State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

FINAL DECISION

OAL DKT. NO. EDS 09841-19

AGENCY DKT. NO. 2019-30170

M.M. ON BEHALF OF I.K.,

Petitioner,

v.

EDGEWATER BOROUGH

BOARD OF EDUCATION,

Respondent.

____

M.M., petitioner, pro se

Isabel Machado, Esq., for respondent (Machado Law Group, attorneys)

Record Closed: June 12, 2020 Decided: July 24, 2020

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE

I.K. is an educationally disabled student as defined under N.J.A.C. 6A:14-1.1 et seq., and eligible for special-education services under the category of “preschool child with a disability.” M.M. and M.K. are I.K.’s parents (“petitioners”) and are domiciled within Edgewater School District (“District”). The petitioners unilaterally placed I.K. at the IntelliChild Academy program (“IntelliChild”). The District proposed programming, but

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there was a dispute. This resulted in a Stipulation of Settlement without either party waiving their respective positions and without any admission of liability. The District agreed to pay the costs of certain services outlined in the settlement agreement should insurance not cover it all. Additionally, the settlement instructed that should disagreement arise between the parties as to proper placement and programming, the individualized education program (IEP) proposed by the District shall be considered an initial IEP and there will be no stay put.

Pursuant to the May 17, 2019, IEP proposed by the District, I.K. would be placed at the in-district full-day preschool program. The District further proposed providing individual and group occupational therapy, and group physical therapy, as well as an extended-school-year program. On June 18, 2019, petitioners filed a request for due process and sought home-based services as follows:

> *speech therapy four times per week; and
> *special instruction three times per week; and
> *occupational therapy two times per week; and
> *ABA therapy three times per week; and
> *physical therapy two times per week.

Petitioners also sought IntelliChild Academy tuition.

The District, through its attorneys, sought records from IntelliChild and was advised that IntelliChild does not maintain any records other than general enrollment documents. On October 25, 2019, petitioners' own independent evaluator, Jessica Cardona, BCBA, conducted an observation of I.K. at IntelliChild Academy and produced her summary. On April 6, 2020, the District filed this motion for summary decision requesting that petitioners' due-process petition be dismissed. No responsive papers were timely filed by petitioners, and a status conference was scheduled for June 1, 2020, at 3:00 p.m. Petitioners did not join the conference call, and were advised on even date, via email, that the motion would be considered unopposed if a reply certification were not received by June 10, 2020. No response of any kind has been received to date, and, as such, the

certifications in support of the unopposed motion for summary decision were not challenged, and are found as **FACTS**.

LEGAL ANALYSIS

a. Summary Decision Standard

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits that may have been filed with the application, show that there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Even if the non-moving party comes forward with some evidence, summary decision must be granted if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted). The opposing party "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cty. Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622 (App. Div. 1987).

b. Petitioners' Request for IntelliChild Academy Tuition and Home Services

Parents of a child with a disability may be entitled to reimbursement for an out-of-district placement only upon a finding that the district did not make available a free, appropriate public education ("FAPE") *and* that the private placement the parents chose is appropriate. See Florence Co. Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); N.J.A.C.

6A:14-2.10; 34 C.F.R. § 300.148(c) (2019). In the within matter, there is a Stipulation of Settlement which specifically notes that neither party waived their position or admitted liability with respect to the placement and programming prior to the unilateral private placement. Additionally, the parties agreed that the District's IEP would be considered the initial IEP if a disagreement arose, and that IntelliChild would not be considered the "stay put." Petitioners therefore must show that the initial District IEP failed to offer a FAPE and that the private placement of IntelliChild is appropriate.

A parent of a student with a disability may seek reimbursement for private-school expenses even if the student never received special education and related services through the public school system. However, the parent will still need to demonstrate that the district failed to offer the student FAPE and that the private placement is appropriate. Forest Grove Sch. Dist. v. T.A., 52 IDELR 151 (U.S. 2009). A district makes FAPE available to a student with a disability if it complies with the statute's procedural requirements and offers an IEP that is reasonably calculated to allow the student to make progress that's appropriate in light of their unique circumstances. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

The parents' decision to unilaterally place a child in a private placement is proper only if the placement is "appropriate, i.e., it provides significant learning and confers meaningful benefit." Mary Courtney T. v. Sch. Dist. of Phila., 575 F.3d 235, 242 (3d Cir. 2009). Petitioners must show that their unilateral placement of I.K. at IntelliChild is appropriate and conferred significant learning and meaningful benefit. Id. at 242. The private placement is not a proper placement if it does not address the child's ongoing needs. See Lauren P. v. Wissahickon Sch. Dist., 310 Fed. Appx. 552 (3d Cir. 2009).

Respondent argues that petitioners are unable to demonstrate that IntelliChild has conferred any meaningful benefit upon I.K. since there is no indication that he has made any progress in the program or that it is designed to address his ongoing needs. IntelliChild has acknowledged that it is a daycare center, not an educational institution. There is no educational component. No records are maintained; there are no progress reports, disciplinary reports, or even attendance records. In fact, the only records IntelliChild has provided indicate that I.K. regressed while attending the private

placement, and confirm that he was moved from his age-group class, pre-K4, to the pre-K3 class at the start of the year.

However, even if a student with a disability benefitted from or made progress in a private program, that will not in itself entitle parents to tuition reimbursement. The parents must also show that the program addressed the student's unique disability-related needs. See, e.g., R.H. v. Bd. of Educ. of Saugerties Cent. Sch. Dist., 74 IDELR 221 (2d Cir. 2019) (unpublished) (a seventh-grader's improved attendance resulted from being allowed to opt-out of nonpreferred tasks as opposed to specific services to address his anxiety); M.B. v. Minisink Valley Cent. Sch. Dist., 61 IDELR 5 (3d Cir. 2013) (unpublished) (because a private school did not provide services to address the student's difficulties with organization and executive functioning or offer appropriate behavioral supports, his parent could not recover the cost of his placement despite his progress). In these instances, the parents were able to show progress and still could not succeed in their petitions because they could not show that the private placements had programming that itself was designed to address the student's unique disability-related needs.

Here, IntelliChild admits to being a daycare-based program that provides childcare, and is not educationally based, which by itself means that it cannot be found to confer any meaningful *educational* benefit. There is no record of I.K. receiving any of the services petitioners seek from the District, including speech therapy, occupational therapy, ABA therapy, and physical therapy. The fact that IntelliChild is a childcare center does not automatically preclude it from being an appropriate placement.[1] Parents are not precluded from being reimbursed for unilateral placement on the grounds that a facility is a licensed childcare center. See R.J. v. Collingswood Bd. of Educ., EDS 4926-96, Final Decision (October 28, 1997), http://njlaw.rutgers.edu/collections/oal/. Instead, the critical inquiry is whether the facility conferred a meaningful educational benefit to the student.

Finally, petitioners' own independent evaluator, Jessica Cardona, BCBA, reported that children at IntelliChild engage in only three activities throughout the day: "seat work," "show and tell," and "story time." Ms. Cordova further reported that I.K. struggles with

[1] A "child care center" is a facility "which is maintained for the care, development or supervision of six or more children who attend the facility for less than 24 hours a day." N.J.S.A. 30:5B-3(b).

seat work, and also with maintaining his attention during story time. I.K. was also noted to have difficulty walking in line with peers, interacting with peers, and following instructions. Ms. Cordova concluded:

> [I.K.] would benefit from having a shadow to help guide him throughout his school day. It was reported that he has a hard time during his seat work and story time, however it was observed that he is also not engaging in appropriate play skills or interaction with his peers. Having a shadow help guide him throughout the day would be beneficial in making sure he is getting the most out of this setting and learning how to interact with his peers appropriately.

Clearly, I.K. is not benefitting from the few activities offered in the daycare setting, which has a student-to-teacher ratio of 30:1.

Petitioners have failed to show that the initial IEP in place, before they unilaterally placed I.K. in IntelliChild, failed to make FAPE available to him. Petitioners have also failed to make a showing that IntelliChild is appropriate for I.K. There is nothing in the record to suggest that I.K. is even receiving a de minimis educational benefit while enrolled at IntelliChild. Courts "must examine the record for 'objective evidence' that indicates 'whether the child is likely to make progress or regress under the proposed plan.'" Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 113 (2d Cir. 2007) (citation omitted). Here, there is no objective evidence that the District failed to offer I.K. a FAPE, and there is no objective evidence that IntelliChild is conferring any educational benefit upon I.K. Respondent's motion for summary decision is therefore **GRANTED**, as there are no material facts in dispute, and respondent is entitled to judgment as a matter of law.

ORDER

Based upon all of the foregoing, respondent's motion for summary decision is **GRANTED**, and it is **ORDERED** that petitioners' due-process petition be and hereby is **DISMISSED**.

This decision is final pursuant to 20 U.S.C. § 1415(i)(1)(A) and 34 C.F.R. § 300.514 (2019) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. § 1415(i)(2); 34 C.F.R. § 300.516 (2019). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Policy and Dispute Resolution.

July 24, 2020
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency July 27, 2020

Date Mailed to Parties: July 27, 2020

dr