

#18-10

AGENCY DKT. NO. 369-12/09

A.P.M. on behalf of minor child, K.A.M., :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 NEW JERSEY STATE : DECISION
 INTERSCHOLASTIC :
 ATHLETIC ASSOCIATION, :
 RESPONDENT. :

For Petitioner, Anthony P. Monzo, Esq. (Monzo Catanese)
 For Respondent, Herbert, Van Ness, Cayci & Goodell, P.C.

BACKGROUND

The material facts in this case do not appear to be disputed. K.A.M., petitioner A.P.M.’s daughter, is currently enrolled as a junior in Lower Cape May Regional High School (“LCMR”). She transferred to LCMR in September 2009 from Wildwood Catholic High School (Wildwood Catholic), where she had attended school as a freshman and sophomore. During both her freshman and sophomore years, K.A.M. had been a member of the Wildwood Catholic varsity swim team, and upon transfer to LCMR she sought to participate in LCMR’s competitive swimming program.

Athletic competition in New Jersey’s public schools is overseen by respondent, the New Jersey State Interscholastic Athletic Association (“NJSIAA”), a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, B.C. v. Cumberland Reg. Sch. Dist.*, 220 N.J. Super. 214, 234 (App. Div. 1987). Article V,

Section 4 (K)(2) of NJSIAA's Bylaws, Rules and Regulations imposes restrictions upon transfer students' eligibility for participation in varsity sports. One restriction is the imposition of a period of one year of ineligibility on tenth, eleventh and twelfth grade student-athletes who transfer from one school to another without a corresponding change of parental/guardianship address. Article V, Section 4 (K)(2) (a) (the "Rule").

K.A.M. transferred to LCMR from Wildwood Catholic in her junior year, without a corresponding parental change of address. Accordingly, under the Rule, she was deemed ineligible to participate on LCMR's swim team during the 2009-2010 season. Petitioner consequently sent a letter dated November 2, 2009 to LCMR's athletic director outlining reasons which, in his view, supported an application for a hardship waiver of the Rule – pursuant to subsection (e) of Article V, Section 4 (K)(2). LCMR, in turn, filed with the NJSIAA's Eligibility Appeals Committee (the "Committee") a request dated November 19, 2009, for a hardship waiver for K.A.M.

The facts and arguments in petitioner's November 2, 2009 letter addressed academic and personal issues. More specifically, petitioner described his daughter's difficulties with a mathematics/science teacher at Wildwood Catholic and his apprehension that Wildwood Catholic might close. Petitioner maintained that swimming had nothing to do with his daughter's transfer, but he also stated that his daughter wanted to swim competitively in her junior and senior years at LCMR so that her college applications would show varsity swimming during all four of her high school years. He mentioned in the last paragraph of his letter that the savings from switching to a public school could help with K.A.M.'s college tuition, and he stated that it would be more convenient for petitioner and his wife to have both teenaged children going to the same school.

K.A.M.'s hearing concerning the requested hardship waiver was conducted on December 9, 2009. At the hearing, the grounds that petitioner's attorney presented for a hardship waiver were the financial ramifications of real estate litigation that K.A.M.'s parents instituted over two years prior to K.A.M.'s transfer to LCMR. No academic issues were discussed, other than the possible enhancement to K.A.M.'s college applications that a record of four years – as opposed to three years – of varsity swimming might represent. Counsel for petitioner also emphasized that K.A.M. was an average swimmer and not likely to have been the subject of athletic recruitment.

Following the hearing, at which sworn testimony was taken from K.A.M., LCMR's athletic director, and K.A.M.'s mother, the Committee concluded that it could not grant a waiver of the one year ineligibility period for K.A.M. since a hardship had not been established. According to petitioner's pleadings, that conclusion was informally conveyed to petitioner on December 10, 2009.

On December 14, 2009, upon learning of the Committee's determination, but before issuance of the Committee's December 18, 2009 written decision, petitioner filed a petition and application for emergent relief with the Commissioner of Education ("Commissioner"). In these papers, petitioner set forth – as reasons supporting a waiver from NJSIAA's eligibility rules – the academic problems and limitations that K.A.M. experienced at Wildwood Catholic and the concern that the school might close. He expanded upon issues that were briefly mentioned in his November 2009 waiver application, *i.e.* better academic options in LCMR, the convenience of sending both his children to the same school, and the possibility of saving for college expenses. The petition included no mention of real estate litigation expenses.

As regards K.A.M.'s competitive swimming, the petition alleged that she is an "average swimmer and has never excelled." (Petition at #3) It further alleged that "Wildwood Catholic . . . has traditionally had a good swim team, and [K.A.M.], although just an average swimmer, really enjoyed being a part of it." However, . . ."Wildwood Catholic never had a JV team which would have been a much better fit for [K.A.M.]" (*Id.* at #16) Also, according to the petition, the LCMR's swim team is "much inferior to Wildwood Catholic." (*Ibid.* at #17) In keeping with these contentions, LCMR Athletic Director Mark Schliffbauer testified at the December 9, 2009 hearing that Wildwood Catholic had a better swim program, so K.A.M. did not change schools for athletic advantage. (T60) Based upon the foregoing allegations, petitioner argued – in the brief supporting his emergent application – that the inferiority of LCMR's swim program precludes any conclusion that athletics was a motivation for K.A.M.'s school transfer, and that the Rule should consequently not be applied to K.A.M.

The Petition was filed pursuant to *N.J.S.A.* 18A:11-3, which mandates that "in matters involving only public school districts and students, faculty, administrators and boards thereof, appeals shall be to the Commissioner and, thereafter, the Superior Court." With respect to applications for emergent relief from a NJSIAA decision, the governing regulation is *N.J.A.C.* 6A:3-7.1, et seq. Pursuant to the regulations, petitioner was required to submit 1) a copy of the Committee's decision; 2) a copy of the record on appeal, including a Statement of Items Comprising the Record or a certification attesting that same has been requested from the NJSIAA and will be provided to the Commissioner within ten (10) days; and, 3) a certification that petitioner has exhausted the NJSIAA internal appeal procedures. Petitioner failed to provide any of the documentation required by the regulations.

Accordingly, by letter dated December 18, 2009, the Department of Education's Bureau of Controversies and Disputes (the "Bureau") advised petitioner that his case could not proceed until the deficiencies were cured. Rather than cure the noted deficiencies, petitioner filed a complaint and application for temporary restraints – *i.e.*, an order allowing K.A.M. to compete with LCMR's swim team while he appealed the decision of the NJSIAA – in the Chancery Division of Superior Court on December 22, 2009. This application raised constitutional issues not pled or argued before the Commissioner.

On December 31, 2009, copies of the challenged decision of the NJSIAA, a transcript of the hearing before the Eligibility Appeals Committee and other items comprising the record were provided to the Commissioner by counsel for the NJSIAA, these having still not been presented to the Commissioner by petitioner as required by *N.J.A.C. 6A:3-7.1(a)*. Review of the NJSIAA's decision revealed that its determination was:

that it could not grant a waiver of the one year ineligibility period for swimming since a hardship had not been established. Unhappiness with academic offerings at a former school does not constitute an unforeseeable, unavoidable and uncorrectable act or condition under the rule. Further, participation in litigation concerning the parents' house was not sufficiently identified as actually compelling a transfer.

NJSIAA December 18, 2009 decision at. 3.

The Superior Court dismissed petitioner's lawsuit on Monday, January 4, 2010. The Commissioner does not have the court's ruling but was informed that the Chancery Judge contemplated that the Commissioner would adjudicate the issues set forth both in the December 14, 2009 petition and in the December 22, 2009 complaint. In that regard, petitioner submitted to the Commissioner on January 5, 2010 a supplemental brief alleging that the Rule violates the New Jersey Constitution, Article I, Paragraph 1.

On January 6, 2010, having received the NJSIAA's decision, the transcript of the December 9, 2009 hearing and the items comprising the record before the Eligibility Appeals Committee, the Commissioner rendered a decision denying petitioner's emergent application. On that same date, the NJSIAA filed a brief and certification responding to petitioner's supplemental brief of January 5, 2010. The Commissioner now addresses the underlying merits of the case, including the merits of the arguments raised for the first time in Superior Court.

DETERMINATION

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

A. Appellate Standard for Review of NJSIAA Actions and Determinations

As explained above, 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. Both Wildwood Catholic and LCMR are member schools.

The present Rule imposing a one year waiting period for student athletes who transfer schools without a bona fide change of parental address replaced a prior rule requiring a waiting period of thirty days. In his January 6, 2010 certification, Robert W. Baly, Assistant Director of the NJSIAA, explained that the prior rule had been one of the most lenient in the nation (NJSIAA Certification at #11) and NJSIAA member schools were concerned that it was not effective. (*Id.* at #13) An NJSIAA task force, after meeting in 2007 with school representatives throughout the State, recommended increasing the transfer waiting period to 365

days – the amount of time imposed by at least thirty-eight other state athletic organizations. (*Ibid.* at #15) The change was made in April of 2008 (*Id.* at #16) and the Commissioner approved it on May 16, 2008.

With the rule change, the NJSIAA included a provision allowing hardship waivers. “Demonstrable hardship” is defined in the Rule itself as an “unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of a severe and non-athletic burden upon the student or his/her family.” Documentary support of the hardship claim must be provided. (NJSIAA Bylaws, Article V, Section 4 (K)(2) (e))

Thus, the language of the waiver provision, on its face, establishes a standard precluding waiver under anything less than extraordinary circumstances, and the Commissioner has sanctioned the standard. Adoption of the Rule has served as notice to member schools, parents and students that – in the absence of extraordinary 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. For instance, parental attempts to address academic or educational issues – even if both serious and unexpected – have been found to fall short of the circumstances contemplated by a rule intended to accommodate victims of uncontrollable external forces. *D.S.J., on behalf of minor child, J.J., v. New Jersey State Interscholastic Athletic Association*, Commissioner Decision No. 93-09, March 13, 2009.

According to Baly, eligibility standards, including rules relating to transfers are established to effectuate the NJSIAA’s goal of equalizing athletic opportunities. (NJSIAA Certification at #6) Level playing fields in school athletics can be and have been undermined both by student transfers for athletic advantage and by school recruitment of promising players. (*Id.* at #9) “Athletic advantage” is defined in Article V, Sec. 4(K)(5) as “not limited to:

- a. Seeking a superior athletic team;
- b. Seeking relief due to a conflict with the philosophy or action of an administrator, teacher or coach relating to sports;
- c. **Seeking a team consistent with the student's athletic abilities;** or
- d. Seeking a means to nullify punitive action by the previous school;
- e. Seeking to be coached by the coach at the new school.

NJSIAA Bylaws, Article V, Sec. 4(K)(5) (emphasis added).

Prophylactic measures such as the Rule, according to Baly, are needed to promote equal athletic opportunity by avoiding 1) the severe administrative burden that results from having to individually review every transfer in the State and 2) the difficulty of assessing the motives behind transfers (NJSIAA Certification at #12) especially given the fact that the NJSIAA has no subpoena power or investigative arm. (*Ibid.* at #10)

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the Eligibility Appeals Committee, 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 it applied such rules in a patently arbitrary, capricious or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *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, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

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

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).

Petitioners seeking to overturn decisions of the NJSIAA therefore 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 his burden so as to entitle him to prevail on appeal.

More specifically, the Commissioner cannot find that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner, in light of its duty to ensure fairness and integrity in athletic competition statewide. The issue before the Eligibility Appeals Committee was not whether K.A.M. transferred for athletic advantage, but rather whether K.A.M. had been compelled to transfer as a result of unavoidable hardship.¹ In the present case, the alleged hardships behind K.A.M.’s transfer were unpersuasive.

First, the Commissioner has previously rejected “academic” issues as grounds for hardship waivers. As explained in *D.S.J., on behalf of minor child, J.J., supra*, at 10, granting hardship waivers based upon such issues would create a “hardship” category potentially usable by any student, and lead to an unworkable “slippery slope.” Second, the real estate litigation expenses described by petitioner’s counsel at the December 9, 2009 hearing were unsupported. Third, the Commissioner cannot fault the NJSIAA for declining to view as hardship the private

¹ This is in contrast to one of the arguments posed by petitioner, *i.e.* that K.A.M. did not transfer for athletic advantage.

school tuition petitioner paid, especially in light of his subsequent admission that he could afford it. Fourth, the inconvenience of having children in different schools clearly does not rise to the level of hardship.

As regards the assessment of K.A.M.'s athletic situation, solely in the context of the underlying purpose of the rule, the Commissioner notes that petitioner's view of athletic advantage is too narrow. First, since K.A.M. swam for a better team at her prior high school, it would not be unreasonable to assume that her advent would be an advantage to the LCMR team. Second, K.A.M. could profit from perceptions of her skills compared to those of the swimmers on a lower level team.

Further, the Commissioner concurs with the NJSIAA that the impact of the Eligibility Appeals Committee's decision upon K.A.M. is not severe. K.A.M. would like her record to show that she swam competitively in all four years of high school. To that end, she could swim this year with other competitive programs available to teenagers, such as AAU or USA swimming. In addition, she is free to practice with the LCMR swim team this year.²

B. Petitioner's Constitutional Claims

At the outset, the Commissioner finds, after review of the facts set forth above, that petitioner received the process that was due him. It is undisputed that all necessary notices were provided by the NJSIAA and a timely hearing was held before the Eligibility Appeals Committee – at which petitioner was represented and was able to provide testimony and documentary evidence.

² K.A.M. participated in track at Wildwood Catholic but testified at the December 9, hearing that she does not wish to participate in LCMR's winter track program.

Petitioner contends, however, that respondent's application of the Rule to K.A.M. violated Article I, Paragraph 1 of the New Jersey Constitution and deprived K.A.M. of "substantive" due process. Article I, Paragraph 1 provides:

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

N.J. Const., Art. I, Para. 1 (2009)

As petitioner stated in his letter brief filed with the Commissioner on January 5, 2010, evaluation of his claim under the paragraph set forth above involves the consideration of K.A.M.'s affected right, if any, the extent to which the NJSIAA's action intruded upon that right, and the public need for the restriction. *B.C. v. Cumberland Regional School District and New Jersey State Interscholastic Athletic Association*, 220 N.J. Super. 214, 223 (App. Div. 1987).

It is well established in New Jersey that students do not have a constitutional right to participate in school athletics. The Commissioner has so held, *see, e.g., Board of Education of the City of Camden v. New Jersey State Interscholastic Athletic Association*, 92 N.J.A.R. 2D (EDU) 182, 188 (1992), as have the courts. *Camden City Board of Education v. New Jersey State Interscholastic Athletic Association*, Docket No. A-2802-91T2, slip. op. (App. Div. February 18, 1992), at 6. *See also, Palmer by Palmer v. Merluzzi*, 689 F. Sipp. 400, 408-09 (D.N.J. 1988), *aff'd*, 868 F. 2d 90, 96 (3d Cir. 1989). Consequently, little weight can be given to petitioner's claim.

By way of contrast, the NJSIAA's Rule regarding transferring student athletes was driven by a legitimate concern about fairness in statewide high school athletic competition. Further, it was implemented as a prophylactic measure after a review of information gathered by a statewide task force, and upon the realization that an individual review of every transfer case

was unworkable as a practical matter. Thus, the Rule reflects a significant public need which is weightier than petitioner's interests in this case.

In light of the foregoing, the Commissioner finds that petitioner's constitutional rights have not been violated. Having also found that the NJSIAA's decision denying petitioner's request for waiver was neither arbitrary nor unreasonable, the Commissioner upholds same. The petition of appeal is accordingly dismissed.

IT IS SO ORDERED.³

COMMISSIONER OF EDUCATION

Date of Decision: January 19, 2010

Date of Mailing: January 19, 2010

³ 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.