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DATE: January 13, 2009
TO: Preschool Advocates
FROM: Claire Ramsey, Staff Attorney
RE: Analysis of Preschool Expulsion in California

Introduction

Preschool access for children has been on the rise over the last several years. Currently, more than 40 states offer some type of voluntary preschool program to eligible children. One of the main reasons behind the growing investment in preschool is the emergence of research showing that high-quality early learning experiences help improve school readiness and will ameliorate some of the negative impacts that children growing up in poverty often experience. While the necessary components of a high quality program are not always easy for policymakers and child development experts to agree on, it is indisputable that the only way a child can get any value out of a preschool program is to actually attend the program. Unfortunately, according to studies released by the Yale University Child Study Center, an alarmingly high number of preschool-age children are being expelled from state-funded preschool.¹

Expulsion is generally defined in the K-12 system as the complete and permanent removal of a student from an entire educational system and is widely considered the most

¹ Gilliam, Walter, *Prekindergarteners Left Behind: Expulsion Rates in State Prekindergarten Systems*, Yale University Child Study Center, May 4, 2005, pg 1.

severe disciplinary response a school or school district can impose on a student.² In the K-12 system, it is generally viewed as the discipline of last resort and tends to be preceded by numerous other disciplinary measures.³ Nationally, the K-12 expulsion rate is 2.09 students per 1,000 enrolled.⁴ The leading national survey of preschool expulsion rate documented a rate of 6.67 per 1,000 enrolled or more than 3.2 times the K-12 rate.⁵

The numbers in California mirror the national trend with 7.5 children per 1000 being expelled in California's State Preschool programs according to the Yale preschool expulsion study.⁶ That is in contrast to 2.52 children per thousand in California's K-12 system. Similar to the national data, preschool children are expelled at a rate of approximately three times the rate of children in the K-12 system. In California, however, there are basic differences between the K-12 system and the preschool system. First, full-time education between the ages of 6 and 18, the ages when children would be in the K-12 system, is compulsory.⁷ Second, the California Constitution contains a mandate that "free schools shall be kept up and supported in each district."⁸ In comparison, children in California are not required to go to preschool and although there is state-funded free preschool only low-income children are eligible.⁹ With no requirement to attend, and no right to receive educational services before kindergarten, preschool-aged children do not have the same sort of legal protections available to school-age children. These fundamental differences may help explain why California's state-funded preschool system does not have a series of laws and regulations to guide preschool expulsion.

² *Id.*

³ Gilliam, Walter, *Prekindergarteners Left Behind: Expulsion Rates in State Prekindergarten Systems*, Yale University Child Study Center, May 4, 2005, pg 1.

⁴ *Id.* at 6.

⁵ *Id.* at 1.

⁶ *Id.* at 7.

⁷ Cal. Educ. Code § 48200 (West 2008).

⁸ Cal. Const. art. 9, § 5

⁹ Cal. Educ. Code § 8200 et seq.

This memo will first outline California's state-funded preschool framework. It will then discuss the lack of legal protections related to preschool expulsion in California and will finally discuss how this creates particular concerns for children with disabilities.

California's Preschool Framework

California is one of the more than 40 states that has a publicly funded preschool system. The State has numerous state-subsidized preschool options including part-day and full-day State Preschool, Head Start, General Child Care, and private preschool programs that accept state vouchers.

In the 2006-2007 school year, over 82,500 three and four year old children were enrolled in part-day or full-day state preschool programs.¹⁰ As of October 2005, more than 89,500 preschool-age children were enrolled in the federal Head Start program, more than 44,500 in CalWORKs child care and more than 41,500 in General Child Care programs.¹¹ In total, throughout California, approximately 258,000 or roughly 25% of children between the ages of three and five received some form of state-subsidized preschool or child care.

The focus of part-day State Preschool is to give children at least one year of education prior to kindergarten. The focus, therefore, is four year olds, although if there is space available, three year olds are also eligible.¹² There are no fees required to attend part-day state preschool and the families only have to qualify as financially eligible, but do not need to prove

¹⁰ Barnett, W. Steven, et al., *The State of Preschool 2007: State Preschool Yearbook*. National Institute for Early Education Research, 2007.

¹¹ Karoly, Lynn A. et al., *Early Care and Education in the Golden State: Publicly Funded Programs Serving California's Preschool-Age Children*, 2007 at 49.

¹² Cal. Educ. Code § 8236(b)(2).

they have need for care.¹³ Full-day State Preschool, conversely, can require fees and families must be both financially eligible and have need for a full-day program.

For the last two years, California has also had another part-day preschool program called Prekindergarten and Family Literacy (PKFL). According to the Department of Education website, PKFL is “designed to facilitate a child’s transition to kindergarten.”¹⁴ This program is only open to children who are one year from entering kindergarten.¹⁵ There is also a parent education component and a literacy component.¹⁶ PKFL programs are linked to low-performing school attendance areas.¹⁷

The California Department of Education also contracts directly with child care centers, many of which offer preschool programs. Like State Preschool and PKFL, these centers, known as Title 5 centers, are required to offer an educational component. A new law, AB 2759 (Jones), which was signed by the Governor in September of 2008, seeks to consolidate the preschool components of State Preschool, both half-day and full-day, PKFL and Title 5 centers serving 3- and 4-year-olds. The Department of Education is currently implementing consolidation plans. Initially, at least, it appears that the consolidation will only affect the contract administration between CDE and the programs and will not change their focus or programmatic content.

There are two other programs where California children attend subsidized preschool. Head Start is governed by federal law and is administered directly from the federal Bureau of Head Start to local agencies. A child could also attend a non-contracted center or family child

¹³ Cal. Educ. Code § 8235(e).

¹⁴ California Department of Education, Child Care and Development Programs (visited Jan. 13, 2009) <<http://www.cde.ca.gov/sp/cd/op/cdprograms.asp>>

¹⁵ Cal. Educ. Code § 8238.4(a)(3).

¹⁶ Cal. Educ. Code § 8238.4(b)

¹⁷ *Id.*

care home that accepts vouchers. Here, the state is paying for the child's preschool education, but does not mandate the educational content of that program.

The variety of programs available through the State means that different laws and regulations apply to each. A memo written by CCLC last year identified the differences between the laws and regulations in a variety of preschool settings. Some of the major differences are staff-child ratios, definitions of preschool age child, staff qualifications and program content. There are also many places where the law is similar with regard to state-funded preschool. One instance where this is true is preschool expulsion.

California Laws Governing Preschool Expulsion

The National Institute for Early Education Research's (NIEER) "State of Preschool 2007" reports that, based on the response of state administrators, state-funded preschool programs in California can expel children for both "behavioral and non-behavioral reasons."¹⁸ The report does not cite to any official source, but it does state in a footnote that "services can be terminated for behavioral reasons that endanger the health and safety of other children or staff, for late pick-ups, or for excessive unexcused absences."¹⁹ This description suggests that either a child's action or a parent's action can precipitate an expulsion. It also suggests that expulsion from preschool is not necessarily treated as the action of last resort as it is in the K-12 system.

A review of California laws and regulations regarding state-funded preschool programs reveals that the State does not have any law or regulation explicitly governing expulsions from state-funded preschool. Furthermore, the California Department of Education, Child Development Division does not have any informal guidance on preschool expulsions for state-

¹⁸ National Institute for Early Education Research, "The State of Preschool 2007," Rutgers, 2007, Appendix A.

¹⁹ *Id.*

funded programs. Instead, the Department allows the local agency or individual program to determine its own reasons for termination. Per California Code of Regulation Title 22, section 101219(b)(7), child care centers including state-funded preschools, must articulate the conditions under which services may be terminated. These conditions must be written into the center's admission agreements and the center is required to jointly complete the agreement with the child's authorized representative.²⁰ This regulation means that each program has the discretion to determine what constitutes an appropriate expulsion.

There is, however, a much more well-defined set of laws and regulations around termination of a subsidy. As explained above, California has a complicated state-funded preschool service delivery model. Part-day State Preschool only requires a child to be of preschool age and the family's income to not exceed the income limits.²¹ All other state-funded preschool programs require a family meet these two requirements and to document need for the program.²² This means that a parent must demonstrate that work, school or another approved activity requires them to have care for their child.²³ These requirements for attendance in a state-funded preschool program means there are several valid reasons a program would be required by state law to terminate a subsidy and to dis-enroll or transfer a child from a program. For example, if a family's income exceeds the program limits, or the family is unable to provide documentation of need, a program would terminate the subsidy and the child would no longer attend the preschool program.

Outside these well-defined reasons for subsidy termination, there appears to be a considerable amount of latitude afforded to state-funded preschool programs in determining the

²⁰ Cal.Code Regs. Tit. 22 § 101219(a) (2008).

²¹ Cal. Educ. Code § 8235(c) (2008). (State Preschool allows for up to 10% over-income enrollment if all eligible children have been served. Families are allowed to be up to 15% over the income ceiling.)

²² Cal. Educ. Code § 8263(a)(2); Cal. Code Regs. Tit. 5 § 18083.

²³ *Id.*

actions that will precipitate an expulsion. This does not mean, however, that there are no unlawful reasons to expel a child; for example, expulsion based on a protected category like race or disability is prohibited. However, it does allow programs to terminate for behavioral and non-behavioral reasons as well as for actions by the child or by the parent. This grant of flexibility from the state may act as a disincentive for programs to create narrow or limited reasons for expulsion. This is problematic because it allows programs to terminate a child from a state-funded preschool program for any number of reasons, resulting in the child failing to attend and gain the benefits from a preschool education.

Preschool Expulsion and Children with Disabilities

As stated above, even though there are no specific laws governing preschool expulsion, there are laws prohibiting discrimination on the basis of disability. Both the federal Americans with Disabilities Act (ADA) and California's Unruh Civil Rights Act, state that it is illegal to discriminate on the basis of disability.²⁴ These anti-discrimination laws can clash with policies that allow programs to expel a child for behavioral reasons. If a child's behavioral problems are a result of his or her disability then the preschool cannot simply expel the child without potentially running afoul of state and federal law.

Instead, the preschool, as mandated by the ADA and Unruh, must make an individualized assessment of the child's needs.²⁵ Next, the program must determine if it can make reasonable accommodations that would allow the child to remain in the current preschool program.²⁶ Reasonable accommodations can take a variety of forms and generally, the program is required to implement any accommodation that does not fundamentally alter the

²⁴ Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. (2009); Unruh Civil Rights Act, Cal. Civ. Code § 51 et seq.

²⁵ 42 U.S.C. § 12182 (2006); 28 C.F.R. § 35.130(b)(7) (2008).

²⁶ *Id.*

program.²⁷ In limited circumstances, however, if a child’s behavior is a direct threat to other children in the program, the program can ask a child to leave without violating the ADA or Unruh.²⁸ This exception, known as the direct threat exception, is only legal if the program cannot ameliorate the behaviors that are causing the direct threat. In other words, if a reasonable accommodation or accommodations would put an end to the challenging behaviors, then the program must implement these accommodations and cannot expel a child based on the direct threat exception.

Without formal state regulations limiting expulsion, a program does not necessarily have to be formal about expulsion. The Yale Study suggests that the figures about preschool expulsion may underestimate the extent of the problem because many parents “voluntarily” take a child out of a program before the program officially expels them. It is impossible to know, without data, whether these families believed they had an actual choice in whether their child could remain in the program. In these instances, it is even harder to know whether a program could be held liable under the ADA or Unruh.

Conclusion

Preschool expulsion is a growing concern among early care and education professionals. While California does not currently have any regulations or procedures limiting the conditions for which an individual program may expel a child, many states do have policies that limit or eliminate the ability of programs to expel children in state-funded preschool programs. For example, several states including Arkansas, Kentucky, North Carolina and

²⁷ 42 U.S.C. § 12182(b)(2)(A)(i)(ii) (2006); 28 C.F. R. § 36.30 (2006); 42 U.S.C. § 12134 (2006); 28 C.F.R. § 35.130(b)(7)(8)(2008).

²⁸ 42 U.S.C. §12182(b)(3) (2009).

Texas prohibit expulsion from state funded preschool program for any reason.²⁹ As a follow-up to the 2005 Yale Study, the author, Walter Gilliam has written a policy brief that makes recommendations to help states alleviate preschool expulsions.³⁰ He suggests four policies that could be implemented at the state level that deal directly or indirectly with expulsion: (1) Mandate that programs make attempts, similar to those in the K-12 system, to assess children who are at-risk of expulsion for developmental, behavioral and medical problems and provide appropriate interventions, (2) provide for access to a mental health consultant for all state-funded preschool programs, (3) Ensure ratios of no more than 10 children per teacher, and (4) provide funding to track the number of expelled children and to implement prevention and improvement models.³¹ Currently, California does have laws or policies in place that mirror any of the recommendations and in a worsening budget environment is unlikely to have money to immediately address solutions. A new state law creates the Early Learning Quality Improvement System Advisory Committee, which will be exploring a wide range of quality improvements over two years. It is possible that this Committee will be an important forum for addressing some of the recommendations made by Gilliam around preschool expulsion.

²⁹ National Institute for Early Education Research, “The State of Preschool 2007,” Rutgers, 2007, Appendix A.

³⁰ Gilliam, Walter S. Implementing Policies to Reduce the Likelihood of Preschool Expulsion, Yale University Child Study Center, January 2008.

³¹ *Id.*