

IOWA DEPARTMENT OF EDUCATION
26 D.o.E. App. Dec. 44

In re Petition for Declaratory Order

Meskwaki Settlement School,	:	
Petitioner,	:	
for a Declaratory Order as to	:	DECLARATORY ORDER
281—36.15(3)	:	
(General Transfer Rule)	:	[Adm. Doc. #4718]

On or about August 26, 2010, the Meskwaki Settlement School filed a petition for a declaratory order with the Iowa Department of Education [“Department”], requesting relief from the general transfer rule for the 2010-11 and 2011-12 school years for students who transfer from South Tama High School to Meskwaki Settlement School [“MSS”]. The general transfer rule, 281—36.15(3), is reproduced as Appendix A to this Order. MSS having requested a declaratory order as to the applicability of the rule to the circumstances specified herein, the Department derives its authority to issue this order pursuant to rule 281—Chapter 3.

Background

MSS is the only school in Iowa of its kind. It is administered nationally by the Bureau of Indian Education [“BIE”, f/k/a the Bureau of Indian Affairs], a part of the United States Department of the Interior. MSS is tribally controlled under the Indian Self-Determination and Education Assistance Act of 1975 (22 U.S.C. §§ 450 – *et seq.*).

The Meskwaki Tribe has operated a settlement school for elementary-age students for decades. It has been adding grades 7 – 12 gradually. The 2006-2007 school year was the first school year that MSS operated as a full K – 12 school. The high school enrollment history is as follows, as reported by MSS:

School Year	Grade Level	Years Offered	Enrollment
2006-2007			
	9	4	6
	10	3	7
	11	2	9
	12	1	4
2007-2008			
	9	5	9
	10	4	8
	11	3	5
	12	2	7
2008-2009			
	9	6	11
	10	5	9
	11	4	8
	12	3	4

2009-2010			
	9	7	19
	10	6	19
	11	5	10
	12	4	9

Enrollment eligibility at MSS is limited to students of at least 25% Native American blood quantum. MSS has no geographic boundaries; it exists within the boundaries of the South Tama County Community School District ["South Tama CSD"]. As a practical matter, all eligible students reside within the South Tama CSD. Those eligible students not already enrolled in MSS are enrolled in South Tama High School.

In the fall of 2003, MSS became an associate member of the Iowa High School Athletic Association [IHSAA] and the Iowa Girls High School Athletic Union [IGHSAU]. Becoming an associate member of these organizations was a necessary step for MSS to enter into cooperative sharing programs with South Tama CSD so that the freshman (and upper grades in later years) of MSS would have the chance to participate in interscholastic athletics. Cooperative sharing programs are authorized by Iowa Code § 280.13A, and are the means by which students in smaller high schools gain access to participation in interscholastic athletics not offered by their schools of enrollment. Following the 2008-2009 school year, South Tama CSD chose not to continue any of its cooperative sharing agreements with MSS. Nothing in section 280.13A compels a school to agree to host a cooperative sharing agreement with another school. MSS offers varsity level competition in the interscholastic sports of football (eight man), volleyball, girls and boys cross country, girls and boys basketball, girls and boys track and field, and softball.

The Department requested the 2010-2011 academic calendars from both MSS and South Tama. A comparison of these calendars reveals that both high schools operate two semester academic years, but their semesters do not align with each other. The first day of classes for MSS students was August 18, with the first semester concluding on December 21. Second semester for MSS students begins January 3 and ends May 25. Students at South Tama High School began classes this year on August 24, and will not finish first semester until January 17. Second semester for South Tama students begins January 18 and ends June 1.

Position Statements

In its petition, MSS states as follows:

The primary mission and reason for the existence of the Meskwaki Settlement School is to preserve and protect the language, culture, traditions, and religion of the Meskwaki Tribe. Being a Native American school gives the Tribe the right to teach all aspects of their beliefs.

In our recruitment efforts¹ many of the families were concerned with the small number of students attending the school and did not

¹ It is noted by the Department that federal law gives MSS the right and the obligation to recruit students, but that such recruitment must be for non-athletic reasons. See 25 U.S.C. § 2501, discussed *infra*.

want to jeopardize their child's possibility of participating on athletic teams and being involved in extracurricular activities. Many parents expressed a desire "to wait and see" what the outcome would be on the school's ability to field and maintain athletic teams. ...

...
We ... are the only Native American school in Iowa and offer a unique, unparalleled educational opportunity for Native American youth. We feel that as a new school, the transfer policy greatly reduces and potentially impedes further growth in enrollment for our school.

Pursuant to rule 281—3.2, notice of the filing of the petition was provided to interested parties. Those parties are the South Tama County Community School District, Iowa Star Conference, the IHSAA, and the IGHSAU.²

The IHSAA and IGHSAU both offered neutral positions, stating that they would fully support any decision of the Department. Three neighboring state high school athletic associations were informally polled. The Minnesota State High School League has granted a similar exception when the settlement school in that state requested relief. On the other hand, both the South Dakota High School Activities Association and the North Dakota High School Activities Association state that they would not grant an exception under similar circumstances.

The Iowa Star Conference, consisting of 12 members including MSS, determined that "a Native American student would be placed at a disadvantage by enrolling at the Meskwaki Settlement School by the general transfer rule." It was the unanimous vote of conference leadership to support the petition filed by MSS, but this support was accompanied by a request for specific and narrow parameters. South Tama High School is not a member of the Iowa Star Conference.³

South Tama CSD questions whether the request by MSS in its petition is contrary to the purpose of the general transfer rule. South Tama correctly points out that the primary purpose of a transfer rule is to prevent students from school jumping and to prevent the recruitment of students for interscholastic athletics. The understandable concern of South Tama is that granting unfettered relief from the general transfer rule will promote the recruitment of eligible students from South Tama to MSS.

Conclusions of Law

The general transfer rule is 281—36.15(3). As noted earlier, it is reproduced as Appendix A to this Order. The essence of the rule is that a student who transfers from one high school to another high school is, absent an exception to the rule, ineligible from

² Notice was provided by the Department to other education stakeholders solely as a courtesy. No entity other than noted herein filed a position statements with the Department.

³ South Tama High School is in its final year of membership with the Little Hawkeye Conference. Not knowing with which conference South Tama will be affiliated with after this year, the department did not give notice to any conference other than the Iowa Star Conference.

varsity level interscholastic athletic competition for the first ninety (90) consecutive school days at the student's new high school. None of the exceptions listed in the rule cover this fact situation.

Before analyzing the request from MSS, we note that the transfer rule applies only to interscholastic sports. *Transfer students may immediately participate in any music, speech, or other fine arts or performing arts offered by the school to which the student has transferred.* Also, incoming freshmen are immediately eligible to compete in varsity interscholastic sports unless the student participated for another school in baseball or softball during the summer immediately following 8th grade.

At the outset, the Department has determined that it would be irresponsible to issue any type of ruling that incents students to transfer from South Tama to MSS or to transfer from MSS to South Tama at any point during the current school year. The disparities in the academic calendars are too great. There is no common beginning or ending point of the grading periods at the schools. Students must be scholars first and foremost.

The petition herein was filed in late August after the IHSAA informed MSS officials that it could not rule on a waiver request filed by MSS on behalf of one specific student because that student had not yet transferred from South Tama High School.⁴ At the same time, MSS officials were informed of the declaratory order procedure, and the appropriateness of that process as a means of obtaining an order that will apply to more than one student. MSS filed its petition shortly thereafter, but the law requires that notice be given to educational stakeholders and other interested parties who needed to be given a reasonable amount of time in which to respond. Even though the process has been streamlined, we are now a quarter of the way through the first semester of the 2010-2011 school year. The reality simply is that the Department will not do anything to encourage students to transfer between these two high schools at any point during this school year.

Thus, the Department examines the request for relief solely for the 2011-2012 school year.

It is instructive that the Congressional declaration of policy with respect to tribally controlled BIE schools, stated at 25 U.S.C. § 2501, includes some extraordinarily strong directives, including the following:

[T]he United States has an obligation to assure maximum Indian participation in the direction of educational services so as to render ... the services themselves more responsive to the needs and desires of Indian communities.

Congress declares that a national goal of the United States is to provide the resources, processes, and structure that will enable tribes and local communities to obtain the quantity and quality of educational services and opportunities that will permit Indian children (1) to compete and excel in areas of their choice; and (2) to achieve

⁴ Neither the IHSAA nor the IGHS AU may issue an advisory opinion. They may only rule on transfer situations where the transfer actually has taken place.

the measure of self-determination essential to their social and economic well-being.

Congress affirms true self-determination in any society of people is dependent upon an educational process that will ensure the development of qualified people to fulfill meaningful leadership roles [and] that Indian people have special and unique educational needs, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities... .

The mission statement of the BIE states, "Recognizing the special rights of Indian Tribes ... it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians... . The Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal ... contexts." 25 CFR § 32.3.

While nothing in federal or state law specifically states that Indian children must be granted a waiver from the interscholastic athletic transfer rules of any state, the spirit of the above statute and regulation persuades the Department that some relief, narrowly tailored, is warranted. The Department also believes fundamental fairness dictates that any relief must be reciprocal between the two affected high schools.

The Department is confronted with a dilemma that is not comparable to any other scenario. For instance, if a school district creates a new additional high school, the district has the right to determine which resident students are assigned to the new school, and cannot deny immediate eligibility to any of those students based upon the transfer alone. On the other hand, if a new nonpublic high school were to open its doors, any 10th – 12th grade student transferring to the new nonpublic school would be ineligible for varsity sports. The Department notes that many newer nonpublic schools have traditionally used cooperative sharing programs the first several years as a means of building the bases for their own interscholastic teams. MSS used cooperative sharing programs as long as it could do so, but neither South Tama nor any other school district can be compelled to enter into a cooperative sharing program. As noted above, this option was no longer available to MSS after the 2008-2009 school year.

MSS is a unique school, not only because it is administered in part by the Federal government through the BIE, but because it is limited to accepting only those students of at least one-quarter Native American blood. The Tribal Council that locally governs MSS is *called upon* by the BIE to recruit eligible students to enroll. While the Council must not recruit for athletic purposes, the Council has noted that the transfer rule is a barrier to its recruitment of students for legitimate purposes.

Finally, the Department understands that individual students may request an exception from the general transfer rule.⁵ However, as demonstrated in the aborted hearing before the IHSAA that led to the filing of the petition herein, students must actually finalize a transfer before asking for a waiver from the IHSAA or IGHSAA. Assuming students with a ripe claim would request waivers from the appropriate athletic organization, and assuming all requests are based on the facts herein, it makes no

⁵ Rule 36.15(3) may be used by any student who transfers before or after the timeline set forth in this order on page 49. Nothing in this order is intended to predict the outcome of any such request.

sense from an administrative economy standpoint to force those organizations to hold multiple hearings on the same question.

Order

Accordingly, it is ordered that a student who transfers between South Tama High School and Meskwaki Settlement School for the first day of school in August 2011 at the school to which the student transfers shall have immediate eligibility to participate in varsity interscholastic athletics pursuant to all of the conditions below.

1. The student must be presently enrolled in South Tama High School or Meskwaki Settlement School, and must be continuously enrolled with his/her present high school for the entire 2010-2011 school year.
2. The student must not have had any misconduct at his/her present high school during the 2010-2011 school year that resulted in cumulative discipline of, or more severe than, two (2) days out-of-school suspension.
3. The student must fill out the "Notice of Intent to Transfer" form and must file it with both high schools on or before March 1, 2011.
4. The student and the student's parent or guardian must fill out the "Transfer Form" and must file it with both high schools no earlier than August 1, 2011, and no later than the first day of school at the school to which the student desires to transfer.

The granting of immediate eligibility does not apply to any transfer that occurs between MSS and South Tama other than on the first day of school at the high school to which the student seeks to transfer.⁶

The prohibition against recruiting for athletic purposes is not affected by this order. No one associated with or acting on behalf of either MSS or South Tama CSD shall encourage any student presently enrolled in South Tama High School or MSS to transfer if that person's motivation is based on interscholastic athletics. This does not prohibit school officials from merely making a copy of this order to give to students and their families.

This declaratory order has the same status and binding effect as a final order issued in a contested case proceeding.

Issued this 22nd day of September, 2010.



Kevin Fangman, Acting Director

⁶ See footnote #5.

APPENDIX A

36.15(3) General transfer rule. A student who transfers from ... one member or associate member school to another member or associate member school shall be ineligible to compete in interscholastic athletics for a period of 90 consecutive school days, as defined in rule 281—12.1(256), exclusive of summer enrollment, unless one of the exceptions listed in paragraph 36.15(3)"a" applies. The period of ineligibility applies only to varsity level contests and competitions. ("Varsity" means the highest level of competition offered by one school or school district against the highest level of competition offered by an opposing school or school district.)

...

a. Exceptions. ...

(1) Upon a contemporaneous change in parental residence, a student is immediately eligible if the student transfers to the new district of residence or to an accredited nonpublic member or associate member school located in the new school district of residence. ...

(2) If the student is attending in a school district as a result of a whole-grade sharing agreement between the student's resident district and the new school district of attendance, the student is immediately eligible.

(3) A student who has attended high school in a district other than where the student's parent(s) resides, and who subsequently returns to live with the student's parent(s), becomes immediately eligible in the parent's resident district.

(4) Pursuant to Iowa Code section 256.46, a student whose residence changes due to any of the following circumstances is immediately eligible provided the student meets all other eligibility requirements in these rules and those set by the school of attendance:

1. Adoption.
2. Placement in foster or shelter care.
3. Participation in a foreign exchange program, as evidenced by a J-1 visa issued by the United States government, unless the student attends the school primarily for athletic purposes.
4. Placement in a juvenile correction facility.
5. Participation in a substance abuse program.
6. Participation in a mental health program.
7. Court decree that the student is a ward of the state or of the court.
8. The child is living with one of the child's parents as a result of divorce, separation, death, or other change in the child's parents' marital relationship, or pursuant to other court-ordered decree or order of custody.

(5) A transfer student who attends in a member or associate member school that is a party to a cooperative student participation agreement, as defined in rule 36.20(280), with the member or associate member school the student previously attended is immediately eligible in the new district to compete in those interscholastic athletic activities covered by the cooperative agreement.

(6) Any student whose parents change district of residence but who remains in the original district without interruption in attendance continues to be eligible in the member or associate member school of attendance.

(7) A special education student whose attendance center changes due to a change in placement agreed to by the district of residence is eligible in either the resident district or the district of attendance, but not both.

(8) In any transfer situation not provided for elsewhere in this chapter, the executive board shall exercise its administrative authority to make any eligibility ruling which it deems to be fair and reasonable. The executive board shall consider the motivating factors for the student transfer. The determination shall be made in writing with the reasons for the determination clearly delineated.

Notice of Intent to Transfer

This form must be filed with both Meskwaki Settlement School and South Tama High School **on or before March 1, 2011.**

1. Name of student: _____

2. Home address: _____

3. Name of parent or guardian: _____

4. School attended (circle one) during the 2010-2011 school year:

Meskwaki Settlement School

South Tama County High School

5. I will be in the _____ grade for the 2011-2012 school year.

I want to enroll in the (circle one below) during the 2011-2012 school year:

Meskwaki Settlement School

South Tama County High School

Signature of student: _____ Date: _____

Signature of parent/guardian: _____ Date: _____

Transfer Form

(This form is to be used exclusively for transfers that occur from Meskwaki Settlement School to South Tama High School or from South Tama High School to Meskwaki Settlement School after August 1, 2011 and before the first day of school in 2011 at the school to which the student seeks transfer.)

1. Name of student: _____

2. Home address: _____

3. Name of parent or guardian: _____

4. School attended (circle one) during the 2010-2011 school year:

Meskwaki Settlement School

South Tama County High School

5. I will be in the _____ grade for the 2011-2012 school year.

6. I want to enroll in the (circle one below) during the 2011-2012 school year:

Meskwaki Settlement School

South Tama County High School

Student and student's parent or guardian must read this, sign, and date below:

We state that the above information is true, and that the student has not been contacted by anyone who attempted to influence the student to make this transfer based primarily on interscholastic athletics.

Signature of student: _____ Date: _____

Signature of parent/guardian: _____ Date: _____

School administrator at school student seeks to leave must read, sign, and date:

I state that the above student was (1) enrolled at the school circled in #4 above, (2) continuously enrolled at our school the entire 2010-2011 school year, and (3) not the subject of any school discipline resulting in cumulative out-of-school suspension of two or more days or more severe discipline during the 2010-2011 school year.

Signature of School Official: _____ Date: _____

(The official who signs this keeps this copy and gives one signed copy to the student to give to the school circled in #6 above.)