SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1762-21

IN THE MATTER OF NEW JERSEY DEPARTMENT OF EDUCATION COMPLAINT INVESTIGATION C2022-6524.

Submitted January 30, 2023 – Decided February 16, 2023

Before Judges Mawla and Marczyk.

On appeal from the New Jersey Department of Education.

Machado Law Group, attorneys for appellant Ringwood Board of Education (Jessika Kleen, of counsel and on the briefs; Maxwell J. Smith, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent New Jersey Department of Education (Sookie Bae-Park, Assistant Attorney General, of counsel; Joshua P. Bohn, Deputy Attorney General, on the brief).

PER CURIAM

The Ringwood Board of Education (Board) appeals from the January 26, 2022 final administrative decision (FAD) of the New Jersey Department of

Education, Office of Special Education Programs (OSEP), finding the Board violated federal and state implementing regulations of the Individuals with Disabilities Education Act (IDEA) when it refused to grant a family's request for their privately retained expert to observe their child in the classroom and other educational settings as part of an Independent Educational Evaluation (IEE). The Board further appeals from the February 1, 2022 denial of its motion for reconsideration. After careful review of the record and the governing legal principles, we affirm.

I.

M.W.[1] is a student who receives special education and related services. During the 2015-2016 school year, the Board, through professionals of its choosing, conducted an evaluation of M.W. to develop M.W.'s Individual Education Plan (IEP). On November 15, 2019, the Board held a re-evaluation planning meeting for M.W. and proposed a number of assessments. On November 27, 2019, the Board provided M.W.'s parents with the proposed assessments in a written re-evaluation plan, along with a consent form. M.W.'s parents did not give consent for the Board to conduct a re-evaluation.

[1] We use the child's initials to protect their identity pursuant to Rule 1:38-3(a).

On January 14, 2020, the Board filed a petition with OSEP for a due process hearing to compel M.W.'s parents to provide consent or waive their rights to challenge the Board's special education programming as proposed. OSEP transmitted the matter to the Office of Administrative Law for a hearing. The Board filed a motion for summary decision, which an Administrative Law Judge (ALJ) granted in an order dated September 24, 2021, finding:

> [A]s long as [M.W.'s parents] continue to withhold consent to allow the [Board] to perform its evaluations on M.W., [M.W.'s parents] will have waived their rights to challenge the [Board]'s placement and programming for [M.W.], or otherwise allege that the [Board]'s placement and programming for [M.W.] failed to provide a [free appropriate public education (FAPE)] at any time after November 27, 2019.[2]
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> [(Emphasis added).]

M.W.'s parents subsequently retained a behaviorist, Lisa Berkowitz, as their proposed evaluator. On October 29, 2021, Berkowitz emailed M.W.'s case manager, Alexis Luna, requesting permission to observe M.W. "across several sessions including structured and unstructured academic and social activities." On December 5, 2021, M.W.'s father emailed Berkowitz and Luna to inquire if Berkowitz had received an email from Luna regarding the request. Berkowitz

[2] The ALJ did not grant the Board's request for injunctive relief to compel the parents to consent to the evaluation. This decision was not appealed.

responded she had not received a response. On December 7, 2021, Luna emailed M.W.'s parents and Berkowitz stating, "the Board is not able to permit an observation at this time. This observation was permitted previously as part of a re-evaluation for special education and related services." M.W.'s father responded to the email the following day stating the Board is required to permit "independent observations and evaluations for parents to the extent they allow [Board personnel to observe students]." On December 19, 2021, M.W.'s father emailed the Ringwood School Board stating:

> Should I take this lack of response as a refusal to allow us and [our evaluator] to evaluate [M.W.] at school? As I have mentioned, there is clearly no question of your obligations to allow this . . . . [C]ould you please reply with a timeframe in the early part of January that is convenient for [the proposed evaluator] to observe or confirm that you are refusing to allow us to.

On December 21, 2021, M.W.'s parents filed a complaint with OSEP alleging the Board wrongfully refused to permit Berkowitz to observe M.W. for an IEE because M.W.'s parents had not given their consent for the school to evaluate M.W. In its response to the complaint, the Board argued:

> [M.W.'s parents] are not seeking an IEE at public expense, they are seeking to force the [Board] to allow their chosen provider to evaluate [the student] in school, while continuing to deny the [Board] [the] same. There is no legal basis for the parents' demand, and they have failed to cite to same in their complaint.

> As there is no law or regulation that requires a school [Board] to allow outside observations of the parents' choosing . . . the [Board] requests this complaint be dismissed.

On January 26, 2022, OSEP issued its FAD with a corrective action plan. OSEP determined the Board was non-compliant regarding M.W.'s parents' request to permit their privately retained behaviorist to observe M.W. for an IEE. OSEP concluded:

> Pursuant to 34 C.F.R. §300.502(a) the parents of a child with a disability have the right to obtain an IEE of their child. While the [Board's] evaluation of the child is a predicate to a [publicly] funded IEE, see 34 C.F.R. § 300.502(b) and N.J.A.C. 6A:14-2.5(c), it is not required prior to parents obtaining an IEE at private expense. Accordingly, the complainants are entitled to an IEE at private expense. Moreover, pursuant to N.J.A.C. 6A:14-2.5(c)(6), the [Board] of education must permit an evaluator to observe the student in the classroom or other educational setting for any IEE, whether purchased at the [Board's] or private expense.

On January 30, 2022, the Board emailed OSEP requesting it to reconsider its position because "the finding is not based on law or fact and is beyond the scope of the jurisdiction of [OSEP]." On February 1, 2022, OSEP denied the Board's request for reconsideration. This appeal followed.

The Board raises the following issues on appeal:

POINT I

A [BOARD]-CONDUCTED [EVALUATION] IS A PREREQUSITE TO AN [IEE].

A. OSEP's Interpretation of 34 C.F.R. § 300.502 Precludes Collaboration in the Development of M.W.'s IEP.

B. OSEP's Interpretation of 34 C.F.R. § 300.502 Does Not Conform to the Language of the Regulation.

POINT II

N.J.A.C. 6A:14-2.5 REQUIRES THE [BOARD] TO PERMIT THE REQUESTED OBSERVATION ONLY AFTER IT HAS PERFORMED ITS OWN EVALUATIONS.

II.

Our role in reviewing the decision of an administrative agency is limited. In re Stallworth, 208 N.J. 182, 194 (2011) (citing Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). We accord a strong presumption of reasonableness to an agency's exercise of its statutorily delegated responsibility and defer to its fact-finding. City of Newark v. Nat. Res. Council in Dep't of Env't Prot., 82 N.J. 530, 539 (1980); Utley v. Bd. of Rev., Dep't of Lab., 194 N.J. 534, 551 (2008). We will not upset the determination of an administrative agency absent a showing that it was arbitrary, capricious, or unreasonable; that it lacked fair

support in the evidence; or that it violated legislative policies. Lavezzi v. State, 219 N.J. 163, 171 (2014); Campbell v. Dep't of Civ. Serv., 39 N.J. 556, 562 (1963).

On questions of law, our review is de novo. In re N.J. Dep't of Env't Prot. Conditional Highlands Applicability Determination, Program Int. No. 435434, 433 N.J. Super. 223, 235 (App. Div. 2013) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). We are "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affs. of Dep't of L. & Pub. Safety, 64 N.J. 85, 93 (1973).

III.

A.

The Board initially argues OSEP's findings must be reversed because OSEP construed 34. C.F.R. § 300.502(a) in a manner that precludes collaboration between the parents of a child with disabilities and the educational agency responsible for providing educational programming.[3] The Board further

[3] Although the Board contends the parents are required to consent to the school evaluating the student before the parents can obtain their own IEE, as noted above, the Board did not appeal from the ALJ's decision. The question before us is whether the Board must permit the parents' evaluator to observe M.W. in

argues OSEP's interpretation of 34 C.F.R. § 300.502(a) is contrary to its plain language. The State counters OSEP reasonably relied on 34 C.F.R. § 300.502(a), which provides parents of children with a disability the right to obtain an IEE for their child at public or private expense. The State adds that although the regulatory scheme lays out certain prerequisites for obtaining an IEE at public expense, the regulation does not require parents seeking an IEE at private expense to first consent to the public agency's own evaluation under these circumstances.

Under 34 C.F.R. § 300.502(a)(1), "[t]he parents of a child with a disability have the right under this part to obtain an [IEE] of the child, subject to paragraphs (b) through (e) of this section." The paragraph most relevant to this matter is 34 C.F.R. § 300.502(b)(1), which provides "[a] parent has the right to an [IEE] at public expense[4] if the parent disagrees with an evaluation obtained

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the classroom and other educational settings as part of their privately funded IEE.

[4] "Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103." 34 C.F.R. § 300.502.

by the public agency, subject to the conditions in paragraphs (b)(2) through (4)[5] of this section." (Emphasis added).[6]

The plain language of 34 C.F.R. § 300.502(a)(1) simply states parents of a child with a disability have the right to obtain an IEE, without distinguishing whether the IEE is at public or private expense. It is only when a parent requests an IEE at public expense that the federal regulation specifies the parent can only do so if they disagree with an evaluation obtained by the public agency. 34 C.F.R. § 300.502(b)(1). This connotes the U.S. Department of Education anticipated situations in which parents, regardless of whether they agree with

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[5] Paragraphs (b)(2) through (4) describe the procedures the public agency has to go through when a parent requests an IEE at public expense. Since this case involves an IEE at private expense, those paragraphs do not apply. Similarly, paragraphs (c) through (e) are also not applicable in this matter.

[6] On the other hand, N.J.A.C. 6A:14-2.5(c), discussed more fully below, states:

> Upon completion of an initial evaluation or re[-]evaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a re[-]evaluation provided by a district board of education. A parent shall be entitled to only one independent evaluation at the district board of education's expense each time the district board of education conducts an initial evaluation or re[-]evaluation with which the parent disagrees.
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> [(Emphasis added).]

the public agency, could obtain a private IEE for their child. This is further supported by the language in 34 C.F.R. § 300.502(c):

> If the parent . . . shares with the public agency an evaluation obtained at private expense, the results of the evaluation—(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child . . . .
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> [(Emphasis added).]

The fact the U.S. Department of Education chose to distinguish between private and public expense IEEs demonstrates 34 C.F.R. § 300.502(b) does not apply to situations in which a parent exercises their right to obtain an IEE at private expense. Moreover, a public agency's evaluation is not a prerequisite to a privately funded IEE.

In stating, "[u]pon completion of an initial evaluation or re[-]evaluation, a parent may request an independent evaluation if there is disagreement with the initial evaluation or a re[-]evaluation provided by a district board of education[,]" N.J.A.C. 6A:14-2.5(c) conflicts with 34 C.F.R. § 300.502 in two ways.[7] First, it makes a public agency's evaluation a prerequisite to parents

[7] The wording of the New Jersey Administrative Code is not entirely consistent with the language of the federal code. When "federal law and state law are not consistent, the state law must yield." Feldman v. Lederle Labs., 125 N.J. 117, 133 (1991). "Conflict preemption occurs when . . . state law 'stands as an

obtaining an IEE at private expense. Second, the language in N.J.A.C. 6A:14-2.5(c) suggests a parent can only obtain an IEE at private expense if they disagree with the public agency's initial evaluation or re-evaluation. However, 34 C.F.R. § 300.502 leaves room for situations in which parents may obtain an IEE at private expense, without being subjected to the limitations codified in 34 C.F.R. § 300.502(b).

Here, in applying 34 C.F.R. § 300.502, OSEP correctly interpreted the plain language of the federal regulation when it held the Board must permit Berkowitz to observe M.W. in the classroom. OSEP properly interpreted 34 C.F.R. § 300.502 when it stated: "While the district's evaluation of the child is a predicate to a [publicly] funded IEE, see 34 C.F.R. §[ ]300.502(b) and N.J.A.C. 6A:14-2.5(c), it is not required prior to parents obtaining an IEE at private expense." (Emphasis added). Therefore, OSEP's interpretation of 34 C.F.R. § 300.502 conforms to the relevant regulations.

The Board's argument OSEP's interpretation of 34 C.F.R. § 300.502 precludes collaboration in the development of M.W.'s IEP is unpersuasive. The

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obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . .'" Id. at 135 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

District bases this argument on the fact that M.W.'s parents have withheld their consent for the District to perform a re-evaluation of M.W. However, the plain language and interpretation of 34 C.F.R. § 300.502 does not condition a parent's right to an IEE on whether a parent reciprocates a public agency's request to conduct an evaluation of their child. Moreover, the ALJ's September 24, 2021 order permits the Board to develop the placement programming for M.W. The ALJ's order further provides M.W.'s parents cannot challenge or argue the Board failed to provide M.W. with a FAPE because of the placement and programming, given their failure to consent to the Board's re-evaluation.

B.

The Board argues the predicate clause in N.J.A.C. 6A:14-2.5(c) applies to (c)(6) of the same regulation such that, when read together, the language means that an independent evaluator hired by parents for an IEE at private expense can only be permitted to observe the student in the classroom after the Board has carried out its own evaluation. While the Board correctly argues statutory words "must be read in context with related provisions so as to give sense to the legislation as a whole[,]" In re Raymour and Flanigan Furniture, 405 N.J. Super. 367, 381 (App. Div. 2009) (citing DiProspero v. Pennsylvania, 183 N.J. 477, 492 (2005)), it is also important to read N.J.A.C. 6A:14-2.5 in light of 34 C.F.R.

§ 300.502, on which it is based. N.J.A.C. 6A:14-2.5(c)(6) states "[f]or any independent evaluation, whether purchased at the district board of education's or private expense, the district board of education shall permit the evaluator to observe the student in the classroom or other educational setting, as applicable."

Applying the predicate clause from the preamble of N.J.A.C. 6A:14-2.5(c) to (c)(6) would mean a parent obtaining an IEE at private expense would only gain permission for an in-classroom observation (1) after the Board has completed its evaluation or re-evaluation of their child and (2) if the parent disagrees with the Board's evaluation or re-evaluation. However, as discussed above, this prerequisite conflicts with 34 C.F.R. § 300.502, which only applies those conditions to IEEs obtained at public expense. Reading N.J.A.C. 6A:14-2.5(c)(6) in light of 34 C.F.R. § 300.502, OSEP correctly concluded the Board was non-compliant and should permit Berkowitz to observe M.W. Although M.W.'s parents withheld their consent for the Board's re-evaluation, that issue was addressed in the ALJ's September 24, 2021 order.

The issue before OSEP was whether the Board should permit Berkowitz to perform an observation of M.W. as part of an IEE M.W.'s parents obtained at their own expense. Since the plain reading and proper interpretation of the federal regulations—34 C.F.R. § 300.502—does not condition the observation

on the board having performed their evaluation first, OSEP correctly determined M.W.'s parents were entitled to obtain a private IEE. Moreover, N.J.A.C. 6A:14-2.5(c)(6) provides, "[f]or any independent evaluations, whether purchased at the . . . board of education's expense or private expense, the . . . board of education shall permit the evaluator to observe the student in the classroom or other educational setting, as applicable." Therefore, OSEP properly found Berkowitz was entitled to conduct observations of M.W. in school. Furthermore, the right to have an IEE pursuant to 34 C.F.R. § 300.502 would have little value if the evaluator would not be permitted to observe the student in the classroom and other educational settings.

IV.

Finally, although it is unclear why the parents have withheld their consent for the Board to perform its own evaluation, the ALJ already determined the parents "have waived their rights to challenge the [Board's] placement and program[m]ing for M.W. or otherwise allege that the [Board's] placement and program[m]ing for M.W. failed to provide a FAPE at any time after November 27, 2019." Accordingly, while the Board must consider this IEE pursuant to 34 C.F.R. § 502(c)(1), it is not required to follow the IEE.

For the reasons noted above, we conclude the Board's decision was not arbitrary, capricious, or unreasonable and was supported by the record. To the extent we have not otherwise addressed the Board's arguments, they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.