

#253-13

RAYMOND STAREGO and REYLENE :  
STAREGO, as guardians on behalf of,  
ANTHONY STAREGO, :  
PETITIONERS, :  
V. : COMMISSIONER OF EDUCATION  
NEW JERSEY STATE INTERSCHOLASTIC : DECISION  
ATHLETIC ASSOCIATION, :  
RESPONDENT. :  
\_\_\_\_\_ :

SYNOPSIS

Petitioners sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying their request for a waiver of the Eight Semester Rule – which limits a student’s eligibility for high school athletics to eight consecutive semesters following his or her entrance into the 9<sup>th</sup> grade – to allow Anthony Starego (Anthony) to participate in a fifth year of football at Brick Township High School (Brick). Anthony has been diagnosed with autism, ADHD, and cognitive impairments; he has attended Brick for four years and will most likely continue to attend until he is 21, due to his eligible disability. Anthony will be 19 when the 2013 football season begins, and petitioners also sought a waiver of NJSIAA’s “Age Rule”, which prohibits students who turn 19 before the school year starts from participating in high school sports. Petitioners asserted that they only sought a limited waiver to allow Anthony to participate as a place kicker on the football team – a position that gives him a sense of self-esteem, self-worth, and dignity. The waiver request was referred to the NJSIAA’s Eligibility Appeals Committee (EAC), which heard the matter on March 11, 2013.

The EAC determined, *inter alia*, that: Anthony has already played four years of high school sports, and allowing him a fifth year would provide him with an advantage over all other Brick students; allowing Anthony to play would be a potential safety issue because of a disparity in size between a 19 year old and younger players on the team; and that Anthony is a difference-maker on the field, and would provide the team with a competitive advantage. The EAC concluded that Anthony does not qualify for a waiver, and that it must be guided by its rules of participation and must uniformly apply the rules. The EAC denied the waiver request.

Upon comprehensive review, the Commissioner – who may not substitute his judgment for that of the NJSIAA on appeal – affirmed the decision and dismissed the petition, finding, *inter alia*, that the petitioners did not meet their burden to prove that the decision of the NJSIAA to deny the request for waiver was arbitrary, capricious or unreasonable.

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.
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June 28, 2013

AGENCY DKT. NO. 91-5/13

RAYMOND STAREGO and REYLENE :  
STAREGO, as guardians on behalf of, :  
ANTHONY STAREGO, :  
PETITIONERS, :  
V. : COMMISSIONER OF EDUCATION  
NEW JERSEY STATE INTERSCHOLASTIC : DECISION  
ATHLETIC ASSOCIATION, :  
RESPONDENT. :  
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For Petitioners, Jacqueline DeVore, Esq. (Mayerson & Associates)

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

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying Raymond and Reylene Starego's (petitioners) request for a waiver of the Eight Semester Rule and the Age Rule to allow Anthony Starego to participate in a fifth year of football at Brick Township High School (Brick) for the 2013 season. Anthony has been diagnosed with autism, ADHD and cognitive impairments. Anthony has attended Brick for four years and due to his eligible disability he will most likely attend Brick until he is 21. Anthony will be 19 years old when the 2013 football season begins, and it is undisputed that he has participated in four years of football at Brick.

Athletic competition in New Jersey's public schools is overseen by respondent, 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 J of NJSIAA's Bylaws, Rules and Regulations restricts a student's eligibility to play sports to four years. Specifically, the provision – known as the

“Eight Semester Rule” – provides that, “[n]o student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his or her entrance into the 9<sup>th</sup> grade. A student becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated.” The NJSIAA Guidelines set forth the reasons for the Eight Semester Rule in the NJSIAA Handbook:

This rule is intended to prohibit “red shirting,” and is also aimed at preventing athletically gifted pupils who are not meeting academic standards from replacing other students who are maintaining their academic standards but who might not have the same athletic prowess. The rule is also aimed at maintaining a uniform progression among all member schools within a four-year cycle and equalizing competition within these schools.

The NJSIAA’s handbook also contains an eligibility rule, known as the “Age Rule”, which states that students who turn 19 before the school year starts are too old to participate in high school sports. The Age Rule is also designed to prevent red-shirting, encourage academic achievement and serve as a safety measure. The Interpretive Guidelines recognize that as a result of their Individual Education Program (IEP), many handicapped students will be required to extend their education beyond the customary twelve years.

In appropriate cases, the NJSIAA may grant a waiver of the eligibility rules if the overall objectives of the association and its member schools will not be undermined. The Eight Semester Rule and the Age Rule can be waived when a student proves that he or she cannot comply with the rule due to circumstances beyond his or her control. Waivers of the Age Rule in contact sports specifically “take into account the size, agility and skills of the student and the degree to which these issues will not fundamentally alter the competition.” Waivers of the eligibility rules are only intended to equalize opportunities among otherwise eligible students, not to provide an advantage, and they are “never granted where it would allow a student to participate in more than four seasons in any one sport ...” (NJSIAA Handbook, page 49).

Based on the fact that Anthony has already had played four years of football, Brick filed an Eligibility Waiver Request with the NJSIAA on February 11, 2013 requesting a waiver from the strict application of the eligibility rules so that Anthony can participate in football during the 2013 season. The waiver request was referred to the Eligibility Appeals Committee (EAC). Following a hearing on March 11, 2013, at which sworn testimony was taken, the EAC voted 7-0 that Anthony did not qualify for a waiver of the eligibility rules.

The EAC found that although Anthony is a compelling young man, the eligibility rules are intended to equalize opportunities for students, not to give students – whether disabled or able-bodied – an opportunity to play sports that other students do not have. The EAC determined that Anthony had already played four years of high school football, and allowing him a fifth year would provide him with an advantage over all other students. Additionally, the EAC concluded that allowing Anthony a fifth year of eligibility would necessarily displace another Brick student who only had four years of eligibility. The EAC further determined that they could not rule out the potential safety issue of having a 19 year old play football in a contact sport against students as young as 14 or 15 years old, despite the fact that Anthony is a place kicker as opposed to a position player.

Finally, the EAC found that Anthony is a difference-maker on the field and that allowing him to play an extra year would provide his team with an actual competitive advantage. The NJSIAA points out that Anthony is a college-level kicker, and that he was a starter for a portion of the 2012 season. During the five games that he started, he scored 16 points and kicked a winning field goal with 20 seconds left against Toms River North. In its decision the EAC also noted that the petitioners are seeking special treatment because Anthony's continued participation on the football team would help his development and he would serve as a model for other students with disabilities. The EAC stated that it cannot base its eligibility decisions on

whether sports would be particularly beneficial to a particular student, but rather it must be guided by the rules of participation and must apply those rules uniformly.

On May 3, 2013, the petitioners filed a petition of appeal with the Commissioner of Education challenging the decision of the EAC, which included a brief in support of the requested relief. On May 10, 2013, the NJSIAA filed its answer to the petition, and on May 20, 2013, the NJSIAA filed its brief. No reply brief was filed by the petitioners within the time provided and accordingly the record closed on May 30, 2013.

On appeal, the petitioners argue that the EAC should have granted the waiver request because they are only seeking a limited waiver to allow Anthony to participate on the football team simply to enable him to kick field goals and extra points. The petitioners contend that Anthony's autism disability is entirely beyond his control, and it is why he is able to attend Brick as an IEP student until he is 21. Additionally the petitioners stress that this is clearly not a case of "red shirting" and a limited waiver for the 2013 football season will give Anthony an opportunity to compete for the place kicking position that gives him self-esteem, self-worth and human dignity.

The petitioners also argue that the seminal case of *PGA Tour, Inc. v. Casey Martin*, 532 U.S. 661 (2001) established the applicable standard of review that the EAC was required to apply in this case. In accordance with the Americans with Disabilities Act, 42 USCS et. al., petitioners maintain that a highly individualized impact analysis is required when a person with a disability is seeking a limited waiver or other policy modification that is needed to access the public accommodation. The petitioners contend that the EAC made a series of erroneous factual findings and then compounded those threshold errors by applying a generic and speculative approach and analysis to Anthony's waiver request that is not permitted under *PGA Tour, supra*.

First, the petitioners argue that the EAC wrongfully determined that Anthony was a difference-maker. Petitioners state that Anthony is a decent kicker but he does not give his team any kind of competitive advantage. The petitioners point out that Brick was 3-7 last season, and there are scores of other high school kickers with statistics that are better than Anthony's. Based on his disability, the applicable test is whether the limited waiver and reasonable accommodation would "fundamentally" alter the game of football, and the petitioners argue that it is clear it will not. With respect to the safety concerns found by the EAC, the petitioners argue that at best Anthony would only have incidental contact with other players because he is only a place kicker, and he avoids any type of physical contact because of his disability.

Additionally, the petitioners contend that there will be no displacement issue, and the EAU's finding is purely speculative. The petitioners stress that Anthony's school, coach and entire team support the limited accommodation that they are seeking, and the only player that would compete for the starting kicker position has indicated that he would be glad to play another position if Anthony beats him out. Further, the petitioners assert that there is a no-cut policy at Brick. Finally, the petitioners maintain that the EAC missed the point and significance of Anthony's disability and exceptionality. The petitioners point out that Anthony is a special education student who is entitled to special treatment and his IEP makes several references to playing football; therefore he should be provided with this reasonable accommodation. As a result, the petitioner argues that the EAC's decision should be reversed and the requested waiver should be granted.

In reply, the NJSIAA asserts that it provided the petitioners with elaborate due process, noting that EAC unanimously denied the request for a waiver of the eligibility rules after a hearing on the matter that included testimony from eight witnesses. The NJSIAA further

stresses that the eligibility rules are designed to ensure that all students have an equal opportunity to play high school sports, and limits that opportunity to four years. The NJSIAA maintains that participation in sports is a privilege not a right and none of the cases cited by the petitioners alters that point. The NJSIAA notes that the petitioners contend that when a disabled student may not be able to meet an eligibility requirement because of a disability, there must be an individualized analysis to determine whether a reasonable accommodation can be made that would not fundamentally alter the competition. In this case, the NJSIAA asserts that the EAC did in fact conduct an individualized analysis and weighed various criteria but ultimately found that Anthony's participation in a fifth year of football would fundamentally alter the competition.

The NJSIAA also argues it did not apply its rules arbitrarily and capriciously to Anthony because he has already played the maximum number of seasons that any student is allowed; he is a difference maker on the field; allowing him an extra year of eligibility would displace another student who only has four years to participate; and his participation in football as a 19 year old poses safety concerns. The NJSIAA also stresses that waivers are never granted to give a student the opportunity to participate in a sport for more than four years. The fact that Anthony is disabled does not mandate a contrary result. Finally, the NJSIAA argues that Anthony's IEP was not provided by the petitioners and therefore it is not a part of the record and cannot be considered on appeal. In the alternative if the IEP is considered by the Commissioner, the NJSIAA claims it is clear that an IEP cannot compel participation in interscholastic athletics. Therefore, the NJSIAA requests that the Commissioner affirm the decision of the EAC.

Upon a comprehensive review of this matter, the Commissioner affirms the decision of the EAC. 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. Brick is a member of the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the EAC, 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 his 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 petitioners:

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. Considering the record of this matter in light of the prescribed standard of review, the Commissioner cannot find that the petitioners herein have met that burden so as to entitle them to prevail on appeal.



Specifically, the Commissioner cannot find that the EAC 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 EAC determined that allowing Anthony to play a fifth year of football would provide him with an advantage over all other students; displace another Brick student who only had four years of eligibility; provide his team with an actual competitive advantage because he is a difference-maker; and pose safety issues. It is undisputed that Anthony was a starting varsity kicker for a portion of the 2012 season, and that he scored 16 points and kicked a winning field goal with 20 seconds left against Toms River North. The EAC provided the petitioners with ample due process and there is nothing in the record demonstrating that the EAC's findings as a whole were arbitrary, capricious or unreasonable and as such the Commissioner cannot substitute his judgment for that of the EAC.

Moreover, the Commissioner finds that the EAC's decision to deny Anthony a waiver was not inconsistent with the ADA. The ADA requires "that any 'policies, practices, or procedures' of a public accommodation be reasonably modified for disabled 'individuals' as necessary to afford access unless doing so would fundamentally alter what is offered." *PGA Tour, supra*, 532 U.S. at 688 (citations omitted). Despite the petitioners contentions to the contrary, the EAC did conduct an individualized analysis to determine whether Anthony should be granted a waiver to enable him to participate in a fifth year of football. The EAC considered Anthony's unique circumstances and the impact his additional year would have on competition. There is also no indication that the EAC did not properly weigh the purpose of the eligibility rules in conjunction with Anthony's exceptional situation before concluding that he was not entitled to a fifth year of eligibility. It is also essential to recognize that Anthony has already had the opportunity to play four years of high school football as envisioned by the eligibility rules, and waivers are never granted when the student has already participated in a sport for four years.

The waiver rule only provides an exception to the Eight Semester Rule when, for some reason, a student did not actually play the particular sport for four years during the eight consecutive semesters following his or her entrance into the 9<sup>th</sup> grade. In this case, Anthony has received an equal opportunity to participate, and in fact did participate, in four years of high school football.

Therefore, the EAC's determination that granting Anthony a fifth year of eligibility would fundamentally alter competition is not arbitrary, capricious or unreasonable.<sup>1</sup> Accordingly, the EAC's decision denying the request for waiver is upheld and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.<sup>2</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 28, 2013

Date of Mailing: July 1, 2013

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<sup>1</sup> Anthony is encouraged to continue to practice with the team and attend games, despite the fact that the interscholastic rules prohibit him from kicking in actual games.

<sup>2</sup> Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Superior Court, Appellate Division.