

**IOWA DEPARTMENT
OF EDUCATION
(Cite as 25 D.o.E. App. Dec. 1)**

In re Petition for Waiver of Rule

Scott D. and Erin K. McDonough,	:	ORDER DENYING
Petitioners,	:	WAIVER REQUEST
for a Waiver of Rule 36.15(2)	:	[Adm. Doc. #4653]

On or about August 27, 2007¹, Scott D. and Erin K. McDonough filed a petition on behalf of their minor son, Jacob “Jake” Andrew McDonough, with this agency requesting a waiver from administrative rule 281-Iowa Administrative Code (IAC) 36.15(2)“c”.

Authority for filing and ruling on petitions for waiver is found in 281—IAC chapter 4. Because the petition herein was not filed within a separate contested case proceeding and because a hearing is not required by statute, rule, or order, no hearing was held. See 281—IAC 4.9. Pursuant to rule 4.10(7), the agency has 120 days to issue its decision. The agency considered the facts, the criteria for waiver in chapter 4, and the information submitted by interested persons in ruling on the petition.

**I.
FINDINGS OF FACT**

Jake McDonough is presently a 17-year old senior at Valley High School [“Valley”] in the West Des Moines Community School District. He participates in interscholastic football for Valley. Jake received a final grade of “F” in chemistry at the end of the 2006-07 second semester. In compliance with rule 281—IAC 36.15(2)“c,” Valley officials notified Jake that he would be ineligible to participate in football for twenty consecutive school days. (For this school year, the period of ineligibility for all football players is August 30 through September 27, a total of four games.)

The rule from which a waiver is sought, 281—IAC 36.15(2)“c,” states that all students who compete in interscholastic athletics “shall be passing all coursework for which credit is given,” and that, “if at the end of any grading period a contestant is given a failing grade in any course for which credit is awarded, the contestant is ineligible to dress for and compete in the next occurring interscholastic athletic contests and competitions in which the contestant is a bona fide contestant for 20 consecutive school days.” All interested parties agree that Jake is a bona fide competitor in football.

The petition herein filed by the McDonoughs asks for a waiver of the twenty day ineligibility period and includes the following arguments:

1. That Jake was not responsible for his failing grade. The Petitioners' assert that Jake had two oral surgeries, complications necessitating daily doctor visits in early April, and side effects of the prescription painkiller, Vicodin, and that these circumstances combined

¹ In response to a phone call to this agency, Mr. McDonough was informed as early as August 2, 2007, of the option of filing a waiver petition.

to adversely impact his ability to keep up with daily school work, including make-up work, and with his ability to study for final exams.

2. Because Jake was mostly an A-B student, the Petitioners state that they did not question whether he was struggling in classes. They state that they "were not made aware" that their son was failing chemistry until a month before the end of the school year.

Pursuant to rule 281—4.8, this agency gave notice and opportunity to comment herein to officials of West Des Moines Community School District, the Iowa High School Athletic Association (IHSAA), and the Iowa Girls High School Athletic Union (IGHSAU). The West Des Moines Superintendent, as well as the executive directors of the IHSAA and IGHSAU, all recommended that the petition be denied. This input was provided to the McDonoughs, who filed a further response.

Valley officials provided the following information:

1. Valley High School provides all students and their families with "Infinite Campus," an online service available literally at all times to all Valley families to enable parents to keep track of the academic progress of their children.
2. Jake was given an opportunity by his chemistry teacher to participate in a grade recovery effort to raise his "F" to a passing grade. None of the work Jake turned in to his teacher pursuant to this opportunity was his work. Jake cheated. He turned in the work of another student. The opportunity to raise his failing grade was withdrawn. Jake took the final exam in chemistry, which was an "open notes" test, with the rest of his class. He did not fail the examination, but received an "F" for the second semester grade for the course.

In response, the Petitioners admit they were aware of the cheating before filing their petition herein. They contend that the cheating is *irrelevant* because if they had been told earlier that he was failing in chemistry, they would have intervened and thus, Jake would not have felt pressured at the eleventh hour to cheat to avoid a failing grade.

II. CONCLUSIONS OF LAW

The rule from which the McDonoughs seek waiver, 281—IAC 36.15(2)"c," is one of several eligibility requirements for high school students to be met as a condition of participation in interscholastic athletics. This particular rule is known as one of the "scholarship rules," and was amended by the State Board of Education effective with the start of the 2006-07 school year. The former rule required students to "pass four" courses to be eligible to compete in interscholastic athletics and set a consequence of one full semester of ineligibility. The new rule increased the standard to "pass all" courses, but softened the consequence so that the student is ineligible to dress for and compete in the next occurring interscholastic athletic contests and competitions in which the contestant is a bona fide contestant for 20 consecutive school days.

When a petition for waiver from an agency rule is filed, rule 281—IAC 4.4 requires that the agency director must find all of the following criteria to be true:

1. The application of the rule to the petitioner would result in an undue hardship to the petitioner.
2. Waiver would not prejudice the substantial legal rights of any person.

3. The provisions of the rule from which waiver is sought are not mandated by statute or other provision of law.
4. Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the rule from which waiver is sought.
5. Waiver would not have a negative impact on the student achievement of any person.

The burden of persuasion rests with the petitioner to demonstrate the above criteria by clear and convincing evidence. 281—IAC 4.10(2). If granted, a waiver shall provide the narrowest exception possible to the provisions of the rule. 281—IAC 4.10(3).

Because all five criteria must be satisfied, we need only examine the first criterion – *whether failure to grant a waiver would result in an undue hardship on the student* – in reaching our determination.

If the requested waiver is granted, Jake McDonough will have failed a class without having served the required period of ineligibility from interscholastic athletics. The reasons he failed the class have not been shown by clear and convincing evidence to be related to his health issues, and thus not beyond his control. He was given a chance to wipe out the “F” in chemistry, and he chose instead to cheat. We disagree with the Petitioners that the cheating is irrelevant. The availability of Infinite Campus to all Valley parents nullifies the Petitioners' argument that they did not know about his "F" until late April. There was ample opportunity for them to check Jake's academic progress, and the Petitioners do not claim that they lacked access to this online service. In addition, the Petitioners do not argue that Jake himself was unaware of his standing in chemistry class.

The Petitioners' argument that “the mere fact of receiving a failing grade is punishment enough” is hardly unique to their son. It is a sentiment that could be urged by every student with a failing grade who must sit out the required twenty school days. Because there is no “right” of students in Iowa to participate in interscholastic athletics [see *Brands v. Sheldon Community School*, 671 F.Supp. 627 (N.D. Iowa 1987)], the penalty to be served by Jake does not result in an *undue* hardship to him or to any other student who fails a course. The whole point of the “pass all” rule is that there must be *some* consequence for failing grades; otherwise, the rule would be meaningless.

The State Board of Education very carefully and intentionally built into the rule an element of hardship to make the point that academics take precedence over athletics. But the consequence can hardly be said to be “undue.” Given that the penalty formerly was an entire semester of ineligibility for not meeting the former standard of pass four, raising the standard and lessening the penalty is wholly reasonable.

Finally, the Petitioners ask whether fine arts students are subject to rule 36.15(2). The State Board of Education was given authority by the Legislature (in Iowa Code section 280.13) to enact eligibility rules for secondary students who participate in interscholastic *athletics*. The State Board has no authority to regulate eligibility in other extracurricular activities. Students in music and speech are governed by a combination of local rules and rules of the Iowa High School Music Association and the Iowa High School Speech Association. However, we note in closing that the Iowa Supreme Court has ruled that students involved in interscholastic sports may be held to a higher standard than other students:

“Standout students...play a somewhat different role from the rank and file. Leadership brings additional responsibility. These student leaders are looked up to and emulated. They represent the school and depict its character. We cannot fault a school board for expecting somewhat

more of them as to eligibility for their particular extracurricular activities." *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555 (Iowa 1972)(case involving high school football player who was in the presence of other students who were illegally consuming beer).

This agency wishes for Jacob McDonough nothing but the best, and has full confidence that he will be successful as a student and as a citizen.

III.
DECISION

For the foregoing reasons, the petition for waiver is DENIED. Jake McDonough's twenty school days of ineligibility are to be served in full during the 2007 football season.

This is final agency action, and may be appealed by filing a petition for judicial review pursuant to Iowa Code section 17A.19.

Date

Judy A. Jeffrey, Director