidance Document also explicitly states that the ADA, relating to parents with physical or cognitive disabilities, applies to state court proceedings, such as termination of parental rights proceedings, because they "are state activities and services for purposes of Title II."[102] A court may also properly look to the ADA's standards for guidance in evaluating whether the agency made "diligent efforts" under Social Services Law Section 384-b (7).[103]

However, courts have held that "termination of parental rights proceedings do not appear to be 'services, programs, or activities' such that the ADA would apply."[104]

> Others have held that the ADA does not apply to TPR proceedings because the court's jurisdiction is limited to interpreting the state child welfare law (i.e., determining the best interest of the child or reasonable efforts) rather than conducting "an open-ended inquiry into how the parents might respond to alternative services and why those services have not been provided." Finally, some courts have concluded that the ADA provides no defense to TPR proceedings because Title II contemplates only affirmative action on the part of the injured party rather than defenses against a legal action by a public entity.[105]

The DOJ Guidance Document clarifies the state's obligations under the "reasonable efforts" standard.[106] This document outlines two

---

99. *Id.*

100. *See id.*

101. *See id.*

102. *Id.* at 9; *see also* Pa. Dep't. of Corr. v. Yeskey, 524 U.S. 206, 209–12 (discussing the breadth of Title II's coverage); *cf.* 28 C.F.R. § 35.190(b)(6) (designating to the DOJ responsibility for investigating complaints and compliance reviews of "[a]ll programs, services, and regulatory activities relating to . . . the administration of justice, including courts").

103. *See* Lacee L. v. Stephanie L., 114 N.E.3d 123, 128 (N.Y. 2018); *see also In re* La'Asia Lanae S., 803 N.Y.S.2d 568 (N.Y. App. Div. 2005).

104. *In re* Chance Jahmel B., 723 N.Y.S.2d 634, 639 (Fam. Ct. 2001); *see also In re* Terry, 610 N.W.2d 563 (Mich. Ct. App. 2000).

105. ROCKING THE CRADLE, *supra* note 8, at 93 (describing courts' various approaches in finding whether the ADA applies). Extensive research has not been done on the application of the ADA in 1028 hearings.

106. *See* PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 14.

fundamental principles for Title II of the ADA and Section 504 of the Rehabilitation Act of 1973:[107] (1) individualized treatment and (2) full and equal opportunity.[108] Individualized treatment emphasizes that individuals with disabilities be treated on a "case-by-case basis"[109] instead of on the basis of "generalizations or stereotypes."[110] "Full and equal opportunity" means "[i]ndividuals with disabilities must be provided opportunities to benefit from or participate in child welfare programs, services, and activities that are equal to those extended to individuals without disabilities."[111] Providing full and equal opportunity can require accommodations "different from those provided to other parents and prospective parents where necessary to ensure an equal opportunity to obtain the same result or gain the same benefit, such as family reunification."[112] The DOJ Guidance Document also includes a question and answer section that responds to different issues, including who must comply with the disability nondiscrimination laws, what the disability nondiscrimination laws require of child welfare agencies and courts, and how aggrieved persons can file a complaint.[113]

For example, the DOJ Guidance Document clarifies that "state court proceedings" include TPR proceedings as a state activity and service for Title II purposes.[114] This document further explains that Title II and Section 504 apply to child welfare agencies' and courts'

---

107. *See id.* at 4.

108. *See id.*

109. *See id.*; *see also* 28 C.F.R. § Pt. 35, App. B (explaining in the 1991 Section-by-Section guidance to the Title II regulation that "[t]aken together, the[] provisions [in 28 C.F.R. § 35.130(b)] are intended to prohibit exclusion . . . of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do"); Sch. Bd. of Nassau Cnty v. Arline, 480 U.S. 273, 289 (1987). Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against disabled individuals by governmental and private entities who received federal financial assistance. *See* 29 U.S.C. § 794.

110. *See* PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 4.

111. *Id.*

112. *Id.*

113. *See id.* at 6–17.

114. *See id.* at 9; *see also* Pa. Dep't. of Corr. v. Yeskey, 524 U.S. 206, 209–12; *cf.* 28 C.F.R. § 35.190(b)(6).

private contractors.[115] Child welfare agencies should ensure "that in the performance of their contractual duties contractors comply with the prohibition of discrimination in Title II and Section 504."[116]

The DOJ Guidance Document describes a "reasonable modification" under Title II and Section 504 as "changes in policies, practices, and procedures to accommodate the individual needs of a qualified person with a disability, unless the change would result in a fundamental alteration to the nature of the program."[117] The document goes on to illustrate how "[t]o provide assistance to parents with disabilities that is equal to that offered to parents without disabilities."[118] For example, child welfare agencies may prescribe classes or training for a parent with regard to parenting skills.[119] If the parent has a disability and requires individualized assistance, child welfare agencies may need to modify the training to accommodate the parent's needs and create more meaningful training.[120]

Beyond what constitutes a modification, the DOJ Guidance Document addresses the steps child welfare agencies must take to ensure that parents with disabilities involved with the child welfare system have an equal opportunity to participate in and benefit from their programs and activities.[121] The DOJ Guidance Document explains that child welfare processes cannot deny parents with disabilities the opportunity to participate fully and meaningfully in reunification efforts with their children.[122] A great majority of courts failed to appropriately apply the ADA and held that CPS agencies made "sufficient reasonable modifications in services . . . to accommodate parents' disabilities and, therefore, no ADA violations occurred."[123]

Additionally, the DOJ Guidance Document addresses child welfare agencies' obligation to ensure children's health and safety — agencies,

---

115. *See* PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 10 (citing 28 C.F.R. § 35.130(b)(1), (3)).

116. *Id.* "Private entities involved in child welfare activities may also be public accommodations with their own nondiscrimination obligations under Title III of the ADA." *Id.* at 10 n.66.

117. *Id.*; *see also* U.S. Dep't of Just., ADA Title III Technical Assistance Manual Covering Pub. Accommodations & Com. Facilities § III-4.3600.

118. PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 10.

119. *See id.*

120. *See id.*

121. *See id.* at 4.

122. *See id.* at 13.

123. ROCKING THE CRADLE, *supra* note 8, at 94.

therefore, must comply with the ADA and Section 504 simultaneously.[124] The ADA and Section 504 make exceptions when an individual with a disability is a "direct threat."[125] A "direct threat" is defined as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services."[126] Child welfare agencies and courts must make an individualized assessment in determining whether a parent is a direct threat to her child and whether reasonable modifications of practices, policies, or procedures will mitigate the risk.[127]

Both the ADA and Section 504 require "decisions about child safety and whether a parent, prospective parent, or foster parent represents a direct threat to the safety of the child . . . may not be based on stereotypes or generalizations about persons with disabilities."[128] In some cases, an individual with a disability may not be qualified to provide permanency for a child for various reasons.[129] However, the basis for finding an individual unqualified cannot be rooted in stereotypes or generalizations about persons with disabilities.[130] According to the DOJ Guidance Document, the ADA applies in the context of child welfare proceedings, and each actor has different responsibilities in keeping families where parents have disabilities together.[131]

C. The Adoption and Safe Families Act of 1997

Congress enacted ASFA[132] to "promote[] timely permanency planning and placement for children in foster care and [emphasize] the importance of children's safety and well-being during the permanency

124. *See* PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 3.

125. *See id.* at 16; ROCKING THE CRADLE, *supra* note 8, at 59; *see also* 28 C.F.R. § 35.139(a).

126. PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 16.

127. *See id.*

128. *Id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, 2118 (codified as amended in scattered sections of 42 U.S.C.); *see also* Ashika Sethi, *A Brief History of Foster Care in the United States* (May 23, 2019), https://www.casatravis.org/a_brief_history_of_foster_care_in_the_united_states [https://perma.cc/X53R-PMCB].

process."[133] After ASFA's passage, child welfare departments' main mission remained to protect children from maltreatment.[134] However, under ASFA, child welfare agencies achieved this mission by placing children into out of home care rather than addressing the families' needs.[135] Congressional sponsors declared that ASFA "put[] children on a fast track from foster care to safe and loving and permanent homes."[136]

ASFA requires the agency to continuously engage in concurrent permanency planning.[137] This means foster children are on two tracks at the same time.[138] One reunites the children with their parents, and the other seeks to find them a permanent home with another family.[139] Caseworkers must pursue both goals simultaneously. This way, if reunification efforts fail, there will be a permanent home waiting for the children.[140] The DOJ Guidance Document explicitly states that agencies should take appropriate steps to ensure that concurrent planning is not applied to a person with a disability in a manner that has a discriminatory effect.[141]

> Jess McDonald, Director of the Illinois Department of Children and Family Services, charged that the time frame to initiate termination of parental rights proceedings "is an overly prescriptive mandate . . . [that] does not allow states the flexibility to decide on a case by case basis what is in the best interests of the child." These experts in the field recognized that it can be harmful to children to place a deadline on agencies' efforts to reunite them with their parents.[142]

---

133. *Federal Laws Related to Permanency*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/permanency/legal-court/fedlaws/ [https://perma.cc/8NAP-D7C5] (last visited Oct. 25, 2020).

134. *See, e.g.*, *About ACS*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., https://www1.nyc.gov/site/acs/about/about.page [https://perma.cc/EL52-QUG5] (last visited Dec. 27, 2020).

135. *See* Dorothy Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426, 429 (2014).

136. *Compare* 143 Cong. Rec. H10771 (1997) (statement of Rep. Barbara Kennelly), *with* ROBERTS, *supra* note 44 (describing how ASFA negatively affects parents and families).

137. *See* Adoption and Safe Families Act of 1997.

138. *See* CHILD.'S BUREAU, CONCURRENT PLANNING FOR PERMANENCY FOR CHILDREN 1 (2016), https://www.childwelfare.gov/pubPDFs/concurrent.pdf [https://perma.cc/5ZA3-7Y7Z].

139. *See id.*

140. *See id.*; ROBERTS, *supra* note 44, at 111.

141. *See* PROTECTING THE RIGHTS OF PARENTS AND PROSPECTIVE PARENTS WITH DISABILITIES, *supra* note 48, at 13.

142. ROBERTS, *supra* note 44, at 110 (alteration in original).

A key provision of ASFA is the 15/22 rule, which requires states to file a petition for termination of parental rights (TPR) if a child has been in foster care for 15 of the most recent 22 months.[143] Termination of biological parents' rights is a necessary prerequisite for children to be adopted by new parents.[144] Additionally, the "decision to terminate parental rights often comes at the 12-month hearing if it is believed that sufficient progress has not been made."[145]

Time requirements particularly disadvantage parents with psychiatric disabilities.[146] Often, mental health treatment can require more than a year to be effective.[147] Claire Chiamulera, Legal Editor and Communications Director at the American Bar Association's Center on Children and the Law, explained that ASFA's shortened permanency timelines "set unrealistic expectations for parents with disabilities and conflict with the ADA by not providing accommodations and flexibility for these parents."[148] For example, for parents with psychiatric disabilities, timelines are often difficult to adhere to, if at all, if a parent needs inpatient care and treatment at any point in the dependency process.[149] Parents with mental illnesses often have their rights terminated, even with the court's recognition of ongoing progress in services, because parents cannot meet reunification goals within the necessary timeframe.[150]

Some service providers are not aware of the time concerns associated with ASFA or cannot sufficiently treat clients within the

---

143. *See* 42 U.S.C. § 675(5)(E).

144. *See Consent to Adoption: What Biological Parents Need to Know*, FINDLAW (Oct. 10, 2018), https://family.findlaw.com/adoption/consent-to-adoption-what-biological-parents-need-to-know.html [https://perma.cc/6CVM-BNUU].

145. ROCKING THE CRADLE, *supra* note 8, at 87.

146. *See* Loran B. Kundra & Leslie B. Alexander, *Termination of Parental Rights Proceedings: Legal Considerations and Practical Strategies for Parents with Psychiatric Disabilities and the Practitioners Who Serve Them*, PSYCHIATRIC REHAB. J. 33, 144–45 (2009).

147. *See id.* at 144.

148. Claire Chiamulera, *Representing Parents with Disabilities: Best Practice*, AM. BAR ASS'N (Feb. 1, 2015), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/february-2015/representing-parents-with-disabilities—best-practice/ [https://perma.cc/QGM7-3PPX].

149. *See* Ella Callow, Kelly Buckland & Shannon Jones, *Parents with Disabilities in the United States: Prevalence, Perspectives, and Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. C.L. & C.R. 9, 22 (2011).

150. *See id.* at 23.

period ASFA prescribes.[151] Therapists will often recommend to the courts that a parent needs six to eight months of treatment before any change can even begin.[152] Even child welfare agencies find the ASFA timelines restrictive.[153] Often, a particular service's timeframe, rather than a service's nature, creates a barrier to reunification for parents with disabilities.[154] The Children's Welfare League of America expressed concern that "the bill's deadline for initiating termination proceedings might 'disrupt good and timely progress toward reunification.'"[155]

Under ASFA, there is an enormous incentive for parents to get their children home quickly so that the timeline for ASFA does not run unnecessarily. Given that it can take more than a year for a case to go to trial, it is incumbent upon the parent to utilize her right to a 1028 hearing to return her child to her custody and stay within the ASFA timeline.[156] Furthermore, under ASFA, even if a parent with a mental illness raises an ADA violation at a permanency hearing, in most states, a child welfare agency could still file a TPR if the child has been in foster care for 15 of the previous 22 months.[157] Thus, parents could lose their children because the court does not recognize ADA violations and the ASFA clock is still running even while parents are experiencing discrimination, preventing them from reunifying with their children in what ASFA considers a timely matter.[158]

III. SURVEILLANCE AND THE STANDARD OF "IMMINENT RISK" AT 1028 HEARINGS

Part III examines surveillance and the standard of imminent risk in a 1028 hearing. Section III.A describes surveillances in the child welfare system by dividing different types of surveillance into layers

151. *See* ROCKING THE CRADLE, *supra* note 8, at 88.

152. *See id.*

153. *See id.*; *see also* Keyna Franklin, *Proposed Federal Legislation Would Suspend the ASFA Timeline, Not Parental Rights, During COVID-19*, RISE MAG. (Aug. 14, 2020), https://www.risemagazine.org/2020/08/proposed-legislation-suspend-asfa-timeline-during-covid-19/ [https://perma.cc/WC9Y-D6NB].

154. *See* ROCKING THE CRADLE, *supra* note 8, at 88 (citing Joshua B. Kay, *Representing Parents with Disabilities in Child Protection Proceedings*, MICH. CHILD. WELFARE L.J. 27, 29 (2009)).

155. ROBERTS, *supra* note 44, at 110.

156. *See The Basics: Abuse and Neglect Cases in New York State*, CROSS-BOROUGH COLLABORATION 28 (2002), http://www.wnylc.net/pdf/misc/AbuseandNeglect.pdf [https://perma.cc/TVS2-CCC5].

157. *See* 42 U.S.C. § 675(5)(E).

158. *See* ROCKING THE CRADLE, *supra* note 8, at 95, 237.

that a parent enters as her case progresses through the child welfare system. Section III.B explains the imminent risk standard and its application in cases where a parent has a mental illness. Section III.C describes why the standard is positive for parents with disabilities, and Section III.D explains why the standard is bad for parents with mental illnesses.

A. Overview of the Four Layers of Surveillance

Surveillance, or state-mandated monitoring of individuals and families, in the child welfare system is not new.[159] In the 1960s, every state passed legislation responding to the identification of "battered child syndrome."[160] The legislation mandates certain professionals working with children to report child maltreatment.[161] Annual nationwide reports of child maltreatment rose from 10,000 in 1967 to 800,000 within a decade and 2.1 million a decade later.[162] These professionals are known today as "mandated reporters."[163] Mandated reporters, such as teachers, doctors, and social workers, are required by New York State law to report suspicions of child abuse and neglect.[164] Although certain reporters are mandated, any concerned individual can call in a report to the State Central Registry,[165] prompting an investigation into the family.[166] The initial observation

---

159. *See generally* Linda Gordon, *Child Welfare: A Brief History*, SOC. WELFARE HIST. PROJECT (2011), http://socialwelfare.library.vcu.edu/programs/child-welfare-overview/ [https://perma.cc/G9GF-3QGT].

160. *See* DENNIS M. MARCHIORI, *Battered Child Syndrome*, *in* CLINICAL IMAGING 733, 733 (3d ed. 2014) ("Battered child syndrome describes nonaccidental trauma to children, representing a major cause of morbidity and mortality during childhood.").

161. *See* Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97 SOC. FORCES 1785, 1786 (2019).

162. *See id.* at 1786–87.

163. *See Mandated Reporters*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., https://www1.nyc.gov/site/acs/child-welfare/mandated-reporters.page [https://perma.cc/22BA-GFQW] (last visited Oct. 25, 2020).

164. *See* HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 20; *see also* N.Y. SOC. SERV. LAW § 413 (McKinney 2018); *Child Protective Services Manual*, N.Y. ST. OFF. CHILD. & FAM. SERVS. (Dec. 2018), https://ocfs.ny.gov/main/publications/Pub1159.pdf [https://perma.cc/9JP6-5FWU].

165. *See The Statewide Central Register of Child Abuse and Maltreatment*, N.Y. ST. OFF. CHILD. & FAM. SERVS., https://ocfs.ny.gov/main/cps/ [https://perma.cc/D8M7-TVGE] (last visited Oct. 25, 2020). The New York State Office of Children and Family Services maintains the SCR for reports made pursuant to Social Services Law. *See id.*

166. *See* CHILD.'S BUREAU, MAKING AND SCREENING REPORTS OF CHILD ABUSE AND NEGLECT (2017), https://www.childwelfare.gov/pubPDFs/repproc.pdf [https://perma.cc/5VDV-2UCT]; CHILD.'S BUREAU, MANDATORY REPORTERS OF

and reporting a mandated reporter engages in is what this Note refers to as Layer One Surveillance.

Layer Two Surveillance is the investigation into the child's life. The CPS investigator will speak to anyone in the child's life, including family members, neighbors, building superintendents, teachers, doctors, nurses, police officers, and other relevant people.[167] The investigator will often visit the home unannounced, at any time of day, to check if the home is free "of hazards, has adequate food, [and] safe sleeping arrangements"[168] regardless of whether the report had anything to do with home accommodations. The investigator may appear at the child's school to interview the child.[169]

If an investigator finds some credible evidence of abuse or neglect, the report is indicated and remains accessible in the SCR,[170] which is Layer Three Surveillance. Therefore, if employers request a check of the SCR, the existence of a report is made available to them.[171] When a parent's information is in the SCR database, it is incumbent upon the parent to clear that record, if possible. Before April 2020, regardless of whether the report was unfounded or indicated, "all reports made to the SCR [were] kept on record until the youngest child in the family at the time of the investigation turn[ed] 28 years old."[172]

On April 3, 2020, Governor Andrew Cuomo signed a bill amending New York's SCR laws.[173] The stated goal of family court is to

---

CHILD ABUSE AND NEGLECT (2019), https://www.childwelfare.gov/pubPDFs/manda.pdf [https://perma.cc/YC4X-JG5B].

167. *See A Parent's Guide to a Child Abuse Investigation*, *supra* note 30.

168. *See id.*

169. *See id.*

170. *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(iv) (2020).

171. *See 2017 Child Protective Services Manual*, *supra* note 28, at J-3.

172. *A Parent's Guide to a Child Abuse Investigation*, *supra* note 30. The collateral consequences of a SCR case are far-reaching. For further analysis, see generally N.Y. SOC. SERV. LAW § 422(6) (McKinney 2019) ("In all other cases, the record of the report to the statewide central register shall be expunged ten years after the eighteenth birthday of the youngest child named in the report."); Colleen Henry et. al., *The Collateral Consequences of State Central Registries: Child Protection and Barriers to Employment for Low-Income Women and Women of Color*, 64 NAT'L ASS'N SOC. WORKERS 373 (2019); *Indicated and Unfounded Central Registry (SCR) Reports*, ADOPTIVE & FOSTER FAM. COAL. N.Y., https://affcny.org/indicated-and-unfounded-central-registry-scr-reports/ [https://perma.cc/E4TE-5DZU] (last visited Nov. 4, 2020).

173. *See* Keyna Franklin, *New Law Reforming NY State Central Registry Will Provide Justice and Relief to Families*, RISE MAG. (Apr. 16, 2020) [hereinafter Franklin, *New Law Reforming*], https://www.risemagazine.org/2020/04/scr-reforms/ [https://perma.cc/4K8D-YAKZ]; *see also* S.B. 7506B, 243rd Sess. (N.Y. 2020) (passed as part of the budget Social Services Law).

rehabilitate rather than to punish families.[174] In that vein, the amended SCR laws made four notable reforms, but two reforms particularly impact Layer Two and Layer Three Surveillance. First, the legislation raises the standard of evidence required for an investigator to indicate a parent's case in the SCR from "some credible evidence" to "a fair preponderance of the evidence."[175] Under this new standard, a report will be indicated only when the evidence shows it is more likely true than not true that neglect or abuse occurred.[176] If the evidence only shows some indication but does not rise to a fair preponderance standard, the report is unfounded and automatically sealed.[177] New York State does not report the number of people on the SCR, but because of the low standard of proof, CPS gives as many as 47,000 people an indicated record each year.[178] The majority of allegations are related to neglect, most of which are connected to living in poverty.[179]

This new legislation will likely significantly impact Layer Three Surveillance. Currently, all SCR records remain accessible to employers until the youngest child named in the SCR report turns 28.[180] The new legislation provides for automatic sealing of neglect records after eight years.[181] Chris Gottlieb, Co-Director of the NYU School of Law Family Defense Clinic, explained, "[b]ecause so many investigations have to do with neglect rather than abuse, lowering the time that neglect records limit employment will benefit the vast

---

174. *See* *Family Court*, N.Y.C. L. DEP'T, https://www1.nyc.gov/site/law/divisions/family-court.page [https://perma.cc/5SYM-GT7T] (last visited Oct. 25, 2020).

175. *See* S.B. 7506B, 243rd Sess. (N.Y. 2020); *see also* Chris Gottlieb, *Major Reform of New York's Child Abuse and Maltreatment Register*, LAW.COM (May 26, 2020, 10:30 AM), https://www.law.com/newyorklawjournal/2020/05/26/major-reform-of-new-yorks-child-abuse-and-maltreatment-register/ [https://perma.cc/B8XP-4C9P].

176. *See* S.B. 7506B, 243rd Sess. (N.Y. 2020); *see also* Gottlieb, *supra* note 175 ("New York is one of only a handful of states that uses a standard that can adversely affect one's livelihood even when the investigator is unable to conclude that it is more probable than not that an act of neglect or abuse occurred.").

177. Records of unfounded reports are available for ten years to investigators of later allegations but are inaccessible to employers. *See* N.Y. SOC. SERV. LAW § 422(4)(A); *id.* § 422(5)(a).

178. *See* Gottlieb, *supra* note 175.

179. *See id.* ("Less than 14% percent of cases involve any allegations of abuse. There is extreme racial disproportionality in who is affected by the SCR, with black parents 2.6 times more likely to have an indicated report than white parents.").

180. *See* N.Y. SOC. SERV. LAW § 422(6).

181. *See* S.B. 7506B, 243rd Sess. (N.Y. 2020). The amended SCR law will not change the accessibility of records of abuse.

majority of those on the register."[182] Gottlieb went on to explain that "for the families most heavily surveilled by children's services, these kinds of actions can limit employment longer than many felony records do."[183] This particular reform in the legislation directly impacts the number of times parents are subjected to Layer Three Surveillance.

Most people listed in the SCR are never charged in court, and those who are charged and prevail "still have to go through a separate administrative challenge to clear the SCR record of the allegations that were dismissed by the court."[184] After this legislation goes into effect, if a judge determines a respondent is not guilty of neglecting her child, the respondent's name will not be added to the SCR.[185] Under the revised statute, parents in this position will still need to request their records be amended and sealed accordingly, but the law requires that the request be granted based on the family court's dismissal, without the need for a fair hearing.[186]

In an Article 10 case, Layer Four Surveillance begins when ACS recommends a service plan for a parent and she chooses to engage in the service plan.[187] Preventive services are the supportive and rehabilitative services provided to families and children to avoid placing a child in foster care, enable a child in foster care to return home, or reduce the likelihood a child will return to foster care.[188] Preventive services include clinical services,[189] parent training,[190] and housing services.[191] Until family court orders a parent to engage in services, ACS's recommended service plan is optional.[192] Parents

182. Gottlieb, *supra* note 175.

183. *Id.*

184. *Id.*; *see also* N.Y. SOC. SERV. LAW § 422(5)(c).

185. *See* Gottlieb, *supra* note 175. A person's name on the SCR can have enormous implications on a person's life. *See* Nikita Stewart, *The Child Abuse Charge Was Dismissed. But It Can Still Cost You a Job.*, N.Y. TIMES (Feb. 25, 2019), https://www.nytimes.com/2019/02/25/nyregion/ny-child-abuse-database.html [https://perma.cc/Y5UH-9TMM].

186. *See* S.B. 7506B, 243rd Sess. (N.Y. 2020). Fair hearings can require extensive preparation depending on the allegations in the petition and parents have to take time off of work to attend. Parents are also often represented pro se.

187. *See generally Prevention Services*, N.Y.C. ADMIN. FOR CHILD.'S SERVS., https://www1.nyc.gov/site/acs/child-welfare/preventive-services.page [https://perma.cc/G6UY-R4Y2] (last visited Nov. 4, 2020).

188. *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b) (2020).

189. *See id.* § 423.2(b)(9).

190. *See id.* § 423.2(b)(12).

191. *See id.* § 423.2(b)(16).

192. *See Prevention Services*, *supra* note 187.

often have to sign HIPAAs for ACS to access their records and speak with parents' service providers about their engagement in services.[193]

B. The Standard and Its Application

Trials and 1028 hearings have different procedural postures and therefore use different substantive standards. At a trial, the court's motivation is to determine whether abuse or neglect occurred.[194] At a 1028 hearing, the court's goal is to determine whether a child would be at imminent risk if she returned home to her parent before a court has made a determination of abuse or neglect.[195]

In the 2004 seminal case, *Nicholson v. Scoppetta*,[196] the New York State Court of Appeals clarified FCA Article 10 in many important respects. Today, the standards set forth in *Nicholson* are binding law throughout the State of New York. In *Nicholson*, the Court of Appeals held that in deciding the parent's application for the return of the child at a hearing pursuant to Section 1028 of the FCA,

> the court must do more than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.[197]

Therefore, at a 1028 hearing, the court must determine whether there is a risk of "serious harm or potential harm to the child[ren]"; there must be evidence that the harm or danger is "imminent," that is, "near or impending, not merely possible."[198]

---

193. *See* Keyna Franklin, *Case Control — Your Rights in Service Planning*, RISE MAG. (May 2, 2018) [hereinafter Franklin, *Case Control*], https://www.risemagazine.org/2018/05/case-control-your-rights-in-service-planning/ [https://perma.cc/5MC3-LW8D] (describing the effect of signing versus not signing a HIPAA).

194. *See* CHILD.'S BUREAU, UNDERSTANDING CHILD WELFARE AND THE COURTS 3 (2016) [hereinafter UNDERSTANDING CHILD WELFARE AND THE COURTS], https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf [https://perma.cc/T69C-HV4R]; *see also The Family Court & You!*, NYCOURTS.GOV, http://ww2.nycourts.gov/courts/6jd/tompkins/family/you.shtml [https://perma.cc/892B-QLVW] (last visited Oct. 13, 2020).

195. *See* UNDERSTANDING CHILD WELFARE AND THE COURTS, *supra* note 194, at 3.

196. 820 N.E.2d 840 (N.Y. 2004).

197. *Id.* at 852.

198. *Id.* at 845.

Nicholson further directs courts to consider making any orders that mitigate or eliminate the need for removal.[199] Orders include, for example, a wide range of programs and services tailored to the family's needs.[200] The orders are guided by what is alleged in the petition and the observations of the caseworker.[201] Therefore, at a 1028 hearing, parents are expected to address the allegations in the petition to prove to the court that there is no imminent risk to the child's life or health.[202] To do so, parents must be willing to follow orders stemming from allegations that have not been proven and are directed at their past behavior, potentially long before a judge has adjudicated them neglectful.[203] For example, if the allegation is medical neglect, the court can order a parent to bring her children to the doctor regularly and attend a first aid course.[204] If the allegation is substance abuse, the court can order substance abuse treatment and submit a parent to random toxicology screenings.[205] If the allegation is a messy home, the court can order in-home services to address poor physical conditions in the home.[206] More broadly, a court can order a parent to enroll in ACS's Family Preservation Program — its stated goal is to work with the family in preventing the removal and placement of children into foster care.[207] The program's goal is to remove the risk of harm to the children rather than take them away from their families.[208]

---

199. *See id.* at 852.

200. *See* N.Y. COMP. CODES R. & REGS. tit. 18, § 423.2(b) (2020).

201. *See* Franklin, *Case Control*, *supra* note 193 ("[S]ervices should be relevant to those concerns and not just random.").

202. *See Nicholson*, 820 N.E.2d at 848.

203. *See* N.Y. FAM. CT. ACT § 1028(c) (McKinney 2010).

204. *See* Franklin, *Case Control*, *supra* note 193.

205. *See Critical Planning: Good Communication and the Right Services Are Key to Reunification*, RISE MAG. (May 2, 2018), https://www.risemagazine.org/2018/05/critical-planning-good-communication-and-the-right-services-are-key-to-reunification/ [https://perma.cc/7HQa-RNUE].

206. *See* CHILD.'S BUREAU, IN-HOME SERVICES IN CHILD WELFARE 4 (2014), https://www.childwelfare.gov/pubPDFs/inhome_services.pdf [https://perma.cc/G4QG-LX27].

207. *See Family Preservation Services*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/topics/supporting/preservation/ [https://perma.cc/QSC4-ZS8W] (last visited Nov. 4, 2020) ("Family preservation services are short-term, family-focused services designed to assist families in crisis by improving parenting and family functioning while keeping children safe. Family preservation services grew out of the recognition that children need a safe and stable family and that separating children from their families is traumatic for them, often leaving lasting negative effects. These services build upon the conviction that many children can be safely protected and treated within their own homes when parents are provided with services and support that empower them to change their lives.").

208. *See id.*

Parents can either choose to engage in or deny the services offered. The service plan is like a contract, and parents do not explicitly confirm facts in the petition by agreeing to services.[209] If a parent agrees to a service without it being court ordered, CPS or the foster care agency can escalate their actions.[210] Kaela Economos, a social worker at Brooklyn Defender Services, explained that "even though NYC has a policy that says that compliance with services should not be used as a bargaining tool for increased or restricted visits, visitation is often tied to compliance."[211] If a parent denies services, they are effectively contesting the allegations in the petition.

Engaging in services invites Layer Four Surveillance into parents' lives. Layer Four Surveillance consists of services CPS recommends or the court orders that, while aimed to address an issue named in the petition, might not be the actual issue the family is facing. For example, Ms. Carol was told to engage in parenting classes and domestic violence counseling.[212] Parenting classes and domestic violence counseling do not address Ms. Carol's bipolar disorder, which affected her life. Layer Four Surveillance means Ms. Carol is interacting with more mandated reporters and even has to sign HIPAAs to give ACS access to her records and service providers. ACS contacts those providers to learn whether Ms. Carol is engaged in the services and whether she is benefitting from them. If Ms. Carol were to contest the allegations at a 1028 hearing while also fighting to have her child immediately returned home,[213] she might be seen as "difficult, lacking insight, and potentially dangerous to [her] children."[214]

While neglect can be based upon evidence of a respondent's mental illness, proof of mental illness will not support a finding by itself.[215] Sometimes, a petition does not directly allege that a parent has neglected a child due to her mental illness mismanagement. The court

209. *See* Franklin, *Case Control*, *supra* note 193.

210. *See id.*

211. *Id.*

212. *See After Years of Chaos*, *supra* note 1.

213. To immediately return a child home, the parent must prove that the child is not at imminent risk of abuse or neglect. *See* N.Y. FAM. CT. ACT § 1028(a) (McKinney 2010).

214. Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the* Floyd *Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 140 (2019).

215. *See* MERRIL SOBIE & GARY SOLOMON, 10 NEW YORK FAMILY COURT PRACTICE § 2:23 (2d ed. 2020) ("If there is sufficient evidence that the respondent's behavior places the children at risk, a finding may be made even in the absence of expert testimony or proof that the respondent is suffering from a definitive mental illness.").

has power under FCA Section 251 to order a parent to undergo a mental health examination.[216] When the allegations in the petition are related to a parent's mental illnesses, she must decide whether to let even more surveillance into her life than a person without mental illnesses would have to. Parents with a mental illness must decide whether to confirm their mental illness in hopes of receiving better quality and sufficiently tailored services, or deny their mental illness in hopes that their mental illness will not be seen as a barrier to reunification with their children.[217] The court orders for a parent with a mental illness typically focus on addressing a parent's mental illness management. The court may therefore order the parent to attend individual therapy,[218] group therapy,[219] or address medication management.[220] At a 1028 hearing, a parent with mental illness must then decide whether allowing more surveillance into her life will be a net positive or negative.

If the petition does not allege a mental health diagnosis, a parent must weigh the benefits of divulging information about her diagnosis before a 1028 hearing or at a 1028 hearing. If a parent does not share her diagnosis with the court, the services may not be tailored to meet her needs. On the other hand, if the parent does divulge her diagnosis, she might be required to do even more services that do not address the root of her problems. For a court to make appropriate orders pursuant to *Nicholson* that mitigate or eliminate the need for removal,[221] parents might need to divulge their mental health diagnoses.

C. Positive Impacts of the Imminent Risk Standard for Parents with Mental Illnesses

i. Improved Procedural Time Frame

A 1028 hearing must be held within three court days of the application, and it should not be adjourned unless good cause is shown.[222] This shortened time frame, in theory, means parents and children could be reunited long before a case goes to trial.

---

216. *See id.*

217. *See* Burrell, *supra* note 214, at 139–40.

218. *See id.* at 139.

219. *See Critical Planning: Good Communication and the Right Services Are Key to Reunification*, *supra* note 205.

220. *See* Burrell, *supra* note 214, at 126.

221. *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 854 (N.Y. 2004).

222. *See* N.Y. FAM. CT. ACT § 1028(a) (McKinney 2010).

The statutory framework of FCA Article 10 clearly contemplates that both the temporary physical removal of the child from the family household and the temporary exclusion of a parent from the home and contact with the child warrant the same due process protections. FCA Section 1028(a) requires an expedited hearing exploring the need to return a child to her parent and determining that this relief is necessary to eliminate any imminent risk.[223] If courts heard 1028 hearings expeditiously, parents and children could be reunited more quickly, preventing unnecessary penalization by the ASFA timeline.

ii. Decreased Effects of Racial Bias

While parents with mental illnesses are often defined by their mental illnesses[224] in child welfare proceedings, they, like everyone else, have other aspects of their identities affecting their cases' outcomes.[225] The imminent risk standard decreases some impact of racial bias in child welfare proceedings.[226] Lower standards, such as best interest of the child (best interest standard), are not clearly defined and lack concrete guidance permitting the judge broad discretion in her decisions.[227] The best interest standard, for example, is vague and subjective,[228] which results in racial and class biases affecting what is deemed to be in the child's best interest.[229]

---

223. *See In re* Elizabeth C., 66 N.Y.S.3d 300, 310 (N.Y. App. Div. 2017).

224. *See infra* Sections IV.A.ii–iii.

225. *See* ROCKING THE CRADLE, *supra* note 8, at 111; *see also* Heron Greenesmith, *Best Interests: How Child Welfare Serves as a Tool of White Supremacy*, POL. RSCH. ASSOCS. (Nov. 26, 2019), https://www.politicalresearch.org/2019/11/26/best-interests-how-child-welfare-serves-tool-white-supremacy [https://perma.cc/Q6MJ-7PPL] (discussing the history and implications of racial bias in the child welfare system).

226. *See* Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 37 (2019) ("A higher standard allows less room for implicit bias to affect the outcome, acting as a check on racial bias that infiltrates the child welfare system.").

227. *See generally* John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 67–68 (2014) (discussing the history of and critiquing the subjective best interest of the child standard); Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 354 (1999) ("[T]he 'best interests of the child' . . . is an extremely malleable and subjective standard.").

228. *See* Sinden, *supra* note 227, at 347 n.36.

229. *See id.* at 352 (noting that the majority of the actors in the child welfare system are well educated, middle class, and white, while most of the accused parents are members of low-income communities of color).

Racial disparities exist at every decision-making stage of a child welfare case.[230] Race also factors into whether families receive mental health-related services, even after controlling for age, type of maltreatment, gender, and behavior of the child.[231] "In particular, Black children are often removed from their families, more frequently than other children, for reasons that are unconnected to imminent risk concerns."[232] Since racial bias is highly likely to influence the determination of whether to return a child removed from his parents' care, the imminent risk standard creates some accountability in the decision-making process.[233] The standard mitigates some undue family separation harm caused by racial bias. In a system that already disproportionately removes children from parents with disabilities, the imminent risk standard and relevant case law provide superior guidelines so that parents do not experience additional discrimination as a result of their race.

D. Negative Impacts of the Imminent Risk Standard for Parents with Mental Illnesses

i. Procedurally, the Process Is Too Slow, and Parents Have Only One Opportunity

1028 hearings are supposed to occur quickly but often do not.[234] Due to overcrowded court calendars, a family court case typically appears in front of a judge for only 30 minutes at a time.[235] Therefore, a hearing with three witnesses that typically takes only three or four hours total to complete is spread out over several weeks, or even months.[236] A parent has the right to hold an emergency hearing on a consecutive, daily basis until a judge can determine whether or not there is an imminent risk of harm.[237] Judges are not necessarily at fault,

---

230. *See* Jennings, *supra* note 226, at 37.

231. *See* Ann F. Garland et al., *Racial and Ethnic Variations in Mental Health Care Utilization Among Children in Foster Care*, 3 CHILD.'S SERVS. 133, 134 (2000).

232. Jennings, *supra* note 226, at 38.

233. *See* Kathleen B. Simon, Note, *Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review*, 51 COLUM. J.L. & SOC. PROBS. 347, 350–54 (2018) (describing the role of racial bias in child protective removals).

234. *See* PROTRACTED 1028 HEARINGS, *supra* note 78, at 1.

235. *See* Jennings, *supra* note 226, at 14.

236. *See id.*

237. *See In re* Elizabeth C., 66 N.Y.S.3d 300 (N.Y. App. Div. 2017); ABIGAIL KRAMER, NEW SCH., CTR. FOR N.Y.C. AFFS., IS REFORM FINALLY COMING TO NEW YORK CITY FAMILY COURT? 3,

though. The Bronx Defenders (BXD) conducted a case study for prolonged 1028 hearings, and its review revealed "that many judges attempt to complete hearings within the statutory timeframe, but their attempts are frustrated by structural problems within the operation of the family court."[238] The report consisted of five case studies, illustrating the problems preventing 1028 hearings from being expedited.[239] Citing *Nicholson*, BXD explained that

> [b]etween the time of removal and the time of reunification, parents and children in these cases suffered the precise harms that expedited proceedings under Section 1028 were designed to avoid, including, by way of example: A six-year-old child placed in stranger foster care who cried often for her mother and who began expressing suicidal thoughts; a parent being separated from her four-month-old baby until that baby was almost eight months old; and a child being beaten by residents in the facility where he had been temporarily placed. The high social cost to these families, their community, and these children compels attention. Even if this were not a moral imperative, it is a legal one.[240]

In Case No. 3, BXD recounts an instance where a father, BH, and son, K, lived in a building operated by a nonprofit that provided extensive services to tenants who suffer from mental illnesses.[241] BH and his son suffered from mental health conditions.[242] In late July 2015, ACS filed a neglect petition against BH. The allegations in the petition included BH's failure to prove "he was receiving necessary treatment for Post-Traumatic Stress Disorder, that K had excessive absences from school, and that K reportedly said BH allowed him to engage in inappropriate sexual activities."[243] On June 14, 2016, ACS removed K "based on BH's alleged failure to comply with agreed upon mental health treatment for himself and his son, and K's acting out in school."[244]

> BH agreed to engage in a course of treatment and did not immediately seek the return of his son. K was placed in the New York City Children's Center, which provides behavioral healthcare services

---

static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/569e7d8bbfe8737de9301b71/1453227404613/CWW+%7C+Is+Reform+Finally+Coming+to+Family+Court%3F.pdf [https://perma.cc/J4TM-QCNN].

238. PROTRACTED 1028 HEARINGS, *supra* note 78, at 2.
239. *See id.*
240. *Id.* at 1.
241. *See id.* at 5.
242. *See id.*
243. *Id.*
244. *Id.*

to youth suffering from mental disturbances. On or about July 14, 2016, K ran away from the facility and was later found by facility staff in the middle of a street.[245]

Although BH objected, K was transferred to a residential treatment center outside of New York City, where K did very poorly and said he desperately wanted to go home to his father.[246] On July 20, 2016, BH filed for a 1028 hearing for K's return.[247] The 1028 hearing lasted approximately three months and consisted of approximately ten court appearances, with only two of the court appearances scheduled on consecutive days.[248] The BXD report highlighted the administrative roadblocks to an expedited 1028 hearing.[249] During the hearing's pendency, K remained at the residential treatment center and continued to deteriorate.[250] Another example in the BXD report described a case where ACS removed a four-month-old from his mother and, due to the lengthy 1028 hearing period, was not returned to her until he was eight months old.[251]

A parent only has one opportunity to bring a 1028 hearing, and if a court denies a parent a 1028 hearing or if a child is not returned home, the appellate process is prohibitive and time consuming.[252] In *In re Julissia B.*, the court of appeals reversed the family court's grant of the mother's application for the return of the subject child to her custody pursuant to FCA Section 1028.[253] The court held that although "the

245. *Id.*

246. *See id.*

247. *See id.*

248. *See id.* at 6.

249. *See id.* (explaining that each 1028 appearance was scheduled for 30 minutes and the difficulty identifying adjournment dates due to routing scheduling conflicts).

250. *See id.*

251. *See id.* at 5; ROCKING THE CRADLE, *supra* note 8, at 102 ("Children who are denied secure attachment due to separation are less able to cope with psychological trauma, self-regulate their behavior, handle social interactions, and formulate positive self-esteem and self-reliance.").

252. *See* FAM. CT. ACT § 1028 Editor's Notes (McKinney 2010) (Practice Commentaries by Professor Merril Sobie) ("[A]ppeals are not perfected and determined overnight; even with the expedited rules which facilitate the process for Family Court appeals (see, e.g. Section 1121), the process consumes at least several months. In the interim, the case continues to wend its way toward conclusion in Family Court. By the time an appeal is heard any intermediate order, including a Section 1028 order, may expire, or be modified, or be superceded by a permanent dispositional order."); *see also In re* Elizabeth C., 66 N.Y.S.3d 300, 305 (N.Y. App. Div. 2017). *But see, e.g.*, *In re* Chelsea BB., 825 N.Y.S.2d 551, 554 (N.Y. App. Div. 2006) (castigating the family court for violating the statutory requirements and fundamental fairness in conducting and determining a Section 1027 hearing (although the resultant order had been superseded)).

253. *See In re* Julissia B., 7 N.Y.S.3d 596, 597 (N.Y. App. Div. 2015).

mother complied with the petitioner's service requirements," the court relied on the case planner's testimony that the mother was "still prone to unpredictable emotional outbursts, even during visits with the children, and she was easily provoked and agitated."[254] The court cited the mother's inability to successfully address and acknowledge the circumstances that led to the removal of the other children.[255] The dissent, however, cited to *Nicholson* and explained that the family court had imposed safeguards and conditions for the subject child's return to the mother, including compliance with ACS supervision and referrals for domestic violence counseling and supportive psychotherapy, compliance with homemaking services, and a criminal court order of protection in her favor.[256] The dissent also highlighted how the subject child, a newborn infant, was differently situated from the older children who had been previously removed.[257] The dissent further opined that it was eminently reasonable to conclude the mother could adequately care for one infant child, but not five children in total.[258] By not allowing the subject newborn infant to return to her mother pursuant to a 1028 hearing, the ASFA timeline continued to run, and the mother could not move for another 1028 hearing if her circumstances changed.[259] Although the statute intends for expedited 1028 hearings, they do not occur in practice.[260] It is then challenging and time prohibitive to appeal a decision from a 1028 hearing.

ii. The ASFA Timeline Is Particularly Detrimental for Parents with Mental Illnesses

ASFA's timeline considers the time a child is in a parent's custody, but the statute does not explicitly account for the needs of parents with disabilities. Most parents with disabilities engage with services that require more time than a parent without a disability.[261] For example, one study found that "therapists either were not aware of the time concerns associated with ASFA, or could not sufficiently treat clients

254. *Id.* at 598.

255. *See id.*

256. *See id.* at 693 (Hall, J., dissenting).

257. *See id.*

258. *See id.*

259. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, 2118 (codified as amended in scattered sections of 42 U.S.C.); *see also* N.Y. FAM. CT. ACT § 1028(a) (McKinney 2010).

260. *See* PROTRACTED 1028 HEARINGS, *supra* note 78, at 1.

261. *See* Chiamulera, *supra* note 148 ("Most parents with disabilities need to start services earlier, receive them more often, and use them for a longer period to address their issues and successfully reunify with their children . . . .").

within the 1-year time period."[262] Therapists also provided recommendations, such as a parent needing at least two years, or even several years, of treatment.[263] For parents with mental illnesses, due to ASFA's timeline, the timing of the aforementioned service plans is hugely detrimental in the process of beginning to get their child back into their care.

iii. No Protection Against Discrimination: Judges Do Not Recognize the ADA in the Child Welfare Context

While the ADA has existed for nearly 30 years, the statute has not effectively defended the parenting rights of people with disabilities, particularly in the area of family law.[264] The National Council of Disability asserts that courts have "[o]verwhelmingly . . . failed to appropriately apply the ADA, concluding that sufficient reasonable modifications in services were made to accommodate parents' disabilities and, therefore, no ADA violations occurred."[265] Some courts hold that termination proceedings, for example, are not "services, programs, or activities," and therefore the ADA does not apply.[266] In 1028 hearings, a claim under the ADA is never raised.

In *In re Chance Jahmel B.*, the family court concluded that the failure to provide services is not disability discrimination because New York law does not require the provision of services to a parent with mental illness prior to termination.[267] The court reached its conclusion, even though a separate ADA claim might have existed for the failure to "provide remedial services for people with disabilities when similar services were provided for people lacking these disabilities."[268]

iv. Caseworker and Service Provider Bias

Caseworkers and service providers "hold negative perceptions of people with disabilities" and consequently, "they may be more likely

---

262. Lenore M. McWey, Tammy L. Henderson & Susan N. Tice, *Mental Health Issues and the Foster Care System: An Examination of the Impact of the Adoption and Safe Families Act*, 32 J. MARITAL & FAM. THERAPY 195, 202 (2006).

263. *See id.*

264. *See generally* Kathryn A. LaFortune & Wendy Dunne DiChristina, *Representing Clients with Mental Disabilities in Custody Hearings: Using the ADA to Help in a Best-Interests-of-the-Child Determination*, 46 FAM. L.Q. 223 (2012).

265. ROCKING THE CRADLE, *supra* note 8, at 94.

266. *See* Leslie Francis, *Maintaining the Legal Status of People with Intellectual Disabilities as Parents: The ADA and the CRPD*, 57 FAM. CT. REV. 21, 29 (2019).

267. *See In re* Chance Jahmel B., 723 N.Y.S.2d 634, 639 (N.Y. Fam. Ct. 2001).

268. Francis, *supra* note 266, at 29.

to focus on developing cases for termination than on helping parents with disabilities reunite with their children."[269] At an American Bar Association webinar (ABA Webinar) on November 13, 2014, several practitioners and scholars, including Ella Callow, Director of Legal Programs at the National Center for Parents with Disabilities and Their Families, provided advice on representing parents with disabilities in dependency and family court cases.[270] Callow explained:

> Many evaluations of parents with disabilities are not evidence-based . . . and do not meet best practice . . . . She cited a review of parent evaluations performed [by caseworkers] across the country that showed: attitudinal bias in 67% of evaluations (negative comments about parents, inappropriate terminology, assumptions, speculation and prejudice), deficiencies in the writing in 66% (poor English grammar and writing), use of inappropriate test measures in 71%, [and a] failure to observe the parent and child together in 69% (the "gold standard" of an effective parent-child evaluation).[271]

Callow has also explained that "[t]his is the only class of children facing loss of family integrity due not to the behavior of their parents, but to their parent's disability status and how this is perceived and understood by child welfare professionals."[272] Children and parents suffer from the impacts of bias against parents. For example, the Mayo Clinic describes numerous harmful effects of mental illness stigma on parents living with disabilities, such as a lack of understanding by others, trouble finding housing, and the personal belief that a person with mental illness will never succeed at certain challenges or will not be able to improve her situation.[273]

In some states, caseworkers are particularly suspicious of parents with psychiatric disabilities because the presence of a psychiatric disability is a ground for TPR.[274] A study found that parents with psychiatric disabilities were almost three times more likely to have

---

269. ROCKING THE CRADLE, *supra* note 8, at 87. *See generally* Greenesmith, *supra* note 225 (discussing the history and implications of racial bias in the child welfare system).

270. *See* Chiamulera, *supra* note 148.

271. *Id.*

272. Ella Callow, *Maintaining Families When Parents Have Disabilities*, 28 A.B.A. CHILD L. PRAC. 133, 134 (2009).

273. *See* Mayo Clinic Staff, *Mental Health: Overcoming the Stigma of Mental Illness*, MAYO CLINIC (May 24, 2017), https://www.mayoclinic.org/diseases-conditions/mental-illness/in-depth/mental-health/art-20046477 [https://perma.cc/4A58-3DDM].

274. *See* ROCKING THE CRADLE, *supra* note 8, at 94.

child welfare involvement or experience loss of child custody than those without such disabilities.[275]

Nina Wasow explained:

> Social science research does not prove that people with mental disabilities cannot use services or reunify with their children; psychologists tend to over-predict dangerousness and lack the tools to assess parental competence accurately; and the social and cultural forces at play in the child welfare system lead experts to focus on certain parental weaknesses.[276]

Thus, while the standard decreases the effect of racial bias,[277] discrimination against parents with mental illnesses potentially goes unchecked. When a child has a parent with a mental illness, the court cannot adequately address a standard like imminent risk without acknowledging the disparate way service providers treat parents with mental illnesses.

IV. SURVEILLANCE IS NOT SAFETY FOR FAMILIES, ESPECIALLY FOR PARENTS WITH MENTAL ILLNESSES

Part IV explains recommendations to better support parents with mental illnesses. Section IV.A gives recommendations applicable in the current child welfare state where Four Layers of Surveillance operate. Section IV.B offers recommendations in the current climate, with calls to defund ACS. This Section also offers solutions targeting the Layers of Surveillance to which parents with mental illnesses are subjected. Over time, the legislature, society, and courts created hurdles that parents with mental illnesses must overcome in the child welfare system. Consequently, the proffered solutions are drastic because, as this Note argues, a radical change is necessary to overcome these entrenched obstacles.

A. Recommendations to Better Support Parents with Mental Illnesses in a 1028 Hearing in a Child Welfare System with Hyper Surveillance

While the government views surveillance as a useful and effective tool for keeping children safe, that is not the reality.[278] Surveillance

---

275. *See* Kundra & Alexander, *supra* note 146, at 143.

276. Nina Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities*, 31 N.Y.U. REV. L. & SOC. CHANGE 183, 207 (2006).

277. *See* discussion *supra* Section III.C.ii.

278. A new bill introduced in the New York State Legislature would replace anonymous child abuse and neglect reports with confidential reports that require

falls disproportionately on low-income parents of color.[279] For example, in New York City, families were subjected to 5,000 more ACS investigations in 2018 than 2013.[280] However, two-thirds of those investigations were "unfounded,"[281] meaning that ACS did not find enough evidence to support the claim that a child had been abused or neglected.[282] Nationwide, schools account for almost 20% of calls made to the State Central Registry; this makes them the number one caller of reports.[283] While it may seem that the benefits of mandated reporting outcomes largely outweigh the costs, it is critical to remember that a CPS investigation is not a "benign event but a source of fear and stress, sometimes with terrible consequences."[284] In fact, *Rise Magazine*[285] published a series called "Surveillance Isn't Safety" to illustrate how over-reporting and CPS monitoring stress out families and weaken communities.[286] *Rise* reported that schools play an "outsized role in putting families in the child welfare pipeline."[287] Additionally, police serve as another example of surveillance that is perceived as safety. Of all child abuse and neglect reports investigated

---

callers to the State Central Registry to provide identifying information when making a report. *See* S. 5572, 242d Sess. (N.Y. 2019).

279. *See Surveillance Isn't Safety — How Over-Reporting and CPS Monitoring Stress Families and Weaken Communities*, RISE MAG. (Sept. 17, 2019), https://www.risemagazine.org/2019/09/surveillance-isnt-safety/ [https://perma.cc/W4SG-XPE9].

280. *See* Rachel Blustain & Nora McCarthy, *The Harmful Effects of New York City's Over-Surveillance*, IMPRINT (Oct. 21, 2019, 5:15 AM), https://chronicleofsocialchange.org/child-welfare-2/the-harmful-effects-of-over-surveillance/38441 [https://perma.cc/HJ9R-7XAK].

281. *See id.*

282. *See A Parent's Guide to a Child Abuse Investigation*, *supra* note 30.

283. *See* Rachel Blustain, *Surveillance Isn't Safety: When Schools Over-Report*, RISE MAG. (Oct. 3, 2019), http://www.risemagazine.org/2019/10/when-schools-over-report/ [https://perma.cc/B8JB-3LVY]; *see also* CHILD.'S BUREAU, CHILD MALTREATMENT 8 (2017), https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf [https://perma.cc/T6NJ-F5BV]; *Rise Recommendations to Address Schools' Over-Reporting to Child Protective Services*, RISE MAG. (Mar. 2, 2020), https://www.risemagazine.org/2020/03/rise-recommendations-schools-over-reporting/ [https://perma.cc/WPU8-YVSJ].

284. Blustain & McCarthy, *supra* note 280.

285. *See What We Do*, RISE MAG., https://www.risemagazine.org/what-we-do/ [https://perma.cc/VW87-N2TJ] (last visited Nov. 3, 2020).

286. *See Surveillance Isn't Safety — How Over-Reporting and CPS Monitoring Stress Families and Weaken Communities*, *supra* note 279.

287. Blustain, *supra* note 283.

by child welfare agencies in the country, police call in approximately one-fifth of the reports.[288]

In the child welfare system, as it is designed today, parents in predominantly poor, Black and Latinx[289] communities are more exposed to mandatory reporters[290] and police.[291] Ultimately, heightened surveillance falls disproportionately on low-income parents of color who come into greater contact with mandated reporters.[292]

i. Consider the ADA in 1028 Hearings

As of today, there is no particularized legal mechanism to address discrimination by a child protective specialist in any Article 10 proceeding, including 1028 hearings.[293] A parent's counsel is unable to bring ADA claims, meaning the court does not adequately consider the threshold question of whether or not the agency is making appropriate and reasonable efforts to reunify the family. If a parent suspects that a CPS service worker is discriminating against her due to her mental illness, she has no legal recourse through which to address this during her Article 10 court proceeding.[294]

While the ADA has existed for nearly 30 years, the statute has not effectively worked to defend the parenting rights of people with disabilities, particularly in the area of family law.[295] Courts should

---

288. *See* Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, RUSSELL SAGE FOUND. J. SOC. SCIS. 50, 50 (2019).

289. The child welfare system also disproportionately affects Native Americans. *See* ROCKING THE CRADLE, *supra* note 8, at 109–12 (providing historical background and statistics on Native Americans and the child welfare system).

290. *See* Kendra Hurley, *When Child Welfare Cases Police Women in Their Homes*, BLOOMBERG CITYLAB (June 11, 2020, 9:09 AM), https://www.bloomberg.com/news/articles/2020-06-11/how-child-welfare-cases-surveil-parents-of-color [https://perma.cc/G7JS-UD4T].

291. *See* Edwards, *supra* note 288, at 50 (stating that since "police contact is not randomly or equitably distributed across populations, policing has likely spillover consequences on racial inequities in child welfare outcomes").

292. *See* Clifford & Silver-Greenberg, *supra* note 74. *But see* Brett Drake, Melissa Jonson-Reid & Hyunil Kim, *Surveillance Bias in Child Maltreatment: A Tempest in a Teapot*, 14 INT'L. J. ENV'T RSCH. PUB. HEALTH 1, 1 (2017) (defining "surveillance bias" as the idea that "[c]hildren are believed to be more likely to be reported for maltreatment while they are working with mental health or social service professionals").

293. *See* ROCKING THE CRADLE, *supra* note 8, at 36, 261 (recommending that Congress address "disparate treatment experienced by parents with disabilities through legislation similar to the [Indian Child Welfare Act — 1978] that will protect the rights of parents with disabilities and their families").

294. *See* Chiamulera, *supra* note 148 (stating that the ADA is never argued in 1028 hearings).

295. *See generally* LaFortune & DiChristina, *supra* note 264.

consider claims raised by parents under the ADA — but in order to consider them, parents must first bring them. There are two types of arguments for ADA claims. The first argument is that under Title II of the ADA, the court should recognize reunification and other family preservation services as services, programs, and activities.[296] Thus, when parents with mental illnesses require accommodations in services to maintain or regain custody of their children, and the state refuses to provide any modifications, parents can file an ADA claim against the state.[297] ACS often prescribes a "cookie-cutter," or one-size-fits-all,[298] service model for parents, especially parents with mental illnesses. "Cookie-cutter" solutions are the antithesis of the ADA's intent.[299]

The second argument is that 1028 hearings are a service, program, and activity covered under the ADA, requiring due process and that there be "no discrimination in these proceedings, and reasonable accommodations when necessary to allow the parent to maintain custody."[300] While the Supreme Court has not ruled on whether state court proceedings, like 1028 hearings, constitute a "state activity" or "service,"[301] the DOJ does consider court actions to be "state activity" for purposes of the ADA.[302] By creating a record at every 1028 hearing, where discrimination against a parent with mental illness occurs in spite of the ADA's existence, the path is laid for reform in court opinions.

ii. Mental Illness Trainings for Everyone in Family Court

Even if states refuse to decrease the surveillance in the child welfare system, the surveillance should be more compassionate and less biased. If parent evaluations and parent-child assessments are biased, an Article 10 case's outcome is potentially unjust. One solution is scrutinizing parent evaluations and parent-child assessments. This can be done by understanding what makes a better quality parent evaluation. According to Callow, "[t]he ADA and American Psychological Association guidelines set best practices for performing parenting evaluations and minimum competencies for those

---

296. *See* Kundra & Alexander, *supra* note 146.

297. *See id.*

298. *See* ROCKING THE CRADLE, *supra* note 8, at 89.

299. *See* Franklin, *Case Control*, *supra* note 193 ("Even though NYC has a policy that says that compliance with services should not be used as a bargaining tool for increased or restricted visits, visitation is often tied to compliance.").

300. Kundra & Alexander, *supra* note 146, at 144.

301. *See* Cecka, *supra* note 95, at 117.

302. *See* Kundra & Alexander, *supra* note 146, at 144–45.

performing them."[303] In the ABA Webinar, Callow "urged advocates to ensure evaluations meet these standards and to challenge them in court when they are not followed."[304]

Medical and mental health professionals are not immune to bias. Further, "[n]egativity and a lack of cultural competence about disability are reflected in language appearing in unpublished court documents and evaluations, such as 'afflicted with dwarfism,' 'wheelchair bound,' 'suffers from physical disability.'"[305] Caseworkers base their recommendations on these reports. It is critical that attorneys remain attentive during any professional's assessments of their clients.[306] Often parents have been disenfranchised and gaslit for so long that they are either reticent to question a professional's opinion or do not believe anyone will believe their experiences of discrimination.[307]

iii. Train Service Providers

If a health care worker is qualified to be a mandated reporter, then why cannot ACS trust the services the person provides? Often, parents dislike the provided services for a variety of reasons. Perhaps the program does not suit their needs or the services are unrelated to the allegations in the petition.[308] Currently, the reasonable efforts standard is not enough to compel ACS to offer parents programs that meet their needs.[309]

---

303. Chiamulera, *supra* note 148.

304. *Id.*

305. Megan Kirshbaum, Daniel O. Taube & Rosalinda Lasian Baer, *Parents with Disabilities: Problems in Family Court Practice*, 4 J. CTR. FOR FAMS., CHILD. & CTS. 27, 37–38 (2003).

306. *See* Burrell, *supra* note 214, at 141 n.69 (stating that "individual caseworkers are not trained or prepared to work with parents who suffer from long term substance misuse or mental illness").

307. *See generally Silenced: My Ex-Husband Has Used CPS to Abuse Me for More Than a Decade*, RISE MAG. (Sept. 1, 2020), https://www.risemagazine.org/2020/09/silenced-my-ex-used-cps-to-abuse-me/ [https://perma.cc/9YXM-NZFK] (describing a case that was indicated for a mother's alleged mental illness, even though CPS never had her evaluated by a mental health professional. Further, the parent experienced repeated discrimination by the investigator and was repeatedly ignored).

308. *See* Keyna Franklin, *Plan of My Own — I Didn't Think I Needed Services But I Did Them Anyway*, RISE MAG. (May 7, 2018), https://www.risemagazine.org/2018/05/plan-of-my-own-i-didnt-think-i-needed-services-but-i-did-them-anyway/ [https://perma.cc/L82X-QYT4]; *see also Critical Planning: Good Communication and the Right Services Are Key to Reunification*, *supra* note 205.

309. *See* ROCKING THE CRADLE, *supra* note 8, at 89.

Service providers are Layer Four Surveillance: another layer where parents must prove their child will not be harmed in their care. Occasionally, parent representation will provide a letter from a health care professional who had the opportunity to observe a parent during a visit with her child or treated her in therapy.[310] If ACS does not feel a parent's problematic behavior has changed, a caseworker will continue to assign services to satisfy the parent's requirements.[311]

One solution is to require that all service providers in the state attend an ACS-approved course or training on mental illnesses. The state should fund this training, and it should be standard as a part of adhering to the ADA's requirements of reasonable efforts. Implementing parenting programs that integrate mental health is essential to prevent the separation of parents and children.[312]

B. In the Age of Defund ACS: Reimagining Support for Parents with Mental Illnesses in a Child Welfare System with Less Surveillance

There has been a sharp drop in calls to child maltreatment hotlines during the COVID-19 pandemic.[313] "One analysis estimates a drop of more than 200,000 allegations of child maltreatment in the U.S. reported in March and April over previous years. In New York City, child abuse reports dipped by 51% compared to the same eight-week period last year . . . ."[314] Mandated reporters are not interacting with children as frequently since the City went into quarantine.[315]

> The media continues to speculate that even though reports are down, child abuse must be up based on the misguided notion that children are only safe if mandated reporters continue to report suspicions.

---

310. *See, e.g.*, Michael Griffin, *It's What You Don't Say*, CAL. ASS'N MARRIAGE & FAM. THERAPISTS (Oct. 2017), https://www.camft.org/Resources/Legal-Articles/Chronological-Article-List/its-what-you-dont-say [https://perma.cc/46LZ-7DXS].

311. *See Critical Planning: Good Communication and the Right Services Are Key to Reunification*, *supra* note 205.

312. *See* Danson Jones et al., *When Parents with Severe Mental Illness Lose Contact with Their Children: Are Psychiatric Symptoms or Substance Use to Blame?*, 13 J. LOSS & TRAUMA 261, 281 (2008).

313. *See* Hurley, *supra* note 290.

314. *Id.*; *see also* Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities Are Very Worried.*, N.Y. TIMES (Aug. 7, 2020), https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html [https://perma.cc/B4EP-GVY8].

315. *See* Stewart, *supra* note 314.

> However, in nearly two-thirds of investigations, ACS does not find any credible evidence to support the allegations.[316]

There is no data to support that fewer reported cases mean child abuse is increasing.[317]

Since COVID-19's emergence in New York, ACS has modified how it handles complaints and checks on troubled families.[318] One investigator reportedly "decided against removing children from a home where the food had run out" and instead went to a pantry and brought the family food.[319] Investigators also ensured children had appropriate resources for online learning after the children "were reported as truant because they had not been logging on during class."[320] NYU Clinical Professor Chris Gottlieb

> suspects that mandated reporting may do more harm than good. With so few reports substantiated, says Gottlieb, cities are "misdirecting resources away from the small percentage of cases where there is serious abuse, and away from what they should be used for, which is much-needed services like housing and health care."[321]

Although the previously mentioned reforms are important to address parents' needs in the short term, it is crucial to imagine a society that does not assume parents with mental illnesses cannot raise their children. Therefore, this Note proposes ensuring parents with mental illnesses are included in the decision-making processes about child welfare laws and policies.

i. Nothing About Us Without Us

South African disability rights advocates developed the slogan "Nothing about us without us" in the 1980s.[322] This slogan has become

---

316. Joyce McMillan & Jessica Prince, *The Press Is Stoking Fears of a Phantom Child — Abuse Crisis*, CITY LIMITS (June 29, 2020), https://citylimits.org/2020/06/29/opinion-the-press-is-stoking-fears-of-a-phantom-child-abuse-crisis/ [https://perma.cc/HJ4F-AMBX].

317. *See id.*; *see also* Richard Wexler, *Dismantle the Racist Child Welfare System, Too*, N.Y. DAILY NEWS (June 15, 2020, 5:00 AM), https://www.nydailynews.com/opinion/ny-oped-dismantle-the-racist-child-welfare-system-too-20200615-gnk7erxjqna7tigxv47fu2rpjm-story.html [https://perma.cc/53HY-UDVX].

318. *See* Stewart, *supra* note 314.

319. *Id.*

320. *Id.*

321. Hurley, *supra* note 290.

322. *See* Rachel Garaghty, *"Nothing About Us Without Us" . . . Including the Use of This Slogan*, YOUTH NONPROFIT PRO. NETWORK TWIN CITIES, http://www.ynpntwincities.org/_nothing_about_us_without_us_including_the_use_of_this_slogan [https://perma.cc/M2P7-QCUV] (last visited Oct. 23, 2020).

a rallying cry for people with disabilities "demand[ing] inclusion in policy and decision-making processes that shaped their lives and environments."[323] The momentum behind this slogan encouraged a shift in policies that affected people with disabilities. People with disabilities became the policy makers in policies that readily affected their lives.[324] For example, people with disabilities advocated for self-directed care plans rather than depending on doctors' orders.[325] Since people with disabilities have been historically oppressed in the child welfare system,[326] the phrase "Nothing about us without us" should apply when drafting legislation and considering policies affecting parents with disabilities. By centering parents with mental illnesses and valuing their voices, decision-makers will begin viewing parents as agents of their own lives, able to "to effectively parent their children with the right kinds of support and treatment."[327]

Undeniably, parents with mental illnesses face unique hurdles in the child welfare system. Hurdles, however, do not prevent parents from knowing what exactly would help them parent safely and effectively. Parents with mental illnesses are best positioned to articulate their particularized needs, which necessarily consider their mental illnesses. *Rise Magazine* is a leading publication centering the voices of parents involved with the child welfare system in New York State. *Rise*'s mission is to train parents to discuss their experiences to support parents and parent advocates and guide child welfare professionals in their responsiveness to the families and communities they serve.[328] This strategy of looking to affected parents for solutions should be a strategy legislatures employ when amending child welfare laws.

> Michael Masutha and William Rowland, two leaders of Disabled People South Africa, separately invoked the slogan, which they had heard used by someone from Eastern Europe at an international disability rights conference. The slogan's power derives from its location of the source of many types of (disability) oppression and its simultaneous opposition to such oppression in the context of control and voice.

James I. Charlton, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 3 (1998).

323. Garaghty, *supra* note 322.

324. *See id.*

325. *See id.*

326. *See* ROCKING THE CRADLE, *supra* note 8, at 260.

327. Glennon, *supra* note 60, at 294.

328. *See About Rise*, RISE MAG., https://www.risemagazine.org/about/ [https://perma.cc/E67P-KCCR] (last visited Oct. 24, 2020).

The state must take its cues from individuals who have mental illnesses and have been involved in the child welfare system. These individuals are experts in their own lives and informed on the lives of those similarly situated. An example of the "Nothing about us without us" mentality[329] is the recent amendments to the SCR laws. These laws were proposed by activists in the communities who witnessed that the SCR registry "penalized low-income families by significantly limiting their earning capacity."[330] It is a disservice to children with mental illnesses to support them as children, when they are subject children in child welfare cases,[331] and then deny them adequate support and resources when they are parents.

ii. Incentivize Reunifying Families, Including Parents with Disabilities

The federal government pays states a bonus for foster child adoptions.[332] Instead of incentivizing states to have children adopted, there should be incentives to reunify families with safeguards if reunification does not work out.[333] It is unreasonable to expect child welfare agencies to make the same reasonable efforts to reunify families and plan for adoption if adoption is incentivized monetarily and reunifying families is not. When a parent has a mental illness and reunifying takes more time and resources from the government, it is unsurprising that the agencies involved are not incentivized.

Amidst marches for Black lives, "[t]his country is saying loud and clear, we do not need police to keep our communities safe. Neither do we need ACS, because surveilling Black families and removing Black children does not keep families safe."[334] ACS has a $2.7 million

---

329. *See* Garaghty, *supra* note 322.

330. Gottlieb, *supra* note 175.

331. *See Mental Health and Foster Care*, NAT'L CONF. ST. LEGISLATURES (Nov. 1, 2019), https://www.ncsl.org/research/human-services/mental-health-and-foster-care.aspx [https://perma.cc/8TEG-ATFC] (describing legislation enacted that addresses and protects children's mental health); *see also Adoption*, CHILD.'S BUREAU, https://www.acf.hhs.gov/cb/focus-areas/adoption [https://perma.cc/NV9G-2ADR] (last visited Nov. 3, 2020).

332. *See* ROBERTS, *supra* note 44, at 110.

333. *See* Dawn Post, *Adoption Bonuses and Broken Adoptions*, AM. BAR ASS'N (Jan. 1, 2014), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/january-2014/adoption-bonuses-and-broken-adoptions/ [https://perma.cc/2279-T6G2] (describing how although adoption is meant to be permanent, it does not always turn out that way).

334. McMillan & Prince, *supra* note 316.

budget.[335] Some of that could go to communities suffering from a lack of resources, particularly for parents with mental illnesses who need more resources. This puts the power back into communities to support one another and removes the toxic relationship often cultivated between service providers and parents.

CONCLUSION

> In February 2018, five years into my case, the agency filed to terminate my rights to my oldest daughters and stopped me from seeing them. They are now 7 and 5, and are being freed for adoption in June. It kills me that I can't see them until they're 18.
>
> But I'm trying to stay positive for my younger kids. I have a new agency, and it's been different. They've understood that the inconsistencies in my life come from the trauma I've suffered.
>
> My new worker helped me to tailor my service plan to what's going on in my life and set clear steps. She printed it out and attached resources that she felt might benefit me.
>
> When I let an ex back into my life and he hurt me, she didn't judge me. She helped me set a new path and nd comprehensive DV counseling that helped me to see that he was manipulating me with money and the promise of love. I learned to recognize the tactics abusers use to get you to stay.
>
> It feels good to have an agency that treats me as a partner.
>
> . . . .
>
> My son and youngest daughter are 3 and 1 now. I see them twice a week, sometimes more. I finally have an apartment and it looks like we are closer than ever to reunification. Still, I get upset with myself because if I had pushed as hard as I do now, believed in myself and had people who believed in me, I know my older daughters would be coming home, too.[336]

Surveillance in the child welfare system is rampant. Parents with mental illnesses experience more surveillance than parents without mental illnesses. When children are removed from their parents, the effects are broad sweeping on their child welfare case and personal growth. Ms. Carol's turbulent journey through the child welfare system is just one of many cases illustrating that surveillance is not enough to support parents with mental illnesses and their families. While the imminent risk standard provides some guidance to state agencies as to appropriate reasonable efforts, the guidance is worthless

---

335. *See id.*
336. *See After Years of Chaos*, *supra* note 1.

without appropriate services in place to support parents and checks on bias and discrimination in the system.

Reforms to the child welfare system to benefit parents with disabilities can come in two forms. One way acknowledges the deeply entrenched surveillance in the child welfare system by repairing the style of surveillance. Judges must acknowledge the safeguard that is allegedly supposed to protect parents with mental illnesses: the ADA. The child welfare system must provide training for everyone whose opinion the court weighs in determining whether a child is at imminent risk of neglect. This includes ACS attorneys and judges. Finally, service providers who understand ASFA timelines and advocate for parents should be prioritized.

In the alternative, reforms to the child welfare system can consider the current calls to defund ACS and actively dismantle some of the surveillance in place. Lawmakers must look to parents with mental health conditions for guidance on how supporting their families should look instead of simply watching them and incorrectly inferring what they and their families need. Finally, the state must incentivize unifying families with parents who have mental illnesses. Since surveillance is not safety, let parents like Ms. Carol tell you what safety looks like for her family and families like hers.