

#343-09

CREATE CHARTER HIGH SCHOOL, :
PETITIONER, : COMMISSIONER OF EDUCATION
V. : DECISION
NEW JERSEY STATE INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, :
RESPONDENT. :
_____ :

SYNOPSIS

CREATE Charter High School (CREATE) appealed the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) suspending its sports program for the 2009-2010 and 2010-2011 school years, following the NJSIAA’s review on appeal of the February 2009 decision of the Hudson County Interscholastic Athletic Association (HCIAA) finding CREATE guilty of a series of infractions and expelling the school from the county conference with the ability to apply for reinstatement in 2012. CREATE contends that the HCIAA committed numerous procedural violations and denied it any semblance of due process, and that the NJSIAA’s decision effectively upholding the HCIAA’s actions in spite of these deficiencies must be reversed as arbitrary, capricious and unreasonable.

The Commissioner – who may not substitute her judgment for that of NJSIAA where due process has been provided and where there is adequate basis for the decision finally reached – upheld the NJSIAA’s findings and conclusions and dismissed CREATE’s petition, noting that the NJSIAA fully considered the circumstances of the appeal and the arguments of the parties, afforded CREATE the requisite level of due process, and issued a decision that was both reasonable and based on sufficient support in the record.

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 22, 2009

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For Petitioner, Bruce W. Padula, Esq. (Scarinci & Hollenbeck, LLC)

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

This matter came before the Commissioner of Education on July 13, 2009, through the filing of a petition of appeal by CREATE Charter High School (CREATE) pursuant to *N.J.A.C. 6A:3-7.1 et seq.* In its appeal, CREATE sought reversal of the June 18, 2009 final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) suspending its sports program for the 2009-10 and 2010-11 school years, following the NJSIAA's review on appeal of the February 27, 2009 decision of the Hudson County Interscholastic Athletic Association (HCIAA) expelling CREATE from the conference with the ability to apply for reinstatement in 2012.¹ Following the July 21, 2009 filing by the NJSIAA of an answer and Statement of Items Comprising the Record on Appeal, CREATE requested an extension of time within which to submit its brief pursuant to *N.J.A.C. 6A:3-7.3*; such brief was duly filed

¹ CREATE additionally named the HCIAA as a respondent; however, since the decision on appeal was a *de novo* determination rendered by the NJSIAA, the HCIAA is not a proper respondent and is hereby dismissed as a party to this matter.

on September 15, 2009, and on September 17, 2009, CREATE's papers were perfected by submission – pursuant to *N.J.A.C.* 6A:3-7.1(a)2 – of the record on appeal as set forth in the Statement of Items prepared by the NJSIAA,² followed by submission on the next day of three items not listed in such statement but appropriately included in the record on appeal.³ Upon filing of the NJSIAA's responsive brief on September 22, 2009, the record was closed and the matter proceeded to determination.^{4 5}

OPERATIVE FACTS

1. CREATE⁶ Charter High School is a charter school located in Jersey City, Hudson County, established in 2001 and currently enrolling approximately 400 students in grades 6 through 12. It offers a number of sports programs and is a member of the Hudson County Interscholastic Athletic Association (HCIAA) and the New Jersey State Interscholastic Athletic Association (NJSIAA). (*Passim*)
2. On or about February 1, 2007 – as a result of issues arising from the behavior of CREATE's coaches, student-athletes and fans – the HCIAA placed the school on probation for two years, beginning in 2007 and ending after the 2009 academic year, noting that any further serious offenses could result in the school's immediate expulsion from the conference. (Petition of Appeal at ¶2; Statement of Items, No. 31)
3. On March 4, 2008, the HCIAA imposed additional sanctions on CREATE as a result of the school's use of an ineligible basketball player and continuing concerns with oversight of the school's sports program, extending the school's probation through the 2010-11 academic year and directing the adoption of a

² Although several of the items comprising the record on appeal had been included as exhibits with CREATE's initial pleading and appeal brief, the full official record was not submitted until this time.

³ The items were: the May 26, 2009 and June 17, 2009 letters to the NJSIAA from counsel for CREATE (see Operative Facts, Nos. 21-22) and the NJSIAA's 2007-08 Handbook. The NJSIAA did not object to CREATE's submission of these items.

⁴ No submissions of any kind were made by the HCIAA.

⁵ On October 12, 2009, CREATE made a further submission in reply to the NJSIAA's brief, asking the Commissioner to accept it pursuant to the discretion granted her by *N.J.A.C.* 6A:3-7.3. The Commissioner has not considered this submission, however, since she did not find additional briefing necessary in this matter and the applicable provision of rule prohibits such briefing *except as directed* by the Commissioner. *N.J.A.C.* 6A:3-7.3(c), emphasis supplied.

⁶ "CREATE" is an acronym for "Center for Responsible Economic and Technological Excellence."

“Progressive Action Plan” requiring CREATE to, *inter alia*, provide security and supervision at all home and away games, carefully scrutinize the eligibility of student athletes, prepare rosters for presentation to the HCIAA, restrict admittance at games to team members and their immediate families, and monitor the conduct of all games. A plan was submitted by CREATE on March 5, 2008, although testimony at NJSIAA proceedings indicated that the plan was not consistently followed with respect to security personnel and student rosters. (Petition of Appeal at ¶3-5; Statement of Items, Nos. 3a, 3b; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 43-45, 81-86; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 2, 7)

4. On June 10, 2008, at an appeal hearing before the NJSIAA Controversies Committee to review the sanctions imposed by HCIAA, CREATE and the HCIAA instead entered into a settlement – encouraged and approved by the NJSIAA – imposing on CREATE a two-year period (2008-09 and 2009-2010) of probation and disqualification from HCIAA and NJSIAA tournament play. The HCIAA agreed to the settlement, but did so with some reluctance due to a belief that probation would not suffice to impress upon CREATE the importance of abiding by conference and State rules. (Statement of Items, No. 3a; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 2, 7; HCIAA Hearing Transcript [Statement of Items, No. 3i] at 22, 25)
5. Between March 5, 2008 and February 5, 2009, CREATE received no notice that any new charges against it were being brought to the HCIAA or the NJSIAA. (Petition of Appeal at ¶6)
6. On February 6, 2009, the HCIAA received a written complaint from Tom Lalicato, Athletic Director of St. Mary’s High School, alleging that CREATE had violated agreed-upon safety conditions (no spectators other than parents and faculty) imposed as a result of past problems at contests between the two schools by allowing a non-CREATE student-athlete – a young man who had recently been arrested for armed robbery and was a star basketball player at a local school – to travel with the team and sit on the bench during that day’s basketball game at St. Mary’s, necessitating his removal from the premises. Later, during testimony, Lalicato indicated that he conveyed the “closed gym” condition to CREATE’s Athletic Consultant John Lisa about a week before the game and clarified that, although CREATE officials understood the issue and readily agreed to the young man’s removal when approached about the problem on site, the CREATE coach took no consequent action and the removal had to be effectuated by St. Mary’s own security officials – to whom the boy offered some resistance, although the situation remained under control. (Petition of Appeal at ¶7; Statement of Items, No. 3h; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4; HCIAA Hearing Transcript [Statement of Items, No. 3i] at 21-25; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 28-33, 61-65)

7. CREATE was not provided with a copy of Lalicato's written complaint until the HCIAA committee meeting of February 25, 2009 (see No. 13 below); however, Lalicato spoke to CREATE officials about the issue on the day of the event and the HCIAA president called CREATE on the morning of February 11, 2009, prior to the General Membership meeting scheduled for that day, to discuss the complaint and was told that the incident did, in fact, occur as Lalicato claimed and that CREATE would submit a written response the next day. (NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4; HCIAA Hearing Transcript [Statement of Items, No. 3i] at 26-27; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 28-33, 61-65)
8. The HCIAA discussed Lalicato's complaint at its General Membership meeting of February 11, 2009. CREATE was not specifically advised that the complaint would be discussed at the meeting, and no representative of CREATE was present. It had been expected by the HCIAA that representatives of CREATE would be there as a matter of routine since the school was on probation, and in fact, CREATE usually had an official in attendance; however, on that particular day, the designated official was unable to attend due to jury duty and CREATE chose not to send a substitute. (Petition of Appeal at ¶8; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 19-20, 26, 106-08)
9. At this meeting, following Lalicato's presentation of the St. Mary's incident, discussion ensued regarding the continuing problems CREATE was allegedly causing within the league and its purported noncompliance with the letter and spirit of its probation; during this discussion, a number of HCIAA members raised additional specific charges against CREATE, none of which had been filed in writing or in accord with the time frames established by HCIAA bylaws – a fact noted by two HCIAA members, although one of these further opined that the single violation properly before the conference should be “enough” to enable disciplinary action. Following Mr. Lalicato's presentation of his complaint, the HCIAA President directed the HCIAA Controversy Committee⁷ – through past practice identical to the Grievance Committee referenced in the HCIAA Constitution – to review Mr. Lalicato's report and make a recommendation to the membership at the March meeting; later, however, this directive was later revised to “handle the situation with CREATE.” (Petition of Appeal at ¶8-11; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4; Statement of Items, No. 3i at 21-36)

⁷ Throughout the record, this committee is alternately referred to as the “Controversy Committee” and the “Controversies Committee.”

10. Because he had expected representatives of CREATE to be present at the General Membership meeting, the HCIAA president called CREATE when the meeting was over to inquire why no one had attended. At that time, he spoke to “one of their athletic staff members,” who, according to the president, stated that “we were told not to go” and avoided the question when pressed as to why and by whom. (NJSIAA Hearing Transcript [Statement of Items, No. 6] at 20, 34)
11. CREATE did, in fact, submit to the HCIAA as discussed (see No. 7 above) an undated – but presumably timely – written statement regarding the St. Mary’s incident, signed by School Athletic Consultant John Lisa, Director of Security Bob Kenney, and Chief School Administrator (CSA) Steve Lipski. This statement represents that the young man in question came to CREATE on February 3, 2009 regarding transferring to the school, and on February 6, traveled to St. Mary’s with the team – along with another non-CREATE student – to sit on the bench and take statistics; it further states that CREATE’s coach agreed to removal of the young men when approached by Mr. Lalicato, that the young men left without any questions, and that the CREATE coach was issued a reprimand “concerning the liability of having a non-CREATE student on the team bus.” Although not referenced in the school’s written statement, the coach in question chose to resign following this incident. (Statement of Items, No. 3j; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 92-93)
12. On February 18, 2009, a full-page color advertisement for CREATE appeared in the *Jersey Journal*, stating “Ready to be More Than Just a Number? Then You’re Ready to be Part of CREATE Football,” describing the benefits of CREATE’s staff, facilities and program goals, and concluding with “To Learn More About Our New Football Program, Contact the CREATE Athletic Director at [phone number]. This ad was part of a nine-ad package developed for CREATE by marketing consultants who were authorized by CSA Steve Lipski to devise and run the ad without his having seen the ad copy. Upon receiving a telephone call that day from the HCIAA president indicating that some conference members were disturbed by the ad, Lipski directed the *Journal* to pull it from further publication, although it ran for one additional day, February 19, 2009. (Statement of Items, No. 3c; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 67-69, 87-89; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 6)
13. Following verbal notification to CREATE through Athletic Consultant John Lisa, the HCIAA Controversy Committee met on February 25, 2009, with three representatives of CREATE present: John Lisa, Athletic Director/Basketball Coach Steve Miller, and Director of Security Bob Kenney. CREATE received a copy of Lalicato’s February 6, 2009 complaint for the first time at this meeting. Although Lisa was expecting discussion of the St. Mary’s incident, it is unclear precisely how broad he otherwise understood the scope of this meeting to be; however, CSA Lipski testified before the NJSIAA that Lisa had told him about

“some charges” that could be resolved before the committee, so that Lipski did not think his own presence was necessary, and that Lisa returned from the meeting feeling he had been “sandbagged.” (Petition of Appeal at ¶12; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 34, 63, 80-81; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4; CREATE’s Appeal Brief, Recitation of Facts, at 4)

14. At some point prior to or during the February 25 meeting, a letter to the Controversy Committee – undated, unsigned and not on letterhead – was submitted by the Athletic Director of Snyder High School and distributed to members present. This letter set forth the charges ultimately considered and sustained by the committee (see No. 15 below). (Statement of Items, No. 4; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 17-20)
15. The committee found CREATE guilty of five violations notwithstanding that only Lalicato’s complaint (“St. Mary’s incident”) was timely filed and in writing: 1) lacking a security plan for the 2009 season, 2) allowing a transfer student to participate in competition on the same day he was enrolled, 3) allowing the head soccer coach’s sixth-grade son to participate in competition, 4) placement in the *Jersey Journal* on February 18 and 19, 2009 of a full-page color advertisement inviting students to join CREATE’s football team in violation of rules against recruitment, and allowing a non-CREATE-student-athlete to travel with the team and sit on the bench during a game at St. Mary’s in violation of agreed-upon safety procedures. The committee – which included one of the HCIAA members who had previously stressed that only the St. Mary’s incident was properly before them – recommended CREATE’s immediate expulsion from the HCIAA and exclusion from all HCIAA and North Jersey Tri-County Conference sponsored contests and championships for two years, with the ability to reapply for reinstatement in the year 2012.⁸ (Petition of Appeal at ¶14-15, 17; Statement of Items, No. 3k; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 2, 4, 7-8)
16. The HCIAA Controversy Committee proceedings were not recorded. However, HCIAA members present at the meeting later testified before the NJSIAA that CREATE’s representatives openly admitted commission of the above-referenced violations; indeed, according to the HCIAA members, the alleged incident regarding the soccer coach’s son was actually raised by CREATE, not by the HCIAA. At the NJSIAA hearing, no witnesses were presented by CREATE to

⁸ CREATE additionally alleged (Petition of Appeal at ¶17) that the HCIAA Controversy Committee recommended assessing the school a fine of one year’s dues (\$1,720); however, it is unclear whether the committee actually did so. Imposition of such fine is nowhere mentioned in the record other than in the parties’ briefs and in the copy of the minutes of the February 25, 2009 HCIAA Controversy Committee meeting appended to the petition of appeal as Exhibit C – which differs from the copy provided with the official record on appeal (Statement of Items, No. 3k), where reference to the fine is omitted, without explanation, from the committee’s recommendations. In any event, whatever penalty the HCIAA may have imposed was superseded by the decision of the NJSIAA, which is the proper subject of the appeal herein.

deny the HCIAA's contentions, other than CSA Steve Lipski – who was not present at the meeting in question and could proffer only a hearsay denial of the purported admissions. (Petition of Appeal at ¶15-16; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 22-26, 33-37, 40, 79-83; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4)

17. On February 27, 2009, at the conclusion of a North Jersey Tri-County Conference meeting, the HCIAA held an emergency meeting to consider the Controversy Committee's recommendation. Although CREATE was told about the conference meeting, it was not specifically told that the committee's recommendation would be considered or that CREATE might be expelled from the HCIAA; the HCIAA expected that CREATE would attend based on the notice given, but, for reasons not revealed by the record and notwithstanding CREATE's awareness of the HCIAA's concerns with – at a minimum – both the St. Mary's incident and the *Jersey Journal* ads, no representative of the school appeared. At the meeting, the committee's recommendations were accepted by a vote of 18-0. (Petition of Appeal at ¶19; Statement of Items, No. 3k; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 36-38; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4-5)
18. On March 11, 2009, counsel for CREATE wrote to the NJSIAA seeking a stay of the HCIAA's decision and a hearing on the charges against it based upon the HCIAA's alleged denial of due process and failure to follow HCIAA and NJSIAA bylaws. The stay was granted on March 19, 2009, with the caution that no finding of probability of success on the merits should be inferred and that CREATE's history of past rule violations would be considered by the NJSIAA Controversies Committee in assessing a penalty if the violations charged by the HCIAA were found to be correct. (Petition of Appeal at ¶20; Statement of Items, Nos. 1-2; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 2-3, 8)
19. On April 15, 2009, in anticipation of the impending Controversies Committee hearing, CREATE filed with the NJSIAA a response to the HCIAA's findings on each charge, alleging both procedural and substantive errors and appending several exhibits in support of its contentions. As summarized by the NJSIAA, CREATE's appeal focused on three issues: denial of due process with respect to the five charges included in the HCIAA's final decision; failure to prove any of such charges; and imposition of an excessive penalty, even assuming some violations did occur. (Statement of Items, No. 3; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 3)
20. On April 23, 2009, the NJSIAA Controversies Committee held a hearing on the CREATE matter, taking testimony and argument on CREATE's due process claims as well as proceeding to *de novo* hearing of the five violations charged by the HCIAA in lieu of remanding the matter to the HCIAA for rehearing. As memorialized in its written decision of May 21, 2009, the committee: 1) deemed

CREATE's concerns regarding due process to have been addressed by proceeding *de novo* and dismissing certain charges; 2) sustained two of the HCIAA's five charges (the "St. Mary's" and "*Jersey Journal*" charges); and 3) additionally found that CREATE did not regularly supply rosters of eligible students or consistently provide security personnel as required, and that it allowed a transfer student to play a game in violation of NJSIAA's six-day practice rule. The committee "reversed and modified" the penalty assessed by the HCIAA, instead imposing a penalty of suspension for the 2009-10 and 2010-11 school years – during which "an experienced and certified athletic director must be employed, who will in turn engage coaches who have completed courses conducted by the NJSIAA" – with the proviso that the school's student-athletes could participate in interscholastic athletics in their districts of residence so long as they met NJSIAA eligibility standards. The HCIAA was directed to cooperate in this process by entering along with CREATE into an appropriate Corrective Action Plan for submission to the NJSIAA by September 2009. (Petition of Appeal at ¶21-24; NJSIAA Hearing Transcript [Statement of Items, No. 6] at 11-12 and *passim*; NJSIAA Controversies Committee Decision [Statement of Items, No. 7] at 4-10)

21. On May 26, 2009, CREATE appealed the decision of the NJSIAA Controversies Committee to the NJSIAA Executive Committee. Speaking at the Executive Committee meeting on June 3, 2009, CREATE's representative reiterated that CREATE had been denied due process by the HCIAA at every turn, noted that the NJSIAA Controversies Committee had sustained only two of the HCIAA's five charges yet had effectively upheld the conference's penalty, and argued that CREATE's situation should be reconsidered in light of: 1) the fact that the school had been in existence for less than ten years and was entitled to some leniency while learning the rules of interscholastic athletics; 2) the school's taking of immediate action when notified of the events in question; and 3) the importance of allowing inner city students to stay in the league and represent their community, so that – at the very least – those sports without violations should be allowed to continue. After hearing opposing arguments from the Acting Chairman of the Controversies Committee, the Executive Committee determined, by a vote of 26-0 with 5 abstentions, to uphold the decision of the Controversies Committee in its entirety;⁹ such determination was memorialized in a written decision dated June 18, 2009. (Petition of Appeal at ¶27; Statement of Items, Nos. 8-10; Supplemental Statement of Items, No. 1)
22. On June 17, 2009, CREATE advised the NJSIAA that it intended to appeal the Executive Committee's decision to the Commissioner and requested a copy of the record on appeal; the following day, the NJSIAA replied with information on how to file such appeal and the process for obtaining records and transcripts. On July 13, 2009, CREATE filed the instant appeal to the Commissioner. (Petition of Appeal, Certification of Bruce W. Padula, Esq.; Statement of Items, No. 10; Supplemental Statement of Items, No. 2)

⁹ Minutes of this meeting, but not a transcript, were provided to the Commissioner on appeal.

CREATE'S POSITION

CREATE asserts that the NJSIAA's decision must be reversed as arbitrary, capricious, unreasonable, and not supported by sufficient evidence in the record as a whole, since it perpetuates the HCIAA's violation of CREATE's due process rights by effectively sustaining the actions of the conference notwithstanding its recognition of their procedural impropriety. According to CREATE, the NJSIAA should have categorically dismissed the charges against it once the NJSIAA acknowledged that the HCIAA had denied CREATE's due process rights by failing to provide adequate notice of charges and hearings and by considering charges that were neither timely filed nor reduced to writing as required by conference bylaws. CREATE opines that "[had] the HCIAA provided CREATE with even rudimentary due process and complied with its own bylaws, this matter would almost certainly have been resolved logically (*sic*) and not escalated to this level;" but instead, the matter rose to consideration by the NJSIAA, which then reviewed all the charges and "based its decision primarily on a deficient record and hearsay testimony, [failing] to consider any subsequent remedial measures taken by CREATE." (CREATE's Appeal Brief at 2, 6, 14)

With respect to the two specific HCIAA charges actually sustained by the NJSIAA, CREATE argues that the charge relating to the St. Mary's incident should be dismissed because: 1) no written documentation was presented to prove that CREATE had advance notice of Lalicato's "closed gym" requirement; 2) any "admissions" made by CREATE's representatives at the February 25, 2009 HCIAA Controversy Committee meeting were elicited without the commenters' knowledge of the purpose of the meeting or the penalty being sought; 3) Steve Lipski's testimony denying the purported admissions was not hearsay as claimed by the NJSIAA, since he – unlike the HCIAA members on whom the NJSIAA improperly relied – had

first-hand knowledge of all charges as chief school administrator, notwithstanding that he did not attend the meeting in question; and 4) CREATE's administration had no foreknowledge of the non-CREATE student's presence at St. Mary's, cooperated fully with Lalicato's request for the student's removal, provided appropriate security for the game, and took immediate action to discipline the coach who allowed the incident to occur – a coach who no longer works for the school as a result of this incident. (CREATE's Appeal Brief at 8-11)

Regarding the *Jersey Journal* ad, CREATE reiterates its arguments before the NJSIAA that it was given no notice of such charge prior to the February 25, 2009 Controversy Committee meeting, nor was the charge properly reduced to writing, thus “offending even the most basic due process rights;” moreover, according to CREATE, the ad in question does not constitute recruitment because it neither invites nor encourages any person to participate in athletics at CREATE, but merely announces creation of CREATE's football program and provides information on conference activities, the school's facilities and the benefits of a CREATE education – as is CREATE's right under the First Amendment and as is routinely done by other schools in the HCIAA. (CREATE's Appeal Brief at 11-13, citing *Tennessee Secondary School Athletic Association v. Brentwood Academy*, 551 U.S. 291 (2007) [Statement of Items, No. 3d, hereafter “TSSAA”] and specified exhibits before the NJSIAA [Statement of Items, Nos. 3e, 3f, 3g])

THE NJSIAA'S POSITION

In response, the NJSIAA counters that its decision was both reasonable and supported by sufficient evidence in the record as a whole, and that CREATE did, indeed, receive the due process to which it was entitled; consequently, according to the NJSIAA, the applicable

standard of review dictates that its decision must be upheld by the Commissioner. (NJSIAA’s Reply Brief at 17) The NJSIAA further notes that CREATE’s brief contains a number of “errors,” including: 1) failure to mention that CREATE was already on probation for an “abysmal record” of serious violations of NJSIAA rules and regulations; 2) contending that the NJSIAA disregarded the HCIAA’s procedural errors and based its decision on the totality of charges raised, ultimately sustaining the HCIAA’s decision to suspend CREATE – when, in fact, the NJSIAA sustained only two of the five HCIAA charges and modified the HCIAA’s penalty from a fine¹⁰ and expulsion to a two-year assisted suspension with provision for CREATE’s student-athletes to join the public school teams in their districts of residence; and 3) stating that CREATE “willingly worked” with Mr. Lalicato to remove the non-CREATE student from the premises at St. Mary’s, when Lalicato’s undisputed testimony was to the contrary. (*Id.* at 18-20)

Moreover, the NJSIAA continues, CREATE’s brief dwells on lack of notice and other due process issues at the HCIAA level without addressing the substantial due process thereafter provided by the NJSIAA, including the grant of a stay pending plenary hearing, full consideration of a detailed brief and multiple exhibits, representation by counsel, presentation of sworn testimony and opportunity to cross-examine witnesses, a detailed written decision, an executive hearing on appeal, and strict compliance with all NJSIAA procedural rules; it further ignores that, in recognition of CREATE’s legitimate concerns about the due process provided to it at the HCIAA level, the NJSIAA considered the matter *de novo*, without any deference to the findings of the HCIAA – which additionally had the burden of proving its charges against CREATE. (NJSIAA’s Reply Brief at 20-21) The NJSIAA also contends that each of its findings was supported by competent evidence in the record, including undisputed testimony in

¹⁰ See note 8 above.

the case of the St. Mary's incident and the ad itself in the *Jersey Journal* incident – the latter, on its face, inviting vulnerable middle school students to attend CREATE to play football, in rank violation of the regulatory limitations on “freedom of speech” with which CREATE agreed to abide, as contemplated by *TSSAA, supra*, in voluntarily joining the NJSIAA. (*Id.* at 21-24)

Finally, the NJSIAA states that the overwhelming evidence before it proved CREATE to be a school that was continuously violating the rules of good sportsmanship, but that it nonetheless attempted to fashion a penalty that was remedial rather than punitive – providing for student-athletes whose conduct was not in question to continue in sports at their home schools, and for CREATE to have an opportunity to right itself by hiring competent staff, providing for training and working with the HCIAA to address deficiencies while on suspension. The NJSIAA characterizes its decision as “a sensible response to a serious problem,” and urges that it not be disturbed by the Commissioner. (NJSIAA's Reply Brief at 24)

DETERMINATION

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss CREATE's appeal.

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 a constitution, bylaws, rules and regulations approved by the Commissioner of Education and adopted annually by member schools, for which they become school policy enforceable by the NJSIAA.

It is well established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner

may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by CREATE that the Association applied such rules 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); *Kopera v. West Orange Board of Education*, 60 N.J. Super. 288, 297 (App. Div. 1960). Nor may the Commissioner substitute her own judgment for that of the NJSIAA, even if she 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 committee. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 S.L.D. 259. As codified to provide clear notice to the public and regulated parties:¹¹

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:3-7.5(a)*.

Additionally, the New Jersey courts have spoken as to the narrow scope of “arbitrary, capricious, or unreasonable” in the context of challenges such as that herein:

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't. Protection*, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), *aff'd* 131 N.J. Super. 37 (App. Div. 1974).

¹¹ See 31 N.J.R. 4173(a) and 32 N.J.R. 1177(a).

Thus, petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden, and, considering the record of this matter in light of the prescribed standard of review, the Commissioner cannot find that CREATE has met that burden.

In essence, CREATE takes the stance before the Commissioner that the NJSIAA should have summarily dismissed all charges against it, with no consideration whatsoever of their merits or circumstances, because of the errors in notice and procedure made by the HCIAA prior to its final decision of February 27, 2009 – without which, according to CREATE, the St. Mary’s incident would have been reasonably resolved at the county level and never have caused CREATE to come before the State association. Under the particular circumstances of this matter, however, the Commissioner finds this argument both unpersuasive and disingenuous.

First, any suggestion by CREATE that, but for the errors of the HCIAA, no aspect of this matter would have risen to the level of consideration by the NJSIAA, is purely speculative.¹² Moreover, contrary to CREATE’s contention, the record is clear that the NJSIAA did not merely review and adopt the HCIAA’s findings and penalties without regard for underlying deficiencies in notice and procedure; rather, it fully considered the circumstances of CREATE’s appeal, reviewed the totality of argument, testimony and evidence before it, and sustained only those two charges that had been timely raised and clearly proven and on which CREATE had been afforded sufficient opportunity to be heard. Having done so, it then appropriately took into account CREATE’s history of past infractions and the many indications on record of continuing problems within the school’s sports program, and – consistent with its statutory obligations – fashioned a remedy designed to ensure safe and fair competition as well as full opportunity for all eligible students to participate in interscholastic athletics – seeking at

¹² Indeed, the record indicates that the *Jersey Journal* ads were forwarded to the NJSIAA by at least one HCIAA member. (Transcript of NJSIAA hearing [Statement of Items, No. 6] at 69, 73)

once to address correction of ongoing deficiencies at CREATE and to insulate students, as far as possible, from the errors and oversights of the adults responsible for operating the program.

In objecting to the NJSIAA's decision, what CREATE is effectively asking the NJSIAA – and the Commissioner – to do is overlook CREATE's prior history of noncompliance, ignore numerous indications of poor program management, and disregard overwhelming evidence of two recent violations in safety procedures and recruitment – both serious and both committed while the school was already on probation for a serious violation of a different type (athlete eligibility) as well as general issues of program oversight, and student, staff and fan behavior. Moreover, with respect to the NJSIAA's sustaining of the St. Mary's charge, CREATE cannot seriously dispute that the incident occurred as found by both the HCIAA and the NJSIAA, and, notwithstanding that expected notice procedures may not have been followed, it is clear that the CREATE representatives who appeared before the HCIAA Controversy Committee on February 25 had direct knowledge of the incident and knew that it would be discussed that day in light of Mr. Lalicato's complaint, of which CSA Lipski had been verbally advised on February 11 and to which CREATE had actually filed a written response signed by two of the three representatives in attendance. Similarly, with respect to the *Jersey Journal* ad – which appeared subsequent to the HCIAA's February 11 general meeting but prior to the February 25 Controversy Committee meeting – CSA Lipski was obviously made aware of concerns regarding it prior to the February 25 meeting, to the point that he had the ad immediately pulled after its first appearance on February 18; moreover, CREATE was afforded full opportunity to persuade the NJSIAA that the ad did not constitute "recruitment" in violation of NJSIAA rules, and the NJSIAA's conclusion that it did – a conclusion, incidentally, with

which the Commissioner wholly concurs – is based on both sound analysis of applicable case law and a reasoned exercise of judgment as to the nature and likely effect of the ad’s content.

Finally, with respect to the penalty ultimately imposed, the Commissioner finds the NJSIAA’s directive to be neither an unfair singling out of CREATE nor a disproportionate response to a relatively minor incident that could have been amicably resolved, as suggested by CSA Lipski during testimony¹³ and in CREATE’s arguments before the NJSIAA and on appeal. Simply stated, the Commissioner cannot ignore that, in addition to the two serious, specific charges sustained, the record of this matter – in many cases through CSA Lipski’s own testimony – is replete with examples of ignorance or disregard of rules by CREATE officials, as well as ample evidence of disarray and lack of coordination and oversight in the school’s sports program, notwithstanding that attempts may be made to address infractions once committed and that there may have been no ill intent or sanctioning of error or wrongdoing on the part of high-level school officials;¹⁴ one need not subscribe to the views that CREATE is a renegade out to assemble winning teams without regard for rules,¹⁵ or that its actions perpetuate an image of dishonesty, danger, and lawlessness and tarnish the image of the entire Hudson County conference,¹⁶ to recognize that its sports program – despite prior penalties, the provision of considerable outside assistance, and efforts to improve on the part of school administrative staff – is not operating in a manner consistent with the goals and obligations of the NJSIAA. Under circumstances such as these, the suggestion that the NJSIAA overstepped its bounds in

¹³ See Transcript of NJSIAA Hearing [Statement of Items, No. 6] at 100-01, 109-110.

¹⁴ See Transcript of NJSIAA Hearing [Statement of Items, No. 6] at 83-109.

¹⁵ See Transcript of HCIAA Hearing [Statement of Items, No. 3i] at 22-24.

¹⁶ See Exhibit C-1, memo from Snyder High School Athletic Director (Statement of Items, No. 4, referenced at 5-6 [Operative Fact No. 14] above).

imposing on the program a two-year, guided suspension¹⁷ while its students are permitted to play elsewhere, is nothing less than irresponsible – and the Commissioner can reach no other conclusion than that the NJSIAA acted fairly, reasonably and fully in accordance with its own obligations and applicable law in reaching its final decision in this matter.

Accordingly, the Commissioner having found that the NJSIAA afforded CREATE the requisite level of due process and that its decision was in all respects reasonable and sufficiently supported by the record, the NJSIAA’s decision is upheld and the petition of appeal dismissed.

IT IS SO ORDERED.¹⁸

COMMISSIONER OF EDUCATION

Date of Decision: October 22, 2009

Date of Mailing: October 22, 2009

¹⁷ In this regard, the Commissioner expressly rejects CREATE’s contention that the NJSIAA “effectively upheld” the penalty imposed by the HCIAA, since a suspension by its very nature entails a presumptive entitlement to restoration upon fulfillment of the terms of suspension, while an expulsion with permission to reapply after passage of a specified period of time offers no such presumption.

¹⁸ This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3 and *N.J.A.C.* 6A:3-7.6.