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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

**ANSWER, ADDITIONAL DEFENSES, AND
CROSS-PETITION**

Respondent Millstone Township Board of Education, by and through its attorneys, Porzio, Bromberg & Newman, P.C., by way of Answer to the Petition of Upper Freehold Regional Board of Education, says:

AS TO THE PARTIES

1. Millstone admits the allegations contained in Paragraph 1 of the Petition.
2. Millstone admits the allegations contained in Paragraph 2 of the Petition.
3. Millstone admits the allegations contained in Paragraph 3 of the Petition.

AS TO JURISDICTION

4. Paragraph 4 of the Petition sets forth a proposed legal conclusion not a factual allegation to be admitted or denied.

AS TO FACTS

5. Millstone admits the allegations contained in Paragraph 5 of the Petition.
6. Millstone admits the allegations contained in Paragraph 6 of the Petition.

7. Millstone admits that it must designate a high school or high schools for its high school students to attend.

8. Millstone admits that it has an unwritten sending-receiving relationship with the Upper Freehold Regional Board of Education, but denies that it has designated Allentown High School as the only high school for its students to attend.

9. Millstone admits that it has an unwritten sending-receiving relationship with the Upper Freehold Regional Board of Education.

10. Millstone admits the allegations contained in Paragraph 10 of the Petition.

11. Millstone admits the allegations contained in Paragraph 11 of the Petition.

12. Millstone admits the allegations contained in Paragraph 12 of the Petition.

13. Millstone is without knowledge or information sufficient to form a belief as to what Upper Freehold "learned."

14. Millstone admits the allegations contained in Paragraph 14 of the Petition.

15. Paragraph 15 of the Petition sets forth a proposed legal conclusion not a factual allegation to be admitted or denied.

16. Millstone admits the allegations contained in Paragraph 16 of the Petition.

17. Millstone denies the allegations contained in Paragraph 17 of the Petition.

18. Millstone denies the allegations contained in Paragraph 18 of the Petition.

19. Millstone is without knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph 19 of the Petition.

20. Millstone denies the allegations contained in Paragraph 20 of the Petition.

21. Millstone is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 21 of the Petition.

22. Millstone denies the allegations contained in Paragraph 22 of the Petition.
23. Millstone denies the allegations contained in Paragraph 23 of the Petition.
24. Millstone denies the allegations contained in Paragraph 24 of the Petition.
25. Millstone denies the allegations contained in Paragraph 25 of the Petition.
26. Millstone denies the allegations contained in Paragraph 26 of the Petition.
27. Millstone admits the factual allegations contained in Paragraph 27 of the Petition

and denies the suggestion that such a Petition is required by law here.

28. Millstone denies the allegations contained in Paragraph 28 of the Petition.
29. Millstone denies the allegations contained in Paragraph 29 of the Petition.
30. Millstone denies the allegations contained in Paragraph 30 of the Petition.
31. Millstone denies the allegations contained in Paragraph 31 of the Petition.
32. Millstone denies the allegations contained in Paragraph 32 of the Petition.

WHEREFORE, Millstone requests that the Commissioner of Education:

- (a) dismiss Upper Freehold's Petition of Appeal with Prejudice and deny each prayer for relief as set forth in Upper Freehold's Petition; and
- (b) award Millstone attorneys' fees and costs of suit; and
- (c) award such other and further relief as the Court deems just, proper and equitable.

ADDITIONAL DEFENSES

In addition to the foregoing, Millstone alleges and asserts the defenses set forth below. By pleading these defenses, Millstone does not assume the burden of proving any fact, issue or element of a cause of action where such burden properly belongs to Petitioner. Moreover,

nothing stated herein is intended to or shall be construed as a concession on any particular issue or subject matter that is relevant to Petitioner's allegations.

FIRST ADDITIONAL DEFENSE

Petitioner fails to state a cause of action for which relief may be granted.

SECOND ADDITIONAL DEFENSE

Petitioner has failed to exhaust its administrative remedies.

THIRD ADDITIONAL DEFENSE

Some or all of claims in the Petition are barred by the applicable statute(s) of limitations.

FOURTH ADDITIONAL DEFENSE

Petitioner has failed to name indispensable parties.

FIFTH ADDITIONAL DEFENSE

Millstone reserves the right to raise additional affirmative or other defenses as may be discovered and appropriate during the course of these proceedings.

CROSS-PETITION

Cross-Petitioner Millstone Township Board of Education requests that the Commissioner of Education hear a controversy that has arisen between Millstone and Cross-Respondent Upper Freehold, pursuant to the Commissioner's authority under the State school laws to hear and determine controversies that arise under the school law. Millstone does hereby say as follows:

THE PARTIES

1. Cross-Petitioner Millstone is a body politic of the State of New Jersey which operates a school district serving students in grades K-8.

2. Cross-Respondent Upper Freehold is a body politic of the State of New Jersey and operates Allentown High School.

JURISDICTION

3. The Commissioner of Education has jurisdiction over the claims herein pursuant to *N.J.S.A. 18A:6-9*.

FACTS

4. Millstone has a sending-receiving relationship with Upper Freehold, through which Millstone sends many high school age students to Allentown High School ("Allentown").

5. Per the arrangement, Upper Freehold is responsible for providing the education for the Millstone students attending Allentown.

6. Upper Freehold is similarly responsible for creating and implementing IEPs and providing special education services for Millstone students at Allentown who require such services.

7. Per state law, Millstone pays tuition to Upper Freehold for each of its students attending Allentown, and remains responsible for any additional costs for its special needs students.

8. Millstone remains the local education agency responsible for its students attending Allentown.

9. As the local education agency, Millstone retains the ultimate responsibility under the State school laws for ensuring that all Millstone students receive a thorough and efficient education.

10. Under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, a local education agency is responsible for ensuring the free and appropriate public education of its students with disabilities.

Special Education Services

11. In November or December of 2014, Millstone received a bill for extraordinary services from Upper Freehold in relation to charges for 1:1 aides for its students with disabilities.

12. Upon assessing the bill for accuracy, Millstone determined that the charges did not match current student IEPs.

13. Upon further review of the current IEPs, Millstone noticed additional charges for services that were not set forth in its students' IEPs.

14. By way of example only, Millstone provides the following:

- (a) Upper Freehold had billed Millstone for a full time 1:1 aide for one student, while this student's IEP clearly only called for a 1:1 aide while in the mainstream setting, which accounted for only 25% of the child's day.

- (b) Upper Freehold had billed Millstone for another student, for services that had been previously discontinued according to this student's IEP.
- (c) Upper Freehold had billed Millstone for another student who had been a resident of Lakewood, not Millstone.
- (d) Upper Freehold had billed Millstone for another student who had been receiving a 1:1 aide and 1:1 bus, when the IEP contained no requirement regarding transportation whatsoever.

15. As a result of these significant discrepancies, Millstone opened up a dialogue with Upper Freehold to work together to address the issues.

16. In August 2015, Millstone began to notice further problems with respect to the IEPs of its students in Allentown.

17. Millstone requested the complete files of three of its students with disabilities attending Allentown, which were provided by Upper Freehold.

18. Upon review, it was evident to Millstone that the IEPs and related documentation failed to consistently provide sufficient rationale for the services, in particular any extraordinary services. In addition, Millstone's review of the IEPs and accompanying documentation revealed that Upper Freehold was not complying with State and federal law.

19. After many meetings between the districts, Upper Freehold suddenly denied Millstone further access to the IEPs of Millstone students, claiming that since the parents are happy, there was no issue. Upper Freehold refused Millstone's request for an internal audit.

20. Thereafter, on December 21, 2015, through counsel, Millstone filed a complaint against Upper Freehold with the Office of Special Education Programs ("OSEP") in the New

Jersey Department of Education, asserting violations of the special education laws and regulations, and requesting an investigation of Upper Freehold's practices.

21. OSEP investigated Upper Freehold's practices, which investigation included a review of documents from both districts, interviews with the directors of special education services of both districts, and site visits.

22. OSEP's findings revealed a pattern of failure by Upper Freehold to follow special education procedures in creating IEPs, to effectively and accurately document IEP services, to provide a rationale and decision-making process for services, and to include all required members of the IEP team consistently.

23. This is significant because OSEP investigated only three student files and only went back one year. These three files had been the focus of communications with Upper Freehold prior to Millstone's requesting copies of the files. Despite this fact, the findings in just these three cases were so numerous and substantial that OSEP imposed corrective action plans reaching beyond the three cases investigated and encompassed whole district corrective action.

24. Millstone has been unable to determine compliance with State and federal law, as it has been denied access to its students' IEPs and files.

25. However, Millstone received a copy of a revised IEP for one of the students identified in the OSEP report. This IEP reflects continued failure to abide by State and federal law. Therefore, Millstone has reason to believe that Upper Freehold continues to violate the State and federal rights of Millstone's students and, as a result, fails to comply with its obligations to Millstone to properly educate its students.

26. The law requires that children with disabilities be educated in the least restrictive environment, 20 *U.S.C.* 1412(a)(5) and *N.J.A.C.* 6A:14-4.2.

27. In various instances, Upper Freehold has been providing more restrictive services, thereby violating the requirement of least restrictive environment.

28. These services are often in excess of what the IEPs require and have determined appropriate.

29. As a recent example, after Upper Freehold spent no more than eight days educating a student, Upper Freehold recommended that the student's 1:1 aide be replaced with a 1:1 speech therapist, the cost of which could be as high as \$90,000 to Millstone. Upper Freehold also advised Millstone that it may not be able to provide for the student in its school at all and may require an out-of-district placement for the student.

30. Upper Freehold's failure to create and implement IEPs properly is a violation of the IDEA and state law, thereby harming Millstone's students with disabilities as well as Millstone, which retains responsibility for the provision of a FAPE under State and federal law.

31. The financial consequences of Upper Freehold's violations of the law fall directly and solely upon Millstone and its taxpayers.

32. Millstone desires to ensure compliance with State and federal law and ensure appropriate, educationally and financially responsible services are planned and implemented to the levels required by law and its students' IEPs. Millstone is unable to do so due to Upper Freehold's refusal to permit Millstone to participate in the IEP process of its own students and further refusal to provide access to the IEPs themselves.

33. In Upper Freehold's view, the only thing to which Millstone is entitled regarding its special needs students is a bill.

34. Millstone and its taxpayers should not be forced to withstand the costs of special education services that it has not directly approved, in which it finds many violations, and which

often far exceed the services required by its students' IEPs, thereby violating special education law.

Access to Student Records

35. Under *N.J.S.A. 18A:38-11*, which states that a district without a high school must designate a high school or high schools for the attendance of its high school grade students, Millstone sends many of its high school students to Allentown High School.

36. These students generally attend the Millstone schools for grades K-8.

37. Millstone has a legal obligation under state and federal law to ensure its students are provided a free and appropriate public education in the least restrictive environment.

38. In addition, in order to ensure its students are provided a thorough and efficient education, Millstone has an obligation to understand how its students perform in high school.

39. Millstone has a reasonable interest in being able to correlate K-8 performance with 9-12 performance for each student individually.

40. Millstone has a reasonable interest in being able to correlate K-8 performance with 9-12 performance for its students as a group.

41. Millstone has a reasonable interest in understanding how its pre-high school programs impact a student's performance in high school.

42. In May 2014, Millstone's Superintendent Scott Feder requested from Upper Freehold's Superintendent the achievement data for Millstone students attending Allentown.

43. As shared at an Upper Freehold board meeting, on September 19, 2014 counsel to Upper Freehold gave his legal opinion that this data could be shared with Millstone without parental consent.

44. Upper Freehold refused to provide the student achievement data to Millstone.

45. In December 2015, after receiving no data from Upper Freehold, despite repeated requests and meetings between Millstone's data point person and Upper Freehold's, Upper Freehold was directed to provide the requested data to Millstone by the Executive County Superintendent, Les Richens.

46. Millstone finally received data in January 2016.

47. The data provided failed to include student identification numbers, making it impossible for Millstone to use it to link students in the high school grades to their performance in K-8.

48. As an example, one of Millstone's goals was to use the data to assess further the efficacy of its K-8 programming. Without being able to identify the students, the data cannot properly be aligned.

49. With respect to the IEPs of its students specifically, until the 2015-16 school year, Millstone had complete access to the IEPs.

50. Through the Upper Freehold IEP database Realtime, the Millstone Director of Special Services, had access to all of the Millstone IEPs, after being given a password for access from Upper Freehold.

51. On January 29, 2016, counsel for Upper Freehold sent a letter to Millstone counsel claiming that Millstone does not have a "legitimate educational interest" in the students' records under state or federal law.

52. On December 21, 2015, Millstone, had requested an opinion from the U.S. Department of Education regarding its right to access the records of its students' performance in a receiving high school under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. 1232g.

53. On February 12, 2016, the US Department of Education responded through Susan Kauffman, Education Specialist, Office of Special Education Programs.

54. Ms. Kauffman confirmed that, under the IDEA regulations, parental consent must be obtained before personally identifiable information of children with disabilities is disclosed to other parties, unless the other party is a "participating agency" per the regulations, or is otherwise authorized by FERPA.

55. A "participating agency" means "any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained," Ms. Kauffman advised that Millstone meets the definition of a "participating agency" under the IDEA regulations, as "it remains financially responsible for providing special education and related services for the high school students in question."

56. Meeting the definition of "participating agency" means that "disclosures without consent for purposes related to meeting a requirement of IDEA" are permitted.

57. This signifies that Millstone is entitled to access to the full records, including IEPs, of its students with disabilities from its receiving districts.

58. Based on this ruling of the US Department of Education, Millstone demanded access to the IEPs and related documentation of its students immediately.

59. At this time, Upper Freehold continues to deny Millstone such access.

COUNT I
(Violation of Federal and State Special Education Law)

60. Millstone repeats and realleges each and every allegation and statement made in the preceding paragraphs of this petition and incorporates the same by reference as though fully set forth at length herein.

61. The IDEA provides a host of procedural mechanisms regarding IEP creation and implementation for students with disabilities.

62. One requirement under the IDEA and *N.J.A.C. 6A:14-4.2* is that schools must educate students with disabilities in the least restrictive environment.

63. Upper Freehold provides services not included in, or in excess of, Millstone students' IEPs, thereby violating the least restrictive environment for Millstone's students.

64. Due to Upper Freehold's flouting of the special education laws and regulations, Millstone's students with disabilities suffer harm to their educational goals.

65. Upper Freehold must immediately cease violating students' rights and accurately follow the law in developing and implementing IEPs.

WHEREFORE, Millstone respectfully requests the following relief from the Commissioner of Education:

- (a) An order enjoining Upper Freehold from making special education and IEP decisions that fail to follow the law; and
- (b) An order for the implementation of a monitor who will review the IEPs of all Millstone students attending Allentown in order to ensure legal compliance with State and federal law, including a determination of appropriateness of services;
- (c) An order mandating that Millstone be provided notice and an opportunity to participate in all IEP meetings and decisions with regard to its students attending Allentown;
- (d) An order mandating that Millstone be provided advanced notice of any change to the IEP of any of its students; and

- (e) An award of any further relief as the Commissioner of Education deems just and proper.

COUNT II
(Return of Overpaid Special Education Costs)

66. Millstone repeats and realleges each and every allegation and statement made in the preceding paragraphs of this petition and incorporates the same by reference as though fully set forth at length herein.

67. Millstone pays Upper Freehold for the tuition and special education services for its students with disabilities.

68. Upper Freehold has continuously provided services to Millstone's students with disabilities far over and above those required by either the law or by the students' IEPs.

69. The excessive and unnecessarily restrictive services have been at the sole expense of Millstone and its taxpayers.

70. On some occasions, Millstone has been billed improperly for services for which it was not obligated to pay.

71. Millstone and its taxpayers have thereby overpaid Upper Freehold for the special education services of Millstone students.

WHEREFORE, Millstone respectfully requests the following relief from the Commissioner of Education:

- (a) An order requiring Upper Freehold to repay Millstone monies due on account of Upper Freehold's failure to abide by State and federal law and to properly implement the IEPs of Millstone's students; and
- (b) An order requiring the implementation of a monitor who will review the IEPs of all Millstone students attending Allentown in order to ensure legal

compliance with State and federal law, including a determination of appropriateness of services; and

- (c) An award of any further relief as the Commissioner of Education deems just and proper.

COUNT III
(FERPA and IDEA)

72. Millstone repeats and realleges each and every allegation and statement made in the preceding paragraphs of this petition and incorporates the same by reference as though fully set forth at length herein.

73. Millstone has repeatedly requested the records of all of its students, as well as the IEPs of its students with disabilities, who attend Allentown.

74. Millstone has a legitimate educational interest in the performance of its students.

75. Furthermore, Millstone retains the sole financial responsibility for the education of its students attending Allentown.

76. Under FERPA, Upper Freehold must permit access to the full student and performance records of all Millstone students attending Allentown, including the student identification numbers, as Millstone officials fall into a FERPA exception for "other school officials, including teachers within the educational institution or local educational agency, who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required."

77. Under the IDEA, Millstone is entitled to access to the IEPs of its students with disabilities without parental consent, as it is a "participating agency" under the law.

78. As access to the IEPs and student achievement data were withheld, only after Millstone's complaint regarding the implementation of special education and request for an

OSEP investigation, it is further evident that Upper Freehold has retaliated against Millstone for its concerns and investigation into issues with the special education provided to its students.

WHEREFORE, Millstone respectfully requests the following relief from the Commissioner of Education:

- (a) A continuing order requiring Upper Freehold to provide the full student records for all Millstone students to Millstone upon request within 10 days; and
- (b) An award of any further relief as the Commissioner of Education deems just and proper.

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Respondent/Cross-Petitioner
Millstone Township Board of Education

By _____
Vito A. Gagliardi, Jr.

Dated:

PORZIO, BROMBERG & NEWMAN, P.C.

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VERIFICATION OF SCOTT FEDER

I, Scott Feder, being of full age, do hereby verify as follows:

1. I am the Superintendent of Schools for the Millstone Township School District.

2. I have read the Answer and Cross-Petition annexed hereto and aver that the facts

contained therein are true to the best of my knowledge and belief.

Scott Feder

DATED:

Sworn and subscribed

before me on this ____ day of May, 2016

Notary Public