IOWA DEPARTMENT OF EDUCATION

27 DoE App. Dec. 634

In re Evan P.

Stephen and Patti P.,	:	
Appellants,		DIA DOCKET NO. 15DOE003
	:	DE # 5022
v.		
	:	**DECISION**
Iowa High School Athletic Association,		
Appellee.	:	

This matter was heard in person on September 23, 2015, before Carol J. Greta, designated administrative law judge with the Iowa Department of Inspections and Appeals Division of Administrative Hearings, presiding on behalf of Ryan M. Wise[1], Director of the Iowa Department of Education ("Department").

Appellant Stephen P. was personally present and represented by attorney William C. Brown. The Appellee, Iowa High School Athletic Association ("IHSAA") was represented by attorney Brian J. Humke. Also appearing for IHSAA was Assistant Director Todd Tharp.

Prior to the hearing, IHSAA had moved to continue the evidentiary hearing because of the unavailability of its Executive Director, Alan Beste. This motion was denied by the undersigned, who found that the preliminary ruling herein was made by Todd Tharp, and that Mr. Tharp was fully capable of representing the interests of the IHSAA with Mr. Humke.

An evidentiary hearing was held pursuant to departmental rules found at 281—Iowa Administrative Code [IAC] chapter 6. Jurisdiction for this appeal is pursuant to Iowa Code section 280.13 and 281—IAC 36.17. The administrative law judge finds that she and the Director of the Department have jurisdiction over the parties and subject matter of this appeal.

The Appellants seeks reversal of a decision that the IHSAA Board of Control made as a result of a hearing before it on August 26, 2015, finding that Dowling Catholic High School student Evan P. is ineligible to compete in varsity interscholastic athletics for 90 consecutive school days under paragraphs "a"(4) and "a"(8) of the general transfer rule, 281—IAC 36.15(3).

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[1] Dr. Wise is an *ex officio*, non-voting, member of the Board of Control of the Appellee. He did not take part in either the hearing of this appeal before the Board of Control or any deliberations of the Board.

The administrative law judge took testimony from Stephen P. and Mr. Tharp. At the close of the hearing and in the presence of the parties, the administrative law judge called Dowling Catholic President, Dr. Jerry Deegan, via speaker phone to ask him a question. Attorneys Humke and Brown were offered the opportunity to question Dr. Deegan; neither had any questions for him. In addition to the testimony, the administrative record before the undersigned consisted of the following:

- A recording of the hearing before (but not the deliberations of) the Board of Control,
- Documents that had been made available to the members of the Board of Control, including a statement of facts, correspondence between the parties, the "Therapeutic Services Agreement" between the Appellants and Whetstone Boys Ranch, Power of Attorney over Evan P. granted to Whetstone Boys Ranch by the Appellants, information regarding the mission and operation of Whetstone Boys ranch as downloaded from its web site, a transcript of Evan's 9th and 10th grade years from Dowling Catholic High School, and the equivalent of a transcript of Evan's 11th grade year from Whetstone Academy, and
- A copy of the decision of the Board of Control signed by Chairperson Craig Scott on September 2, 2015.

All proffered documents and the recording were admitted into the record. Both parties made closing arguments and were given the option to file briefs by 8:00 a.m. on September 24, 2015. Both filed timely briefs, which are also part of the administrative record.

FINDINGS OF FACT

The underlying facts are not disputed. Evan P. resides with his parents within the Des Moines Public School District. (Stephen P. Testimony; Exhibit 001) He attended Dowling Catholic High School, a fully accredited nonpublic school and member school of IHSAA located within the West Des Moines Community School District, his freshman and sophomore years, 2012-14. (*Id.*) Before high school, Evan – as was true of his older siblings – attended schools also operated by the Des Moines Diocese. (Stephen P. Testimony)

Evan's grades dropped precipitously during the second semester of his sophomore year. In fact, he failed biology, Spanish, and composition. (Exhibits 023-024) Dowling Catholic does not offer summer school classes in the subjects failed by Evan, but, according to Dr. Deegan, will allow its students to attempt to remediate failing grades by taking summer classes at their home school districts. At the beginning of the summer of 2014, Evan was enrolled in two unspecified courses at Roosevelt High School within the Des Moines Public School District to remediate failing grades, but did not receive credit for either course. (Stephen P. Testimony) Neither the IHSAA nor its Board of Control was told by the Appellants about the courses Evan took at Roosevelt.

At the same time that they witnessed the change for the worse in Evan's academic performance, his parents noticed that Evan exhibited overt lack of respect for them and other adults in positions of authority, low self-esteem, apathy, lack of motivation, befriended youths of questionable character, and had other behaviors that led them to believe that Evan was abusing substances. Mr. and Mrs. P. chose to enroll him in a residential nonpublic therapeutic school, Whetstone Boys Ranch, in Mountain View, Missouri, for his junior year, the 2014-15 school year. (*Id*.)

Because its enrollment was capped at eight young men, ages 13 up to 18, Whetstone did not offer interscholastic sports. (Exhibit 016) It offered academics and individual, group, and family counseling. (Stephen P. Testimony) Evan took and passed courses in the "core" subjects of algebra, English, biology, chemistry, and American history. He also took and passed four other non-core courses at Whetstone. (Exhibits 025-026) The Board of Control was told by IHSAA staff that Evan is academically eligible for varsity competition. (Recording) A primary purpose of the counseling was to prepare the student for re-integration in his community. Mr. P. was clear at this hearing and in response to a question by Chairperson Scott at the hearing before the Board of Control, that for Evan, this meant re-integration into his family and into Dowling Catholic High School. (Recording; Stephen P. Testimony)

But for a tornado that destroyed the Whetstone facilities in early April 2015, a point when Evan had been at Whetstone ten months, Evan would have been at Whetstone a full 13 months, which is the typical duration of the therapy offered by the facility. In the aftermath of the tornado, Evan immediately returned to his parents' home in Des Moines, and finished his school work from Whetstone "at a self-paced level." (Stephen P. Testimony; Exhibit 001)

As was a goal from the start of his enrollment at Whetstone, Evan re-enrolled at Dowling Catholic High School for his senior year, the present school year, 2015-16. He desired to participate in football (as well as track and field, and perhaps wrestling) at the varsity level. (Stephen P. Testimony) On behalf of Evan, his parents requested that he be allowed to immediately participate in varsity football at Dowling Catholic High School. On behalf of the IHSAA staff, Mr. Tharp issued a written decision to the Appellants denying their request. (Exhibits 027-029)

The Appellants exercised their right to a hearing before the IHSAA Board of Control, which took place on August 26, 2015. The Board of Control concluded that no exceptions applied under which Evan could qualify for immediate eligibility to participate in varsity athletics. (Exhibits 041-046)

In its decision the Board of Control found, in part, as follows:

> In reviewing the evidence submitted, the Board determines that the exceptions set out in paragraph 36.15(3)"a"(4) do not apply in this situation. Evan is residing with his parents in the Des Moines Public School District. The stated exception and Iowa Code Section 256.46

provide for participation of a student when his or her residency is changed for one of the delineated reasons and that child does not meet the residence requirements for participation in extracurricular contests. In other words, these exceptions apply to the member school receiving the student because the student was required to move because of one of the listed circumstances.

Evan meets the "residence requirements for participation" and has not left his home to go to another district for any of the reasons stated in paragraph 36.15(3)"a"(4).

In evaluating the appeal in light of section 36.15(3)"a"(8), the Board determines that an exception should not be granted. The transfer rules are based upon residency. However, a student may enroll at a nonpublic school, even if located in a school district other than their resident district, when entering the ninth grade. The student maintains that eligibility as long as enrollment in that member school is continuous.

This is not a situation where the circumstances are "not provided for otherwise" in the rules relating to student eligibility. Upon the family's decision to enroll in Whetstone, [Evan] moved to Missouri in July of 2014 and resided there until April of 2015. In 2014, Evan and his family made the decision that he would no longer be enrolled at Dowling Catholic High School.

The facts and circumstances presented to the Board concerning the transfer do not reach the level that compels the Board to grant immediate eligibility under the exception requested by the Appellant. The granting of eligibility under this exception by the Board has been consistently reserved for circumstances involving a change in a student's residence that occurs because of the threat of immediate and identifiable irreparable harm.

The Board believes that the decision of the Director and/or his designee was fair and reasonable. There exists no compelling reason to grant an exception to the General Transfer Rule. Furthermore, students do not have a 'right' to participate in interscholastic athletics. Brands v. Sheldon Community School, 671 F.Supp. 627 (N.D. Iowa 1987).

(Exhibits 043-044)

On September 10, 2015, the Appellants perfected a timely appeal of that decision to the Director of the Iowa Department of Education.

CONCLUSIONS OF LAW, ANALYSIS

Standard of Review

This appeal is brought pursuant to 281—IAC 36.17, which states that "an appeal may be made … by giving written notice of the appeal to the state director of education … The procedures for hearing adopted by the state board of education and found at 281—Chapter 6 shall be applicable, except that the decision of the director is final. Appeals to the executive board and the state director are not contested cases under Iowa Code subsection 17A.2(5)."

"The decision shall be based on the laws of the United States, the state of Iowa and the regulations and policies of the department of education and shall be in the best interest of education." 281—IAC 6.17(2). The Director of the Department of Education examines the IHSAA Board of Control's application of the transfer rule to Evan to see whether the Board abused its discretion. "Abuse of discretion is synonymous with unreasonableness, and a decision is unreasonable when it is based on an erroneous application of law or not based on substantial evidence." *City of Dubuque v. Iowa Utilities Bd.*, 2013 WL 85807, 4 (Iowa App. 2013), citing *Sioux City Cmty. Sch. Dist. v. Iowa Dep't of Educ.*, 659 N.W.2d 563, 566 (Iowa 2003) (holding that the Iowa Department of Education erred when it did not apply the abuse of discretion standard). *See also Indiana High School Athletic Ass'n, Inc. V. Carlberg by Carlberg*, 694 N.E.2d 222 (Ind. 1997), in which the Indiana Supreme Court determined that decisions of the Indiana High School Athletic Association based on its transfer rule (very similar to the transfer rule of the IHSAA) are reviewed for arbitrary and capriciousness. 694 N.E.2d at 233.

Does Evan P. Qualify For Immediate Participation in Varsity Athletics Under Any of the Exceptions To The General Transfer Rule?

In 1990, the Iowa Legislature enacted Iowa Code § 256.46, directing the State Board of Education to adopt rules that:

> …permit a child who does not meet the residence requirements for participation in extracurricular interscholastic contests … to participate in the contests or competitions immediately if the child is duly enrolled in a school, is otherwise eligible to participate, and meets one of the following circumstances *or a similar circumstance*: the child has been adopted; the child is placed under foster or shelter care; 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; the child is a foreign exchange student, unless undue influence was exerted to place the child for primarily athletic purposes; the child has been placed in a juvenile correctional facility; the child is a ward of the court or the state; the child is a participant in a substance abuse or mental health program; or the child is enrolled in an accredited nonpublic high school because the child's district of residence has entered into a whole grade sharing agreement for the pupil's grade with another district. … [Emphasis added.]

The State Board of Education then promulgated and adopted the general transfer rule, 281—IAC 36.15(3). The Appellants urge that Evan fits at least one of the following provisions:

> 36.15(3) General transfer rule. A student who transfers from a school in another state or country … to [a] member or associate member school shall be ineligible to compete in [varsity] interscholastic athletics for a period of 90 consecutive school days… unless one of the exceptions listed in paragraph 36.15(3)"a" applies. … In ruling upon the eligibility of transfer students, the executive board shall consider the factors motivating student changes in residency. Unless otherwise provided in these rules, a student intending to establish residency must show that the student is physically present in the district for the purpose of making a home and not solely for school or athletic purposes.
>
> a. Exceptions. The executive officer or executive board shall consider and apply the following exceptions…:
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> …
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> (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.
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> (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:
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> …
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> 2. Placement in foster or shelter care.
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> …
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> 5. Participation in a substance abuse program.
>
> 6. Participation in a mental health program.
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> …
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> (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.

Applicability of Subparagraph 36.15(3)(3)

This provision would make Evan immediately eligible at any of the high schools within the Des Moines Public School District. It would also make Evan immediately eligible at any nonpublic member high school within the Des Moines Public School District.

IHSAA's reliance on *Tyler R. ex rel. Christian R. v. Iowa High School Athletic Association*, 26 D.o.E. App. Dec. 121 (2011) is relevant insofar as that decision formalizes the long-standing practice of defining, for purposes of the general transfer rule, the "boundaries" of a nonpublic school to be those of the school district in which the nonpublic school is physically located.[2] Otherwise, *Christian R.* is distinguishable from the instant appeal. In *Christian R.*, IHSAA and the Department were dealing with a young man whose parents were divorced and who changed his residence from his mother's home to his father's home, located in Nebraska. He was a football player of considerable talent as a running back, and desired to play football for a top team in Iowa, that being St. Albert of Council Bluffs. The Department found that the facts needed to be scrutinized under the "catch-all" subparagraph, 36.15(3)"a"(8), and that under subparagraph (8), motivation for the transfer was to be taken into consideration. Because Christian's motivation was to find a football team where he could excel and attract attention from intercollegiate football teams, immediate eligibility was denied. 26 D.o.E. App. Dec. at 126.

The Board of Control did not address this subparagraph in its decision. The Board merely noted that "[t]his is not a situation where the circumstances are 'not provided for otherwise,'" and thus, declined to exercise its discretion under subparagraph (8). (Exhibit 044) The Board did not perform and analysis of these facts under subparagraph (3), and the undersigned Director concludes that subparagraph (3) does not fit the facts before him. Evan is not limited to the options in that provision. Subparagraph (3) can only be the definitive provision if the facts do not fit another part of the transfer rule. Because other provisions better address the facts presented in this appeal, 36.15(3)"a"(3) is inapplicable.

Applicability of Subparagraph 36.15(3)"a"(4)

IHSAA and its Board of Control interpret subparagraph (4) as applying to a member school upon a student's *entry* into participation in foster care, shelter care, or a substance abuse or mental health program. Thus, they ruled that subparagraph (4) is inapplicable here because Evan was *returning from* a situation that perhaps offered foster care and substance abuse and mental health programming.

The statute upon which the transfer rule and its provisions are based, Iowa Code § 256.46, *supra*, not only does not impose such a restriction, but states that the rules are to cover the enumerated circumstances "or a similar circumstance." The Legislature also provided in section 256.46 that it apply to students "who do not meet the residence requirements for participation in … interscholastic contests … ." Evan does not meet the residence requirement to be immediately eligible to participate at the varsity level at Dowling Catholic High School. He and his family reside in the Des Moines Public

[2] Nonpublic schools also assume the boundaries of the school districts in which they are physically located for purposes of student transportation (Iowa Code §§ 285.1(14-16), 285.16), textbook support (Iowa Code § 301.1), and educational programming for students with disabilities (Iowa Code § 256B.9(4); 20 U.S.C. § 1412(a)(10)).

School District; Dowling Catholic is located in the West Des Moines Community School District. This statute controls Evan's circumstances.

There are several moving parts to the analysis under subparagraph (4).

a. *Was Evan's placement at Whetstone foster or shelter care, participation in a substance abuse program, participation in a mental health program, or "a similar circumstance?"*

IHSAA points out that in *In re Brandon James Bergman*, 22 D.o.E. App. Dec. 130 (2003), in which the student chose to live with his maternal grandparents, who were his court-ordered guardians, the Board and the Department rejected the student's argument that the guardianship was the same as foster care, finding that Brandon chose not to live with either of his parents. *Bergman* is distinguishable because the student failed to show that he had no choice but to eschew either parent's household, the Department finding that his father's work hours had stabilized and that a younger sibling was still in his mother's household.

It is not necessary, however, to parse further the differences between this appeal and *Bergman*. Whether or not Whetstone Therapeutic Boys Ranch was licensed as a substance abuse or mental health treatment facility (a requirement not imposed by rule or statute), Evan was clearly in a placement similar to being in a substance abuse or mental health program. The individual, group, and family therapies mandated by Whetstone for its students and their families addressed "drug or alcohol use, apathy, lethargy, truancy, disrespectful attitudes, behavior problems, school problems, depression, anger, and/or low self-esteem." (IHSAA exhibit 015) This is a similar circumstance to participation in a substance abuse or mental health program; similar enough to continue with the analysis of these facts under subparagraph (4).

b. *Does returning to the parental home from the placement at Whetstone qualify for an exception under subparagraph (4)?*

The Department agrees with the Appellants that it makes no sense to interpret the circumstances in subparagraph (4) as applying only to a transfer made pursuant to a student's initial participation in, for instance, a substance abuse program. The student who returns from a foster or shelter care placement may be in need of a fresh start, or may not – due to court order – be allowed to reside in proximity with one or both of the student's birth parents. The student returning from a substance abuse or mental health program may either need a fresh start in a different school than was previously attended or may benefit more from assimilation back into the student's former school. Each circumstance is difference, as each student is different. There is nothing in the statute or rule to indicate that immediate eligibility is a one-time, one-way status, and no prior appeal decision has made that ruling.

c. *For a student who is able to take advantage of this subparagraph, where does immediate eligibility lie?*

Subparagraph (4) states that a student who meets one of the enumerated or similar circumstances is "immediately eligible provided the student meets all other eligibility requirements in these rules and those set by the *school of attendance*." [Emphasis added.] Thus, the statute (applying as it does to students who do not meet residency requirements) and the rule anticipate that immediate eligibility will lie at the school of attendance. In this case, Dowling Catholic is the school of attendance.

Accordingly, Evan P. has immediate eligibility at Dowling Catholic pursuant to Iowa Code § 256.46 and 281—36.15(3) "a"(4).

Applicability of Subparagraph 36.15(3)"a"(8)

Although Evan's reason for transferring is found to fall within subparagraph (4), making it unnecessary to analyze his circumstances in light of the discretionary language found in 281—IAC 36.15(3)"a"(8), the Department believes it to be beneficial to its varied constituents to proceed with its analysis under this the "catchall" subparagraph.

If subparagraph (4) had not applied here, the undersigned would conclude that the Board had abused its discretion when it refused to grant an exception to Evan under 281—IAC 36.15(3)"a"(8). It was error for the Board to make a decision based on lack of danger of immediate and identifiable irreparable harm to Evan. No such language is in any part of the General Transfer Rule. The Department has previously stated that it reserves this final exception "for compelling personal circumstances, *such as* when a student is in danger of immediate and identifiable irreparable harm." *In re Austin Trumbull*, 26 D.o.E. App. Dec. 99, 102 (2011), citing *In re Derek Sears*, 25 D.o.E. App. Dec. 15 (2007). [Emphasis added.]

Subparagraph (8) compels the Board to render an eligibility ruling "which it deems to be fair and reasonable" after "[considering] the motivating factors for the student transfer." The Department urges the Board to do no more and no less than to consider motivating factors in reaching a ruling that is fair and reasonable.

In this case, Dowling Catholic was the only Iowa high school attended by Evan. The brief enrollment for summer school at Roosevelt High School by Evan was nothing more than an extension of his academic program at Dowling Catholic. It would have been preferable for the Appellants to make the IHSAA and its Board aware of the coursework failed by Evan at Roosevelt, but the failure by the Appellants to do so was harmless.

Evan did not return to Dowling Catholic for unwholesome reasons. Quite to the contrary, a primary goal of his placement at Whetstone was therapy to re-integrate him successfully into his family and his school community. By contrast, *see In re Wilmot W.*, 24 D.o.E. App. Dec. 145 (2006)(student's choice not to stay with his father in Minnesota); *In re Ryan B.*, 25 D.o.E. App. Dec. 216 (2010)(transfer motivated by athletics); *In re Christian R.*, 26 D.o.E. App. Dec. 121 (2011) ("broken home" rule did

not apply because new custodial parent not a resident of Iowa; "catchall" rule did not apply because athletics was a primary motivating factor in the transfer).

"The transfer rules … are reasonably related to the IHSAA's purpose of deterring situations where transfers are not wholesomely motivated." *In re R.J. Levesque*, 17 D.o.E. App. Dec. 317 (1999). No harm is done to the transfer rules by acknowledging that Evan P. has immediate eligibility at Dowling Catholic High School.

That said, the Appellants' insistence that the Board was intent on obstructing Evan's eligibility was not supported by fact and did Evan no favors. The transfer rules are tricky to administer and, despite the best efforts of the State Board of Education, which promulgated the rules, were not written with the clarity of, say, a criminal code. There is no evidence that the staff of IHSAA and its Board acted in anything other than good faith in fulfilling their duties. It just happens to be that in this appeal, the IHSAA and its Board were incorrect when they applied the General Transfer Rule and determined that Evan is ineligible to participate in varsity interscholastic athletics for a period of 90 days. That decision was an erroneous application of the law, and is therefore an abuse of discretion.

DECISION

For the foregoing reasons, the September 2, 2015 decision of the Board of Control of the Iowa High School Athletic Association that Evan P. is ineligible to compete in varsity interscholastic athletics at Dowling Catholic High School for a period of 90 consecutive school days is **REVERSED**. There are no costs associated with this appeal to be assigned to either party.

Any allegation not specifically addressed in this decision is either incorporated into an allegation that is specifically addressed or is overruled. Any legal contention not specifically addressed is either addressed by implication in legal decision contained herein or is deemed to be without merit. Any matter considered a finding of fact that is more appropriately considered a conclusion of law shall be so considered. Any matter considered a conclusion of law that is more appropriately considered a finding of act shall be so considered.

Dated this 25th day of September, 2015.

Carol J. Greta
Administrative Law Judge

It is so ordered.

9/25/2015_____
Date

/s/_____
Ryan M. Wise, Director
Iowa Department of Education