

IN THE MATTER OF
SPECIALIZED EDUCATION
SERVICES, INC. AND SPECIALIZED
EDUCATION OF MARYLAND

BEFORE THE
MARYLAND
STATE BOARD
OF EDUCATION

Opinion No. 16-22

OPINION

INTRODUCTION

Specialized Education Services, Inc. and Specialized Education of Maryland, Inc. (collectively, “SESI”), have requested a Declaratory Ruling on the true intent and meaning of the laws, regulations, and policies governing the placement of children with disabilities in nonpublic schools.

FACTUAL BACKGROUND

SESI is a for-profit corporation headquartered in Yardley, Pennsylvania, that operates nonpublic special education schools at numerous locations in Maryland and throughout the country. Specialized Education of Maryland, Inc., is a subsidiary of SESI that serves approximately 800 students and employs approximately 337 people in schools at 17 locations throughout the state. (Petition, Ex. 5).¹

In Maryland, children with disabilities who require special education and related services that cannot be provided in a public county, regional, or State program are placed in an appropriate nonpublic educational program that offers these needed services. Md. Code, Educ. §8-406(b)(1). The cost of the nonpublic educational program is paid jointly by the State and county in which the child is domiciled. Md. Code, Educ. §§8-406(c)(1); 8-415. The cost of the nonpublic program and the amount of payment or reimbursement must be approved by the Maryland State Department of Education (MSDE). Md. Code, Educ. §§8-406(d)(1); 8-415(d)(2).

To comply with this statute, MSDE’s Nonpublic Cost Group (“Cost Group”) requests that each nonpublic program submit its budget for approval on a yearly basis. To guide nonpublic schools through this process, the Cost Group issues a “Budget Packet” each fiscal year that contains guidelines and instructions. (Petition, Ex. 1).

The purpose of the budget is to fund the expenses necessary to ensure a Free Appropriate Public Education (FAPE) for students who are placed in nonpublic schools at public expense.

¹ This factual background is drawn from the April 18, 2016 decision of the Interim State Superintendent regarding SESI’s appeal of the decision of MSDE’s Nonpublic Cost Group.

To that end, the Budget Packet outlines allowable operating expenses and parameters for included costs. A nonpublic school's budget must include adequate supports for the school to comply with regulatory requirements for nonpublic special education schools and to provide adequate resources for the operation of the facility and administration necessary for the program. Once it reviews and approves a budget, the Cost Group sets a per diem rate for the nonpublic program. (Petition, Ex. 1).

Prior to 2014, SESI operated with the understanding that it was able to claim income taxes as an "allowable cost" as part of its budget. In 2014, the Cost Group informed SESI that it would not permit income taxes to be treated as an allowable cost or as an approved use of revenues in excess of expenditures. In the Fiscal Year 2016 Budget Packet, the Cost Group clarified that any previous exceptions to the Budget Packet's guidelines and instructions were for the specific year only and had to be renewed annually. (Petition, Ex. 1; Ex. 5).

On March 13, 2015, SESI submitted its Fiscal Year 2016 budgets for its nonpublic schools. Three of the schools had income tax liabilities dating to the 2013-14 school year in the amount of \$226,597. As part of its budgets, SESI proposed using excess revenues from the 2015-16 school year to defray its income tax liabilities. (Petition, Ex. 5).

The Cost Group met with SESI in September 2015 and issued a decision on October 2, 2015 denying SESI's request that the payment of income taxes be considered an allowable cost or an appropriate expenditure of excess revenue. (Petition, Ex. 5).

On December 3, 2015, SESI appealed the decision to the Interim State Superintendent of Schools. On April 18, 2016, the Interim State Superintendent issued a final agency opinion upholding the decision of the Cost Group. He concluded that the payment of income taxes is not an "allowable operating cost"; that SESI may use excess revenues up to 10 percent in any way it sees fit, including paying income tax; that revenues in excess of 10 percent may only be used to fund the next fiscal year's budget or to improve or expand educational services; and MSDE was not required to promulgate a regulation implementing the guidelines set forth in the annual Budget Packet. (Petition, Ex. 5).

On May 18, 2016, SESI filed a petition for declaratory ruling, raising the following issues:

- (1) the Budget Packet developed by the Cost Group is a regulation for purposes of the Maryland Administrative Procedures Act;
- (2) MSDE failed to follow the Maryland Administrative Procedures Act by not promulgating the guidelines in the Budget Packet as regulations;
- (3) the Revenues in Excess of Expenditures Policy contained in the Budget Packet is arbitrary, capricious, and illegal, as well as contrary to sound educational policy;
- (4) the Cost Group's policy of not allowing income tax as an allowable cost is "contrary to settled rate-making principles"; and

(5) the Cost Group's rate-setting methodology is contrary to sound educational policy.

Additionally, SESI requests that the State Board initiate a formal rulemaking process and adopt regulations governing rate-setting for nonpublic educational programs.²

STANDARD OF REVIEW

The State Board may dismiss an appeal if the State Board has no jurisdiction over the appeal. COMAR 13A.01.05.03C. The Board exercises its independent judgment on the record before it in the explanation and interpretation of its own regulations. *See* COMAR 13A.02.05.05E; *In the Matter of Allegany County Teachers' Association*, MSBE Op. No. 15-24 (2015).

LEGAL ANALYSIS

We first address the issue of the jurisdiction of the State Board. The State Board is authorized to hear appeals pursuant to either §4-205(c) or §2-205(e) of the Education Article. The jurisdiction of the State Board under §4-205(c) is limited to matters arising within the authority of and initially decided by a local superintendent. *See Board of Educ. of Garrett County v. Lendo*, 295 Md. 55, 66 (1982). Given that there is no decision of a local superintendent to review here, we do not have jurisdiction under §4-205(c).

In contrast to the more narrow jurisdiction afforded under §4-205(c), the State Board has broad jurisdiction and authority under §2-205 of the Education Article. Section 2-205(e) establishes the authority of the State Board to explain the true intent and meaning of the provisions of the Education Article that are under its jurisdiction and the bylaws, rules and regulations adopted by the Board. It states that the Board shall decide all controversies and disputes under these provisions. The State Board's authority under §2-205 has been described as "a visitatorial power of such comprehensive character as to invest the State Board 'with the last word on any matter concerning educational policy or the administration of the system of public education.'" *See Board of Educ. of Prince George's County v. Waeldner*, 298 Md. 354, 360 (1984) (citations omitted).

SESI argues that the rate-setting policies adopted by MSDE should have been promulgated as regulations and it disagrees with MSDE's policies regarding excess revenues and allowable costs for nonpublic schools. Although these questions relate to §8-406 and §8-415 of the Education Article, SESI is not seeking an interpretation of these laws. Instead, SESI challenges whether the policies created by MSDE to enforce these laws should be promulgated as regulations and questions the wisdom of MSDE's policies.

Despite being framed as a Petition for Declaratory Ruling, SESI's request is in actuality an appeal of the decision of the Interim State Superintendent affirming the decision of the Cost Group. The Interim State Superintendent's decision was a final agency decision that can be

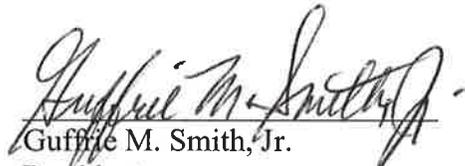
² SESI separately filed a protective petition for judicial review of the Interim State Superintendent's decision in the Circuit Court for Howard County.

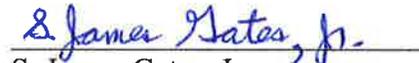
appealed to the circuit court, and SESI has done so. Section 2-205 of the Education Article is not meant as a second bite of the apple to appeal final agency decisions made by the State Superintendent.

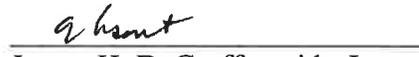
The Petition also includes a request that the State Board promulgate regulations regarding rate-setting for nonpublic educational institutions that serve public school students. Any interested person may petition a government entity to adopt regulations through §10-123 of the State Government Article. It is our understanding that the Department will be working with stakeholders to develop regulations in this area.

CONCLUSION

We dismiss the Petition for Declaratory Ruling based on a lack of jurisdiction under §2-205 of the Education Article.


Guffie M. Smith, Jr.
President

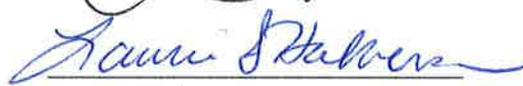

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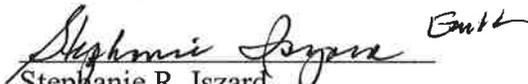

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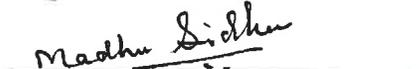

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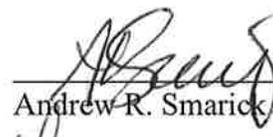

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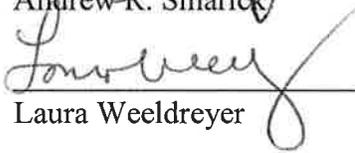

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June 28, 2016