

CARRIE-ING ON: ADVANCING JUSTICE  
FOR DISABLED PARENTS AFTER COLORADO'S  
CARRIE ANN LUCAS PARENTAL RIGHTS  
FOR PEOPLE WITH DISABILITIES ACT

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In 2018, the Colorado legislature declared:

(I) Persons with disabilities continue to face unfair, preconceived, and unnecessary societal biases, as well as antiquated attitudes, regarding their ability to successfully parent their children;

(II) Persons with disabilities have faced these biases and preconceived attitudes in family and dependency law proceedings . . . ;

(III) Because of these societal biases and antiquated attitudes, children of persons with disabilities historically have been vulnerable to unnecessary removal from one or both of their parents' care or are restricted from enjoying meaningful time with one or both parents; and

(IV) Children have been denied the opportunity to enjoy the experience of living in loving homes with a parent or parents with a disability or other caretakers with a disability.<sup>1</sup>

The legislature then enumerated exactly how Colorado would protect the rights of disabled parents<sup>2</sup> alongside the best interests of their children, in child welfare and other family law.<sup>3</sup>

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1. COLO. REV. STAT. § 24-34-805 (2024); H.R. 18-1104, 74th Gen. Assemb., Reg. Sess. (Colo. 2018), [https://leg.colorado.gov/sites/default/files/2018a\\_1104\\_signed.pdf](https://leg.colorado.gov/sites/default/files/2018a_1104_signed.pdf).

2. To acknowledge the disability community's diversity in language preferences, this Article uses person-first ("parent with a disability") and identity-first ("disabled parent") language interchangeably. *See, e.g.*, Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 YALE J.L. & FEMINISM 37, 43-44 (2022).

3. *See* COLO. REV. STAT. § 24-34-805(1)(b).

This law is now known as the Carrie Ann Lucas Parental Rights for People with Disabilities Act, or Carrie’s Law, in memory of the pioneering disability rights advocate who helped will it into existence.<sup>4</sup> Carrie’s Law added Colorado to the growing number of states attempting to address the well-documented phenomenon of discrimination against disabled parents.<sup>5</sup> Carrie Ann Lucas focused much of her career on an arena where that discrimination runs particularly rampant: child welfare, or family policing.<sup>6</sup>

This Article picks up Carrie’s fight, exploring recent developments in Colorado family policing appellate cases relating to parents with disabilities. Part I reviews the family policing system in Colorado, including its disproportionate and disparate entanglement of disabled parents. Part II describes how case law has slowly inched Colorado toward more meaningfully enforcing disability civil rights for parents in family policing cases. Part III identifies how to use Colorado’s important, but imperfect, progress to “Carrie on” in advancing justice for disabled parents.

*I. The Backdrop Onto Which Carrie’s Law  
Expressly Grafted Disability Civil Rights Laws*

*A. Colorado’s Family Policing System*

An overview (with accompanying critique) of the family policing system is beyond the scope of this Article.<sup>7</sup> Suffice it to say that bringing a court case is one option the government has when it alleges a child is dependent or

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4. Carrie Ann Lucas Parental Rights for People with Disabilities Act, S. 21-107, 74th Gen. Assemb., Reg. Sess., (Colo. 2021); see Ruth Padawer, *The Lives They Lived*, N.Y. TIMES (Dec. 23, 2019), <https://www.nytimes.com/interactive/2019/12/23/magazine/carrie-ann-lucas-death.html>.

5. See *Map of Current State Legislation Supporting Parents with Disabilities*, BRANDEIS UNIV.: NAT’L RSCH. CTR. FOR PARENTS WITH DISABILITIES, <https://heller.brandeis.edu/parents-with-disabilities/map/index.html> (last updated Jan. 11, 2023). For an overview of discrimination against parents with disabilities, see NAT’L COUNCIL ON DISABILITY, *ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN* (2012) [hereinafter *ROCKING THE CRADLE*], <https://www.ncd.gov/assets/uploads/reports/2012/ncd-rocking-the-cradle.pdf>.

6. This Article adopts the practice of Professors Roberts, Powell, and other scholars and activists in using the term “family policing” system, believing that that term better captures the harms, impact, and functions of the system historically known as the “child-welfare” system. See Powell, *supra* note 2, at 43-44.

7. See generally, e.g., Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents*, 110 CALIF. L. REV. 1315 (2022); Powell, *supra* note 2; Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021).

neglected.<sup>8</sup> From the outset of such a case and at any point throughout, the government can separate families by a “removal” of children from parents.<sup>9</sup> Throughout the case, the government must make reasonable efforts to keep the family together.<sup>10</sup> Usually, the government must “offer” parents a treatment plan, which theoretically must not be “cookie cutter.”<sup>11</sup> If the parent is not successful in this process to the government’s liking, the government can seek to terminate parental rights, permanently separating the family. A parent only has the right to appeal at two points: (1) shortly into the case, after an “adjudication,” where the government justifies its continuing intervention into the family, and (2) if the case ends in a termination of parental rights or allocation of parental rights.<sup>12</sup>

The system intrudes on what elsewhere are respected as fundamental, substantive-due-process-based constitutional rights: the right to parent and the right to family integrity.<sup>13</sup> In theory, these substantive-due-process-based rights must be protected by procedural due process.<sup>14</sup> In practice, the family policing system is characterized by lax<sup>15</sup> and subjective<sup>16</sup> standards—

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8. See COLO. REV. STAT. § 19-3-403(3.5)-(3.6); COLO. REV. STAT. § 19-3-405.

9. See *id.* § 19-3-403(3.6)(a)(IV).

10. See, e.g., 42 U.S.C. § 671(a)(15)(B); COLO. REV. STAT. § 19-3-100.5(1); COLO. REV. STAT. § 19-3-604(2)(h).

11. COLO. REV. STAT. §§ 19-3-507(1)(b) to 508(1)(a) (2024). Treatment plans generally comprise services from a pre-set menu “offered” by providers already under contract with the government. L. Frunel & Sarah H. Lorr, *Lived Experience and Disability Justice in the Family Regulation System*, 12 COLUM. J. RACE & L. 477, 480 (2022). Whether those services are “necessary” or not, parents are often penalized for anything viewed as non-participation. *Id.* Colorado is not yet among the many jurisdictions that recognize that reasonable efforts are not met via “cookie cutter” treatment plans. See Lorr, *supra* note 7, at 1339 & n.134.

12. COLO. REV. STAT. § 19-1-109(2)(b)-(c).

13. See, e.g., Powell, *supra* note 2, at 50 (collecting cases).

14. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33-34 (1981).

15. COLO. REV. STAT. § 19-3-403(3.6)(a)(II) (allowing court to receive “[a]ny information [of] probative value” at hearings following removal of children from their families); see *People ex rel. D.M.F.D.*, 2021 COA 95, ¶ 2, 497 P.3d 14, 16 (exemplifying common occurrence of dependency courts receiving and relying on hearsay evidence).

16. See, e.g., *ROCKING THE CRADLE*, *supra* note 5, at 86-90 (detailing how vagueness of “reasonable efforts” allows for discrimination, including unlawful disparate impact, against disabled parents); Lorr, *supra* note 7, at 1370-72 (describing how family courts decline to grapple with how social norms about race and ability inform judgments about “reasonable efforts,” “best interest,” “risk” and other subjective family policing standards); CAPACITY BLDG CTR. FOR STATES, *BUZZWORDS: MOVING TO BEHAVIORAL DESCRIPTORS* (n.d.), [https://capacity.childwelfare.gov/sites/default/files/media\\_pdf/buzzwords.pdf](https://capacity.childwelfare.gov/sites/default/files/media_pdf/buzzwords.pdf) (collecting subjective

providing ample territory for discrimination of all varieties.<sup>17</sup>

### B. Disability Civil Rights Laws

While a critique of the rights-based approach to achieving equity is beyond the scope of this Article,<sup>18</sup> in theory, disability discrimination is illegal in the family policing system. The two federal civil rights laws prohibiting disability discrimination by most governmental entities have long applied. In two guidance documents from 2015, federal civil rights agencies confirmed that the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“504”) prohibit disability discrimination by family policing agencies and courts.<sup>19</sup> One document provides near-exhaustive questions and answers, while the other details how a family policing agency discriminated against a disabled parent. Both explain that the law defines

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characterizations that pervade family policing, such as whether parent is “uncooperative,” “hostile,” “noncompliant,” “threatening,” “alcoholic,” or “dysfunctional”).

17. Elsewhere, the law has long recognized that subjective criteria provide ripe breeding grounds for discrimination. *See, e.g.,* *Bodaghi v. Dep’t of Nat. Res.*, 995 P.2d 288, 300 (Colo. 2000). Generalized concerns about safety—the groundwater of family policing cases—are among recognized indicators of decisions based on discrimination. *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1133 (10th Cir. 2003); *McKenzie v. Dovala*, 242 F.3d 967, 971 (10th Cir. 2001); *see also* Joshua B. Kay, *The Americans with Disabilities Act: Legal and Practical Applications in Child Protection Proceedings*, 46 CAP. U. L. REV. 783, 790-94 (2018) (documenting how subjectivity in family policing allows for disability discrimination); Jamelia Morgan, Essay, *Disability’s Fourth Amendment*, 122 COLUM. L. REV. 489, 507, 562-64 (2022) (cataloging how discrimination can influence how behaviors are interpreted and responded to, especially for amorphous judgments like who is “disruptive” or “threatening”).

18. *See* LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* 200, 261-68 (2020); Natalie M. Chin, *Centering Disability Justice*, 71 SYRACUSE L. REV. 683, 693 (2021); Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC’Y REV. 1051, 1085 (2019); Lorr, *supra* note 7, at 1319 & n.12; Powell, *supra* note 2, at 60-61, 80; SINS INVALID, SKIN, TOOTH, AND BONE: THE BASIS OF MOVEMENT IS OUR PEOPLE: A DISABILITY JUSTICE PRIMER 13-15 (2d ed. 2019).

19. *See generally* 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 Rehabilitation Act I* (Aug. 2015) [hereinafter *Technical Assistance*], <https://www.hhs.gov/sites/default/files/disability.pdf>; Letter from Vanita Gupta, Acting Ass’t Att’y Gen., C.R. Div., U.S. Dep’t of Just., et al., to Erin Deveney, Interim Comm’r, Mass. Dep’t of Child. & Families (Jan. 29, 2015) [hereinafter *Sara Gordon Letter*], [https://archive.ada.gov/ma\\_docf\\_lof.pdf](https://archive.ada.gov/ma_docf_lof.pdf) (“Re: Investigation of the Massachusetts Department of Children and Families by the United States Departments of Justice and Health and Human Services Pursuant to the Americans with Disabilities Act and the Rehabilitation Act”).

disability broadly, in favor of expansive coverage.<sup>20</sup> Both elaborate on one core principle of both the ADA and 504: covered entities' duty to provide individualized treatment to people with disabilities, including through reasonable accommodations.<sup>21</sup>

Carrie's Law expressly grafted disability civil rights principles onto Colorado's family policing system, specifically requiring:

- courts to find whether accommodations can prevent certain family separations (“nonemergency removal on the basis of disability”);<sup>22</sup>
- reasonable efforts to comply with the ADA;<sup>23</sup>
- treatment plans to include accommodations for parents' disabilities;<sup>24</sup>
- showing a parent's disability affects the child before denying or restricting parenting time or parental responsibilities based on the disability;<sup>25</sup> and
- considering accommodations for a parent's disability in a (problematic) procedure to bypass a treatment plan in terminating parental rights.<sup>26</sup>

This Article refers to the ADA, 504, and Carrie's Law collectively as disability civil rights laws.

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20. 42 U.S.C. § 12102(4)(A); 28 C.F.R. §§ 35.101(b), 35.108(a)(1)(i) (2024); Technical Assistance, *supra* note 19, at 7; *see also* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553, 3553 (codified as amended at 42 U.S.C. 12101). Section 504 and Carrie's Law adopt the ADA's definition of disability. 29 U.S.C. § 705(9)(B), (20)(B); COLO. REV. STAT. § 19-1-103(57); COLO. REV. STAT. § 24-34-805(3)(a).

21. 28 C.F.R. § 35.130(b)(7) (2024); Technical Assistance, *supra* note 19, at 4-5, 10, 12-16; Sara Gordon Letter, *supra* note 19, at 12-15; *accord* ROCKING THE CRADLE, *supra* note 5, at 129-47 (explaining the importance, but rarity, of adapting assessments and services for disabled parents).

22. COLO. REV. STAT. § 24-34-805(2)(e).

23. *Id.* §§ 19-3-100.5; 19-3-208(g).

24. *Id.* § 19-3-507(1)(c). Federal civil rights agencies add an important qualifier: treatment plans should not “require parents with disabilities to accept unnecessary services or complete unnecessary tasks to prove their fitness to parent when nondisabled parents would not be required to do so.” Technical Assistance, *supra* note 19, at 13.

25. COLO. REV. STAT. § 24-34-805(2)(a)(III).

26. *Id.* § 19-3-604(1)(I)(b).

*C. Disproportionality and Disparities for Disabled Parents in Colorado's Family Policing System*

Despite the existence of disability civil rights laws, disability discrimination is very much alive in the systems those laws regulate. Colorado's family policing system is no different: before and after Carrie's Law, the system has subjected disabled parents to disproportionalities and disparities.

In Colorado and across the nation, the family policing system is more likely to target people who are poor, people who are disabled, and people of color—all of which are often intertwined and overlapping.<sup>27</sup>

Poverty predicts family policing system involvement across the country.<sup>28</sup> In part, this is because the system overwhelmingly addresses “neglect,” not physical or sexual abuse.<sup>29</sup> Neglect has been described as “a description of what it means to be poor” and “*defined* by poverty rather than . . . *caused* by poverty.”<sup>30</sup>

Systemic racism causes—and tolerates—people of color to live in poverty at disproportionate rates.<sup>31</sup> In Colorado, for example, White children make up 55% of Colorado's child population, but only 6% of children living in poverty; Black children comprise only 4% of Colorado's child population, but 22% of children living in poverty.<sup>32</sup> As adults, Coloradans of color earn less than their White counterparts with the same level of education: \$6,000

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27. See, e.g., Lorr, *supra* note 7, at 1327-28; Powell, *supra* note 2, at 61-65.

28. See, e.g., Powell, *supra* note 2, at 68-69 (citing *ROCKING THE CRADLE*, *supra* note 5, at 202).

29. U.S. DEP'T OF HEALTH & HUM. SERVS., *THE AFCARS REPORT: PRELIMINARY FY 2021 ESTIMATES OF JUNE 28, 2022 – No. 29*, at 2 (2021) [hereinafter *AFCARS REPORT*], <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> (detailing circumstances under which the system removed children from families, 63% of which were for “neglect” and 9% for “housing”).

30. Powell, *supra* note 2, at 93 (quoting works of Professors Khiara Bridges and Dorothy Roberts).

31. See, e.g., Angela Hanks et al., *Systematic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, *CTR. FOR AM. PROGRESS* (Feb. 21, 2018), <https://www.americanprogress.org/article/systematic-inequality/>.

32. *Compare Child Welfare Outcomes Report Data: Colorado*, CHILDREN'S BUREAU, <https://cwoutcomes.acf.hhs.gov/cwodatasite/> (last visited June 17, 2024) (select “Data by State” from the left side menu, then “Colorado”), *with Children in Poverty in Colorado*, AMERICA'S HEALTH RANKINGS, [https://www.americashealthrankings.org/explore/measures/ChildPoverty/CO?population=ChildPoverty\\_multiracial#](https://www.americashealthrankings.org/explore/measures/ChildPoverty/CO?population=ChildPoverty_multiracial#) (last visited Mar. 29, 2024).

less in average median earnings with a high school education and \$7,500 less with a bachelor's degree.<sup>33</sup>

Also for systemic reasons, disability is a cause and a consequence of poverty.<sup>34</sup> “[P]eople with disabilities live in poverty at more than twice the rate of people without disabilities.”<sup>35</sup> Race affects these disparities too. People of color have a higher incidence of disability than White people.<sup>36</sup> The poverty rate varies by race and ethnicity for people with and without disabilities, with disabled people of color living in poverty at higher rates.<sup>37</sup>

Poverty, race, and disability, in turn, create intersecting disproportionalities and disparities within the family policing system. While about ten percent of Coloradans live below the poverty line, *nearly all* parents in family policing cases do.<sup>38</sup> Nationally, between five to 10% of parents are

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33. ANNIE KUCKLICK ET AL., COLO. CTR. ON L & POL'Y, THE SELF-SUFFICIENCY STANDARD FOR COLORADO 2022, at 37 (2022), [https://cclponline.org/wp-content/uploads/2022/11/CO22\\_SSS.pdf](https://cclponline.org/wp-content/uploads/2022/11/CO22_SSS.pdf).

34. Powell, *supra* note 2, at 93-97; *see also* ROCKING THE CRADLE, *supra* note 5, at 201-03.

35. NAT'L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT 11 (2017), <https://www.ncd.gov/assets/uploads/reports/2017/ncd-2017-progress-report.pdf>.

36. *See Adults with Disabilities: Ethnicity and Race*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html> (last reviewed Sept. 16, 2020); ROCKING THE CRADLE, *supra* note 5, at 44-45. As the AP recently documented, Black Americans face a lifetime of health disparities on the basis of race. Kat Stafford, *From Birth to Death: Black Americans and a Lifetime of Disparities*, ASSOCIATED PRESS (May 23, 2023), <https://projects.apnews.com/features/2023/from-birth-to-death/index.html>. These disparities also include access to life-saving treatment for opioid use disorder (“OUD”). Jan Hoffman, *Addiction Treatment Medicine Is Vastly Underprescribed, Especially by Race, Study Finds*, N.Y. TIMES (May 10, 2023), <https://www.nytimes.com/2023/05/10/health/addiction-treatment-buprenorphine-suboxone.html?smid=nytcore-ios-share&referringSource=articleShare>. OUD is a disability that is a frequent cause of child welfare system involvement. *See* C.R. DIV., U.S. DEP'T OF JUST., THE AMERICANS WITH DISABILITIES ACT AND THE OPIOID CRISIS: COMBATING DISCRIMINATION AGAINST PEOPLE IN TREATMENT OR RECOVERY 2 (2022), [https://archive.ada.gov/opioid\\_guidance.pdf](https://archive.ada.gov/opioid_guidance.pdf); *cf.* AFCARS REPORT, *supra* note 29 (attributing 36% of child removals nationwide to “drug use (parent)”).

37. NANETTE GOODMAN ET AL., NAT'L DISABILITY INST., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA 12 (2017), <https://www.nationaldisabilityinstitute.org/wp-content/uploads/2019/02/disability-race-poverty-in-america.pdf>; *see NIH Designates People with Disabilities as a Population with Health Disparities*, NAT'L INSTS. OF HEALTH (Sept. 26, 2023), <https://www.nih.gov/news-events/news-releases/nih-designates-people-disabilities-population-health-disparities>.

38. Colorado Judicial Branch data analyzed for fiscal years 2020-2021 through 2022-2023 show that approximately 90% of dependency cases involve at least one parent who is indigent (i.e., living below the poverty line). COLO. OFF. OF RESPONDENT PARENTS' COUNS.,

estimated to be disabled,<sup>39</sup> but disabled parents are widely acknowledged to be disproportionately represented in the family policing system.<sup>40</sup> Data from Colorado show:

- nearly *half* of all indigent parents in Colorado's system are disabled;
- 47% of indigent parents in the system whose race or ethnicity is known are people of color, compared to 33% of adult Coloradans; and
- of those parents with disabilities, 43% are non-White, again compared to 33% of adult Coloradans.<sup>41</sup>

These disproportionalities proceed to disparities. Compared to non-disabled parents in Colorado, disabled parents are:

- 240% more likely to face permanent family separation via a termination of parental rights (TPR);
- 160% more likely to face partial family separation via an allocation of parental responsibilities (APR) or guardianship to a relative;
- 70% less likely to succeed in reunifying their families; and
- 250% more likely to be subject to more than one dependency case.<sup>42</sup>

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FISCAL YEAR 2024-25 BUDGET REQUEST 22 (2023) [hereinafter ORPC 2024-25 BUDGET REQUEST], <https://coloradoorpc.org/wp-content/uploads/2023/10/FINAL-ORPC-FY-2024-25-Budget-Request.pdf> [<https://perma.cc/7D5B-2G68>]. This number almost certainly undercounts parents in the system who are poor as the poverty line is set well below what it takes a family to meet its basic needs. *See, e.g.,* KUCKLICK ET AL., *supra* note 33, at vi-vii, 21-23.

39. Powell, *supra* note 2, at 73; *see also* ROCKING THE CRADLE, *supra* note 5, at 44-45.

40. *See, e.g.,* ROCKING THE CRADLE, *supra* note 5, at 76-84; Lorr, *supra* note 7, at 1326-29; Powell, *supra* note 2, at 61-65.

41. ORPC 2024-25 BUDGET REQUEST, *supra* note 38, at 25; ORPC Internal Data, *ORPC Global Statistics FY17-FY23*, Respondent Parent Payment System (analyzed August 2023) (on file with the author). These numbers, too, are almost certainly an undercount, for reasons including the system's failure to acknowledge and address disability, discussed in Section III.A. *Accord* ROCKING THE CRADLE, *supra* note 5, at 16.

42. ORPC 2024-25 BUDGET REQUEST, *supra* note 38, at 26.



Even disparities are not distributed equally. Among non-White parents, disabled parents are 240% more likely than non-disabled parents to have their parental rights terminated. The corresponding disparity among White parents is slightly lower: 220%.<sup>43</sup> It is widely acknowledged that families of color are “disproportionately surveilled and separated by the child welfare system,” and studies are beginning to document how this phenomenon is heightened for disabled parents of color.<sup>44</sup>

In addition to these disparities, parents with disabilities face additional invasive treatment in an already intrusive system. Often a parent’s disability is the initial (and then continuing) justification for the dependency case.<sup>45</sup> This can be traced to the inception of the system, also in Colorado.<sup>46</sup> Presumptions that parents’ disabilities are *per se* safety concerns date to that time—specifically to speculation that “‘psychiatric factors,’ including ‘low intelligence,’ were predictors of child maltreatment.”<sup>47</sup> The system has characterized disability as a risk factor ever since—despite legislatures, courts, and federal civil rights agencies later making clear that families that include a parent with a disability must be assessed individually and not with blanket judgments.<sup>48</sup>

Once in the system, disabled parents may face the additional intrusion of an adult guardian ad litem (“GAL”) to advocate for a parent’s “best interests,” which may be contrary to a parent’s expressed position.<sup>49</sup> Theoretically, the law authorizes the appointment of adult GALs only in limited circumstances.<sup>50</sup> Yet a whopping 7% to 9% of all dependency cases

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43. *Id.*

44. Powell, *supra* note 2, at 42, 64-65; Charisa Smith, *Making Good on an Historic Federal Precedent: Americans with Disabilities Act (ADA) Claims and the Termination of Parental Rights of Parents with Mental Disabilities*, 18 QUINNIPIAC HEALTH L.J. 191, 205-06 (2015).

45. See ROCKING THE CRADLE, *supra* note 5, at 18-19; cf. BEN-MOSHE, *supra* note 18, at 277-78; Nicole Buonocore Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER L. & JUST. 75, 94-97 (2018) [hereinafter Porter, *Mothers with Disabilities*]; Morgan, *supra* note 17, at 554.

46. See Powell, *supra* note 2, at 72-73.

47. *Id.* at 73.

48. See, e.g., *infra* Section III.B.2.

49. In an especially egregious example, in *People ex rel. T.M.S.*, 2019 COA 136, ¶¶ 2-4, 454 P.3d 375, 378, an adult GAL advocated to reduce the parent’s family time and supported termination of parental rights.

50. See, e.g., *id.* ¶ 5, 454 P.3d at 378; COLORADO RULES OF PROFESSIONAL CONDUCT 1.14 & cmnt.

in Colorado have an adult GAL appointed to at least one parent.<sup>51</sup> This is but one stage at which the family policing system stifles disabled parents' autonomy.<sup>52</sup>

## *II. Colorado Cases Inch Toward Meaningfully Enforcing Disability Civil Rights for Parents in Family Policing Cases*

Before and after Carrie's Law (and the ADA), Colorado dependency courts have addressed the rights of disabled parents as such. This Part first reviews the seminal appellate cases in Colorado that discuss disability civil rights laws or the principles on which they were later built. This Part then analyzes how other Colorado appellate courts have, more recently, applied those concepts to gradually advance justice for parents with disabilities.<sup>53</sup>

### *A. Colorado's Published Fits and Starts Toward Justice for Disabled Parents*

Since the 1980s, a handful of published dependency cases in Colorado have addressed parents' disabilities as such. While these cases correctly formulate some disability civil rights laws and principles, those formulations are (at best) incomplete, as is the scope of justice delivered. In these cases, every person has had the termination of their own parental rights affirmed.

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51. Colo. Judicial Branch data analyzed for fiscal years 2012-2013 through 2022-2023 by the ORPC (on file with the author).

52. *But see* 42 U.S.C. § 12101(a)(5) (enacting the ADA to redress, inter alia, "overprotective rules and policies," exclusionary standards, "segregation, and relegation to lesser services"). For critiques of the disability rights movement's reliance on Western, White, patriarchal constructs such as autonomy, see BEN-MOSHE, *supra* note 18, at 79, and Chin, *supra* note 18, at 705-12.

53. Said justice is hindered by a troubling feature of Colorado's system. Colorado has two levels of appellate courts. Colorado's highest court, the Colorado Supreme Court, has discretionary jurisdiction. COLO. R. APP. P. 49. The intermediate appellate court, the Court of Appeals, has initial and mandatory jurisdiction and sits in three-judge panels called divisions. COLO. REV. STAT. §§ 13-4-102, -106 (2024). Divisions are not bound by one another. *See, e.g.*, *People ex rel. A.V.*, 2012 COA 210, ¶ 11 n.1, 297 P.3d 1019, 1022 n.1. Almost all Court of Appeals opinions are unpublished and, until recently, largely inaccessible to the public or practitioners. COLO. R. APP. P. 35(e); *see Colorado Case Law Search*, COLO. JUD. BRANCH, <https://research.coloradojudicial.gov/> (last visited July 4, 2024). Only recently did the courts make unpublished opinions available at all, and the efficacy of this effort remains to be seen. *See id.* Regardless, citation of unpublished opinions in the Court of Appeals is nearly entirely forbidden. *Id.* Opinions may be cited in trial courts only as persuasive authority. *Patterson v. James*, 2018 COA 173, ¶¶ 38-43, 454 P.3d 345, 353-54. Whether an opinion becomes known amongst practitioners is ad hoc at best. *See id.* ¶ 43, 454 P.3d at 354.

### *1. Individualized Treatment for Disabled Parents Before the ADA*

Before the ADA passed in 1990, one prescient intermediate appellate opinion instilled into Colorado law the principle that disabled parents must be evaluated individually, including in the context of their chosen supports. *People ex rel. B.W.* acknowledged that a parent's disability alone does not provide grounds to separate families.<sup>54</sup> Instead, while considering the best interests of the child, courts must also "evaluate a [disabled] parent's actual and potential physical capabilities, his adaptation to the disability, how other members of the family have adjusted to the disability, and the special contributions the person may make to the family."<sup>55</sup>

In *People ex rel. M.M.*, Colorado's highest court also applied the principle of individualized treatment while considering the rights of a parent with a psychiatric disability.<sup>56</sup> The court acknowledged the "wide variety of mental disabilities," that disability manifestations can "fluctuate[]," and that some disabled persons "might be fully capable of making one type of decision but incapable of making another."<sup>57</sup> Refusing to equate a psychiatric disability with per se incapacity, the court upheld a refusal to appoint an adult GAL for the parent.<sup>58</sup>

### *2. Colorado Initially Joins the National Trend of Resisting the ADA in Family Policing*

When the ADA began to trickle down to dependency cases in the 1990s, far too many states resisted and held that the ADA cannot be raised "as a defense to termination" of parental rights.<sup>59</sup> Colorado followed suit in an intermediate appellate opinion from 2000, *People ex rel. T.B.* This case rejected the relatively undeveloped argument that the ADA "precludes, or at least limits, the trial court's authority to terminate [a parent's] parental rights."<sup>60</sup> The court envisioned the ADA, and disabled parents' rights under it, as necessarily at odds with the rights of children: enforcing the ADA "would improperly elevate the rights of the parent above those of the child."<sup>61</sup> Disabilities, in the court's view, could only be deficits: "special needs or

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54. 626 P.2d 742, 743 (Colo. App. 1981).

55. *Id.* at 744.

56. 726 P.2d 1108, 1117-18 (Colo. 1986).

57. *Id.*

58. *See id.* at 1117-21.

59. *See, e.g., People ex rel. T.B.*, 12 P.3d 1221, 1223 (Colo. App. 2000) (collecting cases).

60. *Id.*

61. *Id.* at 1224.

restricted capacities.”<sup>62</sup> However, unlike some states, the opinion at least conceded that the ADA applies to family policing agencies.<sup>63</sup>

*3. Colorado Later Inches Toward Better Understanding Disability Civil Rights Laws’ Guarantees for Disabled Parents*

Luckily, both before and after the ADA, Colorado has engaged in more nuanced ways with the rights of families that include a parent with a disability. Colorado’s highest court has not addressed disability civil rights law in dependency cases. But the intermediate appellate court has done so, in a handful of published opinions and in innumerable unpublished opinions. This Section reviews the former, while the next Section reviews some of the latter.

Though three more published opinions have invoked the “ADA is not a defense to termination” proviso, each has added important details to it.<sup>64</sup> All three joined *T.B.* in acknowledging the plain truth that the ADA covers the government and its services in dependency cases.<sup>65</sup>

Colorado, like many states, has a statute allowing for termination of parental rights based on a parent’s disability.<sup>66</sup> *People ex rel. C.Z.* interpreted that statute to be consistent with the ADA’s requirement to provide individual treatment to families that include a parent with a disability.<sup>67</sup> However, *C.Z.* found that these requirements were met.<sup>68</sup> Carrie’s Law subsequently amended this statute to more expressly conform it to the ADA.<sup>69</sup> Importantly, *C.Z.* declined to set a deadline for raising ADA arguments, finding that the issue was preserved for appellate review via the parents’ counsels’ closing argument at the termination hearing.<sup>70</sup>

Colorado’s seminal case on disabled parents in dependency cases was issued in 2019, shortly after Carrie’s Law came into force. Citing the federal Technical Assistance, *People ex rel. S.K.* acknowledged that agencies and

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62. *Id.* at 1223-24.

63. *Id.* at 1224.

64. *People ex rel. S.Z.S.*, 2022 COA 133, ¶ 14, 524 P.3d 1209, 1214; *People ex rel. S.K.*, 2019 COA 36, ¶ 25, 440 P.3d 1240, 1248; *People ex rel. C.Z.*, 2015 COA 87, ¶¶ 16-19, 360 P.3d 228, 233-34.

65. *S.Z.S.*, 2022 COA 133, ¶ 14, 524 P.3d at 1214; *S.K.*, 2019 COA 36, ¶ 25, 440 P.3d at 1248; *C.Z.*, 2015 COA 87, ¶ 22, 360 P.3d at 234.

66. COLO. REV. STAT. § 19-3-604(1)(b)(I) (2024); *ROCKING THE CRADLE*, *supra* note 5, at 84-86.

67. *C.Z.*, 2015 COA 87, ¶¶ 30-34, 360 P.3d at 235-36.

68. *Id.* ¶¶ 35-37, 360 P.3d at 236.

69. *See supra* notes 1-4 and accompanying text.

70. *C.Z.*, 2015 COA 87, ¶ 9, 360 P.3d at 233.

courts must accommodate parents' disabilities in treatment planning and services.<sup>71</sup> *S.K.* correctly stated that this duty arises once the government is on notice of an individual's disability, *i.e.*, once the disability is "obvious."<sup>72</sup> Alongside this correct statement, however, the court added a requirement of its own making for which it provided no authority.<sup>73</sup> The court required a parent to disclose their disability and identify all requested accommodations.<sup>74</sup> *S.K.* did not acknowledge the tension between notice and requiring disclosure, nor did the case acknowledge the misalignment of this framework with the realities inherent in the family policing system.<sup>75</sup> Termination was affirmed, albeit only after reciting the myriad accommodations provided.<sup>76</sup>

*People ex rel. S.Z.S.* reiterated, but did not meaningfully apply, the rule of notice. There, the parent eventually underwent a psychological evaluation (almost certainly at the government's behest), which resulted in recommendations for treatment and consultation but no formal diagnosis.<sup>77</sup> Without acting on these recommendations, the government later succeeded

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71. *People ex rel. S.K.*, 2019 COA 36, ¶¶ 34-35, 440 P.3d 1240, 1250.

72. *Id.* ¶¶ 21-22, 440 P.3d at 1248 (citing *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1196 (10th Cir. 2007); *In re Hicks/Brown*, 893 N.W.2d 637, 640 (Mich. 2017)).

73. *See id.* ¶ 21, 440 P.3d at 1248.

74. *Id.*

75. *See infra* Section III.A.2.

76. *See S.K.*, 2019 COA 36, ¶¶ 53-59, 62-72, 440 P.3d at 1252-54. Accommodations included:

(1) weekly hands-on parenting instruction that included modeling tasks, behavior, and how to handle different situations, including both (a) hands-on demonstration, and (b) stepping back, observing, and then integrating instruction and demonstration, *id.* ¶ 69, 440 P.3d at 1254;

(2) trying different styles of teaching, *id.* ¶ 58, 440 P.3d at 1252-53;

(3) adjusting education based on what became apparent would be helpful (such as more education on child development), *id.* ¶ 67, 440 P.3d at 1254;

(4) "calling out interaction styles to the parents," *id.*;

(5) additional time on tasks, *id.* ¶ 55, 440 P.3d at 1252;

(6) repeating instructions, *id.*;

(7) asking questions to ascertain comprehension, such as asking a parent to explain concepts in her own words, *id.* ¶¶ 55, 59, 440 P.3d at 1253, 1254;

(8) written communications, such as a schedule of the child's routine, a chart breaking down each month of a child's development, and other handouts to take home, read, and fill out to return to demonstrate comprehension, *id.* ¶¶ 55-58, 440 P.3d at 1252-53.

The caseworker actively requested that the parenting coach make accommodations for *S.K.*'s parents. *Id.* ¶ 68, 440 P.3d at 1254.

77. *People ex rel. S.Z.S.*, 2022 COA 133, ¶¶ 5, 20, 524 P.3d 1209, 1213, 1215.

in terminating the parent's rights.<sup>78</sup> At the termination hearing, the parent's attorney's closing argument referred to this inaction and the parent's "psychological issues."<sup>79</sup> On appeal, the parent sought to reverse the termination for failure to accommodate what should have been an obvious disability.<sup>80</sup>

Despite deeming this issue not preserved for appellate review, the court found any disability was not obvious.<sup>81</sup> The court admonished parents to raise a disability in a "timely" manner.<sup>82</sup> *S.Z.S.* equated a parent *raising* the ADA with the government *knowing* that the parent has a disability, again without grappling with the realities of the family policing system's intrusion into families.<sup>83</sup> To reach this result, *S.Z.S.* cited—but failed to reconcile—conflicting cases from Michigan.<sup>84</sup> Without acknowledging or explaining a basis for doing so, the court grafted a requirement onto Carrie's Law that the parent raise a disability before the department can include accommodations in the treatment plan.<sup>85</sup> This opinion joined others in conceiving of disabled parents' rights as necessarily at odds with children's best interests.<sup>86</sup> The termination was upheld.<sup>87</sup>

#### *B. Colorado's Unpublished Advances Toward Justice for Parents with Disabilities*

Some unpublished Colorado appellate opinions have taken up *S.K.*'s call to consider disabled parents in true accordance with the civil rights laws that document their rights. This Section seeks to advance justice for disabled parents by highlighting these developments, which, as unpublished cases in Colorado's system, would otherwise remain obscured from public knowledge and debate.<sup>88</sup>

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78. *See id.* ¶¶ 5, 15, 18, 524 P.3d at 1213-15.

79. *Id.* ¶¶ 15, 18, 524 P.3d at 1214-15.

80. *See id.* ¶ 11, 524 P.3d at 1214.

81. *Id.* ¶¶ 11-12, 19, 524 P.3d at 1214-15 (citing *People ex rel. S.K.*, 2019 COA 36, ¶ 22, 440 P.3d 1240, 1248); *In re Hicks/Brown*, 893 N.W.2d 637, 640 (Mich. 2007)).

82. *Id.* ¶¶ 16-17, 524 P.3d at 1214-15.

83. *See id.*

84. *Compare id.* ¶ 16, 524 P.3d at 1214 (citing *In re Terry*, 610 N.W.2d 563, 570 (Mich. Ct. App. 2000) for the proposition that a parent must raise a disability in a "timely" manner), *with id.* ¶ 19, 524 P.3d at 1215 (citing *Hicks/Brown*, 893 N.W.2d at 641, for rule of notice, without acknowledging that this later, higher court opinion questioned *Terry*'s preservation requirement).

85. *See id.* ¶ 16, 524 P.3d at 1214.

86. *See id.*

87. *Id.* ¶ 37, 524 P.3d at 1218.

88. *See sources cited supra* note 53.

*1. Advancing Justice for Disabled Parents by Invoking Disability Civil Rights Laws*

Colorado courts are starting to enforce a difference between the standards that apply in all dependency cases and—as one opinion recently put it—the “heightened standard of the ADA.”<sup>89</sup>

*a) Enforcing the Right to Meaningfully Individualized Services*

Applying these principles, two recent cases reversed terminations of parental rights based on failures to accommodate parents with intellectual disabilities (“ID”).

*(1) Familiar Trajectory*

At first, both cases followed familiar trajectories for disabled parents in dependency cases in Colorado. The parents’ disabilities were known from the inception of both cases. *People ex rel. S.S.* involved a parent whom the government initially knew to have medical conditions and later described as having a “learning disability.”<sup>90</sup> In *People ex rel. M.A.P.*, the government was always aware that the parent received supplemental security income (“SSI”) for a disability.<sup>91</sup>

In neither case did the government acknowledge the implications of this knowledge. In *S.S.*, the government disputed through appeal that the parent had an “ADA-qualifying disability.”<sup>92</sup> In *M.A.P.*, a later caseworker confirmed her awareness of—and lack of an individualized response to—the parent’s “significant cognitive delays” and receipt of prior special education services and SSI benefits.<sup>93</sup>

The treatment plans for each parent were a substantially similar set of usual services.<sup>94</sup> Neither plan complied with Carrie’s Law’s directive to include accommodations for parents with disabilities from the outset.<sup>95</sup> The author has yet to see a treatment plan that does.

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89. *People ex rel. T.D.J.*, No. 21CA0454, slip op. at 17 (Colo. App. Dec. 1, 2022) (unpublished), available at <https://research.coloradojudicial.gov/>.

90. No. 22CA1012, slip op. at 1, 7 (Colo. App. Mar. 30, 2023) (unpublished), available at <https://research.coloradojudicial.gov/>.

91. No. 22CA0070, slip op. at 1 (Colo. App. Oct. 20, 2022) (majority opinion) (unpublished), available at <https://research.coloradojudicial.gov/>.

92. *S.S.*, slip op. at 11-13.

93. *M.A.P.*, slip op. at 9.

94. *See id.* at 9-12; *S.S.*, slip op. at 13-14; *cf. supra* note 11 and accompanying text.

95. *See S.S.*, slip op. 14-15; *M.A.P.*, slip op. at 12; *cf. supra* notes 22-26 and accompanying text.

Both parents' attorneys raised disability civil rights law (the ADA) at or close to the termination hearing.<sup>96</sup> In both cases, the government provided its becoming-standard response that its usual services also happened to comply with the ADA.<sup>97</sup> Both trial courts agreed and terminated parental rights over the parent's ADA objections.<sup>98</sup>

(2) *Divergence from the Familiar*

Here, both *S.S.* and *M.A.P.* diverged from the familiar trajectory towards more meaningful compliance with disability civil rights laws. Both courts performed their appellate duty to closely review the lower courts' conclusions<sup>99</sup> on ADA compliance—and found those conclusions lacking.

In *M.A.P.*, the caseworker had not attempted to verify the parent's disability, referred her for any assessments,<sup>100</sup> ensured services accommodated her ID, or used techniques to ensure understanding.<sup>101</sup> Though two providers testified *about* techniques individualized to parents with ID, they did not testify that they had meaningfully *employed* those techniques.<sup>102</sup>

In *S.S.*, the caseworker confirmed awareness that the parent had a “learning disability” and “difficulty with memory and cognition.”<sup>103</sup> The caseworker said that she (1) visited the parent more than required “just to kind of engage and work” with the parent and (2) repeated her

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96. *S.S.*, slip op. at 7-8; *M.A.P.*, slip op. at 2.

97. *S.S.*, slip op. at 7-8; *M.A.P.*, slip op. at 2.

98. *S.S.*, slip op. at 2; *M.A.P.*, slip op. at 3.

99. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 332, 340 (2003) (admonishing that deferential standards of appellate review neither “imply abandonment or abdication of judicial review,” nor “preclude relief”); *accord In re Hicks/Brown*, 893 N.W.2d 637, 639-42 (Mich. 2017); *In re M.A.S.C.*, 486 P.3d 886, 896 (Wash. 2021).

100. *M.A.P.*, slip op. at 9. Requiring parents to undergo evaluations is an overused, sometimes unnecessary, and almost always unindividualized reflex by family policing agencies and courts. *See, e.g.*, Sara Gordon Letter, *supra* note 19, at 19 n.18 (detailing how family policing agency violated disability civil rights law by insisting disabled parent undergo neuropsychological evaluation, when agency already had sufficient information to individualize services); Technical Assistance, *supra* note 19, at 13 (counseling against “requir[ing] parents with disabilities to accept unnecessary services or complete unnecessary tasks to prove their fitness to parent when non-disabled parents would not be required to do so”).

101. *M.A.P.*, slip op. at 9-10. Specifically, though the parent's evaluation identified “verbal comprehension limitations,” nothing suggested use of written materials, additional time to process information, or any efforts to ensure understanding. *Id.* at 9.

102. *Id.* at 9-10.

103. *Id.* at 12-13.



communications in different ways.<sup>104</sup> Also according to the caseworker, the government's service providers worked with parents with ID.<sup>105</sup> *S.S.* found that the government listing its standard menu of services, without explaining how those services had accommodated the specific parent, could not establish ADA compliance.<sup>106</sup> Finding it unpreserved for appellate review, *S.S.* also rejected the government's argument on appeal that the parent did not have an "ADA-qualifying disability."<sup>107</sup> But even if the dispute had been preserved, *S.S.* observed and then enforced the ADA's mandate to define disability broadly, in favor of expansive coverage.<sup>108</sup>

(3) *Convergence Closer to ADA Compliance*

Both cases ultimately converged into an important conclusion. Most courts (and other system actors) blame parents whom they perceive to be "unwilling" to participate in services.<sup>109</sup> Yet both the *M.A.P.* and *S.S.* courts realized that that approach is inapposite when considering unaccommodated parents with disabilities.<sup>110</sup> Both courts were unable to determine whether the parents' alleged "resistance" to or "inconsisten[cy]" in services resulted from their own unwillingness or from the government's failure to accommodate them.<sup>111</sup> Neither record showed that the government individualized treatment planning or services; thus, neither record supported termination.<sup>112</sup> *M.A.P.* observed that the caseworker had done nothing to reengage the parent in services or "facilitate a better understanding of why treatment was needed."<sup>113</sup> Both courts reversed both terminations, remanding to (1) adopt an appropriate treatment plan that provides accommodations for the parents' disabilities and (2) provide services "in accordance with the ADA."<sup>114</sup>

This approach is consistent with what research shows about accommodating parents with disabilities. Accommodations make parents more likely to "engage," improve parenting skills, and be deemed fit

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104. *Id.* at 7-8.

105. *Id.* at 8.

106. *Id.* at 13-14.

107. *Id.* at 11.

108. *Id.* at 12-13 (citing 42 U.S.C. § 12102(1)(A); 28 C.F.R. § 35.108(d)(1)(i) (2024)).

109. *See, e.g.,* *People ex rel. J.C.R.*, 259 P.3d 1279, 1285 (Colo. App. 2011).

110. *S.S.*, slip op. at 14-15; *M.A.P.*, slip op. at 12-13.

111. *S.S.*, slip op. at 15; *M.A.P.*, slip op. at 13.

112. *S.S.*, slip op. at 15; *M.A.P.*, slip op. at 13.

113. *M.A.P.*, slip op. at 12.

114. *S.S.*, slip op. at 28-29; *M.A.P.*, slip op. at 14.

parents.<sup>115</sup> The opposite is also true: not accommodating parents with disabilities increases the likelihood they cannot “engage.”<sup>116</sup> *S.S. and M.A.P.* correctly recognized that the system must scrutinize whether an alleged lack of engagement from a disabled parent is attributable to the government’s failure to comply with disability civil rights laws.

*b) Enforcing the Right to Effective, Individualized Counsel*

Another case found in favor of a disabled parent, but only because the parent’s lawyer had not discharged *their* obligations related to their client’s disability. In *People ex rel. L.E.*, both the family policing agency and court knew that the parent had a traumatic brain injury from the outset of the case.<sup>117</sup> Indeed, at the parent’s first court appearance, the court appointed an adult GAL for her.<sup>118</sup> The trial court described the parent, who had testified at the termination hearing, to have “long lapses” between answers and a

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115. See, e.g., *In re Children’s Aid Soc’y*, No. B-XXXXX-XX-14, 2019 WL 348385, at \*8 (N.Y. Fam. Ct. Jan 9, 2019) (unpublished), *aff’d sub nom.*, *In re Xavier Blade Lee Billy Joe S.*, 187 A.D.3d 659 (N.Y. App. Div. 2020) (noting a parent to be defensive in court, but “in a less threatening and charged environment when she felt supported,” open to constructive criticism, motivated to improve parenting skills); ROCKING THE CRADLE, *supra* note 5, at 139-47; Sandra Azar et al., *Practices Changes in the Child Protection System to Address the Needs of Parents With Cognitive Disabilities*, 7 J. PUB. CHILD WELFARE 610, 619-20 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5012538/pdf/nihms-545125.pdf>; Ben Kerman et al., *Family Teaming to Enhance Engagement and Opportunity for More Families in Child Welfare*, CW360°: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE, Fall 2013, at 22, [https://casw.umn.edu/wp-content/uploads/2013/12/Fall2013\\_CW360\\_WEB.pdf](https://casw.umn.edu/wp-content/uploads/2013/12/Fall2013_CW360_WEB.pdf); Kay, *supra* note 17, at 803-05; 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, 404-05 (2000); Robyn M. Powell, *Safeguarding the Rights of Parents with Intellectual Disabilities in Child Welfare Cases: The Convergence of Social Science and Law*, 20 CUNY L. REV. 127, 142-44 (2016).

116. See, e.g., Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 682(c)(4), 118 Stat. 2647, 2649 (codified as amended at 20 U.S.C. § 1400(c)(4)) (amending Individuals with Disabilities Education Act in part to address “low expectations” and “insufficient focus” on research-proven methods for teaching people with disabilities); ROCKING THE CRADLE, *supra* note 5, at 139-47; Kerr, *supra* note 115, at 415. Characterizing parents as “unengaged” might also be based on misconstruing symptoms of or acting on stereotypes about disabilities. See Michael Perlin, “Half-Wracked Prejudice Leaped Forth”: *Sanism, Pretextuality, and Why and How Mental Disability Law Developed As It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 15 (1999). Specifically, “symptoms of mental illness such as apathy, disorganization, and lethargy may be misconstrued as parental noncompliance.” Azar et al., *supra* note 115, at 621.

117. No. 18CA1576, slip op. at 8 (Colo. App. Apr. 25, 2019) (unpublished), available at <https://research.coloradojudicial.gov>.

118. *Id.*; see *supra* notes 49-52 and accompanying text.

“demonstrated inability to track questions.”<sup>119</sup> The appellate court made an implied finding that the parent’s disability was obvious and remanded to determine whether the parent’s counsel was ineffective for not raising disability civil rights laws.<sup>120</sup>

*2. Advancing Justice for Disabled Parents Without Recourse to Disability Civil Rights Laws*

Given the disability disproportionalities discussed in Part I.C, odds are high that any given case will involve a parent with a disability. Whether disability civil rights laws are invoked on behalf of that parent is a separate question.<sup>121</sup> Accordingly, some Colorado cases have found in favor of disabled parents without expressly saying so.

In *S.S.*, discussed above, the other parent was also covered by disability civil rights laws.<sup>122</sup> That parent also prevailed, but without recourse to those laws.<sup>123</sup> That parent sought to show that his progress in mental health treatment meant it was premature to terminate parental rights.<sup>124</sup> The appellate court found that the parent’s attorney should have secured the attendance of the parent’s treatment providers to corroborate any progress.<sup>125</sup> The termination of parental rights was reversed for ineffective assistance of counsel.<sup>126</sup>

Other opinions have started to challenge the system’s overly broad and punitive reactions to substance and alcohol use. Though rarely framed as such, these issues can be disability issues.<sup>127</sup> Or they can be non-issues, in that the government is concerned about a level of use that is neither a

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119. *L.E.*, slip op. at 8.

120. *Id.* at 8-9.

121. *See, e.g., id.* at 6-7.

122. *People ex rel. S.S.*, No. 22CA1012, slip op. at 21 (Colo. App. Mar. 30, 2023) (unpublished), available at <https://research.coloradojudicial.gov>.

123. *Id.* at 24, 28.

124. *Id.* at 15.

125. *Id.* at 26.

126. *Id.* at 28.

127. *See* 28 C.F.R. § 35.108(b)(2) (2024); C.R. Div., U.S. DEP’T OF JUST., AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL: SUPPLEMENT § II-2.3000 (1993), <https://www.ada.gov/taman2.html> (defining “drug addiction” as an impairment under the ADA); CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS. PARENTAL SUBSTANCE USE: A PRIMER FOR CHILD WELFARE PROFESSIONALS 2 (2021), <https://www.childwelfare.gov/pubPDFs/parentalsubuse.pdf> (detailing likelihood, and importance of addressing, trauma and co-occurring psychiatric disabilities alongside substance use); *see supra* note 36 and accompanying text.

disability, nor a safety issue, nor even existent.<sup>128</sup> Two recent Colorado opinions rejected overly broad, unsupported claims that children who tested positive for substances warranted government intervention.<sup>129</sup> Similarly, four recent opinions rejected the system's use of "concerns" about a parent's substance or alcohol use to separate families.<sup>130</sup> Each time, the court mandated an individualized look at current circumstances, specifically: whether those circumstances involve use at all, legality of any substance used, degree of any use, and whether parenting under the influence occurred.<sup>131</sup> One opinion observed that speculation a child "could" be harmed

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128. See, e.g., *In re N.R.*, 539 P.3d 417, 441 (Cal. 2023) (prohibiting "[s]ubstance abuse, when shown to exist," from serving as automatic prima facie evidence of dependency jurisdiction and requiring courts to assess whether the government has established all elements of jurisdiction, "without shifting the burden to a parent or guardian to rebut a presumption created by a finding of substance abuse"); Andy Newman, *Mother Wins \$75,000 After City Took Her Baby over Marijuana Use*, N.Y. TIMES (Sept. 7, 2023), <https://www.nytimes.com/2023/09/07/nyregion/mother-legal-marijuana-settlement.html?smid=nytcore-ios-share&referrerSource=articleShare>; Brief for Drug Policy Alliance et al. as Amici Curiae Supporting Appellant at 16, *In re N.R.*, 539 P.3d 417 (Cal. 2023) (No. S274943), <https://supreme.courts.ca.gov/sites/default/files/supremecourt/default/documents/13-630-s274943-ac-drug-policy-alliance-et-al-040723.pdf>; cf. *Warshaw v. Concentra Health Servs.*, 719 F. Supp. 2d 484, 489-90, 495-97 (E.D. Pa. 2010) (vindicating disability discrimination claim based on employer firing employee after ADHD medication caused a methamphetamines-positive drug test).

129. *People ex rel. M.L.*, No. 23CA0737, slip op. at 4 (Colo. App. Sept. 28, 2023) (unpublished); *People ex rel. V.D.C.*, No. 23CA0369, slip op. at 9-10 (Colo. App. Sept. 28, 2023) (unpublished). All unpublished opinions are available at <https://research.coloradojudicial.gov/>.

130. *People ex rel. L.S.V-H*, No. 23CA0049, slip op. (Colo. App. Nov. 9, 2023) (unpublished); *People ex rel. S.C.*, No. 22CA1411, slip op. (May 11, 2023) (unpublished); *People ex rel. A.P.*, No. 21CA0222, slip op. (Colo. App. Dec. 15, 2022) (unpublished); *People ex rel. A.G.*, No. 21CA2034, slip op. 8-9 (Colo. App. Sept. 22, 2022) (unpublished). All unpublished opinions are available at <https://research.coloradojudicial.gov/>.

131. *L.S.V-H*, slip op. at 10-11 (Colo. App. Nov. 9, 2023) (unpublished) (reversing adjudication where, *inter alia*, family policing agency did not connect parent's admission of using alcohol and marijuana to any child protection concerns, introduced evidence that parent might have been using methamphetamine but did not introduce into evidence the results of parent's voluntary drug testing, and improperly relied on parent's alleged partial refusal to discuss substance use with the caseworker—because parents are not required to cooperate prior to adjudication); *S.C.*, slip op. at 4-5 (May 11, 2023) (unpublished) (finding parent's counsel ineffective for not presenting evidence of negative drug test after case opened but before adjudicatory trial); *A.P.*, slip op. at 8-9 (Colo. App. Dec. 15, 2022) (unpublished) (reversing termination because conditioning family time on parents' submission to drug testing was improper speculation and coercion); *A.G.*, slip op. at 8-9 (Colo. App. Sept. 22, 2022) (unpublished) (finding that only some tests were positive for alcohol and those showed neither the level at time of testing *nor* that parent ever cared for child while drinking or intoxicated). All unpublished opinions are available at <https://research.coloradojudicial.gov/>.

by substance use and that a desire to force parents into treatment are both illegitimate reasons to keep families apart.<sup>132</sup>

### *III. Next Measures Toward Advancing Justice for Disabled Parents in Colorado*

This Part parses Colorado's important, but imperfect, advances for disabled parents in family policing cases.

#### *A. Where Colorado Must Do Better for Parents with Disabilities*

##### *1. Flawed Assumptions Regarding If and When Disability Is Raised*

Colorado's most recent published cases rest on flawed assumptions that disabled parents are always aware they have a "disability," can enumerate "accommodations" to which they are entitled, and may strategically wait to deploy either issue.<sup>133</sup> In reality, there are several less calculating reasons for if and when parents may raise a disability.

First, because of structural and other inequities based on race, gender, language, class, geography, and other barriers including even disability itself, many parents arrive in family court having not received equal access to healthcare.<sup>134</sup> As a result, and especially for parents of color, some parents who do have disabilities under the law may not have a diagnosis or may have been misdiagnosed.<sup>135</sup> Additionally, some psychiatric conditions may

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132. *A.P.*, slip op. at 6-12.

133. *People ex rel. S.K.*, 2019 COA 36, ¶ 21-22, 440 P.3d 1240, 1248; *People ex rel. S.Z.S.*, 2022 COA 133, ¶¶ 16-18, 524 P.3d 1209, 1214.

134. See U.S. Dep't of Educ., Dear Colleague Letter: Preventing Racial Discrimination in Special Education 17 & n.47 (Dec. 12, 2016) [hereinafter Dear Colleague Letter], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf>; Discrimination on the Basis of Disability in Health and Human Service Programs or Activities, 88 Fed. Reg. 63392, 63395 & nn.22-23 (Sept. 14, 2023) (to be codified at 45 C.F.R. pt. 84); BEN-MOSHE, *supra* note 18, at 29, 105; Margarita Alegría et al., *Disparity in Depression Treatment Among Racial and Ethnic Minority Populations in the United States*, 59 PSYCHIATRIC SERVS. 1264, 1266-67 (2008); Chin, *supra* note 18, at 742; Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 598 (2021); Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 97-98 (2021); SINS INVALID, *supra* note 18, at 94-95; see *supra* note 36 and accompanying text.

135. See *Patricia W. v. Superior Ct.*, 198 Cal. Rptr. 3d 1, 22 (Cal. Ct. App. 2016) (observing how a parent in a family policing case had a psychiatric disability that was "vaguely and inconsistently diagnosed"); In re Alicia Z., 784 N.E.2d 240, 247 (Ill. App. 2002) (describing how an expert witness in a family policing case explained how a child's "race might have contributed to [her] misdiagnosis" with fetal alcohol syndrome or related conditions); In re J.L. Q-R., 193 Wash. App. 1047, 2016 WL 2593878, \*9 (Wash. App. 2016)

preclude the insight necessary to state that one has a disability.<sup>136</sup> Even with diagnoses, parents may not identify a health condition as a “disability,” may never have received the “accommodations” they have been entitled to, or may not be familiar with either term.<sup>137</sup> And even when a parent can and does identify as disabled, the government is often skeptical and demands extensive corroboration.<sup>138</sup> This, too, is contrary to law.<sup>139</sup>

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(unpublished) (sourcing how “a lack of cultural competency can lead to misdiagnosis or overpathologization of immigrant clients” and reversing termination after government failed to provide monolingual Spanish-speaking parent with Spanish-speaking providers); *see also* Dear Colleague Letter, *supra* note 134, at 16-19 & accompanying notes; Discrimination on the Basis of Disability in Health and Human Service Programs or Activities, 88 Fed. Reg. 63392, 63395-96 (Sept. 14, 2023) (to be codified at 45 C.F.R. pt. 84); Liat Ben-Moshe & Sandy Magaña, *An Introduction to Race, Gender, and Disability: Intersectionality, Disability Studies, and Families of Color*, 2 WOMEN, GENDER & FAMILIES OF COLOR 105, 105-07 (2014); Gene Griffin et al., *Addressing the Impact of Trauma Before Diagnosing Mental Illness in Child Welfare*, 90 CHILD WELFARE 69, 85-86 (2011); Lorr, *supra* note 7, at 1332; Powell, *supra* note 2, at 68; Smith, *supra* note 44, at 197-98; *Apology to People of Color for APA’s Role in Promoting, Perpetuating, and Failing to Challenge Racism, Racial Discrimination, and Human Hierarchy in U.S.*, AM. PSYCH. ASS’N (Oct. 29, 2021), <https://www.apa.org/about/policy/racism-apology>.

136. *See, e.g., In re K.C.*, 151 Cal. Rptr. 3d 161, 168 (Cal. Ct. App. 2012) (reversing termination where parent denied he had disability and government used “stale expressions of reluctance as an excuse for its own inaction”).

137. ROCKING THE CRADLE, *supra* note 5, at 44, 95 (recognizing that people with health conditions “may not identify themselves as having a disability” and “the oppression most people with disabilities experience in their lifetimes can affect their ability to self-advocate”); Nicole Buonocore Porter, *Disclaiming Disability*, 55 U.C. DAVIS L. REV. 1829, 1850, 1856, 1872 (2022) [hereinafter Porter, *Disclaiming Disability*] (stating that most people do not consider all health conditions to be “disabilities,” especially those that are episodic or cause “good days and bad days”).

138. ROCKING THE CRADLE, *supra* note 5, at 81.

139. The parent in *People ex rel. S.S.* who sought to testify to his progress in treatment is one example. *People ex rel. SS*, No. 22CA1012, slip op. at 27 (Colo. App. Mar. 30, 2023) (unpublished), *available at* <https://research.coloradojudicial.gov/>. The trial court seemed to default to disbelieving, and requiring corroborative evidence from, that parent. *Id.*; *accord* *State Farm Fire & Cas. Co. v. Wicka*, 474 N.W.2d 324, 327 (Minn. 1991) (documenting common disbelief towards claimed disability, including fear that disability can be “faked” and skepticism that a disabled person “doesn’t look sick”); Sara Gordon Letter, *supra* note 19, at 13-14 (finding that family policing agency violated the ADA and 504 by fixating on obtaining a diagnosis for a disabled parent, “despite having extensive information and being unable to articulate why a diagnosis was necessary”); Dorfman, *supra* note 18, at 1078 (“The second-guessing of a person’s disability and of that person’s need for an accommodation is commonplace for disabled persons.”); Macfarlane, *supra* note 134, at 61-62, 74, 83-84 (detailing common skepticism that people have disabilities and explaining how requiring

Second, parents who have received a diagnosis may be reticent to disclose it because of actual or perceived stigma about disability.<sup>140</sup> That stigma may

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medical documentation of accommodation stems from societal misunderstandings of disability and contravenes ADA).

The family policing system would be better served by looking to the Fair Housing Act. There, verification of disability can usually be provided by the disabled person themselves, including via their own “credible statement.” U.S. Dep’t of Hous. & Urban Dev. & U.S. Dep’t of Just., Joint Statement: Reasonable Accommodations Under the Fair Housing Act 13-14 (May 17, 2004) [hereinafter HUD & Just. Dep’t Joint Statement], [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint\\_statement\\_ra.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf). Medical or other detailed records are generally unnecessary. *Id.* at 14.

140. See *In re M.A.S.C.*, 486 P.3d 886, 896 (Wash. 2021) (parents’ reasonable fear of being judged based on disability hampers voicing difficulties to caseworkers—but does not obviate agency’s obligations); *In re Welfare of D.H.*, 523 P.3d 255, 269 (Wash. Ct. App. 2023) (reversing termination based on “judg[ing parent with ID] negatively for the hallmark features of her disability that should have been accounted for by tailoring communications to suit her needs”); Nat’l Council on Disability, Assisted Suicide: A Disability Perspective Position Paper § IV(B)(4) (Mar. 24, 1997), <https://www.ncd.gov/report/assisted-suicide-a-disability-perspective-position-paper/#4-others-underestimation-of-life-quality> [hereinafter Assisted Suicide] (documenting widespread “negative connotations of disability,” including “tendency of people without disabilities to overestimate the negative aspects and underestimate the positive features of the lives of those who have disabilities”); ROCKING THE CRADLE, *supra* note 5, at 79, 94-98, 119, 142 (detailing common stereotypes in family policing, such as the assumptions that: people with psychiatric disabilities are dangerous and their symptoms are permanent and unchanging; Autistic parents lack empathy; parents with psychiatric disabilities or ID require twenty-four-hour supervision to parent; requiring assistance equates to unfitness to parent; being disrespectful to the caseworker means unfitness to parent; attempting suicide means unfitness to parent; and disabled parents will inevitably put their children at risk); BEN-MOSHE, *supra* note 18, at 65, 172 (observing common stereotypes in which psychiatric disabilities are equated with danger and people with ID are seen as “eternal child[ren] having ‘special needs’”); Dorfman, *supra* note 18, at 1077, 1080-82 (describing common reluctance to accept stigmatizing label of being disabled and needing “special treatment”); Eyer, *supra* note 134, at 587-90, 592 (“Opting in to a stigmatized identity—and especially disclosing such an identity—can come with costs, including, for example, the risk of being targeted for discrimination or bias.”); Frunel & Lorr, *supra* note 11, at 479 (explaining tendencies to characterize parents who resist diagnoses as unable to understand themselves and their children, whereas parents who acknowledge disabilities may be penalized for manifestations of disabilities or for seeking “help”); Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1683-86, 1704-05 (2021) (documenting how “law and society aggressively nudge [disabled people, especially ‘those with less visible disabilities’] to *closet*, *pass*, or *cover* disability identity to meet able-bodied and neurotypical expectations at great costs”); Lorr, *supra* note 7, at 1331-32 (observing that requiring parents to ask for great or more specific forms of assistance risks discrimination and stigmatization); Porter, *Disclaiming Disability*, *supra* note 137, at 1858-62 (explaining the common phenomenon of people with disabilities avoiding being labeled disabled, for example, because of attendant stigma); Porter, *Mothers with Disabilities*, *supra* note 45, at 87 (arguing disabled women are stereotyped as

be heightened for members of multiply marginalized groups.<sup>141</sup> A related strain of stigma may lead some parents to feel they are not disabled “enough” to claim a disability or be entitled to protection for one.<sup>142</sup> Further stigma attaches when a disabled person asks for accommodations, which are often (incorrectly) perceived by others to be unwarranted special treatment rather than a basic tenet of what disabled people are entitled to under law.<sup>143</sup> Even the U.S. Supreme Court has recognized that “hostile reactions . . . far too often bar those with disabilities from participating fully in the Nation’s life,”<sup>144</sup> and family court does not deviate from this norm. Parents who identify as disabled are often disbelieved, or penalized and pathologized, as a result.<sup>145</sup>

Third, Colorado’s approach is ineffective, as it is unlikely to generate sincere or comprehensive results. If dialogues about a parent’s disability occur at all, they usually occur literally. A parent is asked conclusory questions about whether they have a “disability” and is expected to proffer all requested “accommodations,” while the government professes ignorance regarding its ability to participate in determining either.<sup>146</sup> As a constitutional matter, this approach improperly shifts the government’s burdens to make reasonable efforts and comply with disability civil rights laws.<sup>147</sup> As a

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incapable of assuming nurturing roles that women are assumed to play as mothers and instead are viewed as dependent, passive, and in need of assistance); Powell, *supra* note 2, at 68 (“[T]he stigma associated with parenting with a psychiatric disability and the fear of custody loss can result in parents who resist acknowledging their difficulties or requesting assistance.”).

141. See, e.g., Alegria et al, *supra* note 134, at 1270; Chin, *supra* note 18, at 748; Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J. F. 916, 923, 929 (2021).

142. Dorfman, *supra* note 18, at 1080-82; Eyer, *supra* note 134, at 571, 589-90.

143. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) (reasoning equal treatment for disabled people “sometimes require[s] not blindfolded equality, but responsiveness to difference; not indifference, but accommodation”); Dorfman, *supra* note 18, at 1054, 1061; Eyer, *supra* note 134, at 563 & n.65; Lorr, *supra* note 7, at 1335-36; Smith, *supra* note 44, at 229-30; Porter, *Mothers with Disabilities*, *supra* note 45, at 100-01.

144. *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002).

145. Eyer, *supra* note 134, at 597 (explaining that disclosing disability “demands that people with disabilities portray themselves, or indeed be, as incapable at the cost of having their identity recognized”); Lorr, *supra* note 7, at 1362 (relating how an act of claiming disability can be fraught and lead to greater discrimination). See generally Dorfman, *supra* note 18. For a rare instance where a court sided with a disabled parent who was initially penalized for acknowledging her disability, see *In re Jamie M.*, 184 Cal. Rptr. 778, 786 (Cal. Ct. App. 1982).

146. See *supra* notes 86-87 and accompanying text.

147. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 58 (2000) (plurality opinion) (explaining that the lower court erred in improperly placing burden of proof for child’s best interest on her



disability civil rights matter, this framework ignores that accommodating parents with disabilities is not as difficult as the system likes to imagine, because:

- many accommodations are simple and low-cost;<sup>148</sup>
- free, reliable suggestions for accommodations abound and can serve as starting points for discussions with individual parents;<sup>149</sup>
- accommodations are just one requirement of serving people with disabilities—individualizing services by, for example, considering other supports and services like Medicaid waivers, are a vital component that is forgotten when Colorado's formulation is used;<sup>150</sup> and

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mother); *accord* People *ex rel.* S.N-V., 300 P.3d 911, 914 (Colo. App. 2011); People *ex rel.* S.R.N.J-S., 2020 COA 12, ¶ 46, 486 P.3d 1201, 1208-09; People *ex rel.* A.R., 2012 COA 195, ¶ 55; Smith, *supra* note 44, at 229; *supra* notes 10, 23, and accompanying text.

148. *Costs and Benefits of Accommodation*, JOB ACCOMMODATION NETWORK, <https://askjan.org/topics/costs.cfm> [<https://perma.cc/CUT9-LX9E>] (last updated Apr. 5, 2024). The Job Accommodation Network is a federal service that assists with accommodating disabled people at work. *Id.* Additionally, “the notion that claims of disability identity intrinsically entail additional resource consumption in all circumstances is both ableist and false.” Eyer, *supra* note 134, at 604.

149. *Costs and Benefits of Accommodation*, *supra* note 148; *see also* *In re* Children's Aid Soc'y, No. B-XXXXX-XX-14, 2019 WL 348385, at \*14 (N.Y. Fam. Ct. 2019) (unpublished), *aff'd sub nom.*, *In re* Xavier Blade Lee Billy Joe S., 187 A.D.3d 659 (N.Y. App. Div. 2020) (looking to federal guidance under the ADA's employment provisions to formulate accommodations for disabled parent); ROCKING THE CRADLE, *supra* note 5, at 99 (recommending holding meetings at times of day when parent using medication is least affected, allowing advocate to accompany parent with ID to hearings); Sara Gordon Letter, *supra* note 19, at 5 (listing repetition, hands-on instruction, frequency, and visual learning methods); Technical Assistance, *supra* note 19, at 10 (similar). *See generally* ADMIN. FOR CMTY. TBI STATE P'SHIP GRANT, AD HOC WORKGROUP ON CHILD WELFARE, BRAIN INJURY AND CHILD WELFARE BEST PRACTICE GUIDE: INFORMATION AND TOOLS FOR STATE AGENCIES (2023), <https://perma.cc/94VX-8F4M>; Off. of Disability Emp. Pol'y, Fact Sheet: Workplace Accommodations: Accommodating Employees with Post-Traumatic Stress Disorder (n.d.), [https://jobs.alaska.gov/veterans/docs/Accommodating\\_PTSD.pdf](https://jobs.alaska.gov/veterans/docs/Accommodating_PTSD.pdf); *Health Care for Adults with Intellectual and Developmental Disabilities: Communicating Effectively*, HEALTH CARE FOR ADULTS WITH INTELL. & DEVELOPMENTAL DISABILITIES: TOOLKIT FOR PRIMARY CARE PROVIDERS, <https://web.archive.org/web/20230601054608/https://iddtoolkit.vkcsites.org/general-issues/communicating-effectively/> (last visited May 31, 2024).

150. *See, e.g., In re* Victoria M., 255 Cal. Rptr. 498, 507 (Cal. Ct. App. 1989) (reversing termination where government only offered generic reunification services to parent with ID, but should have explored “services offered by the state for developmentally disabled

- that any debates over accommodations should proceed according to an ongoing “interactive process” in which government workers should participate.<sup>151</sup>

Fourth, as Colorado recognized in *M.M.*, manifestations of disabilities may fluctuate.<sup>152</sup> In a family policing case, the realities of system involvement may exacerbate a parent’s disability-related symptoms.<sup>153</sup> And, as at least one family court has recognized, a parent’s disability and its manifestations may come into focus over time:

[I]t will not always be apparent at the time a service plan is adopted, or even soon afterward, that the service plan is insufficient, either in design or execution, to reasonably accommodate a parent’s disability. This is perhaps especially true with respect to intellectual disabilities, which may present in subtle ways and require fine-tuned, albeit reasonable, accommodations.<sup>154</sup>

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persons”); *In re Hicks/Brown*, 893 N.W.2d 637, 639-42 (Mich. 2017) (similar); *In re Xavier*, 187 A.D.3d 659, 660 (N.Y. App. Div. 2020) (similar); *In re Angalee M.S.*, No. B-17xxx/16, slip op. at 3-6, 2018 WL 3341429 (N.Y. Fam. Ct. 2018) (reversing termination where government failed to individualize services despite credible information that parent’s history of trauma “quite likely explained or at least contributed to her aggression, her outbursts, her erratic behavior, and her self-defeating actions”); see *supra* note 21 and accompanying text. Additionally, focusing on accommodations causes more traditional anti-discrimination provisions of disability civil rights laws to be overlooked. See Eyer, *supra* note 134, at 613 (describing the ADA’s multifaceted approach to recognizing different treatment, disparate impact, and reasonable accommodations).

151. Cf. 29 C.F.R. § 1630.2(o)(3) (2024); *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the ADA*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Oct. 17, 2002), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>; *Students with Disabilities Preparing for Postsecondary Education: Know Your Rights and Responsibilities*, U.S. DEP’T OF EDUC.: OFF. FOR C.R. (Sept. 2011), <https://www2.ed.gov/about/offices/list/ocr/transition.html>; HUD & Just. Dep’t Joint Statement, *supra* note 139, at 7.

152. See *supra* notes 56-58 and accompanying text.

153. See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 30 (1981) (recognizing that family policing hearings are “distressing and disorienting” and can cause “overwhelm” for parents); *ROCKING THE CRADLE*, *supra* note 5, at 122; *Kay*, *supra* note 17, at 801; *Powell*, *supra* note 2, at 67-68; Vivek Sankaran et. al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1170 (2019); *Smith*, *supra* note 44, at 206; cf. *Morgan*, *supra* note 17, at 554, 558; *Porter, Mothers with Disabilities*, *supra* note 45, at 97.

154. *In re Hicks/Brown*, 893 N.W.2d 637, 638, 641 n.9 (Mich. 2017).

Fifth, ineffective assistance of counsel may be at the root of a delay in raising a disability and disability civil rights laws.<sup>155</sup> *L.E.* accurately discerned this causality, but few other Colorado courts have.<sup>156</sup> Colorado and other states are making great advances in ensuring advocates recognize and advocate for parents' disabilities, but this reality still exists.

## 2. *Conceding but Not Applying the Rule of Notice*

In *S.K.* and *S.Z.S.*, Colorado correctly stated that the duty to consider accommodations arises once the government is on notice of a parent's disability, *i.e.*, once the disability is "obvious."<sup>157</sup> While Colorado has not elaborated on this duty, others have.

Notice need only be of the underlying fact that a person has a disability, not the legal significance of that fact.<sup>158</sup> Federal civil rights agencies confirmed in the Sara Gordon Letter that family policing agencies violate disability civil rights laws by fixating on, and delaying services until, obtaining a formal diagnosis for a disabled parent.<sup>159</sup>

In a case Colorado endorsed in *S.K.* and *S.Z.S.*, the Michigan Supreme Court applied the rule of notice to find an obvious disability established in an agency's own verbal and written statements and assessments it received.<sup>160</sup> The court cited future U.S. Supreme Court Justice Ketanji Brown Jackson on this topic.<sup>161</sup> In *Pierce v. District of Columbia*, she detailed the history and purpose of the ADA and 504 to conclude that the duty to accommodate arises upon notice, not just request; covered entities therefore cannot be passive in providing accommodations.<sup>162</sup> As the Washington Supreme Court acknowledged, these principles ensure a family policing agency cannot escape its obligation to individualize services by failing to investigate the likelihood a parent is disabled.<sup>163</sup> As Professor Lorr described for this symposium, a New York court acknowledged that these principles extend to recognizing and individualizing services to the pervasive trauma most

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155. *ROCKING THE CRADLE*, *supra* note 5, at 98-101 (explaining how, nationwide, many parents' attorneys fail to understand the implications of disability civil rights laws and also may fail to create, present, or challenge evidence regarding their clients' parenting).

156. *See supra* notes 117-20 and accompanying text.

157. *See supra* notes 71-87 and accompanying text.

158. *United States v. City & Cnty. of Denver*, 49 F. Supp. 2d 1233, 1235, 1241 (D. Colo. 1999).

159. Sara Gordon Letter, *supra* note 19, at 13-14.

160. *In re Hicks/Brown*, 893 N.W.2d 637, 640-41, 640 n.5 (Mich. 2017).

161. *Id.* at 641.

162. 128 F. Supp. 3d 250, 269-70 (D.D.C. 2015).

163. *In re M.A.S.C.*, 486 P.3d 886, 894 (Wash. 2021).

parents have experienced prior to entering—and, in many cases, as children in—the family policing system.<sup>164</sup>

The Seventh Circuit applied these principles in a context involving much less knowledge about a disabled person than is usually the case in family policing. In *Bultemeyer v. Fort Wayne Community Schools*, an employer fired an employee rather than granting his request for a “less stressful” position, despite knowing of the employee’s psychiatric disability.<sup>165</sup> The court rejected the employer’s attempt to “blame” the plaintiff for not specifically requesting an accommodation and found “[t]he employer has to meet the employee half-way, and if it appears that the employee may need an accommodation but doesn’t know how to ask for it, the employer should do what it can to help.”<sup>166</sup>

Colorado has yet to square these notice principles with the degree of knowledge about parents’ health and lives the family policing system entails. As in *S.S.* and *M.A.P.*, many family policing cases are opened *because of*, or at least *with knowledge of*, parents’ disabilities, and additional information generally surfaces.<sup>167</sup> This information almost always meets disability civil rights laws’ broad definition of disability,<sup>168</sup> especially in light of the government’s obligation to make reasonable efforts to tailor its involvement with each family.<sup>169</sup> Colorado’s approach to notice sets too high a bar for disability civil rights laws’ coverage and too low a bar for deeming efforts reasonable. Ultimately, to invoke now-Justice Jackson, Colorado allows and incentivizes the government to “figuratively shrug[] and effectively s[i]t on their hands” when a parent has a known disability.<sup>170</sup>

### 3. *Setting Too High a Bar for Disability Civil Rights Laws’ Coverage*

A fixation on determining which disabilities are “ADA-qualifying” is another way Colorado sets too high a bar for the definition for disability.<sup>171</sup> Were Colorado abiding by Congress’ mandate to define disability broadly,

164. *In re Angalee M.S.*, No. B-17xxx/16, slip op. at 3-6, 2018 WL 3341429 (N.Y. Fam. Ct. 2018); *see also* Sarah Lorr, *Set Up to Fail: Disabled Parents in the Family Regulation System*, 77 OKLA. L. REV 185, 190-91 (2024). *See generally* Griffin et al., *supra* note 135, at 69-90.

165. 100 F.3d 1281, 1282 (7th Cir. 1996).

166. *Id.* at 1285.

167. *See supra* notes 90-91 and accompanying text.

168. *See supra* note 20 and accompanying text.

169. *See supra* note 11 and accompanying text; *see also* Lorr, *supra* note 7, at 1362.

170. *Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 254 (D.D.C. 2015); *accord In re M.A.S.C.*, 486 P.3d 886, 894 (Wash. 2021).

171. *See, e.g., People ex rel. S.Z.S.*, 2022 COA 133, ¶¶ 14, 18, 524 P.3d 1209, 1214-15.

in favor of expansive coverage, this fixation would disappear.<sup>172</sup> Though Colorado is often making progress on this front, when this formulation arises, it is yet another manifestation of the hostility disabled people often face when raising their disability or the civil rights laws that protect it.<sup>173</sup>

#### 4. Using the Medical Model of Disability to Pit Parents Against Children

Perhaps the most fundamental flaw in Colorado cases is the resort to deficits-driven conceptions of disabled parents. By so doing, Colorado readily employs the medical model of disability over the social model.<sup>174</sup> The medical model “reduce[s] disability identity to a sum of medical diagnoses”<sup>175</sup> to be treated or cured, often with a “heavy emphasis on medication”<sup>176</sup>; the social model acknowledges disability and emphasizes how its consequences are shaped by social and environmental norms.<sup>177</sup> “[T]he social model tells us that accommodations simply remedy the fact that the physical and social structures have been built based on an able bodied norm.”<sup>178</sup> Congress intended the ADA to enforce the social model.<sup>179</sup>

However disability is constructed, it overlaps with, and cannot be divorced from, other socially constructed identities, such as race and gender.<sup>180</sup> All of those constructions coalesce to inform an individual parent’s treatment in the

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172. See *supra* note 20 and accompanying text.

173. See, e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002) (“[H]ostile reactions . . . far too often bar those with disabilities from participating fully in the Nation’s life . . .”).

174. See *S.Z.S.*, 2022 COA 133, ¶ 21, 524 P.3d at 1215.

175. Harris, *supra* note 140, at 1698.

176. Frunel & Lorr, *supra* note 11, at 487.

177. Assisted Suicide, *supra* note 140, § IV(B)(1), (6); Ben-Moshe & Magaña, *supra* note 135, at 105-06; BEN-MOSHE, *supra* note 18, at 96, 101; Frunel & Lorr, *supra* note 11, at 484, 487; Harris, *supra* note 140, at 1689-99; Lorr, *supra* note 7, at 1324-26; Macfarlane, *supra* note 134, at 68-69; Porter, *Disclaiming Disability*, *supra* note 137, at 1872; SINS INVALID, *supra* note 18, at 11, 13; cf. ROCKING THE CRADLE, *supra* note 5, at 112 (“[M]ost [Native American] tribal languages have no term for disability, and the idea has no direct parallel in Native cultures.”). The medical model allows us to “individualiz[e] and pathologiz[e]” what are “deeply political and socioeconomic issue[s],” like houselessness, institutionalization, and criminalization. BEN-MOSHE, *supra* note 18, at 141, 159.

178. Porter, *Disclaiming Disability*, *supra* note 137, at 1875.

179. See Dorfman, *supra* note 18, at 1058; Harris, *supra* note 141, at 932; Macfarlane, *supra* note 134, at 68-69.

180. BEN-MOSHE, *supra* note 18, at 97; Ben-Moshe & Magaña, *supra* note 135, at 105-11; Chin, *supra* note 18, at 688-89, 694; Morgan, *supra* note 17, at 507-08, 513, 528, 556.

family policing system and to create the systemic disparities described in Part I.C.<sup>181</sup>

The focus on perceived deficits under the medical model is often used to legitimize system interventions into disabled people's lives.<sup>182</sup> Family policing is no different. The system's approach to parents with disabilities is "of 'risk management'" that establishes "a false dichotomy" between children and parents.<sup>183</sup> In Colorado, the deficits-driven medical model surfaces in the admonishment that, "[r]egardless of the special needs or restricted capabilities of the parent, the child is entitled to at least a minimum level of parental care."<sup>184</sup> It results in conceiving of the ADA as "improperly elevat[ing] the rights of the parent above those of the child."<sup>185</sup> It grounds *S.Z.S.*'s skepticism towards allegedly untimely accommodation requests.<sup>186</sup> It even appears in the seemingly more family-friendly *B.W.* as the caveat that children's best interests are paramount when considering disabled parents individually and in the context of their supports.<sup>187</sup>

Law and research disprove this alleged dichotomy. *Carrie's Law* specifies how accommodating parents is in children's best interests.<sup>188</sup> The federal Technical Assistance confirms, "The goals of child welfare and disability non-discrimination are mutually attainable and complementary."<sup>189</sup> Research reveals that, contrary to stereotypes, children of parents with a wide variety of disabilities generally have "typical development and . . . often enhanced life perspectives and skills."<sup>190</sup> These benefits are in stark contrast to the drastic harm of removing children from their families.<sup>191</sup> By urging the system to weigh these truths rather than common stereotypes and generalizations, advocates can advance justice for disabled parents.

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181. See BEN-MOSHE, *supra* note 18, at 272; Ben-Moshe & Magaña, *supra* note 135, at 105-07; Morgan, *supra* note 17, at 556, 560-61.

182. BEN-MOSHE, *supra* note 18, at 261-68, 277 (explaining usage of disability and mental health as justification for carceral systems); Morgan, *supra* note 17, at 512 (explaining how stereotypes and assumptions cause certain manifestations of disability to be labeled as inherently risky and in need of governmental intervention).

183. ROCKING THE CRADLE, *supra* note 5, at 81.

184. *People ex rel. T.B.*, 12 P.3d 1221, 1223-24 (Colo. App. 2000).

185. *Id.* at 1224.

186. See *People ex rel. S.Z.S.*, 2022 COA 133, ¶ 16, 524 P.3d 1209, 1214.

187. *People ex rel. B.W.*, 626 P.2d 742, 743 (Colo. App. 1981).

188. COLO. REV. STAT. § 24-34-805(1)(b) (2024).

189. Technical Assistance, *supra* note 19, at 1.

190. ROCKING THE CRADLE, *supra* note 5, at 186-89; Kay, *supra* note 17, at 802-05.

191. *Santosky v. Kramer*, 455 U.S. 745, 765 & n.15 (1982); ROCKING THE CRADLE, *supra* note 5, at 101-06, 187; Sankaran et al., *supra* note 153, at 1165-71; Smith, *supra* note 44, at 225.

*B. Where Colorado Must Continue Advancing Justice for Disabled Parents*

*1. Applying Disability Civil Rights Laws Like Carrie's Law*

Despite its passage over five years ago, Carrie's Law itself is widely underutilized. For that matter, so are provisions of disability civil rights laws beyond the duty to accommodate. But some of Colorado's appellate opinions show inklings of change. Both *S.K.* and *S.Z.S.* referenced Carrie's Law, albeit without robustly enforcing it.<sup>192</sup> *S.K.* rightfully endorsed the federal Technical Assistance.<sup>193</sup> All cases addressing the ADA are a significant advancement from years past.<sup>194</sup> Subsequent advancement came as *S.S.* cited, and meaningfully applied, the ADA's broad definition of disability.<sup>195</sup> Colorado has rightfully characterized the ADA's standards as "heightened"<sup>196</sup> compared to the typical standards in all dependency cases. Deploying these standards, in particular, Carrie's Law's five tenets<sup>197</sup> and the duty to individualize services,<sup>198</sup> at every possible juncture will continue to advance justice for disabled parents.

This is all the more true now that the federal government has updated 504 to more clearly target some of the types of disability discrimination that arise in family policing. Revised 504 regulations, which go into effect in July 2024, now expressly prohibit decisions based on speculation, stereotypes, or generalizations about a parent's or child's disability.<sup>199</sup> The regulations also confirm that 504 applies to all stages of dependency proceedings, including custody and visitation decisions (such as "removals"); services provided by family policing agencies (and their contractors) to parents, "companions" (which should include family supports), and others; and TPRs.<sup>200</sup> While these

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192. *People ex rel. S.K.*, 2019 COA 36, ¶¶ 31-32, 440 P.3d 1240, 1249 (citing COLO. REV. STAT. §§ 19-3-100.5(5), 19-3-208, 19-3-507(1)(c), 24-34-805(2)); *People ex rel. S.Z.S.*, 2022 COA 133, ¶ 16, 524 P.3d 1209, 1214 (citing COLO. REV. STAT. § 19-3-507(1)(c)).

193. *S.K.*, 2019 COA 36, ¶¶ 30-36, 440 P.3d at 1249-50.

194. *See, e.g., People ex rel. T.B.*, 12 P.3d 1221, 1223; *People ex rel. C.Z.*, 2015 COA 87, ¶ 22, 360 P.3d 228, 234.

195. *People ex rel. S.S.*, No. 22CA1012, slip op. at 12 (Colo. App. Mar. 30, 2023) (unpublished), available at <https://research.coloradojudicial.gov/> (citing 28 C.F.R. § 35.108(d)(1)(i)).

196. *People ex rel. T.D.J.*, No. 21CA0454, slip op. at 17 (Colo. App. Dec. 1, 2022) (unpublished), available at [https://research.coloradojudicial.gov.](https://research.coloradojudicial.gov/)

197. *See supra* notes 22-26 and accompanying text.

198. *See supra* note 21 and accompanying text; *S.S.*, slip op. at 21; *People ex rel. M.A.P.*, No. 22CA0070, slip op. at 6 (Colo. App. Oct. 20, 2022) (unpublished), available at [https://research.coloradojudicial.gov.](https://research.coloradojudicial.gov/)

199. 45 C.F.R. § 84.60 (2024).

200. *Id.*

principles are not new, they should serve as an important inflection point for all system actors. Advancing justice for disabled parents requires grappling with what these regulations mean and how to achieve full and proactive compliance with them.

### 2. *Ensuring Meaningfully Individualized Services*

S.K. instilled in Colorado the requirement to *meaningfully* individualize services for disabled parents, correctly sourcing it to Carrie’s Law and other disability civil rights laws.<sup>201</sup> The unpublished cases outlined in Part II.B continue to enforce this rule. Courts elsewhere have endorsed this principle as well. The Missouri Supreme Court, in *In re C.W.*, reversed a termination based only on a months-old, generalized evaluation of a disabled parent, without current information about their psychiatric disability or how it affected parenting.<sup>202</sup> The court observed that additional services might assist the parent and that requiring assistance in parenting was insufficient to support termination.<sup>203</sup> Additionally, dependency cases nationwide have required exploration of other common government services for people with disabilities, such as Medicaid waivers.<sup>204</sup> Referrals to these types of services may not “automatically satisf[y] the reasonable [efforts] requirement.”<sup>205</sup> But justice for disabled parents will be advanced by ensuring that *all* available services are timely explored, and adapted for parents’ disabilities, in *every* case.<sup>206</sup>

### 3. *Telling Strengths-Based Stories About Whole Families*

Advancing justice for parents with disabilities requires challenging stigma and deficits-based narratives. To borrow from Professor Morgan, attorneys must robustly screen for disability and then “critically evaluate . . . how disability—and its social meanings—mediated” every interaction with the government and the government’s perceptions of those interactions.<sup>207</sup>

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201. See *People ex rel. S.K.*, 2019 COA 36, ¶¶ 30-36, 440 P.3d 1240, 1249-50.

202. *In re C.W.*, 211 S.W.3d 93, 99-102 (Mo. 2007), *abrogated on other grounds by In re B.H.*, 348 S.W.3d 770 (Mo. 2011).

203. *Id.* at 102.

204. See *supra* note 149 and accompanying text.

205. *T.J. v. Superior Ct.*, 230 Cal. Rptr. 3d 928, 941 (Cal. Ct. App. 2018), *abrogated on other grounds by Michael G. v. Superior Ct.*, 526 P.3d 120 (Cal. 2023).

206. See *supra* note 21 and accompanying text.

207. Morgan, *supra* note 17, at 561-62; *accord, e.g., In re D.H.*, 523 P.3d 255, 269 (Wash. App. 2023) (reversing termination based on “judg[ing parent with ID] negatively for the hallmark features of her disability that should have been accounted for by tailoring communications to suit her needs”).



To borrow from Professor Powell, justice requires “tell[ing] stories of competence” about parents’ strengths and abilities.<sup>208</sup> Forty years ago, *B.W.* gave Colorado one tool to do so, requiring the system to evaluate disabled parents individually, including in the context of their chosen supports. The cases finding in favor of parents, detailed in Part II, add to this toolbox. These cases question the system’s negative assumptions and false dichotomies about parents, focusing instead on whether the parents truly received the individualized treatment to which they were entitled. They also question the system’s reflexive conclusions about “engagement.” Advocates can build on these cases to contrast government overreach into families with more complete, individualized pictures of who parents and families are. This is not only what the law always requires, but in the case of disabled parents, it is what disability civil rights laws demand.<sup>209</sup>

#### *IV. Conclusion*

Disability civil rights laws are not a panacea.<sup>210</sup> For example, they cannot address the family policing system’s disproportionate involvement of disabled people in the first place.<sup>211</sup> Yet, given that system’s entrenched existence right now, disability civil rights laws provide some parents some power to mitigate this system’s discrimination and other harms. The author hopes that this Article provides advocates with tools to “Carrie on” in reducing those harms and working with parents and families to tell their own strengths-based stories in the present—while we continue working toward and re-envisioning how we get families what they need to be safe, healthy, and free.

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208. Powell, *supra* note 2, at 103-05 (quoting Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL’Y 97, 105 (2012)); accord Kay, *supra* note 17, at 814-18.

209. See *supra* note 21 and accompanying text.

210. See *supra* Section III.A.4.

211. Powell, *supra* note 2, at 79.