

Legal Update



CHILD
CARE
LAW
CENTER

Fall 2003

CHILD CARE LAW CENTER

221 Pine Street

3rd Floor

San Francisco, CA 94104

415-394-7144

415-394-7140 (fax)

www.childcarelaw.org

APPLYING THE AMERICANS WITH DISABILITIES ACT IN CHILD CARE SETTINGS

Since Congress passed the Americans with Disabilities Act (“ADA”) in 1990, the Child Care Law Center has worked to make families, advocates, child care providers, and others in the child care field aware that the legislation applies in child care settings, and to promote the full inclusion of children with disabilities in child care programs. The ADA protects all people with disabilities from discrimination by government programs, employers, and “public accommodations.” Child care programs, including family child care, are included within the law’s definition of public accommodation.¹ Therefore, child care providers may not automatically

refuse to admit a child with a disability into their program.

Providers who have no experience caring for children with special needs (also commonly referred to as children with disabilities) may be apprehensive and may feel ill-equipped to take on what they believe will be a challenge. However, not only is excluding children because of their disabilities unfair to the children and their families, it is also clearly illegal. Fortunately, a provider who does enroll a child with a disability in her program will likely learn quickly that few if any changes in routine will be necessary and that the child is more similar to than different from other children. Moreover, certain resources are available to help the provider care for a child with special needs.

The law does not require a child care provider to admit every child with a disability. It does, however, allow exclusion of a child only if, given the child’s individual needs, the program cannot reasonably accommodate the child. It is apparent that training for both parents and child care providers on ADA requirements and education of both parties about successful inclusion policies in child care are vital to the interests of children with disabilities and to full implementation of the ADA. We find that most

CONTENTS

CHILD CARE AND THE AMERICANS WITH DISABILITIES ACT.....	1
SAN FRANCISCO INCLUSION PROJECT.....	4
AMERICANS WITH DISABILITIES ACT: A QUICK REFERENCE.....	INSERT
INCLUSIVE CHILD CARE: A PARENT’S STORY.....	7
FILING AN ADMINISTRATIVE COMPLAINT ABOUT DISABILITY DISCRIMINATION.....	8

conflicts between parents needing accommodations for their children with special needs and child care providers who must provide these accommodations can be resolved by promoting understanding between the parties of legal requirements and models for inclusion. Only after extensive education, trainings and negotiations by a collaborative team approach is any legal action taken.

This year, most California counties have received state funding to increase the capacity of local child care providers to care for children with special needs. Many of the counties have contracted with CCLC to conduct trainings for Child Care Resource and Referral staff and child care providers on the application of disability laws in the child care setting. As we move into new initiatives, including universal preschool, it is critical that systems and programs be designed to provide inclusive services to families of children with disabilities and to provide education and training to the workforce in order to accomplish full inclusion of children with special needs.

Scope of the ADA

The law defines “disability” as a physical or mental impairment that substantially limits one’s ability to engage in a “major life activity,” such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, or learning, in an age-appropriate manner. Discrimination on this basis is prohibited against anyone who has a disability or a *history* of disability (e.g., a child with cancer that is in remission), is *regarded* as having a disability (e.g., severe burn scars), or whose *family*

member or other associate has a disability (e.g., a child whose family member is HIV-positive).

A wide range of disabilities are covered. A child whom the ADA protects may have allergies, moderate retardation, diabetes, cerebral palsy, be visually- or hearing-impaired, be non-ambulatory, or have a learning disability or mental or emotional illness. Even a child with a severe behavioral problem that is not diagnosed as a disability may be protected.

In general, a provider may deny care to a child with a disability *only if* there is no reasonable means to accommodate the child *and* one of five circumstances applies:

- Eligibility criteria that tend to screen out children with disabilities are nonetheless necessary for the program to offer its services safely. For example, a camping program that focused on river rafting could require participants to be able to swim, even if children with certain disabilities would thereby be excluded;
- Enrolling the child would require changes that would fundamentally alter the program;
- Adding “auxiliary aids and services” that would accommodate the child’s needs would impose an “undue burden” on the program;
- Accommodating the child would require architectural changes in an already-existing facility that are not readily achievable;
- The child’s condition would pose a direct threat to the health and safety of other children or staff. A determination of whether one of these circumstances applies must be made on the basis of the individual child or the program, not the disability.

Reasonable Accommodation

The first step when a provider considers enrolling a child with a disability must always be to try to find a reasonable way to accommodate the child’s needs. If adopting new practices or providing auxiliary aids and services would not fundamentally alter the nature of the program or impose an undue burden, *such change must be made*. This standard is so high that even small family child care providers would most likely be required to change policies, practices, or procedures in order to enable children with some disabilities to enroll in their programs. For example, any child care program, regardless of size, would likely be able to accommodate a child with leg braces without fundamentally changing the program’s nature. A small family child care provider, however, might not be able to accommodate a child who has a severe mobility impairment.

Whether a program alteration would impose an undue burden will vary with the individual circumstances of each child care program. The ADA defines undue burden as *significant difficulty or expense*. Factors to consider are: 1) the nature and cost of the proposed accommodation, 2) the program’s financial resources, 3) number of program employees, 4) safety requirements at the site, 5) the resources of any larger entity that owns the program, and 6) if the proposed accommodation does pose an undue burden or fundamentally alter the program, whether any reasonable alternatives exist. Auxiliary aids or services that enhance communication, for example, may enable a child with a

disability to participate in the program. It likely would not be an undue burden even for a small family child care provider to have books in Braille or audio-recorded books available for a child with a visual impairment; therefore, the provider would probably be responsible for providing these aids to accommodate the child. On the other hand, it would probably be an undue burden for a small family child care provider, but not necessarily for a large child care center, to provide a full-time interpreter for a child with a hearing impairment.²

Sometimes removal of architectural barriers is necessary to meet a child's needs – e.g., it may be necessary to replace stairs with a ramp in order to accommodate a child who uses a wheelchair. The ADA requires barrier removal in already-existing facilities³ only if it is “readily achievable” – i.e., can be done without much difficulty or expense. Note that this is an easier standard to meet than “fundamental program alteration” or “undue burden.” In addition, note that the “reasonableness” of barrier removal should be considered in a long-range context. If the provider takes no action until the first child applies who needs barriers removed, likely a time-consuming process, it will probably be too late for that child. Moreover, the cost and inconvenience of architectural changes may be financially impossible in the short term but not in the long term. Keep in mind that some architectural barriers can be addressed fairly easily. For example, consider a family child care home that most children enter through a front door that is reached by climbing several steps. If the home also has a side

door reached by an upward-sloping walkway, making the side entrance accessible may be “readily achievable” even if it requires clearing the walkway, making it smooth enough for a wheelchair, and supplying a portable ramp or adult assistance in getting the child's wheelchair over the doorsill.

Direct Threat

A child care program may deny admission to a child whose condition would pose a direct threat to other children or to program staff, but the direct threat exception is very narrow.⁴ Determination of direct threat must be made on the basis of current medical information or the best available objective evidence, considering the probable duration of the condition, the nature, severity, and probability of potential harm to others, and whether the risk can be eliminated without fundamentally altering the nature of the program. Children with HIV or AIDS, for example, are *not* considered to pose a direct threat unless they have open, oozing lesions. Medical professionals can help determine whether a child's condition poses a direct threat. Remember that the ADA requires that risk assessment be based on objective medical information whenever possible.

Assessing a direct threat can be especially difficult when faced with a behavioral characteristic or disability. Unlike with an infectious disease, it is not always clear when behavioral characteristics will pose a threat to others. Some children with behavioral disorders may require extra supervision, but it may be difficult to assess accurately how much additional supervision is

necessary. This is especially true if the child is not under the care of a medical provider for the disorder. In such cases the child care provider should discuss the child's behavior with the parents and encourage them to seek medical advice.

Surcharges for Children with Disabilities

As a general rule, a child care provider may not pass the cost of reasonable accommodations for a child with a disability along to the child's parents, although the provider may increase fees across the board for all parents to offset the cost. However, given the shortage of child care and the much greater difficulty of finding care for children with disabilities than for other children, if the cost of accommodating a child would fundamentally alter or impose an undue burden on a small child care program, in some instances parents may volunteer to cover the cost.

If this happens, the provider should inform the parents that they are not legally obligated to cover the cost if it is reasonable for the program to assume it and should reassess whether the program is reasonably able to accommodate the child. If the provider still determines that accommodation would be unreasonable for the program and no reasonable alternatives exist, the parent may wish to pay for the accommodation as a last resort. If the parents wish to pay for an accommodation that the provider does not legally have to provide (i.e., it is not a reasonable accommodation under the law) then the provider should get written documentation from the parents that it was their choice to pay for the

accommodation. The provider, however, must never *ask* the parents to cover or share the cost.

Disclosure by Parents of a Child's Disability

Parents need not disclose a child's disability or special needs; by the same token, a child care provider need not accommodate a special need that is neither obvious nor disclosed. While many parents will volunteer information to help their child get the best care, some may be reluctant to discuss their child's limitations; some may be unaware of a child's needs, and some may fail to disclose for fear that care will be denied. Fairly mild disabilities, including learning disabilities, asthma, or allergies, can be relatively invisible.

It is, therefore, good business practice for child care providers to request health records for every child. This is permissible under the ADA as long as records are sought for all children and used to assess individual needs, not to screen out children with disabilities.

Resources

Training: Special training is often unnecessary because caring for a child with special needs is often an individualized matter. Child care resource and referral agencies may have specialists available for consultation, may themselves offer periodic training for providers caring for children with disabilities, or may be able to refer providers to training offered by community agencies or community colleges.

Tax benefits: Two sections of the Internal Revenue Code offer tax benefits for removal of accessibility barriers. Section 190 allows a

deduction capped at \$15,000 for the cost of "qualified architectural and transportation barrier removal" from a facility or vehicle that the taxpayer owns.⁵ Section 44 allows small businesses to take a tax credit for expenses connected with efforts to comply with the ADA, including removal of architectural and transportation barriers, provision of interpreters, readers, taped texts, and modifications of equipment.⁶

Special equipment: Local chapters of nonprofit organizations, societies, or foundations created to support people with specific medical conditions or disabilities may have equipment available at reduced cost or for loan.

Special education services: Under the Individuals with Disabilities Education Act (IDEA) all states have special education programs for preschool children (ages 3-5) as well as school-age children, and early intervention services for children from birth through age 3. The IDEA and ADA define "disability" differently, so not all children whom the ADA protects qualify for IDEA services. Those who do qualify are entitled to services in their natural environments (for children from birth to age 3) and in the least restrictive environment (for children from 3 to 21). These environments could include child care programs.

This article is abridged from CCLC's publication Caring for Children with Special Needs: The Americans with Disabilities Act (ADA) and Child Care. Copies are available for \$25.00; contact Rakefet Avramovitz at CCLC.

1 28 C.F.R. §§ 36.102 & 36.104. Note that in some places, including California,

Massachusetts, and New Jersey, state or local laws provide greater protection against discrimination on the basis of disability than the ADA does. See, e.g., Cal. Civ. Code § 51 & Gov't Code 12926.

2 Note, however, that interpreting resources for a hearing-impaired child might be available under the Individuals with Disabilities Education Act.

3 "Already-existing facilities" are those built before the ADA's date of implementation: Jan. 26, 1993.

4 Short term illnesses, such as flu or chicken pox, are not disabilities under the ADA; children with such conditions may be excluded while they are sick.

5 For more information see Chapter 11 in IRS Publication 535, *Business Expenses*.

6 For more information see Chapter 32 in IRS Publication 334, *Tax Guide for Small Businesses*.

SAN FRANCISCO'S INCLUSION PROJECT WORKS TO IMPROVE CHILD CARE ACCESS FOR CHILDREN WITH DISABILITIES

By Jennifer Chambers

Finding appropriate, quality child care is often a difficult task for families. Nearly one-fifth of all children have a chronic physical, developmental, behavioral, or emotional disability, however, and for their families the task can often feel impossible.¹ Not only must parents of children with special needs find an open slot for their child; they must find a program that will best support their child's special needs. Parents must carefully consider the program's size, physical environment, and curriculum and assess whether the provider seems able and willing to care for the child adequately and to include the child fully in the child care setting.

At the same time that families struggle to find child care, many providers, in both family child care

homes and in child care centers, feel that they lack the training, support, and resources to provide reasonable accommodations in accordance with the Americans with Disabilities Act. Providers may need assistance to understand reasonable accommodations, how to comply with their obligations under the law, what steps they can take, and what resources are available to help them be successful in including children with special needs in their programs. Many providers are willing to care for children with special needs but do not know where to look for support.

San Francisco's Child Care Inclusion Challenge Project was designed to help these families and these providers alike. The project is a collaboration among four organizations led by the Children's Council of San Francisco in partnership with Wu Yee Children's Services – both are child care resource and referral agencies in the city – as well as Support for Families of Children with Disabilities and the Child Care Law Center. Our mission is to make quality inclusive child care the norm in San Francisco so that each child will have the opportunity to realize his or her full potential. We seek to help families who have children with special needs find and maintain quality inclusive child care and provide the various other supports that families need. At the same time, we strive to train and support child care providers so that they can offer fully inclusive child care settings. Over the past four years, the Inclusion Project has worked closely with hundreds of families, child care providers, and community-based organizations. In 1999,

the Inclusion Project was funded for the first time by the San Francisco Department of Human Services to serve families transitioning from welfare to work who have children with special needs, and the providers who serve these children. The Inclusion Project continues to receive funding from the Department of Human Services, and has also been awarded a two-year contract with the California Department of Education to support increased capacity for non-subsidized providers who serve children with special needs.

Clients

The Inclusion Project serves children with special needs from birth through age 13 (we also serve older children on a case by case basis), with no income eligibility restrictions. All of our services are free and confidential. The project maintains a very broad definition of special needs and aims to serve as many clients as possible; our clients have asthma, autism, Down syndrome, allergies, behavioral needs, and a variety of other special needs. We also serve children whose families are concerned that they may have a special need but the specific nature of the need is, as yet, undiagnosed.

The Inclusion Project works closely with the Children's Council and Wu Yee subsidy and referral departments to ensure that all parents seeking child care resource and referral information learn about the Inclusion Project. These agencies refer an average of 150 families to the project each year, and we also do extensive community outreach to encourage families and providers to contact the

Inclusion Project directly. In addition, we work closely with the child care providers who care for the children of Inclusion Project families and provide citywide trainings to the San Francisco child care provider population as a whole.

Services

Each Inclusion Project family is assigned a Family Specialist from Support for Families, who works one-on-one with the family to provide individualized assistance. The Family Specialists, who are all parents of children with special needs, help the family find, access, and maintain appropriate child care. The specialist also helps parents navigate the variety of other services available to families who have children with special needs, including the Golden Gate Regional Center (which serves families of children with developmental disabilities), California Children's Services (which serves children with serious medical conditions of a physical nature), the San Francisco Unified School District, and many other organizations. Parents also receive information about the Americans with Disabilities Act. Parents of Inclusion Project children have access to a staff attorney at the Child Care Law Center who has expertise in the disability laws as they intersect with child care. The attorney may provide information about the rights of children with disabilities and their parents and the responsibilities of child care providers under the American's with Disabilities Act and California's Unruh Civil Rights Act² to serve children with special needs. When appropriate, the attorney may advocate or negotiate on the

family's behalf with child care providers or refer them to alternate legal resources.

Families are also given opportunities to attend trainings, work with parent mentors, and attend support groups. Family Specialists who speak Spanish, Cantonese, Mandarin, Vietnamese, and Tagalog are available to work with families who speak one of these languages at home. Some families may speak to their assigned Family Specialist only once or twice, while others may consult the specialist every day for an extended period. The goal of the Family Specialist is to provide the degree of assistance that the family needs.

If a child is already in child care but the family would like the provider to receive some additional support, Child Development Specialists from the Children's Council are available through the Inclusion Project to work with providers. The Child Development Specialists all have master's degrees in child development or a related area and are available to make site visits to child care centers, family child care homes, and license-exempt providers' homes. They work with both the parents and the child care provider to gain information about what services the child is currently receiving, what the child's strengths are, and in what areas it would be helpful to assist the child. They are available to make informal assessments of the child in the child care setting and to provide feedback to the provider about how the environment and curriculum could be modified to create a fully inclusive child care setting. The Child Development Specialists

are also available to support communication between the parent and the provider.

It is our experience that many providers welcome additional training in caring for children with special needs, and we have trained staff at a variety of centers on topics specific to the population of children whom they serve. In addition, the project aims to ensure that family child care providers have an opportunity to receive group trainings. We offer a one-unit community college class on caring for children with special needs, and we collaborate with SF CARES³ to offer trainings to interested family- and center-based child care providers throughout the year on topics such as the Americans with Disabilities Act, parent provider communication, managing challenging behaviors, and inclusive child care curricula (adapting activities). Training sessions are translated into Spanish and Cantonese.

A Typical Inclusion Project Client

About a year and a half ago, a child was referred to the Inclusion Project from an after-school care program. The child had been diagnosed with Attention Deficit Disorder and Conduct Disorder and showed some negative behaviors in his program. The Child Development Specialist contacted the child's parent, the school, and the regular classroom teacher and found that the child was able to follow directions and participate in activities in his home and school setting. It seemed that his only trouble occurred in his after-school setting.

When the Child Development

Specialist visited the after-school program, it appeared that a number of factors contributed to the child's difficulty in focusing, paying attention, building a positive relationship with the staff, and behaving appropriately. The child care setting seemed very chaotic and unstructured, and the staff was quite loud and directive. The rules for the children were not clear and, as a result, the children were also very loud and ran from one activity to the next. The child's teacher had a style of working with the child that made the child feel defensive and promoted rebellious behavior.

The specialist provided written information and recommendations to the staff and director at the site about the nature of the child's needs; her recommendations included removing excess decorations and organizing the space into distinct activity areas (art area, dramatic play area, reading area, etc.). She also recommended warning the child before transitions, posting and reviewing rules with the child, and offering the child choices. She encouraged the teachers to use a notebook to communicate daily behaviors with home and suggested techniques the teachers could use in interacting with the child in a calm and collected manner.

The specialist also scheduled and facilitated a follow up meeting with the parent and after-school program staff. It was one of the first times they had met as a group. The staff and parent discussed what they noticed about the child; what the child's strengths were; what strategies were working at home, in school, and after school; and what they believed was causing the

negative behavior. This process was enlightening for all of the people involved. During this meeting the child's teacher realized that he was being strict with the child because of his own experience in school. He cared about the child but did not realize that his style of interaction made matters worse. He was willing to try some other strategies and eager to learn about the child's disability. The program modified the environment and applied some of the recommendations, checking in periodically with the parent and the specialist to review what was effective and how the child was adapting to the changes. Within a few weeks the child's behavior began to improve and he began to speak more positively about his teacher and the after-school program. The specialist remained in contact with the program and with the parent over the next few months, to ensure that things remained on track.

In this case, the Inclusion Project not only improved the child's experience in care, but also educated the staff about disabilities and raised awareness of modifying and adapting the program to be more child-centered. In doing so, it improved the quality of care for all the children enrolled. The parent went on to receive further support through a Family Specialist at Support for Families and utilized the Inclusion Project services over the next year each time there was a transition in the child's life.

Planning for the Future

Over the years the Inclusion Project has strived to provide services that are as accessible and comprehen-

sive as possible to children who have special needs, their families, and the providers who work with them. We continue to look for ways to improve our services and funds to support the continuation of our project. In the winter of 2002 the California Department of Education awarded \$200,000 to the city of San Francisco to increase the capacity of non-subsidized providers to serve children with disabilities in child care settings that meet their developmental needs. The Child Care Inclusion Challenge Project received a portion of these funds; the remaining funds were allocated to the Child Care Planning and Advisory Committee (CPAC) to create a city-wide Inclusion Advisory Committee. The Inclusion Project has been working with the advisory committee, which consists of various organizations across the city of San Francisco that serve children with special needs, parents, and child care providers.

The Inclusion Advisory Committee has been working with a consultant to identify the available services, gaps, needs, and barriers to inclusive child care in San Francisco. Once this research has been completed, the committee plans to create a comprehensive strategic plan for filling and overcoming the identified gaps and barriers. The committee intends to use the findings to improve the ways existing organizations serve their clients as well as ways in which they can expand the scope of their services. The research findings will also be used to support proposals for

additional funding for organizations that serve children with special needs.

It is the hope of the Child Care Inclusion Challenge Project that, with continued funding and community support, we will be able to provide services to all families and providers committed to supporting children who have special needs so that each and every child in San Francisco will have the opportunity to flourish in a welcoming environment.

Jennifer Chambers is the Project Manager of the San Francisco Child Care Challenge Inclusion Project, a project of the Children's Council of San Francisco.

1 Newacheck PW, Strickland B, Shonkoff JM, Perrin JP, McPherson M, McManus M et al., "Epidemiological Profile of Children with Special Health Care Needs," *Pediatrics*. 102(1): 117-123, 1998

2 Unruh Civil Rights Act, California Civil Code §51 et seq.

3 SF CARES (an acronym for Compensation and Retention Encourage Stability) increases child care providers' salaries through wage supplements or stipends.

INCLUSIVE CHILDCARE – A PARENT'S STORY

By Nina Boyle

In November of 1998 my husband and I became the proud parents to a wonderful little boy named Drew. We were among those who find themselves needing to return to work a few months later but had the good fortune of being able to place Drew in care at the childcare center where I worked as the Infant/Toddler Coordinator. He thrived in the program and loved his teachers, friends, and the total environment. I couldn't imagine a better scenario.

When Drew was about six months old and continuing through his infancy, we began to notice that he was lagging behind his peers in meeting developmental milestones. The pediatrician continued to assure us that he was still within the developmental range, but I had a sinking feeling that something was going on. When Drew turned nine months old, the director of the childcare program he was attending asked to meet with me. During this conversation she addressed the concerns I had been voicing for a while and very gently suggested that I push harder with our pediatrician to have Drew assessed further. I often refer to that conversation as one of the best and worst of my life. I felt validated and supported by the fact that she was saying she too had concerns and that she was there to support us, yet I felt overwhelmed and scared by what could lie ahead. It was that conversation that propelled me into a mission to figure out what was happening with my baby.

One month shy of his first birthday, Drew was diagnosed with Choreoathetotic Cerebral Palsy. We began the journey of discovering what this meant for him as well as what was available in the community to help him. Around that time, someone asked me if he would continue attending the same childcare program. I was stunned by that question. It had never crossed my mind that he wouldn't continue in the program, with the teachers and friends whom he had been with and loved since he was three months old. Now we just had to figure out how to make Drew's experience there as successful as possible. Within a couple of months, Drew began receiving Early Intervention Services — an Early

Intervention teacher came to his child care every week and physical and occupational therapists provided therapy and were available to consult with the child care program.

Wanting to learn all I could, I attended a Child Care Law Center workshop at Support for Families of Children with Disabilities on the topic of "Child Care and the ADA." I learned about Drew's rights within his child care setting as well as what an amazing resource the Child Care Law Center would be for future questions.

As Drew grew and developed his team (his father and me, teachers, physical and occupational therapists, and early intervention teacher) could all see that he needed seating equipment in order to participate fully in the program. We faced a great deal of red tape as to whether child care licensing and fire codes allowed "posturally supportive" seating equipment to be at the center. The Child Care Law Center was instrumental in cutting through the red tape and making sure the equipment Drew needed was available to him in the classroom. When Drew was ready to move into the toddler classroom, the childcare program told me that he would need to have a one-to-one aide for safety purposes. Again, the Child Care Law Center was there to answer my questions about this and his rights and assisted in pursuing funding for an aide through Golden Gate Regional Center.

Drew will turn five years old this November and will start kindergarten soon. He has continued at the same childcare program he began attending at the age of three months, and it has been an enriching experience for all of us. The key to his success has been the teamwork and communication among his team. With the support of

appropriate equipment and accommodations, his one-to-one aide, consultations from professionals, and, most importantly, interested teachers who are willing to learn about Drew, accept him, and truly include him and give him a sense of belonging. . . . Drew has thrived. I wouldn't change a thing.

Nina Boyle is a Phonedline Supervisor at Support for Parents.

USING ADMINISTRATIVE COMPLAINTS TO CHALLENGE DISABILITY DISCRIMINATION IN CHILD CARE SETTINGS

Parents of children with disabilities who experience discrimination on the part of child care providers may wish to file an administrative complaint with an agency charged with enforcing the rights of those protected by anti-discrimination laws. The Office of Civil Rights (OCR) of the U.S. Department of Education has jurisdiction over disability claims made against child care centers, family child care homes and other programs and services that receive federal funds from that department. In California, the Department of Fair Employment and Housing (DFEH) has jurisdiction over public accommodation claims, including discrimination on the basis of disability, that arise under the Unruh Civil Rights Act. One DFEH employee, when interviewed, did not believe the agency had ever investigated a claim of disability discrimination in a child care setting but said that such a claim would be pursued if presented.¹

Both agencies have procedures in place to accept, investigate, and attempt to resolve charges of discrimi-

nation. Aggrieved parties need not have legal representation to file complaints, as the process is relatively straightforward. Parents also have the alternative of filing a lawsuit in state or federal court, a course that is more likely to require an attorney's assistance.

Filing a Complaint

OCR complaints may be filed in person or by mail at one of the OCR enforcement offices around the country, by fax to the enforcement office, by e-mail to OCR@ed.gov, or on line at www.ed.gov/ocr/complaintprocess.html.² Complainants may use OCR's complaint form, available from the enforcement offices or on line, or simply write a letter giving their contact information (phone number is helpful but optional), the name and location of the entity that committed the act being challenged as discriminatory, a general description (not necessarily the name) of the person harmed by that act, and a description of the act(s) in sufficient detail to enable OCR to understand what occurred, when it occurred, the basis for the alleged discrimination, e.g., disability, and the names of any witnesses. Complainants will also be asked what remedy they are seeking. Under OCR policy, the agency must attempt to resolve all claims within approximately six months (180 days).

To file a claim with DFEH, a complainant should first fill out a Pre-Complaint Questionnaire, which can be obtained by calling 1.800.884.1684. The questionnaire asks complainants to indicate the type of discrimination, the treatment they experienced, why they believe the treatment was discriminatory, and names and contact information of any witnesses who

could be helpful. It also asks for the complainant's own race, primary language, and social security number, although the last is optional. DFEH will then schedule an intake interview to gather more information. Complainants are asked to come to a DFEH office if possible; otherwise the interview will be conducted over the phone. DFEH attempts to investigate and resolve complaints within one year.

Complaint Process

Within seven days of filing a complaint, OCR complainants should receive acknowledgement by letter or by telephone that their claim was received. The agency will evaluate the complaint to determine whether the allegedly discriminatory entity comes under its jurisdiction and whether it has been given enough information to determine whether discrimination has occurred. Within 30 days OCR will notify the complainant as to whether it will proceed further with the complaint. It will decline to do so if the allegation has already been decided elsewhere, if the same or similar action is pending elsewhere, or if too much time has passed since the discriminatory action took place. In this event, the parties will receive written notice of why OCR is unable to continue with the matter.

If OCR pursues the case, it moves into the complaint resolution stage. Generally, one of three methods will be used: 1) resolution between the parties, 2) agreement that addresses the allegations, or 3) investigation with findings. A resolution between the parties occurs when the office informally assists the parties in reaching mutually satisfactory solutions. No judgment is made about whether discrimination occurred, and

OCR does not enforce any agreements that are reached. An agreement that addresses the allegations gives the allegedly discriminatory entity a chance to resolve the complaint allegation. In this case, OCR does not make findings regarding compliance with the law but monitors the agreements reached. Finally, OCR can conduct a fact-finding investigation, including gathering data and interviewing witnesses, and make findings based on civil rights laws. If resolution cannot be reached once a finding of discrimination has been made, OCR will start formal proceedings to terminate federal funds or refer the case to the U.S. Justice Department.

At DFEH, after the intake interview, the interviewer drafts a formal complaint for the complainant to sign; the complaint is then served on the party charged with discrimination. This party, referred to as the respondent, must answer the complaint within 30 days, although that period may be extended for good cause, e.g., if the respondent is asked to produce documents that may take time to gather. The respondent also, at this stage, has the opportunity to resolve the complaint voluntarily. Under DFEH guidelines, a "no-fault" resolution may be reached at any time during the complaint process and the agency will generally attempt informal mediation. If the respondent agrees to a no-fault resolution and the parties can agree on a remedy, a settlement agreement will be signed. Otherwise, the complaint moves to the investigation phase.

During its investigation, DFEH will gather data and interview any witnesses. It has the authority to issue subpoenas and interrogatories (written questions that must be answered in writing under penalty of

perjury) and to take depositions (examination of witnesses orally, under oath). If no probable violation is found after investigation, DFEH will close the case. However, if probable violation is found and efforts at mediation fail, the case will move to the litigation phase.

DFEH may litigate the claim in a public hearing before the Fair Employment and Housing Commission or the respondent may move the case to civil court in lieu of an administrative hearing. In this event DFEH prosecutes the case but the complainant is the “real party in interest.”

Important Considerations

Those considering filing an administrative complaint should keep in mind that both agencies may be overburdened and unable to comply with the time frames they set as goals for taking action on complaints. The different statutes of limitations – six months in the case of OCR and a year in the case of DFEH – may inform the choice of where to file a claim.

Complainants should also remember that OCR has jurisdiction only over programs that receive fund from the U.S. Department of Education. Furthermore, OCR does not consider claims that are pending elsewhere; thus, filing with DFEH may preclude a complainant’s ability to pursue a complaint with OCR. The Department of Justice has jurisdiction over civil rights claims arising under the Americans with Disabilities Act and there is information on their website on how to go about making a claim. US DOJ has investigated disability discrimination claims in child care centers before and there are several settlement agreements

that can be accessed from their website. However, due to the number of claims the US DOJ receives and the number of different laws they have oversight for, it appears that it is less likely that this office will take a disability discrimination case that occurs in the child care setting unless it has large impact implications.

Based on research conducted by Amy Beth Cyphert, a student at Harvard Law School who worked as a law clerk at CCLC during the summer.

1 Conversation between CCLC law clerk Amy Beth Cyphert and DFEH employee.
2 For a list of enforcement offices, with addresses and fax numbers, see www.ed.gov/about/offices/list/ocr/docs/howto.html?src=rt.

GAO FINDS HEAD START PROGRAMS MEET COGNITIVE & LANGUAGE DEVELOPMENT STANDARDS

In a September 2003 report, the General Accounting Office (GAO) found that most Head Start programs met performance standards for overall curriculum and for cognitive and language development, based on data from Head Start compliance reviews conducted during 2000-2002. The report was in response to a request to GAO from Congressman George Miller (D.-Ca.) to assess Head Start programs’ compliance with school readiness performance standards that took effect in January 1998.

The report appeared while reauthorization of the Head Start program is pending in Congress. The Bush administration has advocated fundamental changes in Head Start,

seeking to require high-stakes “literacy and numeracy assessments” of four-year-olds, implement a pilot block grant in some states to replace the federal program and federal standards, and turn away from a holistic view of families’ health and social service needs to focus instead on school readiness. A Republican bill to overhaul Head Start passed the House of Representatives by a single vote during the summer, and the issue now moves to the Senate. Advocates interested in following developments can check any one of numerous web sites, including www.childrensdefense.org and www.saveheadstart.org.

The full GAO report, GAO-03-1049 entitled Head Start: Curriculum Use and Individual Child Assessment in Cognitive and Language Development, is available at www.gao.gov/new.items/d031049.pdf.

RECEIVE LEGAL UPDATE BY E-MAIL

In addition to posting *Legal Update* on its web site, the Child Care Law Center makes the newsletter available by e-mail to readers who prefer to receive it in that form. Those choosing the e-mail option will receive the newsletter sooner and in a form that is easy to circulate to others. We will also continue to use snail mail for readers who prefer a paper copy.

If you wish to receive *Legal Update* by e-mail, please send your request to Rakefet Avramovitz at ravramovitz@childcarelaw.org.

Thank you!

The Child Care Law Center thanks all of our donors who gave in 2002-03. Without donor support we would not be able to accomplish such important work. Please let us know if we have inadvertently excluded your name.

\$500+

Deborah Ballati
Carol Brownstein
Terisa Chaw
Abbey Cohen
James A. Hendriksen
Eric A. Hughes
Stacey Keare
Jane Martin
Lynn Patten
Toni Rembe
Fay Schopp
Joan Story
Donita Stromgren
Jackie White
Alba Witkin
Child Action, Inc.
Keker & Van Nest, LLP

\$200 - \$499

Rory Darrah
Rupali Das
Kate Ertz-Berger
Kurt Galvez
Linnea Klee
David Lieberman
Peter L. Mangione
Bien & Asao Rosen
Lewis & Elizabeth Sternberg
Harrison Uren
CDPI Education Fund
Child & Family Services
Solano Family & Children's
Services
Siskiyou Child Care Council

up to \$199

Mark Aaronson
E. Adefioye
Don Archer
Noreen Axelson
Doug Baird
Bob & Diana Balestreri
Marc & Debra Jo Barach

Judith Brandlin
Jane Brennan-McGovern
Sue Britson
Harold & Joan Brownstein
Warren Buckles
Steve & Marion Bundy
Mark Carlson
Lynne Carmichael
Peter Castillo
Victoria Chin
Abbey Cohen
Elizabeth Colton
Tom Copeland
Eileen Corrigan
Robert Corrigan
Arlyce Currie
Parvin Delshad
Ron Dion
Pat Dorman
Marilyn Drino
Lisa Duncan-Purcell
Bess Emanuel
Linda Erkelens
Nancy Fenstermacher
Lisa Finkelstein
Marcia & Milton Frank
Rafaela Frausto
Henry Freedman
Setsuko Furuike
Angie Garling
Marjorie Gelb
Miye Goishi
Anne Goldstein-Rugel
Deene Goodlaw
Norton & Erica Grubb
Bart & Carrie Hechtman
Holly Henson
Chris & Roda Holabird
Mary L. Hrubby
Elmer Jan
Wilma Jordan
Pauline Koch
John E. Kyle

Ronald J. Lally
Matthew & Diane Larrabee
Sandra Lewis
Sylvia K. Lieberman
Michelle Marin
Shauna & Hirsch Marshall
Diane & Moulton Martin
Amy Kaprow Mezey
Anne Mitchell
Kathy Modigliani
Stephanie & Stewart Mogel
Ruth & Lloyd Money
Merry - Ann Moore
Sharon Nelson-Barber
Neil H. O'Donnell
Rick O'Neill
Amy Osterholm
Donna Overcash
Ella Pennington
Willa Pettygrove
Raymond & Lisa Purcell
Wendy Rakower
Roberta Ranstrom
Michael Rawson
Shirley A. Reece
Roberta Ritvo
Marcia Rosen
June & Samuel Sale
Joe Schunk
Eric & Liane Scott
Martin Selznick
Marsha Sherman
Patty Siegel
Suzy & Martin Springborg
Steve & Bess Sternberg
Jim Stockinger
John Surr
Lujuana Treadwell
Jim & Kit Uren
Raymond & Marilyn Weisberg
Marcy Whitebook
Renee Wolf
Karen Wong

THANK YOU!

The Child Care Law Center extends special thanks to major supporters of our work:

- *Annie E. Casey Foundation*
- *Bernard E. and Alba Witkin Charitable Trust*
- *California Legal Services Trust Fund*
- *California Legal Services Trust Fund - Equal Access Fund*
- *David and Lucile Packard Foundation*
- *John D. and Catherine T. MacArthur Foundation*
- *Miriam and Peter Haas Fund*
- *Penney Family Fund*
- *Providian Financial Corporation*
- *San Francisco Department of Human Services*
- *San Francisco Department of Children, Youth and Families*
- *Schwab Fund for Charitable Giving*
- *Sheppard, Mullin, Richter & Hampton*
- *William Randolph Hearst Foundation*

Child Care Law Center

BOARD OF DIRECTORS

Rory Darrah, *Chair*
Joan Story, *Past President*
Peter Mangione, *Secretary*
Bob Garcia, *Treasurer*
Carol Brownstein
Arlyce Currie
Dora Lopez
Patricia Siegel
M. Patricia Thayer
Michael Zischke

STAFF

Nancy Strohl, *Executive Director*
Eve Hersheopf, *Senior Staff Attorney*
Ava Yajima, *Staff Attorney*
Angeline Ong, *Controller*
Marcia Henry, *Legal Editor*
Willow Lancaster, *Administrative Assistant*
Naomi Boas, *Program Associate*
Rakefet Avramovitz, *Program Administrator*

LEGAL UPDATE
Fall 2003

LEGAL UPDATE is published quarterly for legal services offices, child care resource and referral agencies, child care programs, and friends and supporters of the Child Care Law Center. CCLC is a national nonprofit legal services organization that uses legal tools to make high quality, affordable child care available to every child of every age, every family and every community.

Design :
Rakefet Avramovitz

Production:
Inkworks Press

Copyright 2003 Child Care Law Center



CHILD
CARE
LAW
CENTER

221 Pine Street • 3rd Floor
San Francisco, CA • 94104

RETURN SERVICE REQUESTED

Non Profit
Organization
US Postage
PAID
Permit No. 11276
San Francisco, CA