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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

NOBEL LEARNING COMMUNITIES
d/b/a CHESTERBROOK ACADEMY,

Defendant.

HON. NOEL L. HILLMAN

Civil Action No. 17-366 (NLH) (JS)

UNITED STATES' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR A STAY AND FOR PARTIAL DISMISSAL

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PRELIMINARY STATEMENT

M.M. was a three-year-old child with Down syndrome when Chesterbrook Academy—a private daycare provider owned and operated by Defendant Nobel Learning Communities (“NLC”)—expelled her from its daycare program because she was not toilet-trained by an arbitrary deadline set by an NLC administrator. NLC knew that M.M.’s disability is associated with a range of developmental delays, including delays in toilet-training. NLC’s refusal to make any accommodation for M.M. denied her and her parents equal access to its child care services. Because this discriminatory conduct raises issues of general public importance, the Attorney General commenced this action on behalf of the United States to enforce the Americans with Disabilities Act (“ADA”).

NLC seeks to stay this action because the State of New Jersey is also prosecuting NLC under the New Jersey Law Against Discrimination. NLC raises two theories for a stay, neither of which applies here. First, NLC asks this Court to abstain from exercising its jurisdiction under the *Colorado River* Doctrine. That doctrine, however, applies only in circumstances where there is a parallel state proceeding involving the same parties and where the state proceeding will completely and finally resolve all of the issues between the parties, as well as the existence of additional extraordinary circumstances. The state court proceeding satisfies none of those criteria because, *inter alia*, the United States is not a party to that proceeding and relevant aspects of the ADA will not be considered. Further, NLC litigating two matters simultaneously does not qualify as an extraordinary circumstance meriting abstention.

Next, NLC asks to needlessly delay these proceedings by appealing to the Court's inherent powers to stay this action. That delay would serve no legitimate purpose, and would only serve to prejudice the United States' access to discovery.

NLC also argues that the United States should be collaterally estopped from pursuing an associational discrimination claim based on NLC's discrimination against M.M.'s parents. NLC points to a 2009 lawsuit brought by the United States in a different District Court, in which the court (in ruling on a partial motion to dismiss) held that harm suffered by parents in similar circumstances was merely "indirect" and, therefore, not actionable. NLC's argument fails for two reasons. First, because the parties settled the 2009 lawsuit, the Court must consider the terms of that agreement in evaluating NLC's collateral estoppel argument. The terms of that settlement agreement are fatal to NLC's collateral estoppel argument: NLC agreed that the United States would be free to bring ADA enforcement actions—under any provision of the ADA—against NLC. Second, putting aside the plain language of the settlement agreement, the rulings in the 2009 lawsuit on this issue do not have preclusive effect because they are not, in Third Circuit parlance, "sufficiently firm to be accorded conclusive effect."

Moreover, the Complaint states a claim for associational discrimination. M.M.'s parents have a "relationship" to an "individual with a disability," and when NLC expelled M.M. because of her disability, NLC denied her parents equal access to its child care services. That falls squarely within the scope of the ADA's associational discrimination provision. 42 U.S.C. § 12182(b)(1)(E). NLC's argument

that the harm suffered by M.M.'s parents is too attenuated to be actionable ignores the United States' allegations in the Complaint and misconstrues § 12182(b)(1)(E).

Lastly, the ADA clearly authorizes the Attorney General to seek, and this Court to award, the equitable relief sought in the Complaint. 42 U.S.C. § 12188(b)(2) (authorizing district courts to grant "any equitable relief ... considered to be appropriate"). And the United States' demand for equitable relief satisfies the basic pleading requirements of the Federal Rules of Civil Procedure.

BACKGROUND

NLC owns and operates a chain of private schools throughout the United States, including Chesterbrook Academy and eight others in New Jersey. Complaint ("Compl.") ¶ 7. Chesterbrook is located in Moorestown and offers five daycare programs: "Infants," "Toddlers," "Beginners" (ages 2-3), "Intermediates" (ages 3-4), and "Pre-K." *Id.* ¶ 9. Its employees provide diaper-changing services to children in the Infant, Toddler, and Beginner classes; they typically do not provide those services for children in the Intermediate and Pre-K programs. *Id.* ¶ 14. It is Chesterbrook's policy to place children in a classroom "according to [the child's] developmental progress," not necessarily the child's age. *Id.* ¶ 17. Thus, a child "may continue in a placement or repeat that placement" if needed. *Id.*

M.M. was born on July 11, 2011 with Down syndrome. *Id.* ¶ 10. Her parents enrolled her at Chesterbrook in January 2012. *Id.* ¶¶ 10, 12. Chesterbrook knew of M.M.'s disability and also knew that M.M., like all children with Down syndrome, had certain developmental delays. *Id.* ¶¶ 11, 13.

Initially, and as it did for all children in its Infant, Toddler, and Beginner programs, Chesterbrook employees changed M.M.'s diaper as needed. *See id.* ¶ 14. In December 2014, Chesterbrook personnel informed M.M.'s parents that M.M. would be moved into the Intermediate program and that, as a result, M.M. would have to be toilet-trained. *See id.* ¶¶ 14, 16, 18. M.M.'s parents were concerned about the decision to push M.M. into the Intermediate program; they suggested that she be kept in the Beginner program because she was still age-appropriate for it and because her development needs were more appropriately addressed there. *Id.* ¶¶ 9, 18.

Chesterbrook ignored M.M.'s parents' requests and moved M.M. into the Intermediate program. *Id.* ¶ 18. Not long after, Chesterbrook Principal Kelly Honer sent an email to M.M.'s mother stating that, pursuant to its "corporate policy," she needed to set a deadline for M.M. to be toilet-trained:

Since [M.M.] is in a non-diapering classroom we need to set a time frame... I was thinking about April 1st? [It is] corporate policy [that] I have to set a time frame to get [M.M.] potty trained.

Id. ¶ 19. In response, M.M.'s parents provided literature to Chesterbrook personnel about delayed toilet-training in children with Down syndrome. *Id.* ¶ 20.

When M.M. failed to meet that deadline, Chesterbrook expelled her (on five days' notice). *Id.* ¶ 21. M.M.'s parents provided a doctor's note, again explaining M.M.'s developmental delays and their impact on her toilet-training, and they requested that M.M. be moved back into the Beginner program. These efforts were unsuccessful, and M.M.'s last day at Chesterbrook was March 31, 2015. *Id.* ¶ 24.

OVERVIEW OF THE ADA

Congress enacted the ADA to remedy widespread, pervasive discrimination against individuals with disabilities and “to bring individuals with disabilities into the economic and social mainstream of American life.” *Menkowitz v. Pottstown Mem. Med. Ctr.*, 154 F.3d 113, 120 (3d Cir. 1998) (quoting legislative history). Such discrimination takes many forms, from outright intentional exclusion to less visible but equally injurious forms, such as overprotective policies or a failure to make reasonable modifications that would foster inclusion. 42 U.S.C. §§ 12101(a)(2), 5). Because disability discrimination in any form is irreconcilable with fundamental national principles of equal opportunity, the federal government “plays a central role ... in enforcing” the ADA, which was designed to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities” through “clear, strong, consistent, enforceable standards.” *Id.* §§ 12101(b)(1), 12101(b)(3).

This case involves Title III of the ADA, which prohibits places of public accommodation from discriminating against an individual on the basis of a disability in a way that deprives that individual of full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the public accommodation. *Id.* § 12182(a). It also prohibits discrimination based on an individual’s relationship to a person with a disability. *Id.* § 12182(b)(1)(E).

Congress explicitly identified child care centers and preschools as among the places of public accommodation subject to Title III. *Id.* § 12181(7)(J), (K); 28 C.F.R. § 36.104. Title III entities cannot use standards, criteria, or methods of

administration that have the effect of discriminating on the basis of disability or impose eligibility criteria that screen out or tend to screen out individuals with disabilities. 42 U.S.C. §§ 12182(b)(1)(D), 12182(b)(2)(A)(i); *see also* 28 C.F.R. §§ 36.204, 36.301(a). Public accommodations must make reasonable modifications to their policies, practices, and procedures to ensure full and equal enjoyment of their services by individuals with disabilities, unless the public accommodation can show that such modification would fundamentally alter the nature of the public accommodation's services. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a).¹

Where, like here, the Attorney General determines that a Title III entity's discriminatory conduct raises an issue of general public importance, it can commence an action in a federal district court.² In such actions, the court can "grant any equitable relief," which can include, for instance, permanent injunctive relief,

¹ Although not relevant to any issue in NLC's motion, NLC suggests that its discriminatory actions are justified by 28 C.F.R. § 35.206, which states that public accommodations need not provide "personal devices" such as eyeglasses or "personal services" such as assistance in eating, toileting, or dressing. NLC's Memo. of Law in Support of Motion to Stay or, Alternatively, Motion for Partial Dismissal ("NLC Br."), at 4 & n.1. NLC is wrong. As explained in accompanying regulatory guidance, "if personal services are customarily provided to the customers or clients of a public accommodation, ... then these personal services should also be provided to the persons with disabilities." 28 C.F.R. Pt. 36, App. C at 925 (2015). Because NLC customarily and routinely provides personal services, including diapering, to three-year-old children in its care, NLC must accommodate M.M.'s disability-based need even if she is beyond NLC's arbitrary age cut-off for these services.

² NLC states that the United States brought this action "on behalf of M.M. and [her] parents." NLC Br. at 1, 10, 11. Not so. After determining that the NLC's discriminatory conduct "raises an issue of general public importance," the Attorney General filed this action on behalf of the United States. 42 U.S.C. § 12188(b)(1)(B).

changes to policies or procedures, civil penalties, and damages for “persons aggrieved” by the discriminatory conduct. 42 U.S.C. § 12188(b)(2)(A-C).

ARGUMENT

I. THE COURT SHOULD REJECT NLC’S REQUEST FOR A STAY

NLC’s attempt to stay this action has no basis in law or fact. The *Colorado River* Doctrine, limited to only those circumstances in which the district court “will have nothing further to do in resolving any substantive part of the case,” *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983), does not apply here. Similarly, NLC’s plea to delay these proceedings premised upon the more general “inherent power of the court” is also inappropriate.

A. *Colorado River* Does Not Apply Here

The *Colorado River* Doctrine, while nominally referred to as a stay, in fact is an “abstention” in which the federal court is “surrendering jurisdiction to the state.” *Marcus v. Twp. of Abington*, 38 F.3d 1357, 1372 (3d Cir. 1994). This is an extraordinary remedy because it “deprive[s] the federal plaintiff of a federal adjudication to which he or she may be entitled.” *Id.* The doctrine applies “only if there is a parallel state court litigation involving the same parties and issues that will completely and finally resolve the issues between the parties.” *Id.* at 1371. “Accordingly, a ‘decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the [federal] case.’” *Id.* (quoting *Moses H. Cone Mem. Hosp.*, 460 U.S. at 28). In fact, in applying *Colorado River* abstention, a federal court decides that “the state court’s judgment on the issue would be *res judicata*.” *Michelson v. Citicorp Nat. Servs., Inc.*,

138 F.3d 508, 514 (3d Cir. 1998) (quoting *Moses H. Cone Mem. Hosp.*, 460 U.S. at 10). “The doctrine is to be narrowly applied in light of the general principle that ‘federal courts have a strict duty to exercise jurisdiction that is conferred upon them by Congress.’” *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 307 (3d Cir. 2009) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

Thus, before the Court even considers the elements of abstention under the *Colorado River* Doctrine, the Court should disregard NLC’s application because the state court action does not involve the same parties, or even the same statute, so there is no chance that the state court matter will completely and finally resolve the dispute between the United States and NLC. *See Marcus*, 38 F.3d at 1371.

In arguing for abstention, NLC wrongly conflates the United States and M.M. and her family as the “Plaintiff” in this action. For instance, NLC states that this action was “filed on behalf of the same purportedly aggrieved parties, M.M. and M.M.’s parents,” that are involved in the state court proceeding. NLC Br. at 11.³ In fact, the United States is the plaintiff here and is not a party to the state litigation. And this action was not filed on behalf of M.M. or her parents, it was filed on behalf of the United States to enforce the ADA. 42 U.S.C. § 12188(b). In the state action, the plaintiff is Craig Sashihara, Director of the New Jersey Division on Civil Rights.

³ Similarly, NLC argues that the separate actions are only “nominally brought by different parties.” NLC Br. at 12. But the legal difference between the United States of America and State of New Jersey is at the very core of our nation’s constitutional make-up. There is nothing merely “nominal[]” in the difference between the United States and the State of New Jersey.

The United States has no role in the state action and New Jersey has no role in this action. The United States cannot be bound as a matter of *res judicata* here by the decisions of a state court judge in an action in which it is not a party and which will be decided pursuant to state law. Therefore, based on the difference in the parties alone, this Court should reject NLC's *Colorado River* argument.

Further, as NLC admits, it "owns and operates private schools across the country." NLC Br. at 4. This action concerns NLC's treatment of a student with a disability and NLC's "corporate policy" that served to push M.M. out of Chesterbrook. Compl. ¶ 19. If it is indeed NLC's national policy to expel three-year-old children with disabilities because the particular classroom to which the child is assigned does not provide diapering services (as opposed to the classroom a few feet down the hall), then the United States will seek discovery about and a remedy to that practice at NLC locations "across the country." Therefore, NLC's treatment of similarly situated students at all of their locations is relevant.⁴ The reach of the state litigation is restricted to boundaries of that court's limited jurisdiction (*i.e.*, New Jersey). Therefore, it is impossible for the state litigation to completely and finally resolve the dispute between the United States and NLC.

Moreover, NLC's request for this Court's abstention from and dismissal of this action fails to meet the elements required for such an abstention. In order to

⁴ For example, it would be relevant to the United States' claims in this action if NLC allowed non-disabled 3-year-old children with toileting delays to remain in the "Beginner" program, or if NLC gave non-disabled children in the "Intermediate" program more time to become toilet-trained.

invoke the extraordinary measure of abstention and dismissal pursuant to the *Colorado River* Doctrine, NLC must prove the doctrine’s “essential elements”: (1) that the state action involves “parallel parties and parallel claims as well as a realistic possibility that the federal action would thereafter be precluded,” *Michelson*, 138 F.3d at 515 (citing *Wilton v. Sevens Falls Co.*, 515 U.S. 277 (1995)), and (2) that there are extraordinary circumstances that merit the stay. *Nationwide Mut. Fire Ins. Co.*, 571 F.3d 299. Neither of these elements are met.

First, as discussed above, there are not parallel parties or parallel claims in the state and federal actions. Both sovereigns have the authority and obligation to enforce the civil rights laws prescribed within their respective jurisdictions. Further, while there is some similarity between the ADA and the New Jersey Law Against Discrimination (“LAD”), the statutes are not duplicative. For example, unlike the LAD, the ADA allows for civil penalties, including enhanced penalties for “subsequent violations” of the ADA. 42 U.S.C. § 12188(b)(2)(C)(i-ii). The state court cannot levy an ADA civil penalty, and any decision from the state court cannot be considered in determining any future enhanced civil penalties. Moreover, the holding of the state court would in no way be binding upon the United States.

NLC argues that New Jersey courts often rely upon federal anti-discrimination statutes for guidance in construing the LAD. NLC Br. at 8. This argument, however, provides no basis for the United States’ enforcement of the ADA to be bound by New Jersey state court decisions limited to construing the LAD—much less for those state court decisions to have *res judicata* effects on the

federal proceedings as required under the *Colorado River* Doctrine. Accordingly, the first element is not met.

Second, there are no extraordinary circumstances justifying abstention. Courts consider six factors in determining whether “extraordinary circumstances” exist: “(1) which court first assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties.” *Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165, 171-72 (3d Cir. 1999). This is not an *in rem* action, so the first factor is not relevant.

The second factor, the convenience of the federal forum, weighs against a stay. NLC concedes that it has facilities in New Jersey and that many of the witnesses can be found in this forum. Further, this is not an action where the state and federal actions are being litigated in different states which could potentially lead to inconveniencing the litigants. *See id.* at 171 (finding no inconvenience where both actions were in the same state).

Contrary to NLC’s argument, the third factor—avoiding piecemeal litigation—weighs against abstention. As the Third Circuit has made clear, regardless of whether it “would be more efficient to hold the federal cases in abeyance until the conclusion of the state case . . . *Colorado River* abstention must be grounded on more than just the interest in avoiding duplicative litigation.” *Id.* at 171-72. The Court’s concern is not whether a party might have to litigate in two

courts simultaneously, but rather whether contradictory outcomes might arise. *See Colorado River v. United States*, 424 U.S. 800, 813 (1976) (abstention granted because of concern over contradictory outcomes and clear federal policy against piecemeal litigation in water rights pursuant to McCarran Act). No such concern exists here. Whether NLC violated the LAD is not necessarily determinative of whether it violated the ADA, or vice versa. Any inconvenience to NLC arising from the concurrent lawsuits is neither unusual nor extraordinary. Further, regardless of whether certain ADA claims could be brought in state court, the ADA requires that the Attorney General enforce the ADA in federal courts. 42 U.S.C. § 12188(b)(1)(B). Therefore, the third factor weighs against abstention.

The United States acknowledges that the state court action was filed first, the fourth factor, but NLC greatly exaggerates the difference in the timing by drawing a false comparison. NLC compares the date on which M.M.'s parents filed their state administrative claim to the date on which the federal suit was filed. NLC Br. at 15-16. If the Court compares the date on which the state court action was commenced (October 26, 2016) to the date on which this action was commenced (January 18, 2017), the difference becomes fairly insignificant.

The fifth factor, whether federal or state law controls, weighs heavily against abstention. As NLC concedes, "state law applies to the State Court Action, and federal law applies to the federal action." *Id.* at 16. As the United States cannot be bound by a proceeding to which it is not a party, ultimately a determination of whether federal law was violated must be made by this Court.

Similarly, as the United States cannot be bound by the state court proceedings, the state court's determination cannot adequately protect the federal interests in this matter—the sixth factor. The Attorney General, vested with the power to enforce the ADA throughout the United States, has commenced this action because the violations of the ADA here raise issues of general public importance. As discussed above, not only can the state court not reach the issues of the United States' role in enforcing federal law and not assess civil penalties, but also it cannot supervise the nationwide discovery necessary for the United States' proper enforcement of that law. Therefore, this factor weights against abstention.

In conclusion, other than the state court action having been filed first, none of the factors support abstention. The minor inconvenience to NLC to have to litigate against separate parties, under separate laws in separate courts is not an “extraordinary circumstance” sufficient to support the extraordinary remedy of abstention and dismissal of an action brought by the United States in its statutory enforcement duty. For all of these reasons, the Court must deny the *Colorado River* Doctrine abstention and dismissal sought by NLC.

B. There is No Basis for the Court to Stay this Action Based Upon the Court's Inherent Powers

While the United States acknowledges that it is within the Court's inherent power to manage its docket and, in limited circumstances, stay actions, there is no basis for needlessly delaying this action. *See United States v. \$1,879,991.64 Previously Contained in Sberbank of Russia's Interbank*, 185 F. Supp. 3d 493 (D.N.J. 2016). District courts within the Third Circuit consider four factors in

determining whether to grant a stay premised upon their inherent powers. Those factors are: “(1) the length of the stay; (2) the balance of harm to the parties; (3) the interests of the public; and (4) the interests of judicial economy.” *Id.* at 500.

All four factors weigh against staying this action. First, NLC does not even proffer an estimate as to how long this action would idly sit as the state court proceeds through its litigation. In the absence of any basis for estimating the delay sought, this factor weighs against granting an indefinite stay.

Second, there is nothing unusual or extraordinary in a party having to litigate two matters simultaneously. So, whatever minor harm NLC may suffer by litigating this matter is greatly outweighed by the potential prejudice to the United States in delaying access to discovery. It is an ancient and well-accepted principle of American law that delays serve to cause memories to fade, witnesses to have died or disappeared, and evidence to have been lost. *See, e.g., Wyeth v. Abbott Labs.*, No. 09-CV-4850, 2011 WL 380902, at *2 (D.N.J. Feb. 1, 2011) (denying stay); *cf. Dominguez v. United States*, 82 F. Supp. 693, 694 (E.D. Pa. 1949) (statutes of limitation and repose are designed to prevent a party from litigating after “memories have faded, witnesses have died or disappeared, and evidence has been lost”).

Third, as noted above, the interests of the public strongly weigh against staying the action. Despite NLC’s efforts to paint this action as a dispute between it and M.M. and her family, this is an action brought through the enforcement power of the Attorney General of the United States to vindicate an issue of general public importance. To stay this action infringes on that enforcement authority. *See, e.g.,*

\$1,879,991.64 Previously Contained in Sberbank of Russia's Interbank, 185 F. Supp. 3d at 501 (holding that a stay would “work against public interest” by “infring[ing] upon the discretionary authority of the Attorney General”).

Finally, staying this action in no way advances judicial economy. This is a federal action, involving the United States’ enforcement authority over federal law. The state court will not make any determinations regarding this action because the state court will not rule on the ADA. The delay sought by NLC serves no legitimate purpose—just delay. Accordingly, there is no basis in law or fact for this Court to abstain, dismiss or stay this action, whether pursuant to the *Colorado River* Doctrine, its inherent power to manage its docket or any other basis.

II. NLC’S COLLATERAL ESTOPPEL ARGUMENT FAILS

Pointing to two interlocutory decisions from a 2009 lawsuit brought by the United States against NLC in the Eastern District of Pennsylvania, NLC contends that the United States is collaterally estopped from asserting an associational discrimination claim regarding the discrimination suffered by M.M.’s parents. NLC Br. at 30. NLC’s argument fails for two reasons: *First*, the parties settled the 2009 lawsuit and that agreement expressly allows the United States to sue NLC for violating any provision of the ADA, including 42 U.S.C. § 12182(b)(1)(E). *Second*, the decisions from the 2009 lawsuit are not “sufficiently firm to be accorded conclusive effect.” *Burlington N. R.R. Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F.3d 1227, 1233 n.8. (3d Cir. 1995).

A. NLC's Collateral Estoppel Argument is Foreclosed by the Terms of the Parties' Settlement Agreement

In the 2009 lawsuit, the United States asserted claims against NLC under the ADA for discrimination against children with disabilities and their families that occurred at several NLC-owned centers in Pennsylvania. Decl. of David Simunovich ("Simunovich Decl."), Exh. A (2009 complaint) at 9. Among other claims, the United States claimed that, when NLC expelled the children because of their disabilities, NLC also deprived their parents of equal access to its child care services in violation of § 12182(b)(1)(E). *Id.*; Simunovich Dec., Exh. B (United States' Brief, dated July 22, 2009), at 29-49. Before discovery, NLC brought a partial motion to dismiss, arguing that the parents were not denied services and, therefore, any discrimination they suffered was not actionable. Simunovich Dec., Exh. C (NLC's Brief, dated June 26, 2009) at 22-29.

The District Court ultimately sided with NLC on that issue and granted that part of NLC's partial motion to dismiss. *United States v. Nobel Learning Cmtys., Inc.*, 676 F. Supp. 2d 379, 388 (E.D. Pa. 2009) (hereinafter "*NLC I*"). The court held that any discrimination suffered by the parents was "indirect" and, therefore, not covered by § 12182(b)(1)(E). *Id.* The United States sought to amend the Complaint by pleading with greater specificity the harm suffered by the parents (and siblings of the children who were expelled), but the Court rejected those proposed amendments as "futile," based again on the notion that harm suffered by anyone other than the expelled children was "derivative" and therefore not covered by § 12182(b)(1)(E). *United States v. Nobel Learning Cmtys., Inc.*, No. 09-CV-1818,

2010 U.S. Dist. LEXIS 27688, at *11-16 (E.D. Pa. Mar. 19, 2010) (hereinafter “*NLC II*”).

In arguing that these decisions have issue preclusive effect, NLC neglects to mention that the United States and NLC settled that case. Simunovich Decl., Exhs. D & E (stipulation and order of dismissal). That omission is significant because this Court cannot properly analyze NLC’s collateral estoppel argument without first considering the terms of that settlement agreement. *Arizona v. California*, 530 U.S. 392, 414 (2000) (holding that “settlements ordinarily occasion no issue preclusion ... unless it is clear ... that the parties intend their agreement to have such an effect”); *Wisconsin Elec. Pwr. Co. v. No. Assur. Co. of Am.*, No. 07-C-277, 2007 U.S. Dist. LEXIS 93933, at *6 (W.D. Wis. Dec. 17, 2007) (“When judgment is entered based on settlement, issue preclusion will attach if it is clearly shown that the parties intended that the issue be foreclosed in other litigation.”).

Typically, the parties’ intent is not appropriately addressed on a motion to dismiss, but the plain language of the settlement agreement shows that the United States and NLC agreed to *not* attach issue preclusive effect to decisions in the lawsuit. See Simunovich Decl., Exh. F ¶¶ 16-17.⁵ The settlement agreement was

⁵ Divining the parties’ intent in entering into a settlement agreement can be complex. As explained in *Wisconsin Electric Power Co.*, after an interlocutory ruling, the losing party may settle “to preserve its right to argue for a different ruling ... in future cases. Alternatively, [the losing party] may have negotiated away the potential for reversal on appeal or in a subsequent action, paying less and agreeing to be bound by the decision for all future claims.” 2007 U.S. Dist. LEXIS 93933, at *6-7; *Ecotone Farm, LLC v. Ward*, No. 11-CV-5094 (KM), 2014 U.S. Dist. LEXIS 101046, at *13-14 (D.N.J. July 22, 2014), *aff’d in part, rev’d in part*, 639 F. App’x

effective for two years. *Id.* ¶ 16. During that time, NLC agreed to implement certain changes to its policies and procedures; the United States, in turn, agreed that it would not commence new ADA enforcement actions against NLC. *Id.* ¶¶ 8-13, 16-17. After that two-year period, NLC was free to undo the changes that were designed to prevent further discriminatory conduct, and the United States was free to bring new ADA enforcement actions against NLC—even for claims based on “legal theories raised or that could have been asserted” in the 2009 lawsuit. *Id.* ¶ 17.

That agreement is fatal to NLC’s collateral estoppel argument. *Continental Airlines, Inc. v. Am. Airlines, Inc.*, 824 F. Supp. 689, 706-08 (S.D. Tex. 1993) (holding that collateral estoppel did not attach to decision on a partial motion for summary judgment, where the parties settled the case); *Ecotone Farm, LLC*, 2014 U.S. Dist. LEXIS 101046, at *34-40 (holding that claim preclusion did not apply because an underlying settlement agreement did not express the parties’ clear intention to bar the type of claims being brought); *Wisconsin Elec. Pwr. Co.*, 2007 U.S. Dist. LEXIS 93933, at *2 (rejecting collateral estoppel argument where parties dismissed case “with prejudice” pursuant to a settlement agreement after an interlocutory decision and holding that, in the absence of a express agreement to the contrary, “that claim preclusion but not issue preclusion would apply”); *Perkinelmer, Inc. v. Bruker Corp.*, No. C-13-1602, 2013 U.S. Dist. LEXIS 107662, at *4-6 (N.D. Cal. July 30, 2013) (holding that claim preclusion did not apply where

118 (3d Cir. 2016) (holding that parties’ intent in settling a case raised factual questions not properly resolved on a motion to dismiss).

the underlying case was settled and parties did not include language that “expressly precludes plaintiffs from filing an infringement action based on conduct occurring after the dismissal of the prior action”).⁶

NLC should be held to the bargain it struck. Rather than proceed through discovery and trial, the United States and NLC agreed to resolve their dispute by settlement agreement. That agreement was effective for two years. After that time, NLC agreed that the United States could commence new lawsuits against it for new violations of the ADA. Aside from imposing a two-year waiting period and resolving the specific claims at issue in that case, the settlement agreement does not limit in any way the types of claims that the United States can assert against NLC. Because NLC has not carried its burden to show that the doctrine applies, the Court should reject NLC’s collateral estoppel argument. *Arizona*, 530 U.S. at 414; *Suppan v. Dadonna*, 203 F.3d 228, 233 (3d Cir. 2000) (“The party seeking to effectuate an estoppel has the burden of demonstrating the propriety of its application.”).⁷

⁶ In *Burlington*, a panel of the Third Circuit explained in a footnote that collateral estoppel could apply based on an underlying interlocutory summary judgment decision. 63 F.3d at 1233 n.8. But that part of the holding is of little relevance here because the panel did not discuss how the underlying action was resolved (i.e., by settlement or by final adjudication of the merits). If it was by settlement, the terms of that agreement were not discussed. And the Supreme Court’s subsequent decision in *Arizona v. California* teaches that, when analyzing the collateral estoppel consequences of a prior litigation that has been resolved by the parties’ settlement agreement, courts must look to whether “it is clear ... that the parties intend their agreement to have such an effect.” 530 U.S. at 414.

⁷ Aside from preventing the United States from vindicating the public interest, accepting NLC’s collateral estoppel argument would frustrate the public policy of encouraging parties to resolve their disputes by settlement agreement. Litigants who receive a partially adverse interlocutory ruling will be less likely to settle the

B. The Decisions in the 2009 Lawsuit Lack Sufficient Finality to Support Collateral Estoppel

Putting aside the terms of the settlement agreement, NLC's collateral estoppel argument also fails because *NLC I* and *NLC II* were unappealable interlocutory decisions. Although the finality prong of the collateral estoppel analysis does not always require "entry of a judgment final in the sense of being appealable," *Burlington N. R.R.*, 63 F.3d at 1233 n.8 (quoting *In re Brown*, 951 F.2d 564, 569 (3d Cir. 1991)), a party seeking to invoke the doctrine must show that the underlying decision was "sufficiently firm to be accorded conclusive effect." *Id.* (quoting *In re Brown*, 951 F.2d at 569). To make that determination, courts look to, among other things, "whether that decision could have been, or actually was, appealed." *Id.* (quoting *In re Brown*, 951 F.2d at 569).

The United States does not dispute that NLC has carried its burden on the first two prongs of the collateral estoppel test (i.e., that the legal question at issue is substantially similar to the issue decided in the 2009 lawsuit and that the issue was actually litigated). But NLC cannot show that the issue was "determined by a final and valid judgment" because as a decision on a pre-discovery, partial motion to dismiss, *NLC I* was unappealable; so too was *NLC II*, which denied leave to amend the complaint. *See id.*; *see also Kline v. Hall*, 12-CV-1727, 2013 U.S. Dist. LEXIS 59143, at *11-13 (M.D. Pa. Apr. 25, 2013) (holding that collateral estoppel did not apply where decision at issue was unappealable because he was the prevailing

case for fear of being barred from ever revisiting that issue. *See Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1538 (Fed. Cir. 1995).

party in the underlying action).⁸ In short, these decisions are not “sufficiently firm to be accorded conclusive effect.” *Burlington N. R.R.*, 63 F.3d at 1233 n.8.

Furthermore, because the 2009 lawsuit was dismissed based on the parties’ settlement agreement, NLC cannot show that *NLC I* or *NLC II* were “essential to the prior judgment. *Burlington N. R.R.*, 63 F.3d at 1231-32; *see also Talmage v. Harris*, 486 F.3d 968, 974 (7th Cir. 2007) (“Normally, when a case is resolved by settlement or stipulation, courts will find that the ‘valid final judgment’ requirement of issue preclusion has not been satisfied.”).

III. NLC VIOLATED § 12182(b)(1)(E) BY DENYING M.M.’S PARENTS EQUAL ACCESS TO ITS CHILD CARE SERVICES BECAUSE OF THEIR DAUGHTER’S DISABILITY

In commencing this action against NLC, the United States is vindicating the public interest in combating disability discrimination by targeting two types of discrimination. The first focuses on the discriminatory conduct directed at M.M. (specifically, NLC’s refusal to make reasonable modifications of its policies, practices, and procedures and its subsequent expulsion of M.M.). Compl. ¶¶ 1, 25-27, 29(a-c). The second focuses on the discriminatory conduct directed at M.M.’s parents (i.e., NLC’s denial of equal access to its child care services because of M.M.’s disability). *Id.* ¶¶ 1, 25-27, 29(c). NLC argues that the United States cannot pursue the second type of claim because, according to NLC, any harm suffered by M.M.’s parents was “indirect” and, therefore, not covered by the ADA. NLC Br. at 22-28.

⁸ Because the District Court did not “direct entry of a final judgment” on the associational discrimination claim, that Court remained free to revise that decision “at any time.” Fed. R. Civ. P. 54(b).

In the Complaint, the United States alleges that M.M.’s parents were “exclude[d] or otherwise den[ied] equal” access to the “goods, services, facilities, privileges, accommodations or other opportunities” offered by NLC. Compl. ¶¶ 1, 25, 26, 27, 29(c). And there is no dispute that M.M. had a “known disability” or that M.M.’s parents were “known to have a relationship” with M.M. Thus, the claim falls within the plain language of the statute. *See* 42 U.S.C. § 12182(b)(1)(E).

That M.M. may have been the primary victim of NLC’s discrimination does not mean that the harm suffered by M.M.’s parents is not actionable. Courts have routinely rejected similar attempts by defendants to narrowly define the goods or services they provide so as to avoid discrimination claims by anyone other than the primary beneficiary of the goods or services provided. *See, e.g., Sheely v. MRI Radiology Network*, 505 F.3d 1173, 1187 & n.14 (11th Cir. 2007) (allowing parents to accompany their children to an MRI waiting area can be construed as a “benefit” to the parents); *Rothschild v. Grottenthaler*, 907 F.2d 286, 290 (2d Cir. 1990) (rejecting argument that services and benefits of “public schools are for children, not their parents”); *Bravin v. Mt. Sinai Med. Ctr.*, 58 F. Supp. 2d 269, 272 (S.D.N.Y. 1999) (rejecting hospital’s argument that because pregnant women were the intended recipients of prenatal classes, the hospital had no ADA obligations to a deaf husband who accompanied his wife).

Even if M.M. was the “primary” beneficiary of NLC’s child care services, the United States can still state a claim for associational discrimination based on the discrimination suffered by M.M.’s parents. For more than two years, M.M.’s parents

paid for Chesterbrook's services and Chesterbrook, in turn, provided those services. Compl. ¶¶ 12-21. When M.M. was expelled because of her disability, her parents were denied equal access to NLC's "goods, services, facilities, privileges, advantages and accommodations" because of their "relationship" to M.M. 42 U.S.C. § 12182(b)(1)(E).

Expelling M.M. because of her disability had a direct and measurable effect on her parents. The process of searching for and securing an appropriate child care arrangement can take many months. During that process, parents weigh a range of factors, including the setting (i.e., in-home or at a facility, secular or religious); cost; proximity to a parent's place of employment or to family or friends who might be able to help in an emergency; hours of operation; curriculum and recreational opportunities; and the crucial but indefinable "gut-feeling" that a parent has for a particular provider. Add to that the gravity of entrusting the care of a child, too young to communicate, to a complete stranger. The weight of these decisions is only amplified when a child has a disability. In short, disruptions to child care arrangements have profound impacts on the parents, who may be forced to miss work or school to care for the child or who may need to secure more expensive child care arrangements.

NLC asks this Court to ignore the allegations in the Complaint and the statutory language and be guided instead by the decisions of a handful of other District Courts. NLC relies principally upon *NLC I* and *NLC II*, in which the District Court held that United States could not assert associational discrimination

claims because it viewed the harm suffered by the parents as “indirect” or “derivative.” See *NLC I*, 676 F. Supp. 2d at 388; *NLC II*, 2010 U.S. Dist. LEXIS 27688, at *12.⁹ Those decisions, however, are predicated on an overly-narrow view of the ADA’s associational discrimination provision and, as discussed at length above, the case was settled before any appeals could have been taken.

Section 12182(b)(1)(E) reflects the breadth of the ADA’s protections. Nothing in that provision lends itself to the narrow construction imposed by the District Court in *NLC I*. Even if *NLC I* was correct in reading a “direct” injury requirement into § 12182(b)(1)(E), the discrimination suffered by the parents in that case (that is, the denial of equal access to NLC’s child care services) should have satisfied the requirements of § 12182(b)(1)(E).¹⁰ Rather than follow *NLC I*, this Court should accept as true the United States’ allegation that NLC discriminated against M.M.’s parents by denying them equal access to its daycare program and interpret § 12182(b)(1)(E) in a manner that is consistent with the overall goal of the ADA.¹¹

⁹ In reaching its decision, the District Court in *NLC I* relied on a Third Circuit case and DOJ commentary on a DOJ regulation. *NLC I*, 676 F. Supp. 2d at 386-88. Neither the case (*Doe v. Cnty. of Centre*, 242 F.3d 437 (3d Cir. 2001)) nor the regulation (28 C.F.R. § 36.205) address the viability of the type of associational claim at issue in *NLC I* (or here). The District Court also relied heavily on *Glass v. Hillsboro Sch. Dist.* 142 F. Supp. 2d 1286 (D. Or. 2001) and *Simenson v. Hoffman*, No. 95-1401, 1995 U.S. Dist. LEXIS 15777 (N.D. Ill. Oct. 20, 1995). *Glass* is inapposite because it involved a school’s decision to disallow experts hired by the parents from observing special education classrooms. And in *Simenson*, the court rejected a parent’s associational discrimination claim based on a physician’s refusal to provide medical care to a child. The United States disagrees with that holding.

¹⁰ Notably, the terms “direct,” “indirect,” and “derivative” do not appear in § 12182(b)(1)(E). See, e.g., *NLC Br.* at 24, 25 n.4, 28 n.5.

¹¹ *NLC* states that “[c]ourts around the country have relied on ... [*NLC I* and *NLC II*] in denying associational discrimination claims brought by individuals who

The reasoning from a more recent decision from another Third Circuit district court is instructive. In *S.K. v. Alleghany School District*, the U.S. District Court for the Middle District of Pennsylvania held that a parent adequately pleaded an associational discrimination claim where a school district refused to provide certain transportation services to the parent’s disabled child. 146 F. Supp. 3d 700, 704 (W.D. Pa. 2015).¹² The District Court held that, by refusing to provide transportation to the child, the parent “plausibly show[ed] she suffered a direct injury,” namely, “exclusion from full access to the transportation service provided by the [school district].” *Id.* at 718. It did not matter that the parent was not physically present on the bus (or that the parent was personally denied transportation). What mattered to the Court, and what matters under § 12182(b)(1)(E), is that withholding the transportation service from the child denied the parent equal access to a service based on the child’s disability.

did not plead direct discrimination,” and cites two cases to support that assertion. NLC Br. at 26-27. In *D.N. v. Louisa Cnty. Pub. Sch.*, 156 F. Supp. 3d 767 (W.D. Va. 2016), the district court quoted *NLC II* for the uncontroversial proposition that associational discrimination claims require a “separate and distinct denial of a benefit or services to a nondisabled person.” *Id.* at 773. And in *J.D. v Georgetown Indep. Sch. Dist.*, No. 10-CA-717, 2011 U.S. Dist. LEXIS 79335 (W.D. Tex. July 21, 2011), a district court cited *NLC II* when it denied a parent’s associational discrimination claim. But *J.D.* did not involve expulsion of a child from a daycare program and, unlike the instant action, there were no allegations in the complaint that the parents were denied a benefit or service. *Id.* at *29-30.

¹² *S.K.* involved a claim under Title II of the ADA, not Title III. In some cases, that distinction can be critical; in *S.K.* it is irrelevant. The Department of Justice implementing regulation at issue in that case mirrors the language of Title III’s associational discrimination provision. Compare 42 U.S.C. § 12181(b)(1)(E), with 28 C.F.R. § 35.130(g).

Just as the parent in *S.K.* was denied equal access to the school district's transportation services, so too were M.M.'s parents denied equal access to NLC's child care services. Even though NLC expelled M.M., and even though M.M.'s parents were not, themselves, expelled from Chesterbrook, that expulsion denied M.M.'s parents equal access to NLC's child care services because of M.M.'s disability. That denial of services was itself discriminatory and resulted in measureable harms.¹³

The United States' position is also consistent with how courts treat associational discrimination claims in contexts outside of education and child care. Associational discrimination claims often arise when architectural barriers—for instance, the absence of wheelchair ramps—exclude a person with a disability from accessing a Title III facility. If the person with a disability is accompanied by a person without a disability—for instance, a non-disabled parent accompanying a child who uses a wheelchair—both individuals could have a viable ADA claim based on the facility's failure to remove barriers. *See, e.g., George v. AZ Eagle TT Corp.*, 961 F. Supp. 2d 971, 974-76 (D. Ariz. 2013) (holding that non-disabled father stated associational discrimination claim where he alleged that he was deterred from

¹³ The United States also brings to the Court's attention a decision in *Orr v. Kindercare Learning Centers, Inc.* Civ. No. 95-507 (E.D. Cal. June 9, 1995). Simunovich Dec., Exh. G. There, parents of a child with a disability brought associational discrimination claims on the grounds that "a public accommodation such as Kindercare [a child care provider] provides services not only to children, but also to the parents of children by providing after school care, a service that parents would otherwise have to provide themselves." *Id.* at 10. The district court held that the parents' claim "raised litigable questions" and granted in part the parents' request for preliminary injunctive relief. *Id.* at 21.

visiting a shopping center because of architectural barriers that had the effect of excluding his disabled son); *Spector v. Norwegian Cruise Line Ltd.*, No. 00-CV-2649, 2002 U.S. Dist. LEXIS 28074 (S.D. Tex. Sept. 9, 2002), *aff'd in part, rev'd in part*, 356 F.3d 631 (5th Cir. 2004), *rev'd on other grounds*, 545 U.S. 119 (2005) (holding that a cruise ship passenger stated associational discrimination claim where she could not upgrade cabins because of companion's accessibility problems).

The principles underpinning these associational discrimination decisions apply with equal force here. The Complaint alleges that NLC discriminated against M.M.'s parents by denying them equal access to its child care services based on their relationship to an individual with a disability. That is precisely the type of discrimination that § 12182(b)(1)(E) was designed to root out.

IV. THE REQUEST FOR INJUNCTIVE RELIEF IS SUFFICIENTLY PLEADED AND IS AVAILABLE UNDER THE ADA

As with nearly every complaint brought by the United States to enforce Title III, the United States here seeks injunctive relief (in addition to other remedies). Compl. at 7. NLC argues that the Court should “dismiss” that request for relief because M.M. no longer attends Chesterbrook Academy. NLC Br. at 20-21. NLC also attacks the request for injunctive relief as “extraordinarily broad” because it would force NLC “to comply generally with the ADA.” *Id.* at 21-22. These arguments misconstrue the ADA and the United States' pleading obligations.

A. The Attorney General Can Seek Injunctive Relief Even Though M.M. No Longer Attends Chesterbrook

When the Attorney General exercises his statutory authority to enforce the ADA, district courts can award “any equitable relief that such court considers to be

appropriate.” 42 U.S.C. § 12188(b)(2); *see also* 42 U.S.C. § 12188(b)(2)(A)(i & ii) (authorizing district courts to award, among other forms of equitable relief, “temporary, preliminary, or permanent relief” and “modification of [a] policy, practice or procedure”). The availability of equitable relief is vital to the Attorney General’s “central role in enforcing” the ADA and in “provid[ing] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b)(2-3).¹⁴ This statutory language establishes beyond any doubt that this Court has the power to award the equitable relief sought by the United States, regardless of whether M.M. currently attends NLC.

B. The United States’ Request for Injunctive Relief Complies with Rule 8(a)(3)

NLC also argues that the Court should strike the United States’ request for injunctive relief because, in NLC’s view, the demand is overbroad. NLC Br. at 21. NLC characterizes the demand as little more than a request that NLC “obey the law in the future.” *Id.* at 21-22. NLC misstates the United States’ pleading obligation.

The United States’ request in the Complaint for injunctive relief satisfies Rule 8(a)(3) because it demands a specific form of relief and alleges enough facts to show an entitlement to that relief. Fed. R. Civ. P. 8(a)(3); *RKO-Stanley Warner Theaters, Inc. v. Mellon Nat’l Bank & Trust*, 436 F.2d 1297, 1304 (3d Cir. 1970) (holding that request for relief complied with Rule 8(a)(3) where it sought injunctive

¹⁴ The relief sought in the Complaint is consistent with the relief the Attorney General routinely seeks—and obtains—in similar cases. *See, e.g.*, https://www.ada.gov/enforce_activities.htm#complaints (last visited Apr. 28, 2017) (collecting complaints and settlement agreements in cases brought by the Attorney General).

relief against two defendants, but not for a third defendant, against whom plaintiff only sought “such other order as the Court, in its discretion, deems necessary”); *Triman Indus. v. Pentagon 2000 Software, Inc.*, No. 14-CV-5842, 2015 U.S. Dist. LEXIS 56494, at *5-6 (D.N.J. Apr. 30, 2015) (holding that counterclaims, though “brief, unelaborate, and untitled,” were sufficient because they included short statement of facts underlying the counterclaims and demanded damages in an amount to be determined at trial); *cf. Perdue v. City of Wilmington*, No. 14-CV-44, 2014 U.S. Dist. LEXIS 86944, at *2-3 (D. Del. June 26, 2014) (citing *Liggon-Redding v. Souser*, 352 F. App’x 618, 619 (3d Cir. 2009), and dismissing complaint, without prejudice, where plaintiff failed “to specify relief of any sort”).

NLC relies on two cases to support its position, neither of which have any bearing here. NLC Br. at 22. *Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.* dealt with the terms of a permanent injunction that was issued after a bench trial; it did not evaluate the sufficiency of the demand for injunctive relief in a complaint. 913 F.2d 64, 82-83 (3d Cir. 1990). Similarly, *Glover Construction Company, Inc. v. Babbitt* addressed the terms and conditions of a permanent injunction; it did not so much as mention pleading requirements under Rule 8. No. 97-7122, 1999 U.S. App. LEXIS 1683, at *4-6 (10th Cir. Feb. 5, 1999).

The Complaint satisfies the Attorney General's pleading requirements: it includes a demand for relief, identifies the legal basis upon which that demand is sought, and alleges enough facts to show an entitlement to that form of relief.¹⁵

CONCLUSION

For the reasons set forth above, the United States respectfully submits that NLC's motion should be denied in its entirety.

Dated: Newark, New Jersey
May 1, 2017

Respectfully submitted,

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¹⁵ If the Court agrees with NLC on this issue, the United States requests leave to amend the Complaint.