STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 30, 2016)

SUSAN GIANNINI, as parent and natural guardian on behalf of G. DOE, a minor	:	
v.	:	**C.A. No. PC 2014-5240**
COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION, EVA-MARIE MANCUSO, AMY BARETTA, COLLEEN A. CALLAGHAN, KARIN L. FORBES, JO EVA GAINES, PATRICK A. GUIDA, LAWRENCE PURTILL, MATHIES J. SANTOS, JOYCE STEVOS, in their official capacities as members of the RHODE ISLAND BOARD OF EDUCATION, COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION, and CUMBERLAND SCHOOL DEPARTMENT	:	

DECISION

CARNES, J. Before the Court is an appeal from a decision of the Council on Elementary and Secondary Education (the Council) affirming the denial of a request for a waiver of fees for summer school classes. The Plaintiff, Susan Giannini (Plaintiff), had filed the request as parent and natural guardian on behalf of her son, G. Doe. Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

The facts underlying this case essentially are undisputed. Plaintiff's son, G. Doe, was a ninth-grade student at Cumberland High School during the 2011-2012 school year. (Letter to Pl.

dated June 20, 2012, Ex. 22 of Original Record) (Ex. 22)).[1] On June 20, 2012, Cumberland High School (the School) informed Plaintiff, in writing, that her son had failed Algebra 1 (semester 2), English 1 (semesters 1 and 2), PE/Health, and Physics (semesters 1 and 2), and it "recommended that [he] attend a summer program to recover any missing credits to stay on track with graduation requirements." Id. The School then noted:

> "if your child has an F in a core course from a previous year that has not been made up, they [sic] have the opportunity to make the course up during the CLASS [Cumberland Learning Academy for School Success] Credit Recovery Program. If they [sic] do not complete it during the summer, they [sic] will be required to repeat the course during the school year prior to graduation. The appropriate adjustments have been made to your child's schedule for next year." Id.

Plaintiff later was informed that G. Doe needed three credits to advance into the 10th grade; namely, English, one full credit; Math, one-half credit; and PE, one-half credit. (Ex. 22, Appeal from District Charge of Tuition Fee, 1.) Plaintiff further was informed that the cost for the summer program would amount to $700. Id.

On June 26, 2012, Plaintiff wrote a letter to Dr. Phil Thornton, Superintendent of the Cumberland School District (School District), stating the following:

> "It is my understanding that if my son, [G. Doe], does not attend summer school, he will be retained in the 9th grade. With that said.
>
> "I am requesting a waiver of the summer school fees that I must incur. I cannot afford them and do not feel that I should be responsible for them. These fees are a direct result of the school systems [sic] failure to provide my son with a Free Appropriate Public Education [FAPE].
>
> "All parties need to meet during the summer to address these inadequacies and to ensure the success of my son's academic future." (Ex. 22, Letter to Superintendent dated June 26, 2012.)

[1] Exhibits from the Original Record will be referred to simply by their Exhibit numbers.

On July 3, 2012, Superintendent Thornton requested "more substantive information that supports your assertions regarding [G. Doe's] denial of FAPE . . . In the meantime, you may wish to enroll [G. Doe] in summer school and should I conclude that fees be waived, the School Department will reimburse you for a specified amount of money." (Ex. 22, Letter to Plaintiff dated July 3, 2012.) The Superintendent then suggested that Plaintiff contact the School directly to arrange a meeting with the relevant parties; however, "[s]ince this is the summer vacation period, I anticipate that any meetings with school staff can be accommodated at the beginning of the new school year." Id. Thereafter, Plaintiff consulted with Rhode Island Legal Services (Legal Services) for advice. See Ex. 22, Letter to Cumberland School District dated Aug. 15, 2012.

On August 15, 2012, Plaintiff, through Legal Services, stated that she had paid over $700 in fees for summer classes for her son, and she alleged that the imposition of fees for summer school fees was illegal because they "negate[d] Rhode Island's firm position about the free nature of public education." Id. She also accused the School District of providing G. Doe, a special education student, with insufficient educational support during the year and asserted that charging him fees for summer school exacerbated the denial of his FAPE. Id. Plaintiff then requested a full and immediate reimbursement of G. Doe's summer school fees, as well as a "written clarification about what Cumberland's policy will be going forward with regard to charging fees for summer classes for all students[.]" Id. (emphasis added).

On September 11, 2012, the School District, through counsel, informed Plaintiff "that Cumberland will not be reimbursing [G. Doe's] parents for th[e] expense" of his summer school classes. (Ex. 22, Letter dated Sept. 11, 2012.) The letter gave no explanation or reason for the

denial. See id. On December 13, 2012, Plaintiff filed an appeal with the Commissioner of Elementary and Secondary Education. (Ex. 22, Appeal from District Charge of Tuition Fee.)

In her appeal, Plaintiff sought a determination that summer school fees "are unauthorized under Rhode Island Law because the General Assembly has not granted school committees the authority to charge fees for such school activities." Id. at 3. Accordingly, Plaintiff sought reimbursement of "[t]he illegally charged and collected fees . . . ." Id.

At a January 17, 2013 hearing, the parties agreed that there were no facts in dispute and that the matter purely was a legal question. (Ex. 21 at 2.) Plaintiff's counsel asserted that because G. Doe had to attend summer school in order to obtain the necessary credits for him to pass from the 9th grade to the 10th grade, the fees for such program were illegal. Id. at 3. Counsel for the School District responded by asserting that the fee was not mandatory because attendance in the School's summer program was optional and that G. Doe could have obtained the required credits by repeating the 9th grade or by attending a different summer school program that was approved by the School District. Id. In their post-hearing memoranda, the parties reiterated, and expanded upon, the aforementioned legal arguments. See Exs. 18-20.

In her May 21, 2013 decision, Commissioner Gist observed that G. Doe was entitled to free appropriate special education because he had an Individualized Education Plan (IEP) and that he had "indicate[d] in his brief that he intend[ed] to reserve his right to bring a claim for reimbursement through the normal special education appeal mechanism." See Ex. 17 at 2. She then concluded "that prudential considerations require us to first address the specific special education issues presented in this case to determine if this case may be disposed of a [sic] narrow and particular special education grounds instead of proceeding to immediately address the school

fee issue which involves statewide issues." Id. at 3. Accordingly, Commissioner Gist ordered the matter to be rescheduled for the taking of evidence on the special education claims. Id.

The Plaintiff appealed the decision to the Rhode Island Board of Education (Board) contending that Commissioner Gist erred in not addressing the legality of summer school fees. (Ex. 16.) Specifically, Plaintiff contended that by considering the matter as a claim under special education laws, a claim "which the student had expressly NOT brought . . . [,]" Commissioner Gist had discriminated against G. Doe by not adjudicating his claim on a par with other students. Id.

On December 9, 2013, the Board remanded the matter to Commissioner Gist "for a determination on the question presented of whether a school district may charge any public school student, irrespective of special education protections, for tuition for summer classes." (Ex. 11 at 2.) In doing so, the Board noted that despite the parties' representations to the contrary, there existed an unresolved factual issue as to whether summer classes were mandatory or optional. Id.

On remand, the School District asserted that regardless of whether the summer school program is characterized as mandatory or optional, the fact that the R.I. Department of Education (RIDE) "has not deemed summer school credit recovery or enrichment classes to be 'essential to the provision of a quality education'" was dispositive on the issue of fees. (Ex. 9 at 2.) The Plaintiff countered by arguing that school committees lack the authority to impose such fees. (Ex. 8 at 1.) After reconsidering the matter, Commissioner Gist issued a written decision on March 18, 2014. (Ex. 7.)

In that decision, Commissioner Gist found that the summer school program was not subject to the requirements set forth in RIDE's Basic Education Program Manual (BEP Manual)

because the program was discretionary and outside the scope of the school year. Id. at 4.[2] Accordingly, she concluded that "[t]he Cumberland School District may legally charge tuition fees for its summer programs and courses." Id. at 5. She further concluded that considering that the state does not provide funding for summer school programs, "[t]o hold otherwise would invite a tangible risk of discontinuance of local school district summer educational programs, which in itself may be viewed as violative of public policy." Id. at 4.

Thereafter, Plaintiff filed a second appeal to the Board asserting that the decision had no basis in law and was at odds with longstanding statutory law and legal precedent. (Ex. 5.) On October 14, 2014, the Council, in its capacity as the Board's successor-in-interest, affirmed Commissioner's Gist's decision. (Ex. 2.) In doing so, it found that Commissioner Gist's decision was "consistent with Rhode Island law." Id. at 2.

The Plaintiff timely appealed to this Court by filing a Complaint on October 28, 2014. In her Complaint, Plaintiff asks the Court to reverse and vacate the Council's decision, order reimbursement of the tuition charge, and award fees and costs pursuant to chapter 92 of title 42 of the Rhode Island General Laws, the Equal Access to Justice Act (EAJA).

II

Standard of Review

This Court has appellate jurisdiction to review final orders of state administrative agencies pursuant to chapter 35 of title 42 of the Rhode Island General Laws, the Administrative Procedures Act (APA). McAninch v. State of R.I. Dep't of Labor & Training, 64 A.3d 84, 87

[2] "The BEP Manual set[s] forth a basic educational program that [is] to be available to each student, regardless of where in the state the student attend[s] school." Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 783 (R.I. 2014).

(R.I. 2013). Section 42-35-15(g) of the APA governs this Court's review of the Council's decision and provides in pertinent part:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
>
> "(2) In excess of the statutory authority of the agency;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error or law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

In reviewing an administrative agency's interpretation of a "statute as applied to a particular factual situation[, this Court] must accord that interpretation weight and deference as long as that construction is not clearly erroneous or unauthorized." Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 344 (R.I. 2004) (internal quotations omitted). However, "'[a]lthough this Court affords the factual findings of an administrative agency great deference, questions of law—including statutory interpretation—are reviewed de novo.'" McAninch, 64 A.3d at 86 (quoting Heritage Healthcare Servs. v. Marques, 14 A.3d 932, 936 (R.I. 2011)).

Thus, notwithstanding the Court's "deference to the administrative process," the Court "'retain[s] the power to review all questions of law,'" and can vacate an administrative decision for errors of law. R.I. Temps, Inc. v. Dep't of Labor & Training, Bd. of Review, 749 A.2d 1121, 1125 (R.I. 2000) (quoting Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). Furthermore, in situations where the question of law involves an issue of statutory interpretation,

the Court's "'ultimate goal is to give effect to the purpose of the act as intended by the Legislature.'" McAninch, 64 A.3d at 86 (quoting Labor Ready Ne., Inc., 849 A.2d at 344).

III

Analysis

The Plaintiff contends that school districts do not have the authority to charge a fee for summer school because the General Assembly evidenced its intent to prohibit any and all charges for tuition, including summer school, when it explicitly revoked the authority of school districts to charge for student services and programs in 1868, and then later decreed in 1893 that textbooks would be free. The Plaintiff further asserts that even if the BEP Manual could be construed as authorizing the charging of summer school fees, such authorization would be impermissible and thus null and void. Finally, Plaintiff maintains that the Council's decision was arbitrary and capricious because it failed to distinguish the instant case from longstanding policies and precedents set by RIDE to prohibit such fees.

The Council and its members, in their official capacities (collectively, Defendants), assert that legislative intent must be read in its historical context. Specifically, Defendants contend that when the General Assembly abolished "tuition charges" for schools, it did not contemplate the abolition of fees for summer school because summer school did not exist at that time. They further contend that the General Assembly did not intend the prohibition on fees to apply to programs that fall outside the state-mandated school year. In support of these contentions, Defendants point out that despite enacting many education statutes since 1868, the General Assembly has not required cities or towns to provide summer school for non-special needs students and has not prohibited cities and towns from charging such students a fee for such

programs. The Defendants further maintain that summer school fees are permissible because summer school is not a core element of education, as defined by the BEP Manual.

A

1

School District's Authority to Charge Fee for Summer School

The single issue in this case is one of first impression; namely, whether the School District had the legal authority to charge G. Doe a fee to attend summer classes. As such, the Court's review solely involves a question of law.[3]

As previously stated, the Court's ultimate goal in construing a statute "is to give effect to the purpose of the act as intended by the Legislature." McAninch, 64 A.3d at 86. In determining and effectuating legislative intent, the Court must

> "attribut[e] to the enactment the most consistent meaning. When the language of the statute is clear and unambiguous, it is [the Court's] responsibility to give the words of the enactment their plain and ordinary meaning. The plain meaning approach, however, is not the equivalent of myopic literalism, and it is entirely proper for [the Court] to look to the sense and meaning fairly deducible from the context. Therefore, [the Court] must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections. Finally, under no circumstances will this Court construe a statute to reach an absurd result." Mendes v. Factor, 41 A.3d 994, 1002 (R.I. 2012) (internal citations and quotations omitted).

Our Supreme Court has declared that "[f]ew responsibilities of government are as important as providing for the education of children[.]" Woonsocket Sch. Comm., 89 A.3d at 781. However, although "the right to an education is a constitutional right in this state," City of Pawtucket v. Sundlun, 662 A.2d 40, 57 (R.I. 1995), "the Rhode Island Constitution does not

[3] Indeed, the parties in this case repeatedly have represented that there are no disputed material issues of fact and that the issue involves only a question of law.

provide a fundamental right to education . . . ." Woonsocket Sch. Comm., 89 A.3d at 794 (citing City of Pawtucket, 662 A.2d at 57). Instead, "article 12[,] [sec. 1 of the Rhode Island Constitution] assigns to the General Assembly the responsibility for that right." City of Pawtucket, 662 A.2d at 57.

Thus, although "'education is perhaps the most important function of state and local governments[,]'" it is the Legislature that possesses "the constitutional authority to assign resources to education and to competing state needs." Id. (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)). Furthermore, "[t]he quantity and quality of educational opportunities to be made available to the State's public school children is a determination committed to the legislature or to the people * * * through adoption of an appropriate amendment to the State Constitution." Id. at 59 (emphasis added) (quoting Hornbeck v. Sommerset Cnty. Bd. of Educ., 458 A.2d 758, 790 (Md. 1983)); see also 67B Am. Jur. Schools § 349 (2010) ("The fundamental right to select the system of instruction and course of study to be pursued in the public schools belongs to the legislature.").

While the General Assembly's "duties that existed with regard to public education when the Constitution was ratified in 1842 were slim[,]" it clearly took an interest in public education even before it was ratified. Woonsocket Sch. Comm., 89 A.3d at 788 (citing City of Pawtucket, 662 A.2d at 46). For example, in 1828, the General Assembly enacted "AN ACT to establish Public Schools[,]" whereby it appropriated up to $10,000 per year to be paid to towns, on a proportional basis, "for the exclusive purpose of keeping public schools, and paying the expenses thereof[.]" 1828 R.I. Acts and Resolves 9-10, § 1.

Although the 1828 Act did not require towns to establish public schools, any town that wished to avail itself of state funds was required to supplement its allocation by raising taxes.

See id. at 10, § 2 (limiting each town to raise no more than double the amount received from the state "by tax in each year . . . to be appropriated to the purposes of public schools . . ."). The 1828 Act further mandated towns to appoint a school committee with the "power to make all necessary rules and regulations, which they may deem expedient, for the good government of the public schools in their respective towns . . . ." Id. at 10-11, § 4. However, the General Assembly limited the power of school committees to "pass[ing] such by-laws and regulations as they may deem expedient; provided such laws and regulations are not repugnant to the provisions of this act, nor in violation of any law of this State[.]" Id. at 11.

In 1857, the General Assembly enacted an appropriations statute allocating an annual sum of $50,000 "for the support of public schools in the several towns . . . ." G.L. 1857 ch. 59, § 1. In addition to requiring towns to raise a proportion of their respective appropriations through taxes, the statute specified that "[t]he money appropriated from the state shall be denominated 'teachers' money,' and shall be applied to the wages of teachers, and to no other purpose whatever." Id. at § 3. Chapter 64 of the 1857 Act stated:

> "Any school district, in addition to the money received from the state and town appropriations, may fix or authorize its trustees to fix, subject to the approval of the school committee of the town, a rate of tuition, to be paid by the persons attending school, or by their parents, employers or guardians, towards the expense of fuel, books and other expenses . . . ." G.L. 1857 ch. 64, § 9.

In 1867, the General Assembly amended the appropriations statute to allocate an additional $20,000 "to be apportioned among the several towns in the same manner and in the same form, and subject to the same conditions as the annual appropriation of fifty thousand dollars has heretofore been apportioned for the support of public schools." 1868 R.I. Pub. Laws 518, § 1 (emphasis added). In amending the statute, the General Assembly declared:

> "So much of existing laws as empowers school districts to impose rate bills for tuition upon scholars or their parents or guardians, is hereby repealed; provided, that this appeal shall not affect any contract entered into before this act takes effect, or the collection of any rate bills under such contract, or of any heretofore legally imposed." Id. at § 3.

Thus, in return for an increase in state appropriations, the General Assembly expressly prohibited school districts from charging tuition in public schools.

In 1882, the General Assembly eliminated the discretion of towns to decide whether to establish a public school; instead, it "created a state system of education by mandating that every town establish a public school." Woonsocket Sch. Comm., 89 A.3d at 789 (citing City of Pawtucket, 662 A.2d at 48). Thus, in exercising its "plenary and exclusive power over public education[,]" City of Pawtucket, 662 A.2d at 50, the General Assembly had "command[ed] the various towns to establish and maintain public schools . . . ." Bailey v. Duffy, 45 R.I. 304, 306, 121 A. 129, 130 (1923) (citing G.L. 1909, ch. 66, § 1, as amended by P.L. 1914, ch. 1097). In doing so, "[t]he Legislature deem[ed] it wise to place the entire responsibility for the efficient management of the schools on the school committee." Bailey, 45 R.I. at 306-07, 121 A. at 130 (quoting G.L. 1909, ch. 67, § 9) (stating "[t]he entire care, control, and management of all the public school interests * * * shall be vested in the school committee"). Thus, historically, "since the time article 12 was adopted, the establishment of schools has been left to the local communities although financial and other assistance were provided by the state." City of Pawtucket, 662 A.2d at 56.

Since 1909, G.L. 1909, ch. 67, § 9 has been amended to read in pertinent part:

> "Except as specifically provided in this section, every city or town shall establish and maintain for at least one hundred eighty (180) days annually or the equivalent thereof, exclusive of holidays a sufficient number of schools in convenient places under the control and management of the school committee and under the

> supervision of the board of regents for elementary and secondary education." G.L. 1956 § 16-2-2(a)(1).

It is clear from the foregoing language that while municipalities are mandated to provide a minimum number of public school days per year, there is no prohibition for providing more than that minimum requirement. See § 16-2-2(a)(1). It also is clear that school committees still possess the entire responsibility for efficiently managing public schools. See Bailey, 45 R.I. at 306, 121 A. at 130 (recognizing, under the predecessor statute, that the General Assembly had "place[d] the entire responsibility for the efficient management of the schools on the school committee").

2

Power of School Committees to Charge Fee for Classes

Our Supreme Court has declared that "[t]he power of school committees is coextensive with the authority conferred upon them by the General Assembly to foster education as agents of the state." Greenhalgh v. City Council of Cranston, 603 A.2d 1090, 1093 (R.I. 1992). However, the Court stressed:

> "School committees do not enjoy a residual font of power beyond the dimensions of this authority over matters that may incidentally have an impact upon school operations. The extent of their control over school affairs is fixed by their specifically enumerated powers and duties as set out in title 16 of the General Laws and elsewhere. The General Assembly, through its plenary power to apportion authority over public school interests, may either extend or narrow the scope of these provisions if it so chooses." Id.

Thus, as agents of the state, the powers and duties of school committees are fixed and limited, and said committees possess no residual powers beyond those specifically authorized by the General Assembly. See id. For example, although the General Assembly has authorized school committees to establish school curricula, the state still maintains control over a school

committee's choice of studies. See § 16-2-16 (mandating school committees to "prescribe the studies to be pursued in the schools, under the direction of the department of elementary and secondary education") (emphasis added).

Section 16-2-9 sets forth a list of general powers and duties that school committees possess "in addition to those enumerated in this title[.]" Sec. 16-2-9. Among those "powers and duties" is a requirement that school committees "adopt a school budget to submit to the local appropriating authority." Sec. 16-2-9(a)(9). However,

> "Notwithstanding any provisions of the general laws to the contrary, the requirement defined in subsections (d) through (f) of this section shall apply. The school committee of each school district shall be responsible for maintaining a school budget which does not result in a debt." Sec. 16-2-9(d).

Thus, school committees are required to "adopt a budget as may be necessary to enable it to operate without incurring a debt, as described in subsection (d)." Sec. 16-2-9(e).

Prior to the adoption of a school budget, "[t]he highest elected official of the city or town shall submit to the school committee an estimate . . . of projected revenues for the next fiscal year." Sec. 16-2-21(1). During the same period, the school committee is required to submit to its local appropriating authority "a statement for the next ensuing fiscal year of anticipated total expenditures, projected enrollments with resultant staff and facility requirements, estimated enrollment and payments to charter schools, and any necessary or mandated changes in school programs or operations." Sec. 16-2-21(2). The school committee also is required to submit a report to the Department of Elementary and Secondary Education of its "estimates and recommendations of the amounts necessary to be appropriated for the support of public schools . . . ." Sec. 16-2-21(3). Section 16-2-21(3)(c) specifically states, however, that "[o]nly a school

budget in which total expenses are less than, or equal to, appropriations and revenues shall be considered an adopted school budget." Id. (emphasis added).

It is clear from the foregoing that the term "revenues" refers only to monies raised by the city or town. See § 16-2-21(1) (requiring submission by a municipality of the "projected revenues for the next fiscal year" to its school committee). It also is clear that the only funds available for school budgets are restricted to those that come from such revenues, as well as from state-approved appropriations. The fact that these provisions are silent with respect to school committees means that school committees are not authorized to raise their own funds for purposes of supplementing budgetary items. See Greenhalgh, 603 A.2d at 1093 (stating that "[t]he extent of . . . control [by school committees] over school affairs is fixed by their specifically enumerated powers and duties"). Indeed, had the General Assembly granted school committees the authority to raise such funds, it is inconceivable that it would not have made any provisions relating to the disbursement and accounting of those funds. See New England Die Co. v. Gen. Prods. Co., 92 R.I. 292, 298, 168 A.2d 150, 154 (1961) ("It is well settled that courts will not broaden statutory provisions by judicial interpretation unless such an interpretation is necessary to carry into effect the clear intendment thereof.") (citing Irish v. Collins, 82 R.I. 348, 107 A.2d 455 (1954)).

Consequently, in situations where a summer school program is included in the school budget, then payment for that program is strictly limited to the revenues and appropriations contemplated by chapter 2 of title 16 of the Rhode Island General Laws. Therefore, the school committee of that municipality would not have authority to supplement its budget through the implementation of a summer school fee.

3

Power of School Committees to Assess Fees for Summer School Programs

In the instant matter, it is unclear from the parties' filings whether the School District's budget provided any funding for its summer school program. However, if it did, then the school committee did not have any authority to charge a fee for summer school.

The Defendants assert that school committees have the authority to assess a fee for summer school programs under § 16-2-9(a)(3) of the general powers and duties granted to them by the General Assembly because said programs are "local" programs that fall outside the 180-day mandated school year, and because they do not constitute a core element of education, as defined by the BEP Manual. The Court will assume, for purposes of this argument, that the School District's summer school program did not receive any funding from the school budget because, as previously stated, if it was a budgetary item, then chapter 2 of title 16 of the Rhode Island General Laws necessarily would have precluded the school committee from charging a fee for said program, irrespective of what time of the year the program was conducted.

Pursuant to § 16-2-9(a)(3), school committees "provide for and assure the implementation of federal and state laws, the regulations of the board of regents for elementary and secondary education, and of local school policies, programs, and directives." Sec. 16-2-9(a)(3). Whether this provision constitutes a power, as Defendants contend, rather than a duty, it is clear that it does not expressly authorize school committees to collect fees for the provision and implementation of local school programs. See Greenhalgh, 603 A.2d at 1093 ("The extent of [a school committee's] control over school affairs is fixed by [its] specifically enumerated powers and duties as set out in title 16 of the General Laws and elsewhere.") (Emphasis added.). Furthermore, given the fact the General Assembly has placed vigorous fiscal constraints and

reporting requirements upon school committees and municipalities with respect to the adoption and implementation of school budgets, it defies belief that the General Assembly impliedly granted school committees a residual authority to charge fees for additional local school programs under § 16-2-9(a)(3) without any oversight as to the collection and disbursement of such fees. See e.g., § 16-2-9.3 (establishing "an advisory council on school finances to strengthen the fiscal accountability of school districts, regional school districts, state schools and charter schools in Rhode Island"). Consequently, the Court concludes that even if the summer school program was not part of its school budget, § 16-2-9(a)(3) did not impliedly authorize the School District to charge a fee for said program. Likewise, Defendants' assertion that the School District had authority to charge a fee for summer school because it was not part of the BEP Manual also must fail.

4

Basic Education Programs

The Rhode Island Board of Education Act defines the term "Basic education program" as "the cost of education of resident pupils in grades twelve (12) and below in average daily membership for the reference year as determined by the mandated minimum program level." Sec. 16-7-16(3). The term "Mandated minimum program level" is defined as "the amount that shall be spent by a community for every pupil in average daily membership as determined pursuant to the provisions of § 16-7-18[.]" Sec. 16-7-16(10).[4]

In the 1980s, "[t]he General Assembly delegated to the Board of Regents for Elementary and Secondary Education (Board of Regents) the responsibility of defining the mandated

[4] Section 16-7-18 provides: "The mandated minimum program level shall be determined annually by the board of regents for elementary and secondary education upon recommendation of the commissioner." Sec. 16-7-18.

minimum program, and the Board of Regents in turn directed the Rhode Island Department of Education (RIDE) to prepare a Basic Education Program Manual (BEP Manual) . . . ." Woonsocket Sch. Comm., 89 A.3d at 783. The purpose of the BEP Manual was to "set forth a basic educational program that was to be available to each student, regardless of where in the state the student attended school." Id.

Pursuant to § 16-7-24,

> "A community that has a local appropriation insufficient to fund the basic education program pursuant to the regulations described in this section and all other approved programs shared by the state and required in law shall be required to increase its local appropriation in accordance with § 44-5-2 or find efficiencies in other non-education programs to provide sufficient funding to support the public schools." Sec. 16-7-24 (emphasis added).

Chapter 5 of title 44 of the Rhode Island General Laws governs "[t]he assessment and levy of local taxes in Rhode Island. . . ." Kargman v. Jacobs, 122 R.I. 720, 721 n.1, 411 A.2d 1326, 1327 n.1 (1980). Section 44-5-1 delegates to the electors of each city and town the power to levy taxes. See G.L. 1956 § 44-5-1 ("The electors of any city or town qualified to vote on any proposition to impose a tax or for the expenditure of money, when legally assembled, may levy a tax for the purposes authorized by law, on the ratable property of the city or town . . . ."). Section 44-5-2 provides a formula for the maximum tax levy that cities and towns may impose for ratable property in any given fiscal year. See § 44-5-2. Noticeably absent from chapter 5 of title 44 of the Rhode Island General Laws is any delegation of taxing powers to school committees; consequently, the Court concludes that they do not have the authority to raise taxes under this act for purposes of funding basic education programs. Furthermore, regardless of whether summer school is defined in the BEP Manual as a core element of education, the facts of this case reveal that the purpose of the School District's summer school program is to provide instruction on "core" courses that are required for graduation.

It is undisputed that "[a] promotion-retention policy based on yearly minimum credits ha[d] been established at Cumberland High School . . ." [,] and that G. Doe failed to achieve his "yearly minimum credits" for Grade 9 after he failed several "core" courses. See Ex. 22, Letter to Pl. dated June 20, 2012. Presumably, these yearly minimum credit and core course requirements were part of the School's state-approved curriculum. See § 16-2-16 (mandating school committees to "prescribe the studies to be pursued in the schools, under the direction of the department of elementary and secondary education"). As a result of his failing certain "core" courses, the School "recommended that [G. Doe] attend a summer program to recover any missing credits to stay on track with graduation requirements." Ex. 22, Letter to Pl. dated June 20, 2012 (emphasis added). It is undisputed that had G. Doe failed to recover the missing credits during the summer, he would not have been allowed to pass to the tenth grade.

As previously stated, in 1868 the General Assembly expressly abolished charges for tuition. The term "tuition" is defined as "1. A fee for instruction, especially at a college, university, or private school. 2. Instruction; teaching . . . ." The American Heritage Dictionary of the English Language 1867 (5th ed. 2011); see also Webster's Third New International Dictionary 2461 (3rd ed. 1962) (defining "tuition" as "the act of teaching: the services or guidance of a teacher . . . the price of or payment for instruction").

It is clear to the Court that the purpose of summer school is to provide additional instruction to students who are in need of recovering credits for core courses so that they either may graduate or advance to the next grade. See Vandevender v. Cassell, 208 S.E.2d 436, 439 (W.V. 1974) ("Under a 'free' school system fees cannot be charged as a requirement for students to be admitted to school nor can fees be charged for any required course under the curriculum set up by the state board of education.") (emphasis added); Norton v. Bd. of Educ. of Sch. Dist. No.

16, Hobbs Mun. Sch., 553 P.2d 1277, 1278-79 (N.M. 1976) (holding "courses required of every student shall be without charge to the student"); see also LIH ex. rel, LH v. N.Y. City Bd. of Educ., 103 F. Supp. 2d 658, 670 (E.D.N.Y. 2000) (declaring, in the context of a challenge by disabled students, that "[s]ummer school education for struggling students is intrinsically related to the ability to receive a free appropriate public education"); see generally Ex. 22, Letter to Pl. dated June 20, 2012 (stating "if your child has an F in a core course from a previous year that has not been made up, [he or she has] the opportunity to make the course up during the CLASS Credit Recovery Program . . . [or] will be required to repeat the course during the school year prior to graduation"). Although Defendants categorize summer school as an "optional" program, the obvious reason that a student would opt to avail himself or herself of such a program would be for purposes of recovering the necessary core course credits required by the relevant school curriculum.

Thus, even if the BEP Manual does not specifically address the issue of summer school, it is clear that the School District's curriculum requires students to achieve a certain number of "core course" credits for purposes of graduation. Thus, such credits constitute a core element of education in the School District's school curriculum.

In the instant matter, G. Doe was given a choice: recover his required credits through additional instruction during the summer, or recover them by repeating the ninth grade. Assuming that instead of attending summer school, he had opted to repeat the ninth grade, it is beyond dispute that the school could not have charged him tuition for that additional year of schooling. Instead, however, G. Doe opted to recover his required credits by attending summer school and, in doing so, he was charged a fee for his attendance. The fact that one option would have been free and the other option incurred a fee necessarily leads to an absurd result. See

Mendes, 41 A.3d at 1002 (stating "under no circumstances will this Court construe a statute to reach an absurd result") (internal quotation marks omitted). Consequently, the Court concludes that summer school is an instructional program to which the prohibition on charging tuition applies.

This conclusion is supported by the historical approach taken by the Board on such matters. See Forty-Eighth Annual Report of the State Bd. of Educ. Together With the Seventy-Third Annual Report of the Comm'r of Public Sch. of R.I. (Hamilton Press, 1918). In its 1918 report, the Board expressed disapproval "that the school committee in certain towns of the State, with a view of securing discipline and regularity of attendance in evening schools, requires a deposit of money as a prerequisite for attending these schools . . . ." Id. at 21. After observing that "the public schools, both day and evening, should be free[,]" the Board opined:

> "To exact a charge for admission is contrary to the spirit of the entire school system . . . Besides, there appears to be no authority for the collection of such a fee and no warrant in the law for its retention, when forfeited, by the school committee or town." Id. (emphasis added).

Similarly, in the instant matter, not only is there no statutory authority for the collection of fees for summer school, but also the charging of such a fee is contrary to the spirit of the school system itself—which is to provide a free public education to all students. Considering that the School District did not have any authority to charge a fee for summer school in the first instance, the Court concludes that the Council erroneously affirmed the denial of Plaintiff's request for a waiver. Consequently, Plaintiff is entitled to reimbursement of the fees that she had to pay for her son's summer school tuition.

B

Litigation Expenses

In addition to asking this Court to reverse and vacate the Council's decision and to reimburse the tuition fees charged, Plaintiff requests fees and costs under the EAJA. At the outset, this Court observes that because Rhode Island's EAJA "is modeled on the Federal Equal Access to Justice Act, 28 U.S.C.A. § 2412 (West 1978) . . . this court 'should follow the construction put on it by the federal courts, unless there is strong reason to do otherwise.'" Krikorian v. R.I. Dep't of Human Servs., 606 A.2d 671, 674 (R.I. 1992) (quoting Laliberte v. Providence Redevelopment Agency, 109 R.I. 565, 575, 288 A.2d 502, 508 (1972)).

The EAJA "'was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings.'" Tarbox v. Zoning Bd. of Review of Jamestown, No. 2014-188-Appeal, slip op. at 13 (Mar. 15, 2016) (quoting Krikorian, 606 A.2d at 673). The purpose of the act is "to address government abuse and agency decisions made without substantial justification . . . [by] 'encourag[ing] individuals and small businesses to contest unjust actions by the state and/or municipal agencies . . . .'" Tarbox, No. 2014-188-Appeal, slip op. at 14 (quoting § 42-92-1(b)); see also Gutierrez v. Barnhart, 274 F.3d 1255, 1262 (9th Cir. 2001) (reiterating that "'a clearly stated objective of [the EAJA] is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority'") (quoting Ardestani v. INS, 502 U.S. 129, 138 (1991)). Thus, under the EAJA, "a prevailing '[p]arty' (§ 42-92-2(5)) may be awarded '[r]easonable litigation expenses' (§ 42-92-2(6)) where the '[a]gency' (§ 42-92-2(3)) was without 'substantial justification' (§ 42-92-2(7)) in actions that led to an '[a]djudicatory proceeding[]' (§ 42-92-2(2)) or taken in the

proceeding itself." Tarbox, No. 2014-188-Appeal, slip op. at 14. For purposes of the EAJA, a "'Party' means any individual whose net worth is less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated . . . ." Section § 42-92-2(5).

In bringing a claim, '"[t]he EAJA applicant has the burden of proving he [or she] is a prevailing party."' Advanced Gov't Solutions, Inc. v. United States, 123 Fed. Cl. 610, 612 (2015) (quoting Davis v. Nicholson, 475 F.3d 1360, 1366 (Fed.Cir. 2007)). However, "[s]ince fees are awarded only to a prevailing party, it follows that the fact that the government lost does not create a presumption that its position was not substantially justified." United States v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985). Instead, '"the government bears the burden of proving its position was substantially justified."' Advanced Gov't Solutions, Inc., 123 Fed. Cl. at 612 (quoting Libas, Ltd. v. United States, 314 F.3d 1362, 1365 (Fed.Cir. 2003)); see also Stewart v. Astrue, 561 F.3d 679, 683 (7th Cir. 2009) (stating the agency "bears the burden of proving that both [its] pre-litigation conduct, including the [underlying] decision itself, and [its] litigation position were substantially justified").

The term "Substantial justification" means that "the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Sec. 42–92–2(7). In demonstrating substantial justification, the governmental agency "must show 'not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct.'" Krikorian, 606 A.2d at 675 (quoting Taft v. Pare, 536 A.2d 888, 893 (R.I. 1988)).

Although a case may involve an issue of first impression, that fact, standing alone, is not enough to demonstrate substantial justification. See Gutierrez, 274 F.3d at 1261 ("Whether a litigated issue is one of first impression is properly considered as one factor in determining

whether the government's litigation position is substantially justified . . . [however,] there is no per se rule that EAJA fees cannot be awarded where the government's litigation position contains an issue of first impression."); Swiney v. Gober, 14 Vet. App. 65, 71 (2000) (stating "whether a case is one of first impression is only one factor for the Court to consider"); Keasler v. United States, 766 F.2d 1227, 1234 (8th Cir. 1985) ("That a case presents an issue of first impression in the forum does not ipso facto make the government's position in the litigation reasonable.").

Instead, "[t]he governing standard . . . allows the Government to advance 'in good faith . . . novel but credible . . . interpretations of the law that often underlie vigorous enforcement efforts.'" Abramson v. United States, 45 Fed. Cl. 149, 152 (1999) (quoting Russell v. Nat'l Mediation Bd., 775 F.2d 1284, 1290 (5th Cir. 1985)) (emphasis added). This means that for an issue of first impression to be controlling, "a true question of novelty or first impression must be present for the Government's position to be substantially justified." Abramson, 45 Fed. Cl. at 152 (citing Ratnam v. INS, 177 F.3d 742, 743 (9th Cir. 1999) (standing for the proposition that "where case law of circuit ran squarely against Government's position, Government was not substantially justified in relying on first impression simply because other courts elsewhere in the country were more receptive to its arguments"); see also Gutierrez, 274 F.3d at 1262 (rejecting suggestion that "the government gets an automatic 'first impression' free pass" after violating "its own regulations, or assumably any clear legal rule, for the first time . . .").

In the instant matter, the issue before the Court was one of first impression. From the foregoing, it is clear that this issue, standing alone, is not sufficient to demonstrate substantial justification on the part of Defendants. Nevertheless, if Defendants' position on this issue "was at least colorably supported by the legislative history of the statutory provision involved . . .

[then] its litigating position [may have been] substantially justified within the intendment of the Equal Access to Justice Act . . . ." Change-All Souls Hous. Corp. v. United States, 1 Cl. Ct. 302, 304 (1982). However, as the parties have not briefed their positions with respect to the EAJA claim, this issue is not yet ripe for determination.

IV

Conclusion

For the foregoing reasons, the Court concludes that the Council's decision was made in violation of constitutional, statutory and regulatory provisions, was clearly erroneous in view of the reliable, probative and substantial evidence of the whole record, and was arbitrary and capricious and characterized by an abuse of discretion. Substantial rights of the Plaintiff have been prejudiced. Accordingly, this Court reverses the decision of the Council and grants Plaintiff's request for reimbursement of the fees paid for summer school tuition. Furthermore, unless and until the parties brief the issue, the request for fees and costs in accordance with the EAJA is not yet ripe for this Court's determination.

Counsel shall submit an appropriate order in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Giannini v. Council on Elementary and Secondary Education, et al.**
CASE NO:	**PC 2014-5240**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 30, 2016**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**Veronika M. Kot, Esq.**
For Defendant:	**Paul V. Sullivan, Esq.** **Stephen Adams, Esq.**