

## New Jersey Commissioner of Education

### Final Decision

Bergen Center for Child Development,

Petitioner,

v.

New Jersey Department of Education,  
Office of Fiscal Accountability and Compliance,

Respondent.

### Synopsis

Petitioner Bergen Center for Child Development (Bergen Center) – an approved private school for students with disabilities (APSSD) – challenged the action of respondent, New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC), disallowing a portion of the compensation paid to School Accounting Professionals (SAP) during the 2015-2016 school year. OFAC determined that Bergen Center had retained the services of Mary Bawarski (Bawarski), a certified public accountant affiliated with SAP, under the unrecognized administrative position of “School Accountant,” and therefore the maximum salary for the title is restricted in accordance with *N.J.A.C. 6A:23A-18.6(a)(19)*. OFAC found that the maximum allowable salary paid to SAP was exceeded by \$37,594.43; therefore, the allowable amount was \$21,875.57. The matter was heard at the Office of Administrative Law on May 15, 2019 and June 4, 2019.

The ALJ found, *inter alia*, that: *N.J.A.C. 6A:23-18.3(q)* is inapplicable to the business relationship between SAP and Bergen Center; Bawarski is not an employee of Bergen Center, nor did she receive a “salary” from Bergen Center; as such, the “maximum salary” limitation of the regulation is not applicable; there is no other basis contained in *N.J.A.C. 6A:23-18.6* upon which to disallow the costs; accordingly, OFAC improperly applied the regulation to disallow a portion of the funds paid to SAP. The ALJ concluded that the compensation paid to SAP by Bergen Center is an allowable cost and should be included in the tuition calculation for the 2015-2016 school year. The ALJ ordered the Department to restore the disallowed funds that are the subject of the within appeal.

Upon a comprehensive review of the record, the Commissioner, *inter alia*, concurred with the ALJ’s comprehensive analysis of why *N.J.A.C. 6A:23-18.3(q)* is inapplicable to the relationship between SAP and Bergen Center, and with the ALJ’s conclusion that OFAC improperly applied *N.J.A.C. 6A:23-18.3(q)* to disallow certain costs that Bergen Center paid to SAP. Accordingly, the Commissioner concluded that the expenses associated with the services provided to Bergen Center by SAP are allowable costs, and the costs shall be included in the tuition rate for the 2015-2016 school year.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

March 2, 2020

**New Jersey Commissioner of Education**

**Final Decision**

Bergen Center for Child Development,

Petitioner,

v.

New Jersey State Department of Education,  
Office of Fiscal Accountability and Compliance,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Department of Education, Office of Fiscal Accountability and Compliance (OFAC), and the Bergen Center for Child Development (Bergen Center), as well as Bergen Center’s reply to OFAC’s exceptions.

In this matter, petitioner Bergen Center – an approved private school for students with disabilities (APSSDs) – challenges OFAC’s determination disallowing a portion of the compensation paid to School Accounting Professionals (SAP) during the 2015-2016 school year. As part of the routine oversight of APSSDs, OFAC reviewed Bergen Center’s business services and tuition charges for the period from July 1, 2015 through June 30, 2016. OFAC found that Bergen Center paid fees to SAP for the services of Mary Bawarski – a certified public accountant – in the amount of \$59,470.00, billed at an hourly rate of \$190.00 per hour. OFAC further determined that “School Accountant” was an unrecognized administrative position and as such the maximum salary for the title is restricted in accordance with *N.J.A.C.* 6A:23A-18.6(a)(9).<sup>1</sup> Ultimately, OFAC found that the

---

<sup>1</sup> OFAC relied on various regulations which were re-codified, but not in any way material to this controversy. The Commissioner cites to the current regulations in this decision.

maximum allowable salary paid to SAP was exceeded by \$37,594.43; therefore, the allowable amount was \$21,875.57.<sup>2</sup>

Following a hearing at the OAL, the Administrative Law Judge (ALJ) found that the compensation Bergen Center paid to SAP is an allowable cost and should be included in the tuition calculation for the 2015-2016 school year. In so doing, the ALJ determined that *N.J.A.C. 6A:23-18.3(q)* is inapplicable to the business relationship between SAP and Bergen Center. The ALJ stressed that Bawarski is not an employee of Bergen Center nor did she receive a “salary” from Bergen Center; as such, the “maximum salary” limitation of the regulation is inapplicable. The ALJ also concluded that there is no other basis contained in *N.J.A.C. 6A:23A-18.6* upon which to disallow the costs. Therefore, the ALJ found that OFAC improperly applied the regulation to disallow a portion of the money paid to SAP.

In its exceptions, OFAC reiterated the substance of its post-hearing submission at the OAL, recasting the arguments therein to support its contention that the Initial Decision should be rejected. Although the ALJ considered all of the relevant facts, she erroneously found that OFAC’s decision to disallow certain costs paid to SAP was arbitrary, capricious and unreasonable. OFAC emphasizes that its decision to disallow certain costs was based strictly on the plain meaning of the mandating statutes and regulations. In fact, rather than completely disallowing all fees associated with Bawarski’s unrecognized position, OFAC took further steps to determine if the unrecognized position could fall under an exception to the mandating regulation. Despite any opinion that OFAC may hold with respect to Bergen Center’s business decisions, the record is clear that its findings were in full accord with the statutory mandates and regulatory scheme.

Moreover, the ALJ erred in applying the regulations to the fees associated with Bawarski because she “was not an employee at Bergen Center.” Initial Decision at 6. Essentially, the ALJ concluded that because Bawarski was a consultant rather than an employee with a fixed salary, the fees

---

<sup>2</sup> The specific details regarding OFAC’s decision and the calculations are outlined in the Initial Decision.

associated with her services were not subject to the regulations. In reaching that conclusion, the ALJ erred in her analysis of the plain reading of the regulations and failed to look at the overall intent of the regulations. The regulations cover all costs that are included in the tuition rates that APSSDs may charge sending districts. *N.J.A.C. 6A:23A-18.6* Nowhere in the regulations is it stated that they are inapplicable to fees associated with consultants and a conclusion to the contrary would allow APSSDs to skirt the regulations by hiring consultants rather than employees. OFAC reasonably determined that Bawarski's position was an unrecognized administrative position and that the portion of her fees that exceeded the lowest maximum allowable amount permissible for unrecognized administrative position titles were non-allowable costs. The ALJ's narrow interpretation of the applicable regulations was erroneous and therefore the Initial Decision should be rejected.

In its exceptions, Bergen Center contends that the ALJ appropriately found that the fees paid to SAP were allowable costs; however, the ALJ failed to address all of the issues presented by the petitioner. Bergen Center takes exception to the following legal and factual questions within the Initial Decision: (1) whether OFAC intentionally withheld damning evidence, including evidence supporting the existence of a personal vendetta against Bawarski, warranting an adverse inference; (2) whether OFAC personnel held and acted in furtherance of a personal vendetta, effecting an arbitrary, capricious and unreasonable disallowance of SAP's service fees; (3) whether OFAC substituted its own judgment as to the value of SAP's services, absent formal rule-making; (4) whether OFAC applied a policy limiting APSSDs to exclusive reliance on business office personnel for fiscal oversight and accountability, absent formal rule-making; (5) whether Bergen Center was given a fair and proper internal appeal; and (6) whether OFAC acted arbitrarily and outside of the rule-making process in creating a pay distinction between auditors and school accountants. Bergen Center outlined why each of the above cited issues should have been addressed by the ALJ, as well as the need for a determination that OFAC personnel had a vendetta against Bawarski and used improper means to disallow all of the

costs paid to SAP without formal rule-making. In the absence of an adoption of the Initial Decision, Bergen Center urges the Commissioner to address the issues that were not decided by the ALJ.

In reply to OFAC exceptions, Bergen Center reiterated the positions advanced in its submissions at the OAL, arguing that the ALJ properly determined that OFAC's decision to disallow certain costs that were paid to SAP was arbitrary, capricious and unreasonable. Bergen maintains that the disallowance of certain payments made to SAP was thoroughly contradicted by the ALJ's sound regulatory analysis and the evidence adduced at the hearing, both of which OFAC has failed to rebut. Specifically, OFAC failed to address the ALJ's finding that the plain language of the regulations did not permit application of a salary limit to an outside service provider. Further, OFAC ignored the uncontroverted evidence that it has not interpreted the regulations to apply a maximum salary limitation to all professional service providers.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that OFAC improperly applied *N.J.A.C. 6A:23A-18.3(q)* to disallow certain costs that Bergen Center paid to SAP.<sup>3</sup> In the Initial Decision, the ALJ outlined the applicable provisions and provided a comprehensive analysis as to why *N.J.A.C. 6A:23A-18.3(q)* was inapplicable to the relationship between SAP and Bergen Center. The objections raised in the exceptions filed by OFAC were previously made to the ALJ and were clearly considered by her in reaching her decision. The Commissioner is also in accord with the ALJ's declaration regarding the tangential issues raised by Bergen Center during the proceedings at the OAL as well as in its exceptions. As the ALJ succinctly stated, "it is unnecessary to address the arguments raised by Bawarski that she was the victim of a personal vendetta; or the argument raised by counsel that a negative inference should be made because the Department of Education failed to produce certain

---

<sup>3</sup> It is important to note that when there is a challenge to a finding by OFAC, the Commissioner is not legally mandated to give deference to his staff but instead determines if the finding was legally appropriate. A decision by OFAC is not akin to appellate review of a final agency decision, which is entitled to an arbitrary, capricious or unreasonable standard of review. *See, Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Department of Education, Office of Fiscal Accountability and Compliance, Commissioner Decision No. 334-14, decided August 14, 2014.*

documents. Nor does it matter that OFAC personnel may have questioned the prudence of using SAP's services as opposed to retaining a business manager." Initial Decision at 12.

Accordingly, the expenses associated with the services provided by SAP are allowable costs and the costs shall be included in the tuition rate for the 2015-2016 school year.

IT IS SO ORDERED.<sup>4</sup>

COMMISSIONER OF EDUCATION

Date of Decision: March 2, 2020

Date of Mailing: March 3, 2020

---

<sup>4</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36*. (*N.J.S.A. 18A:6-9.1*).



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. EDU 12485-18

AGENCY DKT. NO. 152-6/18

**BERGEN CENTER FOR CHILD  
DEVELOPMENT,**

Petitioner,

v.

**NEW JERSEY STATE DEPARTMENT  
OF EDUCATION, OFFICE OF FISCAL  
ACCOUNTABILITY AND COMPLIANCE,**

Respondent.

---

**Vito Gagliardi, Jr., Esq., and Janelle Edwards-Stewart, Esq.,** for petitioner  
(Porzio, Bromberg and Newman, attorneys)

**Kerry Soranno,** Deputy Attorney General, for respondent (Gurbir S. Grewal,  
Attorney General of New Jersey, attorney)

Record Closed: November 26, 2019

Decided: December 5, 2019

BEFORE **ELLEN S. BASS**, ALJ:

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Bergen Center for Child Development, (Bergen Center), an approved private school for students with disabilities (APSSD), challenges the action of the Department of

Education, Office of Fiscal Accountability and Compliance (OFAC), disallowing a portion of the compensation paid to School Accounting Professionals (SAP) during the 2015-2016 school year.<sup>5</sup>

Bergen Center filed a petition of appeal with the Commissioner of Education on June 26, 2018. OFAC filed a Motion to Dismiss in Lieu of an Answer on August 27, 2018, and the contested case was transmitted to the Office of Administrative Law (OAL) on August 29, 2018. Bergen Center opposed the motion; OFAC's moving papers included submissions beyond the pleadings, and at its request, I converted its application to a Motion for Summary Decision. Via Order dated October 31, 2018, the Motion was denied.

The matter proceeded to hearing on May 15, 2019, and June 4, 2019. Post-hearing submissions were filed on October 7, 2019. Although counsel had initially sought leave to file reply submissions, on November 20, 2019, counsel for Bergen Center advised she wished to rest on the submissions previously filed. On November 26, 2019, counsel for OFAC advised that she too would rest on her prior submissions, and the record closed.

### **FINDINGS OF FACT**

Bergen Center has served multiply disabled students in kindergarten through age 21 since 1968. During the 2015-2016 school year, Bergen Center had an enrollment of about fifty students, and employed some seventy staff members. As part of its routine process of overseeing APSSDs, OFAC monitored Bergen Center onsite that year, reviewing the school's business services and tuition charges for the period from July 1, 2015, through June 30, 2016. It summarized its findings in a report dated January 19, 2018. Finding One of that report is the subject of the current appeal:

The approved private school for students with disabilities (APSSD) paid fees to a consultant which exceeded the associated maximum allowable established by N.J.A.C. 6A:23A-18.2(r). The excess costs of

---

<sup>5</sup> OFAC relied on various regulations which were recodified, but not in any way material to this controversy. N.J.A.C. 6A:23A-8.1 is now N.J.A.C. 6A:23A-8.2; N.J.A.C. 6A:23A-18.2(r) is now N.J.A.C. 6A:23A-18.3(q); N.J.A.C. 6A:23-18.5(a)(9) is now N.J.A.C. 6A:23-18.6(a)(9).



\$37,594.43 are deemed to be non-allowable in accordance with N.J.A.C. 6A:23A-18.5(a)(9).

The “consultant” at issue is Mary Bawarski, a Certified Public Accountant (CPA) who provided services to Bergen Center via her company, SAP.

Onsite monitor Nicholas Morfogen submitted the data he collected to his manager, Lisa McCormick. Upon review, McCormick noted an expenditure of \$190 per hour for SAP’s services. She asked for copies of invoices so that she could delve further, and she reviewed the contract between Bergen Center and SAP. It revealed that Bergen Center had retained Bawarski’s services as “School Accountant” for the 2015-2016 school year. It is uncontroverted, and I **FIND**, that School Accountant is not a title that appears on the list of recognized position titles issued annually by the Department of Education.

McCormick explained that the fees associated with an unrecognized title are allowable only under two exceptions. Special approval can be obtained from the Executive County Superintendent. Or the APSSD can use an unrecognized title, but is then subject to the lowest maximum allowable salary in the County in which the APSSD is located. The regulations do not preclude APSSDs from hiring or engaging the services of anyone in a position that does not meet these requirements, but the associated fees are deemed non-allowable. It is uncontroverted, and I **FIND**, that Bergen Center did not receive special County approval for the unrecognized title of School Accountant.

But before disallowing all the fees attributable to Bawarski’s work for Bergen Center, McCormick wished to consider whether the position of School Accountant could be viewed as an unrecognized administrative position title, and thus fall under the second exception. She consulted with Division of Finance Supervising Auditor Elise Sadler-Williams. Per Sadler-Williams, in order to determine if a position is an unrecognized administrative position, the Department of Education reviews the functions of the position in conjunction with the Chart of Accounts. This is a collection of accounts created by the Department that APSSDs are required to use to classify and record their expenses. Accounting services are recorded under account number 290. Department personnel consulted Bergen Center’s annual independent audited financial statements to determine what function

account 290 was classified under; all “290” accounts were classified as administrative under column number five. It was on this basis that McCormick and Sadler-Williams determined that School Accountant was an unrecognized administrative position.

The lowest maximum allowable salary for Bergen County was \$127,193.00 in 2015-2016; that was the salary attributable to a vocational teacher.<sup>6</sup> McCormick did some simple mathematical computations to determine an hourly rate based on that salary; her calculations yielded \$69.89 per hour. Applying this rate to the work performed by Bawarski, McCormick determined that of the \$59,470 SAP billed at the rate of \$190 per hour, the maximum allowable amount was exceeded by \$37,594.43. The amount allowable was thus \$21,875.57. Both Sadler-Williams and McCormick urged that in reaching this determination they relied exclusively on the applicable regulations. But their testimony left the impression that value judgments about the approach Bergen Center used to operate its business office may have colored their decision-making. They appeared to strongly disagree with Bawarski’s contention that her services were cost effective. And the arguments of their counsel in her post-hearing submission belie any contention that OFAC personnel made no judgments about the usefulness of SAP’s services.

One of the services provided by SAP was the creation of compilation reports. These are management tools that permit analysis of the variance between budgeted and actual costs and include a balance sheet that may be required by banks. Compilation reports also include a percentage schedule that allow the Board of Trustees to monitor, in real time, its compliance with the spending percentages established by the Department of Education. Counsel for OFAC argued at length that “nothing in the testimony provided indicates that [Bergen Center] had a need for ... compilation reports,” noting that rather, they were “a preference by the President of the Board of Directors.” And while Bawarski urged that using her services efficiently met the fiscal needs of Bergen Center, OFAC replied that this arrangement was not cost effective, asserting that a business manager would work at a lower hourly rate. I am thus hard pressed to accept that judgments about

---

<sup>6</sup> It would seem to me that McCormick should have compared Bawarski’s compensation to that paid to an administrator in Bergen County, rather than a teacher. This was never clarified by the record, but my concern is rendered unimportant by my ultimate ruling below.

Bergen Center's business model factored not at all into OFAC's thinking when it disallowed the fees at issue.

Bawarski has been an accountant for about forty years. She started her own firm in or about 1985, and specializes in accounting work for private schools. Her company provides services to some thirty private schools and includes four employees. SAP reviews and adjusts books, to include a monthly review of the general ledger, and assets, liabilities, revenues and expenses. Bawarski's firm verifies and reconciles financial accounts and ensures that items are in the appropriate accounts. She described this as "taking an outside look at the internal operations and performing tasks during the year that help with the transparency for management." SAP personnel prepare schedules, train staff, and on occasion review auditor's reports. Bawarski explained that the Department has not permitted the School Auditor and School Accountant to perform the same tasks since the early 1990's; for this reason she refers to herself as the School Accountant.

The relationship between Bergen Center and SAP began during the 2006-2007 school year. A prior CPA had left abruptly, and SAP assisted by connecting Bergen Center with an outside payroll company and creating a new set of books. Thereafter, the services provided by SAP evolved and changed based on need. SAP supported Bergen Center employees and supplemented their work effort, delivering services that a business manager could not perform; for example, preparation of compilation reports and implementation of internal controls. Bawarski and Bergen Center entered into a letter agreement dated July 1, 2015, that confirmed Bawarski's "engagement as the School Accountant and for the preparation of quarterly financial statements of The School for the year ended June 30, 2016." Bawarski indicated in the agreement that

I expect the total fee for 2015-2016 to approximate \$50,000. Should I anticipate an amount in excess of my estimate, I will advise you immediately. I will bill my fee for my services for the fiscal year ended June 30, 2016 at the rate of \$190.00 per hour.

The letter agreement was signed by both parties. SAP's services were relied upon for a range of functions during the 2015-2016 school year, including facilitating Quick Book entries, preparing quarterly financial reports, preparing schedules, preparing a set of books, interfacing with school auditors, and conducting trainings.

But Bawarski stressed that SAP did not duplicate the work effort of either Bergen Center employees, or would-be employees. She explained that N.J.A.C. 6A:23A-18.2 outlines roughly ten business manager functions; SAP performed “approximately one and a half” of these functions. Indeed, N.J.A.C. 6A:23A-18.2 provides that a business manager is an individual “whose job function includes a majority of the following: financial budget planning and administration, insurance/risk administration, purchasing, financial accounting and reporting, facility planning, construction and maintenance, personnel administration, administration of transportation and food services, and data processing.”<sup>7</sup> It is thus clear that Bawarski correctly indicated that she performed very little of what a business manager does; the financial and accounting area of this job’s responsibilities were the only area in which she assisted Bergen Center. I **FIND** that Bawarski was not functioning in the role of the business manager for Bergen Center. The parties have agreed, and I further **FIND** that she was likewise not engaged as an Independent Auditor for the 2015-2016 school year.

Bawarski primarily performed her work offsite during the 2015-2016 school year; estimating that her staff appeared onsite not more than 15% of the time. When SAP staff did work at the school facility, there was no office space designated for their use. They were not required to sign in and out like Bergen Center employees. They did not receive salary, benefits, W-2’s or a formal employment contract. SAP professionals did not receive any training from Bergen Center staff, nor did that staff supervise or direct Bawarski’s work effort, or that of her SAP team. Payment checks were not made out to Bawarski personally, but rather to SAP. Payment was made monthly or quarterly, rather than weekly or bi-weekly as is typical with payroll. I **FIND** that Bawarski was not an employee of Bergen Center.

Bawarski was familiar with the Chart of Accounts discussed by McCormick and Sadler-Williams. Bawarski explained that the salaries of business office staff, such as the school business administrator, business manager, assistant business manager, accountant, bookkeepers and support staff are reflected in line 260. Line 263 includes

---

<sup>7</sup> N.J.A.C. 6A:23A-18.1 included identical language.

“purchased professional services,” which is described as “expenditures for purchased professional services other than professional-educational services.” SAP’s services were always charged to this latter account; with no disallowances having been made by the Department of Education in over 35 years of providing services to dozens of APSSDs.<sup>8</sup> Bawarski understood the two payment categories to differentiate between individuals who worked directly with children (salaried employees) and those who provided non-educational services (paid via a service fee).

Bawarski stressed that she was sought after by the Department of Education and had drafted a manual for private school accounting that was approved by representatives of the Division of Finance. She described her relationship with the Department of Education as one of mutual respect when Jim Verner was the supervisor of the Finance Section. She likewise had a good relationship with the OFAC monitors, to include Morfogen. Bawarski indicated that Morfogen enjoyed working with her schools because their books were in order. Bawarski noticed a shift in the attitude of the Finance Section’s staff once Verner retired. And she felt that resentment of her work was a motivator in the OFAC decision to disallow her fees at Bergen Center. OFAC of course disagrees. As will be more fully discussed below, the clear regulatory language answers the question raised by this appeal, thus obviating the need to resolve this factual dispute.

### **CONCLUSIONS OF LAW**

Bergen Center is approved to receive public school special needs students pursuant to N.J.S.A. 18A:46-15. As such, it must comply with complex statutory and regulatory provisions which govern the tuition it may charge. N.J.S.A. 18A:46-21 states that Bergen Center may determine a tuition rate to be paid by its sending boards of education, “but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education.” The statute recognizes that tuition is paid to schools like Bergen Center with public funds, and that these funds are utilized to educate public school students with multifaceted needs that cannot be met within their home school districts. Council of

---

<sup>8</sup> Lines 260 through 269 include a variety of costs attributable to account 290. Importantly, both Bawarski and McCormick agreed that payments to SAP were accounted for in line 263.

Private Sch. for Children with Special Needs v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985). Accordingly, the clear intent of the statute is that the tuition charged be fair and reasonably related to the educational services actually provided by the private school. Regulations promulgated by the Department are designed to implement this statutory intent. N.J.A.C. 6A:23A-18.1 to -18.16. The Department of Education, through OFAC, is responsible for monitoring APSSDs to ensure that the tuition rates they charge sending districts comply with these regulatory mandates. As part of this obligation, OFAC conducts periodic onsite fiscal monitoring of APSSDs. N.J.A.C. 6A:23A-18.13.

Bergen Center bears the burden of demonstrating that the Department's disallowance of certain expenditures in its calculation of actual cost per pupil was arbitrary, capricious or unreasonable. Titusville Acad. v. N.J. Dep't of Educ., EDU 00651-06, Initial Decision (May 21, 2007), adopted, Comm'r (July 6, 2007), <<http://njlaw.rutgers.edu/collections/oal/>>; Catholic Family and Cmty. Servs. v. N.J. Dep't of Educ., EDU 01051-01, Initial Decision (January 14, 2003), adopted, Comm'r (March 3, 2003), adopted, State Bd. (July 2, 2003), <<http://www.nj.gov/education/legal/>>. I **CONCLUDE** that Bergen Center has met its burden.

The amount of tuition that an APSSD may charge is limited by regulation as follows:

The board of directors of an APSSD located in New Jersey shall determine the final tuition rate charged to be an amount less than or equal to the certified actual cost per student as determined by an independent school auditor. The board of directors shall identify the certified actual cost per student and the final tuition rate charged in the audited financial statements submitted to the Department pursuant to N.J.A.C. 6A:23A-18.10.

[N.J.A.C. 6A:23A-18.3(a)].<sup>9</sup>

The regulation outlines the tuition rate procedure at length, making it clear that tuition should include expenditures needed for student instruction. Costs must be "reasonable;" a term defined by the regulation as "ordinary and necessary and not in excess of the cost

---

<sup>9</sup> At the time the facts pertinent to this matter arose, N.J.A.C. 6A:23A-18.2(a) contained almost identical language; the requirement that the auditor certify the actual cost per student was added upon recodification.

that would be incurred by an ordinarily prudent person in the administration of public funds.” N.J.A.C. 6A:23A-18.3(a)(1)(iv). A separate regulation outlines at length those “costs that are not allowable in the calculation of the certified actual cost per student.” N.J.A.C. 6A:23A-18.6.<sup>10</sup> In seventy-three paragraphs, this latter regulation sets out with specificity those expenditures that cannot be included in calculating the “per student cost.” As Bawarski was not an employee, but rather, a consultant, she persuasively urges that the moneys paid to her company were akin to moneys paid to other professional service providers, such as an attorneys, auditors or architects. I **CONCLUDE** that N.J.A.C. 6A:23A-18.6 nowhere lists such fees as nonallowable costs.<sup>11</sup>

OFAC contends that it properly disallowed the moneys paid to Bawarski, urging that the payments made to SAP ran afoul of N.J.A.C. 6A:23A-18.3(q), which requires an approved private school of the disabled to use

the recognized position title list published annually by the Commissioner...to employ staff whose position requires certification in accordance with N.J.A.C. 6A:9B or a bachelor’s or master’s degree, pursuant to N.J.A.C. 6A:23A-18.2. An APSSD shall hire only staff or consultants in job titles that require certification or a bachelor’s or master’s degree if the titles are included on the recognized job titles list, or if such titles are unrecognized job titles that are approved annually by an executive county superintendent in accordance with N.J.A.C. 6A:9B-5.5. The APSSD may use unrecognized administrative job titles, but maximum salaries for the titles are restricted in accordance with N.J.A.C. 6A:23A-18.6(a)(9).<sup>12</sup>

See also: N.J.A.C. 6A:23A-18.6(a)(8) and (a)(9). I disagree. It is well-established that an administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their

---

<sup>10</sup> During the school year at issue, the regulation was N.J.A.C. 6A:23A-18.5. It contained fewer listed exclusions, but again, not any additions or other changes pertinent to this controversy.

<sup>11</sup> N.J.A.C. 6A:23A-18.6(a)(11) does disallow such costs, but only when attributable to a “frivolous challenge to a State audit or financial review.”

<sup>12</sup> N.J.A.C. 6A: 23A-18.2(r) read a bit differently as follows: “An approved private school for students with disabilities shall employ staff pursuant to the list of recognized job titles in accordance with N.J.A.C.6A:9B that require certification and N.J.A.C. 6A:23A-18.1 that require a bachelor’s degree...” Again, the change in language is not substantive for purposes of this controversy.

ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220, 230 (1959). And while an agency's interpretation of its own regulations is entitled to deference. Matturri v. Bd. of Tr. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002), the agency's action here is simply inconsistent with the plain regulatory language. This can be best demonstrated by analyzing the regulation in parts as follows:

1. *The requirement to use "the recognized position title list published annually by the Commissioner...to employ staff whose position requires certification in accordance with N.J.A.C. 6A:9B or a bachelor's or master's degree, pursuant to N.J.A.C. 6A:23A-18.2."*

This part of the regulation does not apply to the services supplied by Bawarski via SAP. She was not employed as a member of Bergen Center's "staff." Nor did her position "[require] certification in accordance with N.J.A.C. 6A:9B." This latter code provision addresses the requirements for certification for educators, providing that "the licensure system shall function along a continuum of rigorous pre-professional preparation, certification, and professional development to better prepare educators to support improved student achievement of the New Jersey Student Learning Standards." N.J.A.C. 6A:9B-1.2. Bawarski was not a certificated educator, nor did she provide pedagogical or other educational services to Bergen Center. Bawarski's position likewise did not require a bachelor's or master's degree, pursuant to N.J.A.C. 6A:23A-18.2. A review of N.J.A.C. 6A:23A-18.2 reveals that only two positions are noted to require degrees, to include the business manager and director. Bawarski did not serve in either role.

2. *The requirement that "[a]n APSSD shall hire only staff or consultants in job titles that require certification or a bachelor's or master's degree if the titles are included on the recognized job titles list, or if such titles are unrecognized job titles that are approved annually by an executive county superintendent in accordance with N.J.A.C. 6A:9B-5.5."*

With this phrase, the regulation now expands its scope to individuals serving as consultants, like Bawarski. It provides that an APSSD can retain consultants in "job titles that require certification [or a degree]" if the title is on the approved list, or specially approved by the Executive County Superintendent. But again, as noted above, Bawarski



was not retained in a title requiring certification or a degree; hence the requirements of this part of the regulation are inapplicable to her employment arrangement with Bergen Center.

3. The requirement that “[t]he APSSD may use unrecognized administrative job titles, but maximum salaries for the titles are restricted in accordance with N.J.A.C. 6A:23A-18.6(a)(9).”

This provision is inapplicable to Bawarski as well. It restricts salary amounts in accordance with N.J.A.C. 6A:23A-18.6(a)(9), a regulation that by its express language applies only to employees, providing that “[a] salary of an employee not covered by (a)6 above in excess of the lowest maximum allowable salary in the same county,” is a non-allowable cost. But Bawarski was not an employee of Bergen Center.

Moreover, N.J.A.C. 6A:23A-18.6(a)(9) references N.J.A.C. 6A:23A-18.6(a)(6), which provides that the following is likewise a non-allowable cost:

The salary of a professional staff member, consultant, or subcontractor, including a member of a management company, who is not certified but is functioning in, or contracted to perform the duties of, a position requiring certification in accordance with N.J.A.C. 6A:9B or bachelor’s or master’s degree under this subchapter.

[N.J.A.C. 6A:23A-18.6(a)(6)].<sup>13</sup>

As noted earlier, “business manager” is such a position, but Bawarski did not function in the role of the business manager. Nor did she perform the duties of “a position requiring certification in accordance with N.J.A.C. 6A:9B.”

And Bawarski did not receive a salary. The “maximum salary” limitation of the regulation is thus likewise inapplicable. OFAC’s attempt to define “salary” to include any form of recompense is unavailing. According to Merriam-Webster.com, salary is “fixed compensation paid regularly for services.” This does not describe the arrangement with

---

<sup>13</sup> After recodification, the phrase “or contract to perform the duties of” was added. See the original version at N.J.A.C. 6A:23A-18.5. The original version referenced only a bachelor’s degree, “master’s degree” was added after recodification.

SAP, which was paid for services rendered via invoice. Likewise, Black's Law Dictionary defines "salary" as a "fixed [periodical compensation](#) to be paid for [services rendered](#); a stated compensation, amounting to so much by the year, month, or other fixed period..."<sup>14</sup>

In summary, the administrative code language relied upon by OFAC simply does not support its action here. N.J.A.C. 6A:23A-18.3(q) is inapplicable to the business relationship between SAP and Bergen Center, and I **CONCLUDE** that OFAC improperly applied the regulation to disallow a portion of the money payed to SAP. And I scoured N.J.A.C. 6A:23A-18.6 for any other basis upon which to disallow these costs. I could find none. N.J.A.C. 6A:23A-18.6(a)(12) does discuss fees paid to a consultant, disallowing such fees if the work is not detailed in a written agreement signed by both parties that describes the anticipated outcome of the project and includes fee information. SAP and Bergen Center were parties to such a contract.<sup>15</sup>

In light of my ruling, it is unnecessary to address the argument raised by Bawarski that she was the victim of a personal vendetta; or the argument raised by counsel that a negative inference should be made because the Department of Education failed to produce certain documents. Nor does it matter that OFAC personnel may have questioned the prudence of using SAP's services as opposed to retaining a business manager. But it should be noted that a decision to disallow the payments to Bawarski based on such value judgments would improperly constitute regulating without formal rulemaking. Indeed, the decision to allow, or disallow certain costs, must be based upon a standard that "is intended to be applied generally and uniformly to all similarly situated persons." N.J.S.A. 52:14B-2(e). In Metromedia v. Div. of Taxation, 97 N.J. 313, 331 (1984) our Supreme Court held that an administrative rule is one that

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4)

---

<sup>14</sup> Black's Law Dictionary Online, <https://thelawdictionary.org/salary>.

<sup>15</sup> The earlier version of this regulation did not require a contract signed by both parties; again the change is of no moment as both parties signed the letter agreement that retained SAP. The prior version was codified at N.J.A.C. 6A:23-18.5(a)(12).

prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

In accordance with this standard, OFAC's feeling that compilation reports were an unneeded expense, should not and could not factor into the decision to disallow moneys paid to Bawarski, absent regulatory guidance. The choice to hire an outside consultant, rather than a business manager, likewise is something that is nowhere expressly noted to be a non-allowable cost in the regulatory scheme. And while the regulations do require that expenditures be those that would be incurred by a reasonably prudent person, N.J.A.C. 6A:23A-18.3(a)(1)(iv), I heard no evidence that would suggest that any of the moneys paid to SAP rose to a level of being inconsistent with that standard. While the Department of Education can extend its regulatory powers to include making compilation reports and school accountant services non-allowable costs, it cannot do so without clear written rules that allow the regulated community to understand the parameters of its local spending authority.

### **ORDER**

Based on the foregoing, together with the record as whole, the relief sought by the petition of appeal is **GRANTED**. The Department of Education is **ORDERED** to restore the disallowed funds that are the subject of this appeal.

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.

December 5, 2019



---

DATE

---

**ELLEN S. BASS, ALJ**

Date Received at Agency:

---

December 5, 2019

Date Mailed to Parties:

sej

## **APPENDIX**

### **Witnesses**

#### **For Petitioner:**

Mary Bawarski  
Lisa McCormick

#### **For Respondent:**

Elise Sadler-Williams

### **Exhibits**

#### **Joint Exhibits:**

- J-1 Joints Stipulation
- J-2 Engagement letter
- J-3 OFAC Report
- J-4 Bergen Center Financial Statements and Reports
- J-5 Appendix O
- J-6 Chart of Accounts
- J-7 Invoice and Payment Records
- J-8 List of recognized position titles
- J-9 Letter of Appeal
- J-10 Department of Education response

#### **For Petitioner:**

- P-1 Email
- P-2 Quarterly compilation report
- P-3 Emails
- P-4 Not admitted
- P-5 Email
- P-6 Letter dated April 22, 2019

For Respondent:

- R-1 Admitted as J-2
- R-2 Admitted as J-7
- R-3 Admitted as J-3
- R-4 Admitted as J-4
- R-5 Not admitted
- R-6 Maximum salaries
- R-7 Not admitted
- R-8 Chart of Accounts – explanation