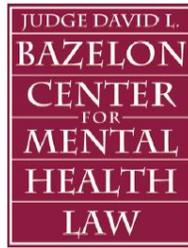


UPENN COLLABORATIVE ON  
COMMUNITY INTEGRATION



# Supporting Parents with Psychiatric Disabilities: A Model Reunification Statute

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*The contents of this model statute were developed under a grant to the University of Pennsylvania from the Department of Education, NIDRR grant number H133B080029 (Salzer, PI). However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government. Special recognition is given to Villanova University School of Law Professor Richard Redding, disability attorney Stephen F. Gold, Dr. Traci LaLiberte of the University of Minnesota's Center for Advanced Studies in Child Welfare, and Katy Kaplan from the University of Pennsylvania's Collaborative on Community Integration, for their guidance and comments.*

The UPenn Collaborative on Community Integration is A Rehabilitation Research & Training Center Promoting Community Integration of Individuals with Psychiatric Disabilities, funded by the National Institute on Disability and Rehabilitation Research (NIDRR). For more information, please visit us at: [www.upennrrtc.org](http://www.upennrrtc.org)

## I. Preamble

### A. *The Importance of Keeping Families Together*

No matter where they live in the world, no matter what they eat for dinner, no matter where they go to school, there is one common thread you can find in every child; they expect to go to bed and wake up with the same family. In almost every situation, children thrive most with their natural families.<sup>1</sup> “When family integrity is broken or weakened by state intrusion, [the child’s] needs are thwarted and . . . [t]he effect on the child’s developmental progress is invariably detrimental.”<sup>2</sup> Children placed in foster care are at risk for more behavioral, psychological, developmental and academic problems.<sup>3</sup>

Our Constitution and laws recognize the importance of the parent-child relationship and require states to take measures to keep families intact.<sup>4</sup> The United States Supreme Court has recognized that parents have a fundamental liberty interest in the care, custody and management of their children.<sup>5</sup> Even when family relationships have been strained, “parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>6</sup> Thus, our laws provide parents the rights to preserve and reunify their families. To support these rights, the state must provide the services needed to prevent or eliminate the need for removing a child from the child’s home, and when a child has been removed from the home, to make it possible for the child to return home safely.<sup>7</sup>

Parents with disabilities are entitled to the same respect for their families as other parents. They must receive equal opportunity to preserve and reunify their families, and must not be subjected to stereotyped assumptions about their ability to parent.<sup>8</sup>

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<sup>1</sup> See Catherine R. Lawrence, Elizabeth A. Carlson & Byron Egeland, *The Impact of Foster Care on Development*, 18 DEV. AND PSYCHOPATHOLOGY 57, 57 (2006).

<sup>2</sup> Joseph Goldstein et al., BEYOND THE BEST INTERESTS OF THE CHILD 9 (1979).

<sup>3</sup> *Id.*

<sup>4</sup> *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>5</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), *Stanley*, 405 U.S. at 651.

<sup>6</sup> *Santosky*, 455 U.S. at 753.

<sup>7</sup> 42 U.S.C.A. § 671 (a)(15)(B) (West 2008).

<sup>8</sup> The Americans with Disabilities Act prohibits state and local governments from discriminating against individuals with disabilities in their programs, services and activities. 42 U.S.C.A. § 12132 (West 2008).

## ***B. Parents with Psychiatric Disabilities Experience Disproportionate Family Separation***

Psychiatric disabilities affect millions of people across all sectors of American society. Fourteen percent of Americans experience a mental illness that impacts their lives.<sup>9</sup> These individuals are no different from anyone else in their desire for fulfilling lives, close friendships, and family bonds.

Parenthood is an integral part of life for Americans with psychiatric disabilities just as it is for all other Americans. Indeed, family ties and supports are critical to many individuals' ability to manage the effects of their mental illnesses and live normal and rewarding lives.

Unfortunately, people with psychiatric disabilities who have achieved the milestone of parenthood have a higher chance of seeing their families forcibly separated – often with no justification. Parents with psychiatric disabilities are more likely to be involved in the child welfare system although there is no evidence of higher rates of abuse and neglect.<sup>10</sup> Numerous commentators and researchers have observed that child welfare agencies and others tend to presume that parents with mental disabilities are unfit to maintain parental relationships regardless of their capacities.<sup>11</sup>

Indeed, many states' laws explicitly reference unfitness due to a parent's psychiatric disability as a ground for loss of custody, termination of parental rights or the lack of a need to provide reunification services. This focus on a parent's disability rather than on the conduct at issue, invites inappropriate and unfounded assumptions concerning the fitness of parents with mental disabilities.

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<sup>9</sup> Ronald C. Kessler, Wai Tat Chiu, Olga Demler, & Ellen E. Walters, *Prevalence, Severity and Comorbidity of Twelve-month DSM-IV Disorders on the National Survey Comorbidity Survey Replication*, 62 ARCHIVES OF GENERAL PSYCHIATRY 617, 617-27 (2005).

<sup>10</sup> Katherine A. Judge, *Serving Children, Siblings and Spouses: Understanding the Needs of Other Family Members*, in HELPING FAMILIES COPE WITH MENTAL ILLNESS 161, 164 (Harriet P. Lefley ed., 1994). See also Carol G. Taylor et al., *DIAGNOSED INTELLECTUAL AND EMOTIONAL IMPAIRMENT AMONG PARENTS WHO SERIOUSLY MISTREAT THEIR CHILDREN: PREVALENCE, TYPE, AND OUTCOME IN A COURT SAMPLE*, 15 CHILD ABUSE & NEGLECT 389, 395 (1991) (documenting similar discrimination resulting in stricter standards and harsher outcomes for parents with intellectual disabilities).

<sup>11</sup> See, e.g., Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 401-04 (2000); David Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 LAW & INEQUALITY 153, 159 (1998); Susan Stefan, *Whose Egg is it Anyway? Reproductive Rights of Incarcerated, Institutionalized, and Incompetent Women*, 13 NOVA L. REV. 405, 448 (1989), Krista A. Gallagher, *Parents in Distress: A State's Duty to Provide Reunification Services to Mentally Ill Parents*, 38 FAM. & CONCILIATION CTS. REV. 234, 234 (2000).

As a result of stigmatizing attitudes toward parents with psychiatric disabilities, families are unnecessarily destroyed, and both parents and children suffer.<sup>12</sup>

### ***C. The ADA Requires Equal Opportunity for Parents with Psychiatric Disabilities***

Americans have adopted a social policy of ensuring that individuals with disabilities have the chance to be full and equal participants in our society. Nearly twenty years ago, Congress enacted the Americans with Disabilities Act (ADA) to eliminate the pervasive and systematic discrimination against individuals with disabilities and enable them to live full lives.<sup>13</sup> One of the primary goals of the ADA is to prevent decision-making based on “stereotypic assumptions not truly indicative of the individual ability of [people with disabilities] to participate in, and contribute to, society.”<sup>14</sup> The unjust separation of families of people with disabilities is exactly the type of discrimination the ADA seeks to eradicate.

The ADA protects parents with disabilities against discriminatory decisions based on unfounded assumptions about the capacity of people with disabilities to parent. The ADA also mandates that a public entity must make reasonable modifications to programs, services and activities to provide equally effective participation to individuals with disabilities.<sup>15</sup> In particular, the ADA requires that reasonable modifications be made to reunification services for parents with disabilities.<sup>16</sup> Because the ADA is a federal law, it trumps state law provisions that are inconsistent with its requirements.

The ADA’s requirements are not reflected in most state laws, however, and are rarely followed in child welfare proceedings. Most state laws reflect only the requirement of the Adoption and Safe Families Act (ASFA) that requires states to make “reasonable efforts” to

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<sup>12</sup> See *supra* note 1.

<sup>13</sup> 42 U.S.C.A. § 12101 et seq. See *id.* § 12101(a)(2) (identifying the continuing isolation and segregation of individuals with disabilities as a “serious and pervasive social problem”); § 12101(a)(3) (“discrimination against individuals with disabilities persists in such critical areas as . . . access to public services”); § 12101(a)(5) (individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, . . . failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs or other opportunities”); § 12101(a)(7) (“individuals with disabilities . . . have been . . . subjected to a history of purposeful unequal treatment . . . resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society”); § 12101(b)(1) (ADA’s purposes include providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”).

<sup>14</sup> *Id.* § 12101(a)(7).

<sup>15</sup> 28 C.F.R. § 35.130(b)(1)(ii), (b)(7) (2008).

<sup>16</sup> See *Stone v. Daviess*, 656 N.E.2d 824, 830 (Ind. Ct. App. 1995); *In re Antony B.*, 54 A.2d 893, 899 n.9 (Conn. App. Ct. 1999); *In re B.S.*, 693 A.2d 716, 722 (Vt. 1997).

preserve and reunify families to prevent or eliminate the need for removing a child from the home.<sup>17</sup> Consequently, most child welfare proceedings focus only on the provision of “reasonable efforts” – a mandate that is not only poorly implemented, but also has been applied by many courts to require only a generic set of parenting services that do not address the needs of many parents with disabilities.

#### ***D. State Laws Should Be Modified to Ensure Compliance with the ADA***

Although our society has afforded parents with psychiatric disabilities legal rights to receive accommodations, these rights are routinely given short shrift in the child welfare system. Courts typically determine that reasonable efforts have been made when a parent has been offered a one-size-fits-all set of parenting services. This approach does not work well for families in general, and it is especially inappropriate for parents with disabilities, whose special needs are rarely addressed.

As a result, many parents with psychiatric disabilities lose their children because they never receive meaningful help to safely care for their children. Many others lose their children based on unfounded assumptions that their disabilities make them unfit parents or on past episodes before the parent began receiving effective mental health treatment.

#### ***E. The Model Reunification Statute Provides a Template***

The model reunification statute set forth below provides a template for states to ensure that their laws reflect the requirements of the ADA and that appropriate protections are in place to prevent the unnecessary separation of families.<sup>18</sup> The model statute is designed to ensure that: (1) the service needs of parents with psychiatric disabilities are appropriately identified, (2) these parents receive the services they need to preserve their families, (3) necessary modifications to reunification services are made to ensure that disability-related needs are addressed – for example, by providing additional service hours, providing services in a different form, or coordinating with mental health, intellectual disability or health service systems, and (4) parents with psychiatric disabilities do not lose their children based on stereotyped assumptions about their parental fitness or the failure to provide appropriate services.

The model statute does not set forth a comprehensive child welfare statute, as each state has its own procedures and unique features of its child welfare system. Rather, the model statute

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<sup>17</sup> 42 U.S.C.A. § 671 (15)(B) (West 2008).

<sup>18</sup> This model statute draws significantly from E.Lightfoot, T. LaLiberte & K. Hill (2007), *Guide for Creating Legislative Change: Disability Status in Termination of Parental Rights and Other Custody Statutes*, Minneapolis, University of Minnesota.

includes key elements that should be incorporated into states' child welfare statutes to ensure fair treatment and equal opportunity for parents with psychiatric disabilities in the child welfare system. States are encouraged to adopt the provisions of the model statute to facilitate compliance with federal law and prevent the unnecessary destruction of families.

## **II. Model Reunification Statute**

### **A. Definitions**

“Disability” means a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such impairment or being regarded as having such an impairment.<sup>19</sup> This definition must be broadly interpreted, consistent with the ADA Amendments Act of 2008.<sup>20</sup>

“Preventative services” are services designed to address the specific needs of a parent, including any needs that may be related to the parent’s disability, in order to prevent the removal of the child from the home.

“Reunification services” are services designed to address the specific needs of a parent whose child has been removed from the home due to abuse or neglect, including any needs that may be related to the parent’s disability, and to make it possible for the child to return home safely.

### **B. Purposes and Goals**

(1) The purposes and goals of this statute are to:

- (a) ensure that parents with psychiatric disabilities are afforded equal opportunity to participate in family life and raise children;
- (b) prevent parents with psychiatric disabilities from losing their children due to stigmatizing and incorrect assumptions that these individuals cannot be good, caring, and loving parents;
- (c) ensure that preventative and reunification services provided to parents with psychiatric disabilities are specifically tailored to address the particular needs of the parents, including needs related to their disabilities, and designed to maximize the chances of preserving their families and achieving reunification;

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<sup>19</sup> See 42 U.S.C.A. § 12102(2) (West 2008).

<sup>20</sup> Pub. L. No. 325-110, § 4(a) (2008), codified at 42 U.S.C. § 12102(4).

(d) support the state's strong preference that children live in their own homes with their own families;

(e) ensure that children live with their own families unless it is not possible, through the provision of services, to protect a child living with or returning to his or her family from imminent, serious harm;

(f) encourage innovative and effective prevention, intervention and treatment approaches, including collaborative community efforts, use of community-based programs, and coordination between child welfare and disability service systems, to support family reunification and to inform legislative, executive and local government policies and programs relating to children and their families.

(2) In light of these purposes and goals, the provisions of the code shall be liberally construed to ensure a full and effective opportunity to preserve families and achieve family reunification.

### **C. Preventative Services Required**

(1) Preventative services shall be provided to prevent or eliminate the need for removal of a child from the child's home due to abuse or neglect. These services shall be designed specifically to address the particular needs of the parent, including, for a parent with a disability, any needs related to that disability that may affect parenting abilities, and to maximize the chance of the child remaining at home safely.

(2) Preventative services shall include a comprehensive array of services, including services that may be necessary to address a psychiatric disability, such as supportive housing, assertive community treatment, crisis services, peer supports, household management training, homemaker services, substance abuse services, and parenting skills training that is tailored to address the parent's specific needs.

(3) Preventative services shall be provided to any parent whose child is at risk of removal from the home due to abuse or neglect unless it is not possible, through the provision of services, to protect the child from imminent, serious harm.

(4) Preventative services may also include services provided to the child or other family member when necessary.

(5) Preventative services shall be based on a comprehensive assessment of parental needs conducted by qualified professionals. For a parent with a psychiatric disability, the assessors must include a person with expertise concerning the service needs of individuals with mental illnesses, including needs related to parenting.

#### **D. Reunification Services Required**

(1) Reunification services shall be provided to allow parents to adjust their circumstances, conduct or conditions to enable a child who has been removed from the home due to abuse or neglect to return safely home. These services shall be designed specifically to address the particular needs of the parent, including, for a parent with a disability, any needs related to that disability that may affect parenting abilities, and to maximize the chance of the child returning home safely.

(2) Reunification services shall include a comprehensive array of services, including services that may be necessary to address a psychiatric disability, such as supportive housing, assertive community treatment, crisis services, peer supports, household management training, homemaker services, substance abuse services, and parenting skills training that is tailored to address the parent's specific needs.

(3) Reunification services shall be provided to any parent whose child has been removed from the home due to abuse or neglect.

(4) Reunification services may also include services provided to the child or other family member when necessary.

(5) Reunification services shall be based on a comprehensive assessment of parental needs conducted by qualified professionals. For a parent with a psychiatric disability, the assessors must include a person with expertise concerning the service needs of individuals with mental illnesses, including needs related to parenting.

#### **C. Consideration of a Parent's Disability**

(1) Nothing in this code shall be construed to permit discrimination on the basis of disability.

(2) The disability of a parent shall not constitute a basis for a determination that a child is in need of care, that the child should be removed from custody of the parent, or that parental rights should be terminated.

(3) The determinations in subparagraph (2) shall focus on whether a parent is likely to engage in conduct causing harm or risk of harm to a child, and not on a parent's disability. A parent's disability is relevant only to the extent that it results in conduct that constitutes abuse or neglect, and for purposes of identifying what preventative or reunification services the parent needs.

(4) In making the determinations in subparagraph (2), a court shall consider whether all needed preventative and/or reunification services have been identified and provided; whether these services have been appropriately tailored to the specific needs of the parent, including treatment

and support services needed to address limitations caused by a psychiatric disability; and whether the parent has been provided with sufficient opportunities to gain skills and/or correct deficiencies.

(5) The determinations in subparagraph (2) shall be based on current and objective evidence of whether a child is at risk of abuse or neglect and not on unfounded assumptions based on a person's disability or on past conduct that is not likely to recur.

(6) In all proceedings and decisions involving a parent with a disability, child welfare agency staff shall involve professionals with expertise concerning the service needs of individuals with the disability at issue.

(7) The child welfare agency shall develop policies that provide for an independent review of the investigation of child abuse and neglect referrals, removal of children from the home (including re-removals after reunification), and termination of parental rights to determine whether the agency is providing equal opportunity to parents with disabilities, and avoiding stereotypes, in its work. The review may be conducted using sampling methods and shall include independent citizen input including input from advocacy groups, research institutions, nonprofit organizations, disability service organizations, and other relevant experts. Analysis of independent review results shall be used to modify procedures and practices as necessary to ensure equal opportunity for parents with disabilities.

#### **D. Removal of a Child from Home**

(1) If the court awards custody to the state child welfare agency, the court shall include in the disposition order findings concerning what preventative services were provided and why it would not be possible, through the provision of further services, for the child to remain at home safely and what plans will be put into place to make it possible for the child to return home safely.

(2) If the court awards custody to the state child welfare agency, the court shall order the provision of reunification services needed to enable the child to return home safely.

(3) Reunification services shall be provided until (a) the child returns home (at which time preventative services may be initiated), or (b) a permanency plan is adopted with consent of the parent or approval of the Court that is inconsistent with the continued provision of reunification services.