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Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0484

In re: Complaint Decision File 21-010C and 21-031C
on behalf of CLC from ISD 0833-01.

Filed January 3, 2022
Affirmed in part and remanded
Segal, Chief Judge

Department of Education
File Nos. 21-010C, 21-031C

Michael J. Waldspurger, Elizabeth J. Vieira, Michael J. Ervin, Rupp, Anderson, Squires & Waldspurger, PA, Minneapolis, Minnesota (for relator Independent School District No. 833)

Keith Ellison, Attorney General, Martha J. Casserly, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Department of Education)

Considered and decided by Segal, Chief Judge; Cochran, Judge; and Klaphake, Judge.[*]

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this certiorari appeal, relator Independent School District No. 833, South Washington County Schools (the school district), challenges a decision by respondent Minnesota Department of Education (MDE) requiring the school district to provide an assistive-technology device to be used by a shared-time student while the student attends a

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

nonpublic school. The school district asserts that (1) MDE erred by requiring it to provide an assistive-technology device to a student while the student attends a nonpublic school, (2) MDE's decision exceeded its authority under state and federal law, and (3) MDE's decision violated the Spending Clause of the United States Constitution. Because we conclude that MDE's decision is consistent with state and federal law and does not violate the Spending Clause, we affirm the decision but remand to MDE to correct a misstatement of the law in its corrective-action memorandum.

FACTS

C.L.C. (the student) is a middle-school student who resides within the school district. In September 2012, the student was diagnosed with bilateral sensorineural hearing loss and as a result is eligible for special-education services under the federal Individuals with Disabilities in Education Act (IDEA), 20 U.S.C. §§ 1400-1482 (2018). Although the student attends a nonpublic school for his regular school instruction, he has received special-education services from the school district on a shared-time basis since February 2013. As part of these services, the school district has provided the student with a frequency-modulation system[1] (FM system) to use while he attends the nonpublic school. The student underwent his most recent hearing evaluation in January 2019. The evaluator concluded that the student was still eligible for and in need of special-education services and noted that the student "needs his FM system for all parts of his school day."

[1] A frequency-modulation system is an assistive-technology device that enables individuals with hearing deficiencies to hear better in noisy environments such as a classroom.

The services provided by the school district are documented in the student's individualized education program (IEP).[2] The student's 2019 IEP provided that the student would "receive direct instruction from a Teacher for the Deaf/hard of hearing for 50 minutes, two times per week" and that the instruction would be provided at a district middle school before the start of the school day at the student's nonpublic school. The teacher was to assist the student with the three goals in his 2019 IEP: one for math, one for writing, and one for functional skills, which included using his FM system. The 2019 IEP generally provided that the student would have access to the FM system while in class, and the school district provided the student with an FM system for use at both his special-education sessions at the public middle school and regular school day at the nonpublic school.

In January 2020, the school district determined that it was not legally obligated to provide assistive-technology devices to shared-time pupils, like the student, while at their nonpublic schools.[3] Rather, the school district determined that it was required to provide assistive-technology devices only while shared-time pupils received instruction and services from staff members of the school district. The student's 2020 IEP was then revised

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[2] An IEP is a statement required by IDEA that includes, among other things, "the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child" to allow the child to "advance appropriately" and "be involved in and make progress in the general education curriculum" and "[t]o be educated and participate with other children with disabilities and nondisabled children." 34 C.F.R. § 300.320(a)(4) (2020).

[3] Under Minn. Stat. § 126C.01, subd. 8 (2020), "shared time pupils" are defined as "those pupils who attend public school programs for part of the regular school day and who otherwise fulfill the [compulsory-education requirement] by attendance at a nonpublic school."

to specify that the student would have access to an assistive-technology device only while "receiving services in a public school."

The student's IEP team met with the student's mother to discuss the 2020 IEP, but did not mention the school district's change in policy regarding assistive-technology devices because they understood that the school district planned to address the issue separately, outside of the IEP process. The revised IEP was officially proposed in February 2020 and went into effect following a 14-day time lapse. However, the school district continued to provide the student with an FM system for use at his nonpublic school for the remainder of the 2019-20 school year.

The 2020-21 school year at the student's nonpublic school started on September 1, 2020. The following day, the principal of the student's nonpublic school emailed the special-services director for the school district about the FM system. The principal indicated that there were two students at the nonpublic school who needed access to an FM system, and offered to take on the responsibility of managing the equipment after it was picked up "to be as low maintenance as possible" for the school district. The special-services director responded that the school district would not be able to provide the FM system because it did not have the resources to provide support to all the nonpublic schools in the school district. The student's mother and the school district's teacher for the deaf and hard of hearing also exchanged emails regarding the student's access to the FM system. The teacher indicated that the student would not be provided with an FM system while he attended the nonpublic school based on a previous decision communicated by the school district's special-services director. The student's mother responded that the student was

struggling at school without the FM system. The student's IEP was revised in September 2020 to address changes related to distance and hybrid learning during the COVID-19 pandemic, but the restriction regarding the FM system was not altered.

Within a week after the start of the new school year, the student's mother contacted the district superintendent about the FM system. The superintendent then asked the special-services director to review the correspondence between the school district and the student's parents regarding the February 2020 IEP. After conducting a review, the special-services director determined that the school district had not adequately explained the reason for the change in policy on no longer providing FM systems at nonpublic school settings. As a result, the special-services director decided to resume providing the student with a district-owned FM system until the issue could be revisited in January 2021 at the annual meeting to review and revise the student's IEP.

The principal of the student's nonpublic school and the student's mother filed complaints with MDE in the fall of 2020. The complaints alleged that the school district's refusal to provide the student with the FM system for use at the nonpublic school violated IDEA and related state law, and requested that MDE order the school district to provide the FM system. The school district conceded in its response to the complaint that it had made procedural errors in communicating its decision to the student's parents and proposed that it would prepare and provide a memorandum to the school district's staff explaining the school district's obligations to provide special-education services to shared-time pupils.

On December 29, 2020, MDE issued its complaint decision. MDE determined that the school district violated federal law when it "failed to consider and include the Student's

use of the FM system at the Student's [nonpublic] school when developing the February 2020 and September 2020 IEPs"; "failed to discuss the removal of the FM system at the January 22, 2020 IEP team meeting [thereby] . . . denying [the student's mother] the ability to meaningfully participate in the IEP team process" as required by IDEA; and "failed to adequately describe the actions proposed by the [school district] in the February 5, 2020 prior written notice and refused by the [school district] in the September 15, 2020 prior written notice." As corrective action, MDE ordered the school district to revise the student's IEP to include the provision of the FM system for the student's use at the nonpublic school and assess if additional compensatory services were necessary for the student. MDE also ordered the school district to prepare and disseminate a memorandum for "continuous improvement training" explaining the school district's obligations to shared-time pupils. MDE approved the final corrective-action memorandum in February 2021. The school district appeals by writ of certiorari.

DECISION

The issues in this case relate to MDE's decision that the school district is legally obligated to provide an assistive-technology device—the FM hearing system—to the student for his use at his nonpublic school. The school district asserts several challenges to the decision of MDE. First, the school district claims that MDE's decision is inconsistent with Minn. Stat. § 126C.19, subd. 4(b) (2020), which the school district claims gives it discretion to decide the location where it will provide special services for shared-time pupils. Second, the school district claims that several of the corrective actions required of the school district by MDE are inconsistent with the law and exceed MDE's authority.

Third, the school district claims that MDE's decision violates the Spending Clause of the United States Constitution.

We review an agency's quasi-judicial actions to determine if a petitioner's substantial rights have been prejudiced because of administrative findings, inferences, conclusions, or decisions that are, among other things, unsupported by substantial evidence, affected by an error of law, or arbitrary or capricious. *In re Chisago Lakes Sch. Dist.*, 690 N.W.2d 407, 410 (Minn. App. 2005) (applying the standard of review in Minn. Stat. § 14.69). Here, all three arguments asserted by the school district involve questions of law and are thus subject to de novo review. *Special Sch. Dist. No. 1 v. E.N.*, 620 N.W.2d 65, 68 (Minn. App. 2000). We address each argument below.

I. MDE did not err in ordering the school district to provide the student with the FM System.

We turn first to the school district's argument that MDE erred by ordering that the school district must provide the student with an FM system while he attends a nonpublic school. The school district argues that, under the relevant state and federal law, it has the discretion to determine the location where it will provide assistive-technology devices, such as FM systems, to shared-time pupils and cannot be mandated to provide the devices at a nonpublic school. The school district also argues that MDE erred because it required the school district to "facilitat[e] core curriculum instruction in a nonpublic school setting" and to provide monitoring that is above and beyond its statutory obligations.

School District Discretion to Determine Location

IDEA requires public schools to provide special-education services to students with disabilities as needed to provide a "free appropriate public education" (FAPE). 20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101 (2020). Minnesota law places an additional obligation on school districts, not required by federal law, that they may not deny any "resident of a district who is eligible for special instruction and services . . . instruction and service on a shared time basis . . . because of attending a nonpublic school." Minn. Stat. § 125A.18 (2020). The student is covered under this provision of state law because he receives services on a "shared time basis," with some special instruction and services provided at his public school and the balance of his education, at the choice of his parents, at a nonpublic school. *Id.*; *see also* Minn. Stat. § 126C.01, subd. 8 (defining "shared time pupils").

The school district maintains that Minn. Stat. § 126C.19, subd. 4(b), gives the school district discretion concerning *where* to provide special services because the section states that, for shared-time pupils "who attend nonpublic school at their parent's choice, a school district may provide special instruction and services at the nonpublic school building, a public school, or at a neutral site other than a nonpublic school." Minn. Stat. § 126C.19, subd. 4(b). The school district maintains that it complied with this section by deciding to provide the FM system to the student at the public school.

Subdivision 4(b) goes on to state that "[t]he school district shall determine the location at which to provide services on a student-by-student basis, consistent with federal law." *Id.* The school district argues that its decision was "consistent with federal law"

because the applicable federal regulation provides similar discretion to school districts in determining the location of special instruction and services. The school district points to the following language in 34 C.F.R. § 300.144(b) (2020), one of the regulations promulgated pursuant to IDEA, which states that a "public agency may place equipment and supplies in a private school." The school district claims that the use of the word "may" in this regulation should be read as granting discretion to the school district to decide not to "place equipment and supplies," such as the FM system for the student, in a private school.

The MDE counters that the school district failed to comply with the requirements of Minn. Stat. § 126C.19, subd. 4(b), because it did not make the decision concerning the location at which to provide services on a "student-by-student basis" and the decision that it made was not "consistent with federal law." We agree.

First, it is undisputed that the decision to cease providing the FM system to the student while he was receiving educational services at the nonpublic school was a district-wide, across-the-board determination based on the district's analysis of its legal obligations and limited resources; it was not made on a student-by-student basis as required by Minn. Stat. § 126C.19, subd. 4(b). There was no individualized analysis of the student's particular circumstances or needs. Indeed, the most recent evaluation of the student's needs, the 2019 hearing evaluation, concluded that the student "needs his FM system for all parts of his school day."

Second, the decision was not "consistent with federal law" as also required by subdivision 4(b). The federal regulation concerning assistive technology provides that

"[o]n a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE." 34 C.F.R. § 300.105(b) (2020). Here, the student's IEP team determined that the student needed the FM system "in order to receive FAPE." *Id.* The only relevant modification made between the student's 2019 and February 2020 IEP was that the FM system would be provided only while the student was "receiving services in a public school." And this change was based solely on the district-wide policy determination and not, as noted above, on an individualized determination by the IEP team that the student no longer needed the FM system to receive FAPE. The decision was not made on a "case-by-case basis" as required by 34 C.F.R. § 300.105(b) and thus was not "consistent with federal law" as required by Minn. Stat. § 126C.19, subd. 4(b). We thereby reject the school district's argument that its decision to limit use of the FM system to the public school was lawful under Minn. Stat. § 126C.19, subd. 4(b). And we further note that the school district's failure to make the decision on a case-by-case basis also violated 34 C.F.R. § 300.105(b).

Requiring School District to Allegedly Facilitate "Core Curriculum Instruction" in a Nonpublic Setting

The school district next argues that MDE's decision contravenes Minnesota law because it impermissibly requires the school district to "facilitat[e] core curriculum instruction in a nonpublic school setting" and to monitor the education offered in the nonpublic school. In support of its argument, the school district points to Minn. Stat. § 126C.19, subd. 4(a) (2020), which states that "[p]ublic school programs that provide

instruction in core curriculum may be provided to shared time pupils only at a public school building." The school district's argument lacks logic, however, because the FM system constitutes a device, not "core curriculum instruction." The phrase "assistive technology device," as defined in IDEA, means "any item, piece of equipment, or product system . . . that is used to increase, maintain, or improve functional capabilities of a child with a disability." 20 U.S.C. § 1401(1)(A). An assistive-technology device is thus quite different from "instruction in core curriculum" and we reject this argument. *See* Minn. Stat. § 126C.19, subd. 4(a).

In arguing that MDE's decision would impose an improper requirement on the school district to monitor the education provided at the nonpublic school, the district relies on language in a decision of the Eighth Circuit Court of Appeals stating that Minn. Stat. § 125A.18 "does not require public school districts to constantly monitor the education offered at private schools." *Special Sch. Dist. No. 1, Minneapolis Pub. Sch. v. R.M.M.*, 861 F.3d 769, 777 (8th Cir. 2017). Nothing in MDE's decision, however, requires "constant monitoring" by the school district. It requires only that the school district provide the FM system and, presumably, refurbish or repair the system when needed.[4]

II. Portions of the corrective-action memorandum are inconsistent with state law.

In addition to challenging MDE's decision to require the school district to provide an assistive-technology device to this shared-time pupil while at a nonpublic school, the

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[4] We note in this regard that the nonpublic school apparently offered to take on the responsibility of managing the equipment after it was picked up to reduce the burden on the school district.

school district claims that some of the items in MDE's corrective-action memorandum "contain[] requirements that are contrary to and in excess of the requirements established in state and federal law." Here, as required by federal regulation, MDE addressed not just the appropriate remedies for the complaining child, but also "[a]ppropriate future provision of services for all children with disabilities." 34 C.F.R. § 300.151(b)(2) (2020). The MDE accomplished this by requiring the school district to prepare a corrective-action memorandum subject to its approval. The school district objects on various grounds to provisions in the memorandum.

The school district points first to the following paragraph:

> The District is required to provide special education instruction and services to students who are parentally-placed in a nonpublic school located within the District's boundaries, and students may not be denied instruction and service on a shared time basis, in accordance with Minn. Stat. §§ 123B.41, subd. 9, 125A.03, and 125A.18. In other words, the public school district where the nonpublic school is located is obligated to provide a FAPE to nonpublic school students.

The school district argues that this paragraph expands its obligation to provide special education and services to include pupils who attend nonpublic schools on a full-time basis, rather than limiting its obligation to provide such services to shared-time pupils. The memorandum, however, states that it is meant to clarify the school district's "obligations that are owed to shared time students." The first paragraph of the memorandum provides the statutory definition of a "shared time pupil," and the paragraph quoted above indicates that the students may not be denied "instruction and service on a shared time basis, in accordance with Minn. Stat. §§ 123B.41, subd. 9, 125A.03, and 125A.18." Consequently,

it does not appear that the language intends to cover students that attend a nonpublic school on a full-time basis, and MDE acknowledges that this was not the intent.

The school district also argues that the paragraph impermissibly requires the district to provide services to nonpublic school students who are not residents of the district. We agree. Minn. Stat. § 125A.03(a) (2020) requires the school district to provide education and services only to children "who are residents of the district and who are disabled," not to children, regardless of their residence, who attend a nonpublic school located in the district. This part of the paragraph is thus contrary to the law and must be corrected.

The school district next maintains that MDE impermissibly relied on Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12165 (2018), in making its complaint decision. In the complaint decision, MDE explicitly acknowledges that it "does not have jurisdiction to review alleged violations of Title II" of the ADA, but cites to a frequently-asked-questions document as providing "helpful guidance to districts regarding effective communication for students with disabilities." The corrective-action memorandum contains the following statement in the section on assistive technology:

> Title II [of the ADA] further requires public schools give primary consideration to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student. Federal guidance states that, "[i]n general, the services, devices, technologies and methods for providing effective communication that are 'auxiliary aids and services' under Title II could also be provided under the IDEA as part of FAPE."

The school district argues that MDE's reliance on the ADA was "critical to MDE's conclusion." But it does not appear that MDE actually relied on the ADA in reaching its

decision. There are only brief references to the ADA in the complaint decision and corrective-action memorandum, and MDE's decision is well-supported by the relevant state and federal regulations specific to the provision of special-education services, not requirements under the ADA. Thus, we are not persuaded that MDE's brief references to the ADA constitute a reversible error.

Finally, the school district argues that the corrective-action memorandum constitutes impermissible rulemaking. A rule is a "statement of general applicability and future effect . . . adopted [by an agency] to implement or make specific the law enforced or administered by that agency or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4 (2020). Generally, an administrative rule must be promulgated in accordance with the procedures of the Minnesota Administrative Procedure Act. *In re Application of Q Petroleum*, 498 N.W.2d 772, 780 (Minn. App. 1993), *rev. denied* (Minn. July 15, 1993). But an agency may formulate a policy on a case-by-case determination without engaging in rulemaking. *Bunge Corp. v. Comm'r of Revenue*, 305 N.W.2d 779, 785 (Minn. 1981).

The school district asserts that the final corrective-action memorandum established a new rule requiring school districts "to provide special education, including assistive technology, to students when they are not scheduled to receive services from the District and while they are attending a nonpublic school." We disagree. The memorandum does not, as the school district argues, take away all of the school district's discretion in determining the location at which special-education services are provided, but rather reflects the school district's obligation to make such a determination on a case-by-case

basis, rather than adopting a general policy without consulting the individual students' IEP teams.

III. MDE's decision does not violate the Spending Clause.

Finally, the school district argues that MDE's decision violates the Spending Clause of the United States Constitution. *See* U.S. Const. art. I, § 8, cl. 1. When legislation is enacted pursuant to the Spending Clause, obligations that are a condition of federal funding under that legislature are valid only when there is "clear notice" of the obligation. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The school district argues that it did not have clear notice that "the District is required to provide an FM system to Student while he is on site at" the nonpublic school. We are not persuaded.

As MDE argues, the complaint decision and corrective action are consistent with the clear mandates of Minnesota law. MDE points out that it has been 13 years since this court observed that the shared-time statute is "unambiguous and prohibits school districts from denying special education instruction and services to children with disabilities enrolled in nonpublic schools." *Indep. Sch. Dist. No. 281 v. Minn. Dep't of Educ.*, 743 N.W.2d 315, 325 (Minn. App. 2008); *see also* Minn. Stat. § 126C.19, subd. 4(b). Further, Minnesota law requires that the determination of where services are provided be made on a student-by-student basis. *See* Minn. Stat. § 126C.19, subd. 4(b).

As discussed above, MDE did not alter the school district's discretion in determining the location of and appropriate services to be provided. Rather, its decision reflects the fact that state law does not permit the school district to adopt a general policy that pertains to all students who receive shared-time aid but otherwise attend a nonpublic

school. State law requires that such a determination be made on a case-by-case basis, and that the need for services such as assistive technology be considered when developing a student's IEP. That did not occur in the case before us, and it was therefore appropriate for MDE to order corrective action under existing and well-established law. The school district had clear notice of MDE's authority to order corrective action, and therefore the decision does not violate the Spending Clause.

For the reasons set out above, we thus affirm MDE's decision, but we remand to MDE to correct the misstatement of law in the corrective-action memorandum.

Affirmed in part and remanded.