SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0742-21

BOARD OF EDUCATION OF
THE TOWNSHIP OF SPARTA,
SUSSEX COUNTY,

Petitioner-Respondent,

v.

M.N., on behalf of A.D.,

Respondent-Appellant.

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Submitted November 28, 2022 – Decided May 24, 2023

Before Judges Mawla, Smith and Marczyk.

On appeal from the New Jersey Commissioner of Education, Docket No. 87-6/21.

John Rue & Associates and Thurston Law Offices LLC, attorneys for appellant (Robert C. Thurston and John D. Rue, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent Commissioner of Education (Sadia Ahsanuddin, Deputy Attorney General, on the statement in lieu of brief).

Schenck, Price, Smith & King, LLP, attorneys for respondent Board of Education of Sparta Township (Katherine A. Gilfillan, of counsel and on the brief; Catherine Popso O'Hern, on the brief).

Carl Tanksley Jr., attorney for amicus curiae New Jersey School Boards Association (Carl Tanksley Jr., on the brief).

PER CURIAM

Defendant M.N. appeals the final decision of the Commissioner of Education on behalf of her son, defendant A.D. The Commissioner found A.D.'s receipt of a state-issued diploma satisfied state standards and qualified as a "regular high school diploma," based on his passing the General Education Development (GED) exam. As a result, the Commissioner terminated the Sparta Board of Education's (Board) obligation to provide A.D. with free access to public education. The underlying action involved two separate petitions, the first petition filed by M.N. on behalf of A.D. and a second filed by the Board, whose petition is the subject of this appeal.

On appeal, M.N. and A.D. raise two arguments: (1) the Commissioner improperly ruled on the Board's petition first, before turning to defendants' earlier-filed petition, in violation of the first-to-file rule; and (2) the Commissioner failed to consider applicable federal law, which excludes general equivalency diplomas from the definition of a "regular high school diploma,"

and therefore erred in finding that A.D.'s receipt of a state-issued diploma terminated the Board's obligation to provide A.D. with free access to public education. We affirm.

I.

A.D. was a minor student classified with a "specific learning disability." Because of this classification, A.D. was eligible to receive special education and related services pursuant to the Individuals with Disabilities Education Act (IDEA).[1]

In September 2018, when he was fifteen years old, A.D. transferred into the Sparta School District. Initially, A.D. did well in his new school setting. However, by January 2019, he refused to complete his school assignments. The district advised him he was in danger of failing his classes. As a response to A.D.'s performance, the school district provided A.D. "temporary home instruction . . . through a combination of online classes and in-person tutoring." In March 2019, after less than ninety days of home schooling, M.N. withdrew her son from the Sparta school district.

[1] 20 U.S.C. §§ 1400 to 1482.

Shortly after his withdrawal, A.D. took the GED exam and achieved a passing score. On April 29, 2019, the State of New Jersey issued A.D. a high school diploma based on his passing GED score. With his GED and state-issued high school diploma in hand, A.D. then reenrolled at Sparta High School. The Board permitted him to re-enroll and reinstated A.D.'s home instruction.

On May 22, 2019, the vice principal of Sparta High School wrote a letter to M.N., stating that A.D. "has met New Jersey graduation requirements as the GED diploma serves as an equivalent to one received in a New Jersey high school." The vice principal advised that "[h]aving met high school requirements . . . [d]istrict services, including protections under the [IDEA] and home instruction services, cease upon receipt of a diploma." A.D.'s home instruction services were to be "discontinued effective immediately."

Notwithstanding this letter, the Board permitted A.D. to continue home instruction for the remainder of the 2018-2019 academic year. He began the 2019-2020 academic year by attending in-person instruction at Sparta High School. By February 2020, A.D. was again failing to complete his schoolwork. This development caused the school district to notify him that he was "in danger of losing credit in four core classes." As the year continued, the district converted to remote instruction due to the COVID-19 pandemic. A.D. did not

attend remote classes or complete required assignments, consequently, he earned no academic credit for the 2019-2020 school year. On June 8, 2020, M.N. again withdrew A.D. from the school district. The reason for withdrawal she stated on his form was, "[e]ntering the workforce."

Beginning in September 2020, M.N. started the process of re-enrolling A.D. with Sparta High School personnel. The record shows A.D. never attended school that fall, but instead enlisted in the United States Army. Three months and one week later, the Army medically discharged A.D; he was eighteen-and-a-half years old.

In May 2021, M.N. once again sought to enroll A.D. in the Sparta school district. This time the Board denied the request, citing A.D.'s possession of a state-issued high school diploma.

M.N. filed a parental request for a due process hearing with the New Jersey Department of Education (DOE) Office of Special Education Programs, challenging the Board's decision. M.N. argued that A.D.'s GED receipt should not foreclose him from getting a "regular high school diploma." She asserted that A.D. needed two more years of high school, and that receipt of a "regular high school diploma" would "improve his skills and opportunities for employment." In support of this request, M.N. cited A.D.'s Individualized

Education Plan (IEP) and special education "classification," his "struggles with every[-]day decisions," and his inability to "handle employment, army or college."

Next, the Board petitioned the DOE, seeking a determination as to whether A.D. could re-enroll in the school district. The Board argued defendants' petition raised, as "the predominant issue . . . whether the student is entitled to enroll in the [d]istrict after having attained a State-issued high school diploma." The DOE referred the matter to an administrative hearing. It did not consolidate the two petitions, but it assigned them to the same administrative law judge (ALJ).

The ALJ conducted a hearing on the Board's petition first and made findings. First, the ALJ found A.D. received a "regular" high school diploma. Second, A.D.'s diploma "satisfied in full the statutory and regulatory requirements of the State for a high school diploma." Third, the ALJ found A.D. was no longer entitled to a free public education in New Jersey.

Next, the ALJ heard defendants' due process petition, taking testimony from M.N. and the Board's school psychologist, Susan Lorentz, Ph.D. and made findings. Finding the two petitions involved the same issue, the ALJ found A.D.

was not entitled to re-enroll in Sparta High School as a matter of law. The ALJ dismissed defendants' due process petition.

The DOE Commissioner (Commissioner) adopted the ALJ's decision on the Board's petition as final. The Commissioner found there was no distinction in the New Jersey Administrative Code between a school district-issued diploma and a state-issued diploma. The Commissioner concurred with the ALJ's finding that A.D. received a "'regular high school diploma' that is fully aligned with State standards," finding A.D. was no longer entitled to a free public education in New Jersey.

On appeal, defendants raise two issues:

> I. THE ALJ ERRED BY NOT FOLLOWING THE FIRST TO FILE RULE. (not raised below)
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> II. THE ALJ AND NJDOE ERRED BY IGNORING THE FEDERAL REGULATION REGARDING REGULAR HIGH SCHOOL DIPLOMAS FOR STUDENTS ELIGIBLE UNDER IDEA.

II.

Our role in reviewing administrative actions is limited to three inquiries:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;

> (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and
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> (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)).]

"When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007). Moreover, "when construing language of a statutory scheme, deference is given to the interpretation of statutory language by the agency charged with the expertise and responsibility to administer the scheme." Acoli v. N.J. State Parole Bd., 224 N.J. 213, 229 (2016). "This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise." In re Election L. Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010). Thus, "an appellate court reviews agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019) (citing Stallworth, 208 N.J. at 194).

The court is not bound, however, by an agency's "interpretation of a statute or its determination of a strictly legal issue. . . ." Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011) (quoting Mayflower Sec. Co., Inc. v. Bureau of Sec., 64 N.J. 85, 93 (1973)). For this reason, an appellate court's review of rulings of law and issues regarding the applicability, or interpretation of laws, statutes, or rules is de novo. In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020).

III.

A.

We address two threshold issues. First, the Board argues that M.N. has no standing to pursue this appeal, as her son A.D. turned eighteen prior to its filing. The Board further argues that without M.N. possessing letters of guardianship for A.D., M.N. cannot sue or appeal on his behalf. After a review of applicable federal and state law, we are not persuaded.

The Board filed its petition for a declaratory ruling pursuant to N.J.S.A. 18A:38-1 and N.J.A.C. 6A:8-5.2, and it invoked both federal and state education statutes with corresponding regulations. See IDEA and N.J.S.A. 18A:46-1.1 to -55.

IDEA has several provisions asserting the rights of parents to ensure their child's access to free appropriate public education. See Winkelman ex rel. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 524 (2007). The provisions include: (1) parental involvement during various stages of the IEP, 20 U.S.C. §1414(d), (e); (2) guaranteed procedural safeguards put in place to protect a parent's informed involvement in the development of their child's education, 20 U.S.C. § 1415(a); (3) the mandate that parents have access to all relevant records, 20 U.S.C. § 1415(b)(1); and (4) a parent's ability to participate in a due process hearing, 20 U.S.C. § 1415(f). Id. at 524-25. The Winkleman Court stated, "the Act's express terms[] contemplates parents will be the parties bringing the administrative complaints." Id. at 527. The Court concluded that since parents had the right to petition on behalf of their children at the administrative stage, parents also had standing to file suit on behalf of their children in federal court. Id. at 526.

We note our Legislature has established the right of free public-school education for "persons over five and under [twenty] years of age." See N.J.S.A. 18A:38-1. This provision discusses the residency requirements for school districts, and it provides parents and guardians with the right to challenge denial of education based on residency, without qualifying that challenge on the child's

status as a minor. Ibid. While the instant case does not involve a challenge to free public education based on residency, the language of N.J.S.A. 18A:38-1 suggests the Legislature contemplates parents having standing to challenge public education decisions made by school districts on behalf of their children not just to the age of eighteen, but beyond, to a student's twentieth birthday.

Turning to the issue of administrative standing, we note "our courts take 'a liberal approach to standing to seek review of administrative actions[.]'" In re Team Acad. Charter Sch., 459 N.J. Super. 111, 125 (App. Div. 2019) (alteration in original) (quoting In re Camden Cnty., 170 N.J. 439, 448 (2002)). Thus, "[a] party has standing to challenge an administrative agency's decision when the party has 'a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision.'" Ibid. (quoting In re Grant of Charter to Merit Prep. Charter Sch. of Newark, 435 N.J. Super. 273, 279 (App. Div. 2014)).

M.N. satisfies this three-prong standard. The record shows M.N. has been deeply involved in education decisions concerning her son, A.D, who has a learning disability. M.N.'s personal and direct involvement as a parent demonstrate a sufficient stake in the outcome of the litigation. As a named

respondent in the Board's petition, M.N. satisfies the element of adverseness. Finally, as the mother of a classified student who may have to provide financial and other support beyond what a parent would normally have to provide to an emancipated adult child, M.N. satisfies the substantial likelihood test in the event of an adverse decision.

Given these considerations, we find M.N. has standing to bring this appeal on her son's behalf.

We turn to the second threshold issue. Defendants contend the final decision was flawed because the Commissioner decided the Board's petition before defendants' due process petition. Defendants argue this sequence violates the first-to-file rule.

When an issue is being raised for the first time on appeal, our scope of review is limited.

> In this state, "[i]t is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest."
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> [State v. Robinson, 200 N.J. 1, 20 (2009) (alteration in original) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).]

"[T]rial and appellate courts are empowered, even in the absence of an objection, to acknowledge and address trial error if it is 'of such a nature as to have been clearly capable of producing an unjust result,'" pursuant to Rules 1:7-5 and 2:10-2. Robinson, 200 N.J. at 20. Moreover, we "retain the inherent authority to 'notice plain error not brought to the attention of the trial court[,]' provided it is 'in the interests of justice' to do so." Ibid. (alteration in original).

Defendants urge us to consider the first-to-file issue in the interests of justice, primarily because they were self-represented at the hearing. While we are not bound to consider this argument on appeal, we briefly discuss the merits applying the plain error standard. Twp. of Manalapan v. Gentile, 242 N.J. 295, 304-05 (2020).

The first-to-file rule is a doctrine of comity, which governs "when a New Jersey court should defer to another jurisdiction's courts." Sensient Colors, Inc. v. Allstate Ins. Co., 193 N.J. 373, 379 (2008). A New Jersey court should not interfere with a similar proceeding filed first in another jurisdiction when that "foreign jurisdiction [is] capable of affording adequate relief and doing complete justice. . . ." O'Loughlin v. O'Loughlin, 6 N.J. 170, 179 (1951).

Consequently, "a New Jersey state court ordinarily will stay or dismiss a civil action in deference to an already pending, substantially similar lawsuit in

another state, unless compelling reasons dictate that it retain jurisdiction." Sensient Colors, Inc., 193 N.J. at 386 (citing O'Loughlin, 6 N.J. at 179). It follows that, to obtain a dismissal or stay of a New Jersey case for comity reasons, the moving party bears the burden to establish two facts: (1) there is an earlier-filed action in another court; and (2) the earlier-filed action "involve[s] substantially the same parties, the same claims, and the same legal issues" as the second-filed action. Id. at 391 (quoting Am. Home Prods. v. Adriatic Ins. Co., 286 N.J. Super. 24, 37 (App. Div. 1995)). If the party seeking the stay or dismissal satisfies these two prerequisites, then the party advocating the exercise of jurisdiction in the second-filed action bears the burden to "show that it will not have the opportunity for adequate relief in the first-filed jurisdiction." Id. at 392.

Defendants' first-to-file argument fails at step one. There is no "earlier filed action in another court." The doctrine is meant to apply to proceedings pending in different states or, at the very least, different courts. The theory behind this rule is that litigating "substantially similar lawsuits in multiple jurisdictions with opposing parties racing to acquire the first judgment" is both "wasteful of judicial resources," and undermines "a federal system that contemplates cooperation among the states." Id. at 387.

Defendants' petition was filed with the Office of Special Education Dispute Resolution. The Board's petition was filed with the Office of Controversies and Disputes. Both offices fall under the purview of the DOE. The DOE transferred each petition to the same ALJ in the Office of Administrative Law for hearing.

The doctrine is intended to identify conflicting litigation which may, in turn, yield conflicting results and cause hostility between jurisdictions. See Cont'l Ins. Co. v. Honeywell Int'l, Inc., 406 N.J. Super. 156, 179-80 (App. Div. 2009). The matter before us does not represent a scenario the first-to-file doctrine is designed to identify and prevent. In our view, the doctrine is not an appropriate vehicle to challenge the sequence in which an ALJ decides cases on the administrative docket. We discern no unjust result.

B.

Defendants next argue that the Commissioner's final decision was error as a matter of law. They contend that a plain reading of the applicable federal education regulations bars the Commissioner from terminating A.D.'s right to a free and appropriate public education even after A.D. withdrew from school and passed his GED exam.

We are not persuaded, and we affirm substantially for the reasons set forth in the Commissioner's final decision. We add the following comments.

34 C.F.R. § 300.102(a)(3)(i) reads in pertinent part:

> (a) . . . The obligation to make FAPE available to all children with disabilities does not apply with respect to the following:
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> . . . .
>
> (3)
>
> (i) Children with disabilities who have graduated from high school with a regular high school diploma.

34 C.F.R. § 300.102(a)(3)(iv) reads in pertinent part:

> . . . the term regular high school diploma means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma . . . . A regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential.

Considering the question of what constitutes a "standard high school diploma . . . fully aligned with state standards," pursuant to 34 C.F.R. § 300.102 (a)(3)(iv), we turn to N.J.S.A. 18:7C-1, entitled "Commissioner of Education to

develop a program of standards and guidelines." The Legislature has charged the Commissioner with establishing standards for graduation from high school, including but not limited to: development of skills assessment tests; establishing standard proficiency levels; and development of graduation standards for students, including students with disabilities.[2]

The Commissioner has established, by regulation, graduation standards for New Jersey public high school students. N.J.A.C. 6A:8-5.2(c), reads in pertinent part:

> [t]he Commissioner shall award a State-issued high school diploma based on achieving the Statewide standard score on the [GED] or other adult education assessments to individuals age [sixteen] or older who are no longer enrolled in school and have not achieved a high school credential.

The record shows A.D. withdrew from the Sparta school district in March 2019. He then took the GED test and passed it while no longer enrolled in the district. There is nothing in the record to suggest A.D. had achieved any type of high school credential at the time he obtained his GED. These facts fall squarely within N.J.A.C. 6A:8-5.2(d), and the regulation's compulsory language required the outcome in this case: the DOE issued A.D. a high school diploma.

[2] See N.J.S.A. 18A:46-1.1 to -55 (codifying education and services for students classified as disabled).

While the Board elected to permit A.D. to attend classes either in-person or virtually for more than a year after the state-issued diploma was awarded, it had no legal obligation to do so.

Defendants essentially contend that N.J.A.C. 6A:8-5.2(d) and 34 C.F.R. § 300.102(a)(3)(iv) are in conflict and that we should exercise de novo review and resolve that supposed conflict in favor of the federal regulation. We decline to do so.

At the direction of the Legislature, the DOE promulgated regulations, including N.J.A.C. 6A:8-5.2(d), to establish graduation standards for public high school students. The DOE has concluded as a matter of education policy that students who are not enrolled in school and achieve a passing score on the GED shall be awarded a high school diploma. That specific policy determination by the DOE represents the alignment with state standards required by 34 C.F.R. § 300.102(a)(3)(iv). Under our standard of review, there is no basis to undo DOE's policy determination on this question. It is well settled that we defer to the DOE's expertise in interpreting federal and state statutes and regulations within its implementing and enforcing responsibility. E.S. v. Div. of Med. Assistance, 412 N.J. Super. 340, 355 (App. Div. 2010). Any arguments raised by defendants

which were not addressed here lack sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION