LETTER OPINION
99-L-4

January 5, 1999

Carol K. Olson
Executive Director
ND Department of Human Services
600 East Boulevard Avenue Dept 325
Bismarck, ND 58505-0250

Dear Ms. Olson:

Thank you for your letter asking whether Department of Human Services (Department) rules basing staffing requirements for child care on the developmental age of children with disabilities violates the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225 and 611. You also ask whether a child care provider violates the ADA by asking the parents of a mentally disabled child the child's developmental age for purposes of complying with staffing requirements.

The Department of Human Services (Department) licenses and regulates a variety of daycare facilities. See N.D. Admin. Code ch. 75-03-08 (family childcare homes); N.D. Admin. Code ch. 75-03-09 (group childcare homes or facilities); N.D. Admin. Code ch. 75-03-10 (childcare centers); N.D. Admin. Code ch. 75-03-11 (preschool educational facilities); and N.D. Admin. Code ch. 75-03-11.1 (school age childcare centers). The Department licenses the operation of a daycare facility only if it is fit "to provide for the health and safety of all children who may be received." North Dakota Century Code (N.D.C.C.) § 50-11.1-04(1). This is consistent with the legislative purpose of N.D.C.C. ch. 50-11.1, authorizing the Department to license and regulate the operation of daycare facilities "to assure that children receiving early childhood services be provided food, shelter, safety, comfort, supervision, and learning experiences commensurate to their age and capabilities, so as to safeguard the health, safety, and development of those children." N.D.C.C. § 50-11.1-01. Pursuant to this legislative mandate, the Department has adopted rules that generally provide for certain ratios of staff to children in care based upon the chronological age and number of children. See N.D. Admin. Code §§ 75-03-08-06(2)(a) (after Jan. 1, 1999 see 75-03-08-09); 75-03-09-14(2) (after Jan. 1, 1999 see 75-03-09-09); 75-03-10-16(2) (after Jan. 1, 1999 see 75-03-10-09); 75-03-11-14(2) (after Jan. 1,

1999 see 75-03-11-09); 75-03-11.1-14(2) (after Jan. 1, 1999 see 75-03-11.1-09(2)).

But if family childcare homes, group childcare facilities, childcare centers, or preschool educational facilities care for a child with a handicapping or disabling condition that requires more than usual care, the developmental age of the child rather than the chronological age is used to assess the proper staff ratios. For example, N.D. Admin. Code § 75-03-09-14(3) previously provided:

> "When a child is in care with a mentally handicapping condition, and requires more than usual care, the evaluated developmental age level, rather than the chronological age of the child, shall be used in determining appropriate staff ratios."

See also N.D. Admin. Code §§ 75-03-08-06(2)(a); 75-03-10-16(3); 75-03-11-14(3). The rules similarly provide after January 1, 1999:

> 4. If a child in care has a disabling condition which requires more than usual care, the child's developmental age level must be used in determining the number of children for which care can be provided.
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> 5. Children with special conditions requiring more than usual care and supervision shall have adequate care and supervision provided to them without adversely affecting care provided to the remaining children in the group child care home or facility.

N.D. Admin. Code § 75-03-09-09(4), (5) (effective Jan. 1, 1999). See also N.D. Admin. Code §§ 75-03-08-09(3); 75-03-10-09(3); 75-03-11-09(3), (4) (effective Jan. 1, 1999). Neither the rules effective Jan. 1, 1999, nor former rules regarding school age child care centers require use of the developmental age for staffing, but they do require an assessment of the needs of special needs children which could include additional staffing. See N.D. Admin. Code §§ 75-03-11.1-26 and 75-03-11.1-25 (effective Jan. 1, 1999).

You advise that a licensed group childcare provider asserts that consideration of a child's developmental age rather than the chronological age to assess adequacy of staffing violates the ADA. The provider asserts that the Department violates the ADA if the provider asks the parents of a child with a mentally disabling condition about the child's developmental age. You advise that commonly the provider simply asks a parent for the information which

is used by the Department in determining whether the provider has adequate staffing.

The licensing process must be operated in a non-discriminatory manner under Title II of the ADA. The ADA specifies that state agencies may not administer licensing or certification programs in a manner that subjects individuals with disabilities to discrimination on the basis of disability. 28 C.F.R. § 35.130(a), (b)(6). But "[a] public entity may . . . impose neutral rules and criteria . . . if the criteria are necessary for the safe operation of the program in question" even if that screens out individuals with disabilities. 28 C.F.R. pt. 35, Appendix A at 450(section 35.130); See also 28 C.F.R. § 35.130(b)(8).

The Department has established certain staffing criteria for the safety of children in daycare. Requiring daycare providers to comply with the criteria is not discriminatory. The information regarding the child's developmental age is not used to screen out children with disabilities from daycare but is used to assure that there is adequate staffing.[1] It requires no expert to teach us that younger children, either by way of chronological age or because of a mental disability, require more supervision than older children. In my opinion, the Department's rules concerning staffing are reasonably related to the safety and health of children in daycare.

Safety requirements necessary for the safe operation of a daycare program are permissible under the ADA across the board whether related to operation of a public entity's program, a private entity's operation, or employment. Thus, "[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs or activities." The Americans with Disabilities Act, Title II Technical Assistance Manual, ¶ II-3.5200. Likewise, a private business "may impose legitimate safety requirements that are necessary for safe operation." 28 C.F.R. 36.301(b). See also A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, ¶ 6.2 at VI-2 ("The ADA does not prevent employers from obtaining medical and related information necessary . . . to promote health and safety on the job.").

[1] The information obtained by providers regarding children in daycare is available to the Department, but is otherwise generally confidential under state law. See N.D.C.C. § 50-11.1-07(3) and 1995 N.D. Op. Att'y Gen. L-4, L-6 (Jan. 17 letter to Wessman).

The best source of information regarding children who may need special assistance because of a disability is their parents. The Americans with Disabilities Act, Title II Technical Assistance Manual at ¶ 2-3.5300 provides guidance regarding inquiries about the existence of a disability in conjunction with a public entity's licensing program.

> "A public entity may not make unnecessary inquiries into the existence of a disability."
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> "ILLUSTRATION: A municipal recreation department summer camp requires parents to fill out a questionnaire and to submit medical documentation regarding their children's ability to participate in various camp activities. The questionnaire is acceptable, if the recreation department can demonstrate that each piece of information requested is needed to ensure safe participation in camp activities. The Department, however, may not use this information to screen out children with disabilities from admittance to the camp."

See also 28 C.F.R. pt. 36, Appendix B at 603 (section 36.301) (The ADA prohibits attempts by a private business to "unnecessarily identify the existence of a disability."). If a recreation or scout camp may elicit medical information to safely accommodate participation in camp activities under Department of Justice guidelines, there is no legal basis to assert that obtaining information about a mentally disabled child's developmental age to allow adequate staffing is a violation of the ADA. A more cogent argument could be made that failure to take into account developmental age of a disabled child to assure adequate staff care for that child would itself place the child at unnecessary risk and be discriminatory.

There are no federal regulations or cases that suggest that obtaining necessary medical information related to the safe operation of a program is impermissible under the ADA.

The Department's licensing requirement affords children in daycare an individual assessment of their staffing needs as it affords an assessment of a licensee's compliance with safety related criteria.

Under the circumstances described, it is my opinion that the information required by the Department may be obtained without violating the ADA. It is necessary information reasonably related to safety in the operation of daycare facilities.

Sincerely,

Heidi Heitkamp
Attorney General

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