

# Legal Update



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## *APPLYING THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT IN PRESCHOOLS*

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As efforts intensify to establish universal preschool or prekindergarten (UPK) in California, advocates and policymakers must not overlook the needs of young children with special needs—or the laws protecting these children. A study in the Archives of Pediatric and Adolescent Medicine states that in 2001, 12 percent of children in the United States had special health care needs.<sup>1</sup> The precise number of preschool children with disabilities is difficult to determine, but extrapolating from the work of various experts suggests that more than 100,000 California children under five have a disability or chronic health condition.<sup>2</sup> Both the law and the children’s best interests require that these children’s needs be considered during the planning process and be fully integrated into UPK design.

To ensure that public schools meet the educational needs of children with disabilities, Congress passed the Individuals with Disabilities Education Act (IDEA) in 1975 and reauthorized it in 2004 as the Individuals with Disabilities Education Improvement Act, which will become effective on July 1, 2005.<sup>3</sup> The Act contains four parts: A through D. Part B guarantees all children with disabilities from age 3 through 18 (and in some circumstances up to age 21) a “free and appropriate public education” (FAPE) in the “least restrictive environment.” For many children the least restrictive environment will be a regular preschool classroom where they learn alongside their typically developing peers. Part C of the IDEA guarantees early intervention services to infants and toddlers up to age 3 in their “natural environments”— that is, settings that would be normal for the child’s peers of the same age who do not have disabilities. Part C also addresses the transition of infants and toddlers from early intervention services to preschool programs.<sup>4</sup> California’s equivalent, the Early Intervention Services Act, is also known as “Early Start.”

States must protect the rights of children with disabilities to a free and appropriate public education *at least* to the extent the IDEA requires, but states have the option to offer greater

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protection. California special education law is based on the IDEA and often cites or uses its language. However, the intent of the California legislature is neither to “abrogate any right provided” by the IDEA nor “set a higher standard.”<sup>5</sup> The California Department of Education is responsible for oversight of special education.

Historically most public school systems have not offered general education preschool programs, and thus finding places where preschool children with disabilities can be educated with their typically developing peers has been a challenge. National statistics show that preschool-age children are more likely than school-age children to be placed in special education classrooms with other children with disabilities. These placements are not necessarily the best way to meet the needs of children with disabilities. To provide placement in the least restrictive environment, school districts without public preschool programs at times have been obligated to pay for private preschool slots as well as the special education services needed by children in that setting. The move toward UPK thus offers a dual opportunity: to educate all preschool children together, both those with and those without disabilities, and to develop publicly funded inclusive preschool programs that may serve the needs of children and families in a more cost-effective way.

### **IDEA Part B**

Part B, guaranteeing free and appropriate public education (FAPE) to eligible preschool and school-age children, applies to all public education agencies and to any private facility where a public agency has placed a child, including preschools.

In some cases it also applies to private facilities where parents have unilaterally placed children. An eligible child is one who has a disability as defined in the IDEA and who needs special education and “related services” (defined below) due to the disability. California uses the federal definition of disability but adds additional criteria. Beginning at age 3, an eligible child is entitled to FAPE and to an individualized education program (IEP). Federal law prohibits placing eligible children on waiting lists for Part B services. If an appropriate program is full the school district must offer comparable services, but a parent may choose instead to wait for an opening in a particular program.<sup>6</sup>

In 1982 the U.S. Supreme Court ruled that to be appropriate, a placement must be 1) specifically designed to address the child’s unique needs, 2) “supported by such services as are necessary to permit the child ‘to benefit’ from the instruction,” and 3) in accordance with the IEP. The Court said the child must receive some educational benefit but not necessarily the “best education available.”<sup>7</sup> Parents may challenge a school district’s failure to provide FAPE through administrative hearings or in court; plaintiffs have prevailed in federal court on the basis of both procedural and substantive violations of special education law.

### *Least Restrictive Environment*

A fundamental requirement of the IDEA is that children be educated in the “least restrictive environment” (LRE). The law assumes that children with disabilities will be educated with typically developing children *unless* “the nature or severity of the disability of a child is such that education in regular classes with the use of

supplementary aids and services cannot be achieved satisfactorily.”<sup>8</sup> In the K-12 setting the “least restrictive environment” will often be a “regular” classroom, but because there are so many types of preschool settings, defining a “regular” preschool classroom can be difficult. This dilemma should ease if the UPK effort “regularizes” preschool settings. In any event the likelihood of meeting the needs of all children is enhanced if a continuum of placements, from less to more restrictive, is available.

The IEP team, which includes, among others, the child’s parents, the child’s regular education teacher (if applicable), the child’s special education teacher, and someone who is knowledgeable about assessment results and placement options, must make a placement decision for the child.<sup>9</sup> The team may also, at the discretion of the parent or agency, include “other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate.”<sup>10</sup> The placement may be reviewed when the IEP is reviewed and revised, which must occur at least annually.<sup>11</sup> Unless the IEP requires otherwise, placement must be in the school the child would have attended absent the child’s disability; if the IEP has required a different placement, California law requires documentation of the reason. If special equipment or a modification to the general curriculum or regular classroom would enable the child to be educated with typically developing peers, placement should occur in the regular classroom. Schools must also ensure, to the extent possible, that children with disabilities can participate in extracurricular activities.<sup>12</sup>

*"Child Find" Requirement*

States have an affirmative obligation to find all eligible children, determine whether they are receiving services, and offer special education services. To comply with this mandate, local education agencies must develop written "child find" policies and procedures. Particularly for young children, the law seeks to ensure that services will be offered when the child is young enough to maximize the child's chances of living independently as an adult.<sup>13</sup> Therefore, UPK systems and programs should be prepared to be integrally involved in these outreach or "child find" efforts.

*Assessment*

A parent or other person may ask that a child be assessed; if the request comes from a non-parent, parental consent must be obtained. Assessments must be nondiscriminatory and must take children's home language into account; if standardized tests are used, the tests must have been validated for the specific use and be given by someone trained to do so.<sup>14</sup> Parents must have input into the assessment and receive copies of reports.<sup>15</sup> Once the request is made, strict timelines apply to conducting the assessment and developing the IEP.

*Individualized Education Program*

Generally, an IEP 1) addresses the child's current level of academic achievement and functional performance, including for preschool children "as appropriate, how the disability affects the child's participation in appropriate activities"; 2) sets out measurable annual goals; 3) states what special education, related services, and supplementary aids and services the school will offer to help the child meet those goals; and 4)

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states how progress will be measured. It is developed and reviewed annually<sup>16</sup> by a team that must include the child's parents, a regular classroom teacher, a special education teacher, a school district representative, a person knowledgeable about assessments, others knowledgeable about the child, and, if appropriate, the child.<sup>17</sup> For preschool children, the "regular classroom teacher" should be an early childhood educator. California law parallels federal law on IEPs but includes further guidance on the IEP's creation and on content and notice of IEP meetings.

*Services*

When needed, the IDEA requires that children receive services beyond the regular school year. In California, children are eligible for such "extended school year" services, generally for 20-30 days, when interruption of their education may cause regression.<sup>18</sup>

The special education that eligible children must receive includes both "instructional" and "related" services such as transportation, speech pathology and audiology, psychological services, physical and

occupational therapy, recreation, school nurse services (added by reauthorization), and social work.<sup>19</sup> Under California law, special education must meet preschool children's unique needs and include both individual and small group services. Preschool special education may be offered in a variety of settings, including regular public preschool, nonsectarian or sectarian private preschool "to the extent consistent with law," family child care homes, a child's own home, and sites of preschool programs for children with and without disabilities.<sup>20</sup> Special education services for preschool children must "be geared toward a readiness for kindergarten and later school success."<sup>21</sup>

*Discipline*

Part B discipline procedures apply to all children with disabilities in both school district programs and non-school district programs in which the school district placed the child. A child with a disability may be removed from a current placement for up to 10 days under disciplinary policies that apply equally to children without disabilities, or for a longer

period if additional protections are offered. These protections also apply to children not yet found eligible for Part B services if the district had “knowledge” of the child’s disability.<sup>22</sup>

#### *Dispute Resolution*

Parents have the right to challenge a school district’s action or failure to act through an administrative process that the state must make available; the process must include voluntary mediation, filing of complaints, due process hearings with a right to appeal, and civil action in state or federal court.<sup>23</sup> Complaints are usually investigated by an independent hearing officer or the California Department of Education. If a complaint is made, the most recently agreed-upon IEP and placement remain in effect until the dispute is resolved.

#### **IDEA Part C**

Part C, formerly Part H, provides for early intervention services for eligible infants and toddlers under age 3; the California equivalent is the Early Intervention Services Act (or “Early Start”), and the Department of Developmental Services is the lead agency. Regional centers and school districts are responsible for ensuring receipt of services.

Federal law defines an eligible infant or toddler with a disability as one who needs early intervention services because the child experiences developmental delays or has a diagnosed physical or mental condition that is likely to result in developmental delay.<sup>24</sup> California also makes early intervention services available to infants and toddlers at *high risk* of disability.<sup>25</sup> States must have policies to prevent delays in services. As with Part B, if an appropriate program is full, the regional center or school district must offer

comparable services unless the parent chooses to wait for an opening in a particular program.

Eligible infants and toddlers may receive services in one or more of five developmental areas: physical, cognitive, communication, social or emotional, or adaptive. Services include family training, counseling, and home visits; speech pathology; occupational and physical therapy; psychological and social work services; assistive technology devices and services; transportation; and more.<sup>26</sup>

Services must, to the maximum extent appropriate, be provided in “natural environments”—settings that are “normal for the child’s age peers who have no disabilities.”<sup>27</sup> These may include the child’s home, child care setting, other community settings, or, for very ill children, a hospital.

A parent may ask either the regional center or local school district to assess a child for early intervention services; others, such as physicians, child care providers, and service providers may also request an assessment, but in this event the parent or guardian’s consent must be obtained prior to any testing. As with preschool children, the state must have a system to seek out eligible infants and toddlers and to coordinate efforts with other agencies, such as Head Start or health care providers, to identify eligible children.<sup>28</sup> Again, any regional or statewide UPK system should coordinate with already existing programs and systems so that UPK is an integral part of this screening and assessment system.

When the regional center or school district receives an assessment request, it must document the date, assign the family a service coordinator, give the parents written

notice, and obtain their consent, generally within 45 days.<sup>29</sup> California regulations require that the assessment include consideration of the child’s needs and strengths, how services will meet those needs and—if desired by the family—the family’s resources, priorities, and concerns related to enhancing the development of the infant or toddler.<sup>30</sup>

A meeting with the parents to develop a written individualized family service plan (IFSP) must be held within 45 days of determination of the child’s eligibility. The IFSP must focus on both the child and the family, and parents must give their written consent before services are provided.<sup>31</sup>

Parents may file written complaints regarding early intervention services with the Department of Developmental Services. Mediation or due process hearings are available to challenge a public entity’s denial of, reduction in, or termination of services. A regional center or school district may also request mediation or a hearing if a parent refuses to consent to evaluation or assessment.<sup>32</sup>

#### **Transitions**

It is of great importance for children receiving special education or early intervention services that they experience smooth transitions to the next stage of education. Federal law offers no guidance on the transition from preschool to kindergarten or first grade, but California law requires reassessment to determine what special education and related services the child still may need. If the child is found to need less intensive services, the transition process must allow the IEP team to monitor the child’s continued progress.<sup>33</sup>

Federal law does require states to

ensure a smooth transition from Part C early intervention services (or California's "Early Start") to Part B preschool special education services.<sup>34</sup> The family must be included in the transition plan and the lead agency must review the options available from the child's third birthday to the end of the school year. Transition plans must also be prepared for children who received services under Part C but are not eligible under Part B due to different criteria.<sup>35</sup>

California law requires development and implementation of an IEP before the child's third birthday and sets out a detailed time frame for the steps involved.<sup>36</sup> Upon turning three an eligible child must have an IEP that is in place and being implemented.<sup>37</sup>

### Conclusion

The requirements for educating preschool children with special educational needs are extensive and complex. Both California and federal law emphasize the importance of placing children with disabilities in regular classrooms with modifications or supports whenever possible. Those designing a UPK system must keep these principles in mind and be familiar with the legal requirements.

*This article is a brief overview of the Child Care Law Center's monograph, Preschool Inclusion Series: Individuals with Disabilities Education Act, which offers background information on California special education laws to those planning and implementing preschool programs and the legal staff with whom they work. For a copy of the full monograph please see [www.childcarelaw.org](http://www.childcarelaw.org)*

I van Dyck, et al., *Prevalence and Characteristics of Children with Special Health Care Needs*. ARCHIVES OF PEDIATRICS AND

ADOLESCENT MEDICINE, Vol. 158, No. 9, p. 884-890 (September 2004). An abstract is available at: <http://archpedi.ama-assn.org/cgi/content/abstract/158/9/884>.

2 In 2002 some 60,000 children, or 3.7 percent of California children ages 3-5, were in special education. See Brault, L., Knapp, P., and Winton, P., *School Readiness for ALL Children: Ensuring Children with Disabilities or Other Special Needs are Included in California's School Readiness Efforts*, FIRST 5 CALIFORNIA IMPLEMENTATION TOOLS FOR SCHOOL READINESS SERIES (2004). California Department of Education website: <http://data1.cde.ca.gov/dataquest/>: A snapshot of children served in December 2002 in Special Education ("student demographics") in California by age (3-5 years) and disability, available at and printed on July 15, 2004.

However, according to one report, approximately double that proportion of children (5-8 percent) have a disability or chronic condition. Dunkle, M. and Vismara, L., *A Different Kind of Test*. EDUCATION WEEK, 23(4) p.38-39 (2003), available at [www.edweek.org/ew/ew\\_printstory.cfm?slug=04dunkle.h23](http://www.edweek.org/ew/ew_printstory.cfm?slug=04dunkle.h23). Thus, one could project that twice the 60,000 who received services in 2002 are in need of supports to function or participate in a classroom with typically developing children. 3 20 U.S.C. §§ 1400-1487 (2003); P.L. 108-446, signed Dec. 3, 2004.

4 34 C.F.R. § 303.148; Cal. Gov. Code §§ 95000 *et seq.*

5 Cal. Ed. Code § 56000. See generally *id.* § 56000 *et seq.* and Cal. Govt. Code § 95000 *et seq.* (early intervention services). State Department of Education regulations implementing the Education Code provisions are at Title 5, Calif. Code of Regulations ("C.C.R.") § 3000 *et seq.*; Department of Social Services regulations implementing the Government Code provisions are at Title 17 C.C.R. § 52000 *et seq.*  
6 34 C.F.R. §§ 300.343(b)(1)(ii), 300.347(a)(6).

7 *Board of Education of the Hendrick Hudson Central School District, Westchester County, et al., v. Rowley*, 102 S.Ct. 3034 at 3041-42, 3047-8 (1982). See also *Capistrano Unif. Sch. Dist. V. Wartenberg*, 59 F.3d 884 (9<sup>th</sup> Cir.1995) at 893 and *Ferminv. San Mateo-Foster City School District*, 2000 WL 1130070 (N.D.Cal.2000) at 3.  
8 20 U.S.C. §1412(a)(5) and 34 C.F.R. § 300.550.

9 "Parent" means natural or adoptive parent; a guardian (but not the state if the child is a ward of the state); a person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or a surrogate parent who has been appointed in accordance with 34 C.F.R. §300.515. Unless prohibited by state law, a foster parent may also be a "parent" under IDEA. 34 C.F.R. § 300.20. California law includes foster parents in its definition of "parents." Cal. Ed. Code § 56028. Neither

includes the state within the definition of parent. 34 C.F.R. § 300.344.

10 Thus, a child care teacher can be brought in as a member of an IEP team.

11 34 C.F.R. § 300.343. Under the newly reauthorized IDEA legislation, no more than 15 states will be given the opportunity to be part of a pilot program which will extend IEPs up to 3 years. P.L. 108-446, § 614(d)(5).

12 *Id.* at § 300.553.

13 *Id.* at § 300.1. See also 34 C.F.R. § 303.12(d)(16).

14 34 C.F.R. § 300.352.

15 *Id.* § 300.534.

16 The newly reauthorized IDEA provides for a pilot program that will allow 15 states to experiment with multi-year (up to 3 years) IEPs. § 614(d)(5).

17 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. 300.344; Cal. Ed. Code § 56341(b) - (e).

18 5 C.C.R. § 3043(d) & (e).

19 20 U.S.C. § 1401(22); 34 C.F.R. § 300.24.

20 Cal. Ed. Code § 56441.4.

21 *Id.* at § 56441.1(b).

22 For requirements regarding disciplinary procedures see 34 C.F.R. §§ 300.523-527.

23 The newly reauthorized IDEA requires a preliminary meeting with a representative of the LEA who has decision making authority before proceeding to a due process hearing.

24 20 U.S.C. § 1432(5) and 34 C.F.R. § 303.16.

25 Cal. Govt. Code § 95001(a)(1).

26 20 U.S.C. § 1432(4)(C)&(E); see also 34 C.F.R. § 300.12.

27 34 C.F.R. § 303.18.

28 *Id.* § 303.321(c)(1).

29 34 C.F.R. §303.321(e)(2)(i) and (ii).

30 17 C.C.R. §§ 52082, 52084, and 52086.

31 20 U.S.C. § 1436; 34 C.F.R. §§ 300.340 through 300.346. See also Cal. Govt. Code § 52102.

32 17 C.C.R. § 52172.

33 Cal. Ed. Code § 56445(a) - (d). Reassessment must be conducted pursuant to Cal. Ed. Code § 56320, which requires the initial assessment to be conducted prior to placement for special education and related services.

34 20 U.S.C. § 1412(a)(9).

35 34 C.F.R. § 303.138.

36 17 C.C.R. § 52112. Newly reauthorized IDEA legislation will enable states to create a policy whereby parents of children who are eligible for Part B services and who previously received services under that part may opt to continue early intervention (Part C) services, "(which shall include an educational component that promotes school readiness and incorporates preliteracy, language and numeracy skills)...until such children enter, or are eligible under state law to enter, Kindergarten." However, such a child during the time they are receiving these services will not be entitled to FAPE. P.L. 108-446 §635(c)(1) and (c)(5).

37 17 C.C.R. § 52112(a).

## *LATINA FAMILY CHILD CARE PROVIDERS SUE FOR CIVIL RIGHTS VIOLATIONS*

In April, Latina family child care providers in Mattawa, Washington filed a class action in state court charging that defendants—the Washington Department of Social and Health Services (DSHS); certain DSHS officials, including fraud investigators; the Town of Mattawa; Mattawa’s mayor, chief of police, and a police sergeant; and Grant County and a county sheriff’s deputy—acted in concert to violate plaintiffs’ civil rights under state and federal law. The plaintiffs received payments from defendant DSHS for caring for children who receive child care subsidies. Alleging discrimination on the basis of national origin, the plaintiff child care providers, who speak Spanish as their primary language and many of whom are immigrants, are asking the court for damages and for an injunction against defendants’ unconstitutional policies and practices.<sup>1</sup>

The class action complaint is the latest installment in an ongoing series of events that, the child care providers say, is rooted in bias on the part of Mattawa officials against the town’s Spanish-speaking immigrant community. The last three years have seen the providers accused of receiving millions of dollars in fraudulent payments and blamed for a portion of the state’s budget deficit; dueling separate state investigations, one based on a fraud investigator’s report estimating that the providers had been overpaid some \$800,000 in child care subsidies and another concluding that the fraud investigation had been racially discriminatory, and, more recently, a mysterious U.S.

Department of Justice criminal investigation that some believe was launched at the behest of the defendants in the providers’ lawsuit in an effort to gain tactical advantage.

Mattawa is located in rural eastern Washington where Latino immigrants provide much of the low-wage labor necessary to keep the predominantly agricultural economy functioning. Parents in many of these families need subsidized child care in order to work, and when the saga of the Mattawa child care providers began approximately 640 local children received subsidies; an additional 150 or so attended a Migrant Council child care center.

According to plaintiffs, some 95 percent of Mattawa child care providers are Latina. Ty Duhamel of Columbia Legal Services, who is one of plaintiffs’ attorneys, told *Legal Update* that “fraud investigators and other government authorities are making sweeping accusations about an entire community and saying that Latina providers should be subject to criminal convictions for working, based on their immigrant status. Only a small fraction of the providers were not U.S. citizens or lawful permanent residents, and accusing these low-wage workers of theft when there’s no dispute they actually did the work is alarming. This is the only instance I’m aware of where governmental entities are seeking criminal convictions for the crime of caring for children.”

The plaintiffs say that, beginning in 2001, the defendant Town of Mattawa used city employees to conduct surveillance of plaintiffs and

concluded that plaintiffs were billing the state for “phantom children” and were dealing drugs. The mayor and police officials, all Anglos, then urged DSHS’s Division of Fraud Investigations (DFI) to target plaintiffs. Although DFI found no evidence to support the claims, it expanded the investigation.<sup>2</sup> The result, plaintiffs allege, was a raid in 2002 on the homes of 47 providers, while children were present, during which defendant state fraud investigators, accompanied by immigration agents allegedly present as interpreters, seized original records and interrogated and intimidated plaintiffs.<sup>3</sup>

The raids traumatized providers and children alike.<sup>4</sup> “They came right into my house. They were shouting at me and intimidating me. They kept telling me to hurry. The kids were crying and crying, holding onto me, they were terrified,” said Maria Chavez, one of the plaintiffs. Added another plaintiff, Maria Fernandez, referring to the English-only subpoenas defendants used, “I couldn’t read the paper they provided. They came demanding my immigration documents as well as my husband’s, my assistant’s and my children’s. Then they asked me for my business records and my child care license. They were threatening and demanding and told me that they could take away my license if I did not give them everything. I felt very scared, so much that I felt sick.”

Plaintiffs say in their complaint that the state’s written policy normally gives targets of fraud investigations two weeks to provide copies of subpoenaed business

records. In Mattawa, however, plaintiffs say that investigators demanded entry into their homes and *immediate* production of *years* of *original* business records—some of those produced still have not been returned. While copies were made and given to the providers, many records were returned to the wrong person or were lost. Because the generic subpoenas defendants presented were written only in English many plaintiffs were unable to understand them, and plaintiffs allege that defendants purposely misled them, telling each plaintiff that the subpoena was a court order. If plaintiffs were unable to comply immediately with defendants' demands for records covering a certain period, defendants concluded that plaintiffs had not been caring for children and that any payments covering the period were fraudulent. One provider was jailed for more than two months before she could supplement her records; Duhamel explains that she was exonerated only when counsel advised DSHS that its fraud investigators had in their possession inspection reports that proved her innocence.

Following the raids, the providers were charged with receiving approximately \$800,000 in overpayments. However, they say, state investigators' rushed investigation missed hundreds of attendance sheets that conclusively disprove overpayments; furthermore, investigators ignored required record-gathering procedures by failing to keep inventories of records seized and failing to complete chain of custody forms. In fact, the providers say, a careful look at their records shows that complicated billing procedures caused many to *under-bill*

the state.

While the DFI fraud investigators of DSHS were demanding repayment of \$800,000, the agency's internal investigation arm, the Division of Access and Equal Opportunity was looking into the providers' charges of discrimination on the part of DFI. In 2002 one of the defendants in the class action, who at the time was a DSHS regional manager, was demoted for making racial slurs, according to the *Yakima Herald-Republic*, which reported that state documents show he "referred to Hispanics as 'wetbacks' in a meeting with Spokane police [and] was demoted because it wasn't his first such offense."<sup>5</sup> In November 2003, the DSHS internal investigation determined that "the allegations of race/national origin/color discrimination [were] supported by the preponderance of evidence standard."<sup>6</sup>

In response to the overpayment charges, the providers' attorneys filed a "motion to dismiss for governmental misconduct" with the state Office of Administrative Hearings. Two weeks after the attorneys received permission to depose officials of DSHS' fraud and subsidized child care divisions the state dropped the overpayment charges. The state says a request from the U.S. Attorney's Office for the Eastern District of Washington that "any administrative overpayment actions be withdrawn as we pursue our federal criminal investigation" was "one of the reasons" it withdrew the charges.<sup>7</sup> However, according to a local newspaper "[i]t's unclear what the U.S. Attorney's Office is investigating."

That office has confirmed only that there is "an ongoing federal criminal investigation related to the Mattawa case, but wouldn't say of whom or for what."<sup>8</sup>

With all these events as background, the plaintiffs' attorneys filed their class action complaint in early April. The complaint asks the court to certify a class comprising "all persons currently licensed and all future persons who will be licensed by the Department of Social and Health Services to provide family home child care" and a subclass of "all limited English proficient (LEP) persons currently licensed and all future LEP persons who will be licensed by the Department ...". The plaintiffs say that defendants' actions violated state law against unrestricted entry into homes and their right to be free from discrimination on the basis of race or national origin in their dealings with state agencies.<sup>9</sup> They also allege violations of their rights under the Fourth and Fourteenth Amendments to the U.S. Constitution and conspiracy to violate their right to equal protection in violation of 42 U.S.C. § 1985. They are asking the court to declare that defendants' actions were illegal and to order defendants:

- not to demand immediate entry into licensed family child care homes or immediate production and removal of original documents without a warrant,
- to advise providers of their right to counsel and opportunity to quash or limit a subpoena,
- to prohibit non-DSHS law enforcement personnel from accompanying DSHS staff in criminal investigations involving warrantless searches and seizures,
- to translate crucial legal documents into the primary language of limited-English-proficient family child care providers, and

• not to investigate immigration-related matters involving family child care providers and their family members.

The plaintiffs are also seeking compensatory and punitive damages.

According to plaintiffs' counsel, defendants have removed the case from state to federal court, and plaintiffs are awaiting developments in the new forum. *Legal Update* will continue to report on the case as it evolves.

1 *Fernandez v. Dep't of Soc. & Health Servs.* (Wash. Super. Ct., Thurston Co., filed April 8, 2005). Subscribers to CLEARINGHOUSE REVIEW may access both the complaint and an earlier motion to dismiss the administrative proceeding charging plaintiffs with receipt of overpayments through the Sargent Shriver National Center on Poverty Law's Poverty Law Library: Clearinghouse No. 55587 (see [www.povertylaw.org](http://www.povertylaw.org)).

2 "We found no evidence of children who do not exist. [T]here is no double-billing." James Ditzel, Lead Mattawa investigator, DSHS "Preliminary Results of Investigation," Nove. 28, 2001, quoted in plaintiffs' *Mattawa Child Care Investigation "Phantom Children" Fact Sheet*, April 2005.

3 CCLC previously reported on these events; see "Small Town Justice" and "Wash. State Says Missing Records = Overpayment = Fraud," *LEGAL UPDATE*, Summer 2004.

4 Both a preliminary DSHS investigation in fall 2001 and a subsequent investigation report found no evidence of billing for non-existent children or double-billing (DSHS, "Mattawa Fact Sheet," March 2004). The DSHS Attorney General announced withdrawal of overpayment charges in Feb., 2005.

5 Charlene Koski, "Day-care providers gather to celebrate a victory, plan another," *Yakima Herald-Republic*, April 10, 2005.

6 Report of the Division of Access and Equal Opportunity (SAEO)

7 Charlene Koski, "DSHS says feds asked agency to withdraw charges," *Yakima Herald-Republic*, April 15, 2005.

8 *Id.*

9 Wash. Const. Art. 1, § 7; Wash. Rev. Code § 49.60.030.

## *SERVICE EMPLOYEES UNION TO REPRESENT ILL. FAMILY CHILD CARE PROVIDERS*

In a three-week vote-by-mail election held this spring, family child care providers in Illinois decided to join the Service Employees International Union (SEIU). The election was held among some 49,000 providers who care for about 200,000 children in families receiving child care subsidies. Approximately one-third of the providers cast votes, with SEIU receiving 82 percent of the vote, and 2 percent of providers voting for no union. The American Federation of State, County and Municipal Employees (AFSCME), which had previously withdrawn from the election, received 16 percent of the vote.

The new union members will now elect a negotiating committee to bargain collectively with the state to raise providers' wages and offer health care benefits. Part of this effort may be to lobby for increased child care funding as part of the state budget. Currently the providers earn as little as \$9.48 per child per day. SEIU officials said that increasing reimbursement rates and offering health coverage would benefit children by reducing turnover among child care providers and increasing stability in child care.

SEIU has been engaged in an organizing campaign among Illinois family child care providers for nearly 10 years. The union also represents 20,000 home health care workers in Illinois; it negotiated a contract with the state two years ago that secured a pay increase for these workers of 34 percent. According to the union, the vote by child care providers was the largest in state history and second nationally only to a vote by 74,000 home health care workers in Los Angeles County in 1999 to join SEIU.

Although the child care providers

are not technically state employees, the election empowering them to bargain collectively with the state through their SEIU local was held pursuant to an executive order that Illinois Governor Rod Blagojevich issued in February of this year, directing that the election be held within six weeks. In the executive order, Governor Blagojevich recognized:

- the essential services family child care homes provide to Illinois children;
- the importance of ensuring that all families have access to quality child care and of adequate reimbursement rates in accomplishing this goal;
- the need to stabilize the child care workforce;
- the importance of preserving parental choice in selecting appropriate care for children;
- the inability of families receiving child care subsidies to "effectively address concerns common to day care home providers" because families "do not control all the economic terms of the delivery of services";
- the fact that the geographic dispersal of providers hindered their ability "to effectively voice their common concerns about the State's child care assistance program, their role in the program, or the terms and conditions of their provision of services ...," and
- the importance of providers' input to improving service delivery.

Child care providers in at least 12 other states - California, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin - are engaged in similar efforts. Both SEIU and AFSCME, through the United Child Care Union, continue to strive to unionize the child care workforce.

## ***PREPARING FOR SUCCESS: HOW HEAD START HELPS CHILDREN WITH DISABILITIES AND THEIR FAMILIES***

*By Danielle Ewen and Katherine Beh Neas*

*Having a child with disabilities is not easy. Since enrolling in Head Start, I have received the best possible care for my child. They are very supportive in helping get the services that I need to help my child succeed. Head Start is always there when I need someone to talk to or when I need some help for my child. Since my child has been in Head Start, his doctors can't believe the progress that he has made. No one ever thought that it would be possible for him to get where he is now. We owe it all to Head Start.*

*Head Start parent from  
Evansdale, Iowa*

In 2004, 13 percent of the children in Head Start and Early Head Start—over 134,000 children—were diagnosed with a disability; the great majority of these children received special education and related services to address their disabilities.<sup>1</sup> Both the Head Start Act and the federal Head Start performance standards require comprehensive services for these children and their families to help to children become ready for school. Without Head Start, some of these children might have gone undiagnosed, leaving their disabilities unaddressed for years, and producing hardship for them and their families and higher special education costs for school districts. Any Head Start reauthorization proposal should retain

these comprehensive service requirements to build upon the important gains for children with disabilities already achieved.

Local Head Start grantees work in conjunction with other service providers and state and local government agencies to deliver comprehensive early education, health, and other social services to all enrolled children and their families. These services are aimed at addressing the wide range of abilities, experiences, and learning styles of the children Head Start serves. Through the process of determining the appropriate mix of services for each child, Head Start providers can identify young children as having disabilities, support the needs of children with diagnosed disabilities, and provide services to children at risk of developing a disability. In fact, entrance into Head Start can provide the first opportunity for a child's disability or developmental delay to be identified and addressed before the child enters school.

In this article we set forth details of the requirements that Head Start grantees must meet to serve children with disabilities and provide data on how the programs are meeting them.

### **Requirement of Outreach and Comprehensive, Inclusive Services**

The Head Start Act and the federal Head Start Performance Standards require local Head Start grantees to seek out young children with disabilities and provide comprehensive educational, medical, and

social services to them and their families. Head Start grantees use the following strategies for addressing comprehensively the needs of children with disabilities: outreach; collaboration and coordination with other educational, health, and social service agencies; provision of comprehensive services to children and families; and training and technical assistance to providers.

### *Grantees Must Seek Out Children with or at Risk of Developing Disabilities*

- The U.S. Department of Health and Human Services must establish policies and procedures to ensure that no less than 10 percent of each grantee's enrolled children are children with disabilities.<sup>2</sup>
- Head Start grantees must incorporate into their general outreach and recruitment activities efforts to identify and enroll eligible children with disabilities through contacts with local education agencies, medical and social service providers, and community-based organizations that serve children with disabilities.<sup>3</sup> Recruitment efforts must include children with severe disabilities, including children who have already been identified as having disabilities.<sup>4</sup>
- Staff engaged in recruitment of children must be knowledgeable about the laws and regulations prohibiting discrimination against children with disabilities, including the Americans with Disabilities Act and the Rehabilitation Act of 1973 (which bars discrimination by

recipients of federal funds).<sup>5</sup>

- Children with disabilities may not be denied placement in a program if space is available and the program can serve the child by drawing upon other resources.<sup>6</sup>

#### *Grantees Must Collaborate with Other Agencies*

- State level: A Head Start representative in each state is required to participate on the State Interagency Coordinating Council (SICC) established by the Individuals with Disabilities Education Act (IDEA). The SICC's purpose is to give advice to programs within state early intervention and education systems regarding the delivery of appropriate services to children between the ages of birth and five years who live in the state.<sup>7</sup>

- Local program level: Collaboration should focus on the needs of each child with a disability. Children with disabilities may either receive all their specialized services at the Head Start program from Head Start personnel or in partnership with other providers in the community:

- Head Start programs must establish formal linkages and coordinate programmatic efforts with the IDEA agencies administering the Section 619 Pre-School Program and the Part C Early Intervention Program for Infants and Toddlers.<sup>8</sup>
- In many communities, Head Start and local educational, health, or social service agencies share personnel who provide specialized services to Head Start children with disabilities.
- Each Head Start grantee is required to have a disability

services coordinator who works with a variety of agencies and providers to coordinate the personnel and processes of eligibility determination and service delivery for Head Start children who are suspected of having, who are at risk of, or who are diagnosed with disabilities. The disability services coordinator assists in developing inter-agency agreements so that all needed services have an appropriate funding stream and that services to children are not delayed.<sup>9</sup> Along with other staff, the disability services coordinator works with the parents of children with disabilities to help them better support their children's development.<sup>10</sup>

#### *Grantees Must Offer Comprehensive Services that Meet Children's and Families' Needs*

- Head Start agencies must coordinate their definitions, assessment criteria and processes, and services with those of the IDEA Section 619 Pre-School or Part C Early Intervention for Infants and Toddlers programs.<sup>11</sup>
  - If Head Start staff believe that a child has a disability, they must screen the child to determine whether a full evaluation is warranted.<sup>12</sup>
  - If a child requires a comprehensive evaluation, it should be conducted in partnership with the local lead agency for the IDEA Part C program (for Early Head Start infants or toddlers) or the local school district's coordinator for the IDEA Section 619 program (for Head Start pre-schoolers), and the child's parents.<sup>13</sup>
  - Once a child is diagnosed with a

disability and determined to be in need of special education and related services or early intervention services, the child must have an Individualized Education Program (IEP)—or, if the child is in Early Head Start, an Individualized Family Services Plan (IFSP). The IEP or IFSP development process involves the parent and either the Head Start program or IDEA agency. The IEP or IFSP assesses a child's level of functioning, provides goals and objectives for the child to meet, and details the specific services that the Head Start or Early Head Start program will provide to address the child's disability.<sup>14</sup> The IEP and IFSP must also identify the personnel responsible for providing the services, provide the date of initiation of the services and their duration, detail objective criteria and evaluation procedures for measuring achievement, and discuss family goals and objectives if they are related to the child's disability and when these goals and objectives are essential to the child's progress.

- If the child meets the IDEA Section 619 or Part C eligibility requirement, the IDEA agency supports the child's education and related services (for pre-schoolers in Head Start) or early intervention services (for infants and toddlers in Early Head Start). If a parent wishes his or her child to remain in Head Start, either Head Start staff or other service providers can provide the services.<sup>15</sup>
  - When a child is not eligible for IDEA-funded early childhood services but still requires specialized services, the Head Start grantee monitors the child's progress and provides supportive services to facilitate the child's development,

Head Start programs may use Head Start funds to pay for the following special education and related services for children with disabilities who are not eligible for IDEA-funded services: audiology services, physical and occupational therapy; speech or language services, including therapy and assistive devices; psychological services; transportation for children with disabilities to and from the program to clinics or other service providers; and assistive technology services or devices to help children improve their functioning to meet their IFSP or IEP objectives.<sup>16</sup>

- Special education and related services for Head Start children with disabilities must be provided by or under the supervision of personnel meeting state-defined qualifications.<sup>17</sup>
- Programs must provide training to all Head Start teachers on how to modify their teaching activities to meet the needs of children with disabilities. Special training is required for personnel in programs that have enrolled children whose disabilities require specific skills or knowledge to address.<sup>18</sup>

- The Head Start Act calls for training and technical assistance to be offered to all Head Start programs about caring for children with disabilities.<sup>19</sup> Over the past six years, this training and technical assistance has been provided through Disability Quality Improvement Centers located in each federal regional office.

### **Head Start Grantees Exceed These Requirements**

Head Start grantees go above and beyond the requirement that no less than 10 percent of the children they serve be children with disabilities, and they are responding to the

needs of children with all types of disabilities. In 2004, 13 percent of Head Start's enrolled children had disabilities; the number of enrolled children with disabilities has increased by more than 17,000 children since 1997.<sup>20</sup> The most common disability identified in Head Start children in 2002 was speech and language impairments. However, Head Start grantees are serving children with all types of disabilities, including children with multiple disabilities, autism, orthopedic impairments, mental retardation, learning disabilities, vision impairments, hearing impairments, traumatic brain injury, and developmental delays. In 2002, the great majority of children identified with a disability (93 percent) received special education and related services through Head Start.<sup>21</sup>

### **Conclusion: Head Start Should Retain Comprehensive Requirements**

Head Start programs provide critical comprehensive services for young children with or at risk of developing disabilities. Both the Head Start Act and federal Head Start performance standards require a mix of outreach, early child assessments, and evaluations, followed by comprehensive educational medical, and social services provided in an inclusive, integrated environment. This mix of services, in turn, helps to address the needs of children with disabilities and their families while helping prepare children for school. It is critical that any Head Start reauthorization proposal retain the protections and services the federal Head Start

performance standards require for children with disabilities and their families, as well as the inclusive programming that benefits children with and without disabilities.

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1 Derived from CLASP calculations of 2004 PIR data. As used here, "Head Start" includes Early Head Start unless otherwise indicated.

2 Head Start Act, Section 640(d).

3 Head Start Performance Standards, Section 1308.5(a); Guidance to Head Start Performance Standards, Subpart C.

4 Head Start Performance Standards, Section 1308.5(f).

5 Head Start Performance Standards, Section 1308.5(b).

6 Head Start Performance Standards, Section 1308.5(c) & (d).

7 Individuals with Disabilities Education Act, Sections 641(b)(1)(H) & (c).

8 Head Start Act, Sections 640(d), 645A(b)(8).

For more information about IDEA early intervention and preschool programs, see the lead article in this issue of *Legal Update*:

"Applying the Individuals with Disabilities Education Act in Preschools.

9 Head Start Performance Standards, Subpart B.

10 Head Start Performance Standards, Section 1308.21; Guidance to Head Start Performance Standards, Subpart G.

11 Head Start Performance Standards, Part 1308, Sections 1304.20(f)(2)(ii), 1304.21(a)(1)(ii).

12 Head Start Performance Standards, Sections 1308.6(b) & (d).

13 Head Start Performance Standards, Section 1038.6(e).

14 Head Start Performance Standards, Section 1308.19; Guidance to Head Start Performance Standards, Subpart B.

15 Head Start Performance Standards, Section 1308.4; Guidance to Head Start Performance Standards, Subpart B.

16 Head Start Performance Standards, Section 1308.4(h).

17 Head Start Performance Standards, Section 1308.4(k).

18 *Id.*; Guidance to Head Start Performance Standards, Subpart B.

19 Head Start Act, Section 648.

20 Schumacher & Irish, 2003; Schumacher, R., & Rakpraja, T. (2003), *Head Start Program Information Report Data for 1997 and 2001 Program Years: Head Start Children*, Washington, DC: Center for Law and Social Policy.

21 Schumacher & Irish, 2003.

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