CONCURRING AND DISSENTING OPINION OF MOON, C.J.

Although I concur with the result reached by the majority, I disagree with the majority's overly broad holding that a parent's allegations of a violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131-12134, could never be raised as a defense in a proceeding to terminate parental rights. I also disagree with the majority's decision to overrule In re Jane Doe, Born on February 2, 1999, No. 24348 (Haw. Ct. App. Oct. 18, 2002) (ICA opinion) and, in effect, to absolutely foreclose the possibility of raising an ADA defense in a termination of parental rights (TPR) proceeding. I, therefore, respectfully dissent.

In In re Jane Doe, the ICA stated that the Department of Human Services' (DHS) alleged failure to provide services or programs to the parents, pursuant to an individualized family service plan that accommodated their special needs, was not a defense in a TPR proceeding. The ICA, however, did not conclude that an alleged ADA violation could never be a defense in a TPR proceeding, notwithstanding the fact that it determined that the particular alleged ADA violation set forth by the parents in that case was not a per se defense.

Title II of the ADA, specifically 42 U.S.C. § 12132 (1997), states in relevant part:

> [s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The majority opinion fails to make the distinction between the "services, programs, or activities" offered by DHS, specifically pursuant to an individualized family service plan, and the TPR proceeding itself.

I agree with the ICA's view that,

> while a TPR proceeding may not be a "service" as that term is ordinarily understood, it is clearly a "program or activity" of the family court, a public entity, within the meaning of the ADA. The Ninth Circuit Court of Appeals has made clear that the reach of Title II of the ADA should be as broad as possible. In the case of *Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002) . . . the court of appeals reversed the district court's denial of petitioners' ADA claim. The district court had ruled that parole hearings could not be challenged using the ADA because the ADA did not apply to "the substantive decision making process in the criminal law context." *Id*. at 896-897. Disagreeing, the court of appeals stated:
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> > [W]e have interpreted Title II's "programs" and "activities" to include all of the operations of a qualifying local government. In reaching this conclusion, we noted that the legislative history of the ADA strongly suggests that § 12132 should not be construed to allow the creation of spheres in which public entities may discriminate on the basis of an individual's disability . . . .
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> The logic of the *Thompson* analysis is equally applicable to a TPR proceeding, which, like a parole hearing, involves an adjudication to determine whether an individual's fundamental right must be curtailed for the good of society as a whole. Accordingly, we conclude that a TPR proceeding is a program or activity that is subject to the ADA.

ICA opinion at 22-23. (Citations and some quotation marks omitted.) The ICA opinion notes several situations in which an ADA defense may be properly raised in a TPR proceeding if, for example, the disabled parents allege that they were discriminated

against in the TPR proceeding itself by a public entity, i.e., "that the family court had an unwritten policy of automatically terminating parental rights in all cases where both parents of a child are mentally disabled, regardless of their ability to provide a safe family home . . . [or] that DHS had a policy of seeking to terminate parental rights of all parents who were mentally disabled." ICA opinion at 23.

Because the question whether a TPR proceeding is a "program or activity" of a public entity subject to the ADA is not before the court in this case, I would limit the sweeping scope of the majority's holding to the specific facts of this case and reject the majority's intention to overrule In re Jane Doe.