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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SHERRY A. ORR as Guardian ad Litem for JEREMY ORR, a Minor Child; SHERRY A. ORR; and WILLIAM ORR, Plaintiffs, v. KINDER CARE LEARNING CENTERS, INC.,		CIV-S-95-507 EJG PAN

UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR ORAL ARGUMENT

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This case was filed by Jeremy Orr, a nine-year old child with a disability, and his parents, against KinderCare Learning Centers, Inc., the owner and operator of an after-school child care program in Elk Grove, California, in which Jeremy has been enrolled since September 1994. Plaintiffs allege that KinderCare's decision in February 1995 to expel Jeremy constitutes discrimination on the basis of disability in violation of title III of the Americans with

Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-89.[1] Plaintiffs' motion for a preliminary injunction is now before the Court, scheduled for hearing on May 26, 1995. The United States requests that it be allowed to present oral argument at that time.

As amicus curiae, the United States urges the Court to grant Plaintiffs' motion to enjoin KinderCare from expelling Jeremy from its after-school program. The principal legal issues presented by this motion involve the meaning of title III and the Department of Justice's implementing regulation. On both of these issues, the Department of Justice's interpretation is entitled to substantial deference.[2]

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[1] Although Plaintiffs seeks redress for violations of the ADA and California law, the United States' brief addresses only those issues arising under the ADA.

[2] Pursuant to statutory directive, 42 U.S.C. § 12186(b), the Department of Justice promulgated regulations to implement title III of the ADA. See 28 C.F.R. pt. 36. Accordingly, the title III regulation is entitled to substantial deference. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (where Congress expressly delegates authority to an agency to issue legislative regulations, the regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."). See also Petersen v. University of Wis. Bd. of Regents, 818 F. Supp. 1276, 1279 (W.D. Wis. 1993) (applying Chevron to give controlling weight to Department of Justice interpretations of title II of the ADA).

The Department's interpretation of the regulation is also entitled to deference. Courts should grant controlling weight to such interpretations unless they are plainly erroneous or inconsistent with the regulation. Thomas Jefferson Univ. v. Shalala, 114 S. Ct. 2381, 2386 (1994) (citing Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144, 150-51 (1991); Lyng v. Payne, 476 U.S. 926, 939 (1986); Udall v. Tallman, 380 U.S. 1, 16 (1965); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); Stinson v. United States, 113 S. Ct. 1913, 1919 (1993). See also Fiedler v. American Multi-Cinema, Inc., 871 F. Supp. 35, 36-37 n.4 (D.D.C. 1994) (granting controlling weight to the Department of Justice's Technical Assistance Manual for Title III of the ADA ("Technical Assistance Manual"), stating that the Department, as

As discussed below, Plaintiffs have demonstrated that they are substantially likely to succeed on the merits of their ADA claims, that they will suffer irreparable harm if Jeremy is expelled, that the harm to Plaintiffs outweighs the minimal harm to KinderCare if the Court orders KinderCare to retain Jeremy, and that public policy strongly favors granting a preliminary injunction in favor of Plaintiffs.

I. FACTS

Plaintiffs are Jeremy Orr and his parents, William and Sherry Orr. The Orrs live in the Sacramento area, where William and Sherry both work full-time. Complaint at ¶ 5; S. Orr Decl. at ¶ 1.[3] The Orrs require after-school care for Jeremy. Complaint at ¶ 5.

Jeremy is a nine-year old child who has been diagnosed with tuberous sclerosis, a genetic disability that has resulted in mental retardation, low vision, and mild seizures. S. Orr Decl. at ¶ 2. Jeremy needs diapering, and, while he can walk and eat by himself, he benefits from assistance with these and other activities. Wilcox Decl. at ¶¶ 3, 5.

He has attended public school from age 2-1/2 through an early intervention program. Complaint at ¶ 7; S. Orr Decl. at ¶ 3. Jeremy now attends a special education class at the Markofer Elementary School, a mainstream public elementary school operated by the

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author of the title III regulation, is the principle arbiter of its meaning and should be accorded substantial deference in interpreting its regulation). The Technical Assistance Manual was also issued pursuant to statutory mandate. 42 U.S.C. § 12206(c)(3).

[3] The United States relies on the declarations provided by the parties, attached to the Plaintiffs' Motion for Preliminary Injunction and Defendant's Opposition thereto.

Sacramento Office of Education. S. Orr at ¶ 3. He has been there since November 1993. Donough Decl. at ¶¶ 1-2. The special education class meets weekdays 8:30 a.m. to 2:30 p.m. Complaint at ¶ 7. Jeremy's teacher, Jan Donough, believes that he has shown significant improvement since November 1993 and that he is a well-liked member of the school community. Donough Decl. at ¶¶ 2, 3, 6. The Orrs have been pleased with his progress. Complaint at ¶ 7. Jeremy has non-disabled 'student buddies' with whom he eats and plays during the lunch hour. Donough Decl. at ¶ 4. He is able to participate in both structured and unstructured activities, enjoys interacting with other children, and responds to staff members' directions. Id. at ¶¶ 3, 4. He has participated in a whole range of activities in his special education program, including swimming, horseback riding, and shopping. Id. at ¶ 5.

Jeremy needs after-school care for approximately three hours each school day and all day during school vacations. Donough Decl. at ¶¶ 3, 7. He began attending KinderCare's after-school program in Elk Grove, California, on September 13, 1994. S. Orr Decl. at ¶ 7.

KinderCare is a publicly traded Delaware corporation that offers full-time child care for preschoolers and after-school care for school-age children at approximately 1200 centers in roughly 40 states. Complaint at ¶ 4; Answer at ¶ 4; Mercado Decl. at ¶ 3; Opposition at 2-4. KinderCare is licensed by the California Department of Human Services to provide day care services throughout California. Complaint at ¶ 4. It provides age-specific group educational programs designed to lead to social, physical, emotional, and intellectual growth. Mercado Decl. at ¶¶ 6-7. These programs are built upon monthly topics and weekly themes such as

transportation, seasons, colors, numbers, pets, safety, shapes, and sizes. Id. at ¶ 6. There are group activities such as music and fingerpainting as well as individual discovery areas. Id.

KinderCare states that it will enroll children with disabilities as long as they can participate in group activities. Mercado Decl. at ¶ 11. KinderCare evaluates each situation on a case-by-case basis. See KinderCare's form entitled, "Physician's Recommendation for Placement in Group Child Care," attached as Exhibit A-4 to Plaintiff's Memorandum in Support of Motion for Preliminary Injunction. KinderCare states that since its inception in 1969, it has enrolled many children with disabilities including those with cancer, asthma, cerebral palsy, cystic fibrosis, hemophilia, diabetes, and epilepsy. Mercado Decl. at ¶ 10. KinderCare states that it routinely provides diapering services for children with disabilities -- presumably referring to children, like Jeremy, who are older than others who customarily require those services. See Muscari Decl. at ¶¶ 10, 11; Opposition at 5. KinderCare states, however, that it does not provide "custodial care" to children with disabilities, but it fails to define that term, except to say that its program is not custodial care. See, e.g., Tronick Decl. at ¶ 8.

The parties disagree over the degree to which Jeremy is capable of interacting with other children and staff in the KinderCare program and the degree to which he is benefitting from the program. KinderCare personnel assert that Jeremy does not communicate with or interact with the other children and further, that he is incapable of participating in any of the regularly scheduled KinderCare group activities. Wilcox Decl. at ¶¶ 4, 6, and 7; Hacha Decl. at ¶ 4.

Even if these observations of Jeremy's behavior in KinderCare are accurate, it appears that he is able to participate in group activities if he is given some direction, such as that which could be provided by a personal care attendant. Jeremy's parents and his public school teacher state that with motivation, Jeremy is capable of and, in fact, enjoys group activities such as eating, playing, and otherwise interacting with other children and adults. S. Orr Decl. at ¶ 3; Donough Decl. at ¶¶ 3-6. In fact, Sherry Orr believes that Jeremy has enjoyed his time at KinderCare, has been able to make friends easily, and has responded well to the program. S. Orr. Decl. at ¶¶ 7, 13.

Some time after Jeremy's enrollment at KinderCare, his parents, KinderCare, and Polly Caple, a service coordinator from a private, non-profit State-funded agency ("the Alta Center"), began discussing the possibility of having the Alta Center provide -- free of charge -- a personal care attendant for Jeremy's use while at KinderCare. S. Orr Decl. at ¶ 11; Caple Decl. at ¶¶ 4-8.[4] No aide was ever placed in service to work with Jeremy. Answer at ¶ 13. The Orrs and KinderCare disagree whether an aide would foster Jeremy's participation in KinderCare's program. Compare S. Orr Decl. at ¶¶ 19-20 to Tronick Decl. at ¶ 6. The Alta Center continues to be ready and willing to provide such an aide at no cost to KinderCare. Caple Decl. at ¶ 8.

On February 15, 1995, KinderCare informed the Orrs in writing that it was no longer willing to care for Jeremy, stating:

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[4] The aide would be selected and trained by the United Cerebral Palsy Association. Caple Decl. at ¶ 8.

> . . . in order to meet Jeremy's needs, he requires more attention than is possible for us to offer in group care. In fact, you have asked that we provide a care giver solely for Jeremy, or a one to one ratio, so that Jeremy may participate in our program. Since the nature of our child care center is group care, where we can meet the needs of the children attending in a group setting, it is not possible to accommodate your request.

(Letter from Janice Tronick, Regional Manager of KinderCare, to Mr. and Mrs. Orr, dated Feb. 15, 1995, attached to Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction ("KinderCare Expulsion Letter")). KinderCare's decision was made despite the Alta Center's ongoing offer to pay for and provide a personal care attendant for Jeremy's use while at KinderCare. Caple Decl. at ¶¶ 6-8. Jeremy continues to attend the KinderCare program pending a resolution of Plaintiff's Motion for Preliminary Injunction. Opposition at 8.

II. ANALYSIS

To obtain a preliminary injunction, Plaintiffs must demonstrate either (1) a likelihood of success on the merits and a possibility of irreparable injury, or (2) the existence of serious questions on the merits and a balance of hardships tipping in its favor. The Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992), citing Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci, 857 F.2d 505, 507 (9th Cir. 1988). These are not distinct legal standards, but extremes of a single continuum. Id. In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff. Id., citing Caribbean Marine Services Co., Inc. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988); Northern Alaska Environmental Center v. Hodel, 803 F.2d 466, 471 (9th Cir. 1986). Each of these factors is

analyzed below.[5]

A. JEREMY ORR IS LIKELY TO PREVAIL ON HIS ADA CLAIMS.

1. KinderCare's decision violates title III's general prohibitions of discrimination and denial of services on the basis of disability and, more particularly, title III's requirement to make reasonable modifications in policies, practices and procedures.

Title III's general prohibition of discrimination on the basis of disability requires public accommodations to provide people with disabilities the "full and equal enjoyment of [their] goods and services."[6] Section 302(a) provides:

> General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (emphasis added); see also 28 C.F.R. § 36.201(a). Discrimination under this general provision is defined to include, inter alia, a denial of an opportunity to participate in

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[5] While KinderCare argues that Plaintiffs seek extraordinary relief in the form of a mandatory injunction that goes "well beyond maintaining the status quo pendente lite" (Opposition at 10), the core injunctive relief sought by Plaintiffs is to maintain the status quo: to keep Jeremy in KinderCare's program. The only affirmative relief sought by Plaintiffs -- requiring KinderCare to allow a personal care attendant to accompany Jeremy -- should alleviate, rather than aggravate, any hardship to Kindercare that might occur by retaining Jeremy pending a trial on the merits.

[6] There is no dispute that KinderCare is subject to the requirements title III imposes on public accommodations. 42 U.S.C. § 12181(7)(K); 28 C.F.R. § 36.104. Complaint at ¶¶ 4, 7; Answer at ¶¶ 4, 17. Nor does KinderCare contest that Jeremy is a person with a disability, 42 U.S.C. § 12101(2); 28 C.F.R. § 36.104 (def. of disability), or that its decision to expel Jeremy affects his parents, 42 U.S.C. § 12182(b)(1)(E); 28 C.F.R. § 36.205. Complaint at ¶ 15; Answer at ¶ 15. Likewise, Defendant admits that its decision to expel Jeremy was based on its opinion that, given the nature of his disability, he was unable to participate in group activities and needed "custodial care." Opposition at 2 et seq.

or benefit from a public accommodation's goods and services. 42 U.S.C. § 12182(b)(1)(A)(i). More specifically, title III prohibits a failure to make reasonable modifications in policies, practices, and procedures where necessary to ensure full and equal enjoyment. 42 U.S.C. § 12182(b)(2)(A)(ii). This section defines discrimination to include:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

42 U.S.C. § 12182(b)(2)(A)(ii); see also 28 C.F.R. § 36.302.[7]

The reasonable modification requirement of section 302(b)(2)(A)(ii) is not without limitation -- modifications are not required if they would *fundamentally alter* the nature of a public accommodation's goods or services or would otherwise be *unreasonable* and they do not have to be made if doing so would pose a *direct threat* to others.

Congress' intent when passing the ADA was to "bring individuals with disabilities into the economic and social mainstream of American life." S. Rep. No. 116, 101st Cong., 1st Sess., at 58 (1989) (Labor and Human Resources). The fundamental alteration defense ensures that even in pursuit of this goal, public accommodations will not have to make fundamental changes to the nature of their goods or services. The principles underlying the

[7] The reasonable modification provision should be construed so that it is consistent with the "full and equal enjoyment" mandate underlying the more general section. See Technical Assistance Manual at § III-3.1000.

notion of "fundamental alteration" are, simply put, that the alteration is not mandatory if it would require a public accommodation to provide an altogether different kind of good or service than it typically provides.[8]

In addition to determining whether a modification fundamentally alters a public accommodation's program, the Court must determine whether the modifications are "reasonable." 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302. As with other specific anti-discrimination provisions of title III, the requirement that modifications be "reasonable" must be read in conjunction with title III's underlying mandate to provide persons with disabilities the "full and equal enjoyment" of a public accommodation's goods and services. 42 U.S.C. § 12182(a); 28 C.F.R. § 36.201(a).

Under the reasonable modification provision, modifications are generally required when they are necessary to allow persons with disabilities to have the full and equal enjoyment of an entity's goods and services. Entities must replace their "business as usual"

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[8] Congress clarified the scope of the fundamental alteration defense by giving several examples. First, a physician who specializes in treating burn victims "could not refuse to treat a burn victim due to deafness, but could refuse to treat a deaf person who did not have burns but had some unrelated medical condition." S. Rep. No. 116, 101st Cong., 1st Sess. at 62, 63 (1989) (Labor and Human Resources); see also H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. at 105, 106 (1990) (Education and Labor).

Second, a drug rehabilitation clinic could refuse to treat a person who was not a drug addict but could not refuse to treat an addict simply because the client had a positive HIV status. S. Rep. No. 116, 101st Cong., 1st Sess. at 63 (Labor and Human Resources); see also H.R. Rep. No. 485 (II), 101st Cong., 2d Sess. at 106 (1990) (Education and Labor). Accord United States v. Morvant, No. CIV-A-93-3251, 1995 WL 131093 (E.D. La. March 22, 1995) (granting United States' motion for summary judgment against a dentist who refused to provide routine dental care to patients who were HIV positive or who had AIDS).

approach with an effort to determine how they can provide meaningful opportunities for persons with disabilities to access the goods and receive the services that other non-disabled Americans receive.

Most reasonable modifications are simple and common sense responses to the individualized needs of persons with disabilities, as in the case of permitting a person of the opposite gender to assist an individual with a disability in a single-sex toilet room, allowing persons to bring food into cinemas if needed for medical reasons, modifying a "no pets" rule to allow service animals, or allowing persons with disabilities to go on amusement park rides without waiting in line if necessary to accommodate their disability.[9] Other modifications required by section 302(b)(2)(A)(ii) would also be 'reasonable' if they are not too dissimilar from the services routinely provided to non-disabled customers. For instance, physicians must assist patients with disabilities with dressing and undressing and child care centers must relax their diapering eligibility requirements for older children with disabilities.

As Congress recognized, the very reason that the ADA was needed was because "business as usual" deprived persons with disabilities, and *children with severe disabilities in particular*, with meaningful opportunities to be integrated into the mainstream of American life. As Senator Dodd stated:

> Mr. President, as chairman of the Subcommittee on Children and Families, I would like to address the important changes that this bill will bring about in the daily lives of children

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[9] Technical Assistance Manual at § III-4.2100. These interpretations of "reasonable modifications" should be accorded controlling weight. See supra at n.2.

> with disabilities and their families. The Americans with Disabilities Act will create an expanded community for children with disabilities and their families. The bill is a statement that we want their participation and that they have a place among all of us. The ADA requires that children with disabilities, regardless of the severity of their disability, be permitted to utilize the same public services that others without disabilities utilize as a matter of course.
>
> They are to be permitted to utilize the same health clinics, day care centers, playgrounds, schools, restaurants, and stores that they would normally utilize, in their communities, if they were not disabled. Children will have new social and recreational and educational opportunities that most Americans take for granted. No longer will children be subjected to forced busing programs outside their neighborhoods because that is where the "handicapped" program is located.

135 Cong. Rec. S10721, S10722 (daily ed. Sept. 7, 1989) (Statement of Sen. Dodd) (emphasis added). Senator Dodd's comments reiterate the theme that integration is the hallmark of compliance under the ADA.

2. Jeremy Orr's continued participation in the KinderCare program does not create a fundamental alteration in the program.

KinderCare offers after-school care and daycare for children. A variety of activities are offered but KinderCare is not a school with an academic curriculum. Plaintiffs have not asked KinderCare to change its curriculum in any respect to accommodate Jeremy. KinderCare can and does continue to provide child care for non-disabled children with Jeremy in the program and it can continue to provide its group activities to other children even if Jeremy is not fully participatory. Nothing in the record suggests that Jeremy's presence detracts from the ability of other children to participate fully in the activities provided by KinderCare.

KinderCare is not being asked to change the basic nature of its child care services. For instance, KinderCare has not been asked to provide a remedial educational program, physical therapy, tactile

stimulation, feeding therapy, speech therapy, or any other disability-specific curriculum for Jeremy, in which case it could have argued that the nature of its program had been fundamentally altered from general child care to something else. Likewise, KinderCare has not been asked to provide extensive medical care for Jeremy, in which case it could have argued that its program had been fundamentally altered from child care to pediatric medicine.[10] If, instead of being asked to supervise a child with a disability, KinderCare was requested to provide daytime care for an elderly person, it could argue that to do so would fundamentally alter its program: KinderCare does not routinely provide care for geriatric adults, regardless of disability. Moderate alterations to the nature of a public accommodation's goods and services must be tolerated -- and, indeed, are often required -- by title III; to disregard this congressional directive would be to eviscerate title III's mandate of integration.

KinderCare's argument regarding fundamental alteration is based primarily on its assertions that Jeremy cannot participate in group activities and that he requires "custodial care."[11] First, based on

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[10] Child care centers must provide medical services that are necessary to integrate children with disabilities, as long as those procedures meet the standards set forth for other modifications of policies, practices, and procedures, i.e., the standards of fundamental alteration, reasonableness, and direct threat. For instance, child care centers may be required to dispense pre-measured doses of medication on a regular basis. KinderCare indicates that it does this routinely for children with disabilities. Muscari Decl. at ¶ 10; Opposition at 5.

[11] The heart of KinderCare's argument is that Jeremy requires "custodial care," something that it deems incompatible with its group child care setting. KinderCare and its declarants use "custodial care" as though it were a legal term of art, endowed with

the public school teacher's assessment of his capabilities and his record of achievements in that setting, Jeremy is capable of interacting with other children in group settings. Donough Decl. at ¶¶ 2-6. Second, if a personal aide were permitted to assist him in the KinderCare program, such an aide would direct and motivate Jeremy's participating in group activities. But, in any event, even with a more limited level of participation, Jeremy is benefitting from the KinderCare program. While KinderCare believes that the only way to benefit from its program is to participate actively in group activities, children can derive other types of benefits -- such as modeling and increased stimulation -- from observing others' activities. The benefit these children receive is as valuable to them as is the benefit received by children who actively participate in group activities. As Jeremy's mother observes:

> 13. I believe that Jeremy has responded well to his time with KinderCare. As recently as February 24, 1995, I was told by "Miss Gloria," a KinderCare staff person that Jeremy had been very active all afternoon, getting up and walking all around the classroom. That same day, "Miss Becky," another KinderCare staff person, commented on how much the children liked Jeremy. Previously, on January 26, 1995, both "Miss Gloria" and "Miss Sharon," yet another KinderCare worker commented on how alert and active Jeremy had been lately, and said that his seizures appeared to be occurring less frequently. . . . From speaking with the people at KinderCare, it appears that Jeremy has become very comfortable there. I also know from his school experience that Jeremy is stimulated to

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a precise meaning. See, e.g., Opposition at 2, 7-9, 11-14, 17-26, 28-29; Tronick Decl. at ¶¶ 7, 8; Wilcox Decl. at ¶¶ 4-8; Hacha Decl. at ¶ 4; Mercado Decl. at ¶¶ 7, 13. "Custodial care" is not found anywhere in the ADA or the Department of Justice title III regulation. Nowhere does KinderCare define the term except to contrast "custodial care" to "group" child care. The United States will assume that the term as used by KinderCare means supervision given on a one-to-one ratio, combined with the delivery of some personal services such as feeding and diapering, rather than the institutionalization or hospitalization of a child.

> engage in more age-appropriate behavior when he is with other children who are good role models for him. . . .
>
> 16. Jeremy has benefitted, with or without assistance, from being placed in group settings with non-disabled children. When Jeremy was about three years old, he was placed in a day care center with non-disabled children. In his three years at that placement, it was evident that he benefitted from being exposed to non-disabled children. Jeremy's father and I witnessed, along with the child care providers, that Jeremy's ability to model the actions of the non-disabled children was a key to his success during that period. Jeremy's ability to model stimulated him, helped him to begin walking, and made him significantly more mobile.

S. Orr. Decl. at ¶¶ 13, 16.

Jeremy is, in fact, benefitting from the KinderCare program and, with an aide, could benefit even more. However, even if Jeremy may not be able to develop to the same degree or in the same manner as non-disabled children given the nature of his disability, he is legally entitled to an opportunity to benefit to the extent that he is able. KinderCare states that its overall goal "is to help the children develop and grow." Opposition at 4. The extent to which children are able to develop and grow is properly measured by degrees, not by reference to some artificially absolute standard. Different children benefit to a different extent and manner when participating in group child care programs. It is important to note that "'full and equal enjoyment' under title III does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but [it] does mean that persons with disabilities must be afforded equal opportunity to obtain the same result." S. Rep. No. 116, 101st Cong., 1st Sess. at 60 (1989) (Labor and Human Resources); H.R. No.

485 (II), 101st Cong., 2d Sess. at 101 (1990) (Education and Labor).[12]

The attitude displayed by the KinderCare employees who "were shocked at the severity of Jeremy's disability and neither could understand why his parents sought the services of KinderCare since it was apparent, to them, that Jeremy was in need of custodial care, not group daycare," (Opposition at 7; Tronick Decl. at ¶ 5; Mercado Decl. at ¶ 5) displays the kind of paternalism that Congress sought to redress with the passage of the ADA. Section 302(b) of the ADA "[i]s intended to prohibit the exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities." 28 C.F.R. pt. 36, App. B at 596 (July 1, 1994) ("Preamble").

By arguing that Jeremy requires "custodial care," KinderCare seems to imply that he should be in a specialized program for children with disabilities. Even if Jeremy might benefit from a

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[12] For example, a gym could not use a person's mobility impairment as a rationale for excluding the person from an exercise class; it is not enough to argue that the person with a disability cannot do all of the exercises and derive the same result from the class as persons without disabilities. H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. at 55 (1990) (Judiciary); see also H.R. Rep. No. 485 (IV), 101st Cong., 2d Sess. at 57 (1990) (Energy and Commerce). Likewise, a symphony orchestra could not exclude a deaf patron on the basis of his disability, assuming for him that he could not benefit in any way from attending a concert. He may indeed benefit from the experience, even if the experience he has and the benefit he receives are different from those of other audience members. It is for people with disabilities, not public accommodations, to determine whether or not they will benefit from a good or service.

specialized program and one was available, the availability of specialized programs for persons with disabilities, whether from the same entity or other businesses, does not relieve a public accommodation from its legal obligation to provide access to its standard program.[13] As the Department has recognized:

> [t]his is an important and overarching principle of the Americans with Disabilities Act. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.
>
> . . . Modified participation for persons with disabilities must be a choice, not a requirement."

Preamble at 596.

KinderCare further argues that it is unreasonable to require it to retain Jeremy in its program because doing so lowers the caregiver-to-child ratio below the 1:12 level required by California law. Opposition at 19-20, citing Cal. Code Regs. tit. 22, § 101179(b)(5) (1994). This issue does not arise, however, if Jeremy is allowed to be accompanied by a personal care attendant, because KinderCare employees would not be focusing disproportionate attention on Jeremy. Furthermore, although KinderCare has had Jeremy in its program since September 1994, it has not alleged that it was notified by any licensing official that its license was put

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[13] See 42 U.S.C. § 12182(b)(1)(C) ("Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different."); 28 C.F.R. § 36.203(b) (using the statutory language); see also 28 C.F.R. § 36.203(c)(1) ("Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit available under this part that such individual chooses not to accept.").

in any jeopardy by Jeremy's presence.

Finally, KinderCare argues that it is under no legal obligation to provide personal services for Jeremy or other persons with disabilities. Opposition at 13-14. The Department's title III regulation generally exempts public accommodations from having to provide personal services to persons with disabilities. 28 C.F.R. § 36.306. "Personal services" include assistance with toileting, dressing, or eating. Id. This exemption, however, does not apply when personal services are routinely provided to others:

> Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using the public accommodation.

Preamble at 614. Child care centers like KinderCare, who have programs for young children, routinely provide diapering and other personal services in their normal course of business. Here, where the very nature of child care requires KinderCare to provide non-disabled children with personal services such as diapering, toileting assistance, assistance with eating, etc., these services must be provided to children with disabilities as well. Indeed, KinderCare indicates that it routinely provides these services to children with disabilities. Opposition at 5; Muscari Decl. at ¶¶ 10, 11.

3. The presence of a personal care attendant for Jeremy does not create a fundamental alteration in KinderCare's program.

KinderCare maintains that it is unreasonable to require it to allow a third party -- a personal care attendant trained by United Cerebral Palsy ("UCP") and provided free of charge by the Alta Center -- on KinderCare's premises on a routine basis for the

following reasons: (1) KinderCare's supervision of a personal care attendant for Jeremy would distract teachers from other students; (2) the aide would not be under KinderCare's control; and (3) the aide might not meet KinderCare's standards.

KinderCare does not, and indeed cannot, state that an aide will not increase Jeremy's level of participation in KinderCare's group activities: KinderCare has never allowed the Orrs or the Alta Center to provide an aide to accompany Jeremy, so it has no basis on which to make such a determination. "[T]he determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question . . . " Staron v. McDonald's Corp., 1995 WL 14875 (2d Cir. April 4, 1995) (citations omitted). Jeremy's experiences as observed by his public school teacher and parents indicate that his level of interaction is likely to increase with the presence of an aide who can help motivate his participation in group activities.

As to KinderCare's first defense, the presence of a well-trained aide should enhance, rather than distract KinderCare employees' ability to concentrate on other children. It is important to note that KinderCare has not stated that it never allows volunteer aides to help care for other children. In fact, California law encourages private child care centers to help train caregivers through volunteer apprenticeships. Cal. Code Regs. tit. 22 § 10136.5(b)(c) (1994). The supervisory responsibilities associated with these volunteers would likely be greater than those associated with the supervision of a professional, trained personal

care attendant for Jeremy.

Secondly, KinderCare's argument regarding its alleged lack of control over the aide (Opposition at 21) is undercut by the fact that KinderCare has not explored reasonable ways to address this legitimate concern. For instance, KinderCare and the Alta Center could structure an arrangement under which KinderCare would be delegated the authority to fire or discipline the aide if he or she did not behave appropriately. Of course, while the Department believes that it is neither a fundamental alteration nor an unreasonable modification to permit a personal care attendant to attend to Jeremy while at KinderCare, if a particular aide behaves in a manner that is incompatible with the safe operation of KinderCare's program, the company may refuse to admit that attendant.

Lastly, KinderCare argues that it "would face a substantial risk of liability" if it allowed Jeremy to be accompanied by an aide, because it would be legally responsible "for ensuring that this aide is physically, mentally, and occupationally capable." Opposition at 21. KinderCare notes that it has an extensive list of requirements for faculty personnel, including aides, such as on-the-job training, health screening, and a criminal record clearance. Id. at 22 n.10, citing Cal. Code Reg. tit. 22, §§ 101216, 101316.3. Public accommodations may generally require personal care attendants to meet the legitimate health, safety, and educational standards set for their own employees. As discussed above, KinderCare has not indicated that it made any effort to determine whether the personal care attendant identified by the Alta Center and trained by UCP meets these specifications. Nor is there anything in the record to

suggest that KinderCare has inquired as to the nature of the training provided by UCP, or whether UCP or the Alta Center conducts its own health, safety, and criminal background inspections of personal care attendants. Thus, KinderCare's objections are merely theoretical ones which are not borne out by the facts in this case. As the Second Circuit noted in Staron, a determination of whether a particular modification is reasonable should be decided on specific facts, not conjecture or speculation. Staron v. McDonald's Corp., 1995 WL 146875 (2d Cir. April 4, 1995).

B. WILLIAM AND SHERRY ORR ARE LIKELY TO PREVAIL ON THEIR CLAIM OF DISCRIMINATION ON THE BASIS OF ASSOCIATION.

Jeremy's parents allege that they are being denied daycare services because of their relationship with Jeremy. Complaint at ¶ 16. Section 302(b)(1)(E) of title III prohibits discrimination against individuals who are associated with persons with disabilities:

> It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

42 U.S.C. § 12182(b)(1)(E); see also 28 C.F.R. § 36.205. Cf. 42 U.S.C. § 12112(b)(4) (prohibiting employment discrimination based on known association with person with a disability).

In a very real sense, the after-school program offered by KinderCare is as much a service to parents as it is to children. Day care allows parents to work full-time without having to leave their children unattended. KinderCare's program is routinely available to the parents of non-disabled children, and, if the company is allowed to expel Jeremy, this service will be denied to

his parents. Sherry Orr and Polly Caple have both stated that quality after-school care is extremely difficult to find in the Sacramento area.[14] S. Orr Decl. at ¶ 15; Caple Decl. at ¶ 9. Sherry Orr has stated that she would have to quit working full-time if KinderCare is allowed to expel Jeremy.[15]

In fact, if this Court were to countenance Jeremy's expulsion, it is likely that some child care providers who currently accept children with severe disabilities into their programs out of a perceived legal duty will not continue to do so. This will deprive not only the children with disabilities of the benefits of child care, but their parents as well.

C. THE BALANCE OF HARDSHIPS WEIGHS HEAVILY IN FAVOR OF PLAINTIFFS.

1. Jeremy and his parents will suffer irreparable injury if expelled from KinderCare's after-school program.

Due to the nature of Jeremy's disability, it takes him a long time to adjust to new surroundings. He has become familiar and comfortable with the KinderCare program. Decl. of S. Orr at ¶ 13. His seizures appear to be occurring with less frequency. Id. The longer he is in a setting, the more engaged he becomes, both independently and with others. Id. As his mother has noted:

17. Jeremy has some difficulty adjusting to changes in

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[14] As discussed above, even if quality care for children with disabilities is widely available, KinderCare cannot use this fact as a pretext on which to expel Jeremy.

[15] According to a recent study, fully thirty-one percent (31%) of mothers of children with severe disabilities report that they are unemployed due to a lack of available child care. Dale Bordon Fink, "My Life Was Turned Upside Down . . .": Child Care and Employment Among Mothers of Young Children with Disabilities. Wellesley College Center for Research on Women, Working Paper Series, No. 232 (1991) at 10.

> his physical settings. In general, Jeremy needs consistency and stability. Changes in his routine and environment are stressful for him and he tends to withdraw and be less inquisitive. It often takes him a long time to get comfortable in a new setting. In time, Jeremy has become acquainted with both the children and the staff and the physical environment at KinderCare. KinderCare's staff has commented to me that Jeremy has become increasingly more alert in the classroom and that he is well-liked among the children.
>
> 18. If Jeremy is disenrolled from KinderCare I believe he will experience a real set-back with respect to his increasing sociability and motivation to participate.

Decl. of S. Orr at ¶¶ 17-18. Taking Jeremy out of the KinderCare environment (in which he has been since last September) pending a determination of the merits of Plaintiffs' ADA claims would cause him undue distress that could not later be redressed through legal remedies. An injunction is the only appropriate means of ensuring that his development is not stifled during this formative stage of his life. KinderCare states, "The only consequence of such a ruling will be that Plaintiffs will have to seek alternative care -- care which is available in the surrounding community." Opposition at 28. Contrary to KinderCare's assertion, the record reflects that the Orrs are likely to have an extremely difficult time finding alternative child care for Jeremy. S. Orr Decl. at ¶ 15; Caple Decl. at ¶ 9.[16]

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[16] Polly Caple, who has been Jeremy Orr's service coordinator at the Alta Center since 1990, states:

> I have spoke [sic] at some length with the Orrs about their difficulty in finding appropriate child care for Jeremy. I am aware that over the years they have had an extremely difficult time with this. They have explored every avenue and have run into a series of problems including unreliable providers, inadequate programs or staffing and most of all prejudice against including [sic] children with disabilities. I am also aware that if Jeremy is terminated from KinderCare it will be very

Finally, title III of the ADA does not allow private plaintiffs to collect monetary damages. 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.501. Instead, their only available remedies are injunctive relief and attorneys fees. Thus, Plaintiffs have no adequate remedy at law for KinderCare's violations of title III. None of them could be compensated under the ADA for emotional distress or pain and suffering, nor could William and Sherry Orr be compensated for any lost salary associated with caring for Jeremy.

2. KinderCare will not suffer irreparable injury if the Court enjoins it from expelling Jeremy.

Enjoining KinderCare from expelling Jeremy from its program preserves the status quo -- the traditional purpose of a preliminary injunction. The only harm KinderCare alleges it may suffer if the status quo is preserved is a generalized fear that doing so may compromise its license, a fear that is unsupported by the record. There are neither supporting affidavits from KinderCare personnel nor statements from licensing officials that indicate that Jeremy's presence in any way compromises KinderCare's license. In fact, the record supports the opposite conclusion. KinderCare has retained Jeremy in its program since September 1994 and has not indicated that it has received a single warning, censure, or other action from State licensing officials.

Likewise, KinderCare does not provide facts to support its

> detrimental for him and an extreme hardship for the family. It is very difficult to find appropriate child care in this area, and I think it will be nearly impossible for the family to find appropriate alternative afterschool care if Jeremy is forced to leave KinderCare.

Caple Decl. at ¶ 9.

claim that allowing an aide to accompany Jeremy will be detrimental to its program, although this does occasion a change in the status quo. KinderCare's defense is based on speculation and conjecture. It has not engaged in meaningful discussions with the Alta Center or UCP to determine their practices regarding hiring, conducting background investigations, or training of personal care attendants. It has not asked to interview or meet with prospective aides. It has not discussed whether they are willing to delegate to KinderCare the authority to discipline or fire an aide. It has not provided its hiring qualifications to the Alta Center or UCP and had those organizations refuse to find someone who meets the criteria. Also, KinderCare has not been asked to subsidize the aide's salary, so it would suffer no financial harm by allowing an personal care attendant to accompany Jeremy. Instead of articulating concrete harms it would suffer, KinderCare simply hypothesizes that "to do so would open up a Pandora's box for KinderCare from which it could never escape." Opposition at 29.

D. PUBLIC POLICY STRONGLY FAVORS GRANTING THE INJUNCTION.

The public interest "is an important consideration in the exercise of equitable discretion in the enforcement of statutes." United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 176 (9th Cir. 1987). The court "must always consider whether the public interest would be advanced or impaired by issuance of an injunction in any action in which the public interest is affected." Caribbean Marine Services Co., Inc. v. Baldridge, 844 F.2d 668, 677 (9th Cir. 1988). Discrimination against an individual on the basis of his or her disability under title III of the ADA "is clearly contrary to public policy and the interests of society as a whole." Anderson v.

Little League Baseball, Inc., 794 F. Supp. 342, 345 (D. Ariz. 1992) (granting temporary restraining order in favor of a coach who uses a wheelchair in order to allow him to serve as an on-field base coach during Little League softball tournament).

Public policy weighs heavily in favor of sending a strong message to child care providers that they may not discriminate against children with disabilities. While parents of non-disabled children often have difficulty finding adequate, affordable child care, this difficulty is significantly amplified for parents of children with severe disabilities who are often forced to forego full-time work in order to care for their children. See supra at n. 15. Children with disabilities who are denied opportunities to attend mainstream child care programs are deprived of meaningful opportunities to learn from their non-disabled peers during their formative years. They may internalize a sense of isolation and develop a self-image of being fundamentally "different" from other children.

The only alternatives facing families like the Orrs is to forego employment or to institutionalize their children, even when they are doing well in public school. These alternatives are incompatible with the public interest. As Senator Dodd stated during the passage of the ADA, isolating children with disabilities from mainstream health clinics, child care centers, playgrounds, schools, restaurants, and stores:

> . . . severely stigmatize[s] children with disabilities and their families. While it may be more cost efficient in some cases to congregate services for children with disabilities in a centralized location, it has been determined that such costs are outweighed by the benefits to children with disabilities and their families of being able to obtain services in their neighborhoods with their friends and family

around.

135 Cong. Rec. S10721, S10722 (daily ed. Sept. 7, 1989) (Statement of Sen. Dodd, Chair, Senate Subcommittee on Children and Families); see also congressional statement of purpose in the newly-enacted Improving America's School Act, 20 U.S.C. § 1491a(c)(6) (Family Support for Families of Children with Disabilities) (1994) ("Families must be supported in their efforts to promote the integration and inclusion of their children with disabilities into all aspects of community life.").

The societal consequences of excluding children with disabilities from mainstream child care are equally devastating. Non-disabled children who are segregated from children with disabilities have no opportunity to assimilate people with disabilities into their concept of who constitutes American society.[17] Non-disabled individuals who have had positive childhood experiences with persons with disabilities are less likely as adults to discriminate against persons with disabilities in employment, public programs, and public accommodations.

E. THE OVERALL BALANCE FAVORS PLAINTIFFS.

Where the balance of the hardship decidedly favors the plaintiff, a lesser showing of likelihood of success on the merits is required; where the probability of success on the merits is high, only the possibility of irreparable injury need be shown. California v. American Stores Co., 872 F.2d 837, 840-41 (9th Cir.

[17] Non-disabled children in KinderCare's program have identified themselves to William and Sherry Orr as Jeremy's friends. S. Orr. Decl. at ¶ 7. This type of bonding is one of the values of mainstream child care.

1989), rev'd on other grounds, 495 U.S. 271 (1990); Caribbean Marine Services Co., Inc. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988); United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987).

Here, there is a substantial likelihood that Plaintiffs will succeed on the merits of their ADA claims and, almost certainly, that Jeremy will suffer unduly if he is taken out of the KinderCare environment with which he is familiar. Neither Jeremy nor his parents can recover monetary damages for discrimination under title III. Moreover, public policy weighs heavily in favor of sending child care centers a strong message that they must provide children with disabilities an opportunity to participate in their programs that is equal to the opportunities provided to nondisabled children.

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III. CONCLUSION

The Court should enjoin KinderCare from expelling Jeremy and should require KinderCare to permit an aide to accompany him in its after-school program.

Dated:

Sacramento, CA
April ____th, 1995

Washington, DC
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