17-013

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 ON REMAND

Held: On remand, Commissioner affirmed his prior decision granting the claims of Petitioner, a private non-profit provider of alternative learning plan services, against two LEAs for the cost of such services which had been provided to students referred by the LEAs pursuant to RIGL §§ 16-19-1 and 16-67.1-3 while denying the Petitioner's request for an award of litigation expenses under the state's Equal Access to Justice Act.

Date: October 18, 2017

I. Introduction and Procedural Background

Petitioner, NEWPORT COMMUNITY SCHOOL ("NCS"), a non-profit corporation and 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") from the Respondents' state education aid;[1]

(2) declare that going forward, Respondents have an obligation to compensate NCS for ALP services provided to students they refer; and

(3) award NCS its fees and costs under the state's Equal Access to Justice Act (the "EAJA"), RIGL § 42-92-1, *et seq*.

After reviewing the legal memoranda submitted by the parties,[2] the undersigned hearing officer concluded that there was no genuine issue of *material* fact and thus presented a decision to the Commissioner which the Commissioner signed on February 22, 2016 (the "February 22 Decision") (NCS Ex. 24). The Decision, which contained a detailed recitation of the relevant undisputed facts and legal provisions, *see id*. at 2 – 6, held that:

(1) RIDE had subject matter jurisdiction over the Petition under RIGL § 16-39-2. *See id*. at 9-12;

(2) the fact that a 2011 amendment to the state's compulsory attendance statute allowing superintendents to waive attendance for students aged sixteen (16) years or older who had an approved ALP was silent as to liability for the cost of such services did not, *ipso facto*, mean that local educational agencies ("LEAs") like Respondents were entitled to

[1] For the sake of convenience, the school districts will be referred to as the Respondents even though the actual Respondents are their respective school committees.

[2] Pursuant to Stipulated Scheduling Orders dated November 5, 2015 and December 18, 2015, NCS submitted a Memorandum in Support of its Petition 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 Reply Memorandum on January 18, 2016 (the "NCS Reply Mem.").

unilaterally delegate their legal and financial obligations to such students to the students' parents and/or to third-party providers of ALP services like NCS. *See id.* at 12-16;

(3) Respondents had thirty (30) days to pay the outstanding NCS invoices to avoid a reduction in state education aid and in the future, should pay similar bills from NCS and other ALP service providers on a timely basis. *See id*. at 16-17; and

(4) although a "close call," an award of NCS's fees and costs under the EAJA was not warranted. *See id*. at 15-16.

Respondents appealed, and on August 9, 2016, the Council on Elementary and Secondary Education (the "Council'), without commenting upon the legal conclusions in the February 22 Decision or identifying a genuine issue of material fact, held that the failure to conduct an evidentiary hearing was a procedural error mandating that the case be remanded. *See* the Council's August 9, 2016 decision (the "Council Decision") at 1-3. Thus, an evidentiary hearing was conducted before the undersigned hearing officer on December 8, 2016 and January 27, 2017,[3] after which the parties simultaneously submitted post-hearing memoranda on March 9, 2017 (the various "Post-Hearing Mems."), with Respondents following-up with post-hearing reply memoranda on March 24, 2017 (the "Post-Hearing Reply Mems.").

II. Facts on Remand

A. The Prior Course of Dealing and RIDE's Compulsory Attendance Implementation Requirements

1. As was discussed in the February 22 Decision, the state's compulsory education law was amended in 2011 to raise the compulsory school age from 16 to 18 and to authorize school superintendents to waive the attendance requirement for students in that age range as long

[3] The transcripts of the two days of hearings were numbered consecutively by the stenographers and so will be referred to collectively as "Tr.," without reference to the separate, additional page numbers created after printing.

as they had an ALP in place for obtaining either a high school diploma or its equivalent. *See* February 22 Decision, ¶¶ 1-6 at 2-4, citing RIGL §§ 16-19-1 and 16-67.1-3. RIDE published guidance in connection with the amendments, *see* NCS Ex. 5, which was re-issued just prior to the start of the 2013-14 school year (the "Implementation Requirements"). *See* NCS Ex. 5A.

2. Under both the original and reissued Implementation Requirements, RIDE made clear that "[s]tudents enrolled in alternative learning plans 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* NCS Ex. 5 at 2-3; NCS Ex. 5A at 3.

3. As an adult general education ("GED") provider, NCS is a RIDE-approved provider of ALP services, *see* Tr. at 17-23; NCS Ex. 4, and it became involved in providing such services following the issuance of the Implementation Requirements. *See* Tr. at 33. In the past, Respondents paid the former Aquidneck Island Adult Learning Center (the "AIALC") for programs similar to what eventually became known as ALP's. *See id*. However, after the Newport School Department turned the AIALC over to NCS in 2010, Respondents were billed directly by NCS. *See id*. at 40, 55-56.

4. Thus, before the start of each school year, NCS's Executive Director sent a letter to Respondents specifying the fees NCS would assess for rendering ALP services to resident students. *See* Tr. at 38; NCS Ex. 8. The formula NCS used to develop its fee schedule was based upon the most recent per pupil cost figure for each LEA as determined by RIDE, *see* Tr.at 36-37, 39, NCS Ex. 7, and the rate schedule was based upon the program chosen and pro-rated by the number of days per week the program was offered. *See* Tr. at 40. In addition, charges

were assessed on a monthly basis and only in the months where the student was enrolled at NCS. *Id*. at 41. In the usual case, students would complete the program within three months. *See id*.

B. Tiverton's Students

The Six Students in 2014-15 ($13,604)

5. Tiverton's Superintendent, William Rearick, testified that he understood from the annual letters that the District received from NCS that NCS expected that Tiverton would pay for services rendered. *See* Tr. at 194. Indeed, Tiverton had paid NCS for such services during the prior school year. *See* Tr. at 54; NCS Ex. 14.

6. However, the Superintendent also testified that he decided in the Fall of 2014 to research whether Tiverton had a legal obligation to pay NCS. *See* Tr. at 201-202. Yet, he approved ALP applications on September 11, 2014 (Students M.B. and T.P.) and October 7, 2014 (Students A.M. and Z.M.), *see* NCS Ex. 12, without informing NCS that he doubted the District's legal obligation to pay, *see* Tr. at 207-209, and he did not inform NCS when – sometime in the end of October or the beginning of November, 2014 – he somehow concluded that Tiverton had no legal obligation to pay NCS's bills. *See id*. at 201-202, 207.

7. Tiverton students continued to receive services from NCS even though the Superintendent knew that NCS was unaware that the District had decided not to pay for the services being provided, *see* Tr. at 207-208, and on November 11, 2014 – after he had decided that his District would not pay NCS – Superintendent Rearick approved an ALP for Student A.B. *See* NCS Ex. 12

8. It was not until January 21, 2015 that Tiverton informed NCS for the first time that it did not intend to pay its bill, *see* NCS Ex. 22, and Tiverton did so then only in response to NCS's follow-up request for payment. *See id*.; *see also* NCS Ex. 22 (2014-15 invoice that

remains unpaid). As a result of Tiverton's refusal to pay for services rendered during 2014-15, the services were terminated by NCS. *See* NCS Ex. 23.

9. In addition, Tiverton claimed that it did not actually receive state education aid under the funding formula for ALP students during 2014-15 because, it alleged, the ALP students had been improperly coded by RIDE as "dropouts" under the state's funding formula. *See* Tr. at 239-241.

2015-16 (Student L.R.) ($982)

10. After this case was remanded by the Council, Tiverton – which until then had denied financial responsibility for NCS services without suggesting who should be made legally responsible for the cost of providing the services, *see* Tiverton Mem. at 3-8 – adopted Middletown's argument that a student's parents (or some other third party) should be required to pay for ALP services. *See* Tr. at 214-215. At the same time, Superintendent Rearick testified on remand that "we should pay moving forward; and if we received a favorable ruling, we'd figure out a way to be reimbursed, but you know, if we did not, we would be in compliance with the first Commissioner's ruling." Tr. at p. 212.

11. Nonetheless, Tiverton continued in its refusal to pay NCS. Thus, although Superintendent Rearick approved Student L.R.'s ALP during the 2015-16 school year, *see* NCS Ex. 25, and although Student L.R. received the services from NCS, the bill remains unpaid. *See* Tr. at 85; NCS Ex. 29 (2015-16 invoice that remains unpaid). Tiverton did issue a check to NCS, *see* NCS Ex. 33, however when NCS presented the check for payment it was informed that Tiverton had placed a "stop payment order" with its bank, s*ee* NCS Ex. 34, a practice which

Superintendent Rearick subsequently admitted was not in compliance with Tiverton's policy. *See* Tr. at 213.[4]

2016-17 (Student A.D.) ($982)

12. In addition, Superintendent Rearick signed a waiver form for Student A.D. at the beginning of the 2016-17 school year, *see* NCS Ex. 26, after having received NCS's annual letter identifying its fee schedule. *See* Tr. at 199; NCS Ex. 8

13. Yet, despite his testimony that Tiverton would pay for ALP services rendered while this case was pending, and specifically, that the bills pertaining to Student A.D. would be paid, *see* Tr. at 212, Tiverton has not honored this obligation. *See* NCS Ex. 30 (2016-17 invoice that remains unpaid).

C. The Ten Middletown Students During 2014-15 ($7,922)

14. In 2011, the Town of Middletown and NCS entered into a lease for space at the John F. Kennedy Middle School. *See* NCS Ex. 16. The lease, which remains in effect today, provides that NCS would grant a credit to Middletown for ALP services provided by NCS, *see id*., § 24 at 8; Tr. at 59-61, and the parties evidently agreed that the lease credit would apply to a maximum of three (3) students per year. *See* Tr. at 59-61. [5]

15. The lease credit granted by Middleton was sufficient to pay for ALP services provided to Middletown students up until 2014-15, when for the first time the annual three student limit was reached without covering ten students. *See* Tr. at p. 65; Tr. at 21; NCS Ex. 17. As to these ten students, NCS sent bills to Middletown totaling some $7,922. *See* NCS Ex. 15.

[4] Tiverton took the position that Student L.R.'s church was somehow on the hook and that NCS was required to accept payment from this third party, even though if offered no evidence that payment was actually tendered by anyone.

[5] Needless to say, the lease provision directly contradicts Middletown's position that it is not legally obligated to pay NCS for ALP services, as will be discussed.

16. Middletown alleged that three of these ten students (Students K.G., B.S. and B.S. (2)) did not receive the ALP services from NCS, citing to correspondence from a former NCS employee, Stanley Brown, which suggested that two of the students (Students K.G. and B.S.) had never attended NCS. *See* NCS Ex. 9; Tr. at 108-09.

17. In addition, upon approving a student's ALP, Middletown sent letters to NCS notifying them of the approval and stating that "[t]he parent [was] responsible for the cost of the program." *See* NCS Exs. 13 and 21; Middletown Ex. 1.[6]

18. Finally, Middletown pointed to a November 25, 2013 e-mail from an employee at RIDE who advised the District that in the case of a student who lived in a group home and who was in the custody of the state Department of Children, Youth and Families ("DCYF") – and who DCYF advised needed to be enrolled at Middletown High School and then placed at AIALC – "RIDE does not require you [Middletown] to pay the APAIC. However, district policy may require you to pay them." *See* Middletown Ex. 2.

III. The Positions of the Parties on Remand

A. NCS

In its Post-Hearing Mem., NCS reiterated the conclusion reached in the February 22 Decision that it had established the elements of its *prima facie* case and that Respondents had failed to raise a genuine issue of material fact. *See* NCS Post-Hearing Mem. at 1-2. It also reiterated its primary argument that Respondents were liable by operation of law, rather than pursuant to any common law contract theory, thus adopting the rationale of the February 22

[6] For what it's worth, NCS's Executive Director testified that "sometime in 2014" NCS formally adopted a policy not to accept payment for ALP services from parents or other third parties. *See* Tr. at 125.

Decision. *See id*. at 20-21.[7]

In addition, NCS maintained that despite using the hearings before RIDE as "a discovery endeavor," Respondents nonetheless failed on remand to raise a genuine issue of material fact, arguing that they had unsuccessfully attempted to challenge only three of the findings recited in the February 22 Decision (i.e., the findings in ¶ 6 (regarding ALP students' entitlement to state education aid), ¶ 9 (concerning whether students had actually been "referred" to NCS), and ¶ 10 (whether parents or other third parties should pay for ALP services)). *See* NCS Post-Hearing Mem. at 20-21, citing February 22 Decision.

Finally, NCS maintained that it was entitled to its litigation expenses under the EAJA, since, it claimed, Respondents had each failed to meet their burden of proving that they had acted with "substantial justification," declaring that:

> nearly every fact in this case was established without controversy. Of the three facts that were raised as being in 'controversy,' further analysis shows none had a reasonable or legitimate bearing on the ultimate decision because none were material (a contention previously made by NCS to the Commissioner and the Council).

NCS Post-Hearing Mem. at 34.

B. Respondents

(1) Common Legal and Factual Arguments

On remand, Respondents reiterated the legal arguments they both made prior to remand, i.e., that:

(a) the Commissioner lacked subject matter jurisdiction over the claims. *See* Middletown's Post-Hearing Mem. at 11-12; Tiverton's Post-Hearing Mem. at 8; Tiverton's Post-Hearing Reply Mem. at 1-2;

[7]Alternatively, NCS reiterated its arguments that Respondents were legally obligated to pay NCS under theories of implied-in-fact contract, *see id*. at 28-31, and/or quasi-contract. *See id*. at 31-33.

(b) since RIGL § 16-19-1(b) does not mention costs in connection with ALPs, no such liability should be imposed upon school districts. Middletown's Post-Hearing Mem. at 4; Tiverton's Post-Hearing Mem. at 6-8; and

(c) NCS failed as a matter of law to meet its burden of proof as to damages, *see* Middletown's Post-Hearing Mem. at 9-10 and/or with respect to its claim of implied or quasi contract. *See id*. at 4-6; Tiverton's Post-Hearing Reply. Mem. at 3-6.

In addition, Respondents argued that the Petition should be denied since RIDE had advised the Districts that they need not pay NCS and since arguably, RIDE's own coding policies had resulted in at least one of the Respondents not receiving state education aid for ALP students. *See* Middletown's Post-Hearing Mem. at 6-8 and Middletown's Post-Hearing Reply Mem. at 8-9; Tiverton's Post-Hearing Mem., ¶ 18 at 4. Finally, Respondents argued that NCS had failed to justify an award of fees or costs under the EAJA. *See* Middletown's Post-Hearing Reply Mem. at 6-8; Tiverton's Post-Hearing Reply Mem. at 6-14.[8]

2. Factual Arguments Specific to Tiverton

In defending its refusal to pay NCS's bill pertaining to Student L.R. during 2015-16, Tiverton argued that since Student L.R. had been accepted into an out-of-state college (an acceptance which was contingent upon her graduation from high school or completion of an ALP program) at the time her ALP was approved in 2015, she "was not seeking an ALP as an alternative to avoiding her compulsory attendance requirements, as contemplated by the Implementation Guidelines," but rather "to facilitate her early enrollment into a private, out-of-

[8] Although lacking in any evidence, Respondents also repeatedly raised generalized concerns regarding whether:

(a) NCS billing rates and calculations were appropriate; and
(b) NCS had been paid by parents or other third parties for the relevant ALP services.

state college," a purpose which the District should not be made to pay for. *See* Tiverton's Post-Hearing Mem. at 9-10.[9]

As to Student A.D. in 2016-17, Tiverton emphasized the fact that at the time the waiver was signed, Student A.D., while still enrolled as a Tiverton student, *see* id. at 11-12; NCS Ex. 5A at 3, was already 18 years of age. *See id*. at 11, citing Tr. at 199.

3. Factual Arguments Specific to Middletown

While admitting that the ALPs for all of its ten students who received services from NCS during 2014-15 had been "reviewed and approved" by Superintendent Rosemarie Kraeger, *see* Middletown Post-Hearing Mem. at 2, Middletown argued that prior to the rendering of "any educational/GED services" the Superintendent had "notified NCS in writing in nine of the ten Middletown cases, that the student's parent would be responsible for paying NCS for the cost of the GED program and that the Middletown School District would not be paying NCS for these students." *Id*. at 3, citing to NCS Exs. 13 and 21 and Middletown Ex. 1. As to the one case where such notice was not provided, Middletown claimed that "the Superintendent contemporaneously notified NCS that DCYF would be responsible for paying NCS . . . and that the Middletown School District would not be paying." *Id*.

In addition, Middletown argued that Students K.G., B.S. and B.S.(2) never attended NCS. *See* Middletown's Post-Hearing Mem. at 9-10.

[9] Despite facing medical issues that required hospitalization, Student L.R. was admitted to college for the Fall of 2016 pending the completion of high school or receipt of a GED. *See* Tr. at 78, 195, 198. The Superintendent approved Student L.R.'s ALP months after the required application for waiver had been approved by the school and only after L.R.'s parent threatened legal action. *See* NCS Ex. 25.

IV. Discussion

A. The Council's Remand Order and the Right to a Hearing Under RIGL § 16-39-2

The Commissioner's imposition of liability under the February 22 Decision was not based upon any common law contract theory, but upon his interpretation of the 2011 amendments to the compulsory education statute, and specifically, his conclusion that:

(1) the General Assembly had not intended "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." February 22 Decision (NCS Ex. 24) at 13; and

(2) allowing school districts to charge parents or other third parties for the cost of ALP services would "'violate a fundamental principle of Rhode Island school law.'" *Id*. at 14, citing 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).

And the Commissioner held that NCS had met its burden of proof as to the students in 2014-15[10] when it produced undisputed evidence that:

(1) the Respondents' Superintendents signed the necessary waiver forms required by the Implementation Requirements on the basis of ALP programs to be provided by NCS. *See* February 22 Decision, ¶¶ 2, 4, 9 at 3-5;

(2) each year NCS notified the Respondents as to the charges that would be made, which were a function of per pupil cost figures for each LEA determined by RIDE. *See id.*, ¶ 8 at 4-5

(3) the relevant students received the ALP services from NCS as per its known practice and procedure. *See id.*, ¶ 12 at 5

(4) Respondents were billed on a timely basis for the services provided. *See id.*, ¶ 8, 11, 13 at 4-6; and

(5) Respondents failed and refused to pay the bills. *See id.*, ¶ 12, 14 at 5-6.

[10] As noted, following the February 22 Decision, NCS added claims for Tiverton students in 2015-16 and 2016-17. *See* § II, ¶¶ 10-13, *supra* at 6-7.

Since liability was a matter of law and a function of statutory interpretation, and since the Commissioner found that the factual issues alluded to by Respondents were not material, the Commissioner signed the February 22 Decision in the absence of a full evidentiary hearing.

As noted, the Council then remanded the case, having concluded that the failure to conduct a hearing in the absence of either a stipulation to an agreed statement of facts or the waiver of any right to a hearing was a "procedural error," *see* Council Decision at 2, n. 1, which rendered the February 22 Decision "patently arbitrary, discriminatory, or unfair." *See id.* at 2, citing *Altman v. School Committee of the Town of Scituate*, 115 R.I. 399, 405 (1975). However, it would be a mistake to construe the Council Decision as standing for the proposition that absent agreement or waiver, a party is always entitled to an evidentiary hearing under § 16-39-2, even in the absence of any genuine issue of material fact.

Significantly, the Council, while alluding generally to "disputed facts," *see* Council Decision at 2, did not identify a specific factual issue in dispute nor address whether Respondents had in fact raised a genuine issue of material fact, but rather assumed the right to an evidentiary hearing and "focus[ed] solely" on what it characterized as a "procedural" issue. *See id.* However, the Council Decision must be interpreted in light of applicable law which, as will be discussed, supports the commonsensical notion that administrative hearing officers are not required to conduct evidentiary hearings, even when a "hearing" is provided by statute, in the absence of a genuine issue of material fact. Admittedly, RIGL § 16-39-2 provides that the Commissioner "after notice to the parties interested of the time and place of hearing, shall examine and decide the appeal without cost to the parties involved," *id*., which, read literally, would seem to mandate that some kind of "hearing" must be afforded to any party who is

properly "aggrieved." But whether an *evidentiary* hearing is required in all such cases is another question.

Although Respondents are correct both that the procedural rules under the state's Administrative Procedures Act (the "APA"), RIGL § 42-35-1, *et seq*., apply to hearings before the Commissioner[11] and that the APA does not include a provision for summary judgment akin to Superior Court Rule of Civil Procedure 56, cases construing the federal Administrative Procedures Act, 5 USCA § 500, *et seq*., make clear that an agency hearing officer is not required to conduct an evidentiary hearing, *even when one is provided by statute*, in the absence of a genuine issue of material fact.[12] Thus, as the D.C. Circuit noted in *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206, 1220 (D.C.Cir.1975):

> an agency is not required to conduct an evidentiary hearing when it can serve absolutely no purpose. In such a circumstance, denial of a hearing may be proper even though adjudicatory proceedings are provided for by statute.

Id.[13]

Such an interpretation is consistent with relevant state APA provisions which, on the one hand provide that in all contested matters "[o]pportunity shall be afforded all parties to respond

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[11] *See Pawtucket School Committee v. Pawtucket Teachers Alliance*, 610 A.2d 1104, 1106 (R.I. 1992).

[12] Rhode Island courts frequently look to such federal cases for guidance in light of the fact that the state's APA was modeled after its federal counterpart. *See, e.g., East Greenwich Yacht Club v. Coastal Resources Management Council*, 118 R.I. 559, 376 A.2d 682, 687, n. 1 (1977); *Nissan of Smithfield, Inc. v. Dolan*, 2001 WL 770907 (R.I. Superior Court, June 29, 2001) (Clifton, J.)

[13] *See also Union of Concerned Scientists v. U.S. Nuclear Regulatory Com'n*, 735 F.2d 1437, 1444-45 (D.C. Cir. 1984) ("When a statute requires a "hearing" in an adjudicatory matter, such as licensing, the agency must generally provide an opportunity for submission and challenge of evidence as to any and all issues of material fact"); *Public Service Co. v. Federal Energy Regulatory Commission*, 600 F.2d 944, 955 (D.C. Cir.), *cert. denied*, 449 U.S. 990 (1979) ("Federal Energy Regulatory Commission need not hold an evidentiary hearing when no issue of material fact is in dispute").

and present evidence and argument on all issues involved," RIGL § 42-35-9 (c), while on the other hand making clear that "[i]rrelevant, immaterial or unduly repetitious evidence shall be excluded." RIGL § 42-35-10(1). It also is consistent with the original purpose of the hearing process before the Commissioner, which, as noted by NCS, was intended as a "provision for a cheap and speedy decision avoiding the delay and expense of a lawsuit." *See* NCS Post-Hearing Mem. at 4, quoting *Appeal of Cottrell*, 10 R.I. 615, 618 (R.I. 1874). If RIDE hearing officers are to ensure the "requisite and speedy" process contemplated by the Legislature, they must be able to determine whether the parties before them have actually raised a genuine issue of material fact before reflexively initiating lengthy (and expensive) hearing processes.[14]

In any event, whether or not Respondents raised any genuine issues of material fact prior to the Council Decision is now moot because, as noted, Respondents have been afforded a full evidentiary hearing. Also moot is Middletown's contention that the Council intended in its August 9 Decision to "wipe the slate clean" and start the proceedings anew. *See* Middletown's Poet-Hearing Reply Mem. at 2-3. Whatever the Council's intention, Respondents have been afforded every opportunity on remand both to raise allegedly relevant factual issues and to re-visit the legal arguments previously made, and their factual claims and legal arguments on remand were considered anew by the undersigned.

B. The Merits

1. Jurisdiction and Procedural Matters

Nothing offered by Respondents on remand, either by way of documentary evidence, testimony or legal memoranda, has altered the position of the undersigned:

[14] The task is complicated when one of the parties is *pro se*, which, however, was not the case here where, as noted, experienced attorneys submitted lengthy memoranda prior to remand.

(a) that since (i) resolving the issues raised by the Petition requires the construction and/or application of an educational statute, and (ii) resolving these issues would not unnecessarily involve the Commissioner in a non-educational matter to which he brings no expertise or special insight, the Commissioner has jurisdiction over NCS's claims under RIGL § 16-39-2. *See* February 22 Decision at 9-12; or

(b) that the burden of proof is on NCS to prove its case by a preponderance of the evidence, and the Commissioner's review is *de novo*. *See id*. at 12.

Thus, the undersigned hereby adopt and incorporate by reference Section IV(1) of the February 22 Decision at 9-12, entitled "Jurisdiction and Procedural Matters."

2. The Interpretation of the Compulsory Education Statute Statute and Other Legal Conclusions

Likewise, nothing offered by Respondents on remand, either by way of documentary evidence, testimony or legal memoranda, has altered the position of the undersigned with respect to any of the legal conclusions reached in the February 22, Decision. This includes the Commissioner's holding that the mere fact that liability for the cost of providing ALP services was not expressly considered under the 2011 amendments to the state's compulsory education statute does not alter the fact that charging parents or other third parties for ALP services would "violate a fundamental principle of Rhode Island school law." *See id.* at 13-15; or

Thus, the undersigned hereby adopt and incorporate by reference Section IV(2)(a) – (c) of the February 22 Decision at 12-15, entitled, respectively, "The Alleged Statutory Gap," "Charging Parents for ALP Services," and The Duty to Provide a FAPE."

3. The Pre-Petition Invoices to Tiverton

As noted, a portion of the amount NCS claims as to Tiverton pertains to invoices that were tendered after NCS filed its petition with the Commissioner on July 16, 2015. *See* § II, ¶¶ 10-11, *supra* at 6 (2015-16 totaling some $982) and ¶¶ 12-13, *supra* at 8 (2016-17 also totaling $982). Although Tiverton raised an objection to the inclusion of these post-petition amounts in

any award, *see, e.g.*, Tr. at 80-81, no cogent legal rationale was put forward for failing to do so, either at the hearing or in any of Tiverton's lengthy post-hearing memoranda, and Tiverton had ample time and opportunity to challenge the bills on the merits.

Thus, since it would be a waste of time and money to require NCS to file another petition, its motion to amend the current Petition to include its post-petition claims against Tiverton is granted, and the invoices tendered during 2015-16 and 2016-17 will be considered.

4. The Alleged Genuine Issues of Material Fact

(a) Factual Issues Alleged by Both Respondents

As noted by NCS, Respondents on remand challenged three of the findings made in the February 22 Decision. *See* NCS Post-Hearing Mem. at 20-21, citing February 22 Decision). However:

(i) Respondents failed to explain how state funding issues –such as whether or not Tiverton actually received state education aid for students in ALPs during 2014-15 and/or whether such students were properly coded by RIDE for purposes of the funding formula – were relevant to the District's liability to NCS for the cost of approved ALP services that were provided to its students. Nor is the fact that a RIDE employee informed Middletown that it need not pay AIALC for a student in DCYF custody dispositive on the issue of its liability to NCS here. As Middletown well knows, only the Commissioner has been exclusively authorized to interpret school law, *see* RIGL §§ 16-1-5(10) and 16-60-6(9)(viii), and there is a well-known process for seeking an advisory opinion from the Commissioner when necessary, a procedure which Tiverton neglected to utilize;

(ii) the fact that Respondents "referred" students to NCS is apparent from the undisputed facts, which make clear that in each and every case the District Superintendents signed the required waiver forms authorizing the referrals, and were aware not only that the ALP services were being provided by NCS, but that NCS expected to be paid by the Respondents for the cost of such services. *See* February 22 Decision, § II, ¶¶ 2-4, 9-10 at 3-5; § II, ¶¶ 9-11, *supra* at 5-6. In fact, Middletown explicitly admitted the essential facts relating to its "referral" of the students in question. *See* Middletown Mem. at Ex. A; *see also* Middletown Post-Hearing Mem. at 2-3. Indeed, *the fact that students were being referred and that both parties assumed that the costs would be paid for by Middletown is effectively memorialized in a lease credit agreement between NCS and the Town. See* § II, ¶¶ 14-15, *supra* at 7; and

(iii) the notion that Middletown could unilaterally overturn what the Commissioner made clear was "a fundamental principle of Rhode Island school law," *see* February 22 Decision at 14, by stating in a letter that "[t]he parent [was] responsible for the cost of the [ALP] program," *see* NCS Exs. 13-21; Middletown Ex. 1; or that Tiverton could unilaterally make a student's church financially responsible for ALP services, *see* note 4, *supra* at 7, cannot withstand even the slightest scrutiny.

Finally, as to how NCS calculated its bill and whether its billing rate was appropriate, NCS's Executive Director testified that:

(i) the NCS fee schedule was based upon the most recent per pupil cost figure for each LEA as determined by RIDE;

(ii) the rate schedule was based upon the program chosen and pro-rated by the number of days per week the program was offered; and

(iii) that charges were assessed on a monthly basis and only in the months where the student was enrolled at NCS.

See § II, ¶¶ 3-4, *supra* at 4-5. Not only was this testimony undisputed, it was, in substance, the subject of annual letters that NCS sent to both Respondents since 2010. *See* Tr. at 38; NCS Ex. 8. In addition, there is no evidence that either Respondent even bothered to ask a single question over the years concerning any of the challenged bills prior to the date NCS filed the Petition, after which a surprising number of concerns suddenly came to light.

(b) Factual Issues Alleged by Tiverton

As to the alleged factual issues particular to Tiverton, *see* § III(B)(2), *supra* at 11, the District's argument that it should not be liable for services rendered to Student L.R. since she had been accepted into college, while *perhaps* suggesting that Superintendent Rearick should not have approved her waiver request, does not somehow establish that NCS should bear the cost of providing the services for an ALP that had been approved. And as to Student A.D., the fact that he was provided services after he turned eighteen years of age is simply not an excuse for non-

payment, as has been made clear. *See* February 22 Decision, § II, ¶ 5 at 4, quoting Implementation Requirements at 2.

(c) Factual Issues Alleged by Middletown

As to the alleged factual issues particular to Middletown, *see* § III(B)(3), *supra* at 12, NCS's Executive Director testified that Mr. Brown was simply mistaken when he suggested in correspondence that Students K.G. and B.S. never attended NCS during 2014-15, and her testimony to that effect – which was based upon, *inter alia*, the notes of a discussion with Middletown's truancy officer as well as pertinent testing and attendance records, *see* Tr. at 105; Tr. at 16-18; NCS Exs. 31 and 32 – was credible and unrefuted. Moreover, she made the point that NCS incurs costs regardless of any particular student's actual attendance record. *See* Tr. at 45. Thus, NCS has been in the practice of charging LEAs after an ALP has been approved based upon the program a student was enrolled in, irrespective of the student's actual attendance. *See* NCS Ex. 15. Indeed, in the past, Middletown has paid AIALC bills, irrespective of attendance and/or actual knowledge of non-attendance. *See id.*[15]

As to the lease credit between the Town and NCS, the fact that it still exists seriously undermines Middletown's argument that it is not liable to NCS, and the unrebutted testimony of NCS's Executive Director established that it had been construed in Middletown's favor. *See* Tr. at 59-61. *Finally, there was absolutely no evidence suggesting that NCS ever received payment for ALP services from any parent or any other third party*.

[15] For example, the May, 2004 bill charged the same amount for two different students despite the disclosure on the face of the invoice that one attended 12 out of 16 classes, and the other attended 11 out of 16 classes. *See id.* More dramatic examples are shown in the May 1, 2006 bill where one student only attended 7 out of 14 classes, yet the full amount was charged, and paid. *Id.*

In conclusion, none of the factual claims made by Respondents on remand has altered the position of the undersigned with respect to the accuracy of the facts recited in the February 22 Decision. Thus, the undersigned hereby adopt and incorporate by reference Section II of the February 22 Decision at 1-6, entitled "Undisputed Facts and Legal Provisions" to the extent not supplemented here.

4. Fees and Costs Under the EAJA

The EAJA provides, in pertinent part, that:

> *[w]henever the agency conducts an adjudicatory proceeding subject to this chapter*, the adjudicative officer *shall award* to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding. *The adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself. The adjudicative officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust.* The award shall be made at the conclusion of any adjudicatory proceeding, including, but not limited to, conclusions by a decision, an informal disposition, or termination of the proceeding by the agency. The decision of the adjudicatory officer under this chapter shall be made a part of the record and shall include written findings and conclusions. No other agency official may review the award.

RIGL § 42-92-3(a) (emphasis added). Since the Act refers to an "adjudicatory proceeding" that is "conducted" (as opposed to commenced) "by or on behalf of the state," *see id*. and § 42–92–2(2), a proceeding under § 16-39-2 (which is "conducted" by RIDE) would be covered.[16] In addition, the Act defines "agency" broadly and in a manner that would include RIDE as well as the Respondents. *See* RIGL § 42–92–2(3).

Thus, in *Student Doe v. Davies Career & Tech. Ctr*., RIDE No. 0027-07 (October 26, 2007), the Commissioner rejected the argument that the EAJA could only be applied in cases

[16] The "chapter" referenced in § 42-92-3(a) quoted above refers to chapter 42, which includes the APA which, as noted, applies to hearings under § 16-39-2. *See* note 10, *supra* at 14 and accompanying text.

where the "agency" had actually commenced the relevant proceeding, noting that in *Taft v. Pare*, 536 A.2d 888 (R.I. 1988), the relevant "adjudicatory proceedings . . . actually took place in the District Court (not even an 'agency' as defined in the statute) and [yet] the 'agency' found to have acted without substantial justification was the Registry of Motor Vehicles." *See Davies, supra*, at 7. The Commissioner then concluded that "[g]iven the statute's remedial purpose and the liberal construction it has been given by the [R.I. Supreme] Court, application of this law to hearings before the Commissioner seems appropriate . . ." *Id.*

In addition, nothing in the Council's August 9 Decision suggests that the Council intended to immunize Respondents from potential liability under the EAJA. The Council neither commented upon the legal conclusions in the February 22 Decision nor identified a genuine issue of material fact. Thus, the Council's Decision has no impact upon the applicability of the EAJA.

In *Taft, supra,* the Rhode Island Supreme Court adopted the Eighth Circuit's interpretation of what it means to be "substantially justified" set forth in *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986), where the Circuit held that in meeting the substantial justification test, "the Government 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." *Id*. at 892-93.

In considering NCS's initial request under the EAJA prior to remand, the undersigned opined that liability under the EAJA was "a close call." *See* February 22 Decision at 16. On remand, Respondents made a close call even closer by:

(a) simply ignoring the legal conclusions made in the February 22 Decision, which even if not binding on remand, certainly communicated the Commissioner's likely conclusions as to the relevant law; and

(b) making several factual arguments which were not "substantially justified."

Nonetheless, given the confusing procedural posture of the case on remand and viewing Respondent's positions in their totality, it cannot be said that Respondents were not "substantially justified" under the EAJA, and thus the request for fees and costs under the Act is denied.

V. Conclusion

For all the above reasons:

1. NCS's Petition is hereby granted, in part;

2. Respondents shall have thirty (30) days from the date of this Decision, or until the close of business on November 17, 2017, 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., $15,568 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

3. Respondents shall 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,

_____
Anthony F. Cottone, Esq.
Hearing Officer

_____
Ken Wagner, Ph.D.,
Commissioner

Dated: October 18, 2017