STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 21, 2018]

LINCOLN SCHOOL DISTRICT,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2018-0379**
	:	
RHODE ISLAND COUNCIL ON	:	
ELEMENTARY AND SECONDARY	:	
EDUCATION and D. DOE by and	:	
through his parents,	:	
***Defendants*.**	:	

DECISION

VOGEL, J. The Lincoln School District (District) brings this appeal from a decision of the Rhode Island Council on Elementary and Secondary Education[1] (Council), ordering the District to provide D. Doe (Doe) with special education services in the form of a teacher of the deaf (TOD) for all hours of academic instruction at Doe's private school. In response, Doe, through his parents, filed two counterclaims seeking a preliminary injunction to enforce the Council's decision and attorneys' fees. This Court derives its jurisdiction from G.L. 1956 §§ 42-35-15, 16-39-4 and 42-92-3(b). For the reasons set forth below, this Court affirms the Council's decision and denies Doe's request for a preliminary injunction and attorneys' fees.

[1] Prior to the enactment of the Rhode Island Board of Education Act, the Rhode Island Board of Education was referred to as the Board of Regents for Elementary and Secondary Education. *See* § 16-97-4. Currently, the Board of Education consists of the Council for Elementary and Secondary Education and the Council for Postsecondary Education. *See* § 16-97-1(b).

I

Facts and Travel

Doe is eleven years old and suffers from severe to profound hearing loss. Tr. 15:2-18, July 19, 2016 (Vol. 1). Both Doe and his parents are residents of Lincoln, Rhode Island. *Id.* Although Doe's hearing loss was present at birth, none of Doe's physicians provided him with an official diagnosis until shortly before he turned two. Report of Langone Medical Center, Apr. 26, 2010, Pet'r's Ex. 3. For a full year following his diagnosis, Doe wore hearing aids in hopes that the devices would enable him to hear. Vol. 1 Tr. 18:6-8. However, the hearing aids proved unhelpful, and Doe received his first cochlear implant at age three. Vol. 1 Tr. 18:19-20:11. At this point, Doe gained the ability to hear some sound. *Id.* However, due to Doe's severe to profound hearing loss and the three years it took to find a proper solution, Doe experienced significant delays in his language development. Report of Langone Medical Center, Apr. 26, 2010, Pet'r's Ex. 3; Clarke Evaluation, Pet'r's Ex. 8 at 1.1.

Pursuant to an agreement between Doe's parents and the District, Doe began attending preschool at the Northern Rhode Island Collaborative's Auditory-Oral Program (AOP) in May 2010, shortly after he turned three. Vol. 1 Tr. 20:18-21:4. The AOP serves students suffering from profound hearing loss who use hearing aids or cochlear implants to communicate through speech as opposed to sign language. Tr. 422:11-424:16, Aug. 2, 2016 (Vol. 3). Doe's preschool class at AOP included only five students, all of whom were deaf or hearing impaired. Vol. 1 Tr. 22:3-12. In addition to AOP, Doe attended a regular preschool two days a week. *Id.* at 21:12-22.

In fall of 2012, Doe began his kindergarten year at AOP. Vol. 1 Tr. 26:17-20. Doe spent mornings in a small classroom taught by a TOD that consisted solely of children with hearing

loss and afternoons in a regular classroom of 18 students. Vol. 1 Tr. 26:17-28:9. Doe's mother volunteered in Doe's classroom once a week and grew concerned with Doe's ability to comprehend his teachers' instructions. *Id.* at 28:21-29:7.

At the end of Doe's kindergarten year, AOP informed Doe's parents that for Doe's first grade year, it intended to place Doe full-time in a larger, regular education classroom and provide pull-out services.[2] Vol. 1 Tr. 29:16-30:3. Doe's parents were concerned that Doe was not ready to be placed in a larger classroom full-time and, after visiting alternative schools, decided to remove Doe from AOP and enroll him in The Gordon School (Gordon), a private elementary school located in East Providence, Rhode Island, for the 2013-2014 school year. Vol. 1 Tr. 31:7-32:21; 86:20-87:2. Gordon offered smaller class sizes and had experience working with deaf students such as Doe. *Id.* Additionally, Gordon allowed Doe to repeat his kindergarten year. Vol. 1 Tr. 34:6-14. Doe's parents paid for Doe's tuition out of their personal funds. *Id.* at 34:15-17.

On June 5, 2014, the District assembled an Individualized Education Program (IEP)[3] team, including Doe's parents, to evaluate Doe's need for special education services and determine what services the District would provide to Doe during his second year attending Gordon. IEP Team Minutes, June 5, 2014, Pet'r's Ex. 4; T. Vol. 1 Tr. 36:7-14; 107:10-22. Before the IEP meeting, Doe's parents gave the District the results of an assessment conducted in March 2014 that placed Doe in the .07th percentile compared to his same aged hearing peers.

[2] A "pull-out" service is when a student is taken out of the regular classroom during a typical school day and placed in an alternative program to receive special education services.

[3] Under federal law, public schools are required to annually create an IEP for every child in their district with a disability. 20 U.S.C. § 1414(d)(2)(A). An IEP is "a written statement for each child with a disability" that addresses the child's specific challenges, achievements, goals, placements, services, etc. 20 U.S.C. § 1414(d)(1).

Pet'r's Ex. 5; Vol. 1 Tr. 37:15-23; 95:21-24. The assessment also recommended "one-on-one support during class time," preferably "offered by a teacher of the deaf." Pet'r's Ex. 5. Based on the 2014 assessment, Doe's parents requested a TOD at Gordon for three hours a week. Vol. 1 Tr. 38:12-20. The District denied the request, which led Doe's parents to personally hire a TOD to provide services for Doe for five hours a week during his first grade year at Gordon. *Id.* at 39:12-15; 41:21-42:17.

Although the District denied the request for a TOD, the District continued to provide Doe with physical and occupational therapy once a week and auditory and speech training three hours per week at an in-district school. Vol. 1 Tr. 34:22-35:5. The District also agreed to conduct periodic observations and consultations at Gordon. *Id.* at 35:6-12.

In April 2015, Doe's parents requested and the District agreed to have Doe's three-year evaluation conducted at the Clarke School for Hearing and Speech. Vol. 1 Tr. 43:4-16. The Clarke evaluation indicated that due to his hearing loss, Doe often missed and/or misperceived important information during academic instruction and group discussions. Clarke Evaluation, Pet'r's Ex. 8 at 5.9. The report also recommended that

> "[Doe] should receive direct support from a teacher of the deaf to support him with pre and post-teaching, instruction in understanding/use of text structures, support for the development of his written language, check-in to ensure that [Doe] understands all assignments, and any other needs that may arise." *Id.* at 5.10.

As a result of the Clarke evaluation, Doe's parents hired another TOD so that Doe would have services for the full school day. Vol. 1 Tr. 45:19-46-6.

On October 21, 2015, the District conducted another IEP meeting. Pet'r's Ex. 9; Vol. 1 Tr. 46:15-17. At the meeting, Doe's parents renewed their request for the District to provide a TOD for all academic portions of the school day at Gordon. Vol. 1 Tr. 46:18-21. Following the

meeting, the District sent Doe's parents a formal letter rejecting their request and stating that the AOP was the appropriate placement for Doe, and that Gordon would not provide an adequate free and appropriate education. Pet'r's Ex. 9; Vol. 1 Tr. 46:22-47:23. The District also informed Doe's parents that if they rejected the IEP, "the services that [Doe] is presently receiving will terminate." Pet'r's Ex. 9.

Doe's parents then filed a due process complaint pursuant to the federal Individuals with Disabilities Education Act (IDEA) and the equivalent Rhode Island regulations. Amended Request for Hearing in the Nature of an Impartial Due Process Hearing, Pet'r's Ex. 1; Comm'r's Decision at 1, n.1. Doe's parents also requested and the District agreed to a "stay-put" placement ensuring that the District would continue to provide Doe with the speech and occupational services that he was receiving while the appeal was pending. Vol. 1 Tr. 56:20-57:4. Subsequently, a due process hearing officer transferred the matter to the Commissioner of Education (Commissioner) because Doe's parents' claim arises from rights provided under § 16-24-1 and not the IDEA. Comm'r's Decision at 1, n.1. The Commissioner agreed to hear the matter, and neither party objected. *Id.*

Before the Commissioner, Doe's parents contended that § 16-24-1(b)-(d) requires the District to provide special education services to Doe in the form of a TOD for all hours of academic instruction at Gordon, the private school in which they have placed him. Doe's parents also requested reimbursement for the costs they have incurred to provide a TOD at Gordon since the beginning of the 2015-2016 school year. Additionally, they asked the Commissioner to order the District to revise Doe's IEP and to refrain from threatening to cease to provide services if Doe's parents do not agree with the recommended placement. For its part, the District contended that it is not required to provide a TOD at Gordon because that is not a service that it would

provide to an in-district student. Pursuant to § 16-39-1, regarding the appeal of matters of dispute relating to schools or education, the Commissioner conducted hearings over four days between July 19 and August 3, 2016.

The Commissioner heard testimony from various witnesses involved in Doe's education. Testimony focused primarily on the witnesses' observations of Doe's academic and social challenges due to his hearing loss, as well as the progress he has shown with the assistance of services. Doe's parents presented eight witnesses, including Doe's mother and father; Doe's kindergarten and first grade teachers at Gordon who were both qualified as teachers of the deaf; Doe's second grade teacher at Gordon; two teachers of the deaf hired by Doe's parents to assist Doe at Gordon; and a former research assistant who conducted a formal language assessment of Doe during his kindergarten year at Gordon. Vol. 1 Tr. 14:23-15:15; 67:15-79:8; 86:7-13; 130:9-140:5; Tr. 189:21-191:2; 219:10-227:5; 250:1-259:4, July 21, 2016 (Vol. 2); Vol. 3 Tr. 306:1-5. Three teachers of the deaf who have worked with Doe at Gordon testified that based on their experience, observations, and the recommendations of formal assessments, Doe requires TOD services to be provided during academic instruction in order to further his linguistic and educational development. Vol. 1 Tr. 124:13-125:10; 148:22-152:21; Vol. 2 Tr. 246:16-247:8.

Next, the District presented six witnesses, including two diagnostic-prescriptive teachers employed by the District; a school psychologist for the District, Doe's preschool teacher at AOP; the Program Coordinator at AOP; and the then Director of Student Services for the District. Vol. 3 Tr. 312:23-313:20; 346:15-20; 374:18-23; 419:9-428:22; Tr. 454:11-17; 502:4-11, Aug. 3, 2016 (Vol. 4). The two diagnostic-prescriptive teachers and the school psychologist testified that based on their observations of Doe during a normal school day at Gordon in October 2015, Gordon was not an appropriate placement for Doe because of the high noise level and lack of

other hearing impaired peers. Vol. 3 Tr. 322:19-324:17; 357:11-359:6; 382:17-388:24. Additionally, Maryann Struble, the Director of Student Services for the District at the time of the hearing, testified that the District never would provide a student enrolled in public school with a TOD but would instead place the child at the AOP. Vol. 4 Tr. 502:7-11; 508:1-12.

On April 28, 2017, the Commissioner issued a decision in favor of Doe's parents. Comm'r's Decision, Compl. Ex. A. The Commissioner gave great weight to the expert testimony of the three teachers of the deaf who have worked with Doe personally and concluded that "Doe needs specialized language instruction delivered pursuant to a particular methodology calculated to advance his linguistic development and provide him with access to the general education curriculum." *Id.* at 4. The Commissioner further found that "these services need to be provided during academic instructional time by a teacher of the deaf." *Id.* The Commissioner also noted the "meaningful progress" Doe has made while at Gordon. *Id.*

After making the aforementioned findings, the Commissioner addressed § 16-24-1(b)-(d), which imposes a duty on the District to provide Doe, as a child parentally placed in private school, with "the same free and appropriate education as it provides to children in public schools." *Id.* at 8-9. The Commissioner interpreted this provision to mean that "[t]he school district must accept the parents' enrollment decision [and] cannot override that decision by providing a free and appropriate education that would require the removal of the child from the private school's program." *Id.* at 9. The Commissioner found that "the teacher-of-the-deaf services needed by Doe must be provided simultaneously with the academic instruction[,]" and, thus, "AOP cannot perform this service for Doe while he is attending his private school." *Id.* at 9. The Commissioner also emphasized that "[i]f his language development is to advance, . . . Doe needs the services of a teacher of the deaf during all of his academic instruction." *Id.* at 10.

Accordingly, the Commissioner held that under § 16-24-1(b)-(d), Doe is entitled to receive TOD services at Gordon at the expense of the District. *Id.* at 10. The Commissioner then ordered the District to provide Doe with TOD services "at Gordon for all hours of the school day during which academic instruction is taking place." *Id.* at 10. Additionally, the Commissioner ordered the District to reimburse Doe's parents for the cost of TOD services incurred since the 2015-2016 year.[4] *Id.* at 11.

The District timely appealed the Commissioner's decision to the Council pursuant to § 16-39-3, and, on December 19, 2017, the Council affirmed the Commissioner's decision. Council's Decision, Compl. Ex. B. The Council reasoned that Doe's parents' right to place Doe in private school combined with "the unique circumstances of this case and Doe in particular" require that the District provide the necessary services at Doe's parentally placed private school. *Id.* at 4-5. The Council also held that the Commissioner's factual findings were supported by evidence in the record and that the decision was not "patently arbitrary, discriminatory, or unfair." *Id.* at 6.

On January 19, 2018, the District timely appealed the Council's decision to this Court. *See* Compl. The District contends that the Council erroneously interpreted § 16-24-1 to require the District to provide services in excess of what it would provide to children enrolled in-district. District's Mem. Supp. of Appeal 15-16. In addition to filing an Answer denying the material allegations set forth in the District's appeal, Doe's parents filed two counterclaims seeking a preliminary injunction to enforce the Council's decision and attorneys' fees. Doe and his Parents' Answer and Countercl. On November 5, 2018, Doe's parents filed a formal motion for

[4] The Commissioner also ordered the District to refrain from threatening to cease providing Doe services if Doe's parents do not agree with the District placement recommendation and to revise Doe's IEP. Comm'r's Decision, Compl. Ex. A. at 11. This Court notes that the District has not raised objections to these orders in its appeal.

a preliminary injunction and a supporting memorandum. Doe's Parents' Mot. Prelim. Inj. Other than filing an Answer denying Doe's parents' right to recover attorneys' fees or to a preliminary injunction, the District has not otherwise briefed either of Doe's parents' counterclaims.

II

Standard of Review

Decisions regarding matters of dispute arising under school or education law are subject to a two-tier administrative review process. *See* §§ 16-39-1 and 16-39-3. At the first tier, the Commissioner conducts a hearing, analyzes the live testimony and documentary evidence presented, and reaches a decision. Sec. 16-39-1. At the second tier, the Council reviews the Commissioner's findings to determine if the Commissioner's decision "was patently 'arbitrary, discriminatory, or unfair.'" *D'Ambra v. N. Providence Sch. Comm.*, 601 A.2d 1370, 1374 (R.I. 1992) (quoting *Altman v. Sch. Comm. of Town of Scituate*, 115 R.I. 399, 404–05, 347 A.2d 37, 40 (1975)). The Supreme Court compared this two-tier review process to a funnel and concluded that "the further away from the mouth of the funnel that an administrative official is when he or she evaluates the adjudicative process, the more deference should be owed to the factfinder." *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993).

Section 42-35-15, which governs the superior court's review of an agency's decision, provides:

> "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:
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> "(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).

Thus, this Court may vacate an agency's decision "'if it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record.'" *Power Test Realty Co. Ltd. P'ship v. Coit*, 134 A.3d 1213, 1218 (R.I. 2016) (quoting *Envtl. Sci. Corp.*, 621 A.2d at 208). When reviewing an agency's decision, "questions of law—including statutory interpretation—are reviewed *de novo*." *Iselin v. Ret. Bd. of Emps.' Ret. Sys. of Rhode Island*, 943 A.2d 1045, 1049 (R.I. 2008). However, this Court must give deference to an agency's interpretation of an ambiguous statute, unless the interpretation "'is clearly erroneous or unauthorized.'" *Town of Warren v. Bristol Warren Reg'l Sch. Dist.*, 159 A.3d 1029, 1038 (R.I. 2017) (quoting *Unistrut Corp. v. State Dep't of Labor and Training*, 922 A.2d 93, 99 (R.I. 2007)). It is well-established that "'[i]n matters of statutory interpretation our ultimate goal is to give effect to the purpose of the act as intended by the Legislature.'" *GSM Indus., Inc. v. Grinnell Fire Prot. Sys. Co., Inc.*, 47 A.3d 264, 268 (R.I. 2012) (quoting *D'Amico v. Johnston Partners*, 866 A.2d 1222, 1224 (R.I. 2005)). Accordingly, when a statute is clear, "'this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" *Town of Smithfield v. Churchill & Banks Cos., LLC*, 924 A.2d 796, 802 (R.I. 2007) (quoting *Moore v. Ballard*, 914 A.2d 487, 490 (R.I. 2007)).

III

Analysis

A

G.L. 1956 § 16-24-1(b)-(d)

On appeal, the District contends that the Council erroneously interpreted § 16-24-1(b)-(d) to require the District to provide special education services in excess of what it would provide to children in public school. District's Mem. Supp. of Appeal 15-16. The District also contends that a full-time TOD at Gordon would not be "under public supervision and direction" as required by § 16-24-1(d). *Id.* at 16. Lastly, the District avers that the Council's interpretation provides Doe's parents' decision to place Doe in a private school greater weight than the General Assembly intended. *Id.* at 17. In response, Doe's parents assert that the Council correctly interpreted § 16-24-1(b)-(d) to require the District to provide Doe with TOD services in a manner that preserves their choice to place Doe in a private school. Doe's Parents' Mem. Opp'n to District's Appeal 34.

Both the IDEA, 20 U.S.C. §§ 1400 *et seq.*[5], and Chapter 24 of Title 16 of the Rhode Island General Laws require Rhode Island school districts to provide all children with a disability residing within their district with FAPE.[6] To meet the requirements of FAPE, a local education

[5] The IDEA does not directly require school districts to provide special education services to children with disabilities, but instead conditions the receipt of federal education funds upon compliance with the statutory provisions. 20 U.S.C. §§ 1412 and 1413.

[6] FAPE is defined similarly under both federal and state law. *See* 20 U.S.C. § 1401(9) and § 16-24-1(d). Specifically, 20 U.S.C. § 1401(9) defines "free appropriate public education" as "special education and related services that--

> "(A) have been provided at public expense, under public supervision and direction, and without charge;
> "(B) meet the standards of the State educational agency;
> "(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

agency (LEA) must provide special education services individually tailored to meet the unique needs of a particular child with a disability. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999-1000 (2017). Such services are implemented through IEPs created through the collaboration of the child's parents, teachers, administrators, and services providers. 20 U.S.C. § 1414(d). The IDEA also provides a child's parents with the opportunity to present challenges to a school district's proposed IEP through filing a complaint requesting an impartial due process hearing. 20 U.S.C. §§ 1415(b)(6)(A) and 14515(f)(1)(A).

However, the IDEA provides only limited rights to children whose parents have voluntarily chosen to place them in a private school.[7] 20 U.S.C. § 1412(a)(10). Under the IDEA, a LEA is not required to provide or pay for individual special education services for a disabled child parentally-placed in a private school. *See* 20 U.S.C. § 1412(a)(10)(C)(i); IDEA 1997 Regulations 34 C.F.R. § 300.137(a) ("No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school."). Section 20 U.S.C. § 1412(a)(10)(C)(i) provides:

> "Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate

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> "(D) are provided in conformity with the individualized education program required under section 1414(d) of this title."

[7] The IDEA also requires a school district receiving federal funds to allocate a proportionate amount of federal funds for special education based on the number of parentally-placed children with disabilities enrolled services in private elementary and secondary schools. 20 U.S.C. § 1412(a)(10)(A)(i). However, parents do not have a right to an administrative or judicial hearing to contest the allocation of such funds. 34 C.F.R. § 300.140(a)(1). Additionally, the school district must meet the same requirements to identify, locate, and evaluate children with disabilities parentally placed in private school as it does for children enrolled in public school. 20 U.S.C. §§ 1412(a)(10)(A)(ii) and 1412(a)(3).

> public education available to the child and the parents elected to place the child in such private school or facility."

If, however, the LEA fails to make FAPE available to a child with a disability in a timely manner, the child's parents may be entitled to reimbursement of education costs incurred at the parentally-placed private school so long as certain conditions are met. 20 U.S.C. § 1412(a)(10)(C)(iii); *Florence Cty. Sch. Dist. Four v. Carter, By and Through Carter*, 510 U.S. 7, 12, 114 S. Ct. 361, 364-65 (1993). This exception does not apply here because Doe's parents do not assert that the District's suggested placement at AOP would not qualify as FAPE. Additionally, they are not seeking reimbursement of Doe's private school tuition, but instead are seeking reimbursement for only the costs of special education services.

The IDEA establishes the floor of educational requirements for children with disabilities, and a state is free to grant greater rights to its citizens if it so chooses. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 201, 102 S. Ct. 3034, 3048 (1982); *Town of Burlington v. Dep't of Educ. for Commonwealth of Mass.*, 736 F.2d 773, 789 (1st Cir. 1984). Rhode Island has chosen to provide children with disabilities parentally-placed in private school with broader rights than the IDEA. Section 16-24-1(b)-(c) provides:

> "(b) Notwithstanding any other federal or state law or regulation, the school committee where a parentally placed child who has, or develops, a disability in private school resides, **shall provide the child with the same free and appropriate education as it provides to children in public schools.** These children shall have the same rights and remedies in the regulations of the board of education governing the education of children with disabilities as children in public school relative to initially determining eligibility, implementation, and/or any other rights and remedies relative to any special education services the child may be eligible to receive from the public school district.
> "(c) For the purpose of this statute, a parentally placed child who has, or develops, a disability in private school is defined as a child

> enrolled or placed in a private school by the unilateral decision of his or her parents and without consolation of the public school district, who either has, or at some point while at the private school is diagnosed with, a learning disability. Parents who unilaterally enroll their child in a private school are required to pay the tuition costs related to the child's education that are unrelated to the child's disability, and **the public school district where the child resides is responsible for payment of the services related to the child's disability** as developed and determined in the child's individual education plan." (Emphasis added.)

This appeal primarily focuses on the Council's interpretation of the phrase "same free and appropriate education" contained in § 16-24-1(b). The District contends that § 16-24-1(b) clearly and unambiguously requires the District to provide "the same free and appropriate education as it provides to children in public schools," not more. District's Mem. Supp. of Appeal 15-16. According to the District, the Council's interpretation requires the District to provide more services to Doe than he would receive if he attended public school. *Id.* at 16. To support this contention, the District relies on the former School Department Director of Student Services' testimony that the District would never provide a one-on-one TOD to a student in its public schools, but instead would place the child at AOP. *Id.* at 16; Vol. 4 Tr. 508:1-12. Doe's parents aver that the statutory language is ambiguous and that the Council appropriately gave effect to the Legislature's intent to preserve parental choice and to guarantee that the child would receive special education services. Doe's Parents' Mem. Opp'n to District's Appeal 34.

The language "same free and appropriate education" found in § 16-24-1(b) is not clear and unambiguous. A statute is ambiguous if it is susceptible to more than one reasonable meaning. *Balmuth v. Dolce for Town of Portsmouth*, 182 A.3d 576, 580 (R.I. 2018). Here, a reader could interpret the phrase "same free and appropriate education" more narrowly to mean that the services must be provided in the exact manner in which they would be provided if the child were enrolled in public school, *i.e.*, by the same providers, at the same location, at the same

time of day, for the same length of time, etc. Alternatively, a reader could interpret the language more broadly to require the services to meet the same standards and provide the same overall educational benefits as the services the child would receive if he or she were enrolled in public school. Thus, this Court finds that § 16-24-1(b) is not clear and unambiguous.

If ambiguity exits, "this Court will 'employ our well-established maxims of statutory construction in an effort to glean the intent of the Legislature.'" *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 505 (R.I. 2011) (quoting *Town of Burrillville v. Pascoag Apartment Assocs., LLC*, 950 A.2d 435, 445 (R.I. 2008)). As stated above, this Court must give deference to an agency's interpretation of an ambiguous statute unless clearly erroneous. *Id.* at 505. However, an agency's interpretation is not conclusive. *Id.* at 506. Here, the Commissioner interpreted § 16-24-1(b)-(d) to require the District to "accept the parents' enrollment decision" and to provide FAPE in a manner that allows the child to remain in the private school program. Comm'r's Decision, Compl. Ex. A at 9. The Commissioner then applied this interpretation to Doe's circumstances and found that the District's proposed placement at AOP would be contrary to the legislative intent of § 16-24-1(a) because it "[would] not allow Doe to attend the Gordon School." *Id.* On appeal, the Council affirmed the Commissioner's reasoning. Council's Decision, Compl. Ex. B at 5.

A close review of the history of § 16-24-1 affirms the Council's finding that the Legislature intended to preserve the right of parents of children with disabilities to place their child in private school without having to sacrifice access to special education services. Rhode Island first recognized the rights of parentally-placed private school children with disabilities in 2000 when the Rhode Island Board of Regents for Elementary and Secondary Education adopted a regulation that provided:

> "(a) General. Each LEA shall make FAPE available to eligible students with disabilities who are enrolled by their parents in private schools.
>
> "(b) LEA Responsibility. Each LEA of residence shall ensure that, an IEP is developed and implemented for each eligible child with a disability enrolled by their parents in a private school and that the child is afforded all of the rights of a child with a disability served by the LEA." Sec. 300.452 (2000).[8]

Prior to 2008, § 16-24-1 addressed only the general duty of the school district to provide special education services to children in elementary and secondary education within its district and did not address the rights of children parentally placed in private school.[9] Then, in 2008, the General Assembly added the current language of § 16-24-1(b)-(d), addressing the rights of children with disabilities whose parents placed them in private school. P.L. 2008, ch. 141, § 1,

[8] This Court rejects Doe's parents' argument in their Memorandum in Opposition to the District's Appeal that in 2007 the Board of Regents "eliminated Section 300.452(b) altogether, leaving parentally-placed students in private schools with only the rights provided under federal law . . . ." Doe's Parents' Mem. Opp'n to District's Appeal 56-59. It appears that rather than eliminate the language of § 300.452 from the regulations, the Board of Regents merely reorganized it to appear under § 300.129. 2008 Regulations Governing the Education of Children with Disabilities § 300.129. This Court does note that the General Assembly codified the right of children parentally placed in private school to receive special education services in 2008, but it does not appear that the General Assembly did so to reinstate a right formerly removed by the Board of Regents.

[9] Prior to the 2008 amendment, § 16-24-1 read:

> "(a) In any city or town where there is a child with a disability within the age range as designated by the regulations of the state board of regents for elementary and secondary education, who is functionally limited to such an extent that normal educational growth and development is prevented, the school committee of the city or town shall provide the type of special education that will best satisfy the needs of the child with a disability, as recommended and approved by the state board of regents for elementary and secondary education in accordance with its regulations.
>
> "(b) In those cases that an individual education plan has been adopted for a child and the child moves to another town or city, the plan shall remain in effect until a new plan is adopted for the child in the new town or city." P.L. 1999, ch. 130, § 26.

effective July 1, 2008. In effect, the General Assembly codified the rights of children parentally placed in private school that was previously only provided by regulation. By the time the General Assembly enacted § 16-24-1(b)-(d) in 2008, Congress had amended the IDEA to clearly establish that children of parentally placed private school children have no individual right to services under the IDEA. 20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.137(a); *see also C.G. ex rel. A.S. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 289 (1st Cir. 2008) ("When the parents make a unilateral choice, they must bear the associated risk: if the conditions for reimbursement are not met, the financial burdens are theirs."). Thus, the 2008 addition to § 16-24-1 demonstrates the General Assembly's intent to provide those students with greater protections than they received under federal law.

Other states have similarly chosen to statutorily provide children parentally placed in private school with greater rights to special education services than the IDEA. *See* Kan. Stat. Ann. § 72-5393; Minn. Stat. § 120.17(9); Iowa Code Ann. § 256.12(2); 24 Pa. Cons. Stat. Ann. § 13-1372(4). In *Fowler v. Unified Sch. Dist. No. 259, Sedgwick Cty., Kan.*, the Tenth Circuit addressed a Kansas statute similar to § 16-24-1(b)-(d), which then required the district to provide the services it provided its own students on an "equal basis" to all students attending a private school.[10] *See* 128 F.3d 1431, 1438-39 (10th Cir. 1997). In *Fowler*, the child, who was in strikingly similar circumstances as Doe, was profoundly deaf and initially attended a public school designed for hearing-impaired students. *Id.* at 1433. The child's parents later placed him

[10] Kansas subsequently amended Kan. Stat. Ann. § 72-5393 to eliminate the "equal basis" language. The statute now provides:

> "Every school district shall provide special education services for exceptional children who reside in the school district and attend a private, nonprofit elementary or secondary school, whether such school is located within or outside the school district, upon request of a parent or guardian of any such child for the provision of such services." Kan. Stat. Ann. § 72-5393 (West 2006).

in a private school because they felt his intellectual needs were not sufficiently met at the public school and requested that the school district provide interpretive services at the private school. *Id.* The court held that although the IDEA did not provide the child with an individual right to services, "under Kansas law, [the child was] entitled to the provision of an interpreter on site at his private school at a cost no greater than the average cost of providing hearing-impaired students with interpretive services at public schools." *Id.* at 1439; *see also John T. v. Marion Indep. Sch. Dist.*, 173 F.3d 684, 688-89 (8th Cir. 1999) (holding a similar Iowa statute required the school district to provide a child with cerebral palsy attending a private, religious school with a full-time assistant while in school).

In order to give effect to the Legislature's intent to preserve a parent's choice to place his or her child in private school, § 16-24-1(b) must be interpreted to allow a child with a disability to continue attending his or her private school while receiving the necessary special education services at the school district's expense. The Council made a similar finding and applied the statute in a way that would allow Doe to remain at Gordon while receiving the deaf education services that he needs, as evidenced by multiple assessments and the 2015 IEP. Accordingly, this Court finds that the Council's interpretation of § 16-24-1(b)-(d) was not clearly erroneous. *See Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket*, 622 A.2d 452, 456 (R.I. 1993) (recognizing that a reviewing court should accord deference to an administrative agency's interpretation of a statute whose administration and enforcement the General Assembly entrusted to the agency).

Additionally, this Court finds that the District's assertion that the Council's interpretation would require the District to provide services that would not be "under public supervision and direction" as required by § 16-24-1(d) is unavailing. The District contends that if it employed a

TOD at Gordon, it would effectively be staffing a private school at public expense, which would contradict both § 16-24-1(d) and Section 300.141 of the Board of Education's Regulations Governing the Education of Children with Disabilities. Section 300.141(a) states that "an LEA may not use funds provided under §§ 611 or 619 of the Act to finance the existing level of instruction in a private school or to otherwise benefit the private school." If the District provides a TOD for Doe at Gordon, the funds will not be used to finance the existing instruction at Gordon or to benefit Gordon, but would be used to provide individual instruction to Doe. Moreover, § 300.129(VI)(a) of the Board of Education's Regulations Governing the Education of Children with Disabilities provides: "[s]ervices provided to private school children with disabilities may be provided on-site at a child's private school, including a religious school." Thus, the Council's decision does not contradict § 16-24-1(d) or § 300.141 of the Board of Education's Regulations Governing the Education of Children with Disabilities.

For the aforementioned reasons, this Court affirms the Council's decision finding that under § 16-24-1(b)-(d), Doe is entitled to receive a TOD for all hours of academic instruction at Gordon at the District's expense. Accordingly, this Court affirms the Council's decision ordering the District to reimburse Doe's parents for the costs of a TOD for Doe incurred since the beginning of the 2015-2016 school year.

B

Preliminary Injunction

Doe's parents assert that they are entitled to a mandatory preliminary injunction enforcing the Council's final administrative decision under § 42-35-15(c), which states that filing a complaint in superior court does not automatically stay enforcement. Doe's Parents' Mem. Supp. Prelim. Inj. 4. Doe's parents also assert that § 16-24-1(b) requires the District to provide

Doe with the "same rights and remedies" as it would a child in public school, including the right under Section 300.518(a) and (d) of the Board of Education's Regulations Governing the Education of Children with Disabilities to "stay-put" in the child's "current educational placement" during review proceedings afforded. R.I. Admin. Code 21-2-54:E § 300.518; Doe's Parents' Mem. Supp. Prelim. Inj. 15-16. Based on these provisions, Doe's parents conclude that the District is required to immediately comply with the Council's decision and provide a TOD for Doe at Gordon and to reimburse them for the costs they have incurred to provide a TOD at Gordon since the date of mailing of the Council's decision. Doe's Parents' Mem. Supp. Prelim. Inj. 4-16. For the reasons set forth below, this Court denies Doe's parents' request for a preliminary injunction.

As an initial matter, in light of this Court's ruling in this case, Doe's parents' request for a preliminary injunction is moot. Under § 42-35-16, the only avenue for an aggrieved party to seek Supreme Court review of a Superior Court's ruling on an administrative decision is by petition for writ of certiorari. Thus, unless or until the Supreme Court grants a writ of certiorari in this case, this Court's decision is final and is not subject to further review for purposes of § 16-39-3.1.[11]

Additionally, although Doe's parents request a preliminary injunction, the nature of their motion is more akin to a request to enforce the Council's decision. *See Sch. Comm. of City of*

[11] Section 16-39-3.1 of the Rhode Island General Laws provides:

> "All final decisions made after a hearing by the commissioner of elementary and secondary education or the board of regents for elementary and secondary education, *and which are not subject to further judicial or administrative review*, shall be enforceable by mandamus or any other suitable civil action in the superior court for Providence County at the request of any interested party." (Emphasis added.)

Cranston v. Bergin-Andrews, 984 A.2d 629, 649 (R.I. 2009) (finding that when the court is interpreting the Superior Court Rules of Civil Procedure, it takes a liberal approach to "look to substance, not labels"). Section 42-35-15(c), which addresses judicial review of administrative appeals under the APA, states that "[t]he filing of the complaint does not itself stay enforcement of the agency order." Doe's parents rely on this language as a basis to enforce the Council's final decision. However, § 42-35-15(c) does not provide an automatic right to enforce an agency's decision pending appeal. Instead, the language of § 42-35-15(c) merely provides that a stay of enforcement is not automatic, but must be requested by a party and will be granted in the court's discretion.

Moreover, granting a mandatory injunction at this point in the administrative appeals process would run afoul of the procedures proscribed in the Administrative Procedures Act (APA).[12] *See* §§ 42-35-15 through 42-35-16; *see also Bd. of Cty. Comm'rs of Anne Arundel Cty. v. Buch*, 58 A.2d 672, 676 (Md. Ct. App. 1948) ("It is well established that where an appeal from the action of an administrative body is provided by statute, a remedy by way of mandamus, injunction or declaratory judgment will be denied."); Charles H. Koch, Jr., *Administrative Law and Practice*, Litigation with the Government § 8:31 (3d ed. 2010); *see generally Cipolla v. Rhode Island Coll., Bd. of Governors for Higher Educ.*, 742 A.2d 277, 282 (R.I. 1999) (finding the motion justice appropriately dismissed the plaintiff's claim when the plaintiff initiated a grievance procedure but refused to proceed to arbitration, as required by the collective

[12] Even assuming that this Court has authority to issue an injunction, Doe's parents have not provided any evidence of irreparable harm. In *Giacomini v. Bevilacqua*, the Supreme Court vacated a superior court order granting a preliminary injunction ordering the Department of Mental Health to provide services that it previously refused to provide the plaintiff. 372 A.2d 66 (R.I. 1977). The court found the case was governed by the APA and that assuming the trial justice had authority to grant such preliminary relief under the APA, a mandatory preliminary injunction "should be granted . . . only in cases of great urgency and when the right of the complainant is very clear." *Id.* at 67.

bargaining agreement, because "he had selected the remedy to adjudicate his claim, and he should have pursued that remedy to its conclusion"); Charles Alan Wright, et al., *Federal Practice and Procedure Juris.*, Election of Remedies § 4476 (2d ed. 2002).

Doe's parents also assert that they are entitled to enforcement of the Council's decision through the "stay-put" provision in § 300.518(a) and (d) of the Board of Education's Regulations Governing the Education of Children with Disabilities. R.I. Admin. Code 21-2-54:E § 300.518(a) and (d). Section 16-24-1(b) provides children parentally placed in private school with the "same rights and remedies in the regulations of the board of education governing the education of children with disabilities as children in public school." Both federal and Rhode Island regulations provide that a child with a disability must remain in his or her "current educational placement" while an administrative or judicial appeal is pending, unless the State or the local school district and the parents agree otherwise. 34 C.F.R. § 300.518; R.I. Admin. Code 21-2-54:E § 300.518. Section (d) provides that "[i]f the hearing officer . . . agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for the purposes of paragraph (a)." R.I. Admin. Code 21-2-54:E § 300.518(b).

Doe's parents contend that the Council's decision in their favor constitutes an agreement with the State and, thus, the Council's order becomes Doe's "current educational placement." Doe's Parents' Mem. Supp. Prelim. Inj. 11-13. Even if the Council's order providing for Doe to be placed at Gordon constitutes the "current educational placement," the requirements of § 300.518(a) and (d) of the Board of Education's Regulations Governing the Education of Children with Disabilities are satisfied because Doe is in the agreed upon placement as he is currently attending Gordon full-time and has a TOD. *See* R.I. Admin. Code 21-2-54:E § 300.518(a) and

(d). At issue is who should bear the costs for such services at Gordon. Thus, Doe's right to remain in his "current educational placement" has not been violated. *See Town of Burlington v. Dep't of Educ. of Commonwealth of Mass.*, 655 F.2d 428, 433 (1st Cir. 1981) (refraining from applying the "stay-put" provision under the IDEA when "no one proposed to change [the child's] placement at [his private school]; rather the dispute was over who should bear a portion of the expenses of that placement until final judgment could be rendered").

C

Attorneys' Fees

Lastly, this Court will address Doe's parents' request for attorneys' fees pursuant to § 16-24-1(b) and § 300.517 of the Board of Education's Regulations Governing the Education of Children with Disabilities. R.I. Admin. Code 21-2-54:E § 300.517. Again, Doe's parents assert that §16-24-1(b) affords Doe the "same rights and remedies" as a child in public school. Doe and his Parents' Answer and Countercl. ¶ 27. Accordingly, they contend that they have the same opportunity as the parents of a child in public school to be awarded reasonable attorneys' fees. *Id.* Section 300.517 provides that in a proceeding "brought under § 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to [t]he prevailing party who is the parent of a child with a disability." *Id.* The "Act" the regulation refers to is the IDEA. *See* § 300.4 of the Regulations Governing the Education of Children with Disabilities. As Doe's parents' claims do not arise under the IDEA, § 300.517 does not provide an avenue for this Court to award attorneys' fees.

Doe's parents' request for attorneys' fees more properly arises under the Equal Access to Justice Act (EAJA), §§ 42-92-1, *et seq.* The General Assembly enacted the EAJA "to encourage individuals and small businesses to contest unjust actions by the state and/or

municipal agencies" as a way of "address[ing] government abuse and agency decisions made without substantial justification." Sec. 42-92-1; *Tarbox v. Zoning Bd. of Review of Town of Jamestown*, 142 A.3d 191, 200 (R.I. 2016).

Under § 42-92-3, "[i]f a court reviews the underlying decision of the adversary adjudication," the court must "award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding." For an individual to qualify as a "party" under the EAJA, the individual's net worth must have been "less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated." Sec. 42-92-2(5). Additionally, a prevailing party cannot recover if the court "finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself." Sec. 42-92-3(a). An agency's action is substantially justified if "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).

Doe's parents did not base their request for attorneys' fees on the EAJA, which is the only vehicle through which such an award is available to them. Even so, this Court finds the District's action was substantially justified as defined under § 42-92-2(7) because its position that the District was not required to provide Doe a TOD at Gordon was based on the language of § 16-24-1(b)-(d) as well as federal and Rhode Island education regulations. Thus, this Court denies Doe's parents' request for reasonable attorneys' fees.

IV

Conclusion

After reviewing the entire record, this Court finds that the Council's decision is supported by reliable, probative, and substantial evidence and is not clearly erroneous. Accordingly, this Court affirms the Council's decision ordering the District to provide Doe a TOD for all hours of

academic instruction at Gordon and to reimburse Doe's parents for the costs of a TOD at Gordon incurred since the 2015-2016 school year. Also, for the reasons stated above, this Court denies Doe's parents' motion for a preliminary injunction and their request for attorneys' fees. This Court also finds that because the only avenue for an aggrieved party to seek Supreme Court review of a Superior Court ruling of an administrative decision is by petition for writ of certiorari, this Decision is not subject to further judicial or administrative review. As such, this Court's finding that Doe's parents are entitled to recover the costs of a TOD at Gordon incurred since the 2015-2016 school year is enforceable without delay.

Counsel shall prepare an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Lincoln School District v. Rhode Island Council on Elementary and Secondary Education, et al.
CASE NO:	PC-2018-0379
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 21, 2018
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
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