

574-03

C.J.N. AND D.W.N., on behalf of minor child, C.N.,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	
	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
	:	
RESPONDENT.	:	
_____	:	

SYNOPSIS

Petitioning parents sought reversal of the NJSIAA’s decision not to allow their son, who attends private school, to play on a high school tennis team in the Cherry Hill Public School District. Petitioners sought waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws.

The NJSIAA determined that petitioners’ son, C.N., who has been diagnosed with Attention Deficit Disorder (ADD), was not eligible to play tennis at Cherry Hill West since petitioners, without involvement by the Cherry Hill Child Study Team, unilaterally determined to place their child in a private school that was neither a Department of Education approved school nor a member of NJSIAA.

The Commissioner found that petitioners were provided the due process to which they were entitled; that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee; and that NJSIAA’s rule was not applied in an inconsistent manner. Since no student, nonpublic or public, attending one school is permitted to play sports for another school, unless assigned by that school to a vocational/technical school, or as a result of the Child Study Team designation of Individualized Educational Plan, the exception requested could affect all NJSIAA member schools and, thus, create situations where proper oversight and administration of NJSIAA rules would be impossible. Moreover, the Greenberg Academy, where C.N. is enrolled, has no relationship whatsoever to the NJSIAA or the Cherry Hill Child Study Team or the Cherry Hill School District. The Commissioner found that the NJSIAA’s decision to deny C.N.’s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was not arbitrary, capricious or unreasonable. Petition was dismissed.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

October 9, 2003

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For Petitioners, Frank P. Cavallo, Jr. (Parker, McCay & Criscuolo, P.A.)

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on June 9, 2003, by way of a Petition of Appeal seeking reversal of the final decision of the New Jersey Interscholastic Athletic Association (NJSIAA) not to allow petitioners' son, who attends private school at the Center for Education, to play on a high school tennis team in the Cherry Hill public school district. Briefs and the underlying record of proceedings before the NJSIAA were duly submitted in accordance with the provisions of *N.J.A.C.* 6A:3-7.1 *et seq.*, and the record on appeal closed on August 1, 2003.

The material facts and procedural history of this matter are as follows: C.N. is domiciled in the Cherry Hill School District and attended the public schools of the district from Kindergarten through grade nine. By his parents' account, his attendance and interest began to deteriorate in eighth grade, and worsened through ninth grade. C.N.'s pediatrician and a Neuro-Cognitive Learning Consultant referred by the

pediatrician concluded that C.N. suffered from Attention Deficit Disorder (ADD)¹ and recommended that C.N. be provided with modifications and accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504). Petitioners met with school district officials to discuss C.N.'s situation, but were dissatisfied with the results, which petitioners state were limited to seating C.N. in the front row of class when he did attend school and suspending him when he did not. Accordingly, at the beginning of tenth grade, in the fall of 2002, petitioners unilaterally decided to place C.N. at the Center for Education (Center), where the ADHD students were being educated in a small-class, individualized environment and the Section 504 accommodations recommended for C.N. were available, and where C.N. has completed eleventh grade and reportedly improved substantially in both attendance and attainment; at no time did petitioners seek to have C.N. placed by the school district, in the Center or elsewhere, since they believed C.N.'s situation required immediate resolution. When C.N. then sought to participate on the Cherry Hill High School West Tennis Team during the 2002-03 school year, his request was denied by the local school district based on its obligation to abide by operative rules of the NJSIAA. On or about March 3, 2003, a request for eligibility waiver was made to NJSIAA, supported by a letter from the principal of Cherry Hill High School West, and its denial was unsuccessfully appealed to the NJSIAA Eligibility Appeals Committee. The Committee ruled at its meeting of March 5, 2003 and memorialized its decision in a written document on March 13, 2003, which constitutes the final decision now before the Commissioner on appeal.

¹ The record is not entirely clear as to whether C.N.'s diagnosis was Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD), but that distinction is immaterial to the determination herein.

PETITIONERS' POSITION

Initially, petitioners assert that the NJSIAA acted arbitrarily and capriciously when it denied C.N.'s request to participate on the tennis team at Cherry Hill West High School. (Petitioners' Brief in Support of Appeal at 6-7) Citing *Florence County School District Four v. Carter*, 510 U.S. 7, 12 (1993); *Bernardsville Board of Education v. J.H.*, 42 F.3d 149 (3rd Cir. 1994); and *School Comm. of Burlington Mass. v. Department of Education*, 471 U.S. 359 (1985), and pointing to *N.J.A.C. 6A:14-2.10* and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C.S., 1400 *et seq.*, petitioners argue that parents have the right to place their child in a private school without the consent of their local board of education. (*Id.* at 7) Petitioners point out that a student placed in a private school setting by the Cherry Hill West Child Study Team, or through assignment to a vocational school program, would be permitted to participate in interscholastic sports for Cherry Hill West even where the private school placement resulted in enrollment in a school that is not a member of NJSIAA, because the student remains under the jurisdiction of the assigning school. (*Ibid.*) Thus, petitioners argue, NJSIAA's decision denying petitioners' request effectively acted to punish petitioners for electing not to request public school payment for their son's education or to wait over three months for him to be placed in an institution which may not have achieved success comparable to what has occurred at the Center for Education. (*Id.* at 8)

Secondly, petitioners submit that the NJSIAA violated the Rehabilitation Act of 1973, which provides that no otherwise qualified individual with a disability shall be excluded solely by reasons of his or her disability from participation in, or be denied the benefits of, any program or activity receiving federal financial assistance. (*Id.* at 9)

Citing numerous federal court cases, petitioners maintain that NJSIAA is subject to the Rehabilitation Act and, therefore, required to provide a handicapped individual the opportunity to participate in its programs. (*Id.* at 11) Petitioners contend that C.N. is excluded from participation in the Cherry Hill West High School program solely because of his handicap, since, if C.N. were not handicapped, he would remain a student at Cherry Hill West High School and be entitled to participate in the tennis program. (*Id.* at 12) Therefore, petitioners conclude, the NJSIAA decision must be reversed as violative of the Rehabilitation Act of 1973.

NJSIAA'S POSITION

In presenting its "Statement of Facts," the NJSIAA avers that, contrary to petitioners' assertions that they were required to place C.N. themselves because the Child Study Team was not dealing productively with C.N.'s disability, the hearing before NJSIAA showed otherwise. Citing to testimony and exhibits, NJSIAA contends the school, in fact, carefully developed a plan under Section 504 of the Federal Rehabilitation Act to provide special assistance to C.N., and that the school principal opined that C.N.'s problems were "not so much what was occurring in the classroom, but the travel time which C.N. was experiencing in going from various buildings in a complex housing 1,600 students." NJSIAA further notes that petitioners complained of class sizes, but rejected the district's suggestion of an alternative school having an enrollment of 49 students; and that petitioners' testimony at hearing clearly established the desire not to have their son "stigmatized" by classification as the basis for their reluctance to work with the district child study team to develop an Individualized Education Plan (IEP) for C.N. Finally, NJSIAA notes that the school, through its Principal, recognizes full well

that it can have nothing to do with students not enrolled in the system, yet it somehow believes that participation on the school tennis team should nonetheless be allowed. (NJSIAA Brief at 1-3, quotation at 1)

Citing Dam Jin Koh and Hong Jun Kim v. NJSIAA, 1987 S.L.D. 259, *Brady v. NJSIAA*, 96 N.J.A.R.2d (EDU) at 980, and *N.J.A.C. 6A:3-7.4*, the NJSIAA points out that the Commissioner's scope of review in NJSIAA determinations is an appellate one; thus, the Commissioner may not overturn an eligibility decision of the NJSIAA absent a finding that it applied its rules in a patently arbitrary, capricious or unreasonable manner. (*Id.* at 5) The NJSIAA asserts that petitioners cannot meet their burden of demonstrating that the NJSIAA Bylaws, Article V, Section 1, or its application violated any federal or state laws or was arbitrary or unreasonable. (*Ibid.*)

Initially, the NJSIAA maintains that this appeal does not implicate any rights under federal law. The Association avers that the federal court decisions cited by petitioners have absolutely no application to the facts of this case, where the challenge is to the requirement that a child, whether disabled or not, be enrolled in a member school to participate in interscholastic sports, since none of the cited decisions supports the right of parents to forsake a school's academic program, while at the same time requiring that school to include their child in its athletic program. (*Id.* at 5-6) The NJSIAA maintains that it has adopted rules, as set forth in its 2002-2003 *NJSIAA Handbook*, to assure that disabled students are fully accommodated to participate in four seasons in any sport, as demonstrated by: 1) the provision that any handicapped or classified student is not required to comply with the Academic Credit Rule and 2) the provision permitting disabled students to participate in interscholastic sports in the seventh and eighth grades

to make certain that they involve themselves in four seasons of a sport before turning 19. (*Id.* at 6-7) The NJSIAA also points out that, although home-schooled students are not eligible to participate in interscholastic sports, a student placed on home instruction under the auspices of the school district is eligible to participate in that district's sports program. (*Id.* at 7)

Secondly, the NJSIAA contends that C.N. participated on the Cherry Hill West tennis team while attending that school and there is no allegation that his disability in any way impeded his participation in interscholastic sports at this member school. (*Ibid.*) The NJSIAA maintains that, if C.N. had remained a student at Cherry Hill West, or if he had been placed by the Cherry Hill School District in an education setting under the district's jurisdiction, then C.N. could have continued to participate in the Cherry Hill School District's interscholastic program; but, instead, his parents decided to place him in a private school outside the Cherry Hill School district's jurisdiction. (*Ibid.*) Thus, C.N.'s inability to participate in interscholastic sports has not been caused by his disability, but, rather, was due solely to a parental decision, made "without any pressure or compulsion from Cherry Hill West or from the NJSIAA," to educate C.N. in a private school. (*Id.* at 7-8)

Additionally, the NJSIAA points out that the Greenberg Academy has no relationship whatsoever to the NJSIAA or the Cherry Hill School District, since the Greenberg Academy has no sports program, is not a member of the NJSIAA, and C.N. was placed at the Greenberg Academy without involvement by the Cherry Hill Child Study Team or the Cherry Hill School District. (*Id.* at 8) The NJSIAA also notes that the NJSIAA is a voluntary association of schools subject to an internal governance

structure established by the member schools themselves. (*Ibid.*) Thus, the NJSIAA posits, the NJSIAA can only function through its member schools who are obligated to administer interscholastic sports at the local level and are responsible for assuring that students are given a physical examination, are under the supervision of certified coaches and adhere to the eligibility standards of the NJSIAA. (*Id.* at 9) The NJSIAA also sets forth the position that Article V, Section 1, of the Bylaws of the NJSIAA, which was adopted in 1978 and requires that a student must be enrolled in a NJSIAA member school to participate in the school's interscholastic athletic program, serves several legitimate interests of the NJSIAA and its member schools, as follows:

1. Each member school is responsible for properly administering and enforcing all NJSIAA rules and regulations, including eligibility rules, to its own students; allowing students to attend one school and compete athletically for another would make proper oversight and administration of rules and regulations impossible.
2. Sports offered by member schools are an integral part of the overall academic and extracurricular program provided for each student enrolled in that school.
3. Allowing students to participate on the athletic teams of other schools would discourage the initiation of appropriate athletic programs by the schools attended by the students and may even encourage schools in difficult financial situations to eliminate programs as a cost saving measure if their students are free to participate in that activity at another school.
4. Allowing a non-enrolled student to participate in a member school's athletic program would wrongfully deny an enrolled student the opportunity to participate in that athletic program at his or her own school. (*Id.* at 10-11)

Moreover, the NJSIAA asserts that *E.L. and N.L., on behalf of R.L. v. NJSIAA*, decided by the Commissioner, August 31, 1998, is controlling; there, as here, petitioning parents voluntarily placed their children in a private school and claimed that

provisions of Article V, Section 1, of the NJSIAA Bylaws infringed on parental choice. (Id. at 11-12) In *E.L.*, the Commissioner found that the four above-enumerated reasons were “sound reasons for the rule as it stands” and the Commissioner further determined that NJSIAA’s application of Article V, Section 1, of the NJSIAA Bylaws to deny petitioners’ request to allow their son to play ice hockey for the Cranford public high school while enrolled in the Oratory Catholic Preparatory School was neither arbitrary nor unjust since the parental choice had been made by petitioners to enroll their son in a school which did not provide ice hockey. (*Id.* at 12) The Commissioner held that:

...That petitioners argue the rule compels them to make a choice with respect to their son’s education does not elevate their claim to one of prejudicial or unjust treatment; indeed many parents are similarly faced with having to weigh the varied components of a private or parochial education against those of the public school education. (*Id.* at 12, citing *E.L.*, *supra*, at 7)

Citing cases from court decisions in Maryland, Oklahoma, Montana and Maine, the NJSIAA submits that “courts in other jurisdictions have held that school district policies and requirements which forbid non-enrolled students from participating in public school classes or extracurricular programs are permissible if they are rationally related to the school’s objectives and interests.” (*Ibid.*) In particular, the NJSIAA points out that, in *Kapstein v. Conrad School District*, 931 P.2d 1311 (1997), the Montana Supreme Court held that that, in balancing a student’s right to participate in public school sports programs with the school district’s right to organize and administer its academic and athletic programs, the school district’s interest in integrating its academic and extracurricular activities outweighed the private school student’s interest in participating in extracurricular activities. (*Id.* at 13-14) Similarly, in *Pelletier v. Maine Principals’ Association*, 261 F. Supp. 2d 10 (Me. D.C. 2003), the United States District Court upheld

the Maine Principals' Association rule permitting home schooled students to participate in interscholastic athletics, but only at their local public high school, reasoning that "Maine's decision to open the public school athletic programs to home-schooled students without at the same time opening the private school programs does not create a burden on parental choice." (*Id.* at 14-15, *citing Pelletier* at 14)

In conclusion, the NJSIAA readily acknowledges that petitioners have the freedom to choose where their son will be educated, but asserts that petitioners do not have the right, under either state laws or their federal counterparts, to select only the portions of the offered public education which best serve their interests. (*Id.* at 15) The NJSIAA, therefore, contends that its decision in the instant matter must be upheld because it is consistent with the Commissioner's decision in *E.L.*, *supra*, and because the rule in question is rationally related to the legitimate interests of the NJSIAA and its member schools and does not infringe upon petitioners' rights. (*Ibid.*)

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.

The Commissioner's scope of review in matters involving the NJSIAA is appellate. *See 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, 183. The Commissioner may not

overturn an action by the NJSIAA in applying eligibility rules absent a finding that the rules were applied in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 N.J. Super. 214, 231-232 (App. Div. 1987). Nor may the Commissioner substitute his judgment for that of the NJSIAA, *even if he would 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 Eligibility Appeals Committee. *Dam Jin Koh, supra*. As codified to provide notice of this standard to the public and regulated parties:²

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 *** 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. *N.J.A.C. 6A:3-7.4(a)*.

The burden of proof that an action was thus deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Education*, 60 N.J. Super. 288, 297 (App. Div. 1960). It is well-established that:

In the law, "arbitrary" and "capricious" means having no rational basis. *** 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.*** (citations omitted) *Bayshore Sew. Co. v. Dep't. of Env., N.J.*, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), *aff'd* 131 N.J. Super. 37 (App. Div. 1974).

² See, 31 N.J.R. 4173(a) and 32 N.J.R. 1177(a).

Upon careful consideration of this matter, and mindful of the applicable standard of review, the Commissioner determines to affirm the NJSIAA's decision denying petitioners' request for a waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws for the reasons set forth below.

Initially, the Commissioner finds that petitioners were provided the due process to which they were entitled and that the NJSIAA made every effort to provide a full, fair and timely hearing by the Eligibility Appeals Committee. Upon review of the testimony and the documentation provided by petitioners and the Cherry Hill School District, it is noted that the Committee voted unanimously to deny petitioners' request for a waiver of Article V, Section 1, of the NJSIAA Bylaws, which states:

A student, to be eligible for participation in the interscholastic athletic program of a member school, must be enrolled in that school and must meet all the eligibility requirements of the Constitution, Bylaws, and Rules and Regulations, of the NJSIAA. (*NJSIAA Handbook* at 42)

The Committee's decision, memorialized in a written document on March 13, 2003, explains the Committee's reasoning, as follows:

[1.] There are many students who are not enrolled in a NJSIAA member school, but who are eligible to participate in interscholastic sports, where they have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation or Individualized Educational Plan. However, these students remain under the jurisdiction of the assigning school. Students who have left the jurisdiction of the member school cannot be eligible to participate on that school's athletic teams.

[2.] To allow any other arrangement would permit parents to enroll in any school of their choice without any oversight by a member school and then participate in that school's team in the unbridled discretion of the student's parents.

[3.] In this case, the student's parents had the ability to have their son assigned to an appropriate placement to deal with his disability. Instead of utilizing the opportunities available through the member school's system,

including the placement in an alternative school, the parents voluntarily decided to place their son outside of the Cherry Hill School District's jurisdiction, in the Center for Education in Marlton, New Jersey.

[4.] By removing their son from the Cherry Hill West system without any assignment by the District to the private school, the parents made a voluntary determination to remove their son from the ability to participate in interscholastic sports at Cherry Hill West.

[5.] The Committee believes that the parent's motives were certainly laudable and does not in any way question that determination. However, since the choice was totally voluntary and outside the jurisdiction of a member school, there is no basis for granting a waiver of the provisions of Article V, Section 1 of the NJSIAA Bylaws. Accordingly, this student will not be eligible to participate on the Cherry Hill High School West tennis team or any other athletic program at that member school. (NJSIAA's March 13, 2003 Letter memorializing the Committee's decision of March 5, 2003)

Given the explicitness of Article V, Section 1, of the Bylaws and the NJSIAA's articulation of sound reasons for its decision, the Commissioner cannot find that the application of Article V, Section 1, is arbitrary or unjust, as applied to petitioners' son. In so determining, the Commissioner observes that the record is devoid of any allegation that the NJSIAA's rule is being applied in an inconsistent manner. Moreover, since no student, nonpublic or public, attending one school is permitted to play sports for another school,³ the exception requested here could affect all NJSIAA member schools and, thus, create a situation that would make the proper oversight and administration of NJSIAA rules impossible.

Although the Commissioner completely agrees with petitioners' assertion that they have the right to place their son in a private school at their own expense without the consent of the local board of education, the fact that petitioners have that right does

³Article V, Section 1 of the Bylaws has been interpreted to permit students to participate in a school's interscholastic program where students have been assigned by that school to a vocational/technical school or as a result of the Child Study Team designation of Individualized Educational Plan, which did not occur in the instant matter.

not mean that they concomitantly have the right to participate in interscholastic athletics at their local public school while attending a private school that has no relationship to it. As set forth by the Commissioner in *E.L., supra*, at 7, “[t]hat petitioners argue the rule compels them to make a choice with respect to their son’s education does not elevate their claim to one of prejudicial or unjust treatment; indeed, many parents are similarly faced with having to weigh the varied components of a private and parochial education against those of the public school education.” Moreover, the NJSIAA’s determination that non-enrolled students are to be excluded from participating in interscholastic sports in member schools’ sports programs is consistent with the findings of courts in other jurisdictions.

Additionally, the Commissioner finds petitioners’ argument that C.N. is excluded from participation on the Cherry Hill West tennis team by virtue of his handicap because, absent the handicap, he would remain at Cherry Hill West High School, to be without merit. In so determining, the Commissioner observes that there is no allegation of C.N.’s disability having in any way impeded his participation on Cherry Hill West’s tennis team while attending that school; that NJSIAA Bylaws and the Interpretative Guidelines to the NJSIAA Handbook support the NJSIAA’s contentions that it has adopted rules to accommodate disabled students to ensure their full participation in interscholastic sports in member schools; and that C.N.’s situation arises not from his disability, but from parental choice freely exercised.

In the instant matter, the Greenberg Academy where C.N. is enrolled has no relationship whatsoever to the NJSIAA or the Cherry Hill School District, and C.N. was enrolled at the Greenberg Academy without any involvement by the Cherry Hill

Child Study Team or the Cherry Hill School District. Under these circumstances, therefore, and for the reasons set forth above, the Commissioner cannot find that the NJSIAA's decision to deny C.N.'s request for waiver of the provisions of Article V, Section 1, of the NJSIAA Bylaws was arbitrary, capricious or unreasonable.

Accordingly, the decision of the NJSIAA Eligibility Appeals Committee is sustained and the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.⁴

COMMISSIONER OF EDUCATION

Date of Decision: October 9, 2003

Date of Mailing: October 10, 2003

⁴ This decision, as the Commissioner's final determination, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.