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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. KINDERCARE LEARNING CENTERS, INC., Defendant	No. CIV-S-95-507 EJG PAN REPLY BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The complaint in this case alleged that KinderCare Learning Centers, Inc., has violated title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-89, by expelling a nine-year old child with a disability from its after-school child care program. Plaintiffs' motion for a preliminary injunction to prevent the expulsion is scheduled for hearing on May 26, 1995. In its opening brief as amicus curiae, the United States urged

the Court to grant the motion because Plaintiffs are likely to prevail on the merits of their claim and because the balance of hardships and the public interest weigh in favoring of granting the injunction.

This reply addresses three issues raised by KinderCare in its response:

(1) the level of deference due to the government's interpretations of title III and its implementing regulation;

(2) the proper application of Southeastern Community College v. Davis and related case law; and

(3) the limited scope of the personal services exemption of 28 C.F.R. § 36.306.

All other substantive issues raised by KinderCare, as well as those raised by Plaintiffs, are discussed at length in the United States' opening brief.

I. The United States' Interpretation of the ADA is Entitled to Substantial Deference.

KinderCare concedes, as it must, that the statutory and regulatory interpretations of an agency charged with promulgating implementation regulations are entitled to controlling weight so long as they are reasonable and not clearly erroneous or contrary to the statute or regulation. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994). While KinderCare challenges the government's analysis, in fact, as detailed in its brief, the United States' interpretations of the key title III provisions -- including the

mandate to make reasonable modifications and the limited scope of the personal services exemption -- are consistent with legislative intent, the statute, the regulation, and the Department's previously published interpretations of title III. Each of the Department's arguments is supported by citations to relevant authority.

KinderCare further suggests that the government's views should be discounted because they are put forth as amicus curiae. However, even the cases cited by KinderCare indicate that some measure of deference must be afforded the views of the agency that authored the regulations at issue, regardless of whether those views have previously been articulated. See also Martin v. Occupational Safety and Health Review Comm'n, 499 U.S. 144 (1991). In Martin, the Supreme Court held that even though the Secretary of Labor's interpretation of Occupational Safety and Health Act standards were first advanced during an adjudicative proceeding, they were entitled to deference because the Secretary was charged with establishing standards though the exercise of workplace rulemaking powers and enforcing them by issuing citations for violations of those standards. The Supreme Court held that the Secretary's litigation positions were "as much an exercise of delegated lawmaking powers as is . . . promulgation of a workplace health and safety standard," and not simply appellate counsel's "post hoc rationalizations" of agency actions that had already occurred. Id at 156 (citations omitted).

Here, the Department of Justice is the agency charged by Congress with both implementing title III of the ADA by promulgating a regulation, see 42 U.S.C. § 12186(b), and enforcing it by investigating complaints and litigating matters that cannot be resolved through voluntary compliance. See 42 U.S.C. § 12188(b)(1). The Department's position, therefore, is analogous to the position in which the Secretary of Labor stood in Martin. Hence, the Department's positions, even if first espoused in the context of this litigation, are still entitled to some deference.

II. The *Davis* Decision and Related Cases Are Not Dispositive Here.

The Supreme Court held in Southeastern Community College v. Davis, 442 U.S. 397 (1979), that entities subject to the Rehabilitation Act of 1973, 29 U.S.C. § 794, did not have to modify their programs to accommodate persons with disabilities if doing so would fundamentally alter those programs. The Davis court found that a nursing college did not have to enroll a deaf applicant who relied on lipreading for verbal communication, in part because it appeared unlikely that the applicant could succeed in the program, i.e., become a licensed registered nurse. The college's curriculum included a clinical component involving "'many situations, such as an operation room intensive care unit, or post-natal unit, [in which] all doctors and nurses wear surgical masks which would make lip reading impossible.'" Id. at 403 (quoting from the district court's decision, 424 F. Supp.

1341, 1343 (E.D.N.C. 1976)). Exempting the deaf applicant from these clinical components would fundamentally alter the nature of the college's nursing program, as she would not be fully prepared for the career of a licensed registered nurse.

Similarly, in Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994), the Third Circuit found that a Pennsylvania program designed to teach persons with physical disabilities to live independently and to become active and useful members of society did not have to be modified to include persons with mental impairments who, the program administrators had determined, could not meet the program's sole purpose: to develop fully-functioning, independent citizens. Allowing persons with mental disabilities to participate in the program with the use of surrogates as decision-makers would be fundamentally inconsistent with the level of achievement -- i.e., independent living -- expected of program participants.

The "fundamental alteration" defense from Davis was specifically incorporated into title III's reasonable modification provision, 42 U.S.C. § 302(b)(2)(A)(ii), and its implementing regulation, 28 C.F.R. § 36.302(a). KinderCare has used this defense to justify expelling Jeremy, arguing that he cannot benefit from "group child care," and, as such, it would fundamentally alter the KinderCare program to require it to retain him. This argument is specious. It ignores the fact that the Supreme Court's analysis in Davis was based primarily on the achievement-oriented nature of nursing school. KinderCare relies

on Davis and Easley to say that neither the Rehabilitation Act nor the ADA imposes any "requirement upon an 'educational institution to lower or effect substantial modifications of standards to accommodate a handicapped person.'" Defendant's Brief at 13, quoting Davis at 413. However, this argument is inapposite: simply put, KinderCare is not a competitive educational program designed to lead to a degree or professional certification, nor is it a program with a specific goal of achieving independent living. Instead, it is a program that offers children a safe, supervised place to play and rest after school while parents work or are otherwise occupied.

Jeremy attends KinderCare after attending his regular school -- it is there, and not at KinderCare, where he and his parents seek a specialized educational program designed for his particular needs. While KinderCare has set goals for healthy child development, the nature of those goals is fundamentally different from the achievement expectations of a professional school (or even an elementary school): people do not attend KinderCare or other non-competitive after-school child care programs to obtain specialized skills that will enable them to meet particular educational requirements or professional standards. There is no way to "pass" or "fail" KinderCare's program. Unlike nursing colleges, who can judge the success or failure of their programs by monitoring the rate with which their graduates go on to become licensed nurses, KinderCare has no similar measurement. Also, unlike the facts underlying Easley,

the presence of an attendant will facilitate rather than undermine Jeremy's ability to fulfil the articulated goals of KinderCare's program, including developing a healthy, positive self-image; developing social skills through group interaction; increasing attention span and following simple directions; practicing thoughtful and courteous behavior; developing fine and gross motor skills; and experiencing success through developmental activities. Defendant's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 3-4.

Here, where Jeremy's ability to enjoy the benefits of KinderCare's program does not require a change in the basic curriculum, the fact that Jeremy may not benefit to the same extent as other children does not mean that his mere presence fundamentally alters that program. KinderCare suffers no hardship by continuing Jeremy in its program, nor do other participants suffer. Plaintiffs have not asked KinderCare to provide Jeremy with any kind of disability-specific curriculum to entertain or educate him. Nor has KinderCare been asked to provide Jeremy with a remedial educational program, physical therapy, tactile stimulation, speech therapy, or any other curriculum for which specialized knowledge regarding developmental delays would be necessary. It is irrelevant, then, for KinderCare to assert that "KinderCare is not a special education program." Id. at 9. Plaintiffs are not asking KinderCare to provide Jeremy with special education, or to use

any specialized knowledge regarding developmental delays while he is in its care. Instead, Plaintiffs are merely asking KinderCare to make reasonable modifications that will enable Jeremy to have an equal opportunity to enjoy the benefits of KinderCare's program.

III. KinderCare Must Provide Personal Services to Jeremy Orr, As It Does for Younger Non-disabled Children.

Title III does not require public accommodations to afford personal services to individuals with disabilities unless such services are typically provided to non-disabled individuals. 28 C.F.R. § 36.306; see also 28 C.F.R. pt. 36, App B at 614 (July 1, 1994). Thus, KinderCare would not have to provide diapering services for Jeremy if no child in the center received such services. However, KinderCare regularly does provide diapering and toileting services for children. In this circumstance, the reasonable modifications requirement of title III, 42 U.S.C. § 12182(b)(2)(A)(ii), requires KinderCare to make its services normally provided to younger children available to Jeremy as well.[1] Indeed, KinderCare has provided diapering services to

[1] Of course, if KinderCare permits a personal care attendant to accompany Jeremy, the aide could provide personal services such as diapering or assistance with eating, eliminating KinderCare's need to provide these services directly.

KinderCare argues that it would have to supervise the aide very closely, something it suggests would be very burdensome. KinderCare has other aides in its program and concedes, as it must, that these aides do not jeopardize the quality or stability of its programs. KinderCare has done next to nothing to determine how best to structure its relationship with the aide or

Jeremy since he enrolled in its after-school program in September 1994. There is nothing in the record to suggest that this has been difficult or problematic.[2]

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with the Alta Center or United Cerebral Palsy to ameliorate any of these concerns. Even if a personal care attendant provides services that are different from those provided by other aides, there are undoubtedly ways to successfully integrate this kind of service provider into KinderCare's program. Under title III's reasonable modification requirement, KinderCare has a duty to explore ways of achieving this integration.

[2] However, there might be circumstances where diapering older children with disabilities would not be a reasonable modification. This is not the case with Jeremy.

IV. Conclusion.

The Court should issue a preliminary injunction to prevent KinderCare from expelling Jeremy and to require KinderCare to permit an aide to accompany him in its after-school program.

Dated:

May ____, 1995
Sacramento, CA

May ____, 1995
Washington, DC

Respectfully submitted,

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