No. _____

In The
Supreme Court of the United States

IRVING N., DAWN N., AND SANDRA N.,

Petitioners,

v.

RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH, AND FAMILIES,

Respondent.

On Petition For A Writ Of Certiorari To The Rhode Island Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (Title II), provides that "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 question presented is:

Whether Title II applies to termination of parental rights proceedings initiated by state agencies and prosecuted in state courts.

PARTIES TO THE PROCEEDING

The Petitioners are Irving N., Dawn N., and Sandra N. The Respondent is the Rhode Island Department of Children, Youth, and Families.

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PETITION FOR A WRIT OF CERTIORARI

Irving N., Dawn N., and Sandra N., respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Rhode Island in this case.

OPINIONS BELOW

The opinion of the Rhode Island Supreme Court was published at 900 A.2d 1202 and is reproduced in Appendix A. The unpublished decision of the Providence, Rhode Island, Family Court is reproduced in Appendix B.

JURISDICTION

The Rhode Island Supreme Court's decision was entered on June 30, 2006. On August 24, 2006, Justice Souter granted an application to extend the time to file this petition to and including October 30, 2006. This petition is being filed within that time. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*; the Rehabilitation Act of 1973, 29 U.S.C. § 794; and the Rhode Island Termination of Parental Rights Statute, R.I. Gen. Laws § 15-7-7, are reproduced in Appendix C.

STATEMENT

1. This case involves the State of Rhode Island's termination of the parental rights of Petitioners Irving and Dawn N. to their daughter Kayla N., as well as its refusal to permit Petitioner Sandra N. to adopt Kayla. Both Irving and Dawn N., who are married, have mild mental retardation. App., *infra*, at 1a. Irving has been tested as having an IQ of 61, and Dawn has been tested as having an IQ of 64. *Id.* at 32a. Dawn has a daughter by a previous relationship, Michelle, whom the state placed in foster care; when the state filed a motion to terminate Dawn's parental rights to Michelle, Dawn gave her up for adoption to the foster family. *Id.* at 1a-2a.

In early 2000, Rhode Island's Department of Children, Youth, and Families ("DCYF") determined that Dawn was pregnant with Irving's child. *Id.* at 24a. While Dawn was pregnant, the Department concluded that Irving and Dawn could not properly parent a child, both because of Dawn's experience with her first daughter and because Dawn's mother had made threats against Irving and the unborn child. *Id.* at 2a. Accordingly, the Department asked Irving's sister, Sandra N., whether she could take in the baby after birth. *Id.* at 24a. But Sandra could not do so; at the time, she had assumed full-time care responsibilities for another brother and a niece, both of whom were in the late stages of terminal illness and were living with her. *Id.*

On April 13, 2000, Dawn gave birth to Kayla. *Id.* at 2a. DCYF did not permit Irving and Dawn to take Kayla home. *Id.* Instead, the Department placed the baby in foster care with the family that was caring for her half-sister, Michelle. *Id.* DCYF set a goal of reunifying Kayla with her parents and referred Irving and Dawn to a state

contractor, Spurwink of Rhode Island. *Id.* at 2a-3a. Spurwink provided Irving and Dawn with training in parenting skills, and it also supervised once-per-week visits with Kayla at a DCYF office. *Id.* Unlike any of the services the state would later offer Petitioners, Spurwink's services were specifically geared toward parents with intellectual disabilities. *Id.* at 3a.

In December 2000, Irving and Dawn asked the Rhode Island Family Court overseeing their case to permit supervised visits in their home. *Id.* Spurwink refused to supervise those visits, however, because of a threat Dawn had allegedly made to one of its workers. *Id.* at 3a & n.2. DCYF responded in January 2001 by terminating Spurwink's contract to provide services to Irving and Dawn; the state never explained why it did not permit Spurwink to continue its parenting services while another contractor supervised the in-home visits. *Id.* at 3a-4a, 26a.

Over the next year, the state referred Irving and Dawn to a succession of programs, none of which provided services targeted at parents with disabilities. *Id.* at 4a-5a. In February and March, the John Hope Settlement House provided weekly parent-aide services and supervised a weekly two-hour visit with Kayla in Irving and Dawn's apartment. *Id.* at 4a. In April, after it declined to renew John Hope's funding, DCYF itself began arranging two *un*supervised visits per week. *Id.*[1] In May, the state

[1] In March 2001, John Hope had sent a favorable progress report to DCYF and recommended unsupervised visitations, but the Department did not inform the Family Court about that report. On April 27, after learning that DCYF caseworkers had not disclosed the favorable report, the Family Court ordered the Department to reassign the case to a new social worker and unit. It also granted

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referred Irving and Dawn to the Early Intervention Program – a program aimed at addressing developmental delays that had been diagnosed in Kayla. *Id.* at 4a-5a. The state also referred Irving and Dawn to a Visiting Nurses Association program (to help deal with Kayla's asthma), and to the Partners in Permanency program of Children's Friend and Service, Inc. *Id.* at 5a. Although the Partners in Permanency caseworker testified that "forty-two percent of the families she worked with were cognitively limited," the program's services were not tailored to the particular needs of parents with disabilities. *Id.* at 29a. "It is undisputed that Dawn and Irving substantially complied with each referral," *id.* at 5a; *accord id.* at 34a, though their caseworkers expressed continuing concerns about conflicts with other tenants in Irving and Dawn's building, *id.* at 29a-30a, and various parenting issues.[2]

In May 2001, the Family Court granted Irving and Dawn two unsupervised in-home visits with Kayla per week; one for two hours during the day, and one overnight. *Id.* at 34a. Because of the caseworkers' concerns about conflicts with other tenants in Irving and Dawn's building, the overnight visits were moved to Sandra's house in August, where they continued until the Family Court's decision in this case. *Id.* at 34a, 51a. By November 2001, the relatives under her full-time care had passed away,

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Irving and Dawn two unsupervised in-home visits with Kayla each week. App., *infra*, at 4a n.4, 26a-27a.

[2] *See* App., *infra*, at 29a (on one occasion, "the parents argued in front of the child" over whether Kayla should have gone to a Dunkin Donuts); *id.* at 34a (Irving and Dawn "would dump a whole bag of toys out onto the floor, then just sit and watch" Kayla); *id.* at 39a ("Father did a better job of playing with Kayla than did mother, who would leave frequently to visit neighbors or make telephone calls.").

and Sandra proposed to take placement of Kayla. *Id.* at 5a n.5, 44a. Irving moved for that change of placement, but DCYF advised the Family Court that, despite having failed since January to make any accommodations for Irving and Dawn's disabilities, it would seek termination of their parental rights. *Id.* at 5a.

2. DCYF filed its termination petition in the Family Court on January 10, 2002. *Id.* Irving, Dawn, and Sandra then filed petitions for an open consent adoption, in which Sandra would adopt Kayla. *Id.* at 6a. After some procedural wrangling, the Family Court heard the termination and adoption petitions together. *Id.*

The state presented the testimony of, among others, its caseworkers and of Dr. Steven Hirsh. *Id.* at 31a. Dr. Hirsh, a clinical psychologist, had spent just over two hours evaluating Irving and Dawn, and he had never observed them with Kayla. *Id.* at 31a, 33a. He "recommended that the parents' rights be terminated and felt that future psychological social services were not recommended." *Id.* at 32a. As the transcript of 22 July 2002 reveals (at page 17), his conclusion rested significantly on his generalized belief "that individuals who have those two types of difficulties ["mild mental retardation and moderate personality disorder"] frequently have significant difficulty parenting their children."

Irving, Dawn, and Sandra all testified in support of the adoption petition. *Id.* at 42a-46a. Each of them characterized the adoption as a form of accommodation for Irving and Dawn's disabilities that would permit them to continue to see Kayla while assuring that she would be well cared for. *Id.* at 42a (Irving testified that he felt that he and Dawn could not take care of Kayla alone and that he

moved for the adoption by Sandra so that he could still see his daughter); *id.* at 42a-43a (Dawn testified that she and Irving could not take care of Kayla without help); *id.* at 43a (Sandra testified that "it was in Kayla's best interest to be with her because of her brother's limitations" and that she would permit Irving to see Kayla).

3. On January 22, 2003, the Family Court granted the state's petition for termination of parental rights and denied the petition for adoption. *Id.* at 7a. Irving and Dawn had argued both that the state had not made "reasonable efforts . . . prior to the filing of the petition to encourage and strengthen the parental relationship so that the child can safely return to the family," as required by state law before termination of parental rights, R.I. Gen. L. § 15-7-7(b)(1), and that the Americans with Disabilities Act required the state to undertake "special efforts" tailored to their disabilities. App., *infra*, at 40a. But the Family Court concluded that the state had made the "reasonable efforts" required by state law and that the ADA "is not applicable in cases such as the present case." *Id.*

4. The Rhode Island Supreme Court affirmed. In a brief discussion, the court agreed with "the result reached in cases from several other jurisdictions that have held that a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA." *Id.* at 11a (citing *In re Anthony P.*, 101 Cal.Rptr.2d 423 (Cal. App. 2000); *In re Antony B.*, 735 A.2d 893 (Conn. App. 1999); and *In the Interest of Torrance P.*, 522 N.W.2d 243 (Wis. App. 1994)). Because termination of parental rights proceedings "are held for the benefit of the child, not the parent," the court concluded that "the ADA is inapplicable

when used as a defense by the parent(s)." *Id.* (internal quotation marks omitted) (quoting *M.C. v. Department of Children & Families*, 750 So.2d 705, 706 (Fla. App. 2000)).

REASONS FOR GRANTING THE PETITION

Title II of the ADA provides that "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." 42 U.S.C. § 12132. A "public entity" is a state or local government or any of its departments, agencies, or instrumentalities. *Id.* § 12131(1). By its plain and unqualified terms, Title II therefore covers *any* services, programs, or activities of a state entity and reaches *any* disability-based discrimination by such an entity. The statute makes no exception for activities that implicate particularly strong state interests or that the state wishes to insulate from a prohibition on disability discrimination. This Court made that point clear in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998), which rejected the argument that Title II should be read as exempting prisons from its apparently unqualified coverage.

But despite the plain statutory text and this Court's decision in *Yeskey*, the Rhode Island Supreme Court here – joining appellate courts in at least 15 states – held that the ADA's nondiscrimination protections simply do not apply to state-initiated termination of parental rights proceedings adjudicated by state courts. Because that manifest misreading of the statute implicates a persistent confusion among state courts, and affects interests that

this Court has repeatedly recognized as being of the highest importance, this Court's intervention is necessary.

A. The Decision Of The Rhode Island Supreme Court Conflicts With The ADA's Plain Terms And This Court's Decision In *Yeskey*

In both the Family Court and the Rhode Island Supreme Court, Petitioners argued that termination of their parental rights would violate the ADA for several reasons, including: (1) the state failed to provide reunification services that were tailored to Irving and Dawn N.'s disabilities and thus violated the requirement that it make "reasonable modifications" where necessary to avoid discrimination, *see Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 592 (1999); pp. 3-4, *supra*; (2) Dr. Hirsh's key testimony in support of the decision to terminate rested on stereotypes about the parenting skills of people with mental retardation rather than on a truly individualized assessment of Irving and Dawn's abilities (*see* p. 5, *supra*); and (3) the state court failed to consider whether permitting Sandra N. to adopt Kayla would be a proper "reasonable modification," *see* pp. 5-6, *supra*.

The state courts refused to consider these arguments; they held, instead, that the ADA simply does not apply to termination of parental rights proceedings. The Rhode Island Supreme Court declared that "a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA." App., *infra*, at 11a. But the court did not discuss any definitions of the terms "services, programs, or activities" in making that ruling, nor did it address this Court's interpretation of those terms in *Yeskey*. Instead, the Rhode Island Supreme Court simply

asserted that because termination of parental rights proceedings "are held for the benefit of the child, not the parent . . . the ADA is inapplicable when used as a defense by the parent(s)." *Id.*

1. The Rhode Island Supreme Court's conclusion disregards the plain text of the ADA. Termination of parental rights proceedings are "activities" of a public entity (here, the State of Rhode Island) under the plain meaning of the term. As Judge Boggs has explained, "the word 'activities,' on its face, suggests great breadth and offers little basis to exclude *any* actions of a public entity." *Johnson v. City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (emphasis added); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44 (2d Cir. 1997) ("the plain meaning of 'activity' is a 'natural or normal function or operation,'" and thus the ADA encompasses any "normal function of a governmental entity") (citation omitted), *overruled in part on other grounds*, *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). Both lay and legal dictionaries support that reading. *See Webster's Third New International Dictionary* 22 (1961) (defining "activity" as the "function or duties" of "an organizational unit for performing a specific function" and as an entity's "natural or normal function or operation – on the stock exchange'"); *Black's Law Dictionary* (8th ed. 2004) (defining "activity" as "[t]he collective acts of one person or of two or more people engaged in a common enterprise"). Termination of parental rights proceedings, which are normal functions or operations of state courts and child welfare agencies, are plainly "activities" under these definitions – regardless of whom they are designed to protect. If the contrary were true, the judicial proceedings to which this Court applied Title II in *Tennessee v. Lane*,

541 U.S. 509 (2004), would not have been covered by the statute.

Moreover, in seeking family reunification efforts tailored to their disabilities, Petitioners also plainly requested reasonable modifications to state "services" and "programs." Indeed, the Rhode Island termination of parental rights statute itself refers to such reunification efforts as "*services* to correct the situation which led to the child being placed [in state custody]." R.I. Gen. Law § 15-7-7(a)(3) (emphasis added). And the Rhode Island Supreme Court's own opinion repeatedly referred to the reunification efforts provided by the state and sought by Petitioners as "services" (18 times) and "programs" (9 times). App., *infra*, at 2a-14a. In *Yeskey*, 524 U.S. at 210, this Court held that the ADA applied to a request to participate in a prison boot camp that a state statute explicitly referred to as a "program." The Rhode Island Supreme Court should have reached the same conclusion here.

In any event, Title II's plain text extends beyond exclusion from "services, programs, and activities" to reach (in the second clause of the operative provision) *any* disability-based discrimination by a public entity. *See* 42 U.S.C. § 12132 ("[n]o otherwise qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any [public] entity"). The Rhode Island Supreme Court completely ignored that statutory prohibition.[3]

[3] The Department of Justice, which is charged with issuing regulations to implement the ADA, *see* 42 U.S.C. § 12134, has confirmed that "title II applies to anything a public entity does." 28 C.F.R. Pt. 35, App. A. And Section 504 of the Rehabilitation Act of 1973, which the ADA specifically incorporates, *see* 42 U.S.C. 12201(a); *Bragdon v.*

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2. The decision of the Rhode Island Supreme Court cannot be squared with *Yeskey*. There, Pennsylvania argued that Title II should be construed not to reach state prisons, because applying the ADA in that context would override the state's ability to structure its activities in an area in which it had important interests. *See Yeskey*, 524 U.S. at 208-209. But this Court rejected that argument and held that Title II's unqualified coverage of any service, program, or activity of a public entity "unmistakably includes state prisons": The broad statutory text "plainly covers state institutions, without any exception that could cast the coverage of prisons into doubt." *Id.* at 209. To the argument that Congress never expected the ADA to apply to prisons, this Court responded: "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Id.* at 212 (internal quotation marks omitted).

In reading the ADA as not applying to state termination of parental rights proceedings, the Rhode Island Supreme Court relied on exactly the sort of argument this Court rejected in *Yeskey*. Because the state treats termination proceedings as being "held for the benefit of the child, not the parent," the Rhode Island Supreme Court believed it inappropriate to protect the parents' rights against discrimination in those proceedings. App., *infra*, at 11a. But Title II simply contains no "exception that could cast the coverage of [parental-rights termination proceedings]

Abbott, 524 U.S. 624, 632 (1998), also confirms the point. Like Title II, Section 504 applies to "program[s] or activit[ies]," 29 U.S.C. § 794(a), and it defines "program or activity" to embrace "*all* of the operations of" a "department, agency, special purpose district, or other instrumentality of a State or of a local government." *Id.* § 794(b)(1)(A) (emphasis added).

into doubt." *Yeskey*, 524 U.S. 209. Regardless of the state interests the Rhode Island Supreme Court believed to be served by denying parents protection against disability-based discrimination in proceedings to terminate their parental rights, the ADA's broad text plainly reaches those proceedings.[4] Both the plain statutory text and this Court's decision in *Yeskey* foreclose any argument that Title II applies only to state activities that occur for the benefit of the disabled plaintiff.

B. This Case Involves A Recurring Issue That Has Confused The Lower Courts

Even if the lower courts were uniform in construing the ADA not to apply to termination proceedings, the plain conflict between that construction and the statutory text would warrant certiorari. *See Lexcon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (granting certiorari to consider a question on which lower courts were unanimous when those decisions conflicted with the plain text of a federal statute). But the state courts have in fact taken a variety of different positions regarding whether and how Title II of the ADA applies to

[4] In any event, the application of the ADA to termination of parental rights proceedings was hardly beyond Congress's contemplation. *See, e.g.*, H.R. Rep. No. 101-485, Part 3 at 25 (1990) (House Judiciary Committee Report on the ADA observing that "discriminatory policies and practices affect people with disabilities in every aspect of their lives," including "securing custody of their children"). Nor is it a novel proposition that federal law can protect parents against discrimination in state proceedings that aim to protect their children. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (recognizing that child custody proceedings aim to protect the child, but holding that the Fourteenth Amendment protects parents from racial discrimination in those proceedings).

termination of parental rights proceedings. That disagreement makes it all the more urgent that this Court step in.

1. In the sixteen years since the ADA's enactment, state appellate courts have issued scores of decisions addressing Title II's application to termination of parental rights proceedings. Although we have found no reported decision holding that a state violated a parent's ADA rights in a termination proceeding, that seeming unanimity obscures a deeper confusion among the state courts on whether and how the ADA applies to those proceedings.

Rhode Island is one of 16 states in which the courts have refused to permit parents with disabilities to assert, as grounds opposing termination of their parental rights, that termination would violate their rights under the ADA. Courts in seven of those states (including the Rhode Island Supreme Court) have held that termination of parental rights proceedings are not "services, programs, or activities of a public entity" that implicate the ADA.[5]

[5] *See In re La'Asia Lanae S.*, 803 N.Y.S.2d 568, 569 (N.Y. App. Div. 2005) (ADA "has no bearing on" termination of parental rights proceeding); *In re Chance Jahmel B.*, 723 N.Y.S.2d 634, 632 (N.Y. Fam. 2001) ("Termination of parental rights proceedings do not appear to be 'services, programs, or activities' such that the ADA would apply here"); *In re Anthony P.*, 101 Cal.Rptr.2d 423, 425-426 (Cal. App. 2000) (termination of parental rights proceedings are not "services, programs, or activities" for purposes of ADA); *In re Antony B.*, 735 A.2d 893, 899 (Conn. App. 1999) ("a termination proceeding is not a 'service, program or activity' under the ADA"); *Adoption of Gregory*, 747 N.E.2d 120, 125 (Mass. 2001) ("proceedings to terminate parental rights do not constitute 'services, programs, or activities' for the purposes of 42 U.S.C. § 12132, and therefore, the ADA is not a defense to such proceedings"); *State ex rel. B.K.F.*, 704 So.2d 314, 317 (La. App. 1997) ("termination of parental rights proceedings are not 'services, programs or activities' within the meaning of the ADA"); *In re B.S.*, 693 A.2d 716, 720-721 (Vt.

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Courts in eleven of those states have specifically held, also consistent with the Rhode Island Supreme Court, that the ADA cannot be asserted as a defense in termination proceedings.[6] Courts in some of these states (though, notably, *not* the Rhode Island Supreme Court) have acknowledged that the ADA applies to the reunification services states provide prior to termination, but they have

1997). *See also Arneson v. Arneson*, 670 N.W.2d 904, 911 (S.D. 2003) ("A custody proceeding is not a 'service, program, or activity' under the provisions of the ADA").

[6] *See In re Brendan C.*, 874 A.2d 826, 836 (Conn. App. 2005) ("Connecticut does not recognize the ADA as providing a defense or creating special obligations in a termination proceeding."); *In re E.T.C.*, 141 S.W.3d 39, 48 (Mo. App. 2004) (ADA provides no defense to termination proceeding); *In re S.G.S.*, 130 S.W.3d 223, 230 (Tex. App. 2004) (declining "to create an affirmative defense out of noncompliance with the ADA"); *In re Doe*, 60 P.3d 285, 291-93 (Haw. 2002) (ADA does not provide a defense to termination proceedings); *In re Kassandra T.*, 2001 WL 1243364 at *3 (Wis. App. 2001) ("an alleged violation of the ADA is not a basis for challenging a TPR proceeding"); *Adoption of Gregory*, 747 N.E.2d at 125 ("ADA is not a defense to such proceedings"); *M.C. v. Dept. of Children and Families*, 750 So.2d 705, 706 (Fla. App. 2000) ("the ADA is inapplicable when used as a defense by the parent(s)," because "dependency proceedings are held for the benefit of the child, not the parent"); *In re Diamond H.*, 98 Cal.Rptr.2d 715, 722 (Cal. App. 2000) (ADA "does not directly apply to juvenile dependency proceedings and cannot be used as a defense in them"), *overruled on other grounds*, *Renee J. v. Superior Court*, 110 Cal.Rptr.2d 828, 838 & n.6 (Cal. 2001) (ADA "does not directly apply to juvenile dependency proceedings and cannot be used as a defense in them"); *In re Harmon*, 2000 WL 1424822 at *12 (Ohio App. 2000) ("a failure to comply with the ADA" does not serve "as a basis for invalidating an award of permanent custody"); *People ex rel. T.B.*, 12 P.3d 1221, 1223 (Colo. App. 2000) ("the ADA cannot be raised as a defense to a termination of parental rights proceeding"); *In re A.P.*, 728 A.2d 375, 379 (Pa. Super. 1999) (ADA inquiry "untenable" in "the context of a disposition review proceeding"); *In re Torrance P.*, 522 N.W.2d 243, 246 (Wis. App. 1994) (ADA violation "is not a basis to attack the TPR order").

said that parents must enforce their rights by filing separate lawsuits.[7]

In other states, however, the courts have permitted parents to oppose termination on the ground that it would violate the ADA. The Iowa and Washington courts have treated violation of the ADA as a defense to termination proceedings, but they have not, to our knowledge, yet found any actual violations of the ADA in this context.[8]

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[7] *See Chance Jahmel B.*, 723 N.Y.S.2d at 640 ("a failure of the government to offer a disabled parent access to remedial services available to non-disabled parents" might "in a proper case provide a separate and independent claim under the ADA"); *Doe*, 60 P.3d at 291 ("any purported violation may be remedied only in a separate proceeding brought under the provisions of the ADA"); *Adoption of Gregory*, 747 N.E.2d at 126-127 (state must comply with the ADA "in its provision of services *prior* to" termination, and parents can challenge violation of that duty at the time they receive those services or in "a separate action for discrimination under the ADA"); *Anthony P.*, 101 Cal.Rptr.2d at 425-426 ("parent may have a separate cause of action under the ADA") (internal quotation omitted); *Antony B.*, 735 A.2d at 899 n.9 (failure to provide appropriate reunification services "would give rise to a separate cause of action under the ADA"); *Diamond H.*, 98 Cal.Rptr.2d at 722 (the ADA does not "provide a separate basis for challenging the actions of the court or Agency," and any challenge "must be raised in a separate cause of action in federal court"); *Harmon*, 2000 WL 1424822 at *12 ("the ADA appears to contemplate a separate procedure for its enforcement"); *A.P.*, 728 A.2d at 379 ("Mother may have a separate cause of action against CYS pursuant to the ADA"); *B.S.*, 693 A.2d at 722 (mother could sue the state "if SRS [Social and Rehabilitative Services] has violated the ADA"); *Torrance P.*, 522 N.W.2d at 246 (parent "may have a separate cause of action under the ADA based on the County's actions or inactions"). *See also In re E.E.*, 736 N.E.2d 791, 796 (Ind. App. 2000) (ADA does not apply to termination of parental rights proceedings in Indiana, because "the provision of family reunification services is not a requisite element of our parental rights termination statute").

[8] *See In re C.M.*, 2004 WL 1900100 at *2 (Iowa App. 2004) (the "ADA requires a public entity to make 'reasonable accommodation' to allow a disabled person to participate in services," but finding that the

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The Alaska Supreme Court has suggested that an ADA violation would preclude a showing of "reasonable efforts" at reunification, a showing state law requires before termination. *J.H. v. State Dep't of Health & Social Services*, 30 P.3d 79, 86 n.11 (Alaska 2001).[9] And Arkansas, by statute, requires state compliance with the ADA in at least

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reunification services provided to the mother were reasonable); *In re K.K.*, 2004 WL 574685 at *1 (Iowa App. 2004) (same); *In re J.A.*, 2003 WL 22203471 at *1 (Iowa App. 2003) (same); *In re S.S.*, 2002 WL 31425426 at *2 (Iowa App. 2002) (same); *In re M.J.M.*, 2002 WL 987437 at *1-2 (Iowa App. 2002) (same). *See also In re M.C.*, 2002 WL 1758359 at *2 (Iowa App. 2002) ("We conclude the juvenile court was correct in concluding the ADA mandates were met with regard to the mother"); *In re Welfare of Angelo H.*, 102 P.3d 822, 826 (Wash. App. 2004) (recognizing, in termination of parental rights proceeding, that "the ADA requires public entities to make reasonable accommodation for disabled persons" but finding no violation because the statute "does not require DSHS to provide disabled parents with services not offered to other parents"); *In re Welfare of H.S.*, 973 P.2d 474, 481 (Wash. App. 1999) (although the ADA "requires public entities to make reasonable accommodation for disabled persons," the statute "does not require public entities to provide the disabled with services not offered to others"); *In re Welfare of A.J.R.*, 896 P.2d 1298, 1302 (Wash. App. 1995) (finding that the state provided "reasonable accommodation" of disabilities); *In re Dependency of C.C.*, 1999 WL 106824 at *5 (Wash. App. 1999) (same); *In re Welfare of Joshua R.*, 1998 WL 465203 at *5 (Wash. App. 1998) (same); *In re Dependency of C.P.*, 2002 WL 49922 at *7 (Wash. App. 2002) (finding no ADA violation and therefore declining to decide whether ADA provides defense to termination proceeding).

[9] A Michigan case illustrates the intense confusion that has gripped the lower courts on this issue. Although the court held "that termination of parental rights proceedings do not constitute 'services, programs or activities,' " and "that a parent may not raise violations of the ADA as a defense to termination of parental rights proceedings," it turned around to hold, in almost the same breath, that if the state's provision of reunification services violates the ADA, a court cannot make the required finding "that reasonable efforts were made to reunite the family." *In re Terry*, 610 N.W.2d 563, 570 (Mich. App. 2000).

some termination proceedings. Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(b).

This confusion in the state courts has real consequences for parents with disabilities. If Irving and Dawn N. had lived in Iowa or Washington (or perhaps Alaska), their ADA claim would have been considered on the merits. Because they live in Rhode Island, however, the state courts terminated their parental rights without even considering whether that action violated their rights under the ADA.

Congress enacted the ADA as a "clear and comprehensive *national* mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added). This Court's intervention is necessary to assure that the implementation of that national mandate does not vary based on the state in which an individual with a disability resides.

2. The Rhode Island Supreme Court's decision also implicates a broader disagreement in the lower courts about the coverage of Title II of the ADA. At least six federal circuits have held that Title II's broad operative language reaches "anything a public entity does." *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998). *See Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 782 (7th Cir. 2002); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003); *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 732 (9th Cir. 1999); *Johnson*, 151 F.3d at 569-570; *Bledsoe v. Palm Beach Soil & Water Conservation Dist.*, 133 F.3d 816, 821-822 (11th Cir.), *cert. denied*, 525 U.S. 826 (1998); *Innovative Health*, 117 F.3d at

44-45. *See also Gorman v. Bartch*, 152 F.3d 907, 913 (8th Cir. 1998) (Title II reaches "the ordinary operations of a public entity").[10]

In *Thompson v. Davis*, 295 F.3d 890, 896-99 (9th Cir. 2002), *cert. denied*, 538 U.S. 921 (2003), the court applied that principle to a context very much like the one here. There, the court of appeals held that Title II applies to parole proceedings and that parole determinations therefore must comply with the statute's requirements of nondiscrimination and reasonable modification. *See id.* Although parole proceedings exist to protect the public (just as parental-rights termination proceedings exist, according to the Rhode Island Supreme Court, to protect children), the court held that the ADA prohibited the state from relying on stereotypes or blanket exclusions to deny parole to otherwise qualified prisoners with disabilities. *Id.* at 898 & n.4.

By holding that Title II does *not* reach one of the ordinary activities of state government – that termination of parental rights proceedings are not "services, programs, or activities of a public entity" – the Rhode Island Supreme Court and courts in at least six other states have taken positions in conflict with these federal circuit courts.

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[10] A panel of the Ninth Circuit seemed to reject the argument that Title II applies to anything a public entity does, reading the statute to apply to all "outputs" of a public entity (as opposed to " 'inputs' such as employment"). *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999), *cert. denied*, 531 U.S. 1189 (2001). Later decisions confirm that the Ninth Circuit applies Title II at least to all "outputs" of public entities. *See Barden*, 292 F.3d at 1076; *Hason v. Medical Bd.*, 279 F.3d 1167, 1172 (9th Cir. 2002) (ADA applies to medical licensing as an "output" of the state medical board), *cert. dismissed*, 538 U.S. 958 (2003).

The conflict with the Ninth Circuit's decision in *Thompson* is particularly direct. This Court's intervention is necessary to resolve this basic disagreement about the ADA's reach.

C. The Question Presented Is Exceptionally Important

The question here, like the one on which this Court granted certiorari in *Olmstead*, 527 U.S. at 596, is exceptionally important "to the States and affected individuals." In 1999, the National Institute on Disability and Rehabilitation Research estimated that at least 6.9 million Americans with disabilities between the ages of 18 and 64 are custodial parents. *See* Lita Jans & Susan Stoddard, CHARTBOOK ON WOMEN AND DISABILITY IN THE UNITED STATES 31 (1999). This Court's intervention is vital to assure those parents that the ADA's "clear, strong, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(2), constrain state efforts to strip their parental rights.

Indeed, this Court has repeatedly recognized that a "parent's interest in the accuracy and justice of the decision to terminate his or her parental status" is "a commanding one." *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981). A "parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982) (internal quotation marks omitted). Through a termination of parental rights proceeding, a state "is seeking to destroy permanently all legal recognition of the parental relationship." *Rivera v. Minnich*, 483 U.S. 574, 580 (1987). "Few forms of state action are both so severe

and so irreversible." *Santosky*, 455 U.S. at 759. Petitioners – and all parents with disabilities who must defend against termination of parental rights proceedings – have a fierce interest in assuring that "the State's devastatingly adverse action," *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1997), conforms with federal law. *See also id.* at 129 (Kennedy, J., concurring in the judgment) (noting parent's "fundamental interests . . . in ensuring that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law").

Despite this commanding interest, parents with disabilities suffer widespread, unjustified discrimination in termination proceedings. Discrimination touches parents with intellectual disabilities (like Petitioners),[11] psychiatric disabilities,[12] and even physical and sensory disabilities.[13] Discrimination occurs directly in judicial

[11] *See* Martha A. Field & Valerie A. Sanchez, EQUAL TREATMENT FOR PEOPLE WITH MENTAL RETARDATION: HAVING AND RAISING CHILDREN 5, 273 (1999) ("Often state authorities move to terminate the parental rights of persons with mental retardation because of generalized fears that retardation makes for parental inadequacy. Often their rights actually are terminated, even though the parents' conduct would have seemed acceptable to state authorities had the parents not been considered 'mentally retarded.' . . . [A]ny broad selection of opinions suggests that judges are peculiarly unacquainted with and unsympathetic to the problems of persons with mental retardation and are particularly fearful of allowing them to parent.").

[12] *See* Theresa Glennon, *Walking with Them: Advocating for Parents with Mental Illnesses in the Child Welfare System*, 12 TEMP. POL. & CIVIL RIGHTS. L. REV. 273, 291-299 (2003).

[13] *See* Michael Ashley Stein, *Mommy Has a Blue Wheelchair: Recognizing the Parental Rights of Individuals with Disabilities*, 60 BROOK. L. REV. 1069, 1083 (1994) (judicial bias "often manifests itself in different guises for different disabilities: deaf parents are thought to be incapable of effectively stimulating language skills; blind parents cannot provide adequate attention or discipline; and parents with

(Continued on following page)

determinations of parental fitness, and in the failure to make reasonable accommodations in family reunification services that must be provided before termination.[14] Indeed, a recent federal review lists statutes in 30 states that make "mental deficiency," "mental illness," or similar disabilities a factor in termination decisions. *See* National Adoption Information Clearinghouse, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS: SUMMARY OF STATE LAWS (2005).[15] These statutes are often "interpreted such that the mere label of mental disability constitutes grounds for parental rights termination." Kerr, *supra*, at 403. Parents with disabilities in the many states where these statutes are in force have an especially strong interest in ensuring that courts make the individualized determination of qualification that the ADA demands – rather than broadly disqualifying all parents with a given disability – before terminating their parental rights.

Irving and Dawn N. have a powerful interest in the question presented as well. Their ADA claims were hardly frivolous. *See* p. 8, *supra*. But the Rhode Island courts refused even to consider those claims. This Court's

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spinal cord injuries cannot adequately supervise their children") (footnotes omitted).

[14] *See* Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387, 403-420 (2000).

[15] The states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. Statutes in Georgia, Kansas, Mississippi, Ohio, and South Carolina make physical disability a factor as well.

intervention is necessary to ensure that Irving and Dawn N. are protected against the violation of their ADA rights in the proceedings in which the state seeks "to sever permanently [their] parent-child bond." *M.L.B.*, 519 U.S. at 116.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 30, 2006

APPENDIX A

Supreme Court Appeal.

No. 2003-400-(98-336-2)

In re KAYLA N. :

Present: Williams, C.J., Goldberg, Flaherty, Suttell, and Robinson, JJ.

OPINION

(Filed June 30, 2006)

Introduction

Justice Robinson for the Court. This is an appeal from a Family Court judgment terminating the parental rights of the respondents Dawn and Irving N. with respect to their child, Kayla N., and denying a petition for an open adoption of the child by the respondent Sandra N., who is the child's paternal aunt. For the reasons set forth herein, we affirm the judgment of the Family Court.

Facts and Travel

The involvement of Dawn and Irving N. with the Department of Children, Youth and Families (DCYF) began even before the birth of their daughter, Kayla. Both parents are cognitively limited and have been diagnosed as being mildly mentally retarded. Prior to her marriage to Irving, Dawn had had another child, Michelle, with another man; but Dawn was unable to care for Michelle because, in addition to her cognitive and other limitations, she moved from place to place and was homeless at one

point.[1] After DCYF filed a petition for involuntary termination of parental rights with respect to Michelle, Dawn agreed to an open adoption of that child by the foster family with whom Michelle had been living.

Prior to Kayla's birth, DCYF had determined that it would be unsafe for the baby to be placed at home with Dawn and Irving due to (1) Dawn's inability to care for her first child; and (2) DCYF's concerns about threats to the child and to Irving that had been made by Dawn's mother. Approximately one month before Kayla's birth, DCYF had inquired as to whether there were any biological relatives with whom Kayla could be placed, and Irving had suggested both his niece, Cheryl L., and his sister, Sandra N. However, DCYF deemed Cheryl L. to be an unsuitable candidate because she herself had an open case with the agency at that time. The second suggested biological relative, Sandra N., was unable at that time to take on the full-time responsibility which placement of Kayla with her would entail, because she was caring for two other relatives, each of whom was terminally ill.

Consequently, after Kayla was born on April 13, 2000, she was placed in non-relative foster care with the foster parents (who later became the adoptive parents) of her half-sister, Michelle. Kayla has remained with that foster family ever since.

DCYF developed several case plans for Dawn and Irving, the goal of each of which was the reunification of Kayla with her parents. As part of those case plans, DCYF also provided certain services to the parents, including a

[1] Kayla is Irving's only child.

referral to a parent-aide program conducted by an entity known as Spurwink of Rhode Island (Spurwink). That program is tailored to assist parents and/or children with cognitive limitations or developmental delays. As part of the services offered by Spurwink, which services began when Kayla was born, Dawn and Irving visited with Kayla once a week at a DCYF office, under the supervision of a Spurwink case aide.

In October of 2000, Dawn and Irving began to request that their visits with Kayla take place in their home. On December 1, 2000, both parents admitted to dependency due to their cognitive limitations. Their admissions of dependency were conditioned, however, upon DCYF's arranging supervised in-home visits between Kayla and them. The Family Court ordered that DCYF provide such visits by January 26, 2001. Spurwink refused to supervise the court-ordered in-home visits between Kayla and her parents, stating in the discharge summary that its refusal was prompted by "safety issues and concerns."[2] Because Spurwink was unwilling to supervise in-home visits, the last Spurwink-supervised visit took place at a DCYF office on December 29, 2000.[3]

Earlier in December, Spurwink had informed DCYF that funding for its services was running out, and it requested that DCYF renew the necessary funding so that

[2] The "safety issues and concerns" mentioned in the Spurwink discharge summary, dated January 10, 2001, appear to revolve around a purported threat made by Dawn in a telephone message to a Spurwink employee, in connection with an ongoing conflict involving Dawn's mother.

[3] Because no home visits had been arranged for Dawn and Irving, their admissions of dependency were vacated on January 26, 2001.

it could continue to provide parent education services to Dawn and Irving. Spurwink reiterated its request for the renewal of funding twice more in January of 2001. However, DCYF opted not to renew funding for Spurwink's services on the ground that Spurwink had refused to supervise in-home visits. Because the funding was not renewed, Spurwink's parent education services terminated in January of 2001.

Following the cessation of Spurwink's services, DCYF referred Dawn and Irving to several other programs. In February of 2001, weekly parent-aide services were provided to Dawn and Irving by the John Hope Settlement House; those services included in-home visits for two hours once per week.[4] Funding for the services of the John Hope Settlement House unfortunately ran out in March of 2001, and DCYF did not renew that funding. Consequently, those services terminated on March 22, 2001. In March of 2001, DCYF made a referral to the Child Development Center at Rhode Island Hospital in order to obtain services to address the special needs of Dawn and Irving. The Child Development Center also later diagnosed Kayla as having global developmental delays.

In April of 2001, the Family Court ordered that Dawn and Irving be provided two unsupervised in-home visits per week with Kayla. In addition to arranging those visits, DCYF referred Dawn and Irving to the Early Intervention

[4] In March of 2001, a supervisor at the John Hope Settlement House sent a favorable progress report to DCYF with respect to Dawn and Irving. On April 11, 2001, counsel for Irving filed a motion seeking reassignment of a DCYF caseworker, who Irving alleged had failed to disclose that report to the Court. The Family Court granted that motion on April 26, 2001.

Program at the Meeting Street Center, and those services began in May of 2001. DCYF also referred Dawn and Irving to the Healthy Tomorrows Program of the Kent County VNA and to a parent-aide program of Children's Friend and Service, Inc., called Partners in Permanency. Dawn and Irving were also referred for various evaluations and for individual counseling. It is undisputed that Dawn and Irving substantially complied with each referral.

In August of 2001, Irving's sister, Sandra, began hosting overnight visits with Kayla at her home once a week; and Dawn and Irving visited Kayla during those overnight visits at Sandra's home.[5] Dawn and Irving were also counseled in their own home by a parent aide from the Partners in Permanency program, and Kayla was occasionally present at those meetings as well.

On January 4, 2002, Irving filed a motion seeking to have Kayla placed with his sister, Sandra. On January 10, 2002, DCYF filed a petition to terminate the parental rights of both Dawn and Irving alleging, in reliance upon G.L.1956 § 15-7-7(a)(2)(vii), that Dawn and Irving were unfit to parent Kayla on the ground that they "exhibited behavior or conduct that is seriously detrimental to the child, of such a duration as to render it improbable for the parents to care for the child for an extended period of time." DCYF's petition also alleged, in reliance upon § 15-7-7(a)(3), that Kayla had been in the legal custody or care of DCYF for a period of at least twelve months; that Dawn

[5] By the end of November of 2001, Sandra's other niece and her brother, for both of whom she had been caring on a full-time basis, had died. Sandra then discussed with Irving the possibility of seeking placement of Kayla with her.

and Irving had been offered and had received services to correct the situation and that there was not a substantial probability that Kayla would be able to return to their care within a reasonable period of time considering her age and need for a permanent home.

On February 21, 2002, Irving filed a motion seeking to have Kayla permanently placed with his sister, Sandra, in contemplation of a "direct consent adoption" of Kayla by Sandra. On February 24, 2002, Dawn filed a motion seeking the same placement for Kayla; her motion incorporated Irving's motion by reference. On April 5, 2002, Sandra filed a petition for adoption, to which Dawn and Irving consented, which was accompanied by an open adoption decree form. Initially, a justice of the Family Court ordered that the adoption petition be heard prior to any hearing on DCYF's petition for termination of parental rights, but he thereafter indicated that he would not give precedence to the hearing on the adoption petition. Dawn, Irving, and Sandra then filed a joint petition with this Court seeking issuance of a writ of certiorari. We granted that petition on May 23, 2002. In the order granting the petition for writ of certiorari, we ordered that "[t]he hearing on the direct consent adoption petition * * * be consolidated with the termination of parental rights hearing."

After the remand by this Court, the consolidated hearing in Family Court began on May 24, 2002. It was a protracted hearing, and it continued on various dates until December 6, 2002. The hearing justice ruled that the hearing on DCYF's petition for termination of parental rights would proceed first; and, immediately after conducting that hearing, he heard testimony with respect to the petition for a direct consent adoption that had been filed

by Sandra and consented to by Dawn and Irving. At the conclusion of the consolidated hearing, the Family Court justice issued a forty-two-page decision, in which he reviewed in some detail the testimony of the witnesses (which testimony is recorded in fourteen volumes of transcript). He also expressed concern about the number of innocent parties involved in the case and about the emotionally heartbreaking aspects of the case.

The hearing justice ultimately found that DCYF had shown, by clear and convincing evidence, that Dawn and Irving were unfit to parent Kayla. He further found that there was no probability that Kayla could safely be returned to their care within any reasonable time. The hearing justice also concluded, after considering the totality of the evidence, that DCYF had made reasonable efforts to reunify Kayla with her parents. After finding that Dawn and Irving were unfit to parent Kayla, the hearing justice also found that terminating their parental rights was in Kayla's best interests.

In addition, the hearing justice denied the petition for adoption that had been filed by Sandra and consented to by Dawn and Irving. In so doing, he found that the adoption petition would never have been filed had DCYF not petitioned for the termination of Dawn and Irving's parental rights. He determined that Dawn and Irving consented to the adoption petition because they felt that it was their only chance to maintain contact with Kayla. In addition, the hearing justice placed considerable weight on (1) the fact that Kayla and her half-sister, Michelle, had been raised in the same home since Kayla's birth and (2) the fact that the two young girls had closely bonded with each other during that time.

Dawn filed a notice of appeal on February 20, 2003. Irving and Sandra each filed a notice of appeal on March 26, 2003.[6] The appeal was docketed in this Court on July 18, 2003. Visitation between Kayla and her parents has continued during the pendency of this appeal.

On appeal, respondents contend that the hearing justice made numerous errors in his findings of fact which formed the basis for his decision to terminate Dawn and Irving's parental rights.[7] Specifically, respondents contend that the hearing justice erred in finding (1) that DCYF made reasonable efforts towards reunification; (2) that Dawn and Irving were unfit under § 15-7-7(a)(2)(vii) and § 15-7-7(a)(3);[8] and (3) that it was in Kayla's best interests

[6] These notices of appeal were all filed prior to the actual entry of the judgment on April 28, 2003. However, this Court has routinely treated prematurely filed notices of appeal as if they were timely. *See, e.g., McBurney v. The GM Card,* 869 A.2d 586, 589 n. 3 (R.I. 2005); *Dovenmuehle Mortgage, Inc. v. Antonelli,* 790 A.2d 1113, 1114 n. 1 (R.I. 2002).

[7] Irving and Sandra N. are not represented on this appeal by the same counsel as represents Dawn, and the brief filed in this Court on behalf of Irving and Sandra is different from Dawn's. Nevertheless, Irving and Sandra have adopted and incorporated the arguments made by Dawn in her brief, and Dawn has likewise adopted and incorporated the arguments of Irving and Sandra.

[8] The provisions of G.L.1956 § 15-7-7 that are relevant to this appeal read as follows:

> "**Termination of Parental Rights.** – (a) The court shall, upon a petition duly filed by a governmental child placement agency or licensed child placement agency after notice to the parent and a hearing on the petition, terminate any and all legal rights of the parent to the child, including the right to notice of any subsequent adoption proceedings involving the child, if the court finds as a fact by clear and convincing evidence that:
>
> " * * *

(Continued on following page)

to have the parental rights of Dawn and Irving terminated. The respondents have also adopted the argument articulated by the Rhode Island Disability Law Center, Inc., in a brief which it filed in its capacity as amicus curiae, to the effect that certain provisions of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 through 12134, apply to proceedings to terminate parental rights.

With respect to the hearing justice's denial of the petition for adoption, respondents contend that Dawn and Irving retained the right to consent to Kayla's adoption prior to a final termination of their parental rights and that, by choosing to address DCYF's petition for termination first, the Family Court "short-circuited" their fundamental right to consent to the adoption. In addition, respondents contend that the Family Court should have deferred to their expressed preference concerning who would be a suitable adoptive parent for Kayla. They also argue that the denial of the adoption petition was contrary

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"(2) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to, the following:

" * * *

"(vii) The parent has exhibited behavior or conduct that is seriously detrimental to the child, for a duration as to render it improbable for the parent to care for the child for an extended period of time;

"(3) The child has been placed in the legal custody or care of the department for children, youth, and families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed; provided, that there is not a substantial probability that the child will be able to return safely to the parents' care within a reasonable period of time considering the child's age and the need for a permanent home * * * ."

to Kayla's best interests. Finally, respondents contend that Sandra is a fit and proper relative to adopt Kayla and that the amount of time that Kayla has spent with her foster family should not control the outcome of this case.

Standard of Review

This Court employs a deferential standard of review when reviewing a Family Court decision to terminate a person's parental rights. *See, e.g.*, *In re Shawn M.*, 898 A.2d 102, 106 (R.I. 2006); *In re Mariah M.,* No. 2004-193-A., slip op. at 6 (R.I., filed Mar. 14, 2006). We examine the record to establish whether the hearing justice's findings are supported by legally competent evidence. *E.g., In re Shawn M.,* 898 A.2d at 106; *In re Mariah M.,* slip op at 6. The hearing justice's findings are entitled to great weight, and this Court will not disturb them on appeal unless he or she overlooked or misconceived material evidence or was otherwise clearly wrong. *In re Shawn M.,* 898 A.2d at 106.

Analysis

I
Termination of Parental Rights

A
The Americans with Disabilities Act

The respondents have adopted as their own the argument of the amicus, the Rhode Island Disability Law Center, Inc., to the effect that certain provisions of the Americans with Disabilities Act (the ADA), 42 U.S.C. §§ 12131 through 12134, apply to proceedings to terminate parental rights. Relying upon Title II of the ADA, which prohibits any public entity from discriminating against

qualified persons with disabilities in the provision or operation of public services, programs or activities, 42 U.S.C. §§ 12131-12134, respondents contend that DCYF is required to abide by the ADA when that agency seeks to terminate the parental rights of natural parents. The hearing justice, in his written decision, concluded that the ADA was not applicable to cases such as this one.

After considering the issue in a *de novo* manner, we are in agreement with the conclusion of the hearing justice, which is consistent with the result reached in cases from several other jurisdictions that have held that a termination-of-parental-rights proceeding does not constitute the sort of service, program, or activity that would be governed by the dictates of the ADA.[9]

We agree with and apply to termination of parental rights proceedings in this state the following language from a Florida court with respect to that state's dependency proceedings: "[Such] proceedings are held for the benefit of the child, not the parent. Therefore, the ADA is inapplicable when used as a defense by the parent(s) in proceedings such as here under review." *M.C. v. Department of Children & Families,* 750 So.2d 705, 706 (Fla. Dist. Ct. App. 2000); *see also In the Interest of A.P.,* 728 A.2d 375, 379 (Pa. Super. Ct. 1999).

[9] *See, e.g., In re Anthony P.,* 101 Cal.Rptr.2d 423, 425, 426 (Cal. Ct. App. 2000) (holding that a proceeding to terminate parental rights is not a governmental service, program, or activity and therefore is not preempted by Title II of the ADA); *In re Antony B.,* 735 A.2d 893, 899 (Conn. App. Ct. 1999) ("[T]he ADA neither provides a defense to nor creates special obligations in a termination proceeding."); *In the Interest of Torrance P.,* 522 N.W.2d 243, 246 (Wis. Ct. App. 1994).

Accordingly, we reject respondents' ADA-based contention.

B
DCYF's Efforts Towards Reunification

The respondents also contend on appeal that the hearing justice erred in finding that DCYF made reasonable efforts towards reunification. The respondents are correct that, pursuant to § 15-7-7(b)(1), DCYF was required to make reasonable efforts to encourage and strengthen the parental relationship so that Kayla could safely return to the family. *See In re Christopher B.,* 823 A.2d 301, 308 (R.I. 2003). Moreover, this Court has stated that "'consistent with a "totality of the circumstances" approach,' the efforts required from DCYF to satisfy the reasonable efforts standard 'vary with the differing capacities of the parents involved.'" *Id.* (quoting *In re William, Susan, and Joseph,* 448 A.2d 1250, 1256 (R.I. 1982)).

Nevertheless, we agree with the hearing justice's observation that "[t]here must be a limit to the extension of reasonable efforts." In the instant case, DCYF prepared four case plans, all of which had as their goal the reunification of Kayla and her parents. DCYF initially made a referral to Spurwink, a facility that tailored its programs to cognitively impaired persons; and, when those services were terminated, DCYF made no fewer than four other referrals to programs providing services intended to encourage and strengthen the parental relationship. In addition, the hearing justice pointed out that one of the parent aides to whom DCYF referred Dawn and Irving had had experience with persons suffering from the same medical condition as respondents.

We are unable to conclude that those various efforts aimed at reunification were inadequate. Accordingly, we affirm the hearing justice's determination that the efforts made by DCYF were not unreasonable.

C
The Hearing Justice's Finding of Unfitness

The respondents' next contention on appeal is that the hearing justice erred in finding that, pursuant to the provisions of both § 15-7-7(a)(2)(vii) and § 15-7-7(a)(3), Dawn and Irving are unfit to parent Kayla. They argue that none of the factual findings upon which the hearing justice based his conclusion that Dawn and Irving are unfit constitutes clear and convincing evidence of conduct that would be "seriously detrimental" to Kayla. The respondents further contend that, even if the factual findings relied on by the hearing justice are viewed as a whole, DCYF's burden of proving unfitness by clear and convincing evidence still has not been met.

In his decision, the hearing justice acknowledged that at least one DCYF witness testified that Dawn and Irving were compliant with the parent aide to whom they had been referred. At the same time, however, the hearing justice pointed to the testimony of several other witnesses who testified that Dawn and Irving would probably not progress to the point where they could safely parent Kayla.

For example, the hearing justice pointed to the testimony of Lisa Granda, a representative from the Partners in Permanency program who met with Dawn and Irving on a weekly basis and who testified that, although the two parents "tried and were consistent in their meetings with

her, * * * they just could not understand their responsibilities." In what the hearing justice considered to be significant testimony, Ms. Granda stated that the parents had made minimal progress and had been unable to demonstrate that they could "safely and effectively parent Kayla without continued supervision and ongoing interventions and directions." The hearing justice also pointed to Ms. Granda's observation that respondents seemed unable to develop the skills necessary to avoid conflict.

The hearing justice also referred in his decision to the report of Dr. Steven Hirsch, a clinical psychologist who had evaluated Dawn and Irving. With respect to Dawn, Dr. Hirsch's report stated: "Her psychological makeup indicates that she would have difficulty emotionally bonding to a young child. She has a tendency to put her own needs first." With respect to Irving, Dr. Hirsch's report stated: "His emotional and cognitive functioning indicates that he has difficulty adequately caring for himself, let alone the special needs of a developmentally delayed eighteen month old child." Doctor Hirsch indicated that future psychological social services were not recommended for Dawn and Irving and that their parental rights should be terminated.

The hearing justice also pointed to the report of The Providence Center, the organization to which Dawn and Irving had been referred by DCYF for an assessment relative to the possibility of reunification. That report stated: "In conjunction with parents' observed tendency to misread Kayla's cues are their own unique ways of dealing with the stressors that a toddler presents. * * * These responses to Kayla's cues could and did result in Kayla's needs not being met." After reviewing the report, the hearing justice made two observations: (1) that Dawn and

Irving loved Kayla and she loved them; and (2) that, unfortunately, the parents could not properly parent Kayla.[10]

Finally, the hearing justice referred to the testimony of various witnesses concerning specific instances in which Dawn and Irving had interacted with Kayla. These instances generally involved the parents' difficulty in controlling Kayla's behavior. The hearing justice also cited Dawn's reaction to her daughter's misbehavior, which often involved Dawn's leaving the house angrily. There was also testimony that Dawn often had to be told to get off the phone during times when she was supposed to have been visiting with Kayla. The hearing justice also noted that, although Dawn and Irving had learned how to use a nebulizer, which Kayla often needed for difficulty breathing, they did not understand when the nebulizer was to be used.

We are well aware of the gravity of a judicial decision that results in the termination of parental rights. We are in full agreement with the Supreme Court of Virginia when it stated: "The termination of parental rights is a grave, drastic, and irreversible action." *Lowe v. Department of Public Welfare of Richmond,* 343 S.E.2d 70, 72 (Va. 1986). Nevertheless, there are times when such an action must be taken.

Although in the instant case it is clear that Dawn and Irving love Kayla and have largely complied with the

[10] These observations of the trial justice poignantly summarize the inherently tragic nature of this case. The truth is that John Lennon was not entirely correct when he famously declared: "Love is all you need."

various recommendations of DCYF, in the end we can perceive no clear error in the factual findings of the Family Court justice, nor do we disagree with his conclusion, which he reached after exhaustive review of the testimony of several witnesses, that reunification could never have been achieved. Consequently, we affirm the hearing justice's determination that Dawn and Irving were unfit to parent Kayla.

D
Kayla's Best Interests

The respondents contend on appeal that, even if this Court should uphold (as indeed we do) the hearing justice's determination that Dawn and Irving are unfit, he nevertheless erred in finding that the termination of their parental rights was in Kayla's best interests. We disagree with this contention.

In arguing that terminating the parental rights of Dawn and Irving is contrary to Kayla's best interests, respondents have brought to our attention the following passage from an article in the Harvard Law Review:

> "No child should be endangered by the foolhardy suggestion that he can thrive solely on the love of a parent, but neither should that parent's love be diminished by an insensitive, mechanistic process that singlemindedly extols the virtues of rationality." Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent,* 103 Harv. L. Rev. 1201, 1257 (1990).

No one would contend that there is any shortage of love for this child emanating from any of the persons involved in

this heart-wrenching case. If Kayla could thrive solely on her parents' love, the hearing justice's analysis of her best interests may have been different. It is our view, however, that, far from undervaluing the parents' love in the instant case by resorting to an "insensitive, mechanistic process," the hearing justice, who aptly described the case as one involving "a situation which is fraught with heartbreaking emotions," painstakingly articulated his findings in a very comprehensive decision and reached a conclusion that we consider to be sustainable.

We perceive no clear error in the hearing justice's "best interests" determination. In particular, it is our view that he properly saw much significance in the fact that Kayla has bonded with her half-sister and with her foster family, with whom she has lived since her birth more than six years ago. While not giving exclusive weight to that factor, the hearing justice appropriately considered the preservation of that bond in determining where the best interests of the child lie in this case.

After carefully considering the record, we affirm the hearing justice's determination with respect to Kayla's best interests.

II
Petition for Open Adoption

With respect to the hearing justice's denial of the petition for adoption, respondents contend that Dawn and Irving retained the right to consent to Kayla's adoption prior to a final termination of their parental rights and that, by going forward with DCYF's petition for termination, the Family Court "short-circuited" their fundamental right to consent to the adoption. In addition, they contend

that the Family Court should have deferred to their preference as to who would be a suitable adoptive parent for Kayla and that the denial of the adoption petition was contrary to Kayla's best interests. Finally, respondents contend that Sandra is a fit and proper relative to adopt Kayla and that the amount of time that Kayla has spent with her foster family should not control the outcome of this case.

Contrary to respondents' contentions on appeal, it is our view that the hearing justice properly rejected the joint petition for an open adoption in the instant case. Open adoptions are creatures of statute, and the relevant statute, § 15-7-14.1(b)(4), expressly requires that, before the Family Court may in its discretion approve a proposed open adoption, DCYF or another licensed child placement agency and the child's guardian ad litem or court-appointed special advocate must first recommend to the court that the open adoption agreement be approved.[11] In the instant case, it is clear that DCYF did not recommend that the Family Court approve the petition for adoption and the accompanying decree of open adoption filed by

[11] Section 15-7-14.1(b) reads, in pertinent part, as follows:

"A court may grant post-adoption privileges if:

"(1) The court determines that the best interests of the child would be served by granting post-adoption privileges; [and]

" * * *

"(4) The department of children, youth and families and the child's court appointed special advocate or the guardian ad litem, if one has been appointed * * * , recommends that the post-adoption privileges agreement be approved by the court; or if the adoption petition is being sponsored by a licensed child placing agency other than the department of children, youth, and families, the licensed placing agency sponsoring the adoption makes a recommendation that the post-adoption privileges agreement be approved by the court."

Sandra and consented to by Dawn and Irving. Absent such a recommendation by DCYF, the Family Court was statutorily barred from considering the petition for open adoption. This would have been true even if the Family Court had not already terminated Dawn and Irving's parental rights prior to making its determination on the adoption petition.[12]

Moreover, the hearing justice determined that it would not be in Kayla's best interests to have her move from the home of her foster parents, where she has lived for her entire life with her half-sister, to the home of her aunt, Sandra. He found that Kayla and her half-sister are closely bonded and that to move her would "rupture the close relations" between the two. In concluding that the open adoption was not in Kayla's best interests, the hearing justice also noted that Kayla had bonded closely with her foster parents. Section 15-7-14.1(b)(1) requires a court to first determine that the best interests of the child would be served before it may grant post-adoption privileges. In the instant case, the hearing justice found the converse to be true – *i.e.,* that Kayla's best interests would best be served by her remaining with the foster parents. We cannot say that he clearly erred in so finding. Consequently, we affirm the hearing justice's denial of the adoption petition.

[12] Because we conclude that the Family Court lacked the statutory authority to consider the open adoption agreement, we do not address the serious issues raised by respondents concerning the "fundamental interest" of parents in determining who should be permitted to adopt their child before the termination of their parental rights.

Conclusion

For the reasons set forth herein, we affirm the Family Court's judgment. The record may be remanded to the Family Court.

APPENDIX B

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC. FAMILY COURT

IN RE: KAYLA FC NO. P 01-0101

DECISION

John A. Mutter
Associate Justice
Rhode Island Family Court

APPEARANCES:

For DCYF..... Karen Clark, Esquire
For CASA.....John J. O'Brien, III, Esquire
For Respondent Father.....Lia Stuhlstaz, Esquire
For Respondent Mother .....Frank Pannozzi, Esquire
Guardian ad Litem for
Respondent Mother ..... Timothy Morgan, Esquire
For Petitioning Aunt (Adoption).....Robert Caron, Esquire

DECISION

MUTTER, J. This matter was heard over an extended period of time. The facts are, for the most part, undisputed.

A. Kayla was born April 13, 2000.

B. Kayla was the first child fathered by the Respondent Father, although this was his third marriage.

C. The Respondent Mother, prior to the birth of Kayla, had given birth to another child named Michelle, who had been fathered by another man. In 1998, the Respondent Mother did a voluntary consent as to this child, who was adopted by her foster parents.

D. At the time of Kayla's birth, there were no relatives of the biological parents with whom she could be placed, though the Department of Children, Youth and Families made efforts to place the child in relative foster placement.

E. Kayla reportedly has certain development delays.

F. By expert testimony, both of the biological parents have been described as mildly retarded.

G. Kayla, upon her release from the hospital at age thirteen days, was placed with the same foster parents who had adopted her half-sister. Michelle and she had never lived any other place to the present time.

H. On December 1, 2001, the Respondents admitted to an allegation of dependency based upon their cognitive limitations.

I. A Petition for Termination of Parental Rights was filed on January 10, 2002.

J. In April of 2002, a Petition for Adoption was filed, signed by the Respondent parents, giving consent to the adoption of Kayla by the Respondent Father's sister, Sandra.

K. The Respondents, after the commencement of hearing on the Termination Petition, sought the intervention of the Rhode Island Supreme Court, requesting that the Supreme Court order that the Adoption Petition be given a priority hearing. The higher court ordered that both petitions be entertained by this Court at the same time.

This Court then proceeded to hear both petitions. Testimony relative to the Termination Petition was completed and testimony immediately began on the Adoption Petition.

A REVIEW OF THE TESTIMONY FOLLOWS.

The facts of the case are, as has been previously stated, quite straight forward, and there is little or no conflict as to the facts. The law of the case is equally uncomplicated. The difficulty is in applying the law to the facts, as revealed by oral and written testimony, in a situation which is fraught with heartbreaking emotions and in which there are so many innocent parties. This Court is aware that whatever decision it reaches, based upon the evidence produced, that heartbreak will be inflicted upon some or all of the parties involved.

The Termination Petition alleges: (1) The child has been placed in the legal custody or care of the Department of Children, Youth and Families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed and provided further that there is not a substantial probability that the child will be able to be returned safely to the parents, considering the child's age and need for a permanent home. (2) The parents have exhibited behavior or conduct that is seriously detrimental to the child, of such duration to render it impossible for the parents to care for the child for an extended period of time.

The State called as its first witness ***Brenda Almeida.*** Ms. Almeida had been employed by the DCYF for a period of twenty-two years, being promoted to Supervisor, a position she has held for the last five years.

The witness first became involved with the Respondent Mother in 1998, at which time Mother had given birth to her first child. Witness was involved with the case until September 2000. This child's name was Michelle. Mother did a voluntary consent and the child was adopted by the foster parents with whom she had been living. Subsequently, Mother married the present Respondent Father who, it is reported, had been married twice previously. Respondent Mother became pregnant with the child who is the subject of this case. The Department apparently had certain misgivings regarding this child, in view of Mother's inability to care for her first child and with reported difficulty with the extended family. Maternal grandmother threatened the Respondent Father, as well as the unborn child. She threatened to kill the Father as well as the child and "would cook and eat the child." It was felt that the child could not be placed at home, in view of what were considered to be unsafe conditions in the home. As per Department policy, the Respondents were asked if there was anyone available for relative foster placement. The Respondent Mother indicated she had no relatives with whom the child could be placed. Respondent Father indicated a niece, Miss Lopes, or in the alternative, his unmarried sister, Sandra.

In March 2000, the worker spoke to both. Miss Lopes was ruled out, as she had an active case with the Department. At that time, Sandra was caring for two terminally ill relatives, as well as having two nieces and the two children of one of the nieces living with her. Sandra felt that she could not take the child at the time she was going to be born and stated that she felt that the child would be best served by placing her with the foster family that adopted Michelle, and she would be with her older sister.

Thirteen days after she was born, April 13, 2000, Kayla was placed in the foster home with her half-sister, where she remains to this day.

A referral was made to SPURWINK for parenting. A visitation schedule was set up, whereby visitation would take place with the parents once per week in the home of the parents, supervised by Spurwink case aide, Elsa Horton.

A case plan was prepared, ***State 1 Full***. The goal of the case plan was reunification with parents. The plan was dated May 25, 2000 and signed by both parents.

The witness testified that frequently, the foster mother would bring Kayla for the visits, and she observed that the foster mother was very caring and loving of the child.

The witness also testified that at birth, it was felt that Kayla would have some developmental delays.

The State called its second witness, ***Gail O'kai***, an employee of the Department for three years. At the time she took over the case in September of 2000, Spurwink was already involved with the family, supervising visitation. The objects to be met were: providing a safe home for the child, mental health issues to be addressed, parenting skills and family relationships to be strengthened.

In February of 2001, the worker made a referral to St. Mary's for parent education. A referral was also made to Early Intervention.

A referral was made to John Hope for the Respondent Father for parent education. Father told the worker that

his attorney told him that he did not have to go for parenting education.

The witness testified that from her observations, the Respondents were compliant with the parent aide.

A referral was made to the Family Learning Center.

The witness prepared only one case plan, ***State 2 Full*** dated November 4, 2001, signed by both parents, with a goal of reunification with parents.

The witness observed that the child, Kayla, and the foster parents had become very bonded. Kayla would become upset if her foster mother was not in her line of sight. The foster father "adored" the child.

The eyewitness testified that Spurwink never recommended increased visitation for the parents and child.

Spurwink, in December 2000, requested additional 005's. They made the same request on January 4, 2001. They were not provided with same.

The witness made a referral for a parent/child evaluation.

The witness stated that the visitation supervisor reported that mother had threatened her and refused to supervise any further visitation. It was necessary to change the visitation arrangement.

On April 5, 2001, ***Respondent's 4 Full,*** the Court ordered unsupervised visitation.

In a court letter presented on March 22, 2001, the worker stated that she had not received any information from John Hope regarding visitation. In fact, John Hope

had sent a letter dated March 21, 2001 recommending unsupervised visitation to the worker. The worker testified that she did not receive the letter until after the March 22nd hearing. The Court was less than pleased with the explanation of the worker, and on April 27, 2001, ordered a new social worker and unit assigned to the case forthwith.

State called ***Lisa Granda***, a representative of Children's Friend and Service, Partners in Permanency Program, whose goal is to provide comprehensive services to families, foster families and children in care.

The witness held prior employment as a mental health worker for eight years at Butler Hospital. She had also been employed at Atwood House, a treatment center for adolescent girls.

Ms. Granda had an undergraduate degree in psychology and a Masters degree in clinical social work from Boston University. The witness was qualified as a clinical social worker.

The purpose of the agency is to provide home-based counseling services to birth families, individualized according to their need.

The first contact she had with the Respondents was on June 6, 2001, after first discussing the case with the Department social worker and supervisor, the birth family and the foster family to ensure that all were in accord. For the services of this program to go into effect and to be applicable, the child has to be in a concurrent permanency position.

The issues presented were reunification, parenting, mental health counseling and a safe environment for the child. She met with the Respondents four times in their

home on a weekly basis prior to setting up any case plan. She continued to see the Respondents weekly for approximately one year. A lengthy assessment form had to be filled out. The initial case plan was to develop parenting skills in the biological parents, then issues developed around their home, which then became the focus of the home visits.

Respondent Mother reported having an argument with a thirteen year old boy who lived on the third floor. She reported that he had called her names, so she punched him. Mother reported that the boy was running through the building with a knife. Mother reported there were numerous problems within the apartment house. She reported having a dispute with the landlord who, she said, threw a chair at her. Mother stated that there were people within the building who had threatened to burn the building down. She said that a fire had been lit in the building and the Fire Department had responded.

In view of the circumstances, the worker felt it was unsafe for Kayla's visitations to be in that house. The visits were continued on a weekly basis, but at the office of the witness. Eventually, visitation was moved to Aunt Sandra's home in August 2001.

Respondent Mother complained of difficulties with a nephew who was living with the aunt who was supervising the visits.

It was suggested to the parents that they move from their apartment house, which was considered unsafe in view of mother's reports. The parents still reside in the same apartment.

Ms. Granda testified that, in her opinion, the parents tried and were consistent in their meetings with her, but that they just could not understand their responsibilities.

Since February of 2002, this witness only observed a few visits between parents and Kayla, during which time, they engaged with the child in varying degrees.

On September 17, 2001, the parents argued in front of the child. Respondent father was angry with the mother because she had taken the child into Dunkin' Donuts, to which he objected.

The witness reported that mother would become upset when she had to go to Court but that she would calm her down and redirect her.

A parent/child evaluation was done at The Providence Center on July 11, 24, and August 8, 2001. Psychiatric and psychological evaluations were done of both Respondent parents – Respondent Father, on October 12, 2001 and Respondent Mother, on October 11, 2001.

Under cross examination, the witness stated that the program she was involved with was not specifically designed for parents with a disability of mental retardation, but that forty-two percent of the families that she worked with were cognitively limited.

The witness testified that the apartment of the Respondents was clean, tidy and appropriate.

The testimony of this witness indicated that the social worker from DCYF, that social worker's supervisor, a representative from Early Intervention, and a representative from the VNA Health Tomorrows at a case conference on July 23, 2001, all expressed concern as to the parents'

ability to keep Kayla safe in that apartment. Mother reported that she had called the police to report that a former tenant on the first floor had threatened to burn the house down. She also reported that a former tenant had made threats against her. Despite their concerns, the Respondents refused to move. The observation was made that the parents did not seem to be able to gauge the risks posed to them and to the child. A letter signed by the witness and Tricia Kennedy of Partners in Permanency stated, "Due to the limited awareness and insight, that (the respondents) have been unable to maintain a safe environment, therefore, the Partners in Permanency program supports the DCYF recommendation to terminate overnight visitation (in the home of the parents).

It was brought out in cross examination that prior to Partners in Permanency becoming involved in the case, the child must already have been placed in a foster home.

Ms. Granda had met with the parents once a week for a period of three months before she recommended termination. She testified that she had been working with the parents on parent/child relationship issues, effective interpersonal communication skills and how their conflicts impacted Kayla adversely.

In what this Court considered significant testimony, she stated that the parents had made minimal progress and have been unable to demonstrate that they can safely and effectively parent Kayla *without continued supervision and ongoing interventions and directions. The Respondents seem unable to develop the skills necessary to avoid conflict. "The primary goal of our program is to assist and support the parents' case plan goal of reunification. However, first and foremost, we need to consider the safety and*

well being of Kayla, and at the same time, preserve connections and seek to establish timely permanency." The witness stated that the foster parents would have had as much time spent with them as with the biological parents.

The state called ***Dr. Steven Hirsh*** who was qualified as a clinical psychologist. The parents were referred to him for psychological evaluation. Testing was done in late September or early October 2001. The evaluation was conducted at his office over the course of two sessions commencing September 28, 2001. The first session lasted one hour and twenty minutes; the second session lasted fifty minutes. Each of the parents was evaluated individually. The doctor had referred to a history given him by the Department, as well as the history which he took himself from the parents. The doctor testified that he first did a clinical interview and then specific tests.

The Department had given the doctor a history of the mother, indicating that she had been emotionally and sexually abused as a child. The mother denied this history. The doctor felt that this response was typical of how she copes and reacts with other people.

The doctor testified that he did the standardized tests, including the Wechsler test, verbal and non-verbal; incomplete sentence test and the ink blot tests. The same tests were done with both respondents.

State Exhibit 6 Full – Report of Dr. Hirsh as to Respondent Mother.

Mother's history indicated that her first child was placed right after birth and subsequently adopted by the foster parents. Kayla is placed in the same foster home.

Mother was alert, cooperative and oriented in all three spheres. There were indicated cases of physical, sexual and emotional abuse of mother, as well as a history of fire setting, all of which mother denied.

Mother was within the mildly retarded range. Sixty-four (64) full scale I.Q. level. Her reading skills were at fifth grade level and math skills at the first percentile for adults her age. The doctor testified that Respondent Mother is a very psychologically immature adult. The doctor's report states: *"Mother is a very self-centered person who frequently manipulates the truth for her own benefit. Her psychological makeup indicates that she would have difficulty emotionally bonding to a young child. She has a tendency to put her own needs first. She becomes jealous of her husband as well as her child, all of which reflects the presence of a personality disorder with narcissistic and borderline characteristics . . . " "Kayla is 18 months of age. She deserves to grow and develop in a healthy family system that will provide her with emotional stability and permanency." The doctor recommended that the parents' rights be terminated and felt that future psychological social services were not recommended.* (emphasis added)

State Exhibit 7 Full – Report of Dr. Hirsh as to Respondent Father

Father had been married three times. He was alert, cooperative and oriented. He was found to be mildly mentally retarded with a full scale I.Q. of sixty-one (61). Academic skills are below third grade level. The doctor stated that Father suffered from a personality disorder with passive dependent features. Father and Mother

shared household tasks. Father's sister assisted with money management. Both parents receive Social Security benefits. *The doctor states: "His emotional and cognitive functioning indicates that he has difficulty adequately caring for himself, let alone the special needs of a developmentally delayed eighteen month old child.*" (emphasis added)

Under cross examination, the doctor stated that he had no direct information as to how the Respondent Mother behaved with the child during visitations.

The State then called ***Amy Welch***, the present social worker on the case. Ms. Welch took over the case from Ms. O'kai.

The witness met with the parents. There had been an earlier referral to Early Intervention but service was not yet in place.

Ms. Welch made a referral to Project Early Start, but they were not able to provide services. To be eligible for their service, the child had to be placed in the home.

A referral was made to the VNA, as the child had medical problems. A referral was made to Partners in Permanency.

A referral was made for mother to the Trauma Center, based upon her history of abuse. This referral was made in May of 2001.

On May 31, 2001, the parents were referred to Haven Miles of The Providence Center for a parent/child evaluation.

In June of 2001, Mother was referred to the Comprehensive Community Action Program.

In September 2001, a referral was made to Dr. Steven Hirsh for a psychological evaluation of both parents.

In September 2001, parents were referred to Dr. Sadigshi for a psychiatric evaluation.

Parent/child visitation was originally maintained at two visits per week, each visit for two hours.

The worker provided transportation from day care or foster parents' home to the visits and back.

The parents complied with the referrals. (emphasis added)

The Respondent Mother started going to counseling in July of 2001. She went for several weeks then said she was finished and was not going any more. She stopped.

On May 21, 2001, the visits were changed to one two-hour visit per week and one overnight visit per week, both unsupervised at the home of the parents. In August, the visits were again changed to one four-hour visit per week and one overnight visit per week, supervised by the Respondent Father's sister, Sandra.

It was observed that the parents had been advised that to help Kayla learn to play properly, it was best to give her one toy at a time, which would enable her to concentrate more fully. Despite the advice, the parents would dump a whole bag of toys out onto the floor and then just sit back and watch. They did not work with the child.

The worker prepared three case plans – two had a case plan goal of reunification; the third case plan goal was adoption.

The witness testified that she also had the opportunity to observe Kayla in the home of the foster parents. She stated that there appeared to be a very close and loving relationship between Kayla and the foster parents as well as between Kayla and her half-sister, Michelle. She observed them often at play.

The one overnight supervised visitation at aunt Sandra's continued to the present.

The Termination Petition was filed on January 10, 2002. The worker explained that case plan 4 had been signed prior to the termination being filed, but the case plan had been lost and a duplicate original was signed after the filing of the termination.

State Exhibit 10 Full – Report From The Providence Center.

State Exhibit 11 Full – Report of Dr. David Savitski as to Respondent Mother.

State Exhibit 12 Full – Report of Dr. Savitski as to Respondent Father.

Reference is made to ***Exhibit 10***. The Department had referred the parents to The Providence Center to access the possibility of reunification of child with parents. The parent/child evaluation was done on July 11, 24 and August 8, 2001. The report was based upon a history received from the Department, conversation with Amy Walek and from direct contact with the parents over three one-hour sessions.

The report stated: *"In conjunction with parents' observed tendency to misread Kayla's cues are their own unique ways of dealing with the stressors that a toddler presents. Father is observed as becoming anxious in response to Kayla's behaviors, while Mother appears to become removed, focusing on concrete tasks such as diapering. These responses to Kayla's cues could and did result in Kayla's needs not being met."*

Continued visitation was recommended so that the Department could monitor the parents' ability to care for Kayla.

It is the Court's observation from reviewing the report in detail that two things are obvious – That the parents loved Kayla and she them, and unfortunately, the parents, at least at the time of that evaluation, could not properly parent Kayla. (emphasis added)

Reference is made to ***Exhibit 11***. The psychiatric evaluation of Mother was dated October 11, 2001. The history that Mother gave the doctor was, according to the doctor, grossly divergent from that documented in previous assessments, including the documentation of her level of functioning at age fifteen. Mother was unable to give any reason for the loss of her parental rights to her first child and the loss of custody of her second child. The description Mother gave of her medical condition diverged from previous descriptions documented in her record.

Mother acknowledged that there had been conflicts between her mother and her husband.

Mother displayed consistent use of distortion, outright lies, mis-remembering and evasion in order to proceed with her stated goal.

According to the doctor's report, mother stated that she suffered from asthma or emphysema, used a nebulizer and continues to smoke one-half pack Camels per day. She reported being in a coma in 1997 as a result of domestic violence. There was nothing in the records to document any of these statements.

Mother was unable to describe Kayla's development or any of her likes and dislikes. She did report that her first child had been adopted by the foster parents with whom Kayla had been placed.

Mother reported being sexually abused by her father at age eight. None of the details she gave could be documented.

Mother said that she was a student at CCRI, studying day care for certification.

The doctor agreed with a previous diagnosis of mild mental retardation, borderline intellectual functioning and personality disorder. There was no evidence of other major mental illness.

It was the doctor's conclusion that mother's lack of empathy and inability to use language truthfully and her inflexible approach to meeting her own needs are likely to grossly impair her ability to effectively parent her daughter. (emphasis added)

State Exhibit 2 Full – Psychiatric Report of Evaluation of Respondent Father.

The report indicated that Father described his affection for his wife and daughter, repeating himself for emphasis. *Father felt that he and his wife were perfectly*

capable of caring for Kayla. He was pleased with his capacity to feed Kayla and change her diapers. He could not express a more abstract articulation of what the child's needs may be. In the opinion of the doctor, Father, despite his affection for the child, had limited capacity to intuit the needs of the child and to respond to those needs in a timely fashion. Father has not been able to shield the child from the chaotic people in his life. When asked to name the most important people in his life, he identified two of his sisters, two of his nieces and one of his nephews. He did not mention his wife or child. (emphasis added)

Respondent Father receives SSI.

The doctor concluded that Father would not be able to respond to Kayla's needs without extensive and ongoing site prompting and supervision. The records indicate Kayla suffers from developmental delays and is likely to require a level of consistency and empathetic response which he is not going to be able to provide. (emphasis added)

Amy Walek testified that the VNA had reported that the parents had successfully learned to use a nebulizer, which Kayla frequently needed.

On July 12, 2001, Mother called Ms. Walek at her office at 6:00 AM and left a message that Kayla was having trouble breathing and wanted to know if she should use the nebulizer. By the time the worker got to the office and called the Respondent Mother, she reported that it was alright and that Kayla had begun to breathe normally. It is the observation of the Court, based upon this testimony that the parents knew how to physically use the nebulizer; they did not understand when it was to be used.

Ms. Walek stated that as a result of the reports of the parents as to trouble with other tenants in the house, as well as with the landlord, the location was considered unsafe and the visitations were moved to Sandra's house, with her permission, so that she could supervise the visitations.

The landlord is still the payee on Mother's Social Security.

The parents, to this day, remain in the same apartment. Respondent Father has inquired about moving to Warwick, in the vicinity of where his sister lives. Mother refused to move, and Father refused to leave Mother. Visitation was never returned to the home of the parents.

The witness reported that during a visit on December 21, 2001, Father did a better job of playing with Kayla than did Mother, who would leave frequently to visit neighbors or make telephone calls. On a consistent basis, it was only the Respondent Father who interacted with the child.

The Evidence indicated that the respondents had extensive visitations and cancelled very few. (emphasis added)

The State called ***John Surrette,*** a case aide technician at the Department of Children, Youth and Families. He had been so employed for seventeen years. Mr. Surrette supervised some of the visitations.

The witness had his first contact with the Respondents in October or November of 2001.

During a visit on February 18, 2002, in which he observed Kayla running around the house with Father

chasing her, Mother got angry and left the house. The witness reported that this reaction by the mother happened frequently.

At times during visits, during the first hour, Father spent ten minutes with the child and the rest of the time cleaning up. Mother watched television. Witness would sometimes have to tell Mother to get off the phone.

The witness reported that the home was clean. At times when witness was present during lunch hour, Kayla was given a lunch which was appropriate.

During a visit on April 11, 2002, Kayla had colored markers and was writing on her clothing and her hands. Mother tried to take the markers away from Kayla but could not.

All parties rested as to the Termination Petition portion of the case.

In argument, Mr. Pannozzi argued on behalf of the Respondent Mother that reasonable efforts were not made to reunite the child with the parents. His argument was to the effect that because the Respondents were found to be mildly mentally retarded that reasonable efforts to effectuate reunification were not sufficient, but that special efforts were required. He referred to the ***Americans with Disabilities Act***. It is the opinion of this Court, which is supported by authorities, that the referred to Act is not applicable in cases such as the instant case. Respondent Father argued that if the Court agreed that when the Department first became involved with this case, their efforts to assist the family were less than might be expected, even if subsequent case workers made all reasonable or even extraordinary efforts to unify, the Termination

Petition must fail as reasonable efforts must begin from day one.

The Court, after carefully examining all of the evidence in its totality, cannot subscribe to this argument. Even if, for the sake of argument, it was admitted that initially the social worker involved in this case was less than might be expected, this Court cannot substitute its judgment for the worker who was on the scene. With the exception of the actions of Ms. O'Kai, who delayed presenting to this Court the report which recommended unsupervised visitation and within days was corrected by order of the Court granting the visitation and removing Ms. O'Kai from the case and ordering a new social worker and new unit assigned to the case, the Court cannot refer to a specific instance of improper conduct on the part of the Department. The Court further opines that the actions of subsequent workers and aides were performed with the goal of reunification with parents.

The Guardian ad Litem was allowed to present his argument without objection by any of the parties. He argued that special efforts should have been made, as it applies to the Mother, but were not needed as to Father. The Guardian argued that in this case, as in all cases involving the Department, they had their own agenda and it had been his experience in all of his dealing with the Department that they were impossible to deal with. It appeared to this Court that the Guardian also had his own agenda when it came to his dealing with the Department.

In argument, the Respondents pointed out that an example of the Departments failure to carry through with planning with the parents was the failure of the Department to provide additional 005S when they were

requested by Spurwink and as a result, the services of Spurwink were terminated. However, ***State Exhibit 13*** refutes this argument. This report from Spurwink states that they were terminating their services not for nonpayment but because of unsafe conditions in the home, specifically that the worker from Spurwink supervising visitations refused to supervise because of unsafe conditions resulting from the Respondent Mother's conduct.

The Court began the hearing on the Adoption Petition filed by the aunt, Sandra, which was signed by the Respondent parents giving their consent to the adoption.

Respondent Father was called as a witness by his counsel. He identified his signature on the Adoption Petition and indicated that he had signed the same in April of 2002. At that time, according to Father, his sister, Sandra, had been supervising the weekly visits for about nine months. He testified that he thought Sandra was a good person and would take good care of Kayla. Respondent Father testified that he understood that if the Adoption Petition was granted, he would lose his parental rights as Kayla's father but that this would allow him to have contact with his daughter.

The Court questioned the witness as to his intent in signing the Adoption petition.

Q. Are you doing this because you realize that through the termination you may not see her (Kayla) at all?

A. Yup.

Q. Do you feel that you could take care of Kayla, yourself and your wife?

A. No.

Q. Do you have some doubts as to whether you and your wife together could take care of her?

A. Yeah.

Q. When did you begin to have those doubts?

A. I don't remember Your Honor.

Respondent Mother was called as a witness by her counsel. Mother identified her signature on the Adoption Petition and testified that she did it freely and voluntarily. Respondent Mother stated that she understood she was in effect giving up her parental rights. She also testified that she understood that by the terms of the open adoption agreement, she would be allowed to see Kayla once a month.

The Court posed some questions to the Respondent Mother.

Q. Do you think that you and your husband could take care of Kayla?

A. Not without help, Your Honor

Q. What kind of help would you need?

A. Kayla has special needs. She needs special help like programs to help us follow Kayla's issues.

Mr. Caron called his client, ***Sandra****.*

Sandra is the person presenting the Adoption Petition. She is the sister of the Respondent Father.

Sandra testified that she has lived at the same address in Warwick for over thirty years. Living with her are her two nieces, Sandra Jones and Karen Nardolillo, and

Sandra Jones' two children, Robert and Michael. Her niece, Sandra, has lived with her all of the niece's life, some thirty years.

The witness identified her signature on the Adoption Petition, as well as the open adoption agreement.

The witness testified that her mother had died when the Respondent Father was only four years of age, and she took care of him. She testified that it was her primary responsibility to take care of her brother.

The witness testified that she had met with a representative of the Department prior to Kayla's birth to discuss where the child could be placed upon her birth, as the Respondents' home was not considered safe at that time. The witness stated that she was told that the Respondent Father would never get placement of the child (This was later amended that the Respondent Father would never get placement of the child as long as he remained with the Respondent Mother as she was not considered a safe guardian for the child). The witness testified that she was asked if she could take placement of the child when Kayla was released from the hospital. The witness refused. She stated that at that time, she was caring for her sick mother as well as a brother with a heart condition. The brother with the heart condition died January 6, 2001, which was approximately nine months after Kayla had been placed in a foster home with her half-sister, who had been adopted by these foster parents. The witness testified she was also caring for her brother's sister, who was a diabetic, had cancer and was blind. She was living with the witness until her death on November 16, 2001. The witness testified that in August of 2001, she was asked if she could supervise an overnight visitation between the parents and Kayla

once a week, as other visitation arrangements had failed. (emphasis added)

The witness testified that at first, all she did was supervise the visits, but as time went on, she became bonded to Kayla as a result of the one overnight visit per week that Kayla spent at her house. *The overnight visitation with the Respondents, which took place at her house, began in August of 2001.* (emphasis added) The witness testified that the Department had checked out everyone living in her home before they allowed the overnight visitations.

Sandra testified that she began to feed Kayla to ensure that she was eating properly, but that the parents were bathing Kayla and "things like that". She stated that Kayla was fond of everyone in her home but did not know everyone's name. *the witness said she felt it was in Kayla's best interest to be with her because of her brother's limitations. She felt that the only special need that Kayla had was a little delay in her speech. The witness stated that she could not have taken Kayla in until after the death of her niece in November of 2001. She said that when Kayla comes to visit at her home, she talks about her sister, Michelle. The witness had filed a Motion to Change Placement of Kayla from the foster home to her home after receiving authorization from the Respondents to do so. The motion for change of placement was heard in January of 2002 and was denied by this Court as not being in Kayla's best interest.*

The witness was definite in her statement that in her opinion, the Respondents could not take care of Kayla by themselves. The witness stated that she had problems with her neck and suffered from chronic pain for the last twenty

years. She said that she could lift Kayla but could not carry her due to her neck condition. (emphasis added)

> ***Q. You've taken care of your brother who died and you have taken care of your nieces and nephews?***
>
> ***A. Yes, you know I even get attached to animals.***
>
> ***Q. Suppose your brother showed up and you had adopted the child and said he wanted to see the baby?***
>
> ***A. I told them they could come over once in awhile but not all the time.***

The witness felt that she was a closer relative to Kayla because she was a "full aunt" rather than a half sister. She said if she was allowed to adopt Kayla she would try to foster visits between Kayla and Michelle. (emphasis added)

> **Q. If the shoe was on the other foot, would you be satisfied if the foster parents said to you, "We would be pleased to let you visit once a week?"**
>
> **A. I would have at one time, but now.**

Mr. Caron then called Sandra's Niece, ***Karen***.

Karen testified that she had lived with her Aunt, Sandra, for the last thirty years. It was Karen's father that Sandra had cared for until his death in January of 2001.

The witness felt that there was a bond between Kayla and Sandra.

Karen testified that Sandra had also cared for her sister until she died recently.

Counsel for Sandra then presented a video tape which depicted a little girl at an outdoor party and apparently having a good time. It was Kayla's birthday party given by Aunt Sandra. There was nothing remarkable about the video, with children running about, with grownups watching their antics. The Court is of the opinion that the video was taken to be used for the purpose for which it was used – in Court. The video, in the opinion of the Court, neither added to nor detracted from the merits of the case.

Mr. Caron called ***Robert Jones***, one of the nephews living in Sandra's house. He testified that he was seventeen years old and had lived with his aunt Sandra all of his life. It was his opinion that Kayla and his aunt had bonded as a result of the once per week overnight visitations which the aunt had supervised.

When asked if the Respondents interacted with Kayla during visitations, he replied, "A bit." (emphasis added)

This concluded the direct testimony on behalf of the aunt Sandra relative to her Petition to adopt Kayla.

The State called as its first witness, Kayla's foster father, ***George Mergner***. He testified that Kayla had been placed in his home, with he and his wife acting as foster parents. Kayla was placed with them shortly after her birth and had resided with them constantly since that time. At the time of this hearing, it had been over two and one-half years. The witness stated that he lives with his wife and another child that they had adopted, Michelle, who was Kayla's half sister. His wife works two to three day per week, and he works four ten-hour days per week. Two of the five foster children they have had in their home have been reunited with their parents. *Mr. Mergner stated that Kayla was a special needs child, particularly as to her*

speech and that she attends physical therapy, as she is not physically coordinated. (emphasis added)

The witness was questioned as to the relationship between Kayla and her half-sister, Michelle, and he replied, "She follows her like a second shadow."

In response to a question, the witness stated that at such time as either of the two children express a desire to see or have contact with the biological parents, he replied, "I will do everything in my means to do so." (emphasis added)

Under cross examination by Mr. O'Brien, CASA Attorney, the witness testified that he and his wife teach Kayla her number cards, work on her speech and her ABC's. A Meeting Street School representative comes in to their home and works with Kayla.

The witness testified that Kayla refers to him as "Daddy" and refers to his wife as "Mommy". He stated that Kayla and Michelle are inseparable. They each have their own bedroom. (emphasis added)

Cross examination by Ms. Stuhlstaz brought forth the information that Michelle goes to a Catholic School Mondays, Wednesdays and Fridays for a half day. Kayla goes to day care during the week, but on Tuesdays and Thursdays, the two girls are together.

The State called ***Deborah Mergner***, Kayla's foster mother. She stated that Kayla has both a speech therapist and an occupational therapist. She testified that at the end of the day, both girls run to the door to greet "Daddy".

The witness concluded her testimony with the statement that she has to take Michelle to the doctor at least

every other week, as she has chronic ear infections and tonsillitis.

All parties rest.

The basic facts of this case have been set forth in the opening paragraphs of this Decision.

The facts are straight forward, and there is little or no contradiction in the testimony of the various witnesses. The law is also relatively clear. What is concerning to this Court is the depth of human emotions which are involved in the permanent placement of Kayla – a child that is loved by all of the parties involved.

The Family Court, though a creature of statute, sounds in equity, which demands that a just conclusion be reached based upon the totality of the evidence.

Query: If parents are unable to properly care for a child, regardless of their love for the child, are they unfit to parent that child?

Expert testimony made it clear that the Respondents cannot care for Kayla without constant on-site supervision. Both Respondent parents have testified and both have admitted substantially what the experts have averred. The petitioning aunt in the adoption matter has testified that, in her opinion, her brother cannot care for the child without the help specified by the experts. (emphasis added)

Can parents such as the respondents be found unfit to exercise parental rights?

The Court had the opportunity to observe the Respondents during the course of the lengthy hearing. The Respondent Father was subdued, placid and reserved. The Court is convinced of his love for Kayla and equally

convinced that he has no concept of what is in the best interests of the child.

The Respondent Mother was flighty, physically active and appeared quite aggressive in her reactions to certain testimony. These observations, particularly as it pertains to the Respondent Mother, were more than adequately supported by the testimony.

It is the opinion and decision of this Court that unfitness cannot only be ascribed to positive acts which are harmful, physically and/or emotionally to the child, but that the inability to act or react to a situation which could imperil the child and ultimately cause harm to the child, constitutes unfitness. Based upon this criteria, this Court finds, by clear and convincing evidence, that the Respondent Parents are unfit. There is no probability that Kayla could safely be returned to her parents' care, considering the mental and emotional condition of the parents and the special needs of this child, including the need for a permanent, safe and stable home, within any reasonable time. The Respondents are no more capable of caring for Kayla now than they were when she was born.

Did the Department make reasonable efforts to effectuate the reunification of Kayla with her parents?

The placement of the child in the first instance was caused in great measure by the aggressive behavior of the Respondent Mother. The Department rightfully sought relative placement for the child. Respondent Mother had no suggestions for relative placement. The Respondent Father suggested a niece. That placement was rejected based upon the contact that the Department had with that niece.

Respondent Father's sister, Sandra, rejected the placement for very good reason – her on-going care of several terminally ill relatives. This resulted in the placement of Kayla, upon her release from the hospital after her birth, in the foster home which had previously adopted the Respondent Mother's first child, Michelle.

It is apparent from the testimony that neither the Department nor the foster parents initially considered this a permanent placement, as witness the case plan goals which called for reunification with the parents. The foster parents initially refused to acknowledge the blood relationship of Kayla and Michelle, as they did not believe this was a permanent arrangement.

Sandra did not enter into the picture at all until such time John Hope refused to supervise visitations in the Respondents' home. Their refusal to supervise was due to the aggressive nature of the Respondent Mother and the worker's statement that she felt unsafe in the presence of the mother.

Sandra, not wishing to deprive her brother of his visitations, agreed to the one overnight visitation which she would supervise in her home. This was approximately nine months after Kayla had been placed in the foster home. Time passed without any resolution of the problem, reunification appeared out of the question, and the Department filed a Termination of Parental Rights.

It is the opinion of this Court, considering the totality of the evidence, that DCYF did make reasonable efforts to reunify parent and child. The Respondents argue that reasonable efforts were not enough – that because the parents were mildly retarded, special efforts should have been make. The Court points out that one of the workers

on the case stated that almost half of the cases she serviced dealt with people in the same medical conditions as the Respondents. There must be a limit to the extension of reasonable efforts.

Subsequent to the filing of the Termination of Parental Rights Petition, a Petition for Adoption was filed by the Respondent's sister, Sandra, which was consented to by the Respondents.

Hearing on the termination hearing was interrupted when a Petition was filed in the Rhode Island Supreme Court seeking relief, specifically requesting that the hearing on the termination petition be abated and that this Court proceed with hearing on the Adoption Petition. The Supreme Court returned the case to this Court with the instruction that both petitions be heard at the same time. Procedurally, that is what this Court has done.

This Court has ruled that the Respondents were unfit and that the grounds for termination have been proven by clear and convincing evidence and that it is in the best interest of the child, Kayla, that the parental rights of the Respondents be terminated. This Court, however, wishes to make comment on all of the evidence.

This Court, in previously heard motions on this case, as well as in the case on merits, has commented that Sandra is kind, gentle, caring woman, who, at fifty four, has been the primary caregiver for several members of her family. She has cared for terminally ill relatives until their death. For thirty years, she has taken care of two of her nieces who live with her and two of her nephews who have lived with her since their birth and who are now in their teens. She has raised the Respondent Father since the death of her parent when the Respondent Father was four

years of age. She can best be described as a "compulsive care taker." *In her own words, "I even become attached to animals."* (emphasis added) She states that she has become attached to Kayla as a result of her supervision of the once per week visitations held at her house. Sandra testified that she would foster a relationship between Kayla and her sister, Michelle, if she was allowed to adopt Michelle. That is not necessary, inasmuch as all of the testimony on the subject reveals that Kayla and Michelle are already closely bonded in the foster home. In the opinion of this Court, to move Kayla now can do nothing by rupture the close relations these two sisters have as a result of being raised together in the same home since Kayla's birth.

It is the opinion of this Court that if the Department had not filed a termination petition, there never would have been an Adoption Petition filed by the aunt and consented to by the Respondents. The testimony supports the view that the Adoption Petition was filed and consented to in the hope that it would at least guarantee that the Respondents would maintain some connection with Kayla. *The Respondents both testified that they "voluntarily" consented to the adoption Petition because they felt that this was their only chance to maintain contact with Kayla.* emphasis added) There is no doubt in the mind of this Court that if the Adoption Petition were to be granted, regardless of the terms of the open adoption agreement, Sandra could never deny her brother, indeed the child she raised as a son, visitation with Kayla if he requested same. The Respondents were of the mind set that this was the "best deal" that they could make under all of the circumstances. The bonding between the two sisters, as well as the bonding which has been testified to between Kayla and

her foster parents, was part of the determining factors this Court considered in making its decision.

This Court is not unaware of the heartache this Decision will cause to the Respondent Father in particular, and to the aunt, Sandra, and to a lesser degree, to the Respondent Mother, but the best interest of Kayla is assured by granting the termination petition and denying the Petition for Adoption, which is what this Court has done.

Sandra has lived at least half her life. She has a full house with four relatives still residing with her, and it is the opinion of this Court that they will be there for some time to come. It is the opinion of this Court that the Respondent Mother will continue to think primarily of her own interests and that the Respondent Father is the one who will bear the burden of the loss.

This case has presented a series of ***"What If's"***.

What If the Respondent Mother had not given up her first child for adoption?

What If the Respondents had not been mildly mentally retarded?

What If Kayla had not been born exhibiting developmental delays?

What If the aunt, Sandra, had been available and accepted placement of Kayla when she was born?

What If Kayla had not been placed in the same foster home with her adopted half-sister and bonded with her and the foster parents?

What if? What if? What if?

The confluence of all of these "What If's" at the same time have influenced the life and future of one small child, named Kayla.

This Court is saddened by the effect its decision will undoubtedly have on the Respondent Father and his sister, Sandra, but it is consoled by the belief that it has done what it had to do to preserve Kayla's best interest.

This Court is of the opinion that hopefully its decision will result in a happy, full life, not only for Kayla, but also for her sister, Michelle – a future hopefully without so many "what if's".

An Order shall enter in accordance with this decision.

_____/s/ John A. Mutter_____
John A. Mutter
Associate Justice
Rhode Island Family Court

Dated: _____1/22/03_____

APPENDIX C

The Americans with Disabilities Act:

42 U.S.C. § 12131:

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132:

§ 12132. Discrimination

Subject 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.

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42 U.S.C. § 12133:

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

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42 U.S.C. § 12134:

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of

this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of Title 29. (c) Standards Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

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42 U.S.C. § 12201(a):

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

* * *

Section 504 of the Rehabilitation Act of 1973:

29 U.S.C. § 794:

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such

department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

Rhode Island's Termination of Parental Rights Statute

R.I. Gen. Laws § 15-7-7:

15-7-7. Termination of parental rights.

(a) The court shall, upon a petition duly filed by a governmental child placement agency or licensed child placement agency after notice to the parent and a hearing on the petition, terminate any and all legal rights of the parent to the child, including the right to notice of any

subsequent adoption proceedings involving the child, if the court finds as a fact by clear and convincing evidence that:

(1) The parent has willfully neglected to provide proper care and maintenance for the child for a period of at least one year where financially able to do so. In determining whether the parent has willfully neglected to provide proper care and maintenance for the child, the court may disregard contributions to support which are of an infrequent and insubstantial nature; or

(2) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to, the following:

(i) Institutionalization of the parent, including imprisonment, for a duration as to render it improbable for the parent to care for the child for an extended period of time;

(ii) Conduct toward any child of a cruel or abusive nature;

(iii) The child has been placed in the legal custody or care of the department for children, youth, and families and the parent has a chronic substance abuse problem and the parent's prognosis indicates that the child will not be able to return to the custody of the parent within a reasonable period of time, considering the child's age and the need for a permanent home. The fact that a parent has been unable to provide care for a child for a period of twelve (12) months due to substance abuse shall constitute prima facie evidence of a chronic substance abuse problem;

(iv) The child has been placed with the department for children, youth, and families and the court has previously involuntarily terminated

parental rights to another child of the parent and the parent continues to lack the ability or willingness to respond to services which would rehabilitate the parent and provided further that the court finds it is improbable that an additional period of services would result in reunification within a reasonable period of time considering the child's age and the need for a permanent home;

(v) The parent has subjected the child to aggravated circumstances, which circumstances shall be abandonment, torture, chronic abuse and sexual abuse;

(vi) The parent has committed murder or voluntary manslaughter on another of his or her children or has committed a felony assault resulting in serious bodily injury on that child or another of his or her children or has aided or abetted, attempted, conspired or solicited to commit such a murder or voluntary manslaughter; or

(vii) The parent has exhibited behavior or conduct that is seriously detrimental to the child, for a duration as to render it improbable for the parent to care for the child for an extended period of time;

(3) The child has been placed in the legal custody or care of the department for children, youth, and families for at least twelve (12) months, and the parents were offered or received services to correct the situation which led to the child being placed; provided, that there is not a substantial probability that the child will be able to return safely to the parents' care within a reasonable period of time considering the child's age and the need for a permanent home; or

(4) The parent has abandoned or deserted the child. A lack of communication or contact with the child for at least a six (6) month period shall constitute prima facie evidence of abandonment or desertion. In the event that parents of an infant have had no contact or communication with the infant for a period of six (6) months the department shall file a petition pursuant to this section and the family court shall conduct expedited hearings on the petition.

(b) (1) In the event that the petition is filed pursuant to subdivisions (a)(1), (a)(2)(i), (a)(2)(iii), or (a)(2)(vii) of this section, the court shall find as a fact that, prior to the granting of the petition, such parental conduct or conditions must have occurred or existed notwithstanding the reasonable efforts which shall be made by the agency prior to the filing of the petition to encourage and strengthen the parental relationship so that the child can safely return to the family. In the event that a petition is filed pursuant to subdivisions (a)(2)(ii), (a)(2)(iv), (a)(2)(v), (a)(2)(vi) or (a)(4) of this section, the department has no obligation to engage in reasonable efforts to preserve and reunify a family.

(2) Any duty or obligation on the part of a licensed or governmental child placing agency to make reasonable efforts to strengthen the parental relationship shall cease upon the filing of a petition under this section. This provision shall not be construed and is not intended to limit or affect in any way the parents' right to see or visit with the child during the pendency of a petition under this section.

(3) Upon the filing of a termination of parental rights petition, the agency has an affirmative duty to identify, recruit, process and approve a qualified family for adoption or other permanent living arrangement for the child.

(c) (1) In considering the termination of rights as pursuant to subsection (a), the court shall give primary consideration to the physical, psychological, mental, and intellectual needs of the child insofar as that consideration is not inconsistent with other provisions of this chapter.

(2) The consideration shall include the following: If a child has been placed in foster family care, voluntarily or involuntarily, the court shall determine whether the child has been integrated into the foster family to the extent that the child's familial identity is with the foster family and whether the foster family is able and willing to permanently integrate the child into the foster family; provided, that in considering integrating into a foster family, the court should consider:

(i) The length of time child has lived in a stable, satisfactory environment and the desirability of maintaining that environment and continuity for the child; and

(ii) The reasonable preference of the child, if the court determines that the child has sufficient capacity to express a reasonable preference.

(d) If the court finds that the parental rights of the parent should be terminated as specified in subsection (a), it shall by decree duly entered, appoint some suitable person to give or withhold consent in any subsequent adoption proceedings. In the case of petitions filed by licensed or governmental child placement agencies, the court shall appoint the agency to be the sole party to give or withhold consent to the adoption of the child and further vest the agency with all rights of guardianship over the child.

(e) Nothing in this section shall be construed to prohibit the introduction of expert testimony with respect to any illness, medical or psychological condition, trauma, incompetency, addiction to drugs, or alcoholism of any parent who has exhibited behavior or conduct that is seriously detrimental to a child, to assist the court in evaluating the reason for the conduct or its probable duration.

(f) The record of the testimony of the parties adduced in any proceeding terminating parental rights to a child shall be entitled to the confidentiality provided for in § 8-10-21 and more specifically shall not be admissible in any civil, criminal, or other proceeding in any court against a person named a defendant or respondent for any purpose, except in subsequent proceedings involving the same child or proceedings involving the same respondent.

(g) In the event any child, the parental rights to whom have been finally terminated, has not been placed by the agency in the home of a person or persons with the intention of adopting the child within thirty (30) days from the date of the final termination decree, the family court shall review the status of the child and the agency shall file a report that documents the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship. At a minimum, this documentation shall include child specific recruitment efforts, such as the use of state, regional and national adoption exchanges, including electronic exchange system.