

BOARD OF EDUCATION OF THE CITY OF :
WILDWOOD, CAPE MAY COUNTY,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

CAPE-ATLANTIC LEAGUE AND THE NEW : DECISION
JERSEY STATE INTERSCHOLASTIC
ATHLETIC ASSOCIATION, :

RESPONDENTS. :

_____ :

SYNOPSIS

Petitioning school district appealed the decision of NJSIAA affirming the Cape-Atlantic League's (CAL) denial of petitioner's application to continue to play an independent schedule in football, which it had done for the past four years. Petitioner argues that its request must be granted in order to protect the health and safety of its students, as the schools in the CAL are much larger than those it played as an independent, and the risk of injury increases when playing physically and numerically larger teams.

Respondents, NJSIAA and CAL, argue that petitioner was permitted to utilize an independent schedule in order to build its program, with the understanding that it would ultimately resume playing a league schedule after it did so, which they argue has occurred. In this regard, they note petitioner's 6-4 record in the 1999 football season. Respondents posit that their determinations conform with their Bylaws and Constitutions and, because they are not arbitrary, capricious or unreasonable, NJSIAA's decision should be affirmed by the Commissioner.

The Commissioner affirmed the decision of NJSIAA. The Commissioner noted that petitioner was afforded extensive due process, but had failed to demonstrate at any of the numerous levels of appeal that CAL's legitimate interest in having member schools compete within the league and not to permit independent schedules of indefinite duration was arbitrary, capricious or unreasonable or contrary to respondents' Constitutions or Bylaws. Rather, petitioner's arguments demonstrated only that its win-loss record could suffer if the decision on appeal is affirmed. Therefore, the Petition of Appeal was dismissed.

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For Petitioner, Bruce M. Gorman, Esq. (Gorman & Rauh)

For Respondent, New Jersey State Interscholastic Athletic Association,
Steven P. Goodell, Esq. (Herbert, Van Ness, Cayci & Goodell)

For Respondent, Cape-Atlantic League, Michael P. Stanton, Esq.(Taht, Stanton
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PROCEDURAL HISTORY

This matter came before the Commissioner of Education by way of a Petition of Appeal filed by the Wildwood Board of Education (petitioner) on April 24, 2000, seeking a reversal of the decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) Executive Committee, dated April 5, 2000, which affirmed the determinations of the Cape-Atlantic League (CAL) and the NJSIAA Special Committee for Leagues and Conferences (Special Committee) denying petitioner permission to implement an independent football schedule or, in the alternative, to leave the CAL immediately, rather than comply with the two-year waiting period required by the CAL’s Constitution.¹ Procedural deficiencies in complying with *N.J.A.C. 6A:3-1.1 et seq.* had to be corrected by petitioner before the matter could move forward. This was accomplished on May 2, 2000.

¹ In its petition, Wildwood seeks only reversal of the determinations precluding it from playing an independent schedule in football. The request to withdraw immediately from the CAL was not pursued before the Commissioner.

On May 2, 2000, respondent NJSIAA filed its answer to the Petition of Appeal and the Statement of Items Comprising the Record pursuant to *N.J.A.C. 6A:3-7.2* and, as a courtesy, a copy of the record itself.² Respondent CAL filed its Answer on May 8, 2000. On the same day, a request by petitioner to the Commissioner, dated May 5, 2000, that NJSIAA be ordered to prepare minutes of its Special Committee's "off the record" deliberations and to add those minutes to the record, was received.³ On May 11, 2000, respondents were afforded an opportunity to reply to the request. NJSIAA did so by letter dated May 12, 2000, urging that the Commissioner deny the request, as it does not prepare minutes of such deliberations. NJSIAA further noted that the entire hearing of the Special Committee, including introductions, testimony, ruling and vote, was on the record. Moreover, NJSIAA argues, after the vote, the Special Committee's decision was memorialized in a written decision containing detailed findings of fact and conclusions. On May 17, 2000, the Commissioner denied petitioner's request.

On June 5, 2000, petitioner submitted its brief in support of its position. Reply briefs were filed by the CAL on June 16, 2000 and by NJSIAA on June 19, 2000; whereupon, the record in this matter was closed.

The findings of fact and conclusions determined by the NJSIAA Special Committee at its March 24, 2000 meeting, and adopted by the Executive Committee on April 5, 2000 are as follows:

Wildwood High School, located in Cape May County, is a founding member of the Cape-Atlantic League. The Cape-Atlantic League consists of 23 schools in Cape May and Atlantic Counties.

The Schools in the Cape-Atlantic League range in size from Group I (Wildwood High School, population 235)⁴ and Parochial B (St. Joseph's High School, population 262), to Group III (Middle Township High School, population, 709).⁵ The League is divided

² *N.J.A.C. 6A:3-7.2(c)* requires that petitioner obtain from NJSIAA a copy of the hearing transcript(s) of its proceedings and other documents identified as comprising the record on appeal which are to be affixed to petitioner's brief as an appendix.

³ *N.J.A.C. 6A:3-7.2(d)* provides that any appeal from the NJSIAA shall be based exclusively on the record established in the internal proceedings before the NJSIAA, as specified in the Statement of Items Comprising the Record or as determined by the Commissioner in the event of a dispute. Supplementation of the record is not permitted except as directed by the Commissioner.

⁴ NJSIAA classifies schools for competition purposes by enrollment, with Group I having the smallest enrollments and Group IV the largest.

⁵ This description is of CAL's small school division. The League itself also includes Group IV schools. See Exhibit 30 at 61.

into a large school American Division and a small school National Division. Wildwood is the smallest school in the League.

From 1986 to 1996, Wildwood's record in football was 9-61. Due to the fact that Wildwood was not competitive within the League, League members voted in 1996 and again in 1998 to allow Wildwood to pursue an independent football schedule. Each vote allowed Wildwood to play as an independent for two years, and the League's permission had to be renewed again in 2000 or Wildwood could be required to play a regular League schedule.

Wildwood's football record improved during the years it competed in an independent schedule. In 1999, its football team posted a 6-4 record. Its opponents were mostly Division I schools, including Group I power Florence, but also included Princeton High School, a Group III school.

Wildwood's request to continue playing an independent football schedule came before a meeting of the League's athletic directors and principals on November 5, 1999. The approval required a two-thirds majority to pass, but did not receive a simple majority. Ten schools voted in favor of the school's request, 12 voted against it.

On December 1, 1999, the Cape-Atlantic League Executive Committee, a committee made up of representative superintendents, principals and athletic directors, met to consider Wildwood's appeal of the League's decision. The Executive Committee voted 8-2 to deny Wildwood's appeal. According to a letter prepared by the League Secretary, several factors were considered by the Executive Committee, including the following:

- Wildwood applied for, and was granted, an independent schedule for the last two cycles in order to rebuild the program.
- The football team had a winning season this year and a larger varsity squad than several other National Conference schools. The number of freshmen and sophomore athletes was taken into consideration. Additionally, the team had 1000 yard rushers and nearly qualified for the State play-offs.
- Wildwood presented plans for upgrading the training facility and the school has significantly upgraded the playing facility.

- The team has a stable coaching staff and Wildwood has taken measures to adequately compensate the coaches to maintain that stability.
- Past requests for an independent schedule were approved contingent upon a school developing a plan to improve and come back into the League.
- Despite numerous appeals and regardless of reason, the League has not granted a request to play an independent schedule to any other school, in any sport, for the past two years.
- The CAL Constitution and By-Laws provide an avenue of relief from a varsity schedule if a member school feels it cannot compete in a given sport.

[December 2, 1999 letter from Cape-Atlantic League Secretary Michael C. Adams to Wildwood Principal Walter Dull.]

On January 14, 2000, Wildwood appealed the Executive Committee decision back to the League. Again, Wildwood needed a two-thirds vote, but did not obtain a simple majority. This time 14 schools voted to uphold the Executive Committee decision, 8 voted against.

At the same January 14, 2000 meeting, after the League denied Wildwood's request for a third time, the school requested permission to leave the conference. The Cape-Atlantic League Constitution allows a school to leave the conference with two year's notice, or in the alternative to leave immediately with the unanimous approval of the League schools. Five Cape-Atlantic schools voted against allowing Wildwood to leave the League immediately, and therefore Wildwood did not obtain the necessary unanimity.

At the January 14, 2000 meeting, League officials noted that Wildwood had independently scheduled schools that were larger than many Cape-Atlantic schools; Wildwood had not invested in a weight room, which could help improve their football program; that the League would assist Wildwood in allowing the school to play a junior varsity-only schedule; and that the League would allow Wildwood to drop its football program entirely.

On November 9, 1999, four days after the Cape-Atlantic League turned down Wildwood's initial request to remain independent in football, the school applied for membership in the Tri-County

Conference. The Tri-County Conference consists of 16 schools in Salem, Gloucester and Camden Counties.

On December 16, 1999, a subcommittee from Tri-County Conference visited Wildwood to inspect the school's athletic facilities. The subcommittee reported its findings to the Conference schools.

The Tri-County Conference still has not taken formal action on Wildwood's application for admission. On January 6, 2000, the Tri-County Conference athletic directors voted to hold the school's application until March 2, 2000. On that date, the application was tabled pending the results of NJSIAA review of this matter.

Cape-Atlantic League representatives noted that the League had recently denied one of its members, St. Augustine Prep, the right to participate in an independent schedule for basketball. The prep school wanted to make its own basketball schedule because of the strength of its program. League officials also noted that two schools, St. Augustine Prep and Middle Township, had made it clear to the League that if Wildwood were granted an independent schedule, they too would request an independent schedule for football, based on the perceived inadequacies of their football programs.

League officials also noted Pleasantville, another small Cape-Atlantic League school, had disbanded its football team and then rebuilt it from the ground up playing a junior varsity schedule.

Wildwood has been competitive in other sports. The school's girls basketball team won the state Group I championship this year, and last year school teams also had winning records in girls cross-country, boys basketball and boys golf.

The Cape-Atlantic League's actions were consistent with the League's constitutional process. The school's application was first heard by the League's athletic directors and principals, who voted 12-10 to deny the request (2/3 vote in favor was needed to pass); it was then heard by the Executive Committee of superintendents, principals and athletic directors, which voted 8-2 to deny the appeal; and was heard for a final time by principals and athletic directors at a League meeting, at which Wildwood's request was denied by vote of 14 opposing--8 in favor (2/3 majority in favor needed to pass).

The Constitution of the Cape-Atlantic League has been reviewed and approved by the NJSIAA, as have the constitutions of all leagues and conferences in the state.

The process before the Cape-Atlantic League was fair. The League gave Wildwood three opportunities to argue its case before League officials. Each time, the League turned down Wildwood's request.

CONCLUSIONS

1. As a member of the Cape-Atlantic League, Wildwood has agreed to comply with the Constitution and Bylaws of that league. The League provides a process for approving any school's independent sports schedule and a process for a school leaving the League. In both instances, the League applied an appropriate process when it reviewed and subsequently denied Wildwood's request to play an independent football schedule and request to leave the League immediately.
2. The NJSIAA will not overturn a validly determined decision of a league or conference unless that decision violates the mandate of the Commissioner of Education; unfairly deprives the school of membership in a league or conference; or violates the Constitution and Bylaws of the NJSIAA. The Cape-Atlantic League did none of these when it voted not to allow Wildwood to play an independent football schedule and not to leave the League immediately.
3. The Cape-Atlantic League has given Wildwood four reasonable options: continuing the school's football program within the small school division of the League; continuing with a junior varsity program; maintaining the school's status as a member of the League while dropping football; or leaving the League in two years.
4. The Special Committee on Leagues and Conferences voted 4-1 to deny Wildwood's appeal. The League's decision was the result of a valid constitutional process that Wildwood was bound to follow, and violated neither the Commissioner's mandate nor the NJSIAA Constitution and Bylaws. Wildwood is a member of the League. It has adopted the League's Constitution and Bylaws, and is bound by its agreement to comply with those rules. Further, Wildwood is not without options. If the school determines that it cannot compete in the League in football, it has the option of dropping the sport or competing at a less competitive junior varsity level. The League

Constitution allows the school to leave in two years, if it so desires. (Exhibit 28 at 3-6)

PETITIONER'S POSITION

Petitioner first argues that the determinations made by respondents constitute an arbitrary and capricious violation of Article II Section 5 of the Constitution of the Cape-Atlantic League, entitled Philosophy and Goals, which reads: "Section 5 To uphold the Constitution, By-Laws, Rules and Regulations of the [NJSIAA]." Petitioner also argues that the determinations are contrary to Article II Section 2 of the Constitution of the NJSIAA, which reads "Section 2 To equalize athletic opportunities by standardizing rules of eligibility for individuals and classifying for competitive purposes the institutions which are members of the Association."

(*NJSIAA Handbook, 1999-2000* at 20) Further, NJSIAA Bylaws, Article III Section 5 state:

Secondary schools are grouped for competitive athletics according to enrollments. The main objective of this grouping procedure is the health and safety of the students as well as balance in numbers among all groups. Therefore, groupings will be established for all schools only on basis of their enrollments and may not be changed at the request of the school. Such requests tend to circumvent the purposes of grouping. (*Id.* at 32)

Petitioner avers that by forcing it to play football against much larger schools, respondents have placed the health and safety of Wildwood High School students at risk, thus violating the above-cited articles; *i.e.*, Article III Section 5 of the NJSIAA Constitution expressly provides that the objective of grouping according to enrollments is to protect student health and safety. Thus, by definition, compelling petitioner to play against much larger schools in the CAL places its students at risk.

Petitioner urges, *inter alia*, at pages 18 to 22 of its brief, that the following be considered by the Commissioner:

1. Wildwood has only 235 students (107 males). The average population of the eight schools petitioner would play in the

CAL is 586, or 2.5 times its size. Seven of the eight schools are more than twice as large as Wildwood, and several are three times as large. Five of the eight schools are either Group III or about to become Group III. Thus, CAL's National Division fails to comply with NJSIAA's Article II Section 2 or Article III Section 5.

2. In order to field a team, petitioner must play freshmen, who are either 13 or 14 years of age, which thrusts them in varsity games against seniors who are 17 and 18; thus increasing the odds of injury. Further, because of the small male population at Wildwood High School, it cannot field a junior varsity or freshman team. Consequently, the freshmen who play varsity enter games against older and larger boys without the skills and experience necessary to protect them. If freshmen do not play, petitioner then has only 17 upperclassmen on the team, which would force them to play both offense and defense, thus increasing the possibility of exhaustion and injury.
3. It seeks an independent football schedule because football, unlike most interscholastic sports, is a contact sport wherein athletes of varying sizes compete against one another.
4. Compelling petitioner to compete in the CAL National Division does not provide equal athletic opportunity and is thus contrary to Article II Section 2 of NJSIAA's Constitution. Thirty-four losing seasons in a row, and a ten-year record of 2-33 in CAL, clearly connote an inability of petitioner to compete in CAL in football. Also, being outscored 1,057 to 210 (a ratio of 5:1) over a ten-year period in CAL indicates a noncompetitive situation. It does not constitute an equal athletic opportunity to be "slaughtered" by 40-50 points. For example, in 1994, petitioner lost 4 games to CAL schools by scores of 44-6, 28-0, 56-0 and 25-8. Each of the schools winning those games have grown larger, while Wildwood has grown smaller.

Petitioner next argues that respondents' refusal to allow an independent football schedule violates Article II Section 1 of their respective Constitutions, which espouse to foster and develop amateur athletics among member schools/secondary schools of the State. It is petitioner's position that applying such a standard to the four options afforded petitioner herein

can only lead to the conclusion that respondents' determinations are arbitrary and capricious. More specifically, petitioner maintains that option 1 (continuing in the CAL's small school division) is unreasonable because the "small school division" consists of schools three times its size. (Petitioner's Brief at 25) The second option (continuing in the CAL as a junior varsity program) is, according to petitioner, problematic because it already attempted this option in 1987 and found it "an abject failure." (*Ibid.*) Moreover, petitioner argues, this option deprives its present students, particularly the seniors, of an opportunity to play varsity football; concomitantly denying them the chance to attract football scholarships because no college recruiters scout junior varsity games. Most significantly, petitioner argues that moving to junior varsity belies the declining population base at its high school, which makes it unlikely that doing so would encourage more athletes to play football. As such, option 2 will neither foster nor develop amateur athletics in football which will, accordingly, violate respondents' Constitutions.

Petitioner deems option 3 (maintaining the CAL membership but dropping football) to be "the most offensive" option offered by respondents, since it does not foster and develop amateur athletics, averring, *inter alia*, that "[i]f no other aspect of this case is arbitrary and capricious, this option most certainly is." (Petitioner's Brief at 27)

As to option 4 (leaving the League in two years), petitioner sets forth two problems, the first being that it has no place to go at the present time, for although it has made application to the Tri-County Conference, that conference has declined to act on the application. It asserts that, if its application is not accepted by Tri-County, Wildwood will find itself an independent in all sports, which is a "generally untenable position." (*Id.* at 28) Moreover, the option does not address the 2000 and 2001 seasons.

Given the above, petitioner urges reversal of respondents' determinations. It further argues that the standard of review set forth in *N.J.A.C. 6A:3-7.4* requires that respondents' actions be overturned because there is no credible evidence in the record to support the position taken by respondents. As to this, petitioner avers that the minutes of the January 14, 2000 meeting of the CAL contain no findings of fact, nor does the League set forth any specific reason for the denial. Petitioner believes the true reason for the denial was that if Wildwood is allowed to play an independent schedule, then other schools may wish to do so, an argument which petitioner asserts does not constitute a valid reason to violate the health and safety requirements of respondents' Constitutions and Bylaws. In this regard, petitioner states:

That argument belies the fact that there is no other Group I school in the [CAL]. Wildwood and only Wildwood has this problem. The *real* issue is that certain schools in the league (St. Augustine, Middle Township) have basketball programs which consistently win State Titles. Those schools have been seeking permission to *upgrade* their schedule so that they may play more competitive teams. Their desire to play an independent schedule has nothing to do with the health and safety of the students. (emphasis in text) (Petitioner's Brief at 31)

Petitioner further argues that the fact that Pleasantville reverted to a junior varsity program and then returned to the League does not constitute credible evidence supporting a determination that its application should be denied. Pleasantville has 655 students, and thus, a competitive population base; whereas petitioner has only 235 students. In support of this, petitioner cites to the comment of a NJSIAA Special Committee member who stated, "***as long as they're a group with a hundred seven [males], they are never going to be competitive in their leagues. It's a numbers' game, ***with a hundred and seven kids playing Group IIs and Group IIIs, it's not going to happen." (Exhibit 27 at 64). It is petitioner's position that it has presented statistical and historical data which conclusively demonstrate that it cannot compete in CAL football and that the health and safety of its students will be jeopardized if it is required to

do so, and it asserts that there is no evidence to the contrary presented by respondents, including the NJSIAA.

As to the NJSIAA, petitioner further avers, *inter alia*, that Dr. Killeen, Chair of the NJSIAA Special Committee, testified briefly before the Executive Committee and offered no facts, only conclusions, the most relevant one being that the CAL had not violated the NJSIAA Constitution and Bylaws. Petitioner believes the following statement by Dr. Killeen reflects his lack of enthusiasm for his position which reads:

The Special Committee voted on this item, and the vote was four to one to deny Wildwood's appeal. That's basically the thinking of the committee on the complex issue, complex presentation of facts. Some issues are not easy to determine. I would categorize this as that way. (Exhibit 30 at 56-57)

Finally, petitioner concludes that, absent credible evidence to rebut its unrefuted statistical evidence, the Commissioner should overturn respondents' actions and permit it to play an independent football schedule.

RESPONDENT CAL'S POSITION

The CAL urges, *inter alia*, that petitioner was granted full due process by both the CAL and the NJSIAA, pointing out that Wildwood had three hearings before the CAL, one before the NJSIAA Special Committee on Leagues and Conferences and one before the NJSIAA's Executive Committee. The CAL further avers that, at each of these hearings, petitioner had a full and complete opportunity to present its arguments and they were reviewed by numerous individuals involved in the fields of education and athletics. At all five hearings it was determined that petitioner should not be permitted to play an independent football schedule or to withdraw immediately from the CAL.

The CAL also argues that the decisions it made, and those made by the NJSIAA, were based on sufficient credible evidence to support its decision in this matter. Moreover, the

CAL urges that it has provided petitioner with four reasonable options as discussed above, and that all the rules of the CAL have been applied in a reasonable manner. Consequently, it asserts that the Commissioner, pursuant to *N.J.A.C. 6A:3-7.4*, has no basis to overturn the decision.

RESPONDENT NJSIAA'S POSITION

The NJSIAA first argues that the hearings before the CAL and the NJSIAA provided petitioner an “extraordinary degree” of due process and that the decisions of those bodies were based on the record. The NJSIAA maintains that, pursuant to the League and Conference Position Statement (*NJSIAA Handbook, 1999-2000* at 133-135), the role of the Executive Committee in reviewing a decision of a league or conference “will be limited to determine [sic] whether the actions of the conferences were arbitrary or capricious or in violation of the NJSIAA Constitution and Bylaws. The NJSIAA and its Executive Committee will not substitute its judgment concerning such issues for that of the conference.” (*Id.* at 135) In the instant matter, the NJSIAA provided Wildwood with two hearings at which it was represented by counsel, had an opportunity to present witnesses, was able to cross-examine witnesses from the CAL and the Tri-County Conferences, was permitted to make opening and closing statements and could submit documentary evidence. Further, the proceedings were stenographically recorded and the Special Committee issued a comprehensive decision within two days. The same procedures were accorded before the NJSIAA Executive Committee, which voted overwhelmingly to adopt the Special Committee’s report. As to this, the NJSIAA states:

Both the Special and the Executive Committee were neutral fact finders. The Executive Committee was comprised of 34 separate individuals, each of whom represented a separate constituency. These constituencies included each of the counties in the state, parochial schools, the School Boards Association, the Principals and Supervisors Association, the Council of Catholic Diocesan Superintendents, the Scholastic Coaches Association, the Officials Associations, the Association of Independent Schools, and other groups intimately involved in education. See, NJSIAA Constitution, Article V, Sections 1 to 2d. All Executive

Committee members were well versed in the problems faced by school boards and school administrators in administering athletic programs. None had any special interest in Wildwood's case. The five Executive Committee members who did have a conflict of interest all abstained. (Ex. 30, p. 63). (NJSIAA's Reply Brief at 14)

According to the NJSIAA, at no time during the hearing process did Wildwood make a claim before it that the CAL violated its constitutional process, nor did anything other than provide Wildwood appropriate opportunities to be heard. Yet, at page 14 of its brief, petitioner insinuates that the CAL officials turned down petitioner's requests because they feared disruption of their own football schedules, a claim belied by the CAL's actions which would allow Wildwood to either drop football or play junior varsity, either of which would disrupt the CAL football schedules.

The NJSIAA further argues that its decision is supported by sufficient credible evidence in the record, reiterating that petitioner's evidence has now been reviewed five times (three hearings before the CAL and two before the NJSIAA), and each time were rejected. It is the NJSIAA's position that the record supports its determination for five reasons:

First, CAL procedures allow a school to seek permission to play an independent schedule for two years at a time. The CAL followed those procedures with respect to Wildwood's request. The CAL granted Wildwood's request twice, but after due deliberation, decided not to grant it a third time. The decision was inherently discretionary, and was made after proper procedures were followed. Second, the CAL only granted Wildwood permission to play an independent football schedule on the condition that it use the opportunity to improve its program and that the school develop a plan to improve and come back into the League. It was never meant to be a permanent solution. Third, the objective evidence showed that Wildwood had improved its football program. The team had a winning record (6-4) in 1999, almost qualified for the state playoffs, and had a larger varsity squad than several other schools in the CAL National Conference. The school competes successfully in other sports, including girls basketball, which won a State Championship last year. Fourth, another school, Pleasantville, went through a similar rebuilding process and now has a successful football program that has been reintegrated into the CAL. Fifth, League administrators have a legitimate interest in

keeping the CAL vital, and are concerned about repeated requests by Wildwood and other schools for special exceptions to compete outside the League in specific sports. (*Id.* at 14-15)

The NJSIAA next argues that it applied its rules in a reasonable manner, averring, *inter alia*, that there was nothing arbitrary or capricious about the CAL decision, which was based on the CAL's desire to, as expeditiously as possible, carry out the policy expressed in 1996 to reintegrate Wildwood with the rest of the schools in the conference that have football programs. The NJSIAA further avers that the decision was a reflection of a legitimate policy determination to stem the tide of schools seeking independent schedules in certain sports. Moreover, the CAL determined that the Constitution and Bylaws to which all schools, including Wildwood, had committed themselves should be enforced – a special exception had been made for petitioner for four years, and it is now time for Wildwood to compete once more in the CAL, as it had agreed to do.

The NJSIAA asserts that the crux of the issue, and the flaw in petitioner's argument in this matter, is that Wildwood mistakenly believes that it has an absolute right to participate in interscholastic sports, even though petitioner acknowledges it cannot compete and does not want to compete against schools in its own league. As to this, the NJSIAA maintains that the Commissioner has long recognized that there is no right to participate in interscholastic sports and cites as support *Bd. of Ed. of the City of Camden v. NJSIAA*, 92 N.J.A.R.2d (EDU) 182, 188 (1992). NJSIAA's Reply Brief at 17. The NJSIAA further emphasizes that, despite petitioner's claim to the contrary, Wildwood is not being forced to play football by anyone other than the Board itself. Furthermore, it is the NJSIAA's contention that petitioner wants the NJSIAA and the Commissioner to absolve it of its responsibilities as a member of the CAL and to ignore NJSIAA's regulations, which state that:

The Executive Committee wants to strongly emphasize that a school should not have the right to appeal its placement in a

division because the school believes that it should be given a “weaker” or “stronger” schedule. The ability of member schools to have a winning season, or to obtain state or national prominence in its particular sport, is simply not a concern of the Association. (*NJSIAA Handbook, 1999-2000* at 134)

Lastly, the NJSIAA argues that, despite its admitted poor performance, Wildwood insists on fielding a football team.⁶ Of this, the NJSIAA states:

Despite its agreement to abide by [CAL] and NJSIAA rules, [petitioner] insists on setting its own football schedule, a schedule that will allow it to avoid schools it does not want to compete against. Fifty-two NJSIAA schools have chosen not to participate in football. Some of those schools have made that decision based on their size and inability to compete; some have made it based on the lack of interest among students; for others the decision has been the result of financial considerations. Not all CAL schools compete in football. (Ex. 27, p. 54). Yet despite its record, Wildwood stubbornly insists on continuing to compete in the sport. At the same time, it resists forming teams in other sports, such as soccer, which don’t require the same number of players or amount of resources. Wildwood’s excuse that soccer is a “suburban” sport and Wildwood is a “city” school rings hollow. (Ex. 27, p. 39-41). Wildwood admits that JV is not unsafe (Ex. 14, p. 4). If Wildwood were truly interested in the “safety” of its students forced to play the “behemoths from Buena” (Pb 21), it would drop the sport or play JV. (NJSIAA’s Brief at 18)

COMMISSIONER’S DETERMINATION

The NJSIAA is a voluntary association. The Commissioner’s scope of review in NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3, *N.J.A.C.* 6A:3-7.4; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188 (1992). That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules absent a finding that NJSIAA applied the rules in a patently arbitrary, capricious or unreasonable manner. Nor may the Commissioner substitute his judgment for that of the 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. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259. Further, the burden of proof rests with the person

⁶ By way of a footnote on page 17 of its Reply Brief, NJSIAA states with respect to this issue, that on December 6, 1999, NJSIAA member schools approved an amendment to the Association’s Bylaws which allows

challenging the decision. *Kopera v. West Orange Board of Education*, 60 N.J. Super. 288, 297 (App. Div. 1960).

The standard of the Commissioner's review in NJSIAA determinations has been explicitly delineated in *N.J.A.C. 6A:3-7.4*, a regulation recently adopted by the State Board, which reads:

- (a) In determining appeals from NJSIAA decisions, the Commissioner's scope of review shall be appellate in nature.
 - 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his or her judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
 - 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner.

Upon careful and independent review of the record of this matter, the Commissioner affirms the determination of the NJSIAA to uphold the CAL's denial of petitioner's request that it be allowed to continue the independent football schedule which it was granted by the CAL for the past four years and, in the alternative, to be allowed to leave the CAL immediately, rather than in two years as required by the CAL's Constitution. In so holding, the Commissioner initially notes his agreement with both respondents that petitioner was provided extensive due process in this matter, particularly since NJSIAA's Leagues/Conference Position Statement clearly stipulates that:

The Association will continue to exercise its supervisory role to assure *membership* by applicant schools in appropriate conferences and leagues. However, unless it can be shown that there has been a violation of the order of the Commissioner that there be an opportunity for a full schedule of interscholastic sports, there will be no appeals from conference and league *scheduling*. (emphasis in text) (*NJSIAA Handbook, 1999-2000* at 134)

small schools to enter into cooperative sports programs in football and indicates that two such programs have already been approved, *i.e.*, Keyport-Henry Hudson and Palisades-Leonia.

The arbitrary, capricious or unreasonable standard of review is narrow in its scope and consequently imposes a heavy burden on those who challenge actions of boards of education and the NJSIAA. The standard defined by the New Jersey Courts states:

In the law, “arbitrary” and “capricious” means having no rational basis. (citation omitted) ***Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached. (citation omitted) Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citation omitted) (*Bayshore Sewerage Co. v. Dept. of Env't. Protection*, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), *aff'd* 131 N.J. Super. 37 (App. Div. 1974))

In applying the requisite standard of review to the instant matter, the Commissioner may not substitute his judgment for that of the NJSIAA, even if he believed an erroneous conclusion had been reached by the NJSIAA, because the record establishes that respondents did not take willful or unreasoning action, without consideration and in disregard to the circumstances. The record demonstrates the CAL granted petitioner's request for an independent football schedule for four years beginning in 1996 (two cycles of two years each), in order for it to build its football program in light of the dismal ten-year win-loss record it had compiled in competing in the CAL, a record which petitioner sets forth at length in its submissions. Thorough review of the record, however, convinces the Commissioner that the CAL was not arbitrary, capricious and unreasonable in determining that Wildwood had improved its football program after four years of independent scheduling, which included competition against Group I, Group II and Group III schools, and having achieved a winning record for the

1999 season to the point that a return to the CAL was reasonable.⁷ In so holding, the Commissioner concludes that the CAL has a legitimate interest in having its member schools compete within the league and not to allow indefinite independent schedules for particular sports for individual schools within the league.⁸

Consequently, the Commissioner finds that petitioner has not met its burden in this matter, having failed to demonstrate that respondent's actions herein were violative of respondents' Constitution and Bylaws, or that the actions of the CAL and NJSIAA were arbitrary, capricious and unreasonable.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.⁹

COMMISSIONER OF EDUCATION

Date of Decision: July 28, 2000

Date of Mailing: July 31, 2000

⁷ In 1999, petitioner had a 6-4 record with independent football scheduling against Group I schools Clayton, Riverside, Florence, Palmyra, Pennsville and Bordentown, Parochial B schools McCorristin and St. James, Group II school Cinnaminson and Group III school Princeton. (Petitioner's Brief at 12)

⁸ The Commissioner notes that petitioner's statistical and historical account of Wildwood's football program from 1986-1999 consists of information regarding its win-loss record. There are no data/information provided relative to student health and safety concerns raised by petitioner with respect to competing against large schools in the CAL that would support a determination that playing a league schedule will increase the risk of injury to petitioner's athletes beyond that which is inherent in all football games. (*Id.* at 4-13)

⁹ This decision, as the Commissioner's final determination in this matter, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.