STATE OF MINNESOTA
IN COURT OF APPEALS
A09-269

Lisa Van Der Heiden, petitioner,
Respondent,

vs.

Minnesota Department of Education,
Appellant.

Filed December 1, 2009
Affirmed
Larkin, Judge
Dissenting, Johnson, Judge

Kandiyohi County District Court
File No. 34-CV-08-393

Rebecca H. Hamblin, Jess Anna Glover, Education Minnesota, 41 Sherburne Avenue, St. Paul, MN 55103 (for respondent)

Lori Swanson, Attorney General, Martha J. Casserly, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, MN 55101 (for appellant)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

LARKIN, Judge

This is an appeal from a district court order that reversed a final maltreatment determination of the Minnesota Department of Education. We hold that the maltreatment determination was arbitrary and capricious, and we affirm the district court's order.

FACTS

Respondent Lisa Van Der Heiden was a special education teacher in 2005. One of Van Der Heiden's students at that time was C.N., a seven-year-old first grader. C.N. had a functional behavioral assessment (FBA) and an individualized education plan (IEP) that identified running away from teachers and others as a target behavior that required behavioral intervention. C.N.'s FBA and IEP provided that if C.N. displayed a target behavior, she was to be removed to the "resource room" until she was calm.

On April 5, Van Der Heiden received a call during her lunch break informing her that C.N. had run away from staff at the playground and entered the building unsupervised. Van Der Heiden interrupted her lunch to look for C.N. Van Der Heiden found C.N. inside the building with D.D., a paraprofessional. C.N. told Van Der Heiden that she needed to use the bathroom. Van Der Heiden told C.N. that she could use the bathroom when she was calm and directed C.N. to the resource room.

C.N. entered the resource room and then entered the time-out room, which is a small room within the resource room with a lockable door and a small window. A short time later, another paraprofessional entered the resource room, and Van Der Heiden asked her to check on C.N. The paraprofessional informed Van Der Heiden that C.N.

had wet her pants. D.D. reported the incident to the Minnesota Department of Education (MDE) approximately 16 months later, in August of 2006. MDE investigated the incident, interviewed the witnesses, and on April 10, 2007, an MDE maltreatment investigator found Van Der Heiden had physically abused C.N. by denying her access to toilet facilities. On April 23, Van Der Heiden submitted a request for reconsideration, which was denied.

Van Der Heiden requested a fair hearing under Minn. Stat. § 626.556, subd. 10(i) (2008), which occurred on October 5. The human services administrative-law judge (ALJ) received numerous exhibits into evidence and heard the testimony of several witnesses, including Van Der Heiden and D.D. After considering the evidence, the ALJ found that D.D. was one of several paraprofessionals who were "dissatisfied with" Van Der Heiden. The ALJ also found that D.D. "had philosophical differences" with Van Der Heiden's approach to teaching and felt that Van Der Heiden's style was "excessively authoritarian." The ALJ also found that "[u]ntil the time that this group of dissatisfied paraprofessionals began working with [Van Der Heiden], [Van Der Heiden] had been a special education teacher for many years without any reports of maltreatment being made against her."

The ALJ concluded that MDE failed to show, by a preponderance of the evidence, that Van Der Heiden impermissibly denied C.N. access to toilet facilities such that physical abuse occurred. The ALJ determined that D.D.'s credibility was undermined by the fact that she waited such a long time to report the incident, particularly since she testified that she was so upset by the incident that she stayed home from work the

following day. The ALJ also determined that Van Der Heiden's account was not reliable, due to her interest in the matter as well as the length of time that had passed since the incident. The ALJ concluded that the only facts that had been proved by a preponderance of the evidence were those that were either uncontroverted or upon which the witnesses agreed. The ALJ issued an order recommending that MDE reverse the maltreatment determination.

On May 2, 2008, MDE issued its final determination, declining to adopt the ALJ's recommendations. Van Der Heiden then appealed to the district court, and a hearing occurred on December 9. No new or additional evidence was considered by the district court. The district court reversed MDE's determination, and this appeal follows.

D E C I S I O N

MDE is responsible for investigating and assessing allegations of child maltreatment in Minnesota schools. Minn. Stat. § 626.556, subd. 3b (2008). Judicial review of state-agency maltreatment determinations is governed by Minn. Stat. § 256.045 (2008). A party who is dissatisfied with a maltreatment decision of the MDE may appeal to the district court. *Id.*, subd. 7. A party dissatisfied with the district court's order "may appeal the order as in other civil cases." *Id.*, subd. 9. Although this is an appeal of the district court's decision, we review MDE's decision independently, giving no deference to the district court.[1] *Zahler v. Minn. Dept. of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001).

[1] Accordingly, we do not address the district court's analysis or reasoning.

When judicial review is authorized by Minn. Stat. § 256.045, the scope of review is governed by Minn. Stat. § 14.69 (2008). *Id.* Our role is to review MDE's decision to determine if the decision was:

> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
> (f) arbitrary or capricious.

Minn. Stat. § 14.69.

The district court concluded that MDE's determination was arbitrary and capricious. An agency's decision is arbitrary and capricious if the agency (1) relied on factors it is not permitted or intended by the legislature to rely on, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation that runs counter to the evidence, or (4) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise. *In re Charges of Unprofessional Conduct Contained in Panel File 98-26*, 597 N.W.2d 563, 567 (Minn. 1999) (citing *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983)). A decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). "[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to

the agencies' expertise." *In re Appeal of O'Boyle,* 655 N.W.2d 331, 334 (Minn. App. 2002) (quotation omitted).

MDE was not required to follow the recommendations of the ALJ. *See* Minn. Stat. § 256.045, subd. 3b(c) ("The state human services referee shall recommend an order to the commissioner of health, education, or human services, as applicable, who shall issue a final order. The commissioner shall affirm, reverse, or modify the final disposition."). "The standard of review is not heightened where the final decision of the agency decision-maker differs from the recommendation of the ALJ." *In re Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001); *see Hymanson v. City of St. Paul,* 329 N.W.2d 324, 326-27 (Minn. 1983) (noting that "the agency is not bound by the findings and recommendations of the hearing examiner [and…] the relationship differs from that of an appellate court reviewing a lower court's findings of fact: an agency could make new findings and decide contrary to the hearing examiner's recommendation"). But rejection of the ALJ's recommendations without explanation may suggest that the agency exercised its will rather than its judgment and was therefore arbitrary and capricious. *Markwardt v. State, Water Res. Bd.,* 254 N.W.2d 371, 374-75 (Minn. 1977).

MDE argues that it provided multiple reasons for deviating from the ALJ's recommendations. MDE further argues that it identified the evidence upon which it relied and explained how that evidence connects rationally with the agency's choice of action. Van Der Heiden counters that the district court correctly concluded that MDE's

maltreatment determination was arbitrary and capricious, representing an imposition of its will to override the ALJ's recommendation without a factual basis to do so.

Maltreatment is defined to include an act of "physical abuse," including "any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67." Minn. Stat. § 626.556, subd. 2(g) (2008). Section 121A.67 provides that the commissioner of education "must amend rules governing the use of aversive and deprivation procedures by school district employees or persons under contract with a school district." Minn. Stat. § 121A.67, subd. 1 (2008). In accordance with this mandate, MDE adopted rules containing a list of prohibited procedures, which are defined as "interventions that are prohibited from use in schools by school district employees" and include "denying a pupil access to toilet facilities." Minn. R. 3525.2900, subp. 5(A)(2)(i) (2007).

MDE found that Van Der Heiden committed maltreatment by denying C.N. access to toilet facilities in violation of Minn. R. 3525.2900, subp. 5(A)(2)(i). At oral argument before this court, MDE asserted that a "reasonableness" requirement must be read into the rule. This position is reflected in MDE's final determination, which states that delayed access to toilet facilities does not always constitute a denial and that "[t]here may be situations where an issue needs to be addressed prior to use of a restroom by a student, including health and safety issues." MDE also asserted that it must look at the facts and circumstances of each case to determine whether maltreatment has occurred.

MDE's final determination states that C.N.'s IEP provides, "if C.N. exhibits a target behavior, C.N. will immediately be removed to a location away from the view of

her peers (resource room)." In this regard, the final determination is consistent with the ALJ's findings. The ALJ found that the IEP in effect for C.N. at the time of the incident identified "running away" as a target behavior and provided that if C.N. demonstrated a target behavior, "she will be immediately removed to a location away from the view of her peers (resource room) where a basket hold will be implemented until she is calm. THERE WILL BE NO VERBAL OR VISUAL COMMUNICATION DURING THE IMPLEMENTATION OF THIS PROCEDURE." (Emphasis in original.) The ALJ also found that the FBA in effect for C.N. at the time of the incident listed "actual or attempts to run from the room/supervision of the adults responsible for her health and safety" as a target behavior. Finally, the ALJ found that C.N.'s FBA stated that C.N.:

> is very bright and highly capable of linking her maladaptive behaviors with the control violation. Again any conversation related to the behaviors, which resulted in the intervention **will only serve to communicate a sense of control, enable her to access the 1:1 time and attention she desires and enable her to avoid the exposure to the educational environment and learning, which is important for her.**

(Emphasis in original.) MDE did not explicitly reject any of the ALJ's findings related to C.N.'s IEP or FBA.

MDE's final determination also addressed whether C.N. had a history of wetting accidents. The determination states that a paraprofessional who worked with C.N. reported that C.N. normally did not have wetting accidents. C.N.'s second-grade teacher reported that C.N. may have wet herself several times, but never in the classroom setting and that to her knowledge, C.N. did not request to use the bathroom unless she needed to use it. Van Der Heiden reported that C.N. had one or two wetting accidents from

kindergarten to third grade and that C.N. did not lie about needing to go to the bathroom, but did "tease."

With regard to the incident in question, MDE's final determination provides the following background information:

> [Van Der Heiden] received a call on the [walkie-talkie] from a paraprofessional that she needed help with C.N. in the hallway. C.N. was running up and down the hallway and up and down the stairs. According to [Van Der Heiden], C.N. then walked to her in the hall, grabbed her crotch, jumped up and down and said "I have to pee." [Van Der Heiden] said she told C.N. they needed to talk first about why she was running in the hallway. She walked back to the resource room with C.N. following her and C.N. ran into the time-out room and wet herself.

MDE summarized the factual basis for its maltreatment determination as follows:

> The only individuals who provided statements or testified to remembering the specific incident in question are C.N., [D.D.], and [Van Der Heiden]. C.N. remembered that [Van Der Heiden] would not let her go to the bathroom and C.N. urinated on herself in the time-out room.
>
> [D.D.] remembered that she saw C.N. *alone* in the hallway and that C.N. asked to go to the bathroom. [D.D.] also remembered that as C.N. went around the corner in the school, she saw [Van Der Heiden] and asked if C.N. could go to the bathroom herself or if she should take her. [D.D.] also remembered that [Van Der Heiden] stated that C.N. did not need to use the bathroom and saw [Van Der Heiden] take the student through the resource room and into the [time-out] room.
>
> [Van Der Heiden] remembered that she received a call on the walkie-talkie from a paraprofessional that the student was *running in the hallway*. [Van Der Heiden] acknowledged that when she encountered C.N. she stated her need to use the bathroom. [Van Der Heiden] informed C.N. that they needed

> to talk first about why C.N. was running and she walked C.N. to the resource room where the student ran into the [time-out] room. [Van Der Heiden] acknowledged that the student urinated in the time-out room.
>
> Although the memories diverge in a number of details among the three individuals, they are not inconsistent considering that the memories were all more than a year old at the time. [D.D.] knew that she found C.N. *alone* in the hallway, C.N. wanted to go to the bathroom and that [Van Der Heiden] took C.N. to the resource room rather than taking the student directly to the bathroom. [Van Der Heiden] knew that she was looking for a student who was *running unsupervised*. When [Van Der Heiden] found C.N., she was reacting to both the student's behavior and the student's request to go to the bathroom. [Van Der Heiden] decided to address the behavioral issue before taking the student to the bathroom.

(Emphasis added.)

Based on these facts, MDE concluded that Van Der Heiden delayed C.N.'s access to toilet facilities and that the delay resulted in C.N. urinating in the time-out room. MDE next acknowledged that delayed access to toilet facilities does not automatically constitute a denial of access under rule 3525.2900, subp. 5(A)(2)(i) and identified the issue in this case as "whether the delay constituted a denial under the rule." MDE ultimately concluded that the delay constituted a denial because "[Van Der Heiden] heard and understood C.N.'s need to use the restroom. [Van Der Heiden] could have addressed C.N.'s need to use the restroom and then addressed C.N.'s behavior issues." MDE implicitly concluded that it was unreasonable to delay C.N.'s access to the toilet facilities while addressing C.N.'s behavioral concerns and that the delay therefore constituted a denial under the rule. We review MDE's conclusion that the delay constituted a denial of

access to toilet facilities in light of its position that "reasonableness" must be inferred into the rule.

While it is obvious that Van Der Heiden could have decided to take C.N. to the bathroom before addressing C.N.'s behavior, MDE fails to offer any explanation, or to cite to any evidence, that supports its implicit conclusion that the delay attendant to Van Der Heiden's decision to address C.N.'s behavioral issue before taking C.N. to the bathroom was unreasonable and therefore a denial constituting maltreatment. MDE cites the testimony of C.N.'s regular education teacher that C.N. "was always real good about being [sic] to tell me when she needed to use the restroom . . . and if [she] said she needed to use the restroom, she did need to use it." While this testimony supports a conclusion that C.N. was not lying about having to use the bathroom, it does not lead to the conclusion that C.N. was likely to have a wetting accident if she was not immediately taken to the restroom, thereby making any delay unreasonable. MDE's own determination indicates that C.N. was not known to have wetting accidents. Thus, even if there was no reason to question the veracity of C.N.'s claim that she needed to use the bathroom, in the absence of evidence that C.N. was prone to wetting accidents it does not follow that the delay here was unreasonable.

Moreover, MDE's final determination fails to consider an important aspect of the problem: the competing concern presented by the existence of a target behavior that triggered a defined intervention under C.N.'s IEP and FBA.[2] MDE's final determination

[2] Van Der Heiden argues that C.N.'s IEP identified "actual or attempts to run from the room/supervision of the adults responsible for her health and safety" as a target behavior.

acknowledges that when Van Der Heiden approached C.N. in the hallway, she was of the belief that C.N. had engaged in a target behavior: running in the hallway without adult supervision. The record demonstrates that this target behavior called for a specific response: immediately removing C.N. to the resource room and not engaging in any dialogue with C.N. regarding the behavior. And MDE's final determination acknowledges, "[t]here may be situations where an issue needs to be addressed prior to use of a restroom by a student, including health and safety issues." Yet MDE concluded, without explanation, that this was not a case in which a "health and safety" issue needed to be addressed prior to use of the restroom. Given MDE's determinations that Van Der Heiden believed that C.N. had engaged in a target behavior—running from the supervision of the adults responsible for her health and safety—and that C.N. was not known to have wetting accidents, it is incumbent upon MDE to explain why the need for behavioral intervention did not justify delayed access to toilet facilities.

One of MDE's stated reasons for rejecting the ALJ's recommendation was that it would render rule 3525.2900, subpart 5(A)(2)(i) "null and void" to the extent that the recommendation provides that a student's IEP can override state and federal laws regarding maltreatment. MDE overstates the impact of the ALJ's recommendation. MDE's own determination recognizes that there may be situations in which health and safety issues must be addressed prior to allowing a student to use the restroom, and MDE

Van Der Heiden also argues that "C.N.'s running away from the playground staff not only was a targeted behavior, but a behavior that implicated C.N.'s own health and safety in running away from adult supervision. These are two bases that, even by the MDE's own standard, support Van Der Heiden's actions, and yet the MDE ignores these facts in finding that Van Der Heiden committed maltreatment."

concedes that the delay attendant to these circumstances does not necessarily constitute a denial under the rule. The ALJ simply recognized, consistent with MDE's final determination and its position on appeal, that there may be circumstances that justify delayed access to toilet facilities and that delay under these circumstances does not result in a denial constituting maltreatment.

There are two opposing points of view regarding whether the delay attendant to Van Der Heiden's implementation of behavioral interventions was reasonable. MDE was entitled to reject the view that the delay was reasonable, but it was required to do so in a reasoned decision. *See CUP Foods*, 633 N.W.2d at 565 (holding that a decision is not arbitrary and capricious if the agency, presented with opposing points of view, reaches a reasoned decision that rejects one point of view). It is not sufficient for MDE to recognize that delay is justified under circumstances related to a student's health and safety and to conclude, without explanation or citation to supporting evidence, that the circumstances here did not justify delay.

Because MDE did not explain its conclusion that the delay attendant to Van Der Heiden's decision to address C.N.'s behavior before taking C.N. to the bathroom constituted a denial of access to toilet facilities and did not consider an important aspect of the problem—the need to address a target behavior related to C.N.'s health and safety—we hold that MDE's maltreatment determination was arbitrary and capricious. Accordingly, we affirm the district court's order reversing MDE's final determination.

Because we affirm on this ground, we do not address Van Der Heiden's additional claims of error.

Affirmed.

Dated:

_____
Judge Michelle A. Larkin

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. The decision of the deputy commissioner of education is not arbitrary and capricious in light of the text of the applicable administrative rule, which states that a teacher engages in maltreatment by, among other things, "denying a pupil access to toilet facilities." Minn. R. 3525.2900, subp. 5(A)(2)(i) (2005). It is undisputed that C.N. informed Van Der Heiden that she needed to use a toilet, that Van Der Heiden did not provide C.N. with access to a toilet, and that C.N. wet her pants. The conclusion that Van Der Heiden violated the rule is the product of a straightforward application of the law to essentially undisputed facts. *See Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989) (holding that agency decision was not arbitrary and capricious because "the facts are undisputed" and commissioner "applied the Department's rule properly to the facts of [the] case").

One reasonably may wonder whether a finding of maltreatment in this case is fair or worthwhile. But those considerations are beside the point. An agency's interpretation of its own rule enjoys considerable deference and should be upheld if it is reasonable. *St. Otto's Home v. Minnesota Dep't of Human Servs.*, 437 N.W.2d 35, 40 (Minn. 1989). "If there is room for two opinions on a matter," an agency's decision "is not arbitrary and capricious, even though the court may believe that an erroneous conclusion was reached." *In re Review of 2005 Annual Automatic Adjustment of Charges*, 768 N.W.2d 112, 120 (Minn. 2009). Accordingly, an agency's interpretation of an administrative rule may not be overturned merely because the interpretation is viewed as "harsh or undesirable," *Mammenga*, 442 N.W.2d at 789, or "draconian," *Hy-Vee Food Stores, Inc. v. Minnesota*

Dep't of Health, 705 N.W.2d 181, 190 (Minn. 2005). By overruling the department's interpretation of its own rule, this court's opinion is in tension with the doctrine of separation of powers. *See In re Excess Surplus Status of Blue Cross & Blue Shield*, 624 N.W.2d 264, 278-79 (Minn. 2001); *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977) (recognizing "need for exercising judicial restraint and for restricting judicial functions to a narrow area of responsibility, lest [a court] substitute its judgment for that of the agency").

For these reasons, I would reverse the judgment of the district court and reinstate the decision of the deputy commissioner of education.