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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF LACEE L., a child under the  
age of eighteen years.

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STEPHANIE L.,

Appellant,

-against-

No. 95

ADMINISTRATION FOR CHILDREN'S  
SERVICES,

Respondent.

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20 Eagle Street  
Albany, New York  
September 5, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN



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Sharona Shapiro  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 95, Matter of  
2 Lacey L.

3 Good afternoon, counsel.

4 MR. SCHOENFELD: May it please the court, Your  
5 Honor. Alan Schoenfeld for the mother, Stephanie. I'd  
6 like to reserve two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Two minutes?

8 MR. SCHOENFELD: Two minutes, please.

9 CHIEF JUDGE DIFIORE: Very well.

10 MR. SCHOENFELD: Thank you, Your Honor.

11 CHIEF JUDGE DIFIORE: Um-hum.

12 MR. SCHOENFELD: This court has long held that  
13 the reasonable efforts standard requires the petitioning  
14 agency to make meaningful and tailored efforts to reunify  
15 parent and child. As a matter of both State and - - -

16 JUDGE RIVERA: Counsel, is it your position that  
17 the reasonable efforts standard in our state law is the  
18 same as the ADA reasonable accommodations - - - reasonable  
19 modifications standard, or is there a difference?

20 MR. SCHOENFELD: The reasonable - - - our  
21 position in this appeal is that the reasonable efforts  
22 standard, in a case where the parent presents with a  
23 disability covered by the ADA, the ADA substantive content  
24 is part of the reasonable efforts determination, such that  
25 a family court cannot conclude that reasonable efforts have



1           been made where ADA - - - ADA-required accommodations are  
2           not made.

3                   JUDGE RIVERA:   So the required - - -

4                   CHIEF JUDGE DIFIORE:   But isn't here a situation  
5           - - -

6                   JUDGE RIVERA:   - - - ADA modifications are a floor  
7           - - -

8                   CHIEF JUDGE DIFIORE:   - - - where a - - - a  
9           permanency hearing looks at a snapshot of six months,  
10          correct?  So is there not a situation where there - - - the  
11          Agency learns about the parent's disability, connects the  
12          parent to tailored services accomplishing reasonable  
13          efforts, but has not learned enough, in the context of that  
14          six-month period, about the parent's disability to  
15          accomplish the ADA goal of reasonable accommodation?

16                   MR. SCHOENFELD:   So let me speak in hypotheticals  
17          or in generals and then about the facts of this case.  That  
18          may happen in the course of permanency proceedings.  The  
19          family court always has discretion to kick out the time as  
20          to which it'll make a reasonable efforts determination.  
21          Here the period covered by the order on review was nine  
22          months, for example.

23                   In this particular case, however, that's not what  
24          happened.  At the first appearance before the family court  
25          the - - - the ACS had a history with Stephanie.  They



1 understood that she had a cognitive disability. They  
2 understood that she had executive function difficulties,  
3 and that decision-making, following schedules was part of  
4 her disability.

5 She had been in the foster care system. There  
6 was a prior case with her older daughter. They understood  
7 her disability. Accommodations were requested at that very  
8 first appearance in front of the family court. They were  
9 again requested. And that was in June of 2014.

10 JUDGE RIVERA: Then didn't the court order  
11 certain modifications?

12 MR. SCHOENFELD: The Court eventually ordered  
13 them; that was on December 1st, 2014. But there were at  
14 least two - - -

15 JUDGE RIVERA: And they failed to comply even  
16 with that order, is that correct?

17 MR. SCHOENFELD: Absolutely. And you know, that  
18 - - -

19 JUDGE WILSON: And they eventually got, in  
20 substance, all of the five specific accommodations  
21 requested?

22 MR. SCHOENFELD: Not as a result of ACS' efforts,  
23 no. So - - -

24 JUDGE WILSON: But as a result of the court  
25 process, ACS provided them.



1 MR. SCHOENFELD: No, I think, at least with  
2 respect to supplying her with the assistance to be able to  
3 fill out the Medicare forms that gave her eligibility for  
4 particular services and connecting her to the office of  
5 persons with developmental disabilities, that was all as a  
6 result of counsel. That was all as a result of the Bronx  
7 Defenders - - -

8 JUDGE STEIN: Would you just help me out a little  
9 bit with the time line? When did the permanency hearing  
10 commence?

11 MR. SCHOENFELD: The permanency hearing commenced  
12 in June of 2014. Lacey was born on June 5th. I think the  
13 first appearance in front of the court was June 10th, 2014.

14 JUDGE STEIN: Okay. So that's actually from - -  
15 - from - - - right from the beginning of the court's  
16 involvement is when the permanency hearing begins, or is  
17 that the time frame that the permanency hearing covers?

18 MR. SCHOENFELD: So I think the permanency  
19 proceeding might have actually begun before Lacey was even  
20 born.

21 JUDGE STEIN: I'm sorry; I don't mean the  
22 proceeding. I mean that there is - - - at some point the  
23 beginning of testimony, hearing about reasonable efforts  
24 and - - - and - - - and what the permanency plan is and all  
25 the - - - I know there's - - - there's court appearances,



1           there's meetings - - -

2                       MR. SCHOENFELD:   Yeah.

3                       JUDGE STEIN:   - - - there's all this stuff going  
4           on continuously.  But - - - but - - - but the - - - the  
5           actual hearing is - - - can - - -

6                       MR. SCHOENFELD:   I think the first date - - - and  
7           my colleague will correct me when I sit down, but I think  
8           the first date where testimony was taken on reasonable  
9           efforts was in September of 2014, so three month - - - the  
10          child at that point was three months old.  But there were  
11          appearances in front of the court in June of 2014,  
12          September of 2014.  Counsel in the family court filed a  
13          motion for a finding of no reasonable efforts on November  
14          20th, 2014 in anticipation of the parties' December 1st  
15          appearance.

16                      CHIEF JUDGE DIFIORE:  Did counsel assert the  
17          specific disabilities that her client was suffering from?

18                      MR. SCHOENFELD:  Absolutely.  It was very clear  
19          to everyone.  It's undisputed in the record that her  
20          precise form of cognitive limitations, her executive  
21          functioning deficiencies were all - - - were all made clear  
22          to everyone.  And in fact - - - no, I apologize.  Go ahead,  
23          Judge.

24                      JUDGE RIVERA:  No, no, since the proceeding with  
25          this child is actually subsequent to another child, and the



1 ACS has a history and familiarity with - - - with the  
2 mother, I just want to know, did they not know, until  
3 counsel at this point gave them that information, that she  
4 had these cognitive limitations?

5 MR. SCHOENFELD: The initial intake notes for  
6 this case for Lacey's birth reflect ACS's knowledge of her  
7 cognitive limitations stemming back to the proceedings of  
8 her older daughter.

9 JUDGE RIVERA: Even before this?

10 MR. SCHOENFELD: Correct.

11 JUDGE GARCIA: Counsel, how would your rule work?  
12 So I think your position is, if you violate the ADA, then  
13 it cannot be reasonable efforts.

14 MR. SCHOENFELD: Correct.

15 JUDGE GARCIA: So how do you effect that in a  
16 family court proceeding without a family court judge  
17 essentially making a full-blown ADA finding?

18 MR. SCHOENFELD: In the mine-run of cases, in the  
19 mine-run of permanency proceedings, these issues are  
20 already part of the parties' submissions to the court.  
21 Even under the State's reasonable efforts standard,  
22 unvarnished by the ADA - - -

23 JUDGE GARCIA: But now we're varnishing it.

24 MR. SCHOENFELD: Sure.

25 JUDGE GARCIA: So the ADA comes in, and you say





1           you haven't complied with X. And there may be a court  
2           ruling saying this particular circumstances you have to do  
3           Y. And now ACS hasn't done Y. And you say, you didn't do  
4           Y, can't be reasonable efforts, we're done, you couldn't  
5           have made reasonable efforts here. And that - - - doesn't  
6           that take the focus away from the best interests of the  
7           child?

8                       MR. SCHOENFELD: Not at all, Your Honor. So let  
9           me - - - let me respond to one factual point, and then I -  
10          - - I can answer your question. There - - - there's no  
11          point at which, in these proceedings, at least, the  
12          permanency proceedings are over. The permanency  
13          proceedings are ongoing. The finding that the court made  
14          that's on appeal here was that, from the period of June of  
15          2014 to March of 2015, the Agency had not - - - had made  
16          reasonable efforts. Our position is because they violated  
17          her rights under the ADA during that period, they had not  
18          made reasonable efforts - - -

19                      JUDGE GARCIA: And she would have to determine  
20          that during that period. At the end of that nine-month  
21          period, this family court judge would have to essentially  
22          make a finding as to ACS's compliance with the ADA.

23                      MR. SCHOENFELD: As part of the reasonable  
24          efforts determination.

25                      JUDGE FAHEY: So would the court then apply ACS



1 remedy - - - or excuse me, ADA remedies in that situation?

2 MR. SCHOENFELD: No, there's no - - -

3 JUDGE FAHEY: All right. So - - -

4 MR. SCHOENFELD: - - - ADA claim - - -

5 JUDGE FAHEY: Hold on.

6 MR. SCHOENFELD: I apologize.

7 JUDGE FAHEY: Hold on. I don't want you to go  
8 too far astray here because your time's going to be out,  
9 and I want you to address the jurisdictional issues that -  
10 - -

11 MR. SCHOENFELD: Sure.

12 JUDGE FAHEY: - - - your opponents rely on. So  
13 go ahead and address those issues.

14 MR. SCHOENFELD: Should I address your first  
15 question first or - - -

16 JUDGE FAHEY: Go ahead.

17 MR. SCHOENFELD: - - - just the jurisdictional  
18 one?

19 JUDGE FAHEY: Yeah.

20 MR. SCHOENFELD: So there is no ADA claim in this  
21 case. There's no counterclaim. There's no ADA cause of  
22 action.

23 JUDGE FAHEY: Right. I am struggling to figure  
24 out how a family court judge can have jurisdiction to apply  
25 the ADA - - - I can see using them as a model, though it's



1           difficult for me to see what the difference between the  
2           phrases "reasonable accommodations" and "diligent efforts"  
3           are, but okay, I'll accept it.

4                       MR. SCHOENFELD: I'm happy to explain that also.  
5           But let me - - -

6                       JUDGE FAHEY: No, no, no, don't bother.

7                       MR. SCHOENFELD: Let me - - - let me address the  
8           jurisdiction.

9                       JUDGE FAHEY: Let's just address the  
10          jurisdictional question.

11                      MR. SCHOENFELD: Sure. I think the  
12          jurisdictional concern here is misplaced. And I would  
13          remind the court that in Michigan Supreme Court's decision  
14          and in - - -

15                      JUDGE FAHEY: Well, there's the one Michigan  
16          case. Is there any other state - - - the Hicks/Brown case,  
17          I think it may - - -

18                      MR. SCHOENFELD: Sure.

19                      JUDGE FAHEY: - - - but is there anything else?

20                      MR. SCHOENFELD: There's Elijah C. from the  
21          Connecticut Supreme Court.

22                      JUDGE FAHEY: I'm sorry?

23                      MR. SCHOENFELD: Elijah C. from the Connecticut  
24          Supreme Court. Both of those cases find, consistent with  
25          DOJ and HHS guidance, that family courts applying the



1 reasonable efforts standard have the authority and the  
2 obligation to determine whether the Agency has complied  
3 with the ADA as part of their reasonable efforts  
4 consideration.

5 So with respect to the jurisdictional question,  
6 in particular, the court has jurisdiction over neglect  
7 proceedings. The court has jurisdictions to conduct  
8 permanency proceedings. As part of the court's  
9 jurisdiction to do those things, under Article 10 of the  
10 Family Court Act, they must make a reasonable efforts  
11 determination. ACS would not stand here and submit to this  
12 court that if the Agency discriminated - - -

13 JUDGE FAHEY: Let me stop you. Let me stop you.  
14 What that sounds like you're saying to me is that New York  
15 law covers the concerns that the ADA would protect.

16 MR. SCHOENFELD: The ADA supplies a floor in the  
17 case of a disabled family. Part of the reason we are here  
18 - - - the reason we're here is because the family court in  
19 the Appellate Division held, as a categorical legal matter,  
20 that the ADA is inapplicable to these proceedings.

21 JUDGE FAHEY: So what does ACS argue - - -

22 MR. SCHOENFELD: ACS argued - - -

23 JUDGE RIVERA: Just to clarify, I thought in the  
24 First Department the position has been, and I thought they  
25 concede this, that the Agency does have to comply with the



1 ADA, and that whether or not it does is guidance in - - -  
2 in its reasonable efforts determination for that family  
3 court judge. Am I incorrect about that?

4 MR. SCHOENFELD: I think - - - I think that's not  
5 the only reading of - - - of either the - - -

6 JUDGE RIVERA: La'Asia?

7 MR. SCHOENFELD: - - - Appellate Division case -  
8 - - so La'Asia Lanae was an Article 6 case, and I think  
9 that's an important distinction that we can get into. But  
10 here the court applied that rule in the context of an  
11 Article 10 proceeding. ACS is - - -

12 JUDGE FAHEY: Here's - - -

13 JUDGE STEIN: Can we get back to the - - -

14 MR. SCHOENFELD: If I - - - may I?

15 JUDGE FAHEY: Sure. Go ahead.

16 MR. SCHOENFELD: I apologize.

17 JUDGE FAHEY: We're all jumping on you.

18 MR. SCHOENFELD: ACS's position in front of the  
19 family court was that the ADA did not apply and, in fact,  
20 that it would be unfair to hold ACS to its obligations  
21 under the ADA because it had no notice that those  
22 obligations would apply in the family court.

23 JUDGE RIVERA: That's not its position now,  
24 though?

25 MR. SCHOENFELD: It's not its position now, but



1 part of the - - - part of the reason they - - - they say  
2 that is because, at that point in time, they said there was  
3 insufficient authority directing them to their obligation  
4 to comply with the ADA. And the family court said the same  
5 exact thing. There's - - -

6 JUDGE FAHEY: Let me ask this question. I don't  
7 mean to be rude, but you're running out of time.

8 MR. SCHOENFELD: Sure.

9 JUDGE FAHEY: So I just - - - how will this child  
10 be helped by us ruling that the ADA would apply and create  
11 a different standard? What benefit will this child get by  
12 our saying that this ADA standard would apply, as opposed  
13 to New York law, solely?

14 MR. SCHOENFELD: So let me answer that question  
15 in two ways. First off, we're asking for the same standard  
16 to apply. Reasonable efforts need to be made in every  
17 case. In the case of a parent with a disability, that  
18 requires reasonable accommodations.

19 But to answer your question more directly, this  
20 court has made clear, in any number of cases, Michael B.,  
21 Marino S., Nicholson v. Scoppetta, Jamie J., the  
22 legislature has made a very clear directive that this court  
23 is obligated to follow. It is in the best interests of the  
24 child to be reunified, where possible, with their parent.

25 JUDGE STEIN: But what the ACS is saying is that



1 the reasonable efforts tailored to the parent's particular  
2 circumstances is what achieves that end. And - - - and  
3 what - - - what is confusing me a little bit is that you're  
4 - - - and the Chief Judge alluded to this. You're taking a  
5 snapshot of a period of time. We're not to the end of  
6 this. We're a long way from the end of this, perhaps,  
7 right? And - - - and - - - and it is - - - it seems to me  
8 that it is possible to - - - for ACS to be making  
9 reasonable efforts to get there. I mean, we had  
10 communication problems, we had all kinds of, you know, the  
11 mother saying she was getting certain evaluations which  
12 were necessary to reasonably accommodate them. All sorts  
13 of things were happening here. And they hadn't gotten to  
14 the point at which, perhaps, under an ADA hearing, a court  
15 might say, okay, you've made reasonable accommodations.  
16 But they could still be making reasonable efforts to get to  
17 the same goal.

18 And - - - and that's what concerns me is that - -  
19 - that you're asking for the family court to make that  
20 determination before that - - - before the time is ripe for  
21 that determination to be made. And it seems to me that then  
22 you're getting a trial within a hearing, and this is not  
23 serving the best interests of the child.

24 MR. SCHOENFELD: So let me answer that question  
25 in two different ways. The first one is ACS still hasn't



1 provided the services that the court ordered them to  
2 provide, the accommodations that the court ordered them to  
3 provide in December of 2014.

4 JUDGE STEIN: Well, we - - - I mean, that's sort  
5 of outside the record, and we don't know what - - - what  
6 the reasons for any of that - - -

7 MR. SCHOENFELD: Certainly. Well, this record  
8 closed in 2016, and they still hadn't been provided, even  
9 though there was an order in the - - -

10 JUDGE WILSON: But that's a different issue.  
11 That's the failure to comply with a court order.

12 MR. SCHOENFELD: I think it's - - - it is  
13 indicative of ACS's decision not to accommodate  
14 disabilities in the course of providing reasonable efforts.

15 JUDGE RIVERA: Did they at any time say we need  
16 more time?

17 MR. SCHOENFELD: No. And let - - - to - - -

18 JUDGE RIVERA: They've never said - - -

19 MR. SCHOENFELD: They never - - -

20 JUDGE RIVERA: - - - we need more time and then  
21 we'll do it?

22 MR. SCHOENFELD: That's exactly right, and I  
23 think just - - -

24 JUDGE STEIN: They did say we haven't been able  
25 to do it because of - - - of these other problems. And





1 they say that we did not - - - we were not informed until  
2 the eve of the permanency determination that the mother's  
3 problem was that she couldn't do these things on her own to  
4 get to the point where we could help provide her with the  
5 services.

6 MR. SCHOENFELD: So that - - - that's just wrong.

7 JUDGE STEIN: Well - - -

8 MR. SCHOENFELD: And we - - -

9 JUDGE STEIN: That's a fact-finding matter.

10 MR. SCHOENFELD: No, understood, but - - -

11 JUDGE STEIN: But - - - but that's - - -

12 MR. SCHOENFELD: Well, I think the record is  
13 clear on that point that they were aware of her disability,  
14 they were aware that the request was for accommodations for  
15 her disability.

16 JUDGE STEIN: Yes, but what - - -

17 MR. SCHOENFELD: But with respect to - - -

18 JUDGE STEIN: What exact accommodations is the  
19 question.

20 MR. SCHOENFELD: So yes, and I also think, in  
21 your question, the "it" there is a question. Is the "it"  
22 that they - - - that ACS is obligated to do, to identify  
23 for her certain services that accommodate parents with  
24 disabilities, or, as the family court said, are they  
25 required to take her there and help her fill out the



1 paperwork, which they never did. Under the reasonable  
2 efforts standard, they should have done that.

3 But with respect to the timing question, I think  
4 it's important to realize that in permanency proceedings  
5 there's a retrospective dimension and a prospective  
6 dimension. At the end of a period that is the subject of a  
7 permanency proceeding, the family court needs to enter an  
8 order and say: During this period were reasonable efforts  
9 made? And they conclude - - - the - - - the function of  
10 the reasonable efforts determination is to figure out  
11 whether ACS can propose a permanency goal that is other  
12 than return to parent.

13 JUDGE WILSON: But that goes right back to the  
14 Chief Judge's first question she asked you which is, it  
15 seems to me, at least, in reading the papers - - - and  
16 we'll ask him in a second - - - that ACS says there's no  
17 dispute that ACS must comply with the ADA as part of its  
18 reasonable efforts. And so the Chief's question is: Do  
19 you have to do that every six months? And Judge Fahey's  
20 bookend question to that is: Suppose we were to reverse  
21 here, what is the practical effect for this family of  
22 reversing?

23 MR. SCHOENFELD: Sure.

24 JUDGE WILSON: What will happen that is not going  
25 to happen otherwise? And when you keep saying that here



1           there are orders that ACS hasn't complied with, that  
2           suggests something different. It's not the failure to  
3           comply with the ADA; it's the failure of ACS to comply with  
4           court orders that have been issued.

5                       MR. SCHOENFELD: That's certainly right. Let me  
6           try to answer both of your questions. As I said, there's a  
7           prospective dimension to what the family court does at the  
8           conclusion of a permanency period. What they say is during  
9           this forthcoming permanency period, in order to make  
10          reasonable efforts, you need to do these things. And  
11          that's what's set out in the permanency order. There's a  
12          question of whether those things are the things that are  
13          required under the reasonable efforts standard, as ACS and  
14          the family court and the Appellate Division construe it, or  
15          those things also require making reasonable efforts as - -  
16          - reasonable accommodations as required under the ADA.

17                      Our position is you cannot comply with the  
18          reasonable efforts standard, in the aggregate, without  
19          complying with the ADA. The timing question, the  
20          periodicity of the family court's determination, the family  
21          court has lots of tools at its disposal to figure out when  
22          it is going to make those determinations. If there was a  
23          claim by the responsible agency that they were in the  
24          process of making reasonable accommodations in order to  
25          comply with the ADA, the family court could be responsive



1 to that. That was never the position here.

2 There are things that she asked for at the  
3 beginning of these proceedings in 2014 that she never got.  
4 On remand to the family court - - - just to answer your - -  
5 - your question, on remand to the family court, first off,  
6 this court should reverse the categorical legal conclusion  
7 of the Appellate Division and the family court that the ADA  
8 is inapplicable to these proceedings.

9 Second, this court should reverse the family  
10 court's determination that reasonable efforts were made  
11 during the period of June of 2014 to March of 2015 because  
12 they did not comply with the ADA.

13 Third, in making prospective permanency orders in  
14 this case, because the permanency proceedings are ongoing,  
15 the family court should direct ACS to provide the  
16 accommodations that are required under the circumstances.  
17 Those may not be the same accommodations that were  
18 requested in 2014, but now Lacey is four years old,  
19 Stephanie is trying to parent her, she's still in the  
20 custody of her grandmother, but - - - but Stephanie is  
21 trying - - - is making efforts to try to parent her. So  
22 for example, one of the accommodations that is very  
23 regularly offered in these cases is homemaking assistance,  
24 helping Stephanie develop a routine under which Lacey can  
25 thrive. All Stephanie - - -



1 JUDGE STEIN: So how is that different from the  
2 reas - - - I can't - - - I'm still not understanding what  
3 you think the ADA adds to what ACS is already required to  
4 do to fulfill its obligations to this mother and this  
5 child?

6 MR. SCHOENFELD: Our conception of the reasonable  
7 efforts standard is that it can never go beneath what the  
8 ADA requires.

9 JUDGE FAHEY: So if there is a violation of the  
10 ADA, the court holds a hearing - - - we say family court  
11 has the authority to do it - - - does the custody of the  
12 child go from the grandmother back to the mother?

13 MR. SCHOENFELD: No. No. There needs to be a  
14 determination about the disposition at the end of the  
15 permanency. Those proceedings are ongoing. Right now the  
16 permanency goal is kinship guardianship with her  
17 grandmother.

18 JUDGE FAHEY: I see.

19 MR. SCHOENFELD: But there's always a hope that  
20 she will be returned to her daughter. She only wants the  
21 opportunity to prove - - -

22 JUDGE FAHEY: See, the problem I think we're all  
23 struggling with is it seems to be more about the quality of  
24 the delivery of the services to a person who's  
25 intellectually impaired as opposed to a legal solution that



1 the ADA may or may (sic) offer, and I'm trying to find my  
2 way to say how does this help. And that's what I'm  
3 struggling with.

4 MR. SCHOENFELD: The ADA says that when you  
5 exclude a parent from services that a public entity, a  
6 covered public entity provides, you are discriminating  
7 against them on the basis of a disability.

8 JUDGE STEIN: Might there not be other services  
9 that the ADA would require that wouldn't necessarily enure  
10 to the benefit of the child?

11 MR. SCHOENFELD: And if that's right, then they  
12 aren't reasonable under the circumstances. There are  
13 mechanisms - - -

14 JUDGE STEIN: Well, it may be reasonable for this  
15 - - - for this parent but not for the child.

16 JUDGE RIVERA: Isn't the reasonableness  
17 reasonable for the purpose not the parent? It's reasonable  
18 modifications for the service, and the service here - - -

19 MR. SCHOENFELD: Absolutely.

20 JUDGE RIVERA: - - - is the goal of  
21 reunification.

22 MR. SCHOENFELD: Absolutely. These are services  
23 in the service of reunifying the parent and child, and so  
24 the accommodation has to have some nexus. It has to be  
25 reasonable under the circumstances with the goal of



1 reunifying the parent and the child. There are - - - there  
2 are grounds under the Eighth - - -

3 JUDGE STEIN: But I guess my question is - - -  
4 and I know - - - I think I understand what the family court  
5 needs to determine, but if the - - - the mother brought a  
6 plenary action under the ADA, let's just say, okay, she - -  
7 - she could show that she, as a - - - as a person, needed  
8 additional accommodations, okay, that - - - that maybe go  
9 beyond the services that she needs for - - - for this  
10 particular purpose.

11 MR. SCHOENFELD: But that - - - the correct  
12 respondent in that plenary action wouldn't be ACS. ACS is  
13 only providing services to her to the extent that she's  
14 enmeshed in permanency proceedings where the services being  
15 provided are meant to reunify her with her child.

16 So if she were asking for services like, I don't  
17 know, assistance with filling out a job - - - well, a job  
18 application's a bad one because that may have a connection  
19 too, but if - - - if her services were, you know, having  
20 physical access to particular buildings that had nothing to  
21 do with her ability to care for her child, that would fall  
22 outside the scope of the services we're talking about here.

23 These accommodations are reasonable, on their  
24 face, because they go to ACS's ability to provide her with  
25 meaningful access to the services that the family court,



1 ACS, and the parent have recognized are necessary to  
2 rehabilitate her as a parent and allow her to be reunified  
3 with her child which is the goal of our Article 10.

4 JUDGE STEIN: And I don't know how that differs  
5 from a reasonable efforts standard.

6 MR. SCHOENFELD: So let me try - - -

7 JUDGE STEIN: I mean, what - - -

8 MR. SCHOENFELD: No. Let me try again to answer  
9 the question.

10 JUDGE STEIN: I know you're saying that - - -  
11 that reasonable accommodations should be a floor, but that  
12 doesn't explain to me what the difference is.

13 MR. SCHOENFELD: So our view is that there is no  
14 difference, that reasonable efforts need to include the ADA  
15 because you cannot - - -

16 JUDGE STEIN: No, but what is it that the ADA  
17 includes - - -

18 MR. SCHOENFELD: It - - -

19 JUDGE STEIN: - - - that the reasonable efforts  
20 doesn't?

21 MR. SCHOENFELD: I think the problem is that the  
22 case, as it was framed by the ACS and family court,  
23 recognizes a distinction between what reasonable efforts is  
24 and what reasonable accommodations are. The Court found  
25 that reasonable efforts were made in this case during this





1 period, notwithstanding the court's recognition that  
2 additional accommodations were warranted and yet had not  
3 been made.

4 JUDGE STEIN: Does that have anything really to  
5 do with the ADA, or does that have to do with what you are  
6 arguing is necessary to get this parent the access to  
7 services she needs?

8 MR. SCHOENFELD: The only reason the family court  
9 identified for not ordering those services is because it  
10 believed that it was barred from considering her ADA claims  
11 or her submission under the ADA. The accommodations she  
12 asked for were tethered to an undisputed disability, were  
13 tethered to the particular proceedings, the purpose of  
14 those proceedings, to rehabilitate her as a parent and to  
15 reunify her with her child.

16 JUDGE WILSON: Let me ask it this way: If the  
17 ADA didn't exist, would you have been asking for the exact  
18 same set of services?

19 MR. SCHOENFELD: Absolutely. So the point is  
20 that the lower courts have - - - have misconstrued the  
21 reasonable efforts standard to include a different standard  
22 for parents with disabilities. We think that the  
23 reasonable efforts standard, with its focus on meaningful,  
24 tailored, individualized attention is overlapping with the  
25 ADA. The problem is that the lower courts believe that



1           there is an exception to the reasonable efforts standard  
2           for parents with disabilities. And so they can find  
3           reasonable efforts, notwithstanding that the accommodations  
4           that are required under the ADA have not been provided to  
5           the parent.

6                         JUDGE GARCIA: There could be no circumstances  
7           then, in your view, where there is a violation of the ADA  
8           over this nine-month period, and the court could still find  
9           that reasonable efforts were made, overall, in applying the  
10          best interests of the child, looking at all the services  
11          and all the efforts that were made. One of these things  
12          may have had a violation, there should have been a  
13          reasonable accommodation made in some fashion, but that one  
14          thing then would mandate finding that reasonable efforts  
15          were not made. The Court would have no discretion in that  
16          case?

17                        MR. SCHOENFELD: I think that the court has  
18          discretion about how exactly to sort of configure the  
19          permanency proceedings. If there has been a violation of  
20          the ADA in the provision of the services that ACS is  
21          obligated to provide - - -

22                        JUDGE GARCIA: One meeting, no ramp, person can't  
23          get in, but they have another meeting and - - -

24                        MR. SCHOENFELD: That's not a violation of the  
25          ADA. The case law is entirely clear that one - - - you



1 know, failure to provide a ramp one day, failure to provide  
2 an interpreter when you provide an interpreter next week,  
3 that's not a violation of the ADA. They caricature it as  
4 perfect compliance.

5 JUDGE GARCIA: What about level of interpreter?  
6 What about level of interpreter?

7 MR. SCHOENFELD: What - - -

8 JUDGE GARCIA: Is that controlled by the ADA?

9 MR. SCHOENFELD: Level of interpreter? You mean  
10 for someone - - -

11 JUDGE GARCIA: Level of skill.

12 MR. SCHOENFELD: I don't think so. I mean, what  
13 - - -

14 JUDGE GARCIA: What if it was, then what - - -  
15 could you come in and say you didn't provide the level of  
16 skill, even though the evidence is that it was provided and  
17 they understood, but you didn't comply with the ADA's  
18 technical requirement that a certain level of skill be  
19 provided?

20 MR. SCHOENFELD: I don't think - - - the ADA as  
21 we - - - as we say in our - - - our brief, and we cite  
22 ample case law on this, requires good-faith interactive  
23 negotiations between the responsible agency and the party.  
24 It doesn't require perfect compliance. It doesn't say you  
25 fail - - -



1 JUDGE GARCIA: And the family judge would be  
2 ruling on whether there was a good-faith interactive effort  
3 here?

4 MR. SCHOENFELD: Absolutely. That's the same  
5 inquiry that they make under the reasonable efforts  
6 standard.

7 JUDGE GARCIA: So what, again, does the ADA add  
8 to that?

9 MR. SCHOENFELD: If this court were to clarify  
10 that the reasonable efforts standard requires making  
11 accommodations for parents that is meaningful - - - that  
12 grants them meaningful access to the services to which they  
13 are entitled - - -

14 JUDGE GARCIA: Why isn't it that the ADA can  
15 inform or the other language used by some of these other  
16 courts, the family court's consideration of whether  
17 reasonable efforts were made? Is that - - -

18 MR. SCHOENFELD: Because this case - - -

19 JUDGE GARCIA: - - - of interest - - -

20 MR. SCHOENFELD: - - - is evidence that that sort  
21 of direction to lower courts, in their view, and in ACS's  
22 view, it makes it optional. It makes - - -

23 JUDGE GARCIA: We've never said that, though.  
24 This court's never said that.

25 MR. SCHOENFELD: This court has never said that,



1 no. But if this court were to clarify that it is a binding  
2 obligation on the lower courts to consider a parent's  
3 disability, make accommodations, and that is part of the  
4 reasonable efforts standard, I mean, I think that is  
5 tantamount to what we're asking for.

6 I think - - - what the Michigan Supreme Court  
7 said and what the Connecticut Supreme Court said, in their  
8 two decisions implementing or reflecting DOJ and HHS's  
9 guidance, is the reasonable efforts standard, which applies  
10 in all of the states as a result of ASFA, simply means that  
11 you need to make the sorts of efforts to accommodate  
12 disabilities that is expected in ordinary nondiscrimination  
13 law. And so the ADA supplies the substantive content.  
14 Efforts are not reasonable. The Michigan Supreme Court and  
15 the Connecticut Supreme Court say this categorically:  
16 Efforts cannot be reasonable when you fail to do what a  
17 federal nondiscrimination statute expects of you.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. SCHOENFELD: Thank you, Your Honor.

20 CHIEF JUDGE DIFIORE: Counsel?

21 MR. SHORR: Good afternoon. May it please the  
22 court. My name is Scott Shorr, and I represent ACS.

23 JUDGE STEIN: Where do you differ from the  
24 arguments that we just heard?

25 MR. SHORR: Based on the arguments I've heard



1 this afternoon, there is not a lot of difference between  
2 the parties' positions. We agree that the ADA should  
3 provide guidance to family court in appropriate cases for  
4 determining whether - - -

5 JUDGE WILSON: Well, let me press you on the  
6 "should provide guidance". And just tell me what you meant  
7 by the sentence that I read to counsel, which is at page 4,  
8 right under the heading "Point 1" in your reply brief to  
9 the amici. "There is no dispute that ACS must comply with  
10 the ADA as part of its reasonable efforts to reunify  
11 children with parents who are disabled." What do you want  
12 us to take from that?

13 MR. SHORR: Which means that if a parent believes  
14 that a foster care agency or ACS has violated their ADA  
15 rights, of course they can take ACS or the foster care  
16 agency to court and sue for a violation of the ADA. Or  
17 they can, alternatively, use the ACS accommodation and  
18 grievance procedure.

19 JUDGE WILSON: Well, the sentence doesn't speak  
20 to what - - - maybe this is all you meant by it. It  
21 doesn't speak to what a parent may do, what right of action  
22 it has under the federal statute. It talks about ACS's  
23 obligation. Does ACS have an obligation to comply with the  
24 ADA?

25 MR. SHORR: Of course it does. The question here



1 is whether a permanency hearing, which only normally looks  
2 back at six months of reunification efforts - - -

3 JUDGE WILSON: Well, is that where the rubber  
4 meets the road here? That is, if you were asking about the  
5 life of the proceeding, you would not dispute that, over  
6 the life of the proceeding, you have to comply with the  
7 ADA, and failure to comply with the ADA is a baseline.  
8 It's just that in every six month, or however long or short  
9 the snapshot is, you can't - - - is what - - - is your  
10 argument that you can't, sort of, take the ADA's - - -  
11 ADA's requirement and couple it with a six-month period and  
12 turn that into a requirement that every six months there  
13 must be a determination of compliance with the ADA during  
14 that period. Is that - - -

15 MR. SHORR: That is exactly the point, Your  
16 Honor.

17 JUDGE WILSON: Is that the whole of your  
18 argument?

19 MR. SHORR: That - - -

20 JUDGE WILSON: Is that where the rubber meets the  
21 road here?

22 MR. SHORR: That is a big part of the argument,  
23 Your Honor, but another part is that - - - well, of course  
24 the family court - - -

25 JUDGE RIVERA: Well, nothing forecloses you from



1 when - - - when counsel shows up at the hearing, to say we  
2 need more time, we're in the process of - - - of reaching  
3 compliance, that we concede is our responsibility and  
4 obligation under the federal statute.

5 MR. SHORR: We - - -

6 JUDGE RIVERA: Correct?

7 MR. SHORR: We said here that we need - - - we  
8 said, in sum and substance, we need more time. We said - -  
9 - the foster care agency said we're exploring programs that  
10 - - -

11 JUDGE RIVERA: Is it ACS's position that you did  
12 comply with the ADA?

13 MR. SHORR: It's - - -

14 JUDGE RIVERA: Put aside the reasonable efforts.  
15 I'm just talking about compliance with the ADA.

16 MR. SHORR: It's our position that that issue was  
17 - - - was not raised in this case. We didn't have a burden  
18 to show that we complied with the ADA because no one was  
19 saying that the ADA applied to this six-month look-back  
20 period.

21 JUDGE RIVERA: So it's your position that you  
22 could fail to comply with the ADA even though you  
23 acknowledge - - -

24 MR. SHORR: It's - - -

25 JUDGE RIVERA: - - - let me finish - - - you





1 acknowledge it is your obligation and duty to do so, that  
2 you could fail to comply with the ADA, across the lifespan  
3 of the hearing procedure, and yet a court could conclude,  
4 as it did here - - - even though you say the ADA issue was  
5 not really resolved here - - - could conclude that the  
6 Agency had made reasonable efforts.

7 MR. SHORR: There's - - - we're talking about two  
8 different timelines, Your Honor.

9 JUDGE RIVERA: No, we're talking about one thing.

10 MR. SHORR: The - - -

11 JUDGE RIVERA: If - - - is it possible for a  
12 court to find that you made reasonable efforts even though  
13 you've not complied with the ADA? It's a yes or no.

14 MR. SHORR: Yes, it is - - - it is possible - - -

15 JUDGE RIVERA: Okay. Well, then what is - - -

16 MR. SHORR: - - - because - - -

17 JUDGE RIVERA: - - - the difference in that  
18 standard? Now I'm back to Judge Stein's question, I think.

19 MR. SHORR: Because - - -

20 JUDGE RIVERA: What's the difference in the  
21 standard?

22 MR. SHORR: I believe Judge Stein had it right  
23 when she said - - - and I may be paraphrasing slightly - -  
24 - what is required at the permanency hearing, looking back  
25 at the last six months of reunification efforts, is the



1 question is did family court make reasonable efforts to  
2 provide the accommodations - - -

3 JUDGE RIVERA: Not family court.

4 MR. SHORR: This is family court.

5 JUDGE RIVERA: No, no, the family - - -

6 MR. SHORR: I'm sorry; I misspoke.

7 JUDGE RIVERA: ACS - - -

8 MR. SHORR: Family court - - - the question  
9 family court needs to ask is whether ACS and the foster  
10 care agency made reasonable efforts to provide the  
11 reasonable modifications to services that are required  
12 under the ADA. And that is - - -

13 JUDGE RIVERA: In other words, reasonable efforts  
14 doesn't mean you achieved the modifications.

15 MR. SHORR: Right, and that's - - -

16 JUDGE RIVERA: But is there some point when  
17 family court has to decide you've been given enough  
18 opportunities to make these reasonable efforts and you  
19 haven't achieved them, and now I say you haven't made  
20 reasonable efforts?

21 MR. SHORR: Family court doesn't have  
22 jurisdiction to adjudicate that ADA claim. If - - -

23 JUDGE RIVERA: Why not? That's, I think, the  
24 real question: why not?

25 JUDGE STEIN: Can I just clarify that question



1 before you answer it for Judge Rivera?

2 MR. SHORR: Of course.

3 JUDGE STEIN: Is - - - is it your argument that  
4 if there's a dispute as to what the ADA requires under  
5 federal law, that dispute doesn't - - - shouldn't be heard  
6 in the context of the permanency proceeding?

7 MR. SHORR: That's right, Your Honor.

8 JUDGE STEIN: Is that - - - okay.

9 MR. SHORR: It would derail the permanency  
10 proceeding and turn it into a mini-trial to adjudicate  
11 federal rights, which family court doesn't have  
12 jurisdiction to do because it's a court of limited  
13 jurisdiction under the Const - - -

14 JUDGE RIVERA: But if you're going in and saying  
15 I need more time to comply, then you have some idea. So  
16 let me ask you a different question. What does ACS do when  
17 faced with a parent who has disabilities, who's eligible  
18 under the ADA to have services provided, meaningful  
19 services so that they can achieve this reunification, or  
20 attempt to achieve this permanency reunification goal, what  
21 does ACS do to identify the nature of the disability and  
22 the services that it will provide?

23 MR. SHORR: The - - - the ACS does - - - what ACS  
24 does not do, if I may start there, is impose strict ADA  
25 requirements. It does not - - -



1 JUDGE RIVERA: No, no, no.

2 MR. SHORR: - - - say to the parent - - -

3 JUDGE RIVERA: No, no, please. Answer my  
4 question - - -

5 MR. SHORR: Okay. If - - -

6 JUDGE RIVERA: - - - not the one you wish I  
7 asked. What does ACS do? I just want to get a sense of  
8 your protocols and your procedure.

9 MR. SHORR: I know what happened in this case.  
10 What happened in this case is that the Agency referred the  
11 mother for testing to determine what was the nature of her  
12 disability.

13 JUDGE RIVERA: At what point did the Agency do  
14 that?

15 MR. SHORR: It was - - - I believe that it  
16 started before the permanency hearing began, which to  
17 answer your earlier question, was December 1st, 2014. But  
18 it was starting to look for services for the mother even  
19 before it had medical - - - definitive medical evidence  
20 that the woman had cognitive disabilities. It was looking  
21 at that Sinergia program, found out that there was a  
22 Medicaid pre-requisite - - - Medicaid coordinator  
23 pre-requisite, and started working with the mother and the  
24 Bronx - - -

25 JUDGE RIVERA: And is that your procedure and



1 protocol with respect to a parent with disabilities?

2 MR. SHORR: I - - -

3 JUDGE RIVERA: Not just in this case. Is that  
4 what ACS does?

5 MR. SHORR: I - - - I - - - my knowledge is of  
6 this case, Your Honor. I don't have knowledge of the full  
7 range of protocols. I would be surprised if it worked very  
8 differently in other cases when parents with disabilities  
9 presented themselves in permanency hearings.

10 But the reasonable efforts standard not - - - not  
11 only applies to parents like the mother here, it applies to  
12 parents who don't speak English. Reasonable efforts would  
13 require a translator. It applies to parents who are using  
14 illegal drugs without getting treatment.

15 JUDGE FAHEY: Can I ask - - -

16 MR. SHORR: That may not - - -

17 JUDGE FAHEY: Can I ask you, is there anywhere in  
18 the record - - - and I didn't see it, so if you don't know,  
19 I understand - - - that points to an objective test result  
20 that establishes some basis for the mother's cognitive  
21 function? In other words, some test - - - somewhere I can  
22 look in the record that tells us what the results of these  
23 tests were.

24 MR. SHORR: I'm not aware of that in the record.

25 JUDGE FAHEY: Okay.



1 JUDGE RIVERA: Well, did ACS, at any point in  
2 time, challenge what the attorneys said were her cognitive  
3 limitations?

4 MR. SHORR: No, Your Honor.

5 JUDGE RIVERA: Um-hum.

6 JUDGE FAHEY: So the - - - do you know if the  
7 test was ever actually done?

8 MR. SHORR: I - - - I'd have to go back and look  
9 at the record. Nothing springs to mind, as I stand here.

10 JUDGE FAHEY: Okay.

11 MR. SHORR: But nevertheless - - - and that's an  
12 interesting point of distinction between applying the ADA  
13 strictly and applying reasonable efforts. If we were  
14 applying the ADA strictly, the parent would have to prove  
15 that she is a qualified person with a disability under the  
16 ADA. We didn't require that here; we started looking for  
17 appropriate services for this woman before - - - apparently  
18 before we had any evidence - - -

19 JUDGE FAHEY: Well, you know - - -

20 MR. SHORR: - - - of what her cognitive  
21 disability was.

22 JUDGE FAHEY: - - - sometimes with these things  
23 it becomes ridiculous. You've dealt with people for a  
24 while; you recognize they have the disability. Let's say  
25 it was a physical disability, like you were missing a leg,



1           you don't need to send somebody for - - - and it may be a  
2           level of dysfunction here that it - - - it was evident that  
3           the lady needed help, so - - -

4                   MR. SHORR: But it wasn't evident in granular  
5           detail, what kind of help she needed.

6                   JUDGE FAHEY: Um-hum.

7                   MR. SHORR: It was only on the last day of the  
8           permanency hearing, March 15th, for the period covered in  
9           this case - - -

10                   JUDGE FAHEY: That's why I was wondering if there  
11           was ever any follow up if she ever actually had the test  
12           done and what the test showed.

13                   MR. SHORR: I - - - I would have to look at the -  
14           - - at the record. My colleague may be able to answer that  
15           question.

16                   JUDGE RIVERA: But the court did order - - -  
17           right? Didn't the court order ACS to take particular steps  
18           that it didn't comply with?

19                   MR. SHORR: The Court did make orders and the  
20           Agency made reasonable efforts to comply. But things like  
21           getting - - - securing a Medicaid coordinator, that is not  
22           within the Agency's power to do. All the Agency can do is  
23           help the mother get the documents together, help her  
24           present the package. Eventually this woman was deemed  
25           eligible for a Medicaid coordinator. That's on page 801 or



1 804 of the record.

2 JUDGE RIVERA: Did ACS inform the court that it  
3 was ordering things that ACS could not do?

4 MR. SHORR: It - - - I don't believe that - - -  
5 those words were ever used, but we certainly said - - - or  
6 the Agency caseworker said, I found - - - I called and I  
7 found out that we need a Medicaid coordinator, I discussed  
8 it with the mother, I discussed it with the social worker,  
9 here's what we're doing to try to get those documents  
10 together. I reminded the mother, on many occasions, that  
11 she needed to get the documents, and I told the social  
12 worker that too. That was what happened during that  
13 particular nine-month snapshot. And eventually she was  
14 found eligible.

15 JUDGE RIVERA: And counsel says you can't just  
16 tell her to do those things; you have to - - - you have to  
17 recognize that's part of the cognitive limitations.

18 MR. SHORR: I - - -

19 JUDGE RIVERA: Let's use this hypothetical.

20 MR. SHORR: I - - -

21 JUDGE RIVERA: You're informed of that and - - -  
22 and ACS continues, nevertheless, to merely just tell the  
23 parent this is what you need to do, knowing full well that  
24 the parent cannot function with that kind of instruction.  
25 Would that be - - -





1 MR. SHORR: That - - -

2 JUDGE RIVERA: Would that - - - excuse me - - -  
3 if that's all you did, would you have made reasonable  
4 efforts - - -

5 MR. SHORR: I think - - -

6 JUDGE RIVERA: - - - to achieve reunification?

7 MR. SHORR: I think family court would be well  
8 within its rights to say, no, we did not make reasonable  
9 efforts. But the point is that can all be handled under  
10 the reasonable efforts standard. This court, in Star A.,  
11 in the 1980s, before the ADA was even enacted, applied the  
12 reasonable efforts standard.

13 JUDGE RIVERA: So I think you didn't answer:  
14 What's the difference between the two standards? I asked  
15 that before. I think you may have gotten interrupted in  
16 the answer. What - - - what's the difference?

17 MR. SHORR: Even my adversary has said that they  
18 are coterminous. It's not clear to me what is going to be  
19 required under the ADA that isn't already required under  
20 reasonable efforts. And courts have been - - - have been -  
21 - -

22 JUDGE RIVERA: So if that's true, then what's the  
23 objection to us saying that the court has to make this  
24 decision, when it's deciding reasonable efforts, that  
25 you've complied with the ADA? If they're coterminous,



1 that's your position now?

2 MR. SHORR: Well, the objection is the  
3 jurisdictional objection, the idea that there would be a  
4 finding, the idea that there would be a finding without an  
5 adjudication.

6 JUDGE RIVERA: But if they're coterminous, that's  
7 essentially what they're doing.

8 MR. SHORR: Well - - -

9 JUDGE RIVERA: I don't understand this argument.  
10 They're doing that anyway.

11 MR. SHORR: What - - - what we're doing and what  
12 we suggest family court does, what it did in La'Asia, what  
13 was endorsed by family court and the First Department here  
14 is to use the ADA as - - - as guidance, not only guidance  
15 as for whether reasonable efforts were made, but guidance  
16 about future orders.

17 JUDGE RIVERA: To use it as guidance, the  
18 judiciary would have to understand the parameters and the  
19 law anyway, correct?

20 MR. SHORR: I think it would - - - it wouldn't  
21 have to do the - - - the burden-shifting analysis, it  
22 wouldn't have to try to figure out how ADA burden-shifting  
23 fits in with the preponderance of the evidence standard  
24 that applies during permanency hearings. It wouldn't have  
25 to have an adjudication with vast discovery.



1 JUDGE RIVERA: Well, what does it have to do?  
2 All the things it doesn't have to do. What does it have to  
3 do?

4 MR. SHORR: It can - - -

5 JUDGE RIVERA: What does that mean, "guidance"?

6 MR. SHORR: It can look at the Code of Federal  
7 Regulations, it can look at HHC and justice department  
8 interpretations of the regulations. It can say: According  
9 to these documents this person needs these kinds of  
10 services; what have you done to provide them?

11 JUDGE WILSON: Is part of what's mucking this up  
12 here that in the same breath the Appellate Division, in two  
13 different cases, La'Asia and now this case, has said it can  
14 be used to inform, but it has no bearing or it's not  
15 applicable? I mean, those things don't sit well in  
16 ordinary English.

17 MR. SHORR: I - - - I take your point, Your  
18 Honor. Based on the language of the decision in the First  
19 Department, when they cite La'Asia, it looks like the First  
20 Department is taking the approach that the ADA can provide  
21 guidance to family courts. That statement that it has no  
22 applicability seems to go well beyond where it felt  
23 comfortable going in the rest of its decision. And family  
24 court used the ADA as guidance as well. It happened in  
25 La'Asia. And other courts, like the Everett court, have

1 resolved issues like this without looking at the ADA at  
2 all.

3 And I just want to close by saying that with  
4 respect to reasonable efforts, putting aside the ADA issue  
5 - - - before I get there, let me add that one - - - another  
6 problem with making everything contingent on a finding of  
7 ADA compliance is reimbursement, federal reimbursement for  
8 the expenses of the foster care services provided during  
9 the previous six months. We don't want to be in a  
10 situation where we find out in month five that the mother  
11 or the parent needs a particular accommodation. We just  
12 can't get it to her within that final month, or there's  
13 some minor shortfall in our efforts - - -

14 JUDGE RIVERA: But then it's not reasonable,  
15 right? That's the whole point: there is some flexibility  
16 in this standard.

17 MR. SHORR: There is flexibility, and the reason  
18 - - -

19 JUDGE RIVERA: And if you need more time, you  
20 communicate that to the court, and that's about the  
21 reasonableness part of it, yeah?

22 MR. SHORR: Right. That's fine, and that can be  
23 done under reasonable efforts without trying to engraft the  
24 ADA and ADA adjudications - - -

25 JUDGE RIVERA: But that's reasonable



1 modifications. I thought we - - - I thought you'd taken a  
2 position that you're obligated to comply with the ADA - - -

3 MR. SHORR: Right.

4 JUDGE RIVERA: - - - and that it's coterminous.

5 MR. SHORR: We are obligated to comply, but there  
6 should not be and there cannot be a finding, an  
7 adjudication and a finding of ADA compliance or  
8 noncompliance.

9 JUDGE RIVERA: Let's say we disagreed with you.  
10 Let's say a majority of the court disagreed with you, how -  
11 - - how would you avoid the preclusive effect - - - I'm  
12 going to ask that to counsel when he gets up on rebuttal -  
13 - - of that finding?

14 MR. SHORR: We would have to argue that the  
15 family court had no jurisdiction to enter that finding.  
16 But if - - -

17 JUDGE RIVERA: Is that the only way to avoid the  
18 preclusive effect?

19 MR. SHORR: We - - - we would have - - -

20 JUDGE RIVERA: You sort of made a whole argument  
21 about how - - -

22 MR. SHORR: - - - to say - - - we would - - - we  
23 would have - - -

24 JUDGE RIVERA: - - - the court isn't going to do  
25 a full-blown ADA assessment.



1                   MR. SHORR: We would have to say that we didn't -  
2                   - - our rights were not fully vindicated in that family  
3                   court hearing because there was not a full adjudication.  
4                   And of course family court could have not have conducted a  
5                   full adjudication because it would derail the permanency  
6                   hearing, it would delay the permanency hearing when the  
7                   whole point is to - - - is to achieve timely and effective  
8                   review of the services that are provided. So there - - -  
9                   we - - - but if - - - if we were wrong and someone - - -  
10                  and the court said that - - - that family court findings on  
11                  ADA violations do have a preclusive effect, well then we're  
12                  in a whole new world where every permanency hearing turns  
13                  into a full-blown ADA trial, depositions, expert witnesses,  
14                  and then appeals.

15                  The whole permanency process is going to - - -  
16                  would become fundamentally different. Unreasonable  
17                  efforts, putting aside the ADA for a moment, under this  
18                  court's decision in Star A., in order for this court to  
19                  reverse on that ground, they would have - - - the mother  
20                  would have to show that the efforts were unreasonable as a  
21                  matter of law. And they haven't come close to showing  
22                  that. Thank you.

23                  CHIEF JUDGE DIFIORE: Thank you, counsel.

24                  Counsel?

25                  MR. BAER: May it please the court. My name is



1 Andrew Baer, and I represent the child, Lacey L., in this  
2 matter.

3 CHIEF JUDGE DIFIORE: So you're the attorney for  
4 the child. What benefit does the child, who is the subject  
5 of this proceeding, obtain from what appellant argues for?

6 MR. BAER: Well, again, because I think that the  
7 standard is coterminous, as we've all, I think, agreed to  
8 here, and I think that the court even agrees at this point  
9 in time, there is no further benefit, in a sense, in  
10 applying the ADA specifically to the case. The - - - the  
11 services that they would have - - -

12 JUDGE WILSON: Counsel, what's the consequence  
13 for the family if we affirm? What's the consequence if we  
14 reverse?

15 MR. BAER: Well, I was going to actually address  
16 that.

17 JUDGE WILSON: Is there any difference?

18 MR. BAER: Well, there really isn't. I mean,  
19 again, because we talked about how this is an ongoing  
20 proceeding. The only practical effect that would really  
21 occur is that the Agency would not receive its federal  
22 funding for that period of time. But I mean, we are where  
23 we are today, and we can't go back and - - - and redo what  
24 was already done. Part of providing services to a parent  
25 is a process.

1 JUDGE FEINMAN: Well, you say that that's the  
2 only effect of perhaps reversing, but how does it effect,  
3 later on, where we - - - when we get to the end at the  
4 termination proceeding, if we get there, where it has to be  
5 established by clear and convincing evidence that - - -

6 MR. BAER: Well, what's interesting about making  
7 - - -

8 JUDGE FEINMAN: - - - there's been compliance  
9 with reasonable efforts.

10 MR. BAER: - - - efforts is that it actually goes  
11 towards what the current goal is. If the goal is actually  
12 termination of parental rights, what they look toward is  
13 what the Agency has done towards that - - -

14 JUDGE FEINMAN: No, I'm not saying that that's  
15 the goal.

16 MR. BAER: - - - what the Agency's done towards  
17 that goal.

18 JUDGE FEINMAN: I'm saying that that could be  
19 where this ends up, ultimately.

20 MR. BAER: That is correct.

21 JUDGE FEINMAN: Right. And is there an effect on  
22 how that's going to get evaluated, depending on what's been  
23 happening at these snapshots, if you will?

24 MR. BAER: Well, but I mean, what's going to  
25 happen at these snapshots is the Agency and the court is





1 going to learn what further services are needed, what  
2 services may have actually been provided that are not  
3 giving the effect that they need to, to reunify the child  
4 and the mother, and that they need to go forward with  
5 further types of services that would allow that to happen.

6 As an example - - -

7 JUDGE GARCIA: I'm not so sure they are  
8 coterminous. Maybe they are; maybe they aren't. But if we  
9 find for the appellant here, they will be. So essentially,  
10 what we would be doing would be molding whatever our  
11 standard was - - - maybe it was coterminous, maybe it  
12 wasn't - - - to now be the ADA standard.

13 MR. BAER: Well, what I'd say just about that is  
14 the Agency has admitted that - - - I mean, I'm sorry, the  
15 appellant has admitted that they are. But this court could  
16 make a ruling that was different than that.

17 JUDGE GARCIA: What if we're not sure? What if  
18 any given circumstance it may be - - - maybe there is a  
19 hypothetical where it wouldn't be. Essentially, my concern  
20 is wouldn't we be removing from family court the ability to  
21 say, on all of these circumstances, and there may be some  
22 violation of the ADA which could be championed in some  
23 other form, we're going to have to find that reasonable  
24 efforts weren't made, whereas under the prior state  
25 standard we would have found that they were.



1 MR. BAER: Well, I - - -

2 JUDGE GARCIA: And that concerns me because I  
3 don't know if they're coterminous or not.

4 MR. BAER: I understand. I think part of the  
5 problem that we get - - - that we discussed is where is the  
6 jurisdiction of the family court to allow it to adjudicate  
7 an ADA claim. In this case we had a - - -

8 JUDGE RIVERA: Counsel, but they're not making an  
9 ADA claim. Let me go back to something else that - - -  
10 that you said, because I'm not sure that I'm persuaded by -  
11 - - by the point you were making about what might be the  
12 disposition depending on whether or not we reverse. Could  
13 we not reverse and remit and simply say the wrong standard  
14 was applied, we're going to apply the correct standard,  
15 you're incorrect to say, as a matter of law, a family court  
16 does not take into consideration or may not, cannot take  
17 into consideration compliance with the ADA in determining  
18 whether or not reasonable efforts have been made. Now go  
19 determine, knowing that you have to decide whether or not  
20 they've complied with the ADA, whether or not reasonable  
21 efforts were made during this period of time.

22 MR. BAER: Well, I think that then forces the  
23 family court - - -

24 JUDGE RIVERA: And the court might come out with  
25 the exact same determination.



1 MR. BAER: It might. But it forces the family  
2 court, I believe, at that point in time, to make an ADA  
3 determination. And part of the problem - - -

4 JUDGE RIVERA: Yes, but that - - -

5 MR. BAER: Part of the problem - - -

6 JUDGE RIVERA: Counsel.

7 MR. BAER: I apologize.

8 JUDGE RIVERA: I just wanted to clarify this  
9 other point that it's not necessarily the case in this case  
10 that ACS is going to lose its money. The Court might  
11 decide, even now knowing that, yes, I can take into  
12 consideration - - - or I have to apply the ADA here and  
13 determine whether or not ACS has complied with the ADA, I  
14 believe that they've made reasonable efforts.

15 MR. BAER: And I think that's correct. I think  
16 that they can do that. But the problem still, I think,  
17 goes to a larger question, and that is if the family court  
18 is making an ADA adjudication then, in that sense, and  
19 saying that they did comply with the ADA, where does the  
20 line get drawn to where that finding then can be taken? If  
21 a parent applies for a disability, then is it determined  
22 already that they're disabled and that there's been an - -  
23 -

24 JUDGE RIVERA: Applies to who? I lost the thread  
25 of the point.



1 MR. BAER: Well, I'm saying applies to the  
2 parent. In this case there was a consent that this parent  
3 was disabled. What happens in the case where there's no  
4 consent between the parent and the Agency that there is a  
5 disability? Again, then you're talking about the family  
6 court having to basically hold a full-blown hearing under,  
7 I guess, the mental health or mental hygiene laws, to  
8 determine whether or not she is disabled, and then from  
9 there obviously you've completely disrupted the permanency  
10 hearing's purpose and goal. That's actually what happened  
11 - - -

12 JUDGE RIVERA: But don't you have to do that  
13 anyway? If one party says, listen, I need these services -  
14 - - not - - - not anyone who's disabled - - - I need these  
15 services, and the Agency says you don't need those  
16 services. Doesn't the family court have to decide whether  
17 or not you need those services?

18 Isn't the whole point of the ADA to put persons  
19 with disabilities, in this case parents with disabilities,  
20 on a fair, just, equal footing with everyone else who  
21 doesn't have disabilities when they're trying to access  
22 services that the government is providing? That's all it's  
23 saying. She might not be able to parent. The conclusion  
24 from the court might be: You complied with the ADA, you  
25 made reasonable efforts, but she's still not able to



1 parent.

2 MR. BAER: The case law, essentially, though,  
3 already - - -

4 JUDGE RIVERA: And reunification is not  
5 appropriate here.

6 MR. BAER: The case law, essentially, though,  
7 already says that, that they must tailor towards that  
8 person's specific problems. And so I think - - -

9 JUDGE RIVERA: So then the courts are already  
10 doing that. So I'm not understanding, other than the loss  
11 of money, which I'm not so persuaded would be the result,  
12 what it is that the ACS says the family court cannot do, if  
13 it's already doing that, if - - - I understand Judge Garcia  
14 is not persuaded, maybe others are not, but let's take for  
15 the moment, if - - - if it is coterminous, they're already  
16 doing that. That's why I don't understand this argument  
17 from the ACS.

18 MR. BAER: But if they are already doing it, then  
19 why does this court need to make any further ruling as to  
20 what they're already doing? They're already complying with  
21 it.

22 JUDGE RIVERA: To clarify that you have a court  
23 saying we don't have to do it.

24 MR. BAER: Well, I don't think that the court  
25 ever said here - - -



1 JUDGE RIVERA: And says there's guidance and we  
2 don't know what that means.

3 MR. BAER: Well, I think the court said that they  
4 should use the ADA as guidance. I mean, I don't think the  
5 court ever said that it didn't know what that means. And I  
6 think that the courts in Michigan, in Hicks v. Brown, and  
7 the courts in Connecticut, in Elijah C., further said the  
8 exact same thing, that it should be used as guidance and  
9 that they were not going to go as far and say that this can  
10 be used as a defense in a determination of parental rights  
11 case.

12 JUDGE WILSON: I don't know. Reading - - -  
13 reading family court's paragraph titled "The ADA is not  
14 applicable to this proceeding", at least the way I read it,  
15 they - - - they - - - family court judge latches on the  
16 "has no bearing" language, and then criticizes it, saying,  
17 essentially, I've got to follow this but I don't really  
18 understand it because neither Chance Jahmel nor La'Asia has  
19 really any rationale, and there's no detail in the holding.  
20 But you know, it - - - it's - - - I think it's confused by  
21 the language that the Appellate Division used.

22 MR. BAER: Well, I just think that in a full  
23 reading of this case, along with those other two cases,  
24 that the courts did state, though, that the ADA rule should  
25 be a guideline. So I think that if you're not reading that



1 in a vacuum, that the courts would understand that.

2 JUDGE RIVERA: Let me ask you this on this  
3 jurisdiction question. I'm going to pose a different  
4 hypothetical. Let's say you have a parent and counsel who  
5 comes in and says, you know - - - and I'm not saying this  
6 is true; it's just a hypothetical - - - but ACS provides  
7 services in a way that it is discriminatory based on race.  
8 Are you saying the family court would not, when it's  
9 deciding whether or not reasonable efforts have been made,  
10 be able to decide that question? Because I don't see the  
11 difference between that question and the question here.

12 MR. BAER: Well, I mean, I guess it's the same  
13 question as a parent who comes in, who we said is disabled  
14 physically, and whether or not - - - and what  
15 accommodations the ACS would be required for that parent.

16 JUDGE RIVERA: No, but now you're talking about  
17 figuring out, sort of, that factual issue. This is a  
18 different issue, right? This is about the jurisdictional  
19 question that someone presents and says you're violating a  
20 core legal requirement. Let's use Title VI: you can't  
21 discriminate based on race in the - - - the provision of  
22 services. The parent comes in, or counsel, and says that's  
23 exactly what you're doing. You're saying family court  
24 cannot make that determination in deciding whether or not  
25 reasonable efforts have been made?



1 MR. BAER: I don't know that it can,  
2 jurisdictionally. Again, this is a court of limited  
3 jurisdiction that was, you know, made by statute. And I  
4 don't think that it can exercise powers beyond what it is  
5 granted.

6 JUDGE RIVERA: Okay. Thank you.

7 MR. BAER: Thank you.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.  
9 Counsel?

10 MR. SCHOENFELD: Judge Rivera, let me pick up  
11 with the last point you made because I think it's - - -  
12 it's an apt analogy. It may be the case that the court  
13 could not hear a freestanding Title VI claim, but what the  
14 family court cannot do is bless, with a reasonable efforts  
15 finding, an Agency's discriminatory conduct against a  
16 parent. And that's exactly what the Agency is trying to do  
17 here.

18 I think ACS's position before this court today  
19 obscures some real differences between - - -

20 JUDGE RIVERA: Can I ask you the question I asked  
21 him?

22 MR. SCHOENFELD: Sure.

23 JUDGE RIVERA: Because I promised him I would ask  
24 you about the preclusive effect.

25 MR. SCHOENFELD: I - - -





1 JUDGE RIVERA: He's very concerned about that,  
2 and I too am struggling with this preclusive effect of a  
3 finding that, let's say here a negative finding, that the  
4 Agency didn't comply with the ADA.

5 MR. SCHOENFELD: And I don't think that there  
6 would be any preclusive effect of a reasonable efforts  
7 determination that was predicated on some finding that the  
8 ADA had not necessarily - - -

9 JUDGE FEINMAN: But would it have some effect  
10 down the road if the Agency then wanted to proceed to  
11 termination proceedings, which they then have to prove by  
12 clear and convincing, and then depending on where it is in  
13 the snapshot - - -

14 MR. SCHOENFELD: That's certainly right.

15 JUDGE FEINMAN: - - - they can't - - -

16 MR. SCHOENFELD: I understood Judge Rivera's  
17 question to refer to a freestanding ADA - - -

18 JUDGE FEINMAN: I think you did understand her  
19 question - - -

20 MR. SCHOENFELD: Okay.

21 JUDGE FEINMAN: - - - correctly. Mine's  
22 different.

23 MR. SCHOENFELD: Sure. So just to go to Judge  
24 Rivera's question, I think if someone said the family court  
25 found that no reasonable efforts had been made, and so I am



1 bringing this ADA claim in the United States District Court  
2 for the Southern District of New York, there would not be  
3 preclusive effect. There is not a full and fair air - - -  
4 opportunity to air all of the aspects of the ADA claim.

5 JUDGE STEIN: Well, then how can the court make a  
6 determination that there's been a violation of the ADA?

7 MR. SCHOENFELD: Federal - - - family courts make  
8 determinations, predicate determinations, under federal law  
9 all the time. If you look at some of the decisions - - -

10 JUDGE GARCIA: How does this not have preclusive  
11 effect? I mean, if you're saying it's not really a full-  
12 blown ADA finding, then what is it?

13 MR. SCHOENFELD: It is a weird animal, I grant  
14 that. But if you look at some of the cases we cited,  
15 there's a - - - one of the adoption cases we cited, the  
16 court needed to make predicate determinations about the  
17 adoptive child's immigration status to determine whether  
18 the best interests of the child were being met in that  
19 case. And they said sometimes adoption depends on  
20 questions of federal law. So too here, sometimes  
21 reasonable efforts turns on interpretations of federal law.

22 There's another case we cite that involves the  
23 state's interpretation of the state provision of ICWA. And  
24 the question in that case was is there a whole Indian  
25 family exception mandated by the constitution to preserve



1 the constitutionally of ICWA. That's a question that's  
2 been before the United States Supreme Court. And the  
3 family court considered that as a predicate determination -  
4 - -

5 JUDGE STEIN: But I think the statute  
6 specifically gives - - - requires family court to consider  
7 that.

8 MR. SCHOENFELD: Not to make a constitutional  
9 determination as to the federal ICWA statute. What it says  
10 is it can make determinations as to whether a parent is a  
11 member of an Indian tribe recognized under United States or  
12 New York law. It's a completely different question from  
13 the one the court entertained.

14 I think one of the points that I want to leave  
15 the court with is what we are asking for, as a matter or  
16 process, is not different from the permanency proceedings  
17 that are conducted every day.

18 Mr. Shorr explained that, you know, allowing the  
19 ADA to become part of the standard here would require  
20 depositions or testimony or experts. It happens at  
21 permanency proceedings all the time. There are always  
22 experts called in to discuss a parent's disability, to  
23 discuss the child's status, whether a particular permanency  
24 placement would be in the best interest of the child.  
25 These proceedings would be no different. It's simply a



1 question of whether the family court is complying with the  
2 ADA by providing reasonable accommodations.

3 I understand my time is up, but if I may, I just  
4 want to make sure that I address one final point. ACS has  
5 done a very good job, on appeal, of obscuring the  
6 difference between the parties. Before the family court,  
7 ACS argued as follows: There is no basis to superimpose  
8 the requirements of the ADA onto Article 10A as a means of  
9 evaluating reasonable efforts. Such an arbitrary use of a  
10 federal statute by this court would be ultra vires, not  
11 only because there is no precedent for same, but because  
12 ACS would have no notice that the court is requiring it to  
13 adhere to certain standards not contained within the text  
14 of Article 10A.

15 ACS has been on notice that it is obligated to  
16 comply with the ADA for decades, and it does not comply  
17 with the ADA, it has no protocol to comply with the ADA.  
18 The availability of this ACS grievance process in ADA first  
19 came to our attention in the briefing of the appeal before  
20 this court. That's not something that any practitioner in  
21 family court has any ideas available.

22 ACS needs to understand that it is obligated to  
23 comply with the ADA in providing reasonable efforts. And  
24 it needs to understand that the family court will not  
25 bless, with a reasonable efforts finding, its violation of



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the ADA in cases where a parent has a disability.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. SCHOENFELD: Thank you, Your Honor.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Lacey L. (Stephanie L. v. Administration For Children's Services), No. 95, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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