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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3170-20**

**IN RE ADOPTION OF
N.J.A.C. 6A:27-5.1**

Argued March 20, 2023 – Decided July 3, 2023

Before Judges Mawla, Smith and Marczyk.

On appeal from the New Jersey Department of Education.

Thomas O. Johnston argued the cause for appellant New Jersey Public Charter Schools Association, Inc. (Johnston Law Firm LLC, attorneys; Thomas O. Johnston and Barbara Bohi, on the briefs).

Carolyn G. Labin, Deputy Attorney General, argued the cause for respondent New Jersey Department of Education (Matthew J. Platkin, Attorney General, attorney; Donna Arons, Assistant Attorney General, of counsel; Jaclyn M. Frey and Hasibul Haque, Deputy Attorneys General, on the brief).

PER CURIAM

The New Jersey Public Charter Schools Association (Association) challenges on appeal the New Jersey Department of Education's (Department)

adoption of an amendment to its regulations governing the transportation of students. The Department amended N.J.A.C. 6A:27-5.1, which governs the allocation of transportation costs for disabled students who attend out-of-district charter schools, by adding a new subsection, N.J.A.C. 6A:27-5.1(b).

The new subsection caps the financial responsibility of the district of residence for disabled students' transportation cost, and it requires the out-of-district charter school to pay all remaining transportation costs. On appeal, the Association argues the Department's adoption of the amended regulation was procedurally deficient, and the regulation as amended is ultra vires. We affirm.

I.

On June 3, 2020, the State Board of Education (Board) held a public meeting on the proposed readoption with amendments of regulations "pertaining to the transportation of students pursuant to N.J.S.A. 18A:1-1, 18A:4-15, 18A:39-21, 18A:39-24, and 18A:39-33." The meeting agenda item was titled, "Student Transportation, First Discussion[.]" The agenda also noted that a presentation accompanied this item.

On July 1, 2020, the Board conducted a second public meeting on "Student Transportation[.]" This agenda item was labeled as a "Second Discussion[.]" and included a "Presentation[.]" and a "Commissioner's Recommendation[.]"

The recommendation stated: "[t]hat the State Board discuss the readoption with amendments pertaining to the transportation of students "

On August 19, 2020, the Board met again and included "Student Transportation[,] . . . Proposal" in its "Items for Consideration[.]" The "Commissioner's Recommendation" read as follows: "That the State Board approve for publication in the New Jersey Register the readoption with amendments pertaining to the transportation of students" The record shows the Board had the opportunity to view written public comments on the Readoption with Amendments of N.J.A.C. 6A:27. These comments were submitted after the July 1 Second Discussion and the August 19 public meeting.

The record also shows on August 19, the Board had before it the entire readoption, with amendments, of N.J.A.C. 6A:27. The proposal was submitted to the Board in the form of a written memorandum authored by Kevin Dehmer, Interim Commissioner of the Department. The comprehensive memo was thirty-eight pages long and contained: an executive summary; a community impact statement; and a detailed narrative summary of every regulatory amendment proposed for adoption, including N.J.A.C. 6A:27-5.1(b).

The memo explained the purpose and intended effect of subsection (b); the proposed addition to N.J.A.C. 6A:27-5.1, as follows:

The Department proposes new N.J.A.C. 6A:27-5.1(b) to define the maximum expenditure of the resident district board of education for the transportation of eligible charter school students with disabilities who reside outside the school district in which the charter school is located and eligible choice program students with disabilities. Under the proposed rule, the maximum expenditure will not exceed the maximum per student expenditure for nonpublic school transportation in accordance with N.J.S.A. 18A:39-1. If the cost of transportation exceeds the maximum allowable expenditure, new N.J.A.C. 6A:27-5.1(b)[(1)] will require the charter school or choice district to pay the amount in excess of the annual maximum expenditure. New N.J.A.C. 6A:27-5.1(b)[(2)] states under no circumstances shall the parent or guardian of the student with disabilities be responsible for payment of the cost of transportation services required by the student's [Individualized Education plan] IEP. For charter school and choice program students who have an IEP, the charter school or choice district is responsible for developing and implementing the IEP, which includes decisions on the provision of transportation as a related service. Since the resident district board of education is not involved in the decision-making process as it relates to developing and implementing an IEP for charter school and choice program students, the financial responsibility of the resident district board of education must be limited, as with other charter and choice program transportation. As transportation of students with disabilities is a related service under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400 et seq.) and its implementing regulations (34 C.F.R. [§] 300.34), the cost of the transportation of students with disabilities must be borne by a local education agency (for example, a district board of education or charter school board of trustees) and not parents. Therefore, the

charter school or choice district will be required to pay the excess cost.

The proposed readoption with amendments was published, at 52 N.J.R. 1730(a), in the New Jersey Register, on September 21, 2020. On September 24, 2020, the Department issued a memorandum titled, "Proposal Level Code-N.J.A.C. 6A:27, Student Transportation[.]" The memo notified all chief school administrators and charter school project leads¹ the proposal had been approved by the Board on August 19 for publication in the New Jersey Register. It stated, in part:

The proposal, which can be viewed on the New Jersey Department of Education's (NJDOE) Administrative Code webpage, includes:

- Readoption with amendments of N.J.A.C. 6A:27, Student Transportation, which sets forth the rules regarding the transportation of students to and from school and school-related activities, governs contracts for student transportation, and delineates the Department's responsibilities in oversight of student transportation.

The State Board values public input in all matters regarding code promulgation. Public testimony on the rulemaking is tentatively scheduled to be held on October 7, 2020.

¹ "'Lead person' means the person who performs the organizational tasks necessary for the operation of a charter school." N.J.A.C. 6A:11-1.2.

The memo also included a hyperlink to the proposed regulation. It stated administrators and members of the public could offer comments through the NJDOE's website, a provided email address, or physical mailing address of the Assistant Commissioner by November 20, 2020. The State Board received five written comments from three sources. None were from the Association, or any individual charter school. Not one of the comments submitted relates to the issues before us. The State Board approved the readoption of the transportation regulations with amendments and new rules on January 6, 2021. On January 7, 2021, the Department followed suit.

On appeal, the Association challenges N.J.A.C. 6A:27-5.1(b), arguing that the regulation is ultra vires. It also contends the regulation should be set aside because the proposal notice did not conform to certain procedural requirements of the Administrative Procedure Act, (APA) N.J.S.A. 52:14B-1 to -15, resulting in inadequate notice to "charter school stakeholders."

II.

"It has been a longstanding principle that 'the grant of authority to an administrative agency is to be liberally construed . . . to enable the agency to accomplish its statutory responsibilities.'" In re Adoption of N.J.A.C. 17:1-6.4,

454 N.J. Super. 386, 395 (App. Div. 2018) (quoting N.J. Guild of Hearing Aid Dispensers v. Long, 75 N.J. 544, 562 (1978)).

"[A] challenger must 'demonstrat[e] an inconsistency between the regulation and the statute it implements, a violation of policy expressed or implied by the Legislature, an extension of the statute beyond what the Legislature intended, or a conflict between the enabling act and other statutory law that cannot be harmonized.'" Hackensack Riverkeeper v. N.J. Dep't of Env't Prot., 443 N.J. Super. 293, 302 (App. Div. 2015) (second alteration in original) (quoting N.J. Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 596 (App. Div. 2012) certif. denied, 213 N.J. 536 (2013)).

"While findings of ultra vires actions are disfavored, '[o]ur role is to enforce the will of the Legislature' because '[s]tatutes cannot be amended by administrative fiat.'" In re Agric., Aquacultural, & Horticultural Water Usage Certification Rules, 410 N.J. Super. 209, 223 (App. Div. 2009) (alterations in original) (citation omitted) (quoting TAC Assocs. v. N.J. Dep't of Env't Prot., 408 N.J. Super. 117, 124 (App. Div. 2009)). "[I]f the regulation is plainly at odds with the statute, we must set it aside." In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004). The challenging party bears the burden of

proof. Ibid. (citing Bergen Pines Cty. Hosp. v. Dep't of Hum. Servs., 96 N.J. 456, 477 (1984)).

An agency's decision should be upheld "unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007). "When an agency violates the express policy of its enabling act, the agency action may be deemed arbitrary and capricious." Caporusso v. N.J. Dep't of Health & Senior Servs., 434 N.J. Super. 88, 103 (citing Pub. Serv. Elec. & Gas v. N.J. Dep't of Env't Prot., 101 N.J. 95, 103 (1985)). Our "[i]ntervention is warranted when the action is unsupported or unaccompanied by reasonable explanation." Ibid. (citing Pub. Serv. Elec. & Gas, 101 N.J. at 103).

III.

The Association first contends N.J.A.C. 6A:27-5.1(b) is invalid because it frustrates the purpose of N.J.S.A. 18A:36A-11(b), which states, in part, "the fiscal responsibility for any student currently enrolled in or determined to require a private day or residential school shall remain with the district of residence." Understanding that N.J.S.A. 18A:36A-11(b) places fiscal responsibility for students in "private day or residential schools" on the students'

district of residence, we examine the statutory framework governing student transportation.

N.J.S.A. 18A:39-1, -33 constitutes the Legislature's scheme for the transportation of pupils, including, but not limited to issues such as safety, cost, operations and administration. Transportation of students who are residents of the district is governed by N.J.S.A. 18A:39-1. Pursuant to N.J.S.A. 18A:39-1, school districts which provide remote² transportation for resident children attending its public schools must also provide remote transportation to resident children attending charter schools within the district. The amount the school district must pay for transportation of remote resident students (as defined by N.J.S.A. 18A:39-1) who attend non-public schools, is capped by a statutory maximum expenditure, which is indexed annually. N.J.S.A. 18A:39-1(a).

In 1995, the Legislature enacted the Charter School Program Act of 1995 ("CSPA"), N.J.S.A. 18A:36A-1 to -18. Students living in the school district where the charter school is located receive priority for enrollment in the charter school. N.J.S.A. 18A:36A-8(a). A charter school may enroll non-resident students if certain conditions are met. N.J.S.A. 18A:36A-8.

² "'Remote' shall mean beyond two and one-half miles for high school students (grades nine through [twelve]) and beyond two miles for elementary school students (preschool through grade eight)." N.J.A.C. 6A:27-1.3(a)(1)(i).

N.J.S.A. 18A:36A-13, titled "Transportation Services," states:

The students who reside in the school district in which the charter school is located shall be provided transportation to the charter school on the same terms and conditions as transportation is provided to students attending the schools of the district. Non-resident students shall receive transportation services pursuant to regulations established by the State board.

The statute's language contemplates two classes of students who require transportation services to a charter school. The first class of students contemplated are those students residing in the school district where the charter school is located. The second class of students contemplated are those students who are not residents of the school district where the charter school is located. The Legislature has elected to treat these two classes of students differently. It expressly delegated regulation of non-resident students' charter school transportation services to the State Board of Education.

In light of this express delegation of authority, we turn to the State Board's specific regulation of non-resident students' charter school transportation services.

N.J.A.C. 6A:27-3.4, is titled "Transportation outside the school district[.]" It states that when a charter school student lives outside the district where the charter school is located, the student's district of residence is limited to paying

the maximum allowable expenditure for transportation permitted under state law. N.J.A.C. 6A:27-3.4(a). Where the total cost to transport a student to a charter school outside of the district exceeds the maximum allowable expenditure, that student's parents may pay the difference between the total cost and the maximum expenditure, or they may choose to transport their student independently, and collect the maximum expenditure. Ibid.

The amended regulation before us governs the transportation of charter school students with disabilities. The pre-amendment version of the regulation, N.J.A.C. 6A:27-5.1(a), requires the district to provide transportation for disabled students in accordance with their IEP. The regulation recognizes that children with disabilities may be eligible for related services under their IEP, which could include "special transportation equipment, transportation aides, and special arrangements for other assistance to and from school." N.J.A.C. 6A:27-5.1(a)(1). In its 2021 proposed rule adoption, the Department amended N.J.A.C. 6A:27-5.1, adding subsection (b) to address payment for the transportation costs of children with disabilities who attend charter schools outside of their district of residence. Subsection (b) reads as follows:

The expenditure of the resident district board of education for the transportation of eligible charter school students with disabilities who reside outside the district in which the charter school is located and

eligible choice program students with disabilities shall not exceed the maximum per student expenditure for nonpublic school transportation in accordance with N.J.S.A. 18A:39-1.

1. If the cost of transportation exceeds the maximum allowable expenditure, the charter school or choice district shall pay the amount in excess of the annual maximum expenditure.

2. Under no circumstances shall the parent or guardian of the student with disabilities be responsible for payment of the cost of transportation services required by the student's IEP.

[N.J.A.C. 6A:27-5.1(b)(1)(2).]

The Association argues that "N.J.S.A. 18A:36A-13 does not give the State Board license to substitute its judgment for the Legislature's [judgment] about the charter school funding scheme." We are unpersuaded. N.J.S.A. 18A:36A-13 represents the Legislature's express delegation of its power to regulate transportation services for students attending out-of-district charter schools. Empowered by the Legislature to do so, the Board addressed transportation services for disabled students attending charter schools outside of their district of residence. First, the Board required school districts to arrange such transportation in accordance with the student's IEP. See N.J.A.C. 6A:27-5.1(a)(1). Next, the Board specifically capped the school district transportation

services payment for the disabled student attending a charter school outside of their district of residence at the annual maximum allowable expenditure established by N.J.S.A. 18A:39-1 and 1(a). See N.J.A.C. 6A:27-5(b). Finally, the Board specifically imposed any excess transportation costs for a resident disabled student attending an out-of-district charter school on that charter school, exempting the parent or guardian of those students from paying any overage.

The regulation does not change the resident district's statutory obligation to pay for a resident disabled student's transportation costs up to the maximum allowable expenditure. Instead, it specifies that any costs above the statutory maximum expenditure shall be covered by the charter school instead of the parents. We find no inconsistency between N.J.S.A. 6A:27-5.1(b) and N.J.S.A. 18A:36A-13. See Hackensack Riverkeeper, 443 N.J. Super. at 302. Indeed, we find the proposed regulation does not impede or frustrate the Legislature's statutory authority, but rather works in harmony with it.

The Association argues Hatikvah Int'l Acad. Charter Sch. v. E. Brunswick Twp. Bd. Of Educ. 10 F.4th 215, 219 (3d Cir. 2021) supports the proposition "that the Legislature made a 'deliberate policy choice' that the resident school district must fund a student's private placement if it is the educational setting the

student's IEP prescribes." In Hatikvah, a student was moved from a public charter school to private school in accordance with his IEP. 10 F.4th at 217. The student's resident school district disputed whether: "the financial responsibility for a student's pendent placement costs rests with the resident school district or the student's former charter school under the . . . IDEA and N.J.S.A. 18A:36A-11, when the student's former charter school implemented the IEP that placed the student at a private school." Ibid.

We conclude the Association's reliance on Hatikvah is misplaced. The Hatikvah court was presented with the question of allocating responsibility for payment of pendant placement costs. The court was asked to decide whether the student's resident school district or former charter school would pay pendant placement costs, where the student's IEP dictated placement outside the charter school. Ibid. Hatikvah does not squarely address out-of-district transportation costs for charter school students, a cost singled out for regulation by the Legislature.

Here, the issue is whether the charter school should bear the excess transportation costs, not pendant placement costs, for disabled students beyond the statutory maximum allowable expenditure which the Legislature permits the resident school district to pay. The Board, using powers delegated to it by the

Legislature under N.J.S.A. 18A:36A-13, has adopted regulations which answer that question in the affirmative, while simultaneously barring collection of excess transportation costs from the parents of disabled students who, by virtue of their child's IEP, send their child out of district for the education guaranteed to them under our state constitution.

The Association did not meet its burden to show N.J.A.C. 6A:27-5.1(b) is "plainly at odds" with the Legislature's statutory scheme for transporting students, including under N.J.S.A. 18A:36A-13. In re Freshwater Wetlands, 180 N.J. at 489.

Finally, the Association argues the rule change is invalid because it did not comply with the APA. The Association contends the proposed rule heading was deficient because it did not include: a caption describing the subject matter proposed; a "suggested N.J.A.C. citation for any proposed new rule and the existing citation for any rule(s) proposed for amendment, repeal, or readoption"; and a "citation to the specific N.J.S.A. statutory authority for the proposal or the Public Law number if an N.J.S.A. citation is unavailable." The Association further contends the heading failed to reference charter schools, give adequate notice, or contain the suggested N.J.A.C. citation.

The record shows the proposal included a caption that stated: "Proposed Readoption with Amendments: N.J.A.C. 6A:27[.]" 52 N.J.R. 1730(a). It included the citations of regulations to be amended: "Proposed New Rules: N.J.A.C. 6A:27-7.14, 11.5 and 12.4[.]" Ibid. The proposal also identified the subject matter as "Student Transportation[.]" Ibid. Finally, it identified the statutory authority invoked for the rule change by stating "Authority: N.J.S.A. 18A:1-1, 18A:4-15, 18A:39-21, 18A:39-24, and 18A:39-33." Ibid.

Additionally, the record shows the Board conducted three public meetings regarding the proposal in June, July, and August of 2020. For the August 19 Board meeting, the Department submitted a thirty-eight-page proposal, compliant with the requirements of N.J.S.A. 52:14B-4(a)(2), which discussed the eighty-seven proposed amendments in substantial detail, categorizing them by chapter, sub-chapter, and section. It published the proposed rule in the New Jersey Register, and then, days later, notified lead officials at all charter schools the proposal was approved for publication and even included a link for the public to offer comments. Notwithstanding these efforts, the Board only received feedback from three commenters, none of whom were the Association.

We conclude the Board provided ample notice and complied with the APA. Its actions in adopting N.J.S.A. 6A:27-5.1(b) were not arbitrary, capricious or unreasonable.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION