

**IN THE COURT OF COMMON PLEAS
JUVENILE DIVISION
[REDACTED], OHIO**

[REDACTED]

:
:
:
:
:
:
:

CASE NO. [REDACTED]
JUDGE [REDACTED]
MAGISTRATE [REDACTED]

**AMICUS BRIEF OF DISABILITY RIGHTS OHIO IN SUPPORT OF MOTHER
[REDACTED] OBJECTIONS TO MAGISTRATE’S DECISION**

I. STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae is Disability Rights Ohio. Disability Rights Ohio is a not-for-profit organization designated by the Ohio Governor as the protection and advocacy system under federal law for people with disabilities in Ohio. See 42 U.S.C. 10541, *et seq.*; R.C. 5123.60. The mission of Disability Rights Ohio is to advocate for the human, civil, and legal rights of people with disabilities in Ohio. As the protection and advocacy system for Ohio, Disability Rights Ohio investigates abuse, neglect, and rights violations affecting people with disabilities; pursues administrative, legal, and policy remedies to address identified violations; and advocates for individuals in many areas of disability rights, special education, and other civil rights. Disability Rights Ohio has considerable experience and expertise in disability rights.

Disability Rights Ohio recognizes that this case has important implications for parents with disabilities to raise their children without fear of unwarranted government intervention. The right to care for and raise one’s own children is one of the most fundamental rights parents have. Parents with intellectual disabilities frequently experience discrimination in child protection proceedings based on stereotypes and assumptions about their parenting capacity. Because child protective services and courts sometimes take action based on implicit bias against persons with

disabilities, parents often find themselves fighting to maintain custody of their children when no evidence of maltreatment has been presented against them.

The power to remove a child from the care of a parent should be based on concrete evidence of abuse or neglect and not on generalized expectations that assume parents with mild intellectual disabilities are incapable of parenting children safely.

Disability Rights Ohio has a substantial interest in ensuring that child protection proceedings uphold the rights of parents with disabilities and follow both state and federal law.

II. FACTS AND PROCEDURAL HISTORY

The mother, [REDACTED], has a mild intellectual disability. On March 6, 2018, [REDACTED] gave birth to [REDACTED] at [REDACTED]. Immediately following [REDACTED] birth, a hospital worker contacted [REDACTED] Job & Family Services (“[REDACTED] JFS”) to report her concerns about [REDACTED] ability to parent. [REDACTED] JFS sent an intake worker to the hospital to evaluate [REDACTED] parenting capacity. On March 9, 2018, Magistrate [REDACTED] granted [REDACTED] JFS an emergency order to remove [REDACTED] from [REDACTED] care and ordered temporary custody to [REDACTED] JFS. On March 12, 2019, approximately one year after the initial emergency order was granted, Magistrate [REDACTED] adjudicated [REDACTED] as dependent and ordered that [REDACTED] remain under the protection of [REDACTED] JFS. On March 19, 2019, [REDACTED] attorney [REDACTED] and her guardian ad litem [REDACTED] filed a motion objecting to the March 12 decision of Magistrate [REDACTED]

III. ARGUMENT

- A. **Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act require that child protective agencies and court systems not engage in unlawful discrimination against parents with disabilities during child protection proceedings.**

Congress first recognized and addressed widespread discrimination against people with

disabilities with the passage of the Rehabilitation Act of 1973 (“Section 504”). *See* 29 U.S.C. 701, *et seq.* Finding that individuals with disabilities “continually encounter various forms of discrimination” in a broad array of critical areas (including discrimination in the administration of public services), Section 504 prohibits discrimination on the basis of disability in federal programs, as well as in state and local government programs that receive federal financial assistance. 29 U.S.C. 701 and 794.

In 1990, Congress passed the Americans with Disabilities Act (“ADA”), extending the prohibition against discrimination found in Section 504 to *all* state and local government programs—regardless of funding source. 42 U.S.C. 12132; *see also Lincoln Cercpac v. Health & Hosp. Corp.*, 977 F.Supp. 274 (S.D.N.Y.1997). Besides prohibiting direct discrimination against people with disabilities, Title II of the ADA requires state and local governments to ensure that people with disabilities receive equal treatment in the programs and services compared to that provided to the rest of the public. 42 U.S.C. 12132 (“[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”). State and local governments are even obligated to “make reasonable modifications” to their programs and services in order to avoid “discrimination on the basis of disability,” unless doing so would entail a “fundamenta[l] alter[ation]” of the government program. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (quoting 28 CFR 35.130(b)(7)). In some situations, this means that state and local governments must provide “auxiliary aids”—extra services not generally offered to the public—when necessary to ensure that citizens with disabilities have equal access to programs and services. 28 C.F.R. 35.130(b)(1)(ii); 28 C.F.R. 35.104; *see also Pierce v. D.C.*, 128 F.Supp.3d 250, 266

(D.D.C.2015).

The civil liberties afforded by Section 504 and Title II of the ADA take on particular significance in the administration of a state’s child welfare system, where one of the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court—the constitutional right of a parent to the raise his or her child—is at stake. *See In re D.A.*, 113 Ohio St.3d 88, 2007-Ohio-1105, 862 N.E.2d 829, ¶ 8 (“the United States Supreme Court noted that parents’ interest in the care, custody, and control of their children ‘is perhaps the oldest of the fundamental liberty interests recognized by this Court.’”) (quoting *Troxel v. Granville* 530 U.S. 57, 65 (2000)); *see also Stanley v. Illinois*, 405 U.S. 645, 651(1972)).

State child welfare programs—like the one set out at R.C. Chapter 2151—were shaped by Congress with the establishment of Title IV-B Programs within the Social Security Act, wherein Congress provided block grants for states in pursuit of the promotion of safe and stable families. *See* 42 U.S.C. 621. Among the goals of Title IV-B Programs is that of “supporting at-risk families through services which allow children, where appropriate, to remain safely with their families or return to their families in a timely manner[.]” 42 U.S.C. 621(3). States that receive federal funding for their child welfare programming must agree to include several provisions in their plan for foster care and adoption assistance; for instance, states must make “reasonable efforts” to “preserve and reunify families,” both “prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home,” and “to make it possible for a child to safely return to the child's home[.]” 42 U.S.C. 671(a)(15)(B). Indeed, these goals are reflected in the language of R.C. 2151.01, which carefully limits interference in the parent/child relationship—balancing the state’s interest in ensuring a child’s safety with the constitutional and other civil rights of the parent. *See* R.C. 2151.01.

Families with parents who have disabilities are entitled to no less. Section 504 and Title II of the ADA require states to provide parents with disabilities equal access to such programming and “reasonable efforts” that states must make to keep parents and children together when at all possible. For parents with disabilities, this may require states to provide reasonable modifications to their programs and policies and auxiliary aids. *See* U.S. Dept. of Health and Human Services, U.S. Dept. of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities* (Aug. 2015) at 1, 6, <https://www.hhs.gov/sites/default/files/disability.pdf> (accessed Apr. 29, 2019). As explained in a guidance provided by the U.S. Department of Human Services (“HHS”) and the U.S. Department of Justice (“DOJ”), the ADA and Section 504 apply to both state child welfare agencies and the state courts tasked with overseeing administration of the juvenile code. *Id.* at 1. Further, the ADA and Section 504 apply in all stages in the child welfare system, including “investigations, witness interviews, assessments, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, reunification services, and family court proceedings.” *Id.* at 8.

Special care is warranted in the administration of Ohio’s Juvenile Court Statute, which has one of only a handful of remaining juvenile provisions in the United States which permits the “mental or physical condition of the child’s parents, guardian, or custodian” to be the basis for a finding of dependency. R.C. 2151.04(B).¹ It should be noted that Ohio’s Juvenile Court Statute nonetheless provides for liberal interpretation in order to protect a parent’s “constitutional and other legal rights,” limiting the state’s interference in the parent/child relationship “only when

¹ The current trend is toward appealing such language and replacing it with standards that focus on the specific facts and their impact on the safety of the child. *See, e.g.,* National Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* (2012) at 124 https://www.ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf (accessed Apr. 30, 2019)

necessary for the child's welfare or in the interests of public safety.” See R.C. 2151.01.

To ensure compliance with Title II of the ADA and Section 504—not to mention R.C. 2151.01—juvenile courts must scrutinize the decisions of child welfare agencies on a “case-by-case basis consistent with facts and objective evidence,” and be careful not to treat parents with disabilities “on the basis of generalizations and stereotypes.” HHS and DOJ, *Protecting the Rights of Parents* at 4 (citation omitted). This is necessary to ensure courts uphold the civil rights of all parents—including those of parents with disabilities.

B. Longstanding discrimination and bias in child protection systems continue to impact the fundamental civil right of parents with disabilities to raise their children.

People with disabilities historically have suffered discrimination and mistreatment because of ignorant and false assumptions about their ability to enjoy the rights and freedoms granted to all individuals. Throughout much of U.S. history, mainstream society regarded people with disabilities as incapable of directing their own affairs or participating in ordinary life experiences—such as education, meaningful work, sexual relationships, and parenting. People with disabilities have been the subject of cruel and inhumane policies for decades, culminating with programs such as compulsory institutionalization and forced sterilization in the twentieth century. Stephon N. Proctor, *Implicit Bias, Attributions, and Emotions in Decisions About Parents with Intellectual Disabilities by Child Protection Workers* (August 2011), at 5, https://etda.libraries.psu.edu/files/final_submissions/5719 (accessed Apr. 30, 2019). As prominent disability rights scholar Professor Robert Burgdorf noted, “the history of society’s formal methods of dealing with people with disabilities can be summed up in two words: segregation and inequality.” Robert L. Burgdorf, Jr., Patrick P. Spicer, *The Legal Rights of Handicapped Persons: Cases, Materials, and Text* 51 (1980).

The belief that people with intellectual disabilities are “unfit” to parent whose offspring

would create “socially inadequate” populations influenced legislatures across the United States to institute forced sterilization policies. Ella Callow, et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 Tex. J. on C.L. & C. R. 9, 13 (2011). The ruling in the seminal 1927 Supreme Court case *Buck v. Bell*—which upheld Virginia’s forced sterilization program against Carrie Buck, a pregnant young woman institutionalized in Virginia who was alleged to have an intellectual disability—epitomizes the negative attitudes against people who “sap the strength of the State” with their “degenerate offspring.” *Buck v. Bell*, 274 U.S. 200, 207 (1927); Proctor, *Implicit Bias* at 5. Deemed “feebleminded” by Justice Holmes, the Court held that the interests of the society are better off if it “can prevent those who are manifestly unfit from continuing their kind.” *Buck*, 274 U.S. at 207. The Court’s opinion in *Buck* has never been overturned and several states continue to have a judicial process that allow for involuntary sterilization against persons with disabilities. Callow, *Parents with Disabilities* at 14.

The bias against people with disabilities that fueled past discriminatory policies continues to permeate throughout the child welfare system today and to impact the parental rights of people with disabilities. Disparate treatment, over-representation of parents with intellectual disabilities in the child protection system, and the disproportionately high rates of child removals are commonplace in child welfare systems throughout the United States. National Council on Disability, *Rocking the Cradle* at 76-77. Historically, there has been a judicial presumption of unfitness involving parents with disabilities. *See, e.g., In re J.B.K.*, 322 Mont. 286, 95 P.3d 699 (2004) (terminating the parental rights of a parent with a mental disability); *In re Marriage of Carney*, 24 Cal. 3d 725, 733, 598 P.2d 36 (1979).

Studies suggest that parents with intellectual disabilities are disproportionately represented in child protection proceedings. Proctor, *Implicit Bias* at 1; see Marjorie Aunos & Maurice A. Feldman, *Attitudes Towards Sexuality, Sterilization and Parenting Rights of Persons with Intellectual Disabilities*, *Journal of Applied Research in Intellectual Disabilities* (Dec. 2002); see also Tim Booth, et al., *The Prevalence and Outcomes of Care Proceedings Involving Parents with Learning Difficulties in the Family Courts*, *Journal of Applied Research in Intellectual Disabilities* (Feb. 2005). In its guidance on parental rights of people with disabilities, the DOJ and HHS explicitly notes that “parents with disabilities are overly . . . referred to child welfare services . . . [and] are permanently separated at disproportionately high rates.” HHS and DOJ, *Protecting the Rights of Parents* at 2.

A review of data identifying the portion of the child welfare population that comprises families where at least one parent has a disability found that in 2010 at least 12.9% of children involved with protective services had at least one parent with a disability. Callow, *Parents with Disabilities* at 15. This figure only accounts for self-identified disabilities, so it most likely underestimates the actual number of children who fall into this category.

Data from Canada shows that parents with intellectual disabilities constitute over 10 percent of investigation reports, though they only represent one to three percent of the general population. Traci LaLiberte & Elizabeth Lightfoot, *Parenting with Disability—What Do We Know?*, CW360° *The Intersection of Child Welfare and Disability: Focus on Parents*, Center for Advanced Studies in Child Welfare (Fall 2013) at 5, https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf (accessed Apr. 29, 2019). Several smaller studies show that the frequency of parents with intellectual disabilities in child protection system caseloads range between 33 to 78%, far exceeding the rate of intellectual disability in the general

population (1.27% based on a national survey). Marjorie Aunos, et al., *Mothers with Intellectual Disabilities Who Do or Do Not Have Custody of Their Children*, *Journal on Developmental Disabilities*, 10(2), 65-79 (2003). Some independent organizations have compiled statistics showing that removal rates range from 40-60% for parents with developmental disabilities. *Id.* at 15.

Parents with a disability are two times more likely than their non-disabled peers to experience child welfare involvement, and three times more likely to experience termination of parental rights once involved with the child protection system. Traci LaLiberte, et al., *Parental Disability and Termination of Parental Rights in Child Welfare*, Minn-LInK Brief No. 12., Center for Advanced Studies in Child Welfare (2015) at 2, https://casw.umn.edu/wp-content/uploads/2015/06/Brief-12-ParentalDisabilityTPR_2015.WEB_a.pdf (accessed Apr. 30, 2019).

Implicit bias on the part of child protection professionals leads to unnecessary intervention by child welfare systems. Callow, *Parents with Disabilities* at 18 (Father who became walking paraplegic from on-the-job injury ordered by family court judge to maintain nanny whenever he had custody of his three-year-old daughter; arthritic grandmother who had custody of grandson since birth told by caseworker that agency deemed her “old and handicapped” and unsuitable for permanent placement). In 2015, the DOJ and HHS issued a letter to the Massachusetts Department of Children and Families (“DCF”) following their investigation into DCF’s removal of a child from a 21-year-old woman who had a developmental disability. U.S. Dept. of Justice, U.S. Dept. of Health and Human Services, DJ No. 204-36-216 and HHS No. 14-182176 (January 29, 2015) https://www.hhs.gov/sites/default/files/mass_lof.pdf (accessed Apr. 29, 2019). Their investigation concluded that DCF’s actions were based on the

woman's disability "as well as on DCF's discriminatory assumptions and stereotypes about her disability, without consideration of implementing appropriate family-based support services." *Id.* at 2.

In 2012, the National Council on Disability ("NCD") issued its report, "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children" ("NCD Report") presenting the White House with a comprehensive review of the barriers people with disabilities experience when attempting to exercise their right to parent. *Supra* fn.1. This extensive report documents the array of discriminatory practices, legal and social obstacles, and unjust assumptions that parents with disabilities face when involved with the child welfare system. Some of the findings in the NCD Report concluded the following: (i) institutional and legal failures to support parents with disabilities result in disproportionately high rates of permanent loss of parental rights; (ii) persistent system bias and discriminatory practices are inherent in child protection systems; (iii) child protection systems lack expertise to address issues concerning parents with a disability; (iv) inappropriate parenting assessments are used to collect evidence against parental fitness; and (v) significant barriers prevent supports and services from aiding parents in daily parenting activities. *Id.* at 16-27.

C. Evidence-based strategies and community supports promote parenting success for parents with intellectual disabilities.

According to data from the 2010 Survey of Income and Program Participation (SIPP), up to 56.7 million adults report some type of disability in the United States, with 38.3 million reporting a severe disability. Traci LaLiberte, *Parenting with Disability* at 5. Information on the number of parents living with a disability is scarce. One estimate puts the number of mothers with a disability in the United States at approximately 1.4 million. *Id.* The NCD Report estimated that approximately 4.1 million parents have at least one reported disability—

representing more than six percent of all American parents. National Council on Disability, *Rocking the Cradle* at 15.

As society becomes increasingly supportive of people with intellectual disabilities living independently, the resources earmarked for home and community-based services are expanding, which allows people to move away from segregated institutional settings—such as nursing facilities or intermediate care facilities—and integrate into the wider community. Over the years, home and community-based programs have been developed by the state of Ohio to enable people with disabilities to live and receive the services and support they need in their own homes or in other settings integrated in their communities. *See, e.g.*, Ohio Adm.Code 5160-51-01, *et seq.* (HOME Choice program transitions people out of institutional settings into the community); Ohio Adm.Code 5160-46-02, *et seq.* (Ohio Home Care waiver program provides personal care or nursing care in the community in lieu of institutionalization in a nursing facility); Ohio Adm.Code 5160-31-02, *et seq.* (PASSPORT program provides home-based services for persons over age 60); Ohio Adm.Code 5123:2-9-01, *et seq.* (Individual Options Waiver provides comprehensive supports and services to people with developmental or intellectual disabilities).

Despite the fact that many child welfare professionals continue to hold the belief that disability severely limits parenting ability, persons with disabilities enjoy greater opportunity to participate as parents. Margaret Spencer, *Change Attitudes, Change Practice*, , CW360° The Intersection of Child Welfare and Disability: Focus on Parents, Center for Advanced Studies in Child Welfare (Fall 2013) at 13, https://casw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf (accessed Apr. 29, 2019). A growing body of research supports the propositions that intellectual disability is not “a valid predictor of child maltreatment” (Proctor, *Implicit Bias* at 7) and that predictors of problem parenting are

“often found to be the same for disabled and nondisabled parents.” National Council on Disability, *Rocking the Cradle* at 230. Child welfare systems must recognize that intellectual disabilities “are not a single categorical classification, but instead reflect qualitative differences in cognitive ability and self-care skills varying at all levels of the intellectual ability domain.” Proctor, *Implicit Bias* at 8. IQ alone is insufficient to determine a person’s capacity to function in diverse environments. The heterogeneity of parents with intellectual disabilities and the vagueness of what constitutes adequate parenting makes determining parental capacity complex. *Id.* at 7-8. The flawed assumption linking intellectual disability with child maltreatment, as well as the bias in decision-making by child welfare professionals, stresses the importance of conducting evaluations that not only assess the lack the parental skills, but also how access to home and community-based supports can optimize parenting capacity. Sarah H. Bernard & Jean O’Hara, *Needs of Parents with Intellectual Disabilities: An Ecological Perspective*, CW360° The Intersection of Child Welfare and Disability: Focus on Parents, Center for Advanced Studies in Child Welfare (Fall 2013) at 10-11, https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf (accessed Apr. 29, 2019).

The success of parent training to teach parents with intellectual disability effective parenting skills is increasingly supported by research. Studies show that parents receiving evidence-based strategies see improvements in parenting skills such as basic child care, child health and safety, decision-making, and positive and stimulating interactions. Maurice A. Feldman, *Interventions for Parents with Disabilities*, CW360° The Intersection of Child Welfare and Disability: Focus on Parents, Center for Advanced Studies in Child Welfare (Fall 2013) at 20, https://cascw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf (accessed Apr. 29, 2019). Other research reveals that home-based training leads to parents with intellectual

disabilities effectively acquiring parenting skills. Catherine Wade, et al., *Review of Parent Training Interventions for Parents with Intellectual Disability*, *Journal of Applied Research in Intellectual Disabilities*, 21, 351–366 (2008). Whereas a first wave of research on parent training has provided insight into effective intervention strategies that teach parents with intellectual disability new skills, a second wave of research has confirmed their efficacy and broadened the scope of how the training is implemented. *Id.* at 364.

In addition to the positive effects home and community-based services have in promoting effective parental activities, studies have also shown that mothers who maintain custody of their children were (i) more involved in their community, (ii) more satisfied with the services they receive, (iii) earned higher incomes, (iv) and had children who received more special services than mothers who lost custody. Marjorie Aunos, *Mothers with Intellectual Disabilities* at 73.

IV. CONCLUSION

Federal and state law prohibits courts and the child welfare systems from discriminating against parents based on their disability. Disparate treatment by the child welfare system against parents with intellectual disabilities leads to unjust removals and terminations of parental rights. Decisions to intervene and remove children from the homes of parents with disabilities are frequently based on bias and false assumptions about their parenting capability rather than on actual evidence of maltreatment. This court must review the actions of █ JFS and Magistrate █ decision finding dependency with increased scrutiny to ensure that longstanding discrimination and bias against parents with intellectual disability do not taint the proceedings of the child welfare system. This court must use its oversight function to guarantee that the rights of parents with intellectual disabilities to raise their children are protected against the bias and ignorance that have historically subjected people with disabilities to unequal and unconstitutional treatment.

