

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of
East Brunswick, Middlesex County,

Petitioner,

v.

Board of Education of the City of Trenton,
Mercer County,

Respondent.

Synopsis

The Board of Education of East Brunswick (East Brunswick) filed a petition of appeal regarding a dispute between petitioner and the respondent Board of Education of Trenton (Trenton) over Trenton's refusal to pay East Brunswick for the provision of extraordinary services to a minor student, S.B., who attends school in East Brunswick, but is a resident of the City of Trenton. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; since June 2016, East Brunswick and Trenton have entered into multiple sending/receiving agreements for tuition and transportation costs relating to the education of S.B., except for the costs of one-on-one aides; it is undisputed that Trenton is the educational agency responsible for creating the Individualized Education Plan (IEP) for S.B., and there is no dispute as to its content and/or appropriateness; East Brunswick, as the receiving district, is responsible for implementing the IEP; the dispute herein relates to the staffing and costs involved in providing the one-on-one aide specified in S.B.'s IEP; pursuant to *N.J.A.C. 6A:23A-17.1(e)(5)(viii)*, "extraordinary services" such as one-on-one aides are not included in the actual cost per student for tuition purposes, and may be billed directly to the sending district; per regulation, East Brunswick has submitted agreements covering the extraordinary services provided to S.B. since June 2016, as well as invoices for the direct costs of aides; Trenton has argued that it has no obligation to enter into contracts with East Brunswick for S.B.'s one-on-one aides, that it contracts for such services with an outside vendor for purposes of economy, that the tuition agreements between the parties do not bar Trenton from hiring its own aides for S.B., and that Trenton owes East Brunswick only the lower amount that Trenton would have paid for one-on-one aides through its outside vendor, rather than the actual, higher cost of aides that have been provided by East Brunswick. The ALJ concluded that: Trenton is obligated to pay petitioner the direct costs incurred by East Brunswick in providing a one-on-one aide for S.B. from June 2016 to the present, and for as long as S.B. remains in East Brunswick schools and requires an aide; East Brunswick has no obligation to use the services of one-on-one aides provided by Trenton; and Trenton cannot limit its payment to East Brunswick based on the amount that Trenton would have paid its outside vendor for the same services. Accordingly, the ALJ granted summary decision in favor of the petitioner, and ordered Trenton to pay East Brunswick the full direct costs of aides assigned in compliance with S.B.'s IEP.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 22, 2019

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of
East Brunswick, Middlesex County,

Petitioner,

v.

Board of Education of the City of Trenton,
Mercer County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the respondent Trenton Board of Education (Trenton). The petitioner, East Brunswick Board of Education (East Brunswick), did not file a reply.

This matter involves a student who is a resident of Trenton, but attends school in East Brunswick. East Brunswick has provided the student with a one-to-one aide, consistent with the terms of his Individualized Education Program (IEP), and has billed Trenton for the cost of the aide. The ALJ found that: Trenton is obligated to pay East Brunswick the direct costs incurred by petitioner to provide the aide; Trenton cannot limit its payment to East Brunswick based on the amount Trenton pays its own aides; and Trenton cannot require East Brunswick to use Trenton's aides for this student.

Trenton argues in its exceptions that it should be permitted to supply individual aides through a contracted vendor to its students who attend school in East Brunswick, rather

than be forced to contract with East Brunswick for the individual aides. Trenton contends that the cost of East Brunswick's aides is not reasonable when compared to the lower amount Trenton pays its aides, and that the facts in this case are distinguishable from those in the matter on which the ALJ relied in part, *Board of Education of the City of Trenton, Mercer County v. Board of Education of the Mercer County Special Services School District, Mercer County*, OAL Dkt. No. EDU 16465-15, decided August 5, 2016, *affirmed* Commissioner Decision No. 334-16, decided September 20, 2016.

Upon review, the Commissioner concurs with the ALJ that Trenton is obligated to pay petitioner the direct costs incurred by East Brunswick to provide the one-to-one aide. The Commissioner finds Trenton's exceptions unpersuasive. Individual aides are "extraordinary services" for which a district board of education may bill directly, pursuant to *N.J.A.C. 6A:23A-17.1(e)(5)(viii)*. As such, while Trenton and East Brunswick enter into tuition agreements for the cost of a student's placement in East Brunswick,¹ Trenton is billed separately by East Brunswick for the cost of individual aides.

East Brunswick retains some autonomy in providing the services and programs that it is charged with administering, including the provision of services required by a student's IEP. Indeed, the legislature has given East Brunswick the power to "make rules . . . governing the employment, terms and tenure of employment, promotion, and dismissal, and salaries and time and mode of payment thereof of teaching staff members . . .". *N.J.A.C. 18A:27-4*. There is no legal authority for Trenton to unilaterally require East Brunswick to use Trenton's contracted vendor for individual aides when petitioner is otherwise able to provide that service, or to set the

¹ The parties disagree as to whether the 2016-17 Extended School Year (ESY), 2016-17 school year, and 2017-18 ESY agreements were fully executed. However, East Brunswick agrees that Trenton paid the tuition amounts due for this period in full and, as such, the fact of execution of the agreements is immaterial to the resolution of this matter. Tuition for 2018-19 is addressed separately herein, as it was one of the issues raised in Trenton's exceptions.

terms of compensation for East Brunswick's employees by limiting the amount it pays petitioner for services rendered by those employees.

By operation of law, East Brunswick is permitted to charge Trenton for the direct cost of the aides. *N.J.A.C.* 6A:23A-17.1(e)(5)(viii). Trenton's attempts to negotiate a contract whereby it would provide its own aides or pay East Brunswick a lower amount for its aides do not change this result. The obligation to pay arises from the law, not from a contract. Trenton argues in its exceptions that the Initial Decision has forced it to enter into a contract with East Brunswick for the cost of the aide, but no such requirement has been imposed. While *N.J.A.C.* 6A:23A-17.1 requires a written contractual agreement establishing the tuition charge, extraordinary services may be billed directly without any contract.²

Trenton argues that the cost charged by East Brunswick for its aides is excessive, because it exceeds what Trenton would pay for the same services. However, the regulation allowing a receiving district board of education to directly bill the sending district board of education for extraordinary services does not impose a reasonableness requirement. Even if such a requirement were imposed, Trenton has not proffered any evidence that East Brunswick's rate is unreasonable. The fact that East Brunswick's rate exceeds Trenton's rate is not, in and of itself, a basis to conclude that East Brunswick's rate is unreasonable. Moreover, the per diem rate of \$181.04 charged by East Brunswick for the aide in this matter is lower than the per diem rate of \$195.00 that the Commissioner has previously permitted a receiving district to charge for a one-to-one aide. *BOE Trenton, supra*. Notably, in that matter, the receiving district was also

² While a written contractual agreement is not required for extraordinary services, nothing prohibits the districts from entering into such an agreement, either to allow Trenton to provide its own aides, or to agree upon a cost other than the actual cost paid by East Brunswick. The Commissioner notes that should the parties enter into such an agreement, the Commissioner would not have jurisdiction over any dispute between the parties regarding the terms of or compliance with such a contract because it does not arise out of New Jersey school law. *N.J.S.A.* 18A:6-9.

permitted to charge for days when the student was absent, and so Trenton's exceptions to East Brunswick's charges for days absent are unpersuasive. *Ibid.*

Trenton further contends that the decision in *BOE Trenton, supra*, is inapposite because Trenton places students in the Mercer County Special Services District by choice and can remove students at its discretion, whereas the student in this matter attends East Brunswick because he was placed in a resource home in that district by the Division of Child Protection & Permanency. However, Trenton does not dispute that it is responsible for providing the student with a Free Appropriate Public Education (FAPE). Trenton's responsibility to provide FAPE continues regardless of the mechanism by which the student is placed in another district. Similarly, the requirements for the billing of extraordinary services by the receiving district are not dependent on whether the student is placed by choice or by another method.

Finally, Trenton argues that summary decision in favor of the petitioner was not warranted because there exists a genuine issue of material fact regarding the amount of money that Trenton owes East Brunswick. Trenton claims that the ALJ failed to deduct money already paid by Trenton for the 2018-19 school year. However, the decision clearly indicates that "Trenton is obligated to pay the amount claimed by East Brunswick, \$157,052.39, reduced by the amount paid by Trenton toward invoices for the 2018-19 school year." As the ALJ's award explicitly reflects that payments have been made for the 2018-19 year and deducts those amounts from the amount that Trenton was ordered to pay, there is no remaining issue of material fact that must be decided. Trenton's remaining arguments on the topic of material fact merely repeat its other arguments regarding payments for the aide more generally, and those issues have been resolved as a matter of law as indicated in the Initial Decision and herein.

Accordingly, the Initial Decision is hereby adopted as the final decision in this matter. Summary judgment is granted in favor of East Brunswick. Trenton is ordered to pay the full direct cost of the aides retained by East Brunswick in compliance with S.B.'s IEP for the period in question, and for as long as S.B. remains in East Brunswick schools and requires the services of a one-to-one aide.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: May 22, 2019
Date of Mailing: May 24, 2019

³ This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

**BOARD OF EDUCATION OF THE TOWNSHIP
OF EAST BRUNSWICK, MIDDLESEX COUNTY,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER COUNTY,**

Respondent.

OAL DKT. NO. EDU 18381-17

AGENCY DKT. NO. 235-9/17

Micci J. Weiss, Esq. for petitioner (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Audra Pondish, Esq., for respondent (Adams Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: March 29, 2019

Decided: April 9, 2019

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

Petitioner Board of Education of the Township of East Brunswick, Middlesex County (East Brunswick), as the receiving school, seeks \$157,052.39, from respondent Board of Education of the City of Trenton, Mercer County (Trenton), the sending school, for extraordinary services provided to minor student S.B. for school years 2015 through 2019. N.J.A.C. 6A:23A-17.1(e)(5)(viii).

PROCEDURAL HISTORY

On September 29, 2017, East Brunswick filed a petition of appeal to the Department of Education (DOE) asserting that a dispute had arisen between East Brunswick and respondent Trenton over Trenton's refusal to pay East Brunswick for the provision of special education and extraordinary services for S.B. On December 1, 2017, following three notices from the DOE, Trenton filed its answer to the petition.

The matter was transmitted by the DOE to the Office of Administrative Law (OAL), where it was filed on December 7, 2017, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the Honorable Joseph A. Ascione, Administrative Law Judge (ALJ), on December 27, 2017. Judge Ascione convened telephonic case management conferences with counsel on February 21, 2018, and April 4, 2018, to discuss the potential issues in the case and a discovery schedule, and to schedule the matter for hearings. A telephonic status conference scheduled for July 18, 2018, was adjourned at the request of the parties, and a telephonic status conference scheduled for September 4, 2018, was adjourned as Judge Ascione was on medical leave. On September 5, 2018, East Brunswick filed a request to amend its petition, which was reviewed and granted on September 17, 2018, by the Honorable Edward J. Delaney, Jr., Administrative Law Assignment Judge. On September 19, 2018, East Brunswick filed an amended petition.

On October 4, 2018, this matter was reassigned to the undersigned and scheduled for a telephonic case management conference on October 12, 2018. During this conference, it was agreed that Trenton would file its answer to the amended complaint on or before October 19, 2018, the plenary hearing would be held on April 2, 2019, and the deadline for the parties to file dispositive motions was March 1, 2019. On February 27, 2019, East Brunswick filed a motion for summary decision in its favor. I notified the parties that the hearing was rescheduled for May 15, 2019, to allow time to consider the motion. On March 19, 2019, Trenton filed its response in opposition to East Brunswick's motion and cross-motion for summary decision in its favor. East Brunswick replied on March 29, 2019, and the matter is now ripe for decision.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. East Brunswick is a local school district in Middlesex County, New Jersey. Trenton is a local school district in Mercer County, New Jersey.
2. S.B. is a resident of Trenton. As such, Trenton is the district responsible to provide S.B. a Free and Appropriate Public Education (FAPE), pursuant to 20 U.S.C.A. 1400(d)(1)(A).
3. While attending school in Trenton, S.B. received special education services under an Individual Education Program (IEP) developed pursuant to the requirements of the Individuals with Disabilities Education Act, 20 U.S.C.A. 1401 et seq. (IDEA), and New Jersey regulations. In accordance with his IEP, S.B. received extraordinary service, a one-to-one aide. N.J.A.C. 6A:23A-18.2.
4. Prior to June 6, 2016, the Division of Child Protection and Permanency (DCP&P) removed S.B. from his home in Trenton and placed him in a resource family home located in East Brunswick. On or about June 6, 2016, S.B. began attending school in East Brunswick. S.B. has remained at East Brunswick for each subsequent school year, including the current one.
5. Pursuant to N.J.A.C. 6A:23A-17(f), Trenton and East Brunswick entered into a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the remainder of the 2015-2016 school year, covering June 6, 2016 through June 30, 2016 (2015-2016 Tuition Agreement). Trenton executed the 2015-2016 Tuition Agreement on or about July 3, 2016, and paid East Brunswick the amount due under this agreement in full.⁴
6. East Brunswick provided a sending/receiving agreement to Trenton for a one-to-one aide for S.B. for the remainder of the 2015-2016 school year, covering

⁴ See, Summary Chart, ¶ 20.

June 6, 2016 through June 30, 2016 (2015-2016 Aide Agreement). East Brunswick claims to have received the fully-executed 2015-2016 Aide Agreement from Trenton on or about July 3, 2016. Trenton claims it did not execute the 2015-2016 Aide Agreement. Trenton paid only a portion of the \$2,135.34, due under this agreement.

7. S.B.'s IEP provides him with an extended school year (ESY) program and with a one-to-one aide for his ESY program.
8. East Brunswick provided Trenton a sending/receiving agreement for ESY Program and Transportation for the 2016-2017 school year, covering July 6, 2016 through August 9, 2016 (2016-2017 ESY Tuition Agreement). East Brunswick claims to have received the fully-executed 2016-2017 ESY Tuition Agreement on or about July 3, 2016. Trenton claims it did not execute the 2016-2017 ESY Tuition Agreement. Trenton paid East Brunswick the amount due under this agreement in full.
9. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2016-2017 ESY Program, covering July 6, 2016 through August 9, 2016 (2016-2017 ESY Aide Agreement). Trenton did not return the 2016-2017 ESY Aide Agreement. East Brunswick billed Trenton for \$6,382.50, the cost of providing S.B. with a one-to-one aide for the 2016-2017 ESY Program; Trenton has not paid this invoice.
10. East Brunswick provided Trenton a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the 2016-2017 school year, covering September 6, 2016 through June 30, 2017 (2016-2017 Tuition Agreement). East Brunswick claims to have received the fully-executed 2016-2017 Tuition Agreement on or about July 3, 2016. Trenton claims it did not execute the 2016-2017 Tuition Agreement. Trenton paid East Brunswick the amount due under this agreement in full.

11. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2016-2017 school year, covering September 6, 2016 through June 30, 2017 (2016-2017 Aide Agreement). Trenton did not return the 2016-2017 Aide Agreement. East Brunswick billed Trenton for \$45,954.00, the cost of providing S.B. with a one-to-one aide for the 2016-2017 school year; Trenton paid \$17,500.00, of this invoice.
12. East Brunswick provided Trenton a sending/receiving agreement for ESY Program and Transportation for the 2017-2018 school year, covering July 6, 2017 through August 9, 2017 (2017-2018 ESY Tuition Agreement). East Brunswick claims that on or about October 11, 2017, Trenton executed the 2017-2018 ESY Tuition Agreement. Trenton does not admit or deny executing this contract; Trenton paid East Brunswick the amount due under this agreement in full.
13. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2017-2018 ESY Program, covering July 6, 2017 through August 9, 2017 (2017-2018 ESY Aide Agreement). Trenton did not return the 2017-2018 ESY Aide Agreement. East Brunswick billed Trenton \$6,719.25, for the cost of providing S.B. with a one-to-one aide for the 2017-2018 ESY Program; Trenton has not paid this invoice.
14. Trenton and East Brunswick entered into a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the 2017-2018 school year, covering September 6, 2017 through June 30, 2018 (2017-2018 Tuition Agreement). On or about July 3, 2017, Trenton executed the 2017-2018 Tuition Agreement and paid East Brunswick the amount due under this agreement in full.
15. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2017-2018 school year, covering September 6, 2017 through June 30, 2018 (2017-2018 Aide Agreement). Trenton did not return

the 2017-2018 Aide Agreement. East Brunswick billed Trenton \$48,378.60, for the cost of providing S.B. with a one-to-one aide for the 2017-2018 school year; Trenton paid only \$17,500.00, of this invoice.

16. East Brunswick sent Trenton a sending/receiving agreement for ESY Program and Transportation for the 2018-2019 school year, covering July 3, 2018 through August 7, 2018 (2018-2019 ESY Tuition Agreement). Trenton did not return the 2018-2019 ESY Tuition Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the \$5,608.50, due under this agreement.
17. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2018-2019 ESY Program, covering July 3, 2018 through August 7, 2018 (2018-2019 ESY Aide Agreement). Trenton did not return the 2018-2019 ESY Aide Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the \$4,526.00, due under this agreement.
18. East Brunswick sent Trenton a sending/receiving agreement for School Year Behavior Disability Tuition and Transportation for the 2018-2019 school year, covering September 5, 2018 through June 30, 2019 (2018-2019 Tuition Agreement). Trenton did not return the 2018-2019 Tuition Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the \$40,636.00, due under this agreement.
19. East Brunswick sent Trenton a sending/receiving agreement for a one-to-one aide for S.B. for the 2018-2019 school year, covering September 5, 2018 through June 30, 2019 (2018-2019 Aide Agreement). Trenton did not return the 2018-2019 Aide Agreement; the parties dispute whether Trenton has paid East Brunswick any amount of the \$32,587.20, due under this agreement.

20. In summary, East Brunswick contends that Trenton owes a balance of \$157,052.39, to East Brunswick as shown below:

<u>Contract</u>	<u>Billed</u>	<u>Paid</u>	<u>Owing</u>
15/16 Tuition*	\$ 1,655.42	\$ 1,655.42	\$ 0.00
15/16 Aide	2,135.34	875.00	1,260.00
16/17 ESY	6,329.00	6,329.00	0.00
16/17 ESY Aide	6382.50	0.00	6,382.50
16/17 Tuition	46,175.20	46,175.20	0.00
16/17 Aide	45,954.00	17,500.00	28,454.00
17/18 ESY	11,990.25	11,990.25	0.00
17/18 ESY Aide	6,719.25	0.00	6,719.25
17/18 Tuition*	86,329.00	86,329.00	0.00
17/18 Aide	48,378.60	17,500.00	30,878.60
18/19 ESY	5,608.50	0.00	5,608.50
18/19 ESY Aide	4,526.00	0.00	4,526.00
18/19 Tuition	40,636.00	0.00	40,636.00
18/19 Aide	32,587.20	0.00	32,587.20

*Indicates that parties agree that the contract was fully-executed.

21. Although petitioner contends that Trenton has failed to pay any of the costs incurred by East Brunswick to educate S.B. during the 2018-2019 school year, Trenton claims that it has paid \$34,676.50, of the total owed, and will continue to make incremental payments throughout the 2018-2019 school year. Resp't Br. in Support of its Cross Motion for Summary Decision and in Opposition to Petit'r Motion for Summary Decision (March 19, 2019), p. 12; Certification of Jayne Howard (undated), ¶ 30 and Ex. 14.

DISPUTED FACTS

1. There is no dispute that East Brunswick provided a sending/receiving agreement to Trenton for a one-to-one aide for S.B. covering June 6, 2016 through June 30, 2016 (2015-2016 Aide Agreement), but there is a dispute regarding whether this contract was executed. East Brunswick claims to have received the fully-executed 2015-2016 Aide Agreement from Trenton on or about July 3, 2016. See, Br. in Support of Petitioner Motion for Summary Decision (February 27, 2019), p. 4, ¶¶ 10. In its answers to the initial and amended petitions, Trenton admitted “that it entered into a sending/receiving agreement for a one-to-one paraprofessional commencing on June 6, 2016 and ending on June 30, 2016.” Respondent Trenton Board of Education’s Answer to Amended Petition of Appeal and Affirmative Defenses (October 18, 2018), p. 2, ¶¶ 10. Trenton claims, however, that it did not execute the 2015-2016 Aide Agreement and in support, provided a copy of this contract that is signed only by East Brunswick. Howard Cert., Ex. 7. East Brunswick did not provide a copy of this contract, signed or unsigned. As explained below, East Brunswick’s claim for payment of the amount owed under the 2015-2016 Aide Agreement is not dependent on a fully-executed contract, making this dispute one of an immaterial fact.

2. There is no dispute that East Brunswick transmitted Tuition Agreements to Trenton for the 2016-2017 ESY, the 2016-2017 regular school year, and the 2017-2018 ESY. With respect to each of these contracts, however, the parties disagree as to whether they were fully-executed. East Brunswick did not provide copies of the fully-executed contracts but since there is no dispute with respect to the amounts owed under these contracts, the fact of execution is immaterial.

3. Trenton claims that it never agreed to pay East Brunswick more than \$17,500.00, on an annual (or pro-rated) basis for a one-to-one aide for S.B. In fact, Trenton refers to discussions with East Brunswick in which Trenton offered to provide an aide for S.B. and then refused to pay more than the amount Trenton pays for its

own aides. Howard Cert., ¶ 20. East Brunswick does not affirmatively deny that such discussions took place; neither party contends that any agreement was reached. As explained more fully below, these facts too are immaterial.

ARGUMENT ON THE MOTIONS

East Brunswick argues that, consistent with New Jersey regulations, it has implemented S.B.'s IEP from June 6, 2016, to the present, including providing S.B. with extraordinary services, a one-to-one aide. Pursuant to N.J.A.C. 6A:23A-17.1(e)(5)(viii), extraordinary services provided to special education students are not included "in the cost per student for tuition purposes." Therefore, as permitted by regulation, in each billing cycle, East Brunswick has billed Trenton for S.B.'s tuition and transportation and sent Trenton a separate bill for the additional direct cost of the one-to-one aide. Trenton has failed to pay the full invoiced costs for these extraordinary services.

Trenton argues that it had no obligation to enter into contracts with East Brunswick for the one-to-one aides, and the tuition contracts Trenton did sign do not bar Trenton from hiring its own aides for S.B. Trenton further claims that it never agreed to pay East Brunswick more than \$17,500.00, on an annual (or pro-rated) basis for a one-to-one aide for S.B. Proof of this is that during the fall of 2016, after S.B. had been attending school in East Brunswick for approximately four months, the Districts "engaged in conversations and exchanged correspondence" regarding the decision made by Trenton to contract with an independent agency to provide one-to-one aides for its students. Resp't Br., p. 8. At that time, Trenton advised East Brunswick that this independent agency would supply an aide for S.B.; if, however, East Brunswick chose to use its own aide for S.B., Trenton only agreed to pay East Brunswick the capped amount of \$17,500.00, on an annual (or pro-rated) basis for that aide.

Trenton also argues that in an attempt to save money, the District's contract with the independent agency provides that if a student is absent, there is no charge to the District for his or her aide. East Brunswick acknowledges that on days when S.B. was absent (thirty times to date), his aide was reassigned to tasks unrelated to S.B. and Trenton received no credit.

Finally, Trenton argues that the aides it uses are well-trained and qualified to serve special education students and the failure of East Brunswick to use these aides places a tremendous financial burden on Trenton, an underfunded school district.

LEGAL ANALYSIS AND CONCLUSIONS

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided “when the evidence is so one-sided that one party must prevail as a matter of law.” Brill guides us thusly:

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

[Id. at 540.]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.

[Id. at 536-3.7.]

As discussed above, I **CONCLUDE** that the parties raise no dispute with respect to material facts and the following issues can be decided as a matter of law:

1. Whether Trenton is obligated to pay East Brunswick the direct costs for the one-to-one aide retained by East Brunswick for S.B. between June 6, 2016, and the present;
2. Whether East Brunswick is obligated to accept a one-to-one aide for S.B. supplied by Trenton; and
3. Whether Trenton owes East Brunswick for S.B.'s one-to-one aides only the lower amount that Trenton would have paid had it supplied the aides.

The primary purpose of the IDEA is to ensure that all disabled children will be provided a FAPE. 20 U.S.C. 1400(d)(1)(A). New Jersey has also enacted legislation and adopted regulations that assure all disabled children the right to a FAPE. N.J.S.A. 18A:46-1 to -46; N.J.A.C. 6A:14-1.1 et seq. Under the IDEA, a FAPE requires 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, or secondary education in the State involved; and (d) are provided in conformity with the IEP required under Sec. 614.” 20 U.S.C. 1401(9).

“At the beginning of each school year, each local educational agency . . . shall have in effect, for each child with a disability in the agency’s jurisdiction, an [IEP].” 20 U.S.C. 1414(d)(2)(A). The IEP is the “‘centerpiece’ of the IDEA’s system for delivering education to disabled children,” ensuring that each child receives a “basic floor of opportunity.” D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010); see also, N.J.A.C. 6A:14-3.7.

The parties agree that Trenton, as S.B.’s home District, is the educational agency responsible for creating the IEP for S.B. and that East Brunswick, as the District in which S.B. was placed by DCP&P, is the educational agency responsible for implementing S.B.’s IEP. An IEP must be accessible to each “regular education teacher, special education teacher, related services provider, and other service provider who is responsible for its implementation.” N.J.A.C. 6A:14-3.7(a)(2). There is no dispute as to the content and/or appropriateness of

S.B.'s IEP; the parties merely disagree as to their respective responsibilities and obligations for the staffing and costs of implementation of the IEP.

“Any board of education . . . which receives pupils from a sending district under this chapter shall determine a tuition rate to be paid by the sending board of education.” N.J.S.A. 18A:46-21. “This tuition rate may not exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education.” Id. However, “extraordinary service,” which includes “the services of a one-to-one aide for a student,”⁵ are not included in the actual cost per student for tuition purposes and may be billed directly to the sending district. N.J.A.C. 6A:23A-17.1(e)(5)(viii).

Since June 2016, consistent with the regulations, East Brunswick and Trenton have entered into multiple sending/receiving agreements for School Year Behavior Disability Tuition and Transportation covering the actual costs to East Brunswick of educating S.B., except for the costs of the one-to-one aides. As detailed above, Trenton has (for the most part) paid those invoices. As permitted by the regulations, East Brunswick has prepared agreements covering the extraordinary services provided to S.B. during the same period and has sent those agreements to Trenton as well as invoices for the direct costs of the aides.

Trenton argues that it had no obligation to enter into contracts with East Brunswick for the one-to-one aides, and the tuition contracts Trenton did sign do not bar Trenton from hiring its own aides for S.B. Trenton is correct in that it had no obligation to sign contracts for extraordinary services, but that does not mean that Trenton can use the absence of a contract to get out of paying for those services. Trenton's obligation to pay comes from the regulations, not from contracts. While the Tuition Agreements that Trenton entered with East Brunswick for S.B. do not specifically prevent Trenton from hiring its own aides for S.B., neither do those contracts specifically obligate East Brunswick to use, or pay for, aides hired by Trenton.⁶

⁵ N.J.A.C. 6A:23A-18.2.

⁶ The tuition contracts provided by Trenton (most of which are not fully-executed) appear to be a standard form in which there is no mention of extraordinary services. Howard Cert., Exs. 7 through 13.

To support its claim for payment, East Brunswick cites an earlier case, the facts of which almost replicate this one, in which Trenton unsuccessfully challenged the refusal of a receiving district to accept aides supplied by Trenton for the special education students sent to that district by Trenton. Bd. of Educ. of the City of Trenton v. Bd. of Educ. of the Mercer Cty. Spec. Servs. Sch. Dist. (MCSSSD), OAL Docket No. EDU 16465-15 (Initial Decision, August 5, 2016), aff'd., Commr. of Educ. (Final Decision, September 20, 2016). In 2015, in an attempt to balance its budget, Trenton eliminated hundreds of full-time positions, including one-to-one aides assigned to students with disabilities, and contracted with an outside agency for those aides. Id., at 2. Trenton had placed a number of special education students in the Mercer County Special Services School District (MCSSSD) and entered into contracts with MCSSSD for the costs of tuition and transportation. Similar to the present case, Trenton wanted to use aides supplied by the outside agency for those students in the MCSSSD, “rather than paying [MCSSSD] separately for services of an individual aide.” Ibid. The Honorable Dean Buono, ALJ, found, and the Commissioner agreed, that the Legislature granted the receiving school control over its employment decisions and, although Trenton and the MCSSSD are free to reach agreement as to the use of aides provided by Trenton, or as to the costs of the aides, “there is no authority that states that Trenton may unilaterally force [the receiving district] to accept Trenton’s preferred individual aides.” Id., at 7.

Trenton now argues that the earlier case should be given limited weight as Judge Buono did not consider whether Trenton should be forced to pay an excessive amount for the out-of-district aides or to enter into a contract for the extraordinary services. As with East Brunswick, Trenton tried to convince MCSSSD to use the outside vendor of Trenton’s choice for one-to-one aides and then stated its intention to only reimburse MCSSSD for the cost Trenton would have paid if it had hired the aides. The failure of the parties to reach agreement on these issues led Trenton to file the earlier lawsuit. Id., at 2-3. In the absence of an agreement otherwise, Judge Buono relied on N.J.A.C. 6A:23A-17.1(e)(5)(viii), which provides that one-to-one aides are an extraordinary service that may be billed directly by the receiving district to the sending district.

Contrary to Trenton's claim, the failure of Judge Buono to consider whether Trenton could be forced to enter into a contract for extraordinary services has no impact on the application of his ruling here. East Brunswick prepared contracts for extraordinary services for S.B. but did not force Trenton to sign them. East Brunswick hired and paid one-to-one aides for S.B. from June 2016 to the present in the absence of both valid contracts and full payment from Trenton.

Similarly, the dearth of discussion by Judge Buono as to the rate charged by MCSSSD for the one-to-one aides is of no impact here. As explained above, the regulations permit the receiving district to bill the sending district for the direct cost of the extraordinary service. In other words, East Brunswick is permitted to bill Trenton for aides in the amount that East Brunswick pays to the aides. East Brunswick states that it charges Trenton the exact cost that it incurs for S.B.'s aide. Reply Br. of Petit'r (March 29, 2019), at p. 1. Trenton has not alleged, or provided evidence, otherwise. The amount that East Brunswick pays S.B.'s aide is not necessarily excessive simply because Trenton would be able to obtain the same service at a lower cost.⁷

Trenton also contends that Judge Buono did not address the practice of the receiving district of billing Trenton for services when students are absent. Though he did not appear to directly address this question, Judge Buono stressed that the Legislature granted MCSSSD "control over its employment decisions," similar to that granted to local school boards. City of Trenton v. MCSSSD, at 7, citing N.J.S.A. 18A:46-38 and 18A:11-1(c). A school board may "make, amend and repeal rules . . . for the employment, regulation of conduct and discharge of its employees." N.J.S.A. 18A:11-1(c). Additionally, "[e]ach board of education may make rules . . . governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district[.]" N.J.S.A. 18A:27-4. The duties of staff, including one-to-one aides, are certainly within the scope of authority granted to school boards by the Legislature and it seems reasonable for

⁷ Although Trenton may not have argued that MCSSSD was charging an excessive rate, East Brunswick noted that in 2015, MCSSSD was charging Trenton more for aides than East Brunswick has charged. Reply Br. of Petit'r, at p. 5.

East Brunswick to reassign these full-time employees when the students to whom they are assigned fail to show up for school.⁸

Trenton also argues that the aides it uses are well-trained and qualified to serve special education students and the failure of East Brunswick to use these aides places a tremendous financial burden on Trenton, an underfunded school district. Despite the validity of these arguments, the Legislature has not recognized either as an exception to the obligation of a sending district to pay for the extraordinary services provided to its special education students.

For the reasons described above, I **CONCLUDE** that Trenton is obligated to pay to East Brunswick the direct costs incurred by East Brunswick to provide a one-to-one aide for S.B. from June 2016, when S.B. first enrolled in the East Brunswick District, through the present, and for as long as S.B. remains in the East Brunswick schools and his IEP requires the services of a one-to-one aide. I **CONCLUDE** that East Brunswick has no obligation to use the services of one-to-one aides provided by Trenton and that Trenton cannot limit its payment to East Brunswick for one-to one aides provided to S.B. to the amount that Trenton would have paid its outside vendors for the same services for S.B. Finally, I remind the parties that there is nothing that prohibits them from reaching agreement to modify their respective obligations under applicable law and regulations.

ORDER

It is **ORDERED** that the motion for summary decision of petitioner East Brunswick for an order granting summary decision in its favor is hereby **GRANTED**. It is further **ORDERED** that the cross-motion of respondent Trenton for an order granting summary decision in its favor is hereby **DENIED**. Trenton is **HEREBY ORDERED** to pay East Brunswick the full direct costs of the aides retained by East Brunswick in compliance with S.B.'s IEP between June 6, 2016

⁸ This is not to say that the parties cannot agree to some form of credit in such an instance, but here they did not so agree.

through June 30, 2019,⁹ and for as long as S.B. remains in the East Brunswick schools and his IEP requires the services of a one-to-one aide.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 9, 2019

DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/nd

⁹ Trenton is obligated to pay the amount claimed by East Brunswick, \$157,052.39, reduced by the amount paid by Trenton toward invoices for the 2018-2019 school year.