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WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,  Petitioner,  v.  NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,  Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY  DOCKET No.: _____  <b>BRIEF IN SUPPORT OF MOTION FOR EMERGENT RELIEF</b>
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Petitioner, West Windsor-Plainsboro Regional School Board of Education (the “Board” or “WW-P”), by and through its counsel, the Comegno Law Group, P.C., hereby moves for Emergent Relief pursuant to N.J.A.C. 6A:3-7.1 and 6A:3-7.4, and N.J.S.A. 18A:11-3 for an Order compelling Respondent New Jersey State Interscholastic Athletic Association (“NJSIAA”) to allow the Board to enact its May 23, 2017 Board Resolution in order to allow WW-P students equal opportunity and access to full co-curricular athletic activities and programs.

#### **PRELIMINARY STATEMENT**

“When a school’s demographics change and ... enrollment is up, people want more of this or more of that, you add a sport, you add a program, it is very difficult to take one away, when the population no longer cares about it and that may be what’s

\* happening and the last few that are there left are the ones who are get short-changed."<sup>1</sup>

vs.

**The NJSIAA, a private, voluntary Association serves its student/Athletes, member schools and related professional organizations by the administration of education - based interscholastic athletics, which support academic achievement, good citizenship and fair and equitable opportunities.**

We believe that member schools, along with their leagues and conferences, share these convictions: ...

- ...
- Participation in interscholastic athletics enhances the educational experience of all students.
  - Excellence in both academics and athletics is pursued by all.
  - Interscholastic participation develops good citizenship and healthy lifestyles, fosters involvement of a diverse population and promotes positive school/community relations.
- .....
- The NJSIAA is the recognized state authority on interscholastic athletic programs.<sup>2</sup>

In this matter before the Commissioner, the NJSIAA has effectively adopted the former -- which encapsulates the opposition of the West Jersey Football League ("WJFL") to the proposed offered solutions to provide all WW-P High School students equal access and the opportunity to participate in interscholastic activities -- and abandoned the latter -- which is its own Mission Statement. That position is a prioritization by the NJSIAA of competition and convenience, over the values of equal access, providing students with the opportunity to participate, and most important, doing what is right for students. As such, the NJSIAA has lost focus of what is important in high school athletics, which according to its Executive Director should not be "how many goals

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<sup>1</sup> See the Audio Recording of the May 17, 2017 NJSIAA League and Conference Hearing at 1:34:28 to 1:34:50, which is attached as Exhibit 23 to the Supporting Certification of David Aderhold, Ed.D, (hereinafter referred to as "Aderhold Cert.").

<sup>2</sup> See [www.njsiaa.org/sites/default/files/document/MissionStatement2013.pdf](http://www.njsiaa.org/sites/default/files/document/MissionStatement2013.pdf) (emphasis added).

Johnny scores, and how many wins the local varsity squad compiles, but whether or not all participants have a safe, positive experience ... and, in the bargain, learn something about life.”<sup>3</sup>

To date, the NJSIAA has failed and/or refused to take action to affirm those values that it purports to cherish and hold dear. In fact, the NJSIAA has chosen to ignore the voices of both students and the community, and has failed to consider that crucial and relevant input in its determinations regarding student-athlete programming. Those voices have spoken up again and again and again in every forum provided by the NJSIAA; but as will be set forth herein -- and as the continuous feedback from current and former District students, current and former District parents, and in some cases, even prospective student athletes themselves reveals the NJSIAA has done nothing but show that it values competition over participation, and the convenience of scheduling over its very own statement that “playing a sport should be a safe and positive learning experience for all.”<sup>4</sup>

#### **STATEMENT OF FACTS AND RECORD OF APPEAL**

1. The District currently has a diverse enrollment of approximately nine thousand, seven hundred twenty-three students (9,723) students, with the following demographic breakdown: 68.4% of students identify as Asian; 24% of students identify as Caucasian; 5.5% of students identify as African American; and 4.4% of students identify as Hispanic.<sup>5</sup> See Aderhold Cert. at ¶3.

2. The District is comprised of the following (10) schools: Dutch Neck Elementary School, Maurice Hawk Elementary School, Millstrone River School, Town Center Elementary School at Plainsboro, J.V.B. Wicoff Elementary School, Village School, Community Middle

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<sup>3</sup> See “Op-Ed: The True Meaning of High School Sports,” by Steve Timko, Executive Director, NJSIAA (Sept. 6, 2016), which is attached as Exhibit 18 to Aderhold Cert.

<sup>4</sup> Id.

<sup>5</sup> The total percentage of 102.3% is due to those students that identify as more than one demographic.

School, Grover Middle School and West Windsor-Plainsboro High School North (“HSN”) and West Windsor-Plainsboro High School South (“HSS”). Id. at ¶4.

3. Based on the NJSIAA’s General Public Classifications for the 2016-2017 School year, which pursuant to the NJSIAA’s website are based on student enrollment, the District’s HSN is classified as Group III and HSS is classified as a Group IV. Id. at ¶5.<sup>6</sup>

4. During the 2016-2017 school year, concerns were raised in the District regarding the viability of maintaining two separate football programs at HSN and HSS. Those concerns resulted from a combination of 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. Id. at ¶6.

5. In addition, due to the District’s demographic breakdown indicated above, the number of student athletes who choose to participate in football and other athletic programs is minimal in relation to the actual student body count at both high schools. Id. at ¶7.

6. By way of example, for the 2016-2017 school year, despite the size of both HSN and HSS, the District’s football program was only comprised of the following student athletes: a total of fifteen (15) rising seniors - 11 at HSS and 4 at HSN and a total of eleven (11) rising juniors; -- six (6) at HSS and five (5) at HSN. Id. at ¶8.

7. The impact of WW-P’s demographic make-up on its athletic programs, in particular football, is revealed in the following excerpts from a number of District parents’ letters submitted to the Board in response to concerns over the viability of its high school football programs:

At the high school level, I have been working with Coach Jeff Reilly over the past two years to recruit freshmen and upperclassmen. We were successful last year in recruiting 22 freshmen for WWP HS North. Given our community’s unique demographic, it is imperative to educate many of our Asian families about football, which may be foreign to them. Given that I am Chinese, I have

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<sup>6</sup> See also <http://www.njsiaa.org/sites/default/files/document/General%20Public%20Classifications%20%2716-%2717%20-%2010.24.16.pdf>.

been serving as an example by promoting football through my boys' and husband's dedication to the sport.

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I have thought over and over about what I can say, but no matter what I have started to write, it has never seemed sufficient to express the myriad of emotions I am feeling over this. The fact that we are facing the elimination of football at North is just incomprehensible to me. Whenever I have told people who don't live in WWP about the number of students in our 2 high schools but the low numbers we have had in football over the last few years, no one can understand it.

Unless you live in the largely international community like we do, it is hard to understand how that can be. But then, after I explain the demographics of our town, most people ask me why don't they just combine the two high school football teams? That is the logical thing to do. It simply defies logic that we can live in the same town and our kids can go to high schools in the same school district, but yet we are being prohibited from doing the logical thing to keep football alive in WWP.

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Recently the participation of the students in athletic programs within the district has declined steadily due to a number of factors that face not only our district but which is endemic nationally. While I recognize that the district needs to respond in a manner that promotes participation within its population, clearly the demographic situation cannot be ignored.

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Since the student demographics of the WW-P school district is heavily slanted towards families of Asian heritage with little past exposure to American sports particularly football, an exception should be made to allow students who have experienced this sport in the past & would like to participate on a level, safe playing field; be allowed to field a properly sized competitive team without fear of injury and have a real opportunity to fairly compete.

Id. at ¶9.

8. As result of the above-referenced concerns, the Board and the District began to question whether it could safely field a football team at HSN for the 2017 Season, and expressed concern that it was within a season or two of possibility eliminating the HSS program as well. Id. at ¶10.

9. In January 2017, the head football coaches for both HSN and HSS wrote to the West Jersey Football League ("WJFL"), outlining their concerns over the ability of their teams to safely play against other teams, and the impact that was having on their students' morale. The HSN coach also requested that the WJFL permit WW-P to have a Co-op program in order to allow both HSN and HSN to form one team in order to be able to play safely. Id. at ¶11.

10. To make matters more troubling, the Board and the District's concerns about being able to safely field a team and have sufficient participation numbers have also extended to baseball, softball, wrestling and lacrosse and hockey. In fact, in the foreseeable future, it is entirely conceivable that the District will also be unable to maintain two separate programs in these sports at HSN and HSS. Id. at ¶12.

11. The Board and the District have long believed that the educational goals and objectives of the District are best achieved by a diversity of learning experiences and opportunities, including those that take place outside the regular classroom environment and program. In that respect, both the Board and District recognize and appreciate the educational, social and emotional value of a program of athletic competition for both boys and girls as an integral part of the total school experience and programs of athletic competition, both intrascholastic and interscholastic, offer students the opportunity to exercise and test their athletic abilities in a context greater and more varied than that offered by the class or school or school district alone, as well as provide an opportunity for career and educational development. Id. at ¶13.

12. On February 24, 2017, the Board wrote to the NJSIAA, informing Respondent that without immediate remedy, WW-P would be forced to dismantle its football program at HSN and expressed concern over the viability of the football program at HSS as well. To save its football program, the Board requested that the NJSIAA immediately consider allowing HSN and HSS to enter into a cooperative agreement for football for the 2017-2018 school year. See Aderhold Cert. at ¶.; and Exhibit 14.

13. On March 7, 2017, the District Superintendent and other Board representatives met with the NJSIAA. At that meeting, a two-pronged approach was proposed to sustain the viability of WW-P's football program, which consisted of either (1) an exemption from the NJSIAA's

Executive Committee of its current cooperative sport guidelines in order to allow HSN and HSS to play as a single team for the 2017-2018 season; or (2) proposed changes to the NJSIAA's constitution and bylaws to allow cooperative teams in Groups II, IV, and V to exist under specific circumstances. See Aderhold Cert. at ¶ 15.

14. On April 5, 2017, District administrators appeared before both the NJSIAA Executive Committee and the NJSIAA Advisory Committee. At the NJSIAA Executive Committee meeting, the request for HSN and HSS to enter into a cooperative agreement was postponed and returned to the WJFL for their review and approval. At the NJSIAA Advisory Committee meeting, the District presented proposed changes to the NJSIAA Bylaws. This proposal was scheduled to be presented to the NJSIAA Executive Committee on May 3, 2017. See Aderhold Cert. at ¶ 16.

15. On April 5, 2017, per the decision of the NJSIAA Executive Committee earlier that day, the Board submitted a letter to the WJFL to formally request the approval and support of a cooperative agreement between HSN and HSS for football. The Board explained that granting relief of schedule would not suffice, as the District lacked enough student-athletes to safely sustain two football programs. The Board also reiterated that this request was based entirely on a desire to allow students the opportunity to safely participate in interscholastic sports and that should its request be granted, any sanctions towards playoff or post season participation would be accepted. See Aderhold Cert. at ¶ 17.

16. On April 28, 2017, the Board submitted a request for an appeal to the NJSIAA League and Conference Committee in connection with the WJFL's rejection of WWP's request for permission to enter in a cooperative agreement between HSN and HSS for football the 2017-

2018 school year. Shortly, thereafter the Board received copy of the opposition submitted by the WJFL to the NSJIAA. See Aderhold Cert. at ¶18.

17. On May 3, 2017, the Board appeared before the Executive Committee of the NJSIAA 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. See Aderhold Cert. at ¶19.

18. On May 12, 2017, the Board wrote to the NJSIAA League and Conference Committee submitting information in connection with the Board's requested appeal of the WJFL's decision to deny permission to enter in a cooperative agreement between HSN and HSS for football the 2017-2018 school year. See Aderhold Cert. at ¶ 20.

19. In response, the League and Conference Committee set a Hearing date for May 23, 2017. See Aderhold Cert. at ¶ 21.

20. On May 16, 2017, representatives of WW-P met with members of the NJSIAA to discuss the upcoming League and Conference Committee Hearing, as well as the upcoming June 7<sup>th</sup> Executive Committee meeting. At this meeting, the parties discussed the concept of the WW-P Board adopting a Board Resolution that would allow students within WW-P to participate on another co-curricular or athletic program if that program were not available at their school of residence. The parties further discussed that such a concept was not a novel one, as the NJSIAA Constitution and Bylaws already allows for same for students attending Vocational-Technical High Schools and Public Academies. See Aderhold Cert. at ¶ 22.

21. In addition, it was also discussed at the May 16<sup>th</sup> meeting that should the WW-P Board elect to adopt such a Board Resolution, then the current pending requests for its football program could be foregone, since the Board Resolution would solve other anticipated athletic



concerns facing WW-P in the future. Finally, it was discussed that if the Board adopted such a resolution, there would be no need for the May 23, 2017 League and Conference Committee Hearing or the June 7, 2017 Executive Committee Hearing. Furthermore, the parties agreed that the adoption of a Board Resolution would also eliminate the need for the proposed changes to the NJSIAA Constitution and Bylaws to be voted upon on the December 2017 ballot. See Aderhold Cert. at ¶ 23.

22. Later that same date, the Board prepared a proposed Resolution and shared it with the Board Committee members, all of whom shared their support for the adoption of same. See Aderhold Cert. at ¶ 24.

23. On May 24, 2017, the Board forwarded the proposed Resolution to the NJSIAA. In response, the NJSIAA stated:

I have reviewed the resolution and it does what we want it to do...I'm reaching out to our legal team to make sure that what we propose is allowed. I'm banking on the comparison to this section [of the NJSIAA Constitution and Bylaws]:

*CL 8 Vo-Tech/Public Academy-Full Time-when a student-athlete elects to transfer to or from a Vocational-Technical High School to or from the district school where the student resides the student is subject to the transfer restrictions contained in Article V, Section 4.K(1) and (2). If a Vocational-Technical High School Public Academy does not offer the particular sport in which one of its full-time students demonstrates a desire to participate, that student may participate in that sport at his/her sending school upon agreement of both Principals, regardless of sports programs offered at the Vocational-Technical High School Public Academy.*

Additionally, I am referencing the arrangement with the urban schools we have which allows the student to participate at their "home" school if the academy/charter/magnet school does not have a team in that sport.

See Aderhold Cert. at ¶ 25.

24. On May 19, 2017, the Board wrote to the NJSIAA, summarizing the discussions had between the parties on March 16, 2017, and informing it of the May 16, 2017 support of the

proposed Board Resolution and the intent to have that Resolution formally adopted at the upcoming scheduled May 23, 2017 WW-P Board Meeting. See Aderhold Cert. at ¶ 26.

25. On May 23, 2017, District representatives appeared before the NJSIAA League and Conference for the Hearing to appeal the denial from the WJFL. After more than two hours of testimony by WW-P and WJFL representatives, the NJSIAA League and Conference Committee voted 3-2 against the Board, thereby denying WW-P the opportunity to seek a Cooperative Agreement for HSS and HSN football. See Aderhold Cert. at ¶27.

26. Later that day, the Board unanimously adopted the Resolution allowing for participation in co-curricular and/or athletic programs at another District high school when such programs are not offered at their school of residence. See Aderhold Cert. at ¶28.

27. On May 24, 2017, the Board informed the NJSIAA's Executive Committee of the Board Resolution's adoption, and requested a Hearing before the Executive Committee on June 7, 2017, pursuant to the NJSIAA's Bylaws, on the Resolution's immediate enactment. Specifically, the Board pointed to Article III, Section 6, which states:

In emergent circumstances where time will not permit a controversy to be heard by the Controversies Committee. [sic] The Executive Committee may hear such a controversy and render a decision thereon in an informal manner after all involved parties are provided with notice and an opportunity to present their positions before the Executive Committee.

See Aderhold Cert. at ¶29.

28. On June 2, 2017, the Board received a response from the NJSIAA to its May 24, 2017 correspondence. The NJSIAA's response was puzzling, as it failed to address the Board's request to be granted a Hearing before the Executive Committee on the May 23, 2017 Board Resolution's immediate enactment and instead stated, "[a]s you know, the NJSIAA League and Conference Subcommittee has denied your request for a one-year waiver of the Co-operative

Sports Program regulation. Although you have requested a platform and a hearing before the Executive Committee on 6/7/17, such a remedy is not available on this instance. See Aderhold Cert. at ¶30.

29. This response completely failed to respond to actual underlying basis for the Board's request to appear before the Executive Committee on June 7, 2017, and failed entirely to account for the fact that on May 16, 2017, the NJSIAA had agreed that the enactment of the Board's Resolution would negate the need for any other remedy proposed to the NJSIAA, such as changes to the NJSIAA Constitution and Bylaws or a waiver of the Co-operative Sports Program regulation for the 2017-2018 school year. See Aderhold Cert. at ¶31.

30. Accordingly, the Board requested that the NJSIAA address the actual request before it, and either confirm or deny WW-P's request for a Hearing on the enactment of the May 23, 2017 Board Resolution before the Executive Committee on June 7, 2017. See Aderhold Cert. at ¶32.

31. To date, the NJSIAA has not responded or otherwise provided due process to the Board's request for a hearing on the enactment of the May 23, 2017 Board Resolution. However, the Board anticipates that a forthcoming response, if any, would be rooted in the same logic and manner as the NJSIAA's June 2, 2017 response and the WJFL's April 28, 2017 letter. See Aderhold Cert. at ¶ 33.

32. In light of the nature of WW-P's matter of concern, the Board cannot wait any longer for a response, as football program staffing decisions for the Fall 2017 Sports Season must be made no later than the Board's meeting on June 27, 2017. Without a decision promulgated prior to that date, the Board will lose the opportunity to hire coaches and other necessary personnel; a delayed ruling, even if in the Board's favor, will prove ineffective for the 2017 football season

if the Board does not have the necessary hired staff to run its football program. See Aderhold Cert. at ¶ 34.

33. As such, the Board has no choice but to file the herein Petition and Motion for Emergent Relief, in order to obtain the requested relief in a timely manner. See Aderhold Cert. at ¶ 35.

### **STANDARD OF REVIEW**

As noted above, this Request for Emergent Relief is being submitted pursuant to the provisions and procedures set forth N.J.A.C. 6A:3-7.1 *et seq.* As noted therein, the Standard of Review for matters of appeal involving the NJSIAA is set forth in N.J.A.C. 6A:3-7.5 and is as follows:

In determining appeals from NJSIAA decisions, the Commissioner's scope of review shall be appellate in nature.

1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his or her judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner.

Id.

As noted above, the NJSIAA has not granted or provided WWP with due process, as it rejected out of hand the Board's request for an Emergent Hearing before the NJSIAA's Executive Committee and, to date, has refused to provide any decision on the matter before it -- namely the immediate enactment of the Board Resolution adopted on May 23, 2017 to apply the current language in the NJSIAA Constitution and Bylaws for Vo-Tech/Public Academies in order to allow

students in the WW-P District equal access and opportunity to safely participate in co-curricular activities and programs, which is also an application of the NJSIAA's own rules.

In the absence of any action or interpretation by the NJSIAA, it appears that the applicable standard here is whether to prohibit immediate enactment of the Board Resolution adopted on May 23, 2017 would be arbitrary, capricious and unreasonable. That standard, which is well established, has previously been articulated and explained as follows:

In the law, "arbitrary" and "capricious" means having no rational basis. Bicknell v. United States, 422 F.2d 1055, 1057 (5th Cir. 1970). The terms "arbitrary" and "capricious" embrace a concept that emerges from the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and operate to guarantee that acts of government will be grounded on established legal principles. See Canty v. Board of Educ., City of New York, 312 F. Supp. 254, 256 (D.C.N.Y. 1970). **Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances.**

(emphasis added). See also Sheridan v. Board of Education of the Borough of Pitman, OAL Dkt. No. EDU 8068 (Oct. 18, 2004), modified on other grounds, Commissioner of Education decision (December 1, 2004).

#### **EMERGENT RELIEF IS APPROPRIATE**

The Board seeks the commencement of an Emergent Hearing before the Commissioner of Education, pursuant to N.J.A.C. 6A:3-7.1 and 6A:3-7.4, and N.J.S.A. 18A:11-3, and an Order granting the immediate enactment of the Resolution of the West Windsor-Plainsboro Regional School District Concerning Participation and Programmatic Efficiencies for Athletics and Co-Curricular Activities. In order to be granted emergent relief, the application must "set forth the specific relief sought and the specific circumstances which the applicant contends justifies . . . the relief sought." N.J.A.C. 1:6A:12-1. Further, emergent relief may be granted if:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Crowe v. DiGioia, 447 A.2d 173, 176-78 (N.J. 1982); N.J.A.C. 1:6A:12.1(e).

As is set forth herein, the Board satisfies all four prongs and meets the standard for emergent relief. See Atlantic Highlands Board of Education v. M.F. o/b/o K.F., OAL Dkt. No. (EDS) 4312-03 (June 27, 2003).

**WW-P Will Suffer Irreparable Harm if the Immediate Enactment of the May 23, 2017 Board Resolution Is Not Granted**

The irreparable and specific harm faced by the Board in this matter is the forced dismantling of its High School North's football program. The Board has been actively seeking a resolution regarding the safety and viability of its high schools' football programs. As has been clearly evidenced above, not one other option proposed by the board, the NJSIAA or the WWFL will allow for a resolution to be reached in timely manner to allow for the participation of *all* eligible WW-P high school student athletes to participate in the District's football program. Specifically, a continuation of the Board's earlier attempt to change the NJSIAA's Constitution and Bylaws would not lead to a vote until December 2018, thereby resulting in the unnecessary loss of two full football seasons.

Furthermore, as noted above, Respondent has yet to provide the Board with a legitimate response to its May 24, 2017 request for a Hearing on the immediate enactment of the May 23, 2017 Board Resolution. Football program staffing decisions for the Fall 2017 Sports Season must be made no later than the Board's meeting on June 27, 2017. See Aderhold Cert. at ¶. Without a decision promulgated by an emergent hearing, the Board will lose the opportunity to hire coaches and other necessary personnel; a delayed ruling, even if in the Board's favor, will prove useless

for the 2017 football season if the Board does not have the necessary hired staff to run its football program.

Accordingly, WW-P will suffer irreparable harm if the immediate enactment of the May 23, 2017 Board Resolution is not granted.

**The Legal Right Underlying WW-P's Claim is Well Settled**

The sole underlying basis for WW-P's request for relief is to allow for the equal access and opportunity of all of its student athletes, regardless of their school of residence. As illustrated above, the Board pursued a number of proposed solutions in order to obtain its result, but the one solution identified by the NJSIAA itself and which speaks most directly to the specific circumstances within the WW-P District that created the need for the herein requested relief, is to apply the same exception allowed for Vocational-Technical High School and Public Academy students to WW-P District students.

The presumed basis and justification for the prior adoption and implementation of the Vocational-Technical High School/Public Academy exception is found within the NJSIAA Constitution, Bylaws and Procedures itself. More specifically, according to the NJSIAA, one of its key roles is to exercise the following responsibility:

Assuring that all students enrolled in member schools, who would otherwise be eligible to participate in interscholastic sports, are not precluded from a full opportunity to do so, irrespective of their race, sex, religion, or the school that they are attending.

See EXCERPTS FROM LEAGUE/CONFERENCE POSITION STATEMENT, Adopted by NJSIAA Executive Committee on April 11, 1983 and Amended on June 6, 2002.

The Vocational-Technical High School/Public Academy exception provides that a student that is enrolled in a member school, and who is otherwise eligible to participate in interscholastic sport, should not be denied equal access and otherwise prevented from the opportunity from being

able to participate in that sport just because the school that he/she attends does not offer that sport. Such a concept is clearly rooted in the long-standing ideals and values that the NJSIAA has, until recently, used to guide its decision.

The Board's May 23, 2017 Resolution is similarly rooted in and based upon those same ideals and values. Namely, all students, who are otherwise eligible, should be afforded equal access and an opportunity to participate in interscholastic sports irrespective of the District school (whether it be HSS or HSN) that they are attending. Put another way, the Board's May 23, 2017 Resolution reaffirms that a District student should not be denied an opportunity to participate in an extra-curricular activity or an interscholastic sport that is not offered at the District school that they are currently attending, but is offered at another District school.

While WW-P is admittedly neither a Vocational/Technical High School or Public Academy, the underlying basis for the need for such an allowance remains the same: the opportunity for eligible student athletes to participate in sports programs within their school district, regardless of whether their school of residence offers a particular sports program. Furthermore, such an extension of the Vocational/Technical/Public Academy provision to a New Jersey state-funded public school has already been sanctioned by the NJSIAA in other school districts. By way of example, the Newark Public School District Extracurricular Activities Policy notes the following:

All student-athletes must play for the school they currently attend provided the sport is offered at that school. Student athletes who wish to participate in a NJSIAA sponsored sport which is not located at the school building in which they are attending school must adhere to the following guidelines beginning in their 9<sup>th</sup> grade year...

Newark Public Schools Policy 6145 Extracurricular Activities.

Accordingly, the legal right underlying WW-P's Claim is Well Settled.



### **WW-P Has a Likelihood of Prevailing on its Underlying Claim**

As has been evidenced herein, the concept for a Board Resolution extending the NJSIAA's Vocational/Technical/Public Academy exception to the WW-P District was set forth by the NJSIAA itself on May 16, 2017. Accordingly, with the Board's unanimous adoption of such a resolution, the NJSIAA should have no basis or reason to deny the implementation of same, in light of the fact that the underlying basis for the need for such an exception for WW-P student athletes mirrors that of such students attending Vocational-Technical High Schools or Public Academies. To deny WW-P's request for relief would be arbitrary, capricious, and unreasonable.

Furthermore, in discussing the creation of a Board Resolution on May 16<sup>th</sup>, the parties identified that WW-P's aim in identifying a solution for its student-athletes was to fulfill "the NJSIAA's mission and core values to afford students the opportunity for participation and access to full co-curricular activities and programs, while at the same time taking appropriate steps to protect the health and safety of student athletes." In fact, the Commissioner of Education herself, in an April 17, 2017 letter regarding the NJSIAA's Transfer Rule, highlighted the NSIAA's mission of "enhancing the educational experience of all students and promoting positive school/community relations." See Letter from Kimberly Harrington, State of New Jersey Department of Education, Acting Commissioner to Kayleen Egan, Esq., dated April 17, 2017.

Denying students the opportunity to participate in athletic programs lies in direct contradiction to the position of NJSIAA's executive director, who has stated, "[t]he multitude of benefits provided by athletic participation are well known to educators and students...it's appropriate and wise that we continue expanding opportunities for students to enjoy a well-

rounded high school experience that includes athletics.” See NJISAA Report on the Rise of High School-level athletics participation.<sup>7</sup>

Accordingly, WWP has a likelihood of prevailing on its underlying claim.

**When the Equities and Interests are Balanced, WW-P Will Suffer Greater Harm than the NJSIAA Will Suffer if the Emergent Relief is not Granted**

As evidenced above, if emergent relief is not granted, WW-P will suffer great harm in the form of the loss of one and perhaps more of its athletic teams. To appreciate the significance of the potential loss of an athletic team, it is necessary to understand the importance of athletic programs for students. The United States Government Accountability Office, in a February 2012 report on school-based physical education and sports programs, addressed the impact of athletic programs on academics and noted the following academic benefits:

A growing body of evidence indicates a relationship between PE and sports and academic attainment and attendance. A 2010 CDC report that examined 50 existing studies found positive associations between academic performance and both PE and school-based sports. Specifically, it concluded there is substantial evidence that physical activity can help improve academic achievement, including grades and standardized test scores. Further, it suggested physical activity can affect cognitive skills, attitudes, and academic behavior, and concluded that increasing or maintain time dedicated to physical education might help academic performance.

See United States Government Accountability Office (“GOA”) K-12 Education School-Based Physical Education and Sports Programs Report, dated February 2012.

Such benefits have also been addressed directly by the NJSIAA Executive Director , Steve Timko:

...I’m fully aware that high school athletics are entertaining...not entertainment. They aren’t primarily about state championships, earning scholarships, or even running for Team USA. Those are simple wonderful side benefits, when they happen. The true reason we have athletic competition for high school students is to further extend the reach of classroom education. That’s the reason scholastic sports developed in the first place, more than a century ago, and that’s why they continue to exist.

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<sup>7</sup> <http://www.njsiaa.org/sites/default/files/document/HS%20sports%20participation%20--%202013-14%20PR.pdf>

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Further, multiple studies have shown that scholastic athletes do better in the classroom than their classmates who don't play sports. And it's worth noting that student-athletes become much more adept than their peers at time management, which may certainly contribute to the better grades they achieve.

See NJSIAA Op-Ed: The True Meaning of High School Sports, by Steve Timko, dated September 6, 2016.

In direct contrast, the NJSIAA stands to lose nothing if WW-P's request for emergent relief is granted. Permitting HSN student athletes to join HSS's football team will do nothing more than allow District students equal access and the opportunity to participate in athletic programs, which, as illustrated above, is the stated mission of the NJSIAA itself.

The NJSIAA's decision and inaction appear rooted solely in the notion of student enrollment, which candid is an antiquated twentieth-century mindset that a large number of student bodies equates to an equally large number of participating students in an athletic program. Unfortunately, such a mindset is outdated, and does not account for or take in to consideration changes in population and culture such as the one at WW-P has experienced over the last decade.

The harm that WW-P will suffer if emergent relief is not granted is evidenced by the outpouring of support from the WW-P community, attached as "Exhibit 1" to the Supporting Certification of the Board's Superintendent Dr. Aderhold, imploring the NJSIAA to take the necessary action to enable WW-P's student athletes to continue to have the same opportunity afforded to other students to participate in a desired athletic program.

Accordingly, WWP, and most importantly its students, will greater harm than the NJSIAA if Emergent Relief is not granted.

### CONCLUSION

Accordingly, for the reasons noted herein, the Board respectfully requests entry of an Emergent Relief and/or Plenary Order:

- a. Finding NJSIAA's application of its own rules to be arbitrary, capricious and unreasonable; and
- b. Authorizing the immediate enactment of the Board's May 23, 2017 Resolution; and
- c. Granting such other relief as may be just and appropriate.

Respectfully submitted,

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