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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEREMY ALVAREZ, through his next friends LYNN and JOSE ALVAREZ, LYNN ALVAREZ, and JOSE ALVAREZ Plaintiffs, v. FOUNTAINHEAD, INC., ANA SUAN, SARAH ZIMMERMAN, AND DOES 1 through 10, Defendants.	CASE NO. C.99-1202 MEJ **UNITED STATES' BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR ORAL ARGUMENT** Date: May 13, 1999 Time: 10:00a.m. Court: Magistrate Judge Maria Elena Jones

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INTRODUCTION

This case was filed by the parents of Jeremy Alvarez, a four-year old child with a disability, on his behalf and on the basis of their own claims, against Fountainhead, Inc., the owner and operator of Fountainhead Montessori Schools (“Fountainhead”), a private school program in Dublin, California. Plaintiffs allege that Fountainhead's enforcement of its “no medications” policy in regard to 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 ___, 1999. 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 Fountainhead from enforcing its “no medications” policy in regard to Jeremy. 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 seek 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 Bragdon v. Abbott, 524 U.S. 624, 141 L. Ed. 2d 540, 562 (1998); 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

As discussed below, Plaintiffs have demonstrated that they are likely to succeed on the merits of their ADA claims, that they will suffer irreparable harm if Fountainhead is not required to make a reasonable modification to its "no medications" policy, that the harm to Plaintiffs substantially outweighs any possible harm to Fountainhead if the Court orders Fountainhead not to enforce its "no medications" policy and to provide a reasonable modification to its policies with respect to Jeremy, and that public policy strongly favors granting a preliminary injunction in favor of Plaintiffs.

I. FACTS

Plaintiffs are Jeremy Alvarez and his parents, Lynn and Jose Alvarez. Jeremy Alvarez is a four-year old child who has been diagnosed with asthma. Complaint ¶ 14; Declaration of Lynn Alvarez In Support of Plaintiffs' Motion for Preliminary Injunction

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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. "As the agency directed by Congress to issue implementing regulations...and to enforce Title III in court, the Department's views are entitled to deference." Bragdon v. Abbott, 524 U.S. 624, 141 L. Ed. 2d 540, 562 (1998). 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 author of the Title III regulation, is the principle arbiter of its meaning and should be accorded substantial deference in interpreting its regulation). The Department's Technical Assistance Manual was also issued pursuant to statutory mandate. 42 U.S.C. § 12206(c)(3).

("Alvarez Decl."), ¶ 2.[3] He and his parents desire that he attend Fountainhead pre-school. Complaint ¶ 14. Currently, Jeremy's medical condition requires, and his doctor has prescribed, that Jeremy use a preventative asthma medication at home twice a day and an albuterol inhaler whenever he starts wheezing or becomes short of breath. Alvarez Decl. ¶ 3; Declaration of Henry Wax, M.D., In Support of Plaintiffs' Motion for Preliminary Injunction ("Wax Decl."), ¶ 5. Albuterol is an aerosol medication commonly prescribed for the relief of asthma and for the prevention of exercise-induced asthma. Complaint ¶ 14; Wax Decl. ¶¶ 3-4; Declaration of David Denmead, M.D., In Support of Plaintiffs' Motion for Preliminary Injunction ("Denmead Decl."), ¶ 5; Declaration of Colleen Richardson In Support of Plaintiffs' Motion for Preliminary Injunction ("Richardson Decl."), ¶ 3. Jeremy has been using the albuterol inhaler since he was two years old and he can use it himself, although he needs some supervision when doing so. Complaint ¶ 14. Plaintiffs are requesting little more than that Jeremy be supervised throughout the day by teachers who have been trained to keep watch for the symptoms of an asthma attack, and that the teachers supervise Jeremy's use of his asthma inhaler should he have need for it. Wax Decl. ¶¶ 5-7. The albuterol, if used within five minutes of the first signs of an asthmatic episode, can alleviate or lessen the severity of an asthma attack. Complaint ¶ 14.

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[3] The United States relies on the declarations provided by the Plaintiff, attached to the Plaintiffs' Motion for Preliminary Injunction.

In September of 1998, Lynn and Jose Alvarez began to investigate pre-schools for Jeremy. *Id.,* ¶ 16. They visited several schools in the area, researched curricula, sat in on classes and met several teachers and other school personnel at these various schools. *Id.* At the end of this process they chose Fountainhead because they liked the teachers and curriculum, it had a part-time curriculum, and this particular school was close to Jeremy's grandparents' home. *Id.* Jeremy's parents could not afford to send Jeremy to school for a full day of class. Alvarez Decl. ¶ 7. Thus, it was envisioned that Jeremy's grandparents would pick Jeremy up after school and care for him until the end of his parents workday. Jeremy's name was placed on the waiting list for admission. *Id.*

In late November 1998, Fountainhead notified Jeremy's parents that a space would be available beginning January 4, 1999. Complaint ¶ 17. Mrs. Alvarez, Jeremy's mother, requested application forms from Fountainhead. *Id.*, ¶ 18. During the course of this conversation, Mrs. Alvarez mentioned to Candyce Myers, a Fountainhead registration department employee, that Jeremy had asthma and needed to have his albuterol inhaler with him at all times. *Id.* Ms. Myers informed Jeremy's mother that the school had a policy of "no medications" on school grounds. *Id.* Despite this statement Mrs. Alvarez requested an application be mailed and left a message for the chief administrator, Ana Suan, to call her. *Id.*

When Ms. Suan returned the call she confirmed the school's "no medications" policy. *Id.* ¶ 12. She asked Mrs. Alvarez how bad Jeremy's asthma was and if he could come to school without his

inhaler. *Id.* Ms. Suan suggested Jeremy's father or grandparents could bring Jeremy his inhaler when he needed it. *Id.* When Mrs. Alvarez said this was impossible, Ms. Suan suggested Mrs. Alvarez speak with a teacher at the school to discuss how they had handled such situations in the past. *Id.* Ms. Suan told Mrs. Alvarez that a child with asthma had attended Fountainhead in the past without medication and had experienced an asthma attack during school hours. *Id.*, ¶ 20. According to Ms. Suan's account, school personnel handled this situation by placing the child in a janitor's closet with the hot water running and the door closed with the idea that the steam would help relieve the asthma attack. *Id.*

During the same conversation Ms. Suan also informed Mrs. Alvarez that medications could not be allowed at Fountainhead and school personnel could not be permitted to administer medications to students because Fountainhead's insurance company would not permit it. *Id.*, ¶ 21.

Mrs. Alvarez then contacted a teacher named Mary who confirmed that a child actually had been placed in the janitor's closet during an asthma attack for a "steam treatment" because the child did not have an inhaler with him at school. *Id.*, ¶ 22. Mary informed Mrs. Alvarez that, for those children who require prescription medications during the school day, a parent would come in and administer the medication. *Id.*

Although concerned about the "no medications" policy, Jeremy's parents brought him to Fountainhead on November 30, 1998 for his "try-out" day. *Id.* ¶ 23. They spoke to the teacher who was to be

Jeremy's teacher about the "no medications" policy and whether the ADA applied to Jeremy. *Id.* As a result of these conversations Mrs. Alvarez began to research the school's obligations under the ADA. *Id.* ¶ 24. Mrs. Alvarez also called some local schools and was eventually referred to the Disabilities Rights Education and Defense Fund ("DREDF"). *Id.* DREDF provided Mrs. Alvarez with information on the ADA and California Senate Bill 1663, the new law allowing child care providers to administer inhalers to children. *Id.*

On December 21, 1998 Mrs. Alvarez faxed Ms. Suan information regarding Section 504 of the Rehabilitation Act and Title II of the ADA. *Id.,* ¶ 25. The next day Ms. Suan called Mrs. Alvarez and informed her that the statutory sections faxed to her did not apply to Fountainhead because it is a private school that receives no federal funds. *Id.*, ¶ 26. A few days later, after again contacting DREDF, Mrs. Alvarez faxed Ms. Suan a brochure authored by the Child Care Law Center entitled "The ADA and Childcare." *Id., ¶ 27.* The brochure stated that all child care centers, whether federally funded or not, are considered public accommodations under Title III of the ADA. *Id.* The brochure detailed Title III requirements with regard to centers and included the phone numbers for DREDF, the Child Care Center, and the Department of Justice's ADA hotline. *Id.*

After attempting to contact Ms. Suan without success, Mrs. Alvarez, on January 5, faxed Ms. Suan written materials from the Child Care Law Center describing California Senate 1663, signed into law on September 21, 1998, allowing child care providers to

assist children with inhaled medications. *Id.*, ¶ 29. On the same day, Mrs. Alvarez, concerned that Jeremy was going to lose his place at Fountainhead, again called Ms. Suan and asked whether the school was going to meet its obligations under the ADA. *Id.*, ¶ 30 Ms. Suan stated that only the Fountainhead board of directors could change the school's policy and that the Board meets only when necessary. *Id.* After Mrs. Alvarez' suggestion that this might be such a time, Ms. Suan informed her that she would speak with Sarah Cole Zimmerman, founder and president of Fountainhead, and get back to her. *Id.*

During this same conversation, Ms. Suan stated that the "no medications" policy was uniformly enforced. *Id.*, ¶ 31. She stated that a child who used to attend Fountainhead left the school after his parents learned that he had a bee-sting allergy. *Id.* Because the school policy prohibited the child from bringing a bee-sting kit to school, his parents decided to withdraw him from school for fear of his health. *Id.*

On January 6, Ms. Suan called Mrs. Alvarez and informed her that Fountainhead's legal counsel had requested a statutory reference showing that a private school is required to comply with the ADA. *Id.*, ¶ 32. Mrs. Alvarez provided Ms. Suan with pertinent excerpts of the ADA. *Id.* On January 7 Ms. Suan again called Mrs. Alvarez. *Id.*, ¶ 33. Ms. Suan informed Mrs. Alvarez that Ms. Zimmerman stated that the school would not change its "no medications" policy until it was "forced to do so." *Id.*

In a subsequent letter faxed to Fountainhead's legal counsel on January 13, Mrs. Alvarez explained that Fountainhead is a public

accommodation within the meaning of Title III of the ADA and her belief that the school was required to make reasonable modifications to its policies so as to accommodate people with disabilities. *Id.*, ¶ 34. After numerous subsequent calls requesting a response from Fountainhead's counsel, she received a letter restating the school's position that it would not permit Jeremy to bring his medication to school. *Id.*, ¶ 37. The letter suggested the Alvarezes either enroll Jeremy in another school, come to campus to administer Jeremy's medication themselves, or provide a medically trained individual to do so. *Id.*

The Alvarezes retained counsel. *Id.*, ¶ 38. The Alvarez' counsel wrote a letter to Fountainhead's counsel containing, among other things: 1) an analysis of Fountainhead's legal obligations to Jeremy; 2) attached settlement agreements reached in several similar cases that were brought by the Department of Justice; 3)offered assistance from the American Lung Association in training Fountainhead personnel about asthma and the administration of inhaled asthma medication; 4) an explanation that Jeremy's doctor supported his admission with the inhaler to Fountainhead; and 5) that Colleen Richardson, Director of the American Thoracic Society, the medical section of the American Lung Association, fully supported Jeremy's case and volunteered to have a representative visit Fountainhead to explain the disease and its treatment and teach Fountainhead's teachers, in a few minutes, how to assist Jeremy in using his inhaler. *Id.*, ¶ 39.

On March 8, Fountainhead responded imposing several conditions and stating: "Individual health needs are the responsibility of the

parent." *Id.*, ¶ 40. Fountainhead maintained they were providing a reasonable accommodation to Jeremy by referring him elsewhere. *Id.* Counsel's letter additionally made several assertions that were in direct conflict with statements made by school administrators. *Id.*, ¶ 41.

Thus far, Jeremy has missed out on over three (3) months of pre-school. *Id.*, ¶ 44.

II. ARGUMENT

A preliminary injunction is proper here if this Court finds that the plaintiffs have demonstrated either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions of law are raised and the balance of hardships tips sharply in plaintiffs' favor. *See* Cadence Design Sys. v. Avant! Corp., 125 F.3d 824, 826 (9th Cir.), cert. denied, 118 S. Ct. 1795 (1998); 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.

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

1. Fountainhead'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."[4] 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 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

[4] There is no dispute that Fountainhead 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 ¶¶ 1, 9. Nor does Fountainhead contest that Jeremy is a person with a disability, 42 U.S.C. § 12101(2); 28 C.F.R. § 36.104 (def. of disability). In fact, they implicitly admit that Jeremy qualifies for coverage under the ADA. Declaration of Wesley E. Overson in Support of Plaintiff's Motion for Preliminary Injunction ("Overson Decl."), Exh. C, H, O, F, J, Q, T (in which counsel for Fountainhead uses language from the ADA to outline its views of its efforts to comply with the ADA). Fountainhead also does not dispute that its decision to exclude Jeremy affects his parents, 42 U.S.C. § 12182(b)(1)(E); 28 C.F.R. § 36.205. Complaint at ¶ 16, 44-45.

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.[5]

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. 42 U.S.C. § 12182(b)(3); 28 C.F.R. § 36.208.

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 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

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

service than it typically provides.[6]

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).

Entities must replace their "business as usual" 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

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[6] 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). Bragdon v. Abbott, 524 U.S. 624, 141 L. Ed. 2d 540, 562 (1998). (Upholding summary judgment on the issue of disability in favor of a patient who had HIV against her dentist after he refused to treat her.).

assist an individual with a disability in a single-sex toilet room; allowing persons to bring food into cinemas, if needed for medical reasons; or modifying a "no pets" rule to allow service animals.[7] 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.

As Congress recognized, the very reason that the ADA was needed was because "business as usual" deprived persons with disabilities, and *children with 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 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

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

theme that integration is the hallmark of compliance under the ADA.

2. Jeremy Alvarez' participation in the Fountainhead program does not create a fundamental alteration in the program.

Fountainhead offers educational services and care for children. A variety of activities are offered by Fountainhead including an academic curriculum. Plaintiffs have not asked Fountainhead to change its curriculum or teaching methods in any respect to accommodate Jeremy. Nothing in the record suggests that Jeremy's presence would detract from the ability of other children to participate fully in the activities provided by Fountainhead or prevent staff from carrying out the Fountainhead program.

Fountainhead is not being asked to change the basic nature of its services. For instance, Fountainhead has not been asked to provide medical care for Jeremy, in which case it could have argued that its program had been fundamentally altered from education and child-care to pediatric medicine.

Requiring Jeremy's teachers to be trained - in less than one hour by a trained professional from the American Lung Association - to supervise Jeremy's use of an inhaler would in no way alter the basic function of these teachers. Fountainhead's teachers have not been asked to engage in a function that is wholly different from those already performed. As part of their daily duties teachers maintain custodial supervision over children. As part of this routine, teachers watch for such common occurrences as a cut knee, a child who has soiled clothing, a child who is vomiting, a child with a rash or with a fever, or one who is not feeling well in some other way. The teachers have been trained to notice these types of

common ailments. Keeping any eye out for these ailments and their symptoms is no different than keeping an eye out for Jeremy and the symptoms, such as heavy breathing, he will exhibit during an asthma attack. In such an instance, the simple process of handing Jeremy his inhaler, watching Jeremy administer a dose of medication, and then taking the inhaler back from Jeremy is not out of the scope of Jeremy's teachers' other custodial duties, such as wiping a child's mouth or helping with a change of clothes and thus does not create a fundamental alteration in Fountainhead's program.

3. Fountainhead cannot assert that it is not permitted to require its teachers to be trained to supervise Jeremy's use of an inhaler due to its employment contracts with the teachers.

Fountainhead maintains that it cannot require its teachers to undergo training of less than one hour - provided free by qualified personnel from the American Lung Association - due to limitations imposed by the employment contracts of these teachers. *See* Overson Decl. Exh. H. Fountainhead asserts that such training would violate the employment contracts with its teachers and is "not justified by any public policy issue." *Id.* Fountainhead cannot hide behind the employment contracts that it created in order to avoid ADA liability. First, the Title III regulations promulgated by the Department of Justice under the ADA make clear that public accommodations such as Fountainhead cannot contract away their Title III obligations. 28 C.F.R. § 36.102(a)(1).

Second, Fountainhead's claim that it cannot comply with a federal civil rights statute because its employment contracts forbid it to do so is patently invalid. "A contract to do an act

forbidden by law is void and cannot be enforced in a court of justice" Tiffany v. Boatman's Institution, 85 U.S. 375, 385 21 L. Ed 868 (1873). "[C]ourts should not recognize contracts that violate law or public policy. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 373, 98 L.Ed.2d 286 (1987). "The bottom line is that courts should not enforce a contract that violates some explicit public policy." Hurd v. Hodge, 334 U.S. 24, 35, 68 S.Ct. 847, 853, 92 L.Ed. 1187 (1948). The plaintiff correctly makes the point that if an employment contract states that employees need only serve caucasians, such a limitation would obviously fail. Overson Decl. Exh. I.

Finally, contrary to Fountainhead's assertion, public policy does in fact justify that its teachers be trained to supervise Jeremy's use of his inhaler. Congress clearly sought to formulate a strong public policy in favor of equal opportunities for people with disabilities through the passage of the ADA.

B. LYNN AND JOSE ALVAREZ ARE LIKELY TO PREVAIL ON THEIR CLAIM OF DISCRIMINATION ON THE BASIS OF ASSOCIATION.

Jeremy's parents allege that they are being denied educational 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 pre-school program offered by Fountainhead is as much a service to parents as it is to children. Pre-school allows parents to work without having to leave their children unattended. This is especially so due to the fact that Fountainhead is located close enough to Jeremy's grandparents that they plan to pick him up after school in order to allow Jeremy's parents to work full time. Complaint ¶ 16. Fountainhead's program is routinely available to the parents of non-disabled children, and, if it is allowed to deny enrollment to Jeremy, this service will be denied to his parents. Lynn Alvarez has stated that she decided upon Fountainhead in part because it was near Jeremy's grandparents. Alvarez Decl. ¶ 7. This factor was necessary because the Alvarezes could only afford a part-time program. *Id.* It is logical to assume that Lynn or Jose Alvarez would therefore have to quit working full-time if Fountainhead is allowed enforce its "no medications" policy in regard to Jeremy.[8]

In fact, if this Court were to countenance Jeremy's continued exclusion, it is likely that some child care providers who currently accept children with similar disabilities and similar needs into their programs out of a perceived legal duty will not continue to do so. This will deprive not only the children with

[8] According to a 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.

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 Fountainhead is allowed to continue to exclude Jeremy from its educational program.

Jeremy is losing valuable time in his education for every day that he misses pre-school. Plaintiff presents an extensive list of studies and cases recognizing that children who do not attend pre-school are disadvantaged in relation to those who do. Plaintiffs' Motion for Preliminary Injunction and Memorandum of Points and Authorities in Support Thereof, ¶ III, (C).

Additionally, at this time Jeremy's parents have no other school to which they can send Jeremy and continue to work. Alvarez Decl. ¶¶ 7, 34. This school's proximity to Jeremy's grandparents allows them to pick him up after school and care for him until the Alvarezes finish their workday. *Id.,* ¶ 7. Thus, the Alvarez family will suffer substantial financial harm in order to send Jeremy to another pre-school.

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

The only harm Fountainhead alleges it may suffer if Jeremy is allowed to attend the pre-school with his inhaler is that it might be liable if Jeremy hurts himself in some way while taking his medication.[9] Overson Decl. Exh. C, F, H, J, O, Q, T.

9 For some time, Fountainhead also asserted that its insurance policy would not permit Jeremy to bring any medications on school grounds. Complaint ¶ 21. However, Fountainhead, presumably

Fountainhead's argument that it is exposed to increased liability in supervising Jeremy's use of an inhaler is invalid. Fountainhead does not provide facts to support its claim that allowing a teacher to supervise Jeremy's inhaler use might result in harm to Jeremy for which it would be held liable. Fountainhead's defense is based on speculation and conjecture, and should be rejected.

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 educators that they may not discriminate against children with disabilities. While parents of non-disabled children

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realizing such an excuse is invalid under the ADA, has renounced this position. *See* Overson Decl. Exh. C.

often have difficulty finding adequate, affordable child care, this difficulty is significantly amplified for parents of children with disabilities who are often forced to forego full-time work in order to care for their children. See supra at n. 8. 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 Alavarezes is to forego employment so as to care for their children. 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.").

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. Cadence Design Sys. v. Avant! Corp., 125 F.3d 824, 826 (9th Cir.), cert. denied, 118 S. Ct. 1795 (1998), California v. American Stores Co., 872 F.2d 837, 840-41 (9th Cir. 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 excluded from Fountainhead. Moreover, public policy weighs heavily in favor of sending child education institutions 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 non-disabled children.

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III. CONCLUSION

The Court should enjoin Fountainhead from enforcing its "no medications" policy and should require the Fountainhead teachers responsible for Jeremy to undergo training adequate to supervise his use of an inhaler.

Respectfully submitted,

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