STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 16, 2014)

KENNETTE PIERRE, Legal Guardian For STUDENT P. DOE	:	
v.	:	**C.A. No. PC-2013-3422**
CITY OF PROVIDENCE SCHOOL BOARD; SUSAN LISI and in her official capacity as the Superintendent of the PROVIDENCE SCHOOL BOARD; DEBORAH GIST, in her official capacity as the COMMISSIONER OF THE STATE OF RHODE ISLAND; THE STATE OF RHODE ISLAND BOARD OF EDUCATION; And, EVA-MARIE MANCUSO , in her individual capacity as CHAIRWOMAN THE STATE OF RHODE ISLAND BOARD OF EDUCATION	:	

DECISION

PROCACCINI, J. Between the years 1980 to 2012, there were 137 school shootings resulting in 297 fatalities across the United States.[1] As this Court releases its Decision today, there have been at least seventy-four additional incidents of school shootings in this country since the tragedy at Sandy Hook Elementary School in Newtown, Connecticut on December 14, 2012.[2]

It is against this alarming and tragic backdrop that this Court is presented with a "fee dispute" pursuant to the Equal Access to Justice Act (Act) which requires this Court to determine the larger issue of whether the Providence School Board was "substantially justified" in

[1] This number includes colleges and universities. See Chris Kirk, Sandy Hook: A chart of all 137 fatal school shootings since 1980, Slate Magazine (Dec. 19, 2012), http://www.slate.com/articles/news_and_politics/map_of_the_week/2012/12/sandy_hook_a_chart_of_all_196_fatal_school_shootings_since_1980_map.html.

[2] Data provided by Everytown for Gun Safety. This number includes colleges and universities. An incident is classified as a school shooting when a firearm is discharged inside a school building or on school grounds and subsequently documented in media reports.

prohibiting a student to return to Classical High School as it undertook an assessment of that student's attendance, disciplinary, and psychological issues.

Kennette Pierre (Plaintiff), legal guardian for Student P. Doe (Student Doe), appeals a decision by the Rhode Island Board of Education (Board) upholding a decision of the Rhode Island Commissioner of Education (Commissioner), denying Plaintiff's claim for reimbursement of reasonable litigation expenses pursuant to the Act. Jurisdiction is pursuant to G.L. 1956 § 42-92-5.

I

Facts & Travel

Student Doe was enrolled at Classical High School, a public examination school in Providence, Rhode Island, during the 2011-2012 school year. Compl. ¶ 10. She struggled with various mental health and depression issues throughout the year and was either entirely absent or significantly late to school most of the days during the 2011-2012 school year. Tr. 7, 13, May 16, 2012; Tr. 102, May 29, 2012. Student Doe's resulting educational disabilities necessitated the development of a "504 Plan" in middle school pursuant to the requirements of § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 and the American Disabilities Act. Compl. ¶¶ 13-14. Her 504 Plan included modifications and accommodations to assist her with her educational disabilities at Classical High School. Id. ¶ 13.

During the 2011-2012 school year, Student Doe was hospitalized at Butler Hospital twice, in October 2011 and May 2012, and underwent multiple psychological examinations. On December 2, 2011, Theresa L. Manela, LICSW (Manela) completed a Firesetting Behavior Assessment of Student Doe as a result of Student Doe's admission to Butler Hospital from October 25, 2011 through November 3, 2011. R. Ex. 10, PSB Ex. A, Firesetting Behavior

Assessment (Dec. 2, 2011). That evaluation was "prompted by [Student Doe's] report of engaging in firesetting behaviors within her home over the past year," as well as Student Doe's statement "that she was intending to use fire again following discharge." Id. at 1. The evaluation concluded that Student Doe relied "on fire as [a] compensatory coping strategy in response to feelings of powerlessness and social isolation." Id. at 10. The Firesetting Behavior Assessment recommended that Student Doe participate in "comprehensive clinical services," including in-home stabilization and outpatient treatment services; therapy with an adolescent provider; be prohibited from potential ignition sources; engage in fire-specific, psycho-educational intervention; participate in positive social experiences in a supervised environment; and for her mother to seek additional testing for more support at school. Id. at 11.

The second evaluation was a Psychiatric Evaluation completed by Dr. David Kahn (Kahn) at the request of the Providence Public School District on April 9, 2012. R. Ex. 10, PSB Ex. B, Psychiatric Evaluation (April 9, 2012). The Psychiatric Evaluation was completed because of Student Doe's worsening depression and failure to comply with medication following her release from Butler Hospital in November 2011. Id. at 2. Kahn first noted that, of the Firesetting Behavior Assessment recommendations, Student Doe and Plaintiff had successfully prevented Student Doe from accessing ignition sources; engaged in psycho-educational intervention; and advocated for additional testing. Id. at 2. However, Plaintiff's advocacy had not resulted in obtaining more support at school and Student Doe was unable to engage in psychotherapy because of a lapse in insurance coverage. Id. The Psychiatric Evaluation diagnosed Student Doe with "Depressive Disorder NOS [Not Otherwise Specified]," ADHD, and ODD (Oppositional Defiant Disorder). Id. at 4. Kahn recommended that, "[t]o minimize the

level of risk [Student Doe] poses, as much as possible, it is necessary to reduce her level of stress and enhance her supports to the extent she will accept [it]." Id. at 5.

On May 1, 2012, Student Doe asked her mother to take her out of school and admit her into Butler Hospital for treatment related to depression. Compl. ¶¶ 16-17. At this point in the school year, she had been absent fifty-four days and tardy an additional fifty-two days. Tr. 7, May 16, 2012. She was released from Butler Hospital on May 8, 2012. Compl. ¶ 17. Included in her release materials were "Aftercare Instructions," electronically signed by her physician, instructing Student Doe to "return to school," and suggesting that "patient would benefit from IEP given decompensation and more than one hospitalization despite 504 plan." R. Ex. 10.1, Patient Aftercare Instructions, at 1. In addition, her Transfer Discharge Summary noted that Student Doe had been "noncompliant with med[ication]," but that she "was pleased to return to school." R. Ex. 10, Pl.'s Ex. 4, Transfer Discharge Summary (May 8, 2012). The physician left blank a category entitled "Danger to Self/Others" but filled in all other categories on the form. Id. at 4.

When Student Doe attempted to return to school on May 9, 2012, Plaintiff was informed that she needed to provide the school with a copy of Student Doe's Aftercare Instructions before she would be allowed to return to her classes. Compl. ¶¶ 19-20. After presenting the document the next day, Plaintiff was told that it was insufficient because it was not physically signed by her treating physician. Id. ¶¶ 21-22. Plaintiff procured a note from Student Doe's treating physician stating, "Please allow patient [Student P. Doe] to resume all normal activities and return to her regular school program." Id. ¶ 23. However, the Providence School Board would not allow Student Doe to return to school and issued no trespass orders against her and Plaintiff prohibiting both of them from coming onto school property. Id. ¶ 24.

On May 10, 2012, Plaintiff sent a letter to the Commissioner requesting an Interim Protective Order Hearing Request pursuant to G.L. 1956 § 16-39-3.2. Id. ¶ 27; R. Ex. 9, Interim Protective Order Hearing Request (May 10, 2012). In the letter, Plaintiff alleged that the Providence School Board was denying Student Doe "a free and appropriate education" by denying her access to Classical High School after her release from Butler Hospital. R. Ex. 9. The Commissioner held a hearing on the matter on May 16, 2012. Compl. ¶ 29.

At the hearing, a representative of the Providence School Board informed the Commissioner that it had subpoenaed Student Doe's treating physician at Butler Hospital, but that the doctor's lawyer had filed a motion to quash the subpoena. Id. As the physician was not present, Providence School Board requested a continuance. Id. ¶ 30. A discussion ensued, during which Providence School Board offered tutoring to Student Doe. Id. ¶ 31. Following the discussion, the hearing officer permitted the Providence School Board to introduce its requirements to permit Student Doe to return to school through the testimony of its Chief Academic Officer, Paula Shannon (Shannon). Tr. 25-30, May 16, 2012.

Shannon testified regarding the school's concerns regarding Student Doe and what facts could be presented to permit her to return to class. Compl. ¶ 35; Tr. 26, May 16, 2012. When asked why the Providence School Board had prohibited Student Doe from returning to her classes, Shannon stated, inter alia:

> "Based upon a couple of evaluations that are concerning to us, one being a Fire Safety Evaluation that was conducted in December of 2011 . . . which made clear that this student is a diagnostically, complicated adolescent and in need of clinical services, as well as in April of 2012, a Psychiatric Evaluation which provided a diagnosis of Oppositional Defiant Disorder, ADHD, and severe depressive disorder, as well as acknowledging that this student suffers from severe stressors . . . . [In addition,] this Psychiatric Evaluation referenced back to the Fire Safety Evaluation and recommended that we follow what was outlined; there again, that

> the student was in need of comprehensive clinical services." Tr. at 27-28, May 16, 2012.

Shannon also testified that on a number of occasions, Student Doe had been unaccounted for while in the school building, and school officials were forced to search for her. Id. at 42. After noting that the school was "quite concerned" about Student Doe and the fear that her depression might threaten her safety or that of other students, Shannon stated that the school "need[s] to understand what her current treatment plan is . . . so that we know what services we may need to provide, and if, in fact, we're able to provide those services and conditions." Id. at 28-29. Shannon continued by stating that the school needed to know whether or not Student Doe was "stable and safe and able to return to a six-hour school day, that, at this point in time, is very different than the typical school day, given that students are moving into the exam period at Classical High School." Id. at 29.

On cross-examination, Shannon testified that after a student has been absent from school for a significant amount of time, the school's unwritten policy is for the student's parent to "meet[] with the building administrative team and provide[] the documentation that we request and a plan is worked out in terms of transitioning the student back into the school." Id. at 37. In Student Doe's case, Shannon testified that she "began the conversation on May 9th about what [the next] steps should be" although "[t]he school administrators have really not been able to engage in any robust conversation with [Plaintiff]." Id. at 52-54. Although Plaintiff provided the school with a copy of Student Doe's Patient Aftercare Instructions, Shannon testified that the note was insufficient in that it did not state that "[Student Doe] is stable and able to return to a normal routine at the school." Id. at 54. Shannon stated that, after receipt of a note, the school's normal protocol is to meet with the student's parents to "talk about what has happened to the student, what the treatment plan is for the student and we work together to develop a school base

plan." Id. at 55. Shannon testified that "[t]hat did not happen in this case." Id. A representative of the Providence School Board stated that a doctor's note that Student Doe's depression would no longer affect her school attendance would be insufficient because of Student Doe's lengthy medical history. Id. at 62-63. Shannon was unable to provide more information regarding when and why the Providence School Board arrived at the decision to prevent Student Doe from attending classes because some of its information came from a separate hearing before the Office of Civil Rights, after which all parties signed confidentiality statements. Id. at 9-10, 51.

At the conclusion of the May 16, 2012 hearing, Student Doe accepted the Providence School Board's offer for home instruction. Id. at 73. The hearing reconvened on May 29, 2012, at which time the Providence School Board reiterated its reluctance to readmit Student Doe because there were "five days left of instruction at the school . . . " Id. at 81. Instead, counsel for the Providence School Board stated that it was in Student Doe's "best interest at this point to go on the home instruction piece . . . [and] we don't think it's in her best interest, for her health and safety, to return to school when we have evaluations that state that her stress needs to be reduced." Id. The Providence School Board then called Student Doe as a witness and asked her a series of questions regarding her own comfort level with returning to classes. Id. at 100-13. Student Doe testified that if she was able to return to school immediately, she was uncomfortable with taking her final exams in Spanish and Chemistry but believed she could take final exams in all of her other subjects. Id. at 109-11. After Student Doe's testimony, counsel for the Providence School Board stated that:

> "Based on the facts that the standard that you've asked for us to make is something that I can't attain today, the Providence School Department is hereby resigning its position that [Student Doe] cannot go back to Classical . . . tomorrow. So, there is no need for a hearing." Id. at 114.

Counsel for Plaintiff and the Providence School Board then entered into a discussion with the hearing officer regarding the resolution of the original petition and Student Doe's services moving forward. Id. at 115-123. At the conclusion of the hearing, the hearing officer stated that:

> "I will retain jurisdiction. We have discussed, and I forget where we left off, the parties, [defendant's counsel] indicated that [Student Doe] will be allowed to resume her attendance at Classical and the parties were to meet in the very near future so that they can plan for the productive use of her time there and, perhaps, some additional academic support and services so that she can make some progress this year, as much progress as she can, and they're also going to, at some point when they have all of the information they need, reconvene the 504 team.
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> "[Plaintiff's counsel] has requested that I consider attorney fee awards. I think I should wait until we're sure the case is finished, and I would ask him to put that request in writing with the supporting memo, and [defendant's counsel] would then respond and I'll rule on that." Id. at 123-24.

The hearing officer then noted that the trespass order against Student Doe would be withdrawn and requested that counsel for the Providence School Board provide a formal notice of the withdrawal. Id. at 124-26.

Following the hearing, counsel for Plaintiff submitted a request for litigation expenses pursuant to the Act. R. Ex. 8, Amended Request, Aug. 2, 2012. The Providence School Board responded in opposition to the request on August 17, 2012. R. Ex. 7, Memorandum of Law in Support of It's [sic] Objection to Plaintiff Parent's Petition for Attorney's Fees, Aug. 17, 2012. The hearing officer published a decision on September 19, 2012, denying Plaintiff's claim for reimbursement of reasonable litigation expenses because, under the Act, Plaintiff "is not a 'prevailing party' and because the Providence School Board was substantially justified in actions leading to the hearings and in its position during the proceedings of May 16, 2012 and May 29,

2012." R. Ex. 5, Decision on Request for Reasonable Litigation Expenses Under the Equal Access to Justice Act, Sept. 19, 2012.

In its decision, the hearing officer found that Plaintiff's Interim Protective Order Request was not resolved by a formal decision, consent decree, or any other "favorable ruling on the merits." Id. at 2. Instead, the dispute was resolved when the Providence School Board withdrew its objection to Student Doe's return to Classical High School. Id. at 2-3. The hearing officer also found that the Providence School Board's decision to prohibit Student Doe from attending classes was factually supported. Id. at 3. Specifically, the hearing officer found that the Providence School Board was "substantially justified by a legitimate concern that [Student Doe's] attendance posed a danger to her safety and the safety of other students and staff at Classical High School." Id. Because the Providence School Board has both a common-law duty to protect its students while at school and a duty to provide students and staff a "right to a safe school" pursuant to § 16-2-17, the hearing officer found that it acted reasonably to protect all students and staff from harm resulting from Student Doe's return to school during a particularly stressful time of year. Id. The hearing officer concluded that:

> "In light of the evaluations [the Providence School Board] had received with respect to Student Doe's fire-setting behaviors and how they were affected by stress, together with the timing of her release from the hospital just prior to exams, the district acted reasonably and with substantial justification in refusing her re-entry pending her doctor's testimony in this matter." Id. at 3-4.

Plaintiff appealed to the Board, which affirmed the decision of the Commissioner on May 23, 2013. R. Ex. 1, Decision, May 23, 2013. Specifically, the Board agreed with the hearing officer's finding that Plaintiff's initial request "resulted in no formal decision of the Commissioner, nor any consent decree or other favorable ruling on the merits." Id. at 1. In addition, the Board concurred that the Providence School Board's justification for preventing

Student Doe from attending classes from May 9 through May 29, 2012 was substantially justified. The Board also concluded that the hearing conducted before the Commissioner was not an "adjudicatory proceeding" and, therefore, the Act was not applicable to the case. Id. at 2. Finally, the Board noted that it was "concerned as to the process which Providence followed and the length of time it took to reach the conclusion to permit Student [] Doe back in to the high school . . . " Id. at 3. The Board suggested that the Providence School Board "avoid such delays in the future as such could impact an analysis of substantial justification in such future case." Id. Plaintiff timely appealed the Board's decision.

II

Standard of Review

When a request for litigation expenses pursuant to § 42-92-3 is denied, a dissatisfied party may appeal the adjudicatory officer's determination to "the court having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication." Sec. 42-92-5. "If the court grants the petition, it may modify the fee determination if it finds that the failure to make an award, or the calculation of the amount of the award, was not substantially justified based upon a de novo review of the record." Id. Therefore, on appeal this Court engages in a de novo review of the agency's refusal to grant litigation expenses to determine if the agency was substantially justified. As defined in the Act, substantial justification means that the agency's determination "has a reasonable basis in law and fact." Sec. 42-92-2(7); Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988).

In addition, this Court will review all questions of law de novo. See Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (1977). "When construing a statute [this Court's] ultimate goal is to give effect to the purpose of the act as intended by the Legislature."

Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 168 (R.I. 2003) (quotations omitted). If "'the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" Solas v. Emergency Hiring Council of State, 774 A.2d 820, 824 (R.I. 2001) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). Where a statute is ambiguous, this Court "employ[s its] well-established maxims of statutory construction in an effort to glean the intent of the Legislature." Unistrut Corp. v. State Dep't of Labor & Training, 922 A.2d 93, 99 (R.I. 2007). The "ultimate interpretation of an ambiguous statute . . . is grounded in policy considerations" and this Court will not construe a statute in such a way as to "defeat its underlying purpose." Arnold, 822 A.2d at 169.

III

Analysis

On appeal, Plaintiff contends that the Board's decision upholding the Commissioner's refusal to grant litigation expenses was not substantially justified in law or in fact. Plaintiff argues that the decision was affected by error of law in finding that the hearing before the Commissioner was not an "adjudicatory proceeding" and the Act did not apply because Plaintiff was not a "prevailing party." Finally, Plaintiff argues that the Commissioner's holding that the Providence School Board's actions in this case were "substantially justified" was arbitrary, discriminatory, and unfair.[3]

[3] Plaintiff raised five additional claims in her Complaint. By Order of the Court, Matos, J., on November 6, 2013, the parties agreed to sever Plaintiff's discrimination and constitutional due process claims—under 42 U.S.C. § 12132 (the Americans with Disabilities Act); 29 U.S.C. § 794 (the Rehabilitation Act of 1973); Sec. 42-87-4 (the Rhode Island Civil Rights Act); and 42 U.S.C. § 1983—and only address the Equal Access to Justice and APA claims in the instant action. At a hearing on May 5, 2014, Plaintiff acknowledged that only the Equal Access to

In response, Appellees assert that this Court is without jurisdiction to entertain Plaintiff's appeal. Specifically, the Providence School Board contends that appeals from Board decisions must go directly to the Rhode Island Supreme Court via petition for common-law certiorari. In addition, Appellees contend that the Board's decision should be upheld because the Act does not apply, and, even if it did apply to the hearings before the Commissioner, the Providence School Board was "substantially justified" in its actions.

1

Jurisdiction

The Providence School Board's argument that this Court lacks the jurisdiction to consider Plaintiff's appeal is without merit. The Providence School Board contends that decisions of the Board may only be appealed via petition for common-law certiorari to the Supreme Court based upon statutory and case law applying to the Rhode Island Board of Regents for Elementary and Secondary Education (Board of Regents). However, the Board of Regents was replaced by the Board in 2013 by the General Assembly. Sec. 16-97-1. At the same time, the General Assembly repealed § 16-49-15, which had "'expressly exempt[ed] decisions of the board of regents from judicial review under the provisions of the Administrative Procedures Act.'" Latham v. State Dep't of Educ., 116 R.I. 245, 249, 355 A.2d 400, 402 (1976) (quoting Jacob v. Burke, 110 R.I. 661, 668, 296 A.2d 456, 460 (1972)). As no replacement for § 16-49-15 has been enacted, the previous exemption for appeal of Board of Regents decisions under the Administrative Procedures Act no longer applies to the Board. See R.I. v. Narragansett Indian Tribe, 19 F.3d 685, 700 (1st Cir. 1994) (changes in a statute that constitute "[d]eletion, without more, suggests that Congress simply had a change of heart" and the statute was intended to operate without

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Justice Appeal was properly before this Court, and, by agreement of the parties, that is the only claim this Court will address.

limitation). Moreover, the instant appeal is pursuant to § 42-92-5 rather than to the Administrative Procedures Act. Section 16-49-15 only operated to shield the Board of Regents from the Administrative Procedures Act, not the Equal Access to Justice Act. Therefore, this Court may consider an appeal from a decision of the Board.

2

The Act

"The Equal Justice Act was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings, as defined in the act." Taft, 536 A.2d at 892 (citing §§ 42-92-1, et seq. (1985, as amended 1994)). The Act is intended to "encourage individuals and small businesses to contest unjust actions by the state and/or municipal agencies . . . " Sec. 42-92-1(b). An adjudicative officer may award reasonable litigation expenses to a prevailing party if, at the conclusion of an adjudicatory proceeding, it finds that the agency's action was not "substantially justified." Sec. 42-92-3. The party seeking litigation expenses must prove both that it was a "prevailing party" in the adjudicatory proceeding and that the agency was not substantially justified in its actions.[4]

Both the Commissioner and the Board found that Plaintiff was not a "prevailing party," a finding which Plaintiff challenges as error of law on appeal. In particular, Plaintiff contests the Commissioner's finding that the Providence School Board's withdrawal to its objection to

[4] This Court notes that the Act applies only to "agencies," as defined in § 42-92-2(3) as "any state and/or municipal board, commission, council, department, or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases, to bring any action at law or in equity, including, but not limited to, injunctive and other relief . . . ." It is unclear whether the Providence School Board is an "agency" as defined by the Act because it is not authorized by law to make rules under § 42-35-3 or determine contested cases. Sec. 42-92-2(3). Nevertheless, this Court will assume, arguendo, that the Providence School Board is an agency for the purposes of this decision.

Student Doe's return to school was not a "favorable ruling on the merits." See § 42-92-3. Although the Rhode Island Supreme Court has not ruled on the definition of the word "prevailing" in the specific context of the Act, it has defined the term in the more general context of attorney's fees following the resolution of an action. "[P]laintiffs are said to 'prevail' when they 'succeed on any significant issue in litigation which achieves some of the benefit [they] sought in bringing suit.'" Doe v. R.I. Ethics Comm'n, 707 A.2d 265, 267 (R.I. 1998) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983)); accord Kenyon v. Town of Westerly, 735 A.2d 228, 230 (R.I. 1999). This definition has been applied to the term "prevailing party" as referred to in the federal Equal Access to Justice Act as well. See Austin v. Dep't of Commerce, 742 F.2d 1417, 1419-20 (Fed. Cir. 1984) (noting that the term "should not be limited 'to a victor only after entry of a final judgment following a full trial on the merits'" and that "[a] court should look to the substance of the litigation to determine whether an applicant has *substantially* prevailed in its position, and not merely the technical disposition of the case") (quotation omitted).

In this case, Plaintiff requested, pursuant to § 16-39-3.2, to compel the Providence School Board to permit Student Doe to return to Classical High School. See R. Ex. 9 at 1. The matter was concluded when, at a hearing before the Commissioner, counsel for the Providence School Board withdrew the agency's objection to Student Doe's attendance and specifically stated that "she can be allowed back to Classical tomorrow." Tr. 114, May 29, 2012. As Plaintiff clearly succeeded in causing the Providence School Board to allow Student Doe to return to classes—the exact "benefit sought in bringing suit"—she is a prevailing party. See § 42-92-3; Doe, 707 A.2d at 267; Kenyon, 735 A.2d at 230.

The parties raise a number of additional issues regarding the applicability of the Act. Nevertheless, assuming, arguendo, that the Act applies to the actions of the Providence School Board in this case, Plaintiff has failed to prove that the Providence School Board was not substantially justified in preventing Student Doe from attending classes. Campbell v. Tiverton Zoning Bd., 15 A.3d 1015, 1025 (R.I. 2011) (assuming, without deciding, that a building official was an agency under the Act and denying a claim under the Act on other grounds). The Act defines the phrase "substantial justification" to mean "that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Sec. 42-92-2. The agency has the burden to prove "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." Taft, 536 A.2d at 893; see also Krikorian v. R.I. Dep't of Human Servs., 606 A.2d 671, 675 (R.I. 1992). Nevertheless, "[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." Sec. 42-92-3.

The record shows that the Providence School Board had both a reasonable factual and legal basis to keep Student Doe out of school until it could obtain more information regarding her release from Butler Hospital and her present mental state. During the 2011-2012 school year, Student Doe had been absent fifty-four days and tardy an additional fifty-two days. Tr. 7, 13, May 16, 2012; Tr. 102, May 29, 2012. In addition, Student Doe had been hospitalized twice in the past six months, in October 2011 and May 2012. She underwent two psychological examinations during that year: a Firesetting Behavior Assessment and a Psychiatric Evaluation. R. Ex. 10, PSB Exs. A & B. The evaluations concluded that Student Doe was depressed and unable to consistently take her medications. See id. In addition, the evaluations noted that

Student Doe turned to fire-setting behaviors as a "coping strategy" and recommended that, "[t]o minimize the level of risk [she] poses, as much as possible, it is necessary to reduce her level of stress." See id. Student Doe returned to classes following her May 2012 hospitalization, a mere three weeks before final exams were scheduled to begin, which was a very stressful time of year for students. Tr. 29, May 16, 2012. It was reasonable for the Providence School Board to follow the recommendations of Student Doe's doctors in trying to avoid placing her into the exact type of stressful situation that taking finals after a hospitalization and missing a significant number of classes would create.

In addition, even though the Providence School Board admitted that it had not followed its usual unwritten policy for admitting students back to school after an extended absence, Shannon testified that, in this case, school officials determined that the doctor's note simply did not provide them with enough information about Student Doe's mental condition. Tr. 53-54, May 16, 2012. Upon her return to school, Student Doe merely provided a copy of her Patient Aftercare Instructions to the school, which only included an electronic signature from her doctor and did not provide any information about her condition beyond recommending that she return to school. Id. at 54; R. Ex. 10.1 at 1. In addition, Student Doe's Transfer Discharge Summary did not provide an answer to the most important category on the form—"Danger to Self/Others"—even though everything else on the form was filled out. R. Ex. 10, Pl.'s Ex. 4 at 4. The school was unable to meet with Plaintiff or engage in any "robust conversation" with her about their plan for Student Doe's transition back to school. Tr. 54-55, May 16, 2012.

Finally, the Providence School Board had a legitimate and substantial legal basis for insisting upon more information before it allowed Student Doe back into classes. School officials had a common-law duty to protect Student Doe and the other students at Classical High

School for whom, while on school grounds, they stood in loco parentis. See Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644, 119 S. Ct. 1661, 1672 (1999) (noting that schools may be responsible for their failure to protect students from tortious acts of third parties under the common law); Reek v. Lutz, 90 R.I. 340, 345, 158 A.2d 145, 147 (1960) ("The primary duty to exercise reasonable care for the safety of a child rests upon the parent or him who stands in loco parentis."); see also McLeod v. Grant Cnty. Sch. Dist. No. 128, 42 Wash. 2d 316, 319 (Wash. 1953) (teachers have custodial responsibility for protecting students on school grounds because the relationship between a school district and a student is not voluntary); Restatement (Second) Torts § 320 (1965).[5] The Providence School Board believed that Student Doe posed a danger to herself and others at school because of her history of fire-setting behavior and struggles with depression. Tr. 85-86, May 29, 2012. In addition, Shannon testified that there were "quite a few occasions" in which Student Doe had been unaccounted for while in the school building, and school officials were forced to search for her. Tr. 42, May 16, 2012. Thus, under the school's

[5] Restatement (Second) Torts § 320 provides:

> "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor
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> "(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> "(b) knows or should know of the necessity and opportunity for exercising such control."

This rule applies to "teachers or other persons in charge of a public school." Restatement (Second) Torts § 320 cmt. a (1965).

common-law duty to act as in loco parentis to not only Student Doe but also to all of the students at Classical High School, it certainly had a legal justification for requesting more information about Student Doe's mental stability before readmitting her. See Reek, 90 R.I. at 345, 158 A.2d at 147.[6] It also had a legal justification for attempting to clarify that Student Doe's doctor's recommendations, most particularly to limit her stress, were understood and followed while on school grounds. See Restatement (Second) Torts § 320 (imposing a duty on school officials to exercise reasonable care in preventing others from creating an "unreasonable risk of harm").

In sum, upon review of the entire record, it is inescapable that the Providence School Board had more than a substantial justification for its reluctance to readmit Student Doe: she was absent from school fifty-four days and tardy fifty-two days in that same school year; she was noncompliant with her medications; her most recent Transfer Discharge Summary left the "Danger to Self/Others" section blank; her mother presented the school with Aftercare Instructions that were not personally signed by her physician; on prior occasions, Student Doe had been unaccounted for in the school building; she would be returning to school at a high-stress time of year because of finals; she had a documented issue with fire-setting behavior; and she had been diagnosed with depression, ADHD, and ODD. Taken together, the Providence School Board was substantially justified in heeding these various warning signs and taking steps

[6] Appellees also contend that they were legally justified to keep Student Doe out of school pursuant to § 16-2-17, which provides that students and school staff have a "right to attend and/or work at a school which is safe and secure . . . and which is free from the threat, actual or implied, of physical harm by a disruptive student." However, pursuant to this statute, a student who violates or threatens to violate this right and is suspended is granted the right to appeal the school's action to the Commissioner. See § 16-2-17(c). In this case, the Providence School Board did not suspend Student Doe or cite any applicable statute; it simply prevented her from attending class. Without providing Plaintiff with a right to appeal under § 16-2-17 when the facts of this case arose, the Providence School Board cannot now invoke this statute as a justification for its actions and as a way to prevent Student Doe from potentially receiving litigation expenses under the Act.

to protect Student Doe herself, as well as the other students and faculty members at Classical High School.

Having found that the Providence School Board was substantially justified in its actions, this Court need not reach the additional issues raised by the parties; namely, whether the hearing before the Commissioner was an "adjudicatory proceeding" and whether the Commissioner made an "underlying decision," providing any court with the ability to review an appeal of fee determinations under the Act.

IV

Conclusion

After a de novo review of the entire record, this Court finds that the Commissioner's refusal to award Plaintiff litigation expenses was substantially justified. Accordingly, the Commissioner's decision is affirmed. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Pierre v. City of Providence School Board, et al.**
CASE NO:	**PC-2013-3422**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 16, 2014**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
For Plaintiff:	**Gregory A. Mancini, Esq.**
For Defendant:	**Paul V. Sullivan, Esq.** **Mary Ann Carroll, Esq.** **George Muksian, Esq.**