STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0085

In re Complaint Brought on Behalf of Student 1 and
All Students in the Functional Skills Program at
Halverson Elementary School,
Independent School District No. 241

Filed October 2, 2017
Affirmed
Rodenberg, Judge

Minnesota Department of Education

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Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Relator Independent School District No. 241 (district) appeals by certiorari, arguing that the Minnesota Department of Education (department) legally erred in the course of determining eligibility of students for extended school year (ESY) services. The district argues that the department's complaint-review procedure was deficient, resulting in two erroneous conclusions of law. Because we conclude that the department's central

conclusion is supported by substantial evidence and the district was not prejudiced despite the several procedural errors by the department, we affirm.

FACTS

The Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2012 & Supp. 2015), requires each state to ensure a "free appropriate public education" to all children between the ages of 3 and 21. 20 U.S.C. §1400(d)(1)(A) (2012); 34 C.F.R. § 300.101(a) (2016). The mechanism for ensuring that students with disabilities receive appropriate educational services is the individualized education program (IEP), "a written statement for each child with a disability" that must include, among other things, a statement of present levels of achievement and functioning, a statement of measurable goals, a description of how the goals will be measured, and a statement of the services that will be provided to the student. 34 C.F.R. § 300.320(a) (2016). The parents of a disabled student must be afforded the opportunity to participate in IEP team meetings, at which the team discusses which services the student requires and identifies and evaluates the educational placement of the student. 34 C.F.R. §§ 300.321(a), .501(b) (2016).

If an IEP team determines that a child requires ESY services as a part of the child's free and appropriate education, those services must be made available to the child. 34 C.F.R. § 300.106(a)(1)(2) (2016). ESY services are "special education and related services" that are provided to a disabled child outside of the normal school year, and in accordance with the child's IEP at no cost to the child's parents. 34 C.F.R. § 300.106(b) (2016). To determine whether a child is eligible for ESY services, the IEP team assesses whether one of the following is true:

> A. there will be significant **regression** of a skill or acquired knowledge from the pupil's level of performance on an annual goal that requires more than the length of the break in instruction to recoup unless the IEP team determines a shorter time for recoupment is more appropriate;
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> B. services are necessary for the pupil to attain and maintain **self-sufficiency** because of the critical nature of the skill addressed by an annual goal, the pupil's age and level of development, and the timeliness for teaching the skill; or
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> C. the IEP team otherwise determines, given the pupil's **unique needs**, that ESY services are necessary to ensure the pupil receives a free appropriate public education.

Minn. R. 3525.0755, subp. 3 (2015) (emphasis added). The IEP team must consider information including prior observation of regression, observation of the student's tendency to regress, and experience with similar students. *Id.*, subp. 4 (2015). Schools may not limit ESY services to "particular categories of disability"; nor may they "unilaterally limit the type, amount, or duration" of ESY services. 34 C.F.R. § 300.106(a)(3) (2016).

At Halverson Elementary School (Halverson), operated by the district, seven particular students were eligible for ESY services during the summer of 2015; four of the students qualified based on "self-sufficiency," and the other three qualified based on an "IEP team decision." Six students utilized ESY services during the summer of 2015, and one student's parents waived the service. In the summer of 2016, only two of the seven students qualified for ESY services. Both qualified based on "self-sufficiency."

On August 8, 2016, a parent of a nonqualifying student (student 1[1]) filed a complaint with the department alleging that the district failed to follow the law in determining the Halverson students' needs for ESY services during the summer of 2016. Specifically, the parent alleged:

> The district did not offer ESY to students with special needs for the summer of 2016 unless they showed academic regression throughout the year. [The district] told parents that even if the student would have qualified in the past based on "self-sufficiency," this year (2016) the students MUST show academic regression or they [were not] qualified for ESY. The district also cut all [physical therapy] for the students that did qualify for ESY based on academic regression. My son has a long list of disabilities, including physical, and while he did not show academic regression, he qualifies based on "self-sufficiency." ESY was not offered to him for 2016.

(Emphasis in original.) In the district's response to the complaint, it stated that it had not adopted a new policy. But it agreed that it had provided new training to its staff concerning the requirements for a student to be eligible for ESY services.

Early in its investigation, the department requested records from the district and notified the district that it would "need to talk with" seven members of the district's staff, specifically naming each staff member and mentioning that the department would be "asking each individual about multiple students." The district supplied the IEPs for the seven students. It also provided the department with a copy of its ESY training slides, presented to staff as part of a presentation entitled "ESY October 2015." One training slide

[1] Because this case involves sensitive educational and other information, we will identify the students by numbers 1 through 7, conforming to the identification method used by the parties.

states that ESY eligibility should be based on "1) Regression/Recoupment . . . AND/OR[;] 2) Self-sufficiency . . . AND [;] 3) Unique Need." (Emphasis in original.) The slide also specifically states: "Student[s] should NOT be qualifying for Unique Need alone." (Emphasis in original.) The school informed the department that this training was provided to staff at the district's schools in October 2015.

The department proposed to interview seven employees of the district. It conducted a phone interview with one of the seven identified interviewees, who was the school's special education director, and subsequently requested onsite interviews with the remaining interviewees. On the date of the scheduled onsite interviews, a department investigator emailed another employee of the department indicating that the investigator "had an issue" with the district's superintendent, who "wanted to tape the interviews for the special education complaint and was very antagonistic." The investigator reported that the interviews had been cancelled because the investigator felt "unsafe" and had "significant concerns about a district taping our interviews with staff." The employee responded that the superintendent had "called the commissioner" and "was OK with our proposal of doing the interviews on paper." The department did not interview the remaining members of staff, either in person or "on paper."

Accordingly, in acting on the special education complaint, the department gathered and relied on the following evidence: records provided by the complainants and the district, including the October 2015 training materials and IEPs for the involved students; the interview with the special education director; an interview with a former staff member of the school; and phone interviews and email communications with the parents of the

students. The documentation of all interviews is in the form of notes taken by the investigator.

Based on this evidence, the department decided that the district had committed four violations: (1) it "failed to determine if all students were in need of ESY services" in a manner consistent with Minn. R. 3525.0755; (2) it failed to ensure that each student's IEP team decided whether ESY services were necessary; (3) it failed to provide notice to parents of students 3 and 7 that there had been a change in the provision of ESY services; and (4) it unilaterally limited the types of services available to students receiving ESY services in the summer of 2016.

The department also prescribed three corrective actions. First, within 14 days of the decision, the district was required to demonstrate to the department that it had "made reasonable attempts" to send a copy of the department's decision to all students who were either determined to be ineligible for ESY services during the summer of 2016 or who were eligible for ESY services but did not receive occupational therapy or physical therapy services.

Second, within 15 days, the district was required to submit to the department both a "revised ESY eligibility process" consistent with Minn. R. 3525.0755 and a written assurance that future ESY eligibility determinations will be made in accordance with the department's determination. Within 30 days, and as part of this second corrective action, the district was required to provide training to its special education staff regarding the new ESY eligibility process and to submit its training plan and materials to the department.

Finally, within 30 days of the decision, the district was required to hold IEP team meetings for students 1, 6, and 7 to determine, under Minn. R. 3525.0755, whether each student had been eligible to receive ESY services during the summer of 2016. The district was also required to hold IEP team meetings for students 2 and 4, who were eligible for ESY services during the summer of 2016, "to consider the student's [occupational therapy], [physical therapy], and/or [developmental adaptive physical education] needs with regard to ESY services during the summer of 2016." To the extent that the IEP team determined that a student was eligible for ESY services or related services that the student did not receive during summer 2016, the department instructed the IEP team to consider whether compensatory education was required.[2] Documentation of the IEP team meetings had to be sent to the department.

The district filed a petition for a writ of certiorari. At oral argument, the district represented that all of the required corrective actions have been completed.

D E C I S I O N

The district argues that the department erred in finding two of the four violations and used an improper procedure in addressing the complaint. The district does not dispute that it failed to provide notice of a change in the provision of ESY services or that it limited the types of services available to ESY-eligible students during the summer of 2016 in a manner contrary to federal law. It acknowledges that its training to staff provided the

[2] If the IEP team could not reach agreement regarding compensatory education, the department instructed the parents and the district to submit a plan to the department, which would then "determine the appropriate corrective action."

wrong standard for ESY eligibility. Concerning the merits of the department's decision, the district contends (1) that the department erred when it relied in part on the timing of IEP team meetings to conclude that the proper ESY eligibility standard was not used and (2) that the record does not support the department's conclusion that the district made ESY eligibility determinations unilaterally.

"The relator has the burden of proof when challenging an agency decision in an appeal." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 660 N.W.2d 427, 433 (Minn. App. 2003). This court accords "substantial deference" to an agency's decision due to the agency's "expertise" and "special knowledge in the field." *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006); *Indep. Sch. Dist. No. 709 v. Bonney*, 705 N.W.2d 209, 213 (Minn. App. 2005). We will reverse only where "the substantial rights of the petitioners may have been prejudiced" because the agency's findings, inferences, conclusions, or decisions violate the constitution, exceed statutory authority, were made upon unlawful procedure, were affected by error of law, were unsupported by substantial evidence, or were arbitrary or capricious. Minn. Stat. § 14.69 (2016).

"When an agency performs the quasi-judicial function of receiving and weighing evidence, making factual findings, and applying a prescribed standard to reach a conclusion, a reviewing court applies the substantial-evidence test." *Hurrle v. County of Sherburne*, 594 N.W.2d 246, 249 (Minn. App. 1999) (quotation omitted). When applying the substantial-evidence test, we review "the evidence relied upon by the agency in view of the entire record as submitted." *Bonney*, 705 N.W.2d at 213 (quotation omitted). An

agency's determination is sufficiently supported where, considering the evidence in its entirety, there is relevant evidence that a reasonable person would accept as adequate to support a conclusion; the substantial-evidence standard requires more than 'a scintilla of evidence' and more than 'some' or 'any' evidence." *In re Expulsion of A.D.*, 883 N.W.2d 251, 259 (Minn. 2016) (quoting *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984)). If we conclude that the agency engaged in "reasoned decision-making" we will affirm even if we would have reached a different conclusion. *Bonney*, 705 N.W.2d at 213.

The record amply supports the department's conclusion that the district trained its staff to apply an incorrect standard to determine whether a student was eligible for ESY services. The district concedes that its October 2015 training materials explicitly state that a student could not be eligible for ESY services on the basis of a "unique need alone." This is the wrong standard. The law provides that a student is entitled to ESY services if the services are required to prevent "significant regression of a skill"; if the "services are necessary for the pupil to attain and maintain self-sufficiency"; ***or*** if "the IEP team otherwise determines, given the pupil's unique needs, that ESY services are necessary." Minn. R. 3525.0755, subp. 3.

The district acknowledges that its training material should have separated the second and third factors with "and/or" rather than "and," an error the district characterizes as "typographical" in nature.[3] The district informed the department that its staff members

[3] The district's contention that this was a typographical error is suspect to say the least. In addition to substituting "and" in place of "and/or," the training materials explicitly state

were directed to follow the October 2015 training materials and that the staff "followed the training they received." These facts alone are enough to support the conclusion that the district made its summer 2016 ESY eligibility determinations improperly.

The district's additional contention that the department erroneously relied on the timing of the IEP meetings[4] does not affect our conclusion. The department noted that "ESY determinations for several students were made in the fall of the school year, preventing observation of their tendency to regress over extended breaks," but this comment was not the basis for the department's determination that the district improperly determined ESY eligibility. Instead, the department based its finding of a violation on its

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that "unique need alone" is "NOT" enough to qualify a child for ESY services. But regardless of the source and particular reason for the district having identified and used the wrong legal standard for determining ESY eligibility, it used the wrong standard. The motive or intent of the district is not the issue.

[4] The district argues that an ESY determination need not "be made at any particular time during the school year." The district cites to several nonprecedential authorities to support its argument. *See Reinholdson ex. rel. Simon v. Sch. Bd. of Indep. Sch. Dist. No. 11*, 187 F. App'x 672, 673 (8th Cir. 2006) (rejecting an argument that a district must make ESY determinations at least 105 days before the end of the school year); *Pachl ex. rel. Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11*, No. Civ02-4065, 2005 WL 428587, at *8 (D. Minn. Feb. 23, 2005) ("There is no need to specify a timeline for determining whether a child should receive ESY services." (quotation omitted)); Minn. Dept. of Educ., Complaint file 12-006C (Nov. 29, 2011) (order, http://education/state.mn.us/140/Complaints/12006C.pdf ("[T]he [s]tudent's IEP team was required to make an annual ESY determination . . . prior to the end of the [preceding] school year."); *see also Johnson ex rel. Johnson Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990) (holding that a district determining ESY eligibility should apply both retrospective data about the student's experiences with past breaks and predictive data about how the student will likely fare over the upcoming summer). Because the department did not find any violation based on the timing of the IEP meetings, we need not address this question.

conclusion that the district utilized the wrong ESY eligibility standard, a conclusion that is amply supported by the record.

The corrective actions ordered by the department flow naturally and necessarily from this central violation. Because the district utilized the wrong standard when making ESY determinations, it was ordered to modify its training and hold an IEP team meeting for each student to determine whether the student was entitled to ESY services in the summer of 2016. The department's accompanying conclusion that the district also used the wrong *process* to apply the incorrect standard is inconsequential.

We nevertheless briefly address the district's argument that the department erred when it concluded that the district denied parents of students 1, 6, and 7 a meaningful opportunity to participate in ESY determinations. The district argues that the record is not sufficient to substantially support this conclusion because the record (1) does not include interviews with relevant district personnel and (2) does not include transcripts of interviews conducted by the department.

Concerning the district's contention that the department abdicated its duty to conduct interviews with all seven of the staff members it identified as having relevant information, the department is required to consider "all relevant information" in the course of its investigation, and, in some circumstances, interviews with staff are considered relevant information. *See* 34 C.F.R. § 300.152(a)(4) (2016). We have reversed a department determination based on flaws in the investigation where the department did not make "substantive inquiries" of *any* school-district personnel or conduct an onsite

investigation. *Indep. Sch. Dist. No. 192 v. Minn. Dept. of Educ.*, 742 N.W.2d 713, 720-21 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008).

The investigation here is not of the sort we found wanting in *Indep. Sch. Dist. No. 192*. In this case, the department interviewed both the current case facilitator and a former district staff member; it did not rely only on the statements of advocates for the students. It did have significant additional information on which it relied. The department represents on appeal that it concluded that interviews with the remaining six interviewees were unnecessary. This contention is not supported by the record. The only evidence in the record referencing the department's decision not to continue interviews involves an unspecified, and seemingly unwarranted, safety concern expressed by the assigned investigator. The department agreed to conduct additional interviews on paper. No such interviews were ever conducted. Moreover, the department's explanation is not credible—when seeking to determine what happened at an unrecorded closed-door meeting concerning a student's eligibility for ESY services, it would be prudent to seek information from people who were at the meeting.

The department's handling of the interview process was also flawed. The briefs suggest that the reason the interviews did not take place is because the district wanted to record the interviews and the department did not want the interviews to be recorded. The department's attempts to justify its position on appeal rely wholly on information outside the record. The record does not contain adequate documentation of the decision to not record the interviews, the discussion with the district, or the subsequent decision to not interview district employees "on paper." The department summarized this disagreement

in its decision by stating simply "The district declined to participate in interviews in accordance with [the department's] process. As such, onsite interviews did not take place." We agree with the district that this finding is unsupported. The record identifies no formal department policy prohibiting recording.[5] And nothing in the record suggests that the district refused to comply with interviews on paper, which was an alternate method suggested by the department and to which the district agreed. The fact of the matter is that the district did not "decline" to do the interviews. The department decided, for reasons not disclosed in the record, to abandon the "paper" interview process.

Ultimately, however, we see no reversible error in the department's failure to interview additional staff members. The department's unsupported finding that the district "declined to participate in interviews" is unrelated to the corrective action ordered by the department, as discussed above.

Finally, we address the district's argument that the department failed to maintain an adequate record by failing to include in the record on appeal transcripts of the interviews it conducted. "Governmental bodies must take seriously their responsibility to develop and preserve a record that allows for meaningful review by appellate courts." *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999). The district suggests that an accurate verbatim transcript of interviews is required. It notes that the only record of the department's interviews are typed, undated notes that apparently paraphrase the statements made by

[5] Because we conclude that such a policy does not exist, we do not address the district's argument that the adoption of such a policy was in violation of the Administrative Procedure Act, Minn. Stat. §§ 14.001-14.69 (2016).

interviewees. These notes do not indicate which questions correspond to each statement. But this is an informal complaint process, distinct from the more formal due process hearing. *See Bonney*, 705 N.W.2d at 219 (describing the administrative complaint process as "informal and less adversarial when compared to due process hearings" (quotation omitted)). Accordingly, we decline to hold the department responsible for maintaining a verbatim transcript of every conversation it has during the course of an investigation. There is no authority to support such a holding in the present procedural posture of this case, and such a holding would be beyond our proper role. *See In re Am. Iron & Supply Co.'s Proposed Metal Shredding Facility*, 604 N.W.2d 140, 144-45 (Minn. App. 2000) ("[W]hen an agency reasonably interprets a statute, it is the role of the legislature or the supreme court, and not the role of this court, to overrule that interpretation."); *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987).

We may reverse or modify the decision of an agency only "if the substantial rights of the petitioner[]" were prejudiced by an agency error. Minn. Stat. § 14.69. Because the corrective action ordered by the department was warranted by the department's supported conclusion that the district applied the wrong ESY eligibility standard to seven students, the district's substantial rights were not prejudiced, and we therefore affirm the department's decision.

Affirmed.