

209-00

IN THE MATTER OF THE DIVISIONAL :

REALIGNMENT BY THE NORTHERN :

COMMISSIONER OF EDUCATION

NEW JERSEY INTERSCHOLASTIC :

DECISION

LEAGUE. :

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### SYNOPSIS

Petitioners, six parochial school members of the Northern New Jersey Interscholastic League (NNJIL), sought reversal of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee's decision upholding a divisional realignment by the NNJIL which established two public school divisions and one nonpublic school division. NNJIL is a voluntary league comprised of 13 large public schools in Bergen, Essex and Passaic Counties and six parochial schools in Bergen County, and is one of the 21 leagues and conferences under the jurisdiction of the NJSIAA. On June 3, 1999, the NNJIL adopted an Amendment to Article VII of its Constitution establishing a third division comprised solely of nonpublic schools. Petitioners alleged that by NNJIL establishing a separate division segregating the parochial schools, the public schools had discriminated against the parochial schools and had denied them full membership in the League. Petitioners filed suit in Bergen County Superior Court against the 13 NNJIL public schools but the NJSIAA intervened and the Superior Court enjoined the NNJIL from implementing the new divisional alignment pending the NJSIAA's full and final review and further order by the Court.

Following a hearing, issuance of a Report, a subsequent meeting and work session by the NJSIAA's Special Committee, the Committee issued a Supplemental Report finding that the new divisional alignment was an acceptable method of addressing the League's competitive imbalance (the dominance of the nonpublic schools since 1988) while providing all member schools full membership in the League and a full and fair schedule of athletic competition. On January 12, 2000, NJSIAA's Executive Committee heard oral argument on the Special Committee Reports and voted 33-0 to adopt the Reports.

As set forth in *N.J.A.C. 6A:3-7.4*, the Commissioner's review in NJSIAA determinations is an appellate one. Having conducted an independent review of the 500-page record of the proceedings, including transcripts of the hearings and meetings and the parties' submissions on appeal, the Commissioner was persuaded that petitioners have been accorded the due process to which they were entitled, that the Special Committee's findings and conclusions were well-grounded in the record and that petitioners failed to establish that the NJSIAA's determination upholding the divisional realignment of the NNJIL was arbitrary, capricious or unreasonable. The Commissioner found petitioners' contention that because there is an absence of a rational basis or legitimate State purpose to be served by the divisional realignment, that the NNJIL violated petitioners' constitutional rights under the Fourteenth Amendment, Equal Protection Clause, was without merit. The Commissioner found that the record supported the conclusion that a rational basis exists to limit the League's organization to public schools because: 1) parochial schools were found to be dominating League competition creating a competitive imbalance and 2) parochial schools have an enrollment advantage since they are able to enroll students from a wide geographic area and are able to offer financial aid to their student-athletes. Moreover, the Commissioner found petitioners' allegations that the realignment contravened their rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution to be without merit. Petitioners were not excluded from the benefits of membership, maintain full voting rights, continue to compete against public schools within the League and their games against public schools carry the same weight in the standings as their games against parochial schools. The Commissioner also found that the realignment did not in any way advance or inhibit the exercise of religion, nor did it violate the Law Against Discrimination, noting that the Special Committee could not find evidence that the new divisional alignment was motivated by discrimination on the basis of religion or out of any "anti-Catholic bias." The Commissioner affirmed the NJSIAA's decision.

June 23, 2000

IN THE MATTER OF THE DIVISIONAL :  
REALIGNMENT BY THE NORTHERN : COMMISSIONER OF EDUCATION  
NEW JERSEY INTERSCHOLASTIC : DECISION  
LEAGUE. :

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**BACKGROUND AND PROCEDURAL HISTORY**

This matter has come before the Commissioner of Education by way of a Petition of Appeal filed on February 15, 2000, and amended on March 3, 2000, by the six parochial school members of the Northern New Jersey Interscholastic League (NNJIL). Therein, petitioners seek a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee, dated January 13, 2000, adopting the July 22, 1999 and January 3, 2000 determinations of the Special Committee on Leagues and Conferences (Special Committee), upholding a divisional realignment by the NNJIL which established two public school divisions and one nonpublic school division. Petitioners seek reversal of NJSIAA's decision as being a violation of petitioners' rights as guaranteed by the U.S. Constitution, Amendment XIV; New Jersey Constitution, Article 1, paragraphs 1 and 5; and

the provisions set forth at 42 *U.S.C.* sec. 1981 (sic) *et seq.* Petitioners submit that they have suffered and will continue to suffer irreparable harm by being excluded from full membership in the league because of the NJSIAA's failure to provide petitioners with a full and fair schedule, and that, further, petitioners will suffer harm and damages by the discriminatory acts as they pertain to women's high school sports in violation of their civil rights. (Petition of Appeal at 2)

On March 21, 2000, respondent NJSIAA filed its Answer to the Petition of Appeal, along with the Statement of Items Comprising the Record and the attached two-volume Record before the NJSIAA. On March 28, 2000, respondents, public school districts of the NNJIL, filed their Answer to the Petition of Appeal. By letter of March 30, 2000, the Director of the Bureau of Controversies and Disputes established a briefing schedule. Petitioners subsequently filed a brief in support of their appeal on April 17, 2000,<sup>1</sup> and respondents, public school districts and NJSIAA, filed briefs on April 27, 2000 and May 9, 2000, respectively, whereupon the record in this matter was closed.<sup>2</sup>

NNJIL is a voluntary league comprised of 13 large public schools in Bergen, Essex and Passaic Counties and six parochial schools in Bergen County, and is one of the 21 leagues and conferences under the jurisdiction of the NJSIAA. Prior to the adoption of an Amendment to Article VII of its Constitution on June 3, 1999 by the NNJIL establishing a third division comprised solely of nonpublic schools, NNJIL was structured into two divisions, the Atlantic Division and the Pacific Division. Bergen Catholic was in the Atlantic Division with

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<sup>1</sup> Along with their brief, petitioners submitted a Certification of the Athletic Director of Bergen Catholic High School, Angela Hickey, and several athletic schedules. These additional documents submitted by petitioners were not before the NJSIAA and not previously made a part of the record. In accordance with *N.J.A.C.* 6A:3-7.2(d), these additional submissions were, therefore, not considered by the Commissioner in rendering his decision.

<sup>2</sup>On June 2, 2000, petitioners filed Certifications of Anthony Karcich and Susan Liddy. These certifications were not before the NJSIAA and not previously made a part of the record. In accordance with *N.J.A.C.* 6A:3-7.2(d), these additional submissions were, therefore, not considered by the Commissioner in rendering his decision.

the larger public schools, and the five other parochial schools were in the Pacific Division with the smaller public schools. (Petitioners' Brief at 5)

As a result of the amendment, the three divisions were designated as follows:

**LARGE PUBLIC**

	<u>Enrollment</u>
Clifton	1,997
Passaic	1,562
Eastside	1,441
Kennedy	1,367
Bloomfield	1,158
Hackensack	1,114

**SMALL PUBLIC**

	<u>Enrollment</u>
Montclair	1,121
Ridgewood	1,049
Belleville	987
Teaneck	964
Barringer	962
Paramus	870
Nutley	798

**NON-PUBLIC**

	<u>Enrollment</u>
Bergen Catholic	1,140*
Don Bosco Prep	1,026*
St. Joseph	688
Paramus Catholic	652
Immaculate Heart Academy	1,130*
Holy Angels	800*

\*Enrollment is doubled for single-sex schools  
(*Id.* at 6)

On June 10, 1999, the six parochial school members of the NNJIL filed suit against the 13 NNJIL public schools in Bergen County Superior Court, alleging that, by

segregating the parochial schools in a separate division, the public schools had discriminated against the parochial schools, and had denied them full membership in the League. The NJSIAA intervened and requested the Superior Court to permit NJSIAA to hold hearings and investigate the complaint. (NJSIAA's Brief at 1, 2) The Superior Court's decision on August 17, 1999 enjoined NNJIL from implementing its new divisional realignment pending the NJSIAA's full and final review and further order by the Court. The Court further ordered that the injunction would not apply to the NNJIL's 1999-2000 football schedule as it had been agreed to by the parties. (Superior Court Decision at 2)

On July 7, 1999, the Special Committee of the NJSIAA held a hearing at which all parties appeared with counsel for the purpose of considering the parochial schools' complaint. The Special Committee issued its report of its findings and conclusions on July 22, 1999. (NJSIAA's Brief at 2)

The Findings of Fact determined by the Special Committee in its July 22, 1999 report were as follows:

1. The NNJIL consists of nineteen schools: thirteen large public schools in Bergen, Essex and Passaic Counties and six parochial schools, located in Bergen County. Three of the parochial schools: Bergen Catholic, St. Joseph's Regional and Don Bosco are all boys schools; two of the parochial schools, Immaculate Heart and Holy Angels Academy, are all girls schools; and the remaining parochial school, Paramus Catholic, is co-educational.
2. In 1982, five of the six parochial schools were added to the NNJIL by the NJSIAA as part of the first statewide realignment.
3. After the first realignment, the NNJIL consisted of a Bergen Division and an Essex-Pacific Division. Since the 1988-89 school year, the NNJIL was divided into the Atlantic Division, consisting of Bergen Catholic and the larger NNJIL public schools, and the Pacific Division, comprising the five remaining parochial schools and the smaller NNJIL public schools.
4. Since the 1988-89 school year, parochial schools have won both the boys and girls All Sports Championship in each division in which they have competed.

Immaculate Heart Academy has won the Pacific Division All Sports Championship for girls for nine straight years; Don Bosco has won it for boys for nine of the last ten years; and Bergen Catholic has won its boys division title for thirteen of the last fourteen years. The only division title regularly won by public schools is the Atlantic Division Girls, where no parochial schools compete.

5. In their most recent football game, St. Joseph's was beating Paramus 46-0 in the first quarter, when St. Joseph's substituted their junior varsity team in for their varsity. Such lopsided games do not foster healthy competition.
6. Although all NJSIAA schools are subject to the Association's eligibility rules, parochial schools operate under different admissions policies and are able to draw student-athletes from a wide geographic and population base. Public schools are generally restricted to admitting students from the local school district.
7. While some public schools admit tuition-paying students, it is not the norm, and there is no evidence that such students have had an impact on athletic competition.
8. Bergen Catholic, as an example, accepts students from throughout Bergen County, outside Bergen County, and outside New Jersey.
9. Parochial schools also differ from public schools because they are able to offer financial aid to student-athletes who qualify.
10. In the fall of 1998, Dr. Charles Khoury [Principal, Paramus High School] initiated a proposal to amend the NNJIL Constitution to create a public school division and a non-public school division. The public school division would be divided based on enrollment. He convened a meeting of public school principals on November 4, 1998 to discuss this initiative. Parochial schools were not invited to that session.
11. Dr. Khoury sent his proposed constitutional amendment to Mr. John Job, the Principal of St. Joseph's High School, who was then serving as the President of the NNJIL. It was thereafter distributed to all of the nineteen schools in the League. He submitted the amendment at the December 3, 1998 league meeting.
12. On March 11, an NNJIL meeting was convened, at which time Dr. Khoury again advanced his proposal for the new divisional alignment. Representatives of the parochial schools in attendance opposed this proposal, which was deferred for consideration until the June 3, 1999 meeting of the NNJIL.

13. In mid-April 1999, George Middleton, the Athletic Director of Bloomfield High School, prepared a schedule for the 1999 football season. The schedule requires each team to play the rest of the teams in its division; honors prior contracts schools have for games against non-conference teams; and fills out the remainder of the schedule with intra-divisional crossover games. The crossover games were scheduled based on the competitive strengths of the respective teams.
14. The League voted to adopt this schedule 17-1, with all the parochial schools accepting the schedule while reserving their right to object to the new division alignment. The only school to dissent was Clifton.
15. As crafted, the football schedule provides the parochial schools with a full and fair opportunity for athletic competition. The schedule assures that the parochial schools are not excluded from the League, and provides for competition with other League members.
16. On June 3, 1999, the NNJIL adopted Dr. Khoury's constitutional amendment by a 13 to 6 vote, with every parochial school opposed.
17. The parochial schools have charged that they were shut out from the process by which the League amended its Constitution, and were therefore denied due process. Their chief complaint was that the public schools had secretly met without them to discuss the proposal, and also met with an NJSIAA staff member who recommended the new alignment.
18. Dr. Khoury testified that NJSIAA Associate Director James Loper did not meet with the public school representatives, which was confirmed by Mr. Loper.
19. Dr. Khoury admitted that the public schools had met, at his invitation, for lunch at his school to discuss whether the schools shared a common concern about the lack of competitive balance in the League, and if so, to discuss how to address the problem. While it certainly would have been preferable to include parochial school members, there was nothing improper about this meeting.
20. The amendment was debated twice and voted upon in an open forum in which all NNJIL members, public and parochial alike, were present. At the June 3, 1999 NNJIL meeting, the amendment garnered the required two-thirds majority for passage. There was nothing about the process that would invalidate the result.
21. On June 5, 1999, the six parochial schools instituted a lawsuit against the NNJIL and its public school members, contending that the constitutional amendment deprived them of the full benefits of League membership.

22. The Committee finds that the NNJIL constitutional amendment was not motivated on religious grounds. It was rather advanced because of the domination of the League competition by the parochial schools and desire by the public schools to require more competitive balance within the League. The amendment recognized that the parochial schools could draw a wider enrollment of student-athletes, without consideration to geographic attendance zones.
23. The Committee finds that the aforesaid reasons for adopting the constitutional amendment were both legitimate and rational and came only after years of domination of intra league competition by Bergen Catholic in the Atlantic Division and Don Bosco and Immaculate Heart in the Pacific Division.
24. The NNJIL has not changed any schedules for the 1999-2000 school year other than the football schedule. In turn, the football schedule, which was approved by the parochial schools, provides for a full schedule of nine contests for each of the four parochial football teams and was approved by the parochial schools themselves in April 1999.
25. The Committee could not find any evidence that the new divisional alignment was motivated by discrimination on the basis of religion or out of any “anti-Catholic bias.”
26. Except for the meeting on November 4, 1998, all of the meetings of the NNJIL, beginning in December 1998 leading up to the adoption of the constitutional amendment in June 1999, were open to all members of that League. The amendment was adopted after early notice to all schools and after open and free discussions among League members.
27. Despite allegations to the contrary by the parochial schools, there is no evidence that the NNJIL will discount contests played by its public school members against parochial school opponents in determining divisional and league champions.
28. Although arranging the divisions on the basis of enrollment or attendance zones is rational, the impact on the parochial schools raises substantial concerns. In particular, a division of three girls’ programs does not provide an adequate competitive framework for divisional championships. (July 22, 1999 Report by the Special Committee on Leagues and Conferences at 8-11)

Based on the above Findings of Fact, the Special Committee reached the following conclusions and recommendations:



1. The amendment to Article VII of the NNJIL Constitution on June 3, 1999 was based upon an attempt by that League to provide greater competitive balance among its member schools. It was also based upon a decision to arrange three divisions; two public divisions based on enrollment, and a non-public division, which recognized that these schools had a much wider enrollment pool. That decision was founded on a decade or more of experience with parochial schools dominating intra league competition.
2. Placing parochial schools in a separate division can be a reasonable method of redressing competitive imbalance in a league. In this case, a competitive imbalance was found to exist, and it was not unreasonable to require that non-public schools, all of which operate with similar admissions policies, be required to play each other in the same division. The decision was not based upon any “anti-Catholic school” sentiment and did not deprive the parochial schools of either full membership in the League or complete interscholastic sports schedules for the future.
3. Having found that the decision to require the non-public schools to compete against each other was rationally based, the Special Committee nevertheless recognizes that significant problems continue to exist with this particular alignment:

*First*, the non-public school division contains only four schools competing in boys sports and three schools competing in girls sports. League and conference divisions in New Jersey generally consist of five or more schools. Without any question, a girls’ division of three teams is far too small.

*Second*, the League has not yet addressed how divisional championships will be awarded. When it does, results from public-parochial contests should be given the same weight as results from other games.

*Third*, future League schedules should be similar to the existing football schedule, which takes into account the relative strengths of the teams and continues to schedule publics against parochials.

*Fourth*, as is the prevailing practice for most conferences, adjustments in divisional alignments could be made every two years.

4. The Special Committee recommends that the NNJIL schools meet to review its new divisional alignments, taking into account the issues set forth in this decision.
5. The Special Committee directs that the NNJIL report by November 1, 1999, as to action taken consistent with this decision. It is the hope of the Special Committee that the NNJIL will resolve these concerns itself, amicably, without resorting to further litigation. (*Id.* at 11-12)

On October 22, 1999, Joseph O. White, President of the NNJIL, filed a response to the Special Committee's July 22, 1999 decision. The Special Committee met on November 8, 1999 and decided at that time to invite the involved parties to a December 8 work session for discussion purposes.<sup>3</sup> (January 3, 2000 Supplemental Report by the Special Committee on Leagues and Conferences at 2) On January 3, 2000, the Special Committee issued its Supplemental Report. The following are the findings and conclusion in that report:

### **FINDINGS**

The Special Committee is satisfied that the NNJIL has taken substantial steps to meet the concerns expressed by the Special Committee in its July 22, 1999 decision. While not perfect, the new divisional alignment appears to be an acceptable method of addressing the League's competitive imbalance while providing all member schools with full and fair athletic schedules.

The Special Committee's first concern was that the parochial divisions were too small: four parochial schools compete in boys sports and only three parochial schools compete in girls sports. The NNJIL addressed this concern in two ways. First, the League attempted to expand its membership by merging with other regional conferences. The hope was that the parochial division could thereby be increased with parochial schools from nearby conferences. Those attempts were unsuccessful. Second, the schedule devised by the League insured that, for purposes of competition, the parochial schools would not be isolated in the parochial division. Parochial schools will compete against schools from the two public school divisions as well as against the parochial schools in the non-public school division. The parochial-public games will carry the same weight in the division standings as parochial-parochial games. Therefore, the disadvantages of a small division--playing the same teams over and over again and having a limited number of games from which to draw a division champion--will not be present. Although there are only three schools competing with girls programs in the parochial division, those schools will play a full schedule of games against schools throughout the NNJIL, and their division champion will be determined based on the results of all of their NNJIL games.

A benefit of the new alignment is that the League will award more division championships. Division champions will be named for three divisions instead of just two, and All Sports Banners will be awarded for all three divisions.

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<sup>3</sup> League representatives and parochial school representatives were invited to attend. George Middleton, Executive Secretary of the NNJIL, attended, as well as nine other public school representatives, but no representatives from the parochial schools attended the work session. (January 3, 2000 Supplemental Report by the Special Committee on Leagues and Conferences at 2, 3)

The Special Committee's second concern was that at the time of the July 1999 hearing, the League had not finalized how it would designate division champions. The Committee recommended that the League accord results from inter-divisional play the same weight as results from intra-divisional play. As noted above, the League accepted the Committee's recommendation and as a result, division champions will be selected based on all the regular season games a team plays against NNJIL schools, not just on games played against division rivals.

The Special Committee's third concern was that future scheduling take into account the relative strength of a school's athletic program for each sport and continue to schedule public schools against parochial schools in the future. To meet that concern, NNJIL schedulers divided the League into three sections, based on the strength of a school's athletic program for each sport over the last five years. Inter-division, or "crossover" games were then scheduled between programs of similar strength. Scheduling in this manner, based on strength of program, insures that the League will maintain a competitive balance that is healthy for all schools. It also has the added benefit of allowing schools to play games against a wider variety of opponents. As the strength of a school's program rises or falls each year, the school's opponents will change accordingly.

The new schedule also gives all NNJIL schools an opportunity to play each other. Under the old two-division format, teams from the Atlantic Division rarely met teams from the Pacific Division. Bergen Catholic, for example, played just two regular season football games against parochial schools in the five seasons from 1994 through 1998.

Certain aspects of the old scheduling system remain in effect. As in the past, all schools will have an opportunity to schedule their own non-League games. Public and parochial schools will continue to compete against each other. Most importantly, the new League schedules demonstrate that both parochial and public schools will enjoy a full schedule of League competition, just as they did under the old system.

Finally, the Special Committee recommended that adjustments in divisional alignments could be made every two years. In response, the NNJIL noted that the Constitutional amendment establishing the public and non-public divisions stated, in part, that "divisions shall be established every two years." According to the League, adjustments to the manner of division alignments could be made every two years on any basis that is agreeable to the membership, as long as the change has the necessary votes for adoption.

### **CONCLUSION**

The NNJIL has satisfactorily addressed the concerns raised by the Special Committee in the July 22, 1999 report. The League's scheduling assures that the

parochial schools will not be denied full membership in the League, and that they will receive a full and fair schedule of athletic competition. (*Id.* at 3-6)

On January 12, 2000, the Executive Committee of the NJSIAA heard oral argument on the two Special Committee reports and voted 33-0 to adopt the reports.<sup>4</sup> (Statement of Items Comprising the Record, Exhibit 42)

### **PETITIONERS' POSITION**

Initially, petitioners argue that the realignment is improper because the parochial schools will be deprived of the benefits of full competition and conference play. Since the non-public division contains only four schools competing in boys' sports and three schools competing in girls' sports, petitioners contend that the configuration is inconsistent with other New Jersey leagues and conference divisions, which generally consist of five or more schools. Petitioners aver that the fact that the parochial schools would enjoy a full schedule misses the point, because it is simply improper to maintain a division of three teams in the NNJIL, and that permitting a three-team division is potentially precedent setting. Citing Bergen Catholic High School as an example, petitioners submit that the number of games scheduled in several sports for Bergen Catholic are fewer in number for the 2000 season than were scheduled in 1999 under the previous division alignment. Petitioners further argue that parents of Bergen County Catholic school students still have to pay taxes to finance public school athletic stadiums, sports equipment, coaches, *etc.*, but their children will be unable to play in a division which would allow them to engage in direct competition for the division championship with those schools. (Petitioners' Brief at 8-10)

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<sup>4</sup> The NNJIL parochial schools chose not to attend this meeting. (Statement of Items Comprising the Record, Exhibit 42)

Further, petitioners assert, *inter alia*, that there is no rational basis to segregate the parochial schools into their own division, as set forth by the Supreme Court in *Christian Bros. Inst. v. No. N.J. Interschol. League*, 86 N.J. 409, 418 (1981), and that the false purpose of fostering competition is merely a pretext for the discriminatory intent of the public schools to segregate the parochial schools into their own division. Despite the findings of the Special Committee, which concluded that the parochial schools dominated the public schools in athletic competition, petitioners point out that two of the parochial schools, Don Bosco and Paramus Catholic, have not fared well against either the public schools or the other parochial schools. Since public schools, such as Barringer, Belleville, and Paramus have also not fared well against other public schools, petitioners suggest that segregating the parochial schools into their own division will do little to improve competitiveness. (*Id.* at 11-13)

Petitioners continue by arguing that their rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution have been violated. Petitioners assert that they have been denied the privileges of full membership in the NNJIL and will experience scheduling difficulties because they have been segregated into a separate division solely due to their religious affiliation. Citing *Sorbino v. New Brunswick*, 43 N.J. Super. 554 (Law. Div. 1957), *Kerr v. Kerr*, 129 N.J. Super. 291 (App. Div. 1974), *State v. Levine* 109 N.J.S. 503 (1932) and *Robinson v. Cahill*, 118 N.J. Super. 223 (Law Div. 1972), petitioners further argue that they have been denied equal protection as guaranteed by the State Constitution as a result of the discriminatory manner in which they have been treated. Petitioners assert that religious beliefs should not bar petitioners or any of its students from the equality of rights which the law affords to others. (*Id.* at 14-18)

Additionally, petitioners seek damages and injunctive relief pursuant to 42 U.S.C. sec. 1983, contending that there is a cause of action because segregation of the League, without just reason and with harm to petitioners, violates the equal protection of the laws guaranteed by the Fourteenth Amendment to the U.S. Constitution. Petitioners emphasize that no specific purpose is alleged for the deprivation of their federal rights, but that it is claimed that petitioners have not been treated similarly with the other members of the League. Petitioners contend that a State Court has the power to hear the matter and that it has been held that an action based on 42 U.S.C. sec. 1983 can be properly brought before a State Court as State and Federal Courts have concurrent jurisdiction over civil suits arising under the Constitution and laws of the United States, except in exceptional circumstances. *See Luker v. Nelson*, 341 F. Supp. 111 (D.C. Ill. 1972) and *Long v. District of Columbia*, 469 F.2d 927 (D.C. Cir. 1972). Petitioners submit that *Wright v. Arkansas Activities Assoc.*, 501 F.2d 25 (8<sup>th</sup> Cir. 1974) held that “a voluntary association consisting of public and parochial schools in a state which maintains competitive athletic programs qualifies as a ‘person’ under 42 U.S.C. 1983.” Therefore, the League is a “person” under the statutory meaning of the word. (*Id.* at 19-21)

Citing *Gabaldon v. United Farm Workers Organizing Committee*, 111 Ca. Rptr. 203 (1973), *Sykes v. California Dept. of Motor Vehicles*, 497 F.2d 197 (9<sup>th</sup> Cir. 1974), *Ward v. Kentucky State University Board of Regents*, 360 F. Supp. 1179 (D.C. Ky. 1973) and *Parish v. National Collegiate Athletic Assoc.*, 361 F. Supp. 1214 (D.C. La. 1973), petitioners argue that League members and everyone of its individual members acted through the authority derived from the State and therefore acted “under color of state law.” Petitioners further argue that the courts have the power and duty to fashion affirmative relief under the statute so as to

provide a more effective remedy for violation of the Federal Law. *See Johnson v. Capital City Lodge No. 74, Fraternal Order of Police*, 477 F.2d 601 (4<sup>th</sup> Cir. 1973). (*Id.* at 21-24)

Recognizing that the Fourteenth Amendment of the U.S. Constitution does not protect an individual against wrongs committed by other individuals, petitioners submit that the crucial factor in determining the existence or non-existence of Fourteenth Amendment protection is the interplay of governmental and private action. Petitioners assert that discrimination by the creation of a nonpublic league is rendered possible by the “State Authority” lodged in respondents and is a violation of the Fourteenth Amendment Equal Protection Clause. Arguing that, in the absence of a rational basis or reasonable explanation why petitioners are continuously treated differently from other members or a legitimate State purpose to be served by petitioners’ segregation into a nonpublic division, that petitioners Constitutional Rights of Equal Protection have been violated. (*Id.* at 25-27)

Finally, petitioners assert that their rights as protected by the New Jersey Law Against Discrimination set forth in *N.J.S.A. 10:5-12(f)*, were violated when they were segregated from the rest of the League without any reasonable justification or explanation. Petitioners contend that the statute applies in this instance, because the NNJIL qualifies as a “place of public accommodation” as settled in *Nat. Org. for Women v. Little League Baseball*, 127 *N.J. Super.* 522 (App. Div. 1974). As a “public accommodation,” NNJIL has withheld its facilities, its advantages and its privileges, petitioners aver, and has, therefore, acted in an illegal and discriminatory manner. (*Id.* at 28-30)

## RESPONDENTS NNJIL PUBLIC SCHOOLS' POSITION

Initially, respondents state that the scope of review by the Commissioner in NJSIAA determinations is limited. Citing *Board of Educ. of the City of Camden v. NJSIAA*, 92 N.J.A.R.2d (EDU) 182, 188; *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 S.L.D. 259; and *B.C. v. Cumberland Regional School Dist.*, 220 N.J. Super. 214, 231-32 (App. Div. 1987), the Commissioner may not overturn an action by NJSIAA, absent a finding that NJSIAA acted in a patently arbitrary, capricious, and unreasonable manner, even if the Commissioner would have decided differently in a *de novo* hearing. Respondents aver that NJSIAA's divisional realignment decision resulted from a desire to foster competition and to eliminate competitive imbalance, was not based on religious affiliation or beliefs, did not violate NJSIAA rules and did not deprive petitioners of a full and fair opportunity to participate in interscholastic athletics. Respondents, therefore, urge the Commissioner to affirm NJSIAA's reasonably and legitimately based determination upholding the divisional realignment. (Respondents' Brief at 5-7)

Respondents submit that the divisional realignment at issue does not contravene petitioners' rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution. In *Christian Bros.*, *supra*, they argue, the New Jersey Supreme Court expressly addressed Bergen Catholic's claim that denial for admission into the NNJIL constituted a violation of its State and Federal constitutional rights, ruling that a *rational basis*, *i.e.*, that the action taken is rationally related to a legitimate public end, would be sufficient to withstand any challenge under Article I, paragraphs 1 and 5 of the New Jersey Constitution. See *Barone v. Department of Human Servs.*, 107 N.J. 355, 366 (1987); *Board of Educ. v. Borough of Englewood Cliffs*, 257 N.J. Super. 413, 469 (App. Div. 1992), *aff'd* 132 N.J. 327, (*cert. denied*), 510 U.S. 991 (1993). Further in *Valencia v. Blue Hen Conference*, 476 F. Supp. 809 (D. Del. 1979), *aff'd without*



*opinion* 615 F.2d 1355 (3<sup>rd</sup> Cir. 1980), respondents contend the trial court found that a classification limiting membership in an interscholastic athletic organization to public schools would be supportable if it was motivated by legitimate interests in preventing athletic recruiting and in maintaining a competitive balance among schools within the association. (Respondents' Brief at 8, 9)

Respondents aver, *inter alia*, that *Sorbino, supra*, which petitioners cite in support of their equal protection argument, is clearly distinguishable as complainants were property owners, not members of an athletic association. Respondents also observe that *Sorbino* inferentially undermines petitioners' position in that the Law Division expressly noted therein that "[W]here reasonable justification exists for separate classification, legislation that treats all persons within a class reasonably selected for regulation in a like or similar manner satisfies the requirements of the State and Federal Constitutions." (Respondents' Brief at 10, citing *Sorbino* at 19) Since the nonpublic schools in the NNJIL have dominated athletic competition within the League for the past decade and the NNJIL's decision was motivated by a rational purpose, *i.e.*, to foster competition, NNJIL's realignment of the divisions in a procedural proper manner did not violate petitioners' constitutional rights. Respondents also argue that petitioners' reliance on *Kerr, supra*, is inappropriate because *Kerr* is inapposite, holding in the context of a divorce proceeding that protective privilege of communication between a psychologist and his client was not a violation of the equal protection clause. (*Id.* at 10, 11)

Respondents state that petitioners cannot meet their burden of showing that NNJIL has advanced or inhibited the exercise of religion in violation of Article I, Paragraph 3 of the New Jersey Constitution. Respondents assert that there is not a single fact in evidence to suggest that the majority vote of the League's members amending its Constitution to establish a

nonpublic school division was done for any reason other than a secular legislative purpose, nor have petitioners shown that the primary or even incidental effect of the realignment will advance or inhibit religion. (*Id.* at 12)

As a voluntary association, the NNJIL's decision to realign its League into public and nonpublic groupings was private conduct, not state action, respondents argue. Citing *NCAA v. Tarkanian*, 488 U.S. 179, 197 n.18 (1988) (quoting *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545 (1987)), (where an athletic association speaks collectively through its member institutions to govern the manner in which member schools may compete and where it does so independent of state law, its conduct cannot be deemed "state action"), and *Arlosoroff v. National Collegiate Athletic Ass'n*, 746 F.2d 1019, 1021 (4<sup>th</sup> Cir. 1984), (where the NCAA's adoption of bylaws limiting player's eligibility was private conduct, not state action), respondents assert that petitioners have no cause of action against the NNJIL under the equal protection clause of the Federal Constitution or under 42 U.S.C. sec. 1983 because the realignment of the League's divisions does not constitute "state action." Even assuming *arguendo*, that the NNJIL's action amounts to State action, however, respondents claim that the majority of Courts have determined that rules and decisions by state and local athletic associations analogous to those posed here are subject to the rational basis standard. See *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121 (3<sup>rd</sup> Cir. 1978). Respondents argue that in *Archbishop Walsh High School v. Section VI of the New York State Public High School Athletic Ass'n, Inc.*, 643 N.Y.S.2d 928, 931 (N.Y. 1996), a case with facts similar to those herein, the Court of Appeals found that among the legitimate goals which persuaded the Court to adopt a rational basis standard were the association's interest in preserving the character of its competition by excluding private schools that are able to offer

financial incentives and differentiating admission incentives to their students. The Court also rejected the Catholic High Schools’ argument regarding its Fourteenth Amendment right to equal protection, finding that this “narrowly targeted argument is untenable because the unequal treatment of which it complains is discriminatory between *public* and *nonpublic* schools, not anything of a religious nature and not even anything within the entire class of nonpublic schools. ([*Archbishop Walsh*] at 930)” (emphasis in text) (Respondents’ Brief at 13-17)

Additionally, respondents aver that petitioners’ claim that NNJIL’s decision to realign the divisions within the League contravened the New Jersey Law Against Discrimination (LAD), *N.J.S.A.* 10:5-3, is without merit. Although the Legislature did not expressly address whether a nonprofit athletic organization falls within the LAD’s coverage as a “place of public accommodation,” the statute has been construed to permit reasonable restrictions which promote reasonable government functions, even where the functions are overtly religious in nature. *See In re Katherine Frey Dickerson*, 193 *N.J. Super.* 353, 372 (Ch. Div. 1983). (Respondents’ Brief at 22)

Finally, respondents explain that both the Special Committee and the Executive Committee of NJSIAA found that the concerns raised by the Special Committee in its first report have been sufficiently addressed. In response to the concern regarding how championships would be awarded, NNJIL determined that all interdivisional and intradivisional contests would count equally in determining championships and that each division would award championships and select all-division teams, increasing by 50% the number of championships awarded and the number of athletes recognized. The NNJIL also agreed to schedule public schools against nonpublic schools with consideration to the strengths and weaknesses of the respective teams, and to make adjustments to divisional alignments every two years. In response to the Special

Committee's concern about the size of the nonpublic schools' women's teams, the NNJIL devised a schedule whereby the nonpublic schools' women's teams would participate in a full and fair schedule by competing with the public schools. Respondents conclude, therefore, that petitioners' allegation that NNJIL did not adequately address the Special Committee's concerns is meritless, and they, therefore, urge affirmance of the Special Committee's and Executive Committee's findings. (*Id.* at 24-27)

### **RESPONDENT NJSIAA'S POSITION**

Respondent NJSIAA argues that the legal standard for the Commissioner's review of its decisions is set forth in *N.J.A.C.* 6A:3-7.4, which provides that if NJSIAA has granted petitioners due process and its decision is supported by sufficient credible evidence in the record, the Commissioner shall not overturn the NJSIAA's application of its own rules, absent a demonstration by petitioners that such rules were applied in an arbitrary, capricious, or unreasonable manner. In that regard, NJSIAA submits that the due process afforded petitioners was extensive, allowing both the public and parochial school members ample opportunity to present their arguments, as follows:

- (1) within one month of the filing of petitioners' complaint in Superior Court, NJSIAA held a hearing before its eleven-member Special Committee with all interested parties;
- (2) the Special Committee prepared a 12-page written decision within 15 days of the hearing setting forth its findings of fact and conclusions and its concerns, and directing the NNJIL to respond to its concerns by November 1, 1999;
- (3) upon receipt of the NNJIL response to its concerns, the Special Committee met in executive session to consider the response and then met again

at a work session at which all the parties were invited to participate;

(4) less than one month after the work session, the Special Committee issued its Supplemental Report; and

(5) on January 13, 2000, the Special Committee presented its two reports to the Executive Committee at a meeting where all NNJIL schools were invited to participate, and at which the Executive Committee voted to adopt the Special Committee's conclusions. (NJSIAA's Brief at 15-17)

NJSIAA further argues that its decisions were based on the record, which showed that the public schools had not unconstitutionally discriminated against the parochial schools, and that there was a rational basis for placing the parochial schools in a "non-public" division because the League had indeed experienced a lack of competitive balance. NJSIAA contends that there was nothing about the process of the NNJIL's realignment which would invalidate the result, and that the evidence further showed that the realignment was not motivated by religious bias, but rather by the fact that the parochial schools had dominated the League championships since 1988 in all sports except the Girls Atlantic Division in which no parochial schools competed. NJSIAA submits that the statistics provided by petitioners actually prove that there was a need for some action, since those statistics show that overall the parochial schools were 99-32 against public schools in football from 1994-98, and that the Bergen Catholic football team was 42-1 against public schools from 1994-98, while St. Joseph's football team was 26-2. Yet these two parochial powerhouses never met during that period of time because they were in different divisions. (*Id.* at 17, 18)

NJSIAA points out that the record shows that parochial schools operate under enrollment policies different from those of public schools, enabling parochial schools to draw

student-athletes from a wide geographic and population base and enabling them to provide financial aid to qualifying student-athletes. NJSIAA asserts that its decision addressed both (1) the concerns of the public schools that their competition with the parochial schools was inherently unequal, by ensuring that the parochial powerhouses would compete against each other, as well as the strongest public schools, and (2) the parochial schools' fear of exclusion, by ensuring that parochial schools would continue to play public schools, and that such interdivisional games would carry equal weight with the intradivisional games in the League standings. (*Id.* at 18, 19)

NJSIAA avers that petitioners' argument that the 2000-2001 schedules do not provide full scheduling are without merit. NJSIAA points to the fact that in a League with an odd number of schools, no schedule will be symmetric, as demonstrated by the 1999-2000 basketball schedule wherein Paramus Catholic had 17 league games, while several public schools had 14 league games and the rest of the schools averaged 16 league games. (*Id.* at 20)

NJSIAA disputes petitioners' claim that its realignment decision will set a precedent for other leagues, stating that the controversy within NNJIL was due to a unique set of circumstances and that any such issue brought before the NJSIAA would be addressed on its own merits. NJSIAA also asserts that its decision does not have the effect of *stare decisis* and that petitioners' contention that leagues will create one-team divisions is speculative. (*Id.* at 20)

Further, NJSIAA argues that participation in interscholastic athletics is a privilege, not a right, and that privilege can be circumscribed by rules such as those found in the NJSIAA Constitution, Bylaws, rules and regulations. *See Burnside v. NJSIAA*, unpublished decision of the Appellate division dated Nov. 15, 1984 (Docket No. A-625-8477), *Camden City Bd. of Ed. v. NJSIAA*, unpublished decision of the Appellate Division dated February 18, 1992

(Docket No. A-2802-91T2), and *Bd. of Ed. of the City of Camden v. NJSIAA*, 92 N.J.A.R.2d (EDU) 182, 188. Even if there were a fundamental right to participate, NJSIAA further argues, an interscholastic league limitation of its membership to public schools does not result, per se, in a denial of equal protection if there is a rational basis, such as in this instance, where nonpublic schools were found to be dominating League competition creating a competitive imbalance, attributable to their ability to enroll students from a broad geographic base and their ability to offer scholarships. *Christian Bros., supra*. In contrast, the public schools are limited to enrolling those students living within the district and cannot offer scholarships. (NJSIAA's Brief at 20, 21)

Finally, NJSIAA concludes that the NNJIL's new alignment takes a strong first step toward restoring competitive balance within the League and has not deprived the parochial schools of any competitive opportunities. NJSIAA takes issue with petitioners' argument that they have been excluded from the League, reasoning that the parochial schools remain members of the NNJIL, have full voting rights, still compete against public schools within the League and their games against public schools carry the same weight in the standings as their games against parochial schools. (*Id.* at 21, 22)

### **COMMISSIONER'S DETERMINATION**

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education and adopted annually by the member schools. Upon adoption by the

member schools, the said rules and regulations are deemed school policy and are enforced first by the internal procedures of the NJSIAA.

As set forth in *N.J.A.C. 6A:3-7.4*, the Commissioner's review in NJSIAA determinations is an appellate one. *Camden City Bd. of Ed., supra*. That is, the Commissioner may not overturn an action by NJSIAA in applying its rules absent a finding that NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. *B.C., supra*. Nor may the Commissioner substitute his judgment for that of NJSIAA, *even if he were to decide differently in a de novo hearing*, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA Committees. *Koh, supra*. Further, the burden of proof rests with the person challenging the decision. *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960).

Having conducted an independent review of the approximately 500-page record of the proceedings below, including the transcripts from the Special Committee and Executive Committee hearings and meetings, and the parties' submissions on appeal, the Commissioner is persuaded that petitioners have been fully accorded the due process to which they are entitled, that the Special Committee's findings and conclusions are well-grounded in the record, and that petitioners, therefore, have failed to establish that the NJSIAA's determination upholding the divisional realignment of the NNJIL was arbitrary, capricious or unreasonable.

Initially, the Commissioner notes that the record substantiates NJSIAA's contention that extensive due process was afforded petitioners. After Dr. Khoury sent his proposed amendment to realign the divisions in the NNJIL to Mr. John Job, Principal of St. Joseph's High School, who was then President of the NNJIL, the proposal was distributed to all 19 schools in the League. The proposed amendment was subsequently discussed at League



meetings on December 3, 1998 and March 11, 1999, and adopted on June 3, 1999 with the required two-thirds majority for passage.<sup>5</sup> On July 7, 1999, the Special Committee of the NJSIAA held a hearing on petitioners' complaint that the public schools had discriminated against the parochial schools by denying the parochial schools full membership in the League when it segregated them into a separate division. At the complaint hearing on July 7, the Special Committee took testimony under oath and reviewed numerous documents. The proceedings were recorded and transcribed, and all sides were represented by counsel and had the opportunity to present evidence and cross-examine witnesses. (Tr. 7/7/99 at 2-4)

The Special Committee issued a Report of its findings and conclusions on July 22, 1999 indicating some concerns with the realignment, which the NNJIL addressed in a response filed on October 22, 1999. The Special Committee subsequently met in executive session on November 8, 1999, and thereafter invited all parties to their December 8, 1999 work session for discussion purposes. On January 3, 2000, the Special Committee issued its Supplemental Report, and the Executive Committee heard oral arguments on the two Special Committee Reports at an open public meeting on January 12, 2000, at which time the Executive Committee voted 33-0 to adopt the Special Committee's Reports.

In approving the NNJIL divisional realignment, the Special Committee specifically found that:

the NNJIL constitutional amendment was not motivated on religious grounds. It was rather advanced because of the domination of the League competition by the parochial schools and desire by the public schools to require more competitive balance within the League. The amendment recognized that the parochial schools could draw a wider enrollment of student-athletes, without consideration to geographic attendance zones.

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<sup>5</sup> The amendment passed by a vote of 13 to 6, with all parochial schools opposed.

The Committee finds that the aforesaid reasons for adopting the constitutional amendment were both legitimate and rational and came only after years of domination of intra league competition by Bergen Catholic in the Atlantic Division and Don Bosco and Immaculate Heart in the Pacific Division. (July 22, 1999 Report by the Special Committee on Leagues and Conferences at 11)

The record supports the Special Committee's conclusion that NNJIL has experienced a lack of competitive balance with the parochial schools' domination of the League Championships since 1988 in all sports except the Girls Atlantic Division in which no parochial schools competed. Immaculate Heart Academy has won the Pacific All Sports championship for girls for nine straight years; Don Bosco has won it for boys for nine of the last ten years; and Bergen Catholic has won its boys division title for 13 of the last 14 years. (NJSIAA's Brief at 17, 18 and Exhibit 14, T-1 to T-9) As the Special Committee noted, parochial schools operate under less restrictive enrollment policies than public schools whereby parochial schools enroll student-athletes from a wide geographic area and, unlike the public schools, are able to provide financial aid to student-athletes who qualify. Therefore, the Special Committee's conclusion affirming NNJIL's divisional realignment for the purpose of fostering a competitive balance by placing nonpublic schools, all of which operate under similar admissions policies, in the same division, is reasonable and rational. *See Christian Bros., supra*, and *Valencia, supra*. Further, the Commissioner's painstaking review of the record in this matter *found no basis whatsoever* to support petitioners' allegations of discriminatory intent or that the parochial schools have been segregated into a separate division solely due to their religious affiliation. (Petitioners' Brief at 13)

With respect to petitioners' claim that the realignment will deprive the parochial schools of the benefits of full competition and conference play, the Commissioner finds that the Special Committee and NNJIL have adequately addressed those concerns by ensuring that parochial schools would continue to play public schools, based on strength of athletic program, and that such interdivisional games will carry equal weight with the intradivisional games in division standings. Additionally, adjustments to the division alignments can be made every two years on any basis that is agreeable to the membership, as long as the change has the necessary votes for adoption. (January 3, 2000 Supplemental Report by the Special Committee on Leagues and Conferences at 5) The Executive Committee of the NJSIAA also noted on the record at its January 12, 2000 meeting that NNJIL schedules would be reviewed on a year-to-year basis by NJSIAA as part of its oversight to assure equity of athletic schedules. (Tr. 1/12/00 at 39-42)

Further, the Commissioner finds petitioners' allegations that the NNJIL's divisional realignment contravenes petitioners' rights under Article I, Paragraphs 1, 3 and 5 of the New Jersey Constitution are without merit. Article I, Paragraphs 1, 3 and 5 read as follows:

Paragraph 1

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

Paragraph 3

No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry,

contrary to what he believes to be rights or has deliberately and voluntarily engaged to perform.

Paragraph 5

No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry, or national origin.

There is no support in the record for petitioners' assertions that they have been excluded from the benefits of membership, and, therefore, that their state constitutional rights have been violated under the above provisions. Initially, petitioners have not demonstrated that they have been excluded from the benefits of membership by the realignment of the divisions within NNJIL. Under the provisions of the division realignment, as approved by NJSIAA, the parochial schools remain members of NNJIL, have full voting rights, continue to compete against public schools within the League and their games against public schools carry the same weight in the standings as their games against parochial schools. (NJSIAA's Brief at 21, 22) *See Christian Bros., supra*, at 416-418, where, in an action brought by Bergen Catholic High School in 1981 contending that its denial for admission to the NNJIL violated its rights under Article I, Paragraphs 1 and 5 of the New Jersey Constitution, the New Jersey Supreme Court concluded that a *rational basis* would be sufficient to withstand any challenge under Article I, Paragraphs 1 and 5 in circumstances limiting membership by classification similar herein where the "classification was supportable by legitimate interests in preventing athletic recruiting and maintaining a competitive balance within the association." In the Commissioner's view, therefore, NJSIAA's finding that a rational basis existed for the NNJIL divisional realignment, is supported by the record.

With respect to petitioners' assertion that their state-protected right of religious freedom stated in Article I, Paragraph 3 above has been violated, petitioners have not demonstrated that NNJIL has in any way advanced or inhibited the exercise of religion by its divisional realignment. In *In the Matter of the New Jersey Interscholastic Athletic Association's Proposed Realignment of Athletic Leagues and Conferences*, 1982 S.L.D. 544, 562, the Administrative Law Judge observed that "athletic activities and contests which NJSIAA oversees have no direct relationship to the content of the instructional program in member schools. Nor are those athletic activities such that they foster the establishment of religion. As such, they do not violate the principles enunciated by the United States Supreme Court\*\*\*." See also *Everson v. Ewing Board of Education*, 330 U.S. 1 (1946) and *School District of Abington Township, Pennsylvania, et al v. Schempp*, 374 U.S. 203 (1963).

Similarly, the Commissioner finds petitioners' contention that because there is an absence of a rational basis or legitimate State purpose to be served by the divisional realignment, that NNJIL violated petitioners' constitutional rights under the Fourteenth Amendment, Equal Protection Clause, is without merit. As stated above, the record clearly reflects that a rational basis existed for the divisional realignment, since NNJIL athletic competition had been dominated for years by the parochial schools and since the parochial schools enjoyed an advantage by their less restrictive enrollment policies. As articulated in *Christian Bros., supra*, at 418, "a rational basis can exist for an interscholastic league limited to public schools and that such a limitation does not result *per se* in a denial of equal protection under the Federal Constitution.\*\*\*" It is further noted that classifications differentiating between public and nonpublic schools on similar reasonable grounds designed to mitigate uneven competition between public and non-public high schools as affected by recruitment opportunities geared

toward student athletes have been upheld by the Fifth and Sixth Circuits. *See Denis J. O'Connell High Sch. v. Virginia High Sch. League*, 581 F.2d. 81, 85 (4<sup>th</sup> Cir. 1978), *cert. denied*, 440 U.S. 936 (1979) and *Louisiana High Sch. Athletic Ass'n*, 616 F.2d. 16. Additionally, to sustain a cause of action under the Equal Protection Clause or under 42 U.S.C. sec. 1983, petitioners must demonstrate state action. Even assuming, *arguendo*, that NNJIL's decision to amend its Constitution to permit the divisional realignment was "state action" sufficient to raise a claim, however, decisions by state and local athletic associations analogous to those posed here have been found to be subject to the rational basis standard. *See Christian Bros., supra, at 416-417; Moreland, supra; and Archbishop Walsh, supra.* In the Commissioner's view, NJSIAA's determination that a rational basis existed for the divisional realignment is amply supported in the record.

The Commissioner also finds no basis for petitioners' assertion that the divisional realignment by the NNJIL violated the Law Against Discrimination as set forth in *N.J.S.A. 10:5-1 et seq.* Even *if* a nonprofit athletic organization would fall within the LAD's coverage as a "place of public accommodation" as argued by petitioners, there is nothing in the record to suggest that the decision to realign the divisions reflect any religious restrictions which would implicate LAD, nor, as noted above, have petitioners provided any *evidence* that the realignment has deprived them of full membership privileges in NNJIL. The Special Committee specifically noted that they "could not find any evidence that the new divisional alignment was motivated by discrimination on the basis of religion or out of any 'anti-Catholic bias.'" (July 22, 1999 Report by the Special Committee on Leagues and Conferences at 11)

Finally, it is well-settled that participation in interscholastic sports is a privilege, rather than a right, and that privilege can be circumscribed by rules, such as those found in the

NJSIAA Constitution, Bylaws, rules and regulations. *Burnside, supra; Camden City Bd. Of Ed., supra.* Even assuming, *arguendo*, a right to participate, however, an interscholastic league may limit its organization to public schools if there is a *rational basis* to do so. The record supports the conclusion that a rational basis exists, in this instance, because 1) parochial schools were found to be dominating League competition creating a competitive imbalance and 2) parochial schools have an enrollment advantage since they are able to enroll students from a wide geographic area and are able to offer financial-aid to their student-athletes. *Christian Bros., supra,* and *Valencia, supra.* It is noted, however, that the League herein does not seek to *exclude* parochial schools, but rather to incorporate their participation in such a manner as to restore a competitive balance within the League. The record reflects that NNJIL has realigned its divisions cognizant of the necessity of maintaining the benefits of full membership for the parochial members, expanding the competition among the parochial schools enjoying the same enrollment procedures, and insuring the parochial schools of continued competition against public schools within the League.

Accordingly, having found that due process was granted petitioners, and that there is sufficient credible evidence in the record to support the NJSIAA's conclusion with regard to competitive imbalance within the League, the Commissioner can find no basis under the appropriate standard of review on which to overturn the NJSIAA's decision and, therefore, must affirm its determination in this matter.<sup>6</sup>

IT IS SO ORDERED.<sup>7</sup>

COMMISSIONER OF EDUCATION

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<sup>6</sup> In so holding, the Commissioner again stresses that, even if he might have decided differently in a *de novo* hearing, he may not set aside the determination of the NJSIAA absent a showing that such determination was patently arbitrary, unreasonable or otherwise contrary to law.

<sup>7</sup> This decision, as the Commissioner's final determination in the instant matter, may be appealed to the Superior Court pursuant to *N.J.S.A. 18A:11-3.*

Date of Decision: June 23, 2000

Date of Mailing: June 27, 2000