STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: January 13, 2017]

SUSAN GIANNINI as parent and natural guardian on behalf of G. DOE, a minor	:	
v.	:	**C.A. No. PC 2014-5240**
COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION, EVA-MARIE MANCUSO, AMY BARETTA, COLLEEN A. CALLAGHAN, KARIN L. FORBES, JO EVA GAINES, PATRICK A. GUIDA, LAWRENCE PURTILL, MATHIES J. SANTOS, JOYCE STEVOS, in their official capacities as members of the RHODE ISLAND BOARD OF EDUCATION, COUNCIL ON ELEMENTARY AND SECONDARY EDUCATION, and CUMBERLAND SCHOOL DEPARTMENT	:	

DECISION

CARNES, J. Before the Court is a request for fees and costs under Chapter 92 of title 42, entitled "Equal Access to Justice Act" (EAJA) filed by Plaintiff Susan Giannini as parent and natural guardian of G. Doe, her minor son. Previously, this Court ruled in her favor with respect to an appeal from the denial of her request for a waiver of fees for summer school classes. Jurisdiction is pursuant to the EAJA.

I

Facts and Travel

The following is a summary of the facts and travel of this case. A more detailed recitation may be found in Giannini v. Council on Elementary and Secondary Educ., No. PC 2014-5240 (Decision, Mar. 30, 2016).

At the end of the 2011-2012 school year, Plaintiff's son, G. Doe, needed three credits in core courses to advance into the tenth grade at Cumberland High School. As a result, G. Doe was faced with a Hobson's choice: repeat ninth grade or make up the missing credits during the summer. G. Doe decided to make up the credits through the Cumberland Learning Academy for School Success Credit Recovery Program (summer school) at a cost of $700.

Being of limited means, Plaintiff sent a request to the Superintendent of the Cumberland School Department for a waiver of the summer school fees so that her son could attend the classes. While awaiting a response to her request, Plaintiff paid the fees. In the meantime, she contacted Rhode Island Legal Services (Legal Services) for assistance in her quest for fee reimbursement. It was at this point that Plaintiff, through Legal Services, questioned the legality of summer school fees in the first instance by asserting that they were violative of the free nature of a public school education. The School Department ultimately refused, without explanation, to reimburse Plaintiff the cost of her son's summer school classes.

The Plaintiff appealed the School Department's decision to the Commissioner of Elementary and Secondary Education. In doing so, Plaintiff sought a determination that school committees do not have any legal authority to charge fees for summer school.

At the hearing, the parties agreed that the issue on appeal was purely a legal matter because the underlying facts were undisputed. Plaintiff took the position that the fee was illegal because G. Doe had to attend summer school in order to pass into the tenth grade. In response, the School Department alleged that the fee was not mandatory because G. Doe could have chosen to repeat ninth grade or to attend a different, Department-approved summer program.

Thereafter, rather than addressing the legality of summer school fees, the Commissioner ordered the taking of evidence on a matter not raised by Plaintiff. The Plaintiff appealed the

Commissioner's decision to the Rhode Island Board of Education (Board), which later remanded the matter to the Commissioner to determine whether school districts could charge fees for summer school. In doing so, the Board observed that an unresolved factual issue existed as to whether summer school classes were mandatory or optional.

On remand, the Commissioner found that Cumberland's summer school program was discretionary and outside the scope of the school year because it was not subject to the requirements set forth in the Rhode Island Department of Education's Basic Education Program (BEP) Manual. As a result, the Commissioner concluded that the Cumberland School District had authority to legally charge a fee for summer school classes. Defendant Council on Elementary and Secondary Education, in its capacity as the Board's successor-in-interest, affirmed the Commissioner's decision. The Plaintiff timely appealed the decision to this Court, seeking it to reverse the Council's decision, order reimbursement of the summer school fee, and award fees and costs under the EAJA.

After observing that the legal issue before the Court was one of first impression, the Court ultimately resolved the matter in favor of Plaintiff. On April 12, 2016, the Court entered an order reversing the Council's decision and ordering reimbursement of the fees to Plaintiff. See Order, Apr. 12, 2016. The Court did not rule on Plaintiff's request for fees and costs because the parties had not briefed the issue. See id.

On April 26, 2016, the Council filed a Motion to Reconsider. See Def. Council on Elementary and Secondary Educ.'s Mot. To Reconsider. Specifically, the Council sought "the Court [to] reconsider, and amend its prior decision to correct an interpretation of the law contained in the Court's decision that seems to say that school committees may only use state or federal funds for operations, and cannot generate its own revenue." Id. at 1.

After a hearing on the Motion to Reconsider, the Court amended three sentences in its previous Decision to address the Council's concern. See Order, July 29, 2016. In doing so, however, the Court stressed that the underlying Decision was "limited to the question of whether school committees may raise revenue by charging students tuition[,] [and that it did] not address whether school committees may raise revenue from other sources." Id. Thereafter, the parties briefed the instant request for fees and costs under the EAJA. Accordingly, the issue is now ripe for decision.

II

Standard of Review

This case requires the Court to statutorily interpret the EAJA. When reviewing a statute, the Court's '"ultimate goal is to give effect to the purpose of the act as intended by the Legislature.'" Providence Journal Co. v. Rhode Island Dep't of Pub. Safety ex rel. Kilmartin, 136 A.3d 1168, 1173 (R.I. 2016) (quoting Webster v. Perrotta, 774 A.2d 68, 75 (R.I. 2001)). In doing so, "[i]t is well settled that the plain statutory language is the best indicator of the General Assembly's intent." Twenty Eleven, LLC v. Botelho, 127 A.3d 897, 900 (R.I. 2015) (quoting Zambarano v. Ret. Bd. of the Emps.' Ret. Sys. of R.I., 61 A.3d 432, 436 (R.I. 2013)) (internal quotations omitted). When a statute's language "is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Swain v. Estate of Tyre ex rel. Reilly, 57 A.3d 283, 288 (R.I. 2012).

However, as our Supreme Court has stated,

> "In giving words their plain-meaning . . . we note that this approach is not the equivalent of myopic literalism. When we determine the true import of statutory language, it is entirely proper for us to look to the sense and meaning fairly deducible from the context. As we previously have held, it would be foolish and myopic literalism to focus narrowly on one statutory section

> without regard for the broader context." Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011) (internal citations and quotations omitted).

Accordingly, the Court is required to "'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections."' Twenty Eleven, LLC, 127 A.3d at 900 (quoting Ryan, 11 A.3d at 71). Furthermore, the Court always should avoid construing statutes "to achieve meaningless or absurd results." Id. It also is very important that the Court not construe a statute "'in a way that would * * * defeat the underlying purpose of the enactment."' Providence Journal Co., 136 A.3d at 1173 (quoting Swain, 57 A.3d at 289).

III

Analysis

The Plaintiff contends that as the prevailing party in this case, she is entitled to fees and costs pursuant to the EAJA. The School Department asserts that it should not be liable to pay fees under the EAJA because there were no adjudicatory proceedings before the Cumberland School Committee. The Council, on its part, contends that any matters that occurred before the Commissioner and Council did not constitute "adjudicatory proceedings" for purposes of the statute because it did not initiate the action. Both Defendants further maintain that fees are not available to Plaintiff because the underlying issue was a matter of first impression and, thus, their actions were substantially justified under the EAJA.[1]

[1] The Court observes that the EAJA was amended on June 16, 2016 by identical amendments contained in P.L. 2016, ch. 77 § 1, and P.L. 2016, ch. 81, § 1. It is axiomatic "that courts should apply the law in effect at the time a decision is rendered even though that law was enacted after the events that gave rise to the suit." Solas v. Emergency Hiring Council of State of R.I., 774 A.2d 820, 825 (R.I. 2001). Thus, "'a trial court should apply the law in effect at the time it makes its decision if such application would implement the legislative intent."' Id. (quoting Dunbar v. Tammelleo, 673 A.2d 1063, 1067 (R.I. 1996)). In Solas, the Rhode Island Supreme

In declaring the purpose of the EAJA, the legislature recognized that the state, its municipalities, and their respective agencies possess "a tremendous power in their ability to affect the individuals . . . they regulate or otherwise affect directly." Sec. 42-92-1(a). It further recognized "that the abilities of agencies to determine benefits, impose fines, suspend or revoke licenses, or to compel or restrict activities imposes a great, and to a certain extent, unfair, burden upon individuals . . . ." Id. The legislature found "that by contesting an unjust agency action and prevailing, the individual . . . often performs an important service to the public because it compels the agency to enforce the laws of this state and respective municipalities as they were written by the elected representatives of this state . . . ." Sec. 42-92-1(b).

The EAJA '"was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies during adjudicatory proceedings."' Tarbox v. Zoning Bd. of Review of Town of Jamestown, 143 A.3d 191, 199 (R.I. 2016) (quoting Krikorian v. R.I. Dep't of Human Servs., 606 A.2d 671, 674 (R.I. 1992). The purpose of the Act is "to address government abuse and agency decisions made without substantial justification . . . [by] 'encourag[ing] individuals and small businesses to contest unjust actions by the state and/or municipal agencies . . . .'" Tarbox, 143 A.3d at 200); see also Gutierrez v. Barnhart, 274 F.3d 1255, 1261 (9th Cir. 2001) (reiterating that '"a clearly stated objective of [the EAJA] is to eliminate financial disincentives for those who would defend against unjustified governmental action and thereby to deter the unreasonable exercise of Government authority"') (quoting Ardestani v. INS, 502 U.S. 129, 138 (1991)).

Court approved the trial court's application of an "amendment providing for the award of reasonable attorney's fees [that] was enacted" after the action was filed, but which "became effective before judgment was entered." Solas, 774 A.2d at 826. Likewise, judgment has not yet entered in this case; consequently, the Court will apply the recently amended provisions to the EAJA in the instant matter.

Section 42-92-3 of the EAJA provides in pertinent part:

> "(a) Whenever the agency conducts an adjudicatory proceeding subject to this chapter, the adjudicative officer shall award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding. The adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself . . . The award shall be made at the conclusion of any adjudicatory proceeding, including, but not limited to, conclusions by a decision, an informal disposition, or termination of the proceeding by the agency. . . .
>
> "(b) If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses shall be made by that court in accordance with the provisions of this chapter."

Thus, under the EAJA, "a prevailing '[p]arty' (§ 42-92-2(5)) may be awarded '[r]easonable litigation expenses' (§ 42-92-2(6)) where the '[a]gency' (§ 42-92-2(3)) was without '[s]ubstantial justification' (§ 42-92-2(7)) in actions that led to an '[a]djudicatory proceeding[]' (§ 42-92-2(2)) or [that were] taken in the proceeding itself." Tarbox, 143 A.3d at 200. An adjudicatory proceeding is defined as "any proceeding conducted by, or on behalf of, the state, administratively or quasi-judicially, which may result in the loss of benefits; the imposition of a fine; the adjustment of a tax assessment; the denial, suspension, or revocation of a license or permit; or which may result in the compulsion or restriction of the activities of a party." Sec. 42-92-2(2).

Citing to Campbell v. Tiverton Zoning Bd., 15 A.3d 1015 (R.I. 2011) for support, the School Department contends that it is not subject to the provisions of the EAJA because no adjudicatory proceedings were conducted before the Cumberland School Committee. However, the plaintiffs in Campbell commenced their action in Superior Court by way of a request for declaratory relief. See Campbell, 15 A.3d at 1025 ("The act clearly provides that the contemplated 'adjudicatory proceeding' is one that occurs at the agency level either

administratively or quasi-judicially, not an adjudicatory proceeding in Superior Court."). The instant matter came before the Court by way of an appeal from the Department of Education.

Clearly, the EAJA permits the Court to grant fees and costs in agency appeals. See § 42-92-3(b) ("If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses shall be made by that court in accordance with the provisions of this chapter."). Furthermore, the record reveals that the School Department participated in, and objected to, Plaintiff's appeal to the Commissioner. In fact, but for the Department's refusal to grant a waiver and/or reimburse Plaintiff the fee for summer school, this case never would have come before the Commissioner; consequently, this argument has no merit.

The Council contends that because it did not conduct any "adjudicatory proceedings" as defined by the Act, it also is not subject to the EAJA. Specifically, it contends that because it did not initiate, cause, or pursue any proceeding that resulted in a loss of benefits, it cannot be held liable for fees and costs under the EAJA. However, there was a loss of benefits in this case; namely, G. Doe's right to a free education. Consequently, the Council's argument with respect to this point also must fail.

This Court observes that as the Rhode Island EAJA is modeled on the Federal Equal Access to Justice Act, 28 U.S.C.A. § 2412 . . . this court "should follow the construction put on it by the federal courts, unless there is strong reason to do otherwise." Krikorian, 606 A.2d at 674 (quoting Laliberte v. Providence Redevelopment Agency, 109 R.I. 565, 575, 288 A.2d 502, 508 (1972)). In bringing a claim for fees and costs, "'[t]he EAJA applicant has the burden of proving he [or she] is a prevailing party."' Advanced Gov't Solutions, Inc. v. U.S., 123 Fed. Cl. 610, 612 (2015) (quoting Davis v. Nicholson, 475 F.3d 1360, 1366 (Fed. Cir. 2007)). For purposes of the EAJA, a "'Party' means any individual whose net worth is less than five hundred thousand

dollars ($500,000) at the time the adversary adjudication was initiated . . . ." Sec. 42-92-2(5). It is undisputed that in the instant matter Plaintiff prevailed on her underlying claim, and Defendants have not disputed that Plaintiff's net worth was less than $500,000 when her request for a waiver was adjudicated.

However, "[s]ince fees are awarded only to a prevailing party, it follows that the fact that the government lost does not create a presumption that its position was not substantially justified." U.S. v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985). Instead, "the government bears the burden of proving its position was substantially justified." Advanced Gov't Solutions, Inc., 123 Fed. Cl. at 612 (quoting Libas, Ltd. v. U.S., 314 F.3d 1362, 1365 (Fed. Cir. 2003)); see also Stewart v. Astrue, 561 F.3d 679, 683 (7th Cir. 2009) (stating the agency "bears the burden of proving that both [its] pre-litigation conduct, including the [underlying] decision itself, and [its] litigation position were substantially justified").

The term "substantial justification" means 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(7). In demonstrating substantial justification, the governmental agency "'must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct.'" Krikorian, 606 A.2d at 671 (quoting Taft v. Pare, 536 A.2d 888, 893 (R.I. 1988)).

Although a case may involve an issue of first impression, that fact, standing alone, is not enough to demonstrate substantial justification. See Gutierrez, 274 F.3d at 1261 ("Whether a litigated issue is one of first impression is properly considered as one factor in determining whether the government's litigation position is substantially justified . . . [however,] there is no per se rule that EAJA fees cannot be awarded where the government's litigation position

contains an issue of first impression."); Swiney v. Gober, 14 Vet. App. 65, 71-72 (2000) (stating "whether a case is one of first impression is only one factor for the Court to consider"); Keasler v. U.S., 766 F.2d 1227, 1234 (8th Cir. 1985) ("That a case presents an issue of first impression in the forum does not ipso facto make the government's position in the litigation reasonable.").

Instead, "[t]he governing standard . . . allows the Government to advance 'in good faith . . . novel but credible . . . interpretations of the law that often underlie vigorous enforcement efforts.'" Abramson v. U.S., 45 Fed. Cl. 149, 152 (1999) (quoting Russell v. Nat'l Mediation Bd., 775 F.2d 1284, 1290 (5th Cir. 1985)) (emphasis added). This means that for an issue of first impression to be controlling, "a true question of novelty or first impression must be present for the Government's position to be substantially justified." Abramson, 45 Fed. Cl. at 152 (citing Ratnam v. INS, 177 F.3d 742, 743 (9th Cir. 1999) (standing for the proposition that "where case law of circuit ran squarely against Government's position, Government was not substantially justified in relying on first impression simply because other courts elsewhere in the country were more receptive to its arguments"); see also Gutierrez, 274 F.3d at 1262 (rejecting suggestion that "the government gets an automatic 'first impression' free pass" after violating "its own regulations, or assumably any clear legal rule, for the first time . . .").

In the instant matter, the underlying issue before the Court was one of first impression. Thus, if Defendants' position on this issue "was at least colorably supported by the legislative history of the statutory provision involved . . . [then] its litigating position [may have been] substantially justified within the intendment of the Equal Access to Justice Act . . . ." Change-All Souls Hous. Corp. v. U.S., 1 Cl. Ct. 302, 304 (1982).

The Plaintiff essentially contends that the Council acted in bad faith because it failed to follow the historical approach the state previously had taken in exempting certain activities from

being assessed a fee. However, the novel argument raised by the Council required this Court to undertake a thorough and extensive review of the evolution of education law in Rhode Island. This was by no means an easy task. Although Plaintiff ultimately prevailed in her appeal, the arguments set forth by Defendants in opposition to her appeal were complex and nuanced. Thus, the Court finds that Defendants' position in the underlying case had "a reasonable basis in law and fact[,]" (§ 42–92–2(7)), such that their actions were substantially justified.

IV

Conclusion

In light of the foregoing, the Court concludes that although ultimately incorrect, Defendants were substantially justified in taking the position that school committees could charge a fee for summer school. As a result, the Court denies Plaintiff's request for fees and costs under the EAJA.

Counsel shall submit an appropriate Order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Susan Giannini v. Council on Elementary and Secondary Education, et al.
CASE NO:	PC 2014-5240
COURT:	Providence County Superior Court
DATE DECISION FILED:	January 13, 2017
JUSTICE/MAGISTRATE:	Carnes, J.
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