State of Rhode Island and Providence Plantations
RHODE ISLAND BOARD OF EDUCATION
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Enclosure 6a
April 24, 2018

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April 24, 2018

TO: Members of the Council on Elementary and Secondary Education

FROM: Amy Beretta, Chair of the Appeals Committee

RE: Approval of Appeals Committee Recommendation on the matter of Newport Community School v. Middletown School Committee and Tiverton School Committee

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The Appeals Committee of the Council on Elementary and Secondary Education met on March 6, 2018, to hear oral argument on the appeal of the following Commissioner decision:

Newport Community School v. Middletown School Committee and Tiverton School Committee

RECOMMENDATION: THAT, in the matter of Newport Community School v. Middletown School Committee and Tiverton School Committee, the Commissioner's decision is affirmed, as presented.

STATE OF RHODE ISLAND **COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION**

NEWPORT COMMUNITY SCHOOL,	:
v.	:
TIVERTON SCHOOL COMMITTEE and MIDDLETOWN SCHOOL COMMITTEE	:

DECISION

Newport Community School ("NCS") has appealed from a portion of the October 18, 2017 decision of the Commissioner (the "Decision"), wherein the Commissioner ruled in favor of NCS on its request for payment of certain NCS invoices for alternative learning plan ("ALP") services, but denied NCS's request for attorney's fees and expenses of litigation. Neither the Tiverton School Committee ("Tiverton"), nor the Middletown School Committee ("Middletown") appealed the Decision regarding the order to pay the NCS invoices for ALP services. NCS's appeal is limited to the portion of the Decision denying an award of attorney's fees and costs. Therefore, the only issue on appeal is whether the Commissioner properly denied the award of attorney's' fees and expenses of litigation. For the reasons stated herein, we affirm the Commissioner's decision.

This matter first came before the Council on Elementary and Secondary Education (the "Council") when Tiverton and Middletown appealed a February 22, 2016 decision of the Commissioner. The Appeals Committee entertained oral argument on July 19, 2016, wherein Tiverton and Middletown argued that the Commissioner erred by issuing the February 22, 2016 decision ordering payment of the ALP invoices without conducting a hearing. The Council

remanded the case back to the Commissioner for the Hearing Officer to conduct a hearing. An evidentiary hearing was conducted on two dates, followed by submission of post-hearing memoranda, and finally the October 18, 2017 Decision of the Commissioner granting payment of the ALP invoices and denying an award of attorney's fees and costs.

On appeal NCS argues that the Commissioner committed error by denying the request for an award of attorney's fees under the Equal Access to Justice Act ("EAJA"), *R.I.G.L. § 42-92-1 et. seq.*, and under *R.I.G.L. § 9-1-45*, which allows an award of attorney's fees in some breach of contract actions. NCS relies upon the language of *R.I.G.L. §9-1-45(1)*, which states "[t]he court may award a reasonable attorney's fee to the prevailing party in any civil action arising from a breach of contract in which the court: (1) Finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party . . ." as well as language in the EAJA, *R.I.G.L. §42-92-3(a)*, which states "[t]he 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." Combining the standards, NCS argues that "[a] case litigated without a sufficient factual or legal basis is not substantially justified under with the EAJA or §9-1-45." *Petitioner, Newport Community School's Brief on Appeal, at page 7.* Finally, NCS asserts that none of the legal or factual arguments made by Tiverton and Middletown on remand were material in the controversy, and therefore the Commissioner erred in denying an award of attorney's fees.

In reply, Middletown argues that *R.I.G.L. 42-92-3(a)* gives the Commissioner broad discretion, stating "[t]he adjudicative officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust." Further, Middletown points to the record where it identified six (6) disputed material facts at the hearing upon remand. *Respondent Middletown School Committee's Reply Brief at 5*. Lastly, Middletown argues that there is no contract claim

and therefore no basis for requesting legal fees under *R.I.G.L. § 9-1-45*. Tiverton similarly outlined the many legal and factual arguments it made upon remand, but also asserts that there is no jurisdiction for an award of attorney's fees by the Commissioner under *R.I.G.L. § 9-1-45*, and that NCS failed to establish the statutory requirements for entitlement under the EAJA.

The Council reviewed the briefs and considered the well-presented arguments of both parties at oral argument. We find that NCS incorrectly asserts that the Decision failed to address the request for an award of attorneys' under the breach of contract statute. *R.I.G.L. § 9-1-45*. The Commissioner explicitly adopted and incorporated by reference Section IV(1) of the February 22, 2016 decision of the Commissioner. *Decision at 16.* Section IV(1) explicitly rejected the contract theory put forth by NCS, stating that "[i]n fact, NCS has not relied upon contract theory in any conventional sense . . . " *February 22, 2016 Decision of the Commissioner at 11*. After finding that there was no basis for a breach of contract award, it is unnecessary to then ask the Commissioner to look further into an award under a breach of contract statute. However, assuming arguendo that such an analysis were required, both Tiverton and Middletown presented sufficient "justiciable issues of either law or fact raised . . ." upon remand.

In NCS's request for attorney's fees and costs under the EAJA, the Commissioner found that "viewing Respondent's positions in their totality, it cannot be said that Respondents were not 'substantially justified' under the EAJA. . . ." *Decision at 22.* We agree. Further, we agree with Middletown's contention that NCS failed to take a complete view of the EAJA, which also states "[t]he adjudicative officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust." R.I.G.L. §42-92-3(a). Denying the request for fees, the Commissioner also noted the special circumstances in this matter, particularly the "confusing procedural posture of the case . . . " *Decision at 22.*

In light of all the above and the reasoning set forth in the Commissioner's decision, we concur with and affirm the Commissioner's decision denying an award of attorney's fees and costs. We find that the Commissioner's relied upon facts were supported by evidence in the record, correctly interpreted and applied the statutes at issue, and that the decision is in no way "patently arbitrary, discriminatory, or unfair," which is the standard of review for appeals to the Council. *Altman v. School Committee of the Town of Scituate*, 115 R.I. 399, 405 (1975).

For the reasons stated herein, the Decision of the Commissioner is affirmed.

The above is the decision that the Appeals Committee recommends after due consideration of the record, memoranda filed on behalf of the parties and oral arguments made at the hearing of the appeal on March 6, 2018.

Council on Elementary and Secondary Education,

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Daniel P. McConaghy, Chair

April 24, 2018

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Amy Beretta, Esq., Appeals Committee Chair

April 24, 2018