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October 14, 2016

VIA FACSIMILE AND FEDERAL EXPRESS

Kimberley Harrington, Acting Commissioner of Education
c/o M. Kathleen Duncan, Director, Bureau of Controversies and Disputes
New Jersey Department of Education
100 Riverview Plaza
Trenton, NJ 08625

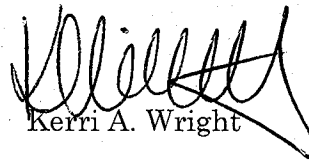
Re: *Upper Freehold Regional Board of Education v. Millstone
Township Board of Education, et al.*
OAL Docket No.: EDU-06068-2016
Our File No.: 19281.05906

Dear Acting Commissioner Harrington:

We are counsel to the Millstone Township Board of Education in the above matter. Enclosed please find Millstone's Response to Petitioner's Request for Interlocutory Review.

Should you have any questions or require anything further, please do not hesitate to contact us.

Respectfully,


Kerri A. Wright

KAW/jac
Encl.

cc: Clerk, Office of Administrative Law (via Federal Express)
Honorable Sarah G. Crowley, A.L.J. (via Federal Express)
Robert Lorfink, Esq. (via electronic mail)
Bruce Helies, Esq. (via electronic mail)

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Kimberley Harrington, Acting Commissioner of Education
c/o M. Kathleen Duncan, Director, Bureau of Controversies and Disputes
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Township Board of Education, et al.*
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Dear Acting Commissioner Harrington:

We are counsel to the Millstone Township Board of Education in the above matter. Please accept this brief in lieu of a more formal brief in response to Petitioner Upper Freehold Regional's Request for Interlocutory Review.

This case presents a school district that has chosen, via a sending-receiving arrangement, to send nearly all of its high school students to Upper Freehold Regional, while lawfully permitting the individual choice of a small group of its students to attend more specialized and State-approved courses of study elsewhere. While Millstone does not have the ability to modify or terminate its sending-receiving relationship with Upper Freehold Regional without Commissioner review and approval, it may lawfully pay for its students' choices to attend elsewhere under the current statutes, as it has done for more than a decade, and as do various other districts across the State. Notably, Millstone has been doing so for many years, while still fewer than twenty of its students have chosen to attend Red Bank Regional in any given year without the apparent opposition of Upper Freehold. The proverbial floodgates have never opened, and the dire consequences alleged by Upper Freehold Regional are nonexistent.

Millstone does not object to interlocutory review. However, to the extent that such review is granted, it should be limited to the specific ruling that a hearing is necessary to determine whether Upper Freehold Regional provides the same courses of study as those in which Millstone's students are enrolled at Red Bank Regional. Administrative Law Judge Crowley's

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ruling on *N.J.S.A. 18A:38-15* was correct as a matter of law, and must stand lest hundreds of school districts and thousands of students across the state be deprived of valued educational courses. Millstone only agrees that interlocutory review is appropriate on the limited basis of whether a hearing is in fact required on the issue of course of study.

A. The Legal Basis for Millstone's Actions

ALJ Crowley interpreted the law on this subject correctly. Her determination that *N.J.S.A. 18A:38-15* applies to Millstone is accurate and, as such, requires no further review. Most importantly, this decision comports with the reality of school district practice over many years in consistently interpreting *N.J.S.A. 18A:38-15* to authorize all districts to send students to high school programs that meet their individual needs.

For the first time, Upper Freehold Regional cites to *Bd. of Educ. of Union Beach v Bd. of Educ. of Keyport*, OAL Dkt. No. 5758-82 (Comm'r May 5, 1983), aff'd with modification on other grounds, State Bd. of Educ. Sept. 7, 1983, as supporting its view that sending districts without high schools do not maintain discretion under *N.J.S.A. 18A:38-15*. Upper Freehold Regional similarly paints a dire portrait of all unhappy sending districts relying upon *N.J.S.A. 18A:38-15* to "get out of" their respective receiving districts. This claim is meritless.

The context is important. First, the State's educational philosophy has evolved and changed, in some ways dramatically, to further bolster the educational philosophy embodied in *N.J.S.A. 18A:38-15* since 1983. Today, the State focuses on educational choice and allowing students the ability to determine what types of educational and vocational opportunities best suit their individual needs and goals. *N.J.S.A. 18A:38-15* is indeed one key measure used by students to attain this.

Second, the posture of *Union Beach* is entirely different than that of the current case, as set forth in the relief sought from the Commissioner, "pursuant to *N.J.S.A. 18A:38-13*, for an equitable determination allowing Union Beach high school students to select and attend the area high school which most suits the educational requirements and needs of Union Beach high school students." *Union Beach* at 14-15. Union Beach was attempting to modify (or sever, according to Keyport) its sending-receiving arrangement with Keyport by changing its designated high school. It only brought up *N.J.S.A. 18A:38-15* for the first time in its Exceptions to the Commissioner. It sought to misapply *N.J.S.A. 18A:38-15* to change its designation of its high school for all of its students simultaneously. The decision is not determinative here, because the district's *students* were not attempting to access vocational programs, and they were not driving the process and decision-making. Instead, *the district was acting on its own behalf with the intent of undermining the sending-receiving relationship*. The operative issue was about wholesale modification of the sending-receiving arrangement, not using *N.J.S.A. 18A:38-15* for its intended purpose of supporting students in pursuing specialized programs based on their individual needs.

N.J.S.A. 18A:38-15 focuses on the needs of individual students, and requires that an *individual student* desire another relevant educational opportunity. To argue that *N.J.S.A.* 18A:38-15 allows a district to act inappropriately to circumvent the procedure to sever a send-receive is illogical: a handful of Millstone's students have chosen Red Bank Regional, and it is their choice that is relevant. Upper Freehold Regional has provided absolutely no evidence that Millstone is using *N.J.S.A.* 18A:38-15 to modify the sending-receiving relationship. Indeed, Millstone agrees that *N.J.S.A.* 18A:38-15 cannot be used to subvert or usurp or modify or terminate its sending-receiving arrangement with Upper Freehold Regional. *Union Beach* similarly stands for that proposition, which is irrelevant to the matter here.

Based on the forgoing, *Union Beach's* holding and dicta are being misused here. The case is no longer relevant - - indeed, the seminal *Asbury Park* case did not even reference it. *Bd. of Educ. of City of Asbury Park v. Bd. of Educ. of Red Bank Reg'l Sch. Dist.*, 1997 WL 715018 (N.J. Adm. Mar. 27, 1997).

B. Courses of Study Only Provided By Red Bank Regional

Only two discrete issues therefore and they are simple for the Department to decide now, without further need for a hearing. Both boil down to a few simple questions, and allow the Department to easily rely on State policy, which both permits and encourages student choice in determining what their educational and career opportunities should be.

1. Career and Technical Education Approval

The specific courses of study in which Millstone's small number of students are enrolled at Red Bank Regional are approved by the State Department of Education as Career and Technical Education programs. As a matter of law, then, they are different from any "similar" classes offered by Upper Freehold Regional that do not similarly have the Department's approval. The Department itself has assessed the Red Bank Regional courses of study and approved them, and students and districts are to understand this distinction as meaningful and determinative.

The Department of Education has a system whereby it reviews high school courses of study and approves some as Career and Technical Education programs. State approval has meaning. There is a logical reason that the State wishes to validate and place its mark of approval on certain vocational programs in the State's high schools: State approval sets these programs apart and on a separate level from those programs that are unapproved. The Department determines that certain courses of study merit being highlighted and held up for prospective students desiring to engage in those vocational subjects.

Upper Freehold Regional insists that its programs are the same as those attended by Millstone's students at Red Bank Regional. However, its programs at issue are not approved by the Department as Career and Technical Education programs. It is relevant to consider *why the Department would bother* going through the administrative trouble of a review and approval

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process, if unapproved programs were considered the same and of equal value to students to students interested in a substantial educational and vocational program in a particular subject.

In addition, the State's overarching policy of student choice is served by the Department's vetting of high school programs and stamp of approval on those best designed to meet students' needs. This determination has already in essence been made by the Honorable Kathleen Duncan when, as an Administrative Law Judge, she stated that "[s]ince vocational programs are required to be approved by the Department of Education and once approved are listed in the New Jersey Directory of Verified Occupational Programs, and since none of the districts herein have any approved vocational programs in the visual or performing arts or any of the course sequences listed, if I were to address this issue I would conclude that no hearing is required to determine that none of the local districts offers a comparable type of program" when analyzing the exact same issue in *D.M. on behalf of minor child, A.M. v. Bd. of Educ. of City of Long Branch, Monmouth Cty., & Bd. of Educ. of Red Bank Reg'l High Sch. Dist., Monmouth Cty., et al.*, 2000 WL 1661431, at *18, fn. 3 (N.J. Adm. Oct. 16, 2000).

The designation of a vocational program is very important to the Department, and as such, is very important to Millstone's students seeking the most relevant career and vocational opportunities they can. Supporting the choices of this small number of students by Millstone is the lawful policy of the State of New Jersey and their choices deserve to be honored.

2. International Baccalaureate Diploma Program

Red Bank Regional offers the International Baccalaureate Diploma Program, while Upper Freehold Regional does not. No hearing is needed on this narrow issue, as the only question is whether each school provides the International Baccalaureate Diploma Program. Either a school provides this highly specialized course of study, or it does not. There is no gray area.

Red Bank Regional, along with only 14 other high schools in the state, provides this course of study. Upper Freehold Regional does not provide this course of study. A hearing is unnecessary to determine this simple issue, and would be an inefficient expenditure of time and resources.

C. Indispensable Parties to this Action

Finally, the type of relief that Upper Freehold Regional is requesting in its interlocutory appeal is for the Commissioner to determine whether hundreds of students from over two dozen districts are suddenly unable to attend Red Bank Regional for its specialized CTE programs. Many indispensable parties are missing from this matter.

There are numerous school districts who currently approve and pay for their students to obtain their desired educational and vocational opportunities, as well as the many particular students and parents themselves. Unlike in other matters, the parties here are finite and

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identifiable. See, e.g. *S.V., M.R. and G.R. on behalf of K.V., E.R. AND F.H., v. Bd. of Educ. of The City of Camden, Camden County*, 2013 WL 6908437, at *11 (N.J. Adm. Dec. 6, 2013) ("because such districts have not been identified, no other district beyond Camden has any interests in the outcome of this case at the moment.") (citing *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.*, 394 N.J. Super. 71, 82 (App. Div. 2007)).

None of the hundreds of parents of out-of-district students attending Red Bank Regional are parties to this matter. None of the numerous other districts paying for their students' attendance at Red Bank Regional are parties to this matter. All of these parties are indispensable.

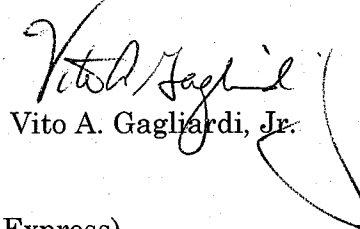
We respectfully assert that the Commissioner cannot make this decision, in the posture of an interlocutory appeal as positioned by Upper Freehold Regional, without notice to and the presence of these parties and their opportunity to be heard. This simply cannot be permitted.

CONCLUSION

ALJ Crowley correctly determined that the law permits every action made in this matter by both Millstone and Red Bank Regional. Now, the matter boils down to two core issues that ALJ Crowley left for a hearing. These are in fact two discrete sub-issues that are easy to decide without the need for an elaborate and expensive hearing. They rest on the State's own policy of student educational choice, whereas Upper Freehold Regional would choose an interpretation that limits the career and vocational opportunities deserved by New Jersey's students.

We respectfully ask that Upper Freehold Regional's request for interlocutory appeal be granted on the limited basis of the issue of the approved courses of study provided by Red Bank Regional. The legal basis for Millstone's and Red Bank Regional's actions was already fully and appropriately analyzed by ALJ Crowley and no further review on that issue is needed. The Commissioner is able to decide this case at this time, in toto, in favor of the position taken by Millstone and Red Bank Regional.

Respectfully,


Vito A. Gagliardi, Jr.

VAG/jac

cc: Clerk, Office of Administrative Law (via Federal Express)
Honorable Sarah G. Crowley, A.L.J. (via Federal Express)
Robert Lorfink, Esq. (via electronic mail)
Bruce Helies, Esq. (via electronic mail)

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Attorneys for Respondent Millstone Township Board of Education

UPPER FREEHOLD REGIONAL BOARD
OF EDUCATION,

PETITIONER,

v.

MILLSTONE TOWNSHIP BOARD OF
EDUCATION AND RED BANK
REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION,

RESPONDENTS.

BEFORE THE COMMISSIONER OF
EDUCATION

OAL DOCKET NO.: EDU-06068-2016
AGENCY REFERENCE NO.: 108-4/16

**CERTIFICATION OF
SERVICE**

I, Rodger J. Sisco, do hereby certify:

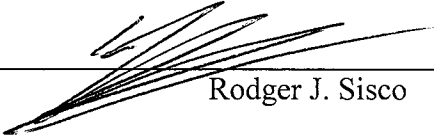
1. I am a paralegal employed at the law firm of Porzio, Bromberg & Newman, P.C., attorneys in the within matter for Respondent Millstone Township Board of Education.

2. On October 14, 2016, I caused to be served via electronic mail a true and correct copy of Millstone's Response to Petitioner's Request for Interlocutory Review to the individuals below at their last known address:

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bruceh@wolffhelies.com

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Rodger J. Sisco

Dated: October 14, 2016