006-16

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COMMISSIONER OF EDUCATION

NEWPORT COMMUNITY SCHOOL, *Petitioner,*	:
vs.	:
TIVERTON SCHOOL COMMITTEE and MIDDLETOWN SCHOOL COMMITTEE, *Respondents*	:

DECISION AND ORDER

Held: Commissioner has subject matter jurisdiction under RIGL § 16-39-2 over petition by private provider of alternative learning plan services seeking payment for the cost of such services provided to students referred by two LEAs which had waived compulsory attendance as to the referred students, aged sixteen to eighteen, pursuant to RIGL § 16-19-1(b); the LEAs had no legal right to refuse payment and in effect abandon their responsibility to the referred students, and thus the petition was granted, exclusive of attorneys' fees and costs.

February 22, 2016

I. Introduction

Petitioner, NEWPORT COMMUNITY SCHOOL ("NCS" or the "Petitioner"), a provider of alternative learning plan ("ALP") services, filed a petition (the "Petition") with the Commissioner on or about July 16, 2015 requesting that he: (1) direct the General Treasurer to deduct the amount of certain past-due tuition invoices pertaining to ALP services provided by NCS to students referred by Respondents, TIVERTON SCHOOL DEPARTMENT ("Tiverton") and MIDDLETOWN SCHOOL DEPARTMENT ("Middletown" and collectively, the "Respondents"), plus "all reasonable attorneys' fees and costs," from the state school aid provided to the Respondents; and (2) declare that going forward, Respondents have an obligation to compensate NCS for ALP services provided to students they refer.

The facts, below, are not in dispute and the parties agreed to brief the relevant legal issues which, as will be discussed, dictate that the Petition be granted, absent an award of attorneys' fees or costs.[1]

II. Undisputed Facts and Legal Provisions

1. The state's compulsory school attendance statute, which was amended in 2011 to include students between sixteen and eighteen years of age,[2] provides, in pertinent part, that:

> [e]very child who has completed or will have completed six (6) years of life on or before September 1 of any school year and has not completed eighteen (18) years of life shall regularly attend some public day school during all the days and hours that the public schools are in session in the city or town in which the child resides.

RIGL § 16-19-1(a).

[1] Pursuant to Stipulated Scheduling Orders dated November 5, 2015 and December 18, 2015, NCS submitted a Memorandum in Support of its Appeal on December 17, 2015 (the "NCS Mem."); Tiverton and Middletown submitted memoranda in opposition on January 7, 2016 (the "Tiverton Mem." and the "Middletown Mem," respectively); and NCS submitted a final Reply Memorandum on January 18, 2016 (the "NCS Reply Mem.").

[2] *See* P.L. 2011, chs. 338 and 376, § 1, eff. July 13, 2011.

2. The statute provides that a waiver may be granted by a superintendent only upon proof that the student is sixteen (16) years of age or older, "and has an [ALP] for obtaining either a high school diploma or its equivalent," *see id.* at (b), and it mandates that ALPs shall:

> [a] . . . include age-appropriate academic rigor and the flexibility to incorporate the pupil's interests and manner of learning. These plans may include, but are not limited to, such components or combination of components of extended learning opportunities as independent study, private instruction, performing groups, internships, community service, apprenticeships, and online courses that are currently funded and available to the school department and/or the community [; and]
>
> [b] . . . be developed, and amended if necessary, in consultation with the pupil, a school guidance counselor, the school principal and at least one parent or guardian of the pupil, and submitted to the superintendent for approval.

Id.

3. The statute also provides that "[i]f the superintendent does not approve the [ALP], the parent or guardian of the pupil may appeal such decision to the school committee," and then, if necessary, "to the Commissioner of education pursuant to chapter 39 of title 16." *Id*.

4. The statute's Implementation Requirements (the "Implementation Requirements"), which were published by the Rhode Island Department of Elementary and Secondary Education ("RIDE") on or about August 1, 2013, provide in pertinent part as follows:

> **Superintendent** is responsible for approving [ALPs] with acceptable learning programs or opportunities that have been developed in conjunction with the appropriate school personnel, the student and at least one parent or guardian. Signing [ALPs] indicates that the student has been given permission to be waived from regular attendance at their resident local educational agency [("LEA")]/school.
>
> **Parents or guardians** are responsible for participating in the development of the [ALP]. A parent or guardian will be required to sign the [ALP] that indicates they participated in the development of the plan, give permission for their son or daughter to participate in the alternative learning activities, and that they understand the conditions for continuation of the alternative learning program.

> **Students** are required to participate in the development of their [ALP], obtain parent or guardian permission, and fulfill the expectations and conditions of their alternative learning plan program.

Id. at 3.

5. The Implementation Requirements also make clear that "[it] is expected that our educators and counselors have exhausted all available learning programs for students seeking a waiver and that waivers are only granted to students who are at great risk for dropping out of school," *id*. at 2, and in addition, provide that:

> ***[s]tudents enrolled in [ALPs] will remain as an enrolled student of the resident LEA until completion of their plan***, obtainment of a high school diploma or its equivalent, or until such time as the conditions for withdrawal (dropping out) are met (*see* RIGL § 16-19-1 for conditions for withdrawal from school).

Id. at 3 (emphasis added).

6. LEAs continue to receive state education aid under title 16, chapter 7 of the Rhode Island General Laws and pursuant to the state's Education Equity and Property Tax Relief Act, RIGL § 16-7.2-1, *et seq*. (collectively, the "Funding Formula"), for students whose compulsory attendance has been waived and who are receiving ALP services.

7. NCS, a domestic, non-profit corporation, has been providing ALP services to students referred by LEAs in Newport County since September of 2011. *See* Petition at ¶ 3. NCS receives no funding with respect to such services other than the tuition payments made by referring LEAs. *See id.* at ¶ 2.

8. On August 28, 2014, NCS sent Tiverton's Superintendent a schedule of fees for APL services available at its Aquidneck Island Adult Learning Center (the "NCS Learning Center"), including a per pupil cost based upon the aid provided to Tiverton under the Funding

Formula. *See* Petition at ¶ 13 and Exhibit 1. A similar schedule of fees was sent by NCS to Middletown's Superintendent on September 2, 2014. *See id.* at Exhibit 4.[3]

9. At the beginning of the 2014-15 school year, Tiverton waived the compulsory attendance requirement and referred five students aged 16-18 to the NCS Learning Center. *See* Petition at ¶ 24. Middletown waived the requirement and referred ten such students. *See id.* at ¶ 35.

10. Each time Middletown referred a student to the NCS Learning Center, it informed its Director, in writing, that "the parent is responsible for the cost of the program." *See* Middletown Mem. at Exhibit A. However, no evidence was presented suggesting either that NCS responded to any of the notices from Middletown or that any of the students' parents had actually been notified that they would be billed for the ALP services.

11. On April 14, 2015, NCS sent an invoice to Middletown totaling some $7,922 with reference to the ALP services provided to the ten students who had been referred to the NCS Learning Center during the 2014-2015 school year.[4]

12. Middletown failed and refused to honor the NCS invoices, claiming that the students' parents were responsible for the cost of the program. S*ee id.* at Exhibit 5. NCS nonetheless continued to provide the ALP services and the Middletown students completed the 2014-15 school year at the NCS Learning Center.

13. During the period October 7, 2014 through January 15, 2015, NCS sent invoices to Tiverton totaling some $13,604 with reference to the ALP services provided to the five

[3] Tiverton referred students to NCS for ALP services during the 2013-14 school year and evidently paid NCS for that year without protest. *See* NCS Mem. at 2. There is no evidence that Middletown referred students to NCS prior to the 2014-15 school year in dispute.

[4] *See id*. at Exhibit 6. Although not material, the amount charged Middletown evidently reflected a credit for lease payments owed the Town. *See id*. at ¶ 34.

students who had been referred to the NCS Learning Center during the 2014-2015 school year. *See id.* at Exhibit 3.

14. Tiverton failed and refused to honor the NCS invoices and stated on January 21, 2015 that "the Tiverton School Department has no obligation to pay for your services. Accordingly no payment will be made." *See id.* at Exhibit 2.

15. In response, NCS discharged the five students from Tiverton.

16. As noted, NCS has requested that the Commissioner: (a) direct the General Treasurer to deduct the amounts billed the Respondents for the 2014-15 school year, plus "all reasonable attorneys' fees and costs," from the state school aid provided to the Respondents; and (b) declare that Respondents have "an obligation to compensate NCS for services provided to [their] students going forward."[5]

III. The Positions of the Parties

1. NCS

NCS cites four (4) statutes which it claims confers jurisdiction upon the Commissioner:

(a) RIGL § 16-39-1, which confers jurisdiction with respect to "any matter of dispute . . .arising under any law relating to schools or education." *Id.*;

(b) § 16-39-2, which pertains to appeals by "[a]ny person aggrieved by any decision or doings of any school committee or in any other matter arising under any law relating to schools or education . . ." *Id.*;

(c) § 16-5-30, which refers to "nonpayment of tuition owed by one community to another." *Id.*; and

(d) § 16-7-31, which pertains to the failure of "any community" to "maintain local appropriation" or to "appropriate or otherwise make available to the school committee the minimum sums provided in this chapter. . ." *Id.*[6]

[5] *See id.* at 4, 5-6.

[6] *See* NCS Mem. at 7-8 citing *N.R.I. Collab. v. East Providence Sch. Cmmttee.*, RIDE No. 0008-09 (April 24, 2009); *Turning the Corner v. Cranston Sch. Cmmttee.*, RIDE No. 0001-05 (January 11, 2005); and *Jane A.U. Doe v. Portsmouth Abbey School*, RIDE No. 009-97 (February 19,

As to the merits, NCS concedes that there is "a gap in the statutory and regulatory framework" regarding payment for ALP services since "nowhere in the statute or current regulations does it directly state who must pay for the provision of services related to an [ALP]."[7] NCS argues that the Commissioner must fill this gap by making clear that the cost of providing such services must be borne by the referring LEA. According to NCS, any other interpretation – such as one requiring that a student's parents bear the cost – would "ignore the fundamental principle that every child is entitled to a free, appropriate, public education" ("FAPE").[8]

2. Tiverton and Middletown

Respondents claim that the Commissioner lacks subject matter jurisdiction, arguing that the Petition does not implicate a specific educational or jurisdictional statute,[9] but rather is a claim for breach of contract – a "pure collection matter" – over which the Commissioner has historically refused to exercise jurisdiction.[10] Middletown also claims that NCS lacks standing to raise a student's right to a FAPE.[11] In addition, Tiverton argues that the Petition must be

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1997).

[7] *See* NCS Mem. at 1, citing *Asadoorian v. Warwick Sch. Cmmttee.*, 691 A.2d 573 (R.I. 1997); *Little v. Conflict of Interest Comm.*, 397 A.2d 884 (R.I. 1979); *Britt v. Britt*, 383 A.2d 592 (R.I. 1978); *Sch. Cmmttee. of the City of Providence v. Bd. of Regents for Educ*., 429 A.2d 1297, 1300-01 (R.I. 1981); *Members of Jamestown Sch. Cmmttee. v. Schmidt*, 427 F.Supp. 1338, 1345 (D.R.I. 1977); *Sousa v. School One*, RIDE No. 0001-93 (January 27, 1993); and *Laidlaw Transit, Inc. v. South Kingstown Sch. Cmmttee.*, RIDE No. 0026-92 (April 6, 1992).

[8] *See* NCS Mem. at 3, citing RIGL § 16-64-1.1(a).

[9] S*ee* Tiverton Mem. at 8-9; Middletown Mem. at 3-4, citing *LaPierre v. Cranston Sch. Cmmttee.*, RIDE No. 0018-88 (May 11, 1988) and *Sch. Cmmttee. of the City of Providence*, note 4, *supra*.

[10] *See* Tiverton Mem. at 10-11, citing *N. R.I. Collab.*, note 4, *supra*; *Coen v. Portsmouth Sch. Cmmttee.*, RIDE No. –29-08 (October 10, 2008); and *Pardo v. Johnston Sch. Cmmttee.*, RIDE No. 0023-03 (November 20, 2003); *see also* Middletown Mem. at 4, citing *N. R.I. Collab.*, note 4, *supra.*

[11] *See* Middletown Mem. at 4-5.

dismissed since NCS failed to name the correct party, i.e., the Town Treasurer.[12]

As to the merits, Respondents agree with NCS that there is no legal authority expressly mandating that school districts fund ALPs.[13] Middletown argues that parents should be charged, while Tiverton simply ignores the cost issue.[14] In addition, Respondents argue that the Commissioner should not hold them liable, despite the fact that they continue to receive state aid with respect to students they refer to the NCS Learning Center, because:

(a) "silence on local obligations for home instruction and [ALPs] is markedly different from the other statutes governing other situations in which a student might be receiving educational services outside the local public school[;]"[15]

(b) "[t]he simple fact that the [LEA] approved of a student's home instruction or [ALP] does not by itself translate into a funding obligation for that program[;]"[16] and

(c) "FAPE may be a statutory requirement – but only for those students who are eligible for special education services under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., or Section 504. It does not apply to general education students."[17]

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[12] S*ee* Tiverton Mem. at 12. Presumably, Tiverton's citation to § 45-15-2 was a typographical error as that section concerns actions brought by, rather than against, a municipality. Thus, it will be assumed that Tiverton intended to cite § 45-15-5, which, provides, *inter alia*, that suit can only be commenced forty (40) days after the "claim or demand against any town or city" has been presented to the Town or City Council. *See id.*

[13] *See* Tiverton Mem. at 2; Middletown Mem. at 2-3.

[14] *See* Middletown Mem. at 1-2; Tiverton Mem. at 3-8.

[15] *See* Tiverton Mem. at 5-6, 8, citing RIGL §§ 16-7-30 (mandating that communities not maintaining a local high school must make provision for the free attendance of its children at some high school or academy approved by the state board of regents for elementary and secondary education"); 16-5-30 and 16-45-10 (providing remedy for "nonpayment of tuition owed by one community to another including but not limited to . . . vocational education"); 16-21.1-2 and 16-23-2 (providing for free transportation and books); 16-64-1.1 (mandating certain payments for children placed in foster care, group homes and other residential facilities); and 16-77.3-5 and 16-77.4-5 (mandating certain payments to charter schools); *see also* Middletown Mem. at 203.

[16] *See* Tiverton Mem. at 5.

[17] *See* Tiverton Mem. at 7; *see also* Middletown Mem. at 4-5.

IV. Discussion

1. Jurisdiction and Procedural Matters

The fact that the Petition involves the "decisions" and/or "doings" of two school committees is not in dispute.[18] Thus, the Commissioner's jurisdiction must be established with reference to RIGL § 16-39-2, which makes explicit reference to school committees, rather than § 16-39-1, which does not. And since NCS – a domestic, non-profit corporation – is not a "community" within the meaning of either § 16-5-30 or § 16-7-31, neither section is applicable.[19]

In *Sch. Comm. of the City of Providence,* note 7, *supra,* the Rhode Island Supreme Court made clear that the Commissioner's jurisdiction under RIGL § 16-39-2 requires that:

> (a) the party appealing to the Commissioner be "aggrieved" within the meaning of the statute;
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> (b) the appeal involves a "decision" or "doing" of a school committee; and
>
> (c) the committee's' "decision" or "doing" "[arose] under a law relating to schools or education."

See id. at 1300-1301.

Middletown has challenged NCS's status as an "aggrieved party," arguing that it failed to meet the requirement of (a), above. Yet, whether or not NCS has standing to assert a student's right to FAPE,[20] it is clear that NCS is "aggrieved" under § 16-39-2 because it has alleged a "concrete and particularized" economic injury.[21]

As noted, Respondents do not dispute that NCS has appealed the decisions of two school

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[18] Familiar agency principles render the lack of any formal action by the school committee irrelevant. *See* RIGL § 16-2-11(a) (superintendent "shall be the chief administrative agent of the school committee").

[19] The applicable definition includes "any city, town or regional school district . . ." *See* RIGL § 16-7-16(5).

[20] *See infra* at 15.

[21] *See Sch. Cmmttee. of City of Providence,* note 7, supra, 429 A.2d at 1300 and *Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997).

committees and thus do not dispute that the requirement of (b), above, has been satisfied. However, Respondents both claim that NCS has failed to meet the requirement in (c), above, arguing that their decisions not to reimburse NCS were not related to any "law relating to schools or education." *See* notes 9-11 *supra*, and accompanying text.

In *Laidlaw Transit, Inc*., note 7, *supra*, the Commissioner held that a private transportation company's appeal of a school committee's failure to award the company a five-year school transportation contract did not "'arise under' a law relating to schools or education" because it did not "require construction or application of an educational statute," *see id.* at 4, an articulation which the Rhode Island Supreme Court has cited with approval, expressly finding it to be "a correct interpretation of the law."[22] More recently, the Commissioner has framed the relevant inquiry in terms of whether and to what extent the matter would involve him "in a non-educational matter to which he brings no expertise or special insight."[23] In other words, not all § 16-39-2 petitions alleging a breach of contract are outside the Commissioner's jurisdiction, only those that do not "require construction or application of an educational statute."

Thus here, the fact that NCS characterizes its Petition as an action for breach of contract[24] is not dispositive. The relevant inquiry is two-fold: (a) Does resolving the issues raised by the

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[22] *See Asadoorian*, note 7, *supra*, 691 A.2d at 582.

[23] *See N. R.I. Collab.,* note 6, *supra* at 3 (Commissioner brought no "expertise or special insight" into task of interpreting term "net-30 days" in contract between school committee and non-profit corporation providing special education and related services). Admittedly, some of the Commissioner's decisions cited by Respondents on the jurisdictional issue appear hard to reconcile, at least at first blush. *Compare, e.g*., *Pardo,* note 10, *supra* at 4-5 (denying jurisdiction over appeal concerning the placing of a letter of reprimand in a teacher's personnel file) with *LaPierre*, note 9, *supra* at 4-6 (exercising jurisdiction over teacher's claim to tenure based upon law pertaining to veterans); *see also Jane A.U. Doe*, note 6, *supra* at 5-6 and *Sousa*, note 7, *supra*, at 5 (denying jurisdiction over claim under the Educational Bill of Rights, RIGL § 16-71-1, while deciding that provisions did not apply to private schools). Upon closer examination, however, it is apparent that the difficulty is a function of the *sui generis* nature of the analysis, rather than any material doctrinal inconsistency.

[24] *See* Petition at ¶¶ 25 and 41.

Petition require the construction and/or application of an educational statute? And if so, (b) To what extent would resolving these issues unnecessarily involve the Commissioner in a non-educational matter to which he brings no expertise or special insight?

In fact, NCS has not relied upon contract theory in any conventional sense, eschewing the evidence usually associated with contract formation such as proof of a specific and individual "intent to be bound by the terms of [an] agreement."[25] Rather, NCS argues that liability arises by operation of law, and more specifically, by operation of the state's compulsory education statute, i.e., RIGL § 16-19-1 (quoted in relevant part at ¶¶ 1-3, *supra*) and its Implementation Requirements (quoted in relevant part at ¶¶ 4-5, *supra*).[26] Therefore, the answer to part one of the two-part inquiry is in the affirmative. Unlike the cases relied upon by the Respondents,[27] resolution of the issues raised by NCS requires the construction and/or application of an educational statute.

As to the second part of the inquiry, the issues relevant to the Petition are not likely to unnecessarily involve the Commissioner in non-educational matters, but rather pose questions relating to the meaning of the state's compulsory education statute that are squarely within his area of expertise and the duties that have been expressly conferred upon him by the General Assembly.[28]

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[25] *See R.I. Five v. Medical Assocs*., 668 A.2d 1250 (R.I.1996) (citation omitted).
[26] *See* NCS Reply Mem. at 3-7.
[27] *See* Tiverton Mem. at 10, citing *N.R.I. Collab*., note 6, *supra* (construing the term "net-30 days" in a contract between an LEA and a private entity); *Coen*, note 10, *supra* (alleged agreement between teacher/coach and superintendent re employment); and *Pardo* note 10, *supra* (whether letter of reprimand should be removed from teacher's personnel file); and *Smith v. Tiverton Sch. Cmmttee.*, RIDE No. 0023-00 (June 26, 2000) (employment dispute between school administrator and LEA); *see also* Middletown Mem. at 3-4, citing *N.R.I. Collab*., *supra.*
[28] The Commissioner has been expressly delegated by the General Assembly to, *inter alia*: (a) "interpret school law" under §§ 16-1-5(10), 16-60-6(9)(viii); (b) "require the observance of all laws relating to elementary and secondary schools and education" under §§ 16-1-5(9) and 16-60-

As to Tiverton's argument concerning NCS's failure to join the Town Treasurer, there is absolutely no legal support for the notion that the municipal claims process mandated under chapter 15 of title 45 applies to appeals under chapter 39 of title 16. Indeed, the notion that one would have to appeal education-related issues from a municipal school committee to a municipal city council directly contradicts the intent of the General Assembly when it delegated to the Commissioner the "duty" to "decide such controversies as may be appealed . . . from decisions of local school committees."[29]

Thus, the Commissioner has jurisdiction over the relevant subject matter.

Finally, it should be noted that the burden of proof is on NCS to prove its case by a preponderance of the evidence, and that the Commissioner's review is *de novo*.[30]

2. The Merits

Respondents make slightly different arguments to defend their non-payment. Both rely upon (a) the lack of any specific statutory provision expressly mandating that LEAs pay for the cost of ALP services,[31] and (b) argue that they have no duty to provide students with a FAPE.[32] However, Middletown also maintains (c) that the students' parents should bear the cost of ALP

6(9)(vii); and (c) "administer the policies, rules, and regulations of the board of education and the council on elementary and secondary education with relation to the entire field of elementary and secondary education within the state not specifically granted to any other department, board, or agency and not incompatible with law" under § 16-60-6(11).

[29] *See* RIGL §§ 15-1-5(10), 16-60-6(9)(viii) and 16-39-2.

[30] *See, e.g., Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases); *see* also 2 Richard Pierce, *Administrative Law Treatise*, § 10.7 at 759 (2002); *see also Pawtucket Sch. Cmmttee. v. Bd. of Regents*, 513 A.2d 13, 17 (R.I. 1986), citing *Brown v. Elston*, 445 A.2d 279, 285 (R.I.1982) and *Slattery v. School Committee of Cranston*, 116 R.I. 252, 263, 354 A.2d 741, 747 (1976) ("We have consistently held that § 16–39–2 provides aggrieved persons *de novo* review by the commissioner of education of school committee decisions").

[31] *See* Tiverton Mem. at 2-6 and Middletown Mem. at 2-3.

[32] *See* Tiverton Mem. at 6-8 and Middletown Mem. at 4-5.

services,[33] while Tiverton simply ignores the cost issue.

a. The Alleged Statutory Gap

Although they have challenged the Commissioner's jurisdiction, Respondents have not addressed NCS's contention that the "statutory silence" they suggest is present under the 2011 amendment to § 16-19-1 should be filled by the Commissioner.[34] Rather, Respondents argue, without benefit of legal authority, that this "silence" was intended by the General Assembly to enable LEAs to delegate their legal and financial obligations to students aged sixteen to eighteen to the students' parents, and/or to third-party providers of ALP services like NCS. However, this counter-intuitive assumption is nowhere supported by the evidence.

If the General Assembly had intended to enable LEAs to avoid responsibility for students in the sixteen to eighteen age range it hardly seems likely that it would have amended the compulsory attendance statute in 2011 to include these students without making clear that LEAs would not be responsible for the cost of ALP services; nor would the General Assembly have:

(a) provided that when enrolled in ALPs, students "remain[ed] as an enrolled student of the resident LEA until completion of their plan," thus enabling LEAs to continue to receive state education aid under the Funding Formula;[35] or

(b) carved out a clear role for the LEAs both by requiring: (i) that § 16-39-2 waivers be approved by a superintendents only in limited situations – i.e., when a student: is "at great risk for dropping out of school," and "has an [ALP] for obtaining either a high school diploma or its equivalent," *see* ¶¶ 2 and 5, *supra* – and (ii) that LEAs remain involved after referral by considering the need for ALP amendments, and then requiring that superintendents approve any amendments that might be required.

See RIGL § 16-19-1(b) (quoted at ¶ 2, *supra*).

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[33] *See* Middletown Mem. at 2 and attached Exhibit A.
[34] *See* NCS Reply Mem. at 4, citing *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ*., 550 U.S. 81, 89, 96 (2007) and *Energy Corp. v. Riverkeeper, Inc*. , 556 U.S. 208, 223 (2009); *see also* note 23, *supra*.
[35] S*ee* ¶¶ 5-6, *supra.*

b. Charging Parents for ALP Services

Respondents' bare assumption as to the effect of the relevant "statutory silence" seems particularly unlikely when one focuses upon the cost issue. As noted, Middletown argues that the General Assembly secretly intended that parents should pay for the cost of mandated ALP services.[36] For its part, Tiverton simply ignores the cost issue, evidently assuming that the General Assembly intended that third party providers like NCS would provide ALP services on a *pro bono* basis.[37] In fact, both Middletown's argument and Tiverton's assumption ignore clear evidence of legislative intent establishing that charging fees for mandatory services is not permissible.

Indeed, the Commissioner has on several occasions emphasized that charging fees for mandated services "violates a fundamental principle of Rhode Island School law."[38] As the Commissioner has noted, the Board of Education emphasized as early as 1917 that imposing fees "introduces anew one of the greatest evils of the public school system."[39]

Middletown cannot avoid this "fundamental principle" by simply sending a letter unilaterally concluding that "the parent is responsible for the cost of the program."[40] And Respondents' reliance on *Student G. Doe v. Cumberland*, RIDE No. 002-14 (March 18, 2014) (appeal pending), is misplaced. Unlike the voluntary summer school programs the cost of which the Commissioner held could be charged to students or parents in *Student G. Doe*, ALP services

[36] *See* Middletown Mem. at 1-2.
[37] *See* Tiverton Mem. at 3-8.
[38] *See* Commissioner's August 5, 2009 letter to the Executive Director of the R.I. Interscholastic Athletic League (prohibiting LEAs from charging fees for the right to compete in interscholastic athletics).
[39] *See id. at* 1, citing Report of the State Board of Education, Rhode Island School Reports at 21 (1917).
[40] *See* ¶ 10, *supra*, citing Middletown Mem. at Exhibit A.

are mandatory if compulsory attendance is to be waived,[41] and LEAs continue to receive education aid from the state with respect to students receiving such services.[42] Thus, ALP services are materially different from the programs addressed in *Student G. Doe*.[43]

c. The Duty to Provide a FAPE

NCS argues that charging fees for ALP services would "ignore the fundamental principle that every child is entitled to a [FAPE]."[44] Although, as noted, charging these fees violates a fundamental and long-standing principle of Rhode Island School law, and while it certainly is true that every child with a disability is entitled to a FAPE under the IDEA, it should be made clear that, as Respondents have noted,[45] the right to a FAPE does not extend to children without disabilities. Moreover, it is a right which is not generally enforceable by the Commissioner since applicable federal and state law mandates that IDEA "due process" complaints must be considered by an impartial hearing officer who is not an employee of RIDE.[46]

d. Attorneys' Fees and Costs

The Commissioner need not address the source and extent of his authority to award attorneys' fees, whether by statute – under Rhode Island's Equal Access to Justice Act, RIGL § 42-92-1 *et seq*.[47] or RIGL § 9-1-45, which provides for such awards in certain breach of contract

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[41] *See* RIGL § 16-19-1(b) (quoted at ¶ 2, *supra*).
[42] *See* Implementation Requirements at 3 (quoted at ¶ 5, *supra*), and ¶ 6, *supra*.
[43] *See id.* at 4 (emphasizing that "[n]o law or regulation mandates that [LEAs] establish and implement summer programs and courses, nor is there any legal authority allowing a school district to compel its students to attend summer school); *id.* (noting that LEA "does not receive state aid for the funding of the summer program"); and *id*. at 3 and note 6 (recognizing the possibility that fees may not be permissible if summer programs were required under a student's IEP).
[44] *See* NCS Mem. at 3, citing RIGL § 16-64-1.1(a).
[45] *See* Tiverton Mem. at 7, Middletown Mem. at 4-5.
[46] *See* IDEA, § 1415(b)(2) and R.I. Special Ed. Regs. at § 300.511(c)(i)(A).
[47] *See, e.g., Student Doe v. Davies Career & Tech. High School, RIDE No. 0027-07* (October 26, 2007) (awarding fees despite "some uncertainty" as to the applicability of the Equal Access to

actions – or pursuant to the inherent authority incident to his duty to resolve disputes involving school committees under § 16-39-2. Although a close call, it cannot be said that Respondents were not "substantially justified" within the meaning of the Equal Access to Justice Act,[48] or that there was "a complete absence of a justiciable issue of either law or fact" as required under RIGL § 9-1-45, especially under the lenient interpretation of the quoted language that has been followed by the Commissioner in the past.

Thus, NCS's request for attorneys' fees and costs is denied.[49]

V. Conclusion

For all the above reasons:

1. NCS's Petition is hereby granted, exclusive of attorneys' fees and costs;

2. However, Respondents shall have thirty (30) days from the date of this Decision, or until the close of business on March __, 2016, to pay the outstanding NCS invoices, failing which the Commissioner will forthwith direct the state's General Treasurer to withhold the requested amounts – i.e., $13,604 as to Tiverton and $7,922 as to Middletown – from the state aid to education which otherwise would be due to Respondents during the next state fiscal year for their general uses and purposes, and then to transfer said amounts to NCS; and

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Justice Act in hearings at RIDE); *Charland v. Pawtucket School Committee*, RIDE No. 0027-01 (November 26, 2001) (applying Act but denying fee request in absence of proof that applicant's net worth was less than five hundred thousand dollars ($500,000, as required under the Act); and *Ugurhan K. Akturk Kosereis v. DCYF*, RIDE No. 0031-98 (November 16, 1998) (argument that general appeals to the commissioner under §§ 16-39-1 and 16-39-2 are required to be "without cost to the parties involved" is a strong one against authority to award fees); *see also Taft v Pare*, 536 A.2d 888, 892-93 (R.I. 1988) (confirming an award of reasonable litigation expenses against the Registry of Motor Vehicles).

[48] *See* RIGL§ 42-92-2 (a). Under the Act, "substantial justification" requires that the position taken "has a reasonable basis in law and fact." *Id*. at (f).

[49] The Petitioner has not sought interest, thus whether or not the Commissioner has authority to award interest need not be decided here. *But see Quatrucci v. East Providence School Committee, Bd. Regents* (August 6, 2009) (no sound educational policy advanced by awarding pre-judgment interest to a teacher's back pay award).

3. Respondents, who shall not continue to avoid their responsibility to educate children of compulsory age, are hereby directed to pay the cost of ALP services with respect to students they may in the future refer to NCS, or to any other private provider of ALP services, on a timely basis.

For the Commissioner,

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Anthony F. Cottone, Esq.
Hearing Officer

Dated: February 22, 2016

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Ken Wagner, Ph.D.,
Commissioner