

**State of New Jersey**

DEPARTMENT OF EDUCATION

PO BOX 500

TRENTON, NJ 08625-0500

CHRIS CHRISTIE  
GovernorKIM GUADAGNO  
Lt. Governor

July 12, 2017

KIMBERLEY HARRINGTON  
Acting Commissioner

Mark G. Toscano, Esq.  
Comegno Law Group, P.C.  
521 Pleasant Valley Avenue  
Moorestown, New Jersey 08057

Edward C. Bertucio, Esq.  
Hobbie, Corrigan & Bertucio, P.C.  
125 Wyckoff Road  
Eatontown, New Jersey 07724

Re: West Windsor-Plainsboro Regional School District, Mercer County v. New Jersey State Interscholastic Athletic Association, Agency Dkt. No. 113-6/17

Dear Counsel:

I have reviewed the materials filed in connection with the petition of appeal and motion for emergent relief filed by the petitioner, West Windsor-Plainsboro Regional School District (District), in the above-captioned matter. The District is appealing the decision of the Executive Committee of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying its request for a hearing before the Executive Committee in connection with the May 23, 2017 Board Resolution, permitting West Windsor-Plainsboro students to participate in co-curricular and/or athletic programs at the other District high school when such programs are not offered at their school of residence.

The District contends that it began having concerns that it may not be able to maintain separate football programs at the West Windsor-Plainsboro High School North (HSN), which is classified as Group III school, and West Windsor-Plainfield High School South (HSS), which is classified as Group IV school. As a result, the District sought to establish a cooperative agreement for football whereby there would be one football team for the 2017-2018 school year that would be comprised of students from both HSN and HSS.<sup>1</sup> However, Article III, Section 10 of NJSIAA's Constitution, Bylaws, Rules and Regulations prohibits cooperative football agreements by a Group III football program. Therefore, the District applied to the West Jersey Football League (WJFL) to request a waiver of the Cooperative Sports Program Regulation and the approval of a cooperative football agreement between HSN and HSS for the 2017-2018 school year.<sup>2</sup> The WJFL denied the District's request, citing various reasons why the waiver would not only impact other schools in the WJFL conference but also all schools in the state.

<sup>1</sup> The District contends that it was seeking a waiver of the Cooperative Sports Program Regulation based upon several factors, including: the lack of a robust feeder program; decreasing enrollment; decreasing student interest; fear of sports injury and concussions; and the District's inability to run sub-varsity programs.

<sup>2</sup> The District also appeared before the NJSIAA Executive Committee to present its request to advance proposed legislation regarding a formal change to the NJSIAA's Constitution and Bylaws to allow Groups III, IV, and V to enter into a cooperative agreement for football under specific provisions.

The District appealed the WJFL's decision to the NJSIAA League and Conference Committee. Following a hearing on May 23, 2017, the League and Conference Committee denied the District's request for a waiver of the Cooperative Sports Program Regulation. The District could have appealed that decision to the Executive Committee in accordance with Article XII, Section 5 of the Bylaws.<sup>3</sup> Instead, later that day, the District passed a Board Resolution that permitted District students to participate in co-curricular and/or athletic programs at the other District high school when such programs are not offered at their school of residence. The Board Resolution effectively allowed the cooperative agreement for football that is expressly prohibited by the NJSIAA's Constitution and Bylaws and was the subject of the waiver request that was denied by the League and Controversies Committees.

On May 24, 2017, the Board informed the NJSIAA's Executive Committee of the Board Resolution and requested a hearing before the Executive Committee on the Resolution's immediate enactment. The District sought to have an immediate decision from the Executive Committee under Article XII, Section 6 of the Bylaws, which permits the Executive Committee to hear a controversy and render a decision in "emergent circumstances where time will not permit a controversy to be heard by the Controversies Committee." The NJSIAA denied the District's request for another hearing, stating that the substance of the Board Resolution was already the subject of a hearing before the League and Conference Committee.<sup>4</sup> The NJSIAA also noted that the District's desire to have the Executive Committee act on the Board Resolution does not amount to a "complaint, protest or dispute" that would entitle the District to review by the Executive Committee under Article XII, Section 4 of the NJSIAA's Bylaws.

The Commissioner's scope of review in matters involving NJSIAA decisions 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). 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).

Additionally, pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon review of the parties' submissions, I find that the District has failed to meet the standard required for emergent relief because the District has not demonstrated a likelihood of success on

<sup>3</sup> Pursuant to Article XII, Section 5 of the Bylaws, "[a]ny party [that] is aggrieved by any decision of the Controversies Committee ... may appeal to the Executive Committee ... [whereby] the Executive Committee shall serve as an appellate body, and the appeal shall be limited to the record developed before the Controversies Committee."

<sup>4</sup> The League and Conference Committee is a sub-committee within the Controversies Committee.

the merits.<sup>5</sup> More specifically, the District has not made a preliminary showing that the NJSIAA applied its rules in an arbitrary or unreasonable manner when it denied the District's request for a hearing and immediate action on the Board Resolution based on the fact that the substance of the resolution was already decided by the League and Conference Committee after an extensive hearing:

The District contends that the NJSIAA has failed and/or refused to take action with respect to the Board Resolution that would establish one football team comprised of students from both HSN and HSS for the 2017-2018 school year. Although the District has attempted to characterize the Board Resolution as a separate action from its request for a waiver of the Cooperative Sports Programs Regulation, it is evident that the application of the Board Resolution to football has already been decided and denied by the League and Conference Committee.<sup>6</sup> Certainly without the NJSIAA granting a waiver of the Cooperative Sports Programs Regulation, the adoption of the Board Resolution is meaningless with respect to football.<sup>7</sup> A board of education cannot simply pass a resolution as a mechanism to circumvent the NJSIAA's Constitution and Bylaws; and it is undisputed that the NJSIAA Bylaws prohibit Group III schools from entering into a cooperative agreement for football. There is also nothing in the record to suggest on emergent relief that the NJSIAA's determination that the District's desire to have the Executive Committee act on the Board Resolution does not amount to a "complaint, protest or dispute" under Article XII, Section 4 of the NJSIAA's Bylaws.

In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to analyze the three remaining factors. Accordingly, the District's request for emergent relief and an Order granting the immediate enactment of the Board's Resolution is hereby denied.

Sincerely,



Peter Shulman  
Deputy Commissioner<sup>8</sup>

c: County Superintendent  
State Law Library

VIA FAX AND REGULAR MAIL

---

<sup>5</sup> This is not a decision on the merits of the NJSIAA's denial of the District's request for a waiver of the Cooperative Sports Program Regulation, but rather a decision on the NJSIAA's denial of the District's request for a hearing before the Executive Committee and the immediate enactment of the Board Resolution.

<sup>6</sup> The District was afforded the requisite due process in connection with the waiver request. Not only did the WJFL review the waiver request, but the League and Conference Committee also held a hearing during which the District had an opportunity to present testimony and thoroughly present its arguments in favor of the waiver.

<sup>7</sup> Not all sports are treated the same in the Cooperative Sports Programs Regulation.

<sup>8</sup> This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.



## State of New Jersey

DEPARTMENT OF EDUCATION  
PO Box 500  
TRENTON, NJ 08625-0500CHRIS CHRISTIE  
Governor  
KIM GUADAGNO  
Lt. GovernorDAVID C. HESPE  
Commissioner**FAX COVER SHEET**Date: July 12, 2017TO: Mark Toscano, Esq.  
Edward Bartner, Esq.FAX: 856 234 4262  
732 380 1720FROM: M. Kathleen Duncan, Director  
Bureau of Controversies and DisputesPHONE: (609) 292-5706  
FAX: (609) 292-4333SUBJECT: West Windsor - Plainsboro v. NJSEA 113-6/17This document consists of 4 pages including this cover memorandum. It is being transmitted through facsimile by the NJ State Department of Education.Message: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

If you have any questions, please feel free to contact our office at the number listed above.