BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY
OFFICE OF ADMINISTRATIVE HEARINGS

IN RE OFFICE OF ADMINISTRATIVE HEARINGS CASE NO. 227-2017:

ALISCHA MASON,	)	
	)	
Charging Party,	)	HEARING OFFICER DECISION
	)	AND NOTICE OF ISSUANCE OF
vs.	)	ADMINISTRATIVE DECISION
	)	
MONTANA DEPARTMENT OF PUBLIC HEALTH & HUMAN SERVICES,	)	
	)	
Respondent.	)	

* * * * * * * * * * *

I. PROCEDURAL AND PRELIMINARY MATTERS

Alischa Mason brought this complaint alleging the Montana Department of Public Health and Human Services (DPHHS) discriminated against her on the basis of her disability of hearing loss, learning disability and psychiatric disability in the provision of government services in violation of the Montana Human Rights Act, Mont. Code Ann. § 49-2-308 and the Governmental Code of Fair Practices, Mont. Code. Ann. § 49-3-205.

Hearing Officer Caroline A. Holien convened a contested case hearing in this matter on January 17, January 18, January 19, and January 20, 2017 in Helena, Montana. Beth Brenneman and Roberta Zenker, attorneys at law, represented Mason. Mary Tapper and Vicki Knudsen, attorneys at law, represented DPHHS.

Mason, Kathy Hampton, Dr. Michelle Danielson, Dana Hillyer, Sandi McDonald, Lisa Gault, Amy Russell, Dr. Mark Mozer, Dr. Art Becker-Weidman, Dr. Gabriel Lomas, Brie Oliver, R.N., Brandon Moore, Michelle Maltese, Anne Peterson,

Jane McFarlane, Mary Huigen, Adria Willis, Kevin Hurlbut, Linda Mason, Michelle Silverthorne, Maurita Johnson[1], and Brent Lashinski testified under oath.

Charging Party's (C.P) Exhibits 1, 2, 6, 7, 9, 10, 15, 24, 29, 30, 31, and 41 were admitted into the record, as were Respondent's (R) Exhibits103 through 115, 117, 118, 119, 122 through 126, 128 through 131, 133, 134, 135, and 136.

The Hearing Officer granted the parties' motion to seal those documents subject to the order issued by District Court Judge Kathy Seeley dated January 13, 2017. Those exhibits contain private and/or sensitive medical information in which the affected parties' right to privacy outweighs the public's right to access that information. The following exhibits do not appear to contain confidential information and should not be subject to the Hearing Officer's order: C.P. Exs. 6, 10, 29, 30, 41, and R. Ex. 103.

The parties submitted post-hearing briefs and the matter was deemed submitted for determination after the filing of the last brief, which was timely received on April 14, 2017. Based on the evidence adduced at hearing and the arguments of the parties in their post-hearing briefing, the following hearing officer decision is rendered.

II. ISSUES

1. Did DPHHS discriminate against Alischa Mason on the basis of disability in the area of government services in violation of the Montana Human Rights Act, Title 49, Chapter 2, Mont. Code Ann.?

2. If DPHHS did illegally discriminate against Alischa Mason, as alleged, what harm, if any did she sustain as a result and what reasonable measures should the department order to rectify such harm?

3. If DPHHS did illegally discriminate against Alischa Mason as alleged, in addition to an order to refrain from such conduct, what should the department require to correct and prevent similar discriminatory practices?

[1]The hearing officer declined to recognize Johnson, Administrator, Child and Family Services Division, as an expert witness due to the failure of DPHHS to disclose her as an expert witness by the deadline set in the scheduling order. Johnson was allowed to testify as a rebuttal witness.

III. FINDINGS OF FACT

Background

1. Alischa Mason is a 39-year-old woman who resides in Helena, Montana.

2. Mason has been deaf since birth. Mason attended the School for the Deaf in Great Falls, Montana from the age of three until she was 18 or 19 years old.

3. Mason had a cochlear implant in approximately 1997. Mason's deafness substantially limits her ability to hear and to communicate. Mason communicates exclusively through sign language and requires a qualified interpreter to communicate. Mason's deafness has also substantially limited her ability to read the written word. Mason understands short sentences but has difficulty understanding longer sentences and paragraphs.

4. Mason has never been diagnosed as being intellectually or developmentally disabled. Mason's mother has never regarded her daughter as being intellectually or developmentally disabled.

5. Dr. Dean Gregg, Ph.D. first tested Mason in approximately 2005 and determined she was not intellectually disabled. Dr. Gregg is a Clinical Psychologist whose practice is located in Helena, Montana. As a result of Dr. Gregg's determination in 2005, Mason has never qualified to receive services through Vocational Rehabilitation that are available for those individuals determined to have developmental disabilities.

6. Mason has worked part-time as a dishwasher at St. Peter's Hospital for approximately 17 years. Mason has also worked for Helena Industries an average of 25 hours per week for approximately ten years.

7. Mason has lived in her own home for several years. Mason has frequently required the assistance of her mother and others for many daily life activities including medication management, basic housekeeping, work/employment, transportation, and finance management. However, Mason has essentially lived independently for several years and recently obtained her driver's license.

8. Mason's paramour, Robbie, has lived in Mason's home for approximately 17 years. Robbie is developmentally disabled and has suffered several physical injuries over the years that has required him to receive assistance in performing his daily cares. Robbie's health issues ultimately required him to move from the home

into an assisted living facility approximately one year ago. Mason, at the time of hearing, lived with a male family member, who is also deaf and who has children of his own who are not living in Mason's home.

9. Mason and Robbie considered themselves to be a committed couple and held themselves out as such throughout their relationship.

10. Kevin Hurlbut was Robbie's service provider from April 2011 through March 2015. Hurlbut worked with Robbie approximately two hours a day five days a week assisting him with his daily cares, errands, and other daily activities. Hurlbut Tr., 720:8-23. Hurlbut took Robbie and Mason to Wal Mart every other week to purchase groceries. Hurlbut Tr., 721:3-6.

11. Hurlbut did not understand sign language and did not have a qualified interpreter with him when he interacted with Mason. Hurlbut was in a position to observe Mason's behavior, including her behavior toward Robbie. Hurlbut felt Mason often "bullied" Robbie and treated him in a demeaning fashion. Hurlbut Tr., 722:2-19. Robbie often showed Hurlbut text messages he received from Mason that read as though Mason was "cussing him out." Hurlbut Tr., 721:19-21.

12. Hurlbut had frequent disagreements with Mason and her mother regarding Mason's treatment of Robbie and financial issues involving Robbie. Hurlbut was concerned about Mason's outbursts that were directed at Robbie and arranged for another room in the home to be treated as Robbie's "safe room." The room included a bed, a television and other things that Robbie could use when he felt the need to separate himself from Mason. Hurlbut Tr, 728:21-25 - 729:1-11. To Hurlbut's knowledge, Robbie never used the "safe room." Hurlbut Tr., 729:13-14. The room was turned into Earl's room when he moved into the home.

13. Hurlbut frequently expressed concern about the state of the home Robbie shared with Mason, which he considered "deplorable." Hurlbut Tr, 721:12-25. Hurlbut observed that litter boxes were frequently overflowing with animal waste, that was often tracked through the home. Id. Hurlbut arranged for an outside cleaning service to come in to the home that was paid for by Robbie. Id. Hurlbut often had to have Robbie and Mason clean the home enough for the cleaners to agree to come in to the home. Hurlbut Tr., 725:7-10.

14. Hurlbut felt Mason took advantage of Robbie by having him perform menial tasks for her such as rubbing her feet at night before she fell asleep and caring for Mason's cats. Hurlbut Tr: 729:22-24 and 730:14-22.

15. At one point, Hurlbut reported concerns to Adult Protective Services that Robbie was paying a larger share than Mason for the upkeep and maintenance of the home owned by Mason. Hurlbut Tr: 726:10-16.

16. In April 2014, a second couple moved into Mason's home. The couple consisted of man named Earl and his girlfriend, who moved out of the home a short time later. Linda Mason Tr., 762:2-8.

17. At some point, Earl and Mason began having sexual contact. Mason testified at hearing that she was frightened of Earl, who she described as a "bad man." Mason testified, ". . . [Earl] wanted to make me get pregnant, and so it was his idea. And he made me have sex with him and I was scared and I didn't know what to do." Alischa Mason Tr., 249:22-24.

18. Mason was noted as having told Dana Hillyer, Advanced Practice Psychiatric Nurse (APRN), who worked with Mason for several years, that Earl "agreed to help her significant other out who is impotent." Ex. 118, p. 56. Hillyer noted, "[Mason] remembers that 12 years ago she was playing a video game and one of the characters was named Stephen and she knew that she would have a baby someday and she would name the baby Stephen." Ex. 118, p. 72.

19. In October 2014, Mason discovered she was pregnant. Mason's mother notified Sandi McDonald. McDonald Tr., 153:14-15. McDonald assisted Mason with finding and keeping jobs, as well as other issues, for more than 20 years. McDonald Tr., 136:10-13. McDonald worked as an Employment Placement Specialist with Helena Industries since August 1986. Id. at 135:9. McDonald assists individuals with mental and/or physical disabilities to seek and obtain employment.

20. McDonald uses signing exact with Mason, which means she signs exactly what is said rather than the more conceptual approach used in American Sign Language (ASL). McDonald Tr., 139:4-12. If Mason is unable to understand her, McDonald tries to explain things in a different way until Mason indicates she understands. Id. at 16-19. Mason and McDonald have had a close working relationship with McDonald having played a large part in Mason's life for many years.

21. McDonald has never received a report indicating Mason is intellectually or developmentally disabled; nor has she ever received a report regarding Mason's cognitive skills. McDonald Tr., 160:1-3.

22. Mason frequently becomes upset or frustrated when things do not go right or something unexpected happens. McDonald assists Mason in dealing with those situations in the workplace in an effort to avoid causing a disruption at work and jeopardizing her employment. McDonald Tr., 138:21-25.

23. McDonald has also helped Mason with other things such as creating a checklist to ensure the house stayed tidied; going grocery shopping; ensuring Mason took her medications as prescribed; and arranging rides for Mason. McDonald Tr., 143:17-25. Mason's mother and Robbie also assisted Mason with those type of things. Mason has assumed responsibility for these types of chores since the birth of her child and does not require as much assistance in these areas as she had in the past.

24. McDonald assisted Mason in finding classes and community resources to assist her after finding out Mason was pregnant. McDonald Tr., 154:4-13. McDonald has provided fewer services to Mason since the delivery of Mason's son. McDonald Tr., 158:1-10.

Mason's Relationship with Dana Hillyer

25. McDonald had concerns about Mason's mental health for several years. McDonald made various attempts to find Mason a counselor in an effort to "help to even out." McDonald Tr., 139:20-25 through 140:1-8. McDonald encountered difficulties because Mason's insurance would not pay for an interpreter and it is difficult, if not impossible, to find a counselor in Helena that understands sign language or is willing to provide an interpreter. McDonald Tr., 142:9-15.

26. In 2007, McDonald and Mason's mother took Mason to the emergency room at St. Peter's Hospital after Mason became increasingly agitated and aggressive. Mason was not admitted to St. Peter's Behavioral Health Unit. McDonald Tr., 163:1-17. Mason was referred to Dana Hillyer, APRN.

27. Hillyer has a bachelor's degree in nursing and a master's degree in psychiatry. Hillyer is licensed to practice in Montana and has prescribing authority. Hillyer has been in private practice for more than 16 years. Hillyer Tr., 81:20-25 and 82:1-5.

28. Hillyer's first visit with Mason was in October 2007. Mason was accompanied by her mother and McDonald. An interpreter was not present at the meeting. Mason had difficulty answering Hillyer's questions during this initial

meeting due to her own health issues at the time, as well as Hillyer's lack of familiarity with interviewing hearing impaired patients. Hillyer primarily relied upon her own observations and the information provided by Mason's mother and McDonald when conducting this visit.

29. Hillyer's visits with Mason were initially once a week and became more infrequent occurring once a month or bi-monthly. An interpreter was not present at any of the visits and Hillyer relied upon the assistance of McDonald and Mason's mother in communicating with Mason. Hillyer Tr., 83:5-25. Mason never indicated she had difficulty understanding what was going on or requested that her mother or McDonald not join her at the session. Id.

30. Hillyer regularly prepares progress notes regarding patient visits notes at or near the time of the visit and maintains a running record of her notes in her patient's file.

31. Hillyer wrote in the Summary and Case Formulation section of her notes of the October 23, 2007 visit:

> This thirty year old hearing impaired and developmentally disabled woman appears to be suffering from a mood disorder. She has disturbances of sleep, mood and behavior that are characteristic of possible bipolar disorder . . . Although I was not able to diagnose bipolar disorder at this time given the lack of sufficient history I do believe that she is showing signs of a cyclic mood disorder and will provisionally be given a diagnosis of bipolar I disorder with mixed episodes and rapid cycling as a provisional diagnosis.

Ex. 118, 1- 6.

32. Hillyer prescribed medications for Mason that were intended to stabilize her moods. Hillyer continued Mason on two antidepressants.

33. Hillyer adjusted Mason's medications several times throughout the course of her treatment of Mason. These adjustments were typically done based upon information provided by McDonald and/or Mason's mother. Hillyer noted over the years concerns she had about Mason's medication compliance and spoke with Mason about the need to take all of her medication as prescribed. Hillyer's notes suggest that several of Mason's behavioral issues during the period of their relationship were

caused in some part by Mason's failure to take her medication as prescribed. See Ex. 118, pp. 1- 83.

34. On October 27, 2014, Hillyer noted that McDonald had called and notified her that Mason was pregnant. Hillyer also noted that McDonald reported that Robbie was not the father of the child and the father was most likely a sex offender. Hillyer confirmed that it was appropriate for Mason to continue with one of her medications during the period of her pregnancy. Ex. 118, p. 55.

35. On December 16, 2014, Hillyer met with Mason and Mason's mother. Hillyer noted that Mason was excited about the pregnancy and seemed to be compliant with her medications. Ex. 118, pp. 56-57.

36. On January 6, 2015, Hillyer noted that McDonald called and reported that Mason had been posting disturbing comments on Facebook suggesting she was depressed and she felt hurt by other people. Hillyer also noted that McDonald reported that Mason had an appointment with a public health nurse and an interpreter would be present so she would question Mason about the Facebook posts. McDonald called Hillyer later and reported that Mason was feeling emotional but did not intend to hurt herself. Ex. 118, p. 58.

37. On January 14, 2015, Hillyer met Mason and McDonald. Hillyer noted that Mason reported crying a lot and having an issue at the bowling alley where her feelings had been hurt. Hillyer noted that Mason's mental status reflected some increasing emotional reactivity which she attributed to the serum concentration of one of her medications having decreased due to Mason's pregnancy. Hillyer increased Mason's medication dosage. Ex. 118, pp. 59-60.

38. On January 19, 2015, McDonald called Hillyer and reported that Mason was agitated and sad and had been making vague threats about harming herself. Hillyer noted that she had "concerns that [Mason] may be psychotic." Ex. 118, p. 61.

39. On February 20, 2015, McDonald contacted Hillyer and reported that Mason had been angry for a few days. McDonald reported there was an incident at Wal Mart where Mason had become angry after Hurlbut told her that she needed to hurry. McDonald reported Mason had been taken to the emergency room and admitted to the behavioral health unit. Hillyer noted, "The patient's mother wants me to tell Alischa that she has a good chance of the baby going to foster care due to her actions and behaviors." Ex. 118, p. 67.

40. On February 23, 2015, McDonald reported to Hillyer in an email that Mason had an incident where she kicked the door of a taxi when the driver didn't wait for her one morning. McDonald also reported that Mason's boss was considering disciplinary action due to comments Mason had posted on Facebook about St. Peter's Hospital. Ex. 118, p. 68.

41. On February 24, 2015, Hillyer noted after speaking with McDonald, "I impressed upon Sandi that I really needed to see the patient and while I understand that it is the patient's responsibility to contact me, I am concerned about her mental status and whether or not she may be manic and perhaps on the verge of psychosis." Ex. 118, p. 69.

42. On March 5, 2015, Hillyer met with Mason. An interpreter was present for this meeting. Neither McDonald or Mason's mother attended the visit. Hillyer noted that Mason had reported that she had a bad two weeks and ended up in the emergency room because she was really depressed. Mason reported that she had felt upset during the Wal Mart incident where Hurlbut had told her to hurry up when they had gone grocery shopping. Mason expressed feeling bad when people told her she was doing things wrong and she was having trouble at work. Ex. 118, pp. 70-71.

43. On March 17, 2015, Hillyer met with Mason and Public Health Nurse Brie Oliver, RN. An interpreter was present for this meeting. Hillyer wrote in her notes:

> The interpreter noted that she has difficulty understanding abstract concepts. She appears childlike in her responses to how she might handle situations with a new baby. She does express the desire to have help as far as her emotions. She acknowledges that she sometimes can become emotionally reactive. Given her difficulty with reading and understanding astract concepts, it is unclear if she could really understand the basis of cognitive behavioral therapy. Even if she did, I am still not convinced that she is adequately prepared to care for an infant.

Ex. 118, p. 74.

44. On March 20, 2015, Hillyer met with Oliver and Greg Daly, coordinator of Lewis and Clark County's Family/Child Health Program, regarding Mason's mental status and competency and ability to care for a newborn. Hillyer included in her notes, "I again reiterated my concern that she is not stable in her bipolar disorder and

that she is not emotionally mature enough to meet the needs of a newborn. I did make that report and detailed my observations over the last couple of months as well as my knowledge of the patient's mental status over the last seven months." Hillyer also noted that a meeting would be arranged with the patient, "her deaf interpreter," McDonald, Mason's mother and someone from CPS to "discuss how best to meet this newborn's needs when the patient does deliver." Ex. 118, p. 75.

45. Hillyer also noted in her progress notes for March 20, 2015, that the pharmacy had requested to fill one of Mason's medications. Hillyer determined that the refill request was approximately 20 days late. Hillyer wrote, "Once again this says to me that she is not taking her medications consistently which likely explains some of her erratic and volatile behavior." Id.

46. On March 30, 2015, Hillyer met with Mason and Robbie, as well as McDonald and Oliver. An interpreter was present for this meeting. Mason was late for the appointment due to transportation issues but the group was able to meet long enough to discuss a meeting that was scheduled for April 1, 2015. Hillyer wrote, "She was told that we were going to have a meeting to come up with a good plan for the safety of her baby. She was informed that a representative from child protective services would be at the meeting. She expressed a lot of fear that they would take her baby." Ex. 118, po. 76 - 78.

47. Hillyer also wrote:

> I attempted to share with her my concerns about her ability to parent and the importance of finding an appropriate plan so that her baby is safe and she is safe. She reiterated several times throughout her visit that she did not want [CPS] to take her baby and that she would never harm her baby. I agreed that she would never overtly harm her baby, however, I am concerned that because of the fact that she is not taking her medications correctly, and the fact that her mood can ben volatile, that she is at risk for inadvertently hurting her baby as well as developing a postpartum depression and possibility a psychotic postpartum depression.

Ex. 118, p. 78.

48. On March 31, 2015, Hillyer noted in her progress notes that Mason's mother had contacted her regarding the purpose to the April 1st meeting. Hillyer noted that she told Mason's mother that the idea for the meeting had been hers and

Oliver's and that the idea was to come up with a safe plan for the baby and Mason. Hillyer wrote:

> I explained that in the last three visits I have been able to meet with Alischa with a certified sign interpreter and have been able to do a more thorough assessment of her mental status and her level of functioning and level of decision making and ability to parent a new baby. I did inform her that I did not believe that Alischa was emotionally ready to parent a child and her moods have not been stable in the last several weeks which causes me grave concern about her risk of a postpartum depression after the baby is born.

Ex. 118: 79-80.

49. After learning that Mason cancelled the meeting, Hillyer made the decision to end their therapeutic relationship. On March 31, 2015, Hillyer sent a letter to Mason informing her that she was resigning as her psychiatric provider effective 30 days from the date of this letter. Hillyer wrote:

> My decision to resign is based on your decision to cancel the meeting scheduled for Wednesday, April 1, 2015, at 8:00 a.m. in my office. I considered this meeting to be a very important part of your treatment plan for helping you with your Bipolar disorder and managing your mental health needs during your pregnancy. The meeting was meant to help you find the best and safest plans for you and your baby. Cancelling this meeting disrupted our therapeutic alliance and I can no longer effectively provide for your needs.

Ex. 118, p. 81.

50. In April 2015, Mason began seeing Dr. Mark Mozer, a psychiatrist with St. Peter's Hospital after Hillyer terminated their therapeutic relationship. Dr. Mozer Tr., 233:1-9. Mason's relationship with Dr. Mozer has been successful and her mental health issues have improved under his care. Dr. Mozer has had an interpreter present or utilized other translation resources at every appointment with Mason except for the first one. Dr. Mozer Tr., 233:9-13.

Involvement of Public Health Nurse Brie Oliver

51. After learning of Mason's pregnancy, McDonald began contacting various agencies and service providers in Helena to obtain assistance for Mason. McDonald finally reached Brie Oliver, RN, Supervisor of the Healthy Families Program with Lewis and Clark County Public Health. McDonald Tr., 154:4-13.

52. On December 9, 2014, Oliver conducted her first meeting with Mason, who was accompanied by McDonald. Ex. 119. Oliver conducted an assessment of Mason as is typical when she receives a referral for services. Oliver learned at this meeting that there were concerns that Earl had pressured Mason into a sexual relationship. After discussing ways to keep Mason safe, Oliver recommended that Earl be removed from the home. Ex. 119, 1-4. Oliver later learned that Earl was a registered sexual offender. Oliver Tr., 483:15.

53. Oliver had a qualified interpreter present at every meeting she had with Mason. Oliver Tr., 478:16-12.

54 . Oliver's standard practice is to enter her visit notes within a day or two of her visit in the Born to Learn Health Record database. Oliver Tr., 506:21-24. Oliver wrote in her notes regarding her assessment of Mason:

> S: Initial HV [home visit] with ct [client] after referral from Helena Industries, Sandi McDonald (job coach) who referred because, "She is deaf, bipolar, diabetic, and of low intelligence. Her partner is DD [developmentally disabled] and has a head injury. They wanted a baby but weren't able to get pregnant, so their roommate (also deaf) impregnated her." Present at HV; Alischa, Robbie (ct's "husband"), Earle (father of baby), Linda (Alischa's mother), Sandi, Patti (interpreter) and the HVer. SafeCare program described and a brief history taken. Enrollment paperwork completed. Alischa and Earle agreed that he will be on the birth certificate and Earle has agreed to be responsible and engaged parent.
> A: Complex family needs, requiring weekly visits.
> P: Begin SafeCare curriculum in January. Will work primarily with Alischa's learning needs and ask for Earle's assistance as needed.

Ex. 119, 1-4; Oliver Tr., 476:14-17.

55. SafeCare is an evidence-based home visitation program intended to reduce child maltreatment and provide families with resources and training to ensure a safe and healthy environment for the child. The program employs educational modules that are typically done week by week as part of the three-week program. Oliver's practice was to follow scripts provided as part of the program. Oliver Tr., 477:11-25.

56. It was challenging for Oliver to use the SafeCare program with Mason due to Mason's hearing impairment and her struggles with reading and comprehension. Oliver Tr., 478:6-12. For example, Oliver encountered difficulty in explaining medical jargon. Oliver Tr., 489:4-18. These challenges ultimately prompted Oliver to stop following the SafeCare program with Mason on March 9, 2015. Oliver Tr., 490:3.

57. Oliver conducted home visits on January 6, and January 13, 2015. At these home visits, Oliver learned from McDonald that Mason had posted a suicide threat on Facebook. Mason told Oliver that she no longer felt that way and was upset with how her mother was treating her. Mason observed the house was clean and Mason indicated a desire to keep the baby. Ex. 119, pp. 2-3.

58. Oliver conducted a domestic violence assessment between Mason and Earl during the visit on January 20, 2015. Mason indicated she was afraid of Earl and the family was considering asking Earl to move out. Oliver also received a report that Mason had threatened to hurt herself and Robbie had attempted suicide, which resulted in him visiting the ER. Ex. 119, pp. 4.

59. On January 21, 2015, Oliver conducted a Care Coordination and Referral staffing meeting with her associates. It was decided that law enforcement would be involved regarding Earl and an informational report would be provided to Child and Family Services Division (CFSD), a division of the Montana Department of Public Health and Human Services (DPHHS). Oliver also arranged for Mason to have a pro bono IQ test administered by Dr. Gregg on February 6, 2015 in order to determine the best approach in teaching Mason SafeCare concepts. Ex. 119, p. 5.

60. Dr. Gregg's report outlined challenges Mason would face when learning new things and recommended "hands on" demonstrations rather than written text. Dr. Gregg also recommended repetition and breaking down concepts as much as possible. Dr. Gregg's report stated:

> Based on today's exam along with the results of the 2005 exam I think it is quite clear that she [Mason] has the capacity to learn, reason and

> comprehend. Her knowledge deficits appear to be the result of language problems, poor ability to read written English, and as a result of that, poor vocabulary. She is not intellectually disabled.
> . . . .
> Finally, even though she [Mason] knows what to do in various situations, she tends to rely on others instead of doing it herself. In 2005 there was concern that she was becoming more and more dependent on others and less self-sufficient, and I think this remains the case now. Anything you could do to, for example, get her to phone a taxi instead of her boyfriend doing it will probably be beneficial in the long run. This may be easier said than done however, since the behaviors look pretty ingrained.

Ex. 31.

61. Law enforcement subsequently interviewed Mason, Robbie, Mason's mother, Robbie's Social Worker, McDonald and Oliver regarding the situation between Mason and Earl. A police investigation into Earl's background revealed that he was a sex offender registered in another state.

62. Mason subsequently filed for an Order of Protection against Earl upon the advice of the officer and it was decided Earl would be evicted from the home.

63. On February 23, 2016, Oliver conducted a home visit with Mason, Robbie and an interpreter. Oliver informed Mason of Dr. Gregg's findings, which she included in her notes, "Received results of IQ test from Dr. Gregg. He assessed no intellectual disability. Shared test results with ct. She was very excited that 'I am smart'." Ex. 119, p. 9.

64. Mason reported to Oliver during the February 23, 2016 visit that she had spent the weekend in the Behavioral Health Unit at St. Peter's because she had gotten 'really mad' but felt better after leaving the hospital. Oliver later spoke with McDonald about the incident. Oliver wrote in her notes, "Probably Dana Hillard [sic] called the police for a safety check after ct was wrapping robe tie around neck (report per Sandy)." Id.

65. On March 16, 2015, Oliver met with Hurlbut. Oliver wrote in her notes:

> Kevin reports that he has called APS on behalf of Robbie several times d/t domestic violence in the home. Reports that Robbie has walked out

> in traffic and he had to pull him back. Report fears of leaving baby in the car, not being a safe caregiver. Reports that there is a 'safe room' in the house for Robbie to protect him from Alischa during her anger spells. Reports Robbie and Alischa not cleaning up the house and that in the past none of the support workers came in due to the condition. This RN enc'd Kevin to make an informational call to DFS if he had concerns of the safety of the baby. He stated that he did and that he would.

Ex. 119, p. 12

.

66. On March 16, 2015, Oliver met with Mason's mother and McDonald to discuss the possible involvement of CFSD. Oliver told Mason's mother that she was concerned that Earl would be considered next of kin if CFSD decided the child could not stay with Mason. Oliver wrote in her notes, "This RN reiterated that there has been no decision made, but that it is likely that the hospital will have her case flagged at delivery and there is a chance that an investigation could take place to ensure the baby is going home to a safe location." Oliver later spoke with Hillyer who she noted as saying she did not think "Mason 'is at an emotional age to take care of a baby'. This RN enc'd her to make a informational safety report to [CFS] if she has specific concerns. This RN plans to attend apt. tomorrow. Dana plans to talk more about plans to care for baby safely." Ex. 119, p. 13.

67. On March 18, 2015, Oliver wrote in her notes after speaking with Hillyer, "Reports history of alcohol abuse and stated that she 'doesn't think she is at an emotional age to take care of a baby'." Ex. 119, 15. During the course of their subsequent discussions, Hillyer told Oliver that she did not think Mason was taking her medication as prescribed and 'has the potential to have increased volatility and increased risk of post partum depression." Ex. 119, p. 16.

68. On March 30, 2015, Oliver met with Hillyer to discuss a safety plan for Mason due to their shared concerns about Mason's ability to safely care for an infant. Ex. 119, p.17.

69. On April 1, 2015, Hillyer and Oliver attempted to hold a meeting with Mason and her mother to discuss the possibility that Child Protective Services (CPS) may not allow Mason to take the baby home with her after his birth. The meeting was never held due to Mason's mother cancelling the meeting.

70. On April 27, 2015, Oliver conducted her last home visit with Mason, Robbie, Mason's mother and an interpreter. Mason reported she was seeing a new mental health provider through St. Peter's, her medications had been changed, and she was feeling better. Mason also reported that she was taking insulin, was sleeping better and felt happy. Oliver also observed Mason's home was tidy.

71. During her time with Mason, Oliver never observed Mason's mental health "out of control." Oliver Transcript, p. 504, 2-5. Oliver never independently assessed Mason's cognitive ability. Tr. 502, 6-8. Oliver never determined Mason's ability to parent based upon her intellectual capabilities. Tr. 504, 15-18.

The Birth of Mason's Son and his Health Issues

72. Prior to the birth of her son, Mason took childbirth and parenting classes at St. Peter's. Mason also made efforts to retrofit her home to include devices that would alert her if her son was awake or was crying. Mason also purchased clothing, furniture and other supplies in anticipation of bringing her son home. Exs. 6 & 8; Mason Tr., 252:7-12. Mason was excited about the prospect of being a mother and was preparing for her son's arrival.

73. On May 24, 2015, Mason's son was born prematurely at St. Peter's. Mason's son suffered respiratory distress shortly after his birth and he was transferred to Community Medical Center in Missoula. Mason's son subsequently developed feeding problems while his respiratory problems resolved. Ex. 108.

74. An MRI revealed that Mason's son had a brain infarct, a genetic abnormality that causes a loss of blood flow to the region of the brain that can manifest as developmental delays and/or intellectual disabilities. Ex. 129. There is no way to determine whether such delays or disabilities will actually occur with a child who suffers a brain infarct as an infant. Dr. Danielson Tr., 75:16-20.

75. There was no evidence offered at hearing regarding the current developmental status of Mason's son.

76. From approximately May 24, 2015 through June 25, 2015, Mason's son was hospitalized at Community Medical Center. Hampton Tr., 15:11-25.

77. While at Community Medical Center, Mason participated in parenting classes that included lessons on feeding, swaddling, dressing and undressing, and caring for the baby. Mason made a sincere effort to be present in the child's room and to take instruction from nursing staff. Nursing staff used interpreter programs

to communicate with Mason and, when available, the services of an interpreter. Ex. 135.

78. Both nursing staff and physicians working with Mason noted that she appeared eager to learn parenting skills and to interact with her son. There were times when Mason was noted as being asleep in the hospital room or deferring to her mother when being asked to provide direct care to her son. Ex. 135.

79. On June 1, 2015, Courtesy Worker Linda Waller, Child Protection Specialist (CP) with Missoula County Children and Family Services Department (CFSD), met with Mason, Mason's mother and the baby at Community Medical Center at the request of Lewis and Clark County CFSD. Waller had been requested to perform a Present Danger Assessment. Waller wrote in an email addressed to CPS worker Michelle Silverthorne and Silverthorne's supervisor Brent Lashinski:

> I found no present danger, baby looks healthy [i]s gaining weight, no longer on breathing treatment, and has started nursing. Mother presented as appropriate, caring, and showed a healthy attachment to her child . . . Dr. Irvine reported that mom has been at the hospital constantly and that she is doing well with the baby. Mom had plans to meet with the lactation specialist this afternoon and presented as willing to work with all professionals involved. Both mother and grandmother were very pleasant and willing to work with and follow all recommendations of the professionals involved.

Ex. 15.

80. On June 25, 2015, the baby was discharged into Mason's care. Mason and her son returned to Helena.

81 Mason's son had an inpatient procedure at St. Peter's to place a nose tube due to his feedings issues shortly after he returned to Helena. Danielson Tr., 64:1-13.

82. Mason son was hospitalized for three days at Community Medical Center beginning on or about October 1, 2015 to have a G-tube insert. Moore Tr., 520:11-25.

Involvement of Huigen and Gault

83. Staff at Community Medical Center referred Mason's son to Family Outreach, which provides services to children from birth to three years of age through the Montana Milestones program. Huigen Tr., 680:11-21. The Montana Milestones program is the Part C Early Intervention Program for Infants and Toddlers with Disabilities, part of the federal Individuals with Disabilities Education Act (IDEA). Family Outreach provides services to children identified as having developmental delays or disabilities. Mason's child was eligible for the program due to his medical issues at birth. Huigen Tr., 681:17-20.

84. Mary Huigen, Family Outreach Specialist with Family Outreach, began providing services to Mason's son on July 24, 2015. Huigen Tr., 681:21-22. Huigen's first visits on behalf of Family Outreach were with Brandon and Kim Moore, who had a kinship placement of Mason's child beginning on July 7, 2015.

85. Huigen served in the Peace Corps for several years where she taught at a school for special needs kids and working with kids who were deaf and hard of hearing. Huigen Tr., 679:17-20.

86. Huigen is proficient in sign language. Another interpreter, who had worked with Mason in the past, was present at Huigen's early meetings with Mason. Huigen Tr., 690:14-20. When Huigen worked alone with Mason, she was careful to ensure that she was understanding her and was willing to proceed without another interpreter being present. Huigen Tr., 691:13-22; 694:3-12. Huigen was not aware of any concerns Mason may have had that she used "African sign language," until just prior to hearing in this matter. Huigen Tr., 692:22-25.

87. Huigen observed that Mason looked more regularly to her and others for guidance when she first began working with Mason and her son. Huigen observed that Mason gained confidence as they continued working together; concentrated more on learning parenting skills and concepts; and would provide Huigen with progress reports on skills she had mastered. Huigen Tr., 703:5-25.

88. Huigen worked with Mason on the G-tube feedings for the baby. Huigen Tr., 690:14-20. Huigen also talked about various methods Mason could use to get the baby's attention, including vocalization, clapping, and waving her hands. Huigen Tr., 697:5-14. Mason expressed some discomfort using vocalization at the beginning. Huigen Tr., 697:5-15. Huigen did not expect Mason to form full words or sentences,

but rather use her voice as tool if she felt comfortable doing so. Huigen Tr., 699:9-12.

89. Mason's mother was unhappy with the efforts to make Mason use her voice. Mason's mother saw the approach as being demeaning to her daughter, who could not yet form words and seemingly grunted when she tried to use her voice. Linda Mason Tr., 837:4-7.

90. Huigen suggested to Mason and her mother that Mason start working with Lisa Gault, who Huigen had worked with in the past. Huigen thought it would be helpful for Mason to work with Gault, because Gault is a deaf woman who had raised a hearing son. Huigen Tr., 700:3-10.

91. Lisa Gault works as an office assistant for the Montana Telecommunications Access Program (MTAP) and has also worked with families whose children are attending the Montana School for the Deaf and Blind. Gault Tr., 171:3-10.

92. On December 31, 2015, Gault had her first visit with Mason. Gault Tr., 172:17. Gault met with Mason on a weekly basis for approximately two hours in the beginning and up to three to four hours later in their working relationship. Gault Tr., 172:22-25. An interpreter was typically present during Gault's visits. Gault Tr., 173:18.

93. At one point, Gault encouraged Mason to use her voice when interacting with her son and in situations where she needed to get his attention quickly. Gault Tr., 174:1-5. Gault's intention was to help Mason use her voice as a tool to get her son's attention in emergency situations. Neither Gault nor Huigen intended to demean Mason or to force her to engage in efforts that caused her to feel uncomfortable or embarrassed.

94. No one from CFS encouraged Gault to instruct Mason to use her voice when working with Steven. Gault Tr., 178:19-22. Gault worked for and was paid by CFSD. Gault Tr., 179:7-11.

95. Gault observed that Mason's confidence improved, as did her skills when working with her son. Gault Tr., 173:21-25; 176:12-20.

96. Gault stopped working with Mason in October 2016, when she gained full-time employment at MTAP. Gault Tr., 174:17-20.

Mason's Son's Feeding Difficulties

97. In July 2015, Dr. Michelle Danielson, a board certified pediatrician at Partners in Pediatrics in Helena, Montana, conducted a well child exam for the baby. Dr. Danielson Tr., 59:11-22. Brandon Moore accompanied the baby to the appointment. Id.

98. Dr. Danielson did not have a previous professional relationship with the Mason family prior to the birth of Mason's son. Dr. Danielson's practice received the referral because her practice alternates with another practice in Helena in picking up referrals for children who are born without having a pediatrician. Dr. Danielson Tr., 73:5-13.

99. Dr. Danielson determined the baby was not gaining weight at a sufficient rate due to his feeding difficulties during the July 2015 visit. Dr. Danielson Tr., 60:5-8.

100. At first, Dr. Danielson recommended a strict feeding schedule that included strict caloric requirements. Dr. Danielson Tr., 62:12-25. The Moores were directed to feed the baby every three hours and to use an increased calorie formula. Id.

101. After Mason's son continued having growth issues, Dr. Danielson recommended he have a feeding tube inserted. In August 2015, Mason's son received a Gavage tube, which is a thin tube inserted through his nose that travels down the esophagus to his stomach. Danielson Tr., 63:23-24. The Moores had to administer bolus feedings, which essentially is pushing the feeding through the child's nose. However, the baby was still not adequately growing. Dr. Danielson Tr., 63:5-11.

102. Dr. Danielson made several changes over time in how she recommended the baby be fed in an effort to find a successful approach. However, the baby continued experiencing difficulties with growth. Dr. Danielson Tr., 65:8-17.

103. Dr. Danielson subsequently ordered the baby to receive continuous feedings, which required a pump to be used at night to feed the child at a specific rate throughout the night. The Moores were required to "plug in the rate of how much would be given over an hour and they would run continuous feedings overnight. And they would have a goal for the day of what he would bottle but then have to do the math and subtract, okay, what was he unable to do during the day that would have

to be added to what we had already determined his goal overnight." Dr. Danielson Tr., 63:12-20.

104. In late September 2015, Mason's son had a g-tube inserted into his abdomen at Community Medical Center after he continued struggling with growth. Dr. Danielson Tr., 66:8-25. The g-tube allowed the baby to be fed using a syringe hooked up to the tubing from the feeding pump and the feeding is "dumped" into the baby's abdomen. Dr. Danielson Tr., 67:7-10. "Overnight it's hooked up to a tubing system and the bag of formula runs in over a particular rate overnight." Dr. Danielson Tr., 67:12-17.

105. The pump used in feeding Mason's son ". . . takes some getting used to in learning the tubing. You can get errors or the pump might alarm because something is not connected right or the tubing can become dislodged from the G-tube. So, no, it's not the easiest thing to manage." Dr. Danielson Tr., 67:20-25.

106. Dr. Danielson met with Mason one or two times in August and September 2015. Dr. Danielson had a video interpreter for the September 2015 visit where she had to obtain Mason's consent for the g-tube procedure. Dr. Danielson Tr., 78:11-16.

107. Dr. Danielson was concerned that Mason would not be able to provide adequate care for the baby if she was the sole care provider. Dr. Danielson Tr., 69:11-15.

108. Dr. Danielson is able to form an impression about a parent's ability to provide certain cares for a child, particularly one with special needs, based upon her 13 years of experience as a pediatrician. While Dr. Danielson does not have the requisite educational or professional experience to render a diagnosis of any learning or developmental disabilities, Dr. Danielson is competent to offer an opinion about a parent's ability to safely care for a child.

109. Dr. Danielson observed Mason had a childlike response when interacting with Mason. Dr. Danielson was concerned based upon her observation that Mason had a "very elevated scared response that required her mom to calm her and also give additional reassurance." Dr. Danielson Tr., 78:1-10.

110. Dr. Danielson is personal friends with Brandon Moore and his wife, who were the kinship placement for Mason's son after he returned to Helena. Dr. Danielson distanced herself from the child's care after Mason's mother questioned

whether it was a conflict of interest given her relationship with the Moores. Dr. Danielson Tr., 69:22-25 and 70:1-4.

Child and Family Services Reports

111. Child and Family Services (CFSD) of the Department of Public Health and Human Services (DPHHS) is designated by statute as the agency responsible for the protection of children who have been or are at substantial risk of abuse, neglect or abandonment and is specifically charged with the duty to respond to reports of child abuse or neglect and to provide protective services when necessary, including the authority to take temporary or permanent custody of a child when ordered to do so by the court. Child neglect includes substantial risk of physical or psychological harm to a child by acts or omissions of a person responsible for the child's welfare.

112. CFSD maintains a centralized intake bureau that is responsible for operating the statewide centralized intake system which receives all reports of suspected child abuse, neglect or abandonment. CFSD is charged with screening all incoming communications. This is the exclusive means for the filing of abuse or neglect allegations. See Admin. R. Mont. 37.47.302.

113. There are four types of reports screened for by the centralized intake screens bureau. The first type are licensing reports or allegations of abuse or neglect that occur in a licensed facility or foster placement. The second type are calls for service at CFS, which include reports of third-party abuse or request from the parent for assistance. The third type is a Child Protection Information (CPI) report, which is filed for informational purposes and not sent out for investigation. The fourth type is a Child Protective Services (CPS) report that is referred to the field for investigation. Lashinski Tr., 1024:16-25 and 1025:1-2.

114. If CFSD has reasonable cause to suspect that a child is currently at substantial risk of suffering harm, it can immediately place the child in emergency protective services and file a petition for temporary custody.

115. At the conclusion of an investigation into an allegation of child neglect, CFSD decides whether the initial report was "unfounded," "substantiated," or "unsubstantiated. Those terms are defined by statute and administrative rule. If the investigator decides that there was no substantial risk of neglect, the report would be "unfounded." If the investigator decides that there was a substantial risk of neglect, the report would be "substantiated." If the investigator is unable to decide whether or not there was a substantial risk of neglect, the report would be "unsubstantiated."

CFSD bases its classification of initial reports upon the preponderance of the investigative evidence.

116. Reports of abuse or neglect allegations are confidential and the identities of the reporters are not generally available.

117. CFSD does not have the authority to act on reports of alleged abuse or neglect prior to the birth of a child. Lashinski Tr., 1029:5-6.

118. On January 16, 2015, an Intake Assessment (Report No. 350967) was completed based upon a report that included concerns regarding the ability of Mason and Robbie to safely care for an infant. Ex. 104. The reported information in the January 16, 2015 report was noted as not meeting child abuse/neglect allegations. However, under the Circumstances section of the assessment it was noted:

> There are several concerns regarding the harm likely to come to the unborn child in the care of BMR Alischa and Vernon Ransier (Robbie). Alischa and Robbie have cognitive disabilities. Alischa has bouts of uncontrolled rage resulting in a psychiatric stay at St. Peter's hospital on Feb. 20, 2015. BMR raged for over 24 hours during which time she wrapped a belt tightly around her neck in a mock suicide attempt. Earlier in Feb. Alischa rode an ambulance to the hospital as a result of another rage that involved throwing a chair(s) and kicking equipment. BMR's rages at home are so frequent that PRM Robbie's team prepared a "safe room" for which he could reside in order to escape Alischa when she went into a rage. There are severe concerns that Alischa would shake the baby when angry. Robbie is very desperate to appease Alischa and he physically trembles in fear when she is upset. Robbie could most accurately be described as Alischa's mal-treated slave. Robbie has to rub Alischa's feet until she falls asleep at night and he does absolutely anything to appease her. It is likely that if Alischa raged about the baby he would set it outside to get it out of her sight. Robbie uses very poor judgment. Robbie has been hit twice by vehicles resulting in head injuries. 2 other known times Robbie has been pulled out of a vehicles way. The home where Alischa and Robbie reside is full of health and choking hazards as well. A cleaning service now comes in weekly to clean the home but prior to this the house was full of animal feces that were continuously walked through never having been cleaned up. The end tables are full of bottle caps and several other choking hazards for a child. There are times when the home is too dirty the cleaners will not

clean so Robbie's cigarette money is withheld by payee until the home is clean enough to allow cleaners.

119. On January 23, 2015, an Intake Assessment (Report No. 348087) was completed based upon a report that raised concerns about possible safety risks to the unborn child. Under Section B, it is noted, "Concerns of PHN[2] by BMR and PRM to unborn child. BMR and PRM are both deaf. PRM is a registered sex offender in the state of Florida. BMR may have cognitive delays. The baby is due in June." It goes on to note, "BMR might have some low cognitive delays. BFR is developmentally delayed and has a head injury. BMR and PRM are both deaf." Again, the reported information was noted as not meeting child abuse/neglect allegations. Ex. 105.

120. On January 27, 2017, an Intake Assessment (Report No. 0348087) was prepared based upon a report that referenced concerns noted in the January 23, 2015 Intake Assessment. Ex. 106. In addition, the Intake Assessment included the following under Section B, Family Functioning Assessment Areas:

> Maltreatment:
> Extent:
> BMR [birth mother] has cognitive delays which may prevent her from adequately parenting her unborn child.
>
> Circumstances:
>
> Alischa, who is deaf, diabetic, bipolar, and cognitively delayed, is five months pregnant with Earl's child. Alischa's official boyfriend is Robert, who lives with Alischa. Earl was kicked out of the residence yesterday by Linda (MGM)[maternal grandmother] who owns the home.

Ex. 106.

121. On March 20, 2015, an Intake Assessment (Report No. 351236) was prepared based upon a report that included the following under Section B, Family Functioning Assessment Areas:

[2]"PHN" is understood to refer to Public Health Nurse.

Maltreatment:

Extent:
Concerns of PHN [Public Health Nurse] by BMR [birth mother] to unborn baby: for exposure to unreasonable physical or psychological risk of harm. BMR's cognitive ability of what it's going to be like to be a new mother and meet the infant's needs is very questionable. BMR has developmental delays and mental health concerns. BMR is not consistent with her medications.

Circumstances:

BMR and PRM have developmental delays. BMR is deaf and a sign language interpreter is needed. BMR is pregnant and due in June.

BMR has bi polar I disorder and has mixed episodes. BMR can be agitated and irritable but high energy. BMR has depressive episodes.

BMR hasn't had a history of being consistent with her medications ever. BMR takes them but inconstantly. BMR is not being taken off her medications during the pregnancy.

BMR is not emotionally or mentally capable of taking care of the child. BMR is very childlike herself and sees having a baby in a very fantasy type way. BMR dismisses when things are brought up about what happens if the baby cries and she cant' get it to calm down.

BMR has been emotionally unstable the last several weeks and has dramatic outbursts in the community. She can be very volatile.

BMR has a history of using alcohol in the past. BMR insists she isn't using alcohol right now.

There are concerns that BMR being volatile may cause her to inadvertently hurt the baby or neglect the baby. BMR is not emotionally ready to take care of the baby.

BMR has border line psychosis and often thinks people are mad at her or out to get her.

There are concerns that BMR is at risk for post-partum depression. Ex. 107.

122. The March 20, 2015 report was also noted as not meeting child abuse/neglect allegations. Ex. 107.

123. On May 26, 2015, an Intake Assessment (Report No. 0354870) was prepared based upon a report noting the birth of Mason's child and the difficulties he experienced after his birth. The Intake Assessment included, "Steven is in the NICU unit, CPS in Helena is involved due to BMR's mental health and fits of rage. Concerns that BMR will not be able to identify/meet Steven's needs." Ex. 108.

124. Under Section D, Intake Screen Decision, of the May 26, 2015 report, it was noted that the allegations meet the abuse and neglect definitions per statute. Ex. 108, p. 3 of 5.

125. On June 8, 2015, an Intake Assessment (Report No. 0354870) was prepared based upon a report that Mason's son was still in Missoula but focusing on an incident where Robbie was airlifted to Great Falls after having been found lying in the street with blood running out of his ear. The Intake Assessment included, "BMR is deaf. DMR presents has (sic) intellectually disabled but was tested and is not." This report was sent out to the field for investigation. Ex. 109.

Applicable CFSD Policies

126. CFSD Policy 201-1: Investigation Legal Base provides that "intrusion into the family unit by the state is justified only when a child has been abused or neglected, or is at substantial risk of being abused or neglected, as defined by Montana law." DPHHS Ex. 103, p.1; see Mont. Code Ann. § 41-3-102. The policy goes on to state, "the Department must strictly adhere to the specific requirements of the statutes in providing protective services to children in need of such care." Id., at p. 2. Emergency Protective Services are "provided to a child when the child protection specialist determines, based on a thorough investigation, that the child cannot remain safely in the home and the child protection specialist places the child in an out-of-home placement." Id., at p. 3.

127. The term "impending danger" is defined as a threat to a child, which could include something occurring within the family unit that cannot be controlled without intervention of some sort. It's something that is maybe not apparent or happening right here and right now, but it's an ongoing, recurrent pattern of

behavior. Lashinski Tr., 1029:22-25 and 1030:1-2. An impending danger assessment is part of the family functioning assessment that assesses the totality of the circumstances to determine the safety of the child in the home. Id. at 1030:13-20.

128. CFSD Policy 201-2: Investigation/Assessment Policy defines various terms, including Present Danger Plan. Present Danger Plans are used when there is the identification of specific present danger to a child based on the results of the Present Danger Assessment. They are designed to control and manage the present danger threats so that the child is safe while an initial assessment/investigation continues in the form of the completion of a Family Functioning Assessment." Id. at p. 10. "Present Danger" is defined as "[i]mmediate, significant and clearly observable family condition (or threat to child safety) that is/are actively occurring or "in process" of occurring and will likely result in severe (serious) harm to a child, requiring immediate protective response by the child protection specialist. Id. at p .9. Present Danger Plans are limited to 30 days and are replaced with safety plans when the Family Functioning Assessment is completed. Id.

129. CFSD Policy 202-3: Investigation/Assessment of Report requires all reports indicating reasonable cause to suspect that a child abused or neglected must be assessed. C.P. Ex. 20, p. 1.

130. Included in CFSD Policy 202-3 is the requirement that "face to face contact and individual interviews with all members of the household in which the abuse and/or neglect has allegedly occurred" must be conducted by the investigating CPS worker. Id. at p. 6. If such a contact cannot be made, then the reason must be documented. Additionally, the investigating worker must contact the individual(s) who made the CPS reports, as well as collateral contacts and other professionals working with the family. Id.

131. CFSD Policy 202-3 requires a written report, in the form of a completed Family Functioning Assessment, that is approved by the CPS Supervisor within 60 days of the initial CPS report with Centralized Intake. Id. at p. 15.

Involvement of Child Protective Services

132. In early May 2015, Child Protection Services (CPS) Supervisor Brett Lashinski met with Mason and Mason's mother. Kathy Hampton, an advocate with Disability Rights Montana, Roberta Zenker, an attorney with Disability Rights Montana representing Mason, and an interpreter were also at the meeting. Lashinski Tr., 1026 and 1027:1-10.

133. Lashinski informed Mason of the reports received by CFSD and reviewed them with her. The group also discussed Mason's struggles and ways to mitigate them and what options were available to Mason when her child was born. Lashinski informed Mason that the state would be involved in some way after the birth of the child. Lashinski advised the group that CFSD had no legal authority to act until after the baby was born. At the end of the meeting, Lashinski assured Mason that the goal was to help her keep the child. Id.

134. On May 20, 2015, Lashinski sent a form letter to St. Peter's requesting the Centralized Intake Hotline be informed when Mason had given birth so they could "assess the mother and child(ren) for safety prior to the parent or child leaving the hospital." Ex. 9.

135. Lashinski assigned Mason's Case to CPS Specialist Michelle Silverthorne. At the time, Lashinski had five CPS Specialists under his supervision. Lashinski Tr.,1029:7-9. Silverthorne was assigned the case because she "was next up in the rotation." Id. at 1029:11-12.

136. Silverthorne has worked as an ongoing CPS worker for approximately four years. Silverthorne manages caseloads of parents and children who are already in state custody. Silverthorne writes and monitors treatment plans and works towards permanency for the child. Silverthorne Tr., 859:11-16.

137. Silverthorne reviewed the reports filed with the centralized intake system. The first report she received was the report of the birth of Mason's son. Upon reviewing the reports, Silverthorne contacted the reporters and began collecting information about the situation. Silverthorne enters her notes and information she receives during the course of her investigation into a Family Functioning Assessment (FFA), which includes ongoing documentation used by CPS workers to identify safety risks to the child and determine methods to mitigate those risks. Ex. 115; Silverthorne Tr., 863:12-17.

138. On or about June 25, 2015, Silverthorne prepared an in-home Present Danger Plan. Silverthorne prepared the Present Danger Plan so a courtesy worker from Missoula County could review it with Mason while her son was being cared for at Community Medical Center. Ex. 12; Silverthorne Tr., 875:12-22.

139. The primary component of the Present Danger Plan was to have Mason's mother staying with Mason and her newborn son for two weeks after his birth. Present Danger Plans are typically written for 30 days. Silverthorne Tr., 875:15-22.

However, Mason's mother agreed to the Present Danger Plan being in effect until July 10, 2015. Id. at 875:23-25 and 876:1-2. This abbreviated time line required Silverthorne to collect and to evaluate information in Mason's case faster than she would normally do with a 30-day Present Danger Plan. Silverthorne Tr., 875 & 876.

140. Mason and her son were discharged from Community Medical Center within a day or two after the signing of the Present Danger Plan. Silverthorne Tr., 876:13-19.

141. On or about June 29, 2015, Silverthorne met with Mason and Mason's mother at Mason's home for approximately 2.5 hours. Silverthorne's purpose was to discuss Mason's plan for the baby and to get Mason's thoughts on parenting. Silverthorne Tr., 940:16-25; 942:1-5.

142. Silverthorne observed that Mason's interaction with her son was appropriate, as was the boy's nursery. Silverthorne Tr., 941:1-8. Silverthorne observed that Mason had installed devices in the home to alert her if the baby cried. Silverthorne Tr., 942:17-25. Mason informed Silverthorne about the parenting classes she had attended at St. Peter's and Community Medical Center. Silverthorne Tr., 943:1-15. Silverthorne asked Mason about her mental health status, and Mason informed her that she had started a new medication and had been doing well. Silverthorne Tr., 943:16-25.

143. It is more likely than not that Mason informed Silverthorne that she had been seeing Dr. Mozer for her mental health care, which had stabilized under his care.

144. On July 7, 2015, Silverthorne conducted a family engagement meeting with Mason and her son at Mason's home shortly after their return from Missoula. An interpreter was present at this meeting, as was Kathy Hampton, an advocate with Disability Rights Montana, and Roberta Zenker, an attorney with Disability Rights Montana. Also present were Carmen Douglas, Family Engagement Coordinator with CPS, McDonald, and Mason's mother. Ex. 2. This was the first time Silverthorne had met with Mason. The purpose of the meeting was to discuss the concerns raised in the CPI reports and to determine what efforts Mason had made to mitigate those safety concerns. Silverthorne Tr., 875 - 881.

145. Silverthorne presented Mason with a Notification to Parent outlining why she was requesting the Lewis and Clark County Attorney to seek temporary custody of Mason's child. Silverthorne wrote in the notification:

> [The infant] is at significant risk of harm in Alischa's care. Information collected from professionals working with Alischa state that her mental health is out of control and poses a risk to Steven's safety. Additionally, they state and the evidence demonstrates that per her developmental delay she may be incapable of meeting [the infant's] needs or performing parental duties.

Ex. 110.

146. Silverthorne also asked Mason to sign releases for information, including a release to speak to Dr. Mozer. Linda Mason Tr., 790:1-4; Ex. 2.

147. Mason's mother suggested to Silverthorne at the July 7, 2015 meeting that a local pastor (Brandon Moore) might be available to care for Mason's son in order to avoid him being placed in foster care. Silverthorne Tr. 880:23-25 and 881:1-3. Silverthorne reminded Mason that her ultimate goal was reunification and she wanted to see Mason with her son. Silverthorne Tr. 881:23-25.

148. Silverthorne received an email from Mason's mother the following day indicating that Mason's son was in his adoptive home and CPS no longer had a reason to be involved in the case. Silverthorne Tr. 882:9-13. Silverthorne, confused because she thought Mason's goal was reunification, spoke to Lashinski and then sent an email to Zenker questioning the email from Mason's mother. Silverthorne Tr. 881:14-19. Silverthorne was concerned that the child had been placed in a home that had not been determined to be safe and such a placement was contrary to the safety plan. Silverthorne was also concerned that Mason's child may have been taken from her and placed somewhere without her consent. Silverthorne Tr. 882-885.

149. Zenker emailed Silverthorne that Mason did not wish to place her son for adoption and she wanted to work toward reunification. Silverthorne continued working to find supportive services that could assist Mason and her son in the home. Silverthorne Tr. 882:14-25.

150. As a result of Mason's mother placing the baby with the Moores, Silverthorne was required to prepare placement paperwork for the custody arrangement. Silverthorne later met with the Moores to discuss the placement. Silverthorne learned during her meeting with the Moores that they were under the impression that they were going to legally adopt Mason's son and that the placement was not intended to be temporary. Silverthorne Tr. p. 885: 15-25. Silverthorne advised the Moores that adoption was not the plan and the ultimate goal was to reunify the child with his birth mother. Silverthorne Tr. 886: 1-7.

151. After reviewing Mason's situation and doing a search for family members that may be able to assist Mason and her child, Silverthorne determined there were insufficient safety resources to ensure the health and safety of Mason's child while in her custody. Silverthorne Tr., 88:3-25.

152. After discussing the matter with Lashinski, Silverthorne began preparing an affidavit outlining her efforts and her concerns for review by the Lewis and Clark County Attorney's Office. CFSD decided action was appropriate based upon its determination that there was a significant risk of abuse or neglect occurring in Mason's case. CFSD did not find that child abuse and neglect had actually occurred, because it had intervened prior to it occurring based upon the significant risk of harm. Lashinski Tr., 1032:1-7.

153. Using information gathered from her collateral contacts, reports she received from the Missoula County courtesy worker, and information gathered from her contacts with the family, Silverthorne began preparing her affidavit. Silverthorne signed her affidavit on July 7, 2015. Ex. 112.

154. On August 25, 2015, DPHHS held a Permanency Staffing Team meeting. The Permanency Staffing Team included the permanency planning specialist, the family engagement meeting coordinator, the licensing supervisor, the child protection specialist supervisor, and the child protection specialist. Lashinski Tr., 1039:11-15. The purpose of the meeting was to discuss how to get a case moving if the case was languishing and to identify tasks for workers to complete. Id. at 1039:16-22.

155. The meeting notes included mention that Mason's son had been placed with the Moores and the placement was chosen by Mason and her mother. Ex. 122. The tasks identified included getting temporary legal custody, assessing whether a treatment plan would be given to Mason; and completing a relative search for placement purposes. Ex. 122.

156. On October 27, 2015, a second Permanency Staffing Team meeting was held. An update of the court proceedings was noted in the summary. Ex. 125.

157. On January 21, 2016, a Foster Care Review Committee met to determine the appropriateness of the foster care placement of Mason's son. The Foster Care Review Committee includes DPHHS staff and people from the community who have knowledge or experience with placement of children. Silverthorne Tr., 905:11-17.

158. A preprinted form was completed to memorialize the meeting. It was checked, "The child's parents are receiving appropriate services designed to reunify the child with his parents or to place the child with the non-custodial parent." Ex. 131. It was also checked that "The mother has had regular visitation with [the child] and ". . . the most appropriate permanency plan for this child is reunification [illegible]."

159. The following was handwritten on the form:

> Steven 2 months ahead developmentally [illegible] at 10 month level [assessing at 9 or 10 months.
>
> When he first assessed adaptive period 100% delayed.
>
> [The child] diagnosed failure to thrive - he has to take large quantities of calories for him to be able to grow. He is at the 3%.
>
> Alischa has temporary legal custody for 6 months.
>
> Earl is stipulating for temporary legal custody and will be signing it.
>
> Alischa has phase I treatment plan - she completed psychological for [sic] assessment for parenting. Mom visits 2x week - previously 1 x week.

Ex. 131, p. 3, 4..

160. Mason and her attorney attended the meeting, as did Kim Moore and Earl. Ex. 131, p.4.

161. Judge Seeley "signed off" on the recommendations of the Foster Care Review Committee on January 28, 2016. Ex. 132.

Petition Filed in Lewis & Clark County District Court

162. On July 10, 2015, Lewis and Clark County Deputy County Attorney Anne Peterson filed a Petition for Emergency Protective Services, Adjudication as a Youth in Need of Care, Temporary Investigative Authority, and for Temporary Legal Custody in the Lewis and Clark County District Court. Included with Peterson's

petition was Silverthorne's affidavit, which Silverthorne had prepared on July 7, 2015. Ex. 112.

163. In her affidavit, Silverthorne outlined her concerns regarding Mason's ability to safely parent her child. Silverthorne noted,

> The information collected by CPS Silverthorne depicts Ms. Mason as a person with an intellectual disability to a degree that is relatively unknown; however, professionals have stated that the intellectual disability is to an extent that she would be unable to perform basic parental duties without proper and constant monitoring. Specifically, it was stated that, on her own, Ms. Mason would be unable to recognize and respond to Steven's basic needs; concern was expressed that she lacked basic parenting education and experience; concern was expressed that Ms. Mason lacked insight into her own skill level as a caregiver.

Ex. 112, p. 6.

164. Silverthorne relied heavily on information provided to her by Hillyer, Oliver, and Hurlbut in preparing her affidavit. Silverthorne referred to Hillyer as Mason's former psychiatrist and referred to Hillyer as a doctor throughout the affidavit. Silverthorne referenced Hillyer's concerns that Mason was not consistent in her medication management and would be unable to successfully parent a newborn. Silverthorne noted, "Per Dr. Hillyer, regarding Ms. Mason's mental health and medication management, it is of concern as information indicates that her potentiality for out of control mental health issues would place the baby at risk ." Silverthorne concluded, "Information that CPS has received shows that Ms. Mason does not have adequate control of her mental health as related to her emotions, behaviors, and behavior management." Ex. 112.

165. Silverthorne also referred to situations when Mason demonstrated "fits of rage" that required "inpatient mental health treatment for her own safety and the safety of others." Silverthorne referred to the "safe room" in Mason's home for Robbie, which was identified by Hurlbut in his report to CPS. She also referred to the mock suicide attempted noted by Hurlbut. Ex. 112.

166. Silverthorne noted Oliver had concerns about Mason's ability to safely parent a newborn. Silverthorne also addressed in detail how Oliver came to stop providing services to Mason. "Ms. Oliver stated that the Health Department could not work with a family in which the baby is unsafe and staff is unable to engage

services or implement supports and services to keep the baby safe. For the same reasons of familial interference and inability to adequately serve and advocate for the wishes of the family, two other long-time professionals ceased working with Ms. Mason and her paramour due to concerns for the baby that they were rendered unable to affect or change." Ex. 112.

167. Silverthorne also relied heavily on the informational reports filed with CFSD's Centralized Intake Hotline.

168. In the conclusion section of her affidavit, Silverthorne wrote:

> Ms. Mason is a person with an intellectual disability that has demonstrated that this disability is at a level that she is incapable of caring for a child. Ms. Mason has demonstrated an inability to maintain control of her mental health and medications which would directly place Steven at serious and significant risk of harm if he was in her care solely. Ms. Mason's mental health behaviors render her unsafe to care for a vulnerable infant.

169. On July 10, 2015, the Honorable Kathy Seeley, District Court Judge, issued an Order Granting Emergency Protective Services, Temporary Investigative Authority, and Order to Show Cause with Notice finding, in part, that Silverthorne "had sufficient reason to believe [Steven] was in immediate or apparent danger of harm and immediately removed the youth and placed the youth in a protective setting." Ex. 113. In that order, Judge Seeley ordered, "The Department has made and is making reasonable and active efforts to avoid removal of [the child] or to make it possible to safely return the youth to their home." Id. at p. 2.

170. In August 2015, Maltese was appointed as an attorney for Mason's son. Maltese Tr., 532:19-22. After her appointment, Mason spoke with Zenker, Peterson, and Lashinski. Maltese Tr., 533. Maltese also reviewed Silverthorne's affidavit, as well as Dr. Gregg's report and medical records for both Mason and her son. Maltese Tr., 533-536.

171. Maltese felt that there "was a legitimate concern as to whether [Mason] could parent on her own given her abilities and also the child's needs." Maltese Tr., 537:8-10.

172. A probable cause hearing was held on the petition on August 25, 2015. Present at the hearing were Peterson; Maltese, Mason with her attorney Zenker, and

Silverthorne. Testimony was taken from Hillyer, Oliver, Hurlbut, Lashinski and Silverthorne. Both Maltese and Zenker had the opportunity to cross examine witnesses. Zenker also had the opportunity to present evidence on behalf of Mason and cross examine DPHHS' witnesses.

173. On September 2, 2015, Judge Seeley issued Findings of Fact, Conclusions of Law, and Order Adjudicating the Youth as a Youth in Need of Care, Continuing Emergency Protective Services, and Setting a Dispositional Hearing for the Mother. Mason did not appeal the finding of the court. Ex. 123.

174. Judge Seeley made the following Findings of Fact:

> 8. Retention of the youth in, or return of the youth to the home, would place the youth at an unreasonable risk of harm affecting the youth's health and well-being. [The child] cannot be protected reasonably from this harm without being removed from his mother's home. Though there are family members helping [the child], he [is] a particularly vulnerable child who needs extra care and protection due to the nature of his own medical issues.
>
> 21. Based on the testimony presented, no additional services could have been provided to the family that would have prevented or eliminated the need for the removal from the mother's home.
>
> 22. Continuation of [the child] in his mother's home would be contrary to the welfare of the youth and custody of [the child] should be granted to the Department.
>
> Ex. 123, p. 3, 4.

175. Judge Seeley made the following Conclusions of Law:

> 4. Out-of-home placement for the youth is necessary because continuation in the home would create a substantial risk of harm to the youth or be detrimental to the youth's physical or psychological well being, and would likely result in serious emotional or physical damage to the youth, which is contrary to the welfare of the youth. [The child] cannot be protected reasonably from this harm without being removed from the home.
>
> Ex. 123, p. 4.

176. On September 28, 2015, a family engagement meeting was held with Mason, Mason's mother, the Moores, Hampton, Maltese, Zenker, McDonald and Huigen all being present. Silverthorne prepared a Family Engagement Meeting Referral/Offer of Meeting Form in which she set forth the reasons for the involvement of CFSD. Silverthorne wrote, "Alischa's mental health is out of control. Alischa's capacity to parent is unknown and there is concern that she lacks the capacity to parent." Ex. 124, p. 2.

177. On September 23, 2015, the district court approved a Phase I Treatment Plan, which was agreed to by Mason, Zenker, Maltese, the Deputy County Attorney and Silverthorne. Ex. 134, p. 7. Included in the Identification of the Program or Conditions That Resulted in Abuse or Neglect: "Additionally, Ms. Mason has demonstrated an inability to maintain control of her mental health, behaviors and psychiatric medications which directly place Steven at serious and significant risk of harm if he was in her sole care; Ms. Mason's mental health and related behaviors render her unsafe to care for a vulnerable infant. " Ex. 134, p.1.

178. The purpose of the Phase I Treatment Plan was to "treat the conditions that rendered [Mason's son] unsafe, so they identify safety threats. . . strengthen Alischa's parenting skills and get rid ofpretty much the safety threats to [Mason's son]" so Mason could be reunified with her son. Silverthorne Tr. 894:1-6.

179. The Phase I Treatment Plan also included the provision that visitations would be held at least twice weekly with "the assigned Family Concepts Family Support worker (FSW) assigned to her case."

180. Upon successful completion of goals set forth in the Phase I Treatment Plan, Mason was then required to complete a Phase II Treatment Plan. The Phase II Treatment Plan was based, in part, upon recommendations of Dr. Christa Smelko, Psy.D., who conducted a Psychological Assessment for the Purposes of Parenting in January 2016.

The Kinship Placement of Mason's son with the Moores

181. During the last week of June 2015, McDonald contacted Brandon Moore, who served as a pastor at her church, and asked if he and his wife would be interested in caring for Mason's son. Moore Tr., 509:14-25. Moore and his wife had been trained in therapeutic needs foster care and were interested in fostering or adopting a child. Id.

182. Mason's mother had called McDonald just before July 10, 2015 and asked if she knew of anyone who might want to take custody of Mason's child. McDonald told Mason's mother about Moore and his wife. McDonald called the Moores after speaking with Mason's mother and confirmed they were interested in adopting a child. McDonald Tr., 164:3-25.

183. During the first week of July 2015, Moore and his wife met with Mason, McDonald and Mason's mother. Moore understood based upon this meeting that Mason was interested in a private adoption to avoid having the State involved in the matter. Moore Tr., 511:1-8.

184. Mason discussed with the Moores what she expected if they were to adopt her son. Moore Tr., 515:7-12. Mason wanted the boy to keep the name she had given him; wanted the Moores to provide her with pictures; wanted to visit him regularly at church; and she wanted the boy to go to Disneyland. Moore Tr., 515:7-12. Mason's mother served as the interpreter during Mason's conversations with the Moores. Moore Tr., 515:1-4. There was no agreement regarding visitation but for Mason's request to visit the boy at church. Id. at 515:13-17.

185. The Moores took the baby for one night and worked with the baby's feeding schedule. Moore Tr., 512. The Moores and Mason and her mother talked the next day about what supplies the baby would need. Moore Tr., 513:7-16. When the Moores went to get Steven the next day, Mason and her mother appeared ready to turn the baby over to the Moores. Id. All of this occurred within in a span of three to four days. Id.

186. The Moores allowed Mason to visit with the boy "more Sundays than not." Moore Tr., 523:5. The Moores also allowed Mason and her mother to visit with the baby upon their request. Moore Tr., 523:24-25.

187. The Moores, at times, called the baby by another name. Mason's mother had told them that it would be fine for them to call the baby whatever they wanted once he was adopted. Moore Tr., 525:8-15.

188. The Moores found a disconnect between what they were being told by CFSD and Mason and her mother. CFSD made it clear that reunification of the baby and Mason was the goal, while Mason's mother told the Moores that they were only waiting for the termination of the father's parental rights before the adoption could proceed. Moore Tr., 526:17-25. The Moores were under the impression

through their conversations with Mason's mother that there was a strong chance they could adopt Mason's son. Moore Tr., 526:19-25.

189. Mason's son left the Moore's home to return to Mason's home on November 8, 2016. Moore Tr., 527:16. At that time, Mason had completed the Phase I and Phase II Treatment Plans and her son was returned to her custody.

Visitations Facilitated by CFSD

190. In July and August 2015, Silverthorne worked on establishing visitation between Mason and her son. CFSD requires staffing for visitations. At the time, CFSD had only one full-time employee, Jane McFarlane, and one part-time employee staffing visitations. McFarlane Tr., 640:4-9.

191. Silverthorne attempted to arrange for an outside contractor to staff Mason's visitations but the contractor went out of business in August 2015. Due to staffing constraints, CFSD had difficulties scheduling visitations for new clients. Silverthorne asked McFarlane to make Mason's case a priority due, in part, to the outside contractor not being available. Silverthorne Tr., 895, 896.

192. On September 28, 2015, Silverthorne prepared a Request for Supervised Visitation and Transportation requesting McFarlane to staff visitations between Mason and her son. Silverthorne indicated her goal was to have four to six hours of visits per week for Alischa with an interpreter present. Ex. 126.

193. McFarlane was tasked with coordinating the visits to accommodate the work schedule of Mason, as well as the child's own schedule and the schedule of other attendees. In this case, McFarlane had to coordinate the visits to accommodate the schedules of Mason, Mason's son, the Moores, Mason's mother, Huigen, Gault, the interpreter, and representatives from Disability Rights Montana, as well as Michelle Maltese, the court appointed attorney for Mason's son. McFarlane Tr., 643-645.

194. Scheduling visitations proved challenging for McFarlane given the number of people wanting to be involved, as well as Mason's own work schedule. As a result, visitations were not always held on a weekly basis at the beginning during October and November 2015.

195. McFarlane considers the first two or three visitations to be part of an assessment where she observes the parents and determines what needs there may be.

McFarlane's next step is intervening where she tries to address the needs identified in the assessment and to teach the parents the skills needed to be successful. McFarlane Tr., 647:23-25; 648:1-18.

196. McFarlane typically performs 15 to 18 visits per weeks for her clients and puts 300 miles or more on her car in any given week. McFarlane Tr., 666:9-18. McFarlane's ability to coordinate visits for all of her clients, including clients without Mason's actual and perceived disabilities, was hampered by staffing and budget restrains. Id.

197. McFarlane's standard practice was to enter her notes from client interactions into Activity Reports available to other CFSD staff involved in the case within a day or two of the client meeting. See Ex. 127; McFarlane Tr., 664:3-5.

198. On October 8, 2015, McFarlane had her first visit with Mason. In addition to the interpreter, Huigen, Mason's mother, Maltese, and Robbie were also present.

199. McFarlane had an interpreter present at all meetings with Mason until Gault began working with Mason. McFarlane Tr., 643:20-25.

200. On October 14, 2015, a Family Engagement Meeting Summary and Plan was prepared by Silverthorne. Ex. 128. Attending the meeting were Mason, Zenker, Hampton, Silverthorne, McFarlane, Maltese, Mason's mother, Huigen, the Moores, and McDonald. Also in attendance was Marci Buckles, Special Ombudsman. An interpreter was also present at the meeting. The permanency goal of reunification was discussed, as well as other issues including visitation, treatment plans for Mason, appointments Mason needed to attend, the baby's needs, and what needed to be done to assist Mason in understanding what was going on. Exs. 128 and 129 p. 8 of 12.

201. At this meeting, Silverthorne read a letter from Dr. Danielson that provided an update regarding the health status of Mason's son. Dr. Danielson noted the g-tube placement was successful but the baby had continued to experience issues with growth. Dr. Danielson also noted that the baby was developing appropriately but would require regular development follow-up and possibly early intervention service." Ex. 129, 7-8 of 12.

202. Prior to formal visitation arranged for by CFSD, Mason was only able to interact with her son on Sundays at the Moore's church. Although Mason's mother

had been determined to be an appropriate supervisor for visitation, CFSD did not ask her to act in that capacity until October 2015.

203. The duration of the visitations began to increase in December 2015. There were approximately six visitations held in December. McFarlane Tr., 650-651. McFarlane attempted to schedule visits around Mason's work schedule, as well as her participation in Special Olympics. McFarlane Tr., 649:23-24.

204. McFarlane also noted that Mason's confidence improved, as did her instincts when caring for her son. For instance, Mason was able to change her son without prompting and was able to anticipate her son's needs without encouragement from other people in the room. McFarlane was concerned that Mason's mother tended to involve herself when her daughter appeared to be faltering. McFarlane and Huigen frequently had to ask Mason's mother to disengage so Mason would be forced to learn the skill they were trying to teach her. McFarlane Tr., 657:1-16.

205. Mason never fed the baby through the G-tube. McFarlane Tr., 649:3-6.

206. McFarlane observed Gault encouraging Mason to say mama or do other vocalizations when interacting with her son. McFarlane Tr., 658. McFarlane also encouraged Mason to make sounds, including vocalization and clapping, when she needed to get her son's attention. Id. At one point, McFarlane observed Mason making a vocal noise in response to something Robbie had done and McFarlane told Mason that she could get her son's attention the same way. McFarlane Tr., 659:2-9. McFarlane also observed Mason reading a book to her son using her voice and sign language. Mason appeared to be doing so willingly. McFarlane Tr., 659:21-25; 660:1-3.

207. McFarlane noted in her December 4, 2015 Activity Report that Mason appeared less afraid and more confident when working with her son and that she was more able to pick up cues from the baby if he was tired or hungry. McFarlane wrote, "[Mason]also stated that she feels more comfortable and thinks [the baby] is also. While progress is slow due to limited time, [Mason] is demonstrating her ability to retain what she is learning and following through. [Mason] still looks to workers at times for reassurance, but when given the opportunity to make her own decision, she has made good decisions." Ex. 127, pp. 1-2.

208. Once the holidays had passed, the visitations were increased to twice a week, with one hour on Wednesdays and two hours on Thursdays. McFarlane Tr.,

661:1-5. In mid-January 2016, the visitations increased to two hours, two days per week. Id. at 11-13.

209. McFarlane's last formal visit with Mason and her son was in December 2016. A transition plan was in place at that time that had the baby spending longer periods at Mason's home as the parties prepared for the baby's transition from the placement at the Moores to Mason's home. McFarlane Tr., 661:22-25.

210. Once Mason's son was transitioned from the Moore's home to Mason's home, McFarlane attempted eight "drop-in" visits. McFarlane Tr., 662:13-23. Of the eight attempted visits, McFarlane was only able to meet with Mason and her baby twice. Id. Mason was usually gone or would not come to the door. At one attempt, McFarlane observed the blinds were pulled, and she could hear the baby crying. McFarlane rang the doorbell and knocked on the door, but no one answered. Id. Typically, no one was home when McFarlane attempted her visits, which ranged from morning to early evening visits. McFarlane Tr., 663:1-5.

IV. DISCUSSION

Mason argues DPHHS discriminated against her on the basis of disability on two bases. First, Mason contends DPHHS discriminated against her by subjecting her to disparate treatment on the basis of her actual hearing and psychiatric disabilities, as well as her perceived disability of an intellectual impairment. Second, Mason contends DPHHS discriminated against her by failing to reasonably accommodate her actual and perceived disabilities by not consistently using a qualified sign language interpreter in their dealings with Mason; relying upon reports from service providers who failed to use qualified sign language interpreters when working with Mason; and failing to implement methods of communication tailored to Mason's needs.

Montana law prohibits both denial of government services to a person because of disability, Mont. Code Ann. 49-2-308(1)(a), and discrimination in performance of governmental services because of disability, Mont. Code Ann. 49-3-205(1). Those prohibitions coincide with "the policy of the state to encourage and enable the . . . physically disabled to participate fully in the social and economic life of the state." See Mont. Code Ann. 49-4-202; Johnson v. G.F. Pub. Sch., HR 9504007138 (Aug.1998), pp. 12-13, In. 2; affirmed, Great Falls Public Schools v. Johnson, 2001 MT 95, 305 Mont. 200, 26 P.3d 734. No law, regulation or decision exempts DPHHS, either entirely or specifically within CFSD from either of those obligations or that policy.

Investigation of neglect reports involve the provision of services to the involved child and the child's parent, as well as the community at large. As such, those investigations must be "performed without discrimination based upon . . . physical or mental disability," pursuant to Mont. Code Ann. § 49-3-205(1) of the Governmental Code of Fair Practices Act. The Governmental Code of Fair Practices Act prohibits not only discrimination against the recipient of the service, but also discrimination in the performance of that service.

The Montana Supreme Court has not yet decided whether the Americans with Disabilities Act (ADA) applies to Montana parental rights termination proceedings based on alleged neglect of minor children by their parents. See, e.g., In re J.B.K., 2004 MT 202, ¶¶ 24-25, 322 Mont. 286, 95 P.3d 699. However, the Montana Department of Labor and Industry has found that the ADA creates a "separate right of action" under the MHRA and the Governmental Code of Fair Practices Act. Geri Glass, individually and on behalf of her infant child, G.L.G. v. Montana DPHHS, "Final Agency Decision" (December 21, 2007), Human Rights Complaint No. 0055011504 and 507, ¶¶ 39-40 citing In re J.B.K., 2004 MT 202,¶24 322 Mont. 286, 95 P.3d 699.

As the hearing officer noted in Glass, this case does not involve the issue of whether state and federal discrimination laws create an affirmative defense in a termination proceeding. This case involves the exercise of the "separate right of action" created by the MHRA and the Governmental Code of Fair Practices Act based upon the allegation that the conduct of DPHHS in its investigation of reports of neglect and its conduct toward Mason personally was discriminatory due to Mason's actual and/or perceived disabilities.

A. Mason has Shown a Prima Facie Case of Disability Discrimination.

The exact make-up of the elements of proof in a prima facie case of discrimination based upon disability is flexible. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To prove a prima facie case of discrimination based upon disability in the provision of governmental services, Mason must show that:

> (1)[S]he "is an individual with a disability"; (2) [s]he "is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities"; (3) [s]he was "either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity"; and (4) "such exclusion, denial of benefits, or discrimination was by reason of [her] disability." Thompson v. Davis,

295 F.3d 890, 895 (9th Cir. 2002)(per curiam), cert. denied, 538 U.S. 921, 155 L.3d 2d 311, 123 S.Ct. 1570(2003).

McGary v. City of Portland, 386 F.3d 1259 (9th Cir. 2004); see also, Admin. R. Mont. 24.9.610; Townsend v. Quasim, 328 F.3d 511 (9th Cir. 2003); Duvall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001); Helen L. V. DiDairo, 46 F.3d 325 (3rd Cir. 1995).

Restating these elements to fit this case, Mason must prove that (1) she had a disability; (2) her disability was the only reason she came under scrutiny regarding her parent (i.e. she was otherwise a fit parent); (3) she was denied the benefits of the services of DPHHS or was otherwise discriminated against by the agency; and (4) the adverse treatment was because of her actual and perceived disabilities. Mason must present evidence that is sufficient to convince a fact finder that all of the elements of the prima facie case exist. St. Mary's Honor Ctr. v. Hicks, 509 U.2. 502, 506 (1993); Baker v. American Airlines, Inc., 430 F.3d 750, 753 (5th Cir. 2005).

1. Mason is an individual with a disability.

To qualify as a member of a protected class under the MHRA, Mason must prove she has a disability or is regarded as such within the meaning of the MHRA. The statute defines "physical or mental disability" as an impairment that substantially limits one or more of a person's major life activities or is regarded as having such an impairment. Mont. Code Ann. § 49-2-101(19)(a)(i),(iii). It is undisputed that Mason, as a deaf woman who has been diagnosed with bipolar disorder, is an individual with a disability. Substantial evidence of record also shows that Silverthorne and several of the service providers involved in this case regarded Mason as having an intellectual impairment. Mason has shown not only that she is an individual with a disability based upon her being deaf and having been diagnosed with bipolar disorder, but she has also shown she was regarded as having an intellectual impairment. Therefore, Mason has satisfied the first element of the prima facie case.

2. Mason's actual and perceived disabilities were the sole reason for the involvement of CFSD after the birth of her son.

CFSD first became aware of Mason's situation upon receiving four reports regarding Mason's pregnancy on January 16, 2015; January 23, 2015; January 27, 2015; and March 20, 2015. CFSD lacked any legal authority to intervene until the birth of Mason's son on May 24, 2015. On May 26, 2015, CFSD received a report

notifying the agency of the birth of Mason's son. The report noted, ". . .CPS in Helena is involved due to [birth mother's] mental health and fits of rage. Concerns that [birth mother] will not be able to identify/meet [the infant's] needs." The report also noted that Mason was bipolar and had developmental delays. Ex. 108, p. 2.

On July 7, 2015, Mason received a "Notification to Parent" stating the reasons why CFSD was seeking temporary custody of her child. This notice stated that "information from professionals working with Alischa state that her mental health is out of control and poses a risk to [the infant's] safety." Ex. 1. The notice also asserted that Mason had a developmental delay that may make her "incapable of meeting [the infant's] needs or performing parental duties." Ex. 1. These allegations subsequently formed the factual basis of the Motion to Seek Temporary Investigative Custody. Ex. 112.

There is no dispute that DPHHS is required to assess a report that a child is or has been abused or neglected pursuant to Mont. Code Ann. § 41-2-202(1). However, the reports received prior to and shortly after the birth of Mason's son did not detail current or past abuse of the infant, but rather questioned Mason's prospective ability to care for a child based upon her actual and perceived disabilities. The intervention of CFSD could not have been based upon anything other than Mason's actual and perceived disabilities.

It should also be noted that Mason was happy and excited about the impending arrival of her son. Mason had purchased clothing, equipment and supplies for her son, as well as adaptive equipment that would have enabled her to attend to her son's needs. Mason attended various parenting classes through community based programming, as well as programming offered by St. Peter's. After the birth of her son, Mason attended programming at Community Medical Center intended to enhance and to develop her parenting skills. While Mason may have had personal struggles in the early months of her pregnancy, she demonstrated, at the very least, a willingness and a desire to be a good mother to her son at the time of his birth and the months following.

However, there were other reasons that supported CFSD's intervention. Mason's paramour, Robbie, was described as being "a very nervous man about pretty much everything." Hurlbut Tr., 742:3-4. Robbie is developmentally disabled and suffers from leukemia. McDonald Tr., 153:7-10. Robbie also suffered two head injuries as a result of having walked out into traffic and being hit by a truck both times. Hurlbut Tr., 723:20-22. As a result, Robbie had lost his ability to perform many of his day to day activities and required assistance of service providers such as

Hurlbut. Id. at 22-25. Ultimately, CPS required Robbie to move out of the home due to the safety risk he posed to the child. Maltese Tr., 547:7-21.

What cannot be ignored is the circumstances under which Mason became pregnant. Mason testified at hearing that she was raped by Earl. Mason testified, "I felt pressure from Earl. And people told me many, many times but he pressured me because he was trying to get me pregnant. " Mason Tr., 250:10-12. Mason described situations in which Earl acted threatening toward Robbie or "blew up" at her. Mason Tr. 261:7-12; 263:17.

Even considering the other circumstances prompting CFSD's involvement with Mason, Mason has shown that the primary reason for CFSD's intervention was her actual and perceived disabilities. Therefore, Mason has shown the second element of the prima facie case.

3. Mason was denied the benefits of a thorough investigation by CFSD or was otherwise discriminated against by DPHHS due to her disability.

Having shown the first two elements of the prima facie case, Mason must now show she was denied the benefits of services, programs, or activities offered by DPHHS, or was otherwise discriminated against by DPHHS and such action was as a result of her disability - the final two elements of the prima facie case.

As noted above, the concept of "services" has been found to include the investigation of reports of abuse or neglect made to CFSD. See Glass, p. 40. Those investigations must be "performed without discrimination based upon . . . physical or mental disability," pursuant to Mont. Code Ann. § 49-3-205(1) of the Governmental Code of Fair Practices Act.

DPHHS is mandated by statute to assess all abuse and neglect reports and to determine the appropriate response. There is no provision in law allowing DPHHS to ignore abuse and neglect reports because the alleged perpetrator is physically or mentally disabled. Montana Code Ann. § 41-3-202 and CPS Policy 201-1 requires DPHHS to thoroughly investigate reports of abuse or neglect. DPHHS may not conduct its investigation with bias.

Each of the four reports filed with CFSD in January 2015 and March 2015, as well as the report filed upon the birth of Mason's son, deal primarily with Mason's capacity to parent. Replete throughout these reports are terms such as "cognitive disability," "cognitively delayed," "developmentally delayed," and "intellectually

disabled." Additionally, the reports refer to bouts of "uncontrolled rage" and statements indicating Mason's mental health was "out of control."

Upon investigating these reports and having met with Mason only once, Silverthorne adopted these terms and used them in her reports and court filings without verifying the information was actually correct. Looking first at the Present Danger Plan drafted at or near the time of the birth of Mason's son, Silverthorne noted Mason was "developmentally delayed and [was] low functioning, does not have the capacity to perform basic parental duties." Silverthorne went on to note that Mason required assistance in performing daily activities such as working and housekeeping with the comment, "her home conditions are unsafe and deplorable for even herself." Silverthorne further noted that Mason was "out of control: [she] does not have adequate control of her mental health. . .does not manage her mental health well, frequently does not take her medications regularly or as prescribed." Silverthorne described Mason as having "fits of rage," which resulted in Robbie requiring a "safe room" in the home.

There is no evidence showing Silverthorne followed up with Dr. Mozer, who was Mason's most recent health care provider. Silverthorne testified she could not recall if Mason advised her of her relationship with Dr. Mozer. Silverthorne Tr., 944. Mason appears to have been forthcoming with the information that she was on a new medication and was feeling better because of it when she first began working with Silverthorne. It seems unlikely that neither Mason nor her mother, or McDonald for that matter, would fail to mention Dr. Mozer during this meeting.

Further, there is no evidence showing that Mason, at any time, has been diagnosed as being either developmentally delayed or intellectually disabled or any other variant of those concepts. Mason, at the behest of Oliver, submitted to a neuropsych test with Dr. Gregg that concluded that she had a normal IQ but required additional time and more intensive training to understand abstract concepts.

One of the issues raised at hearing that gave the hearing officer pause was how easily labels are placed upon individuals. As explained in Mason's post-hearing briefing, our culture has developed "politically correct" labels such as developmentally delayed, which seem to be used interchangeably with other terms such as intellectually disabled. While each term may have a different technical definition, each label is meant to communicate that the individual does not function at the same intellectual level as others. Silverthorne clearly accepted the labels used by others in regard to Mason without taking the time to consider Mason's individual needs and abilities. Silverthorne could not have conducted a thorough investigation as required

under Mont. Code Ann. § 41-3-202 and CPS Policy 201-1 operating under these assumptions.

In a similar case involving the termination of parental rights, the court considered whether a state agency acted appropriately in moving for the termination of a mother's parental rights based upon the assumption the mother lacked the capacity to parent based upon an old IQ test and outdated reports relied upon by the state's expert in evaluating the mother's functioning completed eight years earlier. In re Guardianship & Custody of W.W. Children, 190 Misc. 2d 258. The court primarily addressed whether the agency was required to demonstrate "diligent efforts" in reuniting the mother with her children. While not directly on point, the opinion offers insight as to the hurdles faced by parents suffering from mental or intellectual disabilities and the impact of the ADA on addressing those issues. In that decision, the court noted:

> Neither developmental disability nor mental retardation is a disease or a disorder; they are simple descriptive labels and administrative terms used to identify those persons who seem to exhibit subnormal intellectual abilities. The only trait shared by persons labeled mentally retarded or developmentally disabled is their inability to perform at a certain level on various measurements of intellectual capacity. The term 'mental retardation' in particular, with its roots in the Binet Intelligence Quotient (IQ) test has been derided as having 'little scientific integrity and minimal predictive or explanatory potential'. Nor does the term refer to a fixed level of ability; as new tests and standards have emerged to determine mental retardation or developmental disability, individuals have moved in and out of the class so labeled. The degree to which one is considered impaired may depend on specific measurement used, as well as on the examiner conducting the test. Thus, it is not unusual for an individual to be classified as severely mentally retarded in one examination and mildly retarded in another.
>
> Currently, there are over 250 known causes of mental retardation or developmental disability, and there are thought to be more unknown than known causes. Persons who share the label share no common symptomatology. They may exhibit deficits in a variety of perceptual or communicative skills, but the extent and nature of the specific deficit varies from individual to individual. Moreover, intelligence does not remain static; like all persons, individuals labeled mentally retarded or developmentally disabled can learn to improve such things as

> comprehension and memory. In other words, they can learn how to learn.
>
> The one thing shared by persons labeled mentally retarded or developmentally disabled is the label itself and the diminished expectations and outright discrimination that so often accompany the label.

Id. at 268, quoting Watkins, Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded, 83 Cal. L. Rev. 1415, 1422-1424.

These concerns are why the ADA requires covered entities to evaluate persons with disabilities on an "individualized basis." See PGA Tour, Inc. v. Martin, 532 U.S. 661, 690 (2001).[3] DPHHS had a duty to conduct "a fact specific inquiry that evaluates the strengths, needs, and capabilities of a particular person with disabilities based on objective evidence, personal circumstances, demonstrated competencies, and other factors that are divorced from generalizations and stereotypes regarding people with disabilities" required under the ADA. See "Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act," fn. 20, citing 28 C.F.R. pt. 35, App. B. Mason points to Mont. Code Ann. § 49-3-202(1) and CPS Policy 201-1, p.3 of 8, both of which require "thorough"investigations. See. Ex 19.

The guidance to the Title II regulation explained in 1991 that "[s]uch an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks." 28 C.F.R. pt. 35, App. B (discussing definition of "qualified individual with a disability"). This obligation to act based on the facts of a person's disability and the situation at hand, rather than on assumptions and stereotypes, is necessary to comply with the obligation to provide individuals with

---

[3]The Montana Supreme Court has found that "because the MHRA is modeled on federal anti-discrimination laws, such as the ADA, it is useful and appropriate to consider federal statutes, regulations and case law as persuasive authority when interpreting provisions of the MHRA." McDonald v. Dept. of Environmental Quality, 2009 MT 93, fn. 4, 214 P.3d 749. The ADA and Section 504 of the Rehabilitation Act of 1973 requires that individuals with disabilities be treated on the basis of individual assessments and sound medical judgments. 28 C.F.R. pt.34, App. B; School Bd. Of Nassau County v. Arline, 480 U.S. 273, 284-285 (1987).

disabilities opportunities to participate in and benefit from services, programs, and activities; to avoid utilizing criteria or methods of administration that discriminate or that substantially impair achievement of the objectives of a public entity's programs; and to reasonable modify policies, practices, and procedures where necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(a), (b)(1), (b)(3), (b)(7); 45 C.F.R. § 84.4(a), (b)(1), (b)(3). See Letter from U.S. Dep't. of Justice, Civil Rights Division & U.S. Dep't of Health & Human Serv., Office for Civil Rights, to Interim Comm'r Erin Deveney, Mass. Dep't of Children & Families (Jan. 29, 2015), available at http://www.ada.gov/ma_docf_lof.pdf.

As DPHHS noted in its post-hearing briefing, the publication noted above also includes the following question and answer that must be considered:

> 14. Child welfare agencies have an obligation to ensure the health and safety of children. How can agencies comply with the ADA and Section 504 while also ensuring health and safety?
>
> Answer: Under child welfare law, child welfare agencies must make decisions to protect the safety of child. The ADA and Section 504 are consistent with the principle of child safety. For example, the ADA explicitly makes an exception where an individual with a disability represents a "direct threat." See fn 87, citing 28 C.F.R. §35.139. Section 504 incorporates a similar principle . See fn 88, citing School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987).
>
> The technical assistance further provides:
>
> In determining whether an individual poses a direct threat to the health or safety of a child or others, child welfare agencies and courts must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain the nature, duration, and severity of the risk to the child; the probability that the potential injury to the child will actually occur; and whether reasonable modifications of policies, practices or procedures will mitigate the risk. See fn. 90, citing 28 C.F.R. § 35.139(b).
>
> As such, in some case an individual with a disability may not be a qualified individual with a disability for child placement purposes. What both the ADA and Section 504 require, however, is that decisions

about child safety and whether a parent, prospective parent, or foster parent represents a direct threat to the safety of the child must be based on an individualized assessment and objective facts and may not be based on stereotypes or generalizations about persons with disabilities. See fn. 91, citing 28 C.F.R. § 35.139.

In this case, there was an examination completed by Dr. Gregg in 2005 and again in 2015 that concluded Mason was not intellectually disabled. Both McDonald and Mason's mother testified that neither had ever considered Mason intellectually disabled or cognitively delayed. At best, the evidence would suggest that Mason had rarely been called upon to act independently and grew dependent upon others to guide her and to assist her day-to-day. However, when forced to learn what others may consider routine tasks, the evidence shows Mason took it seriously and did her level best to learn concepts and techniques taught to her by the services providers brought into her life as a result of the intervention of DPHHS. Needing help does not necessarily render an individual incapable of parenting, or, in this case, learning how to parent, which is why an individual assessment should have been performed. At the very least, DPHHS owed Mason the duty to look beyond the labels placed on her by individuals who had not necessarily had the most effective means of communication with her to determine based upon Mason's individual abilities whether or not she was unfit to parent her child, whom she clearly very much loved and wanted.

DPHHS argued the district court had a right to rely upon information presented during the court proceedings. While the hearing officer has no dispute with that contention, it should be noted that a court can only act upon the information actually presented. That is why, as court officers, we all have a duty to present the best evidence available so the court can make a legally and factually sound judgment. That is not to say the hearing officer believes the court came to a wrong conclusion in this case based upon the evidence presented. However, the issue for the hearing officer is essentially whether the information presented by DPHHS was the result of a thorough investigation.

While the hearing officer sees lapses in Silverthorne's investigation, those lapses appear to have been as a result of a lack of training and implementation of agency policy regarding such issues. The evidence shows Silverthorne was mindful of Mason's needs and worked closely with Mason and her attorney to achieve reunification of Mason with her son. However, the lapses in Silverthorne's investigation interfered with Mason's ability to have a thorough investigation conducted of the allegations made against her and resulted in Mason being

discriminated against due to her actual and perceived disabilities. Therefore, Mason has shown the final two elements of her prima facie case.

B. DPHHS has Shown no Improper Motive Played a Role in its Actions.

Mason's argument that this is a direct evidence case is well taken. "Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption." Davis v. Chevron U.S.A., Inc., 14 F.3d 1082, 1085 (5th Cir. 1994). Direct evidence typically "consists of clearly sexist, racist, or similarly discriminatory statements or actions . . .". Coghlan v. American Seafoods Co., 413 F.3d 1090, 1095 (9th Cir. 2005).

As noted above, DPHHS justified its actions throughout the case notes, reports, and court filings by pointing to Mason's actual and perceived disabilities. Unlike other cases where one is left to surmise as to the individual's motives or intent, the reason for the action has been memorialized and made of record. Therefore, DPHHS is left to prove by a "preponderance of the evidence that an unlawful motive played no role" in its decision to seek temporary custody of Mason's infant or that "the direct evidence of discrimination is not credible and is unworthy of belief." Admin. R. Mont. 24.9.610(5).

1. The Glass Case

At the onset, it is important to address the implication of the Glass case in this matter. In Glass, the Charging Party was a 29-year-old woman who was a "tetraplegic," which caused her to have limited use of her hands and arms. Glass became pregnant and ultimately delivered a healthy baby boy. Hospital staff had concerns about Glass' ability to safely care for the baby despite Glass having made arrangements to live with the baby's paternal grandmother. A report was made to CFSD alleging there was a substantial risk of physical neglect to the baby due to Glass being unable to provide adequate care by herself.

CFSD became involved shortly after the baby's birth and conducted an Investigative Safety Assessment through surreptitious means and without adequate warning or notice to Glass. The hearing officer found CFSD departed from its normal practices in its dealings with Glass. However, the hearing officer noted that there was no evidence any employee harbored any conscious discriminatory animus toward Glass because of her disability. The hearing officer was persuaded that CFSD acted out of an urgency to protect the child. Glass, p. 43.

However, the hearing officer found CFSD staff had lied to or misled Glass on several occasions and failed to provide her explanations and notices as to her rights in order to prevent her from the benefit of normal procedures and the possible exercise of her rights. Ultimately, the hearing officer found CFSD imposed an unrealistic and unfair plan of care that required Glass never to be alone with her child for at least 10 to 12 years in order for her to retain the custody of her child. All of this occurred without CFSD ever obtaining authorization from the court to provide Glass with emergency protective services or filing a petition to remove the child from the home.

The hearing officer noted that "[t]his would have been a much closer case" but for the display of animosity by CFSD workers when Glass disagreed with or resisted CFSD's show of authority. The hearing officer found CFSD did not close its case against Glass until 15 days after publication of an article regarding Glass' case in the Billings Gazette. The hearing officer also found CFSD would not have been able to meet its burden in order to get temporary custody of the child under Mont. Code Ann. §§ 41-4-422(5)(a)(ii) or to terminate Glass' parental rights under Mont. Code Ann. §§ 41-4-422(5)(a)(iv).

There are important points of distinction between the instant case and the Glass case. Here, Lashinski made contact with Mason prior to the birth of her child and informed her of the reports CFSD had received indicating she was incapable of adequately caring for her child. Silverthorne met with Mason and her mother shortly after Mason and her son returned to Helena in July 2015 and discussed with them the concerns held by CFSD and the probability of CFSD involvement. Silverthorne maintained regular communications with Mason and her attorney at every step of the process. There is no evidence showing Silverthorne or any other DPHHS staff member lied to or misled Mason at any step of the process.

Another distinction from Glass is that here the Lewis and Clark County Attorney's Office filed its Petition for Emergency Protective Services, Adjudication as a Youth in Need of Care, Temporary Investigative Authority, and for Temporary Legal Custody on July 10, 2015. Ex. 111. This filing triggered a series of deadlines and procedural steps that DPHHS complied with. Further, it resulted in the district court issuing an Order Granting Emergency Protective Services, Temporary Investigative Authority, and Order to Show Cause with Notice on July 10, 2015. Ex. 113. After a probable cause hearing at which Mason's counsel was free to question witnesses and advocate on behalf of her client, the court adjudicated the child as being a Youth in Need of Care. Ex. 123. Throughout this period, DPHHS continued providing services to Mason intended to help her gain confidence, develop her parenting skills and ultimately regain full custody of her son.

The hearing officer has struggled with an argument offered by DPHHS counsel that suggested any defects in Silverthorne's investigation were essentially cured by the court adjudicating Mason's son as a Youth in Need of Care. It is important to note that the hearing officer is faced with the task of determining whether DPHHS discriminated against Mason in the provision of government services by denying her a thorough investigation while being mindful of the court's orders in the district court proceedings.

Mason offers several arguments as to why DPHHS cannot show an unlawful motive played no role in its actions and decisions in this case. Each argument will be addressed in turn.

First, Mason argues DPHHS disregarded her right to a thorough and unbiased investigation due to her actual and perceived disabilities. Mason argues Silverthorne failed to obtain recent information regarding her mental health and alleged cognitive impairments and, instead, relied upon dated information provided by Hillyer. Silverthorne conceded she did not speak to Dr. Mozer, who had met with Mason at least three times prior to the initiation of the district court proceedings, or obtain a copy of Dr. Gregg's report indicating Mason had at least a normal IQ. DPHHS counters the information relied upon by Silverthorne was not out-of-date and points to the incident where Mason was hospitalized at the Behavioral Unit at St. Peter's as late as February 2015, which was only four months prior to Silverthorne being assigned the case. DPHHS also notes that Dr. Gregg's report does not conclusively conclude Mason had a normal IQ but rather, Dr. Gregg was unable to administer the entire battery of tests because the tests are not designed to be administered to a deaf person. DPHHS also notes Dr. Gregg's comment that Mason's reliance upon others to do things for her rather than do things for herself was "pretty ingrained." Finally, DPHHS notes Dr. Gregg was only asked to determine whether Mason had the capacity to consent to sex and not whether she had the capacity to parent. Finally, DPHHS argues Silverthorne included all information she had collected in the family function assessment.

DPHHS' arguments are well taken. While Mason may have enjoyed several weeks of psychiatric stability once she began working with Dr. Mozer, Silverthorne would have been remiss if she had ignored the information provided by Hillyer. Mason acted out several times during her pregnancy, which, at this point, appears to have been a result of either her failing to take her medication as prescribed or being prescribed ineffective medications for her condition. When undertaking an assessment of whether an individual is capable of safely parenting a newborn, it was not unreasonable for Silverthorne to note those incidents and consider them when

making her recommendation to the court. Further, Dr. Gregg's report, while seemingly finding Mason had a normal IQ based upon the tests he was able to administer, still notes a serious concern that is relevant to a woman facing the challenge of parenting a newborn - could Mason act independently when called upon? Mason admittedly relied upon the assistance of her mother and a host of other people to perform daily life activities at that point in her life. However, upon the birth of her son, Mason was facing a challenge wholly distinct from calling a cab or cleaning a home. The concern about Mason's ability to act independently was a concern that warranted attention by Silverthorne and ultimately the court.

Mason next points to Silverthorne's reliance upon information provided by individuals who did not have an effective means of communication with Mason, specifically Hillyer and Hurlbut. Mason again alleges the information provided was out of date and inherently unreliable because none of those individuals ever interacted with Mason using a qualified interpreter. Mason concedes Oliver used a qualified interpreter but notes Oliver's communication was ineffective due to the extensive use of written materials in her program.

DPHHS counters that Mason's mother and McDonald acted as interpreters for Mason throughout the seven years she received treatment from Hillyer. DPHHS also notes that Hurlbut was not a direct care provider for Mason but was in an unique position to observe Mason's body language and gestures, and to read text messages Mason sent to Robbie, given his relationship to Robbie. Both Hurlbut and Hillyer stopped being involved in Mason's life in late-March or early-April 2015, which was only three months prior to Silverthorne's involvement.

Again, DPHHS' arguments are well taken. Silverthorne received information from Hurlbut and Hillyer suggesting Mason would have difficulties safely parenting a newborn. Both individuals had a long-term relationship with Mason and both were in a position to observe her behavior and draw their own conclusions. Further, a period of a few months does not render information obsolete. While Silverthorne may have been well advised to probe their allegations further, the information they provided was consistent with issues faced by Mason that resulted in her being hospitalized at St. Peters during her pregnancy.

Further, Mason's argument that Oliver did not have effective communication with her is not persuasive. Oliver had an interpreter with her at most, if not all, meetings with Mason. Admittedly, the written materials used in Oliver's program were not effective for Mason. Oliver, as an RN who has worked with several parents as part of her program, was in an unique position to assess Mason in a non-

adversarial environment and, based upon her training and experience, form an opinion as to Mason's ability to safely care for a child

Mason also argues Silverthorne spoke more frequently with Mason's mother and rarely with Mason herself. By all accounts, Mason's mother was a dominant figure in her life. Silverthorne and other DPHHS staff had interpreters present at most, if not all, meetings with Mason. While Mason may have felt Silverthorne focused more on her mother than herself, the evidence does not show Silverthorne excluded Mason or attempted to work around her during her involvement with the family. Rather, it appears Silverthorne made a good faith attempt to address the concerns of each person involved in the matter, including not only Mason, but also Robbie, Earl, Maltese, Zenker, McFarlane, Huigen, Gault, Hampton, and the Moores.

Mason points out that Silverthorne's family functioning assessment included very little positive information about Mason, including the efforts made to ready herself to care for her child. As Anne Peterson, an attorney with the Lewis and Clark County Attorney's Office testified, "Well, when we remove a child and we're filing, the statutory requirements that I have to meet are typically negative. They're the things that the Department feels are safety concerns for a child. So that's what we need the judge to see and understand. It's not -- I mean, the hearings are when you get out more information, but when you're writing a piece of paper that goes in front of a judge that they have to decide based on that piece of paper, it's going to be all the safety concerns." Peterson Tr., 571:21-25; 572:1-3.

Also noted by Peterson, which is important in this case, is that Silverthorne was merely collecting information at the beginning stages of her involvement with Mason and her son. Id., 572:9-16. Silverthorne was not in a position to second guess what information was being provided to her at the early stages. Silverthorne was merely responsible for gathering the information and making an informed opinion based upon the information gathered. As Maltese testified when asked if she saw any issues with Silverthorne's affidavit after she was appointed the child's attorney, "[A]t the beginning there is no way to know what's truth or false. I think the hearing that happened the end of August bore that out as far as what she had to say and the witnesses that were actually the reporters to the Department." Maltese Tr., 534:3-8.

It is difficult to imagine that a CPS worker would have the ability, let alone the time, to gather information from professionals, including nurses, doctors and other medical staff, and determine if there was a proper basis for that professional's

opinion. This is particularly true in a case such as this where the information being gathered is fairly consistent as to describing a young woman with serious mental health issues and some issues functioning day to day without guidance and assistance from others. Therefore, while Silverthorne's investigation may not have been technically perfect, the substantial evidence of record shows Silverthorne made a good faith effort to gather as much information as was relevant to the issue of whether Mason was able to safely care for a newborn child.

Second, Mason argues the present danger plan requiring Mason's mother to stay with Mason and her newborn 24 hours day every day of the week was unrealistic and designed to fail. Mason argues DPHHS offered no parenting support services during the period of the present danger plan or when the child was placed in foster care. Mason's expert, Amy Russell, testified that it was unduly burdensome and unreasonable to require Mason's mother to stay with Mason and basically police her activities. Russell also noted the lack of parenting services offered and the fact that the placement was not the least restrictive step or represent reasonable efforts to avoid removal of the child.

DPHHS argues that Mason's mother had made it clear in her communications with Hillyer that she had no intention of taking the baby if Mason was unable to parent and the present danger plan was limited to ten days to accommodate Mason's mother's refusal to remain in the home any longer than necessary. DPHHS also notes that it was Mason's mother that placed Mason's child in the Moore's home after learning CFSD was going to seek temporary custody of the child when no other kinship placement was identified.

What constitutes reasonable efforts to avoid removal of the child is beyond the scope of this particular matter and was addressed by the district court in its order dated July 10, 2015. Unlike Glass, the request for Mason's mother to remain in the home was not unlimited in time - the present danger plan could not be in place for any more than 30 days and 10 days was used at the demand of Mason's mother. Further, given Mason's difficulties in understanding abstract concepts without repetition and intensive teaching, how plausible was it that an infant with feeding issues would be safe in Mason's sole care. With the health and safety of the child as the paramount issue governing CFSD's actions, it cannot be said that it was unreasonable for CFSD to request the family to make some type of arrangement to ensure the safety of the newborn while in Mason's care. Further, one has to wonder what Mason's mother hoped to accomplish by taking Mason's child and placing him with a family with the apparent promise that adoption would be the next step despite Mason's desire to keep the child and the stated goal of the State to work toward

reunification. Even without the other issues in this case, the actions of Mason's mother would raise concerns.

Mason's mother has clearly been a dominant force in Mason's life and continued to be after the birth of Mason's son. She accompanied Mason to several of her appointments with Hillyer and worked closely with McDonald to ensure Mason was receiving the services she needed in order to maintain her employment and to stay in her own home. Mason's mother accompanied her to Missoula and spent nearly a month with Mason in the hospital following the birth of Mason's son. Mason's mother attended many of the visits with Huigen, Gault and McFarlane and was in regular contact with Silverthorne throughout CFSD's involvement with Mason.

However, Mason's mother, at times, was a disruptive force. For instance, when told that the meeting with Hillyer and Oliver on April 1, 2015 was intended to help Mason develop a safety plan for the birth of her son, Mason's mother cancelled the meeting. When faced with the reality that CFSD intended to be involved after the birth of Mason's son, Mason's mother refused to stay with her daughter for the 30 days usually required under a present danger plan. CFSD did not impose the 30 days but allowed the present danger plan to be in place for only 10 days at the demand of Mason's mother. Near the end of those 10 days, Mason's mother begins arranging for the placement of Mason's son with another family despite Mason's obvious desire to be a mother to her son. During visitations with Huigen, Gault and McFarlane, Mason's mother occasionally interjected herself when the focus should have been on Mason and her son. At one point, Mason's mother became upset enough with being told to stop interfering that she "stormed" out of the home. McFarlane Tr., 655:8-24 The effect of Mason's mother on the course of Silverthorne's investigation cannot be ignored and must be considered when determining whether DPHHS acted appropriately during the course of its involvement with Mason.

Third, Mason argues Silverthorne misstated or overstated the concerns identified by individuals who testified at hearing. Mason points to Silverthorne noting that Adria Willis of St. Peter's told her that "staff was concerned about the baby's safety." DPHHS also notes that Willis, who appeared at hearing with legal counsel provided by St. Peter's, answered, "I do not recall," when asked if she ever told Silverthorne that she was concerned about Mason's ability to parent. Willis Tr., 717:13-16. Mason also points to Oliver's denial at hearing that she ever told Silverthorne that she believed Mason was intellectually disabled or that she attributed Mason's lack of communication to Mason's ability to learn. Silverthorne

noted in the FFA that Oliver "had signficant concerns for Ms. Mason's intellectual state and possible intellectual disability as she did not appear to possess the capacity to parent or learn how to parent."

Mason also points to Silverthorne's assertion that Community Medical Center staff had concerns about Mason's mother primarily caring for the infant while he was in the hospital. There are entries indicating she needed prompting at times but also entries indicating Mason was eager to care for her son and making progress in independently caring for her son. Finally, Mason notes Silverthorne's assertion that there was "no question" that the infant's brain infarct would mean that he would have disabilities. Evidence of record suggests that is not the case and that it is impossible to predict this.

DPHHS counters that Community Medical Center staff clinical notes indicate some concerns about Mason's mother taking the lead in caring for the child and testimony at hearing that Mason never independently fed her son through his G-tube. DPHHS also notes that Silverthorne did not emphatically state the brain infarct would inevitably lead to developmental delays, but actually wrote,"[SM] 's developmental delay(s) and/or intellectual prognosis are unknown at this time as these will not be known until he begins to grow and his developmental milestones are delayed and/or not achieved." Ex. 112, p. 4.

Each of the collateral sources expressed some concern about Mason's ability to safely parent a newborn infant. While Silverthorne may have misstated some information received from collateral sources during the course of her investigation, it does not appear it was deliberate or based on a discriminatory animus. Further, the evidence presented in this matter pertaining to the concerns people working with Mason had about her ability to safely parent a newborn was fairly consistent with the information contained in Silverthorne's reports and court filings.

At hearing, evidence was presented showing Mason was drinking heavily in January 2014 and having frequent conflicts with Robbie. Hillyer Tr., 91:1-6. Evidence shows that during this same period, Mason's mother grew concerned by that Mason was not taking the medication prescribed to her by Hillyer as directed and assumed the responsibility of filling her medication boxes. Hillyer Tr., 98:10-18. Mason had several outbursts and emotional episodes in January, February and March 2015, which included posting Facebook comments about suicide; having an angry outburst at the bowling alley; having a brief, but angry outburst at Wal Mart; and threatening to hang herself in her home. Hillyer Tr., 98:22-25; 99:1-9; 99:12-24; 102:7-17. Mason was admitted to the Behavioral Health Unit at St. Peter's at

least once during this period. Hillyer Tr., 102:15-17. Several of these issues could be attributable to other causes such as Mason's feelings regarding Earl's actions toward her and his behavior toward Robbie or Mason's failure to take her medications as prescribed, the fact remains that people in Mason's life who were there to assist her had very real and very grave concerns about her ability to safely parent a newborn. The fact that those concerns may have been misstated or overstated by Silverthorne in her reports does not erase the fact that people who had known Mason for several years and who were in a position to observe her, reported that her mental health was precarious during that period and she was engaging in behavior that would put a child at risk for harm.

It should also be noted that Silverthorne readily conceded that some of the information included in Mason's Phase I Treatment Plan was cut and pasted from her affidavit. However, Mason's counsel assisted in drafting the treatment plan. Silverthorne Tr., 999:1-3; 1015:21 - 1016:11. Mason's counsel was present at the Family Engagement Meeting on September 28, 2015 and did not object to the information at that time. Ex. 124. Mason's counsel was present at the probable cause hearing and had the opportunity to cross examine witnesses and present evidence on behalf of Mason. The issues raised in this matter were issues that could have and most likely should have been addressed during the district court proceeding.

Fourth, Mason alleges Lashinski holds negative and over generalized views of parents with mental illness that affected the agency's actions in this case. Lashinski testified about his experience in working with parents who have mental illnesses and the issues surrounding the safety of the infant. Lashinski testified directly as to how present danger is determined and in particular the danger of someone with bipolar disorder. Lashinski Tr., 1050:7-1053:14. Lashinski spoke from both personal and professional experience with bipolar disorder. Lashinski Tr., 1070:13-16; 1071:19-24.

It would be difficult to find a professional who had worked in social services, law enforcement, or in any other field dealing with individuals with mental illness and the effect those issues have not only on the individual's life but the life of their friends and families who would not identify the same concerns noted by Lashinski and act to safeguard a child from those issues. While Lashinski clearly had strong feelings about the effect a parent's mental illness may have on children, the hearing officer did not have the impression that those feelings prevented him from providing Mason and her family with the services necessary to ensure the health and safety of her child.

Mason contends the beliefs held by Lanshinski led the agency to interfere with Mason's ability to have more frequent visitation with her son. Clearly, CFSD bears the burden of ensuring contact between the parent and the child once it becomes legally involved with a family. It is unclear why Mason's mother was not approved as a safe person for visitation until after October 2015. Mason points to other service providers, including Huigen, who could have facilitated visitations.

DPHHS argues Silverthorne made a good faith effort to arrange for visits between Mason and her son but was thwarted by a lack of staff and the closure of a local contractor during that same period. The evidence shows Silverthorne took the appropriate steps to arrange for visitation in August 2015, but the contractor closure and the shortage of staff made the task more difficult. The evidence does not show Silverthorne failed to arrange for more frequent and regular visitations between Mason and her son out of a discriminatory animus but rather due to the staffing constraints faced by their agency. Further, it appears the Moores were willing to allow Mason visitation with the child and never denied her the opportunity to visit.

Mason also argues it was inappropriate for service providers to require Mason to speak out loud during her visits with her son. Mason does not typically speak and relies upon sign language as her main form of communication. However, the evidence suggests the effort to have her speak was not done to embarrass or to punish Mason, but, rather, to give her another tool to get her son's attention. A main purpose of having Gault work with Mason was the fact she had raised a hearing son as a deaf mother. It seems unlikely that her suggestion to Mason to use her voice when getting her son's attention or when interacting with the boy was borne from a discriminatory animus. The hearing officer was left with the impression that it was merely another parenting tool that Mason could choose not to use if she was uncomfortable with that approach.

Fifth, Mason argues that the failure of DPHHS to adhere to its own policies evidences an improper motive that it cannot rebut. Mason relies upon a report prepared by the Children and Family Ombudsman's office outlining failures in the case. Similar to Mason's arguments, the Ombudsman found CFSD's reliance on dated information was improper and clearly observable evidence was not relied upon when making the decision to remove Mason's son from her home. The Ombudsman also pointed to the failure to have more frequent and regular visitations as a failure; as well as the agency's failure to effectively communicate with Mason beyond the use of a qualified interpreter.

Several of the issues pointed to in the ombudsman's report appear to have been simple oversights by DPHHS or a result of a different interpretation of DPHHS policies. Again, the hearing officer must point out that the investigation itself and subsequent court filings were reviewed by the district court and the court found DPHHS had made reasonable efforts to avoid removal of the child. See Ex. 113, p.2. Mason had an opportunity at the probable cause hearing and during the pendency of the matter before the district court to make the argument DPHHS had failed to adhere to its own policies thereby calling into question whether granting temporary legal custody to DPHHS was proper. Those arguments were apparently not presented to the district court for its consideration.

The hearing officer does not find that Silverthorne or any other member of DPHHS staff acted in such a manner as to evince an improper motive while working with Mason and her son. Rather, it appears DPHHS and its staff took its duty to Mason and her son seriously by offering the family a variety of services intended to strengthen Mason's parenting skills and to reunify Mason with her son. At or near the time Mason returned to Helena with her son, Huigen, who is proficient in sign language, began working with Mason on parenting skills. In October 2015, McFarlane began working with Mason on parenting skills and continued to do so for almost one year. McFarlane scheduled visits according to Mason's schedule and coordinated visits so Mason's advocate, attorney, mother, and other services providers could attend. In December 2015, Gault, who is a deaf woman who raised a hearing son, began working with Mason as a role model of sorts to show Mason how to effectively parent a hearing child. At most, if not all, of the visits held by DPHHS during this period, an interpreter was present. The hearing officer was left with the overwhelming impression that each service provider who worked with Mason after the birth of her child were mindful of her needs and attempted to adjust their approaches to accommodate her needs. The hearing officer is not persuaded that DPHHS or any member of its staff acted with an improper motive while working with Mason and her son. Therefore, DPHHS has satisfied its burden in this regard.

C. CFSD Provided Mason with Reasonable Accommodations

Montana Code Ann. § 49-2-101(19)(b) provides:

> Discrimination based on, because of, on the basis of, or on the grounds of physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. An accommodation that would

require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.

Mason contends Silverthorne's written communications were inappropriate because Silverthorne knew or should have known that short and succinct written communications were easier for Mason to understand. It is true, by Silverthorne's own admission, that she included detailed information in her reports and her communications with Mason. While Silverthorne may have been well advised to rethink her approach, the fact remains that the written communication was provided as an accommodation to Mason, as well as her attorney. Mason's mother and Mason's attorney were included in these communications, as were the Moores, McDonald, and often times McFarlane, Huigen and Maltese. Silverthorne's emails were clearly intended to ensure that everyone was aware of what was going on. It was not unreasonable for Silverthorne to assume, based upon her experiences with Mason and her mother and the involvement of Disability Rights Montana, that her communications would be explained to Mason if she had any difficulties understanding the communications. The evidence does not suggest Silverthorne's method of communication was intended to cause Mason difficulties but, rather, make it easier for her, her mother and Disability Rights Montana representatives to receive the same information at the same time and to be able to fully participate.

Mason also argues she was denied a qualified interpreter when she was at the Community Medical Center and a present danger assessment was performed by a Missoula CFSD worker. While essential, it appears the worker was able to communicate with Mason and her mother sufficiently to determine they were doing well and there was no present danger.

Mason also argues CFSD knowingly relied upon information provided by individuals who did not communicate with Mason using a qualified interpreter. Both Hurlbut and Hillyer had long-term working relationships with Mason. Both were in a position to observe her physical behavior, reactions to certain situations and had apparently been somewhat successful in communicating with her through the assistance of McDonald and Mason's mother. Both were in a unique position to be able to form opinions as to Mason's behavior and conduct prior to and during her pregnancy. Further, Oliver used a qualified interpreter when she interacted with Mason and concluded only that the abstract concepts she was attempting to teach Mason were not easily communicated via sign language.

While a qualified interpreter would ideally be available for every interaction Mason had with a professional, that obviously has never been the case. Mason's

mother and McDonald have been called upon to serve in that role countless times and Mason has never appeared to have difficulty understanding what was being said with their assistance. There is no allegation that a DPHHS representative ever met with Mason without Mason's mother or McDonald being present.

Mason also argues that CFSD unfairly deemed Mason's reliance upon her mother or partner for assistance in calling for a taxi and other things to be signs of dependence rather than signs of her having fashioned her own accommodations that allowed her to maintain long-term employment. It stands to reason that a deaf person may not look to the telephone as being a tool they regularly use. However, it is understandable that a CFSD worker may have concerns about a parent's apparent reliance upon others to perform daily tasks when you are faced with the issue of infant safety. A parent cannot look to another to respond to a child's needs in the face of an emergency or when dealing with simply a fussy or recalcitrant infant unwilling to be comforted. A parent is expected to be able to act independently and quickly when dealing with a child's needs. The hearing officer was impressed that Mason clearly took her role as a parent seriously and demonstrated a clear commitment to developing her parenting skills to a point where she could safely and successfully parent her child. The hearing officer is not persuaded that CFSD, when identifying concerns about Mason's independence, penalized her for those concerns beyond considering how those issues could affect the health and safety of the child. One cannot ignore that the a primary purpose of CFSD when it becomes involved with a family is to ensure the health and safety of the child. The hearing officer is not persuaded that DPHHS failed to accommodate Mason's needs.

The evidence shows DPHHS provided reasonable accommodation to Mason. Its method of communication with Mason was intended to assist Mason in understanding what was going on by providing that same information to Mason, Mason's mother and Mason's attorney. Further, DPHHS provided a qualified interpreter at most, if not all, meetings with Mason. While Mason's other service providers such as Hillyer may not have worked with a qualified interpreter, someone viewing a seven-year working relationship would not automatically conclude Mason was unable to understand anything that had been going on throughout that relationship particularly when Mason's mother and McDonald continued to appear with Mason at critical points of DPHHS' involvement in this matter. Therefore, the evidence shows DPHHS provided Mason with reasonable accommodations.

D. The Governmental Code of Fair Practices

Mason contended in her pre-hearing contentions that DPHHS violated the Governmental Code of Fair Practices, which prohibits the State from being a party to any agreement, arrangement or plan that has the result of "sanctioning discriminatory practices." Mason argued DPHHS collected and heavily relied upon information from services providers who had not provided Mason with interpreters or an effective means to communicate when making the decision to place her baby with a foster family. This argument was not specifically addressed in either party's post-hearing briefing, but it bears some discussion.

As a result of the hearing officer's decision in Glass, DPHHS implemented a series of policies regarding the agency's duties when working with an individual with a disability. DPHHS apparently has an ADA Coordinator that was not consulted during Mason's case. Although the hearing officer in this case ultimately finds DPHHS to be the prevailing party, DPHHS would be well advised to revisit these policies and to ensure its staff is properly trained as to the application of those policies and define when the ADA coordinator should become involved in a case such as this.

E. Admissibility of Dr. Smelko's Neuropsychological Evaluation

At hearing, Mason's expert witness, Dr. Gabriel Loman, testified regarding his review of a neuropsychological evaluation performed by Dr. Smelko that ultimately formed the basis of the Phase II treatment plan. Exhibit 28, Dr. Smelko's evaluation, was offered and the Hearing Officer reserved ruling to allow the parties' an opportunity to address the admissibility of the report in their post-hearing briefing.

Mason's original Complaint of Discrimination filed on January 11, 2016 made no reference to the Phase II Treatment Plan or Dr. Smelko's evaluation, which was issued on January 15, 2016. The agency's argument that the Phase II treatment plan and Dr. Smelko's evaluation are beyond the scope the present case is well taken; as is the agency's argument that the report itself is not helpful to the hearing officer in making a determination regarding the allegations raised in Mason's complaint. Therefore, Exhibit 28 is hereby excluded from the record.

F. Mason's Expert Witnesses

"[E]xpert testimony is required when the issue presented is sufficiently beyond the common experience of the trier of fact and the expert testimony will assist the

trier of fact in determining the issue or understanding the evidence." Hinkle ex rel. Hinkle v. Shepherd Sch. Dist. No. 37, 2004 MT 175, ¶ 35, 322 Mont. 80, 93 P.3d 1239(citations omitted).

Mason offered the expert testimony of Arthur Becker-Weidman, Ph.D.; Amy Russell; and Gabriel Lomas, Ph.D - all of whom are imminently qualified to serve as expert witnesses. Dr. Becker-Weidman testified regarding the emotional distress Mason suffered as a result of her separation from her son. Dr. Becker-Weidman Tr., 305-306. Russell testified that, based upon her review of Silverthorne's investigation, the investigation was not thorough or that it included bias. Russell Tr. 225; 440; and 446. Dr. Lomas was retained by Mason to testify at the probable cause hearing in August 2016. Dr. Lomas Tr., 387:1-3. Dr. Lomas testified he believed the assessments performed on Mason included some errors; and he believed she had average cognitive function and posed no risk to her son. Dr. Lomas Tr., 388:19-24.

The testimony of these witnesses was helpful to the extent that it assisted the hearing officer in identifying issues in Silverthorne's investigation. However, when viewing the entirety of the record, including the testimony of witnesses who had worked with Mason prior to and after the birth of her son, the hearing officer is not persuaded to join in the conclusions of the expert witnesses that the conduct of DPHHS staff in the course of the performance of their statutory duties evinced a bias or discriminatory animus toward Mason. Therefore, the testimony of Mason's expert witnesses was not given great evidentiary weight when viewed in relation to the entirety of the record.

V. CONCLUSIONS OF LAW

1. The Department of Labor and Industry has jurisdiction over this case. Mont. Code Ann. §49-2-512(1) MCA.

2. Alischa Mason established a prima facie case of discrimination by Department of Public Health and Human Services (DPHHS) based upon her actual and perceived disabilities. St. Mary's Honor Ctr. v. Hicks, 509 U.2. 502, 506 (1993).

3. DPHHS has proven by a "preponderance of the evidence that an unlawful motive played no role" in its decision to seek temporary custody of Mason's infant or its actions thereafter. Admin. R. Mont. 24.9.610(5).

4. DPHHS is the prevailing party for purposes of Mont. Code Ann. § 49-2-505(8).

VI. ORDER

Judgment is granted in favor of the Department of Public Health and Human Services and against Alischa Mason, whose complaint is dismissed with prejudice as meritless.

DATED: this 20th day of October, 2017.

/s/ CAROLINE A. HOLIEN
Caroline A. Holien, Hearing Officer
Office of Administrative Hearings
Montana Department of Labor and Industry

* * * * * * * * * * *

NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Charging Party Alischa Mason, and her attorneys, Beth Brenneman and Roberta Zenker, Disability Rights Montana; and Respondent Montana Department of Public Health and Human Services, and its attorneys, Mary K. Tapper and Vicki Knudsen, DPHHS Office of Legal Affairs:

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, Mont. Code Ann. § 49-2-505 (4), WITH ONE DIGITAL COPY, with:

Human Rights Commission
c/o Annah Howard
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND ONE DIGITAL COPY OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505(4), precludes extending the appeal time for post decision motions seeking relief from the Office of Administrative Hearings, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

IF YOU WANT THE COMMISSION TO REVIEW THE HEARING TRANSCRIPT, include that request in your notice of appeal.. For copies of the original transcript, please contact Lesofski Court Reporting, Inc. 406-443-2010

Mason.HOD.chp