IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

J.R.[1], *Appellant*,

v.

ARIZONA DEPARTMENT OF ECONOMIC SECURITY,
an agency, and,

DDD ARIZONA DES, *Appellees*.

No. 1 CA-UB 19-0093
FILED 9-29-2020

Appeal from the A.D.E.S. Appeals Board
No. P-1591625-001-B

VACATED AND REMANDED

COUNSEL

Manthra Legal Counsel, LLC, Phoenix
By Sai N. Manthra
Counsel for Appellant

Arizona Attorney General's Office, Phoenix
By JoAnn Falgout
Counsel for Appellees

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[1] The caption has been amended to safeguard the juvenile's identity pursuant to Administrative Order 2013-0001. The above caption shall be used in all further filings with the court in this matter.

MEMORANDUM DECISION

Judge David B. Gass delivered the decision of the Court, in which Presiding Judge Jennifer M. Perkins and Judge Michael J. Brown joined.

G A S S, Judge:

¶1 J.R. appeals a decision from the Arizona Department of Economic Security (ADES) Appeals Board terminating his developmental disability services because he turned six years old. The parties agree J.R. had a qualified diagnosis of DSM-5 Autism Spectrum Disorder, but dispute whether he has at least three of the seven statutorily enumerated substantial functional limitations (SFLs).

¶2 While this case was pending, a different panel of this court published an opinion involving an analogous situation. *See A.C. v. Ariz. Dep't of Econ. Sec.*, 1 CA-UB 19-0063, 2020 WL 4149603 (Ariz. App. July 21, 2020). We have considered the parties' supplemental briefing addressing the impact, if any, of *A.C.*'s holding on this case. Applying the holding in *A.C.*, we conclude the Board improperly required J.R. to prove he had at least three SFLs and the error was not harmless.

¶3 We, therefore, vacate the Board's decision and remand for further administrative proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶4 "This court must accept the Board's factual findings unless they are arbitrary, capricious, or an abuse of discretion. The Board's legal conclusions, however, are not binding on this court, and we review *de novo* whether the Board properly interpreted the law." *A.W. v. Ariz. Dep't of Econ. Sec.*, 247 Ariz. 249, 253, ¶ 15 (App. 2019) (italics added).

¶5 J.R. was born on October 24, 2011. At age three, he was diagnosed with a DSM-5 Autism Spectrum Disorder. J.R. underwent developmental testing. The results showed he had delays in "gross motor, visual reception, fine motor, expressive language and receptive language." Based on these documented developmental delays, ADES's Department of Developmental Disabilities (DDD) determined J.R. qualified for services and provided them for several years.

¶6 Because the qualification requirements for DDD benefits change when a person turns six, ADES reassessed J.R.'s qualifications shortly after his sixth birthday. Based on that reassessment, ADES sent J.R. a Notice of Intended Action, saying ADES reviewed his records and found "no acceptable documentation contained in [his] file of a qualifying diagnosis" to qualify for continued services after he turned six. J.R.'s father timely requested administrative review of the decision.

¶7 ADES issued an administrative decision upholding its intended action. A DDD clinical psychologist, Dr. Jennifer Gray, reviewed the documents in ADES's records. In her report, she concluded J.R. had a qualifying diagnosis but the evidence provided did not establish "in a clear and consistent manner" J.R. had three qualifying SFLs.

¶8 J.R. timely appealed the administrative decision. During the ensuing evidentiary hearing, DDD introduced Gray's report and the documents Gray reviewed before the hearing. Gray also testified. Gray noted the absence of results from standardized tests, mentioning the following in particular: the Vineland, the ABLLS, the VPMAP-VBMAP, and the ABAS. She testified those tests would demonstrate the information she needed—what J.R. *cannot do* as compared to the information in the notes she reviewed, which simply said what he *did or did not do on any particular day*. Though Gray mentioned the ABAS, DDD removed the ABAS from its regulations as an acceptable test to establish an SFL several weeks before the hearing. *See* A.A.C. R6-6-303.C.1–.2 (effective Aug. 24, 2018).

¶9 Gray went on to note the Individualized Education Program (IEP) she received was a preschool IEP from 2015 and was three years old when Gray testified. Gray also noted the absence of an updated multidisciplinary evaluation team report, which is a separate evaluation done every three years when a child continues to have an IEP. J.R.'s father said J.R. had a current IEP but did not provide it for the evidentiary hearing. In response to DDD's questions, Gray further concluded a six-year old would not have the capacity for independent living, but she would consider his ability to do things like chores for that SFL "if he was older." Based on J.R.'s age, Gray's testimony also discounted the SFLs of self-direction and economic self-sufficiency. Gray ultimately concluded the documents she reviewed did not demonstrate he had any of the seven SFLs.

¶10 The Administrative Law Judge (ALJ) affirmed the decision to terminate J.R.'s DDD services. In the ruling, the ALJ placed the burden of proof on DDD as the party seeking to stop services. She found DDD proved J.R. did not meet the requirements for six of the seven SFLs. With regard to

"receptive and expressive language," the ALJ found the evidence was conflicting, and DDD did not meet its burden of proof for that SFL. Accordingly, the ALJ found DDD proved by a preponderance of the evidence J.R. did not meet the criteria for DDD services. J.R. timely petitioned for the Board to review the ALJ's decision.

¶11 Though the Board affirmed the ALJ's decision, it took issue with the allocation of the burden of proof. The Board determined it would not be "fair or convenient" to place the full burden of proof on DDD to show J.R. was no longer eligible for benefits. The Board reasoned J.R. could prevail by "simply refusing to supply to the Department any information, reports or other evidence or by supplying only the evidence that supports his eligibility."

¶12 The Board then adopted a two-phase, shifting burden of proof. First, the Board said DDD has the burden of showing a change in circumstance removing the presumption of eligibility. Here, because it was undisputed J.R. had turned six years old, the Board said DDD met its burden. The Board then shifted the burden to J.R. to show he met DDD eligibility criteria. The Board found J.R. failed to prove a single SFL, specifically rejecting the ALJ's conclusion on the SFL of "receptive and expressive language." As part of its review, the Board acknowledged J.R. had a current IEP but did not secure a copy of, or review, it.

¶13 J.R. timely appealed. This court has jurisdiction under Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21.A and 41-1993.B.

ANALYSIS

¶14 Arizona provides therapeutic DDD services to persons who qualify based on DDD regulations. *See* A.R.S. § 36-559.A; A.A.C. R6-6-302. For persons under the age of majority, two standards apply. If a person is under six years old, the person "must have a qualifying diagnosis (which includes autism) *or* be at risk of being diagnosed with a developmental disability." *See A.C.*, 1 CA-UB 19-0063, slip op. at *3, ¶ 15 (emphasis original). A person who is six years old or older but younger than eighteen, "must (1) have a qualifying diagnosis (which includes autism) *and* (2) have functional limitations in three or more of seven areas of major life activities as described in R6-6-303(C)." *See id.* (emphasis original, quotation omitted). The enumerated seven major life activities are: (1) self-care; (2) receptive and expressive language; (3) learning; (4) mobility; (5) self-direction; (6)

capacity for independent living; and (7) economic self-sufficiency. A.A.C. R6-6-303.C.

¶15 On appeal, J.R. argues, among other things, the Board erred in shifting the burden of proof. ADES argues this court does not have jurisdiction to hear most of J.R.'s claims because they were not raised in the administrative proceedings. However, ADES concedes the Board raised the burden of proof issue, so it is properly before us. Because the burden of proof issue is dispositive, we need not decide if J.R.'s other claims are waived or consider them on their merits. *See State v. Korzuch*, 186 Ariz. 190, 195 (1996) (courts should resolve cases on non-constitutional grounds if "possible and prudent to do so").

I. The Board erred when it shifted the burden of proof to J.R. to show he was eligible for DDD services.

¶16 This court reviews *de novo* the allocation of the burden of proof. *See A.C.*, 1 CA-UB 19-0063, slip op. at *4, ¶ 18. We, therefore, first turn to the impact of *A.C.*'s holding on our analysis here. *See Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471 (1974). Though we are not strictly bound by another panel's decision, *stare decisis* and "the need for stability in the law" make another panel's decision "highly persuasive and binding, unless we are convinced [it is] based upon clearly erroneous principles, or conditions have changed so as to render [the] prior decision[] inapplicable." *See id.*

¶17 *A.C.* is factually analogous to this case. When the child was about to turn six years old, DDD reassessed his qualifications and found he did not have the requisite three SFLs. *See A.C.*, 1 CA-UB 19-0063, slip op. at *1, ¶ 3. The case proceeded through reviews as this case did, concluding with the Board adopting the shifting burden of proof and finding the child did not prove he qualified. *See id.* at *3, ¶¶ 11–12. Another panel of this court reviewed the Board's reasoning on the burden of proof issue *de novo* and said, "[I]n seeking to terminate services, DDD had the burden to prove that [the child] was no longer eligible to receive services. Because the Board misapplied the burden of proof, the question then becomes whether the Board's error was harmless." *See id.* at *6, ¶ 27. The parties make the same arguments here. *See id.* at *4–6, ¶¶ 18–27.

¶18 In the supplemental briefing, J.R. argues *A.C.* was correctly decided and we should follow it here. ADES contends *A.C.* was not correctly decided and alternatively asks us to distinguish it from this case. ADES has, therefore, offered nothing new to allow us to conclude *A.C.* was clearly erroneous or any conditions have changed.

¶19 Ultimately, *A.C.* is new precedent, so no conditions have changed to render it inapplicable. *See Castillo*, 21 Ariz. App. at 471. It is well-reasoned and based on a thoughtful analysis of the relevant principles. *See id.* Its analysis, therefore, applies here and guides our analysis. In short, the Board improperly shifted the burden of proof to J.R. *See A.C.*, 1 CA-UB 19-0063, slip op. at *6, ¶ 27.

II. The Board's error was not harmless.

¶20 Because the Board misapplied the burden of proof, we must consider whether the error was harmless. *See id.* at ¶ 28. In arguing its error was not harmless, ADES continues to misapply the burden. Under *A.C.*, the issue is whether DDD demonstrated J.R. did not have three or more SFLs in a major life activity, not whether J.R. demonstrated he had three. But ADES's Supplemental Brief incorrectly says neither the ALJ nor the Board "found that J.R. had demonstrated an SFL in more than one major life activity." This error permeates ADES's argument.

¶21 DDD failed to present sufficient evidence to allow Gray to determine whether J.R. met the criteria for any of the seven SFLs. Indeed, DDD did not introduce even readily available evidence, such as J.R.'s updated IEP. The same is true of the tests Gray said would allow her to say one way or the other. Gray also identified the updated notes from J.R.'s medical providers she would have wanted to review to do a complete analysis.

¶22 Other missing information calls the Board's decision into question, especially given DDD's burden of proof. DDD's own regulations specifically address what DDD must consider for a child "when evaluating SFLs in self-direction, capacity for independent living and economic self-sufficiency." *See id.* at ¶ 30. DDD "shall compare the child's abilities in [these areas] with age and developmentally appropriate abilities based on the current guidelines of Centers for Disease Control and Prevention and American Academy of Pediatrics." *See* A.A.C. R6-6-303.C.5.b. (self-direction), 6.b. (capacity for independent living), and 7. (economic self-sufficiency). DDD failed to do so. Gray did not reference those entities in her report or during her testimony. DDD's omission of "[t]hat evidence is contrary to what the law requires." *See A.C.*, 1 CA-UB 19-0063, slip op. at *6, ¶ 30. Gray identified tests she said would have resolved whether J.R. had a qualifying SFL, but DDD never introduced evidence of those tests.

¶23 J.R. further argues DDD did not provide him the required assistance to prepare for his evaluation. Here, as in *A.C.*, ADES argues J.R.

"waived the sufficiency of his case manager's assistance by failing to raise the argument administratively." But, as in *A.C.*, the Board first implicated the adequacy of DDD's assistance when the Board shifted the burden of proof in its ruling. *See id.* at *7, ¶ 34. J.R., therefore, could not have raised it earlier. *See id.*

¶24 DDD must assist J.R. "in all aspects of the DDD service delivery system, including through the assistance of an assigned case manager." *See id.* at *6, ¶ 33 (quotation and alterations omitted). Importantly here, DDD is required to assist J.R. in "[t]he pursuit of evaluations and professional assessments necessary to substantiate the need for services" and "[t]he collection and analysis of information regarding eligibility." *See* A.A.C. R6-6-601.

¶25 Gray—DDD's own expert—testified DDD's proffered evidence was insufficient for her to substantiate J.R.'s need for services for even one SFL, let alone whether he had three. In short, DDD did not discharge its obligation. Indeed, Gray's testimony here establishes DDD's lack of assistance. She identified the tests she would have wanted—tests DDD did not conduct—and identified the documents she would have wanted—documents DDD did not secure.

¶26 At oral argument, ADES argued the error was harmless because at no point did the ALJ or the Board find J.R. had a total of at least three SFLs. In other words, because the ALJ found J.R. had only one SFL, and the Board found he had none, J.R. was never able to qualify for DDD services by having at least three SFLs between the two decisions. This argument misunderstands the impact of the Board changing the burden of proof. If the Board had correctly held DDD to its burden, the Board could have found DDD's evidence fell short as to all seven SFLs. Because DDD bears the burden, the Board must hold any omissions in the evidence against DDD, not J.R., and the Board must consider the extent to which DDD assisted J.R. in securing the necessary evaluations and assessments.

¶27 The record, therefore, suggests DDD, not J.R., was left without the evidence needed to meet its burden of proof. *See A.C.*, 1 CA-UB 19-0063, slip op. at *6–7, ¶¶ 33–35. The Board's misapplication of the burden of proof, therefore, was not harmless. *See id.*

III. Attorney fees and costs on appeal

¶28 J.R. seeks attorney fees and costs on appeal under A.R.S. § 12-348.A.2. As in *A.C.*, ADES argues J.R. is prohibited from receiving a fee award. *See id.* at *7, ¶ 36. ADES argues we should reject the reasoning in

A.C., and *Johnson v. Arizona Department of Economic Security*, 247 Ariz. 351, 359, ¶¶ 26–29 (App. 2019).

¶29 A.R.S. § 12-348.H.1 precludes a fee award if the State's role "was to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent." *See id.* at 359, ¶ 27; *A.C.*, 1 CA-UB 19-0063, slip op. at *7, ¶ 36. Subsection 12-348.H.1 does not apply to DDD services because they "are not merely a monetary benefit or its equivalent." *See id.* (citing *Johnson*, 247 Ariz. at 359, ¶¶ 27–29). Accordingly, because J.R. is the prevailing party, we award him his reasonable attorney fees and costs upon compliance with ARCAP 21.

CONCLUSION

¶30 The Board's decision is vacated. This matter is remanded for further administrative proceedings consistent with this decision.

AMY M. WOOD • Clerk of the Court
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