SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1990-19

IN THE MATTER OF THE
REQUEST FOR 2019-2020
EMERGENCY AID SUBMITTED
BY THE BOARD OF EDUCATION
OF THE NORTH WARREN
REGIONAL SCHOOL DISTRICT.

Submitted March 23, 2022 – Decided April 18, 2022

Before Judges Hoffman, Whipple and Susswein.

On appeal from the New Jersey Commissioner of Education.

Fogarty & Hara, attorneys for appellant Board of Education of the North Warren Regional School District (Robert D. Lorfink, of counsel and on the briefs).

Matthew J. Platkin, Acting Attorney General, attorney for respondent New Jersey Department of Education (Donna Arons, Assistant Attorney General, of counsel; Michal Czarnecki, Deputy Attorney General, on the brief).

PER CURIAM

The Board of Education of the North Warren Regional School District (District) appeals from the decision of the Commissioner of the Department of Education (DOE) denying its application for emergency aid for roof repairs, and to make up reduced aid from the State. We affirm.

The District operates one school building, a seventh-through-twelfth grade middle and high school in Blairstown. The District applied for $502,795 in emergency aid on August 2, 2019 because the school roof requires major repair that will cost over $1.6 million. The District further asserted its state aid had decreased by $602,795. It projected a total loss of over $4 million by 2025 and without emergency aid, it would be unable to make the roof repair.

The District's application further lamented systemic issues that caused it financial distress. Specifically, the District argued it was subject to inadequate fund balance mandate by the State, inflexibility caused by the tax levy tap mandate, and continued reductions to extraordinary aid. The District argued the state fund balance mandate did not allow it to keep sufficient funds on hand to deal with extraordinary situations such as tremendous reductions in state aid, and the tax levy cap mandate did not allow the District to adequately react to state aid reductions. It further argued the State compounded the financial hardship by continually reducing extraordinary aid and funding certain special

education programs below 100%. The District requested a total of $502,795 in emergency aid, comprised of two figures: $348,898, for the reduction in state aid for fiscal year (FY) 2020, and $153,897, the same amount requested in its previously denied FY2019 emergency aid application.[1]

On December 6, 2019, DOE issued a written decision denying appellant's application. After conducting a thorough review of the District's initial and supplemental submissions, DOE found the District adopted and balanced its FY2020 budget inclusive of the state aid reductions that the emergency aid application sought to offset. Further, data showed that while student enrollment had decreased nearly twenty-five percent since 2009, per-pupil costs had risen by fifty-eight percent over that same period.

DOE's review found the District had the ability to use excess funds and make appropriate budgetary reallocations sufficient to make up the sum sought in the application. Between unbudgeted aid already received, a general fund surplus, available reserve funds, and questionable tuition over-budgeting, DOE

[1] The District filed an emergency aid application for FY2019 that DOE denied. The District appealed and we affirmed. In re Emergency Aid Submitted by the Bd. of Educ. of the N. Warren Reg'l Sch. Dist., No. A-1559-18 (App. Div. July 16, 2021) (slip. op. at 8).

concluded the District was not experiencing fiscal distress. Thus, DOE denied the District's emergency aid application. This appeal followed.

Our review of an administrative agency's action is limited. In re Herrmann, 192 N.J. 19, 27 (2007). An agency decision will be affirmed "unless there is a clear showing that it is arbitrary, capricious, or unreasonable." Id. at 27-28. Courts "may intervene when 'it is clear that the agency action is inconsistent with its mandate.'" In re Proposed Quest Academy Charter School of Montclair, 216 N.J. 370, 385 (2013) (quoting In re Petition for Rulemaking, 117 N.J. 311, 325 (1989)). The reasons for the agency's decision "need only be inferable from the record considered by the agency." In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 320 N.J. Super 174, 217 (App. Div. 1999).

On appeal, the District argues we should reverse DOE's decision because it did not recognize the District's fiscal distress and it was unreasonable for DOE to require it to appropriate every dollar of reserves it has before it is eligible for fiscal distress assistance. Additionally, because the decision did not discuss the unbudgeted roof repair, the District contends the denial of the Board's emergency aid request was unreasonable. Finally, the District asserts that DOE's disbursal of emergency funds to similarly situated school districts demonstrates

that DOE's denial of the District's application was arbitrary and capricious and that it violated the Administrative Procedures Act (APA), N.J.S.A. 52:14B-1 to -31. We disagree.

To explain our decision, we review the Legislative background. The 2008 School Funding Reform Act (SFRA) sought to better allocate state resources to all public school districts. N.J.S.A. 18A:7F-43 to -63. About ten years later, the Legislature altered the SFRA school funding formula to address certain funding inequities through the 2019 Appropriations Act. L. 2018, c. 53. These changes resulted in a reduction in the District's, and many other districts', state aid for FY2019.

The Legislature also amended the SFRA in 2018 to codify the changes to the school funding formula made in the Appropriations Act. N.J.S.A. 18A:7F-67 to -70. This new formula determines the extent to which districts were over- or underfunded. Ibid. Since some school districts would lose state aid while others gained, the SFRA amendments used a phased-in approach to ease the burden. N.J.S.A. 18A:7F-68. Under this schema, districts losing state aid would have their state aid decreased by thirteen percent in FY2020, and then increasing amounts for a six-year period. N.J.S.A. 18A:7F-68(b).

Notwithstanding these funding changes, the Legislature set aside emergency funds for qualifying districts experiencing fiscal distress. The FY2020 Appropriations Act set aside funds for "approved applications for Emergency Aid following district needs assessments conducted by [DOE]." L. 2019, c. 150. The DOE Commissioner then issued the FY2020 budget notification memorandum to all school districts on July 9, 2019 (July 9 Memo). This notified districts how and under what conditions a school district should seek emergency aid. Award of emergency aid would be subject to rigorous review. The July 9 Memo also encouraged districts "to consider all options available . . . prior to filing an [a]pplication for [e]mergency [a]id." Notably, these recommendations included:

> (1) use of unreserved/unbudgeted general fund surplus;
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> (2) use of emergency reserve (which requires application to the Commissioner);
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> (3) use of maintenance reserve to cover required maintenance costs included in the budget;
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> (4) recognition of revenues not previously recorded on the budgetary basis (e.g. [e]xtraordinary [a]id);
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> (5) reduction of discretionary appropriations; or
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> (6) a combination of any of the above.

Based on our review of the record, DOE's denial of the District's aid request is supported by sufficient evidence, including the District's own application and supporting documentation it provided, and is clearly delineated.

The July 9 Memo included a detailed list of twenty-three separate items required for the Department to consider such aid applications. The District's application, consisting of several reports and over two hundred pages, complied with these requirements before DOE considered the application. Upon reviewing the application, DOE determined that the District was not experiencing fiscal distress because it "ha[d] sufficient resources to fund appropriations" for the upcoming fiscal year.

This finding is supported by the voluminous available data DOE analyzed. First, the District had already balanced, and the State had already approved, a FY2020 budget inclusive of the state aid it sought to recoup. The District had not allocated any extraordinary aid[2] for the 2018-19 school year. The District similarly had not factored in any anticipated receipt of extraordinary aid for the upcoming fiscal year. DOE also noted that the District's June 30, 2019 Board Secretary's Report expected a "general fund surplus," of which a portion

[2] "Extraordinary aid" refers to reimbursement of certain special education tuition costs incurred during the prior fiscal year and received by districts after the conclusion of that fiscal year. See N.J.S.A. 18A:7F-55(b) and (c).

remained "to fund the items in the [e]mergency [a]id request." Additionally, there were other unbudgeted funds from maintenance reserve and transportation reimbursements that could also "provide additional surplus" to fund the concerns outlined in the application. Lastly, DOE questioned the need for "unknown potential" budgeted increases in tuition totaling $152,648.

All told, from the documents the District itself provided to obtain $502,975 in emergency aid, DOE determined it possessed $517,996 in funds and budgetary reallocation options. Because DOE's assessment was based on substantial and carefully considered evidence, the denial of emergency aid was not unreasonable.

Nevertheless, the District argues the decision unreasonably failed to account for, or even mention, the roof repair emergency. But in the District's application, the role of any roof repairs plays in its aid request is inconsistent. The District identified four sources of need in its application: one is the roof repairs, and the other three are generally applicable statutory guidelines binding all other school districts in the State.

Tremco, a roof and building maintenance company, compiled a report in January of 2019 detailing repairs needed for the roof. The District included this report in its emergency aid application and explained it required more than $1.6

million for repairs. However, the report shows that of the eleven separate portions of the roof, only one portion, identified as "Roof [three]," required retrofitting in the upcoming year. Of the portions of the roof, only one needed full replacement, but not until at least two years later. In its annual breakdown of suggested repairs, the report showed that while the most pressing repair, Roof three's retrofitting, would cost over $300,000, the entire $1.6 million figure encompassed all repairs Tremco suggested over a six-year period.

The District's aid request lacked any reference or correlation to any specific roof repair. Rather, the amount sought in the application corresponded directly with the amount of the District's reduction in state aid for the preceding two fiscal years: $153,897 for FY2019 and $348,898 for FY2020 for a total request of $502,795. Nowhere in its application did it indicate it required any specific dollar amount for any specific roof repair.

Moreover, though roof maintenance is a normal and expected cost associated with operating a school district, the District only budgeted $80,000 for FY2020 roof repairs. The District submitted its budget approximately five months after Tremco inspected the roof. Thus, neither its aid request, nor its own FY2020 budget, signaled that the District recognized the roof repairs to be the unforeseen crisis it now asserts. DOE's failure to reference roof repairs in

its decision is not unreasonable in light of the District's failure to demonstrate any legitimate concern about that expense.

We also reject the District's argument that because DOE disbursed emergency funds to other school districts who appeared to face similar circumstances, the denial of its emergency aid was arbitrary and capricious. Specifically, the District maintains that there is strong evidence that DOE favored some districts while denying applications to similarly situated districts. However, DOE used the same considerations for each district as outlined in the July 9 Memo, the purportedly comparative districts are not actually comparable, and even if they were, DOE's needs assessment found that the District possessed sufficient funds to make up the amount it requested in emergency aid.

The District's arbitrariness argument necessarily depends on actual similarities existing between itself and the other districts referenced. However, the record demonstrates DOE based its analysis of each district not on whether they were similarly situated to others, but, as the July 9 Memo made clear, whether each district experienced financial distress.

The District also argues that the process DOE employed to award emergency aid violated the APA which required DOE to articulate what the needs assessment entailed by identifying a readily-identifiable standard and

adopting it as a rule and that DOE's failure to promulgate such a rule allowed DOE to retain "unbounded discretion."

The deference to which courts provide agency decisions "is especially appropriate when new and innovative legislation is being put into practice, or when the agency has been delegated discretion to determine the specialized and technical procedures for its tasks." In re Adopted Amendments to N.J.A.C., 365 N.J. Super. 255, 264 (App. Div. 2003). Nevertheless, a reviewing court is not bound by an agency's misapprehension of its own enabling statutes. In re Proposed Quest Academy Charter School, 216 N.J. at 385.

Administrative agencies must implement legislative policy in compliance with the APA. In re Request for Solid Waste Util. Customer Lists, 106 N.J. 508, 519 (1987). "An agency has discretion to choose between rulemaking, adjudication, or an informal disposition in discharging its statutory duty. . . ." Northwest Covenant Med. Ctr. v. Fishman, 167 N.J. 123, 137 (2001). However, "agencies enjoy great leeway when selecting among rulemaking procedures, contested hearings, or hybrid informal methods in order to fulfill their statutory mandates." In re Provision of Basic Generation Serv. for Period Beginning June 1 2008, 205 N.J. 339, 347 (2011). Still, agencies should "articulate the standards and principles that govern their discretionary decisions in as much detail as

possible." Lower Main St. Assocs. v. N.J. Hous. & Mortg. Fin. Agency, 114 N.J. 226, 235 (1989) (quoting Crema v. N.J. Dep't of Env't. Prot., 94 N.J. 286, 301 (1983)).

The Legislature embraced administrative flexibility by approving the use of "regulatory guidance document[s]." N.J.S.A. 52:14B-3(a). Regulatory guidance documents include "any policy memorandum or other similar document used by a State agency to provide technical or regulatory assistance or direction to the regulated community to facilitate compliance with a State or federal law. . . ." N.J.S.A. 52:14B-3(a)(d). Agencies may use regulatory guidance documents only if they are made "readily available to the regulated community through appropriate means. . . ." N.J.S.A. 52:14B-3(a)(b).

In response to the Legislature setting aside emergency funds in the FY2020 Appropriations Act, DOE circulated the July 9 Memo to all school districts. It explained that applications would "be subject to a rigorous review process." It further outlined the detailed process by which districts could file an application and included a lengthy list of documents DOE required to undertake review of emergency aid applications.

Reviewing the July 9 Memo against the requirements of N.J.S.A. 52:14B-3(a) makes clear that it meets the definition of a regulatory guidance document.

DOE circulated the July 9 Memo to explain the aid application process. In so doing, it was plainly an agency document offering "technical and regulatory assistance or direction to the regulated community." N.J.S.A. 52:14B-3(a)(d). The July 9 Memo sought to clarify the criteria DOE would use "to facilitate compliance with" state law, specifically the FY2020 Appropriations Act. By circulating the July 9 Memo directly to each school district electronically, DOE made it "readily available to the regulated community through appropriate means. . . ." N.J.S.A. 52:14B-3(a)(b). Therefore, the July 9 Memo constitutes a "regulatory guidance document" permissible under the APA.

The District argues rulemaking was the only way DOE could have facilitated the needs assessment it undertook to deny its emergency aid application and that reference to a "needs assessment" does not sufficiently identify the standard DOE used, thus frustrating any review of DOE's decisions.

The law requires agencies to identify the standards guiding their discretion "in as much detail as possible," Lower Main St. Assocs., 114 N.J. at 235. The July 9 Memo did so sufficiently. The July 9 Memo specifically urged districts to consider all other options available before resorting to filing an emergency aid application. It then listed six specific, non-exclusive recommendations, including using "unbudgeted general fund surplus," "emergency reserve" funds,

"maintenance reserve," in addition to recognition of "revenues not previously recorded on the budgetary basis (e.g. [e]xtraordinary [a]id)" and "reduction of discretionary appropriations."

In the face of this specific DOE guidance, the District applied for emergency aid. DOE's needs assessment found that the District possessed funds available from its "general fund surplus," "maintenance reserve," and unappropriated and unbudgeted "[e]xtraordinary [a]id." DOE also found the District had the ability to reduce discretionary appropriations due to unexplained tuition cost increases. The July 9 Memo explained exactly how DOE would conduct its rigorous review, the specificity of which is highlighted by the specifics of the District's denial.

The District also argues that, even assuming the July 9 Memo is a regulatory guidance document, it constituted impermissible "de facto rulemaking" under the six-part test announced by the Supreme Court in Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313 (1984). As a result, the District urges us to vacate DOE's denial of emergency aid and compel DOE to engage in the rulemaking process to codify the parameters of the needs assessment. We decline to do so.

As an initial matter, regulatory guidance documents are designed not to constitute de facto rulemaking as defined by Metromedia. See N.J.S.A. 52:14B-3(a)(c):

> A regulatory guidance document that has not been adopted as a rule . . . shall not: (1) impose any new or additional requirements that are not included in the State or federal law or rule that the regulatory guidance document is intended to clarify or explain; or (2) be used by the State agency as a substitute for the State or federal law or rule for enforcement purposes.

Since the statutory definition of a regulatory guidance document conflicts to an extent with the Metromedia test, regulatory guidance documents are less likely to constitute impermissible de facto rulemaking.

Agency action may constitute rulemaking regardless of the label the agency gives it. Metromedia, 97 N.J. at 331-32. Agency action will be considered rulemaking when it:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or

> (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through rulemaking or adjudication.
>
> [Ibid.]

Not all factors need to be present for agency action to constitute impermissible, "de facto rulemaking." Id. at 332. "The pertinent evaluation focuses on the importance and weight of each factor, and is not based on a quantitative compilation of the number of factors which weigh for or against labeling the agency determination as a rule." In re Provision of Basic Generation Serv., 205 N.J. at 350.

Here, there was no impermissible rulemaking. The July 9 Memo did not meet the first Metromedia criterion, 97 N.J. at 331, because it was not generally applicable to any large part of the general public. On the contrary, it offered direction, specifically for school districts experiencing fiscal distress in the upcoming fiscal year, on the guidelines DOE would employ in conducting the needs assessment. The July 9 Memo also did not meet the third Metromedia criterion, ibid., of exclusively prospective applicability. Rather, the guidance document applied to school districts only for FY2020. Additionally, the July 9

Memo does not meet the fourth Metromedia criterion, ibid., because the term "needs assessment" within the context of DOE-approved emergency aid applications is "clearly and obviously inferable" from the FY2020 Appropriations Act.

Further, the needs assessment, as outlined in the FY2020 Appropriations Act, remained consistent with other established Legislative processes from prior years. See L. 2019, c. 150; L. 2018, c. 54; L. 2017, c. 99; and L. 2016, c. 10 (all appropriating "such additional amounts as may be required to fund approved applications for Emergency Aid following district needs assessments conducted by the [DOE]. . . ."). Thus, the July 9 Memo also does not "constitute[] a material and significant change from a clear, past agency position on the identical subject matter." Metromedia, 97 N.J. at 331.

Affirmed.