UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

MELISSA BURRIOLA, for herself and as next friend of **JORDAN TRAVIS BURRIOLA**	)	Case No.:
Plaintiff	)	JUDGE:
v.	)	**MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT**
GREATER TOLEDO YMCA, et al.	)	Thomas J. Zraik (0023099) 5579 Monroe Street Sylvania, Ohio 43560 Telephone: (419) 882-2559 Facsimile: (419) 882-1425

Plaintiff Melissa Burriola, on behalf of her son, Jordan, a child with a disability, moves the court pursuant to Civ. R. 65, for a preliminary injunction requiring the defendants to forthwith reinstate Jordan, with appropriate modifications in place, into their daycare program. Grounds for this Motion are fully set forth in plaintiff's accompanying Memorandum of law

Respectfully submitted,

_____
Thomas J. Zraik,
Attorney for Plaintiff

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiff Melissa Burriola brings this action pursuant to Title III of the Americans With Disabilities Act of 1990, 42 U.S.C. 12180 et seq. ("ADA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 ("Section 504"), and parallel state law seeking declaratory and injunctive relief and damages. Plaintiffs allege that defendants have denied Jordan Burriola the full and equal enjoyment of the benefits of, and the opportunity to participate in, defendants' program, solely on the basis of his disability.

Jordan is seven-years-old and will be eight on his birthday, October 10, 2000. Jordan is a child diagnosed with autism, a pervasive developmental disability commonly attributed to neurological etiology. Autism is an impairment affecting verbal and nonverbal communication, as well as social interaction. Other characteristics often associated with autism include abnormal sensory responses, engaging in stereotyped motor movements or mannerisms, and resistance or reactivity to environmental changes or change in daily routine. [See 34 C.F.R. 300.7(c)(1)(I)] Jordan exhibits many typical characteristics associated with autism including repetitive activities and stereotypic movements and echolalia

Jordan's mother, Melissa Burriola, is employed full time and requires daycare for her children while she is at work. When school is in session, Jordan typically requires after-school daycare for between two and three hours a day. However, when school is closed during a break, holiday, or for inclement weather, Jordan requires full time daycare. For approximately two years, Mrs. Burriola obtained daycare services for Jordan at the Greater Toledo YMCA daycare program operated by a branch affiliate, the West Family YMCA, on the premises of Calvary United Methodist Church. Officials of the West Family YMCA notified Mrs. Burriola by letter dated September 6, 2000, that Jordan would be terminated or "disenrolled" from the daycare program as of September 8, 2000, due to behavior that is inextricably connected to Jordan's autism. [Exhibit 1: West Family YMCA September 6, 2000 letter.] Jordan's removal from the daycare

program was based on his disability and defendants' refusal to provide him with reasonable modifications, such as had previously proved effective in allowing him to benefit from and to participate in defendants' childcare program. Thus, defendants discriminated against Jordan on the basis of his disability and, as such, violated federal and state laws guaranteeing persons with disabilities the right to integrate into the mainstream of society and to be free from discrimination.

II FACTS

Jordan Burriola was born October 10, 1992, and is the older brother of Michael Burriola, age six-years. Both reside in Toledo, Ohio, with their mother, Plaintiff Melissa Burriola.

Jordan was diagnosed at age four-years as having autism. Autism, a pervasive developmental disability, is considered to be a neurological impairment that is characterized by significant deficits in verbal and nonverbal communication, the tendency to engage in repetitive and stereotyped movements, and unusual reactions to changes in routines or environment. 34 C.F.R. 300.7(c)(1) [1]

Jordan's autism is characterized by many of the same symptoms described above. For example, he becomes easily frustrated with changes in his daily routines and engages in repetitive activities and sensory movements such as hand flapping, beating his chest, pounding his head, and running into walls. Jordan also exhibits echolalia on occasion. Jordan "shuts down" when his senses become overloaded. Shutting down is characterized by vocalizations or nonsense verbalizations, quick repetitive arm and leg movements, running around in circles, yelling and screaming, or crying. [Exhibit 2: Melissa Burriola Declaration]

Jordan's autism significantly affects his daily life activities such as learning, social interaction with peers and adults, and other major life activities. As a child with autism, Jordan has been identified as a handicapped child and placed into a special education program for children with autism, where he is provided specially designed instruction and related services to meet his unique needs pursuant to the Individuals With

[1] See also the "DSM-IV", Diagnostic and Statistical Manual Of Mental Disorders, Fourth Ed., American Psychiatric Association (299.00 Autistic Disorder)

Disabilities Education Act, IDEA, 20 U.S.C. 1401 et seq., and Ohio law, ORC § 3323.01 et seq. [Exhibit 3: Jordan's 2000 – 2001 IEP.]

Jordan attends the M.O.D.E.L.[2] School, which is a community or charter school under the laws of Ohio, specifically designed to serve autistic children. The purpose of the M.O.D.E.L. School is limited to providing special education and related services to children with autism. The M.O.D.E.L. School is a public school as that term is defined under R.C. § 3314.01 and as such, it has the same obligation to provide a free appropriate public education to students with disabilities as any other public school. Jordan has attended the M.O.D.E.L. School since the 1998 – 1999 school year.

Plaintiff, Mrs. Burriola, is employed from 9:00 a.m. to 5:00 p.m. and therefore both Jordan and his brother require after-school daycare services, and full time daycare at times when school is closed. Jordan has attended defendants' daycare program for more than two years, beginning with the 1998–1999 school year, and his brother began attending the program in September 1999. Mrs. Burriola selected the Greater Toledo YMCA daycare program because the site is nearest to the plaintiffs' home and because the program offers tuition on a sliding scale and is affordable. The West Family YMCA branch, located at 2020 Tremainsville Road in Toledo, is a branch affiliate of the Greater Toledo YMCA and operates the daycare program where Jordan and his brother were enrolled. The daycare program itself, however, is conducted on the premises of Calvary United Methodist Church, located in Toledo at 3939 Jackman Street. In addition to the after-school daycare, the YMCA program provided full-day childcare for both children during times when school was not in session.

Defendants' daycare program is licensed to serve fifty-four children, however, as many as eighty or ninety may be enrolled for such services. Eligibility for daycare services is based solely on the availability of space. [Exhibit 4: Jerome Kelly Declaration] Kathy Miley is the Director of Family Services at the West Family YMCA and her immediate supervisor is Todd Tibbits. The Executive Director of the West Family YMCA is Henry Presseller. The daycare program is supervised by a Facility Director, who maintains an on-site office located at the Calvary United Methodist Church. In addition to the daycare Facility Director, at least two other staff are employed as

[2] M.O.D.E.L. is an acronym for Multiple Options for Developmental & Educational Learning

"counselors" or teachers to provide direct daycare services to the children enrolled in the program. Fees for the daycare are determined on an individual basis according to family income, the number of daycare hours, and the number of children per family enrolled in the program. An unsubsidized weekly fee ranging from $80.00 to $90.00 per child is charged if the family's income exceeds the benchmark established by the agency. In Jordan's case, Mr. Burriola paid a monthly fee of approximately $30.00 to $60.00 for Jordan's daycare.

In addition to other government funding, the West Family YMCA received a $4,000.00 grant for summer 2000, through the Toledo Community Recreation Committee, which distributed funds including $100,000 allocated by the City of Toledo, in support of youth and family programming.

Because of Jordan's disability, Mrs. Burriola informed the defendants that he would need some minor accommodations to allow him to be successful at the daycare program. In fact, the M.O.D.E.L. School offered to provide training to the employees and staff of the daycare program, at no cost, on the nature of autism and how to work with autistic children in general, and specifically with Jordan. Administrators at the West Family YMCA, however, did not make attendance at this training mandatory and only two persons directly involved with Jordan elected to attend. [Exhibit 5: Joan McCarthy Declaration; Exhibit. 4 *id*.]

The modifications Jordan requires to be successful in the daycare program are inexpensive and minor in nature, requiring primarily that the person or persons supervising him become informed about autism and how to relate to Jordan. [Exhibit 6: McCarthy August 8, 2000 letter]

Of the two daycare staff who attended the training by the M.O.D.E.L. School, one left her employment in the daycare program almost immediately and the second resigned from the program approximately one month later. As a result no daycare staff remained with any training on the topic of autism or how to work with Jordan.

Because no one remaining at the daycare program was willing to become informed about autism, or trained in working with Jordan, his autistic characteristics became exacerbated and he was ultimately forced out of the program on September 8, 2000. [Exhibit 1, letter. *id*.]

West Family YMCA officials promised to hire a "teacher" during summer 2000 qualified to work with Jordan and other children with disabilities in the daycare program. No one was ever hired, however, even though funding for such a position either was or is available. Ms. Miley repeatedly attempted to hire unqualified persons to fill this position and, in addition, repeatedly interfered with one (trained) staff member who had attempted to work with Jordan. [Exhibit 4, Kelly. *id*.]] Ms. Miley informed other staff members that she wanted to get Jordan out of the daycare program because, in her opinion, "he doesn't belong here". [Exhibits 4, Kelly; 5 McCarthy. *id*.] Ms. Miley, in fact, actively prevented the modifications and accommodations that Jordan needed from being implemented. [Exhibits 4, Kelly; 2 Burriola. *id*.]

According to a the former on-site Facility Director, who provided services to Jordan for approximately one year, with the appropriate modifications in place Jordan is easily handled and behaves normally in the daycare program. [Exhibit 4, Kelly. *id*.] Primarily, the persons working with Jordan need to become informed about autism and to provide Jordan the structure and guidance he needs.

II ARGUMENT

In order to prevail on the motion for a preliminary injunction, the court must consider, (1) plaintiffs' likelihood of success on the merits of the claim, (2) whether the plaintiffs will suffer irreparable harm, (3) the probability of substantial harm to others and (4) whether the public interest is advanced. ***Washington v. Reno***, 35 F.3d 1093, 1099 (6th Cir. 1994). These are not prerequisites but rather "factors to be balanced" ***In Re Delorian Motor Co***., 755 F.2d 1223, 1229(6th Cir. 1985).

> None of the four factors is to be deemed conclusive on its own "and" each need not be viewed in isolation from the others, solely as an independent variable." ***Blue Cross & Blue shield Mutual Of Ohio v. Columbia /HC4 Healthcare et al***, 110 F.3d 318, 334 (6th Cir.1997).

The issues presented for review in the context of this motion are relatively clear. The court must determine whether or not the plaintiffs are likely to succeed on their claims that the defendants illegally terminated Jordan from the daycare program operated by the West Family YMCA, and that the defendants failed to maintain or provide

reasonable modifications to its policies, practices and procedures to allow Jordan to benefit from and to participate in the daycare program operated by the defendants.

The Plaintiffs have Shown A Likelihood Of Success On The Merits As Indisputable Facts Show That The Plaintiffs Are Entitled To Relief Under The ADA

> The plaintiffs' burden regarding likelihood of success on the merits is to show,
>
> "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly towards the party requesting the preliminary relief." ***Farm Labor Organizing Committee v. Ohio Highway Patrol***, 991 F. Supp. 895, 900 (N.D. Ohio 1997).

In this case, the plaintiffs must show that Jordan is qualified for defendants' daycare program and was either denied a reasonable modification, or an adverse decision was made against him on the basis of his disability. ***McPherson v. Michigan High School Athletic Ass'n, Inc.,*** 119 F.3d 453, 460 (6th Cir. 1997). citing ***Roush v. Weastec Inc.*** 96 F3d 840 (6th Cir. 1996). The showing for discrimination under the ADA is similar to that under Section 504 of the Rehabilitation Act, and construing the cases in one is instructive for construing cases under the other. ***Andrews v. State of Ohio*** 194 F3d 803, 807 (6th Cir. 1997). Further, the 6th Circuit recently stated that while the standards used in Section 504 and the ADA are largely the same, there are differences. For example, in Title III of the ADA, the phrase "solely by reason of" is not mentioned. ***McPherson*** id. p. 465 In large part this distinction is meaningless since the plaintiff here need only establish that he is disabled and is either discriminated against on the basis of his disability or was denied a reasonable accommodation. ***McPherson*** at pg. 466

Jordan is a person with a disability and the defendants, a private entity providing public accommodations, have excluded Jordan from, and denied him the benefits of the defendants programs, services or activities on the basis of his disability or have otherwise subjected him to discrimination. There can be no dispute that Jordan Burriola is a "qualified individual with a disability" under the ADA. The term "disability" is defined in the Act as:

> "* * * any physical or mental impairment that substantially limits one or more of the major life activities of the individual."
> See 42 U.S.C. 12102(2); see also 28 C.F.R. 36.104; 28 C.F.R. 35.104.

The term "physical or mental impairment" means any physiological, or mental disorder affecting body systems, including neurological, special sense organs, respiratory, cardiovascular and digestive. The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. Id

Jordan's autism affects his ability to communicate effectively with his peers and adults, to interact appropriately with his peers and adults, and causes him to engage in, stereotypic sensory movements, repetitive activities and other types of atypical behavior. [Exhibits 2, Burriola; 4, Kelly; 5 McCarthy. *id*.] In addition, Jordan is identified as a handicapped child and is provided special education and related services to meet his unique disability needs, pursuant to the Individuals With Disabilities Education Act, (IDEA) 20 U.S.C. 1400 et seq., and Revised Code Section 3323.01 et seq. These services are provided to Jordan at the M.O.D.E.L. School, a Community School charted by the State of Ohio pursuant to R.C. 3323.01. The M.O.D.E.L. School provides special education and related services to students diagnosed and identified pursuant to the IDEA as having autism. [Exhibits 3, IEP; 5, McCarthy. *id*] Furthermore, Mrs. Burriola states that, in comparison with same-aged peers, Jordan requires more close supervision, consistency, structure in his environment, and highly organized activities at home due to his disability. [Exhibit 2, Burriola *id*.] Because Jordan functioned successfully in defendants' daycare program when provided with appropriate supervision by informed staff, there can be no question that he meets the essential eligibility requirements for entry into and continued participation in defendants' daycare program. The application and enrollment requirements for the daycare program require simply that the child be between the ages of five and twelve year, and that there is space available. No other eligibility criteria exist. [Exhibit 2, Burriola *id*.]

It is also extremely likely that the plaintiffs can show "sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly towards the party requesting the preliminary relief". The question of whether the defendants, as a place of public accommodations, illegally excluded Jordan from participation in, or denied him the benefits of the defendants' services, programs or activities, or otherwise subjected him to discrimination

is addressed in the Act at 42 U.S.C. 12182, and in 28 C.F.R. 36.201 et seq. As mirrored by the regulation, the Act states:

> "(a) General Rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodations by any person who owns, leases {or leases to}, or operates a place of public accommodations."

In reference to Denial of Participation, 42 U.S.C. 12182(b)(1)(A)(I), in part, states:

> "It shall be discriminatory to subject an individual… with a disability or disabilities, on the basis of a disability…of such individual…directly or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual… to participate in or benefit from the gods, services, facilities, privileges, advantages, or accommodations of an entity."

Section II of the above section addresses Participation in Unequal Benefits, as follows:

> "It shall be discriminatory to afford an individual … on the basis of a disability or disabilities of such individual…directly or through contractual licensing or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals." Id

Subsection (b)(1)(D), Administrative Methods, further states:

> "An individual or entity shall not, directly or by contractual, licensing or other arrangements, utilize standards or criteria or methods of administration (I) that have the effect of discriminating on the basis of disability…". Id.

Subsection (E), Association, 42 U.S.C. 182(b)(1) also states:

> "It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." Id.

Specific prohibitions against discrimination towards persons with disabilities are found at 42 U.S.C. 12182(b)(2). Subsections (b)(2)(A) (I through III) specifically preclude a place of public accommodations from discriminating against individuals with disabilities by:

> "I. [I]mposing eligibility or other or application criteria that screen out or tend to screen out individuals with disabilities from fully and equally enjoying the goods services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of such goods, services… being offered;

> II [F]ailure to make reasonable modifications to the policies, practices, or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations;" and
> III [F]ailure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature the goods, services, facilities, privileges, advantages or accommodations being offered, or would result in an undue burden…."

The regulations at 28 C.F.R. 36.201, 202, 203, 204 and 28 C.F.R. 36.301, 302 and 303 more fully interpret and implement the requirements and prohibitions contained in 42 U.S.C. 12182 as described above.

In short, the defendants may not discriminate against Jordan by denying him the full and equal participation in the daycare program on the basis of his disability, and must ensure that his participation in the daycare program is in the most integrated setting appropriate. Further, the defendants must not apply any application or eligibility criteria that may serve to screen Jordan out from participation in the daycare program; must make reasonable modifications to its policies, practices and procedures that would allow Jordan to enjoy the benefits of defendants' daycare program; and must take all steps necessary so as not to exclude Jordan from participation in the daycare program as the result of not having available auxiliary aids and services, unless the defendants can demonstrate that the criteria, or policies, practices and procedures, or provision of auxiliary aids and services would fundamentally alter the nature of the daycare program or pose an undue burden to the defendants.

Applying the statutory and regulatory requirements listed above to the present facts demonstrates that the plaintiffs are likely to succeed on the merits. It is undisputed that Jordan was terminated from the daycare program operated and administered by the defendants, thus denying him full and equal participation in the benefits, services, facilities, privileges, advantages and accommodations provided by the YMCA daycare program. [Exhibit 2, Burriola. *id*.] Jordan cannot enjoy the benefits of the daycare

program unless the staff who supervise him are informed about the nature and affects of autism, and trained on techniques and interventions appropriate for Jordan. [Exhibit 5, McCarthy *id*.] Jordan has demonstrated that the manifestations of his autism are well managed when staff become informed and implement the reasonable modifications suggested by Jordan's special education teachers, and previously used effectively when implemented at the defendants' daycare program. [Exhibit 4, Kelly *id*.] Thus, even though Jordan has previously demonstrated his ability to enjoy the benefits of the daycare program with reasonable modifications, defendants have and continue to refuse to provide these reasonable modifications and, instead, terminated him from the daycare program.

The defendants are required to provide reasonable modifications to its policies, practices and procedures, unless they can demonstrate that such modifications would fundamentally alter the nature of the daycare program. Defendants' letter to plaintiff, Melissa Burriola, informing her on September 6, 2000, that Jordan was to be terminated from the daycare program as of September 8, 2000, did not raise the issue that making reasonable modifications to its policies, practices and procedures would fundamentally alter the nature of the daycare program. The issue was not raised because under the facts of this case the defendants cannot reasonably make that argument. In fact, it has been clearly demonstrated that with such reasonable modifications Jordan can successfully enjoy the benefits of the daycare program and is able to participate in it as any other child. [Exhibits 4, Kelly; 5 McCarthy *id*.] The modifications that are necessary and which would allow Jordan to benefit from the defendants daycare program are reasonable, not very time consuming and inexpensive. Jordan requires personnel working with him and/or supervising him to become informed about the nature of autism and the effect it has on Jordan's social functioning. In addition, persons working with Jordan need to implement modifications similar to the recommendations made by Joan McCarthy, who has worked directly with Jordan in his special education program at the M.O.D.E.L. School and, in addition, personally observed Jordan in the daycare program, provided training to two YMCA daycare workers, and developed a written plan for Jordan's daycare. The modifications include, in part:

?? … a consistent, visual schedule of each day's activities (Jordan will be relieved to have a schedule of activities made for him as the organization of time is very difficult for him, as is initiating play with other children);
?? Simple board games (Candy Land, Hi-Ho-Cherryio, Shoots and Ladders),simple card games (Old Maid, Go Fish, War);
?? …more time playing with the Nintendo be scheduled for Jordan than the 10 minutes currently allotted. Playing Nintendo is an area of strength for Jordan and it is where he is able to demonstrate age-appropriate social skills) assisting other children…giving high-fives, etc.;
?? Visuals …to redirect Jordan. Visuals … [for example] include "Quiet Hands", "Self-Control", "Sit Quietly", "Check Schedule", and "Share";
?? … Jordan [should] be afforded a "Break" location when the staff [see] … physical signs that Jordan [is] having difficulty regulating his behaviors. These physical signs include Jordan's verbal communication becoming confused and louder, more movement of his arms and legs, and crying sounds or actual crying;
?? …staff need to reduce their auditory input to Jordan when he demonstrates these physical signs and redirect with the above-mentioned visuals

[Exhibit 6, McCarthy letter. *id*]

These modifications may seem inconvenient initially, but they are not unreasonable. However, it is clear they are necessary to enable Jordan to enjoy the benefits of the daycare program.

Interestingly, while the defendants do not appear to raise the argument that Jordan's modifications would fundamentally alter the nature of the daycare program, the letter terminating him appears to raise an argument along the lines that Jordan's attendance at the daycare program would pose a {direct threat} to the safety of others that a reasonable accommodation would not mitigate. The September 6, 2000 letter suggests that Jordan was terminated because he hit or struck other children in the program on several occasions and, on one occasion, went onto a landing between floors and held a door closed so that a staff person could not open it by herself, suggesting his behavior put Jordan at risk. [Exhibit 1, West YMCA letter. *id*.] The direct threat defense is found in the statute at 42 U.S.C. 12182(b)(3) and states:

> Nothing in this title shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of such entity, where such individual poses a direct threat to the health or safety of others.

The term "direct threat" means a significant risk to the health or safety of others that cannot be limited by a modification of the policies, practices or procedures or by the provision of auxiliary aids or services. The regulation implementing this statutory provision helps clarify the intent of the provision. The comment to the regulation states in pertinent part,

> The inclusion of this provision is not intended to imply that persons with disabilities pose risks to others. It is intended to address concerns that may arise in this area. [It establishes a strict standard that must be met before denying services to an individual with a disability or excluding that individual from participation.] 28 C.F.R. 36.208 comment.

The rule requires that places of public accommodation determine whether an individual poses a direct threat by engaging in an individualized process, utilizing reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices and procedures will mitigate the risk. 28 C.F.R. 36.208(c). Applying this standard to the present case clearly demonstrates that the defendants have not and cannot meet the burden of establishing Jordan poses a direct threat to the health or safety of others at the daycare program.

The daycare program's former Facility Director, Mr. Jerry Kelley, who worked closely with Jordan from August 1999 through August 2000, has provided sworn statements that Jordan posed no risk of safety to others when the modifications recommended by Jordan's teachers were implemented. [Exhibit 4, Kelly. *id*.] Mr. Kelley also states that his ability to work with Jordan and freedom to implement modifications for him were significantly impeded by the West Family YMCA's Director of Family Services, Kathy Miley. Ms. Miley directly ordered Mr. Kelley to discontinue spending any one-to-one time working with Jordan, and failed or refused to hire a qualified teacher or instructor to work with Jordan and other special needs children enrolled in the daycare program. [Exhibit 4, Kelly. *id*.] It was only after Mr. Kelley resigned and left, and no staff remained in the daycare program who were trained or willing to use the previously successful modifications required, that Jordan's ability to participate was compromised and began to deteriorate until he was ultimately dismissed from the daycare program.

Obviously, the defendants failed to comply with any of the standards imposed on them by 28 C.F.R. 36.208 when terminating Jordan from the daycare program.

The Balance Of Hardships Tip Decidedly To The Plaintiffs.

The only hardships the defendants can claim are the costs, if any, of training current and future staff employees to recognize and understand the characteristics of autism and the relatively minor inconvenience of implementing the modifications recommended by the M.O.D.E.L. School.

In contrast, plaintiffs will undeniably suffer the complete loss of necessary daycare services for Jordan. Jordan will be denied the opportunity to learn appropriate socialization skills outside the school setting, and will be completely denied the opportunity to be integrated with non-disabled children in a daycare setting. In addition, plaintiffs will be forced to seek costly "special" daycare services designed specifically for children with special needs. These services are not only more costly than the services provided by the defendants, but they are extremely hard if not impossible to find. If found, in most cases a long waiting list for enrollment exist.

Based on the foregoing, the plaintiffs have shown sufficiently serious questions going to the merits to make them a fair ground for litigation and have demonstrated clearly that the balance of hardships unquestionably favors the plaintiffs. Plaintiffs have thus established likelihood they will succeed on a trial of the merits.

Jordan Burriola Will Suffer Irreparable harm If He Is Not Allowed To Participate In The Defendants' Daycare Program.

The harm suffered by Jordan as a result of being dismissed and totally excluded from defendants' daycare program where he had attended for two years is immediate, irreparable and ongoing. Relevant to the issue presented here is the fact that several courts have found that the exclusion of students with disabilities from school sports activities were likely to result in irreparable harm, because of the negative effect of such exclusion on socialization. ***Sandison v. Michigan High School Athletic Assn***., 863 F. supp. 483, 491(E.D. Mich.1994); ***Denin v. Interscholastic Athletic Assn.,*** 913 F. Supp.

663, 667, (D. Xco. 1996); ***Johnson v. Florida High School Activities Assn., Inc.,*** 899 F. Supp. 579, 586, (M.D. Fla. 1995).

In this case, plaintiffs have clearly shown the harm to Jordan, socially and educationally, resulting from defendants denying him the opportunity to participate in and enjoy the benefits of the daycare program provided by the defendants. As a child with autism it is particularly important for Jordan's development that he have consistent and constant interaction with non-disabled children, along with the necessary supervision, and training of the staff working with him to aid in appropriate socialization activities. Denying him this opportunity, will force Jordan to seek daycare services from agencies serving only the disabled, thus delaying any opportunity to learn appropriate social skills. In addition, Jordan is expected to be able to be integrated into a "regular" school for the 2001-2002 school year. [Exhibit 5 *id*.] The effect upon Jordan of removing him from his integrated daycare program may have further negative impact on this. The net result to Jordan is that he has and continues to suffer daily irreparable harm by the defendants' illegal conduct in removing him from his daycare program.

Considering the factor of irreparable harm, within the context of this motion, the question of whether the harm can be fully compensated by money damages is relevant.

> "[A] plaintiff's harm is not irreparable if it can be fully compensable by money damages. However, an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make damages difficult to calculate." ***Basic Computer Corp. v. Scott***, 973 F.2d 507, 511, (6th Cir. 1992); See also ***Dennin v. Conn. Interscholastic Athletic Assn***., supra, 913 f. Supp. at 667; 11 A. Wright and Miller Federal Practice and Procedure, Sec. 2948. 1, n 1221, (1995); Moore's Federal Practice 2'd at Sec. 65.04(1)(A) no. 66, 68,69, 72.

Jordan has and continues to suffer irreparable harm by being totally excluded from the defendants' daycare program. The harm of being excluded from an integrated setting with children who are not disabled, the loss of learning and opportunity to model appropriate interpersonal social behavior cannot easily be measured in terms of money damages. Further, as the 6th Circuit has recognized, the requirement of irreparable harm is met when the plaintiff's injuries "are the very type of injuries Congress tried to avoid." ***E.E.O.C. v. Chrysler Corp***. 733 F. 2'd 1183, 1186, (6th Cir. 1998). The purpose of the ADA is to

> "..provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" [and to provide] "clear, strong, consistent enforceable standards addressing discrimination against individuals with disabilities;" [and to ensure] "the federal government plays a central role in enforcing the standards established by this act on behalf of individuals with disabilities" [and finally] " to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by persons with disabilities". 42 U.S.C. 12101(b).

It is obvious that none of these purposes can be accomplished if a place of public accommodation, in this case the defendants' daycare program, is free to discriminate against Jordan. The defendants' daycare program is a place of public accommodation as that term is defined by 42 U.S.C. 12181(6)(7)(K). The congressional intent to afford full and equal opportunities to persons with disabilities to participate in the mainstream of society begins at the time when disabled children are first enrolled in a nursery or daycare program such as the defendants. To allow disabled children to be excluded at the very time integration can have the most beneficial impact would significantly frustrate the intent of congress to end discrimination against persons with disabilities.

The Defendants Can Make No Showing Of Substantial Harm To Others.

It is unimaginable how requiring the defendants to reinstate Jordan into the daycare program will cause substantial harm to others, in particular, where his reinstatement would be accompanied with the modifications necessary to ensure his successful enjoyment of the program. As argued above, these modifications are not time consuming and may pose a mild inconvenience, at most, to staff. Moreover, the modifications are inexpensive and have a record of demonstrated success when provided to Jordan earlier during his enrollment there.

The Public Interest Is Advanced By Requiring The Defendants To Provide Jordan With The Necessary Modifications That Will Allow Him To Attend The Daycare Program Successfully.

Requiring the defendants to reinstate Jordan along with the modifications he needs to be successful furthers the public interest and the intent required by congress in adopting the ADA. Regarding this factor this court has found that

> " guarding against violations of… federal law serves the public interest." ***Farm Labor Organizing Committee*** supra, 991 F. Supp. at 907.

Similarly, ***Sandison v. Michigan High School Athletic Assn***., supra, stated

> "The purpose of the ADA … is to include persons with disabilities in society, equal to those without disabilities by addressing discrimination against persons with disabilities. 42 U.S.C.A. sec. 12101 [and] There is significant public interest in eliminating discrimination against persons with disabilities…" 863 F. Supp. at 491.

Requiring defendants to readmit Jordan to the daycare program and to provide him with necessary modifications will certainly be within the public interest, especially since the defendants receive public money to help operate its programs in the form of government grants.

IV CONCLUSION

Considering the facts and arguments presented herein, the plaintiffs have shown that they are entitled to a preliminary injunction requiring the defendants to readmit Jordan into the West Family YMCA daycare program and to provide the necessary modifications he requires to participate successfully in the daycare program

Respectfully submitted,

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Thomas J. Zraik
Attorney for Plaintiffs

Links: *Burriola v. Greater Toledo YMCA* (W.D. OH 2001)

Decision in pdf **Decision in html**

Closing Arguments in Burriola v. Greater Toledo YMCA by Attorney Thomas J. Zraik

Why This Case is Important by Thomas J. Zraik, Esq.

Analysis by Peter W. D. Wright, Esq.

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