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When the state removes a child from the custody of his or her parents, the delicate balance between parents' rights and the state's obligation to protect the child comes into play. Because termination of parental rights is irrevocable, it is often referred to as the "death penalty" of family law. Historically, parents with intellectual disabilities have been denied the opportunity to parent through eugenics and sterilization, a horrific history that finds modern articulation through the removal of children from parents based on presumptions of neglect.[1] When a child protection agency removes a child from parental care, without providing the support services to remedy the stated reason for removal, the parents are denied an adequate opportunity to parent their own children and the family suffers. In 2017, the Massachusetts Supreme Judicial Court decided Care and Protection of Walt, *which held that if the Department of Children and Families (DCF) breaches its statutory duty to provide support services prior to removing a child, then the juvenile judge has the equitable authority to order remedial action. This Note discusses what* Walt *tells us about how and when judicial authority may be exercised in care and protection cases in Massachusetts, and what impact this may have on parental rights, specifically the rights of parents with intellectual disabilities.*

INTRODUCTION

The right to parent one's own child is a constitutionally protected private interest and therefore no state interference is permitted without due

1. Tim Booth & Wendy Booth, *Parenting with Learning Difficulties: Lessons for Practitioners*, 23 BRIT. J. SOC. WORK 459, 463 (1993).

process of law.[2] However, under the doctrine of parens patriae[3] the state may take custody of children who are considered to be experiencing, or at imminent risk of experiencing, abuse or neglect.[4] During the 1970s, the number of children in foster care in the United States ballooned from approximately 8,000 to 100,000,[5] and one response to this increase was to refocus state efforts on reunification of the family by providing increased funding for support services.[6] This shift also recognized that prolonged placement in a foster home can have a profoundly negative impact on children.[7]

In an attempt to focus efforts on keeping children in their homes, the federal government implemented the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which encouraged a shift away from child removal and toward providing alternative services to families.[8] Among other requirements, the AACWA includes a "reasonable efforts requirement,"[9] which mandates that in order to receive certain federal funding for foster care, states must alter their statutory schemes to include a requirement that child protection agencies make efforts to reunify the family.[10] This requirement is meant to protect parents and children from

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2. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972); *In re* Hilary, 880 N.E.2d 343, 347–48 (Mass. 2008); Dep't of Pub. Welfare v. J.K.B., 393 N.E.2d 406, 407–08 (Mass. 1979).

3. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

4. The specifics of the statutory schemes empowering state agencies to remove children vary from state to state. In Massachusetts, the predominant statutes governing care and protection proceedings are MASS. GEN. LAWS. ch. 119 (2019) and MASS GEN. LAWS. ch. 210 (2019).

5. STAFF OF H. COMM. ON WAYS AND MEANS, 103D CONG., OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK, H.R. Doc. No. 103-27, at 639 tbl.14-14 (1994).

6. *See* S. REP. NO. 96-336, at 3–4 (1979), *as reprinted in* 1980 U.S.C.C.A.N. 1448, 1452–53.

7. JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 19–20, 90 (1996); CAROLE A. MCKELVEY & JOELLEN STEVENS, ADOPTION CRISIS: THE TRUTH BEHIND ADOPTION AND FOSTER CARE 36–37 (1994); Paul Fine, *Clinical Aspects of Foster Care*, *in* FOSTER CARE: CURRENT ISSUES, POLICIES, AND PRACTICES 206, 206–08 (Martha J. Cox & Roger D. Cox eds., 1985); Shawn L. Raymond, *Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1236 n.5 (1999).

8. Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.). The provision of the reasonable efforts requirement was preserved when Congress enacted the Adoption and Safe Families Act in 1997. *See* 42 U.S.C. § 671(a)(15)(B) (2009).

9. This requirement will be referred to throughout this Note as the "reasonable efforts requirement."

10. *See* 42 U.S.C. §§ 671(a)(1), (a)(15)(B) (2019) ("[R]easonable effort shall be made to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home . . . .").

avoidable removal and prolonged separation.[11] Congress adjusted the requirement through the Adoption and Safe Families Act of 1997 (ASFA),[12] which allows for child welfare agencies to remove children from their homes without first taking reasonable efforts to prevent the removal in circumstances where the child is living in a highly dangerous home.[13]

While the reasonable efforts requirement has been included in the Massachusetts child welfare statute,[14] there is very little federal guidance about what exactly the state must do to satisfy the requirement.[15] Therefore, the requirement has gone largely unenforced.[16] This lack of

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11. Karoline S. Homer, *Program Abuse in Foster Care: A Search for Solutions*, 1 VA. J. SOC. POL'Y & L. 177, 180 (1993).

12. Adoption and Safe Families Act of 1997, Pub L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

13. *Id.* Section 671(a)(15)(D) amended the ASFA by adding exceptions to the reasonable efforts requirement: reasonable efforts need not be made prior to removal of a child or to reunify the child with their parent if

> the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse); the parent has committed murder . . . of another child of the parent; committed voluntary manslaughter . . . of another child of the parent; aided or abetted, attempted, conspired, or solicited to commit such murder or such a voluntary manslaughter; or committed a felony assault that results in serious bodily injury to the child or another child of the parent . . . .

42 U.S.C. § 671(a)(15)(D)(i)–(ii) (2019).

14. MASS. GEN. LAWS. ch. 119, §§ 24, 29C (2019). In codifying 42 U.S.C. § 671(a)(15) into state law, Massachusetts included the requirement that once a child has been removed, the judge "shall determine not less than annually whether the department or its agent has made reasonable efforts to make it possible for the child to return safely to his parent or guardian," which established a timeline for judicial determination of whether reunification efforts are being made once the child has been placed in the custody of DCF. *Id.* Additionally, Massachusetts has included the reasonable efforts obligation in the factors that the court must consider when deciding to terminate parental rights. MASS. GEN. LAWS ch. 210, § 3(b) (2019).

15. Cristine H. Kim, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 299 ("While the HHS regulations require that each state designate in a plan which preventive and reunification services are available, no state is required to provide any specific services." (footnote omitted)); *see* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 313 (2003). "In short, while the law outlines when states do not have to undertake reasonable efforts, it does not articulate a definition of the types of reasonable efforts state child welfare officials should undertake and state youth court judges should consider in the judicial determination process." Raymond, *supra* note 7, at 1260. "In effect, inaction on the part of [Health and Human Services] [to define reasonable efforts] has created a situation in which the federal government's foster care 'contract' with states amounts to only empty 'conditions.'" *Id.* at 1262.

16. *See* Jeanne M. Kaiser, *Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL'Y 100, 111 (2009) ("Massachusetts serves as one example of a state in which judicial enforcement of the reasonable efforts requirement has been forgiving of uninspired state efforts. . . . Massachusetts

enforcement is extremely harmful to families living in poverty, parents who are drug addicted, and parents with intellectual disabilities, for example, because concerns about their ability to provide adequate care could potentially be alleviated by support services from the Department of Children and Families (DCF or the Department).[17] Without meaningful enforcement of the reasonable efforts requirement, there is no guarantee that these parents will receive services from DCF that could be essential to reunification, such as the support of a parent aide, home-making services, and sufficient visitation time. At several stages of a care and protection litigation, the court must determine whether or not DCF has taken reasonable efforts to provide supportive services. However, the level of deference to be afforded to the state agency in determining whether reasonable efforts were made, as well as the scope of the court's authority to order services when DCF has failed to meet their reasonable efforts obligation, remains unclear.[18]

In 2017, *Care and Protection of Walt* addressed these very issues.[19] In *Walt*, the child was removed from the home due to allegations of neglect based on DCF's concerns about the cleanliness of the home and the parents' suspected use of marijuana around the child.[20] The trial judge approved the emergency removal at the initial hearing and transferred permanent custody to DCF at the temporary custody hearing.[21] The father then petitioned for interlocutory relief, and eventually the case made its way in front of the Massachusetts Supreme Judicial Court (SJC).[22] The court concluded that a juvenile judge has the authority to order DCF "to

appellate courts have set the bar for complying with the reasonable efforts requirement quite low . . . .").

17. *Infra* Section I.

18. *See* Ann Balmelli O'Connor, *Care and Protection of Walt: Breathing New Life Into the Decades-Old Policy of Foster Care as a Last Resort*, 62 BOS. B.J. 24, 24 (2018).

19. *See* Care & Prot. of Walt, 84 N.E.3d 803 (Mass. 2017).

20. *Id.* at 807–08.

21. *Id.* at 810.

22. After the father petitioned for interlocutory relief, the petition went to a single justice of the Appeals Court, who found that "[t]he [d]epartment did not make reasonable efforts to eliminate the need for removal prior to removing [Walt]; rather, it summarily removed the child from the premises." *Id.* (alterations in original). In addition to remanding the case for a further hearing on what reasonable efforts DCF would provide to eliminate the need for removal, the court also ordered specific services be provided to the family, including daily visitation, inclusion in the child's special education meetings, and assistance with finding alternative housing. *Id.* at 810–11. The single justice reported his order to a panel of the Appeals Court and the SJC transferred the case on its own motion. *Id.* at 811.

take reasonable remedial steps to diminish the adverse consequences of its breach of duty."[23]

This Note addresses how *Walt* impacted the availability of enforcement of the reasonable efforts requirement, particularly focusing on parents with intellectual disabilities as a case study for the crucial importance of this statutory obligation. Part I examines the current protections in place for parents and the lack of an effective remedy for parents who are not receiving the services to which they are entitled under both state law and the Americans with Disabilities Act (ADA).[24] This deprivation of parental rights is a serious concern under Massachusetts law because children can be removed on account of a parent's disability despite the fact that there is no meaningful remedy for a parent whose disability is not being accounted for in the services provided. Part II explains how two Massachusetts cases previously established the extent of judicial authority to interfere with decisions made by DCF and examines those cases in detail to better understand judicial deference in the context of child protection law in Massachusetts.

Part III argues that *Walt* can be read to expand the authority of juvenile judges to intervene when DCF has failed to make reasonable efforts towards reunification, including reasonable accommodations for parents with disabilities. In conclusion, this Note explores how this reading would provide a necessary check on DCF's power to define its own statutory obligation—a necessary protection for parents with disabilities.

I. THE IMPORTANCE OF THE REASONABLE EFFORTS REQUIREMENT IN BALANCING THE PROTECTION OF PARENTAL RIGHTS AND THE PROTECTION OF CHILDREN

Child protective agencies were originally created to provide safety and protection for children experiencing abuse or neglect.[25] The federal

23. *Id.* at 817 (citing MASS. GEN. LAWS ch. 218, § 59, for the Juvenile Court's equitable jurisdiction in all cases and matters arising under MASS. GEN. LAWS ch. 119).

24. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2009). Title II of the ADA prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services provided by public entities. 42 U.S.C. § 12132 (2018). The ADA was amended in 2008 to "restore the intent and protections of the Americans with Disabilities Act of 1990," an amendment that substantially redefined the definition of disability. *See* ADA Amendments Act of 2008, Pub. L. 110-325, 112 Stat. 3553 (2008).

25. The world's first organization devoted entirely to child protection was the New York Society for the Prevention of Cruelty to Children, established in 1875. John E.B. Meyers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449 (2008). Henry Bergh, founder of the American Society for the Prevention of Cruelty to Animals, and his attorney, Elbridge Gerry, established the organization when Etta Wheeler, who was desperate to find a legal mechanism to protect a young girl who she knew was being routinely beaten, contacted

and state statutes that govern care and protection proceedings attempt to balance the interests of parents and the interests of the state, a challenging task as these protected interests can sometimes be in conflict.[26] While the Supreme Court has recognized that parents have a constitutionally protected interest in retaining custody of their children,[27] the state also has the parens patriae power to protect the welfare and safety of children and to promote their best interests.[28] While leniency in child removal cases may result in catastrophic tragedy, an over-zealous approach means that children who could have safely lived with their parents are placed in foster care and potentially adopted, unjustly denying the rights of both children and parents to live together as a family.[29] Studies show that for children, the experience of being removed from their family can be intensely traumatic, and the effects of removal can be lifelong.[30]

With these concerns in mind, federal and state legislatures have implemented a reunification-promoting policy in the form of the reasonable efforts requirement.[31] This requirement, in essence, is meant to establish that DCF will first and foremost try to put energy and resources into keeping families together. The goal of the Commonwealth—to support families and to avoid child removal unless absolutely necessary—is articulated in the Massachusetts child-welfare statute policy declaration, which states that the Commonwealth will:

> direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself

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them seeking help saving the child. *Id.* at 451–52. By 1922, there were over three hundred child protective agencies throughout the country, but throughout the twentieth century, many cities and rural areas alike had no access to child protection services. *Id.* at 452.

26. *See* Michele N. Jabour, *The Termination of Parental Rights by Massachusetts Courts*, 23 NEW ENG. L. REV. 547, 548 (1988); *see also* Toby Solomon & James B. Boskey, *In Whose Best Interests: Child v. Parent*, 1993 N.J. LAW. 36, 36 ("Protecting the child's interest is more difficult in cases where the parent's interests are at odds with the child's. The clearest example of this arises in cases of termination of parental rights . . . .").

27. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (finding that parents have essential rights to conceive and raise children).

28. Jabour, *supra* note 26, at 550; Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

29. *See* Michelle Goldberg, *Has Child Protective Services Gone Too Far?*, THE NATION (Sept. 30, 2015), https://www.thenation.com/article/has-child-protective-services-gone-too-far/ [https://perma.cc/Y7EG-8DS4] (highlighting the discrepancies within the child welfare system between white middle class parents, poor parents, and parents of color when it comes to monitoring and intervention by child services).

30. Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 70, 70–71 (2008).

31. *Supra* notes 8, 10, 13 and accompanying text.

> or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.[32]

The reasonable efforts requirement is a mechanism for ensuring that children are not removed from the care of their parents when the circumstances that caused the agency to investigate the family could be alleviated by providing services to the parents.[33] In this way, parents are not robbed of the opportunity to parent their children in a safe and healthy environment and are provided the resources they need to care for their family.[34]

A. *Procedural Due Process and Care and Protection in Massachusetts*

Understanding where the reasonable efforts requirement comes into play in a care and protection proceeding requires a bit of background into how this particular area of litigation operates. Care and protection proceedings fall under the jurisdiction of the juvenile court, and throughout the litigation process—from the moment a report of neglect or abuse is filed to the termination of parental rights (TPR) hearing—there are procedural safeguards to which DCF must adhere.[35] These safeguards exist because, as a state agency potentially depriving citizens of a protected interest, there are significant due process concerns as soon as a

32. MASS. GEN. LAWS ch. 119, § 1 (2019).

33. *See* Amelia S. Watson, *A New Focus on Reasonable Efforts to Reunify*, ABA (Sept. 1, 2012), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/september_2012/a_new_focus_on_reasonableeffortstoreunify/ [https://perma.cc/LV7D-BGT7]. This article emphasizes how there is a new focus on enforceability of the reasonable efforts requirement in the wake of the current economic climate and defines reasonable efforts enforcement as ensuring "states offer preventative and rehabilitative services to parents involved with the child welfare agency." *Id.* "The question is pronounced since child welfare cases typically involve poor parents and families who cannot afford services without state agency support." *Id.* (footnote omitted).

34. Mical Raz, *Family Separation Doesn't Just Happen at the Border: Poor Families, Too, Are Torn Apart by Policy that Favors Separation Over Aid*, WASH. POST (Jan. 30, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/01/30/family-separation-doesnt-just-happen-border/ [https://perma.cc/5VK6-C6NS] ("Rather than providing struggling families with the resources they need to make both parents[']and children's lives safer, family separation is all too often the penalty parents pay for poverty, addiction or disability.").

35. MASS. GEN. LAWS ch. 119, § 29C (2019); *see* Leonard P. Edwards, *Judicial Oversight of Parental Visitation in Family Reunification Cases*, 54 JUV. & FAM. CT. J. 1, 2 (2003).

51A report[36] is filed.[37] The SJC's "decisions, and those of the United States Supreme Court, leave no doubt that '[t]he rights to conceive and to raise one's children' are 'essential . . . basic civil rights of man . . . far more precious . . . than property rights.'"[38] Parents and children have a right to be together and to be afforded the procedural due process guarantees associated with that right.[39]

In Massachusetts, every care and protection proceeding begins with a report of abuse or neglect, which then triggers an investigation of the family by DCF. Once the DCF investigator substantiates the report of abuse or neglect, there are two ways in which a child can come into the custody of DCF: either a temporary custody hearing is scheduled or the child is taken into emergency custody, and a temporary custody hearing is scheduled. DCF is permitted to take emergency custody of a child if the DCF investigator finds that the child is currently experiencing abuse or neglect or is at imminent risk of abuse or neglect and the removal of the child is deemed necessary to protect the safety of the child.[40] First, the DCF worker must make a written report stating the reasons for removal and file a care and protection petition on the next court day.[41] Next, the judge must find at an ex parte hearing that DCF had reasonable cause to believe that the child is suffering from serious abuse or neglect, or is in immediate danger of such, and that immediate removal is necessary to protect the child from abuse or neglect.[42] Only then may the court issue an emergency order transferring the child into the custody of DCF for up

36. A 51A report is a report filed against a parent or guardian when there is a suspicion of abuse or neglect. MASS. GEN. LAWS ch. 119, § 51A (2019). The 51A report is often the first contact a family will have with DCF. After receiving a 51A report, the Department "shall investigate the suspected child abuse or neglect, provide a written evaluation . . . and make a written determination relative to the safety of and risk posed to the child and whether the suspected child abuse or neglect is substantiated." MASS. GEN. LAWS ch. 119, § 51B(a) (2019).

37. Care & Prot. of Erin, 823 N.E.2d 356, 361 (Mass. 2005) ("Due process requirements must be met where a parent is deprived of the right to raise his or her child." (citation omitted)); Raymond C. O'Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. ST. L. REV. 1029, 1032 ("[U]nless the parent consents to termination of parental rights, the parent retains a right under the United States Constitution to the custody of his or her child. This right is guaranteed by the Fourteenth Amendment's Due Process Clause and is a fundamental right."). *See generally* Stanley v. Illinois, 405 U.S. 645, 650–51 (1972) (discussing the right of parents to raise their children).

38. Dep't of Pub. Welfare v. J.K.B., 393 N.E. 2d 406, 407 (Mass. 1979) (quoting Stanley, 405 U.S. at 651).

39. *See In re* Hilary, 880 N.E.2d 343, 347–48 (Mass. 2008) ("[P]arents have a fundamental liberty interest in the care, custody, and management of their children.").

40. 110 MASS. CODE REGS. 4.29 (2019).

41. MASS. GEN. LAWS ch. 119, § 51B(c) (2019).

42. MASS. GEN. LAWS ch. 119, § 24 (2019).

to seventy-two hours.[43] In Massachusetts, indigent parents are provided with an attorney and are entitled to a temporary custody hearing, commonly referred to as a "seventy-two hour hearing," where they may present their case.[44]

When there is no emergency removal, the case first goes to court at the temporary custody hearing. At the temporary custody hearing, the juvenile judge must decide whether continuation in DCF's custody is in the best interest of the child, and whether DCF made reasonable efforts to prevent the necessity of removal.[45] Once the child is placed in DCF custody, DCF then has a statutory obligation to make reasonable efforts "to make it possible for the child to return safely to his parent or guardian"[46] in the form of a service plan for the family.[47] Once the child is in the permanent custody of DCF, the parties must routinely return to court throughout the duration of the case, and the judge must decide no less than annually whether reasonable efforts have been made by the DCF to reunify the family.[48] The fact that the reasonable efforts determination is made by a judge, rather than being left for DCF to decide independently, highlights the vital importance that this obligation be honored.

B. *The Particular Importance of Enforcing the Reasonable Efforts Requirement for Parents with Intellectual Disabilities*

To illustrate how critical it is that parents receive the support services towards reunification to which they are entitled, this Part of the Note focuses on the experience of state intervention for parents with intellectual disabilities. The issues identified are also extremely relevant to parents living in poverty or struggling with addiction, and it is clear that judicial enforcement of the reasonable efforts requirement would directly and substantially impact the lives of these parents as well. However, a recent federal investigation into one Massachusetts mother's case provides a particularly helpful illustration of how the lack of enforceable reasonable efforts requirement impacts the lives for parents with intellectual disabilities, and that is the reasoning behind this Note's focus on this

43. *Id.*

44. *Id.*

45. MASS. GEN. LAWS ch. 119, § 29C (2019).

46. *Id.*

47. *Id.*; *see also* 110 MASS. CODE REGS. 7.001–7.095 (2019). While the DCF regulations include a litany of subsections addressing various service options for families, the current regulations are devoid of protocols for how families can access such services, nor any definition or description of the "service plan" or "action plan" that DCF must provide each family.

48. MASS. GEN. LAWS ch. 119, § 29C (2019).

particular issue as a case study for the enforcement of the reasonable efforts requirement.

1. Sara Gordon

A recent joint investigation of DCF conducted by the Department of Justice (DOJ) and Department of Health and Human Services (HSS)[49] highlights the tragic ramifications of lack of oversight with regards to the reasonable efforts requirement. Sara Gordon[50] prompted the investigation after spending over two years separated from her infant daughter based on DCF's belief that her disabilities made her unfit to parent.[51] The findings of the investigation, documented in the joint report, brought to light the services available to parents, and the importance of a mechanism to ensure that those supports are provided.[52]

Sara was a young Massachusetts mother whose child was removed from her care just days after she gave birth because a nurse was concerned that she did not know how to properly care for her child.[53] Sara had a developmental disability that manifested in several ways and caused her to require "repetition, hands-on instruction, and frequency in order to learn new things."[54] Over the next two years Sara received "minimum supports" from DCF, and despite Sara's continuous pleas for more time with her daughter, she was able to visit with her only two to four hours per month.[55] Eventually, DCF decided that it would be in the child's best

49. Letter from U.S. Dep't of Just., Civ. Rights Div. & U.S. Dep't of Health & Hum. Servs., Office for Civil Rights, to Erin Deveney, Interim Comm'r, Mass. Dep't of Children & Families (Jan. 29, 2015), https://www.ada.gov/ma_docf_lof.pdf [https://perma.cc/AP6R-36DE] [hereinafter *DOJ & HSS Letter*]. This joint letter, issued following the Departments' investigation into alleged disability discrimination by DCF, marks a historic moment in disability law because it represents the first time that the federal government has officially interpreted the twenty-five-year-old Americans with Disabilities Act as it applies to the protection of parental rights. Elizabeth Picciuto, *Baby Taken Away Because Mom's "Disabled"*, DAILY BEAST (Feb. 10, 2015, 5:55 AM), https://www.thedailybeast.com/baby-taken-away-because-moms-disabled [https://perma.cc/U54K-73EW]. Robyn Powell, a lawyer with the National Council on Disability, said about the report, the "DOJ and HHS's letter is really significant because it's the first time they've said what we've all thought, which is that the ADA applies to these matters. They are saying, yes, parents have the right to have the appropriate supports and not have their child removed arbitrarily." *Id.*

50. "Sara Gordon" is the pseudonym used by the DOJ and HSS throughout the joint report. *DOJ & HSS Letter*, *supra* note 49, at 1.

51. *Id.* at 12–13.

52. *Id.* at 11–12.

53. *DOJ & HSS Letter*, *supra* note 49, at 5. The Intake Report indicated that DCF decided to conduct an emergency response investigation, noting concerns that Sara was "not able to comprehend how to handle or care for the child due to the [her] mental retardation." *Id.* (citing the 51A report).

54. *Id.*

55. *Id.* at 6.

interest to change the goal from reunification to adoption,[56] the step preceding termination of parental rights.

The report found that DCF had services at its disposal that could have helped Sara, but DCF failed to provide them.[57] The report also concluded that DCF's failure to provide these services violated Title II of the ADA.[58] This violation denied Sara access to existing family resources and in-home parenting services. Moreover, the report states that DCF administered its program in a way that had the "purpose or effect of defeating or substantially impairing accomplishment of the reunification program objectives with respect to Ms. Gordon."[59] Sara and her daughter were reunited following this investigation,[60] but had the DOJ and HSS not become involved in Sara's case, it is highly likely that her parental rights would have been terminated. Sadly, Sara is certainly not alone in her experience, as parents with intellectual disabilities routinely experience this kind of disability discrimination at alarming rates.

2. The High Risk of Termination of Parental Rights for Parents with Intellectual Disabilities

For parents with intellectual disabilities, there are several factors that increase the likelihood that DCF will remove their child and terminate their parental rights.[61] First, cases where children are removed due to fear that the parent lacks the ability to care for the child tend to involve actual or potential neglect rather than abuse.[62] Following the definition of neglect,[63] this means that in order to alleviate the precipitating condition,

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56. *Id.* at 12.

57. *Id.* at 14.

58. *Id.* at 12.

59. *Id.* at 17.

60. Susan Donaldson James, *"We Can Keep Her": Disabled Mom Wins Daughter Back After Legal Battle*, TODAY (Mar. 13, 2015, 3:59 PM), https://www.today.com/parents/disabled-mom-gets-daughter-back-after-legal-battle-t8511 [https://perma.cc/3KVA-3S5C].

61. *See* Jude T. Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa's Child Welfare System and the Americans with Disabilities Act*, 59 DRAKE L. REV. 1165, 1171 (2011); Rachel N. Shute, *Disabling the Presumption of Unfitness: Utilizing the Americans with Disabilities Act to Equally Protect Massachusetts Parents Facing Termination of Their Parental Rights*, 50 SUFFOLK U. L. REV. 493, 494 (2017) ("The stigma surrounding mental illness blinds many who are involved with the care and protection of children, making parents with disabilities more likely to become involved with the child welfare system and face termination of their parental rights.").

62. Maurice A. Feldman, *Parents with Intellectual Disabilities: Implications and Interventions*, *in* HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 401, 401 (John R. Lutzker ed., 1998).

63. According to DCF regulations, neglect is defined as:

> failure *by a caretaker*, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing,

the parents must obtain new skills, rather than desist an abusive behavior.[64] The success of these parents becomes highly dependent on the availability of services because of the requirement that they have new skill development.[65] Unfortunately, parents with disabilities are less likely to have access to these very services because they are more apt to be living in poverty than parents without disabilities.[66] Additionally, parents with disabilities are more likely to receive state services, meaning they are subject to frequent monitoring by professionals who are mandated reporters, increasing their likelihood of referral to DCF.[67] High rates of referral to DCF are also the result of presumptions about the aptitude of parents with disabilities to provide adequate care.[68] Parents with disabilities are often referred to child welfare services and, once involved, experience permanent separation at a much higher rate than the general population.[69] Additionally, the "relative lack of appropriate family

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> shelter, medical care, supervision, emotional stability and growth, or other essential care; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition.

110 MASS. CODE REGS. 2.00 (2019). The very decision to remove the child from Sara's care on account of her disabilities went against DCF regulations, as the concerns arose directly from her disability, or "handicapping condition." *DOJ & HSS Letter*, *supra* note 49, at 2, 23–24 (noting that in Massachusetts DCF has no procedures for social workers to implement or understand how this portion of the regulations applies to their obligations to families in order to avoid discrimination).

64. The definition of abuse according to DCF regulations is "the non-accidental commission of any act by a caretaker upon a child under age 18 which causes, or creates a substantial risk of physical or emotional injury, or constitutes a sexual offense under the laws of the Commonwealth or any sexual contact between a caretaker and a child under the care of that individual," while the definition of neglect is the "failure *by a caretaker*, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care . . . ." 110 MASS. CODE REGS. 2.00 (2019).

65. NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 193–215 (2012) [hereinafter ROCKING THE CRADLE], https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/E7NA-GHJB].

66. Rhoda Olkin et al., *Comparison of Parents with and Without Disabilities Raising Teens: Information from the NHIS and Two National Surveys*, 51 REHABILITATION PSYCHOL. 43, 44 (2006).

67. MARTHA A. FIELD & VALERIE A. SANCHEZ, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 20 (1999); 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, 402 (2000).

68. Michael J. Gassner, *In Search of a Friend: Custody Hearings and the Disabled Parent*, 5 JUV. L. 35, 35–36 (1981) ("The probability of a poor decision is exacerbated when the stigmatizing 'disability' of a parent is inserted into the facts.").

69. ROCKING THE CRADLE, *supra* note 65, at 14, 18; 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

services to address the needs of parents with disabilities and their children, and the short time frames of child protection proceedings . . . make these cases relatively likely to go to court and end in termination of parental rights."[70] Massachusetts is one of the thirty-seven states that actually allows for parents to be found permanently unfit to care for their children on account of their disabilities.[71] Nationally, removal rates for parents with intellectual disabilities are as high as eighty percent.[72] For parents with disabilities in Massachusetts, the DCF rules and regulations have incorporated the ADA requirements by stating that the agency must provide adequate accommodations to parents with disabilities.[73] The ADA[74] and the Rehabilitation Act[75] also both include "a prohibition on making child custody decisions on the basis of generalized assumptions about disability, relegating parents with disabilities to lesser services and opportunities, imposing over protective or unnecessarily restrictive rules, and failing to reasonably modify policies, practices and procedures."[76] In Sara Gordon's case, the DOJ and HSS applied the Americans with Disabilities Act to the lack of implication of services by DCF.[77] The two agencies found that DCF failed to make reasonable efforts by not

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AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT, https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html [https://perma.cc/RMK9-GEZN].

70. Joshua B. Kay, *Child Welfare Cases Involving Parents with Disabilities*, ST. BAR OF MICH.: DISABILITIES PROJECT NEWSL (Sept. 2013), https://www.michbar.org/programs/disabilitynews/disabilities_news_28 [https://perma.cc/U58A-XGJT]. *See also* Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illness in the Child Welfare System*, 12 TEMP. POL. & C.R. L. REV. 273, 291 (2003); Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1201, 1211 (1990).

71. Joan Vennochi, *Disability Does Not Preclude Parental Rights*, BOS. GLOBE (Feb. 12, 2015, 1:25 PM), https://www.bostonglobe.com/opinion/2015/02/12/disability-does-not-preclude-parenthood/KGVyJ13ten3LcSN7YVXTaM/story.html [https://perma.cc/X7ZP-K3ML].

72. *Id.*; Ella Callow et al., *Parents with Disabilities in the United States: Prevalence, Perspectives, and a Proposal for Legislative Change to Protect the Right to Family in the Disability Community*, 17 TEX. J. ON C.L. & C.R. 9, 15 (2011).

73. 110 MASS. CODE REGS. 1.08 (2019).

> The Department recognizes the special needs or handicapped clients. The Department shall make reasonable accommodations to ensure that its services, facilities, communications, and meetings are accessible to all handicapped persons. . . . The Department shall be responsive to issues of handicapping conditions by utilizing social workers who are attuned to the special needs of handicapped persons.

Id.

74. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2009).

75. 29 U.S.C. § 794 (2016). The Rehabilitation Act extends the nondiscrimination requirements of the ADA to all "programs and activities" that receive federal funding. *Id.*

76. *DOJ & HSS Letter*, *supra* note 49, at 11 (citing 42 U.S.C. § 12101(a)(5)).

77. *Id.* at 11–12.

implementing appropriate reunification services, failing to identify an appropriate service plan, and then making no effort to assist the mother with the service plan tasks required of her in order to achieve reunification.[78] Furthermore, they found that DCF did not provide meaningful visitation for Sara and her daughter or the opportunity for her to enhance her parenting skills, and it did not follow the obligation to impose only necessary and legitimate safety requirements.[79] These requirements were not met despite Sara and her attorney repeatedly and persistently advocating for more visitation.[80] Part of the struggle lies in the fact that there is no real way for parents like Sara to ensure that these requirements are being met by DCF due to the ambiguity of the term "reasonable."[81] Furthermore, even if the court were to find that DCF had failed to make reasonable efforts and accommodations, it has been unclear how much power the juvenile judge has to demand that such services be provided before a parent's rights can be terminated.

However, there is not a complete lack of direction as to what reasonable accommodations or services DCF may provide for parents with intellectual disabilities. DCF's placement policy identifies a number of reasonable efforts that can be taken to prevent out-of-home placement, specifically meant to provide parenting assistance to "compensate for deficits, if problem is due to primary caretaker's lack of certain capacities due to mental retardation, mental or physical illness."[82] These identified reunification services include "a spectrum of services that supports maintenance of the family unit, and enables adults or children to meet the goals of a service plan."[83] The DOJ and HHS investigation points out that Sara was directly in the target population for such services, as they are intended for "parents, expectant parents, or primary caregivers whose families are at the risk of or are currently experiencing problems with child abuse or neglect, which may include situations of . . . [r]isk due to

78. *Id.*

79. *Id.*

80. *Id.* at 6.

81. *See* Suter v. Artist M., 503 U.S. 347, 360 (1992) ("How the State was to comply with [the reasonable efforts] directive . . . was, within broad limits, left up to the State."). The Supreme Court also found that there is no private right of action to enforce the reasonable efforts requirement. *Id.* at 364. Finally, while the threatened outcome of a state's failure to comply with the reasonable efforts requirement is loss of federal funding to their child protection programs, this denial has rarely occurred. Kaiser, *supra* note 16, at 110 ("The combination of these factors means that state can essentially enforce the reasonable efforts requirement as rigorously or as loosely as they see fit.").

82. *DOJ & HSS Letter*, *supra* note 49, at 16 (citing 110 MASS. CODE REGS. 7.061) (2015).

83. 110 MASS. CODE REGS. 7.030 (2019).

physical, developmental and/or emotional disability."[84] Yet Sara was not provided with the aid that was particularly designed to support parents in her position because, while these regulations exist, there is yet to be a meaningful way for parents to ensure that they are implemented.

One service that is arguably the most essential to all parents, and particularly important for parents with intellectual disabilities, is the coordination of visitation time. Parents' ability to access their child, otherwise known as "visitation," is a part of the parents' service plan and a core concern of both the court and the parents in care and protection proceedings. The first reason for this is that the maintenance of the parent/child bond calls directly into question the best interest of the child.[85] Because parents like Sara, whose children are removed on account of an alleged failure to provide adequate care, are being evaluated on their ability to acquire these skills, visitation time is particularly vital for learning parenting skills.[86] The American Bar Association has recommended that child welfare agencies implement daily visits for parents and infants because "physical proximity with the caregiver is central to the attachment process."[87] For parents with intellectual disabilities, having access to their child is of particular importance.[88]

"Meaningful visitation" was one of the reunification services that the DOJ and HSS found DCF failed to provide to Sara.[89] Specifically, they found that DCF failed to afford her the opportunity for "frequent, meaningful visitation with support to learn appropriate care for her daughter and to address the agency's concerns."[90] The once-a-week

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84. 110 MASS. CODE REGS. 7.061 (2019).

85. L.B. v. Chief Justice of the Probate & Family Court Dep't, 49 N.E.3d 230, 239 (Mass. 2016).

> [B]eing physically present in a child's life, sharing time and experiences, and providing personal support are among the most intimate aspects of a parent-child relationship. For a parent who has lost (or willingly yielded) custody of a child temporarily to a guardian, visitation can be especially critical because it provides an opportunity to maintain a physical, emotional, and psychological bond with the child during the guardianship period, if that is in the child's best interest . . . .

Id.

86. "[I]n cases where the parent aspires to regain custody at some point, it provides an opportunity to demonstrate the ability to properly care for the child." *Id.*

87. *DOJ and HSS Letter*, *supra* note 49, at 20 n.19. "The ABA similarly recommends that visits occur in the least restrictive, most natural setting while ensuring the safety and well-being of the child." *Id.*

88. *See id.* at 20 (emphasizing that by denying Sara frequent and meaningful visitation time with her daughter, DCF failed to provide services that acknowledged the importance of "repetition, hands-on instruction, and frequency" to Sara's ability to learn new skills).

89. *Id.* at 18.

90. *Id.* at 20.

visitation plan was implemented and continued, despite recommendation for increased visitation from the contracted agency providing Sara with parenting classes, the psychologist who conducted her parenting assessment, and Sara herself.[91] *Walt* also recognizes both the value and critical importance of parenting time, and the authority of the court to make orders regarding visitation in service of the child's best interest.[92]

D. *Without Judicial Enforcement, There are Limited Ways to Challenge the Reunification Services DCF is Providing*

A pertinent flaw in the reasonable efforts requirement, and a further reason that the decision in *Walt* is so vital to protecting parental rights, is that there are extremely limited ways to enforce the reasonable efforts requirement. The fact that the requirement exists in Massachusetts law does not in and of itself mean that it is followed.[93]

The finding that DCF has failed to make reasonable efforts lacks meaning at a termination of parental rights hearing because even if a judge concludes that DCF failed to make reasonable efforts, the judge has the authority to rule that removal is in the child's best interest if the judge finds the parent to be permanently unfit.[94] The only time that a lack of reasonable efforts finding may hold weight at a termination hearing is on the rare occasion the judge determines that the failure to provide services makes it impossible to determine that a parent is *permanently* unfit.[95]

For a child to be removed from his or her parents on account of the parents' intellectual disabilities the court must find permanent unfitness by clear and convincing evidence—temporary unfitness is insufficient.[96]

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91. *Id.* at 7–8.

92. Care & Prot. of Walt, 84 N.E.3d 803, 818–19 (Mass. 2017).

93. Crossley, *supra* note 15 (finding that, in fact, it is rare that federal funding is withheld due to a failure to comply with the reasonable efforts requirement, leaving it largely up to the individual states to determine how this standard is applied).

94. *In re* Adoption of Ilona, 923 N.E.2d 546, 552 (Mass. App. Ct. 2010), *aff'd*, 944 N.E.2d 115 (Mass. 2011).

> [Where there was] little hope that the mother would become a fit parent, there was no error in the judge's decision to terminate the mother's parental rights . . . [despite the social workers' recognition that] the department could have done more in regard to providing services that were more closely tailored to the mother's level of functioning.

Id.

95. Santosky v. Kramer, 455 U.S. 745, 760, 769 (1982) (holding that the standard for unfitness is by the preponderance of the evidence, and that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship").

96. In considering the fitness of the child's parent or caretaker, the judge may consider, as one of fourteen factors, whether the parent has "a condition which is reasonably likely to continue for a prolonged, indeterminate period, such as alcohol or drug addiction, mental

However, the challenge that parents with disabilities face is that they may *not* raise non-compliance with the ADA for the first time at the termination of parental rights hearing.[97] This then begs the question: when can such a claim be meaningfully raised? And when it is raised, is there an enforceable result? *Adoption of Gregory* made clear that DCF is in fact required by law to provide adequately tailored services for parents with disabilities.[98] The catch twenty-two is that parents cannot raise the defense at termination,[99] so without judicial authority to mandate that the proper services be offered during the pendency of the litigation, the determination of adequate services is left completely to the discretion of DCF.[100] As the Sara Gordon investigation clearly illustrates, this level of deference has the potential to cause significant harm to Massachusetts families.

One suggestion offered in *Gregory* for raising the claim in a timely manner was to pursue a claim that the services offered in the service plan were inadequate through an administrative fair hearing or other grievance process.[101] This solution is insufficient on several fronts. First, in Massachusetts, the fair hearings process is conducted within DCF's legal office, so although impartiality is written into the policy,[102] it may be difficult to achieve in reality. Second, the fair hearing process can take up to ninety days,[103] and due to the time-sensitive nature of a care and protection case, this delay can be a damaging length of time for both parents and children. Finally, the Supreme Court has found that the AACWA does not create a private cause of action for seeking enforcement of the reasonable efforts requirement,[104] meaning that if parents are dissatisfied with the fair hearings decision, they cannot seek redress against DCF by filing suit against the agency.

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deficiency or mental illness, and the condition makes the parent or other person . . . unlikely to provide minimally acceptable care of the child." MASS. GEN. LAWS ch. 210, § 3(c)(xii) (2019).

97. *Adoption of Gregory* raised for the first time the question of whether the Americans with Disabilities Act applies to the termination of parental rights. *See* Adoption of Gregory, 747 N.E.2d 120, 123 (Mass. 2001). The court concluded that a claim of inadequate services under the ADA could not be raised as a defense to termination of parental rights at a TPR hearing. *Id.*

98. *Id.* at 126.

99. Adoption of Daisy, 934 N.E.2d 252, 262 (Mass. App. Ct. 2010) ("It is well-established that a parent must raise a claim of inadequate services in a timely manner.").

100. *Gregory*, 747 N.E.2d at 123.

101. *Id.* at 127.

102. The fair hearings process is intended to provide clients who are dissatisfied with certain actions an "informal hearing . . . to receive a just and fair decision from an impartial hearing officer . . . ." 110 MASS. CODE REGS. 10.01 (2019).

103. 110 MASS. CODE REGS. 10.29 (2019).

104. Suter v. Artist M., 503 U.S. 347, 363 (1992).

Another way that a parent may seek remedy for lack of appropriate services resulting in the termination of parental rights is by appellate review.[105] However, prior to *Walt*, virtually no appellate decisions held that DCF failed to uphold its statutory obligation to make reasonable efforts to either prevent removal or promote reunification.[106] In fact, there have been only two cases in Massachusetts where the appellate court found that the Department failed to provide adequate support to a family in pursuit of reunification.[107] Attorneys around the country report that few care and protection cases are appealed at all, and even fewer are reversed.[108] These procedural challenges illustrate the unique nature of care and protection law and highlight the critical importance of policies that provide families with adequate and timely remedies *during* the care and protection litigation. The reasonable efforts requirement was established to ensure that irreparable damage is not done to the delicate relationships between children and their natural parents;[109] if it is to serve its purpose, the reasonable efforts requirement must be paired with a means of enforcement.

Part of the difficulty for appeals courts is that by the time a parent appeals the termination of parental rights, the child may have been placed in substitute care for several years.[110] The fact that a reversal of the trial decision will disrupt the potential permanency of the child inevitably impacts the ruling of appellate judges in care and protection cases.[111] By the time the breach of duty is found the bond between the child and their

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105. A challenge to the termination of parental rights will result in the reviewing court "determin[ing] whether the judge's findings were clearly erroneous and whether [the Department] proved parental unfitness by clear and convincing evidence." Custody of Eleanor, 610 N.E.2d 938, 943 (Mass. 1993).

106. Kaiser, *supra* note 16, at 111 n.40.

107. Care & Prot. of Elaine, 764 N.E.2d 917, 922 (Mass. App. Ct. 2002) (holding that DCF's efforts to help the father acquire housing were insufficient); Care & Prot. of Talbot, No. 01-P-1831, 2002 WL 31455226, at *1–2 (Mass. App. Ct. Nov. 4, 2002) (reversing termination of parental rights on account of the trial judge's reliance on stale information, and because DCF offered the mother a "paucity of services" despite her repeated requests for increased services).

108. *Should a Mental Illness Mean You Lose Your Kid?*, PROPUBLICA (May 30, 2014, 5:45 AM), https://www.propublica.org/article/should-a-mental-illness-mean-you-lose-your-kid [https://perma.cc/3TZ9-SEY3]. Attorneys explained that in termination cases, appellate judges are typically very deferential to the trial court's decision. *Id.*

109. *See* 42 U.S.C. § 671(a)(15) (2019).

110. Kaiser, *supra* note 16, at 103, 103 ("When the appellate court of any state reverses a decision of a trial court in a care and protection or adoption case it may also be reversing years of work to obtain permanency, safety, and emotional well-being for children who are parties to the case.").

111. *Id.* at 113 ("The appellate courts have often excused decidedly non-heroic efforts by the Department as good enough to meet its standards, especially when a failure to so find would undo the placement of the child.").

natural parents may have been too far lost, and the damage done—reunification may no longer be in the child's best interest. At that point, the appellate judges might be influenced by this consideration, despite the legal conclusion that the family's rights had been violated during the care and protection proceedings.[112] And it would not be wrong to have in mind such considerations, because the development of a child happens incredibly quickly and the bonds made in early years have a significant impact on a child's health and sense of security.[113]

Finally, while the trial judge must make a determination as to whether reasonable efforts towards reunification were made, a failure to adhere to this requirement does not preclude the judge from making a determination based upon the best interests of the child at the TPR hearing.[114] The finding of whether or not the removal was in the child's best interest is a factual finding, creating a higher deference in judicial review. Therefore, it would be difficult, if not impossible, for parents to raise lack of reasonable efforts on appeal and win on that argument.[115]

A more impactful remedy for parents than appealing their termination of parental rights would be to argue, in the moment, that they are not being provided with adequate services or visitation time to support their family's reunification. By bringing a motion for adequate services and visitation before the juvenile judge, family defense lawyers may be able to protect the rights of their clients before the time for a meaningful remedy has passed. This mechanism of advocacy, however, depends on the premise

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112. For example, in *Adoption of Gregory*, 501 N.E.2d 1179, 1180–81 (Mass. App. Ct. 1986), DCF made no efforts to reunify the family for the first twenty months of separation, and when efforts were made, they amounted to drafting a list of tasks that the parents needed to complete before they could reunify with their children. Despite these extremely limited efforts toward reunification, the appeals court focused on the children's emotional state and bond with their pre-adoptive parents in their decision to uphold the trial court's decision. *Id.* at 1183.

113. *See generally* Noah Barish, *Using the Harm of Removal and Placement to Advocate for Parents*, JUVENILE RIGHTS PROJECT, INC. (Jan. 7, 2010), http://www.youthrightsjustice.org/media/3844/xxharmandlreplacement.pdf [https://perma.cc/8BW2-9ZP7] (providing research on the long-term harm associated with removal from a parent or parents); William Wan, *What Separation from Parents Does to Children: "The Effect is Catastrophic"*, WASH. POST (June 18, 2018, 6:15 PM), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html [https://perma.cc/EZ5M-NGZH].

114. MASS. GEN. LAWS c. 119, § 29C (2019) ("A determination by the court that reasonable efforts were not made shall not preclude the court from making any appropriate order conducive to the child's best interest."); Adoption of Ilona, 944 N.E.2d 115, 123 (Mass. 2011) ("[E]ven when the department has failed to meet [the reasonable efforts] obligation, a trial judge must still rule in the child's best interest.").

115. *Adoption of Gregory* held, in regard to accommodating a parent's disability, that "a parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made." 747 N.E.2d 120, 127 (Mass. 2001).

that where a judge finds that DCF has not met the reasonable efforts requirement, the judge maintains the equitable authority to order DCF to adjust the services and visitation that they are currently offering.

While it remains clear that DCF has a statutory obligation to make reasonable efforts to keep the natural family together, both before removal and before the TPR hearing, the breadth of the judge's authority to make specific orders to DCF remains unsettled in Massachusetts.[116] *Walt* has provided a clear affirmation of the equitable authority that judges have, permitting injunctive relief to families for increased services prior to removing the child from the home.[117] The following Part argues that the authority granted in *Walt* extends to subsequent stages in the care and protection proceeding, ensuring that parents are provided with adequate services to support reunification throughout the litigation, and certainly before DCF moves to terminate their parental rights.[118]

II. THE ROLE OF THE JUDICIARY IN CARE AND PROTECTION PROCEEDINGS

Generally, judicial review of agency decisions acts as a crucial mechanism for protecting due process rights within the realm of administrative law,[119] yet this Part argues that in the context of reasonable

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116. *See* Care & Prot. of Jeremy, 646 N.E.2d 1029, 1033 (Mass. 1995).

> [W]e recognize that the statutory scheme is, in some respects, unclear and leaves room for the parties . . . to make conflicting arguments about the proper role of a court in reviewing the department's placement decisions. The Legislature may wish to examine the statute to state more definitively the scope of a court's authority when passing on those decisions.

Id.

117. Care & Prot. of Walt, 84 N.E.3d 803, 818 (Mass. 2017) (finding that the single justice was authorized to order equitable relief for the parents after determining that the department had failed to make reasonable efforts); *see also* Balmelli O'Connor, *supra* note 18 (recognizing the court's role in ensuring that DCF follows its statutory obligations and only uses foster care as a last resort).

118. Notably, nothing in the statutory language suggests that there is any differentiation between the reasonable efforts requirement as applied *prior* to removal, and the requirement as applied *after* custody has been granted to DCF. *See* MASS. GEN. LAWS ch. 119, § 29C (2019). Additionally, in *Walt*, the child had already been placed in DCF's custody at the time when the single justice ordered services and visitation for the father. 84 N.E.3d at 819.

119. Section 14 of Chapter 30A, the statute that provides for judicial review of state agencies in Massachusetts, provides that "except so far as any provision of law expressly precludes judicial review, any person or appointing authority aggrieved by a final decision of any agency in an adjudicatory proceeding . . . shall be entitled to a judicial review . . . ." MASS. GEN. LAWS ch. 30A, § 14 (2018); *see also* Edward D. Re, *Due Process, Judicial Review, and the Rights of the Individual*, 39 CLEV. ST. L. REV. 1, 3–5 (1991); William H. Chamblee, *Administrative Law: Journey Through the Administrative Process and Judicial Review of Administrative Actions*, 16 ST. MARY'S L. J. 155, 182 (1984) ("Administrative agencies now

efforts, the typical abuse of discretion standard is not the proper test for the court to employ. In child protection proceedings, the court plays a much more active role than in most administrative proceedings due to the fundamental nature of the rights at stake.[120] Instead of the agency taking on the role of the adjudicator until all other administrative remedies are exhausted, the juvenile court rules on the agency's activities at many stages of litigation.[121] This creates a form of "co-parenting" between the juvenile court and the child protection agency,[122] wherein both the parents and the state agency are subject to frequent review and assessment by the court.[123] This structure is meant to protect parents' rights and to be sensitive to the impact that prolonged and unnecessary separation can have on families[124] by holding DCF accountable to their own regulations and statutory requirements.[125]

The relationship between agency and court implicates a deep issue of separation of the executive and judiciary, towing a delicate line between

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control modern society to such an extent that the rights and liberties of all individuals are affected.").

120 *See* cases cited *supra* note 2.

121 *See, e.g.*, Care & Prot. of Walt, 84 N.E.3d 803, 809–811 (Mass. 2017). Parents are entitled to a hearing before their child is removed from their custody, as articulated in *Stanley v. Illinois*, 405 U.S. 645, 650 (1972), but in extraordinary circumstances, a post-deprivation hearing will suffice in satisfying due process rights. Jordan *ex rel.* Jordan v. Jackson, 15 F.3d 333, 345 (4th Cir. 1994).

> Continuing oversight provides an opportunity for the court to account for changes in the circumstances of the child or the parents, for evolving relationships with individuals significant to the child, for new information coming to light, and for deficiencies in a dispositional plan that become apparent over time, all of which may have an impact on the continuing efficacy of the original dispositional plan. . . . The juvenile court thus carries a continuing and dynamic responsibility to safeguard the interests of its wards.

Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377, 388 (1995).

122. Boyer, *supra* note 121, at 383–85.

123. WILLIAM G. JONES, WORKING WITH THE COURTS IN CHILD PROTECTION 8, 26–37 (2006), https://www.childwelfare.gov/pubpdfs/courts.pdf [https://perma.cc/35Y4-ZPSG] (providing a non-state-specific outline of a care and protection proceeding from initial hearing through termination). "Today, juvenile court judges hear cases alleging child abuse and neglect, delinquency, and status offenses. Most also hear [termination of parental rights] cases and adoption matters." *Id.* at 8.

124 *See* Nell Clement, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 418–19 (2008) (explaining the harmful effects that removal can have on children and parents alike, with a particular focus on culturally diverse families and communities).

125. *See* JONES, *supra* note 123, at 26–27 (providing a detailed explanation of the various hearings that parents are entitled to before the court, including the preliminary hearing, TPR hearing).

when the judge is required to afford deference to DCF's decisions,[126] and when the judge may make a determination that DCF is in violation of its statutory obligations and require a specific remedy.[127] Judicial review of DCF decisions is necessary, because "[r]emoval of children irrevocably from their biological parents is an exceptionally far reaching exercise of State power."[128] However, when it comes to the reasonable efforts requirement, a substantial amount of judicial deference is given to DCF in regard to whether they have provided adequate reunification services, such as visitation time, parenting classes, and re-housing.[129] Some reasons for this deference are the lack of clarity around the definition of reasonable efforts[130] and the fact that courts are already hesitant to interfere with an administrative agency's allocation of resources.[131] While the tension between the executive and judiciary in the realm of administrative law has been comprehensively analyzed, "the doctrinal tools used to resolve tensions between administrative agencies and their judicial monitors have

126. *See* Boyer, *supra* note 121, at 383–84.

> [T]he relationship between juvenile courts and child welfare agencies is not always easy, and the boundaries of their respective responsibilities are not always clear. . . .
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> . . . [T]he range of views among appellate courts called upon to resolve these turf wars may be attributed to the awkward application to the juvenile context of conventional tools of administrative and public law, including the separation of powers doctrine and the prudential administrative doctrine of exhaustion of remedies. Many reviewing courts have sought to apply these principles to the unique relationship between juvenile courts and child welfare agencies within the context of broad and imprecisely drawn statutory schemes. The result is often a prohibition on juvenile courts making decisions in areas considered within the agency's discretion.

Id. (citations omitted).

127. Care & Prot. of Walt, 84 N.E.3d 803, 819 (Mass. 2017) ("[W]here a court contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard the separation of powers mandated by art. 30 of the Declaration of Rights of the Massachusetts Constitution.") (quoting Smith v. Comm'r of Transitional Assistance, 729 N.E.2d 627, 651 (Mass. 2000)).

128. Adoption of Katharine, 674 N.E.2d 256, 258 (Mass. App. Ct. 1997).

129. LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 39 (2014) ("Whether the juvenile court tries these issues is difficult to determine. State appellate decisions and comments from participants in many states court systems indicate that they are rarely litigated." (footnotes omitted)).

130. *See* sources cited *supra* note 13 and accompanying text (explaining how the lack of definition at the federal level has impacted state enforcement of the reasonable efforts requirement).

131. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 16–20 (2008).

failed to take adequate account of either the peculiarities of juvenile law or the practical problems that plague the field of child welfare."[132]

A. *Judicial Deference to Agency Decision-Making*

Each state's legislature is responsible for the "delineation of shared authority between juvenile courts and child welfare agencies."[133] The delineation of responsibility in the context of care and protection law is far from clear, with many areas of overlap, making it difficult for courts to know when they are authorized to make orders contrary to the actions or decisions promulgated by DCF.[134] The previous standard for judicial review of child welfare agency decisions in Massachusetts was established in two cases decided on the same day in 1995. *Care and Protection of Isaac*[135] and *Care and Protection of Jeremy*[136] grappled with judicial intervention in DCF, specifically in the case of child placement decisions.[137] The SJC concluded in both cases that, at least when DCF is deciding where a child should be placed, decisions of this type rest squarely within the agency's custodial decision-making responsibility and may only be overruled by a finding of abuse of discretion.[138] Once the court identifies, as it did in *Isaac* and *Jeremy*, that the decision being reviewed is one over which the agency has discretion, it must apply an abuse of discretion (or "arbitrary and capricious") standard of review.[139]

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132. Boyer, *supra* note 121, at 385.

133. *Id.* at 386.

134. *Id.* at 383 ("[T]he relationship between juvenile courts and child welfare agencies is not always easy, and the boundaries of their respective responsibilities are not always clear.").

> The jurisdictions of the juvenile court and DHS overlap in numerous and varied areas. One such area involves family services, which is defined in the Juvenile Code . . . as . . . "including, but not limited to: child care; homemaker services; crisis counseling; cash assistance transportation; family therapy; physical, psychiatric, or psychological evaluation; counseling; or treatment, provided to a juvenile *or his family*."

Id. at 383 n.13 (quoting Ark. Dep't of Human Servs. v. Clark, 802 S.W.2d 461, 463 (Ark. 1992)) (emphasis added). DHS is the Arkansas equivalent of DCF.

135. *See generally* Care & Prot. of Isaac, 646 N.E.2d 1034 (Mass. 1995).

136. *See generally* Care & Prot. of Jeremy, 646 N.E.2d 1029 (Mass. 1995).

137. *ee infra* Part III.

138. *Id.*

139. The Administrative Procedures Act establishes that agency decisions may only be set aside if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2012). The Massachusetts statute providing for judicial review of administrative agency decisions is MASS. GEN. LAWS ch. 30A, § 14 (2019). Abuse of discretion has been applied commonly, along with the clearly erroneous standard, by juvenile courts reviewing the actions of child welfare agencies. *Boyer*, *supra* note 121, at 421 n.94; *see In re* B.L.J., 717 P.2d 376, 380 (Alaska 1986) ("[T]he abuse of discretion standard of review is appropriate when the court is presented with agency actions on matters committed to the agency's discretion."); O'Bryan v. Eighth Judicial Dist. Court, 594 P.2d 739, 741 (Nev. 1979)

To differentiate the holdings in these two cases from that of *Walt*, brief synopses of *Isaac* and *Jeremy* are provided, followed by an assessment of the court's application of the abuse of discretion standard in the latter two cases.

1. *Care and Protection of Isaac*

In this case, the SJC reviewed the juvenile judge's authority to order, over the objection of DCF, that DCF provide a certain residential placement for a child in its custody.[140] The child and his four siblings had been adjudicated "children in need of protection" and placed in DCF custody.[141] Shortly after gaining custody of Isaac, DCF placed him in a specialized school.[142] When his emotional state began to deteriorate, DCF then committed him to an adolescent psychiatric treatment program.[143] After some time at the hospital, Isaac's treating psychiatrist recommended that he be discharged and allowed to return to the specialized school, with the addition of a behavioral support staff member assigned to assist him in the classroom.[144] DCF rejected the suggestion, in part because the staff member assigned to support Isaac would cost DCF an additional $160 per day.[145] DCF had ceased to fund this type of one-to-one service as of 1990, based on the concern that such services were "inordinately expensive."[146] At the hearing on a motion for increased visitation brought by the mother, Isaac's guardian ad litem raised concerns about his continued placement at the psychiatric hospital.[147] The judge, treating the hearing as a review and redetermination of Isaac and his four siblings' current needs, ordered that Isaac be returned to his previous placement and given the support of a one-to-one aide in the classroom.[148] The Department brought a petition for relief from the order before the single justice, and the justice brought the issue before the full court.[149]

(finding that deference to agency decisions is upheld, unless the court finds that the decisions were arbitrary or illegal) (the decision in *O'Bryan* was later questioned by *Division of Child and Family Services v. Eighth Judicial District Court*, 92 P.3d 1239, 1246 (Nev. 2004), where the court held that the court need not apply the arbitrary and capricious standard based on the subsequent statutory changes providing the juvenile court jurisdiction to make custodial decisions).

140. *Isaac*, 646 N.E.2d at 1038.
141. *Id.* at 1035.
142. *Id.* at 1036.
143. *Id.*
144. *Id.*
145. *Id.* at 1035.
146. *Id.* at 1036.
147. *Id.*
148. *Id.* at 1037.
149. *Id.* at 1036.

The discrete issue raised by the single justice was whether a "judge sitting in a juvenile session [has] authority to order the Department . . . to provide a specific placement and a specific staffing level for a child who has been adjudicated to be in need of care and protection and committed to DCF's (other than temporary) custody."[150] The court concluded that the judge did not have the authority to make such an order against the objection of DCF, as DCF maintains the power to make such decisions for children in its custody, absent a finding of abuse of discretion.[151]

2. *Care and Protection of Jeremy*

While *Isaac* dealt with the court's authority to oppose a placement decision for a child in the permanent custody of DCF, its immediate successor, *Jeremy*, dealt with the same question but in reference to a child who is in the *temporary* custody of DCF.[152] In *Care and Protection of Jeremy*, DCF placed the child in a long-term residential treatment program after removing him from several foster homes due to disruptive behavior.[153] The child's attorney did not agree with this placement, arguing that Jeremy should instead be placed in a specialized foster home, which would be far less restrictive than the residential program.[154] After an evidentiary hearing that spanned several months, the judge agreed with Jeremy's attorney's opposition to his placement and entered an order requiring DCF to place him in a specialized foster home.[155] DCF again brought a petition for relief from the order before the single justice, who vacated the order, deciding that the judge had improperly substituted her "view of what is in the best interest of the child for that of the [D]epartment."[156] The SJC reached the same conclusion as they had in *Isaac*: the judge did not have the authority, absent a finding of abuse of discretion, to make a decision in opposition to DCF in a matter involving the placement of a child in DCF's custody, even if the grant of custody to DCF was merely temporary.[157]

150. *Id.* at 1034.

151. *Id.* at 1039.

152. Care & Prot. of Jeremy, 646 N.E.2d 1029, 1030 (Mass. 1995).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1030–31.

157. *Id.* at 1033 ("We have concluded that G.L. c. 119 allots to the department the authority to determine the residence of a child committed to its custody on a temporary basis.").

B. *Why Do Courts Apply the Abuse of Discretion Standard?*

In both *Jeremy* and *Isaac*, the SJC held that the abuse of discretion standard must be applied in reviewing DCF's placement decisions, rather than finding that the judge had the general authority to make a determination in the best interests of the child.[158] The court applied the abuse of discretion standard because it concluded that these custodial placement decisions remain squarely within the discretion of DCF, therefore mandating deference on the part of the court.[159] Review under an abuse of discretion standard is narrow, disallowing the court from substituting its judgment for that of the agency.[160]

The threshold question for determining what standard of review to apply is whether the court is conducting a traditional review of an administrative decision based on the Massachusetts child welfare statute, Chapter 119.[161] The court in *Isaac* provides an in-depth analysis of "whether the administrative scheme created by G.L. c. 119, §§ 21–37 . . . differs substantially from the ordinary administrative scheme in the degree of authority given to the courts and the manner in which it may be exercised,"[162] by scrutinizing how Chapter 119 allocates authority. To

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158. Throughout its analysis, the court in *Isaac* draws a distinction between the court's power to decide to whom custody will be assigned, and custodial decisions to be made after custody has been decided. For example, Section 29B provides that when "conducting a permanency hearing, the court may make any appropriate orders as may be in the child or the young adult's best interests including, but not limited to, orders with respect to care or custody." MASS. GEN. LAWS ch. 119, § 29B (2018). Yet the court rejected the trial judge's conclusion that "G.L. c. 119, considered in its entirety, grants authority to a judge to resolve a dispute between the department and other interested parties concerning a suitable residential placement for a child in the department's custody." Care & Prot. of Isaac, 646 N.E.2d 1034, 1037 (Mass. 1995).

159. *Isaac*, 646 N.E.2d at 1041 ("[W]e take this opportunity to discuss how a judge in a care and protection proceeding should handle a challenge to the department's exercise of its *custodial* powers.") (emphasis added); *Jerem*y, 646 N.E.2d at 1033 ("[The last sentence of § 29] cannot logically be read to contain a broad grant of authority to a judge to impose conditions or limitations on the department's exercise of its *custodial* powers.") (emphasis added). In Hawaii, the Court of Appeals grappled with this same question. The court originally found that "'the decision as to what custodial arrangements are in the best interests of the child is a matter or question of ultimate fact reviewable under the clearly erroneous standard of review,' insofar as it applies to a family court's review of a DHS determination that its placement decision is in a child's best interest." *In re* AS, 312 P.3d 1193, 1213 (Haw. Ct. App. 2013) (quoting In Interest of Doe, 784 P.2d 873, 880 (Haw. Ct. App. 1989)). *In re AS* overturned this standard of review, finding that "the family court, based on the evidence presented, must make its own determination regarding whether the placement of the child is in the child's best interest." *Id*.

160. *See* U.S. Postal Serv. v. Gregory, 534 U.S. 1, 6–7 (2001); Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 378 (1989); Barnes v. U.S. Dep't of Transp., 655 F.3d 1124, 1132 (9th Cir. 2011); Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1224 (9th Cir. 2011).

161. *See generally* MASS. GEN. LAWS ch. 119 (2019).

162. *Isaac*, 646 N.E.2d at 1037.

reach the conclusion that Chapter 119 does not provide a general grant of authority to the judge to enter orders in the best interest of the child, the court looked to the second paragraph of Section 26, which provides the action the court can take if a child is found in need of care and protection.[163] The trial judge relied upon this section for the authority to resolve disputes between the parent or guardian and DCF about custodial decisions.[164] The court points out the disjunctive language in the statute, that the judge "may commit the child to the custody of the department . . . *or* may make any other appropriate order with reference to the care and custody of the child as may conduce to his best interests."[165] Following this language, the court concluded that once the judge determines that placing the child in the custody of DCF is in the best interest of the child, DCF asserts the authority to make all custodial decisions and the judge can no longer intervene.[166]

Interestingly, Section 26 of Chapter 119 is no longer written in the disjunctive, and instead provides that the court "*also* may make any other appropriate order . . . about the care and custody of the child as may be in the child's best interest" and then provides a non-exhaustive list of potential custodial orders, for example "order[ing] appropriate physical care including medical or dental."[167] This amendment to the statute arguably alters the analysis provided by the court in *Isaac*. At the time when *Jeremy* and *Isaac* were decided, the SJC pointed to the lack of clarity around the scope of the judge's authority in the area of child welfare law and suggested that legislative action may be appropriate to clarify under whose authority placement decisions fall.[168] Were this same issue to come before the court again, it is possible that the SJC would conclude that Section 26 *does* in fact provide the judge with general authority to resolve disputes and make a determination in the best interest of the child, even for custodial decisions such as placement and education.[169] Regardless, the change in the language of Section 26 may provide additional support for equitable judicial authority over decisions that implicate the best interests of the child.

The SJC also focused on the language found in Section 21, which provides the definition of "custodial" and instructions on what a parent or

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163. ch. 119, § 26.

164. *Isaac*, 646 N.E.2d at 1038.

165. *Id.* at 1037 n.3 (citing MASS. GEN. LAWS. ch. 119, § 26) (emphasis added).

166. *Id.* at 1038.

167. § 26(b) (emphasis added).

168. *See* Care & Prot. of Jeremy, 646 N.E.2d 1029, 1033 (Mass. 1995).

169. *See* Div. of Child & Family Servs. v. Eighth Judicial Dist. Ct., 92 P3d 1239, 1246 (Nev. 2004).

guardian may do if they disagree with a custodial decision made by DCF.[170] If a parent or guardian is dissatisfied with a custodial decision, they may challenge that decision, and the judge is authorized to "*review* and make an order on the matter."[171] In *Isaac*, the child's attorney argued that in the absence of language limiting the standard of review to abuse of discretion, such legislative intent should not be presumed.[172] The SJC, however, adopted a traditional reading of "review" in the context of judicial review of an administrative proceeding, concluding that "the appropriate standard of review is error of law or abuse of discretion, as measured by the 'arbitrary or capricious test.'"[173]

Following its analysis in *Isaac*, the court reaffirms the scope of judicial authority in *Jeremy*, further elaborating on its finding that Chapter 119 does not grant power to the judiciary to make custodial decisions.[174] While the court acknowledged that a grant of equitable jurisdiction "is a grant of broad power to act in the best interests of a person properly within the jurisdiction of the court,"[175] that power does not include "decid[ing] questions committed by law to the determination of public officials."[176] "[W]here the means of carrying out [a] statutory duty is within the discretion of the public official, courts normally will not direct how the public official should exercise that statutory duty."[177] The court acknowledges its struggle to parse out the extent of equitable authority by stating:

> [W]e recognize that the statutory scheme is, in some respects, unclear and leaves room for the parties in this case, and in *Care and Protection of Isaac* . . . to make conflicting arguments about the proper role of a court in reviewing the department's placement decisions. The Legislature may wish to examine the statute to state more definitively the scope of a court's authority when passing on those decisions.[178]

Perhaps the most illustrative example of the court's uncertainty applying this level of administrative deference is the court's

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170. MASS. GEN. LAWS ch. 119 § 21 (2019); Care & Prot. of Isaac, 646 N.E.2d 1034, 1038–39 (Mass. 1995).

171. *Isaac*, 646 N.E.2d at 1038.

172. *Id.* at 1039.

173. *Id.* (quoting Caswell v. Licensing Comm'n for Brockton, 444 N.E.2d 922, 930 (Mass. 1983)).

174. *Jeremy*, 646 N.E.2d at 1031.

175. *Id.* at 1033.

176. *Id.* (quoting Capuano, Inc. v. School Bldg. Comm. of Wilbraham, 115 N.E.2d 491, 492 (Mass. 1953)).

177. *Id.*

178. *Id.*

acknowledgment that a judge's equitable authority may fluctuate depending on the type of custodial decision being made. The court reasoned that decisions such as the "termination of visitation between a child and his parents, and the authorization for extraordinary forms of medical treatment, raise issues not raised by the choice of a child's residence."[179] In support of this distinction, the court states that the judge has broader discretion in these types of custodial decisions "for reasons not related to the structure and language of the governing legislation."[180] Therefore, it is fair to say that this decision is limited to the placement of children in DCF's temporary or permanent custody.

This means, in terms of the reasonable efforts requirement, that it is not necessarily clear what level of judicial review should be applied to DCF's decisions about what services to provide, because while efforts to reunify the family may include decisions about the placement of the child, such efforts are not limited to custodial decisions.[181] The matter of what services DCF does or does not provide for families relates to "issues not raised by the choice of a child's residence,"[182] such as DCF's direct statutory obligations and the rights of parents under the ADA. While the analysis provided in *Jeremy* and *Isaac* helps to illuminate how courts contemplate the issue of judicial review of DCF decisions, *Care and Protection of Walt* provides a different form of judicial review in the face of DCF's failure to fulfill a statutory obligation.[183] The very same failure that kept Sara Gordon separated from her baby daughter for over two years.[184]

III. THE GRANT OF EQUITABLE AUTHORITY WHEN DCF FAILS TO MAKE REASONABLE EFFORTS

The consecutive rulings in *Isaac* and *Jeremy* at once affirmed the power of DCF and limited the power of the judiciary. This limitation was based on the fact that the agency's objection to a placement change remained squarely within its custodial powers without violating any statutory obligations and did not infringe on the rights of children or

179. *Id.* at 1031 n.7.

180. *Id.*

181. *See* 110 MASS. CODE REGS. 7.002–7.095 (2019) (providing a list of services available to families in Massachusetts, including homemaking services, parent aide services, and emergency shelter services).

182. *Jeremy*, 646 N.E.2d at 1031 n.7.

183. *See* Care & Prot. of Walt, 84 N.E.3d 803, 817–820 (Mass. 2017).

184. *DOJ & HSS Letter*, *supra* note 49, at 6.

parents.[185] The decisions contested in both *Isaac* and *Jeremy* did not directly contradict DCF's policies and regulations, because while DCF is tasked with making decisions in the best interests of the child, it is also bound to consider allocation of resources when making custodial decisions.[186] In contrast, the decision made by DCF in *Walt* directly implicated a statutory obligation.[187] Therefore, the SJC's decision in *Walt* does not necessarily overrule *Jeremy* and *Isaac*.[188] The distinction made in *Walt* explicitly addresses the custodial nature of the decisions in *Jeremy* and *Isaac* and distinguishes such decisions from instances where DCF failed to meet an obligation.[189] The ruling in *Walt* provides family defense attorneys with a valuable solution for the lack of timely remedy for their clients who are not receiving adequate support in their efforts towards family reunification.

A. Care and Protection of Walt

The child in *Walt* was removed from his home at the age of three after a report was filed with DCF alleging neglect against Walt's parents.[190] The DCF investigator arrived at the apartment unannounced to follow up on the report, and (as was illuminated during the seventy-two-hour custody hearing) made the decision within ten minutes of entering the apartment to remove Walt from the home.[191] The investigator's major concerns were the state of the home and the smell of marijuana.[192] According to the investigator, the upstairs portion of the home, where the family was living, was littered with trash, including dirty plates, cups, cigarette butts, and a chicken bone.[193] The investigator, with the approval of her supervisor, initiated an emergency removal and Walt went into DCF custody.[194] The affidavit attached to DCF's petition for temporary custody, which was signed by both the supervisor and the investigator, stated that "reasonable efforts by the department were attempted."[195] However, at the seventy-two-hour hearing, the investigator admitted that she did not know whether DCF could provide assistance with cleaning the

185. "[I]n this case, we are concerned with the department's authority to determine the place of abode of a child in its custody." *Jeremy*, 646 N.E.2d at 1031 n.7.

186. Care & Prot. of Isaac, 646 N.E.2d 1034, 1036–37 (Mass. 1995).

187. Care & Prot. of Walt, 84 N.E.3d 803, 814 (Mass. 2017).

188. *Id.* at 819.

189. *Id.*

190. *Id.* at 807.

191. *Id.* at 810.

192. *Id.* at 808.

193. *Id.*

194. *Id.*

195. *Id.* at 809.

home, or whether "counseling and management services" were available to the parents prior to removal.[196] She also testified that "it was not her job to make reasonable efforts to prevent or eliminate the need for removal before removing a child to the custody of the department."[197]

The father petitioned for interlocutory relief, and the single justice of the Massachusetts Appeals Court determined that DCF had an obligation to adhere to their statutory mandates, namely the obligation to make reasonable efforts prior to removal.[198] Finding that DCF had failed to make any reasonable efforts, the single justice found DCF did not meet its obligation.[199] Not only did the single justice make a determination that no reasonable efforts had been made, but he also remedied the situation by making specific orders for DCF to provide services.[200] The services ordered included daily supervised visitation between Walt and his father, that Walt's father be included in special education meetings, and that DCF explore alternative housing options for the parents, all in support of reunification.[201]

Faced again with the challenge of defining the scope of equitable authority, the SJC came to a quite different conclusion than it did in *Isaac* or *Jeremy*. Rather than applying an abuse of discretion standard, the court acknowledged that at the seventy-two-hour hearing, the judge has the responsibility to determine whether reasonable efforts were made prior to removal of the child, "separate and distinct from the judge's certification regarding the child's best interests that decides whether the child should remain in the custody of the department."[202] The fact that abuse of discretion was not the standard applied in *Walt* suggests that enforcement of the reasonable efforts requirement should be evaluated differently than custodial decisions regarding children in DCF custody. Because the judge was not reviewing a custodial decision made by DCF at the behest of a parent or guardian, but instead making a determination required by state statute,[203] the court recognized that judges have equitable authority in this area.[204] Furthermore, the court found that the authority granted to the

196. *Id.* at 810.

197. *Id.*

198. MASS. GEN. LAWS ch. 119, § 29C (2019).

199. *Walt*, 84 N.E.3d at 810.

200. *Id.* at 810–11.

201. *Id.*

202. *Id.* at 817.

203. *See supra* notes 8, 10, 11 and accompanying text.

204. *Walt*, 84 N.E.3d at 817 ("Where, as here, the single justice found that the department failed to fulfil its duty to make reasonable efforts before taking custody of Walt, he had the equitable authority to order the department to take reasonable remedial steps to diminish the adverse consequences of its breach of duty.").

judge to make the reasonable efforts determination also provides them with the "authority to order the department to take reasonable remedial steps to diminish the adverse consequences of the department's failure to do so."[205]

While the same issues of separation of powers and allocation of resources exist in *Walt*, in contrast to *Isaac* and *Jeremy*, the holding firmly supports the single justice's authority to order DCF to take very specific action.[206] The interpretation of judicial authority follows *Jeremy* and *Isaac* in that the SJC recognized that "where the department has been awarded temporary custody of a child in a care and protection proceeding, 'decisions related to normal incidents of custody' generally are committed to the discretion of the department, reviewable only for abuse of discretion."[207] The court elects not to rule on "the full scope of judicial authority to issue injunctive orders where the department has been awarded temporary custody of a child, or the limitations on that authority."[208] However, it is stated concretely that

> where the department has been awarded temporary custody of a child after failing to fulfill its duty to make reasonable efforts to prevent or eliminate the need for the child's removal, from parental custody, a judge has the equitable authority to take reasonable steps to attempt to remedy the adverse consequences on the child and the parents arising from the department's breach of that duty.[209]

Perhaps part of the court's willingness to enforce judicial authority in this area is based on the fact that failure to make reasonable efforts prior to removing the child can have an immediate and serious impact on the family, and therefore equitable relief is necessary to counter that harm.[210] Because it was too late for DCF to rectify the error by making reasonable efforts prior to removal, the single justice was justified in "ensur[ing] that the department fulfilled its duty to make it possible for the child to return safely to his father or to attempt to hasten the time when that reunification would become practicable."[211] In this case, the court agreed with the single justice that in order to protect Walt and his family from the

205. *Id.* at 807.

206. *Id.*

207. *Id.* at 819 (citing Commonwealth v. Adkinson, 813 N.E.2d 506, 513 (Mass. 2004)).

208. *Id.*

209. *Id.*

210. "[T]he single justice was entitled to conclude from the evidence in the record that the department's failure to make reasonable efforts also adversely affected Walt and his family and that reasonable equitable relief was needed to diminish that adverse impact." *Id.* at 818.

211. *Id.*

imminent harm of their prolonged separation, it was reasonable to order DCF to act specifically and immediately to remedy this harm.[212]

Another reason that the court may have found an expanded grant of equitable authority in this circumstance is that the single justice did not attempt to substitute his own judgment for that of DCF while reviewing a department decision. Instead, the justice ordered injunctive relief in a response to DCF's clear failure to meet its statutory imperatives.[213] Courts may be reluctant to order the kind of provided found in *Walt* because, "where a court contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard the separation of powers."[214] But if the court does determine that DCF clearly failed to make reasonable efforts, the judge may find this failure harmful to the family and provide an injunctive order to remedy the harm.[215]

Finally, in *Walt*, the order for injunctive relief was made in reaction to the absence of agency action in violation of a statutory obligation.[216] This contrasts with *Isaac* and *Jeremy*, where the judges substituted their judgment for that of the agency to rule on a decision between two placement options, neither of which would have been in violation of DCF's statutory requirements.[217] "Only when, at the time a judicial order is entered, there is but one way in which [an] obligation may properly be fulfilled, is a judge warranted in telling a public agency precisely how it must fulfill its legal obligation."[218] When making a reasonable efforts determination, the court must decide whether DCF made adequate efforts to reunify—not a choice between alternative satisfactory options, but a question of whether or not DCF met its obligation at all.[219] If opposing

212. *Id.* at 817.

213. *Id.* at 810–811.

214. *Id.* at 819 (quoting Smith v. Comm'r of Transitional Assistance, 729 N.E.2d 627, 636 (Mass. 2000)).

215. *Id.*

216. MASS. GEN. LAWS ch. 119, § 29C (2019).

217. MASS. GEN. LAWS ch. 119, § 23 (2019); Adoption of Talik, 84 N.E.3d 889, 897 (Mass. App. Ct. 2017) ("Placement decisions, as opposed to custody decisions, fall within the discretionary power of the legal custodian as one of the usual incidents of custody.") (quoting Care & Prot. of Manuel, 703 N.E.2d 211, 216 (Mass. 1998)).

218. Care & Prot. of Isaac, 646 N.E.2d 1034, 1037 (Mass. 1995).

219. Particularly when advocating for parents with disabilities, the ADA makes clear that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2016). Application of the ADA to everything DCF does means that services provided to parents with disabilities must be catered to these parents' specific needs, and failure to provide properly tailored services is a failure to meet the statutory obligation. *See DOJ & HSS Letter*, *supra* note 49, at 10.

counsel can show that DCF failed to meet this obligation, for example, by not providing any specialized services to a parent with an intellectual disability, it is no longer solely within the discretion of DCF to determine how they should meet the requirement. While the "placement of individuals and the coordination of the provision of services financed by [a social service agency] are executive functions,"[220] the determination of whether or not DCF has fulfilled its statutory requirement is a function of the judiciary.[221]

B. *Applying* Care and Protection of Walt *Beyond the Temporary Custody Hearing*

Now that *Walt* has established that the scope of equitable authority extends to making specific orders that remedy a breach of statutory duty, the question remains as to whether this same power exists if a judge makes this determination at the permanency hearing, rather than at the temporary custody hearing.[222] While the *Walt* court focused on the particular language regarding reasonable efforts prior to removal, the rest of the statute states that once a child has been placed in DCF's custody, the purpose of the reasonable efforts requirement shifts from "eliminat[ing] the need for removal from the home" to "mak[ing] it possible for the child to return safely to his parent or guardian."[223] If the judge has granted custody to DCF, the judge must decide no less than annually "whether the department or its agents has made reasonable efforts to make it possible for the child to return safely to his parent or guardian."[224]

Because it is within the court's power to make specific orders remedying DCF's failure prior to taking custody, it logically follows that this same power exists when DCF breaches the same obligation later in the proceedings.[225] The very same risk of harm to the family exists if DCF fails to provide a service plan reasonably tailored to the needs of the parents, regardless of whether this occurs *after* the child has been

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220. *Isaac*, 646 N.E.2d at 1039.

221. *In re* McKnight, 550 N.E.2d 856, 859 (Mass. 1990) (holding that where an executive agency has a legal obligation, and "there is but one way in which that obligation may properly be fulfilled," the judiciary may order the enforcement of the obligation).

222. On account of the facts of the case, *Walt* focused exclusively on the judge's authority to remedy a reasonable efforts breach prior to removal of the child from the home. Care & Prot. of Walt, 84 N.E.3d 801, 810 (Mass. 2017).

223. MASS. GEN. LAWS ch. 119, § 29C (2019).

224. *Id.*

225. The precise language which requires the court to make a determination of reasonable efforts prior to placement with DCF is mirrored later in the statute, requiring the court to make a determination no less than annually as to whether DCF has made reasonable efforts to make it possible for the child to return safely to his parent or guardian. *Id.*

adjudicated in need of care and protection or *prior* to removal from the home.[226] If parents do not have the opportunity to argue this issue prior to the TPR hearing, then there is truly no enforcement mechanism ensuring that this requirement is followed, which may result in improper removals. The requirement may be overlooked and treated as a "checking-of-a-box" without meaningful adherence, rather than a true procedural protection. With the precedent established in *Walt*, if a court finds that DCF is failing to make reasonable efforts to reunify the family, it may take action and order that those efforts be made.[227]

The amendments to Section 29 of Chapter 119 discussed in Part II also suggest a legislative change in the allocation of judicial authority since the deciding of *Isaac*.[228] Because of the shift away from the disjunctive and the inclusion of a non-exhaustive list of possible actions that the judge may take in the best interest of the child,[229] it could be reasonably argued that a dissatisfied parent could petition the court to make orders in the best interest of the child, such as visitation and services to promote reunification of the family. This would be an additional avenue for arguing lack of reasonable efforts prior to the TPR hearing, and it is congruous with the equitable authority granted by *Walt*. Finally, while the language of Section 29C makes clear that the court *must* make a reasonable efforts determination no less than annually, this does not necessarily mean that the court is limited to making a reasonable efforts determination at the permanency hearing.[230] The mandate of the

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226. The impact of prolonged separation between parent and biological parent, even of that parent cannot fully provide for all of the child's needs, is well documented. In *Ms. L. v. U.S. Immigration & Customs Enforcement*, 310 F. Supp. 3d 1133, 1146–47 (S.D. Cal. 2018), the court relied on an amicus brief submitted by the Children's Defense Fund, and based on the arguments presented found:

> [T]here is ample evidence that separating children from their mothers or fathers leads to serious, negative consequences to children's health and development" and the stress of forced separation "put[] children at increased risk for both physical and mental illness . . . . And the psychological distress, anxiety, and depression associated with separation from a parent would follow the children well after the immediate period of separation—even after eventual reunification with a parent or other family.

Id.

227. Care & Prot. of Walt, 84 N.E.3d 803, 820 (Mass. 2017).

228. *Supra* Section II.B.

229. MASS. GEN. LAWS ch. 119, § 29C (2019).

230. *Id.*

> [I]f a court has previously committed, granted custody or transferred responsibility for a child to the department or its agent, the court shall determine not less than annually whether the department or its agent has made reasonable efforts to make it possible for the child to return safely to his parent or guardian.

Id.

reasonable efforts requirement is to make reunification possible, and because this is an ongoing mandate, a parent (or child) could petition the court to make a determination on an alleged breach of this statutory duty at any part of the process when the provision of services is, in fact, not promoting reunification.

C. *Judicial Authority over Visitation*

In additional support of the argument that the court has equitable authority to make specific orders for services is the fact that the court may order visitation in the best interest of the child.[231] Even after the custody of the child has been transferred to DCF, the parents retain the right to visit their child as long as visitation will not injure the welfare of the child or the public interest.[232] The court addressed this authority specifically in *Walt*, emphasizing that "the single justice did not exceed his authority or abuse his discretion by ordering a visitation schedule that would enable [the parenting] bond to remain intact."[233] The grant of judicial authority in this particular area is due to the fact that "visitation, like custody, is at the core of a parent's relationship with a child," and the critical importance of parenting time to the parent-child relationship implicates the best interest of the child.[234]

Additionally, the court may order visitation between parent and child *even after the parent's rights have been terminated*.[235] This broad sweep of equitable authority allows the judge to determine whether the best interests of the child will be served, and in doing so, allows them to grant orders that may be against the will of the child's legal custodian.[236] The court, acting in its capacity to serve the child's best interests, may even oppose the adequacy of an adoption plan if it does not provide for visitation with the biological parents, and such visitation would be in the

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231. *See* Care & Prot. of Three Minors, 467 N.E.2d 851, 860 (Mass. 1984); Custody of a Minor (No. 2), 467 N.E.2d 1286, 1291 (Mass. 1984) ("[B]efore terminating visitation rights, a judge must make specific findings demonstrating that parental visits will harm the child or the public welfare.").

232. Custody of a Minor, 467 N.E.2d at 1291 (citing Care & Prot. of Three Minors, 467 N.E.2d at 851).

233. Care & Prot. of Walt, 84 N.E.3d 803, 818 (Mass. 2017).

234. *Id.* at 818 (quoting L.B. v. Chief Justice of the Probate & Family Court Dep't, 49 N.E. 3d 230, 239 (Mass. 2016)).

235. *In re* Adoption of Rico, 905 N.E.2d 552, 560 (Mass. 2009) (holding that the court was within its equitable authority to order post-termination visitation between child and biological parent where the child's best interests would be served by maintaining and honoring that bond).

236. *See* Youmans v. Ramos, 711 N.E.2d 165, 174 (Mass. 1999) (holding that the court had authority to order visitation between child and prior permanent guardian, even over the objections of the father, who had legal custody of the child).

child's best interests.[237] The position of the juvenile court to make orders regarding visitation is yet another argument for broad judicial authority to make orders in the best interests of the child, including provision of services that will help the child return home.[238]

D. *Impact of Judicial Enforcement of the Reasonable Efforts Requirement*

To illustrate how a broader grant of judicial authority to find a failure to make reasonable efforts and order a remedy to that failure, it may be helpful to imagine the impact that this would have as a case unfolds. Applying a requirement that particular services be offered to parents as a prerequisite *before* DCF can change the child's goal to adoption would ensure that parents are not deemed unfit before being given the opportunity to prove their parenting potential.[239] Recognizing the court's authority to offer relief to parents who are clearly not receiving adequate services would provide parents with an avenue to compel DCF to provide a service plan that would meaningfully support reunification of the family.[240]

Had the court enforced the provision of services in Sara Gordon's case, this family may have had a profoundly different experience. If Sara had been able to raise a lack of reasonable efforts claim, she could have argued for increased visitation to support her acquisition of the parenting skills that were allegedly lacking.[241] She could have petitioned for a

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237. *In re* Adoption of Vito, 728 N.E.2d 292, 296 (Mass. 2000) ("[W]e hold that a judge may order limited postadoption contact, including visitation, between a child and a biological parent where such contact is currently in the best interests of the child.").

238. *See* SUPREME COURT OF GEORGIA COMMITTEE ON JUSTICE FOR CHILDREN, FAMILY TIME PRACTICE GUIDE: A GUIDE TO PROVIDING APPROPRIATE FAMILY TIME FOR CHILDREN IN FOSTER CARE 45 (2019), http://judgeleonardedwards.com/docs/family-time-georgia.pdf [https://perma.cc/U2NY-KL8L] (explaining the role of courts in ensuring proper family visitation time).

239. *See* Booth & Booth, *supra* note 1 (providing empirical studies supporting no connection between intelligence and parenting ability, but explaining that judges and service providers must work actively to avoid "what might be called *the mistake of false attribution* or seeing all the problems parents may be having entirely in terms of their learning difficulties.").

240. *See, e.g.*, 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, 145–47 (2016) (explaining how advocates should use social science and empirical research about parents with disabilities in order to advocate for their clients and ensure that their rights are protected).

241. *See* IASSID Special Interest Research Grp. on Parents & Parenting with Intellectual Disabilities, *Parents Labelled with Intellectual Disability: Position of the IASSID SIRG on Parents and Parenting with Intellectual Disabilities*, 21 J. APPLIED RES. INTELL. DISABILITIES 296, 301 (2008) [hereinafter *IASSID SIRG*] (reviewing the state of knowledge on parents with intellectual disabilities and their children, and concluding that parents labeled with intellectual

parent aide with experience helping parents with intellectual disabilities, articulating her rights under the ADA, and the necessity of this service to promote reunification with her daughter. Rather than being forced to resort to the DOJ after exhausting her options in juvenile court, Sara could have had the opportunity to efficiently and effectively advocate in court for the services necessary to help her provide adequate care to her child. If the judge found that DCF had in fact failed to make reasonable efforts in compliance with the ADA, the court could have ordered DCF to provide such services, thereby protecting Sara's rights prior to her TPR hearing. If she were then dissatisfied with the court's decision regarding her petition for services and DCF's adherence to the reasonable efforts requirement, she would have had the opportunity to petition for interlocutory relief of the court's ruling on the adequacy of the services being provided to her. While Sara was able to (and did) advocate for increased visitation and services, absent a reading of *Walt* granting judicial authority to find a lack of reasonable efforts and implement a remedy, such requests may not result in a court order.[242] The current combination of deference to DCF for defining what are reasonable reunification services and the stark lack of guidance for social workers on how to act in compliance with disability law is unlikely to result in compliance with the ADA and DCF's statutory requirements.[243]

The ability to effectively advocate lack of reasonable efforts would mean ensuring that parents with intellectual disabilities are afforded a fair chance to prove themselves as capable parents. For parents with disabilities, as with all parents, caring for children is a learning process.[244] With full discretion over what services are adequate, DCF may use the consequences of its intervention (for example, a parent's lack of responsiveness to the child's cues) to justify the continued separation. Parents who have limited time with their children begin to lose their parent-child bond, and the child may become more and more attached to

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disabilities "acquire parenting knowledge and skills when appropriate teaching methods are used.").

242. Care & Prot. of Jeremy, 646 N.E.2d 1029, 1031 (Mass. 1995).

243. *DOJ & HSS Letter*, *supra* note 49, at 23–24. The letter to the Commissioner recognizes that DCF has "failed to provide appropriate policies and training for social workers to understand their obligations to ensure the civil rights of parents with disabilities." *Id.*

244. *See generally* Maurice A. Feldman, *Parenting Education for Parents with Intellectual Disabilities: A Review of Outcome Studies*, 15 RES. DEVELOPMENTAL DISABILITIES 299 (1994) (providing a detailed review of twenty different studies addressing parenting abilities of parents with intellectual disabilities and recognizing the need for further research in the area of programs that teach parenting skills to this group of parents).

their substitute placement.[245] Additionally, a hands-on learning method is particularly important for parents with disabilities.[246] A social worker with no experience working with parents with intellectual disabilities may not feel it necessary or appropriate to provide any education to the parents during their visits, yet this support during visitation is precisely what would most help the parents.[247] Without frequent visitation and parenting education, a parent with an intellectual disability is unlikely to see improvement in the areas identified by DCF as the reason for the parent/child separation.[248] At that point, the lack of progress may be used to prove permanent unfitness at the TPR hearing, when it would be too late to raise an argument of insufficient efforts.

The DOJ and HSS report provides many suggestions for services, and in fact, these services are largely drawn from DCF's own policies.[249] Yet clearly the mere existence of these policies remains insufficient to ensure their implementation, and the services provided to parents with intellectual disabilities are in desperate need of bolstering.[250] Court enforcement would not only benefit parents like Sara, but would also

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245. *Attachment—Babies, Young Children and Their Parents*, PARENTING & CHILD HEALTH, https://www.cyh.com/HealthTopics/HealthTopicDetails.aspx?p=114&np=99&id=1931 [https://perma.cc/3ZW2-6D23].

246. Maurice A. Feldman et al., *Teaching Child-Care Skills to Mothers with Developmental Disabilities*, 25 J. APPLIED BEHAV. ANALYSIS 205, 209 (1992). At the conclusion of the training, the eleven mothers with intellectual disabilities were performing the parenting skills at a higher level than the control group of non-handicapped mothers. *Id.* at 210. For more information about Dr. Feldman's research and approach to assessing parental capacity, see generally MAURICE FELDMAN & MARJORIE AUNOS, COMPREHENSIVE, COMPETENCE-BASED PARENTING ASSESSMENT FOR PARENTS WITH LEARNING DIFFICULTIES AND THEIR CHILDREN (2011) (providing resources for professionals and presenting an innovative approach to assessing parental capacity to aid with custody decisions).

247. *See* Sandra T. Azar & Kristin N. Read, *Parental Cognitive Disabilities and Child Protection Services: The Need for Human Capacity Building*, 36 J. SOC. & SOC. WELFARE 127, 133 (2009).

> We believe [child protective services] will be less effective with cases involving [parents with cognitive disabilities] because of a mis-match of their typical approaches to what may be the special needs of the parents involved (e.g., a high reliance on parents orchestrating their own services, time-limited parent education as the vehicles for change, and traditional service provision, such as psychotherapy) and residual biases that still exist toward this population.

Id.

248. *See Parents with Intellectual Disabilities*, THE ARC (Mar. 3, 2011), https://www.thearc.org/document.doc?id=3659 [https://perma.cc/U23Y-NAWM].

249. *DOJ & HSS Letter*, *supra* note 49, at 17.

250. ROCKING THE CRADLE, *supra* note 65, at 171 ("A study of child welfare evaluations found that evaluators were largely unable to identify appropriate or adapted interventions for supporting or strengthening the parenting capacities of people with disabilities.") (citation omitted).

benefit DCF in supporting compliance with its legal obligations under the ADA. Further clarification of DCF's obligation under the reasonable efforts requirement, codified within its own regulations, would also further help create unity among courts and clarity across the state as to the scope of this requirement.

E. *Additional Proposed Methods to Ensure Adequate Services for Parents*

Even with the recognition that the court has the judicial authority to order that reasonable efforts be made, what exactly is *required* remains largely undefined[251] and would have to be decided on a case-by-case basis. Some states have addressed this issue by providing more concrete requirements for their child protection agencies to follow when providing services. For example, in Oregon, the efforts to reunify a family must have a rational relationship to the reason for the child having been placed in state custody.[252] A clearer indication of the services required under the reasonable efforts requirement would allow for both DCF and the court to better evaluate parents' claims that they are receiving inadequate services. Clearer agency policy about what services parents with disabilities are guaranteed under the ADA would also help DCF avoid lawsuits and investigations and help family defense attorneys advocate for specific services on behalf of their clients. However, lack of clear definition of what constitutes reasonable efforts does not eliminate the judicial responsibility under Chapter 119, Section 29C, to make written findings of reasonable efforts, nor the authority to order that services be provided. It is also possible that the definition of reasonable efforts was intended by the legislature to remain broad, because a factual determination of whether reasonable efforts were made will depend entirely on the unique factual circumstances of each case. Regardless, putting the determination of whether reasonable efforts have been made into the hands of the judiciary rather than DCF itself would create a necessary check on DCF's ability to take custody of children without providing necessary services for parents.

CONCLUSION

The court's decision in *Walt* upheld the power of the judiciary to make specific orders when DCF has been found in violation of the reasonable efforts requirement.[253] This decision extends the scope of authority held by the juvenile court to include ordering DCF to remedy its

251. O'Brien, *supra* note 37, at 1054.

252. OR. REV. STAT. ANN. § 419B.343(1)(a) (West 2018).

253. *See supra* Section III.A.

failure to provide reunification services once the child has been removed.[254] As of now, there is no other meaningful enforcement mechanism for ensuring that adequate reunification services are provided, and therefore no pressure upon DCF to abide by this statutory requirement.[255]

The ability to hold the Department accountable for fulfilling its statutory obligation is of particular relevance in wake of the Sara Gordon case and subsequent DOJ and HSS report.[256] For parents with intellectual disabilities, or other disabilities protected under the ADA, it is fundamental that these clients have a mechanism for timely argument that their specific needs be accommodated for by DCF in support of reunification.[257] Applying *Walt* to provide more active judicial review of services for parents will provide parents with disabilities one way to seek review of the services they are being offered, and potential redress for inadequate services. This added avenue of advocacy and protection would help families reduce the harm associated with a prolonged and unnecessary separation.

254. Care & Prot. of Walt, 84 N.E.3d 803, 810–811 (Mass. 2017).

255. *See supra* Section I.D.

256. *See* Robyn Powell, *Federal Agencies Say State Cannot Discriminate Against Parents with Disabilities*, ABA (Mar. 1, 2015), https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/vol-34/march-2015/federal-agencies-say-state-cannot-discriminate-against-parents-w/ [https://perma.cc/7VGM-P7WQ] ("Regrettably, despite the ADA and Section 504's obvious application to the child welfare system, state courts and child welfare agencies have continued to disregard these important laws and their legal obligations.").

257. Powell, *supra* note 240, at 144–47 (citing *IASSID SIRG*, *supra* note 241, at 301) (explaining how support services for parents with intellectual disabilities must be tailored to meet the parents' learning style, taught in the home, and must "incorporate modelling and simplified verbal and visual techniques and allow opportunities for practice with feedback and positive reinforcement"). The specificity of the services required to adequately serve parents with disabilities can be overlooked when there is not valid avenue to advocate their necessity.