

224-18 (OAL Decision: Not available online)

BOARD OF EDUCATION OF THE :
UPPER FREEHOLD REGIONAL SCHOOL :
DISTRICT, MONMOUTH COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF : DECISION
MILLSTONE, MONMOUTH COUNTY AND BOARD :
OF EDUCATION OF THE RED BANK REGIONAL :
HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, :
RESPONDENTS. :
_____ :

SYNOPSIS

The Board of Education of the Upper Freehold Regional School District (Upper Freehold) and respondent Millstone Board of Education (Millstone) participate in a send-receive agreement whereby Millstone – a K-8 school district – sends its high school students to petitioner’s Allentown High School (AHS). In the instant case, Upper Freehold challenged Millstone’s decision – pursuant to *N.J.S.A. 18A:38-15* – to send a group of its students to Red Bank Regional High School (Red Bank) for specialized high school courses of study not offered at Allentown High School. Petitioner disputed the applicability and scope of *N.J.S.A. 18A:38-15* with respect to Millstone’s determination to pay tuition for several of its residents to attend Red Bank instead of AHS.

The ALJ found, *inter alia*, that: Upper Freehold and Millstone have been in a send-receive relationship since 1964; Millstone sends students to Red Bank because it determined that AHS does not provide a “course of study” in certain areas, such as Finance, Information Technology, Engineering, Visual and Performing Arts, and Culinary Arts; Millstone maintains that it is legally sending students to Red Bank pursuant to *N.J.S.A. 18A:38-15*, as Upper Freehold does not provide a “course of study” in these areas; Upper Freehold argued that: 1) *N.J.S.A. 18A:38-15* is not applicable to Millstone as it only applies to districts that have their own high school, 2) the Commissioner’s approval is necessary before Millstone can modify its send-receive relationship to include Red Bank; and 3) Millstone is precluded from sending students to Red Bank because AHS offers a “course of study” in the subject areas of each the Red Bank Academies; with respect to testimony at hearing, the expert witness for Upper Freehold was not credible as she was inconsistent with the facts and documentation, whereas respondents’ expert witness was credible and consistent with the facts and documentary evidence; and the course of study provided at Red Bank in each of the disciplines in question is quantitatively and qualitatively superior to what is offered at AHS. The ALJ concluded that: Upper Freehold’s arguments were without merit, and the controlling case in this matter is *Board of Education of the City of Asbury Park v. Board of Education of the Red Bank Regional School District, et al.*, 97 *N.J.A.R.2d* (EDU) 464, *affirmed*, Commissioner Decision No. 156-96, decided March 27, 1997, *affirmed*, State Bd. of Educ. Decision No. 43-97, decided September 3, 1997, *affirmed*, No. A-1043-97 (App. Div. March 17, 1999), which stands for the proposition that a K-8 school district can invoke *N.J.S.A. 18A:38-15*; Upper Freehold failed to carry its burden to prove that AHS furnishes courses of study comparable to the specialized programs offered at Red Bank; there is nothing in the record to indicate that Millstone was arbitrary, capricious or unreasonable in sending students to Red Bank for specialized programs.

The Commissioner concurred with the ALJ’s findings and conclusions, and adopted the Initial Decision as the final decision in this matter; the petition was dismissed.

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.

July 26, 2018

OAL DKT. NO. EDU 6068-16
AGENCY DKT. NO. 108-4/16

BOARD OF EDUCATION OF THE :
UPPER FREEHOLD REGIONAL SCHOOL :
DISTRICT, MONMOUTH COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
OF MILLSTONE, MONMOUTH COUNTY AND :
BOARD OF EDUCATION OF THE RED BANK :
REGIONAL HIGH SCHOOL DISTRICT, :
MONMOUTH COUNTY, :
RESPONDENTS. :

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 Upper Freehold Regional School District Board of Education (Upper Freehold), and the reply thereto by the Millstone Board of Education (Millstone) and the Red Bank Regional Board of Education. Upper Freehold, who is in a send-receive relationship with Millstone, is challenging Millstone’s decision to send a group of its students to Red Bank Regional High School (Red Bank) pursuant to *N.J.S.A.* 18A:38-15,¹ which provides that:

[a]ny 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 any other district.

Millstone sends the group of students to Red Bank because it determined that Allentown High School does not provide a “course of study” in certain areas.²

¹ Millstone does not have a high school, so it entered into a send-receive relationship with Upper Freehold whereby Millstone sends its high school students to Allentown High School and Upper Freehold charges Millstone tuition.

² Of the students from Millstone in question, approximately: two 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. The Initial Decision lists all of the course offerings at Allentown High School and Red Bank for the disciplines at issue in this case.

After the matter was transmitted to the OAL, both Upper Freehold and Millstone filed a motion for summary decision. On September 29, 2016, the ALJ issued an Order finding that Upper Freehold failed to demonstrate that *N.J.S.A. 18A:38-15* does not apply to Millstone because Millstone does not operate a high school. The ALJ also concluded that Millstone's decision to send the group of students out of district under *N.J.S.A. 18A:38-15* did not violate the send-receive relationship between the Districts. The ALJ further found that there were issues of material fact that required a hearing as to what constitutes a "course of study," as well as whether what is provided by each school constitutes a course of study in the five separate disciplines in question. Finally, after several days of testimony, the ALJ found that Allentown High School does not furnish a course of study in the disciplines at issue in this case; therefore, Millstone did not abuse its discretion by sending its students to Red Bank.

In its exceptions, Upper Freehold reiterates the statutory arguments made below, maintaining that the ALJ erred by denying its motion for summary decision and ultimately concluding that Millstone can invoke *N.J.S.A. 18A:38-15* to send certain students to Red Bank. Upper Freehold argues that the plain language of *N.J.S.A. 18A:38-15* unambiguously states that it only applies to a board of education "not furnishing instruction in a particular high school course of study." As a result, a board of education who does not operate a high school, like Millstone, cannot invoke this provision. Additionally, implicit in the Legislature's use of "particular" in the statute is a requirement that the board of education invoking the provision furnishes some form of high school course of study. Upper Freehold also suggests that the evolution of *N.J.S.A. 18A:38-15* plainly demonstrates that the statutory provision only applies to boards of education that operate high schools. Thus, the only reasonable way to interpret *N.J.S.A. 18A:38-15* in light of its plain language, companion provisions, and legislative history is to conclude that it may only be used by a board of education that operates a high school.

Additionally, Upper Freehold contends that the ALJ erroneously concluded that *Board of Education of the City of Asbury Park v. Board of Education of the Red Bank Regional School District, et al.*, 97 *N.J.A.R.2d* (EDU) 464, *affirmed*, Commissioner Decision No. 156-96, decided March 27, 1997, *affirmed*, State Bd. of Educ. Decision No. 43-97, decided September 3, 1997, *affirmed*, No. A-1043-97

(App. Div. March 17, 1999), stands for the proposition that a K-8 school district can invoke *N.J.S.A.* 18A:38-15. The *Asbury Park* case was decided under the laws governing vocational education; therefore, Upper Freehold asserts it has no precedential value in this case. Instead, petitioner argues that the decision in *Board of Education of Union Beach v. Board of Education of Keyport*, Commissioner Decision No. 124-832, decided May 5, 1983, *aff'd as modified on other grounds*, State Board of Education Decision No. 60-83, decided September 7, 1983, is the controlling decision in this matter. Upper Freehold maintains that in *Union Beach* the Commissioner and the State Board found that the sending district could not invoke *N.J.S.A.* 18A:38-15 because it does not operate its own high school. Upper Freehold stresses that the decision in *Union Beach* represents the proper application of what the Legislature intended when it enacted *N.J.S.A.* 18A:38-15.

Upper Freehold also argues that interpreting *N.J.S.A.* 18A:38-15 to permit a sending K-8 district to avoid its obligations under *N.J.S.A.* 18A:38-11 and -13 anytime it determines a course of study at another high school is different from its designated receiving school eviscerates the protection the Legislature provided through the sending-receiving relationship. It is undisputed that Millstone designated Allentown High School as the high school for its students and there has been no application made to the Commissioner to modify that agreement as required by *N.J.S.A.* 18A:38-13. Additionally, the ALJ's construction of *N.J.S.A.* 18A:38-15 ignores the fact that the K-8 school district is not in the best position to evaluate whether the receiving high school furnishes instruction in any particular course of study. The decision to send the group of students to Red Bank was made exclusively by Millstone's Superintendent, which cannot be the process envisioned by *N.J.S.A.* 18A:38-15. Therefore, Millstone should be enjoined from violating the send-receive agreement.

Upper Freehold further argues that the ALJ misconstrued *N.J.S.A.* 18A:38-15 by reading a comparability or equivalency test into the statute that the Legislature did not include. There is no requirement that Allentown High School offers an identical or even comparable program to Red Bank; it must only furnish instruction in a course of study. The evidence at the hearing demonstrates that Allentown High School furnishes instruction in all of the courses of study in which Millstone students are enrolled in

Red Bank. It makes no difference that Allentown High School does not offer all of its courses of study under an “academy” umbrella or whether the courses are State-approved as career and technical programs (CTE programs).

In addition to the statutory arguments, Upper Freehold asserts that the ALJ’s credibility determinations were not supported by the record, and should be rejected by the Commissioner. The ALJ erred by concluding that Dr. Gayle Carrick – Upper Freehold’s expert – was not credible because “[s]he had numerous definitions of course of study and her testimony and opinions were not consistent with the facts and documentation.” Upper Freehold cited to various excerpts from the transcript to argue that Dr. Carrick consistently defined a course of study as “a series of individual courses within a specific content area or educational program designed to further learning and mastery of that education content.” Furthermore, Upper Freehold asserts that the Commissioner cannot adopt the ALJ’s baseless conclusion that Allentown High School does not furnish a course of study in the disciplines at issue because it is not supported by the uncontroverted expert testimony. During the hearing, Dr. Carrick unequivocally testified that Allentown High School furnished the relevant courses of study, and Millstone’s expert – Mr. Peter Carter – never once testified to the contrary.

Upper Freehold also maintains it was arbitrary for the ALJ to criticize Dr. Carrick for not speaking to anyone from Red Bank about her report considering that Mr. Carter never spoke to anyone from Allentown High School about his expert report. It was not necessary for Dr. Carrick to provide an analysis of Red Bank’s courses because Upper Freehold is not alleging that Red Bank does not have the requisite course of study; rather, Upper Freehold maintains that Allentown High School also has the requisite course of study in the disputed subject areas. In fact, Mr. Carter testified that “[t]here was no need, in [his] expert opinion . . . , to look into the day-to-day operations of Allentown High School” because this “case was not about Allentown High School per se.” (8T27-9 to 13).³ In light of Mr. Carter’s admission, the ALJ should not have given any credit to his opinion. Upper Freehold cited to various

³ The transcripts are referenced as 1T-8T, in order by date of the hearing.

excerpts from the transcript to contradict the ALJ's finding that Mr. Carter's testimony was "consistent with the facts and documentary evidence in the case."

Finally, Upper Freehold avows that the ALJ's findings of fact were not supported by the record; as a result, the Commissioner must reject those findings. First, Upper Freehold contends that the ALJ failed to make critical findings of fact regarding the instruction that Allentown High School furnishes, in violation of *N.J.A.C. 1:1-18.3*. Three of the factual findings the ALJ did make contradict the record, as there is no support for the findings that: Red Bank's courses are limited to academy students; Red Bank academies are CTE-approved; and Allentown High School does not furnish instruction in the disputed courses of study. Again, Upper Freehold cited to excerpts from the transcript to argue that the ALJ's findings were erroneous, contending that even when considering only the classes that Allentown High School runs consistently, it is clear that Allentown High School furnishes all of the relevant courses of study. In its exceptions, petitioner outlined all of the courses that it argues provide a course of study in each of the designated areas. Therefore, Upper Freehold asserts that the Millstone students who attended Red Bank should be required to attend Allentown High School pursuant to the send/receive relationship.

In reply, Millstone likewise reiterated the arguments it made below contending that the ALJ properly determined that *N.J.S.A. 18A:38-15* is available to all school districts, including Millstone. This case is about Millstone's discretion under *N.J.S.A. 18A:38-15*; it is not related to the parties' sending-receiving relationship. The operative statute in this case, *N.J.S.A. 18A:38-15*, does not even create a cause of action for Upper Freehold because the statute contemplates two entities. *N.J.S.A. 18A:38-15* provides resident districts the discretion to assist their students when they seek an educational choice outside of the high school to which they have been assigned.

Two cases analyzing disputes over out-of-district students' enrollment at Red Bank determined that local boards of education have the absolute discretion to permit their students to enroll at Red Bank even if they do not operate their own high school. *D.M., on behalf of minor child, A.M. v Board of Educ. of the City of Long Branch, Monmouth County*, Commissioner Decision No. 391-00, decided November 28, 2000; *Asbury Park, supra*. The crux of *Asbury Park* is that *N.J.S.A. 18A:38-15* grants school

districts the discretion to pay for their students' attendance at programs offered in other districts. Although some state laws have changed with regard to vocational schools in general, what has not changed is the fact that districts may choose to pay the tuition for their students to attend programs not offered at their designated high school. Further, no reasonable reading of either *Asbury Park* or *D.M.* could lead to the conclusion that *N.J.S.A. 18A:38-15* cannot be utilized by districts that do not operate their own high school. Millstone also contends that the holding and dicta in *Union Beach* are misapplied by Upper Freehold. The posture of *Union Beach* is entirely different from the current case. *Union Beach* was attempting to modify its sending-receiving relationship with Keyport, and it sought to misapply *N.J.S.A. 18A:38-15* to change its high school designation for all of its students simultaneously. That decision is not determinative here because Millstone is not trying to replace Allentown High School as its designated high school; rather, it is simply sending a handful of students to Red Bank to pursue a course of study that is not available at Allentown High School.

To the extent that Upper Freehold characterizes the ALJ's interpretation of *N.J.S.A. 18A:38-15* as reading into the statute a "comparability test," such a reading is proper. Millstone stresses that there must be some comparison between the offerings at the two schools at issue in order to determine whether a course of study is available at Allentown High School. Millstone also contends that the ALJ properly deemed that its expert was credible while finding Upper Freehold's expert was not credible. Mr. Carter's opinions were also based on a more thorough analysis and he reviewed more materials than Dr. Carrick. Unlike Dr. Carrick, he did not rely solely on Allentown High School's Course of Study Guide, but rather he reviewed the curriculum for each school. Mr. Carter also spoke at length with Scott Feder, Millstone's Superintendent, who was already familiar with the offerings at both schools. The law provides that the Commissioner should only disrupt the credibility determinations of an ALJ under the rarest circumstances, and the burden is high on the party seeking to overturn an ALJ's credibility determinations.

Millstone argues that the ALJ correctly found that Dr. Carrick presented numerous definitions of "course of study" and that her testimony was not consistent with the remaining evidence. For

example, Dr. Carrick presented a lengthy, and seemingly tangential, method of defining course of study, while at the same time stating that a single class could constitute a course of study. (2T213:12-21). Clearly a “series of individual courses’ and a “single course” are not the same thing. Additionally, Dr. Carrick was unclear whether extracurricular activities like clubs would be included in a course of study. Dr. Carrick also failed to address the piece of the statute permitting students to attend high school elsewhere unless their school “furnishes instruction” in a particular course of study as opposed to merely offering something in a course guide. Millstone also asserts that Dr. Carrick’s report was so unclear, and incorrect in many respects that the ALJ requested that she supplement or revise her report in the middle of her testimony. For example, Dr. Carrick “over included” items with regard to Allentown High School – such as extra-curricular activities and courses that were not, in fact, offered in a particular year – while failing to include courses or activities that should have been attributed to Red Bank. In its submissions, Millstone outlined all of the inconsistencies and inaccuracies it argues are found throughout Dr. Carrick’s report that negatively impacted her credibility.

With respect to Upper Freehold’s exceptions concerning the ALJ’s factual findings, Millstone first contends that the ALJ’s factual findings comport with *N.J.A.C. 1:1-18.3*. Next, Millstone concedes that not all academy courses at Red Bank are limited to academy students, as found by the ALJ. While some of the academies at Red Bank will, on occasion, allow non-academy students to take some of the courses if space is available, the program for the academy students is prescribed and restricted. Regardless of the ALJ’s finding that all academy classes are closed to non-academy students, the ALJ’s larger conclusion is supported by ample evidence in the record; namely, that all students in every Red Bank Academy are beholden to the specialized sequence of the course of study for each academy. Second, the ALJ correctly determined that the Red Bank Academies are CTE-approved courses of study. While the term academy is only a title or a name, the programs underlying those titles are in fact CTE programs. Upper Freehold’s focus on the “academy” title used in the Initial Decision is not only semantics, but is also belied by its own witnesses, who testified that the academy label was irrelevant. Finally, the evidence supports the finding that Red Bank furnishes instruction in courses of study not furnished at Allentown

High School. Millstone argues that it more than adequately demonstrated that the courses of study furnished at Red Bank are substantially and qualitatively different from those furnished at Allentown High School. Millstone outlined the differences between the classes taught at each high school in support of the ALJ's overall finding that Allentown High School did not furnish a course of study in the disputed areas. Upper Freehold, who has the burden of proof in this case, failed to demonstrate otherwise. Therefore, the Initial Decision should be adopted as the final decision in this matter.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's determination that Millstone is not prohibited from invoking *N.J.S.A. 18A:38-15* simply because it does not operate its own high school. The relevant case law makes clear that local boards of education have the absolute discretion to permit their students to enroll at Red Bank, even if they do not operate their own high school. *D.M., supra; Asbury Park, supra.*

In *Asbury Park*, the Asbury Park Board of Education had a send-receive relationship with multiple school districts, and filed a petition claiming that because its sending districts sent a select group of students to Red Bank, the sending districts were in violation of *N.J.S.A. 18A:38-15*. In that case, the ALJ found that the allegations raised by the Asbury Park Board of Education were without merit, noting that “[t]he legal basis for the attendance of pupils from the correspondent districts at Red Bank Regional High School is both clear and firm.” 97 *N.J.A.R.2d* (EDU) 464 at 15. The ALJ further explained, “[t]his case differs from other, recent sending-receiving cases in that the pupils involved here have not simply opted to attend another high school. Rather, under the clear provisions of *N.J.S.A. 18A:38-15*, parents and pupils have decided that the pupils will attend particular, specialized vocational education programs offered neither at the county vocational school nor at Asbury Park High School, the designated receiving school.” *Id.* at 13-14. Significantly, the Commissioner, the State Board of Education and the Appellate Division affirmed the Initial Decision in *Asbury Park*. See also, *D.M., supra*, at 48 (“Although the administrative law judge’s opinion [in *Asbury Park*] ... spoke in terms of parental choice, in fact, the basis for the decision was *N.J.S.A. 18A:38-15*.... The provisions of that statute make clear that the ultimate discretion concerning whether a student will attend a program in another district at public expense lies with

the local board.”) Although *D.M* and *Asbury Park* also examined other statutes such as *N.J.S.A.* 18A:54-5 through -7 and the change in law regarding vocational school status, the findings under *N.J.S.A.* 18A:38-15 are clear and are controlling in this case.

The Commissioner is not persuaded by Upper Freehold’s attempt to suggest that *Asbury Park* is not relevant in this matter. In discounting that argument, the Commissioner recognizes that in *Union Beach* it was stated that the protections of *N.J.S.A.* 18A:38-15 may not be invoked by the sending district because it does not operate its own high school. First, in that case the petitioning sending district was seeking to modify its sending-receiving relationship by changing the designated high school for all of its students – as opposed to invoking *N.J.S.A.* 18A:38-15 for its intended purpose of supporting students in pursuing specialized programs based on their individual needs. Additionally, *Union Beach* was decided in 1983, well before the Appellate Division confirmed in 1999 that local boards of education have the absolute discretion to permit their students to enroll at Red Bank even if they do not operate their own high school. Although Upper Freehold maintains that *Asbury Park* is not applicable because the case is about a vocational school, this is not accurate as *N.J.S.A.* 18A:38-15 was directly cited and considered in *Asbury Park*. *Asbury Park* stands for the premise that local boards of education have the absolute discretion to permit their students to enroll at Red Bank even if they do not operate their own high school.

The Commissioner is also in accord with the ALJ’s determination that Millstone’s decision to send the group of students to Red Bank in accordance with *N.J.S.A.* 18A:38-15 did not violate the send-receive relationship between the Districts, nor does it constitute a modification of the relationship. Despite Upper Freehold’s assertions to the contrary, Millstone is not trying to circumvent the send-receive relationship, it is simply sending a small group of students to Red Bank to pursue a course of study that is not available at Allentown High School.⁴ Nor does the decision in this case establish precedent encouraging sending districts to blatantly ignore their send-receive relationships and start randomly sending their high school students anywhere they choose. This matter is limited to a select number of high school students

⁴ During the 2016-2017 school year, there were approximately 588 high school students from Millstone that went to Allentown High School, while the dispute in this matter was limited to approximately 20 students or less.

who: have completed an elementary course of study; wish to pursue a focused course of study in high school; and were accepted into one of Red Bank's specialized programs. Moreover, the record indicates that Millstone has been approving the tuition payment for Millstone's students to attend Red Bank since at least 2011. (4T141:3-7). That reality, coupled with *Asbury Park* – which was decided by the Appellate Division in 1999 – seriously undermines Upper Freehold's supposition that if sending districts are able to invoke *N.J.S.A.* 18A:38-15, it will gravely impact all send-receive relationships throughout the state.

The Commissioner agrees with the ALJ's assessment that it is "illogical to preclude sending districts from the right to send students to a specialty high school." Order, September 29, 2016, at 4. Further, a student who resides in a district that does not operate a high school should not be precluded from pursuing a course of study envisioned by the statute. As was succinctly stated by the Appellate Division, "the students at Asbury Park, no less than those assigned there from the respondent sending districts, should be entitled to a vocational program meeting the constitutional levels of thorough and efficient education." *Asbury Park, supra*, A-1043-97 at 9.

Having found that *N.J.S.A.* 18A:38-15 is available to Millstone, the analysis shifts to whether Millstone's determination that Allentown High School did not furnish a course of study in the areas in dispute was an abuse of its discretion. Here, Upper Freehold is challenging Millstone's action to send its students to Red Bank; therefore, Upper Freehold bears the burden of proof in this matter.⁵ A board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. Board of Education of West Orange*, 60 *N.J. Super.* 288 (App. Div. 1960). As such, Upper Freehold must prove that Millstone abused its discretion by arbitrarily and capriciously sending its students to Red Bank to pursue a designated course of study pursuant to *N.J.S.A.* 18A:38-15. Upon a comprehensive review of the entire record, which included the transcripts

⁵ Millstone has argued that Upper Freehold does not have standing to bring this action; however, in light of the sending-receiving relationship between the Districts, the Commissioner finds that Upper Freehold does have standing in this case.

from eight days of hearings conducted at the OAL between February 21, 2017 and May 1, 2017, the Commissioner is in accord with the ALJ's determination that Upper Freehold did not meet that burden.

Although *N.J.S.A.* 18A:38-15 does not provide a test for determining whether a school furnishes a course of study, in order to evaluate whether Millstone's decision to send the students to Red Bank was arbitrary, capricious or unreasonable, it is necessary to compare the programs offered at Allentown High School with those offered at Red Bank. Upper Freehold attempts to suggest that the course of study provided by Red Bank is irrelevant; however, in *Asbury Park*, the Appellate Division emphasized that its decision to affirm the State Board of Education's decision that the students in question should be permitted to attend Red Bank was "based upon a lack of comparable vocational programs in Asbury Park." *Asbury Park, supra*, A-1043-97 at 9.

The ALJ had the opportunity to listen to eight days of testimony related to the extent of the offerings at Allentown High School and those at Red Bank in the designated areas. This included testimony of fact witnesses who discussed the number of courses offered; the sequence of the courses; the curricula; and the depth and variety of courses in each discipline at the respective schools. In the Initial Decision, the ALJ included her analysis of witness testimony in conjunction with the evidence presented at the hearing to find that Allentown High School did not furnish a course of study in the designated areas.⁶

Importantly, Millstone's Superintendent credibly testified regarding the decision making process that he undertook to determine whether Allentown High School furnished the requisite courses of study.⁷ After evaluating the offerings at both schools, Mr. Feder concluded that Red Bank offered four-year sequential, rigorous State-approved CTE programs.⁸ He emphasized that Red Bank's Academies also provided a vigorous curriculum; the classes had a defined order and sequence; and they are offered every

⁶ Upper Freehold's assertion that the ALJ did not make the requisite findings of fact under *N.J.A.C.* 1:1-18.3 is unfounded.

⁷ The ALJ found that all of the fact witnesses were sincere and credible, and the testimony of each witness was fully reviewed even though not all the witness testimony is outlined in this decision.

⁸ The ALJ stated that the academies are CTE-approved. The proper nomenclature is that the programs in the academies are "approved CTE programs." This distinction does not change the outcome in this case.

year. (4T:11- 24; 4T201:21-202:8). Mr. Feder did not find that there were similar opportunities at Allentown High School, and he provided detailed testimony as to why he determined that Allentown High School does not furnish a course of study in the designated areas. (4T174:17-5T14:11). In this regard, the ALJ likewise found that Allentown High School does not furnish a course of study in the designated areas, and noted that the majority of courses at Allentown High School are electives that were often cancelled or not offered due to lack of interest. Further, the courses are not offered in a sequence; there are no prerequisites for many courses; and many of the courses are general courses which are offered in several different disciplines. The Commissioner does not find any evidence in the record, including the testimony of Upper Freehold's witnesses, to negate the ALJ's characterization of the courses at Allentown High School.

With respect to the expert testimony, the ALJ found that Upper Freehold's expert was not credible because she had numerous definitions of course of study, and her testimony and opinions were not consistent with the facts and documentation. On the other hand, the ALJ found that Millstone's expert's testimony was credible, and consistent with the facts and documentary evidence. A review of the transcript indicates that Dr. Carrick did routinely state that course of study was "a series of individual courses within a specific area or education program designed to further learning, and mastery of that education content." However, it was difficult to ascertain from a review of the transcript what exactly a program would need to provide in order to meet that definition.⁹ Further, the overall credibility of Dr. Carrick was significantly damaged by the fact that her expert report was based on inaccurate information in that several courses that she relied on to opine that Allentown High School furnished a course of study in the designated areas were not actually offered in a given year. (2T112:11-22).¹⁰ The evidence at the hearing demonstrated that even though certain courses were listed in Allentown High School's Course of Study Guide it does not mean that

⁹ Dr. Carrick did testify at one point during the hearing that course of study could include a single course. (2T213:12-21).

¹⁰ During the hearing, Dr. Carrick made notations to her report to reflect the courses that did not actually run in a given year at Allentown High School which had been listed in her report. Dr. Carrick also made notations to reflect Red Bank courses that were left off of her report. *See*, Exhibit UFR 4 and UFR4a. A review of those exhibits demonstrates that there were numerous errors in Dr. Carrick's report.

those courses were consistently offered, and there was no guarantee that certain courses would be offered in the future. Importantly, *N.J.S.A.* 18A:38-15 does not simply require the existence of a course of study; rather, the school must also furnish the instruction. Upper Freehold emphasizes that Dr. Carrick still found that Allentown High School furnished a course of study in the designated areas even without certain courses being offered in a given year. At that point, however, Dr. Carrick's credibility had already been compromised. Thus, the ALJ's determination that Dr. Carrick was not credible, based on the fact that her testimony was inconsistent and her report was based on inconsistent facts and documentation, was reasonable. Likewise, the ALJ's determination that Mr. Carter credibly testified that Allentown High School did not furnish a course of study in the designated areas was not inconsistent with the record.¹¹ Therefore, the Commissioner finds that the ALJ's overall assessment of the credibility of the expert witnesses is consistent with the record and cannot be disturbed.

Upper Freehold carried the burden in this case, and failed to prove that Allentown High School furnishes a course of study in the designated areas. In the future, Allentown High School may furnish a course of study in certain areas; but based on the evidence in this record, such claim is not tenable at the present time. Further, there is nothing in the extensive record to indicate that Millstone's decision to pay the tuition for its students to attend Red Bank was arbitrary, capricious or unreasonable. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.¹²

COMMISSIONER OF EDUCATION

Date of Decision: July 26, 2018

Date of Mailing: July 26, 2018

¹¹ A review of the transcript reveals that Dr. Carter's report contained a few omissions from the list of courses offered at Allentown High School. The omissions did not affect his overall credibility, as his testimony demonstrated he did not base his opinion strictly on a listing of courses. Instead he evaluated the courses, curricula and other factors in order to provide his opinion that Allentown High School did not furnish a course of study in the designated areas.

¹² 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).