STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. PP20MB-64570

A.P and M.P. o/b/o their minor child, J.P., and A.P. and M.P., individually, Complainants, v. ABC Growing Tree LLC, Respondent.	)	Administrative Action **FINDING OF PROBABLE CAUSE**

This is a disability discrimination case. Morris County residents A.P. and M.P. (Complainants) allege that a privately-owned daycare center, ABC Growing Tree LLC (Respondent), violated the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, when it refused to continue accommodating their child's disability. The New Jersey Division on Civil Rights (DCR) investigated the matter and found as follows.

Summary of Investigation

Respondent operates a State-licensed daycare center for children from infancy through kindergarten. Located in a strip mall in Mine Hill, the facility has classrooms and common areas such as an outdoor play area in the rear of the school, and an indoor area with books, a television, and a puppet stage.

Complainants are Mine Hill residents whose son, J.P., was diagnosed with Autism Spectrum Disorder. On January 2, 2013, they began bringing J.P. to Respondent's daycare center (Monday through Friday, 8 a.m. to 6 p.m.) where he was assigned to the Nursery 2 classroom in the rear of the building, approximately 196 feet from the front door.

Shortly afterwards, J.P. began receiving services from the Morris County Family Early Intervention Program. Speech and occupational therapists worked with J.P. three to four times a week for one-hour sessions in a private area at the daycare center. This continued for six months until June 27, 2013, when J.P. turned 3 years-old and became eligible for the Mine Hill School District's early intervention program.

In July 2013, J.P. attended a month-long half-day early intervention program. A school bus picked him up at the daycare in the mornings. During that month, M.P. adjusted her work schedule so that she could wait at the daycare center with J.P. and put him on the bus. She stated that this was necessary because the bus driver and Respondent told her that they were unable to place the child on the bus. When J.P.

returned to the daycare center at about 12:45 p.m., a member of Respondent's staff would help him off the bus and accompany him inside where he would spend the rest of the day.

As the new school year approached, Complainants learned that the School District planned to assign an aide to J.P.'s bus. This development would result in a change in procedures. The aide would exit the bus and pick up J.P. at Respondent's front door in the morning and return him to the front door in the afternoon. One of Respondent's employees would need to bring J.P. to the front door when the bus aide arrived, and answer the door upon their return. Because the aide came to the door each morning and afternoon, Respondent's employee would never have to step outside the building. Complainants relayed the new procedure to Respondent.

The parties agree that when school began on or around September 9, the new procedure was implemented and the task of answering the door and meeting the aide was usually undertaken by Director Lauren Kreeger or Assistant Director Jessica Quinn.

Two weeks later, Kreeger sent an email to Complainant stating that it could no longer provide that service. Kreeger wrote in part:

> Our policy is that each child is brought to the center by a parent or someone personally approved by the parent. That person must log the child into Pro Care [[1]] personally, staff is not permitted to do this. The child is then escorted to his or her class by the parent or the authorized person bringing the child to school . . . On pickup, the parent or someone personally approved by the parent must come into the center, retrieve the child and his or her belongings then personally log the child in Pro Care. There are no exception to this rule as our caregivers and staff are assigned specific tasks and classes with multiple children and cannot deviate to take a child off of, or put a child on a bus. In addition, we are required by the state of NJ to log each child in and out of the center as they arrive or depart. We have opted to use an automated system so as to ensure that our staff is not burdened by an additional sign in or sign out task.
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> [See Email from L. Kreeger to A.P., Sept. 25, 2013, 6:25 p.m.]

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[1] Kreeger told DCR that "Pro Care" refers to a computerized tracking system used to enable parents to check in their children using a code or thumb print when arriving and when picking them up at the end of the day. Parents are given key pad codes to enter the building and then "sign in" using the Pro Care system. If anyone other than a parent brings a child to the center, they are required to ring the door bell, identify themselves via the intercom, and be let in by a staff member. Respondent also has a number of security cameras in and outside the building. The cameras can be monitored from the Director's office and remotely by the co-owner, Bruce Kreeger. The Director's office is adjacent to the front door and has a large window to the outside.

The next day, A.P. asked Kreeger to reconsider and noted in part, "I have enclosed the enrollment packet so you can see that nowhere on it is it stated that the child must be brought to his or her respective classroom or picked up from it." See Email from A.P. to Respondent, Sept. 26, 2013, 9:21 a.m. He was referring a pamphlet called the Enrollment Packet that Respondent distributes to prospective parents containing its polices, procedures, and forms.

The Enrollment Packet given to Complainants did not state that parents or guardians must walk the children to and from the classrooms. It noted in part, "If an individual has been authorized to pick up a child from ABC Growing Tree, they are asked to ring the front door bell upon their arrival. An administrative staff member will greet him/her, and will request his/her identification before allowing him/her into our facility." [2]

Kreeger responded that she had not yet reviewed his email but noted in part, "Our issue is simple, we do not have the staff to keep an eye out for the bus, get to the door, get [J.P.] in and to his class with absolute assuredness. That is why our policy and procedure is and has been that children are brought in, logged, and escorted to their class by their parent or authorized person." See Email from L. Kreeger to A.P., Sept. 26, 2013, 3:07 p.m.

The next day, Friday, September 27, 2013, was J.P.'s last day at the facility. Complainants told DCR that they arranged for family members to care for J.P. while they searched for an alternative daycare center.

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[2] Respondent subsequently revised the Enrollment Packet, presumably after it received Complainants' verified complaint, to include the following:

> Student Drop off and Pick up Policy
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> When dropping off your children, the following policy and procedures should be followed to ensure the safety of the children in our facility.
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> 1. Enter the building through the main front door only. Use your assigned access code to come into the main lobby.
> 2. Check your child into the building using the ProCare system.
> 3. Walk your child to his or her classroom.
> 4. Make sure that the caregiver in the classroom has acknowledged your child and knows that you are leaving.
>
> ABC Growing Tree, LLC is not a drop and run facility. All children must be walked to their assigned classroom by an authorized parent or guardian. When picking up your children, the preceding policy and procedures should be followed in reverse. Only those parents or guardians authorized to pick up the children in ABC Growing Tree's care will be permitted access to the classroom and children.

On Monday, September 30, 2013, Kreeger sent an email to Complainants, which stated in part:

> [W]e cannot meet the bus and escort [J.P.] to his class. You will need to make other arrangements with the bus company to have him brought to his class when he arrives at ABC Growing Tree. We decided long ago that we would not become a drop and run school. It is just not possible for us to maintain our classes the way that we want to in offering the children devoted and uninterrupted time.

See Email from L. Kreeger to A.P., Sept. 30, 2013, 11:47 a.m. Kreeger also noted that some of the facility's policies "are written and some are not," but they are "not required to codify each and every one of them in a written form." Ibid.

Complainants contend that Respondent's position was unreasonable and amounts to disability discrimination.

Respondent denied the allegations of disability discrimination in their entirety. It argued in part:

> Over the span of several months, ABC met every reasonable demand for accommodation as a result of J.P.'s disability. ABC went above and beyond that which was required pursuant to law in order to meet J.P.'s needs. However, due to ABC's business structure and low student to teacher ratio, it has a limited number of staff and none that are available to leave their assigned classrooms in order to personally deliver and retrieve J.P. from the front door.

See Respondent's Answer to Verified Complaint, Jul. 11, 2014, p. 3. Elsewhere, it reiterated that it "did not have the staffing capabilities to handle extraordinary and unreasonable demands made by the Complainants." Id. at p. 2.

Respondent produced information about its class sizes, required student/teacher ratios, and "caregivers" in August 2013, which can be summarized as follows:

Class	Students	Full-Time Staff	Part-Time Staff	Required Ratio Student/Teacher
Infants/Little Tots	5		3	1:4
Toddlers	4		3	1:6
Nursery 1 (2.5 - 3 yrs. old)	6	1	1	1:10
Nursery 2A (3 - 4 yrs. old)	9	1		1:10
Nursery 2D	8	1		1:10
Pre-K	8	1	1	1:12

Respondent stated that it had no extra staff beyond the twelve caregivers and directors. There is no indication that Kreeger or Quinn had classroom assignments.

Kreeger stated that Quinn left in September 2013 and was not replaced. Respondent provided the names and assignments of the caregivers who were working in August 2013 and stated that where there was "overlap," it was due to "a staff member being trained." It stated that if attendance was low in one area, it would move caregivers between areas.

Kreeger told DCR that J.P. had "behavioral issues" and that the "transition period" of retrieving him to meet the bus in the morning could be difficult because he would cry, swing his arms, or not walk cooperatively through the school.

Lori Cassidy, owner of Cassidy Bus Company, told DCR that during the relevant time, she was contracted to provide transportation services for special needs students served by the Mine Hill Public Schools. She stated that her contract states that children must be transported door to door, and that aides are not supposed to enter the building.

Gerry Bryant, J.P.'s bus aide, told DCR that the first time he picked up J.P. at school it was apparent that the boy was upset and crying but not difficult to get into the bus. He stated that from the second day forward, the child seemed "okay" and happy to see him and "just about jumped into my arms." Bryant stated that he had been a school bus driver for more than 20 years and then an aide for a year when he was assigned to J.P.'s bus as an aide. He stated that J.P. was no more difficult to deal with than any other child and that he continued to be J.P.'s aide after he began attending another day care center. He described J.P. as a "pleasure to pick up."

Marleen Coscia is a developmental intervention therapist who met with J.P. at Respondent's daycare facility once or twice a week from January to June 2013. She told DCR that she would ring the bell and either the Director or Assistant Director would answer the door. She stated that there were office windows adjacent to the front door so anyone in the office would be able to see who was ringing the bell, and that they always seemed to recognize her.

Neila Schuster is a speech therapist who met with J.P. at Respondent's daycare facility once or twice a week from January to June 2013. She told DCR that she would ring the bell and either the Director or Assistant Director would answer the door. She stated that the door was not answered by a teacher.

Christine Matrisciano is an occupational therapist who met with J.P. at Respondent's daycare facility once a week for about six months. She told DCR that she would ring the bell and a staff member would come to the door. Matrisciano stated that she would walk to the child's classroom either alone or accompanied by whoever answered the door.

Once, during the investigation, the DCR investigator called Respondent to speak with Kreeger. The person who answered the telephone identified herself as a "floater." She stated that the daycare center has other part-time floaters, typically college students, who assist teachers by, for example, taking children to the bathroom or covering when the

full-time staff takes lunch. The investigator asked Kreeger about floaters. Kreeger stated that none were employed in September 2013.

Complainant M.P. told DCR that Quinn was still working at the daycare center when she and her husband were told that Respondent would no longer be providing the accommodation for her son. She did not know the total number of employees working at the time. She said that there always appeared to be two females in each classroom but she was uncertain which were considered teachers as opposed to assistants or aides. She said that there seemed to be some staff turnover--her son would get used to an employee who would then leave. She stated that they may have been college students returning to school.

M.P. stated that in March 2016, her son was evaluated independently and the evaluator concluded that his condition had improved to the extent that he is no longer diagnosed with autism. She credits the Mine Hill School District's early intervention program.

Analysis

At the conclusion of an investigation, the Director is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. The procedure is not an adjudication on the merits but merely an initial "culling-out process" in which the Director makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

The LAD states, "All persons shall have the opportunity . . . to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation" without discrimination on the basis of disability. N.J.S.A. 10:5-4; N.J.S.A. 10:5-12(f). Regulations promulgated pursuant to the LAD state that a place of public accommodation must make "reasonable accommodations to the limitations of a patron or prospective patron who is a person with a disability, including making such reasonable modifications in policies, practices, or procedures, as may be required to afford goods, services, facilities, privileges, advantages, or accommodations to a person with a disability," unless it can demonstrate that making the accommodation would impose an "undue burden on its operation." N.J.A.C. 13:13-4.11(a).

"If a defendant's response to a reasonable accommodation claim is that that accommodation would be unduly burdensome or an undue hardship, this defense is considered an affirmative defense and the defendant assumes the burden of proof on this

issue." See Lasky v. Moorestown Twp., 425 N.J. Super. 530, 545 (App. Div. 2012), certif. denied, 212 N.J. 198 (2012) (quoting Hall v. St. Joseph's Hosp., 343 N.J. Super. 88, 108-09 (App. Div. 2001), certif. denied, 171 N.J. 336 (2002)).

When determining whether a particular accommodation would impose an undue burden, factors to be considered include (a) the overall size of the business that runs the place of public accommodation with respect to the number of employees, number and types of facilities, and size of budget; (b) the nature and cost of the accommodation needed; (c) whether the accommodation sought will result in a fundamental alteration to the goods, services, program, or activity offered. N.J.A.C. 13:13-4.11; Wojtkowiak v. New Jersey Motor Vehicle Comm'n., 439 N.J. Super. 1, 14-15 (App. Div. 2015).

The LAD defines "place of public accommodation" broadly to include entities that offer goods or services to the general public such as day camps and schools. N.J.S.A. 10:5-5(l). Thus, for example, in Ellison v. Creative Learning Ctr., 383 N.J. Super. 581, 587-89 (App. Div. 2006), the Court found that a profit-making private pre-school was a place of public accommodation despite its selective admission process and non-traditional or progressive educational programs, because it "engaged in broad public solicitation for students" and "treated itself as a place of public accommodation, since on its enrollment form it held itself out as having an open admission policy and as nondiscriminatory." Id. at 588.

Here, the material facts are not in dispute. Respondent does not contest that J.P. is a person with a disability, or that its daycare center is a place of public accommodation, or that Complainants requested a disability accommodation, or that it denied the request, or that the requested accommodation would have allowed Complainants to enjoy its accommodations, advantages, facilities, and privileges. Instead, the critical issue is whether there is merit to Respondent's characterization of the requests as "extraordinary and unreasonable demands" that would have imposed an undue burden on its operations.

Respondent argues that continuing to allow the accommodation would have meant creating an exception to its established policy that parents (or persons authorized by the parents) escort the children to the classroom, and then log the child out upon departure through its tracking system. That argument ignores the fact that for purposes of disability law, the very essence of the term "accommodation" is that sometimes an employer or place of public accommodation must create an exception to an established policy. See N.J.A.C. 13:13-4.11(a) (noting that reasonable accommodations includes making reasonable "modifications in policies, practices, or procedures").

Respondent argues that in light of the student/teacher ratios that are mandated by State regulations, its caregivers could not leave their posts to "personally deliver and retrieve J.P. from the front door." See, e.g., Respondent's Answer, supra, at p. 3. Respondent produced the names of the caregivers and class sizes during the relevant time. The information supplied by Respondent suggests that there may have been additional caregivers available to walk J.P. to the front door in the morning and back to his

class in the afternoon. For instance, Respondent notes that there is a mandatory 1:10 ratio for its Nursery 1 class, which had six students at the relevant time. Thus, it would need one staff member, but it had a full-time and a part-time caregiver in August 2013. Likewise, it notes that there was a mandatory 1:12 ratio for its Pre-K class, which had eight students at the time. Here again, it would need one staff member, but it had a full-time and a part-time caregiver in August 2013.

But even assuming for the moment that Respondent is correct that it did not have enough teachers to answer the door, it has not explained why Director Kreeger could not continue performing the task. For a burden to be "undue," it must be more than an inconvenience or annoyance. Moreover, there is a disputed issue as to whether there were others who may have been available to perform the task such as Assistant Director Quinn or part-time floaters.

In sum, Respondent has provided insufficient information from which DCR can fairly conclude that continuing the arrangement would have caused an undue burden.

Based on the above, the Director is satisfied at this preliminary stage of the process that the circumstances of this case support a "reasonable ground of suspicion . . . to warrant a cautious person in the belief" that probable cause exists to support the allegations of disability discrimination based on a theory of failure to provide a reasonable accommodation. N.J.A.C. 13:4-10.2. Respondent had the opportunity to produce persuasive evidence that having a staff member walk J.P. to the front door to meet the aide when the County bus arrived, and walk back to the front door when J.P. returned would have posed an undue hardship. It did not do so. Because the burden of proof on that issue clearly rests with Respondent, and given the legal presumption in favor of disability accommodations, the Director finds–for purposes of this disposition only–that Respondent has failed to establish that its affirmative defense is meritorious.

DATE: 5-6-16

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS