

#93-09

D.S.J., on behalf of minor child, J.J., :  
PETITIONER, : COMMISSIONER OF EDUCATION  
V. : DECISION  
NEW JERSEY STATE INTERSCHOLASTIC :  
ATHLETIC ASSOCIATION, :  
RESPONDENT. :  
\_\_\_\_\_ :

### SYNOPSIS

Petitioner sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying her request for a “hardship waiver” to allow her son, J.J., to participate in Parsippany High School interscholastic basketball contests for the 2008-2009 school year, following his December 2008 transfer from a private school without a *bona fide* change in parental residence. Petitioner contended that the transfer was for urgent and unforeseen academic reasons, and not for athletic advantage.

The NJSIAA argued that the “hardship” provision of its transfer rule permits waivers from athletic ineligibility *only* where the transfer is compelled by an “unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family,” such as such as the unexpected inability to pay private school tuition due to job loss, and that transfer of a student for academic reasons simply does not constitute the type of hardship intended by the rule.

The Commissioner upheld the NJSIAA’s decision and dismissed the petition, noting that: 1) the transfer rule on its face precludes granting of a waiver except under extraordinary circumstances, so that legitimate – even commendable – reasons for a transfer will not suffice in the absence of such circumstances; and 2) the NJSIAA has chosen, in the interest of ensuring integrity and fairness in athletic competition statewide, to apply its rule narrowly, deeming parental attempts to address academic or educational issues – even if both serious and unexpected – not to be the type of calamitous “act, condition or event” contemplated by a rule intended to accommodate victims of uncontrollable external forces. Thus, the Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – could not find that the NJSIAA acted arbitrarily or unreasonably in denying a waiver to petitioner.

<p>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.</p>
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March 13, 2009

D.S.J., on behalf of minor child, J.J., :  
PETITIONER, : COMMISSIONER OF EDUCATION  
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NEW JERSEY STATE INTERSCHOLASTIC :  
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For Petitioner, Patrick J. Jennings, Esq.

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

This matter came before the Commissioner of Education on January 20, 2009, through the filing of a petition of appeal by D.S.J. (petitioner) on behalf her minor son (J.J.), in full conformance with applicable procedural rules at *N.J.A.C.* 6A:3-7.1.<sup>1</sup> In her appeal, petitioner sought reversal, on an expedited basis, of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying her request for a “hardship waiver” that would allow J.J. to participate in Parsippany High School interscholastic basketball contests for the 2008-09 school year, following his December 1, 2008 transfer from Seton Hall Preparatory High School without a *bona fide* change in parental residence. Petitioner concurrently filed a motion for emergent relief, seeking J.J.’s participation during the pendency of the appeal, which was denied by the Commissioner in a letter decision dated January 23, 2009. In her decision, the

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<sup>1</sup> Petitioner provided what she represented to be the entire record before the NJSIAA, as well as proof that an official statement of items had been duly requested from the NJSIAA and would be supplied to the Commissioner upon receipt (Petition of Appeal at ¶8-9; Exhibit F). As events transpired, no statement of items was forthcoming; however, the NJSIAA’s answer to the petition (at 2) admitted petitioner’s representation as to the content of the record.

Commissioner established an expedited schedule – consistent with the provisions of *N.J.A.C.* 6A:3-7.2 through 6A:3-7.4 – affording petitioner the opportunity to submit further argument on the merits of her appeal and directing the NJSIAA to answer the petition and file a responsive brief. Petitioner’s submission, in the form of a detailed certification with appended exhibit,<sup>2</sup> was timely filed on January 27, 2009; the NJSIAA’s answer and brief timely followed on January 30, 2009. Upon receipt of these submissions, the record was closed and the matter proceeded to determination.

### OPERATIVE FACTS

1. J.J. is currently a junior at Parsippany High School, which he entered on December 1, 2008 following his transfer from Seton Hall Preparatory High School (Seton Hall). J.J. attended Seton Hall during his freshman and sophomore years (2006-07 and 2007-08), and during the three months of his junior year (2008-09) prior to the transfer. Before entering Seton Hall, J.J. had attended public school (Grades 4-8) in the Parsippany school district, where he and petitioner reside. (Petition of Appeal at ¶¶11, 12, 22; Exhibit D, items D,E,F,G,H)
  
2. Although not a classified student, J.J. received academic support services in grammar and middle school. Thus assisted, he did well in public school and standardized testing (Terra Nova and Grade Eight Proficiency Assessment) through the 8<sup>th</sup> grade, and additionally passed the admission tests for Seton Hall and the Morris County School of Technology; no recommendation was made at that time to continue support services into the 9<sup>th</sup> grade. J.J. decided to attend Seton Hall, where he found it necessary during his first two years to avail himself of help classes and in-school tutoring – the latter recommended by a guidance counselor in response to petitioner’s expressed concerns about J.J.’s performance. J.J.’s grades ranged from A through C, averaging 2.64 in his freshman year and 3.11 in his sophomore year, for a cumulative average of 2.91 and a class rank of 191/251 at the end of his sophomore year. (Petition of Appeal at ¶¶22-27; Exhibit D, Items E, I, J; Exhibit E, Item A; Exhibit B at 90-91<sup>3</sup>)

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<sup>2</sup> The referenced exhibit is a copy of the summary report presented to the NJSIAA at hearing (Exhibit D, Item K; see Operative Fact No. 7), together with its underlying detailed report and documentation, which was not a part of the record before the NJSIAA. The NJSIAA did not object to inclusion of petitioner’s factual elaborations (through the certification) or the expanded report in the record before the Commissioner.

<sup>3</sup> Exhibit B is the transcript of petitioner’s hearing before the NJSIAA.

3. Petitioner was concerned that J.J. was not achieving at the desired level of excellence despite working hard, completing homework, and participating in class; of particular concern were his C's in English and History. Petitioner was also concerned about the wide variance in J.J.'s test grades, which were rarely clustered around the course average he ultimately received; she was especially concerned that the lowest of such grades were inconsistent with his daily work and had the effect of precluding him from "achieving markedly higher course averages." (Petition of Appeal at ¶28; Exhibit D, Item H; Exhibit B at 91-92)
4. Upon receiving J.J.'s final exam and course grades at the end of his sophomore year, petitioner decided that, despite everyone's best efforts, J.J. was not going to be successful at Seton Hall, and that maybe a change was needed. However, because she lived and worked out of state for the summer, she was unable to carry out her intention. (Exhibit D, Item H; Exhibit B at 93-94)
5. On returning in the fall, petitioner pondered how to make her son more successful, considering that he did not have the best grades he could get, which would limit his success factors moving forward, such as college opportunities and perhaps even his ability to complete high school – since his school work as a junior and senior would get progressively harder and he was already struggling. Petitioner made inquiry regarding J.J.'s possible attendance at a private school (not identified) with smaller classes, but that school indicated that J.J.'s English grade would keep him from being successful, and she did not pursue the matter further. (Exhibit D, Item H; Exhibit B at 94-96, 99)
6. On the advice of professional educators whom she knew in a context not relating to J.J., petitioner had J.J. tested privately – since J.J. had not been recommended for in-school testing and petitioner was told that private testing would be more extensive than in-school testing in any event – to ascertain what was preventing him from achieving at a level consistent with his efforts and goals, and to identify what would be necessary to enable him to improve. Petitioner also arranged for J.J. to receive private one-on-one tutoring in English and SAT preparation, with providers developing strategies based on his demonstrated needs and abilities, beginning on September 25, 2008; as of January 2, 2009, he had attended 20 one-hour sessions.<sup>4</sup> J.J. remained at Seton Hall during this process because he was not failing – nor could petitioner say that he would fail – and she saw no purpose in transferring him without a plan, which only came after seeing the results of the referenced testing (See No. 7 below). (Petition of Appeal at ¶29-30; Exhibit D, Item H; Exhibit E, Item B; Exhibit B at 95-96, 98-99, 102).
7. The primary professional evaluator consulted by petitioner concluded, in an undated summary report reflecting the results of testing conducted on October 27

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<sup>4</sup> Although the record does not definitively so establish, it appears from the referenced exhibit that such tutoring was ongoing as of the date of the letter.

and November 4, 2008,<sup>5</sup> that J.J.’s performance during testing “puts him at academic risk,” and that he had a “language based disability” and “would benefit from a Section 504 plan with assistance in a Learning Strategies Class and Collaborative Class in English and possibly math.” She further concluded that “accommodations for helping [J.J.] manage his school work and developing memory strategies appear essential for him to learn in the school environment at this time.” (Petition of Appeal at ¶¶31-32; Exhibit D, Item K)

8. Presented with this assessment and believing that Seton Hall could not offer the services necessary to enable J.J. to reach his goals,<sup>6</sup> petitioner made the decision to put J.J. back into the school district where he had previously been successful, with the goal of trying – through the services available in public schools – to increase his grades and get him to be the best student he could be.<sup>7</sup> Petitioner transferred J.J. into Parsippany High School, where he began attending school on December 1, 2008. (Petition of Appeal at ¶¶33; Exhibit D, Item H; Exhibit B at 94-95)
9. Assistant Principal/Athletic Director Ryan Miller believes that the plan put together by petitioner and her professional experts, as effectuated at Parsippany High School, has made J.J. more academically successful. J.J.’s grades since the transfer have gone from F to C in algebra, C to B- in English, D to B+ in history, and B to B+ in Spanish. (Exhibit B at 97)
10. Although J.J. did not participate in basketball during the portion of his junior year he remained at Seton Hall, he did play freshman and junior varsity basketball during 9<sup>th</sup> and 10<sup>th</sup> grades. Pursuant to NJSIAA rules effective for transfers occurring on or after September 1, 2008, such participation rendered him ineligible to participate in interscholastic basketball contests during his junior year at Parsippany, since he had not transferred to another school as a result of a *bona fide* change in parental address. (Exhibit D, Item D; NJSIAA Bylaws, Article V, Section 4.K(2))
11. Petitioner requested that Parsippany High School seek a “hardship” waiver from the NJSIAA so that J.J. could play in interscholastic contests as a junior (Exhibit D, Item C). Pursuant to NJSIAA bylaws, a hearing was held before NJSIAA’s Eligibility Appeals Committee (EAC) on January 7, 2009, after which the EAC

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<sup>5</sup> These dates are not indicated in the summary report, but may be found in Exhibit A of Petitioner’s Supplemental Affidavit (see Note 2 above).

<sup>6</sup> It is noted that the record does not permit a conclusion as to the accuracy of this belief.

<sup>7</sup> Petitioner also obtained a January 2, 2009 statement from the provider of J.J.’s English tutoring services (see Operative Fact No. 6 above) that “staffing and resources to provide [assistance of the type the provider was offering to J.J.] are commonly available in public schools and often are not available in private school settings.” (Exhibit E, Item B)

voted unanimously<sup>8</sup> to deny petitioner's request for waiver. A written decision embodying the EAC's determination, which is the final decision of the NJSIAA, was issued on January 9, 2009 (Exhibit C). The decision stated that petitioner's decision to transfer J.J. to another setting to improve his academic performance, however commendable, did not amount to an "unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family" as required by NJSIAA bylaws, and thus could not meet the standard for waiver; however, the EAC did urge J.J. to practice with the basketball team and seek to join the squad in competition as a senior. Petitioner retained legal counsel (Exhibit F), who on January 20, 2009 filed the instant appeal.

### PETITIONER'S POSITION

From the outset, petitioner has stressed that she did not transfer her son to obtain an athletic advantage, but solely for academic reasons. When questioned by the EAC at the conclusion of her hearing – where she appeared without representation – as to how J.J.'s situation as she had described it constituted a hardship as specifically defined by NJSIAA bylaws, petitioner responded as follows:

I guess if when he had the service we didn't think he needed it and now we think he needs it. I'm not sure how that doesn't meet the criteria. I mean as a parent, the criteria for hardship – my son has – should be able to go to school and not be frustrated or believe that people believe he's not doing what he's supposed to be doing. Was not the case here. He had an issue. It wasn't to the extent he needed to be classified. It was never recommended for him to be tested. When you do private testing, it's actually more extensive then when you do in-schoolhouse testing. It was recommended to go outside the school district, and have him tested outside the school district. What we were looking for, we were looking for why he can't achieve the goals that he wants to achieve. I'm not saying I'm looking for my son to have been the top student in the school. That's not what I was looking for. What I was looking for was my son if he works hard and he tries that he should be able to achieve the goals that he's attempting to achieve. I think that's really what the point of going to school and everything is.

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<sup>8</sup> With one abstention, by a committee member affiliated with Seton Hall. (Exhibit B at 88, 103)

Now, if he had turned around and stayed at Seton Hall Prep, and again we're talking skills based – we're talking in this case a deficiency in vocabulary skills, which cuts across all of your classes. If we had not attempted to work on this, this does become a hardship now. You're saying that maybe he doesn't pass all his classes at the end of the junior year or he doesn't pass his classes at the end of his senior year, he does not get to go to college. That's a lifetime impact. So, we're not talking about, you know, just one little issue. We're talking about the issue or impact of life in general and what his success factors will be as he moves forward. (Exhibit B at 98-99)

On appeal, through counsel, petitioner further contended that the NJSIAA (upheld by the Commissioner in her ruling on emergent relief) erred in characterizing petitioner's transfer of J.J. from Seton Hall to Parsippany High as simply an attempt to "improve his academic performance," when it, in fact, represented a necessary parental intervention to rescue a child from "all but certain educational failure". According to petitioner, J.J. clearly met the standard for waiver of the NJSIAA ineligibility rule, since the need for his transfer was: "unforeseeable" in that no one had advised petitioner prior to discovery of J.J.'s learning disability through testing in the fall of 2008 that the boy might have deficiencies requiring further intervention; "uncorrectable" because J.J. could not get the services he needed at Seton Hall; and "unavoidable" because, once petitioner had irrefutable evidence – as set forth in detail in her certification and exhibit on appeal<sup>9</sup>– that J.J. would become an "academic casualty" if he remained at Seton Hall, she had no alternative but to effectuate his transfer in order to avoid the severe hardship that would otherwise have befallen him. (Petition of Appeal at ¶34; Brief in Support of Motion for Emergent Relief at 4; Certification of D.S.J., with attached Exhibit A)

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<sup>9</sup> See Note 2 above.

### THE NJSIAA'S POSITION

The NJSIAA states that the entire purpose of the “hardship” provision, newly incorporated into its bylaws for the 2008-09 school year, is to grant waivers from athletic ineligibility upon transfer of a student – as it has already done on a number of occasions this year – *only* where the transfer is compelled by circumstances which are beyond the expectation and control of the student’s parent and beyond the power of the parent to correct, and which impose a severe hardship on the student or family – such as the unexpected inability to pay private school tuition due to job loss or other economic circumstances. The NJSIAA reiterates that Article V, Section 4.K(2) of its bylaws explicitly requires an “unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family” in order for a waiver to be granted, and that transfer of a student to improve his or her academic performance simply does not, in its view, constitute the type of hardship required by this standard. According to the NJSIAA, petitioner’s arguments on appeal essentially reflect assertions already considered by the EAC, and her supplementary documentation “merely emphasize[s] what was found by the EAC, namely that [J.J.’s] transfer was undertaken to enhance [his] academic performance and while commendable, did not constitute a hardship as defined by the Bylaw.” What petitioner effectively seeks, the NJSIAA asserts, is to have the Commissioner substitute her judgment for that of the NJSIAA – in violation of the applicable standard of review. (NJSIAA’s Answer at 3-4 and Letter Brief at 1-3, quotation at 3).

### DETERMINATION

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss petitioner’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 the petitioner 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:<sup>10</sup>

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).

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<sup>10</sup> See 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(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).

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 petitioner herein has met her burden so as to entitle her to prevail on appeal.

In order to address the evident potential for abuse of student transfers in the realm of interscholastic athletics, the NJSIAA has chosen, effective with the 2008-09 school year, to adopt and enforce strict rules barring any 10<sup>th</sup>-, 11<sup>th</sup>- or 12<sup>th</sup>-grade student who transfers from one school to another without a *bona fide* change in parental address from competitive participation for a period of one year in any sport in which he or she has previously participated at the high school level, with exceptions allowed only upon demonstration that the transfer was the result of an “unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family.” Thus, NJSIAA rules on their face establish a standard precluding waiver under anything less than extraordinary circumstances, and, in adopting such rules, the NJSIAA has served notice on its member schools, parents and students that – in the absence of such circumstances – legitimate, even

commendable, reasons for a transfer will not suffice to enable a student to overcome the regulatory barrier to immediate participation in certain athletic contests.

Moreover – as evidenced by the EAC’s questioning of petitioner, the committee’s ruling and NJSIAA’s defense of it on appeal – the NJSIAA has chosen to interpret and apply its rule narrowly so as to grant as few exceptions as possible, deeming parental attempts to address academic or educational issues not to meet the requisite standard because academic/educational developments – even if both serious and unexpected – are not the type of calamitous “act, condition or event” contemplated by a rule intended to accommodate victims of uncontrollable external forces. While the Commissioner understands petitioner’s reasoning and commends her commitment to her son’s education – as did the NJSIAA – the fact remains that, while the Commissioner might wish to read the rule more broadly in the context of the present matter, she cannot substitute her judgment for that of the NJSIAA, nor can she find the NJSIAA to have applied its rules in a patently arbitrary or unreasonable manner, particularly in light of: the NJSIAA’s duty to ensure fairness and integrity in athletic competition statewide; the potential for creation of an unworkable “slippery slope” if parental decisions to transfer students for academic reasons were deemed to fall within the purview of the “hardship” waiver; and J.J.’s freedom to participate in other sports and to practice with the basketball team until he is eligible to join it for competition in his senior year. *N.J.A.C. 6A:3-7.5(a)*<sup>11</sup>

Accordingly, the Commissioner having found that petitioner was afforded the due process to which she was entitled and that the NJSIAA’s decision denying her request for waiver

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<sup>11</sup> The Commissioner additionally rejects any suggestion that the one-year ineligibility rule – as opposed to its predecessor, which provided for 30 days of ineligibility with no provision for waiver – should not be applied to J.J. because out-of-state summer employment obligations kept petitioner from completing her plans for testing and transfer of J.J. prior to the September 1, 2008 effective date of the one-year rule.

was neither arbitrary nor unreasonable, the NJSIAA's decision is upheld and the petition of appeal dismissed.

IT IS SO ORDERED.<sup>12</sup>

COMMISSIONER OF EDUCATION

Date of Decision: March 13, 2009

Date of Mailing: March 16, 2009

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<sup>12</sup> 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.