IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE DEPENDENCY OF:

A.J., D.J., and A.J.,[1]

Minor children.

Consol. Nos. 52247-1-II
52257-8-II
52267-5-II

RULING REVERSING ORDERS TERMINATING PARENTAL RIGHTS

T.B. is the mother of A.D.J., D.A.J., and A.M.J.[2] T.B. appeals the juvenile court's order terminating her parental rights. She argues that the Department of Children, Youth, and Families (Department)[3] failed to prove: (1) it offered or provided her all necessary

[1] The Court notes that the initials used to designate two of the children in the briefing are incorrect. This ruling will refer to the children with the initials from the names listed in each child's birth documentation, provided to the Court in their individual "Birth System Display[s]." Exhibit (Ex.) 1, Ex. 18, and Ex. 35. So in this ruling, A.R.J. is referred to as A.D.J., D.J. is referred to as D.A.J., and A.N.J. is referred to as A.M.J.

[2] T.B. and T.J. are parents to three children, A.D.J. and D.A.J., twin boys born in January 2013, and a girl, A.M.J., born in February 2010. T.B. also has six additional children: As.H. and R.H., fathered by Mr. H.; and Au.M, B.M., O.M. and S.M., fathered by S.M. As.H., R.H., and Au.M are all now at least 18 years old, and emancipated.

[3] The Department of Children, Youth, and Families has replaced the Department of Social and Health Services as a party to this case. In July 2017, the Washington State Governor signed HB 1661, which moved many of the Department's child-related

services reasonably available and capable of correcting her parenting deficiencies in the foreseeable future; (2) there was little likelihood conditions could be remedied in the near future so the children could be returned to her care; and (3) she was unfit to parent at the time of the termination trial. This court considers her appeal on an accelerated basis under RAP 18.13A, reverses the termination orders, and remands this matter to the juvenile court for further proceedings.

FACTS

Background

In the last 20 years, the Department received over 50 reports about T.B. and her family. Some of these reports led to founded findings of child abuse or neglect.[4] For example, in 2007, the Department received a referral that S.M., the father of four of T.B.'s older children, told T.B.'s then-10-year-old child, R.H., to wear a diaper. When R.H. refused, S.M. threw R.H. to the floor, put his knee on his chest, and tried to force a bar of

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services to this new agency. Starting July 1, 2018, the Department of Social and Health Services and the Children's Administration and Department of Early Learning ceased to exist and the Department of Children, Youth, and Families took over all functions of both agencies.

[4] According to former RCW 26.44.020 (Laws of 2016, ch. 259 § 1):

> (12) "Founded" means the determination following an investigation by the department that, based on available information, it is more likely than not that child abuse or neglect did occur.
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> . . . .
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> (26) "Unfounded" means the determination following an investigation by the department that available information indicates that, more likely than not, child abuse or neglect did not occur, or that there in insufficient evidence for the department to determine whether the alleged child abuse did or did not occur.

soap into his mouth. R.H. cut his mouth on his own teeth and was "spitting out blood" when he eventually stood up. Exhibit (Ex.) 5 at 8. T.B. allegedly did nothing to stop S.M. Many other reports said that the family's homes were littered with urine, dog feces, and garbage. In November 2015,[5] the Department received a referral stating that T.J. had a history of holding a loaded gun to the children's heads.

When social workers visited the home in November 2015, in response to the referral, they found the family living like—and with—animals. For example, the front door was surrounded by "several emaciated cats, a partial animal skeleton, garbage, piles of foul smelling blankets, boxes of decomposing food, and cat food." Ex. 5 at 3. The carpet in the home was saturated with animal urine and feces. The kitchen was stacked with rotting food and garbage. Two piglets lived in a crib in the kitchen and feces was smeared on the walls and the floor near the crib. T.J. stated that the children were often sick, but he did not know why.

The social workers found no firearms at the house, although there were several locked rooms that they could not enter. The children stated that T.J. owned guns and kept them in the home. On November 18, 2015, law enforcement placed the seven minor children living in the home into protective custody.

[5] In 2015, T.B. was not always home because she was in and out of the hospital getting treatment for cancer. By the time of the termination trial, her cancer was in remission.

Dependency

On January 29, 2016, T.B. entered into agreed dependencies for the three children fathered by T.J. The juvenile court ordered T.B. to undergo a psychological evaluation and follow all recommendations, and to complete a parenting course. The juvenile court gave T.B. and T.J. one four-hour weekly visit with all seven children, and one additional two-hour weekly visit with A.D.J. and D.A.J.

Dr. Michael O'Leary performed a psychological evaluation of T.B. in June 2016.[6] He diagnosed her with an unspecified intellectual disability,[7] a neurodevelopmental disorder, persistent depressive disorder, social anxiety disorder, mixed personality disorder, and borderline intellectual functioning.

He concluded that she "remains at high risk to the welfare of her children by virtue of her cognitive deficits and other developmental delays." Ex. 62 at 19. He believed it "highly unlikely" that T.B. would be capable of caring for her children in the future. Ex. 62 at 17. To him, T.B. appeared "amenable to treatment," but she did not appear to

[6] Because T.B. has a learning disability and is functionally illiterate, a retired social worker read each question from the Background Personality and Parenting Measures questionnaire to T.B.

[7] For example, Dr. O'Leary stated that she "displays major cognitive deficits which significantly interfere with her ability to learn, retain, and implement new parenting behaviors," she appears "to be unable to make sound decisions in unfamiliar, fast moving, or critical situations," "she is largely unable to generalize from previous experience," and she "is not likely capable of managing her own funds and adhering to a budget." Ex. 62 at 10. He concluded that she "has significant developmental/cognitive problems which serve as a barrier to efficiently acquiring more adaptive and appropriate parenting behaviors. Ex. 62 at 17. He added, "[s]he has very severe deficits with respect to her ability to sustain attention and concentration." Ex. 62 at 19.

recognize her own deficits and was "perplexed" about why the Department was involved in her life. Ex. 62 at 19. She did not appear motivated to change her behaviors.[8]

Recognizing T.B.'s deficits, social worker Colleen Rice-Lozensky connected T.B. to the Department of Developmental Disabilities (DDA) and the Department of Vocational Rehabilitation (DVR):

> I referred [T.B.] to the [DDA]. At the office when I first met [T.B.], I walked over to the [DDA] and asked them to come over to [T.J.] and [T.B.] to tell them about the services. In addition, I asked for the [DVR] case manager to come as well. They both came over. They both talked about how to apply for the services. . . .

2 Report of Proceedings (RP) Jan.17, 2018 at 150-51. Rice-Lozensky explained that she set up this meeting because she cannot fill out and sign DDA or DVR forms for adults, only for children. According to Rice-Lozensky, she did not know if T.B. followed through with submitting DDA or DVR paperwork because she did not get a release of information from T.B. for DDA. When asked if she agreed with Dr. O'Leary's psychological assessment that "[T.B.] needs someone there, she needs someone there helping her, walking her through this," Rice-Lozensky agreed that Dr. O'Leary said T.B. needed "intensive social case work." 1 RP Jan. 16, 2018 at 153.

[8] The record reflects that T.B. received Family Preservation Services (FPS) or Homebuilders in 2009, 2012, and 2013. T.B. and T.J. responded to these services by cleaning the house, but once the services ended the conditions quickly deteriorated. Dr. O'Leary opined that this pattern "is consistent with [T.B.]'s cognitive problems as well as her personality characteristics." Ex. 62 at 18.

The Department referred T.B. to Positive Parenting Program[9] (Triple P). As part of Triple P, a therapist assisted T.B. to improve communication skills, create chore schedules, and clean the home. Between January and June 2016, T.B. and T.J. successfully completed the program. But according to Brooke Brooling, the initial social worker, the Triple P provider remained concerned that the parents had not made enough progress.

In September 2016, the Department also referred T.B. to TIPS, a parenting class at Centralia Community College.[10] There, T.B. met with a parenting instructor twice per week for 30 weeks. Cristi Heitschmidt, the TIPS administrator, believed T.B. could take direction and apply what she learned to improve her parenting.

In the fall of 2016, three of T.B.'s children, A.M., O.M., and S.M., wrote a letter to T.B. to tell her that they wanted to live permanently with their father, S.M. Deborah Darnell, the children's therapist, delivered the letter to T.B. Although it was a difficult letter to write, the children told T.B. that they "don't want to come home and [they] nam[ed] off

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[9] Positive Parenting Program (Triple P) is a 10 to 17 week in-home or community-based parenting program that teaches parents simple and practical strategies to build strong, healthy relationships, confidently manage their children's behavior, and prevent problems. In the class, parents develop skills to deal safely with difficult or challenging child behaviors, learn coping skills, learn appropriate discipline management, improve parent-child relationships and bonding, support positive behavior in children, and teach children new skills and behaviors. *See* https://www.dshs.wa.gov/sites/default/files/CA/cp/documents/ebp-pppHandout.pdf; and https://www.triplep.net/glo-en/home/ (both last visited January 28, 2019).

[10] The TIPS program is no longer offered by Centralia Community College and has been replaced by a new program called Level Up Parenting. *See https://centraliacollege.wordpress.com/2018/08/30/kids-driving-you-crazy-we-can-help/* (last visited January 28, 2019.

the ways in which [T.J.] had scared them or hurt them. And again, it was hitting them with boards, throwing things, yelling, and fighting." 2 RP Jan. 17, 2018 at 177. But T.B. did not believe them and, at a later therapy session with Darnell, A.M., O.M., and S.M, she accused the guardian ad litem (GAL) and the Department of brainwashing the children. Darnell described how damaging it is for children to "muster up the courage to" report abuse only to have their parent deny that the abuse happened. 2 RP Jan. 17, 2018 at 177-78.

In May 2016, the Department petitioned the court to reduce or suspend visitation. The social worker based this motion on the disclosures the children made to Darnell[11] and the GAL. B.M. told Darnell that T.J. hit him with boards, and made him do "wall[] sits" holding heavy objects in his lap for long periods. 2 RP Jan. 17, 2018 at 173. The court temporarily suspended visitation for 30 days.

During Darnell's therapy sessions, A.M.J. disclosed that T.J. had broken her hand.[12] A.M.J. also recounted other incidents which frightened her: One in which T.J.

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[11] At various times, Darnell treated most of T.B.'s children.

[12] When A.M.J. was brought into care, her hand was broken. When questioned by Child Protective Services (CPS) and the foster parents, she told them that her brother caused the injury by stepping on her hand. A GAL also interviewed A.M.J. at that time, and entered a CPS report in which the GAL stated "that her dad [T.J.] broke her hand." Ex. 141 at 2. But CPS staff and investigators later stated that the GAL may have "suggested this" to A.M.J. during the interview. Ex. 141 at 2. The next day, a CPS investigator and a law enforcement officer interviewed A.M.J., but she "was slow to respond and hard to understand." Ex. 141 at 2. A.M.J. appeared to suffer from some "delayed or developmental disabilities." Ex. 141 at 2. When asked by the CPS investigator for more details, A.M.J. responded "[T.J.] kicked it" and that she had been "placed in the corner and had her hand on her head, when it happened." Ex. 141 at 2. A.M.J. could not provide "much more detail about her dad kicking her in the hand." Ex. 141 at 2. Law enforcement determined that there was insufficient evidence to charge T.J.

threw the cage with the children's pet bird in it across the room; and another incident where T.J. pulled T.B.'s chemotherapy port out of her wrist. The older siblings, As.H. and B.M., reported that T.J. was physically abusive to all the children. "Each time he would go by us, he hit us. We have gone through so much stuff we can't even remember everything." Ex. 55 at 1. They went on to recount that T.J. pressured As.H. for sex and that he once exposed himself to her and performed a sex act. They added that another one of the older siblings, Au.M., was sexually abused by their uncle. Au.M. nodded her assent when asked by the visitation specialist if this had occurred. Darnell also testified that one week before trial, Au.M. disclosed that T.J had sexually abused her. The children stated that T.B. was not present during any of these incidents, and B.M. stated "Mom would have to go to town for appointments and [T.J.] would stay behind to take care of the kids. That's when he would do it." Ex. 151 at 2.

T.B. told Dr. O'Leary that no domestic violence occurred in her relationship with T.J. She testified at trial that she only had one argument with T.J.

The Department referred T.B. for a domestic violence assessment and treatment program in December 2016. T.B. consistently received positive feedback in this program. For example, she documented her learning and participated in group discussions. She "expressed her appreciation for learning about [domestic violence] and has initiated her own research which she shared with the group." Ex. 76 at 1. Finally, she "demonstrated

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Before the dependency, B.M. also suffered a broken arm. In 2016, he disclosed that T.J. caused the injury by twisting his arm behind his back. No charges were filed because the statute of limitations had expired.

an understanding about what [domestic violence] is, the effects on victims (and children), [and] awareness of behavioral warning signs of abusers." Ex. 77 at 1.

Termination Trial

The termination trial began on January 16, 2018. At trial, Carolyn Mosser, who worked with T.B. in the domestic violence treatment program, testified that because of T.B.'s cognitive difficulties she changed T.B.'s program from using the "standard curriculum workbook" in favor of group and one-on-one discussions. 1 RP Jan. 16, 2018 at 73. Mosser incorporated handouts and related them to T.B.'s personal history. Mosser carefully went through T.B.'s personal notes to ensure that she understood the key components of the course.

Mosser stated that after the first three sessions, T.B. was an active participant in group discussions. T.B. attended every session. Mosser was confident that T.B. learned the key elements of preventing domestic violence. But Mosser also testified that T.B. never said that she believed the accusations of domestic violence leveled by the children at T.J.

In her domestic violence treatment program, T.B. said she learned that "if [a partner] say[s] you can't wear clothes, certain clothes or something, that's considered as abuse . . . . And I learned that if they say you're dumb or retarded, that's abuse." 1 RP Jan. 16, 2018 at 26. At Triple P, T.B. learned about how to organize chores with charts. She created a calendar to keep track of all her appointments throughout the dependency.

T.B. testified that she and T.J. had been in a relationship for over five years, but it ended two weeks before trial. When asked why the relationship ended, T.B. said,

"[b]ecause we weren't really getting along. And I feel that he wasn't trying to put effort in to trying to get our kids back . . . ."[13] 1 RP Jan. 16, 2018 at 15. "If he really wanted his kids, he would be up here right now like I am trying to get my kids back." 1 RP Jan. 16, 2018 at 18. She "just found out that" he was not using his services even though he told her that he was going to classes. 2 RP Jan. 17, 2018 at 244.

T.B. testified that she did not know if T.J. abused her children because she "wasn't even told. So if he did, it was when I was gone or something." 1 RP Jan. 16, 2018 at 17. She was not sure if he could parent. She later testified that "[w]ith all the lies and stuff, he probably did it," but "I don't know." 2 RP Jan. 17, 2018 at 245, 247.

When Darnell brought her the letter from her older children, T.B. said she felt confused. She had never seen T.J. hit anyone with sticks.

She testified that she bought new beds for A.D.J. and D.A.J. She also bought new clothes and replaced the rug. She repainted inside the house. She submitted photographs from both September 2016, and January 2017, which showed a clean and appropriate home.

T.B. "[did]n't think" that A.M.J. or A.D.J. had any need for special education.[14] 1 RP Jan. 16, 2018 at 28. She knew that in the past D.A.J. had special needs because his

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[13] Moments later, T.B. testified that she had separated from T.J. in November 2015, and had maintained the appearance of a relationship for the sake of the children.

[14] The twins are both enrolled in Individualized Education Programs (IEPs) for their developmental delays. These programs require coordinating and organizing several different appointments. The children also have occupational and speech therapy appointments.

speech was hard to understand, but she was not sure if he still had special needs at the time of the trial.

Throughout the trial, T.B. could not remember facts and events in response to questions. She did not remember what the conditions of the home were like in November 2015. She did not remember if she had ever received services before 2015, to help her clean or organize her home. She struggled to remember if anyone told her about the allegations of physical abuse against T.J. She testified that if she wrote something down she could remember it better. She also agreed that nerves from being in court limited her memory.

She recalled that her third child, B.M., was physically abused by his father, S.M. But she also testified that the children never told her that T.J. had hit them.

Deborah Darnell testified that when A.M.J. entered foster care she was both aggressive and withdrawn. A.M.J. hit her caregivers, while yelling and screaming at them. After a visit with T.J. and T.B. she returned home and ripped up her bed sheets. In spring 2016, A.M.J. was living with her three older sisters in foster care. But, according to the caregiver, she became jealous when these sisters began to transition to live with their biological father. She reportedly tried to strangle her foster family's kitten in anger.

Both A.D.J. and D.A.J. were aggressive in daycare, and ultimately D.A.J. had to leave the daycare for kicking, biting, and kicking a small child in the face. A.D.J. was more vocal than D.A.J., but Darnell was concerned about sexualized behavior between the twins. Darnell recounted that at their first foster placement, there were incidents where A.D.J. got an erection while bathing and asked D.A.J. to touch his penis. The first

foster parent also reported that the boys took their diapers off and touched each other inappropriately and, when interrupted, they became aggressive and tried to run from the caregiver. Darnell stated that there had been a decline in these behaviors, but that the current foster parent had recently reported that while D.A.J. was taking a bath, he was playing with dolls and he was having the dolls simulate sexual acts on his genitals. Because these behaviors have not stopped and the children simulate adult sexual behavior, Darnell opined that the boys may have been exposed to adult sexuality.

The twins also lacked basic self-care skills, like washing their hands after using the restroom or drying off after a bath. Similarly, A.M.J. and her older siblings did not understand where to put toilet paper. They did not know how to bathe or use a toothbrush. If the children wet themselves while in bed, they would not change and would simply lay in their own urine.

Darnell reported that A.M.J. felt "nervous" visiting T.B. because "she had to pretend that things were okay." 2 RP Jan. 17, 2018 at 174. Darnell said that she had not spoken with T.B. since she completed domestic violence treatment.

Brooling testified that T.J. would control visitation. She was unsure whether T.B. could structure visitation without T.J., but she observed no safety concerns at visitation. T.B. brought appropriate food and showed her children attention and care.

Upon visiting T.B.'s home after the children were removed, Brooling observed that the inside and outside of the house was much cleaner. The parents had steam cleaned the living room carpet and replaced flooring in the kitchen. The second time she visited the home, T.B. had new bunk beds and toys. T.J. was working on installing a heater.

Rice-Lozensky, the current social worker, expressed concern that T.B. continued to remain in a relationship with T.J. when he put her children at risk. She would want to see T.B. separated from T.J. for more than two weeks before she could believe T.B. would not go back to him. She did not believe that T.B. would be capable of caring for children with special needs, like D.A.J. and A.D.J., by taking them to appointments and speaking with medical personnel. Rice-Lozensky noted that T.B. needed gas vouchers to get to her own services.

Similarly, Dr. O'Leary opined that T.B. would have trouble: (1) understanding and comprehending communications from medical and educational personnel; (2) establishing a necessary routine for these delayed children; and (3) understanding and carrying through on recommended medical or medication regimens for her children.

Dr. O'Leary did not believe that T.B. could put what she had learned into practice on a consistent basis because of her cognitive deficits. He was particularly concerned about her choice of partners and he believed:

> given her dependent personality characteristics, that it would not be long before there would be another man in her life that she felt that she could depend on and could help her with . . . raising her children but that her ability to discern risks to the children's safety based on her partner's personality characteristics would be minimal.

2 RP Jan. 17, 2018 at 211.

Dr. O'Leary opined that T.B. was incapable of organizing a household without daily monitoring and support. He recommended a "transitional home with on-site case management, on site education and monitoring of [T.B.]'s behavior with her children." 2 RP Jan. 17, 2018 at 212. But he did not believe this service would remedy T.B.'s

deficiencies. Rather, he believed constant supervision of T.B. was the only way the children would be safe.

Following the termination trial, the juvenile court found that: (1) the Department had expressly and understandably offered or provided all necessary services, reasonably available, capable of correcting T.B.'s parenting deficiencies within the foreseeable future; (2) there was little likelihood T.B. would remedy her parenting deficiencies so that the children could be returned to her care in the near future; (3) T.B. was currently unfit to parent the children; (4) the continuation of the parent-child relationship clearly diminished the children's prospects for early integration into a stable and permanent home; and (5) termination was A.D.J., D.A.J., and A.M.J.'s best interests. The court therefore entered a orders terminating T.B.'s parental rights to A.D.J., D.A.J., and A.M.J. T.B. appeals.

ANALYSIS

The juvenile court may order termination of a parent's rights to his or her child if the Department establishes the six elements in former RCW 13.34.180(1)(a) through (f) (2013) by clear, cogent, and convincing evidence. RCW 13.34.190(1)(a)(i). Clear, cogent and convincing evidence exists when the ultimate fact at issue is shown to be "highly probable." *In re the Welfare of Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973) (quoting *Supove v. Densmoor*, 225 Or. 365, 372, 358 P.2d 510 (1961)). The Department also must prove by a preponderance of the evidence that termination of parental rights is in the child's best interests. RCW 13.34.190(1)(b).

Because the juvenile court has the advantage of observing the witnesses, deference to that court is particularly important in termination proceedings. *In re the*

Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980); *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995). This court limits its analysis to whether substantial evidence supports the juvenile court's findings. *Sego*, 82 Wn.2d at 739. Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. *Bering v. SHARE,* 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed,* 479 U.S. 1050 (1987). This court does not review credibility determinations or weigh the evidence. *Sego*, 82 Wn.2d at 739-40.

Necessary Services

Under RCW 13.34.180(1)(d), the Department must prove "[t]hat the services ordered under former RCW 13.34.136 (2015) have been expressly and understandably offered or provided and all necessary services, reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been expressly and understandably offered or provided." In determining whether the Department met its burden, the juvenile court may consider "any service received, from whatever source, bearing on the potential correction of parental deficiencies." *In re Dependency of D.A.*, 124 Wn. App. 644, 651-52, 102 P.3d 847 (2004), *review denied*, 154 Wn.2d 1030 (2005).

The Department, however, does not have to provide services when the parent is unable or unwilling to use them. *In re Dependency of Ramquist*, 52 Wn. App. 854, 861, 765 P.2d 30 (1988), *review denied*, 112 Wn.2d 1006 (1989). And even if the Department "inexcusably fails" to offer services to a willing parent, termination is still appropriate if the services "would not have remedied the parent's deficiencies in the foreseeable future."

In re Dependency of T.R., 108 Wn. App. 149, 164, 29 P.3d 1275 (2001); *In re the Welfare of Hall*, 99 Wn.2d 842, 850-51, 664 P.2d 1245 (1983).

As for services, T.B. challenges Finding of Fact 2.6:

> 2.6 The services offered under RCW 13.34.130 have been expressly and understandably offered or provided, and all necessary services reasonably available, capable of correcting the parental deficiencies within the foreseeable future have been offered or provided to the mother as follows: parenting education through Triple P and TIPS (Exs. 142-144, 152-154), psychological evaluation with treatment recommendations (Ex. 62), domestic violence victims' treatment through Olympia Psychotherapy (Ex. 74-78), a referral for Developmental Disabilities Administration's services, and a referral to Division of Vocational Rehabilitation. Social Workers Brooke Brooling and Colleen Rice-Lozensky testified that the Department had offered the mother Family Preservation Services twice and Homebuilders once prior to the [children's] removal per protective custody in November 2015. The mother has engaged in all of her court-ordered services, but has not substantially corrected her parental deficiencies.

Mot. for Acc. Rev., Appendix 1 at 2; Clerk's Papers (CP) at 112. She also challenges related Finding of Fact 2.8.10:

> 2.8.10 The Department made reasonable efforts to address the mother's cognitive delays. Ms. Mosser testified that she made modifications for the mother in her domestic violence victims' treatment. Dr. O'Leary testified he took additional steps to address [T.B's] learning disabilities and illiteracy by having a retired social worker read testing items to the mother (Ex. 62). [T.B.'s] TIPS parent educator, Ms. Heitschmidt offered accommodations due to the mother's delays (Ex. 153). Ms. Heitschmidt further recommended parent education through the Triple P program which the Department made the necessary referral and the mother completed the program (Exs. 142-144, 153). Ms. Rice-Lozensky testified that she met with the mother and recommended she apply for services through Developmental Disabilities Administration (DDA) and arranged for the DDA worker to meet with the mother.

Mot. for Acc. Rev., Appendix 1 at 4; CP at 114.

T.B. argues that the Department did not meaningfully refer her for DDA services and did not tailor her services to accommodate her disabilities. *See generally* former RCW 13.34.136(2)(b)(i)(B) (stating that the Department shall consult with disability administration to create an appropriate plan for services); current RCW 13.34.136(2)(b)(i)(B) (same). For support, T.B. relies on *Dependency of H.W.*, 92 Wn. App. 420, 428-29, 961 P.2d 963, *opinion amended on reconsideration sub nom. In re Dependency of H.W. & V.W.*, 969 P.2d 1082 (1998). There, this court reversed a termination of parental rights because the Department failed to refer the parent to DDA. *H.W.*, 92 Wn. App. at 428-29.

Here, however, Rice-Lozensky took T.B. to DDA and DVR, to speak with someone about forms and services because she believed that T.B. had to seek DDA eligibility and services on her own. Former RCW 13.34.136(2)(b)(i)(B) addresses coordination between the Department and DDA when a parent is disabled and has already been deemed eligible for DDA services. The statute, however, does not directly address the Department's responsibility to ask about DDA eligibility or assist a parent in obtaining an eligibility determination and services when, as here, the Department knows that it is working with a cognitively disabled parent.

But *H.W.* supports that the Department should inquire about services available from DDA when working with a cognitively disabled parent. For example, *H.W.* faulted the Department for failing to "investigate what services might be available through" DDA. 92 Wn. App. at 426. And *In re the Matter of I.M.-M.* cautions that the Department, once it learns it is working with a developmentally disabled parent, should both refer the parent

to DDA and work to "coordinate a care plan" to "ensure[] the provision of tailored services."[15] 196 Wn. App. 914, 924, 385 P.3d 268 (2016). *I.M.-M.* states:

> The Department cannot escape its obligation to provide coordinated services by inexplicably failing to investigate the likelihood a parent is developmentally disabled. Our case law specifically requires the Department to identify a parent's specific needs and provide services to meet those needs. This obligation was not met.

196 Wn. App. at 924 (citation omitted).

Here, the Department knew that Dr. O'Leary diagnosed T.B. with significant intellectual and neurodevelopmental disabilities, as well as borderline intellectual functioning. He acknowledged that these disabilities affect her ability to learn, to make correct decisions in unfamiliar situations, to manage her own funds, and to sustain concentration and attention. *See* RCW 71A.10.020(5) (defining "developmental disability"). T.B. also testified that she received Social Security disability benefits. 1 RP Jan. 16, 2018 at 20 (referencing T.B.'s "SSI disability" benefits). But there is nothing in the record to show that any social worker provided the diagnostic information—or asked for T.B.'s permission to provide this information—to DDA, and there is nothing in the record to show that any social worker sought any information from DDA as to what types of supports it might be able to offer to an individual with these diagnoses[16] and conveyed

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[15] *I.M.-M.* cited former RCW 13.34.136(2)(b)(i)(B) to say that the Department must refer a disabled parent to DDA and coordinate with it. The decision does not go into detail about what the Department must do to refer a parent to DDA because there, the social worker failed to obtain a disability diagnosis for the mother.

[16] *In re the Welfare of A.J.R.*, 78 Wn. App. 222, 223-24, 896 P.2d 1298, *review denied*, 127 Wn.2d 1025 (1995), shows that DDA services are available to parents who have been diagnosed with "moderate" or "borderline" developmental disabilities. For example,

this information to T.B. *H.W.*, 92 Wn. App. at 426. Rice-Lozensky, in fact, said she did not obtain the releases necessary for her to speak with DDA about T.B.

Based on Rice-Lozensky's description of T.B.'s meeting with DDA and DVR, the Department would have this court believe that the Department or DDA, or both, fully explained to T.B. how to apply for DDA services, provided her with any assistance or accommodation needed to do so, and investigated and told her what supports she might receive from DDA. That evidence is not in the record. Neither does the record support the Department's contention that T.B. chose not to pursue services from DDA after that meeting.

Rather, Rice-Lozensky's testimony about the DDA meeting is vague. She mentioned that DDA discussed its forms with T.B. but does not state whether anyone offered to help her complete them.[17] T.B. is "learning disabled and functionally illiterate," has below-average reading comprehension, and a well-below-average vocabulary. Ex. 62 at 1. Rice-Lozensky also said that the meeting was to discuss "services" but did not set out what specific services, if any, they discussed. 1 RP Jan. 16, 2018 at 151. It is also unclear whether she actually attended the meeting or left after bringing T.B. to the DDA office. The record, therefore, does not support that T.B. received adequate information about DDA services or sufficient assistance in accessing DDA services.

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in *A.J.R.*, the developmentally disabled parents received in-home living and nursing supports and attended parenting classes tailored to their needs.

[17] In contrast, Rice-Lozensky said that she spent "two to three hours" with the parents to help them fill out Native American ancestry forms and review services available from the Department. 1 RP Jan. 16, 2018 at 151.

In sum, the Department's contention that the single meeting satisfied the Department's obligation to an intellectually and neurodevelopmentally disabled parent finds no support in *H.W.* or *I.M.-M.*, both of which place more of a responsibility on the Department to coordinate with DDA to support parents with developmental disabilities.

T.B. also argues that the services she received were not tailored to her individual needs. *I.M.-M.* illustrates that the Department, even absent DDA coordination, must provide significant supports tailored to the needs of cognitively impaired parents.[18] In *I.M.-M.*, a psychological evaluation showed that the mother was "significantly cognitively impaired." 196 Wn. App. at 918. The evaluator expressed concern whether she could "hold a job, pay bills, [and] take care of herself." *I.M.-M.*, 196 Wn. App. at 918. The evaluator, however, did not make a formal developmental disability diagnosis because he did not perform the necessary testing. *I.M.-M.*, 196 Wn. App. at 919.

The court concluded that even absent a formal disability diagnosis, the Department failed to offer all necessary services to the mother: "Our case law specifically requires

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[18] Other courts agree. *See Tracy J. v. Superior Court*, 202 Cal. App. 4th 1415, 1427, 136 Cal. Rptr.3d 505 (2012) ("Although services need not be perfect, they must be designed to remedy the family's problems and accommodate the special needs of disabled parents."); *In re Victoria M.*, 207 Cal. App. 3d. 1317, 1332-33, 255 Cal. Rptr. 498 (1989) (offering services not tailored to the needs of a disabled parent means that "failure is inevitable, as is termination of parental rights."); *Matter of L. Children*, 131 Misc. 2d 81, 87-88, 499 N.Y.S.2d 587 (Kings Cnty. Fam. Ct. 1986) ("[T]he failure of the petitioner agency to provide specialized mental retardation services related to a respondent diagnosed as having the functional disability of 'mild mental retardation' constitutes a failure to make diligent efforts" to strengthen the parental relationship.). *See generally* Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1438 (1995).

the Department to identify a parent's specific needs and provide services to meet those needs." *I.M.-M.*, 196 Wn. App. at 924. In *I.M.-M.*, the Department failed to do this. For example, "[n]one of [the mother's] service providers testified they were trained to work with cognitively disabled persons." *I.M.-M.*, 196 Wn. App. at 922. Neither her family therapy provider nor her chemical dependency counselor "deployed techniques specific to [the mother's] impairment." *I.M.-M.*, 196 Wn. App. at 922. And the Department did not ensure that providers were aware of the mother's limitations and were prepared to address them. *I.M.-M.*, 196 Wn. App. at 923. Because of these failures, "the Department never provided [the mother] the tools necessary to satisfy the requirements of the dependency." *I.M.-M.*, 196 Wn. App. at 923; Reply to Mot. for Acc. Rev. at 4.

Similarly, T.B.'s domestic violence educator, Mosser, did not testify that she received Dr. O'Leary's evaluation and diagnoses. She only heard from a supervisor that T.B. had "different learning skills." 1 RP Jan. 16, 2018 at 73. She tried to modify the program to suit T.B.'s learning abilities. Mosser admitted, however, that she was "not a specialist in educational needs." 1 RP Jan. 16, 2018 at 73. T.B.'s TIPS instructor did not testify that she made any adjustments to her program for T.B. and did not state that the Department informed her of T.B.'s disabilities.[19] And T.B.'s first social worker, Brooling,

[19] On January 9, 2017, Heitschmidt contacted Rice-Lozensky by e-mail to discuss alternatives for T.B. and T.J. because the TIPS staff were not convinced that the group class was the best setting for them because of their "cognitive needs." Ex. 153 at 1. Heitschmidt suggested a Triple P class for the parents. Rice-Lozensky responded by e-mail later that day and informed Heitschmidt that both T.B. and T.J. had already completed the Triple P class. Two days later, on January 11, 2017, Heitschmidt e-mailed Rice-Lozensky that the TIPS instructor was willing to continue to work with T.J. and T.B., and that the parents "inabilities are more evident and pronounced" during the adult education portion of the TIPS sessions, but that their "behaviors [are] workable." Ex. 152

did not testify that she informed the TIPS provider or the Triple P provider about T.B.'s challenges. There is no indication that Triple P adapted the parenting course for T.B., and there is limited information that the TIPS educators adjusted that program.

For these reasons, the juvenile court's finding that the Department offered T.B. all necessary services is not supported by substantial evidence. Former RCW 13.34.180(1)(d). The Department did not follow *H.W.* and *I.M.M.*'s requirements to provide coordinated and tailored supports and services to cognitively disabled parents. But this conclusion does not end this appellate inquiry because the Department is excused from proving otherwise required services if doing so would be futile. *I.M.-M.*, 196 Wn. App. at 924.

In *I.M.-M.*, the court rejected the Department's futility argument because: (1) no service providers were "aware of the full extent" of the parent's cognitive disabilities and so none of them could offer competent testimony about what types of services would have been beneficial; (2) the parent "made notable efforts to engage in services and work with her providers"; and (3) there was no evidence of irreconcilable parent-child detachment. 196 Wn. App at 925. T.B.'s circumstances are much like those in *I.M.-M.* Yet unlike in *I.M.M.*, where the evaluator doubted whether the mother could parent but had not fully evaluated her, Dr. O'Leary, who conducted a full diagnostic evaluation, opined that he did not believe that T.B. could ever safely parent. Dr. O'Leary's conclusion was based on his June 2016 evaluation.

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at 1. She also told Rice-Lozensky that TIPS planned to contact campus disability services to look into accommodations. But this court cannot determine the result of this inquiry.

But post-evaluation, service providers testified that T.B. completed her services and progressed in some of them (even absent full disability accommodations). *See generally, H.W.*, 92 Wn. App. at 428 (noting that disabled parent was "responsive to the training"). Dr. O'Leary was surprised to learn this and did not consider these circumstances in his direct testimony or update his evaluation. Moreover, because Rice-Lozensky's description of the DDA/DVR meeting lacked detail, the Department's argument that T.B. chose to reject disability services lacks support. For these reasons, this court cannot conclude that providing properly tailored services to T.B. would be futile. *I.M.-M.*, 196 Wn. App. at 925-26 ("[T]he record does not permit the conclusion that [the parent] would have failed to progress, even if the Department had complied with its obligations."). For these same reasons, the record also does not support that properly tailored services, whether from the Department or DDA, would not remedy T.B.'s deficiencies in the foreseeable future.

T.B. also argues that the Department failed to notify her that it would not return the children to her as long as she remained in a relationship with T.J. and did not offer her services to support solo parenting. *See H.W.*, 92 Wn. App. at 429 (observing that the juvenile court never ordered the mother to cease contact with the father and ordered joint visitation). She also contends that the Department failed to offer her intensive case management services.[20] In the alternative, she also believes that she resolved all of her parenting deficiencies.

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[20] This court notes that based on Dr. O'Leary's description of these services, they appear to resemble those provided to the mother in *A.J.R.*, who received assistance from an "alternative living provider" to assist with activities of daily living. *H.W.*, 92 Wn. App. at

Because, however, the juvenile court's finding that the Department offered T.B. all necessary services is not supported by substantial evidence, and, as a result, the Department has not established former RCW 13.34.180(1)(d) by clear, cogent, and convincing evidence, the termination orders must be reversed. This court need not reach T.B.'s additional arguments for reversal to provide her the relief she seeks. *H.W.*, 92 Wn. App. at 429-30. Accordingly, it is hereby

ORDERED that the juvenile court's orders terminating T.B.'s parental rights to A.D.J., D.A.J., and A.M.J. are reversed. The matter is remanded to the juvenile court for further proceedings consistent with this ruling.

DATED this 31 day of January, 2018.

Aurora R. Bearse
Court Commissioner

cc: Kate R. Huber
Robert W. Ferguson
Anne C. Miller
Hon. James W. Lawler

427 (quoting *A.J.R.*, 78 Wn. App. at 224-25); *see also H.W.*, 92 Wn. App. at 430 (noting that the Department did not explore "instituting a monitoring scheme for assessing the children's well-being so they could be returned" to the mother's custody).