FOGARTY & HARA
COUNSELLORS AT LAW

RODNEY T. HARA
STEPHEN R. FOGARTY
VITTORIO S. LAPIRA

JANET L. FIKE
STACEY THERESE CHERRY
AMY E. CANNING
NICHOLAS A. SOTO
DAVID L. DISLER
AFSHAN T. AJMIRI
OLGA UGOLEV
ROBERT D. LORFINK

21-00 ROUTE 208 SOUTH
FAIR LAWN, NEW JERSEY 07410

(201) 791-3340
TELECOPIER (201) 791-3432

October 6, 2016

VIA HAND DELIVERY

Hon. Kimberley Harrington
Acting Commissioner of Education
c/o Director of Bureau of Controversies and Disputes
New Jersey Department of Education
100 River View Executive Plaza
Trenton, New Jersey 08625

Re: Upper Freehold Regional Board of Education v. Millstone Township Board of Education and Red Bank Regional High School District Board of Education
Agency Ref No.: 108/4-16
OAL Dkt. No.: EDU 6068-2016
Our File No.: 101

Dear Commissioner Harrington:

This case presents a challenge to the continued viability of the sending/receiving relationships that have thrived in New Jersey and allowed for the cost-effective education of high school students residing in small K-8 school districts for well over 100 years. On September 29, 2016, the Administrative Law Judge ("ALJ") issued an order in this case in which she held that a sending school district which does not operate its own high school has the authority to decide to send its high school students anywhere it wants because its designated receiving high school's course of study does not meet a standard required by the sending board of education.[1] If this decision is permitted to stand, it will open the floodgates and allow school districts dissatisfied with their designated receiving high school such as Englewood Cliffs,[2] Lincoln

[1] A copy of the September 29, 2016 order is attached to the Certification of Robert Lorfink (hereinafter referred to as the "Lorfink Cert.") as Exhibit A.
[2] Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, 257 N.J. Super. 413 (App. Div. 1992), aff'd o.b., 132 N.J. 327 (1993) (per curiam).

Park,[3] Branchburg Township,[4] Bloomingdale,[5] Avon-by-the-Sea,[6] Bradley Beach,[7] Belmar,[8] and numerous other K-8 school districts to scrutinize the courses of study available at the designated receiving high school and other nearby high schools that it considers to be better, more attractive, or simply less expensive in an attempt to find a new high school for its students to attend without being required to go through the process set forth in N.J.S.A. 18A:38-13.

Additionally, the ALJ misapplied the well-settled law governing motions for summary decision. When submitting cross-motions for summary decision, the parties agreed that there were no issues of material fact requiring a hearing. Instead of acknowledging the absence of any factual disputes and granting the motion for summary decision, the ALJ determined that an issue of fact existed on a purely legal issue. This erroneous conclusion must be reversed.

FACTUAL BACKGROUND

By way of brief but necessary background, the Board operates a K-12 school district serving students from both the Borough of Allentown and the Township of Upper Freehold. (Certification of Richard Fitzpatrick, Ed.D. (hereinafter referred to as the "Fitzpatrick Cert.") ¶3).[9] Allentown High School, the high school the Upper Freehold Regional Board of Education (hereinafter referred to as the "Board") operates for its ninth through twelfth

[3] In re Application of the Bds. of Educ. of Boonton and Lincoln Park for an Order Authorizing Severance of Sending-Receiving Relationship, Agency Dkt. No. 251-8/02 (Comm'r Apr. 25, 2006).
[4] Bd. of Educ. of Branchburg Twp. v. Bd. of Educ. of Somerville, 173 N.J. Super. 268 (App. Div. 1980).
[5] Bd. of Educ. of Bloomingdale v. Bd. of Educ. of Butler, 96 N.J.A.R.2d (EDU) 843 (App. Div. Oct. 1, 1996).
[6] In re Application of the Bd. of Educ. of Avon-by-the-Sea for Termination of the Sending-Receiving Relationship with the Sch. Dist. Of Asbury Park, 1976 S.L.D. 465, aff'd, 1976 S.L.D. 472 (State Bd.).
[7] Bd. of Educ. of Bradley Beach v. Bd. of Educ. of Asbury Park, 1977 S.L.D. 959 (Comm'r Sept. 2, 1977).
[8] Belmar Bd. of Educ. v. Asbury Park Bd. of Educ., 1989 S.L.D. 1880 (Initial Decision Apr. 14, 1989), aff'd as modified, 1989 S.L.D. 1941 (Comm'r June 20, 1989).
[9] The Fitzpatrick Certification was submitted by the Board in support of its motion for summary decision.

grade students, is also the designated high school for students domiciled within the area served by the Millstone Township Board of Education (hereinafter referred to as "Millstone Township"). Id. ¶¶4-5. As a result of the sending/receiving arrangement between the Board and Millstone Township, there were approximately 600 students from Millstone Township attending Allentown High School during the 2015-2016 school year with Millstone Township paying $12,433 per student in tuition. Id. ¶¶6-7.

Instead of attending their designated high school, Allentown High School, sixteen Millstone Township students attended Red Bank Regional High School (hereinafter referred to as "Red Bank Regional") during the 2015-2016 school year. (Fitzpatrick Cert. ¶9). The tuition for these students' attendance at Red Bank Regional was paid by Millstone Township. Id. ¶10. Two Millstone Township students attend Red Bank Regional's Academy of Finance, two attend the Academy of Information Technology, four attend the Academy of Engineering, seven attend the Visual and Performing Arts Academy, and one attends a culinary program. (Certification of Christina Galvao ¶3).[10] The Board furnishes instruction in each of these courses of study at Allentown High School. (Certification of Mark Guterl ¶¶10-16;[11] Reply Certification of Richard Fitzpatrick ¶¶6-18).

LEGAL ARGUMENT

I. GOOD CAUSE EXISTS FOR THE COMMISSIONER TO REVIEW THE ALJ'S SUMMARY DECISION ORDER ON AN INTERLOCUTORY BASIS.

In the summary decision order, the ALJ denied cross-motions for summary decision in which both the Board and Millstone Township agreed that no issues of fact existed. (Lorfink Cert. Ex. A). The ALJ rejected the Board's argument that it is entitled to judgment as a matter of law because there is no legal authority for Millstone Township's action. Id. at 4. Then, the ALJ held that a material issue of fact existed regarding an issue of statutory construction—what constitutes a course of study under N.J.S.A.

[10] The Certification of Christina Galvao was submitted by Millstone Township in support of its motion for summary decision.
[11] The Certification of Mark Guterl was submitted by the Board in support of its motion for summary decision.

18A:38-15. Id. at 4-5. Once this "factual" issue is resolved, the ALJ noted she believed a factual issue existed regarding the course offerings in each high school and whether they constitute a "course of study" under the statute. Id. at 5.

A party may request interlocutory review by the Commissioner within five working days of the receipt of a written order or oral ruling. N.J.A.C. 1:1-14.10. Interlocutory review may be granted in the interest of justice or for good cause shown. In re Appeal of Certain Sections of the Unif. Admin. Procedure Rules, 90 N.J. 85, 100 (1982). According to our Supreme Court,

> good cause will exist whenever, in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of claims or defenses, the identity and scope of issues, the presentation of evidence, the decisional process, or the outcome of the case.
>
> [Ibid.]

There certainly is good cause for interlocutory review of the ALJ's order in this case. The appeal, if sustained, will terminate the litigation and substantially conserve the time and expense of the litigants. Most significantly, interlocutory review will dispose of the need to have an evidentiary hearing in this matter which no party believed was necessary. Preventing a hearing will save all parties substantial litigation costs and will eliminate the need of the parties' witnesses to attend what could be a lengthy and unnecessary hearing.

II. THE ALJ INCORRECTLY EXTENDED N.J.S.A. 18A:38-15 TO THIS CASE CONTRARY TO THE LEGISLATURE'S INTENT AS EXPRESSED IN THE PLAIN LANGUAGE OF THE PROVISION.

In her order, the ALJ held that Millstone Township, a K-8 school district, could invoke N.J.S.A. 18A:38-15 to send students to Red Bank Regional. The ALJ reached this conclusion because "[t]here is nothing in the . . . statute which indicates that it is inapplicable to a district that is in a send-receive relationship. Moreover, it is illogical to preclude sending

districts from the right to send students to a specialty high school." (Lorfink Cert. Ex. A at 4). This conclusion is contrary to the plain language of the statute and a prior decision of the Commissioner and State Board of Education (hereinafter referred to as the "State Board") construing the statute.

The statute provides:

> Any board of education not furnishing instruction in a particular high school course of study, which any pupil resident in the district and who has completed the elementary course of study provided therein may desire to pursue, may, in its discretion, pay the tuition of such pupil for instruction in such course of study in a high school of another district.
>
> [N.J.S.A. 18A:38-15.]

Because the plain language of the provision states that it only applies to a board of education "not furnishing instruction in a particular high school course of study," a board of education who does not operate a high school, like Millstone Township, cannot invoke this provision.

This is clear by applying the principles governing statutory construction. "It is a basic rule of statutory construction to ascribe to plain language its ordinary meaning." Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., 221 N.J. 349, 361 (2015). If the language is clear, that is the end of the inquiry. In re Kollman, 210 N.J. 557, 568 (2012).

Here, the plain language of N.J.S.A. 18A:38-15 only allows boards of education not furnishing instruction in a particular high school course of study to send students to other high schools which offer the desired course of study. The Legislature's use of "particular" clearly evinces an intent that the provision would not apply to a board of education which does not have a high school because such a board of education does not furnish instruction in any high school course of study. Implicit in the Legislature's use of "particular" is an assumption that the board of education offers some form of a high school course of study. Here, Millstone

Township does not furnish instruction in any high school course of study because it does not operate a high school and therefore cannot invoke N.J.S.A. 18A:38-15.

This fact was recognized by the Commissioner and the State Board more than thirty years ago in Board of Education of Union Beach v. Board of Education of Keyport, OAL Dkt. No. 5758-82 (Comm'r May 5, 1983), aff'd with modification on other grounds, (State Bd. Sept. 7, 1983). There, Union Beach sought to modify the sending/receiving agreement it had with Keyport to permit it to send its high school students anywhere its students desired. In its exceptions to the initial decision, Union Beach relied on N.J.S.A. 18A:38-15 to argue "that it has the discretionary authority to implement the change in designation or apportionment of its high school pupils so as to permit them to attend other high schools of their choice." Id. at 15. In its reply exceptions, Keyport maintained that the "discretion as provided in [N.J.S.A. 18A:38-15] belongs to Keyport, not Union Beach. To suggest otherwise is to misread the statute." Id. at 17. The Commissioner and State Board agreed with Keyport and clearly held that Union Beach could not invoke the statute: "the Commissioner finds and determines that the provisions of N.J.S.A. 18A:38-15 may not be invoked by Union Beach inasmuch as it does not operate its own high school." Id. at 18.

This conclusion makes perfect sense. It is unlikely the Legislature would have intended to have a sending K-8 school district evaluate the course of study available in its receiving high school district to determine whether it furnishes instruction in a given course of study. The sending district would not have the intimate knowledge of the receiving school's curriculum necessary to make a determination that a course of study was not furnished in a subject area. It would make little sense for a K-8 school district to evaluate a second school district's high school curriculum to determine if it furnishes instruction that is offered by a third school district's high school.

Furthermore, such a practice of allowing sending K-8 school districts to choose between sending their high school students to Red Bank Regional or their designated high schools is a clear violation of the security the sending/receiving arrangement was designed to offer to the participating school districts. As the Commissioner long ago noted,

> In this State there are 165 school districts which maintain high schools for pupils of all high school grades. This means that 387 school districts must depend upon the 165 for the education of their high school pupils. This arrangement is mutually advantageous. The sending districts obtain high school facilities cheaper than such facilities can be provided by themselves and the additional pupils enable the receiving districts to expand their educational offerings and reduce their overhead.
>
> [Bd. of Educ. of Haworth v. Bd. of Educ. of Dumont, 1950-51 S.L.D. 42, 43 (Comm'r Aug. 24, 1950).]

The Commissioner noted that this was not always the case:

> It was to give stability to the receiving-sending set-up that the first high school designation law was enacted. Before the enactment of this law, receiving districts hesitated to bond themselves to erect buildings and to expand their facilities to provide for tuition pupils for the fear that the tuition pupils might be withdrawn after the facilities have been provided. The high school designation law protects such districts from the withdrawal of tuition pupils without good cause. This statute benefits both the sending district as well as the receiving district.
>
> [Ibid.]

The ALJ's reading of N.J.S.A. 18A:38-15 eliminates any security the Board received from N.J.S.A. 18A:38-11 and -13 if Millstone Township truly is permitted to send its high school students anywhere it desires if it can identify a course of study that is different from those offered at Allentown High School. If it did so, it could theoretically stop sending all of its students to Allentown High School and divide them up among other high

schools without being required to produce a feasibility study and obtain the Commissioner's approval to modify the sending/receiving agreement pursuant to N.J.S.A. 18A:38-13. There simply would be no incentive for any school district to expand its facilities, faculty, and course offerings to take in a large number of students from a school district which lacks a high school if the ALJ is correct that a sending K-8 school district is not obligated to send all of its high school students if it can point to a different course of study in another school district's high school. Millstone Township cannot be permitted to retain the benefit it receives from the sending/receiving arrangement—the requirement that the Board remain ready, willing, and able to educate all of its high school students—while also claiming it is not required to confer a similar benefit on the Board, a guarantee that it will consistently send all of its high school students to Allentown High School.

Nor is there anything in Board of Education of Asbury Park v. Board of Education of Red Bank Regional High School District, 97 N.J.A.R.2d (EDU) 464 (Initial Decision Feb. 6, 1997), aff'd, 97 N.J.A.R.2d (EDU) 464, 467 (Comm'r Mar. 27, 1997), aff'd, No. 43-97 (State Bd. Sept. 3, 1997), aff'd, No. A-1043-97 (App. Div. Mar. 17, 1999) (per curiam),[12] to the contrary. Nowhere in any of the four opinions Asbury Park generated is there any indication the designated receiving school district argued the K-8 sending districts could not invoke N.J.S.A. 18A:38-15 because it did not apply to them, nor is there any citation to Union Beach, the case which had already decided the issue. At most, Asbury Park assumed N.J.S.A. 18A:38-15 applied without deciding the issue. The only case that actually considered the issue, Union Beach, clearly held a school district that does not operate a high school cannot invoke N.J.S.A. 18A:38-15.

The only reasonable way to interpret N.J.S.A. 18A:38-15 in light of its plain language is to conclude that it only applies to a board of education that operates a high school. Applied here,

[12] It is not entirely clear which case the ALJ refers to in the order. She cites "D.M. o/b/o minor child A.M. v. Bd. of Education of City of Asbury Park" which combines the litigants in two different cases. Should the ALJ be referring to D.M. ex rel. A.M. v. Board of Education of Long Branch, No. 391-00 (Comm'r Nov. 28, 2000), aff'd o.b., (State Bd. Jul. 10, 2001), that case also provides no support to her conclusion because every school district involved in that case operated a high school and therefore provided high school courses of study.

this means Millstone Township has no authority to send its students to any high school other than Allentown High School. It cannot use N.J.S.A. 18A:38-15 to send its students to Red Bank Regional.[13]

III. THE ALJ MISAPPLIED THE LAW REGARDING SUMMARY DECISION MOTIONS BY DENYING THE CROSS-MOTIONS AND ORDERING THE PARTIES APPEAR FOR AN EVIDENTIARY HEARING ON A PURELY LEGAL ISSUE.

Alternatively, the ALJ's order must be reversed because it misapplied the law regarding summary decision motions. The Board argued that it offered a course of study in each discipline Millstone Township students pursued at Red Bank Regional and therefore Millstone Township is precluded from sending those students to Red Bank Regional. (Lorfink Cert. Ex. A at 4). The ALJ noted that the Board conceded there is no definition of "course of study" in the statute and there is no case law interpreting what it means. Id. at 4-5. Both the Board and Millstone Township proposed different definitions to use for this legal term, but instead of deciding this issue of statutory construction the ALJ determined that an "issue of fact exists as to what constitutes a 'course of study' . . . ." Id. at 5.

Simply put, there cannot be an issue of fact regarding the definition of "course of study." This is a question of law that was required to be decided by the ALJ. McGovern v. Rutgers, 211 N.J. 94, 108 (2012) ("an issue of statutory interpretation is a question of law"); see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 537 (1995) (judges decide issues of law); see also Schuran, Inc. v. Walnut Hill Assocs., 256 N.J. Super. 228, 230 (Law Div. 1991) (issues of law "may be resolved on the basis of the pleadings and affidavits alone"). Once this question of law is decided, it is possible to apply the undisputed facts and determine

[13] Just because Millstone Township cannot use the statute does not mean its students are permanently barred from all other high schools. It simply means that if its students desire to attend another high school pursuant to N.J.S.A. 18A:38-15, the application must be made to the Board, not Millstone Township. The Board would then evaluate the course of study at the other high school to determine if it is not furnished at Allentown High School. If the Board decides to approve the application, the Board would send the student there and pass the cost of tuition on to Millstone Township. If the Board denies the application, the student could file a Petition of Appeal with the Commissioner challenging the denial as arbitrary, capricious, or unreasonable.

whether the Board furnishes instruction in each course of study Millstone Township students pursue at Red Bank Regional. Miller v. U.S. Fid. & Guar. Co., 127 N.J. Super. 37, 41 (App. Div. 1974) ("The court is not precluded from adjudicating the legal consequences to be drawn from undisputed facts.").

Because the ALJ incorrectly characterized an issue of statutory interpretation as an issue of fact, the decision should be reversed and the matter remanded to the ALJ to make findings of fact based on the undisputed facts of each school's courses of study. Once these factual findings are made, the ALJ can adjudicate the legal consequences that flow from those facts.

CONCLUSION

For all of the above reasons, the Board respectfully requests that the Commissioner grant its request for interlocutory review and reverse the ALJ's order.

Respectfully submitted,

FOGARTY & HARA

BY: STEPHEN R. FOGARTY

SRF:kd
Enclosures
cc: Dr. Richard Fitzpatrick w/encl. - via e-mail only
Superintendent of Schools
Ms. Margaret Hom w/encl. - via e-mail only
Business Administrator/Board Secretary
Kerri A. Wright, Esq. w/encl. - via e-mail & FedEx delivery
Bruce Helies, Esq. w/encl. - via e-mail & FedEx delivery
Hon. Sarah G. Crowley, A.L.J. - via e-mail & FedEx delivery
Clerk, Office of Administrative Law - via hand delivery