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Traumatized Children Who Participate in Legal Proceedings are Entitled to Testimonial and Participatory Accommodations Under the Americans with Disabilities Act

Wendy Murphy*

*“Talking about the worst secret of one’s life . . . [and] being understood . . . is remarkably important and beneficial . . . ”*¹

I. INTRODUCTION

Many states have laws that allow children to testify in legal proceedings with the assistance of special protective measures.²

* Professor Wendy Murphy, J.D., Adjunct Professor of Law, New England Law | Boston. This article is an expanded version of remarks presented at the Roger Williams University School of Law Symposium: Child Witnesses in Sexual Abuse Cases. I thank the organizers of the event and the editors of this Journal for their inspiration and patience, as this piece evolved from slides to a full article. I also thank my research assistants, Sarah Fay and Annalise Scobey, for helping with the arduous citation process. Most of all, I thank Ruby McDonough for having faith that even the literally voiceless among us can change the world.

1. Vincent Fellitti & Robert Anda, *The Relationship of Adverse Childhood Experiences to Adult Medical Disease, Psychiatric Disorders and Sexual Behavior: Implications for Healthcare*, in *THE IMPACT OF EARLY LIFE TRAUMA ON HEALTH AND DISEASE* 77, 84 (Ruth A. Lanius et al. eds., 2010).

2. John E.B. Myers, *Adjudication of Child Sexual Abuse Cases*, 4 *FUTURE OF CHILDREN* 84, 87–90 (1994). *See also*, e.g., CONN. GEN. STAT. ANN. § 54-86g (West 2007) (permitting testimony of victim of child abuse outside of courtroom); KY. REV. STAT. ANN. § 421.350 (LexisNexis 2009); N.C. GEN. STAT. § 15A-1225.1 (2011); N.J. STAT. ANN. § 2A:84A-32.4 (West 2005) (permitting closed circuit television at the trial, out of the view of the jury, defendant, or spectators); UTAH R. JUV. P. 37A (West 2013).

While there is significant variation among the states, common options include testifying outside of the courtroom or by closed circuit television, sitting in smaller chairs, holding stuffed animals, using diagrams and anatomically correct dolls, and turning their bodies away from the accused.³

The United States Supreme Court has upheld the constitutionality of special protections for children when such measures are “reliable and necessary,” and so long as the court makes case-specific findings.⁴ However, some states forbid or substantially limit such protections under their state constitutions.⁵ This disparity between state and federal courts, combined with the disparities among the states themselves, means that children, as a class, experience inconsistent legal protections when participating in judicial proceedings.

Unlike characteristics such as race, sex, and national origin, children do not enjoy protected class status. Thus, under traditional equal protection and civil rights doctrines, the law does not ensure a baseline of fair treatment. However, Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, (“ADA”) provides protection to children with disabilities; these children are entitled to the ADA’s protective benefits with regard to “services, programs or activities” of any “public entity,” including legal proceedings.⁶

Obviously, not all victimized children are disabled, however, a significant number experience Post Traumatic Stress Disorder (“PTSD”) and other serious mental health problems such as bipolar disorder, major depressive disorder, and schizophrenia⁷—all

3. Janet Leach Richards, *Protecting the Child Witness in Abuse Cases*, 34 FAM. L.Q. 383, 399–401 (2000).

4. *Maryland v. Craig*, 497 U.S. 836, 849–53 (1990).

5. *See, e.g., Commonwealth v. Bergstrom*, 524 N.E.2d 366, 367, 377–78 (Mass. 1988).

6. 42 U.S.C. § 12132 (2006).

7. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 23 (2001). *See also*, William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement*, 38 SUFFOLK U. L. REV. 303, 315 (2005) (stating “[i]n addition, because abused children’s resilience and defense mechanisms are not as strong as those of adults, children are more likely to suffer renewed episodes of PTSD when questioned about the abuse.”).

of which are conditions highly correlated with abuse and are recognized disabilities under the ADA.⁸ Other trauma-induced emotional and learning difficulties such as cognitive impairment, memory function and anxiety disorders are also common in abused children⁹ and, likewise, are recognized disabilities under the ADA.¹⁰

Thus, a child with PTSD, or any other disability recognized under the ADA, has a right to receive protective support during all phases of a criminal case in which he or she participates as a witness and/or victim. Accordingly, accommodations are required from the outset of the police or child protective services investigation, through interviews with prosecutors and guardians ad litem and all aspects of court proceedings, to ensure his or her equal and effective participation in legal proceedings.¹¹

Moreover, because the ADA is a federal law, children in all jurisdictions are entitled to the same quality of benefits irrespective of state law differences, so long as the accommodation is “necessary,” “reasonable,” and “available.”¹² Because federal law takes precedence over state law under the Supremacy Clause, state court judges may not diminish the value of a child’s rights under the ADA by “balancing” them¹³ against the rights of the

8. See 42 U.S.C. § 12101 (2006).

9. See Debra Niehoff, *Invisible Scars: The Neurobiological Consequences of Child Abuse*, 56 DEPAUL L. REV. 847, 847 (2007). See also Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witness*, 27 W. ST. U. L. REV. 111, 173 (2000); Judith L. Alpert et al., *Symptomatic Clients and Memories of Childhood Abuse: What the Trauma and Child Sexual Abuse Literature Tells Us*, 4 PYSCHOL. PUB. POL’Y & L. 941 (1998).

10. See 42 U.S.C. § 12101.

11. 28 C.F.R. §§ 35.130 (b)(1), (ii), (iii).

12. See *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that Title II “constitutes a valid exercise of Congress’s § 5 authority to enforce the guarantees of the Fourteenth Amendment” on the States).

13. Even when “balancing” is required, as when a legitimate constitutional right is at stake for the accused and the child has no disabilities or other federal or constitutional rights in controversy, the rights of the accused are not automatically paramount as against the needs of a child witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (stating that a judge may properly limit cross-examination because of concerns about “harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.”). *Delaware v. Fensterer*, 477 U.S. 15, 20 (1985) (per curiam) (“[T]he Confrontation Clause

accused.¹⁴ Similarly, because federal law is supreme, a judge cannot refuse any accommodation provided for in the ADA on the possibility that it could interfere with the ability of defense counsel to conduct cross-examination.¹⁵

This Article will discuss how using the ADA standards will improve children's access to justice and enhance the reliability of their testimony and the overall integrity of their involvement in legal proceedings.¹⁶ Part I will address relevant provisions of the ADA and the landmark decision, *In re Ruby McDonough*, where the Massachusetts Supreme Judicial Court took the unprecedented step of applying the ADA to the testimonial and participatory rights of victims in criminal proceedings. Part II will describe the various circumstances under which the *McDonough* case should apply to child victims with disabilities. Part III will address mechanisms for enforcement of the ADA at the trial court level as well as on direct appeal or through collateral judicial review in state and federal courts when trial courts improperly decline to grant accommodations.

II. THE ADA AND JUDICIAL PROCEEDINGS

The ADA provides that “no qualified individual with a

[only] guarantees ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’”)

14. *Cooper v. Aaron*, 358 U.S. 1, 16–18 (1958); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

15. *See In re McDonough*, 930 N.E.2d 1279, 1291–92 (Mass. 2010) (stating that the court has “rejected claims that permitting an accommodation of a witness’s impaired expressive capacity necessarily violates a defendant’s right of confrontation, even where defense counsel is constrained in cross-examining the witness,” and noting that many other jurisdictions have reached the same result) (interior citation omitted); *see also Commonwealth v. Brown*, 884 N.E.2d 488, 494 (Mass. 2008) (finding no confrontation clause violation where witness “had difficulty articulating verbal responses to some of defense counsel’s questions” and judge permitted witness to answer some questions nonverbally).

16. Analogous state law provisions may also apply. *See, e.g.*, Article 114 of the Massachusetts Constitution which prohibits discrimination against the disabled in any program or activity within the Commonwealth and chapter 93 section 103 of the Massachusetts General Laws, which guarantees disabled persons equal rights to full protection of the laws. This Article covers only the ADA, but it should be noted that state laws may provide even better protections than those afforded individuals with disabilities under federal law.

disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹⁷ Recognizing that persons with disabilities have been “subjected to a history of purposeful unequal treatment,”¹⁸ the ADA’s regulation imposes on public entities the duty to provide appropriate accommodations where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the “same benefit, or to reach the same level of achievement as that provided to others.”¹⁹

Though testifying victims often do not request accommodations, the United States Supreme Court in *Tennessee v. Lane* ruled that courts are obligated to provide accommodations to ensure the equal participation and effective communication of disabled persons during judicial proceedings.²⁰

However, despite *Lane*, no victim or witness in any reported criminal matter had ever asserted a right to testimonial accommodations until, Ruby McDonough, a disabled woman in Massachusetts was deemed incompetent by a judge presiding over the criminal trial of her attacker. Ruby was living at the Sudbury Pines nursing home when a nurse’s aide named Kofi Agana sexually assaulted her.²¹

Ruby suffered from aphasia as a result of a stroke and was unable to say many words or speak in full sentences.²² However, medical experts informed the court that she was competent, fully aware of her surroundings, and understood the nature of what

17. 42 U.S.C. § 12132 (2006).

18. 42 U.S.C. § 12101(a)(7) (2006).

19. 28 C.F.R. §§ 35.130(b)(1) (ii), (iii) (2011).

20. 541 U.S. 509, 525 n.14 (2003) (stating that public entities are not only required to provide individuals with disabilities physical access to the courts by, for example, building wheelchair ramps, but also must ensure their meaningful participation once physical access is ensured). *See also* Popovitch v. Cuyahoga Cnty. Court, 276 F.3d 808 (6th Cir. 2002) (en banc); Galloway v. Superior Court of D.C., 816 F. Supp. 12 (D.D.C. 1993); Soto v. City of Newark, 72 F. Supp. 2d 489 (D.N.J. 1999).

21. *See* Brief for Commonwealth of Massachusetts as Amicus Curiae Supporting Respondents, *In re McDonough*, 930 N.E.2d 1279 (Mass. 2010) (No. SJC-10609), 2010 WL 1556531. Agana had previously been accused of molesting another elderly woman but she had dementia and was unable to recall what happened. *Id.*

22. *Id.*

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happened and who it was that sexually assaulted her. The experts also explained that she communicated mostly by using gestures and simple expressions; she could also answer “yes” or “no” to single subject queries.²³

During pretrial proceedings, Agana’s attorney asked the court to subject Ruby to a competency hearing. During this hearing, he took advantage of her disability and asked her questions he knew she could not answer, such as “can you tell us what happened?”²⁴ At one point, he even blocked Ms. McDonough’s view of Agana with his body and asked whether she could “see” the man who assaulted her in court. Of course, Ruby could not say “yes” because she could not “see” him, but she also could not say “no,” because she knew he was there. Ruby was frustrated and distraught because she could not explain her answer in narrative style or ask the lawyer to get out of the way.²⁵ At that point, the judge stopped the proceedings and ruled the following day that Ruby was incompetent to testify.²⁶

The case against Agana was then scheduled for dismissal since the prosecution could not prove the charges without Ruby’s testimony. The prosecutor and a volunteer lawyer from the Victims’ Rights Law Center in Boston then told Ruby nothing could be done and that no appeals could be filed. Ruby and her family were upset and concerned for the well-being of other vulnerable people to whom Agana would have access if the charges were dropped.

Unwilling to drop the case, Ruby’s family sought a second legal opinion and eventually obtained my volunteer legal services. I filed an emergency petition with a Single Justice²⁷ of the

23. *In re McDonough*, 930 N.E.2d 1279, 1284 (Mass. 2010).

24. *Id.*

25. *Id.*

26. *Id.*

27. The Supreme Judicial Court Explains:

Single Justice Sessions are held each week throughout the year for certain motions pertaining to cases on trial or on appeal, bail reviews, bar discipline proceedings, petitions for admission to the bar, and a variety of other statutory proceedings. The Associate Justices sit as Single Justice each month on a rotating schedule. The full bench renders approximately 200 written decisions each year; the single justices decide a total of approximately 600 cases annually.

About the The Supreme Judicial Court, MASS.GOV, <http://www.mass.gov/>

Massachusetts Supreme Judicial Court under Mass. Gen. Laws ch. 211, §3. This statute allows appeals to be filed when a person has suffered a violation of a “substantive right” and has no other opportunity to seek redress.²⁸ At the time, Ruby had no other avenue by which she could obtain redress as a non-party crime victim. Massachusetts courts, like nearly every state, had no grievance or other procedures in place to help ensure that people with disabilities can enforce their rights under the ADA in legal proceedings. I argued to the Single Justice that the competency ruling should be overturned because (1) Ruby had not been afforded any accommodations for her disabilities, and (2) Ruby had suffered discrimination at the hands of the judge, the prosecutor, the Victims’ Rights Law Center attorney, and defense counsel—each of whom either engaged in overt discrimination or did nothing to protect Ruby’s rights and facilitate her equal and effective participation in court.²⁹

Ruby’s appeal was initially opposed by the prosecutor and by defense counsel on the grounds that Ruby lacked standing to obtain judicial review, but the Single Justice eventually referred the case to the full Supreme Judicial Court for consideration and issued an order staying the underlying criminal trial until Ruby’s appeal was decided.³⁰ Knowing that the case was unprecedented, several disabilities rights groups filed amicus briefs in support of Ruby. At oral argument, the justices asked an unusual number of questions, indicating they were aware the case would set new precedent.³¹

Ruby’s case led to the landmark decision, *In re Ruby McDonough*, where it was announced, for the first time, that crime victims with communication disabilities must be afforded accommodations to facilitate their testimonial participation in criminal proceedings.³² The court acknowledged that Ruby’s rights had been violated and remanded the matter for further proceedings, admonishing the trial court and stating that “[i]t is

courts/court-info/sjc/about/ (last visited Mar. 28, 2014)

28. MASS. GEN. LAWS ch. 211, § 3 (2010).

29. *McDonough*, 930 N.E.2d at 1285.

30. *Id.*

31. Oral Argument, *In re McDonough*, 930 N.E.2d 1279 (No. SJC-10609), available at http://www.suffolk.edu/sjc/archive/2010/SJC_10609.html.

32. *McDonough*, 930 N.E.2d at 1293.

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incumbent on all judges and judicial staff to ensure that every person with a disability be provided with reasonable accommodation, if available, to ensure that she can be a full and equal participant in our system of justice.”³³

Upon remand, I filed a “Motion for Accommodations” with the trial court, in which I sought the issuance of an order forbidding the exploitation of Ruby’s disabilities. I also requested that the lawyers ask primarily single-subject questions that called for a “yes” or “no” response, that Ruby be allowed to testify through the use of gestures and diagrams, and she be allowed extra time to respond. Further, I requested that an expert in aphasia be allowed to testify about the nature of Ruby’s disability. Eventually, Ruby’s competency to testify was reinstated by the trial judge, and all of my requests for testimonial accommodations were granted.

The *McDonough* case opened the door to new opportunities for all disabled crime victims to achieve better access to justice. The case is especially important for people with communications disabilities considering legal proceedings requiring the communication of information. Without accommodations, people who have difficulty with expressive language simply cannot testify effectively.

While *McDonough* clearly applies when a victim has an obvious disability, such as aphasia or cerebral palsy, it also applies when victims have less obvious disabilities, such as mental health disorders that affect communication. Children who have been severely traumatized by abuse, for example, often have disabilities that interfere with their capacity to convey information effectively. While not all traumatized children are disabled, many have disorders that qualify as “disabilities” under the ADA. Such children need and are entitled to the same kinds of accommodations that enabled Ruby to participate effectively in her case.³⁴

33. *Id.* The *McDonough* court mentioned “full and equal” participation in legal proceedings implicates other rights as well. *Id.* at 1293. The court noted, “. . . the Massachusetts Constitution, Massachusetts statutes, and Federal statutes impose on State courts certain affirmative obligations to accommodate an individual with disabilities in order to provide her with access to the courts, including providing her with the ‘same rights as other persons’ to ‘give evidence.’” *Id.* at 1280.

34. Debra Niehoff, *Invisible Scars: The Neurobiological Consequences of*

III. UNDERSTANDING TRAUMATIZED CHILDREN'S DISABILITIES IN THE CONTEXT OF LEGAL PROCEEDINGS

The number of abused children in the United States—and, accordingly, the need to provide such children with special accommodations in legal proceedings—is increasing at an alarming rate.³⁵ Abuse of a child is reported every ten seconds and at least five children die from abuse or neglect every day.³⁶ At least 20% of female and 5–10% of male children are sexually abused,³⁷ and some researchers estimate that the actual number of sexually abused children reaches into the millions every year.³⁸ Of the crimes reported to child protective services, very few are accepted for criminal prosecution.³⁹

A frequently cited reason for why more cases are not prosecuted is a desire to spare the child the additional trauma of participating in the legal system and testifying in court.⁴⁰ While some stress is unavoidable for any person who participates in the

Child Abuse, 56 DEPAUL L. REV. 847 (2007).

35. *National Child Abuse Statistics*, CHILDHELP, <http://www.childhelp.org/pages/statistics> (last visited Jan. 20, 2014),

36. See U.S. DEPT OF HEALTH AND HUMAN SERVICES: ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, *available at* <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment> (last visited Jan. 20, 2014).

37. Jennifer J. Freyd et al., *The Science of Child Abuse*, 308 SCI. 501, 501 (2005).

38. See REBECCA BOLEN & DIANA RUSSELL, *THE EPIDEMIC OF RAPE AND CHILD SEXUAL ABUSE IN THE UNITED STATES* 85, 211 (2000) (Forty percent of adults report being sexually victimized as children, which translates into an annual incidence rate in the many millions).

39. John E.B. Myers, *Adjudication of Child Sexual Abuse Cases*, 4 SEXUAL ABUSE OF CHILDREN 84, 91 (1994), *available at* http://futureofchildren.org/futureofchildren/publications/docs/04_02_04.pdf.

40. AMERICAN PROSECUTORS RESEARCH INSTITUTE, *INVESTIGATION AND PROSECUTION OF CHILD ABUSE*, 187–88 (3d ed. 2004). But, note that many children benefit from testifying against their assailants, and some children actually feel worse if they do not testify. See STRESS, TRAUMA, AND WELLBEING IN THE LEGAL SYSTEM 94 (Monica K. Miller, Brian H. Bornstein eds., 2013) (citing Gail S. Goodman et al., *Testifying in Criminal Court*, 57 MONOGRAPHS SOC'Y RES. CHILD DEV. 1 (1992); Jodi A. Quas et al., *Childhood Sexual Assault Victims: Longterm Outcomes after Testifying in Criminal Court*, 70 MONOGRAPHS SOC'Y RES. CHILD DEV. 1 (2005); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003); and TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW* (2002)).

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legal process, children suffer more than adults because of their unique intellectual, physical, and emotional immaturity.⁴¹ Confusion about the nature of legal proceedings also causes added stress for children.⁴² Moreover, children endure an extra risk of harm when testifying about their own victimization because testifying exposes them to at least some fear of reprisal, which could be a significant contributor to children's psychological suffering in the aftermath of violence.⁴³ Such fear is particularly common when the abuser is a caretaker or when there is intrafamilial abuse.⁴⁴ Even when the offender is not a caretaker, fear remains a significant risk factor, particularly when the perpetrator and victim are acquainted,⁴⁵ which is true 90% of the time.⁴⁶

Sexual abuse victims endure even more harm because, for one reason among many others, they are disproportionately exposed to harsh and intimate questioning.⁴⁷ Older female children, in

41. See, e.g., STRESS, TRAUMA, AND WELLBEING IN THE LEGAL SYSTEM 98 (Monica K. Miller, Brian H. Bornstein eds., 2013) (citing Jennifer L. Altshuler & Diane N. Ruble, *Developmental Changes in Children's Awareness of Strategies for Coping with Uncontrollable Stress*, 60 CHILD DEV. 1337 (1989); Karen D. Rudolph, Marie D. Dennig & John R. Weisz, *Determinants and Consequences of Children's Coping in the Medical setting: Conceptualization, Review, and Critique*, 118 PSYCHOL. BULL. 328 (1995); and Ellen A. Skinner & Melanie J. Zimmer-Gembeck, *The Development of Coping*, 58 ANN. REV. PSYCHOL. 119 (2007)); Stephanie D. Block, Diane Oran, Gail S. Goodman & Howard Oran, *Children in Dependency Court*, Paper Presented at the American Psychology-Law Society Meetings (Mar. 2005) (Children lack the intellectual capability to understand complex ideas such as justice and the legal system).

42. STRESS, TRAUMA, AND WELLBEING IN THE LEGAL SYSTEM 95 (Monica K. Miller, Brian H. Bornstein eds., 2013) (citing Gail S. Goodman et al., *Face-to-Face Confrontation: Effects of Closed Circuit-Technology on Children's Eyewitness Testimony and Juror's decisions*, 22 L. & HUM. BEHAV. 165 (1998); and Jodi Quas et al., *Maltreated Children's Understanding of and Emotional Reactions to Dependency Court Involvement*, 27 BEHAV. SCI. & L. 97 (2009)).

43. RICHARD MCLEARY & DOUGLAS J. WIEBE, CRIME VICTIMS WITH DEVELOPMENTAL DISABILITIES 10 (Joan Petersilia et al. eds., 1999).

44. JENNIFER J. FREYD & PAMELA J. BIRRELL, BLIND TO BETRAYAL: WHY WE FOOL OURSELVES WE AREN'T BEING FOOLED (2013).

45. Melissa M. Foynes et al.; *Child Abuse: Betrayal and Disclosure*, 33 CHILD ABUSE & NEGLECT 209, 217 (2009).

46. Howard N. Snyder, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS (July 2000).

47. CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 342 (Michael E. Lamb et al. eds., 2d ed. 2011) (citing

particular, face extra risks related to fear because they often perceive the legal system as unfair.⁴⁸ Additionally, delays in legal proceedings are common and are highly associated with retraumatization of child victims,⁴⁹ as is having a child testify for an extended period of time.⁵⁰ Interestingly, child witness preparation programs do not appear to help decrease the trauma and stress that child victims face through the judicial system.⁵¹ However, a questioner's relationship of trust with the child can reduce his or her level of stress.⁵²

Not surprisingly, perpetrators of sexual violence choose children as their victims in part because they expect children not to report the crime or be capable of testifying.⁵³ The data on children with disabilities is even more troubling. Like adults with disabilities,⁵⁴ disabled children experience abuse at even greater

Karen J. Saywitz, Gail S. Goodman, Elisa Nicholas & Susan F. Moan, *Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse*, 59 J. CONSULTING & CLINICAL PSYCHOL. 682 (1991).

48. See, e.g., C. Eastwood, W. Patton & H. Stacy, *Surviving Child Sexual Abuse and The Criminal Justice System*, Paper Presented at the Children and Crime: Victims and Offenders Conference convened by the Australian Institute of Criminology (June 17–18, 1999), available at http://www.aic.gov.au/media_library/conferences/children/eastwood.pdf; HANDBOOK OF GIRLS' AND WOMEN'S PSYCHOLOGICAL HEALTH 89 (Judith Worell & Carol D. Goodheart eds. 2005).

49. Lucy Berliner & Jon R. Conte, *The Effects of Disclosure and Intervention on Sexually Abused Children*, 19 CHILD ABUSE & NEGLECT 371 (1995).

50. TALI GAL, CHILD VICTIMS AND RESTORATIVE JUSTICE: A NEEDS-RIGHTS MODEL 96 (2011) (citing Debra Whitcomb, *Legal Interventions for Child Victims*, 16 J. Traumatic Stress 149 (2003)).

51. CHILDREN'S TESTIMONY: A HANDBOOK OF PSYCHOLOGICAL RESEARCH AND FORENSIC PRACTICE 342 (Michael E. Lamb et al. eds., 2d ed. 2011) (citing L.D. SAS, A. HATCH, S. MALLA, T. DICK & P. HURLEY, THREE YEARS AFTER THE VERDICT: A LONGITUDINAL STUDY OF THE SOCIAL AND PSYCHOLOGICAL ADJUSTMENT OF CHILD WITNESSES REFERRED TO THE CHILD WITNESS PROJECT (1993)).

52. Jim Henry, *System Intervention Trauma to Child Sexual Abuse Victims Following Disclosure*, 12 J. INTERPERSONAL VIOLENCE 499, 499 (1997).

53. ANNA C. SALTER, PREDATORS: PEDOPHILES, RAPISTS, AND OTHER SEX OFFENDERS (2003).

54. DICK SOBSEY, VIOLENCE AND ABUSE IN THE LIVES OF PEOPLE WITH DISABILITIES: THE END TO SILENT ACCEPTANCE? 87 (1994) (confirming in striking detail that crimes against people with disabilities occur at much higher rates than crimes against non-disabled people).

rates than non-disabled children do.⁵⁵

Though many child victims are disabled before the crime occurs, others develop disabilities after, or *because of*, the crime.⁵⁶ In one study, 80% of twenty-one-year-olds who were abused as children met the criteria for at least one psychological disorder.⁵⁷ In another study, as many as two-thirds of people in treatment for drug abuse reported being abused or neglected as children.⁵⁸ The Massachusetts Supreme Judicial Court in *McDonough* acknowledged the particular need for accommodations when the crime itself inflicts injury on a victim such that the victim's ability to testify is constrained, noting that excluding testimony in such circumstances "imposes a particular hardship on the victim."⁵⁹

Whether these concerns render a child disabled under the ADA depends on an analysis of two factors: (1) is there a physical or mental impairment that "substantially limits" one or more life activities, and if so, (2) is there "a record" of such impairment or is the person "regarded" as having such an impairment?⁶⁰ A "physical impairment" is defined as:

Any medical disorder, condition, disfigurement or loss affecting one of the body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine.⁶¹

A "mental impairment" is defined as "[a]ny mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or

55. *Id.*

56. A.P. DePrince et al., *Motivated Forgetting and Misremembering: Perspectives from Betrayal Trauma Theory*, NEBRASKA SYMPOSIUM ON MOTIVATION 193, 243 (2012).

57. CHILD WELFARE INFORMATION GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 5–6 (2013).

58. Neil Swan, *Exploring the Role of Child Abuse on Later Drug Abuse*, NAT'L INST. ON DRUG ABUSE (July 1998), http://archives.drugabuse.gov/NIDA_Notes/NNVol13N2/exploring.html.

59. *In re McDonough*, 930 N.E.2d 1279, 1285 (Mass. 2010).

60. 29 C.F.R. § 1630.2(k) (2011). *See generally* Laurel M. Cohn, *When Is Individual Regarded as Having, or Perceived to Have, Impairment Within Meaning of Americans with Disabilities Act (42 U.S.C.A. § 12102(2))*, 148 A.L.R. FED. 305 (1998).

61. 29 C.F.R. § 1630.2(h)(1).

mental illness, and specific learning disabilities.”⁶² A “major life activity” refers to “functions such as: bathing, dressing, going to the restroom; performing manual tasks including eating, sleeping, speaking, learning, reading, concentrating, thinking, communicating, interacting with others, and working.”⁶³ As discussed above, a plethora of research demonstrates that victimized children often endure substantial impairments, especially mental impairments that interfere with major life activities such as learning concentrating, thinking and communicating. Moreover, an individual need not produce scientific, medical, or statistical evidence to prove that a disability interferes with major life activities.⁶⁴ It is enough that a credible claim is made. This holds true even if a disability is only “short term or episodic.”⁶⁵

In determining which accommodations are appropriate, a judge should “give primary consideration to the accommodation requested” by the individual with a disability.⁶⁶ However, a court is not limited to the “accommodation requested” as the ADA is to be liberally construed and a court should broadly consider all options including “auxiliary aids and services,” “interpreters,” “devices,” and “other services and actions”⁶⁷ not requested by the child. This may include allowing a child to answer only those questions that are framed in a manner that accommodates a child’s mental health and cognitive needs related to his or her disability. Under the ADA, courts that decline to allow all necessary accommodations risk legal action and sanctions⁶⁸ not

62. See 29 C.F.R. § 1630.2(h)(2).

63. 29 C.F.R. § 1630.2(i).

64. 29 C.F.R. §§ 1630.2 (j)(1)(i), (j)(1)(ii).

65. 29 C.F.R. § 1630.2 (j)(1)(vii).

66. Cf. 28 C.F.R. § 35.160(b)(2) (2009).

67. 28 C.F.R. § 35.160(b)(1).

68. Recourse for any injury suffered by a court’s denial of reasonable accommodations is the initiation of a separate action in a court of competent jurisdiction. *In re McDonough* 930 N.E.2d 1279, 1287 (Mass. 2010) (citing MASS. GEN. LAWS ch. 93, § 103(b) (2010) (“Any person whose rights under the provisions of subsection [a] have been violated may commence a civil action for injunctive and other appropriate equitable relief . . . in the superior court . . .”)); 42 U.S.C. § 12133 (2006) (setting forth “remedies, procedures, and rights” available “to any person alleging discrimination on the basis of disability in violation” of Title II of ADA). Cf. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (stating that individuals may sue State under

only because accommodations are mandatory under federal law, but also because children face a disproportionate risk of suffering additional harm from participating in legal proceedings without accommodations.⁶⁹

While individual children's needs vary, suggested accommodations could include:

1. Allowing children to communicate (with investigators, experts, guardians ad litem, and fact-finders, both during the investigation and testimony) by videotape or closed-circuit television, or other electronic means, or through the testimony of a third-party, or outside the courtroom and away from the presence of the accused.
2. Allowing children to communicate using gestures, diagrams and other non-verbal means.
3. Requiring attorneys, judges, guardians ad litem, investigators and fact-finders to formulate questions using vocabulary, terminology and phraseology consistent with a child's ability to understand the question and respond reliably, and forbidding questions that may be misunderstood, or provoke an unreliable response, or exploit a child's disability.
4. Allowing children to hold a comforting item such as a stuffed animal.
5. Allowing children to avoid all contact with the accused during the investigative and pretrial period, and to sit facing away from the accused during all legal proceedings.
6. Forbidding repetitive or protracted questioning of children.
7. Forbidding continuances that cause needless delay of the trial;
8. Allowing children to be represented by attorneys free

ADA claiming infringement of "fundamental right of access to the courts").

69. See U.S. DEP'T OF JUSTICE: OFFICE FOR VICTIMS OF CRIME, *BREAKING THE CYCLE OF VIOLENCE: RECOMMENDATIONS TO IMPROVE THE CRIMINAL JUSTICE RESPONSE TO CHILD VICTIMS AND WITNESSES* 5 (1999), <http://www.ojp.usdoj.gov/ovc/publications/factshts/monograph.htm>, (proposing special accommodations for child witnesses in the United States Criminal Justice System)

from all conflicts and with expertise in the child's particular disability as well as relevant state and federal disability laws;

9. Allowing a family member, medical caregiver, or expert familiar with the child's disability to provide assistance to the court in interpreting and understanding a child's needs throughout the process.

More ideas for accommodations can be found in related laws and guidelines. For example, in Massachusetts, witnesses with mental retardation have the option to testify off the witness stand in the courtroom.⁷⁰ Massachusetts also allows the testimony to be taken at another location within the courthouse but outside the courtroom if the proceeding is in front of a judge rather than a jury.⁷¹ During a jury trial, testimony may be taken by videotape outside the courthouse, in a location chosen by the court or by agreement of the parties.⁷² Although these laws apply only to witnesses with the disability of mental retardation, they offer guidance for the kinds of accommodations that might be effective for disabled children generally. Likewise, laws that apply to non-disabled children (such as those that allow a child to hold a stuffed animal during testimony), even if rendered unconstitutional as a matter of state law on the grounds that they evoke unfair sympathy, may nonetheless be proper for a disabled child under the ADA because federal law is supreme. Thus, the fact that a statute was struck down as unconstitutional under state law when applied to the needs of non-disabled children will pose no barrier when applied to disabled children under federal law.

If courts do not know what accommodations to provide in certain situations, many states also have advocacy groups that can offer guidance as to the reasonableness and availability of accommodations for a particular child.⁷³ Also, law enforcement

70. MASS. GEN. LAWS ch. 233, § 23E (b)(1)(ii) (2010).

71. *Id.*

72. *Id.*

73. For example, the Massachusetts Disabled Persons Protection Commission (DPPC), created by Mass. Gen. Laws ch. 19C, assists individuals with disabilities who testify in support of the prosecution of their abusers. *Overview, Disabled Persons Protection Commission*, MASS.GOV, <http://www.mass.gov/dppc/about/overview.html> (last visited Mar. 28, 2014). The DPPC works with specially-trained State Police who assist in the investigation and

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organizations such as the Department of Justice have information and services available to help courts and victims identify reasonable and available accommodations.⁷⁴

IV. ENFORCEMENT OF RIGHTS AT THE TRIAL COURT LEVEL, THE APPELLATE LEVEL, AND DURING COLLATERAL REVIEW

A disabled person has no hope of enforcing their rights under the ADA without knowledge that such rights exist;⁷⁵ and, although the obligation to notify a person of her rights in a criminal case sometimes rests with the prosecutor, the duty to provide notice to a disabled witness rests with the “public entity” responsible for complying with the ADA.⁷⁶ In general, the administrative office of a court, not an individual judge, will assume that responsibility in the first instance. The proper method for providing such notice, and the proper response to requests for accommodations, will vary depending on the role of the person making the request (e.g., litigant, witness, juror) and the type of accommodation requested (wheelchair access, sign language interpreter).⁷⁷

A witness with a disability (or the party proffering the testimony of that witness) should alert the appropriate representative of the court, the police department or social service agency as soon as possible that accommodations are necessary,

interviewing process. *Id.*

74. For example, the California District Attorneys Association has produced a training program addressing ways that courts and law enforcement officials can effectively interview victims with disabilities and ensure their ability to testify. *See also* Cheryl Guidry Tyiska, *Working with Victims of Crime with Disabilities*, OFFICE FOR VICTIMS OF CRIMES ARCHIVE (2008), https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm (noting that criminal justice agencies have a duty to be proactive in providing accommodations and that it is “imperative” that disabled crime victims be assisted throughout the entire criminal justice process).

75. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (minimum due process requires notice and a meaningful hearing); *accord Commonwealth v. Makara*, 980 A.2d 138, 140 (Pa. 2009) (private third-party in criminal trial had “due process” right to notice and a hearing regarding defense request for access to confidential files).

76. 28 C.F.R. §§ 36.160, 36.160(a) (2011).

77. *Cf.* 28 C.F.R. § 35.106 (2009) (Under the ADA, the “public entity shall make available to . . . participants . . . and other interested persons information regarding the provisions of this part and its applicability to the services, programs, or activities of the public entity.”).

and the witness should identify the specific accommodations sought. For example, if a child needs accommodations during an interview with a law enforcement official, a particular accommodation should be requested of the interviewer, as well as the head of the department or agency involved. Notification should be provided in writing, and, if accommodations are sought in connection with existing legal proceedings, notice should be sent to the all parties as well as the judge presiding over the matter. A request should be made as promptly as possible to ensure that the public entity has sufficient time to comply with the request. Where the need for accommodation is “obvious,” the judge or public entity may be obligated to provide an accommodation even without a specific request.⁷⁸ As a practical matter, it will usually be apparent when a child has a disability. Indeed, the mere fact that the witness is a child should suffice to merit at least an inquiry from the public entity as to whether accommodations might be necessary.⁷⁹ Because the consequences of an actual legal proceeding are arguably more serious than the consequences of an interview with a social worker, a judge presiding at the legal proceeding is wise to proactively advise the child, and his or her legal guardian, of the child’s right to seek accommodations and obtain advice of a disability rights advocacy organization or independent counsel before proceeding with an interview or testimony.

While courts typically do not assume responsibility for giving legal advice to victims, judges should take responsibility for informing children of their rights under the ADA just as they take affirmative steps to protect other kinds of rights on behalf of other non-party witnesses.⁸⁰

78. 42 U.S.C. § 12112 (2006); see George S. Howard, Jr., *What Constitutes a “Reasonable Accommodation” under the Americans with Disabilities Act is Determined on a Case-by-Case Basis*, PRAC. INSIGHTS EMP. CA 0073 (West June 20, 2013).

79. The mere fact that a child is subjected to a hearing to determine competency or reliability is enough to alert the court that it has an obligation to inquire as to the need for accommodations. See *Guardianship of Zaltman*, 853 N.E.2d 663, 683 (Mass. App. Ct. 2006) (documents before the court created a “duty” on the part of the judge to ascertain facts regarding ward’s competence).

80. *Commonwealth v. Rocha*, 784 N.E.2d 651, 654 (Mass. App. Ct. 2003) (court appointed a guardian ad litem to protect the interests of mentally

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Because a child's disability may not be obvious, and the disability itself may inhibit a person from asking for accommodations, it may be more efficient and practical to require that a judge affirmatively advise all children—if not all victims and witnesses—of their rights under the ADA, at the outset of a criminal prosecution. Providing notice to everyone rather than only those with obvious disabilities will ensure that all disabled persons are notified of their rights, while protecting against the stigma that may arise from a more targeted notification process that informs only witnesses who identify as disabled or who display obvious infirmities.

Once notice of rights is provided, the individual with the disability, with assistance from a legal guardian or independent counsel, has primary authority to identify for the court the most effective accommodations.⁸¹ It may be appropriate in certain cases for the prosecutor to assist the court in identifying and protecting a child's accommodation needs; however, primary responsibility should not rest exclusively with the prosecutor given that the state's interests and those of a child victim may not always align. The judge, as the neutral arbiter and responsible "public entity," is better situated to ensure enforcement of the ADA because the prosecutor is ethically restrained from zealously advancing the personal rights of crime victims.⁸²

retarded crime victim); *U.S. v. Lowe*, 948 F. Supp. 97, 101 (D.Mass. 1996) (private counsel appointed by court to assist victim in deciding whether to waive her privacy rights); MASS. GEN. LAWS ch. 258B, § 3(j) (2010) (court must inform victims and witnesses of "procedures to be followed in order to apply for and receive any witness fee to which they are entitled."); *Taylor v. Commonwealth*, 338 N.E.2d 823, 829 (Mass. 1975) (judges should advise witnesses of privilege against self-incrimination). Some states, such as Illinois, mandate that victims receive notice of accommodation rights from the prosecutor as a feature of their victims' rights laws. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 120/4.5(b) (West 2014) (the Office of the State's Attorney "shall provide notice to the crime victim of the right to have a translator present at all court proceedings and, in compliance with the federal Americans with Disabilities Act of 1990, the right to communications access through a sign language interpreter or by other means"). Notice in Illinois must be provided to a crime victim "at the initial contact with the criminal justice system by the appropriate authorities and shall be conspicuously posted in all court facilities." *Id.*

81. *See* 28 C.F.R. § 35.160 (2011) (noting that the disabled person's understanding of her own disability and needs provides the best opportunity for the public entity to identify most effective accommodations).

82. *See* *Commonwealth v. Beal*, 709 N.E.2d 413, 416 (Mass. 1999)

A. *How does a child obtain judicial review if a request for accommodations is denied?*

If a disabled child is denied reasonable, necessary and available accommodations, is disallowed to testify or is adjudicated incompetent⁸³ because of a disability, any objection should be presented to the judge who should resolve the issue at a hearing, preferably before trial. If the objection is overruled, the individual can seek redress from federal and state oversight agencies. In addition, he or she can file a direct legal action against the court for violating the ADA.⁸⁴ It may also be possible for a child to pursue an emergency interlocutory appeal or special writ, though state laws vary as to the availability of such options.⁸⁵ Although interlocutory orders are not usually appealable, orders implicating a crime victim's rights under the ADA involve issues collateral to the basic controversy, thus, an appeal before trial is appropriate because an appeal after the litigation concludes would be fruitless.⁸⁶ Furthermore, while

(stating that the prosecutor does not represent the victim).

83. At least one jurisdiction has recognized a fundamental right to judicial review of a ruling on competency because it directly implicates the liberty interests of the adjudicated individual. *See Tingle v. Harville*, 187 S.E.2d 536 (Ga. App. Ct. 1972) (stating that competency determinations are subject to judicial review because they affect constitutional rights and impact "important American rights to liberty . . . and freedom . . .")

84. *In re McDonough*, 930 N.E.2d 1279, 1291–92 (Mass. 2010).

85. *Compare McDonough*, 930 N.E.2d at 1291–92, *with Commonwealth v. Makara*, 980 A.2d 138 (Pa. 2009).

86. *Brum v. Town of Dartmouth*, 704 N.E.2d 1147, 1150 (Mass. 1999) (interlocutory order immediately appealable because it concerned issue collateral to basic controversy and later appeal would have been futile); *Maddocks v. Ricker*, 531 N.E.2d 583, 589 (Mass. 1988) ("[I]f the appeal from an order . . . involves issues collateral to the basic controversy and if an appeal from a judgment dispositive of the entire case would not be likely to protect the client's interests, interlocutory review is appropriate."). *See also Lenardis v. Commonwealth*, 891 N.E.2d 674, 674 (Mass. 2008) (direct appeal from order compelling witness to provide DNA sample when witness refuses to comply, is held in contempt, and appeals therefrom); *Commonwealth v. Silva*, 864 N.E.2d 1, 4 (Mass. 2007) (holding media organization may file interlocutory appeal of court order limiting access to judicial proceedings); *U.S. v. LaRouche*, 841 F.2d 1176 (1st Cir. 1988) (interlocutory appeal by third-party recipient of defense subpoena seeking discovery of witness statements); *Commonwealth v. Makara*, 980 A.2d 138 (Pa. 2009) (private third-party has standing to file interlocutory appeal on collateral matter affecting third-party privacy and due process rights in criminal trial); *Doe v.*

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crime victims in general often lack standing to file a direct appeal *within the criminal litigation* from violations of generic victims' rights laws on the grounds that a victim "has no legal interest in the prosecution of another,"⁸⁷ children with disabilities in every jurisdiction have standing to seek any and all remedies since a violation of the ADA causes injury to the child's cognizable federal rights.⁸⁸

V. CONCLUSION

The ADA is rarely used for its intended purpose in criminal justice matters on behalf of disabled victims and witnesses, especially children, primarily because the law's intended

U.S., Clerk of the Dist. Court, 666 F.2d 43 (4th Cir. 1981) (victim has standing as a private third-party to independently challenge an evidentiary ruling in a criminal case by initiating an appeal because "the remedy [of appeal] is implicit as a necessary corollary of the rule's explicit protection of the privacy interests Congress sought to safeguard"); *U.S. v. Saunders*, 736 F. Supp. 698 (E.D.Va. 1990) (citing *Doe* and noting that victims have independent standing to appeal adverse rape-shield rulings in criminal cases because, without the right of appeal, "victims aggrieved by the court's order will have no opportunity to protect their privacy" from forbidden invasions); *D.M.R. v. Kendrew*, 634 N.E.2d 109, 111 (Mass. 1994) (non-party agency correctly sought relief under chapter 211 section 3 of Massachusetts General Laws from an order of a criminal court judge because there was no alternative remedy).

87. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *See also Hagen v. Commonwealth*, 772 N.E.2d 32, 36–37 (Mass. 2002) (denying crime victim "standing to bring the motion" for the purpose of filing an appeal from the denial of her right to a "prompt disposition" under chapter 258B of Massachusetts General Laws, the so-called "Victims' Bill of Rights"; but granting the victim limited standing to seek enforcement of her right at the trial level); *see id.* at 38 ("victims should be permitted an opportunity to address the court directly when their fundamental right to a prompt disposition is jeopardized. If a victim is prohibited from bringing to a judge's attention that there has been a delay in the proceedings, the right afforded by the statute is essentially meaningless."). Justice Cowin's concurrence in *Hagen*, critical of the majority, explicitly makes the point: "the court, while conceding that the victim is not a party, nevertheless creates a *right* of victims to participate in the proceeding as a non-party." *Id.* at 38–39 (emphasis added).

88. *Ex parte Young*, 209 U.S. 123 (1908); *see Virginia Office for Prot. and Advocacy v. Stewart*, 131 U.S. 1632 (2011); *see also Gabriel v. Borowy*, 85 N.E.2d 435, 438 (Mass. 1949) ("Where a statutory right is conferred upon a class of individuals as distinguished from the public at large but no remedy is provided by the statute for the enforcement of the right, the right may be asserted by any appropriate common law remedy that is available. Otherwise, the right would be useless and illusory.").

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beneficiaries are rarely aware that they even have rights. Nevertheless, the landmark *McDonough* decision holds great promise that American courts will provide more and better enforcement of rights for all victims with disabilities, particularly traumatized children who stand little chance of obtaining effective and equal justice without the ADA. Affording traumatized children reasonable accommodations to improve the quality of their testimonial participation in legal proceedings will promote children's well-being and enhance the integrity of justice for all children.