

#344-05

BOARD OF EDUCATION OF THE :
TOWN OF PHILLIPSBURG, WARREN :
COUNTY, R.T.C., JR., individually and :
on behalf of minor child, R.T.C., III, :
C.S., individually and on behalf of minor :
child, R.S., and D.A.D., individually :
and on behalf of minor child, J.D.D., :

COMMISSIONER OF EDUCATION

DECISION

PETITIONERS, :

V. :

NEW JERSEY INTERSCHOLASTIC :
ATHLETIC ASSOCIATION, :

RESPONDENT. :

_____ :

SYNOPSIS

Petitioning Board, together with parents of three student-athletes, sought waiver of the “70% Rule” of the New Jersey Interscholastic Athletic Association (NJSIAA), which requires that a school play at least 70% of its regular season games against New Jersey schools in order to compete for a State championship. The request was based on a claim of hardship resulting from the extensive travel necessary to play New Jersey schools, and the availability of Pennsylvania schools in closer geographic proximity.

Pursuant to procedural rules agreed to by the parties, the NJSIAA Special Committee on Leagues and Conferences (SCLC) heard petitioners’ request. The SCLC’s denial was upheld by NJSIAA’s Executive Committee on grounds that Phillipsburg’s hardship was not significantly greater than that of other member schools, and that the school’s reduced availability for New Jersey play would negatively impact on the Skyland Conference of which it is presently a member.

On appeal, the Commissioner upheld NJSIAA’s position that: 1) the 70% Rule applies to Phillipsburg; 2) the prior grant of a waiver to the Moorestown Friends School does not compel a similar grant to Phillipsburg; 3) NJSIAA is entitled to bring broader policy considerations into its decisions in matters of this type; and 4) the Commissioner’s review is to be conducted under the established “arbitrary and capricious” standard. However, due to procedural deficiencies in the NJSIAA hearings relating to the participation of Skyland Conference officials and the involvement of SCLC members in Executive Committee deliberations, the Commissioner remanded the matter to NJSIAA for proceedings as necessary to make a decision in the first instance—based upon a properly developed factual record, with no ambiguity as to appearance(s) by the adverse party(ies), full opportunity for prehearing discovery of the testimony and evidence to be relied upon by the party(ies), and recusal of Executive Committee members who are also members of the SCLC—as to whether Phillipsburg’s situation is, in fact, so extreme relative to other member schools, that the hardship imposed on it by the 70% Rule outweighs any hardship that will result from its reduced availability for in-state play if a waiver is granted. Petitioners’ federal claims were preserved for future litigation, and their claims with respect to NJSIAA’s assessment of legal fees were reserved for such appeal of NJSIAA’s decision on remand as petitioners deem warranted.

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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ATHLETIC ASSOCIATION,	:	
	:	
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_____	:	

For Petitioners, David B. Rubin, Esq.

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

This matter came before the Commissioner of Education on October 3, 2003, through the filing of a Petition of Appeal by the Phillipsburg Board of Education and three citizen-taxpayers who are also parents of minor student-athletes attending the Phillipsburg public schools (“petitioners”). In their filing, petitioners sought declarations invalidating: 1) the so-called “70% Rule” of the New Jersey Interscholastic Athletic Association (NJSIAA),¹ either on its face or as applied to petitioners; and 2) Article XIII, Section 8 of NJSIAA’s bylaws,² either on its face or as

¹ Requires that, in order to compete in State tournament games, an entrant must have competed against New Jersey schools in 70% or more of their regular season games.

² Provides that a member school will be assessed for NJSIAA’s litigation expenses if it is unsuccessful in appealing an action or decision of NJSIAA.

applied to appeals which are non-frivolous and brought in good faith. Petitioners sought a plenary hearing before the Commissioner because they were not appealing from a quasi-judicial determination of NJSIAA based on an existing evidentiary record, as contemplated by then-applicable rules for the hearing of appeals from NJSIAA decisions, *N.J.A.C. 6A:3-7.1 et seq.* (31 *N.J.R.* 4173(a), 32 *N.J.R.* 1177(a)) However, the parties and the Department subsequently agreed that, in lieu of a plenary hearing at the Office of Administrative Law (OAL), NJSIAA would: 1) convene its Special Committee on Leagues and Conferences (SCLC) to conduct a quasi-judicial hearing—complete with a record, sworn testimony and discovery rights comparable to those of an OAL hearing—prior to issuing a recommendation on petitioners’ request for a waiver of the 70% Rule; and 2) render a final decision through its Executive Committee which would then be appealable to the Commissioner in accordance with the above-noted rules.³ Pursuant to this procedure, a hearing before the SCLC was duly held on October 6, 2004, resulting in a written decision of November 9, 2004 recommending denial of petitioners’ request; the Executive Committee adopted this recommendation as NJSIAA’s final decision on January 12, 2005. On February 15, 2005, petitioners filed an Amended Petition of Appeal retaining the substance of their original submission and additionally pressing claims arising from subsequent proceedings at NJSIAA; NJSIAA’s Answer, the Record on Appeal, and briefs setting forth the positions of the parties were then filed in accordance with *N.J.A.C. 6A:3-7.1 et seq.*

³ Appeals of the type filed by petitioners are now addressed by *N.J.A.C. 6A:3-7.1(b)1*, which requires aggrieved party(ies) and NJSIAA to make mutually acceptable provisions for a hearing at NJSIAA prior to any request for review by the Commissioner. 36 *N.J.R.* 5032(a), 37 *N.J.R.* 1051(b)

As part of the above-referenced discussions, it was agreed that the issue to be addressed during NJSIAA proceedings would be whether the impact of the 70% Rule upon the Phillipsburg Board of Education, when weighed against the impact upon other NJSIAA members and conferences, constituted undue hardship upon Phillipsburg. It was further agreed that the OAL standard for intervention would be liberalized to allow other districts, upon request, to present testimony and evidence at hearing, provided that any such district would be subject to pre-hearing discovery to the same extent as a party. Petitioners' federal claims and NJSIAA's defenses to them were preserved for future litigation.

Consistent with the above, in proceedings before NJSIAA, petitioners did not pursue the claim made in their petition that the 70% Rule was facially invalid; rather, they argued that it did not apply to Phillipsburg based on its legislative intent, or—if applicable—that it necessitated a waiver in Phillipsburg's case because of the demonstrably greater hardship imposed on the district's student-athletes relative to others in purportedly similar situations, and because of the precedent set by a prior waiver granted to Moorestown Friends School, a private religiously affiliated school (Moorestown). Petitioners deferred addressing their other claims, and, in their brief before the Commissioner on appeal (at 45), indicated that they continued to reserve their constitutional claims and would withhold argument, if not otherwise directed, on NJSIAA's assessment of litigation costs unless and until NJSIAA prevailed on the issue of the 70% Rule.

BACKGROUND OF THE DISPUTE

The following undisputed facts are necessary to an understanding of the present controversy:

1. Phillipsburg High School is a Group IV NJSIAA member school located along the Delaware River in Warren County, across from Easton, Pennsylvania. It is contained within a legislatively designated “Abbott” school district (*N.J.S.A.* 18A:7F-3) and serves a community with longstanding ties to Pennsylvania’s Lehigh Valley.
2. Prior to 1976, Phillipsburg belonged to football conferences (Big 4 and Big 5) in which all other members were Pennsylvania schools. During the 1970s, Phillipsburg was a “football powerhouse.”
3. Beginning in 1976, Phillipsburg was a member of Pennsylvania’s East Penn Conference (predecessor to the Lehigh Valley Athletic Conference) for football, having joined for basketball in 1963 and baseball in 1958. The school was permitted by NJSIAA to engage in New Jersey championship competition, which it did as a “powerhouse” team for several years; however, in 1980 an NJSIAA rule was adopted requiring entrants into championship games to have played at least 50% of their regular season games against New Jersey schools, and in the 1982 settlement of Phillipsburg’s challenge to that rule, the school was barred from NJSIAA championship play in football, although an exception was made for other sports with the admonition that Phillipsburg was required to make a concerted effort to increase scheduling within New Jersey schools whenever possible.
4. When the East Penn conference increased its required regular season schedule in 1982-83 beyond the nine games permitted by NJSIAA, Phillipsburg was granted an exception from the nine-game rule due to the school’s unique circumstances: These were identified as location, unavailability of regular season contests with reasonably close New Jersey Schools of comparable size, and the requirements of the Pennsylvania conference to which the school then belonged. In subsequent years, NJSIAA continued to grant nine-game-rule waivers to Phillipsburg to enable it to comply with the East Penn schedule.
5. In 1987, Phillipsburg applied for membership in New Jersey’s then-existing Mid-State Conference, but was rejected in part because Phillipsburg was too distant from the other members and in part because the conference wished to retain its ten-team structure. On appeal of the Conference’s decision, NJSIAA granted Phillipsburg’s request to join the Conference, so long as it adhered to the required nine-game schedule. Phillipsburg declined to meet this condition because it would mean relinquishing the annual Thanksgiving football game against Easton, Pennsylvania; it withdrew its request for Conference membership

and elected to remain as a member of the East Penn Conference in Pennsylvania while still playing some games against NJSIAA schools.

6. In Fall 1995, because of the increasing difficulty in reconciling East Penn and NJSIAA requirements and the continuing impact of the 50% Rule on the school's ability to enter championship competition, Phillipsburg joined the newly-created Skyland Conference in New Jersey. This conference consisted of NJSIAA members in Somerset, Hunterdon and Warren Counties, essentially uniting the former Mid-State Conference (consisting primarily of Group III and IV schools) with the former Delaware River Conference (consisting primarily of Group I and II schools); its creation had been suggested in 1987 by Phillipsburg itself as a solution not only to its own situation, but to the problem generally of providing for meaningful athletic competition in the Northwest New Jersey region. The Skyland Conference arranged its schedule so that Phillipsburg could continue to play its traditional season-opening and Thanksgiving football games against Pennsylvania teams.
7. After a few years, Phillipsburg became dissatisfied with membership in the Skyland Conference and began exploring the possibility of returning to a Pennsylvania league through membership in the Lehigh Valley Athletic Conference, successor to the East Penn Conference. However, it has viewed NJSIAA's 70% Rule, adopted in 1999 as an amendment to the previously referenced 50% Rule, as an impediment to further consideration of this option, since, if Phillipsburg increases the number of regular season games it plays against Pennsylvania opponents, the 70% Rule—absent a waiver or finding of inapplicability—would prevent it from participating in New Jersey State championship competition.⁴

Petitioners take the position that Phillipsburg students suffer undue and ever-increasing hardship as a result of NJSIAA's requirement that they play 70% of their games in-state in order to be eligible for championship competition. They allege that the lack of nearby New Jersey opponents results in extraordinary travel times, necessitating that students: 1) miss classes (a problem made worse by the district's use of block scheduling); 2) lose the opportunity to use the district's after-school assistance programs; and 3) experience frequent late returns so as to deprive them of time needed for homework, study and rest. They also allege increased transportation costs and diminution of gate receipts which are used to offset the cost of the district's athletic

⁴ As a New Jersey school district, Phillipsburg is ineligible for Pennsylvania State tournament competition.

programs, causing fiscal problems in an already stressed district as evidenced by its “Abbott” status. Petitioners contend that Phillipsburg’s unique circumstances should compel that the school be permitted to enter NJSIAA championship competition notwithstanding that fewer than 70% of its regular season games are played against New Jersey opponents, and that there is precedent for doing so because a waiver of this type was previously granted to Moorestown.

NJSIAA takes the position that: 1) the hardship imposed on Phillipsburg as a result of its geographical location is not substantially greater than that of other Skyland Conference and NJSIAA member schools who must travel substantial distances to events; 2) the Moorestown situation was factually distinguishable; and 3) the requested waiver would be inherently unfair to other schools and student-athletes, since they must qualify for tournament eligibility based on competition against New Jersey opponents, and since the viability of NJSIAA’s leagues and conferences will be compromised by the inevitable absence of Phillipsburg from a conference having few other nearby options for competitors of comparable size.

POSITIONS OF THE PARTIES

Standard of Review

Petitioners argue that this matter should be judged under a heightened standard of review, positing that NJSIAA is subject to the same scrutiny as a government agency because of its domination by public school districts, funding by tax dollars and virtual monopoly over interscholastic sports; in order to prevail on appeal, therefore, it must be found to have exercised its powers in furtherance of the public interest rather than the narrow self-interest of its members. (Petitioners’ Brief at 14-18)

NJSIAA stresses that it is a fully voluntary organization, that the absence of any constitutional right to participate in sports is by now well established at both the state and federal levels, and that the “arbitrary and capricious” standard for review of NJSIAA actions has long since been accepted both by the courts and by the Commissioner and State Board (the latter through adoption of memorializing regulations at *N.J.A.C. 6A:3-7.5*). Therefore, because the decision under review in this matter has a rational basis, the NJSIAA urges, it must be upheld by the Commissioner on appeal. (NJSIAA Brief at 19-22)

Applicability of the 70% Rule

Petitioners contend that while the plain language of the 70% Rule applies without exception to any NJSIAA member school, it is necessary to look beyond plain language to legislative intent. In this regard, petitioners proffer that the rule, adopted in 1999 as an amendment to the existing rule requiring 50% of regular season games to be played in-state, was proposed to address the specific evil of certain small parochial schools scheduling large numbers of out-of-state basketball games so as to give them an unfair advantage in New Jersey tournament competition; according to the proposal’s sponsor and NJSIAA subcommittee discussion, such scheduling enabled these schools to obtain additional funding, engage in enhanced recruitment through national exposure, escape the degree of accountability associated with in-conference play, and increase the strength of the team by arranging for “powerhouse” schedules. Petitioners argue that there is no relationship whatsoever between a rule intended to discourage national schedules—with their concomitant recruitment and financial advantages—and the situation of Phillipsburg: a uniquely placed border school which seeks for historical and

geographical reasons to compete against Pennsylvania schools within a maximum distance of 30-45 minutes. According to petitioners, what must control in determining whether the rule applies to Phillipsburg is “not what some Committee sitting in 2004 wishes [the rule] meant, but what the Commissioner [who has statutory authority to approve or disapprove proposed amendments to the bylaws] was entitled to assume it meant [at the time of approval in 1999], based on the purposes that were apparent at that time.” (Petitioners’ Brief at 18-25, quotation at 25)

NJSIAA counters that, while reducing recruitment was unquestionably an important impetus for initial proposal of the rule, the discussion surrounding its adoption clearly shows its larger purpose to have been ensuring that schools qualifying for NJSIAA tournaments did so based on competition at the same level of their tournament opponents, that is, other New Jersey schools. NJSIAA finds it “self-evident” that entry into State tournaments should be based upon competitive success against schools within the state—which must observe uniform eligibility and competition rules—rather than against outside opponents. NJSIAA further notes that Phillipsburg voted against the 70% Rule when it was placed before NJSIAA members for adoption, thus indicating an understanding of the rule’s broader purpose and how that purpose would work to Phillipsburg’s disadvantage vis-à-vis Phillipsburg’s custom of playing of large numbers of games against Pennsylvania opponents. (NJSIAA’s Brief at 23-24)

Waiver of the 70% Rule

Petitioners argue that they have shown evidence of hardship which is at least as compelling as that which existed in 1983, when NJSIAA granted Phillipsburg a waiver from its nine-game rule in order for the school to continue in its East Penn

affiliation. Specifically, they note: 1) the distances from other schools in the Skyland Conference resulting from Phillipsburg's remote location; 2) already long travel times exacerbated by two decades of real estate development and ensuing traffic congestion; 3) attendant cost increases resulting from greater travel time; 4) gate receipts for football, basketball and wrestling which have "dropped precipitously," leading to a loss of funds in a district that is both needy and subject to heightened State scrutiny owing to its "Abbott" status; and 5) impact on students who must suffer early dismissals from last period classes (a situation made more serious by the district's use of block scheduling), miss after-school academic assistance in order to make game start times ranging from 2:45 to 4:00 (mostly the latter), and experience late arrivals home after games such as junior varsity which are frequently held in the evening, "from time to time" as late as 11 p.m. (Petitioners' Brief at 9-12, quotations at 11-12)

Petitioners point to the survey they conducted of schools characterized by NJSIAA as similarly situated "border schools," contending that, contrary to the unsupported generalization of NJSIAA, Phillipsburg's situation is truly unique because the schools referenced by NJSIAA either have close New Jersey opponents readily available or, to the extent they do not, have no viable options in New York, Pennsylvania or, in some cases, Delaware, that would easily alleviate the hardship caused by travel to remote in-state schools. (Petitioners' Brief at 29-31) According to petitioners, NJSIAA offers only vague, unsupported statements—no evidence as to actual distances, translation into travel time, or impact on students—in contending that Phillipsburg is not experiencing undue hardship. Petitioners acknowledge that Phillipsburg does travel long distances, without complaint, to occasional State contests and other important games, but

urge that these situations are plainly distinguishable from the daily wear-and-tear of regular season travel (*Id.* at 31-32); they also reject NJSIAA’s reliance on Phillipsburg’s 1987 Mid-State application letter stating that travel necessitated by Mid-State membership would not be of great concern to Phillipsburg, since such reliance takes no account of the fact that Route 78 has evolved over the intervening twenty years from a new super-highway into a congested commuter artery. (*Id.* at 32-33) Petitioners also argue that the requested waiver will give them no advantage over other New Jersey schools, since the Lehigh Valley Conference has gone on record as stating that, should Phillipsburg apply and be admitted to the Conference, the school will be allowed to adhere to all NJSIAA rules and regulations relating to athletic advantage. (*Id.* at 28, citing Record on Appeal, Tab 5(h); Petitioner’s Exhibit P-9⁵)

Petitioners additionally contend that a waiver is compelled in Phillipsburg’s case by the precedent of Moorestown, which received a waiver notwithstanding that it did not even claim hardship, but only a desire to continue its longstanding cultural ties with other Quaker schools; according to petitioners, if this was an adequate basis for waiver, then surely petitioners’ case, based on demonstrated hardship as well as evident historic and cultural ties, cannot be denied. Moreover, petitioners argue, if Moorestown’s religious affiliation had any role in NJSIAA’s prior decision—as NJSIAA’s response to Interrogatory No. 6 explicitly states it did—then petitioners’ claim must be honored or NJSIAA will have “unfairly denied petitioners dispensation previously granted to another school because of its religious affiliation,” thereby violating the Fourteenth Amendment by according special treatment on the basis

⁵ This and all similar references refer to the designations used in the Statement of Items Comprising the Record on Appeal, as provided by NJSIAA under cover letter dated February 15, 2005.

of religion. NJSIAA cannot be permitted to “rewrite the record,” petitioners charge, by denying its own sworn statement—likely made in an attempt to avoid setting a precedent—regarding the religious basis for its decision. (Petitioners’ Brief at 37-40, 46; quotation at 46)

NJSIAA counters that the Moorestown situation was clearly distinguishable because: 1) Moorestown is a small, independent school, one of a handful in the state not affiliated with a specific league; and 2) although the school was required to play Friends School League opponents, it still played the majority of its games against smaller NJSIAA schools, mostly members of the Olympic Conference and the Burlington County Scholastic League, both of which fully supported the school’s application for waiver—in contrast to Phillipsburg, which intends to play most of its contests against Pennsylvania schools and which is a member of a conference that would be significantly impacted by any diminution of Phillipsburg’s availability for regular season games. The Moorestown waiver was, therefore, nothing more than “a rational decision to allow a small NJSIAA school to continue to play most of its contests (but not 70%) against NJSIAA member schools who fully supported the waiver without abandoning a 70 year association with an out-of-state conference, which coincidentally happened to be Quaker.” (NJSIAA Brief at 26)

NJSIAA notes that it also considered the “fundamental contradiction” of petitioners’ position that Phillipsburg should not have to travel for regular season play but is more than happy to do so for tournaments or to gain a higher ranking for its “powerhouse” wrestling team. (NJSIAA Brief at 29-30) The Association further notes its consideration of the contradiction between Phillipsburg’s 1987 application to the

Mid-State Conference and its present request, pointing out on appeal to the Commissioner—although conceding that this was not mentioned in the SCLC report—that, in addition to conflicting statements about the ease of such travel, the actual distances given for travel to specific schools presented in 1987, when Phillipsburg *wanted* to join a New Jersey league, were consistently less than the comparable distances presented in the current effort to play more games in Pennsylvania. (*Id.* at 30-32)

NJSIAA further points to what it characterizes as Phillipsburg’s lack of regard for: 1) Skyland’s willing accommodations to the town’s geographic location, including scheduling non-football contests in relative proximity (because size of school is not a dominant factor in such contests) and designing football schedules that allow Phillipsburg to play its traditional opening and closing games against Pennsylvania schools, including the Thanksgiving game against Easton; 2) Phillipsburg’s instrumental role in Skyland’s creation and subsequent development; and 3) the fact that Phillipsburg’s inevitable departure as a conference member if it is granted a waiver from the 70% Rule would require a substantial number of other member schools to schedule—in baseball, softball, basketball, cross country and soccer—at least two regular season contests at great distance, and, in football, to search for large schools outside the region against which to play. (NJSIAA Brief at 33-34)

Procedural Issues

In addition to reiterating their substantive arguments before the NJSIAA, petitioners challenge the Association’s determination on procedural grounds. Petitioners stress that the NJSIAA proceeding in this matter was not an ordinary NJSIAA hearing, but a negotiated compromise between the full-blown trial-type OAL hearing sought by

petitioners and the purely appellate review sought by NJSIAA. They contend that, notwithstanding that Skyland representatives were allowed to testify at hearing and that their testimony was taken as fact by both the SCLC and Executive Committee, Skyland never made a formal request to intervene; thus, petitioners had no notice other than through the “rumor mill” that any other district intended to participate in the hearing, and, in the absence of such notice—given the rules established for the proceeding—they had no opportunity for discovery of the evidence Skyland intended to introduce. Skyland, on the other hand—as the result of petitioners’ compliance with the directives of NJSIAA counsel that Skyland be copied on petitioners’ papers—appeared at the hearing with full foreknowledge of the arguments and evidence upon which petitioners intended to rely. Petitioners object that, in clear contravention of the agreed-upon rules, Skyland officials were “not only allowed to present argument to the Committee but, armed with full disclosure of [petitioners’] evidence, were also permitted to present a detailed factual rebuttal,” a situation tantamount to “trial by ambush.” Moreover, petitioners state, NJSIAA cannot claim that petitioners knew of Skyland’s intentions; to the contrary, they specifically noted in their brief submitted to NJSIAA (and provided to Skyland) a week before hearing that, to petitioners’ knowledge, Skyland had not requested to intervene. (Petitioners’ Brief at 33-35, quotation at 34)

Petitioners further contend that, even if Skyland’s testimony were not disallowed on the aforementioned grounds, NJSIAA erred in crediting it because Skyland witnesses relied on “double- or triple-hearsay, unsupported by any competent data in the record other than [their own] off-the-cuff ruminations.” According to petitioners, when a Skyland witness was questioned on cross-examination about his testimony regarding

travel time and frequency, he stated that he “didn’t know,” “hadn’t examined,” or “wasn’t sure;” yet he “attempted elsewhere in his testimony to insinuate through generalized, undocumented statements” that there were other Skyland Conference members who were forced to travel as much as Phillipsburg, and these statements were in turn (improperly) relied upon by both committees of the NJSIAA. (Petitioners’ Brief at 35)

Petitioners similarly object to what they characterize as the committees’ conflation of petitioners’ request for waiver of the 70% Rule and NJSIAA’s criteria for withdrawal from leagues and conferences. They stress that this matter is *not* an application to withdraw from the Skyland Conference—a development which, if it should come to pass, would be the subject of an entirely separate proceeding—and that NJSIAA erred in allowing testimony and applying standards as if it were; indeed, they contend, the Skyland officials’ entire presentation should be discounted because they actually stated on record that they were “not there about the 70% Rule,” but “to defend about leaving the conference if that were to take place, how it would affect our league” and that they had “no comment” on the 70% Rule issue. (Petitioners’ Brief at 35-37) Petitioners insist that the 70% Rule and withdrawal from a conference are two separate and distinct matters, and that considerations of one cannot be permitted to influence decisions about the other. They explain that Phillipsburg is addressing the 70% Rule first because it is “reluctant to pursue [leaving the Skyland Conference to join a Pennsylvania league] further without an assurance that its students’ dream of an NJSIAA championship will not be compromised in the process.” Granting relief here, petitioners proffer, will be “but the beginning of a lengthy process” before the Skyland Conference and NJSIAA where

“all considerations pertinent” to any withdrawal from the Conference by Phillipsburg will be explored and “all parties’ interests adequately protected.” (Petitioners’ Brief at 26-27)

Finally, petitioners object to the NJSIAA Executive Committee decision because, they allege, the transcript of its underlying deliberations reveals that—despite attempts by NJSIAA counsel to keep the group focused on the record before the SCLC—committee members made no attempt to make a judicial determination, instead reaching a policy-political decision centered on the perceived danger of setting a precedent with any decision in favor of petitioners, treating the record before the SCLC as “nothing more than a starting point for a political discussion.” Furthermore, while petitioners and the Skyland representatives were dismissed following their presentations before the Committee, the SCLC representative—along with other Executive Committee members who were also members of the SCLC—were permitted to remain and participate fully in Executive Committee deliberations. (Petitioners’ Brief at 41-44, quotation at 44)

In response, NJSIAA counters that while petitioners claim “ambush,” the fact is that in November 2003 the Skyland Conference adopted a resolution opposing any departure by Phillipsburg and any “exemption from any NJSIAA regulation.” (NJSIAA Brief at 36, citing Record on Appeal, Tab 1, Exhibit G) Moreover, although Skyland did not formally move to intervene, NJSIAA contends, petitioners had been advised well before the hearing that:

As you are aware, the Skyland Conference has expressed opposition to the application and we are therefore sending a copy of this notice to that Conference so that they may participate in the proceedings. If that conference wishes to submit any document or brief, it should observe the same schedule [as set forth herein for petitioners]. Copies should be furnished to each party. We would ask that copies of any documents be sent to that Conference as well.

(*Ibid.*, citing Record on Appeal, Tab 2)

Additionally, according to NJSIAA, Skyland notified both petitioners and NJSIAA that it would be represented at the hearing, and, once there, its witnesses relied on their own personal experience as athletic directors and seasoned arrangers of conference schedules, and they introduced no documents not previously provided—in contrast to petitioners, who were allowed to introduce previously unprovided documents in rebuttal to the statements of Skyland witnesses and who made questionable claims as previously indicated. NJSIAA urges that Skyland did not act as an intervenor, but

“simply provided testimony which was critical in the assessment of the impact of a waiver of the 70% Rule or the departure of Phillipsburg from that Conference. Representatives of Skyland were present without counsel and were subject to full cross-examination”; everything to which they testified was “consistent with their pre-hearing submissions. What appears to have occurred is that [Skyland’s representatives] presented damaging testimony and after never availing itself of the opportunity to take discovery, Phillipsburg now asserted (*sic*) that they were somehow treated unfairly. Further, Phillipsburg fails to specify what it could have uncovered if it had propounded interrogatories on the Skyland Conference.” (NJSIAA Brief at 36-37)

With respect to petitioners’ “conflation” argument, NJSIAA argues that petitioners are inappropriately trying to “compartmentalize” issues that are, in fact, inextricably intertwined, thereby placing form over substance; NJSIAA notes that Phillipsburg’s own athletic director admitted on record that receiving a waiver of the 70% Rule would result in Phillipsburg playing less than the number of games required of it as a member of the Skyland Conference. It was, therefore, not improper for NJSIAA to consider the impact on Skyland of Phillipsburg’s departure, which would seriously damage efforts to arrange for a fair and balanced competition schedule in a less-populated area of the state where more travel time is necessarily required of student-athletes. According to NJSIAA, petitioners want to “have it both ways” in a

“manifestly unfair” proposition that attempts to provide them with “the benefits of tournament competition without any of the obligations of conference membership.” (NJSIAA Brief at 27-28)

Finally, NJSIAA protests petitioners’ suggestion that the proceedings before the Association in any way denied them due process. To the contrary, NJSIAA urges, petitioners were provided with: complete answers to interrogatories; all documents that would be referred to by Skyland witnesses at hearing; the opportunity to present briefs, full arguments of counsel and sworn testimony, as well as to cross-examine Skyland witnesses; a full stenographic record; and a separate appeal to the Executive Committee, the closed session proceedings of which were recorded by a court stenographer. Under the circumstances, NJSIAA concludes, petitioners cannot claim to have been treated unfairly in any respect. (NJSIAA Brief at 37)

COMMISSIONER’S DETERMINATION

Standard of Review

It is by now settled law that the Commissioner’s scope of review in matters involving NJSIAA is appellate in nature. *See 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, 183. Thus, the Commissioner may not overturn an action by NJSIAA absent a finding that NJSIAA acted in a patently arbitrary, capricious or unreasonable manner, nor may she substitute her judgment for that of NJSIAA, even if she would decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision finally reached. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*,

1987 *S.L.D.* 259 As codified in 2000 to provide notice of this long-held standard to the public and regulated parties:⁶

1. If 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 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)⁷

Although petitioners argue that a heightened standard of review should be applied herein, citing to constitutional constraints and the obligation of a quasi-governmental body to uphold the public interest, the Commissioner is unpersuaded that NJSIAA's actions in this matter are not appropriately judged by the established standard.

Participation in interscholastic sports has long been held to be a privilege which may be circumscribed by reasonable rules governing eligibility, not a constitutional right. *Burnside et al. v. NJSIAA et al.*, 1984 *S.L.D.* 1695 (App. Div. 1984), *cert. denied* 101 *N.J.* 236 (1985); *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182. To that end, NJSIAA was created as a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with its Constitution, Bylaws, rules and regulations, which are approved by the Commissioner of Education, adopted annually by the member schools, and thereafter deemed school policy enforced in the first instance by the internal procedures of NJSIAA.

⁶ See, 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

⁷ Formerly *N.J.A.C.* 6A:3-7.4(a). See, 36 *N.J.R.* 5032(a), 37 *N.J.R.* 1051(b).

It is beyond dispute that NJSIAA must fulfill its obligations in a manner that is not arbitrary or unreasonable. The courts have held that:

In the law, “arbitrary” and “capricious” means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep’t. of Env., N.J.*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff’d* 131 *N.J. Super.* 37 (App. Div. 1974).

The law is thus clear that, while the party challenging an administrative action bears the burden of proof that such action was deficient, *Kopera v. West Orange Bd. Of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960), the administrative agency must still be found to have acted reasonably based upon the facts at hand in order to prevail on appeal; notwithstanding that the challenger may not agree with the manner in which the agency has exercised its discretionary authority, an action withstanding the “rational basis” test is likely to be inherently consistent with the public interest. Even granting, *arguendo*, that NJSIAA is a quasi-governmental entity as claimed by petitioners, public bodies are frequently required to weigh the legitimate concerns of particular individuals or groups—such as petitioners—against broader-based but equally legitimate considerations such as the need to ensure consistency and fairness statewide.⁸ As long as they do so based upon the facts before them and in a rational manner, the public interest is likely to have been adequately served.

⁸ Although petitioners pose the dilemma facing Phillipsburg student-athletes as a “Catch 22” (remain in New Jersey and suffer “extraordinary” travel burden, or affiliate with a Pennsylvania league and be unable to compete for State championships) and characterize their position as “for the kids” in contrast to NJSIAA’s paramount goal of protecting the “interests of the organization,” the Commissioner stresses that NJSIAA’s concern with the integrity of its league/conference structure—which affects every student-athlete in the state—cannot be automatically dismissed as “narrow self-interest.”

Accordingly, the Commissioner's review of this matter will proceed under the established "arbitrary, capricious or unreasonable" standard, so that NJSIAA's determination will be upheld if it is found to have been factually based and reasonably reached, with the appropriate level of due process having been provided to petitioners.

Applicability of the 70% Rule

With the aforementioned standard in mind, the Commissioner first upholds NJSIAA's interpretation of the 70% Rule as applying uniformly to all member districts unless a waiver is specifically granted.

In support of their respective arguments, both parties point in whole or part to the pertinent section of the official minutes of the December 1999 annual meeting of the full membership at which the rule was adopted:

The purpose of this legislation is to limit out-of-state competition to influence schools to remain in conferences within the state to reduce funding and exposure provided by outside out-of-state tournaments and their sponsors, and lastly it would require all NJSIAA tournament teams to place a priority on scheduling New Jersey teams above a national schedule and a national agenda. (Record on Appeal, Tab 1, Exhibit C at 9-10)

Both also point to the April 21, 1999 discussion of Subcommittee C of NJSIAA Advisory Committee as reflected in the committee minutes:

Amended Proposal: "NJSIAA tournament entries must compete against a schedule composed of no less than 70% NJ schools. If a team does not meet this criteria (*sic*) they will forfeit their entry into NJSIAA tournaments."

Advisory Committee Vote: Unanimously in Favor

Discussion:

- the number of schools now playing extended out of state competition was not supplied in the proposal and was not available on the day of the meeting
- present regulations permit individual schools to leave a conference for a single sport, to play a national schedule

- this type of schedule enables recruitment because of greater exposure
- proposal refers predominately to small parochial schools competing in basketball
- schools have little accountability when they leave a conference to play a schedule comprising a much larger area
- a full schedule of “powerhouse” teams increases the strength of the team, and therefore provides an unfair advantage in the State Tournament
- all schools pay dues to the Association and should be entitled to enter a tournament on a relatively equal basis as determined by the size of the school
- since the proposal as stated would affect all sports, baseball and softball teams may not be able to play as many spring recess games in other areas of the country
- acceptance of the proposal may deny schools/players exposure when players from other states do not have the same restrictions
- schools allowing one team to travel out of state for most [of] the schedule, frequently do not sponsor a broad program of additional sports
- suggestion to change the percentage from 90% to 70% was proposed and accepted by the submitting school

(Record on Appeal, Tab 1, Exhibit B at 4-5)

These documents and other evidence on record leave no doubt—and, indeed, the parties do not truly dispute—that the sponsor’s original impetus for offering a proposal to increase in-state game requirements from 50% to 70% arose out of concern over a specific situation not analogous to that of Phillipsburg. *However*, it is equally clear from the committee and plenary discussions surrounding the rule’s official proposal—and from the plain and unambiguous language of the rule as finally adopted by NJSIAA, approved by the Commissioner, and applied in the years since its enactment—that the rule is not, and never has been, intended to be selectively aimed at schools deliberately attempting to obtain national exposure for recruitment and sponsorship

purposes, let alone at the small parochial schools or basketball games referenced in the explicit sponsor statements relied upon by petitioners. Rather, as proffered by NJSIAA, notwithstanding the rule's origin as a response to a specific circumstance, from the outset its overarching purpose has clearly been the maintaining of fairness and uniformity in State championship competition by keeping regular season contests substantially in-state and within officially sanctioned structures.

The Commissioner, therefore, cannot agree with petitioners that NJSIAA's interpretation of its rule is "overbroad" under the circumstances (Petitioners' Brief at 46), nor can she find that NJSIAA has acted in anything other than a reasonable and lawful manner in adopting the rule as written and applying it to Phillipsburg along with all other member schools not specifically exempted by waiver.

Waiver of the 70% Rule

Initially, the Commissioner rejects petitioners' argument that NJSIAA erred in "conflating" the questions of waiver of the 70% Rule and "withdrawal" from the Skyland Conference. While petitioners are correct in asserting that no application for withdrawal has been made—and that if and when it is, there is a process in place to consider it—it is disingenuous in the extreme for petitioners to argue that NJSIAA must be foreclosed, in a waiver proceeding, from considering the impact that will inevitably result from grant of a waiver, in the form of the requesting school's reduced availability for contests within its own conference and New Jersey contests generally. As stated by the Skyland Conference President in his December 16, 2003 letter to the Phillipsburg Director of Secondary Education:

We realize that Phillipsburg has not announced any intention to leave the conference, but if they are successful in the lawsuit [challenging the 70%

Rule] it would have an impact on our conference.***By restructuring into three (3) basic divisions, [the conference] addressed the primary concern of travel, as discussed by several schools including Phillipsburg. ***To replace the contests that would need to be filled by the void of Phillipsburg High could create additional travel depending on the location of those contests. (Record on Appeal, Tab 5(j))

The issue was raised again during the SCLC hearing:

MR. HERBERT: Couldn't there be a waiver of the 70 percent rule and yet allow Phillipsburg to remain a member of the Skyland Conference?

MR. WEIGNER [Skyland Conference President]: It would be pretty difficult based upon our divisional setups.

MR. HERBERT: Why is that?

MR. WEIGNER: You have to look at the numbers that would be in existence here. We play each other twice in some sports. We could give you a ten-game schedule that would be more than the 70 percent that would be required. Other than we have a mandatory, a crossover of three which would be a 13th game that would exceed the 70 percent they're looking to have relief from. (*Ibid.*, Tab 6, Transcript of Hearing at 101-02)

Moreover, in Phillipsburg's case, obtaining a waiver from the 70% Rule is plainly the first step in the school's strategy to position itself for a withdrawal from Skyland; the school clearly wants to assure its right to New Jersey championship play, and its entitlement to play fewer than the number of games required to sustain conference membership, before it submits an application to sever its New Jersey affiliation and join a Pennsylvania league. The following excerpt from the transcript of the SCLC hearing is instructive:

MR. HERBERT: Well what I'm getting to is that wouldn't you have to – in order to get a waiver of the 70 percent rule, wouldn't that involve playing less than what was required as a member of the Skyland Conference or am I misreading that?

THE WITNESS [Phillipsburg Athletic Director Fisher]: That would be true in all sports, yes.

MR. HERBERT: Isn't the 70 percent rule tied in directly with continued membership in the Skyland Conference? I would think the 70 percent rule is tied into, directly into, membership and NJSIAA as well as the Skyland Conference.

MR. RUBIN: Maybe you're raising a point that's not in dispute. The reason why we're concerned about the 70 percent rule – and, frankly, about the only effect your decision on the 70 percent rule would have on us is if and when we apply for withdrawal from the Skyland Conference. We don't dispute that. We haven't made the decision yet to apply for withdrawal from the Skyland Conference. That decision may well be affected by your decision in this proceeding. (*Ibid.*, at 76-77)

The school's intentions are likewise signaled by the September 29, 2004 letter to the Phillipsburg Superintendent from the President of the Lehigh Valley Conference, confirming their prior conversation to the effect that, if Phillipsburg joins Lehigh Valley, officials there would work to create schedules that comply with NJSIAA practice and first-contest start dates, and ensure that the school can conclude its Pennsylvania commitments in time to participate fully in New Jersey championship play. (Record on Appeal, Tab 5(h); Petitioner's Exhibit P-9)

Under the circumstances, it was not only appropriate but *necessary* for the NJSIAA to consider, as part of the relative hardship of Phillipsburg as compared to other member schools, the effect of granting the requested waiver on these schools;⁹ otherwise, the Association would not be fulfilling its statutory responsibility as the governing agency for interscholastic athletics statewide. While viewing Phillipsburg's waiver request in a vacuum undoubtedly serves the school's purpose,¹⁰ it is also an abrogation of NJSIAA's duty to its other member student-athletes and their schools. Accordingly, the Commissioner holds that broader consideration of the impact of any waiver granted to Phillipsburg was, and is, entirely proper in this matter.

⁹ The Commissioner contrasts this standard with the far more comprehensive league withdrawal criteria alluded to by petitioners in their allegation of "conflation."

¹⁰ See, for example, the transcript of the SCLC Hearing at 109-13, 135-36.

With respect to the question of whether NJSIAA’s grant of a waiver to Moorestown compels a similar grant to Phillipsburg, the Commissioner fully concurs with NJSIAA, for the reasons set forth by the Association above, that the Moorestown matter is factually distinguishable and that the record clearly shows the waiver in that instance to have been granted for lawful reasons having no basis in preferential treatment due to religion.¹¹ Therefore, petitioners cannot claim that NJSIAA’s decision was deficient in this regard.

There is, however, one respect in which petitioners’ challenge to NJSIAA’s determination has merit. Petitioners are correct in their contention that the “compromise” proceeding directed in this matter was quasi-judicial in nature and envisioned that petitioners would have specific foreknowledge of adverse testimony and evidence to be presented at hearing:

The standard for intervention will be liberalized to allow other districts, upon request, to present testimony and evidence at the hearing, provided that they are subject to pre-hearing discovery to the same extent as if they were a party. (Record on Appeal, Tab 2, Attachment, January 26, 2004 Letter to Counsel from Director of Controversies and Disputes)

As petitioners correctly note, at no point did Skyland formally request to intervene. Instead, what appears to have occurred is that—based on Phillipsburg’s desire for a waiver and Skyland’s opposition to it being a matter of common knowledge generally, and of prior discussion between officials of Phillipsburg and Skyland specifically—Skyland’s participation in waiver proceedings before NJSIAA was treated

¹¹ The Commissioner is unpersuaded by petitioners’ attempt to force a contrary conclusion. It is apparent from the context of the statements (from NJSIAA’s response to Interrogatories) on which petitioners rely, as well as from documentation in the record, that “religious” is nothing more than a description of the particular affiliation Moorestown sought to preserve in requesting a waiver, and that the religious nature of the affiliation—as opposed to the fact that it was long-standing, deep-rooted and central to the school’s identity—was not a determinative factor in NJSIAA’s decision to grant the school’s request.

by NJSIAA as implicitly understood and less formal protocols were observed. In preparation for hearing, counsel for NJSIAA wrote:

As you are aware, the Skyland Conference has expressed opposition to the application [for waiver of the 70% Rule] and we are therefore sending a copy of this notice to that Conference so that they may participate in the proceedings. If that Conference wishes to submit any documents or brief, it should observe the same schedule. Copies should be furnished to each party. We would ask that copies of any documents be sent to that Conference as well. (*Ibid.*, Tab 2, July 13, 2004 Letter from Counsel for NJSIAA to Counsel for Petitioners, copy to Skyland President)

To which Skyland responded:

On behalf of the Skyland Conference I would like to submit 15 copies of our 2004-2006 Divisional alignments.

The addition of Ridge and Immaculata high schools necessitated new alignments which aided some concerns of several members of our conference. Travel, strength of program and size of schools were the main criteria used in developing the enclosed document. (*Ibid.*, Tab 3, August 25, 2004 Letter from Skyland Conference President to NJSIAA)

Noting the above-quoted exchange and prior communications between petitioner and Skyland, NJSIAA contends that petitioners were well aware of Skyland's intention to participate in the NJSIAA hearing despite the lack of formal intervention proceedings. NJSIAA urges that technical objections based on strict procedural standards should not be allowed to obscure the fact that petitioners were given extensive due process in this matter, and that notice of Skyland's participation was provided to petitioners in substance if not in precise conformance with the rules of administrative practice; thus, it would be truly unfair if petitioners are allowed to benefit because they chose not to avail themselves of the opportunity to seek discovery.

While the Commissioner understands NJSIAA's position given the history of this matter and the lack of precedent for a "hybrid" proceeding of the type

arranged to accommodate it—and while she recognizes that petitioners might well have chosen to seek clarity about Skyland’s actual intentions prior to the hearing rather than standing on ceremony—the fact remains that the “ground rules” established for this proceeding by mutual consent of the parties entitled petitioners to rely on the normal process for effectuating intervention, notwithstanding liberalization of the standard for entitlement to intervene. Therefore, the Commissioner must concur with petitioners that the testimony of Skyland’s witnesses cannot serve as a basis for the NJSIAA decision on appeal herein. Similarly, petitioners are correct in their contention regarding the participation of SCLC members in the Executive Committee’s quasi-judicial review of the SCLC decision.

Notwithstanding these deficiencies, however, the Commissioner cannot in good conscience conclude that petitioners are entitled at this point to prevail on appeal. Although petitioners have presented skillfully prepared evidence and argument in order to demonstrate their own hardship and rebut the “other districts similarly situated” claim proffered by NJSIAA in its Answers to Interrogatories—and have succeeded on procedural grounds in disposing of substantial testimony and evidence adverse to that presentation¹² and, consequently, to the viability of the NJSIAA decision based upon them—the Commissioner simply cannot decide this matter in petitioners’ favor on a record that does not permit her to fully and fairly assess the situation of Phillipsburg relative to other member schools and student-athletes, including those who

¹² Skyland representatives: discussed the history of the conference and its present structure, including the current divisional alignment as supported by Phillipsburg; disputed many of petitioners’ travel claims and opined that Phillipsburg is only one of many conference districts that experience longer travel times than typically found elsewhere in the state; contended that the conference tried to be flexible and accommodating in attempting to reduce travel time; and noted that its membership was surveyed and—by a vote of 15-2 (18-member conference, Phillipsburg did not vote)—determined that Phillipsburg should neither leave the conference nor receive a waiver of the 70% Rule.

will be impacted if Phillipsburg is granted the requested waiver. Moreover, the Commissioner notes that, even if the requisite record could be developed before the Commissioner, NJSIAA is the appropriate entity to make such an assessment in the first instance, and that the Association must be given the opportunity to do so based upon a sufficient factual record and without the participation of SCLC members in Executive Committee deliberations.

Accordingly, the Commissioner finds that the appropriate remedy at the present juncture is to remand this matter to NJSIAA for such proceedings as are necessary for the Association to make the requisite decision—after due deliberation based upon a properly developed factual record, with no ambiguity as to appearance(s) by adverse party(ies), full opportunity for prehearing discovery of the testimony and evidence to be relied upon by such party(ies), and recusal of Executive Committee members who are also members of the SCLC—as to whether Phillipsburg’s situation is, in fact, so extreme relative to other member schools that the hardship imposed on it by the 70% Rule outweighs any hardship that will result to other schools from its reduced availability for in-state play if a waiver of the rule is granted. In so holding, the Commissioner stresses that **it has already been decided herein that:** 1) the 70% Rule applies to Phillipsburg; 2) the prior grant of a waiver to Moorestown does not compel a similar grant to Phillipsburg; 3) NJSIAA is fully entitled to bring broader policy considerations into its determination in this matter; and 4) any subsequent appeal to the Commissioner of NJSIAA’s decision on remand will be reviewed under the established “arbitrary and capricious” standard. Petitioners’ federal claims (and NJSIAA’s defenses thereto) remain preserved for future litigation, while their claims with respect

to NJSIAA's assessment of legal fees may be pursued—since neither party has fully prevailed herein—in any appeal of NJSIAA's decision on remand that petitioners deem warranted.

IT IS SO ORDERED.¹³

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 26, 2005

Date of Mailing: September 26, 2005

¹³ This decision, as the Commissioner's final determination, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3.