254-21

New Jersey Commissioner of Education

Decision

Board of Education of the Township of Lakewood, Ocean County,

Petitioners,

v.

New Jersey Department of Education, and Kathleen Ehling,

Respondents.

Synopsis

This matter involves the determination of the New Jersey Department of Education (DOE) that the Lakewood Board of Education must set aside 15% of its Individuals with Disabilities Education Act (IDEA) funding for the 2021-2022 school year for comprehensive coordinated early intervention services (CCEIS) in order to address significant racial disproportionalities with respect to the Board's identification, placement, and discipline of special education students. This determination came after an analysis of data showing that Lakewood had exceeded the 3.0 percent risk ratio threshold set by the DOE for three consecutive years in five different areas. The Board appealed, arguing that in making this determination, DOE failed to include data on Lakewood's large population of private school students and that if required to set aside funds, it should only be required to set aside a percentage of the IDEA funds allocated to public schools. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the DOE complied with the IDEA as written, and the Board's disagreement with the outcome here does not make the DOE's interpretation of the IDEA arbitrary, capricious, or unreasonable; the State is not required to consider nonpublic students, so failing to do so is not arbitrary and capricious; in fact, making an exception solely for Lakewood in this matter would be arbitrary and capricious, with no statutory or administrative support for such a decision; the Board does not have authority over the nonpublic schools or their students to the extent necessary to address disproportionate identification, placement, or discipline of disabled students; further, including the large number of white nonpublic students in the calculation may prevent the uncovering of disproportionalities, which is the purpose of the CCEIS funds; and the IDEA does not provide for subdividing the total funding into public and nonpublic allocations when calculating the amount of CCEIS funds to be set aside. The ALJ held that the DOE's determination of a 3.0 percent risk ratio is not arbitrary, as the same ratio is used by 20 other states. The ALJ concluded that while the facts support the Board's claim of the unintended application of the regulation for Lakewood, that conclusion is insufficient to support judicial intervention in the allocation, which is solely at the discretion of the Commissioner. Summary decision was granted in favor of DOE.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion herein but disagreed that the Commissioner has discretion to reduce the amount of CCEIS funds that the Board is required to set aside. Accordingly, summary decision was granted in favor of the DOE and the petition was dismissed.

254-21
OAL Dkt. No. EDU 7831-20
Agency Dkt. No. 152-7/20

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Lakewood, Ocean County,

Petitioner,

v.

New Jersey Department of Education, and Kathleen Ehling,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Lakewood Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4, and respondents' reply thereto, have been reviewed and considered.

This matter involves the New Jersey Department of Education's (DOE) determination that the Board must set aside 15% of its Individuals with Disabilities Education Act (IDEA) funding for the 2021-2022 school year for comprehensive coordinated early intervention services (CCEIS) to address significant racial disproportionalities with respect to the Board's identification, placement, and discipline of special education students. Through a data analysis, the DOE determined that Lakewood exceeded the 3.0 percent risk ratio threshold set by the DOE for three consecutive years in five areas: identification of white students for autism, intellectual disabilities, and all eligibilities; placement of white students in separate settings; and disciplinary removals of Black students. The Board appealed, arguing that the DOE should have

included data regarding Lakewood's large population of private school students[1] and that, if required to set aside funds, it should only be required to set aside a percentage of the IDEA funds allocated to public schools.[2]

Following cross-motions for summary decision, the ALJ found that the DOE did not violate the Board's right to procedural due process, as there is no requirement that the DOE provide early notification to a district prior to it being identified as significantly disproportionate, and Lakewood was not entitled to attend the stakeholder meetings held by the DOE as part of setting the risk ratio thresholds. The ALJ also held that the Board does not have any substantive due process rights because, on the facts of this matter, the IDEA does not afford a fundamental due process right to a school district.

The ALJ concluded that the DOE complied with the regulations and requirements of the IDEA as they are written, and while the Board takes issue with the outcome as it applies to their school district, this does not make the DOE's interpretation or application of the IDEA arbitrary, capricious, or unreasonable. The ALJ found that the State is not required to consider nonpublic students, so failing to do so is not arbitrary and capricious; in fact, the ALJ noted that making an exception solely for Lakewood would be arbitrary and capricious, with no statutory or administrative support for such a decision. The ALJ indicated that the Board does not have authority or control over the nonpublic schools or their students to the extent necessary to address disproportionate identification, placement, or discipline of disabled students; further,

[1] According to the parties' stipulation of facts, more than 85% of the students in Lakewood attend nonpublic schools chosen by their parents, and less than 15% of students attend Lakewood Public Schools. Approximately 7,683 students with disabilities attend nonpublic schools (of whom 99.8% are white), and 1,669 students with disabilities attend public schools (of whom 84% are non-white).

[2] Lakewood IDEA funding for the 2020-2021 school year is $9,619,588. Of those funds, approximately $7.7 million is allocated to nonpublic schools and $1.8 million is allocated to public schools. 15% of the total funding equals $1,442,938. 15% of the public school funding equals approximately $270,000.

including the large number of white nonpublic students in the calculation may prevent the uncovering of disproportionalities, which is the purpose of the CCEIS funds. The ALJ found that the IDEA does not provide for subdividing the total funding into public and nonpublic allocations when calculating the amount of CCEIS funds to be set aside. The ALJ also noted that, while the Board implied that it will be unable to provide a free appropriate public education (FAPE) to its public school students if it is required to set aside 15% of its total IDEA funding, the Board is not prohibited from allocating some of the CCEIS funds toward other students and groups if it is necessary to ensure that all public students are receiving FAPE. The ALJ held that the DOE's determination of a 3.0 percent risk ratio is not arbitrary, noting that the same ratio is used by 20 other states. The ALJ concluded that while the facts support the Board's claim of the unintended application of the regulation for Lakewood, that conclusion is insufficient to support judicial intervention in the allocation.[3]

In its exceptions, the Board argues that it is seeking to have Lakewood treated the same as every other district in New Jersey by having the majority of its entire student population included in the disproportionality calculations. According to the Board, by failing to do so, the DOE is treating Lakewood differently and, therefore, its actions are arbitrary and capricious, as well as a violation of the Board's due process rights. The Board alleges that basing the disproportionality calculations on only 15% of Lakewood's total student population – its public school students – makes the resulting calculations inaccurate and unreliable, and the only way to treat Lakewood fairly is to include nonpublic school students in the calculations.[4]

[3] The ALJ noted that any relief falls in the discretion of the Commissioner.

[4] The Board offers that the formula could be changed for all school districts, and that any impact resulting from the change on other districts would be minimal because of the relatively small percentages of nonpublic school students in districts other than Lakewood.

The Board also argues that the DOE failed to demonstrate that the districts included in stakeholder meetings were representative of the population. According to the Board, the DOE advised districts that they would be provided notice if they were at risk for significant disproportionality, and that since Lakewood did not receive such notice, and in fact at one time received notice to the contrary, it was reasonable for the Board to believe that it was not at risk. The Board takes exception to certain statements in the Initial Decision regarding the lack of nonpublic school data, noting that data is available regarding identification and placement, and is only unavailable regarding discipline. According to the Board, the ALJ erroneously held that Lakewood cannot know whether its disproportionality is due only to the number of parents who choose to send their children to nonpublic schools, because this phenomenon is well-known, including to the DOE.

Finally, the Board argues that the Commissioner should exercise her discretion to reduce the CCEIS amount to be set aside by Lakewood based on its unique status. The Board contends that its disproportionality cannot be solved by the allowable and mandatory uses of CCEIS funds, because the parent choice phenomenon is the sole factor contributing to the district's disproportionality. The Board notes that if it is required to set aside $1.4 million, it would be left with less than $400,000 to supplement the special education needs of its students.

In reply, the DOE argues that the plain language of federal regulations refers to students enrolled in the district and that it therefore properly excluded students enrolled in private schools from its calculations. The DOE notes that all data used in its calculations came from Lakewood, such that the Board should have been aware of the possibility that the district would be found to be significantly disproportionate. The DOE contends that the Board's procedural and substantive due process rights were not violated, for the reasons outlined in the Initial Decision. Finally, the DOE argues that it has no discretion in determining the amount of funds that must be set aside.

In addition to its exceptions, the Board filed a motion to supplement the record, seeking to include: 1) documents related to a training session that the DOE hosted for school districts in July 2021; 2) discipline data recalculated by the Board following the training session; 3) Board resolutions identifying its action plan to resolve issues raised during these proceedings; and 4) email correspondence between the parties in July and August 2021, scheduling a meeting to discuss the topics at issue in this matter. The Board contends that these materials are relevant to this matter, were not available prior to the issuance of the Initial Decision, and will not prejudice the DOE if they are included in the record.

In response to the motion to supplement the record, the DOE argues that the Uniform Administrative Procedure Rules (UAPR) preclude the admission of evidence after the record is closed. The DOE further notes that portions of the Board's exceptions which rely on documents that were not a part of the record before the ALJ should be disregarded.

The Board's motion to supplement the record is denied. There is no provision in either the UAPR or *N.J.A.C.* 6A:3 allowing for the filing of such a motion or the acceptance of evidence outside of the record following an Initial Decision. Furthermore, pursuant to *N.J.A.C.* 1:1-18.4(c), "[e]vidence not presented at the hearing shall not be submitted as part of an exception, nor shall it be incorporated or referred to within exceptions." Accordingly, the certifications and documents attached to the Board's motion to supplement were not considered, nor were they considered to the extent that they were relied upon in the Board's exceptions.

Upon review, the Commissioner concurs with the ALJ's conclusion that the DOE was not arbitrary, capricious, or unreasonable – and accordingly did not violate the Board's substantive due process rights – in setting the risk ratio for disproportionality at 3.0 percent or in applying a uniform methodology statewide and determining not to make an exception for the specific circumstances of Lakewood's private-school population. Portions of the Board's

exceptions consist of information that was outside the record and was therefore not considered.[5] The remaining portions of the exceptions reiterate arguments made below that were addressed by the ALJ, and the Commissioner does not find them persuasive, for the reasons thoroughly detailed in the Initial Decision.

The Commissioner concludes that the DOE was not obligated to deviate from its chosen calculation methodology to address Lakewood's private school population. As the ALJ found, the DOE complied with the federal regulations and requirements of the IDEA as they are written, and the fact that the Board disagrees with the outcome as it applies to its school district does not make the DOE's interpretation or implementation of the law arbitrary, capricious, or unreasonable. While the Board argues that the federal regulations permit the DOE to include private school students in the disproportionality calculations, the Board does not point to any provision that requires the DOE to do so, and the Commissioner finds no such requirement in the applicable law. Moreover, 34 *C.F.R.* §300.647, which sets forth how to determine whether significant disproportionality exists, repeatedly refers to students "enrolled in the LEA"[6] or "within the LEA," supporting the DOE's decision to include only public school students in the disproportionality calculations.

[5] For purposes of clarity, the arguments that the Commissioner has determined are based on information outside the record, and which were therefore not considered, are summarized as follows: The Board argues that the DOE's calculations were inconsistent, based on data received in April 2021, following the close of the record. The Board also contends that the DOE failed to include in its calculations public school students who were placed in out-of-district schools, based on Exhibit 9 to its exceptions, which was not a part of the record on summary decision. The Board alleges that the DOE incorrectly calculated disciplinary removals by incident, rather than by student, and performed calculations for disciplinary removals of Black students even though the number of students involved was below the DOE-set minimum threshold, based on training materials from a DOE webinar in July 2021, following the close of the record. Finally, the Board argues that it can develop targeted policies to address disproportionality in discipline at a lower cost than $1.4 million, based on information from July 2021, after the close of the record. While the Commissioner has not considered these arguments, she does note that the Board filed a cross-motion for summary decision, in which it represented that there were no material facts in dispute.

[6] Local education agency (LEA) is defined by 34 *C.F.R.* §300.28(a) as a public board of education or other public authority for the administrative control or direction of public elementary or secondary schools.

The Board asserts – and alleges that the DOE knows – that the root cause for Lakewood's disproportionality is that many white parents in Lakewood send their white children to private schools. However, while the DOE is aware of those demographic circumstances, it does not necessarily follow that the demographics are the root cause of disproportionality among Lakewood's public school students. The purpose of calculating significant disproportionality and setting aside CCEIS funds is to identify and address contributing factors, 34 *C.F.R.* §300.646, and the Commissioner does not agree with the Board that an assumption based on Lakewood's demographics sufficiently analyzes or addresses possible causes. Moreover, with regard to some of the areas of disproportionality, such as discipline, it would be illogical to include private school students, whom the district is not responsible for disciplining, in a risk calculation to determine whether the district is disproportionality disciplining students. The DOE reasonably determined to evaluate Lakewood's disproportionality based on Lakewood's own actions, and not those of private schools.

The Commissioner further concludes that the DOE's actions did not violate the Board's procedural due process rights. The essential requirements of procedural due process are notice and an opportunity to be heard. *Cleveland Bd. of Educ. v. Loudermill*, 470 *U.S.* 532, 546 (1985). Here, there is no dispute that the DOE issued a notice to the Board when it was found to be significantly disproportionate, and while the Board argues that it should have received notice in advance of that finding, as the ALJ noted, there is no such requirement in the regulations.[7] Furthermore, as it is currently participating in the administrative law process to contest the DOE's finding, the Board clearly has been afforded an opportunity to be heard. The Board's opportunity to be heard does not entitle it to participation in the stakeholder meetings the DOE

[7] Additionally, the record and the Board's own exceptions identified two occasions where the DOE notified Lakewood that it was trending towards disproportionality.

held as part of determining the risk ratio threshold, as there is no fundamental or property right implicated by attendance at such meetings. Additionally, the federal regulations have no specific requirements regarding how many or what kinds of school districts must be included in stakeholder meetings, such that the DOE has discretion to invite participants.

The Commissioner further concurs with the ALJ's conclusion that the proper implementation of the finding of significant disproportionality results in requiring the Board to set aside $1,442,938 – 15% of its total IDEA grant funds – to CCEIS programs at Lakewood's public schools. However, the Commissioner disagrees with the ALJ that any relief from the set-aside requirement is in the discretion of the Commissioner. Pursuant to 20 *U.S.C.S.* §1418(d)(2), in the case of a determination of significant disproportionality, a state *shall require* the district to reserve the maximum amount of funds to provide CCEIS (emphasis added). Pursuant to 20 *U.S.C.S.* §1413(f)(1), the maximum amount of funds is 15% of the amount the district receives under the IDEA. These provisions do not afford the Commissioner any discretion to reduce the amount of CCEIS funds that the Board is required to set aside.

Accordingly, the Board's motion for summary decision is denied, the DOE's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[8]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 18, 2021
Date of Mailing: October 19, 2021

[8] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7831-20
AGENCY DKT. NO. 152-7/20

TOWNSHIP OF LAKEWOOD, BOARD OF EDUCATION, OCEAN COUNTY,
Petitioner,
v.
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, and KATHLEEN EHLING,
Respondents.

Michael I. Inzelbuch, Esq., co-counsel for petitioner

Edward J. Dauber, Esq., co-counsel for petitioner (Greenberg, Dauber, Epstein & Tucker, P.C., attorneys)

Aimee Blennar, **Christopher Weber,** and **Michal Czarnecki**, Deputy Attorneys General, for respondents New Jersey State Department of Education and Kathleen Ehling (Andrew J. Bruck, Acting Attorney General of the State of New Jersey, attorney)

Record Closed: March 18, 2021 Decided: July 20, 2021

BEFORE **JOSEPH A. ASCIONE**, ALJ:

STATEMENT OF THE CASE

In this matter arising under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 to -1482 (IDEA), the issue is whether respondent New Jersey Department of Education's (Department or NJDOE) properly required petitioner Lakewood Township Board of Education (District or Lakewood) to set aside certain federal funds for early intervention services to address a significant racial or ethnic disportionality with respect to Lakewood's identification, placement, and/or discipline of special education students.

The IDEA attempts to ensure that students with a disability are provided with a free appropriate public education (FAPE) that is tailored to their individual needs. To help achieve this goal, the federal government provides the States, including New Jersey, with grants, which are then allocated to the LEAs. In exchange for federal assistance, the IDEA requires, for instance, States to determine if there is "significant disportionality based on race and ethnicity" in terms of "the identification of children as children with disabilities," "the placement in particular educational settings of such children," and disciplinary actions in any LEA within a State. 20 U.S.C. § 1418(d). If a State finds any such significant disportionality in a particular LEA, the State may require the LEA to "reserve the maximum amount of funds . . . to provide comprehensive coordinated early intervening services to serve children" in the LEA. Ibid.

In the present case, Lakewood is due to receive $9,619,588 in federal funds for the 2021–22 school year. Of those funds, approximately $7,800,000 goes to private schools and $1,800,000 goes to the District's public schools. The Department identified the District for significant disproportionality for the 2020–21 school year. As a result of that determination, approximately $1,433,000 would be required to be taken from the funds received and allocated to specific programs in the public schools to address the disproportionality. The District maintains that this allocation, itself, is disproportionate, as the District does not control the funds going to the private schools. The District maintains that the allocation is arbitrary, capricious, and unreasonable.

PROCEDURAL HISTORY

On July 1, 2020, Lakewood filed a Verified Petition with the Commissioner of Education. On August 26, 2020, the NJDOE's Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:1-8.2. On August 13, 2020, an answer was filed by the NJDOE and Commissioner Ehling. On March 4, 2021, the NJDOE filed a motion for summary decision in accordance with N.J.A.C. 1:1-12.5. On or about March 18, 2021, petitioner filed a cross-motion for summary decision. The OAL had previously scheduled hearing dates for April 16, 21, and 30, and May 3, 2021. The scheduled hearings were cancelled to consider the within motion and cross-motion. The tribunal held oral argument by Zoom © on May 19, 2021.

FACTUAL DISCUSSION

The parties have provided a Joint Stipulation of Facts containing sixty-six paragraphs which are set forth below. I accept those statements and therefore **FIND** as **FACT**:

1. More than 85% of the students in Lakewood attend parent-chosen nonpublic schools, with less than 15% attending Lakewood Public Schools. Ex. A (Petition) at ¶ 10.

2. With respect to special education, approximately 9,352 children are identified as having a disability. Ex. A (Petition) at ¶ 12.

3. Approximately 7,683 of these students attend nonpublic schools, while approximately 1,669 attend public schools. Ex. A (Petition) at ¶ 13.

4. With respect to racial and ethnic demographics, Lakewood's nonpublic-school population is predominantly white (a conservative estimate is that upwards of 95% of nonpublic school students are white), with nearly all of Lakewood's minority students attending public schools. Ex. A (Petition) at ¶ 15.

5. Of all students with disabilities placed by their parents in nonpublic schools, approximately 7,527 (or 99.8%) are white. Ex. A (Petition) at ¶ 18.

6. Accordingly, less than 5% of Lakewood's total public-school population are white students with disabilities and less than 20% of Lakewood's public school students with disabilities are white students. DOE81.

7. Of the roughly 5,900 students who attend public schools in Lakewood, 1,669 of them have disabilities, of whom approximately 84% are non-white.

8. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq., is a federal statute that, among other things, is intended to improve special education services in schools. See 20 U.S.C. § 1400.

9. The IDEA creates a mechanism for providing federal funding to states that must be distributed to eligible school districts to be used to supplement special education services within those districts. See, e.g., 20 U.S.C. § 1411.

10. For the 2020–21 school year, Lakewood's Basic and Preschool IDEA grant is $9,619,588. This grant is based on the total number of students with disabilities in both the public and nonpublic schools in Lakewood. See 20 U.S.C. § 1411(f)(1)(B).

11. This grant is then allocated by the State between public and nonpublic schools, with approximately $7.8 million allocated to nonpublic schools and $1.8 million allocated to public schools. Ex. A (Petition) at ¶ 23.

12. One of the requirements for receiving IDEA funding is that states must analyze whether there is overidentification or disproportionate representation by race and ethnicity of children with disabilities. 33 U.S.C. § 1412(a)(24).

13. The overrepresentation of specific racial and ethnic minority groups in special education is a national issue, with rates of overrepresentation steady across states. Rb1–2; 2007 Memorandum from Director, Exhibit A to Respondents' SD Motion.

14. This is an issue because minority children have continuously been identified for special education services at a higher rate than would be expected based on the percentage of minority children in the general school population. Rb2; 2007 Memorandum from Director, Exhibit A to Respondents' SD Motion.

15. As minority children continue to comprise an increasing percentage of public school students, the federal government has taken steps to respond to the growing needs of an increasingly diverse society. Rb2; 2007 Memorandum from Director, Exhibit A to Respondents' SJ Motion.

16. Disproportionality refers to the phenomenon that occurs when there are more individuals from a particular group who are experiencing a given situation than one would expect based on that group's representation in the general population. Rb2.

17. Disproportionality is considered "significant" in the context of classification of students for special education services when overrepresentation of a group exceeds a risk ratio threshold, which is set by each individual state. 34 C.F.R. §§ 300.647(a)(7) and (b)(1)(ii); Rb2.

18. A risk ratio is the measure of a specific racial or ethnic group's risk, as compared to all other children, of receiving special education and related services. Rb2.

19. The United States Department of Education (USDOE) has promulgated regulations which guide a state's analysis of whether disproportionality exists and the consequences of such a finding. See 33 C.F.R. § 300.646, 647.

20. Under the Regulations, states have an obligation to collect and examine data to determine whether significant disproportionality based on race or ethnicity is occurring in LEAs of the state. 20 U.S.C. § 1418(d); 34 C.F.R. § 300.646; Rb4.

21. The Regulations set forth fourteen categories of analysis in which the state must calculate risk ratios to determine whether significant disproportionality exists. 34 C.F.R. §§ 300.647(b)(3) and (4); Rb6.

22. In December 2016, the USDOE amended the IDEA Regulations and imposed new requirements regarding acceptable methods for calculating risk ratios used to determine whether significant disproportionality exists (the "2016 Amendments"). Ex. A (Petition) at ¶ 34.

23. The 2016 Amendments required states to use risk ratios to analyze disparities across racial and ethnic groups, while providing each state with the discretion to determine the appropriate risk ratio threshold that would be used to determine significant disproportionality. 81 Fed. Reg. 10968, 34 C.F.R. § 647(a)(6); Rb7.

24. The 2016 Amendments took effect on January 18, 2017; however, the USDOE set the compliance date for the states at July 1, 2018, to "provide states time to plan for implementing these final regulations, including to the extent necessary, time to amend the policies and procedures necessary to comply." 81 Fed. Reg. at 92378; Rb7.

25. There were delays throughout the nation in the implementation of the 2016 Amendments for various reasons, including litigation over the regulations and concerns that they would encourage districts to implement de facto quotas. Ex. A (Petition) at ¶ 34.

26. In February 2018, the USDOE issued a Notice of Proposed Rulemaking proposing to "postpone the compliance date [of the 2016 Regulations] by two years, from July 1, 2018 to July 1, 2020." Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 83 Fed. Reg. 8396 (Feb. 27, 2018); Rb8.

27. Citing concerns that the 2016 Amendments would create an incentive for LEAs to establish de facto quotas, the USDOE issued its final rule postponing the compliance date of the 2016 Regulations by two years. Final Rule Delaying

Compliance Date Regarding Assistance to States for the Education of Children with Disabilities; Preschool Grants for Children with Disabilities, 83 Fed. Reg. 31306, 31308 (July 3, 2018); Rb8–9.

28. This permitted the states to choose whether to implement the methodology from the 2016 Amendments or to continue to choose their own methodology for identifying significant disproportionality. 83 Fed. Reg. at 31309; Rb9.

29. On July 12, 2018, the Council of Parent Attorneys & Advocates, Inc. (Council) filed suit against the USDOE requesting that the Delay Regulations be enjoined, arguing that the Delay Regulations would reduce the number of LEAs identified as significantly disproportionate and that the 2016 Amendments would provide a more accurate calculation. Council of Parent Attys. & Advocates, Inc. v. Devos, 365 F. Supp. 3d 28, 37 (D.D.C. 2019). The court found in favor of the Council, stating that the argument that the 2016 Amendments could not be implemented because it would incentivize LEAs to use racial quotas did not have adequate support in the record. See page 48. As such, the court held that the Delay Regulations should be vacated and that the 2016 Amendments would take effect immediately, on the date of its March 7, 2019, decision. See pages 55–56.

30. Pursuant to the Regulations, the states were directed to calculate whether disproportionality existed in numerous different areas, including, based on seven different racial categories, as applied to seven different special education categories, and seven different special education settings. 34 C.F.R. § 300.647(b)(2)–(4).

31. The Regulations permit a state to use different ratios, data or formulas for the various calculations. See 34 C.F.R. § 300.647.

32. The Regulations required states to schedule, set up and conduct stakeholder meetings with school districts in their states to provide input and recommendations to assist the states in determining these various flexibilities. 34 C.F.R. § 300.647(b)(1).

33. In preparation for the implementation of the 2016 Regulations, NJDOE held meetings with stakeholders on May 18, 2017, and October 19, 2017, to discuss the appropriate number at which to set the risk ratio threshold, as required by 34 C.F.R. § 300.647(b)(1)(i)(a). Rb7; Certification of Kathleen Ehling (Ehling Cert.), dated February 17, 2021, at ¶ 7.

34. At both meetings, NJDOE conducted discussions on appropriate risk ratio thresholds.[1] Ehling Cert., ¶7.

35. NJDOE also consulted with federal technical assistance centers such as the IDEA Data Center, the National Center for Systemic Improvement, and the Center for IDEA Fiscal Reporting. Ehling Cert. at ¶7; Rb8.

36. The stakeholder committee was directed to focus on making recommendations about: thresholds for each of three components (identification; placement; and discipline), minimum cell size and n-size.[2]

37. The stakeholders were also asked to make recommendations for the "threshold for each category." DOE408.

38. At the stakeholder meetings, NJDOE provided examples of ratio calculations. DOE413–419.

39. The October 19, 2017, Stakeholder Meeting Presentation included slides asking the stakeholder group to provide feedback regarding their experience in using comprehensive coordinated early intervention services (CCEIS) funding, including their "successes and challenges in utilizing CCEIS funds to address significant disproportionality." Certification of Aimee Rousseau (Rousseau Cert.), dated February 17, 2021, at Ex. G.

1

2 Minimum cell size is "the minimum number of children experiencing a particular outcome, to be used as the numerator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups." 34 C.F.R. § 300.647(a).

Minimum n-size is "the minimum number of children enrolled in an LEA with respect to identification, and the minimum number of children with disabilities enrolled in an LEA with respect to placement and discipline, to be used as the denominator when calculating either the risk for a particular racial or ethnic group or the risk for children in all other racial or ethnic groups." Ibid.

40. Respondents invited Collingswood, Elizabeth, Jersey City, Manasquan, Montgomery, Moorestown, Ocean City, Princeton, Swedesboro, West Windsor Plainsboro, Riverbank Charter School of Excellence, and Brookfield to participate in the stakeholder meetings. Ex. C, Stakeholder List; Ex. D, Stakeholder Sign-in Sheet.

41. The attendees of the May 18, 2017, and October 19, 2017, stakeholder meetings discussed New Jersey's implementation of the 2016 Amendments and the decisions to be made to implement those revisions, including the numerous ratio thresholds and minimum data sizes. Ehling Cert. at ¶ 7; Rousseau Cert. at Ex. F (May 18, 2017, Stakeholder Meeting Presentation); Ex. G (October 19, 2017, Stakeholder Meeting Presentation); DOE350, 5/18/17 Meeting Agenda.

42. At both meetings, meeting participants discussed the updates to the calculation of significant disproportionality and were afforded the opportunity to ask questions about its application and to give recommendations for New Jersey's risk ratio thresholds. Ehling Cert. at ¶ 7.

43. Stakeholders provided feedback regarding the topics discussed, which was compiled and analyzed by respondents. 5/18/17 Feedback.

44. At the May 18, 2017, meeting, the State acknowledged that it had numerous flexibilities in applying the disproportionality regulations, including to "select a reasonable threshold," "select reasonable minimum cell size," and "select a reasonable minimum n-size." The State further acknowledged that it was to make these determinations for "each of the 14 measures" of disproportionality that it was required to measure under the Regulations. Rousseau Cert. at Exhibit F (May 18, 2017, Stakeholder Meeting Presentation) at DOE381.

45. Following the stakeholder meetings, NJDOE decided that the risk ratio threshold for every category would be 3.0. Similarly, the State also decided that the minimum cell size (numerator) would be 10 and the minimum n-size (denominator) would be 30. Ehling Cert. at ¶ 8; Rousseau Cert. at Ex. H (State Application for IDEA Funding) at DOE612–625; R-1 at 8.

46. States were required to set a "reasonable" risk ratio, pursuant to 34 C.F.R. § 300.647(b)(1)(i)(A). The USDOE explained that: Reasonable means a sound judgment in light of all of the facts and circumstances that bear upon the choice. When choosing a risk ratio threshold, a state may consider its unique characteristics, such as the racial and ethnic composition of the state and LEAs, enrollment demographics, and factors correlated with various disabilities or disability categories. See Freeman Cert. at Ex. T (Significant Disproportionality Questions and Answers) at DOE88.

47. On March 9, 2020, Lakewood received a notice from the NJDOE advising that new IDEA regulations had been implemented and that as "a result of the new calculation, districts will be identified for significant disproportionality that had not been identified in previous years." Freeman Cert. at Ex. H (3/9/20 Letter).

48. On April 6, 2020, Lakewood received notification from the NJDOE ("April 6 Notice") that "[b]ased upon a data analysis, your district has been identified for Significant Disproportionality for the 2020–21 school year." Pursuant to the breakdown attached to the notification, respondents advised that, for the past three years, Lakewood's risk ratios exceeded the State threshold of 3.0 in five categories:

> Category NJDOE Risk Ratio (2019–2020)
> White—Autism 6.85
> White—Intellectual Disability 13.87
> White—All Eligibilities 3.35
> White—Separate Settings 14.38
> Black—Total Disciplinary Removals 8.42
>
> [Freeman Cert. at Ex. A (Petition) at ¶ 28, Exhibit A (April 6 Notice).]

49. On April 6, 2020, Lakewood was advised that it would be "required to set aside 15% of [its] IDEA Basic and Preschool Grant" for CCEIS. Freeman Cert. at Exhibit A (Petition) at ¶ 30.

50. After issuing the April 6 Notice, Lakewood was invited to attend training sessions: A session called "Significant Disproportionality" which would provide technical assistance and was scheduled for April 28, 2020; a session called "Cultural Responsiveness" which would help districts create better policies and practices to address cultural responsiveness on April 30, 2020; and a session called "Learning Strategies to Support the Needs of Diverse Learners" which would help districts improve classroom engagement skills for all learners on May 6, 2020. DOE111–162, 4/27/20 Training PowerPoint; DOE468–498, 4/30/20 Training PowerPoint; P-3 at ¶ 4; P-4; P-5.

51. At the April 28, 2020, session, an employee for Lakewood submitted a question about whether the 15% CCEIS deduction should be for both public and nonpublic allocations. Weisz Cert. at ¶ 5. Respondents' response was that "CCEIS is included within the public budgeted amount and is intended to be used to address the needs of the public students . . . ." Weisz Cert. at ¶ 6; Freeman Cert. at Ex. R (Q&A from April 28 Training).

52. On May 13, 2020, Lakewood employee and supervisor Devorie Stareshefsky sent an e-mail to Director Ehling, with questions regarding how the State calculated Lakewood's disproportionality ratios, including which data was used. On May 20, 2020, Director Ehling responded to the e-mail. Lakewood 92–97, 5/20/20 Email.

53. The first four categories for which Lakewood was identified as significantly disproportionate involve identification of students with special needs (autism, intellectual disability, and all eligibilities) and placement in special settings. Freeman Cert. at Ex. A (Petition).

54. The fifth category for which Lakewood was identified as significantly disproportionate relates to discipline and removals of black students with disabilities. See generally Freeman Cert. at Ex. A (Petition).

55. Following respondents' April 6 Notice, Lakewood retained Sue Gamm, Esq., to analyze Lakewood's student population as well as respondents' findings of disproportionality. Freeman Cert. at Ex. A (Petition) at ¶ 38.

56. After analyzing relevant facts and data provided by Lakewood, Ms. Gamm issued a report on June 1, 2020, in which she calculated Lakewood's ratios, using data from public and nonpublic schools. Freeman Cert. at Ex. A (Petition) at ¶ 41, Exhibit C (Sue Gamm Report).

57. Ms. Gamm also calculated the disciplinary removal ratios based on data provided by Lakewood. Since Lakewood nonpublic schools do not maintain data related to disciplinary removals, Mr. Gamm was unable to recalculate the ratios utilizing data from Lakewood's entire student population.

58. Shortly after receiving Ms. Gamm's report, Lakewood reached out to Director Ehling on June 4, 2020, to advise of Ms. Gamm's findings and calculations; to request that the NJDOE reevaluate its conclusions as to Lakewood; and to request that the NJDOE request IDEA Data Center's assistance to reevaluate its conclusion. Freeman Cert. at Ex. K (6/4/20 Email).

59. Having received no reply to the June 4 letter, Lakewood sent a follow-up letter to Director Ehling on June 12, 2020. Ex. A (Petition) at ¶ 70.

60. On June 17, 2020, Director Ehling responded and provided her explanation for the decision to use only public-school data for respondents' analysis. Freeman Cert. at Ex. M (6/17/20 Letter); Ex. A (Petition) at ¶ 71.

61. On June 24, 2020, respondents sent an e-mail to Lakewood providing the raw data used by respondents to calculate the disciplinary removal findings. Lakewood 000160–000161.

62. On June 28, 2020, petitioner sent another letter to Director Ehling, responding to her June 17, 2020, letter and requesting additional information from respondents regarding the disproportionality finding and its consequences. Lakewood 000162–165.

63. Lakewood submitted its IDEA funding application on June 12, 2020, prior to the June 28, 2020, deadline. Freeman Cert. at Ex. A (Petition) at ¶ 73; see also Lakewood 40–41, May 7 Notice re IDEA grants, Lakewood 42–70, Grant Awards by District, Lakewood 166, Lakewood Grant Allocation.

64. Based on the disproportionality finding, Lakewood was required to allocate 15% of its IDEA grant towards CCEIS. Freeman Cert. at Ex. A (Petition) at ¶ 74.

65. On June 22, 2020, NJDOE approved Lakewood's IDEA grant application for the 2020–2021 school year, as submitted and described above. Freeman Cert. at Ex. A (Petition) at ¶ 75; Lakewood 71–72, Substantially Approvable, Lakewood 73, Approved.

66. The purpose of CCEIS is to ensure that students receive appropriate services needed to reduce behavioral and academic challenges, ultimately obviating the need for their referral for special education services. Rb5.

LEGAL DISCUSSION

Summary decision, or as it is known in judicial matters, summary judgment, is a well-recognized procedure for resolving cases in which the facts that are crucial to the determination of the matters at issue are not actually in dispute and the application to that set of material facts of the applicable law and standard of proof lead to a determination of the case without the necessity of a hearing at which evidence and testimony need be taken. The procedure is equally applicable in judicial and executive-branch administrative cases. N.J.A.C. 1:1-12.5.

The standards for deciding motions for summary decision are contained in Judson v. People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74–75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). Under the Brill standard, as in Judson, a motion for summary decision may only be granted where there is no "genuine issue" of "material fact." The determination as to whether genuine issues of material fact exist is made after

a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits, and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" issues of material fact. The facts upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious.'" Judson, 17 N.J. at 75 (citations omitted). The Brill decision focuses on the analytical procedure for determining whether a purported issue of material fact is "genuine" or is of an "insubstantial nature." Brill, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary-decision motions. "[T]he essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986)).

In searching the proffered evidence to decide the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" that would apply at trial on the merits, whether that is the preponderance-of-the-evidence standard or the clear-and-convincing-evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held. Id. at 535.

As a condition of receiving federal funds through Part B of the IDEA, each state and the LEAs within the state must collect and examine data to determine if there is a significant disproportionality in the identification, placement, or discipline of students in the state based on their race and ethnicity and/or their category of disability. 34 C.F.R. §

300.646(a) (2020). Any LEA that is identified as significantly disproportionate according to the state's standards must reserve the maximum amount of funds required under 20 U.S.C. § 1413(f) in order to provide CCEISto address the factors contributing to the significant disproportionality. This requires the LEA to set aside 15 percent of the funds received under this Act toward providing CCEIS. 20 U.S.C. § 1413(f)(1). The purpose of the CCEIS fund allocation is for the LEA to identify and address any factors that are contributing to the significant disproportionality, including addressing any policies, practices, or procedures the LEA identifies as contributing to the issue. 34 C.F.R. § 300.646(d)(1) (2020).[3]

Whether there is significant disproportionality is determined by the risk ratio threshold, minimum cell size, and n-size established by each state, 34 C.F.R. § 300.647(b)(1)(i) (2020). The standards must be based on advice from stakeholders and are subject to monitoring and enforcement by the U.S. Department of Education's Secretary according to 20 U.S.C. § 1416. 34 C.F.R. § 300.647(b)(1)(iii) (2020). Each state must report all risk ratio thresholds, minimum cell and n-sizes, and the standards for measuring reasonable progress (if this flexibility option is chosen by the state), along with the rationales for each of these standards to the U.S. Department of Education. 34 C.F.R. § 300.647(b)(7) (2020). A risk ratio threshold is reasonable based on "sound judgment in light of all of the facts and circumstances that bear upon the choice." 34 C.F.R. § 300.647(b)(1)(i)(A) (2020).[4] A state may consider its unique characteristics (e.g., racial and ethnic composition of the state and its LEAs) and other facts that correlate with disabilities or disability categories.

Only when an LEA exceeds the established risk ratio threshold for a specific racial or ethnic group in disability category for three consecutive years will that LEA be identified as having a significant disproportionality, at which point the state must notify the LEA of

[3] See IDEA Data Center, A Comparison of Mandatory Comprehensive Coordinated Early Intervening Services (CCEIS) and Voluntary Coordinated Early Intervening Services (CEIS) (Mar. 2017), https://ideadata.org/sites/default/files/media/documents/2017-09/idc_ceis_chart.pdf.

[4] U.S. Dep't of Educ., Office of Special Educ. Programs, IDEA Part B Regulations, Significant Disproportionality: Essential Questions and Answers (Mar. 2017), at 5, https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/significant-disproportionality-qa-03-08-17.pdf; see also id. at 9–10 for a description and rationale of establishing a minimum n-size and cell-size.

the disproportionality. If a state has chosen to implement the flexibility option of reasonable progress, then an LEA will not be identified as having a significant disproportionality even if it has exceeded the risk ratio threshold for three consecutive years, as long as the LEA demonstrated reasonable progress in decreasing the risk ratio (or alternate risk ratio) for that group and category in the two prior consecutive years.

Here, there is not a factual dispute about the mathematical calculations, rather the dispute is over whether students placed in private schools should be considered in computing the ratio to determine disproportionality. Petitioner also questions the reasonableness of including the total amount of grants going to private schools when determining the percentage of the grant funding to be designated for CCEIS. Petitioner argues a lack of procedural due process, a lack of substantive due process, and that the Department's actions are arbitrary, capricious, and unreasonable.

Fifteen percent of the total $9,619,588 grant funding equals $1,442,938. It is this latter amount that the regulations require be allocated to CCEIS programs, as a result of the finding of disproportionality. Application of the regulation to Lakewood is disproportionate to the grant sums allocated to the public schools in Lakewood. The regulations provide the states discretion in the application of the provisions of the regulation. The regulations do not consider the negative implications to Lakewood as a result of the extensive allocation of the grant funds to private schools. The regulations do not provide for the separate calculation of grant funds only designated to public-school application, nor the negative impact on Lakewood, as a result of the entire inclusion of grant funds in the application of the disproportionality designation of the amounts to be used for CCEIS.

A. Procedural Due Process

The U.S. Supreme Court has held that the essential requirements of due process are notice and an opportunity to be heard. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545–46 (1985). A hearing satisfies the latter requirement by providing "[t]he opportunity to present reasons, either in person or in writing, why [the] proposed action should not be taken." Id. at 546. Due-process standards require the right to "timely and

adequate notice detailing the reasons" for the agency action, and "an effective opportunity to defend by confronting any adverse witnesses" and to present the appellant's own arguments and evidence. Goldberg v. Kelly, 397 U.S. 254, 267–68 (1970). This requires a right to notice, reasonably calculated under all the circumstances, to inform the parties of all issues against them. Alfonso v. Bd. of Review, 89 N.J. 41, 43 (1982).

However, if after considering the "practicalities and peculiarities of the case," the requirements of notice and an opportunity to be heard are reasonably met, then the requirement of procedural due process is satisfied. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950). "The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals." Id. at 315. Because due process is flexible, what protections are required depends on the situation; due process does not require that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error." N.S. v. AmeriChoice of New Jersey, Inc., 2005 N.J. AGEN LEXIS 496 at *8 (September 12, 2005).

Lakewood alleges they were not given early notice that they had exceeded the risk ratio thresholds prior to being identified as significantly disproportionate. There is no requirement for early notification since an LEA is only significantly disproportionate after three consecutive years of exceeding the state's established risk ratio threshold. The State did provide Lakewood with notice of the change in risk ratio thresholds and that it had a risk ratio over 1.5 for both identification/placement and discipline in October 2018. See Petitioner's Ex. I. That Lakewood chose not to follow up with the State or to look at the data it was submitting annually to the State and perform its own calculations does not mean that the State failed to provide adequate notice to the LEA.[5]

Lakewood was not entitled to attend the stakeholder meetings the State held to determine the risk ratio thresholds and minimum n-size or cell-size. The due-process requirement of notice and opportunity to be heard applies when a fundamental right or

[5] Since the method for calculating risk ratios is widely available online, and the data used to calculate the risk ratios is publicly available on the State's Department of Education website, Lakewood could have proactively discovered that it would be identified as significantly disproportionate based on its data trends.

property right may be lost. While Lakewood may have unique socio-demographic circumstances compared to other New Jersey school districts, that does not entitle them to attend a stakeholder meeting. There are requirements for who must be included in the stakeholder meetings, including state and local education officials, but there are no other specific requirements regarding how many or which kinds of LEAs must be included in the State Advisory Panel. 20 U.S.C. § 1412(a)(21)(B); 34 C.F.R. § 300.647(b)(1)(iii) (2020). Lakewood has provided no indication of evidence that the State acted unreasonably when it determined which LEAs to invite to the stakeholder meeting. The Department did not include Lakewood (even with its unique characteristics) as one of the 574 school districts that was invited.[6]

B. Substantive Due Process

Generally, unless fundamental rights are involved, "a state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory." United Prop. Owners Ass'n of Belmar v. Bor. of Belmar, 343 N.J. Super. 1, 27 (App. Div. 2001). Substantive due process requires "only that a law shall not be unreasonable, arbitrary or capricious, and that the means selected shall bear a rational relation to the legislative object sought to be obtained." Joseph H. Reinfeld, Inc. v. Schieffelin & Co., 94 N.J 400, 413 (1983).

Lakewood has argued that the State's interpretation and application of the IDEA requirements, as they pertain to Lakewood, are arbitrary, capricious, and unreasonable, and therefore violate Lakewood's substantive due-process rights. The "thorough and efficient" education clause in New Jersey's constitution does provide for publicly-funded education for all students. See Robinson v. Cahill, 62 N.J. 473, 513 (1973); Abbott v. Burke, 119 N.J. 287 (1990). However, this claim is brought primarily under the federal law, where there is no applicable fundamental right. The IDEA provides for certain protections for children, and the parents of children, with disabilities, but these protections likewise do not invoke a fundamental right of due-process analysis for the facts of this matter. See 34 C.F.R. §§ 300.500 to -300.520 (2020). Since there is no fundamental

[6] There are currently 584 operating school districts in the state. N.J. Dep't of Educ., New Jersey Public Schools Fact Sheet, https://www.state.nj.us/education/data/fact.htm.

right for the Lakewood School District at issue, the determination must look at whether the IDEA regulations, as interpreted and applied by the State, are arbitrary, capricious, or unreasonable.

C. Arbitrary, Capricious, and Unreasonable

In general, the standard of review of an agency decision is substantial credible evidence. Similarly, the interpretation of a statute by the agency charged with its enforcement is also entitled to substantial weight. Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg. High Schl. Dist., 199 N.J. 14, 28–29 (2009); State v. Council of N.J. State College Locals, 153 N.J. Super. 91 (App. Div. 1977); In re Hackensack Board of Educ., 184 N.J. Super. 311, 319 (App. Div.). The agency's determination must be given substantial deference and should only be reversed if it is plainly unreasonable. Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009); Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 568 (2008); see also In re Hackensack Bd. of Educ., 184 N.J. Super. at 319 (court not bound by interpretations that are clearly wrong).

An action is determined to be arbitrary and capricious based on four inquiries: 1) was the action in violation of the State or Federal Constitution; 2) did it violate any express or implied legislative policies; 3) does the record contain substantial evidence to support the findings on which the agency based its action; and, 4) when applying the legislative policies to the facts, did the agency clearly err in reaching a conclusion which couldn't have been made on a showing of the relevant factors. Brady v. Bd. of Review, 152 N.J. 197, 210–11 (1997): see also In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 385–86 (2013). Consequently, the challenging party bears the burden of proving that the agency action was arbitrary, capricious, and unreasonable by the preponderance of the credible evidence. J.P. & M.P. v. Bd. of Educ. of South Brunswick, Middlesex Cty., 2002 N.J. AGEN LEXIS 952 at *10–12 (December 17, 2002). N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agriculture, 196 N.J. 366, 385 (2008); In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 415, 432 (2004); N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 158 N.J. 211, 222 (1999); In re the 1999–2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 395 (App. Div. 2002).

According to the record and the undisputed facts by the parties, the State has complied with the regulations and requirements of the IDEA as they are written. While Lakewood takes issue with the outcome as it applies to their school district, this does not make the interpretation or application of the IDEA arbitrary, capricious, or unreasonable. While the IDEA accounts for providing services and funding to students with disabilities attending nonpublic schools, the primary focus of the IDEA is toward public-school students, since the government has limited control over the management, policies, procedures, and practices of nonpublic schools.

The Department's decision in excluding nonpublic students in the computation of the risk ratio threshold is not arbitrary and capricious. The legislation did not contemplate **that a significant majority of an LEA's student population would attend** private schools. It did not require the states to consider that population, as the legislation focused on **the location where most recipients of IDEA services would be located, i.e.,** public schools. As there is no requirement that the State consider private-school students, to do so would make an exception for only Lakewood. That would be arbitrary and capricious, with no statutory or administrative support for such a decision.

It would be unreasonable to require the State to decide whether Lakewood is complying with the risk ratio thresholds. Lakewood acknowledged in their briefs and exhibits that it does not have data necessary to calculate the risk ratio or alternate risk ratios for all the necessary groups and categories. See Petitioner's Brief in Support of Petition at 12 (cannot calculate discipline rates for all schools in the LEA as this data is neither collected nor reported by the nonpublic schools).

Lakewood is correct in claiming that its risk ratios in the identified categories would drastically decrease if it could count data from the nonpublic students. This is because the comparison group (i.e., the denominator) would in effect remain the same while the target group (i.e., the numerator) would increase exponentially. But Lakewood does not have authority or control over the nonpublic schools or their students to the extent necessary to address disproportionate identification, placement, or discipline of disabled students. By including the large number of white nonpublic students who in comparison

have significantly less disabled students than the public-school students, Lakewood may prevent itself or the parents in the LEA from uncovering over- or under-identification of special-education students.

Lakewood implies that by the State requiring that the mandatory 15 percent of the IDEA funds be allocated toward CCEIS, Lakewood will be unable to provide FAPE to the rest of the students in its public schools. As an initial matter, the funds allocated toward CCEIS may be used to serve students who are not currently identified as needing special-education services, but need additional support to succeed in a general-education environment, as well as students who are currently identified as needing special-education services.[7] 20 U.S.C. § 1413(f)(1); 34 C.F.R. § 300.646(d)(2) (2020). Lakewood may spend these funds to serve the groups that were particularly significantly overidentified through the risk ratio calculations, but the IDEA states that it may not exclusively use the CCEIS funds for these groups. Therefore, Lakewood is not prohibited from allocating some of the CCEIS funds toward other students and groups, if it is necessary to ensure that all public students are receiving FAPE. See 20 U.S.C. § 1413(f)(2). Lakewood is only required to reserve the CCEIS funds until it can decrease the risk ratio threshold for the identified categories. Lakewood contends that this can never be achieved because of its racial and ethnic demographics and the choices of the parents.

Lakewood claims that the reason for the disproportionality is that a substantial portion of students residing in Lakewood attend nonpublic schools, thus affecting the public-school ratios. The data shows that the schools Lakewood has control over are disproportionality identifying white students over non-white students. Uncovering the factor(s) causing the discrepancy is the purpose of the CCEIS fund allocation. Lakewood cannot know without an actual investigation into the underlying facts whether the over-identification is due only to the number of parents who choose to send their children to nonpublic schools.

[7] IDEA Data Center, A Comparison of CCEIS and CEIS.

The IDEA requires that the funds reserved for CCEIS must come from the total amount of the subgrants the LEA receives, there is nothing providing for the subdivision of these funds into the public/nonpublic sections before calculating the 15 percent. See U.S. Dep't of Educ., Office of Special Educ. Programs, OSEP QA 21-03, Questions & Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools, at 42–43 (Dec. 2020), https://sites.ed.gov/idea/files/qa-parentally-placed-private-schools-12-2020.pdf (providing that an LEA must calculate the proportional share for nonpublic students and the CCEIS from the total grant amount received).

Finally, Lakewood posits that the determination of a 3 percent risk ratio is arbitrary. An analysis of thirty-three states provides the following risk ratio thresholds: 3.0 (twenty-one states), 2.0 (six states), and 2.5 (six states). U.S. Dep't of Educ., 2020 Part B FFY 2018 SPP/APR Indicator Analysis Booklet, at 89–90, https://sites.ed.gov/idea/files/PartB-IndicatorAnalysis-FFY2018.pdf. It cannot be said that the 3 percent risk ratio is arbitrary. See also Rationale from New Jersey's stakeholder meeting on choosing the risk ratio threshold and general explanation of significant disproportionality. N.J. Dep't of Educ., Office of Fiscal & Data Services, Significant Disproportionality (2019), at 13–16, https://www.nj.gov/education/specialed/CEISTraining1.pdf.

CONCLUSION

After reviewing the papers and arguments of petitioner and respondents and considering the documents and certifications submitted:

I **CONCLUDE** that petitioner has not shown by a preponderance of the evidence that the Department has acted unreasonably, arbitrarily, or capriciously in setting the risk ratio of disportionality at 3 percent, nor unreasonably in determining not to make an exception for the specific circumstances of the District's private-school population.

I **CONCLUDE** that the proper implementation of the finding of significant disproportionality results in the requirement that Lakewood allocate $1,442,938 of the IDEA grant funds to CCEIS programs at the public schools of Lakewood.

I **CONCLUDE** that the facts do support petitioner's claim of the potentially unintended application of the regulations to the allocation of the IDEA grant funding for Lakewood.

I **CONCLUDE** that the previous conclusion is insufficient to support judicial intervention in the allocation; that relief falls entirely in the discretion of the Commissioner of Education.

I **CONCLUDE** that the Department of Education has shown by a preponderance of the evidence that the Department is entitled to prevail in its application for summary disposition in this matter.

ORDER

It is hereby **ORDERED** that petitioner's request for summary disposition is **DENIED**.

It is further hereby **ORDERED** that respondent's motion for summary disposition is **GRANTED**.

It is further hereby **ORDERED** that the allocation of the IDEA grant funding to CCEIS programs be in an amount as directed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 20, 2021
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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APPENDIX

LIST OF EXHIBITS

For Petitioner:

P-1 March 2021, Ex. A, Petitioner's Petition

P-2 Notice of Identification for Significant Disproportionality, dated April 6, 2020

P-3 Certification of Adina Weisz, dated March 18, 2021

P-4 E-mail from Damian Petino regarding training sessions for Significant Disproportionality and Cultural Responsiveness, dated April 27, 2020

P-5 E-mail from Damian Petino regarding training sessions for Support for Diverse Learners, dated April 27, 2020

P-6 Question and Answer document from training on significant disproportionality, dated April 28, 2020

P-7 Report by Sue Gamm, Esq., dated June 1, 2020

P-8 Letter from Michael Inzelbuch, Esq., to Kathleen Ehling, dated June 4, 2020

P-9 Letter from Kathleen Ehling to Michael Inzelbuch, dated June 17, 2020

For Respondents:

R-1 Respondents' April 1, 2021, Brief

R-2 U.S. Department of Education, Significant Disproportionality: Essential Questions and Answers, dated March 2017

R-3 Letter from Peggy McDonald to Laura Winters, dated March 9, 2020